

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

**Civil Case No.: HBM 108 of 2017**

**BETWEEN** : **GOVIND RAJESHWARAN NAIR** Accountant of 15 Waqanui Road,  
Tacirua East, Nasinu.

**PLAINTIFF**

**AND** : **FIJI NATIONAL PROVIDENT FUND** a statutory body established  
under the Fiji National Provident Fund Act, having its principal office at  
Provident Plaza, Level Two, 33 Ellery Street, Suva.

**DEFENDANT**

**Counsel** : **Plaintiff - In Person**  
**Mr. P. Chand for the Defendant**

**Date of Hearing** : **26<sup>th</sup> September, 2017**

**Date of Judgment** : **27<sup>th</sup> September, 2017**

*Catch words - DPO- Constitution of Republic of Fiji (the Constitution) - Bill of Rights - Sections 9 and 21 of the Constitution - Deprivation of personal liberty Section 9(2) of the Constitution - Section 3(2), Section 6(3) of the Constitution, Restrictions on freedom of movement - Sections 104 and 116(A) of FNPF Act 2011- Sections 3, 514 and 515 of the Companies Act 2015- Reasonableness-non service of DPO in terms of Section 104(4)(a) of FNPF Act 2011.*

**JUDGMENT**

**INTRODUCTION**

1. The Applicant is seeking to revoke the Departure Prohibition Order (DPO) issued by the Chief Operating Officer (COO) of the Defendant for default of statutory dues from Giaan Enterprises Limited (GEL), on behalf of its employees, to the Defendant. Admittedly the Plaintiff is a Director of GEL and a foreign national. While he was dealing with the settlement of the arrears of statutory dues of GEL with the Defendant, a DPO was obtained and when he travelled to Fiji, to forward a settlement plan for payment of the said arrears,

he was served with the said DPO obtained previously. The Plaintiff is seeking to revoke the said DPO.

## **FACTS**

2. In the Amended Originating Summons the Plaintiff is seeking the following orders:
  - i. A Declaration that the DPO dated 24<sup>th</sup> July, 2017 imposed upon the applicant is unlawful, unfair, and unjustified.
  - ii. A declaration that the Respondent had abused and or misused its statutory powers by imposing the said Departure Prohibition Orders.
  - iii. An order for the Departure Prohibition Order dated 24<sup>th</sup> July 2017 be removed with immediate effect.
  - iv. An order for costs on indemnity basis.
  - v. Any further order or relief which this court deems just in the circumstances.
3. The Plaintiff is the Director of Giaan Enterprises Limited which owes the Respondent employee contributions. Admittedly he had paid approximately FJ\$9,000 upon arrival, and at the time of the hearing the outstanding amount according the Defendant's counsel was approximately FJ\$80,000.
4. The demand letter of the Defendant seeking recovery dated 16<sup>th</sup> December, 2016 is marked as an annexed 'PS 03' to the affidavit in opposition filed by the Defendant, and the demand letter was addressed to GEL and not to its Directors. Not even a copy of the said demand letter was sent to the Plaintiff and or any of the Directors. So, the Defendant did not even made a formal demand from any of the directors before the issuance of DPO. In the said demand letter had indicated that they could issue a DPO in terms of FNPF Act 2011, if GEL did not settle the amount.
5. The Respondent has filed prosecution at the Nadi Magistrates Court for \$73,175.56 for the period August 2014 to November 2016 in Criminal Action No. 50/2017.

6. The Respondent has placed Departure Prohibition order (DPO) on the Plaintiff on 24<sup>th</sup> July 2017 and served the same on 4<sup>th</sup> September, 2017 upon his arrival to Fiji.
7. The Plaintiff was communicating with an employee of the Defendant regarding the payment of arrears of statutory dues while the DPO was issued by COO of the Defendant, and had arrived Fiji specifically to put forward a written proposal for payment of arrears to the Board of the Defendant for approval.

