IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 88 of 2015

BETWEEN : **KRISHNA NAIR** of 310 Larkspur Dr. E Palo Alto CA 94303, USA, Retired Chef

Plaintiff

A N D : **MADHU SUDHAN** of Nasau, Nadi, Farmer

Defendant

Before : Master U.L. Mohamed Azhar

Counsels: Ms. R. Chand for the Plaintiff
Mr. Anil J. Singh for the Defendant

Date of Ruling: 11th June 2019

RULING

Introduction

01. ***"I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs".*** That is the observation of **Lord Justice Bowen** in **Cropper v Smith** (1884) 26 Ch. D. 700 (CA) at page 710. Therefore, the rules of the courts in all jurisdictions not only give the courts power to award cost, but also give discretion to secure a cost that a party may be liable to pay to the other in future in any litigation. The Court's Rules in Fiji are not exception. Both the High Court Rules (Or. 23 r. 1) and the Magistrate's Courts Rules (Order XXXIII Rule 4) provide such discretion to the respective courts in Fiji to order for security for cost. The summons before me is the one which was filed by the defendant under the Order 23 rule 1 of the High Court Rules seeking to exercise the discretion of this court and to order the plaintiff to provide security for cost. The defendant sought the following orders in the said summons:

> 1. ***THAT*** *the Plaintiff do deposit with the Court within twenty –one (21) days of making such order to give security for the costs of the Defendant in the sum of $20, 000.00 (Twenty Thousand dollars) or such sum as the Court may think just, pending of such security and all further proceedings in the above action be stayed;*

2. ***THAT*** *in the event that such security is not provided within twenty – one (21) days from the date of the Order herein, the action be struck out against the Defendant;*

3. ***THAT*** *the costs of this application be awarded in favour of the Defendant on an indemnity basis;*

4. ***THAT*** *further and/or other relief as this Honourable Court may deem just.*

02. The summons is supported by an affidavit sworn by the defendant himself. The plaintiff opposed the summons and filed his affidavit in opposition, which was followed by the plaintiff's affidavit in reply. At the hearing of the summons both counsels make orals submissions and the counsel for the defendant tendered his written submission too. On the hand the counsel for the plaintiff sought time to file her submission and she later filed the same.

03. The factual background of this matter is that, the defendant owns the Certificate of Title No 20162 known as Nasau (part of) Lot 3 on DP No 4968 in the District of Nadi and containing more or less an area of 15 acres, 1 rood and 39 perches. The plaintiff entered into a Sale and Purchase Agreement on 22.06.2011 with the defendant to purchase 2 acres of the said land at a price of FJ$ 60,000.00. Though the agreement provided for the plaintiff to pay only FJ$ 40,000.00 initially and to pay the balance $ FJ$ 20,000.00 upon receiving final approval of survey plan, he paid a sum of FJ$ 52, 430.80 at request of the defendant. The balance of FJ$ 7,569.20 was to be paid upon completion of title. However, the defendant allegedly breached the agreement, which triggered the plaintiff to sue the former for the following reliefs:

a. *Specific performance of the said agreement.*

b. *Damages for breach of contract in lieu of or in addition to specific performance.*

c. *Alternatively judgment in the sum of $52,430.80 together with accrued interest at the rate of 13.5% per annum until final determination of this action.*

d. *Interest on the Judgment sum at the rate of 5% per annum from the date of issuance of the Writ of Summons until full payment.*

e. *Alternatively the Defendant be ordered to complete the transaction and apply for new certificate of title of the said lot of two acres comprised in CT 20162.*

f. Costs of this action on Solicitor client indemnity basis.

g. Such further and/or other relief as this Honourable Court may deem just and expedient.

Law

04. The Order 23 of the High Court Rules, which contains 4 rules therein, provides for the discretion of the court to order to provide security for cost and deals with the other connected matters. Whilst the rule 1 deals with the discretion of the court, the other rules 2 and 3 deal with the manner in which the court may order security for cost and supplementary power of the court. The rule 4 prohibits any such order being made against the state. The rule 1 reads as follows:

Security for costs of action, etc (O.23, r.1)

1.-(1) Where, on the application of a defendant to an action or other proceedings 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 normal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his 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 proceedings as it thinks just.

