IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Action No. HBC 28 of 2016

BETWEEN : **MEGAN BAILIFF** c/- Joseph Barr & Associates of 9820 Willow Creek Road, Suite 230, San Deigo, CA 92131, USA.

Plaintiff

A N D : **VILIMAINA TUIVUNA** c/- **AQUARIUS TOURS LIMITED** a limited liability company having its registered office at KPMG, Level 10, Suva Central, Renwick Road, Suva trading as **TAVARAU ISLAND RESORT**

First Defendant

A N D : **AQUARIUS TOURS LIMITED** a limited liability company having its registered office at KPMG, Level 10, Suva Central, Renwick Road, Suva trading as **TAVARAU ISLAND RESORT**

Second Defendant

Before : Master U.L. Mohamed Azhar

Counsels: Mr. Roopesh Singh for the Plaintiff
Mr. Jon Apted for the 1st & 2nd Defendants

Date of Ruling: 25th September 2018

RULING

Introduction

01. The saying that goes 'the winner (usually) takes all' usually applies to the litigations too, and this has resulted in the rule of indemnity cost being formulated that, the 'loser pays the winner's cost. Since, the cost is 'one panacea which heals every sore in litigation' as observed by Lord Justice Bowen in **Cropper v Smith** (1884) 26 Ch. D. 700 (CA) at page 710, the rules of the courts in all jurisdictions not only give the courts the jurisdiction to grant cost, but also give discretion to secure a cost that a party may incur in future, in any litigation pending in court. Both the High Court Rules (Or. 23 r. 1) and the Magistrate's Courts Rules (Order XXXIII Rule 4) provide such discretion to the respective courts in Fiji to order for security for cost. The summons before me is the one which was filed by the second defendant under the Order 23 rule 1 of the High Court Rules seeking to exercise the discretion of this court and to order the plaintiff to provide security for cost. The second defendant sought the following orders in the said summons:

1. *The Plaintiff do within 14 days give security for the Defendants' costs to the satisfaction of one of the Masters of the High Court of Fiji on the grounds that –*

    (a) The Plaintiff is ordinarily resident out of the jurisdiction; and

    (b) As otherwise appear in the affidavits of Viliame Tuivuna and Merissa Hung Fong Yam filed herewith;

2. *In the meantime, all proceedings herein other than the proceedings relating to the giving of such security be stayed;*

3. *The costs of this application be costs in the cause or the Plaintiff's costs in any event.*

Law

02. The Order 23 of the High Court Rules, which contains 4 rules therein, provides for the discretion of the court to order to provide security for cost and deals with the other connected matters. Whilst the rule 1 deals with the discretion of the court, the other rules 2 and 3 deal with the manner in which the court may order security for cost and supplementary power of the court. The rule 4 prohibits any such order being made against the state. The rule 1 reads as follows:

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

1.-(1) Where, on the application of a defendant to an action or other proceedings 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 normal 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 mis-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.

03. A cursory reading of the above rule clearly indicates that, the power given to the court is a real discretion, which is simply understood from the word *'may'*, used in the said rule. Lord Denning M.R. when interpreting the same word used in the Companies Act 1948 held in **<u>Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd</u>** [1973] 2 All ER 273 at 285 that;

> *Turning now to the words of the statute, the important word is "may". That gives a judge a discretion whether to order security or not. There is no burden one way or other. It is a discretion to be exercised in all the circumstances of the case.*

04. The next phrase that strikes in this rule is '*if having regard to all the circumstances of the case, the Court thinks it just to do so*', which requires the court to consider all the circumstances of the case before it, in exercising the said discretion and to come to a conclusion that '*it is just to do so*', before making any order and 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. Sir Nicolas Browne Wilkinson V.C in **<u>Porzelack K G v. Porzelack (UK) Ltd</u>**, (1987) 1 All ER 1074 at page 1077 as follows:

> *"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".*

05. It follows that, it is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. **<u>The Supreme Court Practice 1999</u>** (White Book), in Volume 1 at pages 429 and 430, and in paragraph 23/3/3, states clearly and explains the nature of the discretion given to the court. it reads that;

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 to be given. Rule 1 (1) provides that the Court may 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 the 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, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. In particular, the former O.65, r.6s, 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 costs was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).

In exercising its discretion under r.1 (1) the Court will have regard to all the circumstances of the case. Security cannot now be ordered as of course from a foreign plaintiff but only if the Court thinks it just to order such security in the circumstances of the case.

06. When considering all the circumstances of the case, the courts in Fiji should consider the plaintiff's country of origin too. The reason for that consideration may be explained in the following manner. Many jurisdictions recognize and enforce the foreign judgments in their jurisdictions, as if those judgments had, originally, been given by their local courts. This recognition may be based on bilateral or multilateral treaties or understanding on mutual assistance. Fiji is not an exception to this. It has two pieces of legislations, which provide for a statutory scheme for recognition and enforcement of judgments of foreign countries, with which reciprocal arrangements have been made. The said legislations are ***Reciprocal Enforcement of judgments Act 1922 (Cap 39)*** and ***Foreign Judgments (Reciprocal Enforcement) Act 1935 (Cap 40).*** The first one was brought to facilitate the reciprocal enforcement of judgments and awards in United Kingdom and Fiji with the power of the president to extend it to the judgments of any other country or territory of the Commonwealth outside the United Kingdom. The second one was enacted with the purpose of making provisions for the enforcement, in Fiji, of judgments given in foreign countries which accord reciprocal treatment to judgments given in Fiji. Under this latter Act, the president has power to extend its application to the judgments given in other countries and some other commonwealth countries which are not included in the former Act (Cap 39).

