

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 230 of 2015

BETWEEN : **HARISH CHAND** trading as **ITAUKEI FOOD INDUSTRIES** of
Level 1, Unit 1/9, Lot 9, Bila Street, Carreras Road, Votualevu, Nadi.

PLAINTIFF

AND : **BULA ISLAND FOOD SUPPLIES LIMITED** having its registered
office at Lot 9, Bila Street, Carreras Road, Votualevu, Nadi.

DEFENDANT

Counsel : **Mr. Isireli Tuifua Fa for the Plaintiff**
(Ms) Anishini Chand for the Defendant

Date of Hearing : **Thursday, 26th April 2018**

Date of Ruling : **Friday, 08th June 2018**

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Defendant's Summons dated 29th November, 2017, made pursuant to **Order 23 and Order 32 rule 1 of the High Court Rules, 1988** and the inherent jurisdiction of the Court seeking the grant of the following Orders;

1. *The Plaintiff Harish Chand trading as iTaukei Food Industries within seven (7) days*

do give security for costs of the Defendant in the sum of \$25,000.00 (Twenty Five Thousand Dollars) or such other sum as the Court may think just and that in default of giving of such security the Plaintiff's Writ of Summons and Statement of Claim filed on the 17th day of December 2015 be struck out.

2. *The Plaintiff do release the original Agreement to Lease dated the 24th day of July 2015 between the Plaintiff and the Defendant to the Defendant to obtain an opinion of a Handwriting Expert in respect of the defendant's Director's signature.*
- (2) The Summons is supported by an affidavit sworn by 'Narainsammy Naidu', the Director of the Defendant Company.
- (3) The Summons is strongly resisted by the Plaintiff. The Plaintiff filed an 'affidavit in reply' sworn on 05th March 2018 opposing the Summons. Regrettably, the Defendant did not file an 'affidavit in answer'.

(B) THE FACTUAL 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 averments/assertions of the pleadings.

- (2) The Plaintiff in his Statement of claim pleads *inter alia*;

1. *By a lease made the 24th day of July, 2015, the Defendant demised the property known as Lot 9 Bila Street, Carreras Road, Votualevu, Nadi ("the demised property") for a term of one (1) year at a rental of \$2,500.00 (Two Thousand five hundred dollars) per month subject to automatic renewal between one (1) to three (3) years if required by Plaintiff.*
2. *In terms of the lease the Defendant covenanted with the Plaintiff that:*
 - a. *Under clause 6 (i) the Defendant would give possession of the demised property to the Plaintiff on the date of execution of the lease, being the 24th day of July, 2015.*
 - b. *Under clause 6 (ii) the Plaintiff was permitted to occupy and use all facilities on or at the ground floor at the demised premises to process his products for export and distribution.*
 - c. *It was an implied term of the lease that the Defendant would give quiet and peaceful possession of the demised premises to the Plaintiff.*

- d. *Under clause 7 the Defendant would bear all costs of utilities including electricity used on the premises.*
 - e. *Under clause 9 the Defendant had appointed the Plaintiff to become the General Manager of the Defendant.*
3. *The Plaintiff will at the trial refer to the said lease for its full terms and true effect.*
 4. *The Plaintiff entered into possession of the demised premises after execution of the lease and the Defendant confirmed Plaintiff's appointment as General Manager of the Defendant.*
 5. *The Plaintiff started to procure ginger from farmers and suppliers for its own business, brought such ginger and other produce to the demised premises for storage and processing by value adding for export.*
 6. *The Defendant covenanted with the Plaintiff that if he procured other produce for the Defendant, processed them and exported to its sister company in Australia it would pay invoice on such export by remitting funds back to Fiji and pay Plaintiff's travel costs to and from Fiji, accommodation and transport to procure produce for the Defendant.*
 7. *Wrongfully and in breach of covenant the Defendant.*
 - a. *On or about the 9th day of September, 2015 the Plaintiff informed the Defendant that failure to hand over the keys will bring disturbance to his iTaukei business and would invoice the Defendant for \$10,000.00 for the disturbance, then on or about the 29th of October 2015 the Defendant cut off the electricity to the demised premises and refused and or neglected to give the demised premises electricity meter key resulting in loss of \$68,000.00 (sixty eight thousand dollars) worth of Plaintiff's frozen produce and loss of ability to process ginger by value adding from the 9th day of September, 2015 to 23rd day of November, 2015 at a loss of \$10,000.00 a day totalling \$830,000.00 (eight hundred and thirty thousand dollars).*
 - b. *On or about the 11th day of December, 2015, the Defendant through its Director Narainsammy Naidu, its associates and Bailiff broke onto and damaged the demised premises demanding the sum of \$60,000 (sixty thousand dollars) without any Court Order resulting in pain and suffering to Plaintiff and his staff and employees.*
 - c. *The Defendant after breaking into the demised premises stole \$500,000 (five hundred thousand dollars) worth of Plaintiff's business files with projections,*

forecasts and implementation of projects including in particular the production of ginger and other raw materials value adding for export.

