IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 100 of 2015

BETWEEN : **INOX WORLD PTY LIMITED** a limited liability company having its registered office at Unit 2, 10-12 Forsyth Close Wetherill Park, NSW, 2164.

PLAINTIFF

A N D : **SHOPFITTTINGS (FIJI) LIMITED** a limited liability company having its registered office at Shop 3, Namaka Lane, Nadi.

DEFENDANT

(Ms) Shoma Singh Devan for the Plaintiff
(Ms) Barbra Doton Jai for the Defendant

Date of Hearing: - 16th May 2016
Date of Ruling : - 12th September 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Defendant's "Notice of Motion" dated 29th September 2015, made pursuant to Order 23, rule 1 (a) of the High Court Rules, 1988 and inherent jurisdiction of the Court seeking an Order that the Plaintiff give security for the Defendant's costs in this action on the following grounds;

- The Plaintiff is resident abroad.
- The Plaintiff has no assets within the jurisdiction.

(2) The "Notice of Motion" is supported by an Affidavit sworn by one 'Rakesh Chand', the Director of the Defendant Company.

(3) The 'Notice of Motion' is vigorously contested by the Plaintiff. The Plaintiff filed an "Affidavit in Reply" sworn by one 'Micha Krunic', the General Manager of the Plaintiff Company, followed by an Affidavit in Response thereto.

(4) The Plaintiff and the Defendant were heard on the 'Notice of Motion'. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) <u>THE FACTUAL BACKGROUND</u>

(1) What are the circumstances that give rise to the present application? What is the case before me?

(2) To give the whole picture of the action, I can do no better than set out hereunder the averments/assertions of the pleadings.

(3) The Plaintiff in its Statement of Claim pleads *inter alia*;

> *Para 1. The Plaintiff is a limited liability duly incorporated in New South Wales, Australia and carrying on business inter alia as a wholesale supplier of a wide range of stainless fasteners and hardware.*
>
> *2. The Defendant is a limited liability company duly incorporated in Fiji and carries on business inter alia of retail of shop fittings and accessories.*
>
> *3. At all material times, the Defendant was a customer of the Plaintiff having purchased various goods from the Plaintiff on a credit and the payment for which was required to be made within 30 days at the end of each month.*
>
> *4. That between the period 13 August 2014, the Plaintiff sold and supplied to the Defendant, materials consisting of wing nuts, self-tapping screws, cup head square neck bolt and an assortment of other products to the total value of AU$107,683.30 (Australian One Hundred Seven Thousand Dollars Six Hundred Eighty Three Dollars and Thirty Cents).*

5. *The particulars of the invoices raised by the Plaintiff for the goods supplied are as follows:*

Invoice Date	***Invoice Number***	***Currency***	***Subtotal***	***Outstanding***
12/02/2015	*INV002532*	*AUD*	*14.03*	*14.03*
19/01/2015	*INV002344*	*AUD*	*755.60*	*755.60*
17/12/2014	*INV002207*	*AUD*	*208.50*	*208.50*
8/12/2014	*INV002104*	*AUD*	*280.00*	*280.00*
5/12/2014	*INV002085*	*AUD*	*27,902.00*	*27,902.00*
10/11/2014	*INV001834*	*AUD*	*7,925.00*	*7,925.00*
10/11/2014	*INV001829*	*AUD*	*2,040.00*	*2,040.00*
17/10/2014	*INV001622*	*AUD*	*42,160.25*	*41,611.75*
2/10/2014	*INV001488*	*AUD*	*200.00*	*200.00*
13/08/2014	*INV001165*	*AUD*	*51,936.75*	*23,166.57*
29/05/2014	*INV000605*	*AUD*	*3,579.85*	*3,579.85*

6. *On or about November 2014, the Defendant ordered from the Plaintiff two containers of certain materials being HDG bolts and nuts, stainless steel rods and batten screws that were shipped from Shanghai, China upon the request and order of the Defendant.*

7. *The first container of materials valued at A$32,587.68 was due to arrive in Fiji on 27 March 2015 and the second container with materials valued in the sum of $86,025.25 was due to arrive in Fiji on 17 April 2015 ["the said shipments"]*

8. *The Particulars of this shipment by the Plaintiff for the goods sold is as follows;*

Containers	***Ref Number***	***Arrival Date***	***Payment Due***	***Currency***	***Amount Due***
Container 8	*SO2622*	*27/03/2015*	*20/03/2015*	*AUD*	*$32,587.68*
Container 9	*SO2328*	*17/04/2015*	*10/04/2015*	*AUD*	*$86,025.25*

9. *The Defendant has refused to accept delivery of the said shipments referred to herein paragraph 8 and has failed to pay for the said materials which it purchased.*

10. *Thereafter, the Plaintiff in order to mitigate its loss redirected the said shipments from Fiji to Sydney, Australia and has thereby incurred charges in the total sum of AU$22,930.43.*

11. *That the Defendant by way of emails dated 21 January 2015 and 16 March 2015 has unequivocally admitted owing the monies to the Plaintiff and proposed arrangements to settle the debt owed to the Plaintiff.*

12. *The Plaintiff has made numerous requests and demands, latest of which is by a demand notice dated 29 April 2015 however the Defendant willfully neglected and/or pay the monies owed to the Plaintiff.*

13. *By reason of the matters herein, the Defendant is indebted to the Plaintiff for a total sum of AU$130,613.73.*

(4) Wherefore, the Plaintiff claims from the Defendant;

Para 1. *Judgment in the sum of AUD $130,613.73 (Australian One Hundred Thirty Thousand Six Hundred Thirteen Dollars and Seventy Three Cents)*

2. *Further interest at a rate of 13% per annum the Judgment sum pursuant to the Section 3 of the Law Reform (Miscellaneous) (Interest) Act Cap 27.*

3. *Costs of the proceedings on a full solicitor/client indemnity basis.*

4. *Such further and any other orders that this Honorable Court ma deem fit, just and expedient.*

(5) The Defendant in its Statement of Defence and Counter-Claim pleads *inter alia;*

Para 1. *THAT save as to admit that the Plaintiff carried on business inter alia as a wholesale supplier of stainless fasteners and hardware the Defendant has no knowledge of the allegations contained in paragraph 1 of the Statement of Claim therefore denies the same.*

2. *THAT the Defendant admits the allegations contained in paragraph 2 of the Statement of Claim.*

3. *THAT the Defendant admits the allegations contained in paragraph 3 of the Statement of Claim.*

4. *THAT the Defendant denies the allegations contained in paragraph 4 of the Statement of Claim.*

5. *THAT as to paragraph 5 of the Statement of Claim the Defendant states as follows;*

   a. *THAT the Defendant had paid the Plaintiff for goods supplied in invoice no. 001165 in the sum of $51,936.75 by direct debit on the 12th day of December 2014.*

   b. *THAT the Plaintiff had supplied goods to the Defendant from March 2014 to October 2014 to the value of $127,641.39*

c. *THAT the Plaintiff had misrepresented to the Defendant that the goods supplied would be of merchantable quality for the purpose of construction and as per the specifications ordered by the Defendant.*

d. *THAT the Plaintiff purported to deliver the goods to the Defendant however the Defendant informed the Plaintiff's National Sales Manager by telephone and by email that the said goods supplied were of inferior quality, did not meet the description of the goods ordered and were of merchantable quality.*

e. *THAT the Defendant accepted no liability therefore and was holding the said goods at the Plaintiff's disposal pending further negotiations.*

6. *THAT save as to admit that the Defendant had ordered a further two containers from the Plaintiff the Defendant denies the allegations contained in paragraph 6 of the Statement of Claim and further states as follows:*

a. *THAT due to the dispute between the Plaintiff and Defendant as to the quality and specifications of the goods supplied by the Plaintiff the Defendant cancelled the shipment order with the Plaintiff prior to the shipment being released.*

b. *THAT the Plaintiff had advised the Defendant via email on the 30th day of January 2015 that the shipment would not be released until the amount disputed by the Defendant was paid.*

c. *THAT despite being notified of the cancellation of the shipment and despite the Plaintiff informing the Defendant that it would not ship the goods the Plaintiff still proceeded to dispatch the shipment to the Defendant.*

7. *THAT the Defendant admits the allegations contained in paragraph 7 and 8 of the Statement of Claim and reiterates what has been stated in paragraph 6 hereinabove.*

8. *THAT as to paragraph 9 of the Statement of Claim the Defendant denies that it owes the Plaintiff any monies for the said shipments and repeats paragraph 6 hereinabove.*

9. *THAT the Defendant has no knowledge of the allegations contained in paragraph 10 of the Statement of Claim therefore denies the same.*

10. *THAT save as to admit that the Defendant did send the emails to the Plaintiff as per paragraph 11 of the Statement of Claim the Defendant denies that the Defendant had unequivocally admitted owing the monies to the Plaintiff and further states that the amount*

proposed by the Defendant was for other goods supplied by the Plaintiff that were not contested by the Defendant.

11. *THAT as to paragraph 12 and 13 of the Statement of Claim the Defendant denies that it owes the Plaintiff any monies as alleged.*

12. *THAT the Plaintiff's claim is frivolous and vexatious and is an abuse of the court process and therefore ought to be struck out with costs to the Defendant.*

13. *THAT the Plaintiffs have failed to disclose any reasonable claim against the Defendant and therefore it ought to be struck out with costs to the Defendant.*

SAVE as to what has been specifically admitted hereinabove the Defendant denies each and every allegation contained in the Statement of Claim.