(2) The court shall not require a plaintiff to give security by reason only of paragraph (1) (c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

05. A cursory reading of the above rule clearly indicates that, the power given to the court is a real discretion, which is simply understood from the word *'may'*, used in the said rule. Lord Denning M.R. when interpreting the same word used in the Companies Act 1948 held in **Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** [1973] 2 All ER 273 at 285 that;

> *Turning now to the words of the statute, the important word is "may". That gives a judge a discretion whether to order security or not. There is no burden one way or other. It is a discretion to be exercised in all the circumstances of the case.*

06. The next important phrase in that rule is '*if having regard to all the circumstances of the case, the Court thinks it just to do so'*, which requires the court to consider all the circumstances of the case before it, in exercising the said discretion and to come to a conclusion that '*it is just to do so*', before making any order and 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. Sir Nicolas Browne Wilkinson V.C in **Porzelack K G v. Porzelack (UK) Ltd**, (1987) 1 All ER 1074 at page 1077 as follows:

> *"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".*

07. It follows that, it is no longer an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. **The Supreme Court Practice 1999** (White Book), in Volume 1 at pages 429 and 430, and in paragraph 23/3/3, states clearly and explains the nature of the discretion given to the court. it reads that;

> *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 to be given. Rule 1 (1) provides that the Court may 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 the 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, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. In particular, the former O.65, r.6s, 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 costs was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).

In exercising its discretion under r.1 (1) the Court will have regard to all the circumstances of the case. Security cannot now be ordered as of course from a foreign plaintiff but only if the Court thinks it just to order such security in the circumstances of the case.

08. When considering all the circumstances of the case, the courts in Fiji should consider the plaintiff's country of origin too. The reason for that consideration may be explained in the following manner. Many jurisdictions recognize and enforce the foreign judgments in their jurisdictions, as if those judgments had, originally, been given by their local courts. This recognition may be based on bilateral or multilateral treaties or understanding on mutual assistance. Fiji is not an exception to this. It has two pieces of legislations, which provide for a statutory scheme for recognition and enforcement of judgments of foreign countries, with which reciprocal arrangements have been made. The said legislations are ***Reciprocal Enforcement of judgments Act 1922 (Cap 39)*** and ***Foreign Judgments (Reciprocal Enforcement) Act 1935 (Cap 40).*** The first one was brought to facilitate the reciprocal enforcement of judgments and awards in United Kingdom and Fiji with the power of the president to extend it to the judgments of any other country or territory of the Commonwealth outside the United Kingdom. The second one was enacted with the purpose of making provisions for the enforcement, in Fiji, of judgments given in foreign countries which accord reciprocal treatment to judgments given in Fiji. Under this latter Act, the president has power to extend its application to the judgments given in other countries and some other commonwealth countries which are not included in the former Act (Cap 39).

09. If the plaintiff is neither from commonwealth countries, nor from the countries which have accorded reciprocal treatment to judgments given in Fiji, the defendant will not be able to enforce any order against the plaintiff. The fact, that any plaintiff is ordinarily resident of any country other than those two categories, will usually operate as a powerful factor in exercising the Court's discretion in the defendant's favour. If an order for security was made in any case and the plaintiff ultimately succeeds in his or her claim, no harm will be caused, because he or she can take back the security at the close of the case, but on the other hand, if the plaintiff loses the case and on top of that, is ordered to pay cost to the defendant, the latter will not be able to recover the same. Thus, the country of origin too may play a vital role in exercising the discretion of the court either way.

10. Though the rule gives an absolute discretion to the court to make an order in relation to the security for cost in any proceedings before it, there is no reference to the time limit within which such an application must be made by any party. It appears from the wording

of the rules that, the drafters of the rules in their wisdom left it to the court to decide when considering all the circumstances of a case and therefore would have thought that, giving any timetable for such an application would limit the unfettered discretion vested in the court. In both **Martano v Mann** (1880) 14 Ch.D. 419, CA and **Lydney, etc. Iron Ore CO. v. Bird** (1883) 23 Ch.D. 358), it was held that, the old rule of the Court of Chancery that an application for security for cost must be made promptly had been abrogated and in addition, the court held in **Re Smith; Bain v Bain** (1896) 75 L.T. 46, CA, that an order for security may be made at any stage of the proceedings.

11. The absence of time limit in the rule had led the courts to consider the application for security for cost even after the judgment was delivered, if some further proceedings were to be dealt with, as directed by the judgment. In **Brown v. Haig** [1905] 2 Ch. 379, it was held that, where by the judgement in an action, some further proceedings are directed to be taken before the judge in chambers or an official referee, the Court has jurisdiction in a proper case to entertain an application for security for costs made after judgment, but the application must be made by summons and not by notice under the summons for directions, in as much as the summons for directions is limited to interlocutory applications before judgment. In that case, Kekewich J stated at pages 383 and 384 that;