- d. The Defendant did not pay to Plaintiff \$82,000.00 (eighty two thousand dollars) for unpaid invoice on produce exported to Australia and also did not pay \$20,000.00 (twenty thousand dollars) for Plaintiff's transport in procuring produce for it as well as repair of vehicles including travel to and from Fiji at \$10,000.00 (ten thousand dollars) and hotel costs of \$5,000.00 (five thousand dollars).*
- 8. Unless ordered by injunction to restrain it from interfering with Plaintiff's possession of the demised premises the Defendant will continue to harass the Plaintiff and his staff as well as damage the demised premises and steal materials from the demised premises.*
- 9. The Plaintiff has had to incur Solicitor client costs because of the Defendant's aforesaid actions and seeks indemnity costs.*

(3) The Plaintiff **claims** the following;

- 1. The Defendant pays special damages of \$1,447,000.00 (One Million Four Hundred and Forty Seven dollars):*
- 2. General Damages*
- 3. An order by way of permanent injunction that the Defendant, its servants, agents or howsoever be restrained from disturbing the Plaintiff's peaceful occupation of Lot 9 Bila Street, Carreras Road, Votualevu, Nadi without Court Order or lawful distress.*
- 4. Any other Order the honourable Court deems just.*
- 5. Indemnity Solicitors Client Costs.*

(4) The Defendant in its "**Amended Statement of Defence and Amended Counter-Claim**" pleads *inter alia*;

- 1. The Defendant denies paragraph 1 of the Statement of Claim and further says that the purported agreement was made and entered without the Defendants' Directors knowledge and /or consent and/or authority.*
- 2. The Defendant denies paragraph 2 of the Statement of Claim.*

3. *The Defendant denies paragraph 4 of the Statement of Claim and further says that the Defendant had no desire to appoint the Plaintiff as a General Manager of the Defendant Company.*
4. *The Defendant is not aware of the contents of paragraph 5 of the Statement of Claim and therefore neither admits nor denies the same.*
5. *The Defendant denies paragraph 6 of the Statement of Claim and further says that it did not need the Plaintiff to carry out any export to the Defendant's sister company in Australia as the Defendant Company was capable of handling its own affairs.*
6. *The Defendant denies paragraph 7 (a) of the Statement of Claim.*
7. *As to paragraph 7 (b) of the Statement of Claim, the Defendant engaged the services of a Registered Bailiff to recover outstanding rental owed to the Defendant. The Bailiff was chased from the premises by the Plaintiff and his thugs with a cane knife and further states that the Defendant has no intention to damage its own building.*
8. *The Defendant denies paragraph 7 (c) of the Statement of Claim and further says that the Plaintiff's business files and other items as stated in paragraph 7 (c) is of no value to the Defendant company.*
9. *The Defendant denies paragraph 7 (d) of the Statement of Claim.*
10. *As to paragraph 8 of the Statement of Claim, the Plaintiff had failed to bring to its Honourable Courts attention that there was an application for vacant possession filed by the Defendant being Lautoka High Court Civil Action No. 266 of 2015 and obtained an injunction order.*
11. *The Plaintiff is seeking to gain financially by bringing this claim against the Defendant.*
12. *Save as is expressly admitted herein, the Defendant deny each and every allegation made in the Plaintiffs Statement of Claim.*
13. *The Defendant prays for an order that the Plaintiff's Statement of Claim be dismissed with costs on a Solicitor/Client indemnity basis.*

B. AMENDED COUNTER-CLAIM

The Defendant in its Amended Counter-Claim says as follows:-

1. *The Defendant repeats paragraphs 1 to 12 of its Amended Statement of Defence.*

