IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 180 of 2013

BETWEEN : **INSPIRED DESTINATIONS (Inc) LIMITED** a limited liability company having its office at level 1, 112 Casltereagh Street, Sydney NSW 2000, Australia

PLAINTIFF

A N D : **BAYLEYS REAL ESTATE (FIJI) LIMITED** having its registered office at level 3, Aliz Building, Martintar, Nadi

1st DEFENDANT

A N D : **GRANT ROBERT GRAHAM** and **BRENDON JAMES GIBSON** of Level 16, 45 Queen Street, Auckland, New Zealand in their capacity as joint and several Receivers and Managers of AANUKA ISLAND RESORT LIMITED trading as Amunuca Island Resort and Spa.

2nd DEFENDANT

A N D : **BANK OF SOUTH PACIFIC LIMITED** a Company incorporated in Papua New Guinea and which has established a place of business in Fiji within Suva and having branches throughout Fiji.

3rd DEFENDANT

(Ms.) Natasha Feroz Khan for the Plaintiff
(Ms.) Virisila Lidise for the First Defendant
(Ms.) Pulekeria Maibatiki Low for the Second Defendant
Mr. Nemani Vakacakau for the Third Defendant

Date of Hearing : - 13th July 2015
Date of Ruling : - 20th October 2015

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Second and Third Defendants Summons dated 02nd June 2015 and 02nd March 2015 respectively, made pursuant to Order 23, rule 01 of the High Court Rules and the inherent jurisdiction of the Court seeking of security for costs against the Plaintiff on the following grounds;

- ❖ The Plaintiff is a foreign registered Company ordinarily resident out of jurisdiction of the Court; and/or
- ❖ The Plaintiff has no legal status to be present within the jurisdiction of the Court; and/or
- ❖ The Plaintiff has no assets within the jurisdiction of the Court;

(2) The Summons was first called on 22nd June 2015. The Summons is strongly resisted by the Plaintiff. **Regrettably, the Plaintiff did not file an Affidavit in Opposition in support of the Opposition.**

(3) The Plaintiff and the Defendants were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, the Defendants filed a careful and comprehensive written submission for which I am most grateful.

(B) BACKGROUND

(1) What are the circumstances that give rise to the present application?

To give the whole picture of the action, I can do no better than set out hereunder the main assertions of the pleadings.

The Plaintiff in its Statement of Claim pleads *inter alia* (so far as relevant);

1. *THE Plaintiff is a limited liability Company having its registered office at Level 1, 112 Castlereagh Street, Sydney NSW 2000, Australia.*
2. *THE 1st Defendant is a Real Agency carrying its business in and about the Fiji Islands and at all material times were the agents of the 2nd Defendant.*
3. *THE 2nd Defendants were appointed as Receivers of Aanuka Island Resort Limited (In Receivership), by the 3rd Defendant.*

4. *THE 3rd Defendant is a financial institution and were the mortgagors of Aanuka Island Resort.*

BACKGROUND

5. *SOMETIMES in March, 2012, the Plaintiff and the 2nd Defendants entered into a contract for sale of the Resort business known as Amunuca Island Resort and Spa, under the control of the 2nd Defendants, as Receivers.*

6. *UNDER the said contract for sale, the Real Estate Agents were Bayleys Real Estate, New Zealand and all deposit monies payable under the contract was to be paid by bank cheque or cleared funds to the 1st Defendants trust account in Fiji Dollars.*

7. *ON 10th March, 2010, the Plaintiff paid sum of FJ $850,000.00 into the trust account of the 1st Defendant in their account with Australia and New Zealand Banking Group Limited (ANZ) and on 2nd September, 2010 a further sum of FJ $50,000.00 was paid by the Plaintiff into the 1st Defendant's same trust account as further deposit.*

8. *ON 2nd December, 2011, the 2nd Defendant cancelled the contract for sale with the Plaintiff.*

9. *AT the time of cancellation of the said contract it was void ab nitio in that it lacked the consent of iTaukei Board to any alienation or dealing with iTaukei land or iTaukei Lease. The said Resort being on iTaukei land subject to iTaukei Lease 29157.*

10. *THE Plaintiff made demands for refund of the deposit monies from the 1st Defendant only to be informed by the 1st Defendant that it had paid out the deposit monies to the 2nd Defendants.*

11. *THE 2nd Defendant's receivership has since ceased.*

FIRST CAUSE OF ACTION AGAINST THE 1st, 2nd and 3rd DEFENDANTS

12. *THE 1st Defendant was at all times agents and/or were acting on instructions of the 2nd Defendants and/or its agents.*

13. *THE 2nd Defendant was at all material times agents and/or were acting on instruction of the 3rd Defendant and/or its agents.*

14. *THE 1st Defendant were to have held the deposit monies paid under the sale contract in their trust account and could have only paid the same out after proper determination as to the party entitled to the monies.*

15. *THE 1st Defendant ought not to have paid the deposit monies to the 2nd and/or to the 3rd Defendants and the 2nd and/or to the 3rd Defendant ought not have demanded and/or received the said deposit monies.*

(C) PRIMARILY THE PLAINTIFF CLAIMS THE FOLLOWING:

(1) Refund of the deposit of monies in the sum of $900,000.00.