STATEMENT OF COUNTERCLAIM

14. *THAT the Defendant repeats the allegations contained in paragraph 1-13 hereinabove.*

15. *THAT the Defendant has been operating its business of selling shop fittings and accessories since on or about the year 2000.*

16. *THAT the Plaintiff's National Sales Manager was known to the Defendant prior to dealings with the Plaintiff as the National Sales Manager had supplied goods to the Defendant whilst he was employed at James Glen Pty Limited, a supplier of the Defendant.*

17. *THAT the Plaintiff's National Sales Manager contacted the Defendant via telephone and informed the Defendant that he was now employed by the Plaintiff and that the Defendant should order goods from the Plaintiff.*

18. *THAT the Plaintiff's National Sales Manager represented to the Defendant that the quality of the products supplied by the Plaintiff would be the same and/or superior to the quality of that of his former employers, James Glen Pty Limited.*

PARTICULARS OF MISREPRESENTATION

a. *Misrepresented and or induced the Defendant to believe that the quality of the Plaintiff's goods were the same and/or superior to the goods supplied by James Glen Pty Limited.*

b. *Misrepresented and or induced the Defendant to believe that the Plaintiff would provide the same service and quality of goods to the Defendant as that of James Glen Pty Limited.*

19. *THAT the Defendant who had trust and confidence in the Plaintiff's National Sales Manager through its successful dealings with James Glen Pty Limited relied on the representations made by him and from on or about the 20th day of March 2014 to on or about the 17th day of October 2014 ordered goods on credit from the Plaintiff to the value of $127,641.39.*

20. *THAT the Plaintiff was at all material times aware that the purpose for which the Defendant was purchasing the goods was for the sale and distribution of the goods for building construction and infrastructure having supplied the same goods to the Defendant whilst being previously employed by James Glen Pty Ltd.*

21. *THAT the intention of the Plaintiff was to induce the Defendant to act on its misrepresentation and enter into a contract for the sale and supply of goods with the Plaintiff.*

22. *THAT in relying on the Plaintiff's representation the Defendant materially altered its position in that the Defendant ordered goods from the Plaintiff instead of James Glen Pty Limited and paid monies to the Plaintiff for the said goods.*

23. *THAT the Plaintiff delivered goods to the Defendant however upon the Defendant selling the said goods to its customers the goods were returned as it was discovered that in breach of the contract the Plaintiff had supplied goods of unmerchantable quality and that were not as per the specifications of the goods ordered.*

24. *THAT the Plaintiff's said representation was false and was made negligently or was made in breach of the duty of care owed to the Defendant, whereby the Defendant has suffered loss and damage.*

PARTICULARS OF FALSITY

DATE	***INVOICE NO.***	***AMOUNT***	***CONTESTED AMOUNT***	***BREACH***
29/05/14	*000605*	*$3,579.85*	*$3,579.85*	*Thread rods supplied by the Plaintiff were not as per description or Order. The Defendant had ordered galvanized rods however the Plaintiff had supplied zinc rods.*
17/10/14	*001622*	*$42,160.25*	*$30,366.30*	*Thread rods did not have 8.8 stamp. Washers were under sized and did not fit.*

11/06/14	*000615*		*$5,941.94*	*Washers were smaller in size than what was ordered and cannot be used*
11/06/14	*000155*		*$36,910.00*	*Nails were very thin and not as per Order. Nails not suitable for building and construction*
20/03/14	*000001*		*$50,843.30*	*Screw heads break off. Goods not of merchantable quality.*
TOTAL DISPUTED AMOUNT			***$127,641.39***	

25. *THAT the Defendant's customers returned goods supplied by the Plaintiff for the reasons stated hereinabove upon discovering the defects in the goods.*

26. *THAT the Defendant has paid the Plaintiff for goods supplied in invoice numbers 000615, 000155 and 000001 which accumulates to the sum of $93,695.24.*

27. *THAT the Defendant informed the Plaintiff's National Sales Manager and General Manager of the issues with the goods supplied and has on numerous occasions requested the Plaintiff to collect the goods and provide the Defendant with a credit note for the sum of $93,695.24 however the Plaintiff has either failed and/or neglected to do so.*

28. *THAT the Defendant accepted no liability for the disputed goods and was holding the said goods at the Plaintiff's disposal pending further negotiations.*

29. *THAT the Defendant has had to keep the goods supplied by the Plaintiff in storage and as a result the Defendant is not able to utilize the said storage space and has had to incur further costs to extend its bulk storage space to cater for storage of other shipments.*

30. *THAT as a result of the Plaintiff's aforesaid wrongful and unlawful actions the Defendant has suffered loss and damages.*

PARTICULARS OF LOSS & DAMAGES

a. *Total sum paid by the Defendant to the Plaintiff - $93,695.24*

b. *Unable to sell goods supplied by the Plaintiff.*

c. *Loss of reputation amongst its clientele.*

d. *Unable to utilize space occupied by the defective goods in its storage.*

e. *Cost of extension of bulk*

31. *THAT at all material times the Plaintiff knew or ought to have known that the Defendant was a business entity who would utilize the monies in its business.*

32. *THAT the Plaintiff has caused great inconvenience and hardship to the Defendant.*

(6) Wherefore the Defendant prays;

a) *The sum of $93,695.24 as per paragraph 26,*

b) *Interest on the sum of $93,695.24 at a rate of 13% per annum pursuant to the Law Reform (Miscellaneous) Interest Act Cap 27.*

c) *Punitive Damages*

d) *General Damages*

e) *That the Plaintiff's claim against the Defendant be struck out.*

f) *That the Plaintiff pay costs to the Defendant on a Solicitor/Client indemnity basis.*

(C) THE STATUS OF THE SUBSTANTIVE MATTER

(1) The action was instituted by the Plaintiff on 24th June 2015, by way of Writ of Summons and Statement of Claim.

(2) The pleadings in the action begun by way of Writ of Summons was closed on 16th September 2015.

(3) On 15th September 2015, the Plaintiff filed Summons for Directions.

(4) On 01st October 2015, the Defendant filed the 'Notice of Motion' herein for 'Security for Costs'.

(D) THE DEFENDANT'S NOTICE OF MOTION FOR 'SECURITY FOR COSTS'

(1) The Defendant's Notice of Motion for Security for Costs is supported by an Affidavit sworn by one 'Rakesh Chand', the Director of the Defendant Company, which is substantially as follows;

*Para 1. THAT I am the Director of the Defendant Company and am duly authorized by the Defendant to swear this Affidavit on behalf of the First Defendant. Annexed hereto and marked as "**RC1**" is a copy of the Authority from the Defendant.*

2. THAT in so far as the content of this affidavit is within my personal knowledge it is true, in so far as it is not within my personal knowledge; it is true to the best of my knowledge and information and belief.

3. THAT to the best of my knowledge, information and belief the Plaintiff is a company duly registered in New South Wales, Australia, with its registered office situated at Unit 1, 10-12 Forsyth Close Wetherill Park, NSW, 2164.

4. THAT the Plaintiff's claim against the Defendant is for money allegedly owed to the Plaintiff for various goods sold on credit.

5. THAT the Defendant denies the allegations made by the Plaintiff in its claim and has also filed a counterclaim against the Plaintiff on the 3rd day of August 2015 claiming, inter alia, damages for the Plaintiff supplying goods to the Defendant that were of unmerchantable quality and that were not as per the specifications of the goods ordered.

6. THAT if the Plaintiff fails in its claim against the Defendant, and the Court orders that the Plaintiff pay the Defendant's costs of defending these proceedings, it will be difficult for the Defendant to recover its costs incurred in defending these proceedings against the Plaintiffs as:-

i) the Plaintiff is a company registered outside the jurisdiction of this Honourable Court

ii) the Plaintiffs foes not own any property in Fiji.

*7. THAT the Defendant had instructed its solicitors to write to the Plaintiff's solicitors and by their letter dated the 24th day of August 2015 requested the Plaintiff's solicitors to deposit into the Lautoka High Court registry the sum of Twenty Thousand Dollars ($20,000.00) or any other sum as mutually agreed by the parties as security for costs. A copy of the said letter is annexed hereto and marked as annexure "**RC2**".*

8. THAT I am advised by the Defendant's solicitors and verily believe that by the same letter the Defendant's solicitors had requested the

Plaintiff to disclose whether it had any assets within the jurisdiction of the Honourable Court.

