

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

**CIVIL JURISDICTION**

**Civil Action No. HBC 36 of 2023**

**BETWEEN:**            **MICHEAL SALIK & MARGARET SALIK** jointly of 231 Crystalridge Rise,  
Okotoks, AB T1S 1 W4, Alberta, Canada, Entrepreneurs.

**PLAINTIFF**

**AND:**                **MUSKET COVE RESORT LIMITED** a limited liability company having its  
registered residential office at Dick's Place, Malololailai, Nadi in Fiji.

**DEFENDANT**

**BEFORE**            :        **Master P. Prasad**

Counsels            :        Messrs Lal Patel Bale Lawyers for Plaintiff  
   Messrs Young & Associates for Defendant

Date of Hearing       :        By way of submissions.

Date of Decision     :        20 May 2025

**RULING**

(Security for Costs)

1. In their Statement of Claim (**SOC**), the Plaintiff state that they were guests staying at a bure style accommodation (**bure**) at the Defendant's resort. On or about 10 May 2022, while both Plaintiff were sleeping, a fire allegedly caused by an electrical fault in the ceiling destroyed the bure. The Plaintiff allege that the fire was caused by the negligence of the Defendant and as a result the Plaintiff suffered personal injury, loss and damages. The Plaintiff are seeking the following reliefs:
  - a. Judgement in the sum of US\$21,017.00;
  - b. General damages for pain, humiliation, degradation, suffering, anxiety and mental anguish;
  - c. Interest; and
  - d. Costs on indemnity basis.

2. The Defendant filed a Statement of Defence and Counterclaim (**SOD**) and denied that the fire was caused by the negligence of the Defendant. By way of counterclaim, the Defendant claimed that the fire and/or extent of the fire that resulted in the total destruction of the bure was contributed to by the negligence of the Plaintiff. The Defendant further claimed that the Plaintiff were in breach of their common law duty and/or were negligent in either allowing the fire to spread to the extent it did and/or failed to mitigate the loss and damage suffered by the Defendant and the Plaintiff (if any). The Defendant seeks the following reliefs:
  - a. The Plaintiff's claim be dismissed;
  - b. Judgement entered against the Plaintiff for general damages, reinstatement costs of the bure, special damages and unjust enrichment received by the Defendant;
  - c. Interest;
  - d. Costs on solicitor client indemnity basis; and
  - e. Any other relief deemed just by the Court.
3. The Defendant then filed this Summons pursuant to Order 23 of the High Court Rules 1988 (**HCR**) for an Order that the Plaintiff provide such security for costs determined by the Court and to stay the action until the Plaintiff provide such security (**Summons**). The Defendant filed an Affidavit in Support to the Summons and the Plaintiff filed an Affidavit in Opposition.
4. On 30 September 2024, both parties agreed for the Court to give its ruling based on written submissions. Subsequently both parties filed their respective submission. Thereafter, the parties were attempting settlement and on 18 February 2025, they informed the Court that settlement was unsuccessful and moved the Court to deliver its decision on the Summons.
5. The Plaintiff raised a preliminary issue that the Affidavit in Support of Josephine Moffat filed by the Defendant in her capacity as the director of the Defendant company did not annex an authority. The Plaintiff relied on **Paramount Hotel Company Ltd v Sigatoka Builders Pte Limited** [2023] FJHC 631; HBM19.2023 (31 August 2023).
6. However, the Court of Appeal in **RB Patel Group Ltd v Central Board of Health** [2023] FJCA 246; ABU032.2022 (30 November 2023) applying sections 53 and 54 of the Companies Act 2015 held that all "*affidavits filed into Court, need only to comply with Order 41 and under it, there is no requirement for any affidavits, excluding those exceptions under Order 4 Rule 5 (1), to be authenticated or deposed with a written authority in case of a company annexed to it.*"
7. Therefore, I agree with the Defendant's counsel's submissions that the Affidavit in Support of Josephine Moffat did not require the authority on behalf of the Defendant as an annexure.

8. I will now consider the Summons for Security for Costs.
9. Order 23 of the HCR gives a discretion to the Court to order for security for cost and deals with the other connected matters. While Rule 1 deals with the discretion of the Court, Rules 2 and 3 deal with the manner in which the Court may order security for cost and additional powers of the Court. 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.*

10. The Court's decision regarding the amount of security a party must provide is not governed by strict rules. Instead, it relies on the Court's discretion to determine a fair and just amount based on the specific circumstances of each case.

11. In **Nair v Sudhan** [2019] FJHC 567; HBC88.2015 (11 June 2019), Master Azhar (as His Lordship then was) has given a comprehensive review of the law applicable to security for cost orders and I gratefully adopt the same. Master Azhar outlined a non-exhaustive set of principles at paragraph [25] that should guide the court when considering a security for costs application:

- 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 Turismo** (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. Pilkington 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))."*

Is the Plaintiff ordinarily resident out of jurisdiction?

