IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC No.250 of 2008

BETWEEN : **SUNFLOWER AVIATION LIMITED [FORMERLY KNOWN AS SUN AIR (PACIFIC) LIMITED]** a duly incorporated company having its registered office at Shop 1, Beddoes Plaza, Namaka, Nadi.

1ST PLAINTIFF

: **AIR FIJI LIMITED** a duly incorporated company having its registered office at Hangar Road, Nadi Airport.

2ND PLAINTIFF

AND : **CIVIL AVIATION AUTHORITY OF THE FIJI ISLANDS** a body corporate created under the Civil Aviation Authority Act 1979, having its registered office at Nadi International Airport, Nadi, Fiji Islands.

1ST DEFENDANT

AND : **AIRPORTS FIJI LIMITED** a duly incorporated company having its registered office at Nadi International Airport, Nadi, Fiji Islands.

2ND DEFENDANT

AND : **HOT SPRING HIRE SERVICE LIMITED** a company incorporated having its registered office at Estate of Umar Building, 11 Nanuku Street, Labasa.

3RD PARTY

Solicitors : Fa & Company for the Plaintiffs
: Patel & Sharma for the 1st & 2nd Defendants
: Munro Leys for the 3rd Party

RULING

(Security for Costs in a Subrogated claim)

INTRODUCTION

[1]. The background to this case is set out in my earlier ruling which is reported in *paclii* (**Sunflower Aviation Ltd v Civil Aviation Authority of the Fiji Islands** [2015] FJHC 260; HBC250.2008 (20 April 2015). The issue has arisen as to whether or not I should order security for costs against the plaintiffs, given: firstly, that the plaintiffs are in no position to pay security for costs by reason of the fact that, one of them has been wound up and, the other, to quote counsel, *"is no longer in operation"* (whatever that means in terms of current solvency or corporate status); secondly, that the claim is a subrogated recovery action being driven by their insurer.

[2]. The defendants are seeking an order for security for costs in the sum of FJD$500,000 each against the plaintiffs.

[3]. The application is made pursuant to section 402 of the Companies Act 1983 (Cap 247) and also to Order 23 Rule 1(1)(b) of the High Court Rules 1988.

[4]. Section 402 of Fiji's Companies Act (Cap 247) provides:

> Costs in actions by certain limited companies
> 402. Where a limited company is plaintiff in any suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

[5]. Order 23 Rule 1(1)(b) of the High Court Rules 1988 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)* .....
> *(b)* that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

[6]. In resisting the application, the insurer's Australian solicitors assert that the insurer is solvent with substantial assets abroad and is perfectly capable of meeting any costs order in favour of the defendant in the event. And flowing from that, they reason also that, as the insurer is fully funding and pursuing this as a subrogated recovery action for its own benefit, it is hardly necessary to make any order for security for costs against the plaintiffs either[1]. In other words, the insurer is the real plaintiff able to pay the defendant's, in the event, if it comes to that.

[7]. The plaintiffs are in no position to post security for costs. As for the insurers, there are two issues to be considered.

[8]. Firstly, because it (insurer) is not a party on record in this action, does this court have any power to order it to pay security for costs, including security for costs?

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[1] That this is so is confirmed by a letter dated 15 September 2011 by Carter Newell Lawyers of Australia who had written to AFL on 10 November 2011 stating as follows:

> We refer to the above matter.....
> As you know this matter is a subrogated recovery action which has been commenced in the name of our client's insured's' Sunflower Aviation Limited formerly known as Sun Air (Pacific) Limited and Air Fiji Limited. We confirm the action is being funded at the cost and the benefit of our insurer client only.

[9]. Secondly, if this court does have power to order the insurer to pay security for costs, should it exercise that power in this case and order the insurer to post security for costs?

DOES THIS COURT HAVE POWER TO ORDER THE INSURER, A NON-PARTY, TO POSE SECURITY FOR COSTS?

[10]. The general position in law is that no Court has power in any given matter to order a person or entity, not a party on record, to pay any costs. Lord Justice Blackburn's sentiments in **Mobbs v. Vandenbrande**, (1864) 33 LJ QB 177 at page 180 is oft cited in support:

> In ordinary cases, where there has been no abuse of its process, the Court has no jurisdiction to order a person not a party on the record to pay costs.

[11]. The same general proposition would apply *ipso facto* in relation to the posting and payment of security for costs. But having said that, there are situations where the court might award costs against a non-party.

