IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 131 of 2011

BETWEEN : **SIMONE ALLENE** of Flat 4, Gladstone Court, Anson Road, London NW24LA, Businesswoman

PLAINTIFF

AND : **EDWARD JENNINGS** of Sheraton Fiji Resort, Nadi, Fiji

1st DEFENDANT

AND : **SEASHELL BUSINESS CENTRE LIMITED** a limited liability company having its registered office at Sheraton Fiji Resort Island, P O Box 10522, Nadi Airport.

2nd DEFENDANT

(Ms.) Nilema Samantha for the Plaintiff
Mr. Janendra Kaushik Sharma for the Defendants

Date of Hearing :- **11th August 2016**
Date of Ruling :- **06th December 2016**

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Defendants **"Notice of Motion"**, dated 17th December 2015, made pursuant to **Order 23 and Order 20 rule (5) of the High Court Rules, 1988** and under the inherent jurisdiction of the Court seeking the grant of the following Orders;

1. *The Plaintiff being ordinarily resident out of jurisdiction do give such security for costs as this Honourable Court may deem fit;*
2. *That this action be stayed until the Plaintiff give the required security; alternatively*

3. *The Action be struck out if the Plaintiff does not give the required security;*

4. *Leave be granted for the Defendants to amend their Statement of Defence and Counterclaim.*

5. *That the costs of this Application be costs in the cause.*

(2) The "Notice of Motion" is supported by an Affidavit sworn by "Edward Vince Jennings", the First Defendant and the Director of the Second Defendant Company.

(3) The "Notice of Motion" is vigorously contested by the Plaintiff. The Plaintiff filed an "Affidavit in Opposition" sworn on 22nd March 2016, opposing the application for security for costs and amendment of pleadings. The Defendants filed an "Affidavit in Reply" sworn on 09th May 2016.

(4) The Plaintiff and the Defendants were heard on the "Notice of Motion". They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendants filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

(1) What are the circumstances that give rise to the present application?
What is this case before me?

(2) To give the whole picture of the action, I can do no better than set out hereunder the averments/assertions of the pleadings.

(3) The Plaintiff in her Statement of Claim pleads *inter alia;*

Para 1. *The Plaintiff is a British citizen.*

2. *The 1st defendant is a shareholder and company director of Seashell Business Centre Limited, the 2nd defendant.*

3. *Share capital of the 2nd defendant company is $100,000.00 divided into one dollar each. 100 shares were issued of which 70 were issued to the 1st Defendant and 30 were issued to Yoko Jennings who is the wife of the 1st defendant.*

4. *In or about April 2005 the 1st defendant and the plaintiff reached an agreement for the plaintiff to take up 49% shareholding in the 2nd defendant for a consideration of $110,000.00.*

5. *In May 2005 the 1st defendant and the plaintiff attended the office of the defendants' accountant Nanda & Co, Accountants in Nadi and completed the Fiji Trade and Investments Board (FTIB) application form to facilitate the transfer of shares to the plaintiff.*

6. *The 1st defendant was told by the plaintiff that she had GBP 36,000 in United Kingdom with which she will be paying for the shares. The 1st defendant advised the plaintiff that in order for the application to be submitted to the FTIB the plaintiff had to forward the funds to Fiji.*

7. *The 1st defendant represented to the plaintiff that the money should be paid into Yoko Jenning's personal account pending the completion of the formalities and provided the plaintiff with the bank account details of Yoko Jennings which was kept at ANZ Bank, Nadi Account No. 3804377.*

8. *On 19th May, 2005 the plaintiff transferred the said sum of GBP 36,000 at that time totalling $110,081.74 into the above account of Yoko Jennings as instructed by the 1st defendant.*

9. *In May 2005 the plaintiff intended to return to Thailand for a year to assist in Tsunami rehabilitation works. The defendants and Yoko Jenning were made aware of that and they agreed and advised the plaintiff that one year would allow the formalities to be completed for the transfer to be effected.*

10. *It was agreed between the plaintiff and the defendants that the transaction will be completed by May 2006. The Plaintiff left for Thailand in May 2005.*

11. *In January 2006 the 1st defendant asked the plaintiff to return to Fiji to help run the operations of the 2nd defendant and another of the 1st defendant's business known as Dive Tropex since he was scheduled to leave for Iraq in March 2006. The 1st defendant left for Iraq in March, 2006 and in April, 2006 the plaintiff returned to Fiji and started working for Dive Tropex and the 2nd defendant.*

12. *In June, 2006 when the 1st defendant returned from Iraq the plaintiff enquired with him regarding the transfer of the shares to her as agreed. She further enquired about the transfer in September and December 2006.*

13. *Despite numerous requests by the plaintiff the 1st defendant in breach of the agreement failed and/or refused and/or neglected to transfer the shares to the plaintiff.*

14. *The plaintiff by a letter dated 14th July, 2009 through her solicitors accepted the 1st and 2nd defendants' non performance of the agreement and/or breaches of it and the total failure of consideration as the repudiation of the agreement and demanded for a refund of the sum of $110,081.74.*

15. *The 1st and the 2nd defendants have refused and/or neglected to pay the plaintiff the said sum of $110,081.74 and interest as demanded.*

16. *Further and/or in the alternative the 1st defendant and the 2nd defendant have been unjustly enriched in that they received money from the plaintiff but failed to transfer the shares to her by May 2006 as agreed.*

17. *Further the plaintiff was promised a directors salary of $2,000.00 per month. She was initially paid $1,500.00 and it was further reduced to $1,000.00 July 2007. The plaintiff was not paid any salary for the remainder of the time she was in Fiji until her departure at the end of November, 2007.*

18. *The plaintiff as a result of the actions of the 1st defendant and 2nd defendant has suffered loss, damages, inconvenience and mental anguish.*

(4) Wherefore, the Plaintiff claims from the Defendants;

(a) *Judgment for the sum of GBP 36,000 or its equivalent in Fijian dollars as at the date of judgment.*

(b) *Interest at the rate of 13.5% on Judgment sum in (a) above from 19th May, 2005 to date of payment.*

(c) *Judgment for the sum of $12,000 being the plaintiff's loss of income.*

(d) *Interest at the rate of 13.5% on $12,000.00 from August, 2007 to date of payment.*

(e) *General damages for inconvenience and mental anguish.*

(f) *Such further or other relief as this Honourable Court deems just.*

(g) *Costs of this action.*

(5) The Defendants in their Statement of Defence and Counter-Claim plead *inter alia;*

1. *As to paragraphs 1, 2 and 3 of the Statement of Claim,*

The Defendants admit the same.

2. *As to paragraph 4 of the Statement of Claim,*

The Defendants admit that a verbal agreement was made with the Plaintiff at the material time, but the same was always subject to and conditional upon obtaining the prior approval of the FTIB and/or the Reserve Bank of Fiji.

3. *As to paragraph 5 of the Statement of Claim,*

Except as to say they attended in either April or May, 2005, the Defendants admit the same and say further that work permit application for the Plaintiff was also prepared and submitted to Department of Immigration on or about April, 2006 in connection with the said FTIB application.

4. *As to paragraph 6, 7 and 8 of the Statement of Claim,*

The Defendants admit the same.

5. *The Defendants say that the Plaintiff's claim herein and/or the damages prayed for by the Plaintiff are statute barred under section 4 of the Limitation Act.*

6. *As to paragraph 9 of the Statement of Claim,*

The Defendants are not aware of the same and neither admit or deny.

7. *As to paragraph 10 of the Statement of Claim*

The Defendants deny the same and put the Plaintiff to strict proof.

8. *As to paragraph 11 of the Statement of Claim*

The Defendants admit that the Plaintiff took the position of operations manager of the Second Defendant and of the dive shop, known as Dive Tropex, which the Second Defendant operated and managed. Some time in 2006 around the time the First Defendant was posted to Iraq.

9. *The Defendants say that, at the material time, Dive Tropex employed the Second Defendant to handle its accounts and manage its office and operations.*

10. *As to paragraph 12 and 13 of the Statement of Claim,*

Except as to admit that the First Defendant travelled into and out of Fiji several times during 2006, the Defendants deny the same and put the Plaintiff to strict proof.

11. *The Defendants say further that they were awaiting the necessary regulatory approvals at the material time.*

12. *The Defendants say that some time in 2007 the Plaintiff, after initiating a verbal dispute with the First Defendant, left the premises of the Second Defendant, abandoned her position as operations manager and ceased rendering services to the Second Defendant and/or Dive Tropex.*

13. *However, the Plaintiff continued to collect wages despite not working.*

14. *The Plaintiff also continued to stay free of charge in the flat and drive the vehicle provided by the Second Defendant and/or Dive Tropex.*

15. *Later the Plaintiff abandoned the said vehicle at the Korotogo roundabout with the keys inside on the day the vehicle's LTA registration expired, causing the Second Defendant unnecessary expense and loss to retrieve the same.*

16. *The Plaintiff also filed complaints about the Defendants with the FTIB.*

17. *Eventually the Plaintiff left Fiji and the Defendants did not hear anything further from her until some time in 2009.*

18. *As to paragraph 14 of the Statement of Claim,*

The Defendants admit receiving a letter dated 14th July, 2009 from AK Lawyers demanding that the Second Defendant refund the sum of $110,081.74 to the Plaintiff, and pay another $63,000.00 as damages and wages and legal costs, to which the Defendants' solicitors responded in writing on 26th October, 2009, offering to allow the Plaintiff to take up the shares of the Second Defendant.

19. *As to paragraph 15 of the Statement of Claim,*

The Defendants admit the same.

20. *As to paragraphs 16, 17 and 18 of the Statement of Claim,*

The Defendants deny the same and put the Plaintiff to strict proof.