> *Upon this part of the case I am able to accede to the argument that the Court ought not to cut down the operation of a useful provision. Rule 6 of Order LXV., which deals with security for costs, speaks of "Any cause or matter." Why should I say "any cause or matter" does not mean any proceeding directed by the judgment to be taken before an official referee or before the judge in chambers? In my opinion the words are wide enough to include that; and one must remember that an application for security for costs does not preclude a second application if the costs mount up or if any further proceedings are contemplated. It is for the Court to consider these matters from time to time. Why if after judgment inquiries are directed those proceedings should not be covered I cannot see. It seems to me that, assuming that the plaintiff is resident out of the jurisdiction and that the security already ordered is insufficient to meet the costs of the proceedings before the official referee, a good case can always be made for an order for security. If these applications are made by summons they will be in proper form and must be attended to.*

12. **The Supreme Court Practice 1999** (White Book), in Volume 1 at pages 440, and in paragraph 23/3/38 summarizes decision in **Jenred Properties Ltd v. Ente Nazionale Italiano per il Tuismo** (1985) Financial Times, October 29, CA and states that, the delay in making an application for security for costs, however, may be relevant to the exercise of the Court's discretion to order security. Although in most cases delay is not a decisive factor, it may be treated as important, especially where it has led, or may have led the plaintiff to act, his detriment, or may cause him hardship in the future conduct of the action. In the meantime, there are some authorities that require an application for cost to be made promptly. The reason for this is to reduce the cost that may be incurred by the parties. The Supreme Court of Western Australia explained the impact of the timing of an

application for security for costs upon the court's discretion in **Ravi Nominees Pty Ltd v Phillips Fox** (1992) 10 ACLC 1314 at page 1315 as follows;

> *An application for security for costs should be brought promptly and prosecuted promptly so that if it is going to delay the plaintiffs' claim, while it is finding the security, or if it is going to frustrate the plaintiffs' 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 plaintiffs' claim early before the defendant has incurred too may costs.*

13. Since the court has an unfettered discretion to order for cost, considering all the circumstances of a particular case, a mere delay in making such an application cannot be the reason for refusing it, if good reasons shown for delay, in the absence of any prejudice that may be caused to the plaintiff or the defendant as case may be. The level of prejudice that may be caused to the plaintiff by the delay lies at the core of the court's discretion. Even though delay is a significant factor in exercising the discretion by the court, there is no set rule which deprives a party from applying for security for cost and the court from exercising its unfettered discretion. On the other hand it should be acknowledged that, the security for costs is not 'a card that a defendant can keep up its sleeve and play at its convenience'. The belated application for security can only have a prejudicial affect if there is a risk that an order will stifle the action. The main focus of prejudice for this purpose was explained in **Ross Ambrose Group Pty Ltd v Renkon Pty Ltd** [2007] TASSC 75 as follows:

> *Leaving a party with the impression that security will not be sought and so depriving a party of an opportunity to consider whether or not to press the litigation in the face of a prompt application for security can only have a prejudicial affect if there is a risk that an order will stifle the action and hence cause costs incurred to have been wasted. No prejudice can possibly exist where there is no such risk. Where the persons who will benefit from the litigation can and will, in order to pursue the benefit, cover the opponent's costs there can be no injustice in having them do so even where the application is belated. Where there is no possibility of an order bringing an action to an end, no adverse consequence will have resulted from the loss of an earlier occasion on which to consider the future of the action in the context of security being required. In such a case there is no prejudice which needs to be addressed either by declining to order security or by limiting the order to future costs.*

14. It follows from the above authorities that, there is no set rule which either deprives a party to make a belated application for cost, or limits the exercise of the discretion by the court. However, the court should consider the prejudice that might be caused to other party. Accordingly, Leaving a party with the impression that security will not be sought and so depriving a party of an opportunity to consider whether or not to press the

litigation in the face of a prompt application for security can only have a prejudicial affect if there is a risk that an order will stifle the action and hence cause costs incurred to have been wasted. No prejudice can possibly exist where there is no such risk. Where the persons who will benefit from the litigation can and will, in order to pursue the benefit, cover the opponent's costs there can be no injustice in having them do so even where the application is belated. Where there is no possibility of an order bringing an action to an end, no adverse consequence will have resulted from the loss of an earlier occasion on which to consider the future of the action in the context of security being required. In such a case there is no prejudice which needs to be addressed either by declining to order security or by limiting the order to future costs (see: **Ross Ambrose Group Pty Ltd v Renkon Pty Ltd** (supra)).

