

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 204 of 2015

BETWEEN : **RPA GROUP (FIJI) LIMITED**

PLAINTIFF

AND : **KADIR HUSSAIN T/A VITI BUILDERS & HIRE SERVICES**

DEFENDANT

COUNSEL : **Mr. F Haniff for the Plaintiff**

Ms. P. Preetika for the Defendant

DATE OF HEARING : **15 July 2015**

DATE OF JUDGMENT : **20 May 2016**

JUDGMENT

Introduction

1. On 3 June 2015, Plaintiff filed Originating Summons - Expedited Form for hearing of application for following Orders:-

- “1. That the Defendant be restrained, whether by himself, or his servants or agents or otherwise from presenting and advertising a Winding Up Petition against the Plaintiff company based on the sum of \$10,520.00 claimed in the statutory demand dated 10 February 2015 served on the Plaintiff company on 10 February 2015 pending the hearing and determination of this action;
2. A Declaration that the debt of \$10,520.00 claimed in the Defendant’s statutory demand dated 10 February 2015 is genuinely disputed;
3. Any other Orders, Declarations and Relief as seem just and equitable by this Honourable Court;
4. That the Defendant and/or M. A. Khan Esq. pay all the costs of these proceedings to the Plaintiff on an indemnity basis within a prescribed period;
5. Such further and/or other relief as to this Honourable Court may deem just.”

(“Originating Summons”)

2. On the same date Plaintiff filed Ex-Parte Summons seeking following Orders:-

- “1. That the Defendant be restrained, whether by himself, or his servants or agents or otherwise from presenting and advertising a Winding Up Petition against the Plaintiff company based on the sum of \$10,520.00 claimed in the statutory demand dated 10 February 2015 served on the Plaintiff company on 10 February 2015 pending the hearing and determination of this action;
2. That the Defendant and/or M. A. Khan Esq. pay all the costs of this summons to the Plaintiff on an indemnity basis within a prescribed period;

3. *Such further and/or other relief as to this Honourable Court may deem just.”*

(“Ex-parte Summons”)

3. On 4 June 2015, being returnable date of the Ex-parte Summons this Court after hearing Counsel for the Plaintiff made Order in terms of prayer 1 of the Ex-parte Summons and gave directions for service of the documents on Defendant and filing of Affidavits.
4. On 3 July 2015, being returnable date of the Originating Summons both parties were represented by Counsel. When Court enquired with Defendant’s Counsel as to why no Acknowledgement of Service was filed he withdrew his appearance. Counsel for the Plaintiff then sought hearing date for assessment of costs. This matter was adjourned to 15 July 2015, at 11.00am hearing on issue of costs.
5. On the same day M. A. Khan, Esquire filed Acknowledge of Service on behalf of the Defendant.
6. On 15 July 2015, the Counsel appearing for the Defendant informed the Court she was not aware that issue of cost was set down for hearing and she was of the view the injunction application would be heard.

Defendant’s Counsel informed the Court that Defendant is not opposing injunction application and sought adjournment of hearing date on the issue of cost.
7. The application for adjournment was opposed by Plaintiff’s Counsel and after hearing Counsel for the parties this Court in the interest of justice adjourned the hearing to 13 August 2015, at 2.30 pm and directed parties to file Affidavits and Submissions and Ordered Defendant to pay Plaintiff’s cost of the day assessed in the sum of \$300.00.
8. Parties filed Affidavits and Submissions as directed and made Oral Submissions on 13 August 2015.
9. Following Affidavits were filed on behalf of the parties:-

For Plaintiff

- (i) Affidavit of Ritesh Kumar sworn and filed on 3 June 2015 (“**Kumar’s 1st Affidavit**”);
- (ii) Affidavit of Ritesh Kumar sworn and filed on 7 July 2015 (“**Kumar’s 2nd Affidavit**”)

For Defendant

Affidavit of Kadir Hussain in Reply to Affidavit filed on 7 July 2015 (“**Hussain’s Affidavit**”)