[12]. In **Knight v FP Special Assets Ltd** (1992) 174 CLR 178, the Australian High Court (as per Mason CJ and Deane J[2]) at 192 reviewed some English and Australian authorities from which they formed the rather compelling view that (i) where a party to litigation is insolvent and (ii) there is a non-party behind the scene who/which (iii) has played an active part in the conduct of the litigation, and (iv) has an interest in the subject of litigation, the court has power to award costs against that non-party:

> We consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of cases consists of circumstances where the party to the litigation is an insolvent person or a man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation.

[2] Gaudron J agreeing at 205.

[13]. Dawson J in **Knight**, lent further support from a slightly different theoretical angle:

> When it is said that as a general principle costs ought not be awarded against a person who is not a party to the proceedings, what is really being asserted is, not that there is no jurisdiction to do so, but that there is no justification for it because generally speaking persons who are not parties lack a sufficient connection with the litigation to provide a proper basis upon which to award costs against them.

[14]. Broadly speaking, Australian courts have used **Knight** as the foundation upon which an order for security for costs might be made against a non-party insurer pursuing and playing an active part in a subrogated recovery claim in the name of an insured plaintiff (see for example **Matthews v SPI Electricity Pty Ltd & Ors** (No 9) [2013] VSC 671 (9 December 2013).

[15]. I adopt the general approach in **Knight** for guidance.

SHOULD THIS COURT EXERCISE ITS POWER TO ORDER THE INSURER TO POSE SECURITY FOR COSTS IN THIS CASE?

[16]. The question I ask is, whether the facts of this case, when held up against the principled approach in **Knight**, do support the ordering of security for costs against the non-party insurer? As a starting point, I reiterate that all counsel concede that Sun Flower and Air Fiji, are in no position to post any security for costs. Above, I have alluded to the reasons why they cannot do so. Having established that, two questions of fact then arise. Firstly, whether the insurer in this case, which is not a party on record, is playing an active role in the conduct of this litigation and, secondly, does the insurer have sufficient interest or connection in the subject matter of the claim?

[17]. The short answer to these questions are contained in a letter dated 10 November 2011 by the insurer's Australian Solicitors, Carter & Newell, to Airports Fiji Limited. This letter I reproduce below.

> We recently received a Summons for Security for Costs via your Fijian Town Agents, Munro Leys
> As you know this matter is a subrogated recovery action which has been commenced in the name of our client's insured's' Sunflower Aviation Limited formerly known as Sun Air (Pacific) Limited and Air Fiji Limited. We confirm the action is being funded at the cost and the benefit of our insurer client only.

> We understand that you have been on notice of our insurer client's involvement in this matter since August 2007, over four years. In light of this, we were surprised that you instructed your Fijian Town Agents to bring a security for costs motion against our insurer client.
> Do you have a particular concern about the solvency of our insurer client? If so, we would be pleased to discuss this with you further. If not, then given the involvement of our insurer client, we see your client's motion as unnecessary in all circumstances
> .....

[18]. Once it is established that the insurer is playing an active role in the conduct of this litigation, and that it has a sufficient connection with the outcome of this case, then what I have to do next is to accept that the power is discretionary in nature and must be exercised judicially.

[19]. Lord Justice Peter Gibson in **Keary Developments Ltd v Tarmac Construction Ltd** [1995] 3 All ER 534 in commenting on the English equivalent of Fiji's section 402 and Order 23 (see above), said that the Court has a complete discretion whether to order security against a plaintiff company, and must act in the light of all the relevant circumstances. The principles in **Keary** (outlined below) are still applied by English Courts today, even in the face of change in the legal landscape in England - as the English Court of Appeal observed recently in **Seakom Ltd & Anor v Knowledgepool Group Ltd** [2014] EWCA Civ 1164 (08 August 2014)[3]. The persuasive force of **Keary** in Fiji must be placed rather highly, in my view. At the end of the day, the question remains: is there cause to believe from the evidence that the insurer would not be able to pay the defendant's costs in the event? Should the discretion then be exercised in favour of ordering security for costs against the insurer?

Factors

[20]. The Irish High Court in **Greenclean Waste Management Limited v Maurice Leahy Practising Under The Style And Title Of Maurice Leahy & Co. Solicitors** [2013] IEHC 74 (19 February 2013) and reported in BAILLII, said *obita* that the existence of an

[3] The Court said:

> The relevant principles when the court is deciding whether to order security in the case of a company were explained by Gibson LJ in ***Keary Developments Ltd v Tarmac Construction Ltd*** [1995] 3 ALL ER 534 at 539-540. Although that case was a pre-CPR decision, the cases show that the principles which operated before the CPR came into effect remain relevant to the exercise of the discretion under the CPR: see *Al Koronky v Time - Life Entertainment Group Limited* [2006] EWCA Civ 1123 at [14].

insurance policy would, ordinarily, be sufficient security for costs for any defendant because one may assume that the insurer will meet the defendant's costs in the event.

