IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 72 OF 2014

BETWEEN : MAYA KIDMAN

PLAINTIFF

A N D : PREM CHANDRA & AJENDRA PRASAD

DEFENDANTS

Mr. Zoyab Shafi Mohammed for the Plaintiff
Mr. Anil Jatinder Singh for the Defendants

Date of Hearing : - 15th June 2016
Date of Ruling : - 07th October 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Defendants "Summons" dated 29th February 2016, made pursuant to Order 23, rule 1 (a) of the High Court Rules, 1988 and inherent jurisdiction of the Court seeking an Order that the Plaintiff give security for the Defendants costs in this action on the following grounds;

- The Plaintiff is resident abroad.

- The Plaintiff has no assets within the jurisdiction.

(2) The "Summons" is supported by an Affidavit sworn by the First Defendant.

(3) The 'Summons' is vigorously contested by the Plaintiff. The Plaintiff filed an "Affidavit in Opposition" sworn on 05th April, 2016, opposing the application for security for costs. The Defendants did not file an Affidavit in Reply.

(4) The Plaintiff and the Defendants were heard on the 'Summons'. 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 the 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 widower currently residing in Queensland, Australia but previously a citizen and resident of Fiji.*
>
> *2. The first named Defendant is a Fiji citizen and is an acquaintance of the Plaintiff and the second named Defendant is a Fiji citizen and resident.*
>
> *3. In or about 2012, the first named Defendant recommended to the Plaintiff to purchase a property in Fiji and /or the Plaintiff expressed an interest to the first named Defendant in purchasing a property in Fiji and the first named Defendant offered to assist the Plaintiff in such purchase.*
>
> *4. In or about 2012 or in January 2013, the first named Defendant advised the Plaintiff to send funds for the purchase to the bank account of Chandra Kant Lodhia at ANZ Bank, Nadi.*
>
> *5. Pursuant to the advise referred to in paragraph 4 above, the Plaintiff on 29th January 2013 arranged with her Bank ANZ, Acacia Ridge, Queensland, Australia to remit to the said Chandra Kant Lodhia's bank account at ANZ, Nadi for the said purchase the sum of A$300,000.00 which on receipt into the said bank account of Chandra Kant Lodhia, converted to F$514,751.00.*
>
> *6. On or about 12th April 2013,, the Defendants entered into a Sale and Purchase Agreement with Ishwar Lal for the purchase by them of a*

property situated at Kennedy Avenue, Nadi as comprised in Certificate of Title 11093 ("the property") for a purchase price of F$475,000.00

7. *On 12th April 2013, a sum of FJ $47,500.00 was paid into the Trust Account of Vasantika Patel, Barrister & Solicitor of Nadi as a deposit for the purchase of the property, using the funds referred to in paragraph 5 above.*

8. *On 14th April 2013, a sum of F$47,500.00 was paid into the Trust account of Vasantika Patel, Barrister & Solicitor of Nadi as a deposit for the purchase of the property, using the funds referred to in paragraph 5 above.*

9. *By a Transfer dated 8th May 2013 and registered at the Titles Registry on 14th June 2013, the property was transferred into the names of the Defendants.*

10. *In the premises, the Defendants converted to their own use the sum of F$514,751.00 sent by the Plaintiff for the purchase of the property as referred to in paragraph 5 above and wrongful transferred the property into their own names.*

11. *By letter of 31 March 2014 from Cromptons, Barristers & Solicitors of Suva to the first named Defendant, the Defendants were required to immediately transfer at their cost the property to the Plaintiff and to pay to the Plaintiff the sum of $39,751.00 being the difference between the sum of F$514,751.00 sent by the Plaintiff and the purchase price of F$475,000.00 for the property and by letter to Cromptons in reply, the first named Defendant denied his liability.*

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

Para 1. *A declaration that the Defendants are holding the property in trust for the Plaintiff.*

2. *An Order that the Defendants immediately transfer the property to the Plaintiff at their cost.*

3. *An account of all monies received by the Defendants as Income from the property since the property was transferred to them and an Order that the Defendants pay such monies to the Plaintiff.*

4. *Further or alternatively, Judgment in the sum of F$514,751.00 being the funds sent by the Plaintiff for the purchase of the property and/or in the sum of F$39,751.00 being the difference between the funds of F$514.751.00 sent by the Plaintiff for the purchase of the property and the purchase price of F$475, 00.00 for the property.*