15. In "**M.V. York Motors v Edwards" (1982) (1) All E.R. 1024,** Lord Diplock approved the remarks of "**Brandon**" L.J. in the Court of Appeal at page 1028;

> *"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."*

16. The Supreme Court of New South Wales in **Litmus Australia Pty Ltd (in liq) v Paul Brian Canty and Ors** [2007] NSWSC 670 (8 June 2007) further expanded the test of prejudice and held at paragraph 26 that,

> *To show prejudice it generally must appear that not only will the plaintiff be unable to provide the required security from its own resources, so that costs incurred during the period of delay would have been wasted, but also that those standing behind the plaintiff who could be expected to benefit from the litigation are unable to provide the required security (**Rhema Ventures Pty Ltd v Stenders** [1993] 2 Qd R 326 at 333; **Rickard Constructions Pty Ltd v Allianz Australia Insurance** [2002] NSWSC 1162 at [17] – [18].*

17. When considering the prejudice that may be caused to the plaintiff by ordering for security for cost, the court must have careful consideration and much thought on the possible frustration of plaintiff's case. 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 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.** However, the court should be alert and sensitive to the risk that may lead to denial right to access to justice guaranteed by International Human Rights instrument and the Fiji Constitution as well (Section 15 (2) of the Constitution). This consideration was emphasized by Simon Brown LJ in **Olakunle Olatawura v Abiloye**[2002] 4 All ER 903 (CA) at page 910 as follows:

Before ordering security for costs in any case (i e whether or not within CPR Pt 25) the court should be alert and sensitive to the risk that by making such an order it may be denying the party concerned the right to access to the court. Whether or not the person concerned has (or can raise) the money will always be a prime consideration, not least since article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms became incorporated into domestic law.

18. The basic principle underlying the discretion 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 cost against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order for cost can be executed (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd[1991] 2 Lloyd's Rep. 52** *per Lord Donaldson MR* at page 54). Therefore, as a matter of discretion it is a general rule of practice of the court to require the foreign plaintiffs to give security for cost as it is just to do so (**Aeronave SPA v Westland Charters Ltd** [1971] 1 WLR 1445; [1971] 3 All ER 531, CA).

19. It has been emphasized in several authorities that, the purpose of the discretion given to the court under Order 23 is not to make it difficult for foreign plaintiffs to sue, but to protect the defendants (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd[1991] 2 Lloyd's Rep. 52** *per Lord Donaldson MR* at page 55). This purpose was further expounded by Sir Nicolas Browne Wilkinson V.C in **Porzelack K G v. Porzelack (UK) Ltd**, (1987) 1 All ER 1074 at page 1076 as follows:

"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 is to plaintiff's residents within the jurisdiction".

20. This purpose of protecting the defendant is also reflected in the general principle that has been stated on many occasions that, the order for security is not made against the foreign plaintiffs who have properties within the jurisdiction. Thesiger L.J. in **Redondo v. Chaytor** (1879) 40 L.T. 797 said at page.799:

"... 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."

21. It is prima facie rule that, the foreign plaintiffs, who bring the actions, ought to give security for cost. This rule is subject to certain exceptions, one being that, if there is property within the jurisdiction, which can reasonably regarded as available to meet the defendant's right to have cost paid, then there should be no order for security (*per Greer L.J.* in **Kevokian v. Burney** (No.2) (1937) 4 All E.R. 468 at 469C). However, having mere property or an asset within the jurisdiction will not relieve the foreign plaintiffs from being bound to give security for cost. The property or the asset must be of fixed and permanent nature and be quite sufficient to satisfy the costs if the action should be decided against the plaintiffs. This view was expressed by Lord Justice Bowen in **Ebbrard v. Gassier** (1884) 28 Ch.D. 232 at 235 as follows:

> *The Plaintiffs being abroad were prima facie bound to give security for costs, and if they desired to escape from doing so they were bound to shew that they had 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……*
>
> *It is clear that the property referred to in this affidavit affords no real security to the Defendants. It is not property of any fixed amount; what is left of it may be quite insufficient to satisfy the costs if the action should be decided against the Plaintiffs. Therefore, if this appeal were to be decided on the affidavits which were before the Vice-Chancellor, we should probably have ordered the Plaintiffs to give security for costs on the ground that the Plaintiffs to give security for costs on the ground that the Plaintiff's affidavit was ambiguous and insufficient.*

22. There are some other exceptions too, which can be considered by the courts when making its decision of either ordering or refusing the security. Some of those exceptional circumstances are briefed in **The Supreme Court Practice 1999** (White Book), in Volume 1 at page 430, and in paragraph 23/3/3. The said passage reads:

