

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 347 of 2005L

BETWEEN : **CHERYL L BRZOSKA** of 1002 S. 20th Avenue, Yakima, Washington
98902, United States of America

Plaintiff

AND : **HIDE-A-WAY RESORT LIMITED** a limited liability company
having its registered office C/ KPMG, 5th Floor, ANZ House, Victoria
Parade, Suva

Defendant

INTERLOCUTORY JUDGMENT

Of: Inoke J.

Counsel Appearing: Ms Prasad for the Plaintiff
Mr T Tuitoga for the Defendant

Solicitors: Mishra Prakash & Associates for the Plaintiff
Munro Leys for the Defendant

Date of Hearing: 1 September 2009
Date of Judgment: 4 September 2009

INTRODUCTION

[1] This is the Defendant's application for security for costs under **Order 23 rule 1(1)(a)** of the **High Court Rules 1988** and the Court's inherent jurisdiction.

[2] The Plaintiff, Ms Brzoska, came to Fiji from the United States of America and stayed at the Defendant's Hideaway Resort on the Coral Coast. She was at the resort's

spa pool on 15 December 2002 when a portable basketball apparatus either blew over or fell over and seriously injured her. She sued the Resort owner (hereinafter the "Resort") for damages for her injuries alleging negligence on its part as occupier or, alternatively, under the general duty of care.

CASE HISTORY

[3] The cause of action arose on 15 December 2002. On 5 December 2005, eleven days before the end of the limitation period, Ms Brzoska's solicitors in Fiji filed a Writ of Summons and Statement of Claim. The Resort filed its Defence on 25 January 2006. The Summons for Directions was filed on 16 February 2006 and the Order on the Summons was made on 15 March 2006 and sealed on 23 May 2006. From then on the matter went on a down hill slide. Three notices of intention to proceed were filed by Ms Brzoska's solicitors between that date and 20 December 2007. On 15 December 2008, this Court issued a notice to her solicitors under Order 25 rule 9 of the High Court Rules to show cause why the matters should not be struck out for want of prosecution or an abuse of process. The solicitors filed an affidavit explaining the delay which briefly was that the Fiji solicitors were instructed by Australian lawyers who were in turn instructed by lawyers in the United States of America. Since September 2006 the Fiji solicitors have been in contact with the overseas lawyers and others and Ms Brzoska herself seeking instructions, which eventually came on 10 December 2008. On 11 February 2009 the Master restored the matter on the list and adjourned it to 11 May 2009. Ms Brzoska's solicitors filed her List of documents on 6 July 2009. The Affidavit verifying the List was executed in the USA on 18 February 2009. The Resort filed its present application on 10 June 2009 and the matter first came before me on 10 July 2009, on which date I set the timetable for filing further affidavits and submissions and set the matter down for hearing on 1 September 2009. Counsel complied with the timetable so the hearing was able to proceed as scheduled.

THE APPLICATION AND AFFIDAVITS

[4] The application was supported by an affidavit sworn by a senior associate of the Resort's solicitors. The litigation clerk of the Fiji solicitors swore an affidavit on behalf of Ms Brzoska. Both Counsel filed very helpful written submissions and the application argued before me on 1 September 2009.

[5] It is not disputed that Ms Brzoska lives in the USA and does not have any assets or other property in Fiji.

THE LAW

[6] **Order 23 rule 1(1)(a)** of the **High Court Rules** provides:

"Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court – that the plaintiff is ordinarily resident out of the jurisdiction,...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 proceeding as it thinks just."

[7] Both Counsel referred me to several cases which I need not comment on in this judgment except for the decision of Connors J in **Allan v Hillview Limited** [2003] FHC; HBC 366 of 2003; Ruling 169/06 of 23 August 2006, paragraphs 8 to 16, a case with facts similar to this case, which I respectfully quote and adopt:

"[8] In support of the application the defendant relies upon Order 23 Rule 1 of the High Court Rules which in circumstances such as this give to the Court a discretion to order security for costs. The authorities to which the defendant refers the Court emphasise the discretionary nature of the order, in Aeronave SPA v Westland Charters Ltd [1971] 3 All ER 531 at 533 the Court said:

"It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so."

- [9] Again in Lucas v Yorke [1983] 53 ALJR 20 where Brennan J adopted a dictum of Rich J in King v Commercial Bank of Australia Limited [1920] 28 CLR at 292 where His Honor concluded:

“The discretion must, of course, be exercised judicially, which means that in each case the Judge has to inquire how, on the whole, justice will be best served.”