Background Facts

10. Plaintiff has been in the business of constructing roads whilst Defendant carried on the business of hiring construction equipment.
11. Plaintiff has been hiring equipment from the Defendant since October 2013.
12. On or about 10 February 2015, Defendant served on the Plaintiff Winding Up Notice under section 221 of the Companies Act demanding payment of the sum of \$10,520.00 for outstanding debt (“**the Notice**”).
13. Plaintiff disputed the debt stated in the Notice, and prior to the Notice being served on the Plaintiff, parties had meeting to discuss the amount claimed by the Defendant.
14. Upon receipt of the Notice, Plaintiff responded to it through its Solicitors Messrs. Haniff Tuitoga by e-mail dated 27 February 2015 to Defendant’s Solicitors.
15. By the said e-mail Plaintiff’s Solicitors informed Defendant’s Solicitors that:-
 - (i) Plaintiff has overpaid Defendant by at least \$12,010.00;
 - (ii) Issue of Notice is improper;
 - (iii) Requested Defendant to withdraw the Notice and proceed with claim by way of Writ of Summons which would be defended by Plaintiff;
 - (iv) Sought confirmation that the Notice will be withdrawn by midday Monday, 2 March 2015;

- (v) If Plaintiff, is forced to go to Court for Injunction, then the letter will be produced to seek indemnity costs.
16. Subsequent to the aforesaid e-mail, Counsel for the parties spoke to each other about the debt when Counsel for the Defendant informed Counsel for the Plaintiff that she will seek instructions from Defendant and that Defendant's Solicitors will give Plaintiff's Solicitors seven (7) days' notice if Defendant intended to proceed further with Notice.
17. On 22 May 2015, Defendant's Solicitor wrote to Plaintiff's Solicitors informing them that:-
- (i) Time frame for the Notice has lapsed;
 - (ii) They are putting Plaintiff on notice that they have strict instructions from Defendant to proceed with Winding Up Application in High Court;
 - (iii) They have instructions to grant Plaintiff seven (7) days for any reasonable proposal for settlement.
18. On 27 May 2015, Plaintiff's Solicitors sent e-mail to Defendant's Solicitors expressing disappointment and putting them on notice that they are now forced to apply for injunction and will seek indemnity cost against Defendant's Solicitors.
19. On 1 June 2015, Plaintiff's Solicitors e-mailed Defendants Solicitors confirming Defendant's Solicitor's agreement to allow Plaintiff to file application for injunction by 3 June 2015 and attaching copy of decision in Civil Action No. 321 of 2012 on issue of indemnity costs.

Indemnity Costs

20. It is well established that indemnity cost is awarded by Court in exceptional circumstances.
21. The Plaintiff has relied on the case of **Star Printery Limited v. UB Freight (Fiji) Limited** [2013] Civil Action No. 321 of 2012 (30 May 2013).

The facts of **Star Printery case** are almost similar to the facts of this case as stated in paragraph 2.0 of this Ruling. The facts of Star Printery are:-

- (i) Defendant served a Winding Up Notice under section 221 of Companies Act on the Plaintiff;
- (ii) Plaintiff sent a detailed reply to the Defendant, and sought withdrawal of Winding Up Notice;
- (iii) The parties then started to negotiate on without prejudice basis;
- (iv) The Plaintiff, then filed Application seeking Order to restrain Defendant from either filing Winding-Up Petition and if Winding-Up Petition had already been filed then to restrain the Defendant from advertising the Petition.
- (v) At the time of filing of the Application for Injunction, no winding up petition was presented to Court.

22. I consider it appropriate to quote paragraph 25 of the Decision in **Star Printery** (Supra) which is as follows:-

“Despite the exclusion of all the without prejudice correspondence from the present determination, the admitted evidence between the parties are that despite the request of the Plaintiff to withdraw the winding up notice, the Defendant did not grant an assurance of not to proceed with the winding up action against the Plaintiff. Winding up action can have serious consequences depending on the reputation of the company and also due to the nature of the business and the business environment. So, a threat of winding up cannot be considered lightly and despite it being used as a mere threat to expedite negotiations or otherwise, the apprehension of the winding up can lead to parties seeking injunctive relief against such threats to stall any prospective winding up action to save the company from unnecessary strain, provided that they are financially sound as evidenced from the facts of this case. The Plaintiff did not receive any confirmation as to their request to withdraw the winding up action, in their reply to the notice of winding up. The Defendant admitted in the affidavit in opposition to the issue of costs that they were warned of impending action to adjunct the winding up and also for request of indemnity costs in such a situation. The behavior of the Plaintiff is not unreasonable considering the circumstances of the case.”