(2) Compound interest on the sum of $900,000.00.

(D) THE STATUS OF THE SUBSTANTIVE MATTER

(1) The pleadings in the action begun by the Writ are closed.

(2) The Plaintiff and the Defendants have filed an Affidavit verifying List of Documents relating to the matter in question.

(3) The discovery has been obtained and the status of the matter is for the parties to proceed for Pre Trial Conference.

(E) THE SECOND DEFENDANT'S SUMMONS FOR SECURITY FOR COSTS

The second Defendant in his Affidavit in Support deposes as follows (so far as relevant):-

Para (5) The Plaintiff is a limited liability Company having its registered office at Level 1, 112 Castlereagh Street, Sydney NSW 2000, Australia, as stated in the Writ of Summons and Statement of Claim. It is a foreign registered Company having no legal basis for operating and doing business.

(6) I am not aware as to whether the Plaintiff has any assets or assets without any encumbrance to pay for the costs in the event costs orders are made against the Plaintiff in favour of the Second Defendant.

(7) Further I am not aware as to whether the directors of the Plaintiff are in Fiji. In the Affidavit filed in this action, it is sworn by one Victor Chua, who resides in Australia.

(8) I am informed by my Solicitors whom I verily believe that issued raised in the Statement of Claim and the various Defendant's Statements of

Defence are complex and require substantial amount of work leading to trial and the trial itself. The estimate cost for defending this action on a Solicitor-client basis would be around $50,000.00.

(9) *We as the Defendants will be liable to pay our Solicitors costs to defend the action. In the event, we succeed and are awarded costs against the plaintiff, we will not be able to execute the same in Fiji. I am further advised by my Solicitors that it would be very expensive to execute any such order in Australia where the Plaintiff resides.*

(10) *For the reasons set out in the Statement of Defence of the Second Defendants I verily believe that the Plaintiff's claim is without merit. The Plaintiff company had defaulted in performing its obligation to pay the consideration sum pursuant to the Sale and Purchase Agreement.*

(F) THE THIRD DEFENDANT'S SUMMONS FOR SECURITY FOR COSTS

The Third Defendant in its Affidavit in Support deposes as follow (so far as relevant);

Para (7) *THAT due to the complex nature of the claim and the Plaintiff's invocation of the High Court's jurisdiction, the Third Defendant will incur cost approximately of $10,000.00 - $15,000.00 because of engaging a legal Counsel to get detailed and comprehensive legal opinion of the success and/or failure of the claim filed by the Plaintiff and further on sending instructions to external Solicitors to make necessary representation in Lautoka for the Third Defendant.*

Merits of Claim

(8) *I verily believe that the Plaintiff's claim is without merit against the Third Defendant. The behavior and nature of the claim creates doubts as to the bonafide of the claim.*

Plaintiff does not have assets within the Jurisdiction

(9) *THAT there has been no evidence provided to show that the Plaintiff has any assets in Fiji that would secure the Third Defendant for costs. The security for cost is to secure the Third Defendant in the event the Plaintiff's claim is not successful at the conclusion of the matter but the Plaintiff has no assets thus recovery of any cost is doubtful.*

Stay

(10) *Given that the Plaintiff is ordinarily resident out of the jurisdiction, the Third Defendant seeks to be protected for costs and seeks a stay of proceedings until the security is given.*

(G) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and Judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the Defendant's now seek.

(2) Rather than refer in detail to the various authorities, I propose to set out, with only very limited citations, what I take to be the principles of the play.

(3) Provisions relating to security for costs are contained in Order 23, rule 1(1) (a) of the High Court Rules, 1988.

I shall quote Order 23, rule 1 (1) (a) which provides;

> *"1 (1) Where, on the application of the 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 just to do so, it may order the Plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just..."*

The use of the words, **"having regard to all the circumstance of the case, the Court thinks it just to do so, it may order"**, confers upon the Court a real discretion on whether or not to order security for costs.

It is to be noted that residence outside the jurisdiction enables, but does not require, the court to order security for costs of the action. As Sir Nicolas Browne-Wilkinson V, -C, put it in **Porzelack K.G. v. Porzelack (U.K.) Ltd**. [1987] 1. W.L.R. 420, 422-423:-

> *"The purpose of ordering security for costs against a Plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this Court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a Plaintiff who lacks funds. The risk of defending a case brought by a penurious Plaintiff is as applicable to Plaintiffs coming from outside the jurisdiction as it to Plaintiffs resident within the jurisdiction. There is only one exception to that, so far as I know, namely, in the case of limited Companies, where there are provisions under the Companies Act for security for costs. Where the Plaintiff resident outside the jurisdiction is a foreign limited Company, different factors may apply: see DSQ Property Co. Ltd. v Lotus Cars Ltd. [1987] 1 W.L.R. 127. Under the R.S.C., Order 23, r.1 (1) (a), it seems to me that I have entirely general discretion either to award or refuse security, having regard to all the circumstances of the*

case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident Plaintiff. The question is what, in all the circumstances of the case, is the just answer."

(H) ANALYSIS

(1) At the beginning of the hearing of the matter, the Counsel for the Plaintiff raised a preliminary point with regard to the Affidavit of "Vishal Anand", the Affidavit in Support of Summons for Security for Costs on behalf of the third Defendant. The Counsel made an application to strike out the Affidavit since the Affidavit bears an irregularity in its form, such as the omission of the endorsement note.

