

**IN THE COURT OF APPEAL OF FIJI**  
**[ON APPEAL FROM THE HIGH COURT]**

**APPEAL NO. ABU 0063 OF 2024**  
(On appeal from the Family High Court  
Family Appeal No. 16 of 2023  
Magistrates Court File No. 22/LTK/0089)

**BETWEEN** : **ANDREW HUGH GRIFFITHS**

**APPELLANT**  
(Original Second Respondent)

**AND** : **DAVID MCGRATH AND VAUGHAN NEIL**  
**STRAWBRIDGE**, each a receiver and together receivers of  
**ISLAND GRACE (FIJI) LIMITED (IN**  
**RECEIVERSHIP/ADMINISTRATION)**

**FIRST RESPONDENT**  
(Original Appellants/ Cross-Applicants)

**AND** : **MORGEN ELIZABETH GRIFFITHS**

**SECOND RESPONDENT**  
(Original First Respondent)

**Coram** : Prematilaka, RJA

**Solicitors** : Ms. P. Macalikutabua for the Appellant  
Ms. M. Raga for the Respondents

**Date of Hearing** : 17 February 2025

**Date of Ruling** : 24 March 2025

**RULING**

[1] The appellant had lodged summons on 08 July 2024 seeking *inter alia* leave to appeal (LA) against the Ruling at Lautoka High Court dated 17 June 2024 which *inter alia* set aside the

ruling of the Resident Magistrate (RM) dated 24 July 2023 and ordered costs of \$2500.00 against the appellant (and the 02<sup>nd</sup> respondent). This impugned order was made in the appeal filed by the 01<sup>st</sup> respondent in the High Court against the RM's said ruling that the 01<sup>st</sup> respondent did not have *locus standi* to be a party seeking to set aside the consent orders dated 30 March 2022 (sealed on 01 April 2022) entered in the Magistrates court in case 22/LTK/089. The 01<sup>st</sup> respondent as the interested party had on 10 May 2022 moved the Magistrates court to stay and set aside the consent orders. Following the High Court ruling, the Magistrates court finally heard the 01<sup>st</sup> respondent's application on 04 September 2024 and on 08 November 2024 in its ruling dissolved the consent orders sealed on 01 April 2022 subject to summarily assessed costs of \$1000.00 against the appellant and 02<sup>nd</sup> respondent.

- [2] On the first call date *i.e.* 30 July 2024, the court had noted that the LA application was late by three days and the appellant had been asked to file an affidavit explaining the reason for delay. The supplementary affidavit had been filed and the appellant had explained that the impugned Ruling was received from the High Court by his solicitors *via* email only on 25 June 2024. All papers had been duly served on the respondents. On 27 August 2024, the court had given directives for parties to file affidavit-in-opposition, affidavit-in-reply and fixed the argument on 02 October 2024.
- [3] On 02 October 2024, the counsel for the appellant informed court orally that the appellant wished to abandon/withdraw the leave to appeal application. The application to abandon the appeal was made on the basis of a judgment in the High Court of New Zealand given on 16 September 2024 (a copy of which had been made available to this court by the appellant's solicitors along with their letter to the Court of Appeal Registry on 01 October 2024 – copied to the 01<sup>st</sup> respondent's solicitors as well).
- [4] The appellant's letter dated 01 October 2024 confirms that consequent to the said New Zealand High Court decision, the liquidators of Satori Holdings Limited (Satori – a company registered in New Zealand and also as a foreign company in Fiji) have sold Satori's 31.66% interest in Vunabaka Bay Fiji Limited (VBJV) - which was the asset the appellant had transferred to his wife (02<sup>nd</sup> respondent) after the consent orders obtained in

the Magistrates court at Lautoka Case No. 22/LTK/89 - and as this asset has now been sold the appellant would have to abandon the leave to appeal application. It appears that the 01<sup>st</sup> respondent was the First Interested Party in the proceedings before the High Court in New Zealand while the liquidators of Satori and the Satori were the 01<sup>st</sup> and 02<sup>nd</sup> Applicants respectively. The appellant was the Fourth Interested Party. Satori also held 24% of shares in Island Grace Joint Venture (IGJV). The 01<sup>st</sup> respondent had been appointed as Receivers and Managers of Island Grace (Fiji) Limited (IGLF). IGFL is the trustee of IGJV.