## ANALYSIS

8. The Law on Departure Prohibition Order issued by the COO of the Defendant was in terms of Section 104 of the FNPF Act 2011 which states as follows;

### *Departure Prohibition Orders*

#### *10.1-(1) If-*

- (a) *a person is liable to pay an amounts as, or on account of, mandated contributions or additional contributions required to be paid by subsection 38(1);*
- (b) *the amount is due and payable but has not been paid; and*
- (c) *the Chief Executive Officer believes on reasonable grounds that it is desirable to prevent the person from departing from Fiji to another county without –*
  - (i) *fully satisfying the liability; or*
  - (ii) *making arrangements satisfactory to the Board for the liability to be fully satisfied;**the Chief Executive Officer may, by written order, prohibit he departure of the person from Fiji.*
- (2) *A departure prohibition order remains in force until revoked, or set aside by a court,*
- (3) *A departure prohibition order in respect of a person does not prevent the deportation of the person under the Deportation Act (Cap. 90) or the deportation or removal of the person from Fiji under the Immigration Act 2003.*
- (4) *The Chief Executive Officer must, as soon as practicable after making a departure prohibition order in respect of a person-*
  - (a) *send a copy of the order to the person at the address of the person last known to the Board; and*
  - (b) *give a copy of the order and such information as the Chief Executive Officer considers is likely to help facilitate the identification of the person to the Permanent Secretary or the Director of the Department of Immigration.*

(5) *The Chief Executive Officer may give a copy of the order and information described in subsection (4)(b) to any other department of the public service if, in the Chief Executive Officer's opinion, to do so will assist in giving effect to the order.*

9. In this instance the person liable to pay under FNPF Act 2011, is a legal entity namely GEL. Presumably an action had been filed against GEL for the recovery of said amount, in the Magistrate's Court. The Plaintiff is a director of GEL and a foreign national.
10. There was no provision contained in FNPF Act 2011, shown to me at the hearing that would automatically qualify a Director of any defaulting legal entity, for issuance of DPO. Such a drastic action has not been authorized by FNPF Act 2011, though COO had under wrongful assumption had acted and issued a DPO to Plaintiff. The CEO or COO needs to act reasonably and also cautiously, when exercising the powers relating to liberty of subjects, as in the issuance of DPO.
11. At the hearing counsel for the Defendant stated that COO had issued DPO since the Plaintiff who was a Director of GEL was residing overseas. He also admitted that Plaintiff was at that time communicating with Defendant and was suggesting a payment proposal. It was also evidenced that since the issuance of demand notice to GEL, and also alleged warning to issue DPO in terms of FNPF Act 2011, the Plaintiff had visited Fiji more than 6 times and the last visit was in June, 2017. Despite warning of DPO contained in the said demand notice issued on 16<sup>th</sup> December, 2016, the Plaintiff had visited Fiji more frequently in 2017 compared with the previous year where there was no threat of DPO. So, considering the facts of this case Plaintiff cannot be considered as 'flight risk' unless there were other compelling reasons. I have not been submitted any such reason and no such reason was considered by COO before DPO was issued on 24<sup>th</sup> July, 2017.
12. When a DPO is issued against a person it does not contain the reasons for the issue of the same, hence the burden is shifted to the Respondent to justify the issuance of DPO against the Applicant. (See Fiji High Court decision of Herbert v Fiji Islands Revenue & Customs Authority [2010] FJHC 265; Misc Action 05.2010L (decided on 26 July 2010))



13. The primary obligation of the payment of arrears of FNPF contributions was with GEL, which is a separate legal personality from the Directors of GEL.
14. The Defendant in their submission had relied on Section 116(A) of FNPF Act 2011 in order to justify the issuance of DPO to the Plaintiff as a Director of GEL.
15. Section 116(A) of the FNPF Act 2011 states as follow;

***Liability for unpaid contributions, additional contributions by a company in financial difficulty***

*116A. If a company that becomes insolvent or is liquidated owes an amount as mandated contributions, additional contributions or surcharge under the former law, each person who was a Director of the company at the time it became insolvent or was liquidated shall be personally liable for such amount. (underling added)*

16. It is an admitted fact the GEL which is the legal entity that is obliged to pay statutory dues in terms of FNPF Act 2011, is not '*liquidated*'. So, the Defendant is alleging that it is '*insolvent*'.
17. The term '*insolvent*' is not defined in the FNPF Act and in the submissions Defendant relied on the interpretation in the Companies Act 2015. Section 3 of the Companies Act 2015 defines it as follows  
*'Insolvent, in relation to a person, means the person is not solvent, and "insolvency" has the related meaning'*
18. GEL is a legal person and sections 514 and 515 of the Companies Act 2015 deals with '*insolvency*' of companies and state as follow  
*'514.—(1) A Company or Foreign Company is Solvent if, and only if, it is able to pay all its debts, as and when they become due and payable.* (emphasis added)

19. In terms of Companies Act 2015 if a legal entity is unable to pay its debts it cannot be called solvent and can be called '*insolvent*' under said law. Inability to pay its all debts can be a relative thing in business depending on the circumstances, hence it needs to be further elaborated and defined in law. If literal meaning is taken it would be uphill task for any

legal person to be considered solvent as many financial and non-financial entities are heavily leveraged, yet considered financially viable entities and they function under normal business environment satisfactorily contributing to the growth of an economy while providing employment.