9. *THAT I am advised by the Defendant's solicitors and verily believe that the Plaintiff by their solicitors wrote a letter dated the 25th day of August 2015 advising that they would revert back to the Defendant's solicitors upon obtaining instructions from their client. A copy of the said letter is annexed hereto and marked as annexure "**RC3**".*

10. *THAT I am advised by the Defendant's solicitors and verily believe that the Plaintiff's solicitors have not written back to the Defendant's solicitors to date.*

11. *THAT to the best of my knowledge and belief the Plaintiff does not have any assets in Fiji and it has now become necessary to ix an amount for security for costs to be paid by the Plaintiff.*

12. *THAT the Plaintiff has stated its address in the Writ of Summons to be Unit 2, 10-12 Forsyth Close Wetherill park, NSW, 2164.*

13. *THAT the Defendant has incurred legal costs and will continue to incur legal costs in this matter.*

14. *THAT should the Plaintiff not pay any security for costs then any costs awarded by the Court against the Plaintiff would be difficult and costly to recover from the overseas based company as execution of any cost order in Australia would be expensive considering the current money exchange rate.*

15. *THAT the Defendant has a meritorious defence against the Plaintiff's claim and has filed a counterclaim seeking damages against the Plaintiff.*

16. *THAT I therefore pray for orders in terms of the application herein with costs to the Defendant.*

(2) The Plaintiff filed an Affidavit in Reply sworn by one 'Micha Krunic', the General Manager of the Plaintiff Company which is substantially as follows;

Para 1. *I am the General Manager of the Plaintiff Company and am duly authorized to depose to matters herein on its behalf.*

2. *I depose as follows from my own knowledge, from the contents of documentary material in company's files and from information to the best of my knowledge and belief. Such facts and matters, in so far as are within my knowledge are true. In so far as they are not within my knowledge, they are true to the best of my information and belief.*

3. *I crave leave of this Honourable |Court to refer to the Affidavit of Rakesh Chand sworn on the 29th of September 2015 and filed on 1 October 2015 ("Defendant's Affidavit") and set forth my response to the same*

4. *I agree with paragraphs 3 and 4 of the Defendant's Affidavit.*

5. *In respect to the matters stated in paragraph 5, I state as follows:*

   (i) *There is no merits in the Defendant's counterclaim as up and until we served winding up notice on the Defendant Company, it had never raised any issues inter alia concerning the 'unmerchantable quality' of the products that had been supplied by the Plaintiff to the Defendant.*

   (ii) *That prior to our company taking legal action to recover the outstanding debt for materials and goods supplied, the Defendant had been negotiating with the plaintiff and requesting time to pay for its invoices. Copies of emails dated January 2015 and 16 March 2015 are annexed hereto marked "**MK-1**" and "**MK-2**".*

   (iii) *Each product that had been supplied to the Defendant were in fact supplied on the specifications and order that was given by the Defendant. Some of the emails pertaining to certain unpaid orders are annexed hereto marked "**MK-3**".*

   (iv) *Of further relevance is the fact that goods were brought on credit by the Defendant and as per the terms of credit, the Defendant was contractually obliged to raise a dispute regarding the quality, quantity, misdescription of any product within 7 days of receipt of goods from the Plaintiff. This is clearly stated in our invoices that have been rendered and provided to the Defendant. An example of an invoice rendered to the Defendant earlier is annexed hereto marked "**MK-4**".*

   (v) *By reason of the above matters and in particular the previous admissions of debt, the Defendant's counterclaim is frivolous and one that is not grounded on facts and evidence.*

6. *I disagree with paragraph 6 of the Defendant's affidavit in so far as the Defendant claims that any costs order(s) will not be met by the Plaintiff Company. I further state as follows:*

   (i) *I admit that the Plaintiff is a non-resident company and does not own any assets in Fiji however the Plaintiff Company is legally advised that these are no longer the only factors that a Court of law would consider to order security for costs to be paid.*

   (ii) *The Plaintiff is a reputable and financially stable company and is able to provide an undertaking as to payment of costs in the event such an order is made.*

(iii) *Furthermore, the Plaintiff Company has been in existence since August 2013 and was legally incorporated on 21st August 2012. A true copy of Plaintiff Company's certificate of incorporation is annexed hereto marked "**MK-5**".*

(iv) *It currently has in its employ nine full time employees.*

(v) *The Plaintiff has an annual turnover of approximately AU$3 million and is rapidly expanding with over 500 active customers both from within Australia and Fiji.*

(vi) *The Plaintiff Company has never had any liquidity problems and has no outstanding debtor issues with any other of its customers. Added to this, the Plaintiff Company has been submitting its quarterly tax returns with the Australian Taxation Office. Copies of recent quarterly tax returns are annexed hereto marked "**MK-6**".*

(vii) *The Plaintiff as at the filing of the within answering affidavit has stock in hand which is worth over $2 million.*

(viii) *The Plaintiff has established a full trading website. Plaintiff's web pages from its website are annexed hereto marked "**MK-7**".*

7. *I disagree with the Defendant on paragraphs 10 to 16 of its Affidavit and respond as follows:*

(i) *The Plaintiff Company is legally advised that there is a high likelihood or probability that the Plaintiff Company will succeed in its claim. This is grounded on the following matters:*

(a) *There were clearly agreements with the Defendant for supply and purchase of materials comprised of wing nuts, self tapping screws, cup head square neck bolts and an assortment of other products to the value of AU$107,683.30. Copies of invoices and various emails between the parties are annexed hereto marked "**MK8 to MK17**".*

(b) *The Defendant has prior to legal action unequivocally admitted owing monies to the Plaintiff for the supply of materials. At no point during the email discussions did the Defendant raise any issues regarding the merchantable quality or otherwise of the materials that had been supplied. This in*

itself demonstrates that the Defendant has no defence to the Plaintiff's claim.

(ii) *The Defendant between August 2014 and January 2015 was shipped certain goods and materials to the value of AU$137,000 which the Defendant company currently still holds. These goods are valuable security for any costs until the determination of the within action.*

(iii) *I further believe that the Defendant's application for security for costs is purely designed to stifle the claims of the Plaintiff. The Plaintiff is currently owed AU$130,613.73 out of which a sum of AU$71,830.95, the Defendant had made arrangements to pay. This admitted sum by far exceeds the security of costs sought for the sum of $20,000.00. It is only proper that the Court refuse the Defendant's application as the Defendant can secure itself by paying the admitted amount into Court.*

(iv) *The Plaintiff company will further be prejudiced if security for costs in the sum of $20,000.00 is ordered given that the Plaintiff company is already owed a substantial amount of debt by the Defendant.*

8. *The Plaintiff Company is further advised that security for costs ordinarily is not ordered on a solicitor/client indemnity basis. In the event the Court is minded to fix security for costs, we believe that a sum less than $5,000.00 would be appropriate.*

9. *I believe that given the facts and circumstances of the within matter, no proper or just grounds for an order for security for costs is made out by the Plaintiff.*

10. *I therefore pray that the Defendant's application be dismissed with costs to the Plaintiff Company.*

(E) <u>THE LAW</u>

(1) Against this factual background, it is necessary to turn to the applicable law and Judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the Defendant now seeks.

(2) Rather than refer in detail to the various authorities, I propose to set out, with only very limited citations, what I take to be the principles of the play.

(3) Provisions relating to security for costs are contained in Order 23, rule 1 of the High Court Rules, 1988.

Order 23, Rule 1 of the High Court Rules provides as follows:

SECURITY FOR COSTS
Security for costs of action

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

c) Subject to paragraph (2), that the plaintiff's 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 proceeding as it thinks just."*

The use of the words **"having regard to all the circumstances of the case, the Court thinks it just to do so, it may order"**, confers upon the Court a real discretion on whether or not to order security for costs.

It is to be noted that residence outside the jurisdiction enables, but does not require, the court to order security for costs of the action. As Sir Nicolas Browne-Wilkinson V, -C, put it in **Porzelack K.G. v. Porzelack (U.K.) Ltd**. [1987] 1. W.L.R. 420, 422-423:-

"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 to Plaintiffs resident within the jurisdiction. There is only one exception to that, so far as I know, namely, in the case of limited Companies, where there are provisions under the Companies Act for security for costs. Where the Plaintiff resident outside the jurisdiction is a foreign limited Company, different factors may apply: see DSQ Property Co. Ltd. v Lotus Cars Ltd. [1987] 1 W.L.R. 127. Under the R.S.C., Order 23, r.1 (1) (a), it seems to me that I have 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."

The **White Book (1999)** further discussed the development of the law till 1999, which is applicable to Fiji. At page 431 (23/3/5) of the White Book;

"The ordinary rule of practice is that no order for security for costs will be made if there is a co-plaintiff resident within the jurisdiction (Winthorp v. Royal Exchange Assurance Co. (1755) 1 Dick. 282; D'Hormusgeev Gray (18820 10 Q.B.D. 13). The ordinary rule, however, is subject to the general discretion of the Court; it is not an unvarying rule. Its application is appropriate where the foreign and English co-plaintiffs rely on the same cause of action, where each of the Plaintiff is bound to be held liable for all of such costs as may be ordered to be paid by any of the Plaintiffs to the Defendant at the conclusion of the trial, and where one or more of the Plaintiffs has funds within the jurisdiction to meet such liability."

In **Huang Tzung-Hao v A Team Corporation Ltd** **[2003] FJHC 288; HBC 0346r. 1988s** Justice Pathik stated as follows on the issue of security for costs application and Order 23 generally;

"The defendants are entitled to make the application. The onus is on them to prove that the Plaintiff is "ordinarily resident" out of jurisdiction and this they have done. In fact there is no dispute on this aspect.

*The power to make an order for security costs is entirely discretionary (vide **Aeronave S.P.A v Westland Charters Ltd [1971] 1 W.L.R. 1445**). It is stated in The Supreme Court Practice 1988 Vol 1 Or. 23/1-3/3:*

"On the other hand, as a matter of discretion, it is the usual ordinary or general rule of practice of the Court to require the foreign plaintiff to give security for costs, because it is ordinarily just to do so, and this is so, even through by the contract between the parties, the foreign plaintiff is required to bring the action in England (see Aeronave 1445, supra)."

The purpose of the discretion to order for costs against a foreign plaintiff was described in **Corfu Navigation Co. v. Mobil Shipping Co. Ltd** **[1991] 2 Lloyd's Rep. 52 (p.54 Lord Donaldson MR)** –

"The basis principle underlying R.SC, 023, r.1 (1) (a) 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 costs against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order can be executed."

