

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

Civil Action No. **HBC 118 of 2009**

**BETWEEN** : **TOKOMARU LIMITED**

**First Plaintiff**

**AND** : **DENARAU CORPORATION LIMITED**

**Second Plaintiff**

**AND** : **MALCOLM STUART FITTLER**

**First Defendant**

**AND** : **CHIDLOW LIMITED**

**Second Defendant**

---

**INTERLOCUTORY JUDGMENT**

**Of: Inoke J.**

**Appearances: Mr R Vananalagi of Counsel for the Plaintiffs**

**Plaintiffs' solicitors: AK Lawyers**

**Date of Hearing: 17 July 2009**

**Date of Judgment: 17 July 2009**

**INTRODUCTION**

[1] The Plaintiff filed two ex-parte applications this morning.

- [2] The first is an ex-parte Motion for leave to issue the Writ of Summons for service on the First Defendant out of jurisdiction pursuant to Order 6 Rule 6 of High Court Rules 1988.
- [3] The second is an ex-parte Summons for (a) leave to serve the Writ of Summons on the First Defendant out of jurisdiction by substituted service by registered post to PO Box 6004, Coffs Harbour, 2450 NSW, Australia, and (b) interim injunction to restrain the Second Defendant from selling a block of land on Denarau Island, CL 15369 without first registering the usual Restrictive Covenant that applies to all such land in Denarau.
- [4] The Plaintiff filed two affidavits in support by a Brian Legge, the General Manager Designate of the Second Plaintiff. The first affidavit is in support of the application for leave to issue proceedings out of jurisdiction and the second affidavit is in support of the second application.

### **THE PLAINTIFFS' CLAIM**

- [5] The Statement of Claim filed with the Writ of Summons reveals a claim based on the failure of the First Defendant to register a restrictive covenant on his land at Denarau. The restrictive covenant allows the Second Plaintiff as administrator and manager of services on the island, like a municipal council, to enforce its management agreement on all property owners whether original or subsequent purchasers.

### **THE PARTIES**

- [6] The First Plaintiff is one of the shareholders of the Second Plaintiff and one of the founders of the Denarau Charter which the overarching agreement between the Denarau Island owners. The Second Plaintiff is given the right and responsibility under the Charter to act in a similar manner to a municipal council in respect of the Denarau lands. The First Defendant bought land at Denarau the subject of this action for himself or his nominee. The Second Defendant is his nominee and became the owner of that land on 30 June 2004. The First Defendant is one of the directors of the Second Defendant.

**THE CLAIM**

- [7] The Second Plaintiff alleges that the Second Defendant is selling his property without the covenant and is concerned that it may not be able to enforce the management agreement against the new purchaser. That sale is imminent according to the Second Plaintiff. The Second Plaintiff also claims that the Second Defendant has fallen behind in payment of levies due to the services provided by the Second Plaintiff and now owes it arrears totaling \$229,726.83.

**THE FIRST APPLICATION FOR LEAVE TO ISSUE OUT OF JURISDICTION**

- [8] The first affidavit says that the plaintiff is not aware of any other address for the first defendant except as noted in a company search, an address in New South Wales in Australia.
- [9] The application is made pursuant to Order 6 Rule 6 of the High Court Rules
- [10] The claim does not fall within the exceptions mentioned in the proviso to Order 6 Rule 6(1) so leave is required. I am satisfied that the Plaintiffs have a genuine claim against the First Defendant who resides overseas and accordingly **I grant leave to issue the Writ.**

**SECOND APPLICATION**

- [11] I will first deal with that part of the application for leave to serve the Writ out of jurisdiction and for service be by substituted service by registered post to the First Defendant's last address in Australia.
- [12] **Order 11 Rule 1(1)** and **Order 65 Rule 4** are the relevant provisions of the High Court Rules respectively.
- [13] **Order 11 Rule 1(1)** applies. The requirements for leave to issue are set out in **Order 11 Rule 2**. I am satisfied that these requirements have been met so I grant leave for service out of jurisdiction. **Paragraph 3 of Rule 2**

requires the court to set a time within which the defendant to be served must enter an appearance. I therefore set that time as **28 days**.