- [10] The submissions made on behalf of the plaintiff rely in the main on the delay on the part of the defendant in making this application and the Court has been referred to the provisions contained in the Whitebook at paragraph 23/1-3/28 where it said:

“Delay in making an application for security for costs however may be relevant to the exercise of the courts discretion to order security although in most cases, delay is not a decisive factor, it may be treated as important especially where it has led or may have led the plaintiff to act to his detriment or may cause him hardship in the future conduct of the action.”

- [11] There is nothing that has been placed before the Court on behalf of the plaintiff to suggest that the plaintiff has in fact been led to act to his detriment, or that he may in fact face hardship in the future conduct of the action should the defendant’s application be successful.

- [12] The plaintiff refers the Court to the decision of Court of Appeal of New Zealand in Neely v Attorney General [1984] 2 NZLR 636 and there again the Court is considering the lack of promptness in the application being made by the defendant.

- [13] Applications of this type are indeed very relevant in this country, a country which is so dependent upon the tourist industry which of necessity involves people coming from other countries to this country and a natural consequence of which is that some will be injured whilst staying in this country.

- [14] Apart from the delay, another matter of importance for the Court in exercising its discretion is the plaintiff’s prospects 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 upon the pleadings as they appear before the Court. It appears that the plaintiff alleges that he was injured when he fell from a path whilst at the premises occupied by the defendant.

- [15] The defence relevantly alleges that the path or walkway was not on its land but it would appear it is in dispute as to whether the path or footway was under the control of the defendant at the relevant time.

[16] In determining where the interests of justice lie on the brief facts as they have been outlined, I am cognizant of the delay in making the application by the defendant when it has been aware of the plaintiff's domicile since the commencement of the proceedings. I am also aware of the plaintiff not having placed before the Court any evidence to suggest that an order for security for costs would in anyway impede the due prosecution of his action."

APPLICATION TO THE FACTS

[8] Mr Tuitoga for the Resort submitted that I should order the sum of \$100,000 be paid into Court as security for "costs right up to the stage of a full hearing". With respect, I do not accept that costs on a "party-party" basis would amount to that much. The security that the Court orders is not for the whole of the costs that his law firm would charge the Resort. His law firm would only be entitled to costs if they successfully defend the claim and if the Court exercises its discretion and awards costs to them. Consistent with the costs awards that this Court has so far ordered, assuming as he says, that this is a 5 day trial, costs would be closer to \$5,000 than \$100,000. If the two thirds rule, i.e. two thirds of party-party costs, is applied to calculate the appropriate amount for security for costs, then the amount is even lower: See **Sharma v Registrar of Titles** [2007] FJHC 118; HBC 351.2001 (13 July 2007).

[9] This is not a complicated matter, both in fact or in law. The Resort admits that Ms Brzoska was at its resort and was injured by a flying basketball apparatus but simply denies responsibility. It is a bare denial. It does not raise a defence of the type in **Allan** (supra). I am of the view that Ms Brzoska has reasonable prospects of success. I do not think that the apparent slow progress in this matter is her fault. This Court has suffered its own setbacks during the time that this action was filed and there is the inherent delay in having instructions and documents passing between Ms Brzoska and her Fiji solicitors. These delays do not add to the cost of the litigation as far as the Resort is concerned. What is relevant however, in terms of delay, is the delay in

bringing this application. Ms Prasad for Ms Brzoska argued that I should not allow the application because of this delay. I agree with her. The same solicitors have acted for the Resort since the action was filed in 2005. Granting the application would result in further delays.

[10] In the final result, I think the justice of the case requires that I refuse the application for payment of any security for costs.

COURT ABLE TO ASSIST IN SPEEDY RESOLUTION

[11] The Plaintiff's solicitors are now taking steps to progress the matter to trial, which they should as the onus lies on them, but at the same time the Defendant's solicitors should not hang back or frustrate the Plaintiff's attempts. The only pre-trial steps which remain outstanding is agreement on the Pre-Trial Minutes and discovery by both parties. Both solicitors have a duty to their clients and to this Court to ensure that the matter is heard at the earliest possible time.

[12] I informed both Counsel that this matter has been in the Court for too long without resolution. If they have the trial papers in order and advise the Court Registry what dates would be suitable to them and their witnesses then I will allocate a date or dates for hearing late this year or early next year.

[13] I would also urge Counsel and their clients to consider using the mediation procedure under **Order 59** of the **High Court Rules** that is available in this Court now that we have a full time resident Master whom most Counsel in this jurisdiction know and respect as well experienced in civil litigation.

ORDERS

[14] The Orders are therefore as follows:

1. The Defendant's Summons for security for costs filed on 30 June 2009 is dismissed.
2. Costs be in the cause.

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Sosefo Inoke
Judge