07. If the plaintiff is neither from commonwealth countries, nor from the countries which have accorded reciprocal treatment to judgments given in Fiji, the defendant will not be able to enforce any order against the plaintiff. The fact, that any plaintiff is ordinarily resident of any country other than those two categories, will usually operate as a powerful factor in exercising the Court's discretion in the defendant's favour. If an order for

security was made in any case and the plaintiff ultimately succeeds in his or her claim, no harm will be caused, because he or she can take back the security at the close of the case, but on the other hand, if the plaintiff loses the case and on top of that, is ordered to pay cost to the defendant, the latter will not be able to recover the same. Thus, the country of origin too may play a vital role in exercising the discretion of the court either way.

08. Though the rule gives an absolute discretion to the court to make an order in relation to the security for cost in any proceedings before it, there is no reference to the time limit within which such an application must be made by any party. It appears from the wording of the rules that, the drafters of the rules in their wisdom left it to the court to decide when considering all the circumstances of a case and therefore would have thought that, giving any timetable for such an application would limit the unfettered discretion vested in the court. In both **Martano v Mann** (1880) 14 Ch.D. 419, CA and **Lydney, etc. Iron Ore CO. v. Bird** (1883) 23 Ch.D. 358), it was held that, the old rule of the Court of Chancery that an application for security for cost must be made promptly had been abrogated and in addition, the court held in **Re Smith; Bain v Bain** (1896) 75 L.T. 46, CA, that an order for security may be made at any stage of the proceedings.

09. The absence of time limit in the rule had led the courts to consider the application for security for cost even after the judgment was delivered, if some further proceedings were to be dealt with, as directed by the judgment. In **Brown v. Haig** [1905] 2 Ch. 379, it was held that, where by the judgement in an action, some further proceedings are directed to be taken before the judge in chambers or an official referee, the Court has jurisdiction in a proper case to entertain an application for security for costs made after judgment, but the application must be made by summons and not by notice under the summons for directions, in as much as the summons for directions is limited to interlocutory applications before judgment. In that case, Kekewich J stated at pages 383 and 384 that;

> *Upon this part of the case I am able to accede to the argument that the Court ought not to cut down the operation of a useful provision. Rule 6 of Order LXV., which deals with security for costs, speaks of "Any cause or matter." Why should I say "any cause or matter" does not mean any proceeding directed by the judgment to be taken before an official referee or before the judge in chambers? In my opinion the words are wide enough to include that; and one must remember that an application for security for costs does not preclude a second application if the costs mount up or if any further proceedings are contemplated. It is for the Court to consider these matters from time to time. Why if after judgment inquiries are directed those proceedings should not be covered I cannot see. It seems to me that, assuming that the plaintiff is resident out of the jurisdiction and that the security already ordered is insufficient to meet the costs of the proceedings before the official referee, a good case can always be made for an order for security. If these applications are made by summons they will be in proper form and must be attended to.*

10. **The Supreme Court Practice 1999** (White Book), in Volume 1 at pages 440, and in paragraph 23/3/38 summarizes decision in **Jenred Properties Ltd v. Ente Nazionale Italiano per il Tuismo** (1985) Financial Times, October 29, CA and states that, the delay in making an application for security for costs, however, may be relevant to the exercise of the Court's discretion to order security. Although in most cases delay is not a decisive factor, it may be treated as important, especially where it has led, or may have led the plaintiff to act, his detriment, or may cause him hardship in the future conduct of the action. In the meantime, there are some authorities that require an application for cost to be made promptly. The reason for this is to reduce the cost that may be incurred by the parties. The Supreme Court of Western Australia explained the impact of the timing of an application for security for costs upon the court's discretion in **Ravi Nominees Pty Ltd v Phillips Fox** (1992) 10 ACLC 1314 at page 1315 as follows;

> *An application for security for costs should be brought promptly and prosecuted promptly so that if it is going to delay the plaintiffs' claim, while it is finding the security, or if it is going to frustrate the plaintiffs' 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 plaintiffs' claim early before the defendant has incurred too may costs.*

11. Since the court has an unfettered discretion to order for cost, considering all the circumstances of a particular case, a mere delay in making such an application cannot be the reason for refusing it, if good reasons shown for delay, in the absence of any prejudice that may be caused to the plaintiff or the defendant as case may be. The level of prejudice that may be caused to the plaintiff by the delay lies at the core of the court's discretion. Even though delay is a significant factor in exercising the discretion by the court, there is no set rule which deprives a party from applying for security for cost and the court from exercising its unfettered discretion. On the other hand it should be acknowledged that, the security for costs is not 'a card that a defendant can keep up its sleeve and play at its convenience'. The belated application for security can only have a prejudicial affect if there is a risk that an order will stifle the action. The main focus of prejudice for this purpose was explained in **Ross Ambrose Group Pty Ltd v Renkon Pty Ltd** [2007] TASSC 75 as follows:

> *Leaving a party with the impression that security will not be sought and so depriving a party of an opportunity to consider whether or not to press the litigation in the face of a prompt application for security can only have a prejudicial affect if there is a risk that an order will stifle the action and hence cause costs incurred to have been wasted. No prejudice can possibly exist where there is no such risk. Where the persons who will benefit from the litigation can and will, in order to pursue the benefit, cover the opponent's costs there can be no injustice in having them do so even where the application is belated. Where there is no possibility of an order bringing an action to an end, no adverse consequence will have*

resulted from the loss of an earlier occasion on which to consider the future of the action in the context of security being required. In such a case there is no prejudice which needs to be addressed either by declining to order security or by limiting the order to future costs.

12. It follows from the above authorities that, there is no set rule which either deprives a party to make a belated application for cost, or limits the exercise of the discretion by the court. However, the court should consider the prejudice that might be caused to other party. Accordingly, Leaving a party with the impression that security will not be sought and so depriving a party of an opportunity to consider whether or not to press the litigation in the face of a prompt application for security can only have a prejudicial affect if there is a risk that an order will stifle the action and hence cause costs incurred to have been wasted. No prejudice can possibly exist where there is no such risk. Where the persons who will benefit from the litigation can and will, in order to pursue the benefit, cover the opponent's costs there can be no injustice in having them do so even where the application is belated. Where there is no possibility of an order bringing an action to an end, no adverse consequence will have resulted from the loss of an earlier occasion on which to consider the future of the action in the context of security being required. In such a case there is no prejudice which needs to be addressed either by declining to order security or by limiting the order to future costs (see: **Ross Ambrose Group Pty Ltd v Renkon Pty Ltd** (supra) paragraph 26).

