IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 218 of 2007

BETWEEN : **AMRIT PRASAD** of Lot 27 Nuileka Road, Naulu, Nakasi, Nasinu, Plumber.

PLAINTIFF

AND : **AIYUB HUSSEIN** of Didi Place, Nakasi, Nasinu, Driver.

FIRST DEEFENDANT

AND : **TOYOTA TSUSHO (SOUTH SEA) COMPANY LIMITED** trading as "Asco Motors".

SECOND DEEFENDANT

AND : **CORE TECHNOLOGIES LIMITED** a limited liability company having its registered place of business at 322 Princess Road, Tamavua, Suva.

1ST THIRD PARTY

AND : **SUN INSURANCE COMPANY LIMITED** of Rodwell Road, Suva.

2ND THIRD PARTY

AND : **SHIU KIRAN NARAYAN,** Company Director of 322 Princess Road, Tamavua, Suva.

3RD THIRD PARTY

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : Ms. S. Narayan for the Plaintiff
Mr. V. Prasad for the 2nd Defendant
Ms. P. Narayan for 2nd Named 3rd Party

Date of Hearing : 30th September, 2011
Date of Decision : 31st May, 2013

DECISION

Catch Wards

Indemnity Costs- Defendant who was named wrongfully, despite being informed at the earliest opportunity-Delay in the withdrawal of claim against said wrongful party.

A. INTRODUCTION

1. The 2nd Defendant seeks to obtain indemnity costs after it being struck off from the action. The summons to strike off the claim against the 2nd Defendant was filed, and affidavit in opposition of the said application was not filed by the Plaintiff, but on the summons returnable date Mr. E. Narayan who appeared for the Plaintiff sought time to file an affidavit in opposition, and time table was set for the affidavits to be filed before the hearing. At the hearing Ms. S. Narayan who appeared for the Plaintiff consented to strike out the claim against the 2nd Defendant. After the striking out of the 2nd Defendant from the action by consent of the Plaintiff, the 2nd Defendant and the 2nd named third party sought costs on indemnity basis.

2. In the written submission filed by the 2nd Defendant at the hearing seeking strike out had sought costs on indemnity basis stating that they had taken immediate steps upon the service of the writ to inform their position in this action. In the affidavit in support of the strike out of the claim against the 2nd Defendant had annexed a letter of the 2nd Defendant dated 28th May, 2007 which states as follows

> 'We refer to our discussion Mr. Prasad/Khadim regarding the subject issue.
>
> We advise that vehicle Registration No D1416 which was involved in an accident (hitting your client - Mr. Amrit Prasad…… driven by Aiyub Hussein … has been fully paid off on 28th April, 2004, and as such we do not have any financial interest on the same.
>
> We further advise that the vehicle Registration No D 1416 was sold to Mrs. Shiu Kiran Narayan …. On 28th February, 2002. Attached please find copies of documentary evidence in regards to discharge of BOS and financial agreement history.'

3. The wit of summons was filed on 18th February, 2007 and upon the service of the writ of summons the 2nd Defendant had promptly informed the Plaintiff of its position with necessary documentation that supported it and the correspondence between the parties as evidenced from the affidavit in support indicate that the Plaintiff has not examined the documents submitted by the 2nd Defendant properly and this had resulted the 2nd Defendant to remain in the action until the hearing of summons seeking strike out . Even on the summons returnable day seeking strike out of the claim against the 2nd Defendant, the Plaintiff did not consent to the application and sought time to file an affidavit in opposition to this summons, but did not file any and at the hearing consented to drop the claim against the 2nd Defendant. The behaviour of the Plaintiff indicate that no serious attention was made from the initial letter of the 2nd Defendant dated 28th May, 2007 up to the date of hearing of this summons. If adequate attention was made to the contention of the 2nd Defendant the 2nd Defendant would not have been in this action for such a long time.

B. LAW AND ANALYSIS

4. Order 62 rule 12 of the High Court Rules of 1988 deals with the basis of taxation and Order 62 rule 12 (2) states as follows

> '(2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred an any doubt which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term "the indemnity basis" in relation to the taxation of costs shall be construed accordingly'

5. In ***Singh v Commander Naupoto*** [2008] FJHC 193, HBC199.2008 (8 August 2008) Justice Hickie discussed the relevant case authorities for due consideration in respect of indemnity costs as follows:

"[12] Probably one of the best elucidations of the general principles on indemnity costs were set out by Sheppard J in the Federal Court of Australia in ***Colgate-Palmolive Company and Colgate-Palmolive Pty Limited v Cussons Pty Limited; Cussons Pty Limited v Colgate Palmolive Pty Limited*** *(1993) 46 FCR 225;*