At p.55, Lord Donaldson MR further said –

> *In the context of the present appeal it has to be remembered that the purpose of O.23, r.1 is not make it difficult for foreign plaintiffs sue, but to protect defendants."*

Consistently with this, Para 23/3/4 of the **White Book of 1999** states that why **security for costs** is not ordered as a matter of course –

> *"On the other hand, as a matter of discretion, it is the usual ordinary or general rule of practice of the Court to require the foreign plaintiff to give security for costs, because it is ordinarily just to do, and this is to, even though by the contract between the parties, the foreign plaintiff is required to bring the action in England (Aeronave SP v Westland Ltd) [1971] 1 WLR 1445; [1971] 3 All ER 531, CA)."*

The rationale in award of **security for costs** was also described in **Sharma v Registrar of Titles [2007] FJHC 118, HBC 351 of 2001 (13 July 2007),** where Master Udit elaborated further –

> *"[3] 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 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, in 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."*

(F) ANALYSIS

(1) Before passing to the substance of the Defendant's Notice of Motion seeking of security for costs against the Plaintiff, let me record that Counsel for the Plaintiff and the Defendant in their written submissions has done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by Counsel for both parties as well as to the written submissions and the judicial authorities referred to therein.

(2) I ask myself, what is the question in these proceedings?

The Defendant is seeking an Order for security for costs against the Plaintiff.

The primary grounds for the Defendant as to why security for costs should be ordered are;

- The Plaintiff is permanently a resident out of the jurisdiction of the Court.
- The Plaintiff has no assets within the jurisdiction of the Court.

(3) THE POWER TO ORDER SECURITY FOR COSTS

As I already mentioned, provisions relating to security for costs are contained in Order 23, rule 1 of the High Court Rules, 1988.

Order 23, Rule 1 of the High Court Rules provides as follows:

> **SECURITY FOR COSTS**
> **Security for costs of action**
>
> *"1(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court –*
>
> *d) That the Plaintiff is ordinarily resident out of the jurisdiction; or*
>
> *e) That the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will unable to pay the costs of the defendant if ordered to do so; or*
>
> *f) Subject to paragraph (2), that the plaintiff's 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 proceeding as it thinks just."*

The use of the words "**having regard to all the circumstances of the case, the Court thinks it just to do so, it may order**", confers upon the Court a real discretion on whether or not to order security for costs.

The real origin of the jurisdiction to Order security for costs is to cater for the case of a non-resident Plaintiff who is seeking to take advantage of the Jurisdiction of domestic Courts, should be required to produce security for the payment of the costs of the party within the jurisdiction who is sued, in case the action showed fail. [Per Farwell L.J. in "**New Fenix Compagine Anonyme D Assurances de Madrid v General Accident, Fire and Life Assurance Corporation Ltd;** (1911) 2. K.B. 619 at 630P).

The apparent concern is that a non-resident Plaintiff, particularly one without assets in the jurisdiction, could avoid liability for an adverse costs Order precisely because his or her non-residency would make it difficult if not possible for the Defendant to enforce the Order. [Per Morling J, in "**Barten v Ministry of Foreign Affairs** (1984) 2 FCR 463P.]

(4) As the evidence presently stands, the Plaintiff is permanently a resident out of the jurisdiction of the Court. **I am satisfied on this point**. Ordinarily, once it is established that the Plaintiff is not permanently a resident in Fiji, the "**onus**" shifts to the Plaintiff to satisfy the Court that it has property within the jurisdiction which can be made subject to the process of the Court. (See; **Babu Bhai Patel v Manohan Aluminium, Glass Fiji Ltd, Suva High Court Civil Action No. HBC 0019/19**).

"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" (per "Thesiger" L.J. in "**Redondo v Chaylor" (1879) 40 L.T. 797.**)

See also;

* Brown L.J. in **Ebrard v Gassier (1884) 28 Ch. D. 232**
* Greer L.J. in **"Kerokian v Burney" (1937) 4 A.E.R. 468**
* **Reddra v Chaytor (1879) 40 L.T. 797**

In the case before me, the Plaintiff being resident abroad is prima facie bound to give security for costs.

In order to defeat the Defendant's application for security for costs, a number of challenges were ventured by the Plaintiff.

As I understand the evidence, **first** the Plaintiff has annexed to its 'Affidavit in Reply' sworn on 23rd November 2015, its 'quarterly returns' to show that it is able to pay any costs awarded by the Court.

As against this, I do not forget what was said in argument by (Ms) Doton, Counsel for the Defendant. (Ms) Doton's contention was that the Plaintiff's 'quarterly returns' are irrelevant to the application herein. She goes on to argue that the premise for filing the application herein is to avoid the risk of having to enforce a judgment for costs in a foreign jurisdiction should the Defendant succeed and not whether the Plaintiff has the funds to pay. She also asserted that the funds the Plaintiff has is located in a foreign jurisdiction and not within the jurisdiction.

During the course of the arguments, she took me through what Sir Nicolas Browne Wilknson V.C. said at a passage in p.1076 of **Porzelack (UK) Ltd, (1987)**: The passage is this;

> *"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 endorse 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."*

As against this, I heard no word said on behalf of the Plaintiff. (Ms) Devan, Counsel for the Plaintiff did not argue on this point.

I must confess that I acknowledge the force of the submissions by Counsel for the Defendant, (Ms) Doton.

I closely read the decision of **Porzelack (UK) Ltd, (1987)**. The case of 'Porzelack' which was cited by (Ms) Doton certainly appears to carry her good way in her argument.

It is perfectly clear to me that the 'quarterly returns' referred to in Plaintiff's 'Affidavit in Reply' affords no real security to the Defendant. The Plaintiff being resident abroad is prima facie bound to give security for costs and if it desired to escape from doing so it is bound to show that it has 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 Defendant being entitled to the costs of the action. It does not appear that the Plaintiff has property within the jurisdiction of the Court to exempt the Plaintiff from the ordinary liability to give security for costs to satisfy the Defendant if the action should be decided against the Plaintiff.

Secondly the Plaintiff in its 'Affidavit in Reply' has deposed in paragraph 7 (ii) that the Defendant was shipped certain goods and materials to the value of AUD$137,000.00 which the Defendant still holds and suggests that the goods are valuable security for any costs until determination of the within action.

The Defendant responds to this suggestion by the Plaintiff in paragraph 6 (d) of its 'Affidavit in Response'. The Defendant deposes that the goods supplied by the Plaintiff could not be sold due to quality issues and some items that were sold had been returned by the Defendant's customers and as such the said items would not be good security.

During the course of the arguments, (Ms) Doton, Counsel for the Defendant, took me through a passage **at Para 23/3/5 of the White Book (1999)** and submitted that the goods suggested by the Plaintiff cannot be used as security as the goods are the subject of litigation in the proceedings herein and the Defendant has made allegations of their unmerchantable quality. In the same breath, she asserted that the said goods are not good security and the Plaintiff ought to pay security for costs.

The passage (Ms) Doton relied on is this;

> *"Foreign plaintiff with property in England (rr.1-3) – Security will not be required from a person permanently residing out of the jurisdiction, if he has substantial property, whether real or personal, within it (Redondo v Chaytor (1879) 4 QBD 453 at 457; Hamburgher v Poetting (1882) 47 LT 249; Clarke v Barber (1890) 6 TLR 256; Redfern v Redfern (1890) 63 LT 780); and the same rule applies to a foreign company (Re Apollinaris Co.'s Trade Marks (1891) 1 Ch1); but semble,* ***the property must be of a fixed and permanent nature, which can certainly be available for costs*** *(Ebrard v Gassier (1884) 28 CH D 232);* ***or at any rate such as common sense would consider to be so*** *(Re Apollinaris Co.'s Trade Marks (1891); and such person must show that it is so available (Sacker v Bessler & Co (1887) 4 TLR 17)."*

I closely read the passage cited by (Ms) Doton. The passage certainly appears to carry her a good way in her argument. As against this, I heard no word said on behalf of the Plaintiff. (Ms) Devan, Counsel for the Plaintiff did not argue on this point.

I must confess that I acknowledge the force of the submissions by Counsel for the Defendant, (Ms) Doton.

I wish to emphasise that the goods which are the subject of litigation in the proceedings herein does not assist the Plaintiff because the goods are not unencumbered.

Having assets is insufficient for the purpose of being excused from giving security for costs. Any such assets must readily be converted to pay the costs, rather than the mere possibility of it being recovered at a future date again at an extra expense.

In the context of the present case, I am inclined to lean in favour of the judicial thinking reflected in the decision of Master J.Udit in **"Sharma v Registrar of Titles" (2007) FJHC 118**. The Learned Master held;

"Substantive Assets in Fiji

Ms Kenilorea's second ground is that the Plaintiff has substantive assets in Fiji. In support, she cited a decision of His Lordship Mr Justice Fatiaki (as he then was and now the Honourable Chief Justice) in ***Babu Bhai Patel v Manohan Aluminium, Glass Fiji Ltd, Suva High Court Civil Action No. HBC 0019/19*** *(14th November, 1997). In that matter, a similar submission was unsuccessfully advanced. It was argued that the appellant had valuable real estate asset in Fiji, and had continuing "interest and active participation in an operating*

wholesale business in the country and his regular visits in Fiji". His Lordship after referring to the general principle that:-

> *"... if a Plaintiff, who is permanently residence 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 drawn, the rule given way, and the Court will not order security to be given, citing from* ***Reddro v. Chaytor*** *(1879) 40 L.T. 797."*

held :-

> *"In the present case however the trial magistrate correctly noted that the appellant's property was not unencumbered; had not been rented out since March 1997; and indeed, the appellant 'was not even sure whether mortgage repayments were up to date or not', Quite plainly once it had been established that the appellant was not ordinarily resident in Fiji, the 'onus' shifted to him to satisfy the trial magistrate that he came within the above-mentioned 'exception' and clearly he failed to discharge that 'onus'"*

Once again this authority does not assist the plaintiff. Having assets is insufficient for the purpose of being excused from giving security for costs. Any such assets must readily be converted to pay the costs, rather than the mere possibility of it being recovered at a future date, again, at an extra expense.

