

**IN THE HIGH COURT OF FIJI AT SUVA**

**CIVIL JURISDICTION**

**Civil Action No. 95 of 2009**

**BETWEEN** : **FURUUCHI SUISAN COMPANY LIMITED**

**PLAINTIFF**

**AND** : **HIROSHI TOKUHISA**

**1<sup>ST</sup> DEFENDANT**

**AND** : **TOSA BUSSAN (FIJI) LIMITED**

**2<sup>ND</sup> DEFENDANT**

**AND** : **RESERVE BANK OF FIJI**

**3<sup>RD</sup> DEFENDANT**

**COUNSEL** : **K. MUAROR (FOR THE PLAINTIFF)**

: **H.K.NAGIN (FOR THE 1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANTS)**

**DATE OF HEARING** : **4<sup>th</sup> SEPTEMBER 2009**

**DATE OF RULING** : **9<sup>th</sup> SEPTEMBER 2009**

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**RULING ON APPLICATION FOR  
SECURITY FOR COSTS**

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## 2.

- 1.0 The Plaintiff is a company incorporated and operating in Japan.
- 2.0 The First Defendant is a company incorporated and operating in Fiji.
- 3.0 The First Defendant is a Director and President of the 2<sup>nd</sup> Defendant.
- 4.0 The First Defendant is alleged to be the Chairman and major shareholder in both TOSA BUSSAN INCORPORATED, a company incorporated and operating in Japan ("**TBI**") and TOSA BUSSAN (FIJI) Limited, the second defendant ("**TBF**").
- 5.0 It is apparently common ground between the parties that TBF exports Tuna Fish products to TBI which then sells such products to Japan where the Plaintiff is one of the buyers of these products.
- 6.0 In an Affidavit of MOTOYUKI KANETA the Chairman and Director of the Plaintiff sworn on the 2<sup>nd</sup> of March 2009 it is alleged that in or about February 2007, TBI owed the Plaintiff the sum of JPY 183,360. (which was then said to equal FJD 2.6 Million) contributing to cash payments made by the Plaintiff to TBI for fish products. Mr Kaneta alleges that at the relevant time the fish products delivered by TBI to the Plaintiff were significantly less than the moneys paid by the Plaintiff.
- 7.0 In or about late January to early February 2007 Mr Kaneta deposes that he enquired of the first defendant how and when TBI was going to repay the moneys outstanding to the Plaintiff.
- 8.0 In response the First defendant (as major shareholder and Chairman of TBI) offered to transfer or sell of his shares in the second defendant's company (to the equivalent of the outstanding debt of JPY\$183,360) to the Plaintiff thus helping TBI to repay the amount then owed to the Plaintiff.
- 9.0 Mr Kaneta claims that the Plaintiff accepted the first defendant's offer of shares in the second defendant in lieu of payment of the debt.

### 3.

- 10.0 Accordingly on or about 7<sup>th</sup> February 2007, a share transfer document was prepared and executed in Japan for a consideration of Fiji Dollars Two Million Six Hundred and Nineteen Thousand Four Hundred (FJD \$2,619,400.00) for 3 Million Seven Hundred Forty Two Thousand (\$3,742,000.00) of the First Defendant's Shares. A copy of the share transfer was annexed to Mr Kaneta's affidavit.
- 11.0 Mr. Kaneta says that at the time the first defendant executed the share transfer he also assured Mr. Kaneta that he had the full legal authority and capacity to formally transfer or sell part of his shares in the Second defendant to the Plaintiff.
- 12.0 On or about 9<sup>th</sup> February 2007, following the signing of the share transfer in Japan, Mr. Kaneta came to Fiji with the First defendant Hiroshi Tokuisa and, amongst other things was present at a Board Meeting that was held at the Factory of the second defendant at Lot 15, Rokobili Subdivision, Suva on 9<sup>th</sup> February 2007 at 2.30 pm.
- 13.0 Mr. Kaneta alleges that at the Board Meeting which was chaired by the first defendant it was resolved that the second defendant had formally approved the partial transfer or sale of the 1<sup>st</sup> defendant shares to the Plaintiff company.
- 14.0 On or about 12<sup>th</sup> April 2007 BDO Zarin Ali Chartered Accountants of Suva, formally requested the Plaintiff to remit the sum of FD \$26,194.00 to their Trust Account towards payment of Stamp Duty costs for the share transfer. On the same date, the Plaintiff remitted the sum of US \$15,797.40 towards the stamp duty costs.
- 15.0 Mr. Kaneta then deposes that at the time of executing the share transfer he was unaware of the requirements of the Exchange Control Act Cap 211 of the Laws of Fiji. He received legal advice that the Plaintiff required the permission of the Minister whose power has been delegated to the third defendant to transfer a security registered in Fiji to it.
- 16.0 This was not done. Mr. Kaneta says that his omission to seek and obtain Reserve Bank of Fiji permission prior to 7<sup>th</sup> February 2007 was inadvertent and innocent.