2. *The Defendant is a limited liability company engaged in exporting frozen produce to countries such as Australia and the United States of America.*
3. *The Plaintiff with his associates, namely Kushbu Sharma, Paras Ram Naidu and Dinesh, made a Lease Agreement dated the 24th of July 2015, without the Defendant's knowledge.*
4. *Under the purported Lease Agreement the Plaintiff appointed himself as the Managing Director of the Defendant Company.*
5. *One Ms.Kushbu Sharma, who worked with the Defendant Company had in her possession the Defendant Company's Common Seal which was used to stamp the purported Lease Agreement dated the 24th of July 2015.*
6. *Ms. Kushbu Sharma resigned from the Defendant Company prior to the execution of the purported Lease Agreement but stayed on after the Plaintiff refused to accept her resignation letter. The letter was signed by the Plaintiff under the occupation as the Future Managing Director.*
7. *The Plaintiff and his associates namely Kushbu Sharma, Paras Ram Naidu and Dinesh had also forged the signature of Mr. Narainsammy Naidu, who is one of the Directors of the Defendant Company on several documents which were in favour of the Plaintiff and kept with the Plaintiff.*
8. *The Plaintiff later appointed himself as the Managing Director of the Defendant Company without the consent and/or knowledge of the Defendant Company's Directors.*
9. *There was no general meeting and/or special general meeting held by the Defendant Company to appoint the Plaintiff as the Managing Director of the Defendant Company.*
10. *Mr. Narainsammy Naidu, who is a Director of the Defendant Company, came to know about the purported Lease Agreement and the appointment of the Plaintiff as a Managing Director of the Defendant Company after he started to receive correspondence from the Plaintiff.*
11. *The Plaintiff together with Kushbu Sharma, Paras Ram Naidu and Dinesh, damaged assets belonging to the Defendant Company and also caused damaged to the Defendant Company's business dealing which are as follows:-*

(a)	<i>Loss of Income at \$50, 000.00 per week from August 2015 till March 2016</i>	<i>\$1,516,666.60</i>
(b)	<i>Building re-payments as \$9,000.00 per month from August 2015 till March 2016</i>	<i>\$ 63,000.00</i>

(c)	Vehicle re-payments at \$2,465.00 per month from August 2015 till March 2016	\$ 17,255.00
(d)	Damage caused to the property by the Plaintiff	\$ 180,000.00
(e)	Missing 5 tonne Truck Registration No. FU 529	\$ 45,000.00
(f)	Missing Fork Lift Registration No. HA 758	\$ 70,000.00
(g)	Damaged Toyota Hiace Van Registration No. FK 113	\$ 18,000.00
(h)	Damage caused to FEA 3 phase meter Box	\$ 38,000.00
(i)	Damage caused to vegetable processing Machines	\$ 80,000.00
	TOTAL	\$2,027,921.60

12. The Defendant also claims interest at the rate of 10 (ten) per centum per annum under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap.27, Laws of Fiji on the sum of \$2, 027,921.60 (Two Million Twenty Seven Thousand Nine Hundred Twenty One Dollars and Sixty Cents) From August 2015 to the date of judgment.

WHEREFORE THE DEFENDANT CLAIMS FROM THE PLAINTIFF AS FOLLOWS:-

- (a) Judgment for the sum of \$2,027,921.60 (Two Million Twenty Seven Thousand Nine Hundred Twenty One Dollars and Sixty Cents).
- (b) General Damages.
- (c) Interest at the 10 per cent per annum on the sum of \$2,027,921.60 (Two Million Twenty Seven Thousand Nine Hundred Twenty One Dollars and Sixty Cents) from the August, 2015 to the date of judgment under the Law Reform (Death and Interest)(Miscellaneous Clauses) Act.
- (d) Costs on a Solicitor/Client Indemnity basis.

(5) The Plaintiff in his "Reply to Amended Defence and Defence to Amended Counter-Claim" pleads inter alia;

1. THAT the Plaintiff joins issue with the Defendant as to his denials in paragraphs 1- 9 and 11-13 of its Statement of Defence.
2. THAT as to paragraph 10 of the Statement of Defence the Plaintiff denies the allegations therein and further says that they were never served with the Summons for Ejectment and only became aware of the Defendants proceedings after the interim injunction was given.

DEFENCE TO AMENDED COUNTER-CLAIM

1. THAT the Plaintiff repeats paragraph 1 – 9 of its Statement of Claim.
2. THAT the Plaintiff denies the allegations set out in paragraph 1 – 12 of the Defendants Amended Counter-claim and puts the Defendant to strict proof thereof.
3. THAT the Plaintiff further states that the allegations made by the Defendant in paragraphs 3 – 10 of the Defendant's Amended Counter-claim are scandalous as they lack particulars.
4. THAT the Plaintiffs deny the Defendant suffered any losses or damages as claimed.
5. THAT by reason of the matters pleaded, the Defendant is not entitled to any of the claimed.