(5) The Defendants in their Statement of Defence plead *inter alia;*

Para 1. THAT the Defendants refers to Paragraph 1 of the Statement of Claim and says as follows:

- *a. The first husband of the Plaintiff died on 25th December, 1986.*
- *b. The Plaintiff then married the first named Defendant on 20th November, 1995 and this marriage was dissolved on 25th June, 2003.*
- *c. Despite the divorce, the Plaintiff and the first named Defendant remained in a close relationship.*
- *d. The first named Defendant travelled to Brisbane numerous times since 2010 and lived with the Plaintiff and they resumed their relationship.*
- *e. The Plaintiff began living with first named Defendant in January, 2013 at his home in Drasa, Lautoka.*
- *f. That sometimes in April or May, 2013 the Plaintiff left the first name Defendant's residence whilst the first named Defendant was overseas without giving any reason.*
- *g. The second named Defendant was married to the daughter of the Plaintiff but they are now divorced.*
- *h. The Plaintiff lives in Brisbane, Australia and the Defendants live in Fiji.*

2. THAT the Defendant admits paragraph 2 of the Statement of Claim except to say that the parties were not acquaintance as alleged and repeats paragraph 1 of the Defence.

3. THAT the Defendants denies paragraph 3 of the Statement of Claim and say that the Defendants informed the Plaintiff whilst she was living with them that they wanted to buy a property in Fiji and the first name Defendant needed his money held in Australia , in a joint account with the Plaintiff, being Account No.2996-05820 V2 Plus BSB No. 014-141.

4. THAT As to paragraph 4 of the Statement of Claim the Defendants say that the Plaintiff and the first named Defendant travelled to Brisbane, together and there they attended the ANZ bank on 29 January, 2013 and transferred the money to Chandra Kant Lodhia's account at ANZ bank, Nadi.

5. THAT as to paragraph 5 of the Statement of Claim the Defendant repeat paragraph 4 of their Defence and deny that the Plaintiff alone attended the Bank and repeat that the first named Defendant was present and that it was a joint account and the first named Defendant had full entitlement to the money, from the joint account and the amount was FJ$544, 751.21.

6. THAT the Defendant admit paragraph 6 of the Statement of Claim and further say that the Defendants, wanted to buy a house and the first named Defendant obtained the money, from his joint account with the Plaintiff, in her presence and with her full consent and the money was for the first named Defendant to use.

7. *<u>THAT</u> the Defendants admit paragraph 7 of the Statement of Claim*

8. *<u>THAT</u> the Defendants admit paragraph 8 of the Statement of Claim*

9. *<u>THAT</u> the Defendants admit paragraph 9 of the Statement of Claim*

10. *<u>THAT</u> the Defendant deny paragraph 10 of the Statement of Claim and further say that money, was sent from the joint account of the Plaintiff and the first named Defendant, held in ANZ Bank, Brisbane and the first named Defendant, had full entitlement, to access, this money and the Plaintiff was present when the money was transferred and she completed the transaction with ANZ bank.*

11. *<u>THAT</u> the Defendants admit paragraph 11 of the Statement of Claim and further say as follows:*

    a. *The first named Defendant had obtained money held in a joint account, in his and the Plaintiff's name.*

    b. *The Plaintiff and first named Defendant attended the ANZ bank in Brisbane and transferred money from the joint account in Brisbane.*

    c. *The money was to buy a house, in name of the Defendants.*

    d. *That the allegation of conversation is a recent fabrication.*

    e. *The Defendants are registered proprietor of the property and their title is indefeasible.*

    f. *The money from the joint account was equal accessible by the joint owners and the Plaintiff freely allowed the money, to be transferred to Fiji for the benefit of the first named Defendant.*

    g. *The first named Defendant bought the property for himself and the second name Defendant..*

    h. *The first named Defendant and the Plaintiff have a real property in their joint names situated at 64 Desgrand Street, Archerfield, Queensland, Australia.*

12. *<u>THAT</u> the Defendant further says that the Plaintiffs Statement of Claim is frivolous, vexatious, and scandalous and abuse of process.*

13. *<u>WHEREFORE</u> the Defendant prays to this Honorable Court that the Plaintiff's Statement of Claim, be dismissed, with costs on Solicitors/Client indemnity basis.*

