

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 65 of 2015S

**BETWEEN** : **VINOD CHAND** and **SAKILA DEVI** both of 21 Gascoyne Street, Prestons, NSW 2170, Australia, Self Employed and Domestic Duties respectively.

**PLAINTIFFS**

**BETWEEN** : **NOEL ROSS DOWLING** and **ALISON MARGARET DOWLING** both of Ferndale Cnr, Mindarie, Western Australia 6030, Australia, both Businesspersons.

**DEFENDANTS**

**BEFORE** : Master Vishwa Datt Sharma

**COUNSEL** : Mr. Nand - for the Plaintiff  
Mr. Khatri - for the Defendant

**Date of Hearing** : 01<sup>st</sup> October, 2015

**Date of Ruling** : 7<sup>th</sup> June, 2016

**RULING**

(Application for Security for Costs by the Defendant pursuant to Order 23 and Rule 4 of the High Court Rules, 1988)

**A. Introduction**

1. On 13<sup>th</sup> March, 2015, the Defendant filed a Summons for Security for Costs against the Plaintiff and sought for the following Orders-

- (a) *That the Plaintiff do within fourteen (14) days give security for the Defendants' costs to the satisfaction of this court;*

- (b) *That in default of such security the action herein be struck out;*
- (c) *That in the meantime all proceedings herein other than the proceedings relating to the giving of such security be stayed;*
- (d) *That the costs of this application be awarded in favour of the Defendants in any event.*

- 2. This application is made pursuant to **Order 23** and **Order 4 of the High Court Rules, 1988**.
- 3. The Defendant relies on the affidavit of Alison Margaret Dowling and Tracey Talei Sereivale.
- 4. The Plaintiff relies on the affidavit of Vinod Chand.

**B. Brief Background**

- 5. The Plaintiffs and the Defendants entered into a Sale & Purchase agreement for the sale & purchase of the Defendant's property describes as CT 33300, Lot 3 on DP 8520.
- 6. There is no dispute that the Plaintiffs paid a deposit of AUS\$ 50,000 on 01st may, 2013. However, a further sum of AUS\$15,000- \$15,700 was paid thereafter and there is a dispute between the parties whether this sum was paid as a part of sale or compensation for the delay caused on the part of the Plaintiff.
- 7. The Defendants further say that the first named Defendant was at all times a 'resident' in terms of Land Sales Act: the second named Defendant was not a 'resident' in terms of the Land Sales Act and that they had the capacity to sell the property provided the Plaintiffs were residents of Fiji. That the second named Defendant did not have the capacity to sell the property only in the case of a non-resident purchaser.
- 8. The Defendants have not refused to sell the property to the Plaintiffs but that the purported sale is based on an Agreement that is void and of no effect and therefore the Agreement is unenforceable.
- 9. The Defendants deny being indebted to the Plaintiffs in the sum claimed or any sum at all.
- 10. The Plaintiffs state that the deposit paid ought to be refunded otherwise the Defendants will be unjustly enriched if they hold on to the deposit and the land.



**C. The Law on Security for Costs**

**11. *Security for costs of action, etc. (O.23, r.1)***

**(1) *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**

**(b) .....**

**(c) .....**

**(d) .....**

*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 proceeding as it thinks just.*

**12. The Rule states that "having regard to all circumstances of the case, the Court think, it just to do so, it may order" confers upon the Court a discretion whether or not to order security for costs.**

**D. Analysis and Determination**

**13. The issue for this court to determine is 'Whether the Defendant is entitled to Security for Costs' as sought for in their application?**

**14. Security for Costs is not ordered because a Plaintiff is ordinarily resident outside of Fiji, the Court must consider other facts incidental to the proceedings.**

**15. Reference is made to the case of *Inspired Destinations (Inc) Ltd v Bayleys Real Estate (Fiji) Ltd [2015] FJHC 812; HBC180.2013 (20 October, 2015) wherein the issue of security for costs was discussed and observed as follows:***

*"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.'*

16. In the High Court of Fiji in *Furuuchi Susian 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 resident within the jurisdiction".*

17. The Defendant will only be entitled to costs if the Plaintiff's claim is ultimately dismissed with costs. The Defendant is not entitled to security for costs as of right. If the Court feels that the Plaintiff has a good claim with good prospects for success, it may not be inclined to make any order for security for costs.
18. In *Ali v Chandra [2014] FJHC 710; HBA14.2013 (30 September 2014)*, Judge Kumar also saw fit to highlight a portion from *Porzelack K.G v. Porzelack(supra)* and further enunciated as follows::

3.26 The threshold for exercise of discretion is that Respondent (Plaintiff) "does not ordinarily reside in Fiji".

3.27 The term "resident" or "ordinarily resident" cannot be given a precise definition.

3.28 Whether a person is resident or ordinarily resident will depend on various factors such as person's address, type of employment, duration of stay at a particular address, ownership of real properties and so on.

3.29 Once the Court determines that the Respondent (Plaintiff) "does not reside" or "does not ordinarily reside" in the country then Court has to



exercise its discretion as to whether to make an Order for security for costs or not.

3.30 Of course in exercising discretion whether to make an Order for security costs, Court needs to take various factors into account. Some of the factors which Court may take into account are available funds within jurisdiction properties owned by the Respondent within jurisdiction and their values; (*Sharma v. Registrar of Titles*) chances of Plaintiff's claim succeeding (*Para 25.13.1 White Book. Vol 1, 2011*).

3.31 It must be made clear that the factors listed in preceding paragraph are not exhaustive and Court is free in exercise of its discretion to take into consideration any relevant factors.