- [5] The 01<sup>st</sup> respondent insisted on substantial or indemnity cost to be paid in case the appellant was to withdraw his appeal. The appellant was directed by this court to file a formal notice of discontinuance while advising the parties to agree on the amount of costs, if possible.
- [6] The appellant was prepared to pay less than \$5000.00 while the 01<sup>st</sup> respondent insisted on \$15,000.00 as costs and since there was no agreement between the parties as to cost, on 29 October 2024 this court directed parties to file written submissions on the issue of costs.
- [7] In written submissions the 01<sup>st</sup> respondent has indicated an indemnity costs of \$10,000.00 while the appellant has claimed that summarily assessed costs of \$500.00 should be awarded. The appellant's submissions have given instances where the full court of the Court of Appeal upon pronouncing judgments after hearing appeals have awarded costs of \$10,000.00<sup>1</sup>, \$12,500.00<sup>2</sup> and \$75,000.00<sup>3</sup>. However, it appears that in *Fiji National Provident Fund v Colonial (Fiji) Life Ltd* (see footnote 3) the court did not order any costs of the appeal but the appellant was ordered to pay the defendant's costs of the proceedings below in a lump sum of \$75,000 while allowing the appeal against indemnity cost. In *Attorney General v Draunidalo* (see footnote 2), the full court allowed the appeal and substituted a sum of \$12,500.00 instead of indemnity costs of \$20,000.00 ordered by the lower court and ordered separate cost of \$2500.00 as costs of the appeal. The Court of Appeal in *Roberts v Chute* (see footnote 1), awarded a 'gross' or 'global' costs of \$10,000.00 to the successful respondent.

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<sup>1</sup> **Roberts v Chute** [2009] FJCA 4; ABU0040.2007 (17 March 2009)

<sup>2</sup> **Attorney General v Draunidalo** [2009] FJCA 54; ABU0006.2008 (16 March 2009)

<sup>3</sup> **Fiji National Provident Fund v Colonial (Fiji) Life Ltd** [2008] FJCA 92; ABU0036.2006S (8 April 2008)

- [8] Therefore, the above decisions are not a proper guide to award indemnity costs and in any event not in leave to appeal applications upon withdrawal.
- [9] The appellant has also cited a few decisions<sup>4</sup> to show that the costs ordered were in the region of \$500.00 to \$5000.00.
- [10] In *Ali's Civil Engineering Ltd v Habib Bank Ltd* (see footnote 4) was a full court decision of the Supreme Court and after dismissing the appeal it ordered \$5000.00 and \$2500.00 against the petitioner as costs. In *Autoworld Trading (Fiji) Ltd v Total Fiji Ltd* (see footnote 4) the majority refused to review the earlier decision of the Supreme Court and ordered \$5000.00 as costs against the petitioner. In *Moksha Pte Ltd, In re* (see footnote 4), the appellant had filed a motion dated 11 April 2023 with a copy to the solicitors for the respondent seeking to withdraw and discontinue the appeal. When the case was taken up for argument on 02 May 2023 the appellant moved in open court to withdraw the appeal. The counsel for the respondent had not objected to the withdrawal subject to costs. The full court of the Court of Appeal having considered the fact that the respondent had been given prior notice of the withdrawal and other circumstances, decided that costs in a sum of \$500.00 was justified. In *Naidiri v Talenimesi* (see footnote 4), the then President as a single judge of this court had dismissed leave to appeal out of time after inquiry and directed the appellant to pay \$3000.00 and \$1500.00 respectively to the two respondents.

### ***What is indemnity costs?***

- [11] Indemnity costs are a higher scale of costs awarded in legal proceedings, typically granted in circumstances where the conduct of the paying party justifies a departure from the standard "party and party" or "ordered costs" scale. They serve as a punitive or deterrent measure, ensuring the successful party is not out of pocket due to the unreasonable or improper conduct of the other party.