13. In "**M.V. York Motors v Edwards**" **(1982) (1) All E.R. 1024**, Lord Diplock approved the remarks of "**Brandon**" L.J. in the Court of Appeal at page 1028;

> *"The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need."*

14. The Supreme Court of New South Wales in **Litmus Australia Pty Ltd (in liq) v Paul Brian Canty and Ors** [2007] NSWSC 670 (8 June 2007) further expanded the test of prejudice and held at paragraph 26 that,

> *To show prejudice it generally must appear that not only will the plaintiff be unable to provide the required security from its own resources, so that costs incurred during the period of delay would have been wasted, but also that those standing behind the plaintiff who could be expected to benefit from the litigation are unable to provide the required security (**Rhema Ventures Pty Ltd v Stenders** [1993] 2 Qd R 326 at 333; **Rickard Constructions Pty Ltd v Allianz Australia Insurance** [2002] NSWSC 1162 at [17] – [18].*

15. When considering the prejudice that may be caused to the plaintiff by ordering for security for cost, the court must have careful consideration and much thought on the possible frustration of plaintiff's case. The fact that the ordering of security will frustrate

the Plaintiff's right to litigate its claim because of its financial condition does not automatically lead to the refusal of an Order. Nonetheless, it will usually operate as a powerful factor in exercising the Court's discretion in the Plaintiff's favour (*per Clarke J in* **Yandil Holdings Pty Ltd v Insurance Co of North America (1985) 3 ACLC 542.** However, the court should be alert and sensitive to the risk that may lead to denial right to access to justice guaranteed by International Human Rights instrument and the Fiji Constitution as well (Section 15 (2)). This consideration was emphasized by Simon Brown LJ in **Olakunle Olatawura v Abiloye**[2002] 4 All ER 903 (CA) at page 910 as follows:

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

16. The basic principle underlying the discretion 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 cost against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order for cost can be executed (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd[1991] 2 Lloyd's Rep. 52** *per Lord Donaldson MR* at page 54). Therefore, as a matter of discretion it is a usual ordinary or general rule of practice of the court to require the foreign plaintiffs to give security for cost as it is just to do so (**Aeronave SPA v Westland Charters Ltd** [1971] 1 WLR 1445; [1971] 3 All ER 531, CA).

17. It has been emphasized in several authorities that, the purpose of the discretion given to the court under Order 23 is not to make it difficult for foreign plaintiffs to sue, but to protect the defendants (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd[1991] 2 Lloyd's Rep. 52** *per Lord Donaldson MR* at page 55). This purpose was further expounded by Sir Nicolas Browne Wilkinson V.C in **Porzelack K G v. Porzelack (UK) Ltd**, (1987) 1 All ER 1074 at page 1076 as follows:

> *"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 plaintiff's residents within the jurisdiction".*

18. This purpose of protecting the defendant is also reflected in the general principle that has been stated on many occasions that, the order for security is not made against the foreign

plaintiffs who have properties within the jurisdiction. Thesiger L.J. in **Redondo v. Chaytor** (1879) 40 L.T. 797 said at page.799:

> *"... if a plaintiff who is permanently resident out of the jurisdiction, has property within the jurisdiction which can be made subject to the process of the court, in such a case, the reason of the rule being withdrawn, the rule gives way, and the court will not order security to be given."*

19. It is prima facie rule that, the foreign plaintiffs, who bring the actions, ought to give security for cost. This rule is subject to certain exceptions, one being that, if there is property within the jurisdiction, which can reasonably regarded as available to meet the defendant's right to have cost paid, then there should be no order for security (*per Greer L.J.* in **Kevokian v. Burney** (No.2) (1937) 4 All E.R. 468 at 469C).

20. However, having mere property or an asset within the jurisdiction will not relieve the foreign plaintiffs from being bound to give security for cost. The property or the asset must be of fixed and permanent nature and be quite sufficient to satisfy the costs if the action should be decided against the plaintiffs. This view was expressed by Lord Justice Bowen in **Ebbrard v. Gassier** (1884) 28 Ch.D. 232 at 235 as follows:

> *The Plaintiffs being abroad were prima facie bound to give security for costs, and if they desired to escape from doing so they were bound to shew that they had substantial property in this country, not of a floating, but of a fixed and permanent nature, which would be available in the event of the Defendants being entitled to the costs of the action……*
>
> *It is clear that the property referred to in this affidavit affords no real security to the Defendants. It is not property of any fixed amount; what is left of it may be quite insufficient to satisfy the costs if the action should be decided against the Plaintiffs. Therefore, if this appeal were to be decided on the affidavits which were before the Vice-Chancellor, we should probably have ordered the Plaintiffs to give security for costs on the ground that the Plaintiffs to give security for costs on the ground that the Plaintiff's affidavit was ambiguous and insufficient.*

21. There are some other exceptions too, which can be considered by the courts when making its decision of either ordering or refusing the security. Some of those exceptional circumstances are briefed in **The Supreme Court Practice 1999** (White Book), in Volume 1 at page 430, and in paragraph 23/3/3. The said passage reads:

> *"In the case which follow, investigation of the merits was justified only because the Plaintiffs demonstrated a very high probability of success. If there is a strong prima facie presumption that the defendant will fail in his defence to the action, the Court may refuse him any security for costs (see per Collins J. in Crozat v. Brogden [1894] 2 Q. B. 30 at 33 (the judgment of the CA in that case was in substance reversed by the former O. 65, r.6B,*