"It seems to me that the following principles or guidelines can be distilled out of the authorities … The ordinary rule is that, where the Court orders that costs of on party to litigation to be paid by another party, the order is for payment of those costs on the party basis …This has been the settled practice for centuries England. It is a practice which is entrenched in Australia … In consequence of the settled practice which exists, the Court ought not usually make an order for the payment of costs on some basis other than the party and party basis. The circumstance of the case must be such as to warrant the Court in departing from the usual course. That has been the view of all judges dealing with applications for payment of costs on the indemnity or some other basis whether here or in England. The tests have been variously out. The Court of Appeal in Andrews v. Barnes (39 Ch D at 141) said the Court had a general and discretionary power to award costs as between solicitor and client "as and when the justice of the case might so require." Woodward J in Fountain Selected Meats appears to have adopted what was said by Brandon LJ (as he was) in Preston v. Preston ((1982) 1 All ER at 58) namely, there should be some special or unusual feature in the case to justify the Court in departing from the ordinary practice. Most judges dealing with the problem have resolved the particular case them by dealing with the circumstances of that case and finding in it the presence or absence of factors which would be capable, if they existed, of warranting a departure from the usual rule. But as French J said (at 8) in Tetijo. "The categories in which

the discretion may be exercised are not closed". Davis J expressed (at 6) similar views in Ragata.

"[13] Sheppard J Then went on to set out "some of the circumstances which have been thought to warrant the exercise of the discretion" they being:

1. "the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud",

2. "evidence of particular misconduct that causes loss of time to the Court and to other parties",

3. **'the fact that the *proceedings were commenced or continued*** for some ulterior motive **or in *willful disregard of knowing facts or clearly established law"***

4. ***"the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions"***

5. "an imprudent refusal of an offer to compromise"; and

6. "an award of costs on an indemnity basis against a contemnor. [Emphasis Added]

7. The circumstances laid down in Colgate-Palmolive Company and Colgate-Palmolive Pty Limited v Cussons Pty Limited; Cussons Pty Limited v Colgate Palmolive Pty Limited (1993) Australian Law Reports 118.248 at 257 discussed number of case authorities where indemnity costs awarded and stated ' Other categories of cases are to be found in the reports.' Indicating that the list is not exhaustive and further stated 'Yet others to arise in the future will have different features about them which may justify an order for costs on the indemnity basis. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for

payment of costs other than on a party and party basis.' The conduct of the Plaintiff is total disregard to the accepted law as well as facts. This hurriedly bringing parties to the action and refusal to strike them out indicate total disregard to the legal principles and obvious facts that incur unnecessary costs to the parties and waste of time of the court when parties could have easily resolved the obvious issues themselves. This is evidenced from the fact that the Plaintiff though initially sought time to file an affidavit in opposition none was filed and at the hearing sought to withdraw the claim against the 2nd Defendant.

8. Justice Pathik in Judicial Review No 004 of 1996 decided on 16th May 1997 quoted with authority the judgment of Roger C.J. Comm D in Tickell v Trifleska Pty Ltd (1990) 25 NSWLR 353 at 354-355 and emphasized on the issue of unnecessary litigation and at page 9 stated

> 'The Respondent's conduct I find was reprehensible and it calls out for special order, namely, the one that is prayed for in this application
>
> The words of wisdom contained in the following passage from the judgment of Roger C.H. Comm D in Tickell v Triflesla Pty Ltd (1990) 25 NSWLR 353 at 354-355 are worth bearing in mind as underlying the concept of the use of cost orders to encourage compromise; and had the Respondent given though to the views expressed in these statements matters would not have come to head which eventually very belatedly forced the Respondent to concede the error:
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> "It is the primary aim of any judicial system to attempt to bring the parties to a point where, with fairness to themselves, they are able to dispose of the dispute between them by compromise. It is only in the last resort that a dispute should proceed to trial and to determination. That is for any number of reasons. It is the interests of the community that scarce resources, such as the court, should not be over-taxed. It is in the interests of the community and of the parties themselves that they should

> not engage in the rancor which a dispute in court necessarily entails. It is in the interests of the parties themselves to save themselves the expenditure of time and energy necessarily entailed in participation in contested court proceedings."

9. The rationale in award of indemnity costs in the case of Tickell v Triflesla Pty Ltd (supra) is that the parties would have resolved the issue without wasting the court's time and the respondent's behaviour had warranted the indemnity costs against the said party who did not heed to what was an obvious fact. The ratio can be applied to the present case where the 2nd Defendant had as far back in 2007, soon after the service of the writ of summons, indicated to the Plaintiff that it should not remain a party to this action merely relying on LTA records and had readily supplied all the necessary materials. The Plaintiff not only insisted 2nd Defendant on the case but also insisted the 2nd Defendant to bring the 2nd named 3rd Party also in to action. The correspondence between the parties clearly indicate the lack of interest on the part of the solicitor of the Plaintiff to verify the 2nd Defendant's position which they informed as far as in 2007. The conduct of the Plaintiff is reprehensible. The Plaintiff had even sought time to object to the application for striking out of the 2nd Defendant from the action, but again failed to file any objection and at the hearing sought to withdraw the claim against the 2nd Defendant. This conduct of the Plaintiff is reprehensible and warrants indemnity costs being awarded to 2nd Defendant as well as 2nd named third party.