> 16. ..... in the ordinary way, the existence of a policy of insurance would generally be highly relevant to an assessment of this nature. If, for example, a court were to enter judgment in a routine commercial claim, one could not generally say that there would be *"reason to believe"* that a properly insured defendant "will" be unable to discharge this award. At the risk of stating the obvious, this is because one may fairly assume in such circumstances that the insurer will meet the costs of the award.

[21]. However, if there is no provision in the policy to cover security for costs, or if the plaintiff had done things to enable the insurer to void or repudiate the policy, or if there is any doubt as to the financial capacity of the insurer, the court may be justified in refusing to accept that the policy *per se* is sufficient security for costs.

> It might, of course, be different if there was reason to believe that the award was not within the scope of the policy in question or that the defendant[4] was guilty of conduct such as would enable the insurer to void the policy or would otherwise repudiate liability or even perhaps that significant doubts had emerged about the financial capacity of the insurer.

[22]. In the matter before me, I understand that the insurer would have already indemnified the plaintiffs for their insured loss(es) and would be seeking to recover the same from the defendants. As such, it is fair to say that any fear that the defendants may harbor to the effect that the insurer may void or repudiate the policy and, on that basis, elude any cost order against it - would be ill-founded. The only lingering issue is the ability of the insurer to pay the defendants' costs in the event.

Insurer's Solvency

[23]. Peter Gibson LJ in **Keary** (supra)[5] proposes that the fact that a plaintiff company is unlikely to be able to pay security for costs may be overlooked in some situations

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[4] I think the word "defendant" should probably have read "plaintiff".

[5] Peter Gibson LJ said:

"The relevant principles are, in my judgement, the following.

1. As was established by this Court in Sir Lindsay Parkinson and Co Ltd v Triplan Ltd ... [1973] QB 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security...By making the exercise of discretion under s 726 (1) [of the Companies Act] conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security...

(see footnotes). However, the same does not necessarily follow where the company concerned is an insurer. I say that because of the fact that an insurer, by the very nature of its business, is required by law to maintain a (usually statutorily defined) level of solvency as a matter of public policy. For that very reason, insurers generally are closely monitored under a statutory scheme which *inter alia* regulates their solvency. I presume from the letter of Carter & Newell (supra) that the insurer in this case is not subject to the relevant statutory regulatory scheme applicable in Fiji[6].

Onus

[24]. Having said that, it is not clear to me whether the onus, initially, should be on the insurer to establish its ability to pay the defendant's costs in the event, or whether it should be on the defendant to establish otherwise. It is safe to say that, because the solvency of insurers is a matter of public law regulation, the very fact that an insurer is active in the market place, is a testament to its solvency, for, otherwise, the regulator would have intervened to wind it up. In Fiji for example, as this court

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3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at a trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which had been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity...but it will also be concerned not to be so reluctant to order security as it becomes a weapon whereby the impecunious company can use it inability to pay costs as a means of putting unfair pressure on the more prosperous company...
4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure...
5. The court in considering the amount of security that might be ordered will bear in mind that he can order any amount up to the full amount claimed by way of security, provided that it is more than simply a nominal amount; it is not bound to make an order of a substantial amount...
6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There maybe cases where this can be properly be inferred without direct evidence...
However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it will be prevented by an order of the security from continuing the litigation...
7. The lateness of the application Security is a circumstance which can properly be taken into account..."

[6] In **In re Dominion Insurance Ltd** [2011] FJHC 294; HBF39.2008 (23 May 2011) – I did discuss, albeit in the most basic of terms, the regulatory regime in Fiji:

[16]. In Fiji, the Insurance Act 1998 provides inter alia for the regulation of the business, the licensing and the supervision of insurers[1]. The Reserve Bank of Fiji is established as the supervising authority under the Act (see section 3).

[17]. A good part of the Act is concerned with the actual regulation of solvency amongst insurers (such as DIL) in Fiji. The need to regulate solvency no doubt is based on economic and public policy considerations. The aim of the relevant provisions of the Act is to put in place a regulatory mechanism to ensure that insurers are accountable in maintaining their solvency.