23. I fully endorse the comments in paragraph 25 of **Star Printery** decision in particular to the comment about seriousness of winding up action.
24. It is well known fact, that once the secured and unsecured creditors of the Company become aware of the winding-up action, they restrict or tighten the credit arrangement they have with the Company.
25. The issuance of Winding-up proceedings by Petitioner, where Petitioner knows that the debt is genuinely disputed, and the proceedings is to harass and humiliate the Company, will leave that Court with no option but to award indemnity costs in exercise of its discretion.
26. The Court in **Star Printery** quoted with approval the following statement of Megary V. C. in **EMI Records Ltd v. Ian Cameron Wallance Ltd** [1983] 1 Ch 59 at p.70:-

“In the result therefore, I reject Mr. Cook’s clear and forceful contentions on this point, and hold that the court has power in contentious proceedings to order the unsuccessful party to pay the successful party’s costs on bases other than those contained in rule 28: and these include orders for costs on the solicitor and own client basis, on the solicitor and client basis, or on an indemnity basis. I do this, first on the footing of the Court of Appeal decision that I have mentioned. Second, the circumstances of litigation are so various that it is a matter of high importance that the judge should have wide discretion as to the basis of costs, and not be subjected to the Procrustean bed of rule 28. Even in party and party taxation or in common fund taxations it is important for the judge to be able to order that particular items which otherwise would be included should be excluded, and vice versa, so that the taxing master will not be confined to rigid application of formulae set out in the rule.”
27. The Court in **Star Printery** did not award indemnity costs.
28. The principle in respect to whether indemnity cost should be awarded or not was stated in **Prasad v. Divisional Engineer Northern** (No. 2)[2008] FJHC HBJ03.2007 (25 September 2008) by her Ladyship Justice Scutt (as she then was) after a detailed and thorough research.
29. Her Ladyship Justice Scutt (as she then was) stated as follows:-

“3.3 General principles include:

- A court has ‘absolute and unfettered’ discretion vis-à-vis the award of costs but discretion ‘must be exercised judicially’: **Trade Practices Commission v. Nicholas Enterprises** (1979) 28 ALR 201, at 207
- The question is always ‘whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party’: **Colgate-Palmolive Company v. Cussons Pty Ltd** (1993) 46 FCR 225, at 234, per Sheppard, J.
- A party against whom indemnity costs are sought ‘is entitled to notice of the order sought’: **Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd** (1995) NSWLR 242
- That such notice is required is ‘a principle of elementary justice’ applying to both civil and criminal cases: **Sayed Mukhtar Shah v. Elizabeth Rice and Ors** (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA
- ‘... neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable’: **State v. The Police Service Commission; Ex parte Beniamino Naviveli** (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6
- Usually, party/party costs are awarded, with indemnity costs awarded only ‘where there are exceptional reasons for doing so’: **Colgate-Palmolive Co. v. Cussons Pty Ltd** at 232-34; **Bowen Jones v. Bowen Jones** [1986] 3 All ER 163; **Re Malley SM; Ex parte Gardner** [2001] WASCA 83; **SDS Corporation Ltd v. Pasonnay Pty Ltd & Anor** [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.
- Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where ‘there is some special or unusual feature of the case to justify’ a court’s ‘exercising its discretion in that way’: **Preston v. Preston** [1982] 1 All ER 41, at 58
- Indemnity costs can be ordered as and when the justice of the case so requires: **Lee v. Mavaddat** [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.
- For indemnity costs to be awarded there must be ‘some form of delinquency in the conduct of the proceedings’: **Harrison v. Schipp**

[2001] NSWCA 13, at paras [1], [153]

- Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...': **MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2)** (1996) 140 ALR 707, at 711, per Lindgren J.
- '... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order': **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')** (1991) 2 Lloyds Rep 155, at 176, per Kirby, P.
- Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success': **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors** (1998) 81 ALR 397, at 401, per Woodward, J.
- Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] wilful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion': **Fountain Selected Meats**, at 401, per Woodward, J.
- Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate: **Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd** (1992) 30 NSWLR 359, at 362. per Power, J.
- Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences': **Baillieu Knight Frank**, at 362, per Power, J.
- Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court': **Willis v. Redbridge Health Authority** (1960) 1 WLR 1228, at 1232, per