10. Without prejudice to what was stated in the above paragraph the reprehensible behavior of the Plaintiff is not a sine qua non in the determination of an award for indemnity costs. In Australian Federation of Consumer Organization Inc v Tobacco Institute of Australia Ltd 100 ALR 568 at 572 stated as follows

> 'In Balstic Shipping v Dillon (New South Wales Court of Appeal, 19 February, 1991, unreported) the court was concerned with the question whether it was appropriate to make and order for costs on a solicitor and client basis in an Admiralty matter in the New South Wales Supreme Court. Rule 126 of that Court's Admiralty Rules confers a

discretion as to costs not dissimilar to the discretion conferred by s43 (2) of the Act. It provides:

"126. In general, costs shall follow the result but the judge may, in any case, make such order as to costs as to him shall seem fit"

Kirby P (with whose reasons Gleeson CJ concurred) was of the opinion that it was not a prerequisite of the making of an order for costs on a solicitor and client basis in an Admiralty matter that he unsuccessful party's conduct of the litigation had been unmeritorious. He thought that it was appropriate, in that case, that an order for costs should be made on a solicitor and client basis because the proceedings were in the nature of a test case. With respect, I agree with Kirby P's reasoning.

……..

……Each case must be determined on its own facts and merits. However, in all the circumstances of the present case, I think it is appropriate that the respondent should pay the applicant's costs on an indemnity basis, and I so order.'

11. So, what is important is the consideration of all the facts and circumstances of the case and to see whether the conduct of the Plaintiff could warrant a cost award beyond normal standard costs. It is evident that 2nd Defendant had first discussed the issue with the Plaintiff's solicitor and then followed it up with a letter as soon as they received the writ of summons in 2007 and numerous correspondence evidenced in the affidavit in support of the strike out of the claim against 2nd Defendant which is unopposed, indicate numerous correspondences between the 2nd Defendant and the solicitor for the Plaintiff on the issue and finally their application for strike out. Not only did the 2nd Defendant was remained in the action unnecessarily after the facts were revealed, but they had to file an application for strike out in 2011, which costs them further, and even at that time the obvious facts were not considered and Plaintiff sought to object the said application, but at the hearing without filing

any objections, requested to withdraw the claim against 2nd Defendants. The 2nd Defendant had incurred unnecessary costs and this was further aggravated by the delay for nearly 4 years and despite having all the facts Plaintiff's insistence to continue the claim against the 2nd Defendant, that prompted the 2nd Defendant to bring the 2nd named third party. The 2nd Defendant as well as the 2nd named third party has to be compensated fully due to the said behaviour of the Plaintiff and the standard costs are not justified considering all the circumstances of the case. The next issue is whether it can be awarded as a global sum, without an additional evidence of actual costs.

12. In Leary v Leary [1987] 1 All E.R 261 Purhas LJ at p266 (paragraph e) held as follows

> 'We now turn to the questions posed in paras (c) and (d) above. The basis proposition is statutory obligation to give any indication of the powers or their proposed exercise under Ord 62, r 9. To allow a detailed investigation of the figures, as suggested in the second ground of the notice of appeal would, as we have already indicated, fly in the teeth of the provisions and objective of Ord 62, r 9 itself. Clearly to allow a trial what would in effect be a preliminary taxation would be an affront to the process. At the very most it could be said that a party by reference to a schedule of costs might submit, and submit successfully in certain circumstances, that in the particular cases concerned it would be wrong to assess a gross figure because of questions possibly arising out of the individual items disclosed in the schedule. Judges frequently extend, as a matter of courtesy and discretion and in order to achieve justice in the case of illiterate or ill –informed litigants in person, considerable help in the conduct of their cases. Whether this should be done and the degree to which it should extend, again must depend on the circumstances of the case and be entirely in the discretion of the trial judge.'

13. In the circumstances the court has power to award global sum in the assessments under indemnity cost and this had been applied in Fiji as well. If

detailed assessments are to be conducted that would further incur costs to parties and considering the circumstances of the case a global sum is justified. The 2nd Defendant had obviously incurred more costs in this action. They were compelled to file the application for strike out with a detailed affidavit in support. The involvement of the 2nd named third party is less compared with the 2nd Defendant. I summarily assess $2000 for the present application made by the 2nd Defendant, and award another $4,000 for the costs incurred up to the stage of present application for strike out making a total of $6000 as indemnity costs for the 2nd Defendant. Considering that 2nd named third party had not filed any documents in support of the present application their costs would be mainly confined to costs incurred prior to the present application and for that I ward $2,000 as indemnity costs considering the circumstances of the case. The delay is regretted.

C. FINAL ORDERS

a. The 2nd Defendant is granted costs on indemnity basis @ $6,000 to be paid by the Plaintiff.

b. The 2nd named third party is granted a costs on indemnity basis @ $2,000 to be paid by the Plaintiff.

c. The matter to take normal cause.

Dated at **Suva** this **31th day** of **May, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva