

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC No.83 of 2013

BETWEEN : **URI KUROP** of 34 Wasawasa Road, Newtown, Nadi, Businessman.

FIRST PLAINTIFF

: **KADOMO ISLAND LIMITED** a duly incorporated limited liability company having its registered office at Crosbie and Associates, 3 Cruikshank Road, Nadi Fiji.

SECOND PLAINTIFF

: **AQUA BLUE (FIJI) LIMITED** a duly incorporated limited liability company having its registered office at Crosbie and Associates, 3 Cruikshank Road, Nadi Fiji.

THIRD PLAINTIFF

AND : **ADRENALIN WATERSPORTS (FIJI) PTY LIMITED** a duly incorporated limited liability company having its registered office at Shop 8 Port Denarau, Nadi, Fiji.

FIRST DEFENDANT

: **PAUL COOK** of Shop 8 Port Denarau, Nadi, Fiji, Company Director.

SECOND DEFENDANT

: **ZDENKA COOK** of Shop 8 Port Denarau, Nadi, Fiji, Company Director

THIRD DEFENDANT

LOWATA VULASE of Shop 8 Port Denarau, Nadi, Fiji, Company Director.

FOURTH DEFENDANT

R U L I N G

1. I am being asked to award indemnity costs to the plaintiff following a successful interlocutory application by the plaintiff against the defendant seeking various injunctive relief concerning a certain Freezer and other goods which, at the time, were in the possession of the defendants. The application began ex-parte but later proceeded inter-partes on my Orders. There was some issues about ownership of these items. These had to be clarified.
2. The principles by which Courts are guided when considering whether or not to award indemnity costs are well settled.

3. The ruling of Madam Justice Scutt in **Prasad v Divisional Engineer Northern (No 2)** [2008] FJHC 234; HBJ03.2007 (25 September 2008) goes to great lengths to set out the myriad of cases on the point.
4. The starting point is that the winning party is entitled to costs as of right. This is espoused in the general principal that costs follow the event.
5. In assessing costs, the court has 'absolute and unfettered' discretion vis-à-vis the award of costs but discretion 'must be exercised judicially' (see **Trade Practices Commission v. Nicholas Enterprises** (1979) 28 ALR 201, at 207).
6. The purpose of indemnity costs is not penal but compensatory.
7. As a matter of general principle, and citing Scutt J (supra):
 - A party against whom indemnity costs are sought 'is entitled to notice of the order sought': **Hunismans Chemical Company Australia Limited v. International Cools Australia Ltd** (1995) NSWLR 242
 - That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases: **Sayed Mukhtar Shah v. Elizabeth Rice and Ors** (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA
8. This discretion means that the Court may award costs on an indemnity basis rather than on the standard party-party basis in the *Scale of Costs – Standard Basis* set out in the High Court Rules 19888 (Order 62 Rule 13).
9. Indemnity costs will be awarded only 'where there are exceptional reasons for doing so' (see **Colgate-Palmolive Co. v. Cussons Pty Ltd** at 232-34; **Bowen Jones v. Bowen Jones** [1986] 3 All ER 163; **Re Malley SM; ex parte Gardner** [2001] WASCA 83; **SDS Corporation Ltd v. Pasonnay Pty Ltd & Anor** [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J).
10. The question, as Scutt J observed in **Prasad**, is always whether the facts and circumstances of the case warrant an order for payment of costs on an indemnity basis other than by reference to party and party'. In other words, the court should ask itself whether or not the justice of the case requires the winning party to be awarded costs on an indemnity basis (**Lee v. Mavaddat** [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.).
11. There must be some special or unusual feature of the case to justify the award of indemnity costs rather than party-party costs' (see **Preston v. Preston**

[1982] 1 All ER 41, at 58. If the conduct of the losing party amounts to an abuse of process of the Court, such as to waste the court's time and other party's resources, that conduct may attract such an order' (see **Dillon and Ors v. Baltic Shipping Co. ("The Mikhail Lermontov")** (1991) 2 Lloyd's Rep 155, at 176, per Kirby P; **Baillieu Knight Frank**, at 362, per Power J).

12. For example, if an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success, it may be presumed that the applicant had an ulterior motive, or is in willful disregard of known facts or the established law. In such cases, the award of indemnity costs will be considered (see **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors** [1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J).
13. Also, where a defendant knew or ought to have known at the outset that its defence was unsustainable, this will be a misuse of the process of the court which will warrant indemnity costs (see **Willis v. Redbridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ).
14. In exercising that discretion, the court must strike a balance between the right of any party to dispute matters on the one hand and the policy against abuse of court process on the other.
15. As Pathik J cautions:

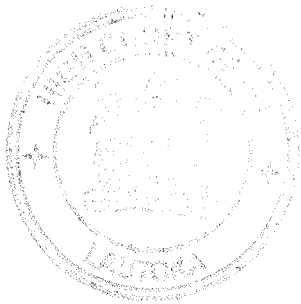
[A party] cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': **Ranjay Shandil v. Public Service Commission** (Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) *NLJ* 710 (May 1996))
16. The Fiji Court of Appeal also offers the following cautionary words which somewhat set the parameters:

'... neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable': **State v. The Police Service Commission; Ex parte Beniamino Naiveli** (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6.
17. Further caution might be found in the approach of the Western Australian Supreme Court in **Quancorp Pty Ltd & Anor v. MacDonald & Ors** [1999]

WASC 101, at paragraphs [6]-[7] as per Wheeler, J – that a case should not be characterized as:

..... 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances'.

18. In this case, I do not think that an award of indemnity costs is warranted as the defendant's counsel had caused an adjournment to verify the issue of ownership. As soon as that was clarified, they were rather cooperative.
19. However, that does not prejudice the plaintiff's entitlement to costs as costs follow the even which in this case I summarily assess at \$450-00.



A handwritten signature in black ink, consisting of stylized initials and a surname, positioned above a horizontal dotted line.

Anare Tuilevuka

JUDGE

12 February 2015