Beldam, LJ

- ‘Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter partes. A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties’: **Ranjay Shandil v. Public Service Commission** (Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, ‘Do costs really follow the event?’ (1996) **NLJ** 710 (May 1996))
- ‘It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case’: **J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2)** (1993) 46 IR 301, at 303, per French, J.
- ‘... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full’: **Quancorp Pty Ltd & Anor v. MacDonald & Ors** [1999] WASC 101, at paras [6]-[7], per Wheeler, J.
- However, a case should not be characterised as ‘hopeless’ too readily so as to support an award of indemnity costs, bearing in mind that a party ‘should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain’ for ‘uncertainty is inherent in many areas of law’ and the law changes ‘with changing circumstances’: **Quancorp Pty Ltd & Anor v. MacDonald & Ors** [1999] WASC 101, at paras [6]-[7], per Wheeler, J.
- The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried: **Medcalf v. Weatherill and Anor** [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn
- Purpose of indemnity costs is not penal but compensatory so awarded ‘where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due’; the court ‘ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs’: **Willis v. Redbridge Health Authority**, at 1232, per Beldam, LJ

- *Actions of a Defendant in defending an action, albeit being determined by the trial judge as ‘wrong and without any legal justification, the result of its own careless actions’, do ‘not approach the degree of impropriety that needs to be established to justify indemnity costs ... [Regardless of how sloppy the [Defendant] might well have been in lending as much as \$70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs] in these circumstances. He should have awarded costs on the ordinary party and party scale’:* **Credit Corporation (Fiji) Limited v. Wasal Khan and Mohd Nasir Khan** (Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11

3.4 (c) **Defining ‘Improper’, ‘Unreasonable’ or ‘Negligent’ Conduct in Legal Proceedings as Guide to Indemnity Costs Awards:** Cases where ‘wasted costs’ rules or ‘useless costs’ principles have been applied against solicitors where their conduct in proceedings has led to delay and/or abuse of process can provide some assistance in determining whether conduct in proceedings generally may be such as to warrant the award of indemnity costs. These cases specifically relate to solicitors’ conduct rather than directly touching upon the indemnity costs question; nonetheless the analysis or findings as to what constitutes conduct warranting an award of costs can be helpful. See for example:

- **Ridehalgh v. Horsefield and Anor** [1994] Ch 205
- **Medcalf v. Weatherill and Anor** [2002] UKHL 27 (27 June 2002)
- **Harley v. McDonald** [2001] 2 AC 678
- **Kemajuan Flora SDN Bh v. Public Bank BHD & Anor** (High Court Malaya, Melaka, Civil Suit No. 22-81-2001, 25 January 2006)
- **Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee** (FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004)
- **SZABF v. Minister for Immigration (No. 2)** [2003] FMCA 178
- **Heffernan v. Byrne** [2008] FJCA 7; ABU0027.2008 (29 May 2008)

3.5 Some of the matters referred to include:

- *At the hearing stage, the making of or persisting in allegations made by one party against another, unsupported by admissible evidence ‘since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot*

be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn: **Medcalf v. Weatherill and Anor**, at 8, per Lord Bingham

- At the preparatory stage, in relation to such allegations – not necessarily having admissible evidence but there should be ‘material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it: **Medcalf v. Weatherill and Anor**, at 8, per Lord Bingham
- Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples of wasting the time of the court or an abuse of its processes resulting in excessive or unnecessary costs to litigants: **Harley v. McDonald**, at 703, para [50] (English Privy Council)
- Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court: **Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee** (FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004), at para [43], per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)
- Lending assistance to proceedings which are an abuse of the process of the court – using litigious procedures for purposes for which they were not intended, ‘as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest’ or evading rules intended to safeguard the interests of justice ‘as by knowingly failing to make full disclosure on ex parte application[s] or knowingly conniving at incomplete disclosure of documents’: **Ridehalgh v. Horsefield** [1994] Ch 205, at 234, per Bingham, MR
- Initiating or continuing multiple proceedings which amount to abuse of process: **Heffernan v. Byrne** [2008] FJCA 7; ABU0027.2008 (29 May 2008), per Hickie, J.

