

**IN THE COURT OF APPEAL FIJI ISLANDS**  
**APPLICATION FOR LEAVE TO APPEAL**  
**FROM THE HIGH COURT OF FIJI**

**CIVIL APPEAL NO. MISC.10 OF2008S**  
**(High Court Civil Action No. HBC20 of 2007)**

**BETWEEN:**

**PACIFIC AGENCIES (FIJI) LIMITED**

**Applicant**

**AND:**

**MARK SPURLING**

**Respondent**

**Coram:**

**Hickie, JA**

**Hearing:**

**12 August 2008, Suva**

**Counsel:**

**Ms B. Narayan for the Applicant  
Mr H. Nagin for the Respondent**

**Date of Judgment: 22 August 2008, Suva**

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**DECISION**

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**A. THE SIX WEEKS RULE**

[1] The Applicant seeks Leave to Appeal out of time from the judgment delivered by Justice Singh on 29 May 2008 in the High Court at Suva wherein His Lordship gave judgment for the Respondent in the sum of UK£22,725 pounds together with interest of 6% per annum and costs of \$1,400.00.

[2] The Respondent had brought the claim in the High Court claiming damages from the Applicant for an alleged breach of a bailment whereby goods were damaged in a container which the Respondent had purchased from the Applicant and stored in the Applicant's unsheltered container yard.

[3] Rule 16 of the Court of Appeal Rules states:

*"Time for appealing*

*16. Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that it to say-*  
*(a) in the case of an appeal from an interlocutory order, 21 days;*  
*(b) **in any other case, 6 weeks.**"* (My emphasis)

[4] The judgment of His Lordship Justice Singh was signed on Thursday, 29 May 2008. Thus, six weeks ran from that date, that is, until 10 July 2008 inclusive. The Applicant's Notice of Appeal was lodged on Friday, 25 two weeks or 15 days after the six weeks' time limit set by Rule 16 of the Court of Appeal Rules.

**B. THE AFFIDAVITS FILED**

[5] The Solicitors for the Applicant filed a Summons on 25 July 2008 (seeking an extension of time to file a Notice of Appeal and Grounds of Appeal together with an Order for Stay of the judgment from Justice Singh in the High Court until the Appeal is heard). The Applicant also filed an Affidavit sworn on 16 July 2008 by IRENE SANDHYA NARAYAN, financial controller for the Applicant company, in Support of the Summons.

[6] Apart from the validity of the Affidavit of Ms IRENE SANDHYA NARAYAN being brought into question (as it is missing details as to the place at which it was sworn), there are a number of matters deposed to in the Affidavit which should have been sworn to by the Solicitor with the conduct of the matter. For example, how can a non-lawyer, depose as to:

(a) what the Solicitors on the Court record did or did not do on 16 July 2008

(paragraph 4);

(b) what “has been well settled law and common practice in Fiji” (paragraph 7) or the “usual rule and practice” (paragraph 7); or

(c) “that the Defendant has valid and arguable grounds of appeal which raise important questions of law and have reasonable prospects of success” (paragraph 8)?

- [7] In relation to the issue of recovery of costs and the allegation that “there is a high likelihood that the Defendant may not be able to recover the same from the Plaintiff” (paragraph 9), again, this is a matter for the Solicitor on the record to depose to in an affidavit together with providing details in support as to the basis upon which she makes such a claim. Further, how can a non-lawyer just boldly state as has the financial controller for the Applicant company done (at paragraph 10) “That no prejudice will be caused to the Plaintiff if a stay is granted on the execution of the judgment”?
- [8] As for the sole annexure to the Affidavit, it is an unsealed Notice of Appeal (containing two Grounds of Appeal) signed by an unknown person allegedly on 16 July 2008. If this was completed by the Solicitor with the conduct of the matter who then attempted to file the Appeal (or instructed a law clerk to do so), then these are all matters that should have been set out in affidavits by both the Solicitor and also the law clerk if they were so involved, with appropriate annexures.
- [9] Similar criticisms can be made in relation to the Affidavit of MARK SPURLING sworn on 5 August 2008 at Suva filed by the Respondent. Despite not being a qualified practitioner, the deponent attempts to depose to a number of legal matters including merits (see paragraphs 6, 7, 8, 9, 10 and 11). At least this Affidavit includes as two of its annexures the Judgment of Justice Jiten Singh, signed and dated 29 May 2008 (Annexure “A”), and a Letter dated 24 July 2008 from Sherani & Co, Solicitors for the Respondent, to Lateef & Lateef, Solicitors for the Applicant, demanding payment within seven days “to settle the Judgment sum together with costs and interest” (Annexure “B”).