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<sup>4</sup> *Ali's Civil Engineering Ltd v Habib Bank Ltd* [2019] FJSC 30; CBV00016.2018 (1 November 2019); *Autoworld Trading (Fiji) Ltd v Total Fiji Ltd* [2022] FJSC 47; CBV0002.2019 (28 October 2022); *Moksha Pte Ltd, In re* [2023] FJCA 75; ABU030.2020 (26 May 2023) and *Naidiri v Talenimesi* [2023] FJCA 180; ABU0025.2021 (18 August 2023)

[12] The following circumstances have been considered to warrant the award of indemnity costs<sup>5</sup>:

- *where the applicant, properly advised, should have known that it had no chance of success*
- *where the moving party persisted in what should, on proper consideration, have been seen to be a hopeless case*
- *where the applicant's case was always clearly foredoomed to fail and it ought to have known this to be so*
- *where an application is wholly untenable and misconceived*
- *where an applicant persisted in prosecuting a proceeding without regard to the evidentiary difficulties in the case*
- *where an applicant unreasonably rejected an offer or compromise that it failed to improve upon in litigation. The Full Court of the Federal Court has taken the following (non-exhaustive) circumstances into account in determining whether the rejection of an offer was unreasonable<sup>6</sup>.*

[13] The deficiencies in the losing party's case must be sufficiently manifest and clear such that it can be inferred that the losing party would or should have appreciated them at the time proceedings were commenced or continued, at least if it had given proper consideration to, or had been properly advised about, the merits of its case. Thus, in assessing whether a case can be said to "have no chance of success", or to be "hopeless" or "foredoomed to fail", it is not sufficient for the successful party to argue that the losing party's case was simply weak or tenuous as the court must have regard to the following<sup>7</sup>:

- *access to the courts is not to be discouraged*
- *the court would not wish to discourage a party from discontinuing a weak case that is getting worse, merely for fear of incurring indemnity costs for doing so*

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<sup>5</sup> **Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd** (No 5) [2021] FCA 246 at [10]

<sup>6</sup> **Anchorage Capital Partners Pty Limited v ACPA Pty Ltd** (No 2) [2018] FCAFC 112 at [6]-[8]; **Wills v Chief Executive Officer of the Australian Skills Quality Authority (Costs)** [2022] FCAFC 43 at [23]; **Hood v Down Under Enterprises International Pty Limited** (No 2) [2022] FCAFC 106 at [23]; and **Treasury Wine Estates Limited v Maurice Blackburn Pty Ltd** (No 2) [2021] FCAFC 38 at [26] - The stage of the proceeding at which the offer was received, the time allowed to the offeree to consider the offer, the extent of the compromise offered, the offeree's prospects of success, assessed as at the date of the offer, the clarity with which the terms of the offer were expressed and whether the offer foreshadowed an application for indemnity costs in the event of the offeree rejecting it.

<sup>7</sup> **Vector Corrosion Technologies Limited v E-Chem Technologies Ltd** [2022] FCA 519 at [53], [57].

- *if a weak or tenuous case fails, the usual order for costs is seen as sufficient compensation for the successful party;*
- *experience shows that apparently weak cases can sometimes succeed*
- *the law develops by reason of all kinds of cases including the apparently weak case*
- *there is a category difference between a weak case (which may improve over the course of a hearing) and a doomed case (subject to a manifest deficiency incapable of remedy).*

[14] Within this context, other instances where indemnity costs may be considered are:

- ***Exceptional Circumstances*** – *Indemnity costs are generally awarded where a party has acted unreasonably, improperly, or in a manner that amounts to an abuse of the court's process. If the litigation history shows that one party has abused the court process, such as by repeatedly bringing unmeritorious claims, defenses or appeals, this may be a strong factor in favor of awarding indemnity costs.*
- ***Misconduct or Unreasonable Litigation Conduct*** – *If a party's conduct is so unreasonable as to warrant an indemnity costs order, courts may grant it. This includes vexatious claims, delaying tactics, or pursuing a claim with no prospects of success, failing to comply with court orders, and this history may justify an award of indemnity costs.*
- ***Settlement refusal/Rejection of a Reasonable Offer*** – *If a party rejects a reasonable settlement offer and later obtains a judgment less favorable than the offer, indemnity costs may be awarded from the date of the rejected offer.*
- ***Fraud, Dishonesty, or Bad Faith*** – *If a party engages in fraudulent or dishonest conduct, courts may impose indemnity costs.*
- ***Litigation Misconduct*** – *Bringing frivolous claims, unnecessary proceedings, or causing undue delay can justify indemnity costs. A history of prolonged, unnecessary, or frivolous litigation by one party may influence the court's decision to award indemnity costs, as it reflects poorly on that party's conduct.*
- ***Statutory or Contractual Basis*** – *Indemnity costs may be awarded where a statute or contract provides for such a measure.*
- ***Previous Costs Orders*** - *If there have been previous costs orders against a party, particularly if they relate to similar conduct, the court may take this into account as evidence of a pattern of behavior justifying indemnity costs.*