COUNTER CLAIM

21. *The Defendants refer to and repeat paragraphs 11 through 15, inclusive above.*

22. *The Defendants say that the Plaintiff, while working for or as an agent of the Second Defendant, undertook the negotiation of an agreement with the Westin Resort for the Second Defendant to relocate its business centre from the Sheraton Resort to the Westin Resort in the year 2007.*

23. *In reliance on the Plaintiff's representations to the Defendants concerning the same, the Second Defendant installed and completed the tenant improvements and renovation works and provided new furniture and computers for the business centre at the Westin Resort at its own expense.*

24. *However, the Plaintiff then agreed with the Westin Resort, without the Defendants' knowledge or approval and without the appropriate authorization from the Board of Directors of the Second Defendant, to move the Second Defendant's business centre to another location inside or next to the conference room at the Westin Resort.*

25. *The Plaintiff acted negligently and/or wrongfully and/or without authorisation in breach of her duties as an employee and/or agent of the Defendants.*

26. *As a result of the Plaintiff's actions, the Second Defendant was forced to remove its newly installed furniture and computers from the already fitted out business centre as the same would not fit in the new space, and had to abandon its tenant improvements and/or fixtures already installed in the business centre.*

27. *The Plaintiff also undertook the renewal of Dive Tropex's lease agreement with the Westin Resort.*

28. *After the Plaintiff walked out and abandoned her position and duties as operations manager, the Westin Resort refused to renew Dive Tropex's lease agreement.*

29. *Previously the Westin Resort had automatically renewed Dive Tropex's lease agreement every year for some 16 years.*

30. *As a result of the Plaintiff's negligent and/or wrongful actions, the Defendants incurred loss and damages and the Second Defendant eventually went out of business.*

31. *The Defendants incurred special damages and loss in respect of the tenant improvements and renovations to the business centre at the Westin Resort in an amount greater than $100,000.00, the particulars of which will be provided at trial.*

32. *The Defendants incurred loss and general damages in respect of the non renewal of the Dive Tropex lease agreement and the loss of its appointment as the dive shop for the Westin Resort, due to the Plaintiff's actions, as the Second Defendant was employed as the manager/operator thereof.*

33. *The Defendants have suffered special damages and general damages and loss due to the Plaintiff's negligent and/or wrongful actions herein.*

34. *The Defendants claim interest pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.*

35. *The Defendants claim the costs of this action.*

(6) Wherefore, the Defendants pray for Judgment as follows;

(a) *THAT the Plaintiff's Statement of Claim be dismissed with costs to the Defendants.*

(b) *FOR general damages and special damages against the Plaintiff.*

(c) *FOR interest pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.*

(d) *FOR the costs of this action on a solicitor-client basis.*

(C) CHRONOLOGY OF EVENTS

i) Writ of Summons filed on 15th August, 2011

ii) Acknowledgement of Service filed on 20th November, 2011

iii) Statement of Defence and Counter Claim filed on 8th December, 2011

iv) Reply to Defence and Defence to Counter Claim filed on 18th June, 2012.

v) Summons for Direction filed on 8th August, 2012

vi) Order on Summons for Direction filed on 10th September, 2012

vii) Affidavit Verifying Plaintiff's List of Documents filed on 18th January, 2013

viii) Affidavit Verifying Defendant's List of Documents filed on 22nd March, 2013

ix) Notice of Change of Solicitors filed on 19th November, 2013

x) Summons filed on 5th May, 2014 to remove AK Lawyers from acting

xi) Affidavit in Support of Ronnie Ram in Support filed on 5th May, 2014

xii) Affidavit in Reply filed on 3rd June, 2014

xiii) Notice of Change of City Agents filed on 16th June, 2014

xiv) Ruling delivered on 4th September, 2015

xv) Summons to Enter Action for Trial 1st December, 2015

xvi) Copy pleadings filed on 1st December, 2015

xvii) Notice of Motion for Security for Costs and Amendment of Pleading filed on 23rd December, 2015

xix) Affidavit in Opposition filed on 31st March, 2016

xx) Affidavit of Edward Vince Jennings in Reply to Affidavit in Opposition filed on 10th May, 2016.

(D) THE DEFENDANTS NOTICE OF MOTION FOR 'SECURITY FOR COSTS'

(1) The Defendants Notice of Motion for Security for Costs is supported by an Affidavit sworn by the First Defendant, which is substantially as follows;

Para 1. *That I am the First Defendant herein*

2. *That I am the Director of the Second Defendant Company and am duly authorized to swear this affidavit on its behalf*

3. *That in so far as the contents of this affidavit are within my personal knowledge it is true and so far as it is not within my personal knowledge it is true to the best of my knowledge, information and belief.*

4. *I am a Security Consultant and due to the nature of my work I usually am out to the Middle East where I spend about 8 to 12 weeks when I am over there. When I am in the Middle East I do not have access to a Notary Public, I therefore authorize Mr. Kavitesh Prabhakar of Janend Sharma Lawyers to swear affidavits on my behalf in this matter if need be.*

5. *The Plaintiff is not ordinarily resident in Fiji. I believe that the Plaintiff is and was at the date of the Writ, a resident of London, England.*

6. *I also believe that the Plaintiff does not have any assets within Fiji.*

7. *The Statement of Claim was served on 15 August 2011. The Summons for Direction was served on 08 August 2012 and the pleadings have closed. The Parties are yet to attend to Pre-Trial Conference.*

8. *I was previously represented by M.K. Sahukhan & Co. of Nadi. I am now represented by my current Lawyers.*

9. *My current Lawyers have informed me that I am entitled to apply for Security Costs by reason of the Plaintiff not being normally resident in Fiji.*

10. *Due to the Plaintiff not being resident in Fiji I will face difficulties recovering any costs that the Court may Order the Plaintiff to pay to me.*

11. *That my Solicitors vide letter dated 16 September 2015 wrote to the Plaintiff's Solicitors and requested the Plaintiff to pay Security for Costs. A copy of this letter is annexed hereto marked "EVC.01". The Plaintiff has not complied. A copy of the Plaintiff's Solicitors response is annexed hereto marked "EVC.02".*

12. *Defendants have incurred legal cost in the sum of $4344.77. Copies of Receipts for the said payments are attached hereto marked "EVC.03".*

13. *Our solicitors have given an estimated schedule of costs to the Defendants for the matter as follows (for the balance of the action):*

a)	*Costs of Trial Preparation*	-	*$ 8145.00*
b)	*Costs for the Trial Stage*	-	*$ 9075.50*
c)	*Costs for Preparing and Filing Closing Subs*	-	*$ 9257.50*
	TOTAL	-	*$26478.00*

Copies of the Estimate Costs are annexed hereto marked as "EVC.04" to "EVC.06"

I am informed by Mr. Janend Sharma and verily believe that this is an Estimate of costs only and is subject to change depending upon how the matter progresses.

14. *That the total estimates costs that we would therefore further incur is $26,478.00.*

15. *Accordingly I respectfully request that the Plaintiff be ordered to provide security for my costs of the action in the sum of $25,000.00 and that pending the provision of such security the action be stayed.*

16. *Messrs Janend Sharma Lawyers were instructed in this matter after my former Solicitors, Messrs M.K. Sahukhan & Co.*

17. *During the course of my Solicitors holding Pre Trial Conference it became necessary in the interest of Justice and to protect my interest that my Statement of Defence be amended.*

18. *It also appears that my Counterclaim also needs amendments as my claim appears not to have been properly pleaded. My proposed Amended Statement of Defence and Amended Counter Claim is annexed hereto marked "EVC.07".*

19. *I verily believe no irreparable prejudice would be caused to the Plaintiff by my amendments.*

20. *I am advised by my Counsel, Mr. Janend Sharma and verily believe that the Statement of Defence and Counter Claim should be*

amended. The amendments required will ensure that the real matters or issues in this case are decided by this Honourable Court.

(2) The Plaintiff filed an Affidavit in Opposition sworn on 22nd March, 2016 which is substantially as follows;

Para 1. *I am the Plaintiff named in this action and unless stated otherwise I make this affidavit from matters within my own knowledge and information provided to me by my Solicitors in Fiji.*

2. *The affidavit of Edward Vince Jennings sworn on 18th December, 2015 filed herein (Jenning's affidavit) has been made available to me which I have read and rely hereunder.*

3. *I am unable to admit the contents of paragraphs 2, 3 and 4 of Jennings' affidavit.*

4. *As to paragraph 5 of the Jenning's affidavit, I admit the contents, and state that my non-residence within the jurisdiction is evident from my particulars in the intituling of this action. This has been taken as an issue nor ever disputed by me. It has now been more than four years since this action was first instituted. My counsel will address the full chronology of steps taken from the records at the hearing of the Defendants applications for security and leave to amend.*

5. *As to paragraph 6 of the Jenning's affidavit I can confirm that I do not own any properties in England. I do have some savings and my current credit balance held with NetWest Bank at the South Norwood Branch, London, England is £16,388.50. Counsel will address arguments against the order for any securities in the circumstances of this case. I now provide a copy of my Bank statement marked "SA-1".*

6. *As to paragraph 7 of the Jenning's Affidavit I am advised by my solicitors that the Pre-Trial Conference was dispensed by consent on 11th December 2015 and the file was then referred to the Deputy Registrar to allocate a hearing date. I am informed by my solicitors that the Pre-Trial Conference could not be completed as the Defendants Solicitors were unreasonably insisting on retracting an admission made in their pleadings. I now attach a series of correspondences exchanged between the respective Solicitors and the draft Pre-Trial Conference Minutes finalized except for the attempted retraction marked "SA-2".*

7. *I am informed by my Solicitors that no issue of security for costs was ever raised by the Defendants until the letter of 16th September, 2015 from their solicitors.*

8. *As to paragraph 9 and 10 of the Jenning's Affidavit, I am advised by my Solicitors that the Defendants were at liberty to file an application for Security for costs. However, this application was not promptly made by the Defendants since the filing of the Writ of*

Summons on 15th August, 2011 and the Notice of Change of Solicitors filed on 19th November, 2013. Apparently, this application was not made until 23rd December, 2015. This is after a lapse of more than 53 months from the filing of the Writ of Summons and a lapse of 25 months from the filing of the Notice of Change of Solicitors. I have incurred considerable liability for fees and other expenses associated with this litigation not to mention the added expenses when the Defendants filed an application for my current Solicitors to cease acting on my behalf. The delay has been inordinate and still continues.

9. *As to paragraph 11 of the Jenning's Affidavit, the letter of 21st September 2015 annexed as EVC-2 is self explanatory and my counsel will address this at the hearing of this application.*

10. *As to paragraph 12 of the Jenning's Affidavit I am unable to comment on legal costs incurred by the Defendants. I am advised by my Solicitors that the Defendants are not entitled to those costs from me even if they succeeded. The Defendants are not the only ones who have incurred costs.*

11. *As to paragraph 13 and 14 of the Jenning's Affidavit the cost of $26,478.00 is still exorbitant. A greater part is anticipated for preparation of submissions in comparison to the actual trial. My Counsel will make submissions on the itemized costs at the hearing. I am quite surprised by the present cost formulation as in their letter of 16th September, 2015 the Defendants demanded $40,0000.00 for costs already incurred by the Defendants and for future costs.*

12. *As to paragraph 15 of the Jenning's Affidavit, this application should be dismissed as it has been excessively delayed and also in view of the pleadings in which the Defendants have admitted to offering shares in the 2nd Defendant in exchange for the refund of $110,000.00. This figure alone should suffice and be sufficient security for the Defendants.*

13. *As to paragraph 17 of the Jenning's Affidavit, I am informed by my Solicitors that there were some issues on which the parties could not agree to in the Pre Trial Conference Minutes. I re-iterate the contents of paragraph 6 herein and my counsel will address these issues in Court on the hearing of the Defendants application.*

14. *As to paragraph 18 of the Jenning's Affidavit, I say that the Defendants current Solicitors have had sufficient time since 25th March, 2014 to get the pleadings in order. In any event no amount of amending of pleadings will change the facts already admitted to in the pleadings and the legal consequences of the admissions which my Counsel will address at the hearing of the Defendants application.*

15. *As to paragraph 19 of the Jenning's Affidavit I deny that no prejudice will be caused as there will be prejudice to me due to the delay. Further by the amendment sought the Defendants are attempting to conceal facts which they themselves have admitted. The action has proceeded to date on the basis of the issues on the pleadings as they stood from the time the Writ was issued on 15th*

August, 2011 and Defence filed. It is surprising this was only raised at the Pre-Trial Conference stage to deny the facts which were never in dispute till this summons for amendment were filled.

16. *As to paragraph 20 of the Jenning's Affidavit I am advised by my Solicitors that amendment sought by the Defendants is clearly without any merits and only can be explained as a device to deviate from the main issue in this action and to prolong this action unnecessarily and demonstrates mala fides on the part of the Defendants. My Counsel will address legal issues that are sought to be avoided by the purported application to amend which I am given to understand cannot be done.*

17. *I therefore ask that the current applications be dismissed with indemnity costs as this application is designed to merely delay the trial of this action.*

(E) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and Judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the Defendants now seek.

(2) Rather than refer in detail to the various authorities, I propose to set out, with only very limited citations, what I take to be the principles in play.

(3) Provisions relating to **security for costs** are contained in Order 23, rule 1 of the High Court Rules, 1988.

Order 23, Rule 1 of the High Court Rules provides as follows:

SECURITY FOR COSTS
Security for costs of action

"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 the jurisdiction; or

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 unable to pay the costs of the defendant if ordered to do so; or

c) *Subject to paragraph (2), that the plaintiff's address during the course of the proceedings with a view to evading the consequences of the litigation;*

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, *it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just."*

The use of the words "**having regard to all the circumstances of the case, the Court thinks it just to do so, it may order**", confers upon the Court a real discretion on whether or not to order security for costs.

It is to be noted that residence outside the jurisdiction enables, but does not require, the court to order security for costs of the action. As Sir Nicolas Browne-Wilkinson V, -C, put it in **Porzelack K.G. v. Porzelack (U.K.) Ltd**. [1987] 1. W.L.R. 420, 422-423:-

"The purpose of ordering security for costs against a Plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this Court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a Plaintiff who lacks funds. The risk of defending a case brought by a penurious Plaintiff is as applicable to Plaintiffs coming from outside the jurisdiction as it to Plaintiffs resident within the jurisdiction. There is only one exception to that, so far as I know, namely, in the case of limited Companies, where there are provisions under the Companies Act for security for costs. Where the Plaintiff resident outside the jurisdiction is a foreign limited Company, different factors may apply: see DSQ Property Co. Ltd. v Lotus Cars Ltd. [1987] 1 W.L.R. 127. Under the R.S.C., Order 23, r.I (1) (a), it seems to me that I have entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident Plaintiff. The question is what, in all the circumstances of the case, is the just answer."

The **White Book (1999)** further discussed the development of the law till 1999, which is applicable to Fiji. At page 431 (23/3/5) of the White Book;

"The ordinary rule of practice is that no order for security for costs will be made if there is a co-plaintiff resident within the jurisdiction (Winthorp v. Royal Exchange Assurance Co. (1755) 1 Dick. 282; D'Hormusgeev Gray (18820 10 Q.B.D. 13). The ordinary rule, however, is subject to the general discretion of the Court; it is not an unvarying rule. Its application is appropriate where the foreign and English co-plaintiffs rely on the same cause of action, where each of

the Plaintiff is bound to be held liable for all of such costs as may be ordered to be paid by any of the Plaintiffs to the Defendant at the conclusion of the trial, and where one or more of the Plaintiffs has funds within the jurisdiction to meet such liability."

In **Huang Tzung-Hao v A Team Corporation Ltd [2003] FJHC 288; HBC 0346r. 1988s** Justice Pathik stated as follows on the issue of security for costs application and Order 23 generally;

"The defendants are entitled to make the application. The onus is on them to prove that the Plaintiff is "ordinarily resident" out of jurisdiction and this they have done. In fact there is no dispute on this aspect.

*The power to make an order for security costs is entirely discretionary (vide **Aeronave S.P.A v Westland Charters Ltd [1971] 1 W.L.R. 1445**). It is stated in The Supreme Court Practice 1988 Vol 1 Or. 23/1-3/3:*

"On the other hand, as a matter of discretion, it is the usual ordinary or general rule of practice of the Court to require the foreign plaintiff to give security for costs, because it is ordinarily just to do so, and this is so, even through by the contract between the parties, the foreign plaintiff is required to bring the action in England (see Aeronave 1445, supra)."

The purpose of the discretion to order for costs against a foreign plaintiff was described in **Corfu Navigation Co. v. Mobil Shipping Co. Ltd [1991] 2 Lloyd's Rep. 52 (p.54 Lord Donaldson MR) –**

"The basic principle underlying R.SC, 023, r.1 (I) (a) is that it is prima facie unjust that a foreign plaintiff, who by virtue of his foreign residence is more or less immune to the consequences of an order for costs against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order can be executed."

At p.55, Lord Donaldson MR further said –

In the context of the present appeal it has to be remembered that the purpose of O.23, r.1 is not make it difficult for foreign plaintiffs sue, but to protect defendants."

Consistently with this, Para 23/3/4 of the **White Book of 1999** states that why **security for costs** is not ordered as a matter of course –

> *"On the other hand, as a matter of discretion, it is the usual ordinary or general rule of practice of the Court to require the foreign plaintiff to give security for costs, because it is ordinarily just to do, and this is to, even though by the contract between the parties, the foreign plaintiff is required to bring the action in England (Aeronave SP v Westland Ltd) [1971] 1 WLR 1445; [1971] 3 All ER 531, CA)."*

The rationale in award of **security for costs** was also described in **Sharma v Registrar of Titles [2007] FJHC 118, HBC 351 of 2001 (13 July 2007),** where Master Udit elaborated further –

> *"[3] The aforementioned rule, vests the court with an unfettered discretion to order security for costs. All this rule entails to protect is the risks to which an applicant may be exposed for recovering of costs in a foreign jurisdiction. The quantum of costs comparatively in Fiji is not relatively high although fairly substantive within the jurisdiction which is worth recovering. Execution of costs abroad where the litigation costs are much higher will render the exercise as wholly uneconomical. Be that as it may, ultimately the issue is not that the respondent will not have the assets or money to pay the costs or that the law of the foreign party's country not recognizing an order of our court, and/or enforcement of costs order even be it under any legislation similar to our Reciprocal Enforcement of Judgments Act. (Cap 39), but it is also the extra steps which will be needed to enforce any such judgment outside the jurisdiction. Indeed, in will not be an irrefutable presumption to infer that an extra burden in terms of costs and delay, compared with the equivalent steps that could be taken in Fiji, will be an inevitable corollary. The obvious expenditure which comes to my mind is the engagement of an attorney and the conundrum of registering an order in the foreign jurisdiction before it can be enforced."*

(4) The law relating to grant of leave to amend pleadings is set out under **Order 20, rule 5 of the High Court Rules, 1988.**

Order 20, Rule 5, of the High Court Rules provides:

> *"5-(1) Subject to Order 15, Rule 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the Plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."*

(5) **Under Order 20/8/6 of the Supreme Court Practice of 1999** under the heading **'General principles for grant of leave to amend'** at page 379 it is stated that:

> *"General principles for grant of leave to amend (rr5, 7 and 8)-It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made* ***"for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or errors in any proceedings."*** *(See per Jenkins L. J. in R. L. Baker Ltd v Medway Building & supplies Ltd[1958] 1 W.L.R. 1216; [1958] 3 All E.R. 540. P. 546)."*
>
> *It is a well-established principle that the object of the court is to decide rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right" (per Bowen L.J. in Cropper v. Smith (1883) 26 Ch. D. 700, pp. 710 – 711, with which observations A.L. Smith L.J., expressed "emphatic agreement" in Shoe Machinery Co. v. Cultam (1896) 1 Ch. 108. P. 112)."*

(6) **Under Order 20/8/6 of the Supreme Court Practice of 1999** under the heading **'General principles for grant of leave to amend'** at page 379 further stated as follows:

"In **Tildesley v. Harper** (1878) 10 Ch. D. 393, pp. 396, 397, Bramwell L.J. said:

> *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs" (per Brett M.R. Clarapede v. Commercial Union Association (1883) 32 WR 262, p263; Weldon v. Neal (1887) 19 QBD 394 p.396. Australian Steam Navigation Co. v. Smith (1889) 14 App. Cas. 318 p 320; Hunt v. Rice & Sons (1837) 53 TLR 931, C.A and see the remarks of Lindley L.J. Indigo Co. v.*

Ogilvy(1891) 2 Ch. 39; and of Pollock B. Steward v. North Metropolitan Tramways Co. (1886) 16 QBD.178, P. 180, and per Esher M.R. p.558, c.a.).An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties," and multiplicity of legal proceedings avoided (Kurtz v. Spence (1888) 36 Ch, D. 774; The Alert (1895) 72 L.T. 124).

On the other hand it should be remembered that there is a clear difference between allowing amendments to clarify the ***issues in dispute and those that provide a distinct defence or claim to be raised for the first time*** *(see, per Lord Griffiths in Kettma v Hansel Properties Ltd [1987] A.C. 189 at 220).*

Leave to amend will be given to enable the defendant to raise a defence arising from a change in the law since the commencement of the proceedings affecting the rights of the parties or the relief or remedy claimed by the plaintiff, even though this might lead to additional delay and expense and a much longer trial, e.g. that the plaintiffs have acted in contravention of Art. 85 (alleging undue restriction of competition) and Article 86 (alleging abuse of dominant market position) of the treaty establishing the European Economic Community (the "Treaty of Rome") which became part of the law of the United Kingdom by the European Communities Act 1972, so as to become disentitled to their claim for an injunction (Application des Gaz SA v Falks VeritasLtd [1974] Ch. 381; [1974]3 All E.R. 51 CA). In a copyright action, leave may be given to amend the statement of claim to include allegations of similar fact evidence of the defendant having copied the products of other persons (Perrin v Drennan[1991] F.S.R. 81).

Where a proposed amendment is founded upon material obtained on discovery from the defendant and the plaintiff also intends to use if for some purpose ulterior to the pursuit of the action (e.g. to provide such information to third parties so that they could bring an action), ***the plaintiff should not be allowed to amend a statement of claim*** *endorsed on the writ and so it the public domain but instead the amendment should be made as a statement of claim separate from the writ and thus not available for public inspection (Mialano Assicuraniona Spa v Walbrook Insurance Co Ltd [1994] 1 W.L.R 977 see too Omar v Omar [1995] 1 W.L.R. 1428,) use of documents disclosed in relation to Mareva relief permitted to amend claim and at trial.*

The Court is entitled to have regard to the merits of the case in an application to amend if the merits are readily apparent and are so apparent without prolonged investigation into the merits of the case (King's Quality Ltd v A.J. Paints Ltd [1997] 3 All E.R. 267)."

(7) Hon.Madam Justice D.Wickramasinghe stated in **Colonial National Bank v Naicker [2011] FJHC 250; HBC 294. 2003 (6 May 2011)** by direct reference to the Supreme Court Practice 1988 (White Book) as set out under Order 20/5-8/6 as:

> *"It is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made" for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings." (see per Jenkins L.J. in R.L Baker Ltd v Medway Building &Supplies Ltd [1958] 1 W.L.P 1216, p 1231; [1958] 3 All E.R 540, p. 546)."*

Hon. Justice Pathik in **Rokobau v Marine Pacific Ltd *Hbc0503d.93s*** said:

> *"We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."*

(8) Lord Keith of Kinkel in **Ketteman and others v Hansel Properties Ltd** (1988) 1 All ER 38 observed that;

> *"Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles. In his interlocutory judgment of 10 December 1982, allowing the proposed amendment, Judge Hayman set out and quoted at some length from the classical authorities on this topic. The rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs. In Clarapade& Co v Commercial Union (1883) 32 WR 262 a 263 Brett MR said:*
>
> *The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by cost: but if the amendment*

will put them into such a position that they must be injured it ought not to be made".

(9) **LORD KEITH OF KINKEL** in **KETTEMAN v HANSEL PROPERTIES** *(supra)* states further that;

> *"The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as a necessary to enable the real questions in controversy between the parties to be decided.*
> *Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs."*

Speight J. in **Reddy Construction Company Ltd v Pacific Gas Company Limited (1980) 26 FLR 121 held;**

> *"The primary rule is that leave may be granted at any time to amend on terms if it can be done without prejudice to the other side."*

(F) ANALYSIS

(1) Before passing to the substance of the Defendants Summons seeking of security for costs against the Plaintiff, let me record that Counsel for the Plaintiff and the Defendants in their written submissions have done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by Counsel for both parties as well as to the written submissions and the judicial authorities referred to therein.

(2) I ask myself, what is the question in these proceedings?

The Defendants are seeking an Order for security for costs against the Plaintiff.

The **primary grounds** for the Defendants as to why security for costs should be ordered are;

- **The Plaintiff is permanently a resident out of the jurisdiction of the Court.**
- **The Plaintiff has no assets within the jurisdiction of the Court.**

(3) THE POWER TO ORDER SECURITY FOR COSTS

As I already mentioned, provisions relating to security for costs are contained in Order 23, rule 1 of the High Court Rules, 1988.

Order 23, Rule 1 of the High Court Rules provides as follows:

SECURITY FOR COSTS

Security for costs of action

"1(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court –

d) That the Plaintiff is ordinarily resident out of the jurisdiction; or

e) 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 unable to pay the costs of the defendant if ordered to do so; or

f) Subject to paragraph (2), that the plaintiff's address during the course of the proceedings with a view to evading the consequences of the litigation;

***then if, having regard to all the circumstances of the case, the Court thinks it just to do so**, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just."*

The use of the words "**having regard to all the circumstances of the case, the Court thinks it just to do so, it may order**", confers upon the Court a real discretion on whether or not to order security for costs.

The real origin of the jurisdiction to Order security for costs is to cater for the case of a non-resident Plaintiff who is seeking to take advantage of the Jurisdiction of domestic Courts, should be required to produce security for the payment of the costs of the party within the jurisdiction who is sued, in case the action showed fail. [Per Farwell L.J. in "**New Fenix Compagine Anonyme D Assurances de Madrid v General Accident, Fire and Life Assurance Corporation Ltd;** (1911) 2. K.B. 619 at 630P).

The apparent concern is that a non-resident Plaintiff, particularly one without assets in the jurisdiction, could avoid liability for an adverse costs Order precisely because his or her non-residency would make it difficult if not possible for the Defendant to enforce the Order. [Per Morling J, in "**Barten v Ministry of Foreign Affairs** (1984) 2 FCR 463P.]

(4) As the evidence presently stands in the case before me, the Plaintiff is permanently a resident out of the jurisdiction of the Court. **I am satisfied on this point.** Ordinarily, once it is established that the Plaintiff is not permanently a resident in Fiji, the "**onus**" shifts to the Plaintiff to satisfy the Court that she has property within the jurisdiction which can be made subject to the process of the Court. (See; **Babu Bhai Patel v Manohan Aluminium, Glass Fiji Ltd, Suva High Court Civil Action No. HBC 0019/19**).

"If a Plaintiff who is permanently resident out of the jurisdiction, has property within the jurisdiction which can be made subject to the process of the Court, in such a case, the reason of the rule being withdrawn, the rule gives way, and the Court will not order security to be given" (per "Thesiger" L.J. in "**Redondo v Chaylor**" **(1879) 40 L.T. 797.**)

See also;

* **Brown L.J. in Ebrard v Gassier (1884) 28 Ch. D. 232**
* **Greer L.J. in "Kerokian v Burney" (1937) 4 A.E.R. 468**
* **Reddra v Chaytor (1879) 40 L.T. 797**

The Plaintiff being resident abroad is prima facie bound to give security for costs and if she desired to escape from doing so she is bound to show that she has substantial property in this country, not of a floating but of a fixed and permanent nature which would be available in the event of the Defendants being entitled to the costs of the action. As the evidence presently stands in the case before me, it does not appear that the Plaintiff has property within the

jurisdiction of the Court to exempt the Plaintiff from the ordinary liability to give security for costs to satisfy the Defendants if the action should be decided against the Plaintiff.

The Plaintiff in her "Affidavit in Opposition" deposed in paragraph (5) that "... *I do have some savings and my current credit balance held with NetWest Bank at the South Norwood Branch, London, England is £16,388.50.*"

As against this, I heard no word said on behalf of the Defendants.

One which I think worth mentioning is that the premise for filing the application for security for costs herein is to avoid the risk of having to enforce a judgment for costs in a foreign jurisdiction should the Defendants succeed and not whether the Plaintiff has the funds to pay. The funds the Plaintiff has is located in a foreign jurisdiction and not within the jurisdiction.

Sir Nicolas Browne Wilknson V.C. said at a passage in p.1076 of **Porzelack (UK) Ltd, (1987)**:

> *"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can endorse the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds."*

The "savings" referred to in the Plaintiff's Affidavit in Opposition affords no real security to the Defendants. The Plaintiff being resident abroad is *prima facie* bound to give security for costs and if she desired to escape from doing so she is bound to show that she has substantial property in this country, not of a floating but of a fixed and permanent nature which would be available in the event of the Defendants being entitled to the costs of the action. It does not appear that the Plaintiff has property within the jurisdiction of the Court to exempt the Plaintiff from the ordinary liability to give security for costs to satisfy the Defendants if the action should be decided against the Plaintiff.

Furthermore, the Plaintiff in her Affidavit in Opposition deposed in paragraph 12 that "*.... the Defendants have admitted to offering shares in the Second Defendant in exchange for the refund of $110,000.00. This figure alone should suffice and be sufficient security for the Defendants*".

Counsel for the Defendants was characteristically frank and brief in relation to the proposition advanced by the Plaintiff.

He accepted that;

- The Plaintiff's Solicitors wrote to the Defendants on 14th July 2009 repudiating the agreement for the share sale and demanded the First and Second Defendants to refund FJ$110,081.74.

- His firm responded by a letter dated 26th October 2009, acknowledging the payment made by the Plaintiff and proposed that the Plaintiff take her shares and if monetary compensation was required value must be given for loss of goodwill alleged against the Plaintiff.

Counsel for the Defendant's contention was that the letter sent by his firm was labeled "without prejudice" and thus it is privileged and inadmissible as evidence and should not be considered by the Court for deciding the factual issues in relation to the Defendant's application for security for costs.

I must confess that I acknowledge the force of the submission by Counsel for the Defendants.

The offering of shares in the 2nd Defendant Company in exchange for the refund of $110,000.00 would not be good security. Because, "without prejudice" in the Defendant's correspondence means that whatever is contained within the document, as well as the existence of the document itself, cannot be shared with the Court.

Moreover, the shares offered by the Defendants cannot be used as a security as they are subject of litigation in the proceedings. **They are not unencumbered.**

I find considerable support for my view in paragraph 23/3/5 of the White Book 1999. The passage is this;

> *"Foreign plaintiff with property in England (rr.1-3) – Security will not be required from a person permanently residing out of the jurisdiction, if he has substantial property, whether real or personal, within it (Redondo v Chaytor (1879) 4 QBD 453 at 457; Hamburgher v Poetting (1882) 47 LT 249; Clarke v Barber (1890) 6 TLR 256; Redfern v Redfern (1890) 63 LT 780); and the same rule applies to a foreign company (Re Apollinaris Co.'s Trade Marks (1891) 1 Ch1); but semble,* ***the property must be of a fixed and permanent nature, which can certainly be available for costs*** *(Ebrard v Gassier (1884) 28 CH D 232);* ***or at any rate such as common sense would consider to be so*** *(Re Apollinaris Co.'s Trade Marks (1891); and such person must show that it is so available (Sacker v Bessler & Co (1887) 4 TLR 17)."*
>
> *(Emphasis Added)*

Moreover, I am comforted by the rule of law enunciated in the High Court decision "**Sharma v Registrar of Titles 2007 FJHC 118**. The Court held;

> *"Substantive Assets in Fiji*
>
> *Ms Kenilorea's second ground is that the Plaintiff has substantive assets in Fiji. In support, she cited a decision of His Lordship Mr Justice Fatiaki (as he then was and now the Honourable Chief Justice) in* ***Babu Bhai Patel v Manohan Aluminium, Glass Fiji Ltd, Suva High Court Civil Action No. HBC 0019/19*** *(14th November, 1997). In that matter, a similar submission was unsuccessfully advanced. It was argued that the appellant had valuable real estate asset in Fiji, and had continuing "interest and active participation in an operating wholesale business in the country and his regular visits in Fiji". His Lordship after referring to the general principle that:-*
>
> > *"... if a Plaintiff, who is permanently residence out of the jurisdiction, has property within the jurisdiction which can be made subject to the process of the Court in such a case the reason of the rule being drawn, the rule given way, and the Court will not order security to be given, citing from* ***Reddro v. Chaytor*** *(1879) 40 L.T. 797."*
>
> *held :-*
>
> > *"In the present case however the trial magistrate correctly noted that the appellant's property was not unencumbered; had not been rented out since March 1997; and indeed, the appellant 'was not even sure whether mortgage repayments were up to date or not', Quite plainly once it had been established that the appellant was not ordinarily resident in Fiji, the 'onus' shifted to him to satisfy the trial magistrate that he came within the above-mentioned 'exception' and clearly he failed to discharge that 'onus'"*
>
> ***Once again this authority does not assist the plaintiff. Having assets is insufficient for the purpose of being excused from giving security for costs. Any such assets must readily be converted to pay the costs, rather than the mere possibility of it being recovered at a future date, again, at an extra expense.***
>
> ***Certainly, the Plaintiff has the land which is subject to this litigation. However, there is no evidence as to whether the land is unencumbered or not. Ms Kenilorea did not elaborate this further in her submissions. Additional properties offered to satisfy the costs are the shares which the Plaintiff owns in Pacific Green Fiji, Fiji TV, R.B.Patel & Co. Ltd, Communication Fiji Ltd, Fiji Sugar Corporation and Colonial First State. How does one convert the shares to satisfy an order for costs? What is the value of the shares? None of the Counsel assisted me on this. However, since this is a discretionary matter, in my view any such security is***

inadequate for two reasons. Firstly, there is no Order restraining the disposal of the land or shares. Nor is there any evidence of an undertaking given to the Court by the Plaintiff obliging him not to dissipate the land or shares until the action if finally determined. Secondly, any enforcement of the Order would unavoidably result in further applications to Court, such as registering a Judgment against the title etc., thus incurring additional unwarranted expenditure and frustration.