20. In terms of Companies Act a company is deemed unable to pay its debts if the circumstances in Section 515 is fulfilled. So definition of 'inability to pay debts' is dealt in following manner;

*'Definition of inability to pay debts*

**515.** *Unless the contrary can be proven to the satisfaction of the Court, a Company must be deemed to be unable to pay its debts—*

*(a) if a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding \$10,000 or such other Prescribed Amount then due, has served on the Company, by leaving it at the Registered Office of the Company, a demand requiring the Company to pay the sum so due ("Statutory Demand") and the Company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice; or*

*(b) if during or after a period of 3 months ending on the day on which the winding up application is made—*

*(i) execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the Company is returned unsatisfied in whole or in part;*

*(ii) a Receiver or Manager has been appointed, of Property of the Company was appointed under a power contained in an instrument relating to a Floating Charge on such Property; or*

*(iii) it is proved to the satisfaction of the Court that the Company is unable to pay its debts, and, in determining whether a Company is unable to pay its debts, the Court must take into account the contingent and prospective liabilities of the Company.*

*(2) A Company or Foreign Company which is not Solvent is Insolvent.*  
(emphasis added)

21. There is no evidence of either Defendant and or any other creditor of GEL had sought winding up of GEL and had served 'statutory demand' in terms of the said provision of

law. In the circumstances GEL cannot be deemed insolvent in terms of Companies Act 2015 and Section 116(A) of FNPF Act 2011, cannot be resorted and as it is not 'insolvent'.

22. Since GEL is neither 'liquidated' nor 'insolvent' in terms of law no liability can be imposed on the Directors of GEL in terms of Section 116 (A) of FNPF Act 2011, hence DPO issued on the Plaintiff was not in accordance with the law and it needs to be set aside immediately.
23. Without prejudice to what was stated above, The Constitution of the Republic of Fiji (the Constitution), under Bill of Rights guarantees freedom of movement of all persons including non-citizens. Section 3(2) of the Constitution states that 'the court must adopt a reasonable interpretation of that law that is consistent with' it. (See Section 6(3) of the Constitution). Section 21 of the Constitution, deals with freedom of movement. It is not an absolute right and Section 21(7) contains the circumstances under which restrictions can be imposed. Section 21 of Constitution of the Republic of Fiji states;

*\*Freedom of movement and residence*

*21.—(1) Every person has the right to freedom of movement.*

*(2) Every citizen has the right to apply for and be issued a passport or similar travel document, in accordance with any condition prescribed by written law.*

*(3) Every citizen, and every other person lawfully in Fiji, has the right to move freely throughout Fiji and the right to leave Fiji.*

*(4) Every citizen, and every other person who has a right to reside in Fiji, has the right to reside in any part of Fiji.*

*(5) Every person who is not a citizen but is lawfully in Fiji has the right not to be expelled from Fiji except pursuant to an order of a court or a decision of the Minister responsible for immigration on a ground prescribed by law.*

*(6) A law, or anything done under the authority of a law, is not inconsistent with the rights granted by this section to the extent that the law—*



*(a) provides for the detention of the person or enables a restraint to be placed on the person's movements, whether—*

*(i) for the purpose of ensuring his or her appearance before a court for trial or other proceedings;*

*(ii) in consequence of his or her conviction for an offence; or*

*(iii) for the purpose of protecting another person from apprehended violence;*

*(b) provides for a person who is a non-citizen to be detained or restrained as a consequence of his or her arrival in Fiji without the prescribed entry documentation;*

*(c) provides for the extradition, on the order of the High Court, of a person from Fiji;*

*(d) provides for the removal from Fiji, on the order of the High Court, of any child who had previously been unlawfully removed from another country, for the purpose of restoring the child to the lawful custody of his or her parent or lawful guardian;*

*(e) provides for the removal from Fiji of a person who is not a citizen for the purpose of enabling the person to serve a sentence of imprisonment in the country of the person's citizenship in relation to a criminal offence of which he or she has been convicted in Fiji; or*

*(f) regulates, controls or prohibits the entry of persons on to land or property owned or occupied by others.*

***(7) To the extent that it is necessary, a law may limit, or may authorize the limitation of, the rights mentioned in this section—***

