IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 81 of 2015

BETWEEN : **BHAGAT SINGH** of Sabeto, Nadi.

PLAINTIFF

A N D : **TOWER INSURANCE (FIJI) LIMITED** a limited liability company having its registered office at 1st Floor, Tower House, Thomson Street, Suva.

DEFENDANT

(Ms.) Arthi Bandhanna Swamy for the Plaintiff
(Mr.) Gyanendra Adish Kumar Narayan for the Defendant

Date of Hearing: **17th March 2016**
Date of Ruling : **27th May 2016**

RULING

(1) The matter before me stems from the Plaintiff's Summons dated 04th December 2015, made pursuant **to Order 2, Rule (2), and Order 18, Rule (18) of the High Court Rules, 1988** and under the inherent jurisdiction of the Court seeking the grant of the following orders;

> *"That the Defendant's Summons for Further and Better Particulars filed on 4th day of September 2015 be struck out on the grounds that the said Summons:-*
> *(a) discloses no reasonable cause of action against the Plaintiff;*

(b) is scandalous and /or frivolous and/or vexatious and
(c) is otherwise an abuse of the process of the Court".

(2) The application for striking out is supported by an affidavit sworn by one "Munil Singh", Law Clerk of Plaintiff's Solicitors.

(3) The Defendant raised preliminary objections to the Summons and the affidavit of the Law Clerk.

(4) The Defendant objected to the affidavit of the Law Clerk and the Summons on the following grounds;

- ❖ The Law Clerks of Solicitors are neither litigants nor competent legal persons to swear on contentious legal matters.
- ❖ Order 2, Rule (2) specifically states that the grounds of objection must be stated in the Summons. The Summons filed herein does not state the grounds of objection.
- ❖ Order 18, Rule (18) cannot be applied in this case as Summons filed herein does not form part of the pleadings.

(5) **This ruling relates to the preliminary objections raised by the Defendant.**

(6) Before I pass to consideration of the preliminary objections, let me set out the chronology of events.

- ❖ The action was instituted by the Plaintiff by way of Writ of Summons and Statement of Claim filed on 27th May, 2015 claiming breach of contract of insurance and damages for the breach.
- ❖ The Defendant filed a defence on 16th July, 2015 following which the Plaintiff filed his Reply to Defence on 19th August, 2015.
- ❖ The Pleadings were closed on 01st September 2015.

- On 4th September, 2015, the Defendant filed Summons for Further and Better Particulars.

- The Defendant's Summons was first called on 17th September, 2015. On that date, the Plaintiff's Counsel informed Court that she is opposing the Defendant's Summons. The Court granted 28 days for the Plaintiff to file response. The case was listed for Mention on 02nd November 2015. The Court did not sit on 02nd November 2015, and the matter was listed for 12th November 2015. On 12th November 2015, the Counsel for the Plaintiff informed Court that she is filing Summons under Order 2, Rule (2) of the High Court Rules, to strike out the Defendant's Summons.

- On 3rd December 2015, the Plaintiff filed Summons under Order 2, Rule (2) and Order 18, Rule (18) to strike out the Defendant's Summons for further and better particulars.

- On 26th January 2016, the Counsel for the Defendant informed Court that he is not filing response to the Plaintiff Summons.

- Thus, the Plaintiff's Summons to strike out the Defendant's Summons for further and better particulars was set down for hearing on 17th March 2016 at 2.30pm.

- **No hearing date is fixed for Defendant's Summons for further and better particulars.** Thus, the Defendant's Summons is yet to be heard. That is for another day.

(7) **Law Clerks swear affidavits on behalf of Clients.**

The affidavit in support of the Plaintiff's Summons is sworn by a Law Clerk employed by the Plaintiff's Solicitors. The Defendant raised a preliminary objection to the affidavit of the Law Clerk. It was contended by the Defendant that the law Clerks of Solicitors are neither litigants nor competent legal persons to swear on contentious legal matters.

I heard no word said on behalf of the Plaintiff in relation to the Defendant's objection to the Plaintiff's affidavit in support.

Let me now move to consider the first preliminary objection.

The Law Clerk deposed in the first paragraph as follows;

> *THAT I am employed at Messrs Patel & Sharma of Nadi, Solicitors for the Plaintiff and duly authorised by the Plaintiff to swear this Affidavit on his behalf.*

But he does not annex any authority given to him by the Plaintiff.

Leave that aside for a moment.

Upon perusal of the affidavit, it is observed that the deponent swears on contentious legal matters.

Reference is made to paragraphs (5) to (8) of the affidavit:

Para	*5:*	*THAT the said application lacks merits.*
Para	*6:*	*THAT as the said application should show the reasoning as to why the further and Better Particulars is required for the said paragraphs of the Reply to Statement of Defence.*
Para	*7:*	*THAT all they had seek in their Summons is that Further and Better Particulars should be provided, however the information they are seeking in their said Summons is already admitted in their Statement of Defence.*
Para	*8:*	*THAT for the aforesaid reasons the application filed by the Defendant does not show any satisfaction to the Court that the said application should be heard before the Court.*

In my view, Law Clerks of Solicitors are neither litigants nor competent legal persons to raise such objections. The litigants are entitled to take up such assertions only on advice of their Solicitors. The Law Clerk does not depose that he has been advised by the Plaintiff's Solicitors on the contentious legal matters he deposed.