[18]. And when solvency is maintained, the consumers or policy holders are protected because the insurer is able to pay out their claims.

[19]. When Sir James Ah Koy introduced the Insurance Bill in Parliament on 13th August 1998, he began as follows:

> Mr. Speaker Sir, this Insurance Bill is a result of a major review of the Insurance Act of 1976, by the Reserve Bank of Fiji. It attempts to modernize the legislation by strengthening the financial management and control provisions of the Insurance Act in lieu of the changing economic financial and legal environments of today.....The Government is convinced that an efficient and effective insurance sector should continue to complement socio-economic development and the potential regulation and supervision of insurance entities remains necessary to achieve it.

[20]. Hence, there is a strong element of public interest in regulating and maintaining insurer solvency.

observed in **In re Dominion Insurance Ltd** [2011] FJHC 294; HBF39.2008 (23 May 2011), the Insurance Act 1998:

> [21]. ..... sets up various checks to ensure that solvency is maintained. Amongst these, is the requirement that every insurer pays and maintains a deposit in the prescribed form acceptable to the Reserve Bank of Fiji with a market value of not less than the surplus of assets over liabilities required under section 31 of the Act (section 20). This deposit exists solely for the benefit of policy holders and cannot be assigned, transferred or encumbered or even be liable to attachment in execution of any judgement in any other way save for the discharge of any liability arising out of a policy of insurance issued by the insurer (see section 21).
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> [22]. Section 25 of the Act sets out the conditions that an applicant must fulfill before a licence to begin or carry on an insurance business in Fiji can be issued. Included amongst these is the requirement that the applicant satisfies the Reserve Bank as to its margin of solvency. For a general insurer incorporated in Fiji such as DIL, the prescribed margin of solvency is set out in section 32(2)(c) of the Act. Generally – the requirement is that the insurer must have a surplus of assets over liabilities and should have books and actuarial accounts to prove this – annually - to the satisfaction of the Reserve Bank (see Part V of the Act).

[25]. The following *obita* comments of the Irish High Court in **Greenclean Waste Management Limited v Maurice Leahy Practising Under The Style And Title Of Maurice Leahy & Co. Solicitors** [2013] IEHC 74 (19 February 2013) may be read in support of the proposition that the solvency of an insurer may be presumed from the very fact of the insurer's continuing existence in the marketplace.

> 16. ..... in the ordinary way, the existence of a policy of insurance would generally be highly relevant to an assessment of this nature. If, for example, a court were to enter judgment in a routine commercial claim, one could not generally say that there would be *"reason to believe"* that a properly insured defendant "will" be unable to discharge this award. At the risk of stating the obvious, this is because one may fairly assume in such circumstances that the insurer will meet the costs of the award.

[26]. In **Matthews v SPI Electricity Pty Ltd & Ors** (supra)[7], the Supreme Court of Victoria in Australia was dealing with a class action relating to the 2009 *"Black Saturday"* bushfires. One of the defendants had applied for security for costs against the lead plaintiff as well as the band of insurers that were behind their respective members' class action. The court refused to order security for costs in the absence of any

[7] my rather rudimentary summary of this case does little (if any) justice to the elaborate and interesting reasoning applied by the Victorian Supreme Court which was dealing with a range of other issues collateral to the security for costs problem in that case.

evidence that the insurers would not be able to pay the defendant's costs in the event.

> The result is that, in my view, the power exists to make an order for costs against the Insurers. However, in light of the matters to which I refer below, it is not necessary to come to a final conclusion as to the power because, assuming the power to exist, this is not a case where the court should, in the exercise of its discretion, make such an order.

[27]. I accept the sentiments in both **Mathews** and **Greenclean**. However, because the insurer in question is not one that is regulated under the appropriate regulatory framework in Fiji (Insurance Act 1998), the benefit of any "presumption" of solvency, in my view, must only be made upon the presentation of evidence of certification from the relevant Australian regulator. This, the insurer must provide.

Undertaking to Pay Defendants' Costs

[28]. I observe, from the few cases I have reviewed, that, once they are satisfied of the insurer's solvency, courts would then require from the insurer an undertaking to pay the defendant's costs, rather than assess and order the payment into court of a an appropriate cash sum.