- [10] Whilst the Court appreciates the time constraints imposed upon busy legal practitioners, it would have made the case of either party far stronger if the Solicitor who had the carriage of the matter in the respective firms had taken the time to provide an affidavit. All I can say in relation both of the affidavits filed is that they have carried virtually no weight with the Court in deciding this matter apart from the first two annexures to the Respondent's Affidavit. Perhaps a waste of time and resources for all involved?

C. THE OTHER DOCUMENTATION BEFORE THE COURT

- [11] This brings me to what else is before the Court. The Application for Leave was heard before me on 12 August 2008. Apart from a copy of the Judgment of Justice Singh, signed and dated 29 May 2008, and a Letter dated 24 July 2008 from the Solicitors for the Respondent to the Solicitors for the Applicant demanding payment within seven days, the following material was before me:

(a) Four cases tendered by Counsel for the Applicant being –

(i) **Raj v Shell Fiji Limited** (Unreported, 9 May 2008, Bryne and Hickie JJA);

(ii) **Official Receiver as Trustee in Bankruptcy for Estate of Karim v Petrie Ltd** (Unreported, Fiji Court of Appeal, Civil Appeal No.ABU0049 of 1997, Application for Leave, 28 November 1997, Sheppard JA); and

(iii) **Muma v University of the South Pacific** [1991] 37 FLR 109; (PacIIi: [1991] FJCA 6, 11 October 1991, Tikaram RJA, <http://www.pacIIi.org/fj/cases/FJCA/1991/6.html>)

(iv) **Gatti v Shoosmith** [1939] 3 All ER 916.

(b) 11 pages of written submissions tendered at the hearing of the Application for Leave by Counsel for the Respondent together with a copy of the judgment of **Fa v Tradewinds Marine Ltd and Anor** (Unreported, Fiji Court of Appeal, Civil Appeal no.ABU0040 of 1994, Application for Leave and Stay, 18 November 1994, Thompson JA);

**D. THE ORAL SUBMISSIONS OF COUNSEL**

[12] In addition, to the documentation before the Court, Counsel for each of the parties then made oral submissions.

**1. Counsel for the Applicant**

[13] Turning first to the Counsel for the Applicant, a summary of her submissions made from the Bar Table is as follows:

(a) In **Muma v University of the South Pacific** (supra) where Tikaram RJA was sitting as a single judge in the Court of Appeal, he said at page 111 (PacII page 3):

*"The ruling given in 1974 by Williams J in **John Fong v. John Polotini & Another** 20 FLR 15 on the interpretation of Rule 16 was correct. There he held that 'the date of entry and perfecting of a judgment in a Civil Appeal from the Supreme Court judgment, is not the day on which the judgment is delivered in Court, but the date on which the Registrar approves, enters, files a draft thereof. This judgment is in accord with Harrison's Case cited by Mr Bulewa and Lant's Case cited by Mr Keil except that it should be clarified **that the time runs from the date of the actual sealing of the judgment or order.***

*In Lant's Case the English Court of Appeal held that 'a **judgment or order which is "otherwise perfected" by sealing as opposed to being signed** or entered **is authenticated when it receives the seal of the Court** in which it is pronounced, **so that the time for appealing from such an order under R.S.C., Ord.58, r4(1) runs from the date of sealing**, not from the date on which the judgment or order is made' ...*

*No affected party has taken any steps to perfect Palmer J's judgment by having it sealed. **In my view therefore the 6 weeks time allowed by Rule 16(b) of the Court of Appeal Rules** ... for filing and service of Notice of Appeal **has not yet begun to run**. It will run from the date when the judgment is "otherwise perfected", i.e. sealed. It therefore follows that this application for leave to appeal out of time is not necessary.*

It is Counsel's submission that this had been the accepted practice in Fiji.

