

IN THE HIGH COURT OF FIJI
AT SUVA

Companies (Winding Up) No. HBE 39 of 2015

IN THE MATTER of RITUNA FISHERIES
LIMITED

AND

IN THE MATTER of the Companies Act
1983, Section 221

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Shelvin Singh : for the Petitioner
Mr. Vinit Singh : for the Respondent
(Sunshine Fisheries Limited)

Date of Hearing: 10th April, 2017

Date of Ruling: 05th June, 2017

RULING

[Issue of Indemnity Costs payable to a Third Party]

INTRODUCTION

1. The Summons was filed by the Petitioner, **Happies (Fiji) Company Limited** on 27th October, 2015 seeking the following orders :
 - a. *An order that the transfer of motor vessels registered as Rituna No. 1, Rituna No. 2, Rituna No.3, Ruifeng No.1, Ruifeng No. 2 and Ruifeng No.3 by Rituna Fisheries Limited to Sunshine Fisheries Limited on 21st May, 2015 is a fraudulent preference, is void and of no legal effect.*
 - b. *Alternatively, a declaration that transfer of the motor vessels registered as Rituna No.1, Rituna No.2, Rituna No.3, Ruifeng No.1, Ruifeng No.2 and Ruifeng No.3 by Rituna Fisheries Limited to Sunshine Fisheries Limited on 21st May, 2015 is a fraudulent preference, is void and of no legal effect.*
 - c. *An order that the costs of and occasioned by this application be paid out by the Official Receiver out from the liquidation or sale of the assets of the Company.*
2. The application was made pursuant to **Section 313 of the Companies Act 1983 and the Inherent Jurisdiction of this Court.**
3. The Summons was eventually withdrawn by the Petitioning Creditor after several adjournments and requests.
4. As a result of this withdrawal, it prompted the **First Respondent, Sunshine Fisheries Limited** to make an oral application to the Court and seek an order for **Indemnity Costs** against the **Petitioning Creditor, Happies Fiji Limited.**

FIRST RESPONDENT'S CASE

5. The First Respondent, Sunshine Fisheries Limited had in or about May, 2015 acquired certain fishing vessels from Rituna Fisheries Limited upon payment.
6. On 23rd September, 2015 Rituna Fisheries Limited was wound up.
7. On 27th October, 2015 the Applicant/Petitioner, Happies (Fiji) Company Limited filed an application under section 313 of the now repealed Companies Act [Cap 247] to seek that the sale and transfer of the several fishing vessels from Rituna Fisheries Limited to the Sunshine Fisheries Limited be set- aside.

8. On 09th August, 2016 after several adjournments and requests to vacate the hearing of the application by Happies (Fiji) Company Limited, it sought leave to withdraw the application.
9. Sunshine Fisheries Limited sought an order for indemnity costs to be made against Happies (Fiji) Company Limited. On this issue that matter was transferred to the Master of the High Court.
10. Therefore, Sunshine Fisheries Limited is entitled to indemnity cost of the application.

PETITIONING CREDITOR'S CASE

11. That Sunshine Fisheries Limited has made an oral application for costs to be paid by the Petitioner, Happies (Fiji) Company Limited on an indemnity basis.
12. On 09th August, 2016 Happies (Fiji) Company Limited withdrew its application wherein it was seeking certain declaratory orders.
13. It is from this withdrawal that the application was costs stems by Sunshine Fisheries Limited.
14. The Judge has transferred this file to the Master to decide-
 - (i) If costs is payable; and
 - (ii) If so, on what scale.
15. Sunshine Fisheries Limited has not provided any basis for seeking the indemnity costs.
16. Therefore, Sunshine Fisheries Limited -
 - (i) Was not a party to the application?
 - (ii) Was given an opportunity to be made a party and it refused?
 - (iii) Has not filed any formal application for determination of costs.
 - (iv) The matter of Happies (Fiji) Company Limited's application for declaratory orders was not heard by the Court so the merits of that application cannot be taken up by Sunshine Fisheries Limited now.
 - (v) There is no reprehensible conduct on the part of Happies (Fiji) Company Limited.
 - (vi) Sunshine Fisheries Limited is a non-party to the action and it is not entitled to any claim for costs.

- (vii) When Sunshine Fisheries Limited was served with the application, it was up to it to decide on whether to defend the application by being a party.
- (viii) No firm basis has been provided by Sunshine Fisheries Limited for its claim.
- (ix) The application be declined with costs.

LAW ON INDEMNITY COSTS

17. Reference is made to the case of *Prasad v Divisional Engineer Northern (No 2) [2008] FJHC 234; HBJ03.2007 (25 September 2008)* [Tab 1]. The High Court discussed the general principles governing indemnity costs therein.

ANALYSIS and DETERMINATION

18. The issue for this Court to decide is whether an order for Indemnity Costs should be made against the **Petitioning/Creditor Happies (Fiji) Company Limited?**

19. The **First Respondent, Sunshine Fisheries Limited**, submitted as follows-

"That the Petitioner/ Creditor's Application was misconceived and an abuse of the Court process; it rushed into filing an application without waiting on the Official Receiver to endeavour and recover monies to pay the debt owed to it; that after filing the application it sought several adjournments and made requests to have the hearing dates vacated when monies were being recovered by the Official Receiver ; and that it had unnecessarily brought this application against Sunshine Fisheries Limited which led to Sunshine Fisheries Limited to incur legal costs on a Solicitor/Client basis and for this reason costs on a party/party basis would not be fair."