[29]. In the Canadian case of **Offrey v. Ryan**, 2003 FCT 35 which is reported in CanLII (http://www.canlii.org/en/ca/fct/doc/2003/2003fct35/2003fct35.html), the defendant applied for security for costs. The action was a subrogated action brought by the plaintiff's insurers. The Court there noted that, although the plaintiff did have an interest in his deductible, he was a nominal plaintiff. The plaintiff did not adduce any evidence that he had assets to satisfy a judgment in costs. In light of that, the Court ordered that security for costs be posted. Notably, in *obita*, Lemieux J said that he would not have ordered the plaintiff to post security for costs had his insurers undertaken to pay any costs.

> When an insurance company with a subrogated claim sues for that claim in the name of the insured, that person, the insured, is a nominal plaintiff. (See, **Gough v. Toronto and York Radial Co**. (1918), 42 O.L.R. 451 (C.A.).
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> It appears that Mr. Offrey has an interest in recovering the deductible he has paid. In my view, he does not have a substantial interest in the action. (See, *Steinberg v. Blum*, [1953] O.W.R. 246, so as to take him out of the category of a nominal plaintiff.

I am satisfied it appears there is reason to believe the plaintiff would have insufficient assets in Canada to pay the defendants' costs. He had an opportunity to reveal his true financial picture which he failed to do despite the Court's order.

In the circumstances, the defendants are entitled to security for costs. I might have been inclined not to order security for costs if counsel for the plaintiff, on proper instructions from the insurance company, had undertaken to pay the defendants costs if ordered against him. That was not forthcoming.

The defendants' draft bill of costs was for the entire proceeding including trial and disbursements. I prefer to adopt a step approach. For now, I order the plaintiff to post security for costs in the amount of $5,000 within 30 days from the date of this order with liberty granted to the defendants to seek additional security as costs are incurred or reasonably anticipated to be incurred.

[30]. In **Greenclean** (supra), the type of insurance cover in question was an ATE ("After the Event") insurance policy. Such policies, I gather are commonly taken out by plaintiffs in the United Kingdom[8] and other bigger jurisdictions to cover legal costs in

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[8] See: Michael Phillips Architects Ltd. v. Rilkin [2010] EWHC 834, [2010] Lloyd's Rep. IR 479 where the Court reviewed various cases that dealt with the issue of the sufficiency of an ATE policy for security-for-costs purposes:

15. Since the use and popularity of ATE insurance has emerged, usually associated with conditional fee agreements, there has been some authority on whether and in what circumstances ATE insurance can be considered as providing security for costs. Nasser v United Bank of Kuwait [2001] EWCA 556 was a security for costs case involving a claimant resident outside England. Mance LJ made these obiter remarks at Paragraph 60:

"I would interpose at this point that, even where a claimant or appellant is resident abroad, there may of course be special factors indicating that any order for costs will be satisfied in some other fashion. The interesting possibility was raised before us that a claimant or appellant who has insured against liability for the defendants' costs in the event of the action or appeal failing might be able to rely on the existence of such insurance as sufficient security in itself. I comment on this possibility only to the extent of saying that I would think that defendants would, at the least, be entitled to some assurance as to the scope of the cover, that it was not liable to be avoided for misrepresentation or non-disclosure (it may be that such policies have anti-avoidance provisions) and that its proceeds could not be diverted elsewhere. The new arrangements for the funding of litigation certainly appear capable of throwing up possible imbalance, in so far as they permit contingency fee arrangements with uplifts potentially recoverable from losing defendants, but enable claimants to pursue litigation without insuring or securing the defendants' fees. The claimant's contingency fee arrangement in the present case is, however, without uplift."

16. In Al-Koronky and another v Time-Life Entertainment Group Ltd [2006] EWCA Civ 1123, the claimants had a conditional fee agreement with their lawyers but by the time of the first instance hearing had no ATE insurance; by the time of their appeal, they had such insurance. In the judgement of the Court of Appeal, Sedley LJ said:

"33. At more than one point of the judgment below, and at more than one point of the argument before us, the inflationary effect on costs of the claimants' CFA with their solicitors has been canvassed. In a paragraph cross-headed "The relevance of the conditional fee agreement" Eady J said this:

"It has already been recognised that when considering "unfair pressure" it is relevant for the court to take into account the fact that a claimant is pursuing his or her case with the benefit of a conditional fee agreement with a substantial uplift – especially if there is no "after the event" insurance ("ATE"): see e.g. the observations of Mance LJ in *Nasser* at [60]. Here it has, after a considerable lapse of time, finally been acknowledged on the Claimants' behalf by their solicitor that there is no ATE insurance that is likely to be of any value whatsoever to the Defendants should they succeed. What is more, as I understand it, there is no challenge to the Defendants' assumption that in this particular case there is likely to be a 100% uplift."