> *"In the case which follow, investigation of the merits was justified only because the Plaintiffs demonstrated a very high probability of success. If there is a strong prima facie presumption that the defendant will fail in his defence to the action, the Court may refuse him any security for costs (see per Collins J. in Crozat v. Brogden [1894] 2 Q. B. 30 at 33 (the judgment of the CA in that case was in substance reversed by the former O. 65, r.6B, made in 1920, which in substance is repeated in r. 1 (1). See also Trident International Freight Services Ltd v. Manchester Ship Canal Co. [1990] B. C. L. C. 263, CA. It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim. Again, if a defendant admits so much of the claim as would be equal to the amount for which security would have been ordered, the Court may refuse him security, for he can secure himself by paying the admitted amount into Court (Hogan v. Hogan (No 2) [1924] 2 Ir. R 14). Further, where defendant admits his liability, plaintiff will not be ordered to give security*

(De St. Martin v. Davis & Co. [1884] W. N. 86) and this may remain the position despite a counterclaim (Winterfield v. Bradnum (1878) 3 Q. B. D. 324);....." (Emphasis added)

23. The court may consider the plaintiff succeeding in a case as a major matter in deciding the security for cost. However, this does not mean that every application for security for costs requires a detailed examination of the merits of the case. The attempt to go into the merits of the case should not be encouraged, unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure. This was clearly demonstrated by Sir Nicolas Browne Wilkinson V.C in **Porzelack K G v. Porzelack (UK) Ltd**, (supra) at page 1077 as follows:

> *The matters urged before me have spread over a fairly wide field. First there have been attempts to go into the likelihood of the plaintiff wining the case or the defendant winning the case, presumably following the note in The Supreme Court Practice 1985 Vol 1, para 23/1 – 3/2, which says: ..."A major matter for consideration is the likelihood of the plaintiff succeeding ..." This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.*
>
> *Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.* (Emphasis added).

24. Furthermore, in an application for security the Court must take account of the plaintiff's prospects of success, admissions by the defendant, open offers and payments into Court (*per Lord Denning MR* in **Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** [1973] 2 All ER 273 at page 286); but a defendant should not be adversely affected in seeking security merely because he has attempted to reach a settlement. Evidence of negotiations conducted "without prejudice" should not be admitted without his consent (**Simaan Contracting Co. v. Pilkingoton Glass Ltd** [1987] 1 W.L.R. 516; [1987] 1 All E.R. 345). However, in a minor's case, security for costs against a party, who is a parent, would only be ordered in the most exceptional circumstances. Pennycuick J in **Re B. (Infants)** [1965] 2 All E.R. 651 held at page 652 that:

Quite apart from that objection to the present motion, which is one of jurisdiction, it would, I think, be extremely unusual to order security for costs in an infant case against a party who was one of the parents of the infant. The general principle on which the court acts in infant cases is, I think, that either parent of the infant, is entitled to put before the court his or her view on the point of what is for the welfare of the infant, and only in the most exceptional circumstances would the court prevent a parent from putting his views before the court by means of an order for security for costs. Counsel has mentioned certain special circumstances in this case but it seems to me that, even assuming that I have jurisdiction to make an order at all – and I do not think I have got jurisdiction to make an order – still, in the exercise of my discretion I ought not to make the order. I must therefore dismiss the motion.

25. The examination of the rules of the court and authorities cited above reveal that, the following principles emerge in this regard. However, given the discretionary power expected to be exercised by courts with judicial mind considering all the circumstances of a particular case, these principles should not be considered to be exhaustive;

a. Granting security for cost is a real discretion and the court should have regard to all the circumstances of the case and grant security only if it thinks it just to do so (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** (supra); **Porzelack K G v. Porzelack (UK) Ltd** (supra) .

b. It is no longer an inflexible or a rigid rule that plaintiff resident abroad should provide security for costs (**The Supreme Court Practice 1999**).

c. Application for security may be made at any stage (**Re Smith** (1896) 75 L.T. 46, CA; and see **Arkwright v. Newbold** [1880] W.N. 59; **Martano v Mann** (1880) 14 Ch.D. 419, CA; **Lydney, etc. Iron Ore CO. v. Bird** (1883) 23 Ch.D. 358); **Brown v. Haig** [1905] 2 Ch. 379. Preferably, the application for security should be made promptly (**Ravi Nominees Pty Ltd v Phillips Fox** (supra).

d. The delay in making application may be relevant to the exercise of discretion; however, it is not the decisive factor. The prejudice that may be caused to the plaintiff due to delay will influence the court in exercising its discretion (**Jenred Properties Ltd v. Ente Nazionale Italiano per il Tuismo** (supra); **Ross Ambrose Group Pty Ltd v Renkon Pty Ltd** (supra); **Litmus Australia Pty Ltd (in liq) v Paul Brian Canty and Ors** (supra)).