3.6 (d) **Specific Circumstances of Grant/Denial Indemnity Costs:** Specific instances supporting or denying the award of indemnity costs include:

- Indemnity costs follow per a ‘**Calderbank** offer’, that is, where a party makes an offer or offers prior to trial, which is/are refused, and that party succeeds at trial on a basis which is better than the prior offer: **Calderbank v. Calderbank** [1975] 3 WLR 586

- However, no indemnity costs awarded where **Calderbank** letter contains no element of compromise, making it not unreasonable for the party not to accept the offer. The question is ‘... whether the offeree’s failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs ...’: **SMEC Testing Services Pty Ltd v. Campbelltown City Council** [2000] NSWCA 323, at para [37], per Giles, JA Hence, if the offer is not a genuine offer of compromise and/or there is no appropriate opportunity provided to consider and deal with it, then no indemnity costs follow: **Richard Shorten v. David Hurst Constructions P/L; D. Hurst Constructions v. RW Shorten** [2008] AdjLR 06/17 (17 June 2008), per Einstein, J. (NSW Supreme Court, Equity Division T&C List); **Leichhardt Municipal Council v. Green** [2004] NSWCA 341, at paras [21]-24], [36], per Santow, JA, Stein, JA (concurring); **Herning v. GWS Machinery Pty Ltd (No. 2)** [2005] NSWCA 375, at paras [4]-[5], per Handley, Beazley and Basten, JJA; **Elite Protective Personnel v. Salmon** [2007] NSWCA 322, at para [99]; **Donnelly v. Edelsten** [1994] 49 FCR 384, at 396
- Indemnity costs awarded:
 - ♦ upon a winding-up petition’s being presented on a debt known to the petitioner to be genuinely disputed on substantial grounds;
 - ♦ the clearly established law being that a winding up order will not be granted in such circumstances, meaning that the petitioner ‘had no chance of successfully obtaining a winding up order’;
 - ♦ where in these circumstances the filing of the petition ‘constituted a deliberate tactical manipulation of the winding up process by the [petitioner, the State Government Insurance Commission ‘SGIC’] for the purposes of bringing very substantial pressure to bear’ on Bond Corp Holdings ‘BCH’;
 - ♦ this in the circumstances meant that the ‘filing of the petition was an abuse of process of the court in the true sense of that expression’;
 - ♦ the discretion to stay the petition should not be exercised because this would ‘cause BCH serious harm’ meaning it would be ‘extremely difficult for BCH to be able to conduct its business normally if the petition [were] not dismissed’: citing **Re Lympne Investments** [1972] 1 WLR 523, at 527, per Megarry, J.; also **Re Glenbawn Park Pty Ltd** [1977] 2 ACLR 288, at 294, per Yeldham, J.
 - ♦ an abuse of process ‘having been established in the circumstances

outlined, justice requires the award of solicitor and client, or, rather, "indemnity" costs' so that 'the SGIC should be ordered to pay all the costs incurred by BCH except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that, subject to [these] exceptions, BCH be completely indemnified by the SGIC for its costs', citing **Foundation Selected Meats (Sales) Pty Ltd v. International Produce Merchants** (1988) 81 ALR 397, at 410, per Woodward J.: **Re Bond Corp Holdings Ltd** (1990) 1 ACSEER 350, at 13, per Ipp, J.

- Indemnity costs are appropriate where an applicant (in an unfair dismissal):
 - ♦ 'insists' over a respondents' objections that an application should proceed to trial rather than await the outcome of other possible litigation (including a police investigation);
 - ♦ fails repeatedly, despite allowances, to meet deadlines for lodgment of a witness statement;
 - ♦ fails to advise her lawyers of her whereabouts so denying them of the ability to inform the court of reasons for seeking an unqualified adjournment less than a week prior to trial;
 - ♦ fails to comply with directions to provide a current address, consult a medical specialist and obtain a report of fitness to attend the trial;
 - ♦ fails to appear at the final hearing when on notice that the application will be dismissed in event of such failure: **Nicole Pender v. Specialist Solutions Pty Ltd** (No. B599 of 2004. 17 May 2005), per Bloomfield, Commissioner
- Indemnity costs denied as against a Plaintiff who discontinued a claim for a permanent injunction to restrain a Defendant's industrial action, where the Defendant had filed a chamber summons seeking to have the Plaintiff's claim struck out as an abuse of process: **Cooperative Bulk Handling Ltd v. Australian Manufacturing Workers Union (WA Branch)**(Unreported, WASC, Lib. No. 970190, 30 April 1997), per Wheeler, J.
- Indemnity costs cannot be awarded in a criminal appeal, albeit 'in criminal appeals, as in civil cases, unreasonable conduct by the unsuccessful party might increase a usual award': **Sayed Mukhtar Shah v. Elizabeth Rice and Ors** (Crim Appeal No. AAU0007 of 1997S, High Ct Crim Action No. HAA02 of 1997, 12 November 1999), at 4, per Sir Moti Tikaram, P., Casey and Barker, JJA" (**emphasis added**)

