

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURSDICTION

Civil Action No. HBC 11 of 2019

BETWEEN

ORGANICA FINE PRODUCE (FIJI) PTE LTD having its registered office at
Unit 2C, Lot 43, Wailada, Suva.

FIRST PLAINTIFF

AND

JAVIER CARLOS IZQUIERDO Managing Director, of
Organica Fine Produce (Fiji) Pte Ltd, having its registered office at,
Unit 2C, Lot 43, Wailada, Suva.

SECOND PLAINTIFF

AND

WILLIAM & GOSLING LTD having its registered office at 82,
Harris Road, Suva.

FIRST DEFENDANT

AND

DAVID VAUGHAN AIDNEY Managing Director of William & Gosling Ltd,

having its registered office at 82, Harris Road, Suva.

SECOND DEFENDANT

EDDIE YUEN Chief Executive Officer and/or Chief Operating Officer of
William & Gosling Ltd, having its registered office at 82,
Harris Road, Suva.

THIRD DEFENDANT

Counsel : Ms. Narayan S. for the Plaintiffs
Mr. S.J. Stanton with Mr. N. Prasad and Mr. D. Kumar for
the Defendants.

Date of Hearing : 15th October 2019.

Date of Ruling : 01st November 2019.

RULING

(On Assessment of Costs)

[1] There were three different application before this court and all three application were taken up for hearing together. The applications were:

1. Striking out application by the defendants pursuant to Order 18 rule 18 of the High Court Rules 1988;
2. Application for Security for costs by the defendants pursuant to Order 23 rule 1 of the High Court Rules 1988; and

3. Application for an injunction and declaration by the plaintiffs pursuant to Order 29 rule 1 and Order 32 of the High Court Rules 1988.

- [2] At the commencement of the hearing of these three applications the plaintiff moved to withdraw the application for injunction and declaration. The court granted the motion and the summons was struck out.
- [3] The hearing of the other two application was proceeded and the plaintiffs then moved to withdraw the entire action. The defendants sought costs on indemnity basis. The parties then agreed to file submissions on the issue of costs and the court granted the motion of the plaintiff to withdraw the action and the action was accordingly, dismissed.
- [4] The defendant in this matter sought costs on indemnity basis but the plaintiff agreed to pay \$2000.00 as costs of the action. The parties then filed their respective submissions on the issue of costs.
- [5] This matter was instituted on 11th January 2019 and it was withdrawn on 15th October 2019. In support of their application the defendants cited the decision of Nanayakkara J. in **Gosai v Pratap** [2019] FJHC 43; HBC299.2005 (8 February 2019) where he ordered indemnity costs. That case was instituted in 2005 and concluded after 14 years in 2019.
- [6] The matter before this court lasted only few months and the three interlocutory applications referred to above filed by the parties were taken up for hearing together.
- [7] In the case of **Prasad v Divisional Engineer Northern** (No 2) [2008] FJHC 234; HBJ03.2007 (25 September 2008) the principles enunciated in various authorities were summarised.
1. A court has 'absolute and unfettered' discretion vis-à-vis the award of costs but discretion 'must be exercised judicially': *Trade Practices Commission v. Nicholas Enterprises* (1979) 28 ALR 201, at 207
 2. The question is always 'whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party': *Colgate-Palmolive Company v. Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J.
 3. 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

4. That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases: *Sayed Mukhtar Shah v. Elizabeth Rice and Ors* (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA
5. '... 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
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 (S2) (23 July 2004), at 16, per Roberts-Smith, J.
7. Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where 'there is some special or unusual feature of the case to justify' a court's 'exercising its discretion in that way': *Preston v. Preston* [1982] 1 All ER 41, at 58
8. 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.
9. 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]
10. 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.
11. '... 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.
12. 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.
 13. Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] wilful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion': Fountain Selected Meats, at 401, per Woodward, J.
 14. 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.
 15. 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.
 16. Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court': Willis v. Redbridge Health Authority (1960) 1 WLR 1228, at 1232, per Beldam, LJ
 17. 'Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter partes. A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': Ranjay Shandil v. Public Service Commission (Civil Jurisdiction Judicial Review No. 004 of 1996,

16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) NLJ 710 (May 1996))

18. 'It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case': *J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)*(No. 2) (1993) 46 IR 301, at 303, per French, J.
19. '... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full': *Quancorp Pty Ltd & Anor v. MacDonald & Ors* [1999] WASC 101, at paras [6]-[7], per Wheeler, J.
20. However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': *Quancorp Pty Ltd & Anor v. MacDonald & Ors* [1999] WASC 101, at paras [6]-[7], per Wheeler, J.
21. The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried: *Medcalf v. Weatherill and Anor* [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn
22. Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': *Willis v. Redbridge Health Authority*, at 1232, per Beldam, LJ
23. 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

[8] The matter before this court was not frivolous case. The learned counsel for the defendant's found fault with almost every paragraph of the statement of claim. However, on the face of it there was substance in the claim of the plaintiff. Whether the plaintiff would succeed or not is a matter to be decided at the end of the trial. The mistake was the way the pleading were drafted by the solicitors of the plaintiff.

[9] In **Sabharwal v Chaudhary** [2018] FJHC 363; HBC105.2012 (4 May 2018) Nanayakkara J held:

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.

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'.

- [10] There is nothing on record to say that the plaintiff brought this action against the defendants with an ulterior motive and the fact that the plaintiff has failed to plead certain facts in detail in the statement of claim is not a ground to say that the action was brought with an ulterior motive.
- [11] For these reasons the court is of the view that the defendants are not entitled to costs on indemnity basis and the court orders \$5000.00 as costs (summarily assessed) in this action.

ORDER

1. The plaintiff is ordered to pay the defendant \$5000.00 as costs of this action.




Lyone Seneviratne

JUDGE

01st November 2019