12. In **Nair v Sudhan** (supra) Master Azhar further discussed as follows:

*" 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)."*

13. In its written submission, the Plaintiff's counsel raised a point that the Defendant has not discharged the burden of proof that the Plaintiff are ordinarily resident out of jurisdiction.
14. The fact that the Plaintiff are ordinarily resident out of jurisdiction is proven by the Plaintiff's own Affidavit in Opposition, more specifically in the address provided in the intitle, plus the Plaintiff themselves state therein that they were only in Fiji at the time of the alleged incident on a holiday. Thus, there is no merit in the Plaintiff's counsels above submission.
15. Furthermore, the Plaintiff in this matter have not shown to this Court any proof that they own any property in Fiji hence they do not fall under the exception from **Nair and Sudhan** (supra) to the rule either.

### Will granting security for costs stifle the Plaintiff's right?

16. The burden of showing impecuniosity rests upon the plaintiff seeking to resist the Order. (See ***Inox World Pty Ltd v Shopfittings (Fiji) Ltd*** [2016] FJHC 781; HBC100.2015 (12 September 2016)).
17. In an attempt to oppose an order for security for costs, the Plaintiff's counsel submitted that this application stifles the Plaintiff's claim in totality. However, no evidence was provided through the Plaintiff's Affidavit in Opposition to support this assertion. Consequently, the Plaintiff have failed to satisfy the Court that an order for security would prevent them from continuing the litigation. I therefore find that the Plaintiff have not discharged the onus as per ***Inox World Ltd*** (supra) and an order for costs will not stifle the Plaintiff's case.

### Probability of success or failure

18. The Plaintiff's case is based on the alleged negligence of the Defendant. The Defendant does not deny that there was a fire that destroyed the bure. However, the Defendant denies liability and also by way of counterclaim claims contributory negligence by the Plaintiff, which resulted in the total destruction of the bure and resulted in loss and damage suffered by the Defendant.
19. In this matter I am satisfied that the Plaintiff's claim is *prima facie* regular and discloses a reasonable cause of action. However, the Defendant has also put forward a reasonable defence which raises certain legitimate triable issues.
20. Given the inadequate material before this Court at this particular stage it is difficult to properly weight the matter in the balance – especially in relation to the probability of success of either the Plaintiff's or the Defendant's respective claims against each other. It will therefore be imprudent to delve into the substantive merits of the case at this time.

### Delay in applying for security for costs

21. The Plaintiff's counsel, in their legal submission states that the Defendant's Summons for Security for Costs is delayed.
22. The Plaintiff's Writ of Summons was filed on 21 February 2023. The Defendant's Statement of Defence and Counterclaim was filed on 17 March 2023. The Plaintiff's Reply to Defence and Defence to Counterclaim was filed on 31 March 2023, and the Defendant's Reply to Plaintiff's Defence to Counterclaim was filed on 23 May 2023.
23. The Plaintiff also filed Summons for Directions on 31 March 2023, the Order for which was sealed on 24 May 2023.

24. The Plaintiff then filed their Affidavit Verifying List of Documents on 1 August 2023 while the Defendant filed both its Affidavit Verifying List of Documents and the Summons for Security for Costs on 9 August 2023.
25. Thereafter, while this Court set timelines for affidavits and written submissions to be filed in regard to the said Summons, the Court on 30 September 2024 also made further pre-trial orders for discovery of documents, pre-trial conference, copy pleadings and Order 34 Summons to be filed.
26. On 22 November 2024, the parties informed Court that they were exploring settlement. On 18 February 2024, the Plaintiff's counsel informed the Court that the parties were unable to settle and therefore the Plaintiff had not attended to pre-trial conference due to this pending Summons.
27. The Supreme Court Practice 1999 (White Book), in Volume 1 at pages 440, and in paragraph 23/3/38 summarizes the 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.
28. 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 many costs."*
29. Since a Court has absolute discretion to award costs based on the specific circumstances of a case, a delay in filing such an application per se is not sufficient grounds for rejection—provided there are valid reasons for the delay and no undue prejudice is caused to either the plaintiff or the defendant. The level of prejudice that may be caused to the plaintiff by the delay lies at the core of the court's discretion. A plaintiff will be prejudiced if there is a risk that an order for Security for Costs will stifle the action. No prejudice will exist if there is no such risk. (See **Bailiff v Tuivuna** [2018] FJHC 909; HBC28.2016 (25 September 2018)).