Certainly, the Plaintiff has the land which is subject to this litigation. However, there is no evidence as to whether the land is unencumbered or not. Ms Kenilorea did not elaborate this further in her submissions. Additional properties offered to satisfy the costs are the shares which the Plaintiff owns in Pacific Green Fiji, Fiji TV, R.B.Patel & Co. Ltd, Communication Fiji Ltd, Fiji Sugar Corporation and Colonial First State. How does one convert the shares to satisfy an order for costs? What is the value of the shares? None of the Counsel assisted me on this. However, since this is a discretionary matter, in my view any such security is inadequate for two reasons. Firstly, there is no Order restraining the disposal of the land or shares. Nor is there any evidence of an undertaking given to the Court by the Plaintiff obliging him not to dissipate the land or shares until the action if finally determined. Secondly, any enforcement of the Order would unavoidably result in further applications to Court, such as registering a Judgment against the title etc., thus incurring additional unwarranted expenditure and frustration.

<u>Land subject of litigation</u>

Thirdly, and lastly, on behalf of the Plaintiff it is submitted that the land which is subject of this litigation will be subdivided and sold. Income derived from the sale of the said land as a whole or after subdivision is submitted to be sufficient security to satisfy any order for costs. Currently, the only impediment in the access. In reply Mr Veretawatini classified this as a very vague and uncertain assertion which is predicated upon future conduct, which may or may not eventuate. In any event, there is reason no for the defendants to wait for the Plaintiff to organise his life and property, before they enjoy the fruits of their

success. I am in agreement with Mr Verewatini's submissions on this point, and dismiss the Plaintiff's objection based on this ground."

(Emphasis Added)

In my Judgment, the Plaintiff in the present case has failed to discharge the onus. The Plaintiff has failed to establish that it has substantive assets in Fiji.

As I said earlier, having assets is insufficient for the purpose of being excused from giving security for costs. Any such assets must readily be converted to pay the costs, rather than the mere possibility of it being recovered at a future date, again, at an extra expense.

Once impecuniosity of the Plaintiff is shown, there might be in the absence of further material a predisposition towards the protection of the Defendant from being sued by the impecunious Plaintiff. But it is also very clear that once the Court enters upon considerations relevant to the particular case the ultimate decision must depend upon the balance of justice and common sense.

Thirdly, the Plaintiff in its 'Affidavit in Reply' has deposed in paragraph 7 (iii) that the total sum claimed by the Plaintiff is AUD$130,613.73 out of which a sum of AUD$71,830.95, the Defendant had admitted and made arrangements to pay. The Plaintiff deposes that this admitted sum by far exceeds the security for costs sought for the sum of $20,000.00.
Moreover, during the course of the arguments, it was pointed out by (Ms) Devan, Counsel for the Plaintiff that the Defendant can secure itself by paying the admitted amount into Court. Reference was made in arguments to the following judicial decisions.

- Hogan v Hogan (No.2)
  (1924) 2 IR.14

- DC St. Martin v Davis & Co
  (1884) WN 86

As against this, I heard no word said on behalf of the Defendant. (Ms) Doton, Counsel for the Defendant did not argue on this point.

I closely read the two judicial decisions cited by (Ms) Devan, Counsel for the Plaintiff. They throw some light on the question to be resolved. They determine the present case.

As I understand the Pleadings, the Plaintiff who resides out of the jurisdiction sued the Defendant for AUD $130,613.73, goods, materials supplied to the Defendant. The goods or materials supplied mainly consisted of wiring nuts, self tapping screws, bolts and an assortment of other products. The Defendant has admitted that goods have been supplied, however it asserts that the goods were not of merchantable quality and description of the goods were essentially misrepresented by the Plaintiff. But the Defendant has offered to pay for **uncontested goods** worth AUD$71,830.95, which the Plaintiff accepted as per reply sent by the Plaintiff's National Sales Manger

on the 21st January 2015. The Defendant's proposed payment plan has been annexed to the Defendant's 'Affidavit in Response' and marked as "**RC-3**".

The clear position that emerges from this is that the Defendant has admitted a large portion of the claim of the Plaintiff and it exceeds the sum sought by the Defendant as Security for costs, viz, AUD $20,000.00.

Thus, this would debar me from making an Order for Security for Costs. The Defendant can apply for an Order that the admitted sum be not paid out until the counter claim is determined.

Is there any authority which precludes me from giving effect to the view which I have expressed?

(5) EXERCISE THE DISCRETION TO ORDER SECURITY FOR COSTS

Let me assume for a moment that the Defendant had not offered to pay for uncontested goods.

I consider the following;

That the Plaintiff is permanently a resident outside the jurisdiction and has no assets in Fiji is a circumstance of great weight favouring a security order. **I am of course mindful to the fact that the making of an Order for security for costs is discretionary and the Courts no longer adopt a rigid rule. [See, M.J. Raine, - "Locals we trust – Foreigners pay cash; rethinking security for costs against Foreign Residents" (2012) 1 JCIVP 210 at 214P)**

As was established by the Court in '**Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd" (1973) (1) Q.B. 609**, the Court has a complete discretion whether to order security, and accordingly it will act in light of all the relevant circumstances. It is a venerable principle that poverty or even insolvency on the part of a Plaintiff will not itself attract a requirement for security for costs conditioning the right to institute and/or conduct legal proceedings. If there is reason to believe that the Plaintiff cannot pay costs, then security "**may**" be ordered. There is not however any requirement that it "**must**" be ordered. The Court has a discretion which it will exercise considering all the circumstances of the case. In exercising its discretions the Court needs to weigh up the competing interests of the parties having regard to all of the facts and circumstances of the case.

The answer is to be found by ascertaining where, on considerations of what is just and reasonable, the balance rests between the risk of exposing an innocent defendant to the expense of defending his position and the risk of unnecessarily shutting out from relief a Plaintiff whose case if litigated would result in his obtaining that relief.

The Court's discretion is unfettered; each case must depend on its own circumstances. See; **Bell Wholesale Co. PVT Ltd v Gates Export Corporation (1984) 2 FCR 1.**

The Court should do Justice to each of the parties attempting not to prejudice the Defendant and attempting not, if possible, to shut out the Plaintiff from litigating its complaints.

See; **M A Products Pty Ltd v Austarama Television Pty Ltd; (1982) 7 ACLR 97.**

In exercising the discretion the Court needs to weigh up the competing interests of the parties having regard to all of the facts and circumstances of the particular case.

See; **Drumdurne Pty Ltd v Braham (1982) 64 FLR 227**

In "**Spiel v Commodity Brokers Australia Pty Ltd" (1983) 35 5 ASR 294**, Bullen J reaffirmed the position adopted in "**John Arnold's Surf Shop Pty Ltd v Heller Factors Pty Ltd (1979) 22 SASR 20**, and said at Page 300;

> *"The discretion is a wide one. The Judge or Magistrate asked to order security for costs should not approach the application with any predisposition at all. I think it follows that the circumstances in which the discretion should be exercised in favour of making an Order cannot be stated exhaustively. Nor should there be any attempts to do so. The Judge or Magistrate must decide according to his view of the justice of the case. There should be no complaint at the imprecision of that statement. Beyond saying that the Judge or Magistrate must behave judicially, one cannot define or delimit or categorise the circumstances in which security should be ordered to be given. It is quite another thing to speak of some matters which are capable of assuming importance in an application for security."*

In the High Court of Fiji in "**Furuuchi Suisan Company Limited v Hiroshi Tokuhisa and Others" Civil Action No. 95 of 2009**, Justice Byrne ordered Security for Costs against a Plaintiff company incorporated and operating in Japan as the Plaintiff was ordinarily resident out of the jurisdiction. In reaching this decision, Justice Byrne relied on what Sir Nicolas Brown Wilkinson V.C. said in **Porzelack KG v Porzelack (UK) Limited** 1987 1 All ER 1074 at p.1076

> *"That 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 the court against which it can enforce a 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 Plaintiffs resident within the jurisdiction".*

His Lordship further stated

> *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".*

The **White Book (1999)** further discussed the development of the law till 1999, which is applicable to Fiji. At page 429 – 430 (23/3/3) of the White Book;

> *"Discretionarily power to order security for costs (rr1 – 3). 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* ***'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 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, and inflexible or rigid rule that Plaintiff resident abroad should provide security for costs. In particular, the former Order 65 r 6B 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 cost was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).*

(Emphasis Added)

The power to order security for costs is discretionary and the Order will not be automatic: **Idoport Pty Ltd v National Australia Bank Ltd** (2001) NSWSC 744. The discretion is to be exercised judicially, and not "arbitrarily, capriciously or so as to frustrate the legislative intent": **Oshlack v Richmond River Council** (1998) 193 CLR 72. Exercise of the power requires consideration of the particular facts of the case: **Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd** (1998) 193 CLR 502. **Southern Cross Exploration NL v Fire and all Risks Insurance Co Ltd** (1985) 1 NSWLR 114. The weight to be given to any circumstance depends upon its own intrinsic persuasiveness and its impact on other circumstances which have to be weighed. **Acohs Pty Ltd v Ucorp Pty Ltd** (2006) 236 ALR 143.

It is these principles I apply.

