

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 105 OF 2012**

**BETWEEN** : **ANIL SABHARWAL** of Motibhai Crescent, Ba Town

**PLAINTIFF**

**A N D** : **VIJAY PRASAD CHAUDHARY** of Uluisila Road, Cuvu, Nadroga  
and/or 124 Coronation Road, Papatoetoe, P.O Box 24-20, Royal  
Oak, Auckland, New Zealand.

**DEFENDANT**

**Counsel** : **No appearance for the Plaintiff**  
**(Ms) Radhika Sunila Naidu for the Defendant**

**Date of Hearing** : **Friday, 02<sup>nd</sup> March, 2018**

**Date of Ruling** : **Friday, 04<sup>th</sup> May, 2018**

**R U L I N G**

- [1]. On 11<sup>th</sup> May, 2012, the Plaintiff filed a Writ of Summons and Statement of Claim against the Defendant.
- [2]. The Plaintiff sued the Defendant pursuant to an alleged Agreement entered into by him and the defendant on 02<sup>nd</sup> October, 2004.
- [3]. By that Agreement, the Defendant allegedly engaged the Plaintiff to sell some property of the Defendant.

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 105 OF 2012**

**BETWEEN** : **ANIL SABHARWAL** of Motibhai Crescent, Ba Town

**PLAINTIFF**

**AND** : **VIJAY PRASAD CHAUDHARY** of Uluisila Road, Cuvu, Nadroga  
and/or 124 Coronation Road, Papatoetoe, P.O Box 24-20, Royal  
Oak, Auckland, New Zealand.

**DEFENDANT**

**Counsel** : **No appearance for the Plaintiff**  
**(Ms) Radhika Sunila Naidu for the Defendant**

**Date of Hearing** : **Friday, 02<sup>nd</sup> March, 2018**

**Date of Ruling** : **Friday, 04<sup>th</sup> May, 2018**

**RULING**

- [1]. On 11<sup>th</sup> May, 2012, the Plaintiff filed a Writ of Summons and Statement of Claim against the Defendant.
- [2]. The Plaintiff sued the Defendant pursuant to an alleged Agreement entered into by him and the defendant on 02<sup>nd</sup> October, 2004.
- [3]. By that Agreement, the Defendant allegedly engaged the Plaintiff to sell some property of the Defendant.

- [4]. The land in question is described as Crown Lease No. 195311 being Lot 2, D.P. 3597 known as Bainivore Subdivision of Nadroga/Navosa.
- [5]. It is alleged that the property in question was eventually bought by one of several people that the Plaintiff had lined up but the Defendant failed to honour their Agreement and pay commission to the Plaintiff.
- [6]. The Plaintiff claims \$105,000.00 being 3% of the sum for which the property was bought plus interest at the rate of 13.5%.
- [7]. On 22<sup>nd</sup> June 2012, the Defendant filed a Statement of Defence and Counter-Claim. The Counter-Claim is founded on an allegation that the Plaintiff had placed a Caveat on the said property pursuant to the alleged Agreement. The said Caveat resulted in the Defendant loosing potential buyers.
- [8]. On 03<sup>rd</sup> August, 2012, a Default Judgment was entered against the Plaintiff on the Defendant's Counter-Claim since no defence to counter – claim has been filed and served and this followed by a Summons for Assessment of damages.
- [9]. The Defendant gave evidence under oath on 02<sup>nd</sup> March, 2018 and has sworn Affidavit evidence in chief on 06<sup>th</sup> March, 2018.
- [10]. The Defendant is claiming for :
- Damages
  - Costs on an indemnity basis against the Plaintiff
  - Costs for the oversea trips from New Zealand
  - Legal costs
- [11]. The Defendant supplemented what he has stated in the Counter-Claim with his oral testimony in Court and Affidavit evidence in chief.
- [12]. As I said earlier, the Defendant's Counter-Claim is founded on the allegation that the Plaintiff had placed a Caveat on the said property pursuant to the Agreement. The Defendant says that the said Caveat resulted in the Defendant loosing potential buyers. **The Defendant made no attempt to prove this on 'balance of probability' by adducing oral evidence or documentary evidence.** What is more, the Defendant did not quantify the damages he has allegedly suffered by registration of the Caveat. Therefore, I refuse to make an award for damages.

- [13]. Next, the Defendant claims expenses incurred by him in respect of his travel from New Zealand to Nandi for the purpose of this hearing and the previous hearing. He estimates his air fare to be around \$1000.00. **There is no documentary proof of the expenses.** Therefore, I refuse to make an award for the expenses.
- [14]. Finally, the Defendant moved for **'indemnity costs'**. He contends that the Plaintiff's claim disclosed no reasonable cause of action, it was frivolous and vexatious and also an abuse of process of the court.

The point is that on 03<sup>rd</sup> August, 2012, a Default Judgment was entered against the Plaintiff on the Defendant's Counter-Claim since no defence to counter – claim has been filed. It is important to note that the court did not hear parties on substantive matter.

- [15]. Bearing that in mind, I now 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, 1988** 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 (0.62, 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.*

- [16]. The following passage is illuminating;

G.E. Dal Font, on **"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. "

[17]. I will pause here to consider the principles underlying the exercise of the courts discretion when considering whether or not to award indemnity costs.

