

HIGH COURT OF SOLOMON ISLANDS

SOLOMON TELEKOM COMPANY LIMITED -V- DANNY PARKINSON

Civil Case No. 200 of 2003

Honiara: Brown PJ

Date of Hearing: 11 February 2004

Date of Judgment: 8 April 2004

Practice and Procedure - Service of writ out of the jurisdiction - leave necessary - matters to be taken into account. O.11 rr.1, 3, 7 & 11.

Rules of Court - ex parte application for leave to serve specially endorsed summons out of the jurisdiction - principles to be applied - discretion when considering forum conveniens issue. O.11 rr.1, 7 & 11.

The plaintiff claims \$65,959.86 for debt for services rendered in the provision of telephone services in the Solomon Islands. The defendant is now a resident of Australia. Rules of Court make provision for service out of the jurisdiction.

Held: (1) The principles to be addressed when considering whether or not to grant leave to serve out of the jurisdiction are:

- (a) the nature of the claim in terms of O.11, r.1., (the head of jurisdiction);
 - (b) something better than an "arguable case" on the plaintiffs part;
 - (c) the proper exercise of a discretion which lies with this court when considering *forum conveniens*,
- (2) The manner of such service is to be approached in the light of -
- (i) the Hague Convention or
 - (ii) Order 11 rr.7, 11.
- (3) In the exercise of the courts discretion when considering *forum conveniens* issues the principles to be applied are:
- (a) The court should put its mind seriously to whether to "try the rights and obligations of this foreigner, who at common law, owes no allegiance or obedience to this (Solomon Islands) court";

- (ii) If, on the construction of the rules, there is a doubt, it must be resolved in favour of the foreigner;
- and (iii) Where the application is made *ex parte*, full and fair disclosure is necessary.

(4) Once the court decides, in the exercise of its discretion to allow service out of the jurisdiction, the manner of service is principally for the plaintiff to decide, commensurate with proper regard to the reasonable suggestion of the applicant, cognizant with the whereabouts and situation of the defendant, and the mode of service acceptable in that foreign place for such types of process.

CASES CITED

The following cases are cited in the judgment –

Slater and Gordon –v- Ross Mining (Solomon Islands) Ltd, Gold Ridge Mining Ltd, and Ross Mining Ltd (Civil Appeal Unreported 07/199);
Seaconsar Far East Ltd –v- Bank Markazi (1993) 4 All. E.R. 456;
(Societe Generale de Paris –v- Dreyfus (1885) 29 Ch.D.239;
The Hagen (1908) P.189;
The China Navigation Co. Ltd –v- Sanwa Trading Co. Ltd and Solgreen Enterprises Ltd (HC CC24/2001)(unreported judgment of Muria CJ dated 4 July 2001).

Ex parte application for leave to serve writ out of the jurisdiction.

J. Katahanas, for the plaintiff.

This *ex parte* summons by the plaintiff sought leave *nunc pro tune* to serve a specially endorsed writ of summons out of the Solomon Islands, by airmail on the defendant at an address in New South Wales, Australia, (*nunc pro tune* meaning, in this context, that the special endorsement shall have the legal force and effect as and from the date of issue, notwithstanding that leave for such specially endorsed summons for service has only subsequently been given).

Mr Katahanas in support of his clients summons filed on the 26 January 2004 formally read the writ and statement of claim of the 15 August 2003 and the affidavit of Milton Aqorau, the finance officer of Solomon Telekom Co. Ltd, in support. This case came before me on the 18 February when I gave oral reasons and made orders. I now give my written reasons.

The claim is simply one for debt for services rendered as per account stated in the sum of \$65,959.86 for telephone charges. The plaintiff also seeks interest on the debt from 1 January 1999 and costs on a solicitor/client basis. (These latter claims need not concern me at this juncture, on the leave application).

The High Court Rules, Order 11 is expressed "Service out of the Jurisdiction". Mr Katahanas, in support of his claim for leave, pointed to the Court of Appeal reasons and ratio in *Slater and Gordon -v- Ross Mining (Solomon Islands) Ltd, Gold Ridge Mining Ltd, and Ross Mining Ltd* (Civil Appeal Unreported 07/199) as setting down principles which need be applied by this court in these types of applications. Those principles which must be addressed are; a) the nature of the claim in terms of O.11,r.1., (the head of jurisdiction"); b) something better than an "arguable case" on the plaintiffs part; (*Seaconsar's* case), c) the proper exercise of a discretion which lies with this court when considering *forum conveniens*. (*per* the Court at 17, 18 &19).