I traversed the Affidavit in Support of the Third Defendant. It is true that there is an omission of the endorsement note.

However, since the irregularity is not fundamental, exercising my discretion, I am prepared to grant leave to the Third Defendant under Order 41, rule 4 to use the Affidavit in evidence notwithstanding the irregularity in the form.

I should quote Order 41, rule 4 of the High Court Rules 1988, which provides.

Use of defective Affidavit (O.41, r.4)

4. An Affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

In the context of the present case, I cannot help but recall the rule of law enunciated by Gates J (as his Lordship then was) in "**Kim Industries Ltd, In Re** (No.1) (2000) FJHC 267; (2000) 1 FLR 141. His Lordship held;

"If an affidavit bears an irregularity in its form, such as the omission of the endorsement note, leave must be obtained from the court for it to be filed or used [Ord. 41 r.4 and Ord. 41 r.9 (2)]. In this case I am prepared to grant such leave to the petitioner. However these Rules have good purpose behind them. The failure of counsel to come with adequately prepared affidavits will not always result in a court allowing indulgence under Ord. 41 or Ord. 2 r.1 see ***Ba Town Council v Fiji Boradcasting Commission and Others*** *[1976] 22 FLR 91 at 94B;* ***Gleeseon v J.Whippell & Co. Ltd*** *[1977] 1 WLR 510 (Emphasis added is mine)*

It is pertinent at this stage to refer to Order 2, rule 1 (1) of the High Court Rules, which provides;

> *"Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect,* ***the failure shall be treated as an irregularity and shall not nullify the proceedings,*** *any step taken in the proceedings, or any document, judgment or order therein.*
>
> (Emphasis is added)

In light of the foregoing, I overrule the preliminary point raised by the Plaintiff. I grant leave to the third Defendant to use the Affidavit in evidence under Order 41, Rule 4 of the High Court Rules, 1988, notwithstanding the irregularity in the form.

(2) Before turning to the substance of the Summons, I ought to mention one thing.

The second and third Defendants filed an Affidavit in Support of Summons for security for costs, sworn by "Ana Ratavo" and "Vishal Anand" respectively.

The Plaintiff chose not to file an Affidavit in Opposition opposing the application for security for costs. To be more precise, the Plaintiff has not sworn an Affidavit in Opposition to the Defendants.

In the result, it is enticing to accept the evidence of "Ana Ratavo" and "Vishal Anand" in *toto*. I am fortified in my view by the Court of Appeal judgment in ***"Jay Prakash v Savita Chandra" Civil Appeal No: ABU 0037/1985.*** It was held;

"Of course he did have to respond in our view the cause of events have taken and the consequences, if did not respond, rendered it as matter of prudence that he should reply if indeed he had a reply. ***And in the circumstances of the case in the absence of a reply, we hold the inference inescapable what the respondent had said to be true."***

(Emphasis Added)

(3) Leave all that aside, if, as I apprehend, now comes a most material and crucial fact.

I ask myself, what is the question in these proceedings?

The second and third Defendants are seeking an Order for security for costs.

The primary grounds for the Defendants as to why security for costs should be ordered are;

- ❖ The Plaintiff is a foreign registered Company ordinarily resident out of jurisdiction of the Court.
- ❖ The Plaintiff has no legal status to be present within the jurisdiction of the Court.
- ❖ The Plaintiff has no assets within the jurisdiction of the Court.

(4) THE POWER TO ORDER SECURITY FOR COSTS

It is clear from the evidence that the Plaintiff is a limited liability Company having its registered office at "Sydney", Australia. It is also clear from the evidence that the Plaintiff has no readily realizable assets in Fiji. There is no material to the contrary. There is therefore a basis under Order 23, Rule 1 (1) (a) to make the Orders sought by the Defendants. The lack of means and the foreign residence of the Plaintiff is a ground for Ordering Security for Costs.

The real origin of the jurisdiction to Order security for costs is to cater for the case of a non-resident Plaintiff who is seeking to take advantage of the Jurisdiction of domestic Courts, should be required to produce security for the payment of the costs of the party within the jurisdiction who is sued, in case the action showed fail. [per Farwell L.J. in "**New Fenix Compagine Anonyme D Assurances de Madrid v General Accident, Fire and Life Assurance Corporation Ltd,** (1911) 2. K.B. 619 at 630P).

The apparent concern is that a non-resident Plaintiff, particularly one without assets in the jurisdiction, could avoid liability for an adverse costs Order precisely because his or her non-residency would make it difficult if not possible for the Defendant to enforce the Order. [per Morling J, in "**Barten v Ministry of Foreign Affairs** (1984) 2 FCR 463P.]

(5) EXERCISE THE DISCRETION TO ORDER SECURITY FOR COSTS

That the Plaintiff is a non-resident and has no assets in Fiji is a circumstance of great weight favouring a security order. I am of course mindful to the fact that the making of an Order for security for costs is discretionary and the Courts no longer adapt a rigid rule. [see, **M.J. Raine, "In locals we trust – Foreigners pay cash; rethinking security for costs against Foreign Residents (2012) 1 JCIVP 210 at 214P)**

Returning to the instant case, although the grounds for security for costs have been proved by the Defendants, I am not bound to make an Order.