Land subject of litigation

Thirdly, and lastly, on behalf of the Plaintiff it is submitted that the land which is subject of this litigation will be subdivided and sold. Income derived from the sale of the said land as a whole or after subdivision is submitted to be sufficient security to satisfy any order for costs. Currently, the only impediment is in the access. In reply Mr Veretawatini classified this as a very vague and uncertain assertion which is predicated upon future conduct, which may or may not eventuate. In any event, there is reason no for the defendants to wait for the Plaintiff to organise his life and property, before they enjoy the fruits of their success. I am in agreement with Mr Verewatini's submissions on this point, and dismiss the Plaintiff's objection based on this ground."

(Emphasis Added)

In my Judgment, the Plaintiff in the present case has failed to discharge the onus. The Plaintiff has failed to establish that she has substantive assets in Fiji.

As I said earlier, having assets is insufficient for the purpose of being excused from giving security for costs. Any such assets must readily be converted to pay the costs, rather than the mere possibility of it being recovered at a future date, again, at an extra expense.

Once impecuniosity of the Plaintiff is shown, there might be in the absence of further material a predisposition towards the protection of the Defendants from being sued by the impecunious Plaintiff. But it is also very clear that once the Court enters upon considerations relevant to the particular case the ultimate decision must depend upon the balance of justice and common sense.

(5) EXERCISE THE DISCRETION TO ORDER SECURITY FOR COSTS

That the Plaintiff is permanently a resident outside the jurisdiction and has no assets in Fiji is a circumstance of great weight favouring a security order. **I am of course mindful to the fact that the making of an Order for security for costs is discretionary and the Courts no longer adopt a rigid rule.** [See, **M.J. Raine, -**

"Locals we trust – Foreigners pay cash; rethinking security for costs against Foreign Residents" (2012) 1 JCIVP 210 at 214P)

As was established by the Court in '**Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd" (1973) (1) Q.B. 609**, the Court has a complete discretion whether to order security, and accordingly it will act in light of all the relevant circumstances. It is a venerable principle that poverty or even insolvency on the part of a Plaintiff will not itself attract a requirement for security for costs conditioning the right to institute and/or conduct legal proceedings. If there is reason to believe that the Plaintiff cannot pay costs, then security "**may**" be ordered. There is not however any requirement that it "**must**" be ordered. The Court has a discretion which it will exercise considering all the circumstances of the case. In exercising its discretions the Court needs to weigh up the competing interests of the parties having regard to all of the facts and circumstances of the case.

The answer is to be found by ascertaining where, on considerations of what is just and reasonable, the balance rests between the risk of exposing an innocent defendant to the expense of defending his position and the risk of unnecessarily shutting out from relief a Plaintiff whose case if litigated would result in his obtaining that relief.

The Court's discretion is unfettered; each case must depend on its own circumstances.

See; **Bell Wholesale Co. PVT Ltd v Gates Export Corporation (1984) 2 FCR 1.**

The Court should do Justice to each of the parties attempting not to prejudice the Defendants and attempting not, if possible, to shut out the Plaintiff from litigating her complaints.

See; **M A Products Pty Ltd v Austarama Television Pty Ltd; (1982) 7 ACLR 97.**

In exercising the discretion the Court needs to weigh up the competing interests of the parties having regard to all of the facts and circumstances of the particular case.

See; **Drumdurne Pty Ltd v Braham (1982) 64 FLR 227**

In "**Spiel v Commodity Brokers Australia Pty Ltd" (1983) 35 5 ASR 294**, Bullen J reaffirmed the position adopted in "**John Arnold's Surf Shop Pty Ltd v Heller Factors Pty Ltd (1979) 22 SASR 20**, and said at Page 300;

> *"The discretion is a wide one. The Judge or Magistrate asked to order security for costs should not approach the application with any predisposition at all. I think it follows that the circumstances in which the discretion should be exercised in favour of making an Order cannot be stated exhaustively. Nor should there be any attempts to do so. The Judge or Magistrate must decide according to his view of the justice of the case. There should be no complaint at*

the imprecision of that statement. Beyond saying that the Judge or Magistrate must behave judicially, one cannot define or delimit or categorise the circumstances in which security should be ordered to be given. It is quite another thing to speak of some matters which are capable of assuming importance in an application for security."

In the High Court of Fiji in "**Furuuchi Suisan Company Limited v Hiroshi Tokuhisa and Others" Civil Action No. 95 of 2009**, Justice Byrne ordered Security for Costs against a Plaintiff company incorporated and operating in Japan as the Plaintiff was ordinarily resident out of the jurisdiction. In reaching this decision, Justice Byrne relied on what Sir Nicolas Brown Wilkinson V.C. said in **Porzelack KG v Porzelack (UK) Limited** 1987 1 All ER 1074 at p.1076

"That the purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of the court against which it can enforce a judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a Plaintiff who lacks funds. The risk of defending a case brought by a penurious Plaintiff is as applicable to Plaintiffs coming from outside the jurisdiction as it is to Plaintiffs resident within the jurisdiction".

His Lordship further stated

Under Order 23, r1 (1) (a) it seems to me that I have an entirely general discretion either to award or refuse security having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident Plaintiff. The question is what, in all the circumstances of the case, is the just answer".

The **White Book (1999)** further discussed the development of the law till 1999, which is applicable to Fiji. At page 429 – 430 (23/3/3) of the White Book;

"Discretionarily power to order security for costs (rr1 – 3). The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs ***'if, having regard to all the circumstances of the case, the Court thinks it just to do so'****. These words have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof to consider the circumstances of each case, and in light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer, for example, and inflexible or rigid rule that Plaintiff resident abroad should provide security for costs. In particular, the former Order 65 r 6B*

which had provided that the power to require a Plaintiff resident abroad, suing on a judgment or Order or on a bill of exchange or other negotiable instrument, to give security for cost was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).

(Emphasis Added)

The power to order security for costs is discretionary and the Order will not be automatic: **Idoport Pty Ltd v National Australia Bank Ltd** (2001) NSWSC 744. The discretion is to be exercised judicially, and not "arbitrarily, capriciously or so as to frustrate the legislative intent": **Oshlack v Richmond River Council** (1998) 193 CLR 72. Exercise of the power requires consideration of the particular facts of the case: **Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd** (1998) 193 CLR 502. **Southern Cross Exploration NL v Fire and all Risks Insurance Co Ltd** (1985) 1 NSWLR 114. The weight to be given to any circumstance depends upon its own intrinsic persuasiveness and its impact on other circumstances which have to be weighed. **Acohs Pty Ltd v Ucorp Pty Ltd** (2006) 236 ALR 143.

It is these principles I apply.

Thus, in exercising the discretion, I consider the followings;

- **The prospect of the claim succeeding**
- **Whether making an order for security for costs would stifle a genuine claim.**
- **Whether there has been delay in making the application for security for costs.**

(6) THE PROSPECTS OF SUCCESS OR MERITS OF THE PROCEEDINGS

A consideration of the Plaintiff's prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the case of the parties at an early stage of proceedings: "**Fiduciary Ltd v Morningstar Research Pty Ltd** (2004) 208 ALR 564.

As a general rule, where a claim is *prima facie* regular on its face and discloses a cause of action, then, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is *bona fide* and has reasonable prospects of success. **KP Cable Investments Pty Ltd v Meltglow Pty Ltd**, (1995) 56 FCR 189 at

197; **Staff Development & Training Centre Pty Ltd v Commonwealth of Australia** [2005] FCA 1643.

In "**Kadavu Shipping Company Ltd v Dominion Insurance Ltd**" 2009, HBC 508, Master J.Udit said in relation to "Strength or *bona fides* of a claim"

> *"Under this criterion, the respondent is to show that it has a prima facie regular claim, which disclosed a reasonable cause of action. It is not the court's duty to divulge into a detailed analysis of the merits of the case unless it can be clearly demonstrated that there is a relatively high degree of success or failure. Once it is established, the Court is to proceed on the basis that the claim is bona-fide".*

In "**Allan v Hillview Limited** [2003] HBC 366, Connors J said;

> *"... another matter of importance for the court is exercising its discretion is the Plaintiff's prospect of success in the action and of course as in any such situation that does not require the court at this point in time to make any detailed determination of the likelihood of success but merely to do so based on the pleadings as they appear before the court".*

On my perusal of the Statement of Claim and the Statement of Defence and Counter-Claim, it seems to me perfectly plain that there are genuine disputes between the parties which raise serious issues for resolution.

They are;

- Whether the share sale was subject to and conditional on obtaining the FTIB/Reserve Bank of Fiji approval?
- Whether the Defendants failed, refused or neglected to transfer the shares to the Plaintiff?
- Whether it was agreed between the Plaintiff and Defendants that the transaction would be completed by May 2006?
- Whether the Defendants were awaiting regulatory approvals?
- Whether the Plaintiff acted negligently and/or wrongfully and/or without authorisation in breach of her duties as an employee and/or agent of the Defendants?
- Whether the Plaintiff's actions were negligent or wrongful?

- ❖ Did the Defendants breach the share sales agreement?
- ❖ Have the Defendants being unjustly enriched?

The evidence before me does not justify drawing the conclusion that the Plaintiff has no reasonable prospect of success in her claim. The Defendants defences are reasonably arguable. I am of course mindful to the fact that bona fide of the claim and its merits have to be considered in the exercise of my discretion.

I am satisfied that the claim is *prima facie* regular and disclosing a cause of action. Moreover, the Defendants defences are *bona fide* and arguable.

There is quite clearly a substantial bon fide issues to be tried between the parties. However, at this juncture, I remind myself of the principle that in deliberating upon an application for security for costs, I am not required to delve into the meticulous details of the merits or demerits of the claim or defence.

