IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 32 of 2012

BETWEEN : **JAMES L PETERS** and **JIMMIE PETERS** (presently of Portland Oregon United States of America but previously residing at Seashell Cove Resort, Savusavu, Nadi.

PLAINTIFFS

AND : **SEASHELL @ MOMI LIMITED** a limited liability company having its registered office at 142 Toorak Road, Suva and owner/proprietor at Seashell @ Momi Limited previously known as Seashell Cove Resort and situated at Momi Savusavu Nadi.

DEFENDANT

Counsel : Mr. R. Singh for the Plaintiffs
Ms. V. Patel for the Defendants

RULING

1. Whether or not to Order a foreign plaintiff to pay security for costs is a matter of discretion for the Court. In **Aeronave SPA v Westland Charters Ltd** [1971] 3 All ER 531 at 533 the Court said:

> "It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so."

2. In **Lucas v Yorke** [1983] 53 ALJR 20 Brennan J adopted a dictum of Rich J in **King v Commercial Bank of Australia Limited** [1920] 28 CLR at 292 where His Honor concluded:

> "The discretion must, of course, be exercised judicially, which means that in each case the Judge has to inquire how, on the whole, justice will be best served."

3. The background to this case is set out in an interlocutory ruling which was handed down by this court in November 2014 and which is reported in *paclii* (**Peters v Seashell @ Momi Ltd** [2014] FJHC 803; Civil Action 32 of 2012 (5 November 2014).
4. In February this year, I also handed down a ruling on the defendant's application for security for costs, which ruling is also reported in *paclii* (**Peters v Seashell @ Momi Ltd** [2015] FJHC 534; HBC32.2012 (13 July 2015)). The full extract of that ruling I reproduce below:

1. The background to this case is set out in an interlocutory ruling which was handed down by this court in November 2014 and which is reported in paclii (**Peters v Seashell @ Momi Ltd** [2014] FJHC 803; Civil Action 32 of 2012 (5 November 2014).
2. What I have to consider now is an application for security for costs.
3. The authority of the court to grant security for costs is provided for in Order 23, Rule 1(1)(a) of the High Court Rules 1988:

   "Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court (a) that the plaintiff is ordinarily resident out of the jurisdiction, or .....then, if having regard to all the circumstances of the case, the Court thinks it is just to do so, it may order the plaintiff to give such **security for** the defendant's **costs** of the action or proceeding as it thinks just."

4. The reason why the rules make provision for security for costs against a plaintiff is to ensure that, in the event the plaintiff loses his case against the defendant, the plaintiff will be in a position to pay the costs of the defendant.
5. The plaintiffs before me are both citizens of the United States of America where they reside and work. They visit Fiji regularly. There is no evidence before me to suggest that they have any assets in Fiji.
6. Ordinarily, once it is established that a plaintiff is not ordinarily resident in Fiji, the 'onus' shifts to him to satisfy the court that he has property within the jurisdiction which can be made subject to the process of the court (see in **Babu Bhai Patel –v- Manohan Aluminium Glass Fiji Ltd Suva High Court Civil Action No. HBC 0019/19**). In other words, if he has no assets in Fiji, upon which a judgement in favour of the defendant might be executed, the plaintiff will be required to post into Court a sum of money as security for costs.
7. But even if a plaintiff is ordinarily resident out of jurisdiction, and has no assets in Fiji, he or she may still yet convince the court under that, having regard to all the circumstances of the case, it would be oppressive and therefore, not just, to order security for costs.
8. After considering all in this case, I am of the view that the plaintiffs should post security for costs into the High Court in the sum of FJD$30,000 (Thirty Thousand Dollars Only). This is to be settled in 28 days, failing which I will consider striking out the claim.
9. Case adjourned to **11 August 2015 at 10.30am for further directions**.

5. This morning, Mr. Singh appeared for the plaintiff and submitted that his clients have not paid security for costs because they cannot afford to do so. However, Mr. Singh urges this Court to be guided by the words of wisdom of Lord Denning in **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd** [1973] 2 All ER 273. In that case, Lord Denning had stressed *inter-alia* that an application should not be used oppressively to stifle a genuine claim.

   "So I turn to consider the circumstances, Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again, it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively – so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work."

6. Courts in Fiji have applied Lord Denning's words in Sir **Lindsay Parkinson** on the strength of the soundness of the principle therein (**Raju v Amalgamated Telecom Holdings** [2011] FJHC 753; HBC268.2010 (18 November 2011); **Khairati v Ibrahim** [2012] FJHC 1284; HBC74.2010 (16 August 2012)).

7. The same principle, in fact, is further reinforced in Fiji in section 15(2) of the 2013 Constitution:

> (2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.

8. When Lord Denning's words are considered together with section 15(2) of Fiji's 2013 Constitution, it follows that an Order for Security for Costs which is oppressive will, in all likelihood, if not always, also offend the right protected under section 15(2) of the Constitution.

9. If follows *ipso facto* that, whenever a Court is being called upon to consider whether or not to order for Security for Costs in any given case, section 15(2) should feature prominently in the balancing exercise.

10. Simon Brown LJ lends support to the above observation in **Olakunle Olatawura v Abiloye [2003] 1 WLR 275** (CA):

> *Before ordering security for costs in any case (i e whether or not within CPR Pt 25) the court should be alert and sensitive to the risk that by making such an order it may be denying the party concerned the right to access to the court. Whether or not the person concerned has (or can raise) the money will always be a prime consideration, not least since article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms became incorporated into domestic law.*

11. The paradox in this exercise, as Lord Simon goes on to explain in **Olakunle**, is that:

> ..... *the more difficult it appears to be for the person concerned to raise the money, the more obvious becomes the need for an order for security to protect the other party against the risk of incurring irrecoverable costs. The court will have to resolve that conundrum as best it may.*

12. In this case before me, I have decided, after hearing both counsels, to resolve that conundrum by exercising my discretion in favour of striking out the claim against the first defendant only. My reasons follow:

    (i) I do not think that the plaintiff's claim against the 1st defendant has a good prospect of success. (see **Peters v Seashell @ Momi Ltd** [2014] FJHC 803; Civil Action 32 of 2012 (5 November 2014)for a discussion of the related issues).

(ii) as highlighted by Ms. Patel, the plaintiff had deposed in an earlier affidavit filed in respect of another interlocutory application of his substantial assets in the US. The amount that I had fixed as security for costs is a rather modest one when compared to the total value of his estate in the US. To say that he cannot afford to post security for costs rings hollow – to say the least.

13. In addition to the above, I also took into account that the first defendants have since sold the property in question to a third party, and which third party has been added as defendant on the last call-over date.

14. In the final, I Order that the plaintiff's claim against the first defendants be struck with costs which I summarily assess at $3,500 to the first defendants only. The said cost of $3,500.00 is to be taken from the $7,000.00 (seven thousand dollars) that was deposited in Court by the Plaintiff in 2013.

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Anare Tuilevuka

JUDGE

11 August 2015.