The manner of service may be left to (i) the Hague Convention or (ii) Order 11 rr.7,11.

In *Seaconsar Far East Ltd -v- Bank Markazi* (1993) 4 All. E.R. 456, the House of Lords (at 457) held, "when considering an application for leave to allow service of proceedings out of the jurisdiction under O.11, r.1(1)(U.K) the court, before exercising its discretion to grant leave, had to consider (i) whether there was a good arguable case that the court had jurisdiction under one of the paragraphs of r.1(i), and (ii) whether there was a serious issue to be tried so as to enable exercise of the discretion to grant leave under r.4(2)." This direction was followed by the Court of Appeal in *Slater and Gordon*.

O.11 rr 1(1) and 4(2)(UK) are in all material respects, the same as our O.11 rr1, 3. I am satisfied the claim is one for debt for breach of contract (the "head of jurisdiction") made in the Solomon Islands and that, (having read the affidavit of the finance officer of the plaintiff,) there is a good cause of action and serious issue to be tried which, in the opinion of the plaintiff's officer would result in recovery of the moneys claimed in the writ.

I am further satisfied, on the *forum conveniens* issue, following the reasoning of the Court of Appeal in *Slater and Gordon* (at 27) that the jurisdiction in which (the breach of contract) is committed is *prima facie* the natural forum for the determination of the dispute. The provision of telephone services has been wholly within this jurisdiction and the breach of contract has occurred here for accounts have been rendered locally, are due but unpaid.

These are the grounds, on Mr. Katahanas' argument, for accepting that the contract for the provision of services was broken in the jurisdiction. There is clear jurisdiction then, in this court under O.11 r 1(e)(breach of contract).

Forum conveniens issue

This is partly encompassed by the need, when exercising my discretion to allow leave to serve on a defendant out of the country, to consider three aspects –

- (i) The court should put its mind seriously to whether to “try the rights and obligations of this foreigner, who at common law, owes no allegiance or obedience to this (Solomon Islands) court”;

(*Societe Generale de Paris -v- Dreyfus* (1885) 29 Ch.D.239 at 242, 243 per Pearson LJ.)

- (ii) If, on the construction of the rules, there is a doubt, it must be resolved in favour of the foreigner; (Nygh – *Conflict of Laws in Australia* 3rd edit, Butterworths, Sydney 1976 at 30) relying on *The Hagen* (1908) P.189 at 201 per Farwell LJ)

and (iii) Where the application is made *ex parte*, full and fair disclosure is necessary. (*The Hagen* at 201 per Farwell LJ).

So far as (ii) and (iii) are concerned, the services were supplied under terms of an agreement with Solomon Telekom in country, so that, on construction of the rule in O.11 r 1(e), I have no doubt and in so far as the *ex parte* nature of the application is concerned, there is nothing on its face to sound a warning that anything but full and fair disclosure has been made by this plaintiff. If not, the defendant may raise the issue if he seeks to argue the grant of leave.

The question of *forum conveniens* is really for the plaintiff, in these circumstances, for the Australian courts have allowed leave for that contrary argument showing “definite and clear ground of inconvenience” should lie on the defendant. That is clearly the preferable approach when the statutory enabling provision in the Rules of Court, O.11 r.1, fundamentally departs from the old common law principle to let foreign birds fly free.

The *Slater and Gordon* case deals with a tortuous cause, but the result reflects the paramount right in the plaintiff to choose.

Manner of Service

In *The China Navigation Co. Ltd -v- Sanwa Trading Co. Ltd and Solgreen Enterprises Ltd* (HC CC24/2001)(unreported judgment of Muria CJ dated 4 July 2001) the former Chief Justice relied upon “Conventions” as affording a proper procedure for service of a Writ of Summons on the 1st defendant in Japan. That rule states –

- “11. Where leave is given in a civil or criminal cause or matter or where such leave is not required, and it is desired to serve any writ of summons,

originating summons, notice, or other document in any other foreign country with which a Convention in that behalf has been or shall be made, the following procedure shall, subject to any special provisions contained in the Convention, be adopted."