*(a) in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of elections;*

*(b) for the purpose of protecting the rights and freedoms of others;*

*(c) for the purpose of protecting the ecology of any area;*

*(d) for the purpose of imposing a restriction on the person that is reasonably required to secure **the fulfilment of an obligation imposed on the person by law;** or*



*(e) for the purpose of imposing reasonable restrictions on the holders of public offices as part of the terms and conditions of their employment.*

*(8) Section 9(3) and (4) apply to a person whose right to freedom of movement is restricted pursuant to a measure authorized under a state of emergency in the same way as they apply to a person detained pursuant to such a measure.*

24. Counsel for the Defendant relied on Section 21(7)(d) of the Constitution for the imposition of DPO on the Plaintiff. I do not agree with that contention since there is no personal obligation on Directors of GEL. The obligation to pay debt is still with GEL, which is a separate legal entity, from its directors. Directors become liable only when Section 116(A) is applicable and I have dealt that issue before and do not wish to repeat the reasoning, here.
25. DPO is a serious restriction on the person's movements and this is more so when it relates to a foreign national as it would preclude a foreign from returning to his domicile. Such a serious restriction on freedom of movement of a person should not be imposed as the first choice, even if that is allowed under the law, when it is relation to a debt, as in this case.
26. Before resorting to such action, other avenues should be resorted to recover the alleged debt before placing a DPO on a person as action of last resort, when there is a 'flight risk' and other methods of recovery are bleak or impractical under the circumstances. DPO should not be used to punish a person unnecessarily, but use as a tool to be used when there is a reasonable likelihood of absconding, and or flight risk, etc. A steam roller should not be used for a peanut.
27. The Plaintiff was constantly communicating with Defendant through emails regarding settlement of dues to the Defendant, and as a result of such communications had visited Fiji to put forward a payment proposal in early part of September, 2017. While these negotiations are going on, as far back as 24<sup>th</sup> July, 2017 a DPO was obtained and it was not revealed to the Plaintiff. When DPO was issued the COO was unaware of the intended

payment proposal that Plaintiff would put forward for GEL and its viability and acceptance or rejection by the Board of the Defendant.

28. In my mind the action of Defendant to issue a DPO while communicating with the Plaintiff regarding payment proposals before such proposals were even submitted to the Board of the Defendant was unreasonable. At least the Plaintiff should be given an opportunity to forward his payment proposal, even if GEL is considered insolvent.

29. In Fiji High Court decision of Herbert v Fiji Islands Revenue & Customs Authority [2010] FJHC 265; Misc Action 05.2010L. (decided on 26 July 2010) it was stated

*'For the restraint to be held valid it must be reasonable, it must be justifiable. There is a further qualification of reasonableness in a free and democratic society. A state must use no more restrictive means than are necessary to achieve the purpose of the limitation.*

*The Canadian case of R v Oakes 26 DLR (4th series) 200 discusses the concept of "reasonable and demonstrably justifiable" in a free and democratic society. It suggested to consider whether a law measured up to being "reasonable and demonstrably justifiable" one has to first look at the objectives which the law or statute sets out to achieve. It is said those concerns must be "pressing and substantial" and not "trivial or discordant" – p 27 Chief Justice Dickson. Secondly Oakes suggests that the means chosen to restrict the right must be reasonable and demonstrably justifiable under three elements of proportionality test, namely:*

*(a) Measures must be carefully designed and rationally connected to the objective.*

*(b) There should be minimal impairment of the right in question.*

*(c) There must be a sense of balance between the deleterious effect of the measures and objectives to be attained.*

*The New Zealand Court of Appeal in Moonen v Film & Literature Board of Review [2002] 2 NZLR 9 had occasion to discuss the approach to taken when considering reasonable limitation on freedom of expression which can be demonstrably justified in a democratic society. It suggested that the way to approach the issue is "first to identify the objective which the legislature was endeavoring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The*

