IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 30 OF 2012

BETWEEN : **PETER ALLAN LOWING** of Nadi, Fiji Islands.

Plaintiff

A N D : **DAVID GRAHAM BLOXHAM** of Wailoaloa, Nadi, Businessman.

Defendant

Before : A G Stuart - J

Appearance : Ms Seru for the Plaintiff

Ms Samantha for the Defendant

Date of Hearing : 24th September, 2019

Judgment Delivered : 2 October, 2019

JUDGMENT

INTRODUCTION

1. This is an application by the defendant for orders under Order 23 rule 1(a) High Court Rules requiring the plaintiff to pay or provide security for costs.

FACTS & HISTORY OF THE PROCEEDINGS

2. It would be an understatement to say that these proceedings have a disappointing history of delays and mis-steps by all parties involved including delays in the Court, and even acts of God – in the form of Cyclone Winston in 2015:

   i. The proceedings originate from what are alleged to be malicious falsehoods published of the plaintiff by the defendant. The publication was said to have been made in a complaint by the defendant in May 2011 to the Chief Registrar of the High Court about the conduct of the plaintiff (who at the time was a solicitor

practising in Nadi) in around May 2010 in the course of acting in court proceedings involving the defendant's business. In his written complaint the defendant asked the Chief Registrar to investigate the conduct of and to discipline the plaintiff under the Legal Practitioners Act 2009.

ii. The plaintiff filed his claim against the defendant in the High Court at Lautoka in February 2012. The original statement of claim alleged simple defamation. To this the defendant understandably asserted qualified privilege, whereupon the plaintiff in April 2013 filed an amended statement of claim alleging malice on the part of the defendant. If upheld this assertion would negate the qualified privilege defence.

iii. In May 2014 the proceedings were ready for trial, and solicitors for both parties signed a pre-trial conference minute dated 8 May 2014 listing the issues to be determined at trial.

iv. In December 2014 a trial date was set for the 9th & 10th July 2015, but on 7 July the plaintiff filed an application for an adjournment of the trial. In an affidavit in support of the application (not by the plaintiff) it was stated that the plaintiff was at the time a partner in law practices in both Fiji and Papua New Guinea, and was unable to attend the court hearing in Lautoka because he was currently in Papua New Guinea and had arranged a *meeting on 9 and 10 [July] with clients from Amsterdam who have flown to Australia and leave for Singapore on Friday.* Perhaps fortunately for the plaintiff, the defendant did not oppose the application for adjournment, and the matter was re- listed for hearing in February 2016.

v. That hearing did not proceed due to power outages as a result of cyclone Winston, and the matter was re-scheduled for hearing on the 24th & 25th April 2017. Again – on the 21st April – the plaintiff sought an adjournment, and indicated that he wanted to apply to have his evidence taken via video link/Skype. Again the defendant agreed to an adjournment. This adjournment occurred in the context of uncertainty about whether the High Court at Lautoka had a judge available to conduct the trial. I accept that with the plaintiff residing overseas it was reasonable for him to seek some reassurance about whether the trial was possible, before incurring the expense of travelling to Fiji. In the event it is not clear whether this reassurance was forthcoming from the Court, but what

is clear is that the plaintiff intended to seek an adjournment in any case, to enable him to apply for leave to present his evidence remotely.

vi. The application for evidence to be taken via video link was itself not without incident, but was eventually heard in March 2018. In a decision dated June 2018 the application was declined by Mackie J. During the course of the hearing of the application counsel for Mr Lowing (his partner in their Fiji legal practice) acknowledged from the bar – in response to questions from the bench – that Mr Lowing was in the process of ending his involvement with the law firm in Fiji, and was *gone for good.* This was the first unequivocal acknowledgement from the plaintiff that he was no longer resident in Fiji, and that he would shortly be ending his business involvement in Fiji. This information had not hitherto been volunteered by the plaintiff. In his affidavit in support of the application the plaintiff had said that he was still a partner in the Fiji practice – as indeed he was. He did not say anything in the affidavit about being in the process of terminating his connection with Fiji.