(6) The Plaintiff in her "Reply to Defence' pleads inter alia;

   a) *The Plaintiff joins issues wit the Defendants on their Defence.*

b) *As to paragraphs 1 and 2 of the Defence, the Plaintiff says that the Plaintiff and the First Defendant were never engaged in a sexual relationship although they were married in 1995 and divorced in 2000 but admits that the Plaintiff and First Defendant were in contact with each other from 2010 to 2013.*

c) *As to paragraphs 3,4,and 5 of the Defence, the Plaintiff admits that the bank account referred to was in the joint names of the Plaintiff and First Defendant but says that she was coerced by the First Defendant to add his name to the account and further says that the only significant deposits made into the said account were amounts resulting from the sale of the Plaintiff's property at 603, Boundary Road, Archerfield, Queensland 4108 for A$260,000.00 and from the sale of the Plaintiff's daughter's property at 599, Boundary Road, Archerfield, Queensland 4108 for A$220,000.00 and that these funds were owned by the Plaintiff and /or her daughter and not the First Defendant.*

d) *The Plaintiff repeats paragraphs 3, 4, and 5 of the Statement of Claim and says that she sent her funds from Australia to Fiji for the purpose of her acquiring property in Fiji.*

e) *Save as herein admitted, the Plaintiff does not admit the allegations in the Defence.*

(C) THE STATUS OF THE SUBSTANTIVE MATTER

(1) The action was instituted by the Plaintiff on 12th May 2014, by way of Writ of Summons and Statement of Claim.

(2) The pleadings in the action begun by way of Writ of Summons were closed on 10th September 2014.

(3) On 26th January 2016, viz, 16 months after the close of the Pleadings, the Plaintiff filed Summons for Directions.

(4) On 26th February 2016, the Defendants filed the 'Summons' herein for 'Security for Costs'.

(D) THE DEFENDANTS SUMMONS FOR 'SECURITY FOR COSTS'

(1) The Defendants Summons 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 named Defendant in the action herein and the second Defendant is my brother and I am authorized to make this*

*affidavit on behalf of him a copy of the authority is annexed hereto and marked as **Exhibit A.***

2. *THAT I am a Fiji Citizen and I have my permanent home in Fiji.*

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

SUMMARY OF PROCEEDINGS:-

4. *The writ of summons was filed in this matter on 12th of May, 2014.*

5. *My Solicitors filed Acknowledgment of Service of Writ of Summons on behalf of the Defendants on 28th of May, 2014.*

6. *My Solicitors filed a Statement of Defence on 13th of June, 2014.*

7. *The Plaintiff filed a Reply to Defence on 13th of June, 2014.*

8. *On 26th of January, 2016 the Plaintiff files a Notice of Change of Solicitors and Summons for Directions.*

9. *I have been informed that for a period of about 17 months the Plaintiff did not take any active steps to advance her case and I have been prejudiced as a result.*

COST

10. *I have been informed by my Solicitors that legal costs may amount to about $15,000.00 to $20,000.*

11. *The nature of the case is such that there will be a need to obtain evidence from Australia for the trial.*

12. *At trial the matter will become complex as I will allege that the money was from my joint account and that the title I have obtained is indefeasible.*

13. *At trial it may ne necessary to call witnesses from Australia who are employees with the bank where the joint account was kept. I estimate such cost to be within the vicinity of $20,000.00 inclusive of Accommodation, Meals and Taxes.*

PLAINTIFF CASE

14. *The Plaintiff is claiming title to property known as Certificate of Title No. 11093 bought for $475,000.00 which sum was remitted from Brisbane Australia.*

THE DEFENDANTS CASE

15. The Defendants say that they are the registered proprietor of the property known CT 11093.

16. That the money was remitted from my joint account with the Plaintiff and that I am entitled to this fund and the Plaintiff approved the money being sent to Fiji.

17. I have been advised that I have a very strong case and if I win, the Plaintiff will have no reason to pay costs awarded and I will not able to recover the same.

18. The Plaintiff to the best of my knowledge does not have any property in Fiji.

19. I believe that the Plaintiff will have insufficient funds to pay any costs awarded in favour of the Defendants.

20. I am seeking an order that the Plaintiff deposits a sum of $40,000 or such sum the court deems just, and be paid to the court within 14 days.

(2) The Plaintiff filed an Affidavit in Opposition sworn on 05th April, 2016 which is substantially as follows;

Para 1. I am the Plaintiff herein and make this affidavit in opposition to the Defendant's application for costs.

2. THAT I respectfully submit that the said application is baseless and unlikely to succeed for the following reasons.

(i) That I refer to my statement of claim and the reply to Defence and confirm the correctness of the same.