(b) This longstanding practice was recently overturned by the Court of Appeal in **Raj v Shell Fiji** (supra) wherein it was stated that six weeks ran from the date when the judgment was signed.

(c) In the present case, according to the view of the Court of Appeal in **Raj v Shell Fiji**, the Notice of Appeal should have been lodged within six weeks of the judgment being signed by His Lordship on 29 May 2008.

(d) When an attempt was made on 16 July 2008 to file an Appeal in the Registry of the Fiji Court of Appeal, it was rejected as being out of time and a copy of the recent judgment in **Raj v Shell Fiji** was provided. (The Court notes that there is no affidavit evidence from any person in the Applicant's firm deposing as to the truth of this matter.)

(e) If the Court correctly understood Counsel for the Applicant, an attempt was made the following day, 17 July 2008, to file in the Registry of the High Court at Suva. (Again, the Court notes that there is no affidavit evidence from any person in the Applicant's firm deposing as to the details of what took place ).

(f) On 25 July 2008, an Application to seek Leave to Appeal out of time was filed in the Registry of the Fiji Court of Appeal. This was made returnable on 6 August 2008 when it was put over until 12 August 2008 to allow the matter to come back before Justice Singh in the High Court where the Applicant was seeking a Stay.

(g) The factors which the Court should take into account in considering the Applicant's application:

(i) The length of the delay is not too long –14 days;

(ii) The reasons for the delay – the change in interpretation caused the delay and the Applicant should not be penalised because of the failure of their Solicitor to be aware of it as held in **Gatti v Shoosmith** (supra). That was a case where an application for leave to appeal out of time was granted with the Court of Appeal (UK) stating (at 919G-920A):

*"... the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say 'may be' because it is*

not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: ***that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case.*** There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.

*The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised."* (My emphasis)

- (iii) The grounds are not unmeritorious – the present case concerned a dispute as to whether what occurred was a licence or bailment. There have not been many such cases in Fiji and probably is appropriate to be considered by Court of Appeal;
- (iv) What prejudice to be suffered by the Respondent – In the Affidavit of the Respondent he has not raised prejudice. He may be out of pocket if the stay is granted. Judgment was delivered on 29 May 2008, however, the Respondent's Solicitors did not write to the Applicant's Solicitors until 24 July 2008, some eight weeks later. They did not show any urgency for payment, so what prejudice might be suffered by the Respondent must be questioned.
- (v) There is a substantial amount of money involved.

## 2. Counsel for the Respondent

[14] Counsel for the Respondent, submitted in reply (speaking to his written submissions) in summary as follows:

(a) This is a case where once a party is out of time then different consequences apply as both the reasons for the delay and merits of the appeal need to be examined. Here the delay was 14 days.

(b) If one looks at the chronology set out in the Respondent's submissions, is it coincidental that the Application for Leave to Appeal was filed on 25 July 2008 one

day after the Respondent's Solicitors wrote to the Applicant's Solicitors on 24 July 2008 demanding payment? Even under the old practice, the Applicant was out of time.

(c) As for the delay of some eight weeks in the Respondent's Solicitors demanding payment from the Applicant's Solicitors, this was due to the Solicitor dealing with the matter in the Respondent's office leaving the firm. In any event, that the Respondent did not press for payment of the judgment, does not assist the Applicant in explaining the delay in filing their appeal two weeks out of time.

