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

CIVIL ACTION NO. HBC 107 OF 2013

BETWEEN : **CHANDRA MANI** of Kuma Place, Glenmore Park, Sydney, New South Wales 2745, Australia, Businessman
PLAINTIFF

AND : **MARK HINTON** of Wailoaloa, Nadi, Businessman
FIRST DEFENDANT

AND : **HORIZON HOLDINGS LIMITED** a limited liability company having its registered office at HLB House, Cruikshank Park, Nadi
SECOND DEFENDANT

AND : **IRVINE INVESTMENTS INTERNATIONAL LIMITED** a limited liability company having its registered office at HLB House, Cruikshank Park, Nadi
THIRD DEFENDANT

Appearance : No appearance for the Plaintiff
Mr J Sharma for the First Defendant
Ms S Seru for the Second Defendant

Date of Hearing : 11 December 2019

Date of Judgment : 12 February 2020

DECISION

1. This ruling relates to applications by the defendants for costs against the plaintiff following the plaintiff's abandonment of his claim for breach of contract.

BACKGROUND

2. The claim by the plaintiff (who at all times since the claim was commenced has lived in Australia) against the defendants was commenced by writ of summons dated 13 June 2013. The statement of claim alleged that the first and third defendants respectively owned 6,000 and 3999 shares in the second

defendant, Horizon Holdings Limited, and had agreed in April 2013 to sell their shares to the plaintiff for $519,000 and $346,000 respectively.

3. As required by the sale and purchase agreement the plaintiff had paid deposits of $51,900 and $34,600 to the vendors, and those deposits were held by the defendants' solicitors as stakeholders. After the commencement of the court proceedings these amounts were paid into Court, where they stayed until paid out in 2019 as set out below.

4. The agreement for sale and purchase was never completed. The plaintiff argued in his claim that the defendants were in breach of the agreement by failing to provide certain documents, or complete certain preliminary steps that were implicitly – he said – essential to settlement. The defendants say that the failure to settle was entirely the fault of the plaintiff, and that his demand for documents and the completion of the preliminary steps was unnecessary and not warranted under their agreement.

5. In the proceedings the plaintiff claimed:

   i. The repayment of the deposits he had paid
   ii. Damages of $20,345 (losses incurred because of the defendants' breach of contract).
   iii. General damages!
   iv. Costs

   These claims were opposed by the defendants, but there was no counterclaim either for specific performance of the agreement, or for damages said to arise from the plaintiff's failure to complete the purchase. What was sought in the counterclaim, probably unnecessarily since the right to forfeit the deposit in the case of default does not depend on a court order, was a declaration that the defendants were entitled to forfeit the deposit paid by the plaintiff.

6. Eventually the proceedings were set down for a four day trial, initially in November 2016 (abandoned because there had been no pre-trial conference), then in October 2018 (hearing date vacated because the plaintiff had health issues), and finally in late October/early November 2019.

7. In early October 2019 the solicitors for the plaintiff sought and were granted leave to withdraw, as they had not been able to get instructions from the plaintiff. The application for leave to withdraw was served on the plaintiff, who took no steps, and made no new arrangements for representation.

8. When the matter was called on 30 October 2019 for commencement of the trial there was no appearance of or for the plaintiff, and the claim was struck out. Orders were then made relating to the payment out of the deposit funds that had in the meantime been paid into court, and the matter was adjourned for the defendants to make submissions as to costs.

9. I have received written submissions from counsel for all the defendants. In his submissions on behalf of the first and second defendants Mr Sharma sought indemnity costs, but failing that suggested that the court should make an order for costs in the sum of $10,000 for each of the first and second defendants. Ms. Seru for the third defendant also seeks indemnity costs, but in the alternative seeks costs of $15,000, which is the amount paid by the plaintiff (because he was residing overseas) for security for the third defendant's costs. The plaintiff also paid another $15,000 for security for the costs of the first and second defendants. The third defendant has also provided evidence that costs incurred by it to date in the conduct of its defence amount to $45,000.