G.E. Dal Pont, in "Law of Costs", Third Edition writes at Page 1015;

> *"The Chief difficulty with any attempt to take into account the Plaintiff's chances of success is the fact that applications for security for costs are usually made prior to trial, often some time prior to it. Given the need for applications for security to be made promptly, a defendant who waits until the eve of the hearing to apply for security in unlikely to succeed. Yet it is this very need to promptly apply for security – possibly even at a time when the pleadings have yet to be finalized – that renders the court's task of assessing the merits of the claim near impossible. This task is arguably little easier even where the application for security is made during the hearing of the matter, when some but not all the evidence has been heard. Again the court has incomplete information upon which to make a determination.*
>
> *Several observations can be made in this respect.* ***First, a court must be careful in deciding security on the basis that the Plaintiff's claim appears weak. As the relevant inquiry is made at an interlocutory stage on less than complete material and without any hearing of the evidence, the real merits of the case are unlikely to sufficiently emerge in the necessarily brief application for security for costs. An evaluation of the strength of the Plaintiff's case is necessarily tentative and largely 'impressionistic'.*** *Second, if a proceeding manifestly lacks legal merit, other remedies are available to protect a defendant from needless vexation. In appeals there is the barrier of leave or special leave. Third, for a judge upon an application for security to preside over a major hearing in which the parties seek to investigate in considerable detail the likelihood of success in the action risks usurping or pre-empting the role of the trial judge or appellate court before which the proceeding is to be litigated. This would, moreover, blow up the case into a large*

interlocutory hearing involving great expenditure of both money and time.

For the above reasons, it has been said that courts deplore attempts to go into the merits 'unless it can clearly be demonstrated ... that there is a high degree of probability of success or failure. That the case is 'obviously hopeless' and 'doomed to fail'. If the case is 'bona fide' and raises 'real issues to be tried', the prospect of success or failure arguably function as no more than a neutral factor in the exercise of discretion to order security, especially where the issues to be litigated are difficult or complex. Expressed another way, if a claim is prima facie regular and discloses a cause of action, in the absence of evidence to the contrary the court will generally assume it to be bona fide with a reasonable prospect of success for this purpose. Cases at either extreme – those are that patently untenable, or ostensibly insuperable – are consequently much more the exception than the rule. So merely because the plaintiff 'may have slender hopes of succeeding', or that the case demonstrates 'a number of weaknesses' is not sufficient to justify departing from the rule that poverty is no bar. The bona fides and strength of the case, in any event, remains only one factor in the equation that informs the court's discretion so far as security is concerned."

(Emphasis Added)

In the case of "**Appleglen PVT Ltd v Mainzeal Corporation PVT Ltd**" (1988) 89 ALR 634, Pincus J. observed that at the hearing of an application for security for costs, detailed investigation into the likelihood or otherwise of the success of the claim will not be the right course to adopt.

Nevertheless, the existence of a genuine dispute cannot of itself provide cause for disentitling the Defendant to security if the circumstances otherwise are appreciated one for the making of such an Order. (See, **Parsdale PVT Ltd v Concrete Constructions** (1995) FCA 1471).

(7) STIFLING THE CLAIM

The Plaintiff in her Affidavit in Opposition deposed in paragraph five (05) that she does not own properties in England. Further at paragraph eight (08) she deposed that *".... I have incurred considerable liability for fees and other expenses associated with this litigation not to mention the added expenses when the Defendants filed an application for my current Solicitors to cease acting on my behalf."*

There is no direct sworn evidence on behalf of the Plaintiff that the making of an Order for security for costs would stifle the prosecution of the claim. To be more

precise, there is no direct sworn evidence as to the likelihood that an Order for security would stultify the prosecution of the claim.

It is for the Plaintiff to satisfy the Court that she would be prevented by an Order for security from continuing the litigation.

"The fact that the ordering of security will frustrate the Plaintiff's right to litigate its claim because of its financial condition does not automatically lead to the refusal of an Order. Nonetheless, it will usually operate as a powerful factor in favour of exercising the Court's discretion in the Plaintiff's favour" **(per Clarke J in "Yandil Holdings Pty Ltd v Insurance Co of North America (1985) 3 ACLC 542.**
See also; Roger J in "**Memuty Pty Ltd v Lissendin" (1983) (8) ACLR 364.)**

The Plaintiff in paragraph five of her Affidavit in Opposition says that she has no properties in England.

Moreover, she says that her current credit balance held with the Bank is £16,388.50.

Parenthetically, there is here a point which I think I should mention.

The Plaintiff should clearly demonstrate by Affidavit evidence that not only that she does not have capital but she cannot raise capital. The Plaintiff has not satisfied Court on this point.

Therefore, I hold that nothing has been said or addressed by way of Affidavit evidence to demonstrate that the making of the Order sought will frustrate the Plaintiff's claim.

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

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

In **Kloeckner & Co AG v Gatoil Overseas Inc [1990] CA Transcript 250 Bingham** LJ cited with approval certain remarks of the Registrar of Civil Appeals. Mr Registrar Adams was willing to assume that the situation before him was the same as that exemplified in the "**Farrer v Lacy, Harland & Co", (1885) 28 Ch. D. 482** that is to say that there was a probability that the defendant wrongly caused the Plaintiff's impecuniosity on the basis of which security for costs was being sought. The registrar said:

> *"In my judgment, the approach to be adopted in cases where, as here, there are good arguable grounds of appeal and it is within the **Farrer** principle but the appellant contends that the award of security will stifle the appeal, should be the same as the approach*

adopted in ***MV Yorke Motors (a firm) v Edwards*** *Ord 14 cases, where conditional leave to defend is being contemplated. The approach, in my view, should be that the onus is on the appellant to satisfy the Court of Appeal that the award of security for costs would prevent the appeal from being pursued, and that it is not sufficient for an appellant to show that he does not have the assets in his own personal resources.* ***As in the Yorke Motors case, the appellant must, in my view, show not only that he does not have the money himself, but that he is unable to raise the money from any where else."***

(Emphasis Added)

(8) THE IMPACT OF THE TIMING OF APPLICATION FOR SECURITY

As earlier mentioned, although the non-residency of the Plaintiff and non-availability of assets within the jurisdiction is one of the main grounds for the exercise of the jurisdiction of the Court to Order security, I do not adopt a rigid rule. I am of course mindful to the fact that the making of an Order for security for costs is discretionary and the Courts no longer adopt a rigid rule. [See, **M.J. Raine –"Locals we trust – Foreigners pay cash; rethinking security for costs against Foreign Residents" (2012) 1 JCIVP 210 at 214P)**

I note that Order 23 confers a discretion in that *"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 costs, as it thinks fit."*

In the context of the present case, I am inclined to be guided by the rule of law enunciated in the following judicial decisions;

In **Gabel PVT Ltd v Katherine Enterprises PVT Ltd** (1977) 2 A.C.L.R. 400 the Court held in relation to the "effect of delay",

> *"Here discovery has been obtained and the case set down for trial. Some twelve days after this the First Defendant issued a motion seeking security. In my view there is much force in the contention that the application has been made too late. From the very beginning all parties were aware at least of the fact that the First Plaintiff must be presumed unless the contrary be shown to be unable to pay costs if unsuccessful.* ***Nevertheless no application was made until after fourteen months after the Writ was issued. No attempt has been made to explain this delay.***
>
> ***...In my judgment the proper time for making this application was at the beginning when the status of the First Plaintiff was known to the Defendants."***
>
> (Emphasis Added)

Einstein J considered decisions dealing with the issue of delay in the making of an application for security in **Idoport Pty Ltd v National Australia Bank Ltd** [2001] NSWSC 744 concluding:

> *"Ultimately it seems to me that in the context of the broad discretion and consistently with the approach referred to in the above authorities; delay is best regarded simply as a factor whose consequences are to be weighed in the balance in determining what is just between the parties.... The Court, in approaching delay as a discretionary factor, looks at the length of the delay and the nature of the acts done during the interval. If a Company has suffered no real relevant prejudice in the sense of expenditure of its own funds or the incurring of liabilities in relation to the litigation in the period until the application for security for costs, the significance of delay reduces or may substantially disappear."*

In **Crypta Fuels (PV) Ltd v Svelte Corporation (PVT) Ltd**, (1994) 14 ACSR 760, the Court held;

> *"Without referring in any greater detail to those authorities, my conclusion from a consideration of them is that there is first and foremost a proposition accepted in every one of the cases* ***which is that if an application for security for costs is to be made it must be made promptly."***
>
> (Emphasis Added)

It is these principles I apply. Applying those principles to the instant case, what do we find?

There are two problems that concern me. At this stage I have to ask myself two questions. The first question that I ask myself is, **whether the Defendants were prompt in the application for security for costs.** The answer is obviously "**NO**."

The second and final question that I ask myself is, **was there a cogent and credible explanation for the delay in filing the application in the Affidavit in Support of the Defendants?** The answer is obviously "**NO**."

In the instant case, the Writ of Summons and the Statement of Claim was filed on 15th August 2011. The Defendants filed Acknowledgement of Service on 20th November 2011.

The Statement of Defence and the Counter-Claim was filed on 08th December 2011. The reply to Defence and Defence to Counter-Claim was filed on 18th June 2012. The Pleadings were closed on 02nd July 2012. The Summons for Directions was filed on 08th August 2012. The Summons for security for costs was filed on 23rd December 2015, namely 4 years after the Writ was issued and 3½ years after the close of the Pleadings.

From the very beginning, the Defendants were well aware that the Plaintiff is permanently a resident out of the jurisdiction and without assets in the jurisdiction. To be more precise, the Defendants were in possession of material disclosing that the Plaintiff is permanently a resident out of the jurisdiction and without assets in the jurisdiction from well before the time of the institution of the action.

Nevertheless, the application for security for costs was filed 3½ years after the close of the pleadings, whereas the proper time for doing so was at the beginning of the proceedings. No application was made until 4 years after the Writ was issued and 3½ years after the close of the pleadings.

The First Defendant in his "Affidavit in Reply" deposed in paragraph (4) that "*.... my previous Counsel did not take any steps to apply for security for costs which they were instructed to do....*".

Again at paragraph (6) the First Defendant deposed that "*I was under the impression that my previous Solicitors would have acted to protect my interest and would have filed application for costs*".

The delay is inordinate. The delay **can be explained but not excused**. So far as the Defendants are concerned, the delay is explained by the fault of the erstwhile Solicitor. But I fear not excused. The Defendants have to be responsible for the conduct of their erstwhile Solicitor. Any delay by the Solicitor is not excluded. The litigant is responsible for the Solicitors default. (See; **B.W. Holdings Ltd v Service Engineers Ltd (2011) FJHC 182.)**

Stripped off the persuasions of Mr. Janendra Sharma's skilful advocacy [Counsel for the Defendants], the proposition is; "*The Defendants erstwhile Solicitor has let time go by; therefore the Defendants are ipso facto to be excused for all delay which has occurred.*"

I am not impressed at all. !!