[15] **Colgate-Palmolive Co v Cussons Pty Ltd** (1993) 46 FCR 225; [1993] FCA 801; 119 CLR 118; 1993 ALR 248; 28 IPR 561:

- ***Principle:*** *The Federal Court of Australia outlined that indemnity costs may be awarded when proceedings are brought in bad faith, without merit, or involve some element of misconduct.*
- ***Facts:*** *The case concerned a dispute over misleading and deceptive conduct.*

- **Held:** *The court ruled that indemnity costs were appropriate where a party's conduct was "so unreasonable" that the opposing party should not bear any costs.*

[16] **Pacific Dunlop Ltd v Hogan** (1989) 23 FCR 553; 1989] FCA 185; 87 ALR 14; (1989) AIPC 39–044; (1989) ATPR 40–948; 14 IPR 398:

- **Principle:** *Indemnity costs may be awarded where a case is hopeless or brought with no genuine basis.*
- **Facts:** *Pacific Dunlop pursued a claim for defamation against comedian Paul Hogan.*
- **Held:** *The claim was found to be so weak that it warranted indemnity costs against the plaintiff.*

[17] **Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd** (1988) 81 ALR 397; [1988] FCA 364; (1988) EOC 92-239:

- **Principle:** *If a party brings proceedings with no reasonable prospects of success, indemnity costs may be justified.*
- **Facts:** *A claim was brought with weak evidence, and the court found it lacked merit.*
- **Held:** *The losing party was ordered to pay indemnity costs due to the frivolous nature of the claim.*

[18] **Keddie v Stacks Goudkamp Pty Ltd** [2012] NSWCA 254:

- **Principle:** *Courts may order indemnity costs against lawyers who act improperly or in an abusive manner.*
- **Facts:** *A lawyer sued a firm for unfair dismissal but conducted proceedings in a manner considered vexatious.*
- **Held:** *The court ruled that indemnity costs were justified due to the unreasonable litigation approach.*

[19] A.M. Mohamed Mackie, J in the High Court at Lautoka too had extensively examined the legal principles relating to cost and in particular indemnity cost<sup>8</sup>. I will take liberty to reproduce then for the benefit of both parties.

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<sup>8</sup> **Kento (Fiji) Ltd v Naobeka Investment Ltd** [2018] FJHC 169; HBC44.2016 (9 March 2018)

“6. ‘Principles Governing Indemnity Costs: Principles governing the award of indemnity costs are set out in a number of authorities.

6.1 General principles, among others, include:

- a. A court has ‘absolute and unfettered’ discretion vis-à-vis the award of costs but discretion ‘must be exercised judicially’: **Trade Practices Commission v. Nicholas Enterprises (1979) 28 ALR 201**, at 207
- b. The question is always ‘whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party’: **Colgate-Palmolive Company and Colgate Palmolive Pty Limited v. Cussons Pty Ltd; [1993] FCA 536; (1993) 46 FCR 225, at 234**, per Sheppard, J.
- c. A party against whom indemnity costs are sought ‘is entitled to notice of the order sought’: **Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd (1995) NSWLR 242**
- d. That such notice is required is ‘a principle of elementary justice’ applying to both civil and criminal cases: **Sayed Mukhtar Shah v. Elizabeth Rice and Ors (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999)**, at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA
- e. ‘... Neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable’: **State v. The Police Service Commission; Ex parte Beniamino Naviveli (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996)**, at 6
- f. Usually, party/party costs are awarded, with indemnity costs awarded only ‘where there are exceptional reasons for doing so’: **Colgate-Palmolive Co. v. Cussons Pty Ltd at 232-34; Bowen Jones v. Bowen Jones [1986] 3 All ER 163; Re Malley SM; Ex parte Gardner [2001] WASCA 83; SDS Corporation Ltd v. Pasonnay Pty Ltd & Anor [2004] WASC 26 (S2) (23 July 2004)**, at 16, per Roberts-Smith, J.
- g. Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where ‘there is some special or unusual feature of the case to justify’ a court’s ‘exercising its discretion in that way’: **Preston v. Preston [1982] 1 All ER 41**, at 58
- h. Indemnity costs can be ordered as and when the justice of the case so requires: **Lee v. Mavaddat [2005] WASC 68 (25 April 2005)**, per Roberts-Smith, J.