THE LAW

10. Both sets of submissions include reference to the comprehensive review by Scutt J in **Prasad v Divisional Engineer Northern (No 2)** (2008) FJHC 234 of the cases and principles related to the award or denial of indemnity costs. I don't intend to refer on detail to that decision, except to note that I have read it and accept the principles set out in it.

11. What is clear from **Prasad** and most other cases relating to costs, is:

    i. that the court must exercise its own judgment (to be exercised judicially) as to what is appropriate in the particular case
    ii. costs are intended to be compensatory, not punitive
    iii. generally speaking costs orders are made on the basis of party and party costs, whereby an unsuccessful party is required to make a contribution to the successful party's costs, but that contribution is usually well short of a full indemnity, and generally follows some widely accepted formula or scale for awarding costs either in general, or in particular types of case.
    iv. The mere fact that a party loses, even emphatically, is not by itself sufficient to justify indemnity costs. As Lord Steyn wryly observed in **Medcalf v. Weatherill and Anor** [2002] UKHL 27 (27 June 2002), the law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried.

v. Indemnity costs are unusual, and are awarded in response to unusual situations, either relating to the weakness of a party's case, or arising from the way in which a party has conducted its claim or defence. As it was put in ***Harrison v Schipp*** [2001] NSWCA 13, at paras [1], [153] it requires *some form of delinquency in the conduct of the proceedings.*

12. What has also become clear from my reading of submissions, and cases, is that the terminology used in different jurisdictions seems to be confusingly different. For example GE Dal Pont's **Law of Costs** 3rd Ed., (2013) LexisNexis Butterworths distinguishes the 'indemnity rule' that applies generally in Australia, from what it describes as the 'converse' of that rule, the 'no costs' approach where *each party bears its own costs, which has traditionally been the usual costs rule applicable to civil litigation in the United States.* But as the text goes on to note; (para 7.7):

> *The term 'indemnity' in the context of the indemnity rule is something of a misnomer, as an award of costs in favour of a successful party is rarely a complete indemnity for the liability to his or her lawyers.*

and goes on to discuss (Chapter 16), all as manifestations of the 'indemnity rule', how costs may be quantified on any of the following bases:

i. 'party and party', involving an inquiry into whether the expenditure would be *necessary or proper for a reasonably prudent [person], endeavouring to get justice, but endeavouring to get it without undue expenditure of money to incur the expense in question.*
ii. 'solicitor and client' allows recovery of all costs reasonably incurred and of reasonable amount, but does not take into account costs made necessary by a *particularly fussy, hysterical, ignorant, suspicious and vindictive person* or to costs incurred by *reason of the solicitors' earnest zeal to try to meet and provide against or provide for a particular eccentricity of his client.*
iii. 'indemnity' or 'solicitor and own client' basis allows recovery of all costs incurred by the person in whose favour costs are awarded except to the extent that they are of an unreasonable amount or have been unreasonably incurred.

So a reference to the 'indemnity basis' for awarding costs, in Australia at least, is a label for the approach taken in the award of costs, i.e. to reimburse – in part at least – the successful party for the costs incurred in the conduct of its claim. The word 'indemnity' in this context refers to the philosophical basis upon which costs are awarded, not to the level of costs.

13. In some jurisdictions, New Zealand is an example that I am familiar with, the court rules specify a basis, permissible time scales and a range of hourly rates at which standard costs are to be awarded depending on the complexity of the dispute. The court's discretion is constrained by this legislative expression of how costs orders should be approached, although the rules still make it clear that the final decision is for the court to make, including the power to award indemnity costs.

14. However, in Fiji these issues don't arise because since amendments were made in 1998 (reflecting changes made in England to the White Book in 1986), Order 62 has set out in some detail the meaning of commonly used expressions relating to costs (e.g. 'costs reserved', 'costs in any event', 'costs in the cause' etc – see O.62,r.3(7)), and – more specifically in relation to this decision – 'the standard basis' and 'the indemnity basis' (see O.62,r1(2)). Order 62, rule 12 makes it clear that:

> *(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party*
>
> *(2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.*

Thus the 'standard basis' equates to the party and party costs basis referred to in paragraph 12(i) above, and 'indemnity basis' is the same as the indemnity, or 'solicitor and own client' basis referred to in paragraph 12(iii) above. In this case it is obvious that when a party is asking for 'indemnity costs' it is doing so in in terms of O.62,r12(2) cited above, leaving the actual amount of costs to be determined by taxation.