In the High Court of Fiji in **Furuuchi Suisan Company Limited v Hiroshi Tokuhisa and Others** Civil Action No. 95 of 2009, Justice Byrne ordered Security for Costs against a Plaintiff company incorporated and operating in Japan as the Plaintiff was ordinarily resident out of the jurisdiction. In reaching this decision, Justice Byrne relied on what Sir Nicolas Brown Wilkinson V.C. said in **Porzelack KG v Porzelack (UK) Limited** 1987 1 All ER 1074 at p.1076

> *"That the purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of the court against which it can enforce a judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a Plaintiff who lacks funds.* ***The risk of defending a case brought by a penurious Plaintiff is as applicable to Plaintiffs coming from outside the jurisdiction as it is to Plaintiffs resident within the jurisdiction"***.

His Lordship further stated

> *Under Order 23, r1 (1) (a) it seems to me that I have an entirely general discretion either to award or refuse security having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident Plaintiff. The question is what, in all the circumstances of the case, is the just answer".*
>
> (Emphasis added)

The White Book (1999) further discussed the development of the law till 1999, which is applicable to Fiji. At page 429 – 430 (23/3/3) of the White Book;

> *"Discretionarily power to order security for costs (rr1 – 3). The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs* ***'if, having regard to all the circumstances of the case, the Court thinks it just to do so'****. These words have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof to consider the circumstances of each case, and in light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer, for example, and inflexible or rigid rule that Plaintiff resident abroad should provide security for costs. In particular, the former Order 65 r 6B which had provided that the power to require a Plaintiff resident abroad, suing on a judgment or Order or on a bill of exchange or other negotiable instrument, to give security for cost was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).*
>
> (Emphasis Added)

The power to order security for costs is discretionary and the Order will not be automatic: **Idoport Pty Ltd v National Australia Bank Ltd** (2001) NSWSC 744. The discretion is to be exercised judicially, and not "arbitrarily, capriciously or so as to frustrate the legislative intent": **Oshlack v Richmond River Council** (1998) 193 CLR 72. Exercise of the power requires consideration of the particular facts of the case: **Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd** (1998) 193 CLR 502. **Southern Cross Exploration NL v Fire and all Risks Insurance Co Ltd** (1985) 1 NSWLR 114. The weight to be given to any circumstance depends upon its own intrinsic persuasiveness and its impact on other circumstances which have to be weighed. **Acohs Pty Ltd v Ucorp Pty Ltd** (2006) 236 ALR 143.

Thus, in exercising the discretion, I consider the following;

- The prospect of the claim succeeding
- Whether making an Order for security for costs would be oppressive and would stifle a genuine claim
- Whether there has been delay in making the application for security for costs.

(6) THE PROSPECT OF SUCCESS OR MERITS OF THE PROCEEDINGS

A consideration of the Plaintiff's prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the cases of the parties at an early stage of proceedings: "**Fiduciary Ltd v Morningstar Research Pty Ltd** (2004) 208 ALR 564.

As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, then, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success. **KP Cable Investments Pty Ltd v Meltglow Pty Ltd**, (1995) 56 FCR 189 at 197; **Staff Development & Training Centre Pty Ltd v Commonwealth of Australia** [2005] FCA 1643.

In "**Kadavu Shipping Company Ltd v Dominion Insurance Ltd**" 2009, HBC 508, Master J.Udit said in relation to "Strength or bona fides of a claim"

> *"Under this criterion, the respondent is to show that it has a prima facie regular claim, which disclosed a reasonable cause of action. It is not the court's duty to divulge into a detailed analysis of the merits of the case unless it can be clearly demonstrated that there is a relatively high degree of success or failure. Once it is established, the Court is to proceed on the basis that the claim is bona-fide".*

In "**Allan v Hillview Limited** [2003] HBC 366, Connors J said;

> *"... another matter of importance for the court is exercising its discretion is the Plaintiff's prospect of success in the action and of course as in any such situation that does not require the court at this point in time to make any detailed determination of the likelihood of success but merely to do so based on the pleadings as they appear before the court".*

G.E. Dal Pont, in Law of Costs, Third Edition writes at Page 1015;

> *"The Chief difficulty with any attempt to take into account the Plaintiff's chances of success is the fact that applications for security for costs are usually made prior to trial, often some time prior to it. Given the need for applications for security to be made promptly, a defendant who waits until the eve of the hearing to apply for security in unlikely to succeed. Yet it is this very need to promptly apply for security – possibly even at a time when the pleadings have yet to be finalized – that renders the court's task of assessing the merits of the claim near impossible. This task is arguably little easier even where the application for security is made during the hearing of the matter, when some but not all the evidence has been heard. Again the court has incomplete information upon which to make a determination.*
>
> *Several observations can be made in this respect. First, a court must be careful in declining security on the basis that the Plaintiff's claim appears weak. As the relevant inquiry is made at an interlocutory stage on less than complete material and without any hearing of the evidence, the real merits of the case are unlikely to sufficiently emerge in the necessarily brief application for security for costs. An evaluation of the strength of the Plaintiff's case is necessarily tentative and largely 'impressionistic'. Second, if a proceeding manifestly lacks legal merit, other remedies are available to protect a defendant from needless vexation. In appeals there is the barrier of leave or special leave. Third, for a judge upon an application for security to preside over a major hearing in which the parties seek to investigate in considerable detail the likelihood of success in the action risks usurping or pre-empting the role of the trial judge or appellate court before which the proceeding is to be litigated. This would, moreover, blow up the case into a large interlocutory hearing involving great expenditure of both money and time.*
>
> *For the above reasons, it has been said that courts deplore attempts to go into the merits 'unless it can clearly be demonstrated ... that there is a high degree of probability of success or failure. That the case is 'obviously hopeless' and 'doomed to fail'. If the case is 'bona fide' and raises 'real issues to be tried', the prospect of success or failure arguably function as no more than a neutral factor in the exercise of*