(ii) That the Defendants have not, contributed a single cent towards the acquisition of Certificate of title No. CT11093.

(iii) That after I had agreed to purchase a property in my name only in Fiji, the first Defendant identified a property in Nadi namely CT11093.

(iv) That the first defendant had coerced me into opening a joint account with him as a co-signatory and this was purely to facilitate the transfer of funds to Fiji for the purchase of the said CT11093.

(v) That I paid a deposit of $10.00 (Ten Dollars) and opened an account at ANZ bank at Acacia Ridge, Queensland, Australia, Account No 299605820 refers. It was a joint account with the first Defendant only.

(vi) *That I sold my property at 603 Boundary Road, Archerfield, Queensland, Australia in the sum of AUS$260,000.00 (Two Hundred and Sixty Thousand Australian Dollars) and deposited the net proceeds in the said joint account.*

(vii) *That my daughter Neeta sold her property at 599 Bundary Road, Archerfield, Queensland, Australia in the sum of AUS$220,000.00 (Two Hundred and Sixty Thousand Australian Dollars) and at my request deposited the net proceeds into the aforesaid joint account.*

(viii) *That on or about the 29th day January, 2013 the 1st Defendant coerced me to co-sign a authority for transfer of funds to one Chandra Kanth Lodhia's account at ANZ bank, Nadi Branh.*

(ix) *That I do not know this Candra Kanth Lodhia and the 1st Defendant assured me that the said Chandra Kanth Lodhia would arrange for payment to the Vendor of CT11093.*

(x) *That the sum of **AUS$300,000.00 (Three Hundred Thousand Australian Dollars) was transferred to the said Chandra Kenth Lodhia's** account at ANZ Bank, Nadi, Fiji.*

(xi) *That the mechanics of payment for CT 11093 is as per my statement of claim.*

(xii) *That how and why the 1st and 2nd Defendants came to be owners of CT 11093 is beyond me.*

(xiii) *That at no stage did I authorize the 1st and 2nd Defendants to register themselves as proprietors at CT 11093.*

(xiv) *That prima facie it is apparent and beyond and challenge that the Defendants have converted my monies in the sum of **AUS$300,000.00 (Three Hundred Thousand Australian Dollars) FJD$514,751.00 (Five Hundred Fourteen Thousand Seven Hundred and Fifty One Fijian Dollars)**to unjustly enrich themselves.*

(xv) *That the Defendants claim of costs of FJD$20,000.00(Twenty Thousand Fijian Dollars) cannot be supported in view of the fact that most of the evidence is by way of money transfers and receipts of which documents are with the Defendants.*

(x) *That there are no witnesses for the Defendants from Australia.*

3. *That in view of the above I respectfully ask this Honorable Court to dismiss the Defendants application for Costs.*

(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 **<u>Porzelack K.G. v. Porzelack (U.K.) Ltd</u>**. [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.1 (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 (1) (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."

(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.

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 Defendant and attempting not, if possible, to shut out the Plaintiff from litigating its 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".*

What are the facts here?

After an in-depth analysis of the pleadings in this case, I bear in mind and focus on the facts deposed by the Plaintiff in her affidavit sworn on 05th April 2016. (Reference is made to paragraph two (02) of the Plaintiff's affidavit)

Para 2: THAT I respectfully submit that the said application is baseless and unlikely to succeed for the following reasons.

(i) That I refer to my statement of claim and the reply to Defence and confirm the correctness of the same.

(ii) That the Defendants have not, contributed a single cent towards the acquisition of Certificate of title No. CT11093.

(iii) That after I had agreed to purchase a property in my name only in Fiji, the first Defendant identified a property in Nadi namely CT11093.

(iv) That the first defendant had coerced me into opening a joint account with him as a co-signatory and this was purely to facilitate the transfer of funds to Fiji for the purchase of the said CT11093.

(v) That I paid a deposit of $10.00 (Ten Dollars) and opened an account at ANZ bank at Acacia Ridge, Queensland, Australia, Account No 299605820 refers. It was a joint account with the first Defendant only.

(vi) That I sold my property at 603 Boundary Road, Archerfield, Queensland, Australia in the sum of AUS$260,000.00 (Two Hundred and Sixty Thousand Australian Dollars) and deposited the net proceeds in the said joint account.

(vii) That my daughter Neeta sold her property at 599 Bundary Road, Archerfield, Queensland, Australia in the sum of AUS$220,000.00 (Two Hundred and Sixty Thousand Australian Dollars) and at my request deposited the net proceeds into the aforesaid joint account.