20. On the other hand, the **Petitioning Creditor's** contention are as follows-

"That no formal application for indemnity costs was made rather it was an oral application only; Sunshine Fisheries Limited was not a party to the application; the Petitioner's application was not heard by the Court on merits but withdrawn; There is no reprehensible conduct on the part of Happies (Fiji) Company Limited; Sunshine Fisheries Limited is a non-party to the action and it is not entitled to any claim for costs."

21. The Court is aware that there is no formal application before this Court rather it was an oral application seeking **Indemnity Costs**.

22. The substantive Winding Up application was dealt with by this Court on 23rd September, 2015.
23. On 27th October, 2015, the Petitioner filed the Summons seeking certain orders as enumerated at paragraph 1 (a), (b) and (c) hereinabove.
24. It was in this very Summons that the Petitioner alleges that the transfer of motor vessels to **Sunshine Fisheries Limited** on 21st May, 2015 was **fraudulent preference** and was void and had no legal effect.
25. A copy of this Summons together with the affidavit of Chen Baohui was served onto the Company, Sunshine Fisheries Limited. This prompted Sunshine Fisheries Limited to represent itself in Court by a Legal Representative. The Summons was adjourned on several occasions until the Summons was eventually withdrawn by the Petitioner on 09th August, 2016.
26. Reference is made to the case of *Hamod v New South Wales (2002) 188 ALR 659; [2002] FCA 424 [665] (ALR)* (per Gray J, Carr and Goldberg JJ agreeing), the Full Federal Court explained the principle for an award of **indemnity costs** as follows:

'Indemnity costs are not designed to punish a party for persisting with a case that turns out to fail. They are not awarded as means of deterring litigants from putting forward arguments that might be attended by uncertainty. Rather, they serve the purpose of compensating a party fully for costs incurred, as a normal costs order could not be expected to do, when the Court takes the view that it was unreasonable for the party against whom the order is made to have subjected the innocent party to the expenditure of costs.'
27. As a general statement of principle, costs orders are discretionary. However, that discretion must be exercised judicially.
28. Reference is made to the case of *TSG Franchise Management Pty Ltd v Cigarette & Gift Warehouse (Franchising) Pty Ltd (No 3)* - wherein the court said-

"It is well-settled law that indemnity costs should not be ordered unless there is some 'special or unusual feature' of the case that justifies departure from the ordinary practice.

29. The categories in which the discretion may be exercised to award indemnity costs are not closed.
30. In *Colgate-Palmolive Company v Cussons Pty Limited*, Justice Sheppard referred to the case law and helpfully identified the following circumstances where the exercise of the court's discretion was warranted to award costs on an indemnity basis-
- Where a party makes allegations of fraud knowing them to be false or makes irrelevant allegations of fraud;
 - Where there is evidence of misconduct that causes a loss of time to the court and to the other parties;
 - Where proceedings were commenced for some ulterior motive;
 - Where proceedings were commenced or continued in willful disregard of known facts or clearly established law;
 - Where allegations were made which ought never to have been made;
 - Where the proceeding was unduly prolonged by groundless contentions;
 - Where there was an imprudent refusal of an offer to compromise.
31. In the current case before me the following were the circumstances wherein the Court's discretion is warranted to award costs on indemnity basis to **Sunshine Fisheries Limited**-
- Where a party makes allegations of fraud knowing them to be false or makes irrelevant allegations of fraud; (*Sunshine Fisheries Limited was added to the action herein for reasons that it was involved in circumstances surrounding a fraudulent preference with Rituna Fisheries Limited through the Summons dated 27th October, 2015*). (Emphasis added)
 - Where there is evidence of misconduct that causes a loss of time to the court and to the other parties;
(It was not a requirement for Sunshine Fisheries Limited to show interest in defending its case but as a matter of law, Sunshine had become a Respondent by way of Happies bringing about proceedings for fraudulent preference). (Emphasis added)
 - Where the proceeding was unduly prolonged by groundless contentions;
(Matter was adjourned on several occasions until finally withdrawn by the Petitioner Happies)
(Emphasis added)
32. Further, the Law on Fraudulent Preference can be found in *Atkins Encyclopaedia of Court Forms in Civil Proceedings, Volume II, pages 650-651 [Tab 1]*'-
The legal principal on Fraudulent Preference is clear. The legal authority clearly outlines the steps to be taken by the liquidator.


33. The Petitioning Creditor, Happies (Fiji) Company Limited in the current case has in fact followed and complied with the steps set out in the legal principal on Fraudulent Preference.
34. In the institution of the proceedings by the **Summons**, on the **Fraudulent Preference 'the person Fraudulently Preferred is made the Respondent.'** In this case it was **Sunshine Fisheries Limited**.
35. The fact that the Petitioning Creditor alleged 'Fraudulent Preference on the part of Sunshine Fisheries Limited, thereafter prolonging the matter and not bringing it to its conclusion rather finally withdrawing the Summons, in my set opinion tantamount to **reprehensible conduct** on the part of the Petitioning Creditor, Happies (Fiji) Company Limited.
36. Therefore, **Sunshine Fisheries Limited** is entitled to **indemnity costs** in the given **circumstances as explained hereinabove**.
37. **In Conclusion**, I make the following Orders:

ORDERS

1. The Petitioning Creditor, Happies (Fiji) Company Limited is hereby ordered to pay summarily assessed indemnity costs of \$1,000 to Sunshine Fisheries Limited.
2. The Indemnity Costs to be paid within 14 days.
3. Orders accordingly.

Dated at Suva this 05th day of JUNE, 2017




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Shelvin Singh Lawyers, Suva
Parshotam Lawyers, Suva