In this, I am comforted by the rule of law expounded in the following judicial decisions:-

In the case <u>Dr. Ramon Fermin Angco v Dr. Sachida Mudaliar & Others</u>, Lautoka High Court Civil Action No. 26 of 1997, the Court on page 3 stated;

> *"The Court will disregard the affidavit sworn by Yogesh Narayan. As a practice it is quite improper that law clerks swear affidavits on behalf of clients. Proceedings such as*

the present are matters in which the latter ought more appropriately to be involved. Too often solicitors allow their law clerks to swear affidavits because it is all too convenient. Such conduct must be discouraged. It trespasses the demarcation between client and solicitor roles."

I reiterate here the comments of Hon. Mr. Justice Jiten Singh in Deo v Singh [2005] FJHC 23; HBC0423.2004 (10 February 2005):

"The swearing of affidavits by solicitor's clerks in contested proceedings with alarming regularity before the courts. Arun Kumar says he was duly authorised by defendants to dispose the contents. There is no authority annexed to the affidavit. Order 41 Rule 1 sub-rule 4 requires affidavit to be expressed in "first person". The affidavit put before the court is more like a statement defence in its wording rather than being expressed in first person. ***Swearing of affidavit by solicitor's clerk on contested matters should be a rare exception and the reason why the party is unable to depose ought to be explained".***

Master Robinson in Chand v Hussein [2009] FJHC 286; Civil Action 17. 2007 {14 October 2009) warned of the inherent danger in such practice:

"I do not wish to delve into the possible implications of solicitor's clerks swearing affidavits on behalf of clients except as to say that personal knowledge of the facts by the deponent is a necessary ingredient".

Applying those principles to the present case, I have no hesitation in concluding that the affidavit of law clerk filed in support of the Plaintiff's Summons to strike out is defective and unacceptable.

Thus, I uphold the first preliminary objection.

(8) **Order 2, Rule (2)**

It was contended by the Defendant that the Summons filed herein does not state the grounds of objection.

The Counsel for the Plaintiff did not say a word against this.

Let me now move to consider the second preliminary objection.

Order 2, Rule (2) provides:

> ***Application to set aside for irregularity (O.2, r.2)***
>
> *2.- (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken ay fresh step after becoming aware of the irregularity.*
>
> *(2) An application under this rule may be made by summons or motion and the grounds of objection* ***must be stated*** *in the summons or notice of motions.*
>
> (Emphasis Added)

The wording of Order 2, Rule 2(2) is perfectly clear to me; *"An application under this rule may be made by summons or motion and the grounds of objection* ***must be stated*** *in the summons or notice of motions".*

Order 2, Rule 2(2) is expressed in mandatory terms. As it seems to me, effect must be given to the Rules of the Court in accordance with their terms.

Upon perusal of the Summons filed herein, it is observed that there is no reference to grounds of objection. It seems to me perfectly plain that Order 2, Rule2(2) is completely ignored by the Plaintiff. Thus, I have no hesitation in reaching the conclusion that the Plaintiff's Summons is defective. In the Court's view, the defect is fundamental, which cannot be rectified simply by the use of Court's discretion. In applications such as this, the technicalities are strictly construed because of the drastic consequences that follow for one of the parties upon the relief sought being granted. At this point, I cannot resist in saying that it behoved the Plaintiff and his Counsel to have exercised more diligence in this regard.

The need for and the importance of complying with the Rules were emphasised as far back as 1983 by the Court in ***"Kenneth John Hart v Air Pacific Ltd", Civil Appeal No. 23 of 1983.***

In 1995, the **Supreme Court**, the highest Court in the land warned; "We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that noncompliance may well be fatal to an appeal" **See; *Venkatamma v Ferrier –Watson, Civil Appeal No. CBV 0002 of 1992 at p.3 of the judgment.***

In August, 1997, the **Court of Appeal** in ***Hon Major General Sitiveni rabuka & Others v Ratu Viliame Dreunimisimisi & Others*** ***(Civil Appeal No. ABU0011 of 1997)*** held as follows-

> "In all the circumstances, having regard to the history of the proceedings in the High Court and bearing in mind what the Supreme Court said in *Venkatamma*, we have decided that the proper course for us to follow now is to reject the application for further time to comply with rule 17 and to dismiss the appeal."