discretion to order security, especially where the issues to be litigated are difficult or complex. Expressed another way, if a claim is prima facie regular and discloses a cause of action, in the absence of evidence to the contrary the court will generally assume it to be bona fide with a reasonable prospect of success for this purpose. Cases at either extreme – those are that patently untenable, or ostensibly insuperable – are consequently much more the exception than the rule. So merely because the plaintiff 'may have slender hopes of succeeding', or that the case demonstrates 'a number of weaknesses' is not sufficient to justify departing from the rule that poverty is no bar. The bona fides and strength of the case, in any event, remains only one factor in the equation that informs the court's discretion so far as security is concerned."

What are the facts here? It is necessary to approach the case through its pleadings.

To give the whole picture of the action, I can do no better than set out hereunder the main assertions of the pleadings.

The Plaintiff in its Statement of Claim pleads *inter alia* (so far as relevant);

Para (1) *THE Plaintiff is a limited liability Company having its registered office at Level 1, 112 Castlereagh Street, Sydney NSW 2000, Australia.*

(2) *THE 1st Defendant is a Real Agency carrying its business in and about the Fiji Islands and at all material times were the agents of the 2nd Defendant.*

(3) *THE 2nd Defendants were appointed as Receivers of Aanuka Island Resort Limited (In Receivership), by the 3rd Defendant.*

(4) *THE 3rd Defendant is a financial institution and were the mortgagors of Aanuka Island Resort.*

BACKGROUND

(5) *SOMETIMES in March, 2012, the Plaintiff and the 2nd Defendants entered into a contract for sale of the Resort business known as Amunuca Island Resort and Spa, under the control of the 2nd Defendants, as Receivers.*

(6) *UNDER the said contract for sale, the Real Estate Agents were Bayleys Real Estate, New Zealand and all deposit monies payable under the contract was to be paid by bank cheque or cleared funds to the 1st Defendants trust account in Fiji Dollars.*

(7) *ON 10th March, 2010, the Plaintiff paid sum of FJ $850,000.00 into the trust account of the 1st Defendant in their account with Australia and New Zealand Banking Group Limited (ANZ) and on 2nd September, 2010 a further sum of FJ $50,000.00 was paid by the Plaintiff into the 1st Defendant's same trust account as further deposit.*

(8) *ON 2nd December, 2011, the 2nd Defendant cancelled the contract for sale with the Plaintiff.*

(9) *AT the time of cancellation of the said contract it was void ab nitio in that it lacked the consent of iTaukei Board to any alienation or dealing with iTaukei land or iTaukei Lease. The said Resort being on iTaukei land subject to iTaukei Lease 29157.*

(10) *THE Plaintiff made demands for refund of the deposit monies from the 1st Defendant only to be informed by the 1st Defendant that it had paid out the deposit monies to the 2nd Defendants.*

(11) *THE 2nd Defendant's receivership has since ceased.*

FIRST CAUSE OF ACTION AGAINST THE 1st, 2nd and 3rd DEFENDANTS

(12) *THE 1st Defendant was at all times agents and/or were acting on instructions of the 2nd Defendants and/or its agents.*

(13) *THE 2nd Defendant was at all material times agents and/or were acting on instruction of the 3rd Defendant and/or its agents.*

(14) *THE 1st Defendant were to have held the deposit monies paid under the sale contract in their trust account and could have only paid the same out after proper determination as to the party entitled to the monies.*

(15) *THE 1st Defendant ought not to have paid the deposit monies to the 2nd and/or to the 3rd Defendants and the 2nd and/or to the 3rd Defendant ought not have demanded and/or received the said deposit monies.*

The Plaintiff claims the following;

- Refund of the deposit monies in the sum of FJ $900,000.00
- Compound interest in the sum of FJ $900,000.00

The second Defendant in his Statement of Defence pleads *inter alia* (so far as relevant);

a) *The Plaintiff failed to provide completed iTaukei Land Trust Board ("iTLTB") application forms for Consent and Transfer,*

b) *The Plaintiff failed to obtain consent from iTLTB to transfer the Native Lease and to remedy that breach within 10 days after being given notice to do so;*

c) *The Plaintiff failed to maintain the Resort by not having necessary insurances cover for the Resort.*

d) *The Plaintiff failed to attend to settlement of the said Native Lease on 18th November 2011; and*

e) *The Plaintiff failed to remedy the default on or before 2nd December 2011 as required in the Default Notice dated 18th November 2011.*

f) *As it was an express obligation in the agreement for the Purchaser to use its best endevours to obtain the iTLTB's consent for the sale of the subject property;*

g) *The Plaintiff was delivered all of the necessary documentation prepared by the Vendor to enable it to obtain iTLTB consent, but failed and/or refused to do so;*

h) *The Purchaser failed and/or refused to obtain iTLTB consent and, as such, it cannot rely upon its own breaches to seek any remedy or relief;*

i) *Denies that the entire agreement was void ab intio and further relies on strict construction of the terms and conditions mutually agreed between the parties.*

