

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

MISCELLANEOUS ACTION NO. 16 OF
2007
(High Court Civil Action No. HBC 149 of
2002L)

BETWEEN: **PACIFIC EDUCATIONAL RESOURCES (FIJI) LTD**

Appellant

AND : **PERMANENT SECRETARY FOR EDUCATION**

Respondent

Counsel: R Mishra for applicant
 E Tuiloma and J Lewaravu for respondent

Hearing: 13 June 2007

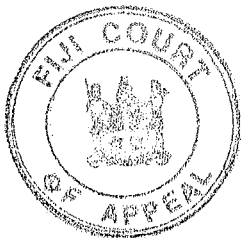
Ruling : 20 June 2007

RULING

- [1] This is an application for leave to appeal out of time.
- [2] The present respondent (PSE) brought an action in the High Court in Lautoka claiming copyright of examination papers from previous years which the present applicant (PERL) had published as revision aids. It appears that PERL denied the copyright and filed a counter claim that PSE had advised schools not use the PERL's publications and they had suffered loss as a result. They also claimed damages from the effect of an interim injunction obtained by PSE.

- [3] In a judgment perfected on 27 February 2007, Finnigan J found PSE owned copyright of some papers but had not suffered any damages by PERL's publication. He awarded PSE costs at one half of the higher scale but gave judgment to PERL on the counterclaim in the sum of \$150,000.00 and costs on the counter claim.
- [4] It is agreed that PSE filed an appeal on quantum and served it on 20 March 2007. An application for security for costs was served three days later. PERL did not file a respondent's notice. The time for any separate cross appeal expired on 10 April 2007 and this appeal was not filed until 22 May 2007.
- [5] The affidavit in support of the application explains that the notice of appeal was sent from the solicitor's Lautoka office to its Suva office on 10 April 2007 but was received by the latter after the Court of Appeal registry had closed. The papers were then presented to the registry on 12 April 2007 but they were not accepted as they were out of time. No explanation is given for the extra delay of a day at that stage or the reason for the further delay before this application for leave to appeal out of time was lodged on 22 May 2007.
- [6] Counsel for the respondent has filed a carefully researched submission in opposition to the application. He correctly asks the Court to consider the length of and reasons for the delay, the chances of the appeal succeeding if the application is granted and any possible prejudice to the respondent.
- [7] Whilst the length of the delay is not very long, it is aggravated by the fact that the applicant clearly was kept aware of the passage of the respondent's appeal and, having failed to meet the deadline, then, inexplicably on the evidence before me, delayed a further five weeks. As counsel points out, this Court has repeatedly stated that time limits in the Rules are there to be obeyed and any party in breach is likely to have his application for extra time refused.

- [8] I am not satisfied that there is any explanation for the delay beyond tardy work by the solicitors.
- [9] The respondent contends that there is only a very slim chance of success in the appeal. I do not accept the issues are such that the result can be so clearly predicted and I consider there is some chance of success on at least some aspects of the appeal.
- [10] The question of prejudice to the respondent must be considered in relation to the appeal that it has already filed. That other appeal will go ahead in any event and whilst the present respondent would no doubt like to keep the issues in its appeal clear from the present case, I do not see that the pursuit of this appeal if consolidated with it would prejudice its position. I also note counsel's advice that the present respondent has not sought a stay of the award of damages.
- [11] The application is allowed but the applicant will pay the respondent's costs of this application fixed at \$400.00. The appellant is to file and serve the appeal within seven days and the two appeals are to be consolidated. At the hearing of the consolidated appeal, unless the parties agree to an alternative arrangement, the present respondent will address the Court as appellant and the present applicant will conduct its appeal as respondent. The notice of appeal for this case will be then treated as a respondent's notice.



A handwritten signature in black ink, appearing to read "Gordon Ward".

Gordon Ward
PRESIDENT
FIJI COURT OF APPEAL