34. What Mance LJ said in *Nasser* was this:

[set out above]

35. Thus a claimant's (or for that matter a defendant's) entry into a CFA with his solicitor has by itself no impact on the case for or against the making of an order for security for costs. This proposition now marches with the decision of the House of Lords in *Campbell v MGN Ltd (No.2)* [2005] UKHL 61 that the enabling provisions of the Courts and Legal Services Act 1990, s.58, as amended, are compatible with article 10 of the Convention, their differential impact being a matter for Parliament. What may matter, however, is what insurance the claimant has obtained against the eventuality of having to pay the defendant's costs. A claimant who has satisfactory after-the-event insurance may be able to resist an order to put up security for the defendant's costs on the ground that his insurance cover gives the defendant sufficient protection.

36. In the present case, however, we are told that the claimants have after-the-event insurance, but that the policy is voidable or the cover ineffective if their eventual liability for costs is consequent upon their not having told the truth. We have not been told what the premium was, but since the outcome of this case will depend entirely upon which side is telling the truth, one wonders what use the insurance cover is. If the claimants win, they will have no call on their insurers. If they lose, it is overwhelmingly likely that it will be on grounds which render their insurance cover ineffective."

17. In Belco Trading Co v Kondo [2008] EWCA Civ 205, the Court of Appeal had to consider an order made by the first instance judge for security for costs which effectively required the payment into court of monetary sums or the provision of an insurance policy which gave the defendants equal or better security than payment of monies into court. There is no analysis in the lead judgement of Lord Justice Longmore of previous authorities. However, the judgement does provide some useful insights into the approach to be adopted on a security for costs applications when there is an ATE insurance in place:

"3. The claimants now seek permission to appeal the order for security for costs... the main ground on which permission to appeal is sought by the claimants relates to what is said to be the judge's apparent acceptance that, in theory, an ...ATE insurance policy... could be used as an alternative to payment in the court, or acceptable bank guarantee, as a means of providing security for the defendants' costs. The order does, however, provide that the insurance policy should give the defendants "equal or better security" than that afforded by a payment into court or a bank guarantee.

4. The claimants, through their Counsel Mr. Douthwaite, submit that this requirement can never be met, since payment into court or a bank guarantee given to the defendants is a complete security, while it is inevitable that an insurance policy is less secure, partly because it is not a promise to the

the event he (plaintiff) were to lose his case. A high premium is paid if/when the plaintiff wins his case. The ATE insurance contract contained a "**prospects clause**" which entitled the insurer to repudiate the contract if there was a reasonable prospect that the plaintiff's claim would fail. The defendant applied for security for costs against the insolvent plaintiff[9]. The latter relied on its ATE policy. The issue as defined at paragraphs 3, 15 and 24 were:

> 3. The question which arises in this application for security for costs brought by the defendant is rather a different one, namely, whether the plaintiff's ATE insurance is a factor to which I properly can have regard in determining whether to order security for costs, whether pursuant to **O. 29 of the Rules of the Superior Courts 1986** or **s. 390 of the Companies Act 1963** ("the 1963 Act").
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> .....
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> 15. Given that the plaintiff is insolvent, one cannot but assume that it would be unable to pay these costs in the ordinary course. The real question is whether the existence of the plaintiff's ATE insurance policy requires one to alter this assessment.
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> .....

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defendants but to the claimants; and partly because the policy gives to the insurers many opportunities to cancel the policy for breach of its terms, quite apart from any insurer's inherent right to avoid the misrepresentation or non-disclosure. The difficulty with Mr. Douthwaite's submission is that it was the claimants themselves who proposed the policy as an effective means of providing security for costs before they had even obtained the policy. Thus, the judge did not know anything about the terms it would contain and may well have assumed, for all one knows, there might be an anti-avoidance provision. It was for this reason that he, as it seems to me, accepted the defendants' argument, post his judgement, and incorporated the requirement in his order that the policy should afford equal or better security than the traditional methods of giving security for costs.