The third Defendant in its Statement of Defence pleads *inter alia* (so far as relevant);

a) *Failing to provide completed NLTB application forms for Consent and Transfer;*

b) *Failed to obtain Consent from NLTB to transfer the Native Lease and to remedy the breach within 10 days;*

c) *Failing to maintain the Resort by not having necessary insurances cover for the Resort;*

d) *Failing to attend to settlement of the said Native lease on 18th November 2011; and*

e) *Failing to remedy the default on or before 2nd December 2011 as per Default Notice dated 18th November 2011;*

On my perusal of the Statement of Claim and the Statement of Defence, it seems to me perfectly plain that there are genuine disputes between the parties which raise serious issues for resolution. The evidence before me does not justify drawing the conclusion that the Plaintiff has no reasonable prospect of success in its claim. The Defendant's defences are also reasonably arguable. I am of course mindful to the fact that bona fide of the claim and its merits have to be considered in the exercise of my discretion.

I am satisfied that the claim is *prima facie* regular and disclosing a cause of action. Moreover, the Defendants have a Defence which is bona fide and has a reasonable prospect of success.

It is suggested on behalf of the Defendants that the Plaintiff's claim is without merits. I must confess that I remain utterly unimpressed by the proposition advanced by the Defendants.

In the case of "**Appleglen PVT Ltd v Mainzeal Corporation PVT Ltd**" (1988) 89 ALR 634, Pincus J. observed that at the hearing of an application for security for costs, detailed investigation into the likelihood or otherwise of the success of the claim will not be the right course to adopt.

Nevertheless, the existence of a genuine dispute cannot of itself provide cause for disentitling the Defendant to security if the circumstances otherwise are appreciated one for the making of such an Order. (see, **Parsdale PVT Ltd v Concrete Constructions** (1995) FCA 1471).

(7) STIFLING THE CLAIM

There is no direct sworn evidence on behalf of the Plaintiff that the making of an Order for security for costs would stifle the prosecution of the claim. To be more precise, there is no direct sworn evidence as to the likelihood that an Order for security would stultify the prosecution of the claim.

The Plaintiff raised an element of "oppression" by contending that the Defendants are endeavoring to avoid having the claim heard. However, there is no evidence to suggest that the Defendant's position involves some improper purpose.

There is no evidence before me as to the assets and liabilities of the Plaintiff or its Directors.

In the context of the present case, I cannot help but recall the rule of Law enunciated in the following judicial decisions.

Austin J in **Fiduciary Ltd v Morning Star Research (PVT) Ltd** (2004) NSWSC 664 said;

> *"...unrealistic for the court to decline to order security on the ground that to do so would stultify the litigation, it if took into account only the financial ability of the plaintiff, and disregarded the financial ability of those who would benefit from the Plaintiff's success and who would therefore have an economic incentive to bear the burden of a security order.* ***More broadly, it is fair for the Courts to proceed on a basis which reflects the proposition that those who seek to benefit from litigation should bear the risks and burdens that the process entails."***
>
> (Emphasis Added)

In **Bell Wholesale Co. Ltd v Gates Export Corporation** [1984] FCA 34; (1984) 2 FCR 1 at 4 (Sheppard, Morling and Neaves JJ) held;

> ***"In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a Company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful.*** *(whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means."*
>
> (Emphasis Added)

In order to establish the ground of "Stifling" it is necessary for the Plaintiff to demonstrate its directors and those who stand behind the Company are without means to provide an Order for security.

In **Bell Wholesale Co. Ltd v Gates Export Corp** [1984] FCA 34; (1984) 2 FCR 1 (at 4) where Shephard, Morling and Neaves Jj said:

> *"In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant her establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means."*

It has been held that an Order for security should not be declined on the ground that it would frustrate the litigation unless the Plaintiff Company establishes that those who stand behind it and will gain from the litigation are also without means: **Bell Wholesale Co. Pty Ltd v Gates Export Corporation** (1984) 2 FCR 1 at 3. The burden of showing such impecuniosity rests upon the Company seeking to resist the Order.

Where such persons are financially able to provide adequate security, then it has been said that generally speaking it is inappropriate to refuse an Order: **Yandil Holdings Pty Ltd v Insurance Co. of North America** (1985) 3 ACLC 542 at 545.

Returning to the present case, there is no sworn evidence before this Court as to the means of the directors of the Plaintiff Company and those who stand behind it.

Thus, I have no hesitation in holding that an Order for costs will not stifle the claim.