Thus, in exercising the discretion, I consider the followings;

- The prospect of the claim succeeding
- Whether making an order for security for costs would stifle a genuine claim.
- Whether there has been delay in making the application for security for costs.

(6) <u>THE PROSPECTS OF SUCCESS OR MERITS OF THE PROCEEDINGS</u>

A consideration of the Plaintiff's prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the case of the parties at an early stage of proceedings: "**<u>Fiduciary Ltd v Morningstar Research Pty Ltd</u>** (2004) 208 ALR 564.

As a general rule, where a claim is *prima facie* regular on its face and discloses a cause of action, then, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is *bona fide* and has reasonable prospects of success. **<u>KP Cable Investments Pty Ltd v Meltglow Pty Ltd</u>**, (1995) 56 FCR 189 at 197; **<u>Staff Development & Training Centre Pty Ltd v Commonwealth of Australia</u>** [2005] FCA 1643.

In "**<u>Kadavu Shipping Company Ltd v Dominion Insurance Ltd</u>**" 2009, HBC 508, Master J.Udit said in relation to "Strength or *bona fides* of a claim"

> *"Under this criterion, the respondent is to show that it has a prima facie regular claim, which disclosed a reasonable cause of action. It is not the court's duty to divulge into a detailed analysis of the merits of the case unless it can be clearly demonstrated that there is a relatively high degree of success or failure. Once it is established, the Court is to proceed on the basis that the claim is bona-fide".*

In "**<u>Allan v Hillview Limited</u>** [2003] HBC 366, Connors J said;

> *"... another matter of importance for the court is exercising its discretion is the Plaintiff's prospect of success in the action and of course as in any such situation that does not require the court at this point in time to make any detailed determination of the likelihood of success but merely to do so based on the pleadings as they appear before the court".*

What are the facts here?

After an in-depth analysis of the pleadings in this case, let me summaries my understanding of the salient facts as follows;

This is a claim by the Plaintiff Company against the Defendant Company for alleged breach by the Defendant Company to pay for goods supplied by the Plaintiff on credit. The Plaintiff claimed AUD$130,613.73. The goods supplied mainly consisted of wiring nuts, self tapping screws, bolts and assortments of other products. The Plaintiff further asserted that the Defendant was shipped goods/materials to the value of AUD$137,000.00 which the Defendant is currently still holding.

The Defendant admitted that goods have been supplied. In the Statement of Defence and Counter-Claim, the Defendant has raised the allegation of being supplied with goods of unmerchantable quality and goods that did not comply with the specifications ordered by the Defendant. The Defendant has admitted a sum of AUD$71,830.95 for **uncontested goods.**

(Ms) Doton, Counsel for the Defendant, provided the following documentary evidence to show a meritorious defence;

- Email sent to the Palintiff on 11th February 2015 disputing the products occupied - Annexure "**RC-1**"
- Email sent by the Defendants Director, Rakesh Chand to the Plaintiff's National Sales Manager on 17th November 2014 confirming issues raised in meeting held in Fiji – Annexure "**RC-2**".
- Payment schedule for the sum of AUD$71,830.95 for uncontested goods supplied – Annexure "**RC-3**"
- Letters from two of the Defendant's customers outlining defects in products supplied by the Plaintiff and reasons for returning products to the Defendant – Annexure "**RC-4**".

She concludes by saying that the Defendant has a **meritorious Defence** and a ***bona fide*** **Counter Claim** against the Plaintiff.

As against this, I do not forget what was said in argument by (Ms) Devan, counsel for the Plaintiff.

A number of challenges were ventured by (Ms) Devan, Counsel for the Plaintiff. The challenges are outlined in para 3.8 of her written submissions. They are;

- *There is no merits in the Defendant's counterclaim as up and until the Plaintiff served winding up notice on the Defendant Company, it had never raised any issues inter alia concerning the 'unmerchantable quality' of the products that had been supplied by the Plaintiff to the Defendant.*

- *Prior to Plaintiff taking legal action to recover the outstanding debt for materials and goods supplied, the Defendant had been negotiating with the Plaintiff and requesting time to pay of its invoices. Refer emails dated 21 January 2015 and 16 March 2015 are annexed hereto marked "**MK-1**" and "**MK-2**".*

- *The first email was at 21 January 2015. The Defendant in its responding affidavit states that it raised a dispute and relies on email dated 11 February 2015, however this email was sent after the admission and undertaking to pay in email of 21 January 2015.*

- *The Defendant's assertions that the debt was disputed as early as November 2014 is displaced by the admissions of liability and undertaking to payment contained in emails dated 21 January 2015 and 16 March 2015.*

- *The admission of least a sum of AU$71,830.95 is now contained in the Defendant's Affidavit in Reply at paragraph 4 (c) and (d). The Plaintiff states that even the undisputed amount remains unpaid by the Defendant.*

- *Each product that had been supplied to the Defendant were in fact supplied on the specifications and order that was given by the Defendant.*

- *Of further relevance is the fact that goods were brought on credit by the Defendant and as per the terms of credit, the Defendant was contractually obliged to raise a dispute regarding the quality, quantity, misdescription of any product within 7 days of receipt of goods from the Plaintiff. This is clearly stated in invoices that have been rendered and provided to the Defendant. An example of an invoice rendered to the Defendant earlier is annexed hereto marked* ***"MK-4".***

The Defendant denies the allegations made by the Plaintiff in its Claim. The Defendant has raised a cause of action of 'misrepresentation' against the Plaintiff in its Statement of Defence. The Defendant has filed a Counter Claim against the Plaintiff on 3rd day of August 2015 claiming, *inter alia*, damages for the Plaintiff supplying goods to the Defendant that were of unmerchantable quality and that were not as per the specifications of the goods offered.

On my perusal of the Statement of Claim and the Statement of Defence, it seems to me perfectly plain that there are genuine disputes between the parties which raise serious issues for resolution with regard to goods supplied by the Plaintiff on credit. The evidence before me does not justify drawing the conclusion that the Plaintiff has no reasonable prospect of success in its claim. The Defendant's defence and Counter-Claim is reasonably arguable. I am of course mindful to the fact that *bona fide* of the claim and its merits have to be considered in the exercise of my discretion.

It is suggested on behalf of the Defendant that the Plaintiff's claim is without merits. I must confess that I remain utterly unimpressed by the proposition advanced by the Defendant.

I am satisfied that the claim is *prima facie* regular and disclosing a cause of action. Moreover, the Defendant's defence and Counter-Claim is *bona fide* and arguable.

There is quite clearly a substantial bon fide issues to be tried between the parties. However, at this juncture, I remind myself of the principle that in deliberating upon an application for security for costs, <u>I am not required to delve into the meticulous details of the merits or demerits of the claim or defence</u>.

<u>**G.E. Dal Pont, in "Law of Costs", Third Edition writes at Page 1015**</u>;

> *"The Chief difficulty with any attempt to take into account the Plaintiff's chances of success is the fact that applications for security for costs are usually made prior to trial, often some time prior to it. Given the need for applications for security to be made promptly, a defendant who waits until the eve of the hearing to apply for security in unlikely to succeed. Yet it is this very need to promptly apply for security – possibly even at a time when the pleadings have yet to be finalized – that renders the court's task of assessing the merits of the claim near impossible. This task is arguably little easier even where the application for security is made during the hearing of the matter, when some but not all the evidence has been heard. Again the court has incomplete information upon which to make a determination.*
>
> *Several observations can be made in this respect. **First, a court must be careful in deciding security on the basis that the Plaintiff's claim appears weak. As the relevant inquiry is made at an interlocutory stage on less than complete material and without any hearing of the evidence, the real merits of the case are unlikely to sufficiently emerge in the necessarily brief application for security for costs. An evaluation of the strength of the Plaintiff's case is necessarily tentative and largely 'impressionistic'.** Second, if a proceeding manifestly lacks legal merit, other remedies are available to protect a defendant from needless vexation. In appeals there is the barrier of leave or special leave. Third, for a judge upon an application for security to preside over a major hearing in which the parties seek to investigate in considerable detail the likelihood of success in the action risks usurping or pre-empting the role of the trial judge or appellate court before which the proceeding is to be litigated. This would, moreover, blow up the case into a large interlocutory hearing involving great expenditure of both money and time.*
>
> *For the above reasons, it has been said that courts deplore attempts to go into the merits 'unless it can clearly be demonstrated ... that there is a high degree of probability of success or failure. That the case is 'obviously hopeless' and 'doomed to fail'. If the case is 'bona fide' and raises 'real issues to be tried', the prospect of success or*

failure arguably function as no more than a neutral factor in the exercise of discretion to order security, especially where the issues to be litigated are difficult or complex. Expressed another way, if a claim is prima facie regular and discloses a cause of action, in the absence of evidence to the contrary the court will generally assume it to be bona fide with a reasonable prospect of success for this purpose. Cases at either extreme – those are that patently untenable, or ostensibly insuperable – are consequently much more the exception than the rule. So merely because the plaintiff 'may have slender hopes of succeeding', or that the case demonstrates 'a number of weaknesses' is not sufficient to justify departing from the rule that poverty is no bar. The bona fides and strength of the case, in any event, remains only one factor in the equation that informs the court's discretion so far as security is concerned."

(Emphasis Added)

In the case of "**Appleglen PVT Ltd v Mainzeal Corporation PVT Ltd**" (1988) 89 ALR 634, Pincus J. observed that at the hearing of an application for security for costs, detailed investigation into the likelihood or otherwise of the success of the claim will not be the right course to adopt.