Wherefore the Plaintiff prays for the following relief:

- (i) That the Defendant's Counterclaim be dismissed;
- (ii) Costs against the Defendant;
- (iii) Any other relief this Honourable Court may deem just.

(C) THE STATUS OF THE SUBSTANTIVE MATTER

- (1) The Plaintiff issued the Writ in this action on 17th December 2015.
- (2) The pleadings in the action begun by way of Writ of Summons were closed on 15th November 2017.

- (3) I note with concern that the Defendant applied for security for costs of the action about one year and eleven months after the Writ was issued.

(D) **THE DEFENDANT'S SUMMONS FOR SECURITY FOR COSTS**

- (1) 'Narainsammy Naidu', the Director of the Defendant Company, in his **Affidavit in Support of Summons** deposes as follows;

1. *I am a Director of the Defendant Company and am duly authorised by the Defendant to make and swear this affidavit on its behalf*
2. *Annexed hereto and marked with the letter "A" is copy of Authority from the Defendant to me.*
3. *The matters deposed herein are within my knowledge and others have been obtained from records maintained in the relevant file.*

Security for Costs

4. *The Plaintiff in this action lives abroad in Australia. He is an Australian citizen and has lived abroad for many years. He comes to Fiji on certain occasions either for business trips or to attend Court matters.*
5. *The Plaintiff has deposed in his affidavit filed on the 17th day of August 2016, that his address is Level 1, Unit 1/9, Lot 9, Bila Street, Carreras Road, Votualevu, Nadi.*
6. *The Plaintiff does not occupy the premises situated at Level 1, Unit 1/9, Lot 9, Bila Street, Carreras Road, Votualevu, Nadi anymore and I am not aware of any assets the Plaintiff has in Fiji nor am I aware as to where the Plaintiff company is operating from.*
7. *The costs of defending the Plaintiff's claim up to the trial will be substantial.*
8. *Since the Plaintiff is resident out of jurisdiction and does not have premises at the address it will be very much difficult to enforce any orders for costs that may be made in the Defendant's favour against the Plaintiff.*
9. *The subject matter of the claim against the Defendant is as follows:-*

"The Defendant pays special damages of \$1,447,000.00 (One Million Four Hundred and Forty Seven Dollars)

General Damages

An Order by way of permanent injunction that the Defendant, its servants agents or howsoever be restrained from disturbing the Plaintiff's peaceful occupation of Lot 9, Bila Street, Carreras Road, Votualevu, Nadi without Court Order of lawful distress.

Any Other Order the Honourable Court deems just

Indemnity Solicitors Client Costs.

10. *The Defendant will have to defend this matter vigorously as the amount claimed is substantial and the trial could last 3 days.*
11. *I will be calling the following witnesses for hearing of this matter over a 3 day trial: -*
 - a. *My brother who lives in Sydney, Australia. His costs will be approximately \$10,000.00 which includes return airfares, accommodation, meals and transportation and partial costs.*
 - b. *Mr. Avinsh Raj who lives in Nadi, Fiji. His costs will be \$800.00.*
 - c. *Mr. Anwar Hussain who lives in Nadi and a land developer. His costs will be \$1,500.00 per day.*
 - d. *The Registrar of Titles. Her costs will be approximately \$1,500.00 being her airfare to and from Suva, accommodation, meals, transportation.*
 - e. *My own expenses will be approximately \$1,000.00 per day.*
12. *There will be other expenses which will be substantial in nature where certain other persons will have to be subpoenaed. Expenses for one witness is estimated at \$300.00*
13. *I pray to this Honourable Court that the Plaintiff be ordered to put sufficient security by way of cash deposit into Court as security for Defendant's costs, estimated to be \$25,000.00 (Twenty Five Thousand Dollars).*
14. *If the Plaintiff fails to pay security for costs, I ask that the Plaintiff's Writ of Summons and Statement of Claim filed on the 17th day of December, 2015 be struck out.*