> *made in 1920, which in substance is repeated in r. 1 (1). See also Trident International Freight Services Ltd v. Manchester Ship Canal Co. [1990] B. C. L. C. 263, CA. It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim. Again, if a defendant admits so much of the claim as would be equal to the amount for which security would have been ordered, the Court may refuse him security, for he can secure himself by paying the admitted amount into Court (Hogan v. Hogan (No 2) [1924] 2 Ir. R 14). Further, where defendant admits his liability, plaintiff will not be ordered to give security (De St. Martin v. Davis & Co. [1884] W. N. 86) and this may remain the position despite a counterclaim (Winterfield v. Bradnum (1878) 3 Q. B. D. 324);....."* (Emphasis added)

22. The court may consider the plaintiff succeeding in a case as a major matter in deciding the security for cost. However, this does not mean that every application for security for costs requires a detailed examination of the merits of the case. The attempt to go into the merits of the case should not be encouraged, unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure. This was clearly demonstrated by Sir Nicolas Browne Wilkinson V.C in **Porzelack K G v. Porzelack (UK) Ltd**, (supra) at page 1077 as follows:

> *The matters urged before me have spread over a fairly wide field. First there have been attempts to go into the likelihood of the plaintiff wining the case or the defendant winning the case, presumably following the note in The Supreme Court Practice 1985 Vol 1, para 23/1 – 3/2, which says: ..."A major matter for consideration is the likelihood of the plaintiff succeeding ..." This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.*
>
> *Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.* (Emphasis added).

23. Furthermore, in an application for security the Court must take account of the plaintiff's prospects of success, admissions by the defendant, open offers and payments into Court

(*per Lord Denning MR* in **Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** [1973] 2 All ER 273 at page 286); but a defendant should not be adversely affected in seeking security merely because he has attempted to reach a settlement. Evidence of negotiations conducted "without prejudice" should not be admitted without his consent (**Simaan Contracting Co. v. Pilkingoton Glass Ltd** [1987] 1 W.L.R. 516; [1987] 1 All E.R. 345). However, in a minor's case, security for costs against a party, who is a parent, would only be ordered in the most exceptional circumstances. Pennycuick J in **Re B. (Infants)** [1965] 2 All E.R. 651 held at page 652 that:

> *Quite apart from that objection to the present motion, which is one of jurisdiction, it would, I think, be extremely unusual to order security for costs in an infant case against a party who was one of the parents of the infant. The general principle on which the court acts in infant cases is, I think, that either parent of the infant, is entitled to put before the court his or her view on the point of what is for the welfare of the infant, and only in the most exceptional circumstances would the court prevent a parent from putting his views before the court by means of an order for security for costs. Counsel has mentioned certain special circumstances in this case but it seems to me that, even assuming that I have jurisdiction to make an order at all – and I do not think I have got jurisdiction to make an order – still, in the exercise of my discretion I ought not to make the order. I must therefore dismiss the motion.*

24. The examination of the rules of the court and authorities cited above reveal that, the following principles emerge in this regard. However, given the discretionary power expected to be exercised by courts with the judicial mind considering all the circumstances of a particular case, these principles should not be considered to be exhaustive;

    a. Granting security for cost is a real discretion and the court should have regard to all the circumstances of the case and grant security only if it thinks it just to do so (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** (supra); **Porzelack K G v. Porzelack (UK) Ltd** (supra) .

    b. It is no longer an inflexible or a rigid rule that plaintiff resident abroad should provide security for costs (**The Supreme Court Practice 1999**).

    c. Application for security may be made at any stage (**Re Smith** (1896) 75 L.T. 46, CA; and see **Arkwright v. Newbold** [1880] W.N. 59; **Martano v Mann** (1880) 14 Ch.D. 419, CA; **Lydney, etc. Iron Ore CO. v. Bird** (1883) 23 Ch.D. 358); **Brown v. Haig** [1905] 2 Ch. 379. Preferably, the application for security should be made promptly (**Ravi Nominees Pty Ltd v Phillips Fox** (supra).

    d. The delay in making application may be relevant to the exercise of discretion; however, it is not the decisive factor. The prejudice that may be caused to the plaintiff due to delay will influence the court in exercising its discretion (**Jenred Properties**

Ltd v. Ente Nazionale Italiano per il Tuismo (supra); **Ross Ambrose Group Pty Ltd v Renkon Pty Ltd** (supra); **Litmus Australia Pty Ltd (in liq) v Paul Brian Canty and Ors** (supra)).

e. The purpose of granting security for cost is to protect the defendant and not to put the plaintiff in difficult. It should not be used oppressively so as to try and stifle a genuine claim (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd** (supra); **Porzelack K G v. Porzelack (UK) Ltd** (supra). Denial of the right to access to justice too, should be considered (**Olakunle Olatawura v Abiloye** (supra)).

f. It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim (**Hogan v. Hogan** (No 2) [1924] 2 Ir. R 14). Likewise, order for security is not made against the foreign plaintiffs who have properties within the jurisdiction (**Redondo v. Chaytor** (supra); **Ebbrard v. Gassier** (supra)).

g. The court may refuse the security for cost on *inter alia* the following ground (see: **The Supreme Court Practice 1999** Vol 1 page 430, and paragraph 23/3/3;

1. If the defendant admits the liability.
2. If the claim of the plaintiff is bona fide and not sham.
3. If the plaintiffs demonstrates a very high probability of success. If there is a strong prima facie presumption that the defendant will fail in his defence.
4. If the defendant has no defence.

h. The prospect of success, admission by the defendants, payment to the court, open offer must be taken into account when exercising the discretion. However, the attempt to reach settlement and "without prejudice" negotiations should not be considered (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** (supra); **Simaan Contracting Co. v. Pilkingoton Glass Ltd** (supra).

i. In case of a minor the security for cost will be awarded against the parent only in most exceptional cases (**Re B. (Infants)**).