(8) TIMING OF APPLICATION FOR SECURITY

As earlier mentioned, although the non-residency of the Plaintiff is one of the main grounds for the exercise of the jurisdiction of the Court to Order security, I do not adopt a rigid rule. I note that Order 23 confers a discretion in that "*if having regard to all the circumstances of the case, the Court thinks it, just to do so, it may Order the Plaintiff to give such security for costs, as it thinks fit.*"

In the context of the present case, I am inclined to be guided by the rule of law enunciated in the following judicial decisions;

In **Gabel PVT Ltd v Katherine Enterprises PVT Ltd** (1977) 2 A.C.L.R. 400 the Court held in relation to the "effect of delay",

> *"Here discovery has been obtained and the case set down for trial. Some twelve days after this the First Defendant issued a motion seeking security. In my view there is much force in the contention that the application has been made too late. From the very beginning all parties were aware at least of the fact that the First Plaintiff must be presumed unless the contrary be shown to be unable to pay costs if unsuccessful. Nevertheless no application was made until after fourteen months after the Writ was issued. No attempt has been made to explain this delay.*
> *...In my judgment the proper time for making this application was at the beginning when the status of the First Plaintiff was known to the Defendants."*

Einstein J considered decisions dealing with the issue of delay in the making of an application for security in **Idoport Pty Ltd v National Australia Bank Ltd** [2001] NSWSC 744 concluding:

> *"Ultimately it seems to me that in the context of the broad discretion and consistently with the approach referred to in the above authorities, delay is best regarded simply as a factor whose consequences are to be weighed in the balance in determining what is just between the parties.... The Court, in approaching delay as a discretionary factor, looks at the length of the delay and the nature of the acts done during the interval. If a Company has suffered no real relevant prejudice in the sense of expenditure of its own funds or the incurring of liabilities in relation to the litigation in the period until the application for security for costs, the significance of delay reduces or may substantially disappear."*

In **Crypta Fuels (PV) Ltd v Svelte Corporation (PVT) Ltd**, (1994) 14 ACSR 760, the Court held;

> *"Without referring in any greater detail to those authorities, my conclusion from a consideration of them is that there is first and foremost a proposition accepted in every one of the cases* ***which is that if an application for security for costs is to be made it must be made promptly."***
>
> (Emphasis Added)

Applying those principles to the instant case, what do we find?

In the instant case, the Writ was issued on 27th September 2013. From the very beginning, the Defendants were aware that the Plaintiff is a non-resident. To be more precise, the Defendants were in possession of material disclosing that the Plaintiff is a non-resident from well before the time of the institution of the action.

Nevertheless, no application was made until after 03 years after the Writ was issued whereas the proper time for doing so was at the beginning.

There is, no explanation as to why the application for security for costs was postponed for 3 years.

In the result, I hold that there is unreasonable and unexplained delay in making the application.

The unfairness of making an application for security for costs at a late stage is demonstrable. An Order for security for costs would not only preclude the Plaintiff from prosecuting an apparently arguable claim, it would preclude the Plaintiff from ever recovering the legal costs that it has already incurred.

G.E. Dal Pont, in "**Law of Costs**", third edition, writes at Page 1021;

> *"If security is not applied for promptly, it is more difficult to persuade the court that such an Order is not, in the circumstances, unfair or oppressive. The reason is that an applicant for security who has pre-existing knowledge of the Plaintiff's impecuniosity, but delays making the application until the last moment, may be seen as perpetrating a tactical manoeuvre designed to encourage the Plaintiff to exhaust whatever funds he or she has in preparing the litigation to then be met with a financial burden that threatens to stifle the Plaintiff's proceeding altogether."*

The impact of the timing of an application for security for costs upon the court's discretion was explained by the Supreme Court of Western Australia in **Ravi Nominees Pty Ltd v Phillips Fox** (1992) 10 ACLC 1313 as follows:

> *An application for security for costs should be brought promptly and prosecuted promptly so that if it is going to delay the Plaintiff's claim, while it is finding the security, or if it is going to frustrate the Plaintiff's claim completely and stop the action, it does so early on before the Plaintiffs have incurred too many costs. An early hearing of such an application also benefits the defendant because it stops the Plaintiff's claim early before the defendant has incurred too many costs.*

The Fiji Court of Appeal in the decision of "**National Bank of Fiji v C Garden Island** WOO 1L Pacific Co. Ltd as – Civil Appeal No. 011 of 1992, considered a High Court Judgment which had dismissed an application for security for costs. The Court of Appeal held;

> *"The basis on which the learned judge dismissed the motion for costs was two fold, as to the first fourth Plaintiffs ... he held there was unreasonable and unexplained delay in making the application although the appellants were aware that at least the first Plaintiff would be unable to pay costs if unsuccessful. He held that the application was made some 14 months after the Writ was issued whereas the proper time for doing so was at the beginning. He held that this delay must tell against the appellants who must have been aware that the Plaintiffs must have incurred potentially substantial costs by the time the application was made. He cited the decision in **Gabbel Pty Ltd v Katherine Enterprises Pty Ltd** [1977] 2 ACLR 400 in support of his views regarding the effect of delay."*

The Court then at page 7 said:

> *"We are of the view that the learned judge exercised his discretion on a paper basis and would not be prepared to interfere with his decision.*

It is suggested on behalf of the Defendants that an application for security for costs can be made even at a Pre Trial conference stage.

