

IN THE COURT OF APPEAL, FIJJI ISLANDS
AT SUVA

CIVIL ACTION NO. ABU0035 OF 2008

[Lautoka High Court Action No. HBC 357 of 2007]

BETWEEN : SILVER BEACH PROPERTIES LTD. *Appellant*

AND : SAIJAD JAWAN *Respondent*

Counsel : S. Maharaj for the Appellant
D. Samusamuvodre & S. Sharma
for the Respondent

Date of Hearing : 30th September 2008

Date of Ruling : 26th January 2009 (In Open Court) – 9.00am

R U L I N G

[1] **Background**

On the 11th of June 2008 Phillips J. in the High Court at Lautoka dissolved a Mareva injunction which she had granted on the 30th of November 2007 and subsequently extended. On the 17th of June 2008 I granted ex-parte on behalf of the Appellant Orders as follows:

- i) **Staying all orders made on the 11th of June by Phillips J.**

had shown any willingness to attempt to settle this case, which it is obvious they have not, but which in my opinion cried out for discussions or even mediation, much of the time I have spent would have been unnecessary.

[9] Of course I realise that the parties are entitled to have their case heard by the Full Court of this Court but my comment refers really to the length of the proceedings until now. I venture to suggest that if the High Court had power to require the parties to submit to mediation by a properly qualified mediator before an action could proceed, the Court's and the parties' time could have been much more usefully employed.

[10] **The Present Motions**

A reasonable observer of these proceedings to date might wonder whether it was possible for the parties to engage in any further interlocutory proceedings in this Court. The answer to that observer is, yes because on the 5th of August 2008 the Respondent issued a Notice of Motion seeking the following orders:

- i) That the Respondent be granted leave to withdraw the sum of \$100,000.00 (one hundred thousand dollars) from the \$212,000.00 (two hundred and twelve thousand dollars) held at Westpac Banking Corporation Sigatoka Branch in Account No. 9801519373 jointly in the name of the Respondent and his wife and that the said**

- called to the office of Jamal Sen the General Manager of Warwick International in the South Pacific to explain certain things relating to his employment as Financial Controller.
- [15] He stated that he owned a house in Olosara which was mortgaged to the ANZ Bank but owned no land in Sigatoka. He does own a Rental Car business. He said that \$93,000.00 was owing to the ANZ bank on mortgage and the value of the property is \$200,000.00. He has ten cars in his Rental Car business and owes \$100,000.00 on them under a Bill of Sale to the ANZ bank. He said the valuation of his Rental Cars was \$180,000.00 and the average rental was between \$5,000.00 and \$6,000.00 per month.
- [16] He repays approximately \$4,200.00 per month on the house and the Bill of Sale. He has two employees in the Rental Car business who carry out repairs and maintenance to the cars and he also pays \$500.00 per month to the Rental Car manager. He pays \$300.00 per month to the mechanic.
- [17] He said he made no money from the business. He said he resigned from the Appellant because of his health. At the time of the employment with the Appellant he was earning \$64,000.00 per annum. He resigned in April 2007 after giving six weeks notice. The company asked him to stay on for a while because it could not find a suitable replacement. In July 2007 it got a suitable assistant Financial Controller and the company then asked the Respondent to train this person for six months on his normal salary just to help the company. He agreed and did so train the new appointee. He agreed that after the injunction was dissolved by Phillips J. in the High Court, he withdrew \$30,000.00 from his bank account. He

subsequently reduced by the Appellant. Phillips J. said, and I agree, that the Appellant equated the responsibility of ensuring the banking of company money to its allegation that this failure supports its contention that the Respondent misappropriated the moneys which were not banked. The Judge did not agree. She said, *“This is a quantum leap to say the least. Surely the Plaintiff (Appellant) was well aware of its own banking procedures during the period in which the Respondent was its financial controller. The Respondent would have been answerable to the General Manager. The internal and external audits of the Appellant’s account would have or should have alerted the Respondent’s superior officers of the short comings, if any, in its banking procedures. The Respondent’s version of the Appellant’s banking procedures has not been challenged by any credible evidence to the contrary. On the Respondent’s version he was not responsible for banking of the company moneys. At this interlocutory stage it would be “precarious” (which I take to mean unwise), to arrive at any findings that just because he was overall in charge of the Accounting department he had misappropriated funds that are now missing. At this stage the accounts are still being audited. Even the Appellant accepts that the audit is still in progress”*. The Judge continued, *“More importantly the Appellant has disclosed in answer to the Respondent’s affidavits that the Appellant itself engaged in the practice of withholding foreign currencies for the use by the company in order to save unfound exchange losses. The threshold requirement of establishing a good arguable case on its substantive claim has not been met”*. Again, I say I find much force in the learned Judge’s reasoning.

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[John E Byrne]

JUDGE

At Suva

26th January 2009