

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 131 OF 2012

BETWEEN : **AMUNUCA RESORT MANAGEMENT LIMITED** a limited liability company having its registered office at Level 2, Mid City, Cnr Cumming Street and Waimanu Road, Suva, Fiji Islands.

PLAINTIFF

AND : **GRANT ROBERT GRAHAM** and **BRENDON JAMES GIBSON** of Level 16, 45 Queen Street, Auckland, New Zealand in their capacity as Joint and Several Receivers and Managers of **AANUKA ISLAND RESORT LIMITED** trading as Amunuca Island Resort and Spa.

DEFENDANT

Appearances : Non-appearance for the plaintiff
Ms P. M Low for the defendants
Date of Hearing : 8 May 2018
Date of Ruling : 8 May 2018

R U L I N G

[on striking-out]

[01] This matter came up for trial today (8 May 2018). The action has been fixed for trial commencing at 8.30 am. The time is now 9.00 am. There was no appearance for or by the plaintiff, albeit the plaintiff's and its solicitor's names were called out for three times.

[02] Counsel appearing for the defendant, Ms Low makes application to strike out the matter with costs. She submits that: I have come all the way from Suva. The matter has been fixed for three-day trial from today (8 May 2018) till 10 May 2018. The trial has been set down to commence at 8.30 am. Yesterday (7 May

2018) through a correspondence we indicated to the plaintiff's solicitors (Messrs Natasha Khan & Associates) that we will come ready for trial. The court has the discretion to strike out the matter under O.35, R.1 of the High Court Rules 1988 ('HCR').

[03] O.35, R.1 states:

"Failure to appear by both party or one of them (O.35, R.1)

(1) If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of the Judge.

(2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party."

[04] When the matter was fixed for trial on 1 November 2017, the plaintiff was represented by counsel (Mr Nacolawa). Therefore, the plaintiff knew very well that the trial will commence at 8.30 am today. The cause list for today also clearly shows that the trial commences at 8.30am. Additionally, by the letter dated 7 May 2018, the defendants' solicitors inform the plaintiff's solicitors (Messrs Natasha Khan & Associates) that the defendant will be ready for trial. The letter reads:

"Attention: Ms Natasha Khan

Dear Ms Khan

***Re: Amunuca Resort Management Ltd v Grant Graham & Anor:
Lautoka High Court Civil Action No. HBC 131 of 2012***

1. *We act for Grant Robert Graham and Brendon James Gibson, the Defendant in the above matter ("Our clients").*

2. Further to our telephone discussion (Ms Khan/Pule) last Wednesday and Friday 2nd May & 4th May 2018 respectively, we note from your good self that the Plaintiff is ready for Trial. We also stated that our clients are also ready for Trial. On the Friday discussion, it was further communicated to your good self that if you hear nothing further from us, it means we will proceed to Trial and will be in court on 8th, 9th and 10th May 2018.

3. In light of the discussion in No. 2 above and the no changes in the fixed trial dates (8th, 9th and 10th May 2018) we will be leaving Suva this afternoon (7th May 2018) for Lautoka and our witness will be travelling from New Zealand tomorrow (8th May 2018).

Thank you

Yours faithfully

HOWARDS

Sgd/

.....
Pulekeria M Low"

[05] The court is empowered to strike out an action when neither party appears at the trial of the action is called on (O.35, R.1 (1) or to proceed with the trial if one party fails to appear at the trial (O.35, R. 1 (2)).

[06] Today, when the trial of the action was called on, there was no appearance for or by the plaintiff. There is no reason why the plaintiff or its counsel is unable to appear in court today to conduct the trial.

[07] Counsel for the defendants seeks to strike out the action with costs. She is asking costs in the sum of \$10,000.00. She submits that she had prepared for the trial and coming all the way from Suva and that one of her witnesses will be coming from New Zealand.

[08] The plaintiff does not appear when the trial of the action was called on. The defendants are entitled to make an application to strike out the action. I do not think that it is expedient in the interest of justice to adjourn the trial to another

date. A trial may proceed despite the non-attendance of any of the parties, and the court may simply strike out the claim or defence, and any counterclaim or defendant to counterclaim. I would, therefore, exercise my discretion under O.35, R. 1 and determine to strike out the action in the absence of the plaintiff with costs, which I summarily assessed at \$7,000.00.

The Result

1. Action dismissed.
2. Plaintiff will pay summarily assessed costs of \$7,000.00 to the defendants.

M.H. Mohamed Ajmeer
8/5/18

M.H. Mohamed Ajmeer

JUDGE



At Lautoka
8 May 2018

Solicitors:

For the plaintiff: Messrs Natasha Khan & Associates, Barristers & Solicitors

For the defendants: Messrs Howards Lawyers