At this point I cannot resist in saying that the proposition advanced by the Defendants is a far cry from the obvious and natural limitations to the scope and application of the security for costs and it flies on the face of the rule law enunciated in **Gabel PVT Ltd v Katherine Enterprises PVT Ltd** (1977) 2 A.C.L.R. 400, **Idoport Pty Ltd v National Australia Bank Ltd** [2001] NSWSC 744, **Crypta Fuels (PV) Ltd v Svelte Corporation (PVT) Ltd**, (1994) 14 ACSR 760, **Ravi Nominees Pty Ltd v Phillips Fox** (1992) 10 ACLC 1313 and "**National Bank of Fiji v C Garden Island** WOO 1L Pacific Co. Ltd as – Civil Appeal No. 011 of 1992

(I) CONCLUDING REMARKS

(1) In the present case, it is clear that the Defendants were in possession of material disclosing that the Plaintiff is a foreign registered Company ordinarily resident out of the jurisdiction of the court, from well before the Writ was issued.

(2) Nevertheless, the application for security for costs was made 03 years after the Writ was issued. The delay has not been explained at all. It is incumbent upon applicants in application of this nature to provide a satisfactory explanation as to delay. This has not been done at all. The delay is inordinate, to say the least. A delay of 03 years in any Civil action in the High Court, constitutes both inexcusable and inordinate.

(3) The discovery has been obtained and the status of the proceedings is for the parties to proceed for Pre-Trial Conference.

(4) The unfairness of making an application for security for costs at such a late stage is demonstrable. An Order for security for costs would not only preclude the Plaintiff from prosecuting an apparently arguable claim. It would preclude the Plaintiff from ever recovering the legal costs it has already incurred.

(5) It has been said that delay on the part of the defendant give rise to a waiver of the defendant's entitlement to security for costs.

- **Jennings Ltd (In Holding) v Cole (1934) NZ Gas LR 165.**
- **Roumeli Food Stores (NSW) (PVT) Ltd v New India Assurances Co. Ltd (1972) 1 NSWLR 227**

(6) "It is, however, incumbent upon a defendant who wishes to obtain security for its costs to apply promptly for that relief once it is, or ought reasonably be, aware that the Plaintiff would be unable to meet an order for costs. Delay is an important consideration in the determination of an application for security for costs because it is capable of causing prejudice or unfairness to the Plaintiff. A Plaintiff is entitled to know at the earliest opportunity, before it has committed substantial resources to pursuing the litigation, whether it will be required to provide security. The later an application is made the greater the likelihood that it will cause substantial disruption or distraction in the conduct of the Plaintiff's case, and if the Plaintiff is unable to provide security, the greater the costs that will have been wasted." [Per **NEWNES JA**, in **Christou v Stanton Partners Australasia PTY Ltd** [2011] WASCA 176 (10 August 2011]

In order to show prejudice it is not necessary for a Plaintiff to establish what it would have done differently if the application had been made earlier (although such evidence would be an important consideration in the exercise of the discretion); prejudice will generally be regarded as inherent in substantial delay: **Green v CGU Insurance Ltd** [2008] NSWCA 148; (2008) 67 ACSR 105 and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

In an era when the need to ensure the efficient use of judicial resources has become increasingly important, delay may also be significant in that regard. A late application which frustrates the action will mean that the judicial resources already devoted to the case will have been wasted: **Town & Fencott & Associates Pty Ltd v Eretta Pty Ltd** [1987] FCA 102; (1987) 16 FCR 497, 514, and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

(7) I remind myself that it is a fundamental principle of any civilized legal system that a court should not generally exercise its discretion in favour of an applicant for security if by his or its delay the other party has been forced to incur expense in the litigation.

(8) It is clear beyond question that the Plaintiff has incurred costs in these proceedings which would not have been incurred if the application for security had been made immediately after the close of the pleadings.

(9) Having had the benefit of written and oral submissions for which I am most grateful and after having perused the pleadings and the Affidavits, doing the best that I can on the material that is available to me, I have no doubt and I am clearly of the opinion that in this case the delay has been so far too long and that no order for security should be made.

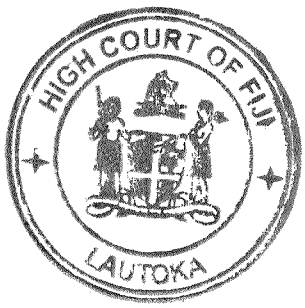
(10) I could see nothing to change my opinion even on the basis of exhaustive work contained in, **G.E. Dal Pont "Law of Costs", Third Edition and M.J. Raine "In Locals We Trust – Foreigners Pay Cash: Rethinking security for costs against Foreign Residents (2012) 1 JCIVP 210 at 214P)."**

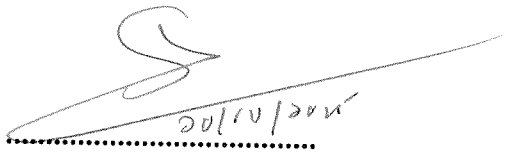
(11) Finally, I cannot resist in saying that *security for costs is not a card that a defendant can keep up its sleeve and play at its convenience.*

(J) FINAL ORDERS

(1) The second and third Defendant's Summons for security for costs is dismissed.

(2) I make no Order as to costs.





Jude Nanayakkara
Acting Master of the High Court

At Lautoka
20th October 2015.