

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. **HBC 143 of 2009L**

BETWEEN : **ESQUIRES FIJI LIMITED**

Plaintiff

AND : **LAYLA DENNIS AND MICHAEL DENNIS**

Defendants

INTERLOCUTORY JUDGMENT

Of: Inoke J.

Counsel Appearing: Mr. S Nandan for the Defendants

Solicitors: Messrs Howards & Co. for the Plaintiff
Lowing Nandan & Associates for the Defendants

Date of Hearing: 27 August 2009

Date of Judgment: 27 August 2009

INTRODUCTION

[1] This is an ex parte application by Layla and Michael Dennis for leave to issue Third Party proceedings against a New Zealand company, **Dynamix Holding Limited**, and for service of those proceedings in New Zealand by registered post.

[2] The application by ex parte motion was supported by an affidavit sworn by Layla Dennis. The motion seeks the following orders:

- (a) *"That the Defendants are granted leave to issue a Third Party Notice against Dynamix Holding Limited and serve the said Third Party Notice on it at its registered office and/or at its address for service at 33 -35 Coronation Road, Mangere Bridge, Auckland 1701, New Zealand and/or at its address for communication at P O Box 59035, Mangere Bridge, Auckland 1701, New Zealand;*
- (b) *"That time for acknowledgment of service in the action herein be 42 days after the service on Dynamix Holding Limited of the said Third Party Notice;*
- (c) *"That the service of a copy of the said Third Party Notice in this action and all other relevant documents including a prescribed form of acknowledgement of service, duly issued and sealed by the Registry of the High Court of Fiji, by sending the same by registered pre-paid post letter addressed to Dynamix Holding Limited at P O Box 50035, Mangere Bridge, Auckland 1701, New Zealand or elsewhere in New Zealand shall be deemed sufficient service on the Dynamix Holding Limited of the said documents."*

THE BRIEF FACTS

[3] **Esquires Fiji Limited** (hereinafter "**Esquires**"), the Plaintiff, is a New Zealand company which is the Master Franchisor for the Esquires Coffee brand in Fiji with exclusive rights to grant franchise rights to run "Esquires Coffee Houses" in this country.

[4] In **May 2007** Esquires entered into a country master franchise agreement with another New Zealand company operating in Fiji, **Dynamix Holding Limited** (hereinafter "**DHL**"), which gave DHL the Sub-master Franchisor rights for "Esquires" in Fiji.

[5] **Layla and Michael Dennis** (hereinafter "**Dennis**") entered into an "Esquires" franchise agreement on **22 November 2007** with DHL for Dennis to run an Esquires Coffee House at Port Denarau (the "**franchise agreement**"). The franchise agreement was subject to certain conditions which were not complied with and, according to the lawyers for Dennis, the agreement came to an end on **30 November 2007** pursuant to its terms.

[6] On **11 December 2008**, DHL assigned the franchise agreement to Esquires.

[7] Disagreement between Esquires and Dennis followed which led to Esquires issuing this action against Dennis on **14 August 2009** claiming damages for breach of the franchise agreement and other relief. Dennis filed their Acknowledgment of Service and Notice of intention to defend on **27 August 2009** but no defence has been filed yet.

[8] Dennis wants to join DHL as a third party to this action hence this application. The Third Party Notice claims an indemnity from DHL against Esquire's claim or, alternatively, contribution which the Court deems just. The Notice also alleges fraud or deceit by DHL in assigning its rights to Esquires and that there are other issues between all the parties which require determination by this Court.

THE LAW

LEAVE TO ISSUE THIRD PARTY NOTICE

[9] **Order 16** of the **High Court Rules 1988** (the "**Rules**") deal with Third Party proceedings. **Order 16 rule 1(1)** allows a defendant, who has given notice of intention to defend, to issue a Third Party Notice (Form 9) claiming a contribution or indemnity against a person not already a party to the action (the "third party"), or such relief connected with the original subject matter of the action, or requiring any question or issue relating to the original subject matter be determined as between the parties or as between them and the third party.

[10] **Order 16 rule 2(1)** allows the defendant to apply ex parte. His affidavit in support must state the nature of the plaintiff's claim, the stage the proceedings were

at, the nature of his claim against the third party, and the name and address of the third party: rule 2(2).

[11] Under **Order 16 rule 1(2)** no leave is required for the issue of a Third Party Notice if the action is begun by Writ and the defendant has not served his defence. However, the effect of other provisions in the Rules on a case where service out of jurisdiction is necessary, such as the present case, is that leave is required.

[12] **Order 16 rule 3(3)** provides that the **Order 6, rule 6(3) and Orders 10, 11 and 12** would apply to the Third Party Notice as if it were at Writ and the defendant were a plaintiff and the third party a defendant.

[13] **Order 6 rule 6** says no writ which is to be served out of the jurisdiction shall be issued without the leave of the Court subject to certain exceptions which do not apply in this case. The writ is issued when it is sealed by the Registry. **Order 6 rules 1 to 4** set out the requirements for the issue of a Writ out of the High Court Registry, or for present purposes the requirements for the issue of the Third Party Notice.

[14] Thus, the effect of **Order 16 rule 3(3)** and **Order 6 rule 6** is that leave is required for the issue of a Third Party Notice which is to be served out of jurisdiction. The Third Party Notice in this case meets the requirements set by the Rules so I grant leave accordingly.

LEAVE TO SERVE OUT OF JURISDICTION

[15] **Order 11 rule 1(1)** of the Rules allows service out of jurisdiction with leave for actions falling within paragraphs (a) to (m). The original and third party actions here fall within those provisions.

[16] **Order 11 rule 2(1)** require the applicant in this case to state in his affidavit the grounds of the application, that he has a good cause of action, where the third party is and that there is a real issue between them.

[17] The Third Party is a necessary and proper party to these proceedings. The supporting affidavit states the matters required by the Order 11 so I grant leave to serve the Third Party Notice in New Zealand.

[18] **Order 11 rule 2(3)** requires the Court to set a time within which the Third Party must enter an appearance. That time is set at 42 days which is the usual time set for proceedings served abroad.

SUBSTITUTED SERVICE

[19] **Order 65 rule 1(2)** of the Rules gives the Court power to dispense with personal service. Service may be effected by substituted service under **Order 65 rule 4** where it is impracticable for any reason to serve personally.

[20] The Third Party, DHL, has its registered office in Auckland, New Zealand and has no local address in Fiji other than that of its solicitors. These solicitors may not have instructions to accept service on DHL's behalf so the practical solution is to serve the Court documents by pre paid registered post. I therefore grant leave to serve the Third Party Notice by registered post as prayed.

THE ORDERS

[21] The orders sought in paragraphs (a) to (c) of the Defendants' ex parte motion filed on 27 August 2009 are granted.

Sosefo Inoke
Judge