vii. In August 2018 the defendant's solicitors wrote to Mr Lowing's solicitors asking for clarification about Mr Lowing's connection with the law firm and with Fiji, and saying that from searches carried out by them it appeared that the plaintiff had no assets in Fiji apart from any continuing participation in the law firm in which he was/had been a partner. The letter advised that if the plaintiff no longer had any connection with the firm, it was the defendant's intention to apply for security for costs. The plaintiff's solicitors did not respond to that letter. The application for security for costs was filed by the defendant on 25 October 2018, supported by an affidavit by the defendant Mr Bloxham sworn on the same date.

viii. Although the matter has now been scheduled for trial on three occasions (in 2015, 2015 and 2017), and in each case was adjourned only at the last minute, I note that the hearing fees (payable by the plaintiff) have not been paid.

2. So here we are, ten years after the plaintiff and the defendant were first involved in court proceedings that gave rise to this claim, more than eight years after the alleged defamation/malicious falsehood occurred, seven years after the filing of proceedings and five years after they were first said to be ready for hearing, still arguing about preliminary matters. In particular the plaintiff does not seem as anxious to get the matter

heard and resolved as one would expect of someone who feels he has a grievance to be answered.

LAW

4. Order 23 Rule 1(1)(a) of the High Court Rules provides:

> *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 jurisdiction, ...*
> *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.*

5. It is well accepted that the power is entirely discretionary, but must be exercised justly (i.e. be fair to both sides). Unlike the equivalent rule in some other jurisdictions (e.g. New Zealand), Order 23 Rule 1 does not provide for an order to pay security for costs where a plaintiff is shown to be impecunious. Hence care is required when considering the decisions of Courts in other jurisdictions to make sure that the basis of the applications they are dealing with are relevant to the rule as it applies in Fiji, i.e. to plaintiffs who are ordinarily resident outside Fiji.

6. The plaintiff accepts that he is now resident outside Fiji, and that he has no assets in Fiji. This means that the circumstances in which the Court is able make an order for security for costs under the rule are satisfied, and the only question that remains is whether it is just to make such an order, and if so, what order can justly be made.

7. There are a number of factors that the Court must take into account in deciding these questions, and in opposing the making of any order the plaintiff points in particular to the following issues which have been taken to be relevant in previous cases by the courts when considering such applications. In listing these I make the point, well established by the authorities, that the 'issues' listed are not rules that mandate or eliminate the possibility of an order for security for costs. They are no more than factors that may be taken into account by the court in deciding whether an order for security will be just in a particular case:

i. Delay by the defendant in making the application for security

(a) It is certainly the case that the courts have consistently required a defendant seeking security for costs to make its application without delay once information becomes available to the defendant that would justify an application. Apart from reasons related to the efficient conduct of court proceedings this is to ensure that a plaintiff who may not be able to provide security does not incur costs of conducting its claim which will be wasted if the plaintiff is forced to abandon the proceedings because it cannot meet an order for security that could have been made earlier. It would be unjust to put the plaintiff to this risk by allowing the defendant to choose when it will make any application.

(b) The circumstances of this case are unusual. At the time the plaintiff commenced his claim he was residing and had a business in Nadi. At that point there was therefore no basis on which an application for security for costs might have been made.

(c) Later in the course of the proceedings, as a result of information provided by the plaintiff when applying for the adjournment of trial dates, it emerged that the plaintiff was now living overseas and no longer had assets in Fiji. It is not completely clear when this became apparent. In March 2018 the plaintiff's counsel acknowledged in the course of submissions on his application for leave to have the plaintiff present his evidence via video link, that he was 'gone for good'. But even at that stage it seemed that the plaintiff still had assets in the jurisdiction, namely his interest in his law firm, which he was in the process of quitting.

(d) The defendant made an inquiry of the plaintiff's solicitors in August 2018 about the plaintiff's residence in and connection with Fiji, but the plaintiff chose not to respond. The defendant's application for security was filed in October 2018, and in response to that application the plaintiff has acknowledged that he no longer has any connection with Fiji. He complains however that the defendant has been too slow in making his application, and submits that the court should dismiss the application for that reason.

