

**IN THE COURT OF APPEAL**  
**FIJI ISLANDS AT SUVA**

[Misc. Action No. 19 OF 2009]  
(On appeal from a decision of the High Court  
in Lautoka in Civil Action No. HBC 39 of 2004L)

**BETWEEN** : **ALL ENGINEERING LIMITED**  
**(APPLICANT/ORIGINAL DEFENDANT)**

**AND** : **PACIFIC PARASAIL LIMITED trading as**  
**SUBSURFACE FIJI**  
**(RESPONDENT/ORIGINAL PLAINTIFF)**

**CORAM** : **Byrne, Acting President**

**COUNSEL** : **F. Khan for the Applicant**  
: **A. Patel for the Respondent**

**DATES OF HEARING** : **8<sup>th</sup> February 2010**

**DATE OF RULING** : **21<sup>st</sup> September 2010**

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**RULING ON APPLICATION FOR LEAVE TO APPEAL OUT OF TIME**

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[1] On or about the 16<sup>th</sup> of February 2004 the respondent (original plaintiff) commenced an action in the High Court at Lautoka for damages. The claim arose following the respondent giving its six cylinder Yanmar Marine Engine to the applicant (defendant) to repair. One of the tasks which the applicant had to perform was to replace and fit a new valve seat. The engine belonged to the respondent's dive boat "KALO" used for its diving operation, taking tourists from the *Beachcomber and Treasurer Island* resorts reef diving.

[2] Five weeks after the repair work was completed, the valve seat failed and caused a catastrophic engine failure. Parasail could not use its vessel "KALO" for several weeks and then claimed in the High Court for the losses it suffered.

[3] The judgment was given by Inoke, J on the 15<sup>th</sup> of September 2009 although he was not the Trial Judge who had retired sometime after July 2008.

[4] Consequently, Counsel for the parties agreed on 31<sup>st</sup> July 2009 that Mr Justice Inoke deliver judgment on the papers rather than a hearing *de novo*.

[5] **THE RESPONDENT'S CLAIM**

Parasail filed its Writ of Summons and Statement of Claim on 16<sup>th</sup> February 2004. It claimed \$38,582.00 for special damages and unspecified general damages, interest and costs.

[6] The Statement of Claim alleged that in December 2002, in reliance on the representations and reputation of All Engineering, Parasail gave the engine to them, to, among other work, machine and fix a valve seat in the engine head for the number 3 cylinder. That, and the other repairs were done on 19<sup>th</sup> December 2002. The cost of the number 3 cylinder valve seat refit itself was only \$45.00.

On 1<sup>st</sup> February 2003, the engine suffered serious damage which Parasail alleged was due to the failure of ALL ENGINEERING to carry out the work in a competent, professional and workman-like manner and its failure to use appropriate and suitable material fit for the purpose of a valve seat. All Engineering's defence was that it had not performed the work negligently or incompetently or had used inappropriate or unsuitable material not fit for the purpose.

[7] **THE JUDGMENT OF INOKE, J**

In a 12-page judgment Inoke, J found for Pacific Parasail and awarded it damages of \$38,582 together with interest thereon of \$13,890.00. He also ordered All Engineering to pay the respondent its costs which he fixed at \$3,000.00.

[8] On the 11<sup>th</sup> of November 2009 the applicant issued a Summons now before me seeking leave to appeal out of time. In an affidavit in support of the Summons sworn on the 10<sup>th</sup> of November 2009, Pradeep Kumar, the Accountant of All Engineering Limited states that, the judgment of Inoke, J being a final judgment, the applicant had six weeks in which to appeal to this Court, that is by the 27<sup>th</sup> October 2009. Consequently it is said the application for leave to appeal was made only fourteen days out of time.

[9] The reasons given for the delay by Mr Kumar were that on the day on which an appeal should have been lodged, its insurer *New India Assurance Co. Ltd* wrote to it stating that because of alleged non-disclosure of material facts including, the use of unsuitable materials to manufacture the valve seat and providing such a seat that was not in good condition, the company refused to cover All Engineering in respect of the claim made by Parasail. It therefore cancelled All Engineering's policy.

[10] Not surprisingly the applicant was concerned about the cancellation of its policy and consequently now has to finance any appeal itself.

[11] **THE PROPOSED GROUNDS OF APPEAL**

The applicant has annexed to the affidavit of Mr Kumar seven proposed grounds of appeal, but, as I understand, its main ground is that Inoke, J in effect overruled the Trial Judge who had upheld an objection by All Engineering that only original invoices should be accepted into evidence. Inoke, J held that copies of such invoices were sufficient. The Judge said that once the plaintiff produced a photocopy of an invoice, the onus shifted to the defendant to show that it was not authentic.

[12] In so doing All Engineering, alleges that Inoke, J committed an error of law.

[13] In my judgment this is a matter which should receive the opinion of the Full Court. I therefore give leave to the applicant to appeal out of time subject to the condition that it pay the respondent's costs which I fix at \$2,000.000 within 14 days of the delivery of this Ruling.

Dated at Suva this 21<sup>st</sup> day of September 2010.



A handwritten signature in black ink, reading "John E. Byrne", is written over a horizontal dotted line.

**John E. Byrne**  
**Acting President**