e. The purpose of granting security for cost is to protect the defendant and not to put the plaintiff in difficult. It should not be used oppressively so as to try and stifle a genuine claim (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd** (supra); **Porzelack K G v. Porzelack (UK) Ltd** (supra). Denial of the right to access to justice too, should be considered (**Olakunle Olatawura v Abiloye** (supra)).

f. It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim (**Hogan v. Hogan** (No 2) [1924] 2 Ir. R 14). Likewise, order for security is not made against the foreign plaintiffs who have properties within the jurisdiction (**Redondo v. Chaytor** (supra); **Ebbrard v. Gassier** (supra)).

g. The court may refuse the security for cost on *inter alia* the following ground (see: **The Supreme Court Practice 1999** Vol 1 page 430, and paragraph 23/3/3;

1. If the defendant admits the liability.
2. If the claim of the plaintiff is bona fide and not sham.
3. If the plaintiffs demonstrates a very high probability of success. If there is a strong prima facie presumption that the defendant will fail in his defence.
4. If the defendant has no defence.

h. The prospect of success, admission by the defendants, payment to the court, open offer must be taken into account when exercising the discretion. However, the attempt to reach settlement and "without prejudice" negotiations should not be considered (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** (supra); **Simaan Contracting Co. v. Pilkingoton Glass Ltd** (supra).

i. In case of a minor the security for cost will be awarded against the parent only in most exceptional cases (**Re B. (Infants)**).

Analysis

26. The facts that, the plaintiff is ordinarily resident out of jurisdiction and he does not have any property within the jurisdiction were not denied. It is prima facie rule that, the foreign plaintiffs who bring the actions ought to give security for cost. This rule is subject to certain exceptions, one being that, if there is property within the jurisdiction, which can reasonably regarded as available to meet the defendant's right to have cost paid, then there should be no order for security (*per Greer L.J.* in **Kevokian v. Burney** (No.2) (1937) 4 All E.R. 468 at 469C). Thus, the plaintiff is not falling under the main exception to the rule.

27. The counsel for the plaintiff opposing the application for security submitted that, there was an inexcusable and inordinate delay on part of the defendant in filling this summons, i.e. the defendant filed this summons only after 25 months from date of filling the writ though he knew well that, the plaintiff ordinarily reside overseas. The issue of delay in this matter should be discussed in two viewpoints. One is the actual delay and the person responsible for that delay and other is the effect of the delay in exercising the discretion of this court either way.

28. There is an actual delay of 25 months from the date of filling the writ to the instant summons. It quite long time considering the general timeframe given for the parties to take stopes in the civil proceedings. However, the question is whether the defendant is

solely responsible for the same. The case file reveals that, writ was filed on 09.06.2015. The defendant filed the Acknowledgment of Service of Writ on 29.07.2015 and followed by the Statement of Defence which was filed on 11.08.2015. The plaintiff should have filed his Reply to Defence within 14 days thereafter at least by 25.08.2015. However, the plaintiff did not take any steps for almost for one year and three months (15 months) till 18.11.2016 when he filed the 'Notice of Intention to Proceed'. Even though the plaintiff expressed his intention to proceed on 18.11.2016, it took further four (04) months for him to file the reply to statement of defence. He only filed the same on 14.03.2017 together with the summons for direction. It now becomes obvious that, though the plaintiff blamed the defendant for delay of 25 months, he (the plaintiff) is the major contributor for delay, being inactive for 19 months, without any reason. In fact, either the defendant or this court on its own motion could have issued notice on the plaintiff to show cause under Order 25 rule 9. Thus, argument of the plaintiff of delay on part of the defendant is weak, as the plaintiff is the one who already delayed the process.

29. The second aspect of the delay is its influence on exercise of discretion by the court in deciding issue of cost in a given case. Several facts to be noted in this regard. Firstly, the old rule of the Court of Chancery that an application for security for cost must be made promptly had been abrogated (**Martano v Mann** (supra) and **Lydney, etc. Iron Ore CO. v. Bird** (supra) and an order for security may be made at any stage of the proceedings (**Re Smith; Bain v Bain** (supra)). Secondly, the Order 23 rule 1 too does not prescribe any time limit within which such application may be made. Thirdly, when it is stated that an application for security for costs should be brought promptly and prosecuted promptly, it does not mean that, the belated application cannot be entertained. The belated application for security can only have a prejudicial affect if there is a risk that an order will stifle the action and hence cause costs already incurred to have been wasted. No prejudice can possibly exist where there is no such risk (**Ross Ambrose Group Pty Ltd v Renkon Pty Ltd** (supra). Finally, in a given case, granting security for cost is a real discretion and the court should have regard to all the circumstances of the case and it should do so only if it thinks it just to do so (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** (supra); **Porzelack K G v. Porzelack (UK) Ltd** (supra). Therefore, the alleged delay by the plaintiff, for which he is major contributor, should be considered in the in the light of above cases.