Cause

25. The plaintiff sued the defendants by the writ issued by this registry on 17.02.2016, for damages for personal injuries allegedly caused by the negligence of the first defendant, and in turn against the second defendant on the principle of vicarious liability. At all material times, the plaintiff was a paid guest at Tavarua Island Resort operated by the second defendant and the first defendant was the employee of second defendant, and was in control and sailing a 'panga boat'. On or about 03.11.2013, the plaintiff was transported in the said 'panga boat' with other guests to a reef near the island. The plaintiff alleges that, while she was snorkeling, the first defendant sailed the said boat over her. As a result she sustained severe injuries as pleaded in her statement of calim. The plaintiff therefore sought the following reliefs;

1. The sum of USD 635,955.79 (Six Hundred Thirty Five Thousand Nine Hundred Fifty Five Dollars And Seventy Nine Cents) for past medical expenses.

2. Damages for Future medical expenses in the sum of $USD 623,109.18 (Six Hundred Twenty Three Thousand One Hundred Nine Dollars And Eighteen Cents).

3. General damages for future medical costs, pain and suffering (past and future), loss of amenities of life and scarring.

4. Costs on client solicitor indemnity basis.

26. The second defendant filed the statement of defence and admitted that, plaintiff was the paid guest at the resort belonged to the second defendant. The second defendant further admitted that, the plaintiff was involved in a collision with the boat operated by the first defendant, but denied the liability for negligence. As the alternative defence, the second defendant pleaded that, the Plaintiff booked her stay at the Resort through Surf Diva Inc. ("Surf Diva Inc.") which coordinated the booking through Tavarua Island Tours Incorporated ("T1T1); the TITI sent the booking information, which includes the Form titled as "Voluntary Agreement to Release Rights and Waive Liability" ("Release and Waiver"), to Surf Diva Inc; the each and every guest at the resort should sign the said "Release and Waiver" before being allowed to participate in any activity at the resort; the plaintiff too signed the same on her arrival on 01.11.2013. Therefore, the second defendant claimed "Release and Waiver of Liability".

27. As the second alternative defence, the second defendant claimed that, the plaintiff, knowing the nature and the nature and the extent of the risk, voluntarily assumed the risk by participating in those activities. The second defendant further pleaded that it was the plaintiff who was negligent. In any event, the second defendant denied that the plaintiff sustained injuries as pleaded by her in her statement of claim.

28. The first defendant, though he lately filed his statement of defence after substituted service of writ on him, virtually took up the same defence as of the second defendant. Thereafter, the second defendant filed the amended statement of defence and the plaintiff too, replied the same. Then was the application by the defendants for striking out plaintiff's action under Order 18 rule 18. However, the previous Master by his ruling dated 27.01.2017 dismissed the said application with the cost to the plaintiff. This was followed by the instant summons for security for cost on the ground that, the plaintiff is ordinarily resident out of jurisdiction. Both parties then filed their respective affidavits.

Analysis

29. At the hearing of the summons, both counsels made the oral submission and filed their written submissions too, together with the copies of useful judgments, both local and foreign. The facts that, the plaintiff is ordinarily resident out of jurisdiction and she does

not have any property within the jurisdiction were not denied. It is prima facie rule that, the foreign plaintiffs who bring the actions ought to give security for cost. This rule is subject to certain exceptions, one being that, if there is property within the jurisdiction, which can reasonably regarded as available to meet the defendant's right to have cost paid, then there should be no order for security (*per Greer L.J.* in **Kevokian v. Burney** (No.2) (1937) 4 All E.R. 468 at 469C). Thus, the plaintiff is not falling under the main exception to the rule.

30. The counsel for the plaintiff opposing the application for security submitted that, it is the personal injury claim by the plaintiff against the defendant and it is unheard of plaintiff to be ordered to provide security in such a case. In support his argument, he cited the judgment of Court of Appeal of New South Wales in **Daniel Rory de Groot (an infant by its tutor Ariena Van Oosten) v The Nominal Defendant** [2004] NSWCA 88 (26 March 2004) and submitted as follows;

> In **Daniel Rory De Groot (an infant by his tutor Arlean Van Oosten v The Nominal Defendant [2004] NSWCA 88** New South Wales Court of Appeal on the issue of security for costs on appeal commented, ***"...in my experience, in personal injury cases and it is practically unheard of for plaintiff to be ordered to provide security in such a case."*** (Emphasis is original).

31. Few necessary points should be made in relation the argument of the counsel and the above case cited by him. The first and foremost thing is that, this is not a case where a foreign plaintiff or a question of security for cost was involved on the ground of residence of the plaintiff out of the jurisdiction, but it was an appeal and the security for cost of appeal was the issue among others. The paragraph 29 of the said judgment, which is self-explanatory, is as follows;

> *29. SCR Pt 51 r 16(1) provides that the Court can order security for the costs of an appeal in special circumstances. The relvant case law was carefully reviewed by Hodgson JA in* ***Porter v Gordian Runoff Ltd & Anor*** *[2004] NSWCA 69 (16 March 2004, unreported). His Honour ordered security for costs of an appeal in an insurance case which had been tried in the Commercial List of the Supreme Court. He said [para 24] "in practice orders are not normally made simply because an appellant is impecunious, because to do so would frustrate may genuine appeals". See also para 44. The practice referred to has certainly applied, in my experience, in personal injury cases and it is practically unheard of for a plaintiff appellant to be ordered to provide security in such a case. I can only recall one instance where security was ordered and that was where a tutor with assets who had appealed an unfavourable decision was replaced almost immediately by a tutor without assets.*

32. Secondly, the basic principle underlying the discretion under Order 23 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 cost against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order for cost can be executed (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd[1991] 2 Lloyd's Rep. 52** *per Lord Donaldson MR* at page 54). Therefore, as a matter of discretion it is a usual ordinary or general rule of practice of the court to require the foreign plaintiffs to give security for cost as it is just to do so (**Aeronave SPA v Westland Charters Ltd** [1971] 1 WLR 1445; [1971] 3 All ER 531, CA).