- i. For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings': **Harrison v. Schipp** [2001] NSWCA 13, at paras [1], [153]
- j. Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...': **MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2) (1996) 140 ALR 707**, at 711, per Lindgren J.
- k. '... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order': **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')** (1991) 2 Lloyds Rep 155, at 176, per Kirby, P.
- l. Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success': **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors** [1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.
- m. Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] willful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion': **Fountain Selected Meats**, at 401, per Woodward, J.
- n. Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate: **Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd** (1992) 30 NSWLR 359, at 362. Per Power, J.
- o. Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences': **Baillieu Knight Frank**, at 362, per Power, J.
- p. Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court': **Willis v. Red bridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ

- q. *'Abuse of process and unmeritorious behavior by a losing litigant has always been sanctionable by way of an indemnity costs order inter partes. A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': **Ranjay Shandil v. Public Service Commission (Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997)**, at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) NLJ 710 (May 1996))*
- r. *'It is sufficient ... to enliven the discretion to award [ indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case': **J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2) (1993) 46 IR 301**, at 303, per French, J.*
- s. *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterized as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full': **Quancorp Pty Ltd & Anor v. MacDonald & Ors [1999] WASC 101**, at paras [6]-[7], per Wheeler, J.*
- t. *However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs , bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': **Quancorp Pty Ltd & Anor v. MacDonald & Ors [1999] WASC 101**, at paras [6]-[7], per Wheeler, J.*
- u. *Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': **Willis v. Red bridge Health Authority**, at 1232, per Beldam, LJ*
- v. *Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions', do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... [R]egardless of how sloppy the [Defendant] might well have been in lending as much as \$70,000 to [a Plaintiff], they had every justification for defending this action ... The*

*judge was wrong to award [ indemnity costs ] in these circumstances. He should have awarded costs on the ordinary party and party scale’: **Credit Corporation (Fiji) Limited v. Wasal Khan and Mohd Nasir Khan (Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008)**, per Pathik, Khan and Bruce, JJA, at 11*

- w. *Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court: **Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee (FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004)**, at para [43], per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)*”

- [20] In **Credit Corporation (Fiji) Ltd v Khan** [2008] FJCA 26; ABU0040.2006S (8 July 2008), the High Court judge ordered that costs be awarded to the plaintiff on the basis of *"full reasonable solicitor/client costs to be agreed or assessed "* and in the judgment the judge held that the actions of the Credit Corporation were *"wrong and without any legal justification, the result of its own careless actions"*. The full court of the Court of Appeal said:

*“[35] .....This simply does not approach the degree of impropriety that needs to be established to justify indemnity costs. It must not be forgotten that regardless of how sloppy the Credit Corporation might well have been in lending as much as \$70,000 to Nasir Khan, they had every justification for defending this action. This is not the place for this Court to articulate an exhaustive summary of the circumstances in which indemnity costs would be appropriate. The judge was wrong to award them in these circumstances. He should have awarded costs on the ordinary party and party scale.”*

- [21] The 01<sup>st</sup> respondent has submitted that the appellant is yet to pay \$2500.00 ordered against him by the High Court in the appeal and another \$1000.00 ordered against him by the Magistrates court in its ruling dated 08 November 2024 (similar costs orders were made against the 02<sup>nd</sup> respondent too) dissolving the consent orders sealed on 01 April 2022. The 01<sup>st</sup> respondent also submits in support of its claim for indemnity cost that the appellant and the 02<sup>nd</sup> respondent had colluded by way of matrimonial property proceedings in the

Magistrates court in Lautoka to dissipate assets that were the subject of significant claims by creditors of *Satori*.

- [22] However, on a perusal of the High Court ruling dated 17 June 2024 and the Magistrates court ruling on 08 November 2024, it does not appear that either of the courts had made any finding as to the alleged collusion between the appellant and the 02<sup>nd</sup> respondent in getting consent orders on 30 March 2022. The lawyers for the appellant had on 08 October 2024 written a letter to the Registry of the Magistrates court at Lautoka (copied to the lawyers for the 01<sup>st</sup> respondent) hearing the application by the 01<sup>st</sup> respondent to set aside the consent orders that shares in *Satori* (where the appellant was the sole director and shareholder) were sold by the 01<sup>st</sup> respondent on 16 September 2024 to pay off the creditors of *Satori*. Later, on 18 October 2024, it had been submitted in court that there was need to set aside the consent orders as shares have now been sold. However, the 01<sup>st</sup> respondent had insisted on a ruling.