(d) Delay should be looked at very carefully and the principles that apply to an application for leave to appeal out of time (as set out in part 3 of the Respondent's written submissions) are –

(i) The length of the delay – 14 days;

(ii) The reasons for the delay – the affidavit filed in support does not make sense. We would suggest the Applicant only filed the appeal once the Respondent's Solicitors wrote to the Applicant's Solicitors demanding payment;

(iii) the chances of the appeal succeeding – The Respondent asks the Court to look at the actual grounds of appeal (Annexure "A" to the Affidavit of Ms IRENE SANDHYA NARAYAN). First, these were findings of fact by Singh J that it was a bailment (see page 4 judgment applying ***Morris v CW Martin & Sons Ltd*** [1965] 2 All ER 725). Second, that there was negligence on the part of the Applicant (see page 9 judgment). That is, the Applicant bore the onus of discharging "the burden of proof that damage occurred without its negligence or default". In these circumstances, one must question the chances of being overturned on appeal;

(iv) As for the degree of prejudice to the Respondent – Any delay is prejudicial (Sheppard J in ***Official Receiver v Petrie*** (supra). In addition, the Respondent has now been out of pocket since October 2006.

(e) Returning to the issue of the delay, it is interesting to note that in ***Fa v Tradewinds Marine Ltd*** (supra) the Appellant had filed the Application for Leave to



Appeal only 4 days after the end of the period of six weeks and Thompson JA said:

*"That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only a [sic] four days requires a satisfactory explanation before an extension of time can be granted. In this case ... the applicant has given no explanation at all."*

### 3. Counsel for the Applicant in Reply

[15] Counsel for the Applicant then submitted in reply:

(a) That in **Fa v Tradewinds Marine Ltd** (supra), while it was only four days out of time, a satisfactory explanation was not given. Here, the reason was an oversight on the part of the Solicitor and that is a satisfactory explanation as held in **Gatti v Shoosmith** (supra);

(b) That in relation to possible prejudice being suffered by the Respondent, as noted by Sheppard JA in **Official Receiver v Petrie** (supra), page 12, paragraph 2: *"But the appellant would have had an appeal as of right if he had filed the notice of appeal [within time] ... "*

(c) That the judgment was sealed on 10 June 2008, so under the old practice if six weeks (or 42 days) ran from that date, then it had to be filed by 22 July 2008. The Applicant filed in the Court of Appeal on 25 July 2008, three days later. The Applicant did file, however, in the High Court (on 17 July?)

(d) That if the Applicant had acted immediately, then would have been within time, but this is why the Rules provide for six weeks so that there is time to consider and obtaining sometimes advice from abroad as to whether it is worth appealing.

(e) That the Applicant's Solicitors thought that they were filing within time when then attempted to do so on 16 July 2008 and as such they have a reasonable explanation.

(f) That in relation to the trial judge's findings of fact, these actually go to issues of

law in relation to the difference between a licence and bailment. Thus Counsel for the Applicant submits, if His Lordship had followed the law then he would have reached a different conclusion and found a licence existed not a bailment. For example, the keys to the container were never given to the Applicant but remained with the Respondent. How could His Lordship find that this was a bailment if the Applicant could not check the container? Further, it was a heavy burden to place upon the Applicant because the Applicant did not assume such responsibility. This is why the Applicant submits it was a licence not a bailment.

## **THE FINDINGS OF THE COURT**

### **1. The Evidence**

- [16] When the Applicant eventually filed their appeal on 25 July 2008, on any view, under either the “old practice” or the “new”, the Applicant was out of time, that is, by three days under the “old practice” (22 July) or 15 days under the “new practice” (10 July). Counsel for the Applicant has answered this by saying that they would have been within time under the old practice if their documents had been accepted by the Court of Appeal Registry when they attempted to file them on 16 July 2008. She has accepted that they are outside under the new practice but argues that there is a satisfactory explanation as held in *Gatti v Shoosmith* (supra) in that it was an oversight on their part not being aware of the new interpretation.
- [17] The problem with this submission is that there is virtually NO evidence to support it. Though at times the word of a legal practitioner is accepted by a Court in terms of giving undertakings and the like, a submission from the Bar Table is NOT evidence. One can appreciate that in a fused profession the practitioner with the carriage of a matter will, when appropriate, have the client depose to matters in an affidavit rather than the practitioner themselves (as otherwise they would not be able to appear as Counsel). When, however, there are factual and/or legal issues which are in dispute that are within the particular knowledge of the legal practitioner with the carriage of the matter, then no person other than that practitioner should be deposing to such matters in an affidavit. In such circumstances, another practitioner from the same firm will need to be briefed to

appear as counsel or alternatively, a practitioner be briefed from another firm.