Nevertheless, the existence of a genuine dispute cannot of itself provide cause for disentitling the Defendant to security if the circumstances otherwise are appreciated one for the making of such an Order. (See, **Parsdale PVT Ltd v Concrete Constructions** (1995) FCA 1471).

(7) STIFLING THE CLAIM

There is no direct sworn evidence on behalf of the Plaintiff that the making of an Order for security for costs would stifle the prosecution of the claim. To be more precise, there is no direct sworn evidence as to the likelihood that an Order for security would stultify the prosecution of the claim.

It is for the Plaintiff to satisfy the Court that it would be prevented by an Order for security from continuing the litigation.

"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 favour of 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.**

See also; Roger J in "**Memuty Pty Ltd v Lissendin" (1983) (8) ACLR 364.)**

Returning back to the case before me, nothing has been said or addressed by way of evidence to indicate that the making of the Order sought will frustrate the Plaintiff's claim.

The burden of showing impecuniosity rests upon the Plaintiff seeking to resist the Order. The Plaintiff has not discharged the onus.

There is evidence placed before this Court as to the financial standing of the Plaintiff. The Plaintiff asserted that it has means and it is solvent. I consider this factor to avoid the claim being stifled. I have no hesitation in holding that an Order for costs will not stifle the claim.

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

> *"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."*

In **Kloeckner & Co AG v Gatoil Overseas Inc [1990] CA Transcript 250 Bingham** LJ cited with approval certain remarks of the Registrar of Civil Appeals. Mr Registrar Adams was willing to assume that the situation before him was the same as that exemplified in the "**Farrer v Lacy, Harland & Co**", **(1885) 28 Ch. D. 482** that is to say that there was a probability that the defendant wrongly caused the Plaintiff's impecuniosity on the basis of which security for costs was being sought. The registrar said:

> *"In my judgment, the approach to be adopted in cases where, as here, there are good arguable grounds of appeal and it is within the* ***Farrer*** *principle but the appellant contends that the award of security will stifle the appeal, should be the same as the approach adopted in* ***MV Yorke Motors (a firm) v Edwards*** *Ord 14 cases, where conditional leave to defend is being contemplated. The approach, in my view, should be that the onus is on the appellant to satisfy the Court of Appeal that the award of security for costs would prevent the appeal from being pursued, and that it is not sufficient for an appellant to show that he does not have the assets in his own personal resources.* ***As in the Yorke Motors case, the appellant must, in my view, show not only that he does not have the money himself, but that he is unable to raise the money from any where else."***
>
> *(Emphasis Added)*

(8) THE IMPACT OF THE TIMING OF APPLICATION FOR SECURITY

As earlier mentioned, although the non-residency of the Plaintiff and non-availability of assets within the jurisdiction is one of the main grounds for the exercise of the jurisdiction of the Court to Order security, I do not adopt a rigid rule. I am of course mindful to the fact that the making of an Order for security for costs is discretionary

and the Courts no longer adopt a rigid rule. [See, **M.J. Raine –"Locals we trust – Foreigners pay cash; rethinking security for costs against Foreign Residents" (2012) 1 JCIVP 210 at 214P)**

I note that Order 23 confers a discretion in that *"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 costs, as it thinks fit."*

In the context of the present case, I am inclined to be guided by the rule of law enunciated in the following judicial decisions;

In **<u>Gabel PVT Ltd v Katherine Enterprises PVT Ltd</u>** (1977) 2 A.C.L.R. 400 the Court held in relation to the "effect of delay",

> *"Here discovery has been obtained and the case set down for trial. Some twelve days after this the First Defendant issued a motion seeking security. In my view there is much force in the contention that the application has been made too late. From the very beginning all parties were aware at least of the fact that the First Plaintiff must be presumed unless the contrary be shown to be unable to pay costs if unsuccessful.* ***Nevertheless no application was made until after fourteen months after the Writ was issued. No attempt has been made to explain this delay.***
>
> ***...In my judgment the proper time for making this application was at the beginning when the status of the First Plaintiff was known to the Defendants."***

(Emphasis Added)

Einstein J considered decisions dealing with the issue of delay in the making of an application for security in **<u>Idoport Pty Ltd v National Australia Bank Ltd</u>** [2001] NSWSC 744 concluding:

> *"Ultimately it seems to me that in the context of the broad discretion and consistently with the approach referred to in the above authorities; delay is best regarded simply as a factor whose consequences are to be weighed in the balance in determining what is just between the parties.... The Court, in approaching delay as a discretionary factor, looks at the length of the delay and the nature of the acts done during the interval. If a Company has suffered no real relevant prejudice in the sense of expenditure of its own funds or the incurring of liabilities in relation to the litigation in the period until the application for security for costs, the significance of delay reduces or may substantially disappear."*

In **<u>Crypta Fuels (PV) Ltd v Svelte Corporation (PVT) Ltd</u>**, (1994) 14 ACSR 760, the Court held;

> *"Without referring in any greater detail to those authorities, my conclusion from a consideration of them is that there is first and*

*foremost a proposition accepted in every one of the cases **which is that if an application for security for costs is to be made it must be made promptly.**"*

(Emphasis Added)

It is these principles I apply. Applying those principles to the instant case, what do we find?

There are two problems that concern me. At this stage I have to ask myself two questions. The first question that I ask myself is, **whether the Defendant was prompt in the application for security for costs.** The answer is obviously "**NO.**"

The second and final question that I ask myself is, **was there a cogent and credible explanation for the delay in filing the application in the Affidavit in Support of the Defendant?** The answer is obviously "**NO.**"

In the instant case, the Writ of Summons was filed on 24th June 2015. The Defendants filed Acknowledgement of Service on 15th July 2015.

The Statement of Defence and Counter Claim was filed on 03rd August 2015. The reply to Defence and Defence to Counter Claim was filed on 14th August 2015. The Reply to Defence to Counter Claim was filed on 02nd September 2015. The Pleadings were closed on 16th September 2015. The Summons for Directions was filed on 15th September 2015. The Notice of Motion for security for costs was filed on 01st October 2015, namely 3 ½ months after the Writ was issued and 14 days after the close of the Pleadings.
From the very beginning, the Defendant was well aware that the Plaintiff is permanently a resident out of the jurisdiction and without assets in the jurisdiction. To be more precise, the Defendant was in possession of material disclosing that the Plaintiff is permanently a resident out of the jurisdiction and without assets in the jurisdiction from well before the time of the institution of the action.

Nevertheless, the application for security for costs was filed 14 days after the close of the pleadings, whereas the proper time for doing so was at the beginning of the proceedings. No application was made until 3 ½ months after the Writ was issued and 14 days after the close of the pleadings. **No attempt has been made to explain the delay in the Affidavit in Support of Notice of Motion for costs.**

It is paradoxical that the **onus** is upon the Defendant to provide cogent and credible explanation as to why the application for security for costs was postponed until 14 days after the close of the pleadings and 3 ½ months after the Writ was issued. **The Defendant has not discharged the onus.** What is of concern is there is an absence

of explanation in the Defendants Affidavit in Support for the delay in filing the application for security for costs. The Defendant in its Affidavit in Support does not explain why the application for security for costs was postponed until 14 days after the close of the pleadings and 3 ½ months after the Writ was issued. What was it doing itself? The Defendant's Affidavit in Support is silent on this. The delay is inordinate, to say the least. The delay could not possibly be described as "reasonable" even on the most generous minded and indulgent view. I should add that the Defendant's failure to explain in its Affidavit in Support that it had a good reason for not filing an application for security for costs promptly does not leave a good impression. The unexplained delay in the affidavit in support of Notice of Motion for security operates as a powerful factor in favour of exercising the Court's discretion in the Plaintiff's favour.

This not a criminal case in which I am called upon to allow my imagination to paly upon the facts and find reasonable hypotheses consistent with innocence. A balance of probability is enough. And when the greater probability is that the Defendant did not care at all to file an application for security for costs promptly, why should this Court hesitate to find accordingly against the Defendant??

I hold that there is unreasonable and unexplained delay in making the application.

The unfairness of making an application for security for costs at a late stage is demonstrable.

G.E. Dal Pont, in "**<u>Law of Costs</u>**", third edition, writes at Page 1021;

> ***"If security is not applied for promptly, it is more difficult to persuade the court that such an Order is not, in the circumstances, unfair or oppressive. The reason is that an applicant for security who has pre-existing knowledge of the Plaintiff's impecuniosity, but delays making the application until the last moment, may be seen as perpetrating a tactical manoeuvre designed to encourage the Plaintiff to exhaust whatever funds he or she has in preparing the litigation to then be met with a financial burden that threatens to stifle the Plaintiff's proceeding altogether."***

(Emphasis Added)

In the context of the present case, I am inclined to be guided by the rule of law enunciated in the following judicial decisions;

In **Gabel PVT Ltd v Katherine Enterprises PVT Ltd** (1977) 2 A.C.L.R. 400 the Court held in relation to the "effect of delay",

> *"Here discovery has been obtained and the case set down for trial. Some twelve days after this the First Defendant issued a motion seeking security. In my view there is much force in the contention that the application has been made too late. From the very beginning all parties were aware at least of the fact that the First Plaintiff must be presumed unless the contrary be shown to be unable to pay costs if unsuccessful.* ***Nevertheless no application was made until after fourteen months after the Writ was issued. No attempt has been made to explain this delay. ...In my judgment the proper time for making this application was at the beginning when the status of the First Plaintiff was known to the Defendants."***

(Emphasis Added)

The impact of the timing of an application for security for costs upon the court's discretion was explained by the Supreme Court of Western Australia in **Ravi Nominees Pty Ltd v Phillips Fox** (1992) 10 ACLC 1313 as follows:

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

(Emphasis Added)

The Fiji Court of Appeal in the decision of "**National Bank of Fiji v C Garden Island** WOO 1L Pacific Co. Ltd as – Civil Appeal No. 011 of 1992, considered a High Court Judgment which had dismissed an application for security for costs. The Court of Appeal held;

> *"The basis on which the learned judge dismissed the motion for costs was two fold, as to the first.....* ***he held there was unreasonable and unexplained delay in making the application although the appellants were aware that at least the first Plaintiff would be unable to pay costs if unsuccessful. He held that the application was made some 14 months after the Writ was issued whereas the proper time for doing so was at the beginning. He held that this delay must tell against the appellants who must have been aware that the Plaintiffs must have incurred potentially substantial costs by the time the application was made.*** *He cited the decision in Gabbel Pty Ltd v Katherine Enterprises Pty Ltd [1977] 2 ACLR 400 in support of his views regarding the effect of delay."*

(Emphasis Added)

The Court then at page 7 said:

> ***"We are of the view that the learned judge exercised his discretion on a proper basis and would not be prepared to interfere with his decision."***

It is suggested on behalf of the Defendant that an application for security for costs can be made even at a Pre Trial Conference stage.