5. It would, in my judgement, be most unjust to the defendants to prevent them from pointing out that the policy in fact gives them much less security than the traditional form of security for costs. If the judge had been informed of, or had foreseen, the problems that have arisen out of the terms of the ATE policy now that it has been acquired, he would almost certainly, in my view, not have given the claimants the option of providing security by reference to the ATE insurance in the first place.
6. In fact, it is in any event doubtful if the judge did accept in principle the suitability of an ATE policy. He said in paragraph 10 of his judgement:
   " Whilst in principle I find that they should be in the order of the security of costs, the alternative to that is the claimant providing evidence that it has acquired the relevant insurance cover which would satisfy the defendants that that would be equal to, or even better than, payment of monies into court in respect of security."
7. That, to my mind, is saying that the defendants are entitled to be satisfied that any ATE policy propose is not in fact equal to, or better than, payment into court, and to reject it if not unreasonably so satisfied.
8. However all that may be, it would, in my judgement, be quite inappropriate for this court now to give permission to appeal to allow the claimants to argue that the equal or better security provision should be deleted, when it was for their benefit that the judge made reference to the ATE insurance in his order. It would be especially inappropriate in a case where the claimants had not even procured the policy on which they were proposing to rely when they made submissions as to its adequacy to the judge.
9. In fact, for the reasons which I have endeavored to give, it is most unlikely that any standard form of ATE insurance could provide a suitable alternative to the standard forms of order the security of the costs. The claimants, not surprisingly, cannot comply with the third option contained in the order and must, in my judgement, now, therefore, comply with option A or B."

18. These three cases are not absolutely determinative as to whether ATE insurance can provide adequate or effective security for the defending party's costs. That is not surprising because it will depend upon whether the insurance in question actually does provide some secure and effective means of protecting the defendant in circumstances where security for costs should be provided by the claimant. What one can take from these cases, and as a matter of commercial common sense, is as follows:
   (a) There is no reason in principle why an ATE insurance policy which covers the claimant's liability to pay the defendant's costs, subject to its terms, could not provide some or some element of security for the defendant's costs. It can provide sufficient protection.
   (b) It will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond or guarantee. That will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the defendant, and because the promise to pay under the policy will be to the claimant.
   (c) It is necessary where reliance is placed by a claimant on an ATE insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs.
   (d) There is no reason in principle why the amount fixed by a security for costs order could not be somewhat reduced to take into account any realistic probability that the ATE insurance would cover the costs of the defendant.

[9] The Irish High Court noted the plaintiff's insolvency as such:

> 8. The plaintiff went into voluntary liquidation in December 2011 and there would seem to be no doubt but that it is currently hopelessly insolvent. In principle, therefore, the defendants are prima facie entitled to an order for security for costs, unless it can be shown the plaintiff's ATE insurance sufficiently mitigates the risk that the plaintiff would be unable to discharge the defendant's costs.

24. .... the crucial question is the extent to which the insurer can legitimately repudiate liability so as effectively to eviscerate the insurance policy so as to deprive the insured (and, by extension, the defendant) of any real security in respect of costs.

[31]. The Court held that the features of the **"prospects clause"**[10] were enough reason not to accept the policy *per-se* as sufficient for security for costs purposes.

29. One can, therefore, sum up this present dilemma by saying that whereas security would be ordered if the plaintiff was not insured because it is clearly insolvent, conversely I would take the contrary view if it were insured in the ordinary way. The difficulty presented by ATE insurance is that such is the breadth of the repudiation clause and the fact that its operation is made contingent on precisely those matters into which a court cannot legitimately inquire that the risk that the plaintiff will not be in a position to discharge an award of costs defies any objective appraisal. In that respect, ATE insurance cannot be regarded in quite the same way as a standard contract of insurance.

[32]. However, the Court further commented that an undertaking by the insurer not to invoke the **"prospects clause"** would be sufficient security for costs.

30. In these circumstances, I find myself coerced by the very novelty of the issues presented by ATE insurance to approach this matter somewhat differently than in the case of the standard s. 390 application. I propose accordingly to adjourn the present application to a date no greater than three months hence to enable the plaintiff, its legal advisers and its insurers to take final counsel regarding its prospects in the litigation.
31. At that point, I shall require a binding assurance from the plaintiff's insurers that it does not propose to exercise the right to repudiate based on the prospects clause. In the event that such an assurance is forthcoming – and I stress that this is entirely a matter

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[10] The Irish High Court observed as follows:

18. The policy in question is expressed in admirably clear and succinct language. Among the relevant provisions are as follows:-

"Your policy only covers you if you agree to pay your insurance premium and you have entered into a no win no fee agreement for your claim with your solicitor.

Your policy is linked to your no win no fee agreement and (unless it is ended earlier, in line with its terms) operates for the duration of your no win no fee agreement. The insurance premium due for your policy is payable at the end of your claim (by court decision or settlement) or when your policy ends if this is sooner. We can end cover under your policy if we and your solicitor agree that it is more likely than not that you will lose your claim."