30. In **Re Aggressor Fiji Ltd** [2005] FJHC 48; HBE 0040.2004 (3 March 2005) the Company filed application for costs.

31. The Court in **Re Aggressor** (Supra) outlined chronology of event in a table format as follows:-

21 st January, 2004	Petitioner issues Section 221 notice
21 st February, 2004	Petitioner files winding up petition
5 th March, 2004	Respondent company responds to the S.221 notice by letter
16 th March, 2004	Respondent's solicitor responds to the Section 221 notice by letter.
5 th May, 2004	Matter called before Deputy Registrar. Respondent's solicitors given 21 days to file affidavit in opposition. Matter adjourned to 26 th May, 2004 before D.R. for mention.
24 th May, 2004	Respondent's solicitors files affidavit in answer.
26 th May, 2004	Petitioner's solicitors given 14 days to file affidavit in reply. Matter adjourned to 9 th June, 2004 before D.R. for mention.
4 th June, 2004	Petitioner's solicitors requests for further 14 days to file affidavit in reply. Further 14 days given to Petitioner's solicitors to file affidavit in reply. Matter adjourned to 30 th June, 2004 before D.R. for mention.
30 th June, 2004	Petitioner's solicitors request for further 14 days to file their affidavit in reply. Another 14 days given to petitioner's solicitors to file affidavit in reply. Matter adjourned to 14 th July, 2004 before D.R. for mention.
14 th July, 2004	Petitioner's solicitors requests for further 14 days to file affidavit in reply. Matter adjourned to 28 th July, 2004 to set a
26 th July, 2004	Petitioner's solicitors file their affidavit in answer.
28 th July, 2004	Respondent's solicitors given 14 days to reply to the Petitioner's affidavit. Adjourned to 11 th August, 2004 for mention before D.R.
16 th August, 2004	Respondent's solicitors files their affidavit in reply
18 th August, 2004	Matter adjourned to 30 th August, 2004 before Justice Winter at 9.30am for mention to fix hearing date.
30 th August, 2004	Mr. Justice Winter notes that the Section 221 notice is defective and that the debt is genuinely disputed and asks the Petitioner's solicitors to consider their clients position. Matter adjourned to 3 rd September, 2004 at 11.00am for mention before Justice Winter.
3 rd September, 2004	No appearance by petitioner's counsel. Matter adjourned to 24 th September, 2004 at 9.30am for mention before Justice Winter.

24 th September, 2004	Petitioner's counsel withdraws the winding up petition. Court reserves the issue of costs.
6 th October, 2004	Respondent's counsel writes to Petitioner's solicitor on the issue of costs but does not receive any response.
29 th October, 2004	Present application filed.

32. In **Re Aggressor** (Supra), Court awarded increased costs but not indemnity cost.
33. In this instance, the Plaintiff and Defendant held meetings prior to Defendant issuing the Notice.
34. The Plaintiff wrote to Defendant immediately after receipt of the Notice disputing the debt and stating that it overpaid the Defendant.
35. As stated earlier and as it appears from the paragraph 1 and 2 of this Judgment, that the facts are almost similar to that of **Star Printery** case and less serious than the the facts in **Re Aggressor**.
36. It is apparent from the meetings held between representatives of Plaintiff and Defendant that accounts between them were not reconciled. Defendant did not oppose the injunction application.
37. I therefore, hold that there are no special circumstances here that warrants award of indemnity costs and Plaintiff is entitled costs on party to party basis on the higher scale.

Orders

38. I make following Orders:-
- (i) The Defendant is restrained, whether by himself, or his servants or agents or otherwise from presenting and advertising a Winding Up Petition against the Plaintiff company based on the sum of \$10,520.00 claimed in the statutory demand dated 10th February 2015 served on the Plaintiff company on 10th February 2015;

- (ii) Defendant pay Plaintiff's costs of this action assessed in the sum of Three thousand five hundred dollars (\$3,500.00) within twenty-one (21) days of this Judgment.



A handwritten signature in blue ink, appearing to read "K. Kumar", written over a horizontal dotted line.

K. Kumar
JUDGE

At Suva

20 May 2016

Messrs. Haniff Tuitoga for the Plaintiff

M. A. Khan, Esquire for the Defendant