30. In their Affidavit in Opposition the Plaintiff state that Summons for security for costs will cause the Plaintiff to incur substantial legal costs which may ultimately lead to the withdrawal of their claim. In addition, the Plaintiff's counsel in their submissions state that such delay will result in delay of setting down the Plaintiff's claim for trial and subsequently delay judgment. However, no supporting evidence has been presented to substantiate these specific assertions or that the Summons will stifle the Plaintiff's claim in general. The Plaintiff's counsel relied on **Inox World Pty Ltd v Shopfittings (Fiji) Ltd** (supra) and **Kidman v Chandra** [2016] FJHC 902.
31. The Defendant in its Affidavit in Support does not provide any reasons for why this Summons was filed almost 6 months after the issue of the Writ. In its submissions, counsel for the Defendant states that there is no delay in this matter, and even if there was any delay, it is not a decisive factor as the Plaintiff have not provided any evidence that they have suffered detriment or there is hardship in the future conduct of the action on their part. The Defendant relied on **Nair v Sudhan** (supra).
32. The Court notes the 6-month lapse since the issuance of the Writ of Summons and the Summons for Security for Costs but finds no evidence suggesting that this delay would stifle the Plaintiff's pursuit of their action. I thus find that this Summons does not prejudice the Plaintiff.
33. In light of the above, I hold that this is a fit and proper case for exercise of the Courts discretion in favour of the Defendant and to order the Plaintiff to deposit some amount as the security for cost.
34. The next issue is the quantum of the security to be ordered in this case.

#### Quantum

35. As stated earlier, there is no strict rule that dictates how a Court determines the amount of security a party may be required to provide. Typically, a Court exercises its discretion to set an amount it deems fair, taking into account all relevant circumstances of the case. In the 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. 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 Britain) 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)....*

*"Sufficient" security or security that in all the circumstances of the case is just does not mean complete security. Where a defendant was seeking £147,000 by way of security and the judge ordered £10,000 the Court of Appeal declined to interfere as the judge had correctly taken into account that the delay by the defendant in making the application had deprived the plaintiff of time to collect the security and that the plaintiff's strong and genuine claim would be stifled by ordering a larger sum: Innovare Displays v. Corporate Booking Services [1991] B.C.C. 174, C.A*

[emphasis added]

37. The Defendant has in its Affidavit in Support stated a figure of \$187,395.48 as an estimate for the costs which would be incurred by the Defendant. This sum includes: the cost of \$70,000.00 for trial preparation; \$70,000.00 for an estimated 14-day trial; \$10,000.00 for disbursements; and the remainder of the sum for witnesses cost (National Fire Authority, Fiji Police Force, airfare from Australia for fire investigator, airfare from Canada for psychologist, accommodation for Canadian and Australian witnesses, accountant, architect and builder).
38. The Plaintiff assert that the provided list of witnesses is merely a proposed selection and, in any case, these individuals are essential for substantiating the Defendant's counterclaim rather than its defence. Consequently, they argue that the Defendant should be responsible for covering the costs associated with

its own witnesses. The Plaintiff further assert that this is a simple case and should take only 3 to 5 days for the substantive trial.

39. There are several cases, including ***Sunflower Aviation Ltd v Civil Aviation Authority of the Fiji Islands*** [2015] FJHC 336, ***Peters v Seashell @ Momi Ltd*** [2015] FJHC 581, ***Aerolink Air Services Pty Ltd v Sunflower Aviation Ltd*** [2014] FJHC 817, ***Neesham v Sonaisali Island Resort Ltd*** [2011] FJHC 642, and ***Bailiff v Tuivuna*** [2018] FJHC 909 where the Courts have required plaintiffs to deposit a substantial amount as security for costs. These cases may serve as reference points in determining an appropriate amount suited to the specific circumstances of the present case. However, they should not be regarded as rigid or binding precedents that constrain the Court's exercise of its discretion.
40. The Plaintiff's case may ultimately hinge on proving that the fire resulted entirely from the Defendant's negligence. Conversely, the Defendant's position may depend on the Court's assessment of the Plaintiff's alleged contributory negligence—specifically whether their actions contributed to the spread of the fire or whether they failed to mitigate the resulting loss and damage affecting both parties.
41. After having considered all the circumstances of the case, I am of the view that to order the amount of security for costs sought by the Defendant would be oppressive. Instead, I order that the Plaintiff pay security for costs of a much lesser sum of \$25,000.00, which is a just and equitable amount.
42. Accordingly, I make the following orders:
- (a) The Plaintiffs should deposit a sum of FJ \$25,000.00 at the High Court Registry within a month from today (by 20 June 2025);
  - (b) Costs will be in the cause; and
  - (c) The matter to be mentioned on 4 July 2025 to check the compliance of this Order by the Plaintiff.



**P. Prasad**  
**Master of the High Court**

**At Lautoka**  
**20 May 2025**