***Can the court take into account or consider the history of litigation between the parties in the lower courts in determining the question of indemnity cost?***

- [23] The answer is ‘yes’. An appellate court can consider the history of litigation between the parties in the lower courts when determining whether to award indemnity costs. Courts generally take a holistic view of the proceedings, including the conduct of the parties in both the trial and appellate stages. The rationale is that a pattern of unreasonable, vexatious, or improper conduct throughout the litigation may justify indemnity costs.

- [24] Key principles supporting this approach are:

- *Litigation Conduct Is a Relevant Consideration*
  - a. *The appellate court can assess whether a party’s conduct in the lower court demonstrated abuse of process, delay tactics, or meritless claims, which continued into the appeal.*
  - b. *If the party seeking indemnity costs had to endure a history of vexatious or oppressive litigation, this can support such an award.*
- *Judicial Discretion on Costs*

- c. Appellate courts have broad discretion in awarding costs, including whether to depart from standard costs orders based on a party's conduct in earlier proceedings.
  - d. Rule-based or statutory provisions governing costs in appeals often do not limit the court to considering only appellate-stage conduct.
- *Relevance of Lower Court Proceedings*
    - e. If a party persistently advanced hopeless arguments or ignored reasonable settlement opportunities in the lower court and then continued this approach in the appeal, indemnity costs may be appropriate.
    - f. A history of non-compliance with court orders or deliberate prolongation of litigation can also weigh in favor of indemnity costs.

[25] **Oshlack v Richmond River Council** (1998) 193 CLR 72 (HCA):

- **Principle:** *A party's overall conduct, including in lower courts, can justify costs orders.*
- **Facts:** *The appellant pursued public interest litigation but was unsuccessful.*
- **Held:** *While not an indemnity costs case, the High Court confirmed that broader litigation history is a valid consideration in costs rulings.*

[26] **Colgate-Palmolive Co v Cussons Pty Ltd** (1993) 46 FCR 225; [1993] FCA 801; 119 CLR 118; 1993 ALR 248; 46 FLR 225; 28 IPR 561:

- **Principle:** *Indemnity costs are appropriate when litigation conduct is unreasonable, including behavior in lower courts.*
- *However, the existence of particular facts and circumstances capable of warranting the making of an order for payment of costs, for instance, on the indemnity basis, does not mean that judges are necessarily obliged to exercise their discretion to make such an order. The costs are always in the discretion of the trial judge. Provided that discretion is exercised having regard to the applicable principles and the particular circumstances of the instant case its exercise will not be found to have miscarried unless it appears that the order which has been made involves a manifest error or injustice.*
- **Held:** *Prior conduct in lower courts influenced the indemnity costs decision.*

[27] **Keddie v Stacks Goudkamp Pty Ltd** [2012] NSWCA 254:

- ***Principle:** An appeal court may impose indemnity costs if a party maintained unreasonable litigation tactics from lower court proceedings.*
- ***Held:** The court considered previous litigation conduct in ordering indemnity costs.*

*Should there be indemnity costs in this case?*

[28] However, the court will carefully assess whether the history of litigation justifies a departure from the usual standard of costs (standard basis) to the more punitive indemnity basis. The decision will depend on the specific facts and circumstances of the case, and the court will aim to balance the interests of justice with the need to discourage improper conduct. In summary, while the history of litigation can be a relevant factor, it is not determinative on its own. The court will consider the overall conduct of the parties and whether indemnity costs are appropriate in the circumstances.

[29] The ruling of the Magistrates court at Lautoka dated 08 November 2024 also shows that Satori had been placed into liquidation by the New Zealand High Court on 17 February 2024<sup>9</sup>. The New Zealand Court of Appeal had dismissed the appellant's appeal on 07 December 2023<sup>10</sup>. The Supreme Court of New Zealand had refused leave to appeal to the appellant on 31 May 2024<sup>11</sup>. The shares had been sold by the 01<sup>st</sup> respondent on 16 September 2024 as permitted by Tahana, J on 16 September 2024 in the High Court of New Zealand (CIV2024-404-001732)<sup>12</sup>.