4.

- 17.0 He became aware of the Exchange Control requirements in or about April 2007. Thereupon he instructed his Accountants BDO Zarin Ali to make the necessary application to the third defendant, which they did.
- 18.0 He alleges that the first defendant (Transferor) became aware of this, and his lawyers wrote to the third defendant. He does not know exactly the contents of this communication but soon after the 11<sup>th</sup> of June 2007 his Accountant, Mr. Zarin Khan received a letter dated 11<sup>th</sup> June 2007 from the Fiji Islands Trade and Investment Bureau stating that the request for the transfer would not be processed until the resolution of a shareholder's dispute between the two companies.
- 19.0 The Shareholders' dispute referred to was the subject of proceedings in Suva High Court Action No. 210 of 2007. On the 16<sup>th</sup> of November 2007 I made an Order in this action which was between Tosa Bussan (Fiji) Limited (Plaintiff) and Hiroshi Tokuhisa (Defendant). Among other things I ordered that the shareholders of the second defendant company in this action (Tosa Busan Fiji Limited) were the following:-

<u>Name</u>	<u>Share(%)</u>
1. Mudu Derenalagi	10
2. Kiniviliame Kiliraki	10
3. Elena Veigalayaca	10
4. Hiroshi Tokuhisa	61
5. Taisin Suisan Co. Ltd	2
6. Naboru Katahira	7

- 20.0 I also found that the following persons are the current directors of Tosa Bussan Fiji Limited:

- 1) Hiroshi Tokuhisa - Chairman
- 2) Kiniviliame Kiriraki
- 3) Tomoyuki Watabiki
- 4) Josua Rabukawaqa
- 5) Mereseini Lagilagi

## 5.

- 21.0 Mr. Kaneta deposes that according to this list of Shareholders, the Plaintiff was found not to be a shareholder and he says that the reason for this is obvious, the share transfer has not been registered as there is no consent of the third defendant which is required.
- 22.0 As a result of the Order of 16<sup>th</sup> November 2007, the Plaintiff now seeks the formal consent of the third defendant to effect the share transfer but this has not yet been obtained.
- 23.0 Mr Kaneta accepts that the application to obtain the formal consent of the third Defendant under the Exchange Control Act is the responsibility of the Plaintiff but he says that the first defendant cannot take advantage of the state of affairs which he has directly produced.
- 24.0 I comment here that eventually this may become a matter of argument if the case ever proceeds to trial.
- 25.0 One thing is certain however according to Mr. Kaneta that it is becoming important for the share transfer to take place and this will enable the Plaintiff to participate in the affairs of the 2<sup>nd</sup> defendant.
- 26.0 Therefore on the 18<sup>th</sup> of March 2009 the Plaintiff issued an Originating Summons seeking the following Orders:-
1. That the Minutes of the Second Defendant Board meeting dated 9<sup>th</sup> February 2007 is valid and binding on the Second Defendant Company.
  2. That, subject to formal approval of the Third Defendant, the Transfer of Shares document executed by the First Defendant and the Plaintiff dated 7<sup>th</sup> February 2007 is valid and binding on the parties.
  3. That the Third Defendant issue a Certificate declaring that the Transfer of Shares dated 7<sup>th</sup> February 2007 from the First Defendant to the Plaintiff is valid as if it had been done with the permission of the Third Defendant.
- 27.0 On the 4<sup>th</sup> of June 2009, which I find to be the earliest reasonable date after which the Courts resumed after the abrogation of the Constitution on 10<sup>th</sup> April 2009, the second Defendant issued a Summons for Security for Costs seeking an Order that the Plaintiff do provide security for costs

in the sum of not less than Thirty Thousand dollars (\$30,000) by way of cash deposit or such other sum as the Court deems just to prosecute this action.