[14] **Order 56 Rule 4** allows me to order substituted service if I think it is impracticable for any reason to serve the First Defendant personally. He has no address in Fiji. The First Defendant is a director of the Second Defendant the owner of the land that is the subject of this claim. The Second Defendant has local solicitors, Muaror & Co, as their lawyers. If there are documents to be signed for the Second Defendant in respect of the alleged imminent sale then this can only be done by its directors and secretary. I therefore think that they should be served as well.

[15] I find that it is impracticable to personally serve the First Defendant. I therefore order that substituted service be effected by registered post to the First Defendant's address as per the ex-parte summons and service by facsimile or otherwise on the solicitors, Muaror & Co, the Second Defendant's solicitors.

### **THE INTERIM INJUNCTION APPLICATION**

[16] The second relief sought by the Second Plaintiff is an interim injunction against the Second Defendant restraining it from selling the subject land without first registering the restrictive covenant.

[17] The application is brought ex-parte. Order 29 Rule 1(2) requires me to be satisfied that it is one of urgency and a delay would cause irreparable or serious mischief. There was a propensity for parties to bring ex-parte application in these courts in the past that brought about the change in the High Court Rules. It is a departure from the normal and accepted practice and should not be encouraged unless there is clear justification for so departing.

[18] In **Sharma v Raj** [2009] **Miscellaneous Action HBM 19 of 2009**, I said that the two requirements must be met.

- [19] In this case the respective solicitors for the Second Plaintiff and the new purchaser know of the existence of the restrictive covenant and the need to register it in the pending transfer. They would be foolish, may be even negligent, if they proceed to effect the transfer in light of their prior knowledge of the covenant and the request from the Plaintiff's solicitors to refrain from proceeding – Annexure BL10 of the second affidavit.
- [20] I am of the view that in the circumstances, there is no urgency in the sense required by Order 29 Rule 1(2) for me to grant the orders ex-parte.
- [21] I am also of the opinion that irreparable mischief or harm may ensue if the Second Defendant is not restrained. If the proposed transfer goes ahead I am sure that this or any other court will have no difficulty in ordering that the covenant be registered on the title of the new owner. As to the outstanding levies that of itself is not sufficient in my view for the granting of the ex-parte injunction.
- [22] Secondly, in an application for injunction such as this one, there must be an undertaking for damages. It is not given in the affidavit material. Counsel referred me to paragraph 17 of the second affidavit. It is not in my view an undertaking in the required form.
- [23] I am therefore of the opinion that the requirements of Order 29 Rule 1(2) for me to hear this matter ex-parte have not been met so I order that this matter proceed inter-partes. The Plaintiff are to serve the Defendants and their solicitors, Muaror & Co and this matter be called on Monday 20 July 2009 at 9.30am before me. I abridge all time limits for service of court documents.
- [24] I do want to make it clear that my judgment is only in respect of the granting of an interim injunction **ex-parte**. I am of the view that this matter should be heard inter-partes and I will then hear argument by all parties as to whether an interim injunction should issue in accordance with the Cyanamid principles.

## **THE ORDERS**

[25] **The Orders are therefore as follows:**

- (a) **I grant leave to issue the Writ.**
- (b) **I grant leave for service on the First Defendant out of jurisdiction with the time within which the First Defendant must enter an appearance be 28 days from the date of service.**
- (c) **I order that substituted service be effected by registered post to the First Defendant's address as per the ex-parte summons as well as service by facsimile or otherwise on the solicitors, Muaror & Co, the Second Defendant's solicitors.**
- (d) **I order that this matter proceed inter-partes. The Second Plaintiff is to serve the Defendants and their solicitors, Muaror & Co, by facsimile or other means and this matter be called on Wednesday 22 July 2009 at 9.30am before me. I abridge all time limits for service of court documents.**
- (e) **I reserve costs.**

.....  
**Sosefo Inoke**  
**Judge**