[30] Yet, there was no justification for the appellant to have waited from 16 September 2024 till 01 October 2024 to inform the 01<sup>st</sup> respondent that he was withdrawing the leave to appeal application in this court on 02 October 2024, the date assigned for hearing.

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<sup>9</sup> **ISLAND GRACE (FIJI) LTD (IN REC AND IN LIQ) v SATORI HOLDINGS LIMITED (IN INTERIM LIQ)** [2023] NZHC 219 [17 February 2023]

<sup>10</sup> **GRIFFITHS v ISLAND GRACE (FIJI) LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION)** [2023] NZCA 627 [7 December 2023]

<sup>11</sup> **ANDREW GRIFFITHS v SATORI HOLDINGS LIMITED (IN LIQUIDATION)** [2024] NZSC 62 [31 May 2024] (PDF 181 KB)

<sup>12</sup> **McDonald v Island Grace (Fiji) Ltd** (in rec and liq) [2024] NZHC 2675

- [31] On the other hand, the onus is on the party seeking indemnity costs to demonstrate clearly from the evidence that the losing party's conduct was unreasonable, whether for bringing or maintaining a hopeless case or rejecting an offer to settle, in subjecting an innocent party to the expenditure of costs<sup>13</sup>.
- [32] The circumstances in which it is appropriate for the court to make an indemnity costs order are not closed, as each case turns upon its own facts, but a losing party unreasonably subjecting a successful party to the expenditure of costs is a recurring theme. Considering the totality of the facts and circumstances and the law on indemnity cost, I am not persuaded that this case has reached the threshold of awarding indemnity cost.
- [33] The appellant had exhausted his legal remedies in his attempt to secure his shares in Satori by 31 May 2024 and finally the shares were sold on 16 September 2024. Consent orders entered in the Magistrates court were in force till 08 November 2024. The impugned ruling is dated 17 June 2024 and the leave to appeal application has been filed on 08 July 2024. The appellant's application to withdraw the leave to appeal application (not a final appeal) was made even before the hearing into the question of leave began, of course with very short notice to the 01<sup>st</sup> respondent. Thus, the 01<sup>st</sup> respondent cannot be called the successful party and the appellant the losing party. There is no winner or loser here as this court would not come to any decision on the question of leave. Thus, by 08 July 2024, the appellant's application against the High Court ruling could not be said to "have no chance of success", or to be "hopeless" or "foredoomed to fail" and it is not sufficient for the 01<sup>st</sup> respondent to argue that the appellant's case was simply weak or tenuous. I cannot conclude that that the appellant has conducted himself "wholly unreasonably in connection with the hearing" and that such conduct was reprehensible to signify the court's condemnation as to the way he has conducted the litigation. Therefore, I am inclined to award costs only on the ordinary party and party scale. However, I am also conscious of the fact that the appellant has so far not paid the costs ordered against him by the High Court and the Magistrates court.

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<sup>13</sup> **Jusand Nominees Pty Ltd v Rattlejack Innovations Pty Ltd (No 2)** [2022] FCA 867


[34] Costs are by statute and by rules of court in the discretion of court. The starting point is the general rule that costs follow the event and, therefore, the successful party ought to be paid its cost by the unsuccessful party. That general rule would apply unless there are cogent reasons to depart from it. The judge has a large discretion as to cost<sup>14</sup>. However, that discretion must be exercised judicially *i.e.* in accordance with established principles and in relation to the facts of the case.

[35] In the meantime, as directed by this court the appellant on 12 November 2024 had tendered a notice of discontinuance to discontinue the appeal. Accordingly, I make the following orders.

**Orders of the Court:**

1. *Appeal is dismissed in terms of section 20(1)(h) of the Court of Appeal Act.*
2. *Appellant is directed to pay \$3500.00 to the 01<sup>st</sup> respondent within 21 days of this Ruling.*
3. *Appellant is also directed to pay \$2500.00 and \$1000.00 awarded to the 01<sup>st</sup> respondent in the High Court and the Magistrates court respectively to the 01<sup>st</sup> respondent within 21 days of this Ruling.*



  
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**Hon. Mr. Justice C. Prematilaka**  
**RESIDENT JUSTICE OF APPEAL**

**Solicitors:**

Lowling Lawyers for the Appellant  
Lal Patel Bale Lawyers for the Respondents

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<sup>14</sup> **Wilmott v Barber** (1881) 17 Ch.D. 772 by Jessell MR