(e) Bearing in mind the rationale for requiring an applicant for security to act promptly – as set out above – I am not particularly attracted to this submission. Apart from the fact that the plaintiff does not at any stage of the proceedings appear to have had any concern about the passing of time, he could have put the issue of his status in Fiji beyond doubt by responding to the defendant's solicitors letter in August 2018, or even by volunteering the information much earlier and less reluctantly than he did. Furthermore, there is no evidence that between March of 2018 when the information emerged, and October 2018 when the defendant filed his application, the plaintiff incurred any costs in these proceedings on the mistaken assumption that the defendant would not be seeking an order for security. My impression from reading the affidavits filed – including those of the plaintiff and his firm – is that the plaintiff provided information only as and when it suited him, and then as little as possible. I do not accept for a moment that the plaintiff has been disadvantaged by the relatively short (in the context of the whole history of the proceedings) delay that occurred in making this application.

ii. Whether the defendant's application for security is oppressive, in the sense that it is being used merely to deny an impecunious plaintiff of the right to litigate.

(a) This is more usually a consideration in those jurisdictions where one of the bases for seeking security for costs is the apparent inability of the plaintiff to meet an order for costs made against him. Connected to this is the issue of whether the plaintiff's impecuniosity is caused by the defendant, which is not relevant to the present application.

(b) In any case, the plaintiff does not say, and has provided no evidence that he is unable to meet an order for security. He says in paragraph 23 of his affidavit dated 11 February 2019 in opposition to the application:

> *I ask that the court consider the circumstances of both parties as security must be proportionate and not oppressive in nature. The amount for security claimed, which appears to be $116,479.92 is oppressive because if it is granted it will prevent me from pursuing my claim any further.*

(c) Unfortunately Mr Lowing does not explain what his circumstances are that the court should consider, nor is there any information about the

defendant's circumstances. Although he says in paragraph 24 of his affidavit that he can afford to pay $4,000, the plaintiff does not say that he cannot afford to pay anything more than that. More specifically he does not say that he cannot afford to pay the sum of $45,000 which the defendant asked for in his solicitor's letter of 8 August 2018, or that an order for payment of that amount would 'prevent' him from pursuing his claim.

(d) The plaintiff suggests (paragraph 24) that because he says he can pay $4,000 there should be no need for him to deposit this into court. This seems to miss the point that the purpose of ordering security to be provided is to ensure that a successful defendant does not have to incur the cost of enforcing an order for costs in - in this case - Papua New Guinea.

(e) As I made clear to counsel during the hearing of this application, if the court makes an order for security for costs it will not be for $116,000 or anything close to that amount. Otherwise there is no information before me that suggests that any order that I do make will prevent the plaintiff from continuing his claim if he chooses to do so.

iii. Relative merits of the claim and defence – prospects of success

(a) The cases show that courts have consistently, in relation to applications for security, resisted any invitation to look in any detail at the merits of the case, and the parties' prospects for success. This is because the assumptions on which the application is based – i.e. that the plaintiff will fail – make it unnecessary in all but the most clear cut cases, to attempt to weigh up the relative merits of the claim or defence.

(b) In those cases where it is obvious that the plaintiff won't fail, the courts may take that into account in deciding whether to order security, particularly where the application for security is based on impecuniosity rather than residence overseas, and even more so if the plaintiff's impecuniously is in some way attributable to the defendant's conduct. But that is not the situation here; it is not obvious that the plaintiff will succeed. The only false publication alleged by the plaintiff is to the personal responsible for dealing with complaints about solicitors, and in the absence of malice – the onus of proving which is on the plaintiff – the plea of qualified privilege seems likely to be a good defence. It is

impossible to say on the basis of the pleadings alone whether there was malice, but I note that the Amended Statement of Claim contains no particulars of the alleged malice.

8. Weighing up these considerations I am satisfied that this is an appropriate case for ordering the plaintiff to provide security for costs either by paying the amount ordered into court, or by providing a bank bond on terms acceptable to the defendant in lieu of payment.