[18] Hence the reason, why some time was spent by the Court earlier in this judgment examining the affidavit evidence which had been filed in this matter and the finding that it was of little weight.

[19] What is also troubling is that no explanation was provided for the nine day delay from when the initial Application was allegedly first rejected by the Court of Appeal Registry on 16 July 2008 to the eventual filing of the Summons on 25 July 2008. Even accepting for the moment the Applicant's submission that an attempt was made to file on 16 July 2008, the fact a representative from the firm of the Applicant's Solicitors did not come back for nine days, does lend weight to the suggestion of Counsel for the Respondent that the Applicant only filed the appeal the day after the Respondent's Solicitors wrote to the Applicant's Solicitors on 24 July 2008 demanding payment (and there is no other evidence to support the contrary).

## 2. Rule 16

[20] The previous decisions on Rule 16 cited before the Court in the present matter were judgments involving applications for leave before a single judge in the Court of Appeal: Fong v. Polotini (1974, Williams J); Muma v University of the South Pacific (11 October 1991, Tikaram JA); Fa v Tradewinds Marine (18 November 1994, Thompson JA); and Official Receiver v Petrie (28 November 1997, Sheppard JA).

[21] It was similar reasoning which Counsel for the Appellant attempted to argue in Raj v Shell Fiji (supra). As was noted by the Court of Appeal at paragraph 12 in that case:

*"The judgment of His Lordship was clearly signed on 26 July 2002. Thus, six weeks ran from that date. The Appellant's Notice of Appeal was lodged on 8 June 2007, just under **five years later**."*

And at paragraph 10:

*"The Appellant's argument ... is ... That **an Order was taken out by the Appellant** and signed by the Court (through the Deputy Registrar) **on 18***

*May 2007 and thus he had six weeks to appeal from that date.* As the Notice of Appeal was lodged on 8 June 2007, he argues that was within time.

Unsurprisingly, the Court held at paragraph 19:

*"It is the Court's view that the time-limits set out in Rule 16 are clear. Judgment was delivered on 26 July 2002. Nothing was filed within the six weeks time period required by Rule 16(b). In fact, no appeal was filed until 1 July 2007, just under five years later. Clearly, the Appellant needs leave to appeal ..."*

- [21] If one was to accept the reasoning cited above from the single judge of Appeal cases, as well as that submitted by Counsel for the Appellant in **Raj v Shell Fiji**, then clearly one could appeal FIVE YEARS AFTER A JUDGMENT was signed and delivered which would make a mockery of having rules in relation to appeals and thus undermine the principle behind them, that is, bringing matters to finality.
- [22] Also, to be fair to the reasoning in the judgments cited, in **Muma v University of the South Pacific** (supra) Tikaram RJA in citing Williams J in **John Fong v. John Polotini & Another** (supra) on the interpretation of Rule 16, they were referring to "the date of entry and perfecting of a judgment" that is, "the date on which the Registrar approves, enters, files a draft thereof". Further, the reference to **Lant's Case** and the English Court of Appeal, was where it was held in relation to "**a judgment or order which is 'otherwise perfected' by sealing as opposed to being signed or entered ... time ... runs from the date of sealing' ...**".
- [22] Indeed, as was said in **Raj v Shell Fiji** at paragraph 11: "A close reading of the Court of Appeal Rules 'puts paid' to the Appellant's argument." Rule 16 states that the six weeks period is "**calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected**". If a judgment was signed, it runs from that date. If an alternative course is undertaken, such as with ex tempore judgments, then time runs from a different point.