19. The policy then continues referring to what is described as "a prospects clause". This provides:-

"We can end cover under this policy if we, after discussion with your solicitor, are of the opinion that it is more likely than not that you will lose your claim."

20. It goes on to say that the coverage extends to paying:-

"Your outlays and your opponent's legal expenses and outlays and we will indemnify you for your insurance premium for your policy;
(a) if you lose; or
(b) if your claim is withdrawn by agreement on us and your solicitor after the start date of your no win no fee agreement; or
(c) if, after a lodgement or tender, you win but a court awards you damages that are less than the offer to settle, provided your solicitor has advised you not to accept the lodgement or tender.

We will pay your opponent's legal expenses and outlays arising from any order the court makes against you but not for order for costs where there has been non-compliance with the rules or order of the court."

21. Outlays are defined earlier in the agreement as:-

"Payments you or your solicitor make to others involved in your claim. These include the costs of mediation which you are liable, court fees, expert fees, accident report fees and Commissioner for Oath fees but not things like postage, travelling and other similar expenses".

22. The policy further recites that the insurer will appoint the claimant's solicitor "to represent you according to our standard terms of appointment." The claimant is then further required to co-operate with the solicitor and the policy also states that the cover will end at once if:-

"(a) your solicitor refuses to continue to acting for you with good reason; or
(b) you dismiss your solicitor without good reason; or
(c) your no-win no-fee arrangement ends for any reason; or
(d) you stop your claim without our agreement and that of your solicitor; or
(e) you do not give suitable instructions to your solicitor."

for the insurer – I will not make an order for security for costs. If, on the other hand, no such assurance is forthcoming, then I will be compelled to conclude that, in the words of s. 390, I have reason to believe that the plaintiff will be unable be unable to discharge a costs award which might be made in favour of the defendant and in those circumstances will direct the making of an order for security for costs.

(the case of **Michael Phillips Architects Ltd. v. Rilkin** [2010] EWHC 834, [2010] Lloyd's Rep. IR 479, is excellent reading).

OBSERVATIONS

[33]. There are important lessons to be learnt from all the cases discussed above. I assume that the insurer in question is not regulated under Fiji's Insurance Act 1998, and is not incorporated in Fiji. It is safe to assume (at the risk of stating the obvious), that the solvency of this insurer is subject to statutory regulation in Australia as a matter of public policy, and under which statutory regime the insurer is accountable in maintaining a prescribed level of solvency. Some sort of certification from the appropriate Australian regulator would be ideal to allay any issue about the insurer's solvency. In addition to that, I would take heed of the Canadian approach in **Offrey v. Ryan** (supra) and in the Irish approach in **Greenclean** (supra) and require a binding assurance from the insurer that it will undertake to pay the defendants' costs if ordered to pay so.

ORDERS

[34]. The insurer is to file and serve within 35 days of the date of this Ruling (**i.e. by 2.30 p.m. Friday 12 June 2015**) a supplementary affidavit annexing the following:

(i) a certificate from the appropriate Australian regulator re: the insurer's solvency status.

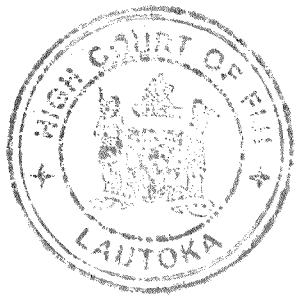
(ii) an undertaking duly executed by the insurer that it will pay the defendants' costs if, in the event, the plaintiff (and/or the insurer) were to be so ordered.

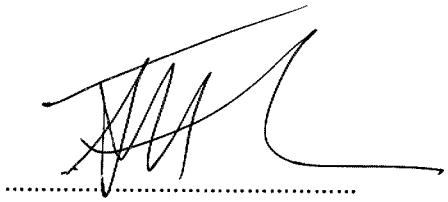
[35]. If, no such binding assurance is forthcoming from the insurer by the above mentioned date, then I will be inclined to the view that there is no proper evidence before me concerning the insurer's solvency and, accordingly, that the insurer

therefore cannot be said with any certainty to be in a position to discharge a costs award which might be made in favour of the defendants.

[36]. Accordingly, in the event, I will have no option but to order for security for costs in the amount that the defendants had sought in their application.

[37]. Case adjourned to **26 June 2015 for mention at 10.30 a.m.** Costs in the cause.





Anare Tuilevuka
JUDGE
Lautoka

08 May 2015