19. As reported in the White Book (1997) at page 407 (23/1-3/2) on Security for Costs it states that:

*"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).*

20. Lord Denning as reported in Sir Lidsy Parkinson & Co Ltd. v.Farripian Ltd [1973] 2 A.E.R. 273 at 285-286.

*.....'If there is a reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. ....The court might also*



*consider whether the application for security was being used oppressively-so as to troy and stifle a genuine claim."*

21. An exception applies if it is established that a foreign Plaintiff has substantial assets within the Jurisdiction which are available to satisfy a costs order. In that exceptional case, security for costs will not be ordered.
22. In *Babu Bhai Patel v Moanohan Aluminium Glass (Fiji) Ltd, Civil Appeal 19/1997*, an appeal from the Magistrates Court, Chief Justice Fatiaki held to the effect that to come within the exception a non- resident Plaintiff has the onus to prove that he has suitable property within Fiji.

'Once it is established that the Plaintiff was not ordinarily resident in Fiji, as in this case they are resident in Australia, the 'onus' then shifted to the Plaintiffs to satisfy Court that they have property within the Jurisdiction which can be made the subject to the process of this court. However, even if the Plaintiffs have no assets in Fiji, they may still avoid having to pay security for costs if they are able to convince the court pursuant to Order 23 of the High Court Rules, 1988, that having regards to all the circumstances of the case, it would not be just and fair to order security for costs or that it would be oppressive to do so in the circumstances.'

In this case, the Plaintiffs have admitted in their affidavit in opposition of paragraphs 4 & 5 that they are 'resident' in Australia and have 'no assets' in Fiji and further derive 'no income' in Fiji. There is no dispute with regards to this.

23. The Plaintiffs filed a Writ of Summons and the Statement of Claim on 23<sup>rd</sup> January, 2015.
24. The Defendants filed their Statement of Defence thereafter on 03<sup>rd</sup> August, 2015.
25. It is noted that upon filing of the Defence, no Reply to Defence was filed as per the requirements of the High Court Rules.
26. The Defendants contention is that they have not refused to sell the property to the Plaintiffs but that the purported sale is based on an Agreement that is void and of no effect. Therefore, the Agreement is unenforceable. The Defendants further admit that they have received a total of AUS\$65,000 in two installments from the Plaintiff. However, this was for extension of time sought by the Plaintiff to settle under the Agreement and



for compensation for causing delay. For these reasons the Defendants deny being indebted to the Plaintiffs in the sum claimed or any sum at all.

27. Prima facie, bearing in mind the Defendants contention as based hereinabove, and the Statement of Claim of the Plaintiffs as set out within the Statement of Claim, upon a careful consideration, the Plaintiffs have an arguable case with good prospects of success. However, this court at this stage of the proceedings cannot delve itself into the merits of the parties' case, since that would be determined upon a proper hearing accordingly.
28. In '*Kadavu Shipping Company Ltd v Dominion Insurance Ltd*' 2009 HBC 508 Master Udit said in relation to the '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.'*

29. 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.'*

30. The balance of convenience lies in the Court accepting that the Plaintiff has a regular bona-fide claim which has a chance of success without making any detailed determination as to the likelihood of success.
31. The Defendant's main thrust is that since the Plaintiffs are resident out of this Jurisdiction, they should be required to pay security for costs. On the other hand, the Defendant will only be entitled to costs if the Plaintiff's claim is dismissed.
32. The Plaintiffs have initiated this proceeding and they have the prosecution of the case to ensure they bring it to the conclusion on the balance of probabilities. And it is for the Defendants to counter the claim in terms of their Defence. However, it is obvious in the circumstances that expenses in terms of costs will be incurred and therefore the parties to the proceedings must be ready to cater for the costs. In this case the Defendants have sought for security for costs against the Plaintiffs.



Quantum of Costs

33. No formula for ascertaining the quantum of the security for costs was furnished to court by any of the Counsels. However, a very helpful guide is provided for in *Halsbury's Law of England (4<sup>th</sup> edition) Vol. 37 para 307, which states as follows-*

*'The amount of security for costs ordered to be given is in the discretion of the court, which will fix such sum as it thinks just to do so, having regards to all the circumstances of the case. It is not the practice to order security for costs on a full party and party, still less on an indemnity basis. In the case of a Plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up the stage of the proceedings for which security is ordered, but there is no hard and fast rule.'*

34. Reference is made to the New Zealand Court of Appeal case of *Mclachlan & Others v. Mel Network Limited [2002] NZCA 215 (29 August 2002)* at paragraph 27 of the Judgment wherein His Lordship, Mr. Justice Gault said-

*'[27] The amount of security is not necessarily to be fixed by reference to likely costs awards: National Bank of New Zealand Ltd v Donald Export Trading Ltd [1980] 1 NZLR 97, at 103- 'It is rather to be what the court thinks fit in all the circumstances...'*

35. For the abovementioned rational, I grant the Defendant's application and proceed to make the following orders.

E. Orders


- (i) The Plaintiff is hereby ordered to pay a sum of \$7,500 as security for costs into the Chief Registrar's interest bearing account within 28days.
- (ii) The Plaintiff's Writ of Summons and the Statement of Claim will be struck out upon the non-payment of the ordered security for costs.
- (iii) Parties to proceed with the next appropriate cause of action in terms of the substantive claim.



- (iv) Cost of this action is summarily assessed at \$750 and to be paid within 28 days.
- (v) The case will now be scheduled for further directions accordingly.

DATED at SUVA THIS 7<sup>th</sup> DAY OF JUNE 2016



  
.....  
MR VISHWA DATT SHARMA  
Master of the High Court  
Suva

cc. Mr. Nand of Nand's Law, Suva  
Mr. Khatri of Parshotam Lawyers, Suva