33. Thirdly, as discussed above, even in a minor's case, security for costs against a party who is a parent would be ordered in the most exceptional circumstances (*per Pennycuick J* in **Re B. (Infants)** [1965] 2 All E.R. 651). Thus, the minor's case too was not excluded from the discretion of the court. Fourthly the court's discretion under the Order 23, rule 1 to order a plaintiff to provide such security for the defendant's costs of the action or other proceeding in the High Court as the court thinks just is, on the plain language of the rule, unrestricted, and there is no justification for excluding the personal injury matters from the discretionary purview of the court.

34. Finally and most importantly, the security for cost was allowed in a personal injury matter, even when the plaintiff was assisted by legal aid. That was in the case of **Jackson v. John Dickinson & Co. (Bolton), Ltd** reported in [1952] 1 All ER 104. In that case, the plaintiff, who was ordinarily resident in Dublin, claimed damages as an assisted person for personal injuries sustained by him while he was in the employment of the defendants. The District Registrar ordered the plaintiff to lodge in court a sum of £ 25 by way of security for cost. On appeal against that order, Mr Commissioner Goodman Roberts, K.C., reversed the order for cost. It was then appealed to the Court of Appeal. The Court of Appeal allowed the appeal and confirmed amount of security for cost ordered by the District Registrar. Somervell , L.J (with whom Jenkins, L.J., agreeing) delivering the judgment of the court said at page 106 as follows;

> *An application for security for costs against a plaintiff out of the jurisdiction is based, not on impecuniosity, but on inability to reach the plaintiff or his property and make effective an order for costs against him if he loses his action. In considering the present legislation under which some order might be made against the plaintiff in these proceedings, the inability to reach him or his property, which is the basis of the rule, remains. The fact that he is an assisted person may well be relied on as some indications that a full order for costs will probably not be made against him, but we have had the advantage of having read to us the certificate under which he became an assisted person, and having regard to the figures therein, it is plain that it may well be that some order for costs may be made against him should he lose the action. In Conway's case, COHEN, L.J., was careful to make it clear that he was not seeking to lay down a general rule covering all classes of case and all circumstances. I think, for the reasons I have indicated, that this case falls into a different class for two reasons: - (i) that security is (subject to exceptions which are not relevant) ordered as a matter of course against a*

plaintiff out of the jurisdiction, and (ii) that the reason for ordering security when a plaintiff is out of the jurisdiction is that, unless he shows he has property within the jurisdiction, an order for costs may be ineffective. Therefore, I have come to the conclusion that the present case is not covered by any rule laid down in Conway's case, and that it is right to make an order. The question then arises as to quantum. We were told that the learned registrar, in fixing the sum of £25, had regard to the provisions of the Legal Aid and Advice Act, 1949, and I do not think we should interfere with the sum which he fixed. For these reasons, in my view, this appeal should be allowed.

35. In fact, the English Court of Appeal, in that case, could have said that, the plaintiff was assisted by legal aid; he was the employee of the defendant; and on top, this was personal injury claim, therefore it could have dismissed the application for security. However, it did not do so. Conversely, the court was strict to rules and the underlying principles of ordering for security and emphasized that, the basis of the rule is the inability to reach the plaintiff or his or her property when there is an order for cost to be executed against him or her. The financial inability to conduct a litigation is not an excuse, because the general rule is that, poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law and in equity as held by Bowen L.J., in **Cowell v Taylor** [1886] 31 Ch. D 34 at page 38. It follows from the above analysis that, the personal injury cases are not exceptions to the unrestricted and unfettered discretion of the court. The court cannot classify the cases according to the nature of claim, and exercise the discretion. As a result, I not only distinguish the case cited by the counsel for the plaintiff, but also decline to accept his argument.

36. The counsel for the plaintiff further submitted that, the defendants filed the summons for security for cost only after the attempt for striking out plaintiff action under Order 18 rule 18 of the High Court Rules. In fact, the application filed by the defendants for striking out the plaintiff' action proved abortive as the previous Master refused the said application by his ruling dated 27.01.2017. However, this application was filed on 17.08.2016 after six months of issue of writ. There is no time limit within which the application for security for cost should be filed. It may be made at any stage of the proceedings (**Re Smith** (1896) 75 L.T. 46, CA; **Arkwright v. Newbold** [1880] W.N. 59; **Martano v Mann** (1880) 14 Ch.D. 419, CA; **Lydney, etc. Iron Ore CO. v. Bird** (1883) 23 Ch.D. 358). If there is a belated application, the court should consider whether it would prejudice the plaintiff and stifle his or her action. The action is still on the pre-trail steps and refusal by the court to strike out the action under Order 18 rule 18 is not a bar for the defendant to bring the summons for security for cost. The plaintiff in her statement of claim stated that, past medical cost is sum of USD 635,955.79. However, she never stated that, she exhausted all the funds in preparing for this action and meeting her past medical expenses as she pleaded in her statement of claim.

37. **G.E. Dal Pont**, in "**Law of Costs**", Third Edition, LexisNexis Butterworth, Australia 2013, explains the delay and the potential prejudice to the defendant in paragraph 29.124 at page 1036, where the writer has said that;

"For a defendant to delay applying for security, and permit the plaintiff to incur substantial costs in preparing for the proceedings, has the potential to unduly prejudice and oppress the plaintiff if there is a risk that the security order will stifle the action. The main concern is that the plaintiff may have incurred costs in pursuing the matter that it would not have incurred had the application for security been made successfully at the outset, and that these costs will effectively have been wasted if the security order threatens the plaintiff's financial ability to continue with the action".

38. It cannot be said in this case that the defendants delayed their application and permitted the plaintiff to incur substantial cost in preparing for the proceedings, as she had already been put on notice by the defendant's solicitors, who wrote on 18.05.2016 to her solicitors before closing the pleadings. The copy of said notice is marked as **MY4** and attached with the supporting affidavit.