The Defendants cannot shield themselves behind the erstwhile Solicitors default. The Defendants are responsible for the erstwhile Solicitors default.

It is still the duty of the party to prod his Solicitors into activity. I am satisfied that there has been nothing approaching an adequate excuse for the inordinate delay in filing an application for security for costs.

Leave that aside for a moment!

The Notice of Change of Solicitors for the Defendants were filed on 19th November 2013. The application for Security for Costs was not filed until 23rd December 2015. This is after lapse of 25 months from the filing of Notice of Change of Solicitors.

What were the Defendants current Solicitors doing themselves for 25 months?

The Defendants Affidavits are silent on this.

The delay is inordinate, to say the least. The delay could not possibly be described as "reasonable" even on the most generous minded and indulgent view. I should add that the Defendants failure to explain in their Affidavit in Support that they had a good reason for not filing an application for security for costs promptly does not leave a good impression. The unexplained delay in the affidavit in support of Notice of Motion for security operates as a powerful factor in favour of exercising the Court's discretion in the Plaintiff's favour.

This not a criminal case in which I am called upon to allow my imagination to paly upon the facts and find reasonable hypotheses consistent with innocence. A balance of probability is enough. And when the greater probability is that the Defendants did not care at all to file an application for security for costs promptly, why should this Court hesitate to find accordingly against the Defendants??

I hold that there is unreasonable and unexplained delay in making the application.

The unfairness of making an application for security for costs at a late stage is demonstrable.

G.E. Dal Pont, in "**Law of Costs**", third edition, writes at Page 1021;

> ***"If security is not applied for promptly, it is more difficult to persuade the court that such an Order is not, in the circumstances, unfair or oppressive. The reason is that an applicant for security who has pre-existing knowledge of the Plaintiff's impecuniosity, but delays making the application until the last moment, may be seen as perpetrating a tactical manoeuvre designed to encourage the Plaintiff to exhaust whatever funds he or she has in preparing the litigation to then be met with a financial burden that threatens to stifle the Plaintiff's proceeding altogether."***
>
> (Emphasis Added)

In the context of the present case, I am inclined to be guided by the rule of law enunciated in the following judicial decisions;

In **Gabel PVT Ltd v Katherine Enterprises PVT Ltd** (1977) 2 A.C.L.R. 400 the Court held in relation to the "effect of delay",

> *"Here discovery has been obtained and the case set down for trial. Some twelve days after this the First Defendant issued a motion seeking security. In my view there is much force in the contention that the application has been made too late. From the very beginning all parties were aware at least of the fact that the First Plaintiff must be presumed unless the contrary be shown to be unable to pay costs if unsuccessful.* ***Nevertheless no application was made until after fourteen months after the Writ was issued. No attempt has been made to explain this delay.***
> ***...In my judgment the proper time for making this application was at the beginning when the status of the First Plaintiff was known to the Defendants."***
>
> (Emphasis Added)

The impact of the timing of an application for security for costs upon the court's discretion was explained by the Supreme Court of Western Australia in **Ravi Nominees Pty Ltd v Phillips Fox** (1992) 10 ACLC 1313 as follows:

> ***An application for security for costs should be brought promptly and prosecuted promptly so that if it is going to delay the Plaintiff's claim, while it is finding the security, or if it is going to frustrate the Plaintiff's claim completely and stop the action, it does so early on before the Plaintiffs have incurred too many costs. An early hearing of such an application also benefits the defendant because it stops the Plaintiff's claim early before the defendant has incurred too many costs.***
>
> (Emphasis Added)

The Fiji Court of Appeal in the decision of "**National Bank of Fiji v C Garden Island** WOO 1L Pacific Co. Ltd as – Civil Appeal No. 011 of 1992, considered a High Court Judgment which had dismissed an application for security for costs. The Court of Appeal held;

> *"The basis on which the learned judge dismissed the motion for costs was two fold, as to the first.....* ***he held there was unreasonable and***

> ***unexplained delay in making the application although the appellants were aware that at least the first Plaintiff would be unable to pay costs if unsuccessful. He held that the application was made some 14 months after the Writ was issued whereas the proper time for doing so was at the beginning. He held that this delay must tell against the appellants who must have been aware that the Plaintiffs must have incurred potentially substantial costs by the time the application was made.*** *He cited the decision in* ***Gabbel Pty Ltd v Katherine Enterprises Pty Ltd*** *[1977] 2 ACLR 400 in support of his views regarding the effect of delay."*
>
> (Emphasis Added)

The Court then at page 7 said:

> ***"We are of the view that the learned judge exercised his discretion on a proper basis and would not be prepared to interfere with his decision."***

I reiterate that, from the very beginning, the Defendants were aware that the Plaintiff is permanently resident out of the jurisdiction and without assets in the jurisdiction. To be more precise, the Defendants were in possession of material disclosing that the Plaintiff is permanently resident out of the jurisdiction and without assets in the jurisdiction from well before the time of the institution of the action.

The Plaintiff is entitled to know at the earliest opportunity, before she has committed substantial resources to pursuing the litigation, whether she will be required to provide security. The later an application is made the greater the likelihood that it will cause substantial disruption or distraction in the conduct of the Plaintiff's case, and if the Plaintiff is unable to provide security, the greater the costs that will have been wasted. The Court, in approaching delay as a discretionary factor, looks at the length of the delay and the nature of the acts done during the delay. The delay must tell against the Defendants who must have been aware that the Plaintiff must have incurred potentially substantial costs by the time the application was made. In the circumstances, I cannot help feeling quite convinced that the Defendants application for security for costs is **unfair and oppressive**. I cannot help thinking that the application for security involves some **improper purpose and ulterior motive.** The reason is that the Defendants for security who have pre-existing knowledge of the Plaintiff's residence out of the jurisdiction and non-availability of assets in the jurisdiction, but delays making the application until 3½ years after the close of the pleadings and 4 years after the Writ was issued whereas the proper time for filing so was at the beginning, may be seen as perpetrating a tactical manoeuvre designed to encourage the Plaintiff to exhaust whatever funds she has in preparing the litigation to then be met with a financial burden that threatens to stifle the Plaintiff's proceedings altogether. This is a matter to be taken into account in assessing the justice of the case. The Court is here to administer justice. The crucial point is that the Court should arrive at a just result.

(G) CONCLUDING REMARKS – Security for Costs

(1) In the present case, it is clear that the Defendants were in possession of material disclosing that the Plaintiff is permanently resident out of the jurisdiction of the court and without assets in the jurisdiction from well before the Writ was issued.

(2) Nevertheless, no application was made **until** 4 years after the Writ was issued and 3½ years after the close of the pleadings. It is incumbent upon applicants in application of this nature to provide a cogent and satisfactory explanation as to delay in the affidavit in support of Summons for costs. This has not been done at all. The delay is inordinate, to say the least. A delay of 4 years in any Civil Action in the High Court constitutes both inexcusable and inordinate.

(3) The unfairness of making an application for security for costs at such a late stage is demonstrable.

(4) It has been said that delay on the part of the defendants give rise to a waiver of the defendants' entitlement to security for costs. See;

- **Jennings Ltd (In Holding) v Cole (1934) NZ Gas LR 165.**
- **Roumeli Food Stores (NSW) (PVT) Ltd v New India Assurances Co. Ltd (1972) 1 NSWLR 227**

(5) *"It is, however, incumbent upon a defendant who wishes to obtain security for its costs to apply promptly for that relief once it is, or ought to reasonably be, aware that the Plaintiff would be unable to meet an order for costs. **Delay is an important consideration in the determination of an application for security for costs because it is capable of causing prejudice or unfairness to the Plaintiff. A Plaintiff is entitled to know at the earliest opportunity, before it has committed substantial resources to pursuing the litigation, whether it will be required to provide security. The later an application is made the greater the likelihood that it will cause substantial disruption or distraction in the conduct of the Plaintiff's case, and if the Plaintiff is unable to provide security, the greater the costs that will have been wasted."*** [Per **NEWNES JA**, in **Christou v Stanton Partners Australasia PTY Ltd** [2011] WASCA 176 (10 August 2011]

In order to show prejudice **it is not necessary** for a Plaintiff to establish what she would have done differently if the application had been made earlier (although such evidence would be an important consideration in the exercise of the discretion); **prejudice will generally be regarded as inherent in substantial delay:** See; **Green v CGU Insurance Ltd** [2008] NSWCA 148; (2008) 67 ACSR 105 and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

In an era when the need to ensure the efficient use of judicial resources has become increasingly important, delay may also be significant in that regard. A late

application which frustrates the action will mean that the judicial resources already devoted to the case will have been wasted: See; **Town & Fencott & Associates Pty Ltd v Eretta Pty Ltd** [1987] FCA 102; (1987) 16 FCR 497, 514, and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

(6) **I remind myself that it is a fundamental principle of any civilized legal system that a court should not generally exercise its discretion in favour of an applicant for security if by his or its delay the other party has been forced to incur expense in the litigation.** I have no doubt and I am clearly of the opinion that in this case the delay has been so far too long and that no order for security should be made.

(7) I could see nothing to change my opinion even on the basis of exhaustive work contained in, **G.E. Dal Pont "Law of Costs", Third Edition .**

(8) Finally this should be made clear; ***the security for costs is not a card that a defendant can keep up its sleeve and play at its convenience.***

(H) AMENDMENT OF PLEADINGS

(1) What concerns me is whether the Defendants should be allowed to amend the Statement of Defence and the Counter-Claim.

I remind myself the words of **Lord Keith of Kinkel** in **"Ketteman v Hansel properties Ltd"**, (*Supra;)*

> *"Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.*
>
> *Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of*

the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings."

I ask myself, what is the rule of conduct of this Court in an application such as this?

I again remind myself the words of **Lord Keith of Kinkel in "Ketteman v Hansel properties Ltd"**

"With regard to the principles on which the discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to RSC Ord 20, r 5 in the Supreme Court Practice 1982 and to the authorities there cited. The effect of these authorities can, I think, be summarised in the following four propositions.

First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided.
Second, amendments should not be refused solely applying for leave to make them: it is not the function of the Court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights.

Third, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendments earlier, and however late the application for leave to make such amendments may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party.

Fourth, there is no injustice to the other party if he can be compensated by appropriate orders as to costs. The Plaintiff to continue with the matter and also directed":

(2) Let me now move to consider the Defendant's application bearing the following mentioned principles uppermost in my mind.

a. *the Court can grant leave to amend at any stage of the proceedings*

b. *amendments are only granted if they bear out the real issues in controversy between the parties*

c. *an amendment adding a new cause of action after the expiry of limitation period is only permitted if the writ was filed before the limitation expired*

d. *amendments are not permitted if –*
i. *they are fraudulent or made to overreach*

ii. *they will cause injustice or prejudice to the other party, which cannot be remedied by costs, or*

iii. *they have no prospect of success.*

e. *The basis of an amendment is to ensure that the real issue is tried and the court should deal with the whole matter in contest between the parties.*

f. *Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.*

g. *There is a clear difference between allowing amendments to clarify the issues in dispute and those that provide a distinct defence or claim to be raised for the first time (**Ketterman v Hansel Properties Ltd,** (Supra)*

h. *An amendment should be allowed if it could be done without prejudice to the other side*

i. *I have to balance the extent of prejudice with the extent of the Plaintiffs need to make the amendments.*

j. *It is a matter of pure judgment or discretion which is not susceptible to the giving of any other reasons.*

The Defendants seek to amend the Statement of Defence and Counter Claim. The proposed Amended Statement of Defence and Counter-Claim is annexed and marked EVC-7 referred to in the supporting Affidavit of the First Defendant.