30. **G.E. Dal Pont**, in "**Law of Costs**", Third Edition, LexisNexis Butterworth, Australia 2013, explains the delay and the potential prejudice to the plaintiff in paragraph 29.124 at page 1036, where the writer has said that:

> *"For a defendant to delay applying for security, and permit the plaintiff to incur substantial costs in preparing for the proceedings, has the potential to unduly prejudice and oppress the plaintiff if there is a risk that the security order will stifle the action. The main concern is that the plaintiff may have incurred costs in pursuing the matter that it would not have incurred had the application for security been made successfully at the outset, and that these costs will effectively have been wasted if the security*

order threatens the plaintiff's financial ability to continue with the action".

31. According to the case file, the plaintiff did not take any steps for 15 months after the statement of defence was filed. It took further 4 months for the plaintiff to file the summons for direction on 14.03.2017 together with the reply to defence. The defendant filed the instant summons on 18.07.2017 within 4 months from the day the plaintiff again started to proceed this matter. The only steps taken by the plaintiff were sealing the order on summons for direction and filling the scanned copy of the Affidavit Verifying List of Documents. The plaintiff could not even file the original Affidavit Verifying List of Documents, though court ordered on 31.03.2017 to file the same. Therefore, it cannot be said that, the defendant delayed the summons for cost, permitting the plaintiff to incur substantial cost in preparing for the proceedings and thereby caused risk or prejudice which can stifle plaintiff's case.

32. Though the defendant admitted signing agreement for sale of portion of his property as pleaded by the plaintiff, he completely denied breaching the said agreement. He further pleaded in his statement of defence that, there were conditions precedents in the said agreement and thereby the plaintiff was to sub-divide the said land and obtain the title. The defendant further pleaded that, the plaintiff had to obtain the consent from the Minister of Lands before the agreement becoming lawful. However, the plaintiff failed to do so within the time specified in the agreement and continued to reside in U.S.A without fulfilling conditions precedent. Therefore, the defendant pleaded that, the said agreement was void *ab initio*. The plaintiff, in his belated reply filed after 19 months from filling the defence, stated that he joined issues with the defendant in relation to all the averments in the statement of defence. The court can consider a party's success or failure in a given case in considering the application for security for cost, if it can clearly be demonstrated (**Porzelack K G v. Porzelack (UK) Ltd**, (supra)). However in this case, it does not clearly demonstrate one way or another that there is a high degree of probability of success or failure. Thus, it is not advisable to consider the same now.

33. Master J.J.Udit stated in **Sharma v Registrar of Titles** [2007] FJHC 118; HBC 351.2001 (13 July 2007) as follows;

"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 to 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, it 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".

34. It follows from the above analysis that, there is a necessity to protect the defendant in this case exercising the unfettered discretion conferred on this court under and by virtue of Order 23 rule 1. Accordingly, I hold that, this is a fit and proper case for exercise of such discretion in favour of the defendant and to order the plaintiff to deposit some amount as the security for cost. The next issue is the quantum of the security to be ordered in this case.

Quantum

35. There is no hard and fast rule which guides the court in deciding the amount of the security that a party may be ordered to provide. The general practice is that, the court, in its discretion, will fix such sum as it thinks just, having regard to all the circumstances of a given case. In a very old case of **Dominion Brewery Ltd v Foster** 77 LT 507, Lindley MR said this at 508:

'It is obvious that, as to a question of quantum such as this, you cannot lay down any very accurate principle or rule. The only principle which, as it appears to me, can be said to apply to a case of the kind is this, that you must have regard, in deciding upon the amount of the security to be ordered, to the probable costs which the defendant will be put to so far as this can be ascertained. It would be absurd, of course, to take the estimate of the managing clerk to the defendant's solicitors and give him just what is asked for. You must look as fairly as you can at the whole case.'