Release of original Agreement to Lease dated 24th July 2015

15. *I refer to Annexure marked "KS 4b" which is the Agreement to Lease dated the 24th day of July 2015 between the Plaintiff and the Defendant in the Affidavit in Support of Khusbu Sharma sworn on the 31st day of May 2016 and filed on the 2nd day of June 2016.*
 16. *The Defendant did not enter into any agreement with the Plaintiff for the lease of the property located at Lot 9, Bila Street, Carreras Road, Votualevu, Nadi.*
 17. *The signature made on behalf of the Defendant is neither mine nor any other Official appointed by the Defendant.*
 18. *The Affidavit of Khusbu Sharma fails to disclose as to who signed the Agreement to Lease on behalf of the Defendant.*
 19. *Any document to be signed for the Defendant has to be executed by the Director and/or the Secretary of the Company as in the documents lodged with the Companies Office and the signature of the Defendant Company.*
 20. *I verily believe that the signature made on behalf of the Defendant in Agreement to Lease has been forged and made in favour of the Plaintiff to take over the property located at Lot 9, Bila Street, Carreras Road, Votualevu, Nadi and the Defendants.*
 21. *I have been advised by my Solicitors to obtain an opinion in respect of the signature made on behalf of the Defendant from a Handwriting Expert in Australia as there are no qualified Handwriting Experts in Fiji.*
 22. *I humbly ask this Honourable Court for orders in term of the Summons filed herein.*
- (2) The Plaintiff in his **'affidavit in reply'** deposes inter alia;
1. *THAT I am the Plaintiff in the above matter.*
 2. *THAT I crave grant to refer to the Affidavit of Narain Sammy Naidu deposed to on the 27th of November 2017 (hereinafter the Affidavit) and crave leave of the Court to reply to the same.*
 3. *THAT I refer to paragraph 1 – 3 of the Affidavit and make no comment on the same.*
 4. *THAT I refer to paragraph 4 of the Affidavit and deny the same. I say that I am a Fiji citizen. My passport number is 922828. Now shown to me and marked as annexure "A" is a copy of my Fiji Passport. I reside in Fiji and in Australia. I have business interest in Fiji and I also operate a sawmill from Olosara Sigatoka.*

5. *THAT I refer to paragraph 5 and say that the registered address referred to is the address of my business when I was forcefully evicted by my landlord and others. This was my place of business for ginger processing for export to Australia. This is well known to the Defendant.*
6. *THAT I refer to paragraph 6 and say that I have a lease agreement with the Defendant to occupy the premises and I occupied the same until I was forcefully removed by the Defendant and their agents contrary to a Court Order granted by the Court in my favour on the 24th day of December, 2015.*
7. *THAT I refer to paragraph 7 and say that this legal action is a result of the Defendant's unlawful action against me.*
8. *THAT I refer to paragraph 8 and deny the same, I say that I am a Fiji Citizen and reside within the jurisdiction of this Court. I also reside in Australia. I travel to and from Australia to conduct my business. The Defendant always knew that I had an Australian passport and he chose to deal with me and had no issues on my nationality on residency when he dealt with me.*
9. *THAT I refer to paragraph 9 and say that the contents of the Statement of Claim are set out in the Statement of Claim and there is no need for me to repeat them here.*
10. *THAT I refer to paragraph 10 and say that this case is a direct result of the Defendant's unlawful actions that have caused my losses. If the Defendant had not breached the lease in the manner that it did, I would not be suffering this loss or having commenced this action against him.*
11. *THAT I refer to paragraph 11 and say I have no knowledge of the people mentioned therein by the Defendant as potential witnesses and I have no knowledge on the relevance of their evidence. I further say however that overseas witnesses do not have to travel to Fiji and their evidence can be taken by Skype. The witnesses have to provide relevant evidence and must attend Court if the Court orders them to.*
12. *THAT I refer to paragraphs 12 – 14 and deny the same and say that their contents are speculative.*
13. *THAT I refer to paragraphs 15 - 21 and say that the allegations herein are denied and must be proved by the Defendant at Trial.*
14. *THAT I say that Defendant's application for Security for Costs should be dismissed with costs, as being without merits.*

(E) **THE LAW**

- (1) Against this factual background, it is necessary to turn to the applicable law and the Judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the Defendant now seeks.
- (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 of the High Court Rules, 1988.

Order 23, Rule 1 of the High Court Rules provides as follows:

SECURITY FOR COSTS

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

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) *that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the Defendant if ordered to do so, or*
- (c) *subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or*
- (d) *that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,*

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.