*way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective.'*

30. The three prone test that was stated in Herbert (supra) should be considered by the issuing authority before issuance of DPO. If not it can result in serious consequences and may even incur substantial loss to a party. The objective of DPO under FNP Act 2011 is to prevent absconding of defaulters and to recover arrears of statutory dues. When the Plaintiff, who is a foreign national and residing overseas, was communicating with the Defendant regarding payment proposal, and attempts are being made to settle the amount outstanding to GEL, a DPO was issued. There is no evidence that COO was unaware of the communications of the Plaintiff and the status of payments before the issuance of DPO. The action to issue DPO should be proportionate to the hardships of the Plaintiff, who had flown specially to submit a payment proposal of GEL to Defendant, voluntarily. The Plaintiff had come on a tourist visa making arrangements to stay only for a short time and his main income is overseas employment. The amount of alleged debt at the time of issuance of DPO was approximately \$60,000 and there is no evidence to suggest the value of the assets of GEL, which is functional and generating employment and also income. In such a situation by detaining a foreign national, far outweigh the benefits of such DPO and impairment to Plaintiff is maximum by the DPO. He had invested in venture in Fiji providing employment and DPO would seriously affect even inflow of money from overseas as it would affect the income earned overseas. So in my judgment three prone tests stated in Herbert (supra) stated for proportionality of the issuance of DPO cannot justify, when the facts of this case are applied.
31. It should also be noted that when a DPO is issued it must be communicated to the person without unreasonable delay (See Section 104(4)(a) FNP Act 2011). This is a mandatory provision and would have done, with a purpose. When a DPO is issued it seriously affect the freedom of movement to outside of the country. So the person against whom DPO is



placed should know the restrictions placed on him over his travel, and that would also allow such person to pay the debt and or arrange suitable alternate security. Such notice would also allow the person against whom a DPO is placed to challenge it in a court of law. He can also arrange his travel plans overseas in terms of DPO. So, depriving such notice without a good reason is also not reasonable, too. The Defendant had issued a DPO to the Plaintiff while one of its employee was communicating with him regarding payment proposal and Defendant could have communicated the issuance of DPO to the Plaintiff. So, not only the issuance of DPO cannot be considered reasonable, even actions after issuance of DPO by non-delivery of the same, cannot be justified under the circumstances of this matter.

32. By the same token, no submission was made regarding any guidelines for issuance of DPO in FNPF Act 2011 or any regulations made under that. When such drastic power is vested in non-judicial authority some guideline or regulation is needed to avoid abuse of that power.

33. When restrictions are imposed on the 'Rights of Personal Liberty' under the Constitution, it imposes even some strictures to the court in terms of Section 9(2) of the Constitution. Section 9 of the Constitution under Bill of Rights deals with the issue of deprivation of personal liberty, as follows

*'9.—(1) A person must not be deprived of personal liberty except—*

*(a) for the purpose of executing the sentence or order of a court, whether handed down or made in Fiji or elsewhere, in respect of an offence of which the person had been convicted;*

*(b) for the purpose of executing an order of a court punishing the person for contempt of the court or of another court or tribunal;*

*(c) for the purpose of executing an order of a court made to secure the fulfilment of an obligation imposed on the person by law;*

*(d) for the purpose of bringing the person before a court in execution of an order of a court;*

*(e) if the person is reasonably suspected of having committed an offence;*

*(f) with the consent of the person's parent or lawful guardian or upon an order made by a court, for the purpose of the person's education or welfare during any period ending not later than the date of his or her 18th birthday;*

*(g) for the purpose of preventing the spread of an infectious or contagious disease;*

*(h) for the purpose of the person's care or treatment or for the protection of the community if he or she is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant; or*

*(i) for the purpose of preventing the unlawful entry of the person into Fiji or of effecting the expulsion, extradition or other lawful removal of the person from Fiji.*

*(2) Subsection (1)(c) does not permit a court to make an order depriving a person of personal liberty on the ground of failure to pay maintenance or a debt, fine or tax, unless the court considers that the person has wilfully refused to pay despite having the means to do so.*

.....

34. So, there is a need for some guide line for the issuance of DPO in terms of the said provision contained in the Bill of Rights in the Constitution, when is is exercised by CEO or COO.
35. Some guide line is found in the Fiji High Court case of *Herbert v Fiji Islands Revenue & Customs Authority* [2010] FJHC 265; Misc Action 05.2010L (decided on 26 July 2010). It had quoted some guidelines issued by Australian Tax Office (ATO) in following terms.