[23] With respect to the single judge decisions cited, perhaps they are from an era when ex tempore judgments were more the “norm” or when numerous copies of judgments were not available hence the reference by Williams J in **Fong v. Polotini** that “... the date of entry, and perfecting of a judgment in a Civil Appeal is not the day on which the judgment is delivered in Court, but the date on which the Registrar approves, enters, files a draft thereof ... except that ... **time runs from the date of the actual sealing of the judgment or order.**” Interestingly, Paclii is not available pre-1976 and the judgment of Williams J in **Fong v. Polotini** is 1974, which may illustrate my point.

[24] To reiterate from the recent decision of the Court of Appeal in **Raj v Shell Fiji**, a Notice of Appeal should be lodged within the period “calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected”, that is, 21 days from an interlocutory order and in any other case, six weeks. Only if it is delivered ex tempore (or is not signed or copies unavailable) would the period not run until it was either “entered” by the Registrar (that is, a copy filed on the Court file) or “otherwise perfected”, that is, sealed.

[25] In short, the Court expects time limits to be observed: **Raj v Shell Fiji** (supra); **Rupeni Silimuana Momoivalu v Telecom Fiji Limited** (Unreported, Court of Appeal, ABU0037 of 2006, 7 September 2007, Byrne, Pathik and Mataitoga JJA); and more recently in **Shah v Fiji Islands Revenue and Customs Authority and 2 Ors** (Unreported, Court of Appeal, ABU0001 of 2007, 4 July 2008, Byrne, Pathik and Hickie JJA), where it was held (amongst other matters) at paragraph 34: “That it was the responsibility of the Appellant’s Solicitors as the Solicitors on the Record for the Appellant to pursue the Appeal in accordance with the Rules ...” and “That the Court will expect adherence to the Rules save in the absence of special circumstances.”

### 3. Consideration of the factors as to whether to grant leave

[26] In relation to the present case, the Court finds:

(a) The length of the delay – This was three days under the old interpretation and arguably 14-15 days under the new interpretation. As Counsel for the Respondent noted, the rules allow 42 days or six weeks and while in ***Fa v Tradewinds Marine Ltd*** (supra) it was only four days out of time, leave was refused because a satisfactory explanation was not given. On the other hand, Counsel for the Applicant has submitted that in the present case a satisfactory explanation was given. That is, they were not aware of the change in practice and this oversight on the part of the Solicitor is a satisfactory explanation as per ***Gatti v Shoosmith*** (supra). The problem with this submission is that there is NO evidence to show that Counsel (or a representative from the firm) attempted to file an appeal on 16 July 2008. Indeed, as the Court has found, it does lend weight to the suggestion of Counsel for the Respondent that the Applicant only filed the appeal the day after the Respondent's Solicitors wrote to the Applicant's Solicitors on 24 July 2008 demanding payment. On either interpretation of Rule 16, new or old practice, the Applicant was out of time (that is, by not filing on or before the 10 or 22 July respectively). The Applicant did eventually file on 25 July 2008, the day after the Respondent's Solicitors wrote to them. **The Court finds that the factor of the length of the delay counts against the Applicant being granted leave.**

(b) The reasons for the delay – for the reasons enunciated earlier in this judgment and immediately above, the Court agrees with the submission of Counsel for the Respondent. There is no evidence in support of the Applicant's contention that they attempted to file on 16 July 2008. Rather, the evidence is that the Applicant's Solicitors filed the appeal on 25 July 2008, a day after the Respondent's Solicitors wrote to them demanding payment. **The Court finds that the factor of the reasons for the delay count against the Applicant being granted leave.**

(c) The chances of the appeal succeeding – As the Court understands the two grounds of appeal they are concerned with findings of fact by the trial judge and whether such facts constituted a licence or bailment and, as such, whether there was negligence on the part of the Applicant. Again, the Court agrees with the

submission of Counsel for the Respondent, "in these circumstances, one must question the chances of being overturned on appeal".