AMOUNT OF SECURITY

9. I come now to consider the amount of security to be provided.

10. In his affidavit of 25 October 2018 in support of his application the defendant Mr Bloxham says that his legal costs to that date (invoice attached) were FD$24,339.92. He also says that the estimated future costs of preparing for and attending trial are $116, 479.92 (detailed estimate prepared by his solicitor is annexed). The defendant's counsel at the hearing indicated that this is the amount the defendant seeks. Somewhat more realistically, the defendant's solicitor's letter of 8 August 2018 to the plaintiff's solicitors asked for security for costs (by payment to court or provision of a bank bond) of FD$45,000. Bearing in mind that this matter is supposedly ready for trial and has been adjourned at the last minute three times, I would have expected that most trial preparation would already have been done. So if the defendant's costs for all matters to date (including two contested interlocutory applications) is only FD$24,000 or thereabouts, I find it difficult to accept that the estimate of approximately FD$116,000 is realistic.

11. The defendant is of course entitled to conduct his defence of the claim in whatever manner he chooses, but the court, in making an order for security for costs, is only concerned with what costs might be awarded against the plaintiff should he be unsuccessful in his claim.

12. Counsel for the plaintiff has attempted to persuade me that orders for costs in defamation cases in Fiji are particularly modest. Hence – she argues – an order of $4, 000 will be suffered to cover any likely award of costs against him, should the plaintiff's claim tail. As evidence for this she has referred me to two cases where the successful plaintiffs in defamation claims were each awarded costs of only FD$2000, in addition to damages of

$50,000 and $60,000 respectively. I have read the decisions she has referred to - **Rajcharan v Prasad** [2019] FJHC 201; Civil Action 19 of 2018 (15 March 2019), and **Chand v Bolatiki** [2019] FJHC 574; HBC23.2014 (5 June 2019). The first case was an undefended claim for defamation where the only hearing was by formal proof. The second decision followed a defended hearing involving a claim against a newspaper for articles that included false information, but were otherwise accurate. In neither case was there any discussion by the court about the reasons for awarding costs at that level. On the other hand counsel for the plaintiff has also – quite properly – referred me to a recent defamation case, **Sharma v Biumaitotoya** [2019] FJHC 415; HBC147.2012 (7 May 2019) where indemnity costs were awarded to the successful plaintiff. Having read these decisions I am not persuaded that there is a clear pattern in Fiji of awarding modest costs in successful defamation cases, or that even if there were, that this translates into a pattern of modest awards of costs against plaintiffs in unsuccessful defamation claims.

13. But I am equally unpersuaded by the defendant's suggestion that I should be guided – in fixing the amount of any security to be provided - by the actual cost of the defendant's conduct of his defence. The principle behind the court ordering an overseas resident plaintiff to provide security for costs – when it has no power to do so in connection with a locally based plaintiff - is that a successful defendant should not be put to the expense of enforcing an order for costs abroad, or to the risk of being unable to recover costs at all. Thus the need to provide security – where it is required – is a modest cost (i.e. the cost of putting up the security, not necessarily the amount of the security itself, which the plaintiffs may get back depending on the outcome of their case) to overseas resident plaintiffs that they may have to meet in return for the privilege of conducting claims against local defendants in the courts of Fiji. Except to this limited extent the security is not supposed to be an impost on the plaintiff. The amount ordered for security for costs should not therefore exceed the amount that the successful defendant is likely to be awarded for costs at the conclusion of the proceedings.

14. With regard to the costs said to have been incurred to date by the defendant, it is unlikely – if the proceedings were to have been abandoned by the plaintiff immediately following the filing of the defendant's affidavit of 25 October 2018 - that the court would have awarded the defendant the full amount of $24,339.92 that he says he is already liable for. This figure is relevant to fixing the amount of security only to the extent that it indicates what order for costs a court might make in favour of the defendant should the plaintiff's claim fail, or be abandoned.

