IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 236 of 2008

BETWEEN	:	**NICOLE EARNSHAW** of 15, Rutherglen Drive, St Andrews, New South Wales, Australia, Secretary.
		Plaintiff
AND	:	**CORAL SURF RESORT LIMITED** a limited liability company having its registered office at Pricewaterhouse Coopers, 52 Narara Parade and **SILVER BEACH PROPERTIES LIMITED** a limited liability company having its registered office at Pricewaterhouse Coopers, 52 Narara Parade, Lautoka trading as **"The Naviti Resort"**
		Defendants
Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. D. S. Naidu for the plaintiff Mr. V. Sharma for the Defendants
Date of Decision	:	23rd September 2020

DECISION

01. This decision refers to the last prayer of the summons filed by the defendants on 28.04.2016 seeking an order on the plaintiff to discover certain documents related to the claim made by the plaintiff in this case. The factual background of this case, albeit brief, is that the plaintiff and her family were on holiday and staying as paying guests at the Naviti Resort operated by the second named defendant, from 31.10.2006 to 07.11.2005. On or about 04.11.2005, whilst the plaintiff was walking through the reception area of the resort, a painting frame and easel stand fell on her. As a result, the plaintiff sustained injuries. The plaintiff therefore sued the defendant for negligence and breach of contract and claimed special and general damages together with the cost. The defendants on the other hand denied negligence and breach of contract, and contented that, the incident was

an inevitable incident occurred due to unexpected and sudden wind or air, notwithstanding the exercise of all reasonable care and skills by them.

02. The pleadings were completed and the matter was pending before a judge for trial. The defendants then filed a summons on 28.04.2016 supported by an affidavit sworn by an insurance officer, seeking discovery of certain documents by the plaintiff together with the cost on a full solicitor/client indemnity basis. The plaintiff then discovered all the documents sought by the defendants and ultimately, the defendants abandoned the orders sought for specific discovery. However, they moved the court to hear their application for indemnity cost on the basis that, the plaintiff was unreasonable in disclosing those documents and caused significant legal cost to them.

03. The plaintiff opposed the application for indemnity cost on the basis that, the plaintiff agreed to provide all the documents as soon as practicable and finally provided them on 03.05.2016. The affidavit was filed in opposition and support of the application for indemnity cost and the counsels filed their written submissions highlighting the relevant authorities.

04. The general principle of awarding cost is that, 'the costs follow the event'. This means that the costs of an action are usually awarded to the successful litigant. Unless there are exceptional circumstances in a special instance, the rule is that, the costs should follow upon success. Bowen LJ in **Forster v Farquhar and Others** [1893] 1 Q.B 564 stated at page 569 that:

> We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success.

05. In **Shirley v Wairarapa District Health Board** [2006] NZSC 63, [2006] 3 NZLR 523 the Supreme Court of New Zealand summarized the principle as "the loser, and only the loser, pays" unless there are exceptional circumstances. However, awarding of costs is at the discretion of the Court and this discretion is recognized in Order 62 rule 3 (3) of the High Court Rules. The costs awarded may include fees, charges, disbursements, expenses and remuneration. The court must be mindful of the purpose of awarding cost when exercising its discretion to award cost.

06. The primary purpose of awarding cost is to compensate a successful party. It is neither punishment nor reward. Further the cost awards are also a check on unmeritorious litigation and to encourage litigants to consider cost-effective alternatives to court litigation. However, award of costs should not prevent litigants from accessing to justice and seeking to enforce their rights through the courts. Edwards J in **Taylor v**

Roper [2019] NZHC 16 (21 January 2019) discussed the purpose of awarding costs in paragraphs 6 and 7 and said:

> The primary purpose of a costs award is to compensate a successful party for the costs they have expended in having their legal rights recognized and enforced in a court of law. Costs are not ordered as punishment against the losing party, nor as a reward for the winner. An award of costs is generally linked to the conduct of the proceeding and its result but is not usually concerned with what happened before the proceeding.
>
> An award of costs also serves a number of other policy objectives. The prospect of an adverse costs award acts as a check on unmeritorious litigation being pursued through the courts. An award of costs also encourages litigants to consider whether there are cost-effective alternatives to court litigation to resolve the underlying dispute. Of course, counterbalanced against those objectives is the public interest in ensuring that an award of costs does not inhibit litigants from seeking to enforce their rights through the courts.