In addition, Counsel must be aware that the Full Court of Appeal as an appellate court, has taken the view (as set out in a number of recent cases) that it will not normally interfere with the findings of a trial judge. For example, in the recent case of **Bebe v Telecom Fiji Limited** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 0065 of 2007, 9 July 2008, Byrne, Powell and Hickie JJA), the Court held at paragraph 14:

*" .... the Trial Judge has made comprehensive findings of fact and the Court of Appeal will not normally interfere with such findings. Indeed, the Court strongly endorses, **Benmax v Austin Motor Co. Ltd** [1955] 1 All ER 326 where it was said that:*

*"An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact ..."*

It is noted that **Benmax v Austin** was similarly endorsed last year by a differently comprised Bench of the Court of Appeal in **South Pacific Academy of Beauty Therapy Ltd v Coral Surf Resort Ltd** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU0105 OF 2005S, 23 March 2007, Ward P, Scott and Ford JJA) (Paclii: [2007] FJCA 14, <http://www.paclii.org/fj/cases/FJCA/2007/14.html>) wherein they cited the Fiji Court of Appeal from some 20 years earlier in **Raghwan Construction Ltd v Wormald Security Services Ltd** [1988] 34 FLR 124, noting:

*"this Court accepted that in relation to such appeals [findings of fact], the relevant principles are those stated by the House of Lords in **Benmax v Austin Motor Co Ltd** [1955] 1 All ER 326."*

Indeed, on this point, it was also stated in **South Pacific Academy of Beauty Therapy Ltd v Coral Surf Resort Ltd**, citing the Fiji Court of Appeal from some 38 years earlier, that:

*"In **Mahadeo Singh v Chandar Singh** [1970] 16 FLR 155, 159, this Court stated:*

*"Much has been written as to the position of an appeal court which is invited to reverse on a question of fact the judgment of a judge, sitting without a jury, who has had the advantage of seeing and hearing witnesses. Where he has based his opinion in whole or in part on their demeanour it is only in the rarest of cases that an appeal court will do so."*

**The Court finds that the factor of the chances of the appeal succeeding count against the Applicant being granted leave.**

(d) The degree of prejudice to the Respondent – Again, the Court agrees with the submissions of Counsel for the Respondent that any delay in obtaining the fruits of judgment is prejudicial. The Court notes that as at August 2008, the Respondent has been “out of pocket” since October 2006 – some 22 months or just under two years. The Court’s comments set out earlier in this judgment in relation to the Affidavit filed by the Applicant again apply here. Nothing has been set out by the Solicitor on the record for the Applicant in either affidavit form and/or by the citation of case law in support of their position querying as to what prejudice might be suffered by the Respondent. **The Court finds that the factor of the degree of prejudice to the Respondent counts against the Applicant being granted leave.**

(e) There is a substantial amount of money involved – Despite an unsubstantiated and bald remark in the Affidavit of the Applicant that “there is a high likelihood that the Defendant may not be able to recover the same from the Plaintiff”, there was no evidence before this Court in either Affidavit form from the Solicitor on the record, or any other person, to support such allegations. **The Court finds that the factor of there being a substantial amount of money involved (without anything further) does not support either the Applicant being granted leave or an Application for a Stay if the Applicant was so granted leave.**

[27] Taking into account all of the above, it is the view of this Court that the Applicant has failed on all five factors considered. As such, the Court finds that the Application for Leave to Appeal must be refused. Accordingly, there is no need for



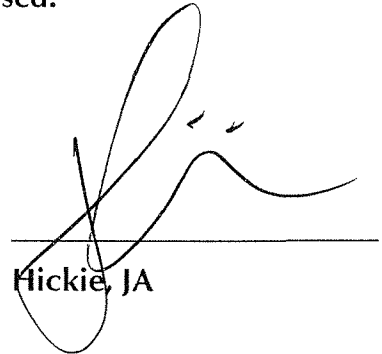
the matter to be referred back to the trial judge for consideration of the Application for a Stay pending the Appeal nor for such an application to be considered by this Court.

**ORDERS OF THE COURT**

[28] The Court orders:

1. That the Application for Leave to Appeal is refused.

I will now hear the parties as to costs.



Hickie, JA

**Solicitors:**

Lateef and Lateef, Solicitors, Suva, for the Applicant  
Sherani & Co, Solicitors, Suva, for the Respondent