ANALYSIS AND ORDERS

15. In submissions in support of the application for indemnity costs counsel for the first and second defendants refers to a number of deficiencies in the plaintiff's statement of claim, and to the implausibility and weakness of elements of the claim, but in the end, whether the claim would succeed or not depended on the evidence to be presented at trial, and nothing has been identified that in my opinion, approaches the threshold of 'delinquency' required by the authorities I have been invited to follow. Even the failure of the plaintiff to attend at trial appears more likely to arise from genuine

medical conditions that the evidence shows he has been afflicted with, rather than a deliberate disregard of the court and the proceedings. Up to that point he had participated in the proceedings as normal, and the manner in which he conducted his claim does not suggest to me a cynical and deliberate pursuit of the hopeless claim for some collateral advantage, or seems to be otherwise 'oppressive or vexatious' or 'reprehensible' (see **EMI Records v Ian Cameron Wallace Ltd & Anor** [1982] 3 WLR 245 and **Singh v Commander Naupoto** [2008] FJHC 193).

16. I also take into account, in deciding whether to award costs on an indemnity basis, the fact that the defendants, as a result of the striking out of the plaintiff's claim, and the orders the court has now made for payment to the defendants of the deposit sums that had been paid into court, have now been able to forfeit the deposit paid by the plaintiff on entering into the agreement. I accept that the defendants are entitled to forfeit the deposits in this way, and there can be no criticism of them for doing so. However the right to forfeit a deposit in circumstances such as this is not an exception to the rule that damages are intended only to be compensatory, rather than punitive or penal. The law recognises the right of forfeiture, even though the deposit forfeited may exceed the losses incurred by an innocent party because, provided the amount of the deposit is reasonable, the history, value and convenience of the whole arrangement for payment and forfeiture of deposits means that the courts have not insisted that a party forfeiting a deposit must first prove its losses. I note that there were no counterclaims by the defendants in these proceedings for losses arising from the failed purchase of their shares by the plaintiff. This is something I would have expected to see if the shares had reduced in value following the plaintiff's aborted purchase. It therefore seems likely that the defendants – having forfeited the deposits – have gained rather then lost, and it is not the purpose of awards of costs on an indemnity basis to further improve their situation. I am not therefore willing to order the plaintiff to pay costs on an indemnity basis.

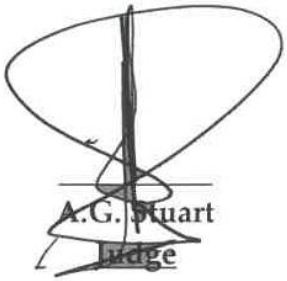
17. Counsel for the first and second defendants seeks, as an alternative to indemnity costs, an amount of $10,000 for each of the first and second defendants. He does not say, and I don't know, why the first and second defendants, who have not been separately represented at any stage, and who have always adopted a common position at every stage of the proceedings, should be entitled to separate awards of costs, or a higher level of costs than the third defendant.

18. Rather than further prolong these very long-standing proceedings by requiring the parties to submit claims for costs for taxation, I intend to fix

costs at a particular amount. I accordingly order the plaintiff to pay costs in the proceedings of;

- $15,000 to the first and second defendants (together),
- $15,000 to the third defendant.

These are the amounts paid by the plaintiff for security for costs, and the defendants are therefore entitled to have the amounts paid to them by the Court. This payment will therefore bring the proceedings to an end without the need for further steps by any party.



At Lautoka this 12th day of February, 2020

SOLICITORS:

Babu Singh & Associates – Plaintiff (given leave to withdraw)
Janend Sharma Lawyers – First & Second Defendants
Lowing Lawyers – Third Defendant