The First Amendment is to paragraph 18 whereby the Defendant deletes an admission that had made.

For the sake of completeness, the paragraph 18 of the proposed Amended Statement of Defence and Counter-Claim is reproduced below in full.

Para 18. As to paragraph 14 of the Statement of Claim

The Defendants admit receiving a letter dated 14th July, 2009 from AK Lawyers demanding that the Second Defendant refund the sum of $110,081.74 to the Plaintiff, and pay another $63,000.00 as damages and wages and legal costs. ~~*to which the Defendants' solicitors responded in writing on 26th October, 2009, offering to allow the Plaintiff to take up the shares of the Second Defendant.*~~ *Save for any admissions herein the allegations in Paragraph 14 of the Statement of Claim are denied.*

In summary, the principle objections to the proposed amendment to paragraph 18 as submitted by the Plaintiff are as follows; (Reference is made to paragraph 15 and 16 of the Plaintiff's Affidavit in Opposition)

> *Para 15.* *As to paragraph 19 of the Jenning's Affidavit I deny that no prejudice will be caused as there will be prejudice to me due to the delay. Further by the amendment sought the Defendants are attempting to conceal facts which they themselves have admitted. The action has proceeded to date on the basis of the issues on the pleadings as they stood from the time the Writ was issued on 15th August, 2011 and Defence filed. It is surprising this was only raised at the Pre-Trial Conference stage to deny the facts which were never in dispute till this summons for amendment were filled.*
>
> *16.* *As to paragraph 20 of the Jenning's Affidavit I am advised by my Solicitors that amendment sought by the Defendants is clearly without any merits and only can be explained as a device to deviate from the main issue in this action and to prolong this action unnecessarily and demonstrates mala fides on the part of the Defendants. My Counsel will address legal issues that are sought to be avoided by the purported application to amend which I am given to understand cannot be done.*

Counsel for the Defendants was characteristically frank and brief in relation to the proposition advanced by the Plaintiff.

He accepted that;

- The Plaintiff's Solicitors wrote to the Defendants on 14th July 2009 repudiating the agreement for the share sale and demanded the First and Second Defendants to refund FJ$110,081.74.
- His firm responded by a letter dated 26th October 2009, acknowledging the payment made by the Plaintiff and proposed that the Plaintiff take her shares and if monetary compensation was required value must be given for loss of goodwill alleged against the Plaintiff.

Counsel for the Defendants contention was that the letter sent by his firm was labeled "**without prejudice**" and thus it is privileged and inadmissible as evidence and should not be considered by the Court for deciding the factual issues.

I must confess that I acknowledge the force of the submission by Counsel for the Defendants.

Because, "without prejudice" in the Defendant's correspondence means that whatever is contained within the document, as well as the existence of the document itself, cannot be shared with the Court.

'Without prejudice' means 'without prejudice to the maker of the statement'.

What this means is that negotiations by parties and letters sent to each other labeled 'without prejudice' are privileged, inadmissible as evidence and should not be considered by the judge or arbitrator for deciding the factual issues.

They can be disclosed during the proceedings only if both parties consent to their disclosure and are admissible when there is a waiver by the maker. **In the case before me there is no waiver by the maker of the document.**

The policy of the courts and legislation in recognizing the 'without prejudice' rule is to encourage parties engaged in disputes to try to settle their disputes as far as possible without resorting to litigation. Conversely, the parties should not discourage in genuine attempts at peaceful resolution by any trepidation that their communications during negotiations may be used to their prejudice in due course during legal proceedings.

The other policy and rationale for the rule is that there is an implied agreement between the parties to not refer to settlement negotiations during proceedings.

There are many cases that have examined, analyzed and confirmed these principles. The following are some of the well-known authorities: **Cutts v Head [1984] 1 All ER 597; Re Daintrey ex p Holt [1893] 2 QB 116; Norwich Union Life Insurance Society v Tony Waller (1984) 270 EG 42; Rush & Tompkins v Greater London Council & Anor [1988] WLR 939; Unilever v The Protector & Gamble [2000] FSR 344; Lim Tjoen Kong v A-B Chew Investments [1991] SLR 188.**

The general principle as restated by Lord Griffiths in **Rush & Tompkins**, (supra) is that the rules applies 'to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence'.

I have no hesitation whatsoever in relying on the above judicial decisions in the instant matter before me. One word more, I can see no reason as to why the rule of law enunciated in the aforementioned judicial decisions should not be applied in the case before me.

Due to the reasons which I have endeavored to explain above, I reject the objections raised by the Plaintiff at paragraph 15 and 16 of the Plaintiff's affidavit in opposition as being wholly lacking in substance.

Thus, I allow the amendment.

(3) As to the other amendment, the Defendants at paragraph 34 add that "*Plaintiff has also caused irreparable loss of goodwill and business to the Defendants*".

There is not a word of objection/allegation in the Plaintiff's Affidavit in Opposition in relation to paragraph 34 of the proposed amended Statement of Defence and Counter Claim.

The Plaintiff in her Affidavit in Opposition did not respond to the proposed amendment at paragraph 34.

In the absence of objection, I hold the inference inescapable the Plaintiff does not oppose the proposed amendment at paragraph 34 of the proposed Amended Statement of Defence and Counter-Claim. (See; **Jai Prakash Narayan v Savita Chandra, Civil Appeal No.- 37 of 1985**)

Thus, I allow the proposed amendment at paragraph 34.

(4) It is of interest to note that the application to amend the Statement of Defence and Counter-Claim was made 4 years after the Original Statement of Defence and Counter-Claim was filed. The delay is explained by the fault of the Defendants erstwhile Solicitor. I am not impressed at all. The Defendants cannot shield themselves behind the erstwhile Solicitor's default.

The Defendants have been neglectful in not raising the matter initially in the original Statement of Defence and Counter-Claim. However, the Court ought to give all reasonable indulgence with regard to amending and I am bound by the rule of law, viz.. .' ***that, however negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side.***

I have not been satisfied that the Defendants were acting mala fide or by their lax conduct they have done some injury to the Plaintiff which cannot be compensated by costs

At this juncture, I echo the sentiments of Staughton LJ in **"British Gas Plc v Green Elms Ltd"** (1998) CA,

> *"It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace."*

"In **Tildesley v. Harper** (1878) 10 Ch. D. 393, pp. 396, 397, Bramwell L.J. said:

> *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs" (per Brett M.R. Clarapede v. Commercial Union Association (1883) 32 WR 262, p263; Weldon v. Neal (1887) 19 QBD 394 p.396. Australian Steam Navigation Co. v. Smith (1889) 14 App. Cas. 318 p 320; Hunt v. Rice & Sons (1837) 53 TLR 931, C.A and see the remarks of Lindley L.J. Indigo Co. v. Ogilvy (1891) 2 Ch. 39; and of Pollock B. Steward v.North Metropolitan Tramways Co. (1886) 16 QBD.178, P. 180, and per Esher M.R. p.558, c.a.). An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties," and multiplicity of legal proceedings avoided (Kurtz v. Spence (1888) 36 Ch, D.774; The Alert (1895) 72 L.T. 124).*

Although I recognize that there is undoubtedly some hardship inconvenience and expense to the Plaintiff who has to face a prolongation of litigation, it is something that cannot be wholly compensated in costs; an appropriate order for **costs** in my judgment substantially protects the Plaintiff from any injustice.

(5) The next issue for consideration is **costs.**

Let me see what authority there is on this point?

> *'As a general rule, where a plaintiff makes a late amendment, as here, which substantially alters the case the defendant has to meet and without which the action will fail,* ***the defendant is entitled to the costs of the action down to the date of the amendment*** *(per Stuart-Smith L.J. in Beoco Ltd v Alfa Laval Co Ltd [1995] Q.B. 137).*
>
> *(Emphasis in mine)*

The Court of Appeal in **Pita Sajendra Sundar and Another –v- Chandrika Prasad** (unreported Civil Appeal No.22 of 1997), delivered on 15th May 1998) held;

> *"However, the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expedition's conduct of trials. When leave to amend is granted, the party seeking the*

amendment must bear the costs of the other party wasted as a result of it."

In the context of the present case, I would prefer to adopt the robust approach of the Court of Appeal in **New Indian Assurance Company Ltd v Singh 1999, FJCA 69** and allow my doubts as to the issue of costs submerged in what I think I may just call current of Authority.

"Prejudice can be of two kinds. It can either specific, that it is arising from particular events that may or may not have occurred during the relevant period or general, that is prejudice that is implied from the extent of the delay"; per Hon. Sir Maurice Casey, **New India Assurance Company Ltd v Singh**, (1999) FJCA 69.

I can see no reason why the rule of law enunciated in the following judicial decisions should not be applied in this case.

The prejudice will generally be regarded as inherent in substantial delay; **Green v CGU Insurance Ltd** [2008] NSWCA 148; (2008) 67 ACSR 105 and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

Town & Fencott & Associates Pty Ltd v Eretta Pty Ltd [1987] FCA 102; (1987) 16 FCR 497, 514, and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

> *"We now turn to consider whether prejudice should be inferred from the extent of the delay. It has long been recognised that the longer the delay the more difficult it can be for witnesses accurately to remember events that may have occurred years before. Such events may be forgotten, and there may be an increased possibility that a witness may, by virtue of the passage of time, come to believe an event or a happening that in fact did not occur, or did not occur in the manner he or she now believes." Per Hon. Sir Maurice Casey,* ***New India Assurance Company Ltd v Singh****, (1999) FJCA 69.*

What should be the result in this case? As I understand, a party who seeks to amend belatedly and whose lax conduct has caused the other side inconvenience or expense should pay costs. The late the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expeditious conduct of trials.

I can see no reason to deprive the Plaintiff of the costs down to the date of the amendment.

(I) ORDERS

(1) The Defendants Summons for security for costs is dismissed.

(2) The Defendants application seeking leave to amend the Statement of Defence and Counter-Claim is allowed.

(3) The Defendants are ordered to file the Amended Statement of Defence and Counter-Claim within 14 days hereof.

(4) The Defendants are to pay costs of $1000.00 (summarily assessed) to the Plaintiff within 14 days hereof.

06/12/2016.

.....

Jude Nanayakkara
Master

At Lautoka
06th December 2016