07. The overriding objective in awarding cost is to do justice between the parties. Lord Neuberger in **R (M) v Mayor and Burgess of the London Borough of Croydon** [2012] EWCA Civ 595; [2012] 1 WLR 2607; [2012] 3 All E.R 1237, classified the circumstances of awarding cost in civil suits. His Lordship held at pages 1252 and 1253 that:

> Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.
>
> In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalized in costs, but the answer to that point is that the defendants should, on that basis, have settled before the

proceedings were issued; that is one of the main points of the pre-action protocols. Ultimately, it seems to me that *Bahta's* case was decided on this basis.

In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in *Scott's* case. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. *Boxall* appears to have been such a case.

In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.

08. In the case before me, there were some communications between the solicitors of the plaintiff and the defendant on interrogatories and discovery of documents. The defendant's solicitors through an email dated 12.01.2016 requested answers to some interrogatories and disclosure of certain documents from the plaintiff's solicitors. The letter is marked as **AR 3** and annexed with the affidavit of Avinesh Rai that supports the summons for specific discovery. The plaintiff's solicitors, by their e-mail dated 20.01.2016 answered some of the interrogatories and further agreed to provide the relevant document as soon as practicable, claiming the 14 days were unreasonable to provide such documents. Though the defendant's solicitors claimed to have sent follow

up e-mails on 20.01.2016 and 18.03.2016, the solicitors for the plaintiff denied receipt of them. Finally the solicitors for the defendants filed the summons for specific discovery on 28.04.2016.

09. The summons for specific discover was returnable on 09.05.2016. However, the plaintiff provided all the documents sought by the defendant on 03.05.2016 – almost a week before the returnable date. Eventually, the defendant's solicitors abandoned the orders sought in that summons. In this background, it cannot be said that, the defendant was successful in its application for specific discovery as all the documents were provided well before the summons was returnable. As a result, I do not think that, the defendant is entitled for cost in general.

10. On the other hand, the defendant seeks cost on solicitor/client full indemnity basis. There are several authorities that guide the court in awarding indemnity cost in civil causes. Scutt J in **Prasad v Divisional Engineer Northern (No 2)** [2008] FJHC 234; HBJ03.2007 (25 September 2008) cited number of cases that lay down the principles governing the indemnity costs. Needless to re-produce all of them here. The principle that follows from those authorities is that, the award of indemnity costs would only be considered in exceptional cases where the conduct of a party was reprehensible to a significant degree.

11. As I stated above, the plaintiff immediately provided certain documents and answered some of the interrogatories at the first instance when the defendant's solicitors sent the first request via e-mail on 12.01.2016. It is true that, the plaintiff did not provide some documents sought by the defendants' solicitors. The solicitors for the defendant argued that, the plaintiff unreasonably failed to provide those documents and thereby caused the defendant to file the summons, incurring cost. However, some documents sought by the defendant could not have been provided in the short span of time prescribed by the defendants' solicitors due the nature and the time of those documents. For example the salary slips for the period of 9 years from February 2009 to 12. 01.2016, as mentioned in paragraph 4 of the e-mail dated 12.01.2016 could not be traced and provided within 14 days. In any event, the plaintiff provided such documents without the intervention of the court and even before the summons for specific discovery was returnable. Therefore, it difficult to say that, this is an exceptional circumstance where plaintiff conducted in a reprehensible way to order for indemnity cost. For the above reasons, I am of the view that, the defendant is not entitled for indemnity cost for bringing the summons which had already been abandoned by the defendant upon production of all the documents by the plaintiff.

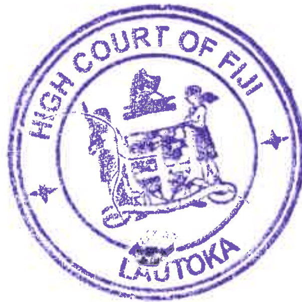
12. Accordingly, I make following final orders:

a. There is no order for indemnity cost,

b. The application for indemnity cost is dismissed, and

c. The parties to bear their own costs.

U. L. Mohamed Azhar
Master of the High Court



At Lautoka
23.09.2020