39. The next issue is the probability of success or failure of the parties in this case, as argued by the counsels. The plaintiff's claim is based on the alleged negligence on part of the first defendant who was the having control over the 'Panga Boat' belonged to the resort operated by the second defendant. The defendant did not deny the collision of the boat with the plaintiff, who was snorkeling at the time of collision. However, the defendants disclaim the liability due to the 'waiver and release' clause in the so called agreement with the guest – the plaintiff. There are several complicated issues to be determined in this case in relation to the liability on tort and the interpretation of contractual term which excludes the liability on the basis of the 'waiver and release' clause etc. There is inadequate material before the court at this stage to properly weigh the matter in the balance. It does not at this stage demonstrate either the plaintiff or the defendants in high probability of success in their respective claims against each other. Hence any attempt to go to the merit of the case will not only be unhelpful but also be non-preferable at this stage.

40. Sir Nicolas Browne Wilkinson V.C in **<u>Porzelack K G v. Porzelack (UK) Ltd</u>**, (supra) at page 1077 as follows:

> *Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.*

41. The special claim made by the plaintiff for the past medical expenses is substantially high as US $ 635,955.79 (Six Hundred Thirty Five Thousand Nine Hundred Fifty Five Dollars And Seventy Nine Cents), and there is number of medical examinations and the reports

which may be tendered during the trial. The defendants stated that, they have to get the report from their medical expert for the purpose of the trial and in return it may cost them immensely apart from the other expenses in defending this action. In the meantime, the plaintiff, who is the citizen of United States of America, admittedly has no assets at all within the jurisdiction, and if the defendants are successful in their defence they may have to be exposed to, for recovering of cost in a foreign jurisdiction. It may be an expensive exercise for the defendants in addition to the cost they already incurred locally as Master J.J.Udit stated in **Sharma v Registrar of Titles** [2007] FJHC 118; HBC 351.2001 (13 July 2007) as follows;

> *"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 to 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".*

42. It follows from the above analysis that, there is a necessity to protect the defendants in this case exercising the unfettered discretion conferred on this court under and by virtue of Order 23 rule 1. Accordingly, I that, hold this is a fit and proper case for exercise of such discretion in favour of the defendants. The next issue is the quantum of the security.

Quantum

43. There is no hard and fast rule which guides the court in deciding the amount of the security that a party may be ordered to provide. The general practice is that, the court, in its discretion, will fix such sum as it thinks just, having regard to all the circumstances of a given case. In a very old case of **Dominion Brewery Ltd v Foster** 77 LT 507, Lindley MR said this at 508:

> *'It is obvious that, as to a question of quantum such as this, you cannot lay down any very accurate principle or rule. The only principle which, as it appears to me, can be said to apply to a case of the kind is this, that you*

must have regard, in deciding upon the amount of the security to be ordered, to the probable costs which the defendant will be put to so far as this can be ascertained. It would be absurd, of course, to take the estimate of the managing clerk to the defendant's solicitors and give him just what is asked for. You must look as fairly as you can at the whole case.'

44. What is required from the court is to make a fair amount in a possible way at the whole case. It is neither on full indemnity basis, nor what is estimated by the law clerk of defendant's solicitors. **The Supreme Court Practice 1999** (White Book), in Volume 1 at page 440, and in paragraph 23/3/39, explains this practice and states that:

> *The amount of security awarded is in the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not always the practice to order security on a full indemnity basis. If security is sought, as it often is, at an early stage in the proceedings, the Court will be faced with an estimate made by a solicitor or his clerk of the costs likely in the future to be incurred; and probably the costs already incurred or paid will only a fraction of the security sought by the applicant. At that stage one of the features of the future of the action which is relevant is the possibility that it may be settled, perhaps quite soon. In such a situation it may well be sensible to make an arbitrary discount of the costs estimated as probable future costs but there is no hard and fast rule. On the contrary each case has to be decided on its own circumstances and it may not always be appropriate to make such a discount (**Procon (Great Brotain) Ltd v. Provincial Building Co. Ltd** [1984] 1 W.L.R. 557; [1984] 2 All E.R. 368, CA). It is a great convenience to the Court to be informed what are the estimated costs, and for this purpose a skeleton bill of costs usually affords a ready guide (cited with approval by Lane J. in **T.Sloyan & Sons (Builders) Ltd v. Brothers of Christian Instruction** [1974] 3 All E.R. 715 at 720).*

45. The defendants have attached the estimated bill of cost amounting to FJ$ 108,480.00 marked as **MY 3** with the supporting affidavit, and claim a sum of FJ$ 60,000.00 being the approximate 2/3 of the estimated amount. On the other hand, the plaintiff's counsel submitted that, in the event this court decides to order the plaintiff to provide a security, it should be a nominal amount. In support of the claim of 2/3 of the estimated cost, the defendants counsel relied on the passage that appears in **Halsbury's Laws of England Vol. 37, 1982 Edition** in paragraph **307** under the sub-title **Amount of Security**, where it states:

> *"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 regard to all the circumstances of the case. It is not the practice to order security for cost 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 to the stage of the proceedings for which security is ordered, but there is no hard and fast rule." (Emphasis added)

46. The above passage had been published in the notes to Order 23 since 1964 and appears in **The Supreme Court Practice 1982** Vol 1, p 440, para 23/1-3/22, and in **1988 Edition** in Vol 1, page 406 and para 23/1-3/29. However, it was not published in other editions thereafter. The reason for the same is that it received a lot of criticism in the case of **Procon (GB) Ltd v Provincial Building Co Ltd and others** [1984] 2 All ER **368** decided by English Court of Appeal. Cumming-Bruce L.J., having considered several cases in this regard has said at pages 375 and 376 that;