(viii) That on or about the 29th day January, 2013 the 1st Defendant coerced me to co-sign a authority for transfer of funds to one Chandra Kanth Lodhia's account at ANZ bank, Nadi Branh.

(ix) That I do not know this Candra Kanth Lodhia and the 1st Defendant assured me that the said Chandra Kanth Lodhia would arrange for payment to the Vendor of CT11093.

*(x) That the sum of **AUS$300,000.00 (Three Hundred Thousand Australian Dollars) was transferred to the said Chandra Kenth Lodhia's** account at ANZ Bank, Nadi, Fiji.*

(xi) *That the mechanics of payment for CT 11093 is as per my statement of claim.*

(xii) *That how and why the 1st and 2nd Defendants came to be owners of CT 11093 is beyond me.*

(xiii) *That at no stage did I authorize the 1st and 2nd Defendants to register themselves as proprietors at CT 11093.*

(xiv) *That prima facie it is apparent and beyond and challenge that the Defendants have converted my monies in the sum of **AUS$300,000.00 (Three Hundred Thousand Australian Dollars) FJD$514,751.00 (Five Hundred Fourteen Thousand Seven Hundred and Fifty One Fijian Dollars)** to unjustly enrich themselves.*

(xv) *That the Defendants claim of costs of FJD$20,000.00(Twenty Thousand Fijian Dollars) cannot be supported in view of the fact that most of the evidence is by way of money transfers and receipts of which documents are with the Defendants.*

(x) *That there are no witnesses for the Defendants from Australia.*

The Defences on which the Defendants rely and by which they are prepared to swim or sink are in these terms in paragraph 11 of the statement of Defence.

11. *THAT the Defendants admit paragraph 11 of the Statement of Claim and further say as follows:*

a. *The first named Defendant had obtained money held in a joint account, in his and the Plaintiff's name.*

b. *The Plaintiff and first named Defendant attended the ANZ bank in Brisbane and transferred money from the joint account in Brisbane.*

c. *The money was to buy a house, in name of the Defendants.*

d. *That the allegation of conversation is a recent fabrication.*

e. *The Defendants are registered proprietor of the property and their title is indefeasible.*

f. *The money from the joint account was equal accessible by the joint owners and the Plaintiff freely allowed the money, to be transferred to Fiji for the benefit of the first named Defendant.*

g. *The first named Defendant bought the property for himself and the second name Defendant..*

> h. *The first named Defendant and the Plaintiff have a real property in their joint names situated at 64 Desgrand Street, Archerfield, Queensland, Australia.*

The Defendants say that they have a meritorious Defence.

As against this, I do not forget what was pleaded in 'Reply to Statement of Defence' (Reference is made to paragraph 3 and 4 of the Plaintiff's Reply to Defence.)

> 3) *As to paragraphs 3,4,and 5 of the Defence, the Plaintiff admits that the bank account referred to was in the joint names of the Plaintiff and First Defendant but says that she was coerced by the First Defendant to add his name to the account and further says that the only significant deposits made into the said account were amounts resulting from the sale of the Plaintiff's property at 603, Boundary Road, Archerfield, Queensland 4108 for A$260,000.00 and from the sale of the Plaintiff's daughter's property at 599, Boundary Road, Archerfield, Queensland 4108 for A$220,000.00 and that these funds were owned by the Plaintiff and /or her daughter and not the First Defendant.*
>
> 4) *The Plaintiff repeats paragraphs 3, 4, and 5 of the Statement of Claim and says that she sent her funds from Australia to Fiji for the purpose of her acquiring property in Fiji.*

On my perusal of the Statement of Claim and the Statement of Defence, it seems to me perfectly plain that there are genuine disputes between the parties which raise serious issues for resolution (viz, **whether the Defendants are guilty of fraud in acquiring the registered title and whether a court of equity will impose a 'constructive trust' on the Defendants for the benefit of the Plaintiff). Fraud, after all is a triable issue**. 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 (viz, **the money from the joint account was equally accessible by the joint owners, the Plaintiff freely allowed the money to be transferred to Fiji for the benefit of the first Defendant and the indefeasibility of Defendant's Title)** 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.

It is suggested on behalf of the Defendants that the Plaintiff's claim is without merits. I must confess that I remain utterly unimpressed by the proposition advanced by the Defendants.

