

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

CIVIL APPEAL NO. ABU0051 OF 2006
(High Court Civil Case No. HBE 36 of
2004L)

BETWEEN: **VIMALS CONSTRUCTIONS & JOINERY WORKS**
LIMITED (IN LIQUIDATION) a limited liability company
having its registered office at 61 Vitogo Parade, Lautoka

1st Appellant
(Original Respondent)

AND : **BIMAL PRAKASH** father's name Dharam Raj of 4 Koata Place,
Lautoka and **JITENDRA SEN** father's name Indar Sen of Field
40, Lautoka both Company Directors.

2nd Appellants
(Affected Party)

AND : **VINOD PATEL & COMPANY (LAUTOKA) LIMITED**
a limited liability company having its registered office in Ba.

Respondent
(Original Petitioner)

Hearing: 23 April 2007
Ruling : 1 May 2007

Counsel: V Maharaj for applicants
V Prasad for respondent

RULING

[1] This is an application for leave to appeal out of time against a Winding-up Order made on 14 January 2005.

[2] In an earlier application before this Court, Scott JA prefaced his decision with the words:

“... this essentially straightforward litigation has become almost hopelessly confused as a result of a multiplicity of applications, affidavits and rulings, several changes of solicitors, failures to follow the proper procedures and what appears to be an unnecessarily confrontational approach by the parties”

[3] I consider those words apt. Scott JA sets out the history of the case and I do not intend to set it out again.

[4] The appeal was filed on 6 September 2006 and, on 26 October 2006, Scott JA ordered that the orders by the High Court for disposal of properties owned by the applicant Bimal Prakash should be stayed and that a sum of \$65,000.00, previously paid into court as part of a conditional stay granted by the High Court, remain there until further order. He also ordered that the present second appellants be joined as parties to the appeal.

[5] This application for leave to appeal out of time was commenced by a notice of motion dated 10 November 2006 and the court has received and considered affidavits from both parties. The respondent opposes the application for leave to appeal out of time principally on the grounds that the delay is clearly inordinate and the explanation for it is inadequate and that the sum paid into court, although less than the sum in the original action, now falls far short of the costs incurred in this protracted litigation.

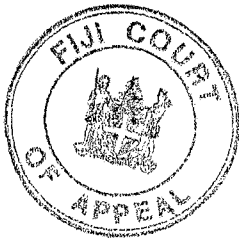
[6] As has been stated many times before, the Court, when considering such an application, must consider the length of the delay, and the reasons for it, the chances of success if leave is granted and any likely prejudice to the respondent. It is a discretionary power which must be exercised judicially according to established principles and the burden lies on the applicants to satisfy the court that, in the circumstances of the case, justice requires that they be given the opportunity to attack the order despite the fact of the delay; see, for example

- [7] There can be no dispute that the length of the delay is considerable in this case bearing in mind the facts together with the nature and effect of the order to be appealed.
- [8] It appears that the present solicitors for the applicants only came into the action well after the Winding-up Order had been made and Mr Maharaj explains that the reason for the delay is that the previous solicitors did not advise the applicants of their right to appeal the order. Once he had been instructed, he considered there were a number of irregularities in the making of the order and filed the notice of motion on 6 September 2006. I do not consider the failure of the previous solicitors is an adequate explanation in itself. However, the Court must pass on to consider the likelihood of success in the appeal.
- [9] I do not set them out but the grounds of appeal suggest that the applicants have arguable grounds in respect of the procedure adopted in the High Court and in the manner in which the court dealt with a number of serious allegations against the second appellants. I do not rule on the actual merits but I do accept that they raise matters of some significance.
- [10] Any delay of this length must be prejudicial to the respondents. However, the sum involved in this case is less than that paid into court. It will be accumulating interest and I do not consider that the prejudice to the respondents is significant.
- [11] Although it is unusual to give leave to appeal against a Winding-up Order after any substantial delay, I am satisfied that the merits of this case and the slight degree of prejudice to the respondent mean that justice requires the applicants to be given an opportunity to pursue this appeal and I give leave to appeal out of time. It appears that, following the filing of the original grounds of appeal,

security for costs was fixed and so I order that the appeal now proceed in accordance with the Rules. No further delay should be considered

[12] For the avoidance of any doubt, I also order that the sum of \$65,000 should remain in court until further order.

[13] The need for this application was entirely the result of the appellants' acts and, although successful, I consider it just that they should pay the respondent's costs of this application which I fix at \$600.00.



A handwritten signature in cursive script, appearing to read "Gordon Ward".

Gordon Ward
PRESIDENT