

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0056 OF 2007S  
(High Court Civil Action No. HBC 212 of 2007L)

<u>BETWEEN:</u>	<u>STRATEGIC AIR SERVICES LIMITED</u>	<u>Appellant</u>
<u>AND:</u>	<u>AIRPORTS FIJI LIMITED</u>	<u>First Respondent</u>
<u>AND:</u>	<u>ATTORNEY GENERAL OF FIJI</u>	<u>Second Respondent</u>
<u>AND:</u>	<u>AIR TRAFFIC MANAGEMENT ASSOCIATION OF FIJI</u>	<u>Third Respondent</u>
<u>Coram:</u>	Powell, JA Pathik, JA Lloyd, JA	
<u>Hearing:</u>	Friday, 7 <sup>th</sup> November 2008, Suva	
<u>Counsel:</u>	R. Matabalavu for the Appellant K. Kumar for the First Respondent R. Green for the Second Respondent No appearance for the Third Respondent	
<u>Date of Judgment:</u>	Friday, 7 <sup>th</sup> November 2008, Suva	

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JUDGMENT OF THE COURT

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- [1] The appellant ("Strategic Air") claims intellectual property rights including copyrights in a number of works and computer programmes ("the works") produced by it under an Air Traffic Management Agreement of 12 April 1999 between it and the first respondent ("the Agreement").

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[2] On 6 July 2007 Strategic Air was granted ex-parte orders by Connors J with respect to the works and the orders were continued until 18 July 2007 when the respondents were represented and the continuation of the orders contested.

[3] On 18 July 2007 the respondents argued that Strategic Air had on 6 July 2007 failed to disclose a material matter to the Court, namely that it was the respondent in a Winding-Up Petition filed on 19 February 2007. The respondents also disputed that Strategic Air had any copyright in the works and that in any event damages would be an adequate remedy. In addition the third respondent contended that it ought not to have been joined to the proceedings because no cause of action was pleaded against it and no injunctive relief was sought against it.

[4] The trial judge:

- found that there was a triable issue
- considered whether or not there had been material non-disclosure
- found that damages would be an adequate remedy
- found that in any event the balance of convenience lay in favour of dissolving the injunctions
- dismissed the notice of motion of 6 July 2008 and ordered Strategic Air to pay costs which he assessed at \$3,000 for the first respondent, \$500 for the second respondent and \$1,000 for the third respondent

[5] On 7 August 2007 Strategic Air filed a Notice of Appeal containing eight grounds namely that the trial judge erred:

- Firstly in failing to give effect to the practical reality that refusal of injunctive relief would have on the claimed property rights

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- Secondly in failing to direct an undertaking as to damages by the first respondent
  - Thirdly in holding that damages were an adequate remedy and not holding that there was a strong likelihood that Strategic Air would obtain an order for specific performance of the Agreement at trial
  - Fourthly in discharging the interlocutory injunctions given that at trial breaches of the Agreement by the first respondent would attract remedies beyond damages and may include an account of profits derived from the use of the works
  - Fifthly in failing to give adequate weight to the facts including that there was no dispute that Strategic Air owned the works, that the first respondent had conceded that *"delivery up of such works and programmes would destroy or at least seriously affect present air traffic control services"* and that the first respondent had begun to deface the works with the risk that the works will be irretrievably destroyed before trial
  - Sixthly in failing to *"expedite immediate resolution of (Strategic Air's) claim to compensation"* for the works
  - Seventhly in holding that there was material non-disclosure by Strategic Air Services
  - Eighthly in failing to take into account the difficulty in ascertaining and quantifying damage

#### Grounds 2, 6 & 7

- [6] Ground 2 of the appeal has the merit of originality but Strategic Air is unable to point to any authority for the proposition that an enjoined party should ever be asked to give an undertaking as to damages.

- [7] Ground 6 is not made out. If Strategic Air wanted expedition of the hearing of the Summons it ought to have applied for it and prepared its case for hearing instead of appealing dissolution of the interlocutory orders.
- [8] Ground 7 is misconceived because the trial judge considered but made no findings as to whether or not there had been material non-disclosure. If the trial judge had found non-disclosure of a material matter then he would have been entitled to do so because the Winding-up petition was relevant to the adequacy of Strategic Air's undertaking as to damages.

**Grounds 1, 3, 4, 5 & 8**

- [9] These five grounds all amount to variations of the ground that the trial judge erred in finding that damages would be an adequate remedy and that the trial judge erred in assessing the balance of convenience .
- [10] Section 12(2)(f) of the Court of Appeal Act provides that in civil cases no appeal shall lie without the leave of the judge or of the Court of Appeal from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, except where the interlocutory decision involves the granting or refusal of an injunction and in certain other limited cases.
- [11] Leave to appeal is thus not required but an interlocutory decision is a discretionary one and the principles relating to appeals from discretionary decisions apply.
- [12] In House v The King [1936] 55 CLR 499 Dixon, Evatt & McTiernan JJ at 504-505 said:
- "The manner in which an appeal against the exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the*

~~position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the material for doing so."~~

- [13] In ***Hadmore Productions Ltd & Ors v Hamilton & Ors*** [1982] 1 All ER 1042 Lord Diplock confirmed that on an appeal from a judge's grant or refusal of an interlocutory injunction an appellate court must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. We are of the view that the trial judge properly considered all relevant matters going to the exercise of his discretion.
- [14] If damages are an adequate remedy and the defendant is in a financial position to pay the damages an interlocutory injunctions should not be granted: ***Honeymoon Island (Fiji) Ltd v Follies International Ltd*** [2008] FJCA 36; ABU 63/2007S.
- [15] The Court is not satisfied that the trial judge erred in finding that damages would be an adequate remedy. In many cases damages are difficult to assess but that difficulty doesn't mean that damages will therefore be inadequate.
- [16] In any event the trial judge dissolved the injunction on the balance of convenience. His finding at paragraph 20 that the material was "*necessary for the proper functioning of airports and the safety of air craft movements in and around Fiji*" seems conclusive on this question.
- [17] The appeal is dismissed.
- [18] The appellant is to pay the first and second respondents' costs as taxed or as agreed.

*Rachel Powell*

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Powell, JA

*Pathik*

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Pathik, JA



*J Lloyd*

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Lloyd, JA

Solicitors:

Essesimarm and Company, Nadi for the Appellant

Young and Associates, Lautoka for the First Respondent

Office of the Attorney General Chambers, Lautoka for the Second Respondent