28.0 It is not disputed by the Plaintiff that the defendant is entitled to make such an application and that it must be made as promptly as possible. The only question the Plaintiff raises is the amount of the security.

29.0 **THE CASE LAW**

There is much case law on this subject and it is not disputed by the Plaintiff, but without going into this in any detail it is desirable to state the relevant principles and some of the numerous authorities.

30.0 The matter is governed by Order 23 r.(1)(a) of the Rules of the High Court which provides as far as relevant :

***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 jurisdiction, or***
- (b) .....***
- (c) .....***
- (d) .....***

***then, if having regard to all the circumstances of the case, the Court thinks it is just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just. (emphasis mine)***

31.0 The first case I mention is Porzelack K G v. Porzelack (UK) Ltd, (1987) 1 ALLER 1074 where Sir Nicolas Browne Wilkinson V.C said at P.1076: ***“The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of***

*defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiff's residents within the jurisdiction".*

- 32.0 A little later His Lordship continued, *"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"*.
- 33.0 I shall endeavour to answer that question shortly.
- 34.0 It is important that the application be made promptly – see *Sir Lindsay Parkinson and Co. Ltd v. Tripland Ltd (1973) 2 ALLER 273* per Lord Denning M R at p286 and Cairns L J at pg 286 paragraph (g).
- 35.0 There is local authority in the Court of Appeal decision in *NATIONAL BANK OF FIJI v 21C GARDEN ISLAND WOO IL PACIFIC CO. LTD (IN LIQ) and Ors* ; Civil Appeal No.11 of 1992 where the Court of Appeal confirmed a decision of the High Court which had refused to make an Order for security for costs when the Judge found that the defendants had delayed unduly in bringing their application.
- 36.0 On behalf of the Plaintiff, Mr. Muaror submitted that it would be fair to order a payment of \$8,500 but Mr. Nagin points out that the amount must bear some relation to the size of the claim made by the Plaintiff. He says this is for \$2.6 million Fiji dollars to which Mr. Muaror demurs. He says that no specific amount is claimed in the originating summons which seeks only a declaration about the validity of the transfer of shares.
- 37.0 With respect I think this is a little too simplistic. The Plaintiff's debt is said to be FJD \$2.6 million which, it apparently considers to be a fair value for the shares offered by the First Defendant.
- 38.0 Mr. Nagin points out correctly that the amount which I order will not be paid into the Trust Account of the defendant's Solicitors. It will be held by the Court to be drawn on if required.

**8.**

39.0 I must also take into account the fact that Fiji has now devalued its currency so that the amount of \$30,000 in Japanese Yen is now probably less than it would have been at the time the Plaintiff's summons was issued. For some time now according to the Exchange Rate published in the Press, One Fiji Dollar buys 44.58 Japanese yen.

40.0 In all the circumstances I consider the appropriate amount to be paid into Court at this time is \$20,000. If, it transpires that this is not sufficient then a further application can be made.

See Nicholas Benjamin Midegs and Ors v. Savita Devi Midegs Civil Action No. HPP 11 of 2007 a decision of Master Udit of the 25<sup>th</sup> of March 2008. It is also relevant, as Master Udit held in that case, to take into account the possibility of this matter being settled.

**41.0 I therefore order that the Plaintiff do pay into Court the sum of FD \$20,000 dollars by way of cash deposit within 14 days of the delivery of this Ruling. Thereafter the action will take its normal course.**

**Dated this 9<sup>th</sup> day of September 2009.**

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**JOHN E. BYRNE**

**JUDGE**