36. What is required from the court is to make a fair amount in a possible way at the whole case. It is neither on full indemnity basis, nor what is estimated by the law clerk of defendant's solicitors. **The Supreme Court Practice 1999** (White Book), in Volume 1 at page 440, and in paragraph 23/3/39, explains this practice and states that:

The amount of security awarded is in the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not always the practice to order security on a full indemnity basis. If security is sought, as it often is, at an early stage in the proceedings, the Court will be faced with an estimate made by a solicitor or his clerk of the costs likely in the future to be incurred; and probably the costs already incurred or paid will only a fraction of the security sought by the applicant. At that stage one of the features of the future of

the action which is relevant is the possibility that it may be settled, perhaps quite soon. In such a situation it may well be sensible to make an arbitrary discount of the costs estimated as probable future costs but there is no hard and fast rule. On the contrary each case has to be decided on its own circumstances and it may not always be appropriate to make such a discount ***(Procon (Great Brotain) Ltd v. Provincial Building Co. Ltd*** *[1984] 1 W.L.R. 557; [1984] 2 All E.R. 368, CA). It is a great convenience to the Court to be informed what are the estimated costs, and for this purpose a skeleton bill of costs usually affords a ready guide (cited with approval by Lane J. in* ***T.Sloyan & Sons (Builders) Ltd v. Brothers of Christian Instruction*** *[1974] 3 All E.R. 715 at 720).*

37. The defendant claims a sum of FJ$ 20,000.00 as the security for cost. On the other hand, the plaintiff objects the same and states that, he already paid a sum of FJ$ 52,430.80 being the part of the purchase price. The plaintiff's counsel in his submission stated that, the consideration should be made to the prospect success of the plaintiff. The whole claim of the plaintiff is based on the agreement he entered into with the defendant to purchase the part of the land owned by the defendant. The rights and the obligations of the parties derive from the said agreement. Whilst the plaintiff claims for specific performance or in the alternative for amount paid by him to the defendant, the latter claims that the said agreement is void ab initio for failure of the plaintiff to fulfill the conditions precedent. The success or the failure of the parties depends on the terms and conditions of that agreement. Had any of the parties attached the copy of that agreement with their respective affidavit, this court would have been in a better position to consider prospective success or failure of either party. However, none of them attached the same. Therefore, the court decided, in the preceding paragraphs, not to give more weight to it as it does not clearly demonstrate one way or another that there is a high degree of probability of success or failure.

38. There are some cases such as **Sunflower Aviation Ltd v Civil Aviation Authority of the Fiji Islands** [2015] FJHC 336; HBC250.2008 (8 May 2015), **Peters v Seashell @ Momi Ltd** [2015] FJHC 581; HBC32.2012 (11 August 2015), **Aerolink Air Services Pty Ltd v Sunflower Aviation Ltd** [2014] FJHC 817; HBC013.2011 (12 November 2014) and **Neesham v Sonaisali Island Resort Ltd** [2011] FJHC 642; Civil Action 262.2007 (13 October 2011) where the courts have ordered the plaintiffs to deposit a substantive amount as security for cost. Those cases may guide in arriving an appropriate amount suitable for all the circumstances of the case in hand before me. However, they cannot be taken as the inflexible or rigid guidance to in exercising the unfettered discretion of this court.

39. The counsel for the plaintiff submitted in paragraph 3.14 of his written submission that, the plaintiff already incurred a sum of 7,213.99 and will need to pay approximately another $ 10,000.00 to 15,000.00 to conduct the trial. If that is case, the plaintiff's cost would be more than $ 20,000.00. It follows that, the defendant claim for $ 20,000.00 as the security is justifiable as he too might incur similar amount of cost at the end of the case.

Conclusion

40. Thus, having considered all the circumstances of the case before me, and in particular, with the view of finding an equilibrium between the two conflicting interests that, the protection of the defendants and ensuring the right of the plaintiff to access to justice, which should not, merely, be stifled with the order of exorbitant cost and the fact that the Plaintiff paid considerable amount of purchase price, I order the plaintiff to deposit a sum of FJ $ 8,000.00 as the security for cost within a month from today. I think this amount is just and equitable in all the circumstances of this case and it is the best this court may do in this case, as Simon Brown LJ observed in **Olakunle Olatawura v Abilove** [2002] 4 All ER (CA) at page 910 as follows:

> ..... *the more difficult it appears to be for the person concerned to raise the money, the more obvious becomes the need for an order for security to protect the other party against the risk of incurring irrecoverable costs. The court will have to resolve that conundrum as best it may.* (Emphasis added).

41. In result, the final orders are;

a. The plaintiff should deposit a sum of FJ $ 8,000.00 at this registry within a month from today,

b. The cost of this summons will be in the cause, and

c. The matter to be mentioned on 22.07.2019 to check the compliance of this order by the plaintiff.

HIGH COURT OF FIJI LAUTOKA

U.L Mohamed Azhar
Master of the High Court

At Lautoka
11.06.2019