#### *“INTRODUCTION*

*2. Part IVA of the Taxation Administration Act 1953 (TAA) gives the Commissioner the power to issue a departure prohibition order (DPO) which prohibits the debtor from leaving Australia, regardless of whether the debtor intends to return.*

*3. The Commissioner's ability to exercise this power depends upon the existence of certain preconditions. These are:*

*(i) the debtor must have a tax liability, and*

*(ii) the Commissioner must believe on reasonable grounds that it is desirable to issue an order for the purpose of ensuring that the debtor does not depart Australia without:*

*Wholly discharging the tax liability, or*

*making arrangements satisfactory to the Commissioner for the tax liability to be discharged.*

*4. The legislation applies to both Australian nationals and foreign nationals who are liable to pay Australian tax (except if a deportation order is in force). Where a deportation order is made after a DPO has issued, the Tax Office will consult with the Department of Immigration, Multicultural and Indigenous Affairs about revoking the DPO.*

#### *POLICY*

*5. By its very nature, a departure prohibition order imposes a significant restriction on the normal rights of a debtor in that it basically deprives debtors of their liberty to travel outside Australia. The Tax Office recognizes the impact of this restriction on a debtor's freedom of movement.*

*6. The critical phase in the making of an order is the process of determining whether there are 'reasonable grounds' which make it desirable to ensure the debtor does not depart from Australia without discharging or making arrangements satisfactory to the Commissioner to discharge the tax liability.*

*7. In deciding whether to issue a DPO, the Tax Office will take a number of factors into account including whether:*

*(i) there is a tax liability and whether it can be recovered*

*(ii) known assets are sufficient to pay existing and future debts and whether those assets are in a readily-realizable form*

*(iii) recovery proceedings are in course*

*(iv) the debtor has recently disposed of assets to associated persons or entities (the transaction may be overturned in bankruptcy)*

*(v) there is any information to suggest concealment of assets (bank accounts in false names, use of an alias) or movement of funds (for example, AUSTRAC reports)*

*(vi) the debtor has entered into transactions that 'charged' assets in*



*Australia and then moved the borrowed funds offshore*

*(vii) the debtor has assets overseas adequate to maintain a comfortable lifestyle*

*(viii) funds have been transferred overseas (and the purpose of the transfer)*

*(ix) the debtor has significant business interests in Australia*

*(x) the debtor is subject to investigation for criminal activities (and whether any charges have been laid)*

*(xi) there is a threat against the debtor's life as a result of criminal or other activities*

*(xii) there is Tax Office audit activity (or similar activity from other Government agencies)*

*(xiii) the debtor holds (or the debtor has applied for) an Australian or foreign passport/visa/work permit*

*(xiv) the debtor has given an indication of likely overseas travel, and there is no apparent need for travel, and*

*(xv) the debtor's family situation (this information may not be relevant by itself, but when combined with a number of other factors, it may influence a decision to issue an order)."*

36. Above guide line along with provisions of Section 9(2) of the Constitution with *mutatis mutandis* can be applied as guide lines for issuance of DPO.
37. The Plaintiff had objected to the COO exercising the powers of CEO to issue DPO granted by FNPf Act 2011. The counsel for the Defendant stated that there was no CEO appointed at the time of issuance of DPO and in such a situation delegation or devolution of the powers of CEO under FNPf Act 2011, was needed and it had been done by the Board of the Defendant. So, I cannot see any merits in that objection.

38. The Plaintiff is also stated that DPO is being used as a method of debt collection. Though DPO is not a method of debt collection it is a tool that can be used to prevent errant and absconding person on reasonable grounds after considering all the circumstances.

### CONCLUSION


39. The obligation to pay statutory payments under FNPF Act 2011 was with GEL. This obligation becomes a personal obligation of the Directors of GEL in terms of Section 116(A) and according to the submissions of the Defendant they had acted on that provision. As stated in this judgment Defendant could not resort to Section 116(A) unless GEL was '*liquidated*' or '*insolvent*' under the law. When DPO was issued GEL was neither liquidated nor insolvent in terms of the Companies Act 2015. So no obligation can be imputed to the Directors in terms of Section 116(A) of FNPF Act, 2011. The DPO issued on 24<sup>th</sup> July, 2017 on the Plaintiff is unlawful and should be removed immediately. Even if I am wrong on that, issuance of DPO by COO is unreasonable and or it does not qualify proportionality test as discussed in this judgment. The cost of this application is summarily assessed at \$2,000. In assessing the costs I have considered that Plaintiff had consulted a firm of solicitors at early stages for the removal of DPO and they had also written to the Defendant.

### FINAL ORDERS

- i. The DPO dated 24<sup>th</sup> July, 2017 imposed upon the Plaintiff is unlawful and or unreasonable.
- ii. The DPO dated 24<sup>th</sup> July, 2017 is set aside /revoked with immediate effect.
- iii. Cost of this application is summarily assessed at \$2,000

Dated at Suva this 27<sup>th</sup> day of September, 2017



  
Justice Deepthi Amaratunga  
High Court, Suva