[18]. 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-a-vis the award of costs but discretion 'must be exercised judicially': **Trade Practices Commission v. Nicholas Enterprises** (1979) 28 ALR201. 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.]
- A party against whom indemnity costs are sought 'is entitled to notice of the order sought': **Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd** (1995) NSWLR 242
- That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases: **Sayed Mukhtar Shah v.**

*Elizabeth Rice and Ors* (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Mod 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] WASC 83; **SDS Corporation Ltd v. Pasonnay Pty Ltd & Anor** (2004) WASC 26 (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 AER 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 Lloyd's 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. Red bridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, U*
- *'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) 46IR 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) WASC101, 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 and 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. Weather ill 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, LI
- Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions) do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... Regardless of how sloppy the [Defendant] might well have been in lending as much as \$70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs] in these circumstances. He should have awarded costs on the ordinary party and party scale': **Credit Corporation (Fiji) Limited v. Wasal Khan and Mohd Nasir Khan** (Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11

[19]. On the meager material before me, I am unable to say that it was unreasonable for the Plaintiff to institute proceedings against the Defendant. I can find no special or unusual circumstances in the Plaintiff's case, which, in my view, are necessary before any order for costs other than 'party and party' costs should be made. I am myself not satisfied in the present case that it has been shown that the case against



the Defendant was instituted for no good purpose at all – due to inertia and carelessness.

*“..... it is appropriate to consider awarding ‘ solicitor and client ‘ or ‘ indemnity costs’ , whenever it appears that an action has been commenced or continued in circumstances where the Applicant , properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some willful disregard of the known facts or the clearly established law. Such cases are, fortunately rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion” ; **Per Woodward J in “ Re Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd and Others” 1988, FCA 202.***

[20]. I can find no facts in the present case to show that the Plaintiff commenced his action for some ulterior motive, or because of some willful disregard of the known facts or the clearly established law. Nor can I find any evidence to justify that the Plaintiff instituted the legal action ‘without sufficient grounds for the purpose of causing trouble or annoyance to the Defendant’.

This Court has not been pointed to any “*reprehensible conduct*” in relation to the initiation of proceedings.

Indeed, as was set out by in *Carvili v HM Inspector of Taxes* (Unreported. United Kingdom Special Commissioners of Income Tax, 23 March 2005, Stephen Oliver QC and Edward Sadler XBailii:[20053UKSPCSPCQ0468.<http://www.bailii.org/cgibin/markup.cRi?doc=/uk/cases/UKSC/2Q05/SPC00468.lit1n1> ) *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.”*

[21]. **I have not found, any evidence of “reprehensible conduct” by the Plaintiff in relation to the initiation of proceedings.** I should add that there is no good reason in the present case to award costs against the Plaintiff otherwise than on a party and party basis. Even allowing for the court’s unfettered discretion in the matter of costs, there is no power, in a case of this character , to order the payment of costs to be taxed as between solicitor and own client.

I state with conviction that the Plaintiff is not guilty of any conduct deserving of **condemnation as disgraceful or reprehensible** and ought not to be penalised by having to pay indemnity costs.

I feel bound to say that the court's discretion in the award of costs is 'absolute and unfettered'. (See; (**Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty. Ltd (1986) FCA 85**).

[22]. Is it a correct exercise of the Court's discretion to direct the Plaintiff to pay costs on an indemnity basis to the Defendant because the Defendant had undergone hardships in defending the action?

The answer to the aforesaid question is in the negative which I base on the following judicial decisions;

- ❖ **Public Service Commission v Naiveli**  
Fiji Court of Appeal decision. No: ABU 0052 11/955,  
(1996) FJCA 3
- ❖ **Thomson v Swan Hunter and Wigham Richardson Ltd,**  
(1954) 21 ALL.E.R 859
- ❖ **Bowen Jones v Bowen Jones (1986) 3 ALL. E.R 163**

I take comfort in and adopt the following passage from the case of "**Public Service Commission v Naiveli**" (*supra*) where the Fiji Court of Appeal held;

*"However, 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 - see the examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Boween Jones [1986] 3 All ER 163. "*

(Emphasis added)

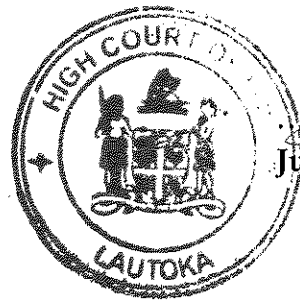
[23]. On the strength of the authority in the aforementioned three (03) cases, I state with conviction that neither considerations of hardship to the Defendant nor

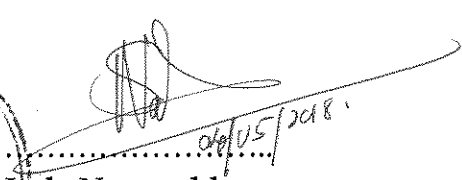
the over optimism of the unsuccessful Plaintiff would by themselves justify an award beyond party and party costs.

In the result, I refuse the Defendant's application for indemnity costs.

**Order**

The Plaintiff is ordered to pay costs of \$1,500.00 (summarily assessed) to the Defendant within 14 days hereof.



  
Jude Nanayakkara  
Judge

At Lautoka  
Friday, 04<sup>th</sup> May, 2018