In the decision of the **Privy Council** in ***Ratnam v Cumarasamy and Another [1964] 3 All E.R. at page 935;***

Lord Guest in giving the opinion of the Board to the Head of Malaysia said, *inter alia*:

> *"**The rules of court must, Prima facie, be obeyed**, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the Affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of appeal was exercised on any wrong principle."*
>
> (Emphasis Added)

On the strength of the authority in the above judicial decisions, I wish to emphasise that the rules are there to be followed and non-compliance with those rules is fatal.

Thus, I uphold the second preliminary objection.

(9) Finally, it was contended by the Defendant that Order 18, Rule (18) cannot be applied in this case as Summons filed herein does not form part of the Pleadings.

Let me now move to consider the third preliminary objection.

Order 18, Rule (18) reads;

Striking out pleadings and indorsements (O.18, r.18)

18- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

(a) It discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

When reduced to its essentials, it is very clear that Order 18, Rule (18) is applicable to pleadings, Originating Summons and a Petition as if the case may be, was a pleading. Thus, the Defendant's Summons for further and better particulars does not form part of the pleadings. Therefore, Order 18, Rule (18) is not applicable.

Thus, I uphold the third preliminary objection.

Accordingly, there is no alternate but to dismiss the Plaintiff's Summons. I cannot see any other just way to finish the matter than to follow the law.

(10) Finally, the Defendant moved for 'Indemnity Costs', without adducing grounds.

It is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"indemnity costs"**.

Order 62, Rule (37) of the High Court Rules empower courts to award indemnity costs **at its discretion.**

For the sake of completeness, Order 62, Rule (37) is reproduced below.

Amount of Indemnity costs (O.62, r.37)

37.- (1) The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.

G.E. Dal Pont, in "Law of Costs", Third Edition, writes at Page 533 and 534;

'Indemnity' Basis

"Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an indemnity basis. Other than in the Family Law and Queensland rules – which define the 'indemnity basis' in terms akin to the traditional 'solicitor and client basis' – the 'indemnity basis' is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of 'indemnity costs'. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.

Although all costs ordered as between party and party are, pursuant to the 'costs indemnity rule', indemnity costs in one sense, an order for 'indemnity costs', or that costs be taxed on an 'indemnity basis', is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a 'punitive' costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred."

Now let me consider what authority there is on this point.

The principles by which Courts are guided when considering whether or not to award indemnity costs are discussed by Hon. Madam Justice Scutt in "**Prasad v Divisional Engineer Northern** (No. 02)" (2008) FJHC 234.

As to the **"General Principles"**, Hon. Madam Justice Scutt said this;

- *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] FCA 536; (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: **SayedMukhtar 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**[1988] FCA 202; (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] willful 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 parties 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 ... [R]egardless 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 MohdNasir 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*

***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)*

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 disclose rue 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.*

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] Adj LR 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] FCA 992; [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] FCA 202; (1988) 81 ALR 397, at 410, per Woodward J.:* ***Re Bond Corp Holdings Ltd*** *(1990) 1 ACSER 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*

- *Indemnity costs awarded then reversed on appeal where solicitor held liable for costs (under a 'wasted costs' order) in initiating action for clients where solicitor taken to have known that the basis of the clients' action was wholly false"*

The oral and written submissions of Counsel for the Defendant have not addressed why *'indemnity costs'* should be awarded. The Court has not been pointed to any "*reprehensible conduct*" in relation to the proceedings. Indeed, as was set out by in ***Carvill v HM Inspector of Taxes*** (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005, Stephen Oliver QC and Edward Sadler)(Bailii:[2005]UKSPCSPC00468,http://www.bailii.org/cgibin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.html), "*reprehensible conduct*" requires two separate considerations (at paragraph 11):

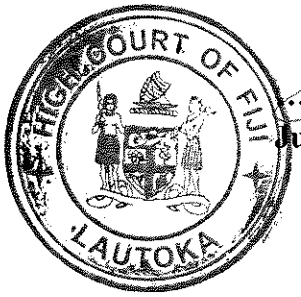
"The party's conduct must be unreasonable, but with the further characteristic that it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma."

I have not found, any evidence of "reprehensible conduct" in the litigation in relation to the present proceedings before me.

In my view, the Plaintiff has done no more than to exercise his legal right to contest the Defendant's Summons for further and better particulars. This simply does not approach the degree of impropriety that needs to be established to justify indemnity costs. The Plaintiff is not guilty of any conduct deserving of condemnation as disgraceful or as an abuse of process of the court and ought not to be penalised by having to pay indemnity costs.

(11) **FINAL ORDERS**

(1) The Defendant's preliminary objections are upheld.
(2) The Plaintiff's Summons dated 04th December 2015 is dismissed.
(3) The Defendant's application for 'indemnity costs' is refused.
(4) The Plaintiff is ordered to pay costs of $500.00 (summarily assessed) to the Defendant which is to be paid within 14 days hereof.
(5) The Defendant's Summons for 'further and better particulars' is set down for hearing on 01st September 2016 at 11.30 a.m.



27/05/2016.

Jude Nanayakkara
Master

At Lautoka
27th May 2016