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IN THE COURT OF APPEAL FIJI ISLANDS

AT SUVA

MISC. ACTION No. 08 of 2009

BETWEEN : SILVER BEACH PROPERTIES LIMITED

APPELLANT

**AND : SAIJAD JAWAN also known as SAIYAD KHAN
also known as SAIJAD J KHAN**

RESPONDENT

COUNSEL : S. MAHARAJ (FOR THE APPELLANT)

: SAMUSAMUVODRE and SHARMA FOR THE RESPONDENT

DATES OF HEARINGS AND SUBMISSIONS : 18TH AUGUST, 29TH SEPTEMBER, 28TH OCTOBER 2009

DATE OF RULING: 2ND DECEMBER 2009

BE FORE THE HON. PRESIDENT : MR JUSTICE BYRNE

RULING ON APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

1.0 I have before me a summons dated the 5th of August 2009 issued by the appellant seeking leave to appeal out of time or file a fresh appeal against the orders of Madam Phillips, J. made on the 11th of June 2008 and subsequent orders made on the 19th of June 2008.

- 2.0 On the 26th of January 2009 I gave a ruling on an application by the appellant to stay orders made by Phillips, J on 11th of June 2008 in which she dissolved a Mareva Injunction which she had granted on the 30th of November 2007 and subsequently extended.
- 3.0 I ordered that the Respondent be given leave to withdraw the sum of \$65,000 from the \$212,000 held in an account of the Respondent at Westpac Banking Corporation, Sigatoka Branch but declined to make other orders sought by the Appellant.
- 4.0 In paragraph 8 of my Ruling I stated that I had spent at least 12 hours in the preparation of the ruling because of my having to read the voluminous affidavit material filed by the parties much of which I considered was unnecessary and could have been avoided if the parties had shown any willingness to settle this case, which was obvious to me they had not.
- 5.0 According to an affidavit by Robert Uma Sen the Regional Financial Controller South Pacific of the appellant the parties had actually reached a settlement on or about the 2nd of June 2009 under which the respondent agreed to pay the sum of \$115,000.00 to the appellant. He failed to do so because in an affidavit dated the 1st of September 2009 which the respondent has filed he claims in paragraph 10 that at no stage did he voluntarily agree to settle the matter.
- 6.0 I find this assertion impossible to believe because the respondent appears to have executed two irrevocable authorities to facilitate payment of this sum to the appellant in its Account Number 058 126 00 00 in Westpac Banking Corporation at Sigatoka. The authority which is dated the 2nd of June 2009 is stated to be given for valuable consideration.

- 7.0 This was confirmed by a letter of 2nd of June 2009 by the Respondent's solicitors to the manager Westpac Banking corporation Limited Sigatoka in which it was stated: "The parties have agreed to settle the above action upon the sum of \$115,000.00 (One Hundred and Fifteen Thousand dollars) is to be paid to SilverBeach Properties Limited (Plaintiff)".
- 8.0 The Respondent was represented by experienced lawyers. I am left with the strongest suspicion that this claim is but an attempt to evade payment to the appellant. The principles on which extension of time are granted by the Courts are well settled. The court has an unfettered discretion which has to be judicially exercised. However as stated by Tomkins, J.A. in *BDO SPICES AUCKLAND TRUSTEE COMPANY LTD v. NLTB and ORS (2003) FJCA 67* at paragraph 35 the test is not simply that an applicant for an extension of time to appeal must have a good arguable case but rather that he has a good arguable appeal.
- 9.0 When considering an application for extension of time for leave to appeal the Court must consider the length of the delay, the reasons for it, the chances of success, if leave is granted and any likely prejudice to the respondent. The burden lies on an applicant/appellant to satisfy the court that, in the circumstances of the case, justice requires that it be given the opportunity to attack the order despite the delay.
- 10.0 In the instant case, the appellant says that the reason why it did not comply with an order of the court that it file the High Court record was because the matter had been settled. As I have said earlier, there is compelling prima facie evidence of this.

- 11.0 Apart from the irrevocable authority signed by the respondent, it would seem that the settlement proposal was put forward by the respondent and his solicitors and there is no evidence of undue pressure on the respondent to settle. This leads me to believe that the respondent has been attempting to delay a settlement into which, on the evidence so far before the court, he willingly entered.
- 12.0 I therefore consider that the reasons advanced by the appellant as to why leave to appeal should be granted out of time are plausible. I thus grant the appellant leave to appeal out of time on condition that grounds of appeal are filed and served in the court and on the respondent no later than the 10th of December 2009.
- 13.0 The appellant has succeeded in its application and I therefore order the Respondent to pay costs of \$1000.00 by the 10th of December next to the Appellant.

Dated at Suva this 2nd day of December 2009.



A handwritten signature in black ink, which appears to read "John E. Byrne", is written over a horizontal dotted line.

JOHN E. BYRNE

PRESIDENT, FIJI COURT OF APPEAL