It is plain that the operative words deal with service of any document "in any other foreign country with which a Convention in that behalf has been or shall be made." At p.6 of his judgment, Muria CJ commenced his reasons for finding that the Solomon Islands was subject to the Convention on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial matters. (The Hague, 1965)(the Convention) since it had been ratified and enforced (sic) in the United Kingdom in 1969, extended to the Solomon Islands on 20 May 1970, and entered into force in the Solomon Islands on 19 July 1970. By virtue of S.5 of the *Solomon Islands Independent (sic) Order 1978* the continuing effect of "existing laws" as part of the law of the Solomon Islands, was preserved. No finding was made in relation to whether or not Japan was a party to the Convention.

In so far as Australia is concerned, (for that is the place of residence of the defendant in these proceedings, and the country in which service need be effected) it is clear the Convention is an Australian Treaty not in Force. This is apparent from the database search document tendered and explained by Mr Katahanas and which forms part of the material on which he seeks to rely. He does not say no treaty is in force between the Solomon Islands and Australia regarding legal proceedings in civil and commercial matters, but a perusal of the Aust L11 Databases search result does not disclose any such treaty.

I am consequently not satisfied that O.11 r 11 affords this court any power to direct service in accordance with the Convention.

O11 r7. Where leave is given to serve a writ of summons or a notice of a writ of summons in any foreign country to which this rule may by order of the Chief Justice from time to time be applied, the following procedure may be adopted:-

- (1) *The document to be served shall be sealed with the seal of t're Court for use out of the jurisdiction, and shall be forwarded by the judge to the Chief Secretary or to the Resident Commissioner as the case may be for transmission to Her Majesty's Secretary of State for the Colonies with a request for the further transmission of the same to the Government of the country in which leave to serve a document has been given*
- (2).....
- (3).....
- (4).....
- (5).....

It would be wrong to suppose that, because the manner of service envisaged in sub rule 7(1) fails for that upon Independence, the patronage of the Crown (in the right of Her Majesty's Secretary of State for the Colonies) ceases, or that *cessante ratione, cessat lex* (when the reason for a law ceases to exist, so also does the law itself) when the introductory phraseology in r.7 clearly presupposes an option in the court. Where the procedure, for instance in sub rule 7(1) is no longer apposite (upon Independence, the filial expectation of the colony, ceased) the Court, where leave has been given, may adopt a procedure alternate to that which had become superceded, for the substantive right to serve out of the jurisdiction should not be frustrated because the "manner" of such service is not apparent.

The use of the phrase "the following procedure may be adopted" in r.7 presupposes a discretion which may be exercised by the court to perfect its power to grant leave to serve out of the Solomons. That accords with the maxim "*interpretatio frienda est ut res magis valeat quam pereat* (that interpretation is to be made, that the thing may rather stand than fall).

The rule speaks of "any foreign country to which this rule may by order of the Chief Justice from time to time apply" so that Australia is clearly one such country to which the order of the Chief Justice must apply when the incidence of documents for service in that country, ever since 1964 (the date of the Rules) is taken into account. The fact of leave to serve, in Australia, previously, presumes such an order and I consider (since, at the time of the coming into operation of the Rules, the Chief Justice constituted the Court) that a judge, sitting as the High Court, has power in terms of r.7 to impliedly declare "any foreign country" when granting leave to serve out of the jurisdiction. This power is clear from the "interpretation" clauses introductory to the Rules where the Court is stated to be "the High Court, the Chief Justice and judges of the Court".

The actual manner in which service should be effected is in the discretion of the court. But it should take account of the reasonable suggestion of the applicant, cognizant with the whereabouts and situation of the defendant, and the mode of service acceptable in that foreign place for such types of process.

In this case, the plaintiff has addressed such issues, and my orders reflect a reasonable mode of service, that will result in a response where documents cannot be delivered in that foreign country, for whatever reason. The plaintiff, then must disclose any such response (because of its lawyers duty to the court), before further steps in these proceeding may be taken.

I accordingly order -

1. The Plaintiff have leave to serve the Writ (and in the absence of clear evidence of nationality, an accompanying notice in accordance with Order 11 Rule 5) on the Defendant in Australia by personal service;

2. Upon service of the Writ of Summons or Notice as herein provided and after expiration of the time limited for appearance to it by the Defendant and in the further event that the Defendant does not nominate an address for service of documents in these proceedings in Honiara then service of any other documents herein by the Plaintiffs upon the Defendant shall be effected by delivery of same to the Registry of the High Court in an envelope addressed to the Defendants;
3. The costs of and in connection with this application be reserved;

AND I DIRECT THAT the Writ of Summons be amended so that the time limited for appearance to the Writ be amended to read "28 days" in lieu of the 14 days period.

Brown J
Judge