(2) *The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the miss-statement thereof was made innocently and without intention to deceive.*

(3) *The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.*

The use of the words **“having regard to all the circumstances 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 is 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.”

The **White Book (1999)** further discussed the development of the law till 1999, which is applicable to Fiji. At page 431 (23/3/5) of the White Book;

“The ordinary rule of practice is that no order for security for costs will be made if there is a co-plaintiff resident within the jurisdiction (Winthorp v Royal Exchange Assurance Co. (1755) 1 Dick 282; D’Hormusgee V Gray (1882) 10

Q.B.D. 13). *The ordinary rule, however, is subject to the general discretion of the Court; it is not an unvarying rule. Its application is appropriate where the foreign and English co-plaintiffs rely on the same cause of action, where each of the Plaintiffs is bound to be held liable for all of such costs as may be ordered to be paid by any of the Plaintiffs to the Defendants at the conclusion of the trial, and where one or more of the Plaintiffs has funds within the jurisdiction to meet such liability.*"

In **Huang Tzung-Hao v A Team Corporation Ltd [2003] FJHC 288; HBC 0346r. 1988s** Justice Pathik stated as follows on the issue of security for costs application and Order 23 generally;

"The defendants are entitled to make the application. The onus is on them to prove that the Plaintiff is "ordinarily resident" out of jurisdiction and this they have done. In fact there is no dispute on this aspect.

The power to make an order for security costs is entirely discretionary (vide Aeronave S.P.A. v. Westland Charters Ltd [1971] 1 W.L.R. 1445). It is stated in The Supreme Court Practice 1988 Vol 1 Or. 23/1-3/3:

"On the other hand, as a matter of discretion, it is the usual ordinary or general rule of practice of the Court to require the foreign plaintiff to give security for costs, because it is ordinarily just to do so, and this is so, even though by the contract between the parties, the foreign plaintiff is required to bring the action in England (see Aeronave 1445, supra)."

The purpose of the discretion to order for costs against a foreign plaintiff was described in **Corfu Navigation Co. And Bain Clarkson Ltd v. Mobil Shipping Co. Ltd And Zaire S.E.P And Petroca S.A [1991] 2 Lloyd's Rep. 52 (p.54 Lord Donaldson MR) –**

"The basic principle underlying R.S.C. 023, r.1 (1) (a) is that it is prima facie unjust that a foreign plaintiff, who by virtue of his foreign residence is more or less immune to the consequences of an order for costs against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order can be executed."

At p.55, **Lord Donladson MR** further said –

In the context of the present appeal it has to be remembered that the purpose of O.23, r.1 is not make it difficult for foreign plaintiffs to sue, but to protect defendants.”

Consistently with this, Para 23/3/4 of the **White Book of 1999** states that why security for costs is not ordered as a matter of course –

“On the other hand, as a matter of discretion, it is the usual ordinary or general rule of practice of the Court to require the foreign plaintiff to give security for costs, because it is ordinarily just to do, and this is so even though by the contract between the parties, the foreign plaintiff is required to bring the action in England (Aeronave S.P.A. v Westland Charters Ltd) [1971] 1 WLR 1445 [1971] 3 All ER 531, CA).”

The rationale in award of security for costs was also described in **Sharma v Registrar of Titles** [2007] FJHC 118, HBC 351 of 2001 (13 July 2007), where Master Udit elaborated further –

“[3] The aforementioned rule, vests the court with an unfettered discretion to order security for costs. All this rule entails to protect is the risks to which an applicant may be exposed for recovering of costs in a foreign jurisdiction. The quantum of costs comparatively in Fiji is not relatively high although fairly substantive within the jurisdiction which is worth recovering. Execution of costs abroad where the litigation costs are much higher will render the exercise as wholly uneconomical. Be that as it may, ultimately the issue is not that the respondent will not have the assets or money to pay the costs or that the law of the foreign party’s country not recognizing an order of our court, and/or enforcement of costs order even be it under any legislation similar to our Reciprocal Enforcement of Judgments Act. (Cap 39), but it is also the extra steps which will be needed to enforce any such judgment outside the jurisdiction. Indeed, it will not be an irrefutable presumption to infer that an extra burden in terms of costs and delay, compared with the equivalent steps that could be taken in Fiji, will be an inevitable corollary. The obvious expenditure which comes to my mind is the engagement of an attorney and the conundrum of registering an order in the foreign jurisdiction before it can be enforced.”