> *I am satisfied that, having regard to the provisions of RSC Ord 23, r 1(1), which on their face confer an unfettered discretion on the court, there is no solid reason for a general and arbitrary practice whereby, after estimating party and party costs up to the date of the proceedings for which security is ordered, an arbitrary fraction of one-third is knocked off before the order for security is made. There is nothing, in my view, in the authorities that have been cited to this court to justify the validity of what the editors of The Supreme Court Practice 1982 describe as the more conventional approach of fixing the sum of two-thirds of the estimated party and party costs. On the contrary, in the cases which I have cited, the principle is this: the security should be such as the court thinks in all the circumstances of the case is just.*

47. His Lordship having described this as 'too dogmatic and inflexible approach', suggested to the editors of **The Supreme Court Practice** to reconsider those wording as they have probably given rise to a misunderstanding by the judicial officers who handle the subject matter. His Lordship at page 376 said that;

> *In my view, whatever the practice in the Commercial Court may be (as to which we have heard varying accounts from the bar) as far as the position in this Queen's Bench action is concerned, the words of the rule point to the order made by the judge; and there was no occasion, having regard to all the circumstances, for making any fractional deduction, whether one-third or otherwise. I take the view that the note under the heading 'Amount of Security' which has been published in The Supreme Court Practice to the notes to Ord 23 since 1964 is expressed in too dogmatic and inflexible terms and has probably given rise to a misunderstanding by masters and judges of the principles to be followed having regard to the words of the rule. In my view, I would respectfully suggest to the editors of The Supreme Court Practice that they reconsider the words of their note.*

48. Griffiths L.J., agreeing with Cumming-Bruce L.J., said at page 379 as follows;

> *I am not myself persuaded that a two-thirds fixed practice in fact exists, but if it does I am satisfied that it is time it stopped. I can see no sensible reason why the court should not order security in the sum which it considers the applicant would be likely to recover on taxation on a party and party basis if the court considers it just to do so. This, as I understand it, is the practice of the judges in the Commercial Court and it is a practice that ought also to be followed in the rest of the Queen's Bench Division. It is, of course, for the party seeking an order for security to put before the court material that will enable the court to make an estimate of the costs of the litigation.*

49. In fact, **The Supreme Court Practice** published in 1991 onwards does not have the same wording, which was subject to criticism by both Cumming-Bruce and Griffiths L.JJ., but has changed it as referred in paragraph 40 above. Even the **Halsbury's Laws of England -Reissue** published after 1982 has edited the said paragraph. Therefore, it is apparent that, deciding the security for cost on two-third of estimated party and party cost as argued by the counsel for the defendants, is neither conventional approach, nor rationale based, given the unfettered discretion to be judicially exercised by the court considering all the circumstances of a case. As a result I am unable to agree with the counsel for the defendants, who argued that the cost in this case should be in sum of FJ$ 60,000.00, which is equivalent to two-third of estimated cost attached with the affidavit supporting the summons.

50. On the other hand, the counsel for the plaintiff submitted that, in the event the court decides there should be security for cost in this case, it should be a nominal cost in sum of FJ $ 5,000.00. I cannot agree with this submission too, because the defendant may inevitably end up with the cost much more than the said nominal amount suggested by the plaintiff's counsel, given the complicated claims and the defences in this case. The defendants may have to hire their own medical experts not only to examine the past medical treatment, which has been calculated by the plaintiff in sum of USD 635,955.79 (Six Hundred Thirty Five Thousand Nine Hundred Fifty Five Dollars And Seventy Nine Cents), but also damages for future medical expenses estimated by the plaintiff in sum of USD 623,109.18 (Six Hundred Twenty Three Thousand One Hundred Nine Dollars And Eighteen Cents).

51. The counsel for the defendants also cited some cases such as Sunflower Aviation Ltd v Civil Aviation Authority of the Fiji Islands [2015] FJHC 336; HBC250.2008 (8 May 2015), Peters v Seashell @ Momi Ltd [2015] FJHC 581; HBC32.2012 (11 August 2015), Aerolink Air Services Pty Ltd v Sunflower Aviation Ltd [2014] FJHC 817;

HBC013.2011 (12 November 2014), Neesham v Sonaisali Island Resort Ltd [2011] FJHC 642; Civil Action 262.2007 (13 October 2011). The courts have ordered the plaintiffs in those cases to lodge a substantive amount as security for cost. Those cases may guide in arriving an appropriate amount suitable for all the circumstances of the case in hand before me, however, they cannot be taken as the inflexible guidance to in exercising the unfettered discretion of this court.

Conclusion

52. Thus, having carefully considering all the circumstances of the case before me, and in particular, with the view of finding an equilibrium between the two conflicting interests that, the protection of the defendants and ensuring the right of the plaintiff to access to justice, which should not, merely, be stifled with the order of exorbitant cost, I order the plaintiff to deposit a sum of FJ $ 25,000.00 as the security for cost within a month from today. I think this amount is just and equitable in all the circumstances of this case and it is the best this court may do in this case, as Simon Brown LJ observed in **Olakunle Olatawura v Abiloye** [2002] 4 All ER (CA) at page 910 as follows:

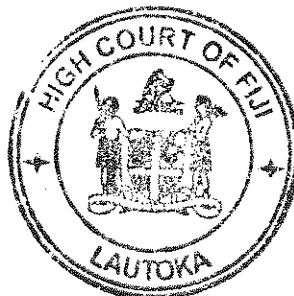
> ..... *the more difficult it appears to be for the person concerned to raise the money, the more obvious becomes the need for an order for security to protect the other party against the risk of incurring irrecoverable costs. The court will have to resolve that conundrum as best it may.* (Emphasis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

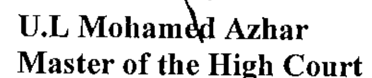
53. In result, the final orders are;

   a. The plaintiff should deposit a sum of FJ $ 25,000.00 at this registry within a month from today,

   b. The cost will be in the cause, and

   c. The matter to be mentioned on 24.10.2018 to check the compliance of this order by the plaintiff.





U.L Mohamed Azhar
Master of the High Court

At Lautoka
25.09.2018