

MICHAEL JAMES BANNER-SMITH -v- THE OWNER OF THE FISHING VESSEL
"EXOCOETUS"

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 20 of 1994

Hearing: 27 January 1994

Judgment: 28 January 1994

T. Kama for Applicant (Ex parte)

RULING

PALMER J. This is an application for issue of a Writ under Order 2 Rule 3 of the High Court (Civil Procedure) Rules, 1964, which rule required that 'No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of the Court.'

By an Originating Summons (ex parte) filed on the 27th of January 1994, the Applicant, seeks leave of the court for the issue of a Writ against the owner of the vessel 'Exocoetus' and to serve the writ outside the jurisdiction of this court. In support of this, an affidavit of Michael James Banner-Smith has also been filed on the same date.

Order 11 Rule 3 states and I quote:

"3. Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or properly may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

Order 11 Rule 1 (e) (iii) reads:

"1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court whenever -

(e) *the action is one brought against a defendant to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract -*

(iii) *by its terms or by implication to be governed by the law of a territory.*

or is one brought against a defendant, in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction; "

The contract relied on by the Applicant is one made in Australia between him and his employer, Australian Pacific Investment (Tas) Pty Limited, a duly incorporated company in Australia, which had chartered the vessel from the owner, Mr Allen Wilkinson of 2/542 Varley Street, Yorkeys Knob, Queensland, Australia. The contract was for the Applicant to be the master of the vessel, the 'Exocoetus'.

In an affidavit filed in this court on the 20/1/94, by Michael James Banner-Smith, he stated at paragraph 4, that his instructions were to have the vessel delivered from Cairns to Honiara and handover by way of sub-charter agreement to a Solomon Islander, Philip Koryar, trading as Philma Export Fisheries Company. The vessel was to remain with the firm for 2 years and he was to remain with the vessel for that period.

At paragraph 9 of the same affidavit, he stated that his remuneration as Master was AUD1,700.00 per week from the 8th December 1993 to 25th February 1994. His remuneration for this full period therefore totals up to AUD10,471.00. He says that he has not been paid this amount. There has been a breach therefore of his agreement, which breach occurred within the jurisdiction of this country.

In a copy of a protest note attached to the affidavit of the Applicant filed on the 26th of January 1994, (exhibit D), the Applicant stated at paragraph 5 and 6 that he was to be advanced a total of AUD20,000.00 to complete the delivery of the vessel in Honiara. He was paid AUD\$8,300.00 before departing Australia. The remainder was to be paid on arrival in Honiara by telegraphic transfer. This was never done. There has been therefore a breach.

I accept that both allegations of breach can be construed as having occurred within this jurisdiction, and therefore come within the provisions of Order 11 Rule 1 (e) (iii).

There is also a claim for damages for refund of expenses incurred after the vessel had left Cairns. Details of these are contained at paragraph 11 of the affidavit filed on the 26th of January 1994. These included airfares from Honiara to Cairns for John Clarke on the 15/12/93, travelling expenses for the Applicant on the 21st January 1994 Honiara to Cairns and return, and stores and provisions obtained in Honiara.

I am satisfied the above grounds give a good cause of action for a writ to be issued here and served out of the jurisdiction of this country. The action however, is to be made against *Australian Pacific Investments (Tas) Pty Limited*, as Defendant, and not the Owner of the fishing vessel.

I am not satisfied that there is a good cause of action against the owner of the vessel. The agreement relied on by the Applicant is one made with Australian Pacific Investment (Tas) Pty Limited.

The writ of summons therefore is to be amended and refiled for issue. Since Mr Andrew Radclyffe is currently acting for Australian Pacific Investments (Tas) Pty Limited in another case involving the same circumstances, I will direct that service of the writ be effected on him. If he refuses to accept service, then further directions should be sought from the court. It does appear likely that this case and civil case No.4/1994 will be consolidated.

(A.R. Palmer)

JUDGE