(F) **ANALYSIS**

- (1) Before passing to the substance of the Defendant's Summons seeking security for costs of the action, let me record that Counsel for the Plaintiff and the Defendant in their written submissions have done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable.

Whilst most grateful for the benefit of oral submissions and research of Counsel, I interpose to mention that I have given my mind to the oral submissions made by Counsel as well as to the written submissions and the judicial authorities referred to therein.

- (2) The Defendant's Summons seeking security for costs of the action proceeds on the following grounds;

- ❖ The Plaintiff is permanently a resident out of the jurisdiction of the Court
- ❖ The Plaintiff has no assets within the jurisdiction of the Court.

(3) **THE POWER TO ORDER SECURITY FOR COSTS**

At the cost of some repetition, I state that the provisions relating to security for costs are contained in Order 23, rule 1 of the High Court Rules, 1988.

Order 23, Rule 1 of the High Court Rules provides as follows:

SECURITY FOR COSTS

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

1. (I) *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) *that the plaintiff (not being a plaintiff who is suing in a representative capacity)*

is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the Defendant if ordered to do so, or

- (c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or*
- (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,*

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.

(2) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the miss-statement thereof was made innocently and without intention to deceive.

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

The use of the words “**having regard to all the circumstances 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.

The origin of the jurisdiction, so far as I can ascertain, seems to have been that the Court, for the protection of defendants resident within the jurisdiction, took upon itself to say that, if a foreigner chooses to come over here, and take advantage of the jurisdiction of the Court, it is within the discretion of the Court to order him to give security for payment of the costs of the party within the jurisdiction who is sued, in case the action should fail. (Per Farwell L.J. in *New Fenix Compagnie d'Assurances De Madrid v General Accident, Fire, and Life Assurance Corporation Limited*, 1911, 2 K.B. 619, at page 630.)

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)

(4) Dealing with the application before me, (Ms) Chand, in arguing for the Defendant, as I understood her, advanced two grounds, as to why the Plaintiff should be called upon to give security. They are;

- (a) *That the Plaintiff is an Australian citizen who travels between Fiji and Australia for business and for the purpose of the suit.*
- (b) *That the Plaintiff no longer resides in the residence stated in his suit, viz Level 1, Unit 1/9, Lot 9, Bila Street, Carrears Road, Votualevu, Nadi and is therefore outside the jurisdiction.*

The following paragraphs taken from the affidavit of Narainsammy Naidu, sworn on 27th November 2017 are pertinent;

- Para 4. The Plaintiff in this action lives abroad in Australia. He is an Australian citizen and has lived abroad for many years. He comes to Fiji on certain occasions either for business trips or to attend Court matters.*
- 5. The Plaintiff has deposed in his affidavit filed on the 17th day of August 2016, that his address is Level 1, Unit 1/9, Lot 9, Bila Street, Carreras Road, Votualevu, Nadi.*
- 6. The Plaintiff does not occupy the premises situated at Level 1, Unit 1/9, Lot 9, Bila Street, Carreras Road, Votualevu, Nadi anymore and I am not aware of any assets the Plaintiff has in Fiji nor am I aware as to where the Plaintiff company is operating from.*

(5) In response, Mr. Fa, Counsel for the Plaintiff put before me with force and ingenuity;

- (a) *That the Plaintiff is a citizen of Fiji who has dual citizenship.*
- (b) *That the Plaintiff resides in ‘Olasara, Sigatoka’ when he is in Fiji as that is where he operates a sawmill business.*

- (c) *That the Plaintiff's occupation of Level 1, Unit 1/9, Lot 9, Bila Street, Carrears road, Votualevu, Nadi was by way of lease agreement between the Plaintiff and the Defendant. Following the forceful removal of the Plaintiff by the Defendant and its agents, the Plaintiff no longer occupies his address mentioned above.*

The following paragraphs taken from the 'affidavit in reply' of the Plaintiff, sworn on 05th March 2018 are pertinent;

- Para 4. *THAT I refer to paragraph 4 of the Affidavit and deny the same. I say that I am a Fiji citizen. My passport number is 922828. Now shown to me and marked as annexure "A" is a copy of my Fiji Passport. I reside in Fiji and in Australia. I have business interest in Fiji and I also operate a sawmill from Olosara, Sigatoka.*
5. *THAT I refer to paragraph 5 and say that the registered address referred to is the address of my business when I was forcefully evicted by my landlord and others. This was my place of business for ginger processing for export to Australia. This is well known to the Defendant.*
6. *THAT I refer to paragraph 6 and say that I have a lease agreement with the Defendant to occupy the premises and I occupied the same until I was forcefully removed by the Defendant and their agents contrary to a Court Order granted by the Court in my favour on the 24th day of December, 2015.*

To counter this, the Defendant adduced no evidence. The Defendant filed no Affidavit in Answer.