At this point I cannot resist in saying that the proposition advanced by the Defendant is a far cry from the obvious and natural limitations to the scope and application of the security for costs and it flies on the face of the rule law enunciated in **Gabel PVT Ltd v Katherine Enterprises PVT Ltd** (1977) 2 A.C.L.R. 400, **Idoport Pty Ltd v National Australia Bank Ltd** [2001] NSWSC 744, **Crypta Fuels (PV) Ltd v Svelte Corporation (PVT) Ltd**, (1994) 14 ACSR 760, **Ravi Nominees Pty Ltd v Phillips Fox** (1992) 10 ACLC 1313 and "**National Bank of Fiji v C Garden Island** WOO 1L Pacific Co. Ltd as – Civil Appeal No. 011 of 1992

I reiterate that, from the very beginning, the Defendant was aware that the Plaintiff is permanently resident out of the jurisdiction and without assets in the jurisdiction. To be more precise, the Defendant was in possession of material disclosing that the Plaintiff is permanently resident out of the jurisdiction and without assets in the jurisdiction from well before the time of the institution of the action.

Nevertheless, the application for security for costs was filed 3 ½ months after the writ was issued, whereas the proper time for doing so was at the beginning of the proceedings. Expressed another way, no application was made **until** 3 ½ months after the Writ was issued and 14 days after the close of the pleadings. **No attempt has been made to explain the delay in the Affidavit in Support of Notice of Motion for costs.** The conduct of the Defendant in deliberately deciding not to explain the delay in filing the application in the Affidavit in Support is a matter to be taken into account in assessing the justice of the case. **The Plaintiff is entitled to know at the earliest opportunity, before it has committed substantial resources to pursuing the litigation, whether it will be required to provide security. The later an application is made the greater the likelihood that it will cause substantial disruption or distraction in the conduct of the Plaintiff's case, and if the Plaintiff is unable to provide security, the greater the costs that will have been wasted. The Court, in approaching delay as a discretionary factor, looks at the length of the delay and the nature of the acts done during the delay.** The delay must tell against the Defendant who must have been aware that the Plaintiff must have incurred potentially substantial costs by the time the application was made. In the circumstances, I cannot help feeling quite convinced that the Defendant's application for security for costs is **unfair and oppressive**. I cannot help thinking that the application for security involves some **improper purpose and ulterior motive.** The reason is that the Defendant for security who have pre-existing knowledge of the Plaintiff's residence out of the jurisdiction and non-availability of assets in the

jurisdiction, but delays making the application until 14 days after the close of the pleadings and 3 ½ months after the Writ was issued whereas the proper time for filing so was at the beginning, may be seen as perpetrating a tactical manoeuvre designed to encourage the Plaintiff to exhaust whatever funds it has in preparing the litigation to then be met with a financial burden that threatens to stifle the Plaintiff's proceedings altogether. This is a matter to be taken into account in assessing the justice of the case. The Court is here to administer justice. The crucial point is that the Court should arrive at a just result.

(G) <u>CONCLUDING REMARKS</u>

(1) In the present case, it is clear that the Defendant was in possession of material disclosing that the Plaintiff is permanently resident out of the jurisdiction of the court and without assets in the jurisdiction from well before the Writ was issued.

(2) Nevertheless, no application was made **until** 3 ½ months after the Writ was issued and 14 days after the close of the pleadings. The delay has not been explained at all in the affidavit in support of the Summons for costs. It is incumbent upon applicants in application of this nature to provide a satisfactory explanation as to delay in the affidavit in support of Notice of Motion for costs. This has not been done at all. The delay is inordinate, to say the least. A delay of 3 ½ months in any Civil Action in the High Court constitutes both inexcusable and inordinate.

(3) The unfairness of making an application for security for costs at such a late stage is demonstrable.

(4) It has been said that delay on the part of the defendant give rise to a waiver of the defendant's entitlement to security for costs. See;

- **Jennings Ltd (In Holding) v Cole (1934) NZ Gas LR 165.**
- **Roumeli Food Stores (NSW) (PVT) Ltd v New India Assurances Co. Ltd (1972) 1 NSWLR 227**

(5) *"It is, however, incumbent upon a defendant who wishes to obtain security for its costs to apply promptly for that relief once it is, or ought to reasonably be, aware that the Plaintiff would be unable to meet an order for costs. Delay is an important consideration in the determination of an application for security for costs because it is capable of causing prejudice or unfairness to the Plaintiff.* ***A Plaintiff is entitled to know at the earliest opportunity, before it has committed substantial resources to pursuing the litigation, whether it will be required to provide security. The later an application is made the greater the likelihood that it will cause substantial disruption or distraction in the conduct of the Plaintiff's case, and if the Plaintiff is unable to provide security, the greater the costs that will have been wasted."*** [Per **NEWNES JA**, in **<u>Christou v Stanton Partners Australasia PTY Ltd</u>** [2011] WASCA 176 (10 August 2011]

In order to show prejudice **it is not necessary** for a Plaintiff to establish what it would have done differently if the application had been made earlier (although such evidence would be an important consideration in the exercise of the discretion); **prejudice will generally be regarded as inherent in substantial delay:** See; **Green v CGU Insurance Ltd** [2008] NSWCA 148; (2008) 67 ACSR 105 and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

In an era when the need to ensure the efficient use of judicial resources has become increasingly important, delay may also be significant in that regard. A late application which frustrates the action will mean that the judicial resources already devoted to the case will have been wasted: See; **Town & Fencott & Associates Pty Ltd v Eretta Pty Ltd** [1987] FCA 102; (1987) 16 FCR 497, 514, and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

(6) **I remind myself that it is a fundamental principle of any civilized legal system that a court should not generally exercise its discretion in favour of an applicant for security if by his or its delay the other party has been forced to incur expense in the litigation.** I have no doubt and I am clearly of the opinion that in this case the delay has been so far too long and that no order for security should be made.

(7) The Plaintiff who resides out of the jurisdiction sued the Defendant for AUD $130,613.73, goods, materials supplied to the Defendant. The goods or materials supplied mainly consisted of wiring nuts, self tapping screws, bolts and an assortment of other products. The Defendant has admitted that goods has been supplied, however it asserts that the goods were not of merchantable quality and description of the goods were essentially misrepresented by the Plaintiff. But the Defendant has offered to pay for uncontested goods worth AUD$71,830.95, which the Plaintiff accepted as per reply sent by the Plaintiff's National Sales Manger on the 21st January 2015. The Defendant's proposed payment plan has been annexed to the Defendant's 'Affidavit in Response' and marked as "**RC-3**".

The clear position that emerges from this is that the Defendant has admitted a large portion of the claim of the Plaintiff and it exceeds the sum sought by the Defendant as Security for costs, viz, AUD $20,000.00.

Thus, this would debar me from making an Order for Security for Costs. The Defendant can apply for an Order that the admitted sum be not paid out until the counter claim is determined.

See;

- Hogan v Hogan (No.2)
  (1924) 2 IR.14

- DC St. Martin v Davis & Co
  (1884) WN 86

(8) I could see nothing to change my opinion even on the basis of exhaustive work contained in, **G.E. Dal Pont "Law of Costs", Third Edition .**

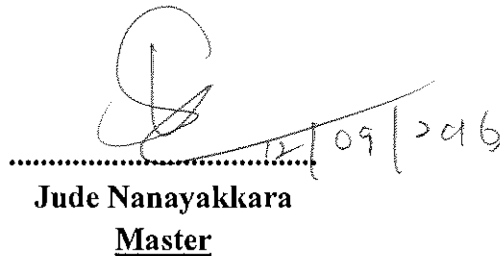
(9) Finally this should be made clear; ***the security for costs is not a card that a defendant can keep up its sleeve and play at its convenience.***

Essentially, that is all I have to say!!!

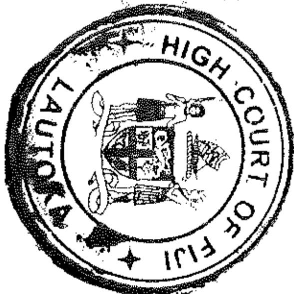
(H) FINAL ORDERS

(1) The Defendant's Notice of Motion for security for costs is dismissed.

(2) I make no Order as to costs.



Jude Nanayakkara
Master



At Lautoka
12th September 2016