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, <u>I am not required to delve into the meticulous details of the merits or demerits of the claim or defence</u>.

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

> *"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

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.)**

Returning back to the case before me, nothing has been said or addressed by way of evidence to indicate that the making of the Order sought will frustrate the Plaintiff's claim.

The burden of showing impecuniosity rests upon the Plaintiff seeking to resist the Order. The Plaintiff has not discharged the onus.

There is no evidence placed before this Court as to the financial standing of the Plaintiff. The Plaintiff did not assert that she has means.

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 12th May 2014. The Defendants filed Acknowledgement of Service on 28th May 2014.

The Statement of Defence was filed on 13th June 2014. The reply to Defence was filed on 26th August 2014. The Pleadings were closed on 10th September 2014. The Summons for Directions was filed on 26th January 2016 , viz, 16 months after the close of the pleadings. The Summons for security for costs was filed on 26th February 2016, namely 21 months after the Writ was issued and 17 months after the close of the Pleadings.

The Plaintiff is the first Defendant's former wife and the former mother- in- law of the second Defendant. 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 17 months 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 21 months after the Writ was issued and 17 months after the close of the pleadings. **No attempt has been made to explain the delay in the Affidavit in Support of Summons for costs.**

It is paradoxical that the **onus** is upon the Defendants to provide cogent and credible explanation as to why the application for security for costs was postponed until 17 months after the close of the pleadings and 21 months after the Writ was issued. **The**

Defendants have not discharged the onus. What is of concern is there is an absence of explanation in the Defendants Affidavit in Support for the delay in filing the application for security for costs. The Defendants in their Affidavit in Support do not explain why the application for security for costs was postponed until 17 months after the close of the pleadings and 21 months after the Writ was issued. What were they doing themselves? The Defendants Affidavit in Support is 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 Summons 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."*

It is suggested on behalf of the Defendants that an application for security for costs can be made even at a Pre Trial Conference stage.

At this point I cannot resist in saying that the proposition advanced by the Defendants is a far cry from the obvious and natural limitations to the scope and application of the security for costs and it flies on the face of the rule law enunciated in **Gabel PVT Ltd v Katherine Enterprises PVT Ltd** (1977) 2 A.C.L.R. 400, **Idoport Pty Ltd v National Australia Bank Ltd** [2001] NSWSC 744, **Crypta Fuels (PV) Ltd v Svelte Corporation (PVT) Ltd**, (1994) 14 ACSR 760, **Ravi Nominees Pty Ltd v Phillips Fox** (1992) 10 ACLC 1313 and "**National Bank of Fiji v C Garden Island** WOO 1L Pacific Co. Ltd as – Civil Appeal No. 011 of 1992

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 Defendant 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.

Nevertheless, the application for security for costs was filed 21 months after the writ was issued, whereas the proper time for doing so was at the beginning of the proceedings. Expressed another way, no application was made **until** 21 months after the Writ was issued and 17 months after the close of the pleadings. **No attempt has been made to explain the delay in the Affidavit in Support of Summons for costs.** The conduct of the Defendants in deliberately deciding not to explain the delay in filing the application in the Affidavit in Support is a matter to be taken into account in assessing the justice of the case. **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 17 months after the close of the pleadings and 21 months 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

(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** 21 months after the Writ was issued and 17 months after the close of the pleadings. The delay has not been explained at all in the affidavit in support of the Summons for costs. It is incumbent upon applicants in application of this nature to provide a 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 21 months 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; **<u>Green v CGU Insurance Ltd</u>** [2008] NSWCA 148; (2008) 67 ACSR 105 and **<u>Christou v Stanton Partners Australasia Pty Ltd</u>** [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; **<u>Town & Fencott & Associates Pty Ltd v Eretta Pty Ltd</u>** [1987] FCA 102; (1987) 16 FCR 497, 514, and **<u>Christou v Stanton Partners Australasia Pty Ltd</u>** [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.***

Essentially, that is all I have to say!!!

(H) <u>FINAL ORDERS</u>

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

(2) I make no Order as to costs.

07/10/2016

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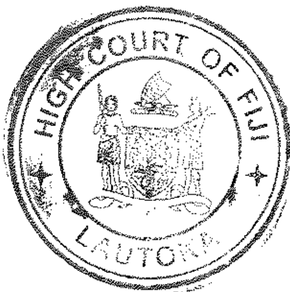
Jude Nanayakkara
<u>Master</u>



At Lautoka
07th October 2016