In the context of the present case, I would prefer to adopt the robust approach of the Court of Appeal in "**Jay Prakash v Savita Chandra**" (Civil Appeal No: ABU 0037/1985 decided on 08-11-1985).

In the Court of Appeal Judgment in "**Jay Prakash v Savita Chandra**" (Civil Appeal No: ABU 0037/1985), it was held;

"The deposition as to the endorsement evoked no response from the appellant. Mr Ramrakha submitted that the appellant was not ordered to

file further affidavits. That indeed was so. The submission was advanced as if it were an absolution of the appellant from the making of a response. Of course, he did not have to respond. In our view, however, the course of events had taken and the consequences if he did not respond, rendered it a 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 that what the respondent has said to be true."

On the strength of the rule of law enunciated in the aforementioned judicial decision (as I understand those last words) it is enticing to accept the evidence of the Plaintiff *in toto*.

- (6) 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 the judgment for costs.

Under Order 23, rule 1(a), I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case.

In my opinion the whole practice as to ordering security for costs had its origin in discretion and the question whether such an order should be made is always a matter of discretion.

- (7) Dealing with the application before me, in exercising my discretion, I take into account the fact that on the face of the Writ of Summons the Plaintiff is not beyond sea.

The next matter, I take into account is that, on the evidence before me, the Plaintiff is a citizen of Fiji (exhibit –A). He is not a foreigner who chose to come over here and take advantage of the jurisdiction of the Court. I would add that he is not a foreigner who periodically visits this country for business purposes.

I unhesitatingly subscribe to the view that 'originally resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether short or long duration.

The Plaintiff has shown that he is a citizen of Fiji. Fiji is his native country. His residence is unquestionably in Fiji, i.e, 'Olosara, Sigatoka'. What is more, he carries on Sawmill business at 'Olosara, Sigatoka'. All this is sufficient. He is open to the process. On these facts, I have no course open to me but to dismiss the Defendant's Summons seeking security for costs of the action.

It is true that the Plaintiff holds a dual citizenship. Of course, he may have changed his sky but not his residence.

I feel compelled to add that in 'Redondo v Chaytor' 4.Q.B.D 453, the English Court of Appeal decided that a foreigner usually residing abroad, but temporarily residing in England for the purpose of enforcing his claim by action, cannot be called on to give security for costs.

- (8) What is more, the property referred to in paragraph four (04) of the 'Affidavit in Reply' of the Plaintiff affords real security to the Defendant. The Plaintiff has shown that he has substantial property in Fiji, (viz, the Sawmill business at Olosara, Sigatoka) not of a floating, but of a fixed and permanent nature, which would be available in the event of the Defendant being entitled to the costs of the action. I am satisfied that the Plaintiff has assets at Olosara, Sigatoka, which the Defendant can seize in execution to satisfy any judgment of this Court or any costs awarded against the Plaintiff if he should not succeed in the trial of this action.

Therefore, conditions for ordering security for costs of the action are not satisfied.

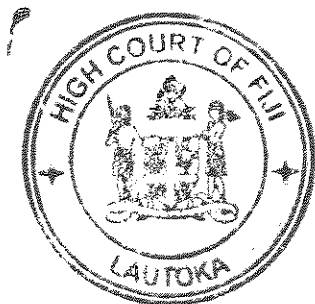
I dismiss the application for security for costs.

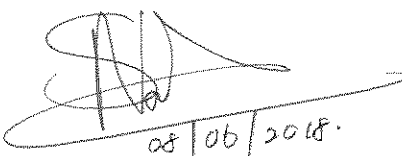
- (9) Finally turning to the second order sought in the Defendant's Summons, as pointed out by Counsel for the Plaintiff, the application is premature. It is a matter for discovery under Order 24 of the High Court Rules, 1988.

ORDERS

1. The Defendant's Summons for security for costs of the action is hereby dismissed.

2. The Defendant is ordered to pay costs of \$500.00 (summarily assessed) to the Plaintiff within 14 days hereof.




08/06/2018.
Jude Nanayakkara
Judge

At Lautoka

Friday, 08th June, 2018