15. Earlier cases have made it clear that the amount of security for costs is a matter for the court to fix such sum as it thinks just, having regard to all the circumstances of the case. Halsbury's Laws of England (4th edtn) Vol 37 para 307 suggests:

> *In the case of a plaintiff resident out of 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.*

but this commentary has since been doubted in a number of cases, and it seems contrary in principle to the rationale for making an order for security in such cases. In the New Zealand Court of Appeal decision in **McLachlan v MEL Network Ltd** [2002] NZCA 215 (29 August 2002) at paragraph 27 Justice Gault said (in a case that arose from the plaintiff's impecuniosity rather than overseas residence):

> *The amount of security is not necessarily to be fixed by reference to likely costs awards ... It is rather to be what the Court thinks fit in all the circumstances.*

16. There have been cases where the courts have fixed security on the basis of an assumption that indemnity costs may be awarded, but those are cases where the nature of the plaintiff's claim suggests strongly that indemnity costs might be awarded in the event that the plaintiff's claim fails. An example of such a case is **Danila v Chermukhin** [2018] EWHC 2503 (Comm) in which Teare J said:

> 14. *The question on this application is whether an order for costs on the indemnity basis is a reasonable, not a speculative, possibility such that it is appropriate that the security ordered by the court should reflect that possibility. That does not involve a consideration of the merits of the claims. On the contrary it assumes that the Claimant loses her claims.*
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> 15. *Upon that assumption it appears to me to be unlikely that the Claimant's TGM claim, if it fails, would have been dismissed because it was founded upon a mistaken recollection by her that she was the beneficial owner of a very valuable asset. It is more likely that if she loses her claim it would be because her evidence was dishonest. ... Thus there appears to me to be a reasonable possibility that costs will be ordered to be assessed on an indemnity basis in the event that the Claimant loses her claims.*

17. Applying that type of analysis to the present case I do not think that indemnity costs are likely, but there is at least a reasonable possibility that the plaintiff, if he is unsuccessful in his claim, will face an elevated award of costs. The plaintiff is a solicitor, and the publication of which he complains is a complaint to the authority responsible for dealing with complaints about solicitors' conduct. The plaintiff did not initially plead malice, but does so in his amended statement of claim in response to the defence of qualified privilege. If he is unable to sustain his plea of malice on the part of the defendant, the plaintiff's claim will fail, and might well be seen as an attempt to intimidate the defendant from persisting with his complaint, and therefore may attract an order for costs higher than would otherwise be appropriate. I am not saying that this **will** be the outcome of the plaintiff's claim. Rather, that if the plaintiff's claim fails – which is the scenario which I am required to postulate in deciding what security, if any, to require – there is a reasonable possibility that an elevated level of costs will be awarded against him.

18. Unfortunately – apart from the defendant's estimate of costs said to be likely for conducting the defendant's defence through to trial - I have not been provided by either party with any calculation of what costs might be set on taxation of costs on a standard basis. Although I have been referred by counsel for the defendant to several personal injury cases in which substantial orders for costs have been made, these decisions do not persuade me that costs of similar amounts are typical in defamation claims. In the absence of this information I will have to set an amount, based on all the information that is available, that takes into account the various factors referred to earlier in this decision. A review of a number of decisions of the courts in Fiji suggests that this is the way in which the courts have previously set the amounts for orders for security for costs.

CONCLUSION

19. I make the following orders:

    i. The plaintiff is ordered to provide security for costs in the sum of FD$35,000. This is to be either paid into Court, paid to a stakeholder or provided by a bank bond from a substantial bank based in Fiji and on terms that are reasonably acceptable to the defendant. If the parties cannot agree on the provider or terms of any bond leave is given to refer that issue to the Court to resolve, in which case the Court is likely to require payment of the amount into court.

ii. The security is to be paid/provided as set out above within 28 days. The proceedings are stayed pending payment/provision of that security.

iii. The costs of this application will be costs in the cause.

HIGH COURT OF FIJI
LAUTOKA

Alan G Stuart
Judge

At Lautoka
02 October, 2019