

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

CIVIL FILE NO.: HBC 99 of 2011

BETWEEN : **FNPF INVESTMENT LIMITED** **PLAINTIFF**

AND : **VENTURE CAPITAL PARTNER (FIJI) LIMITED** **FIRST DEFENDANT**

AND : **DINESH SHANKAR** **SECOND DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr D Sharma [R Patel Lawyers]

DEFENDANT : Ms M Rakai [Sherani & Co]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 05 December 2018

INTERLOCUTORY RULING

[Leave To Issue And Serve Third Party Notice]

THE APPLICATION

1. This is the Second Defendant's Motion filed on 21 February 2018 seeking orders for leave to issue and serve 3rd parties notice.

In support of the application is an Affidavit of the Second Defendant Dinesh Shankar.

Said application is made pursuant to Order 16 rule 2, Order 11 rule 2, 6 of the High Court Rules and Section 23 of the Limitation Act.

SUBSTANTIVE CLAIM

2. The Plaintiff's claim is for damages against the First and Second Defendant for investing in ventures which were non-profitable and in violation of management agreement between the Plaintiff and the First Defendant. As a result there is allegation of substantial loss to the Plaintiff.

This claim is based on an investment management agreement and the alleged failure of the Defendants to perform due diligence as per the agreement; and/or failure to advise as

“professional investment Managers” in terms of the investment management agreement entered between the Plaintiff and the First Defendant which was terminated in 2010.

3. Currently the substantive matter is at the pre-trial conference stage. On 06 February 2018, parties were directed to convene a conference on 20 February 2018.

GROUND FOR THE APPLICATION FOR THIRD PARTY NOTICE

4. According to the Plaintiff, he was invited by David Gemmell and Anthony John O’Farrell [principals of Venture Capital Partners of Sydney] to join the First Defendant as a Director since the First Defendant needed a local director.

He was to simply assist the two majority shareholders and directors namely David Gemmell and Anthony John O’Farrell.

The Plaintiff and First Defendant signed a Management Agreement dated 15 April 2005. David Gemmell and the Second Defendant signed as directors for Venture Capital.

The Management Agreement sets out how investment decision is made for Plaintiff and Fiji National Provident Fund (FNPF) in respect of investment proposals made by the First Defendant.

Under Clause 4.02, the proposals were to be unanimously approved by the 5 member committee of First Defendant Investment Committee.

The First Defendant’s primary role was to find suitable projects for venture capital investments on behalf of the Plaintiff.

It would seek various deals, undertake due diligence (directly and through experts) negotiate deal parameters with deal sponsors and discuss the particular proposal within its own investment committee made up of the Second Defendant, David Gemmell and Anthony John O’Farrell.

The Plaintiff had its representatives in the Investment Committee. The Investment Committee would have to come to a unanimous decision on all venture/projects. The Plaintiff was presented throughout the term of the Management Agreement where its representatives sat before any investments were made.

The Investments decision making process of the Plaintiff and ultimately FNPF in relation to investment proposals made by the First Defendant had to be unanimously agreed by the 5 members of the VCPF Investment Committee as stated in the Article 4 of the Management Agreement. This was then forwarded to the Plaintiff through its Investment Manager, who was the key point for the VCPF Investment Committee at the Plaintiff’s office.

The First Defendant was told that the internal decision-making process at the Plaintiff/Fiji National Provident Fund was as follows:

- *Initial review by the Management Committee, from Investments division of the Plaintiff*
- *Management of Investments division reports (recommends or rejects proposal) to the Plaintiff’s Investment Committee*

- *The Investment Committee decided on the proposal and submits to the Plaintiff's board for a final decision on the same.*

The Management agreement in clauses 4.03 clearly states that prior to the First Defendant's commitment on the Plaintiff needed to be made aware of all investments. This obligation meant the Plaintiff, its Chief Investment Manager, its Managers and directors/members of its Board at the material times were involve with the necessary approvals for each investment which includes, Fiji Malthouse Brewery Company Limited (in the form of shares and a loan), Taunovo Bay Resort Limited (a mezzanine loan) and Tropichealth Incorporated (Fiji) Limited (a loan and share purchases).

According to the Plaintiff, he is sued as a Director of the First Defendant and a member of the VCPF Committee and also as a director of portfolio company Tropichealth. The Plaintiff instituted the proceedings using the review and findings of Chartered Accountants KPMG.

The Plaintiff further says that the KPMG report sets out very clearly that the Plaintiff's representative on the VCPF Investment Committee were present in the meetings that approved the investments for the Fiji Malthouse Brewery Company Limited; Taunovo Bay Resort Limited, and Tropichealth Incorporated (Fiji) Limited. These are as follows:

i) *Fiji Malthouse Brewery Company Limited*
Investment Approval

Dinesh Shankar, David Gemmell, Isoa Kaloumaira, Neale Wright, Epenesa Wilson and Thomas Cottam – August 2005 to 26 July 2007 – which is stated on page 7 & 8 of the Report.

FNPF/FIL personnel involved

Neale Wright, Isoa Kaloumaira, Tom Cottam and Daniel Urai – August 2005 to July 2007 – which is stated on page 10 of the Report.

ii) *Taunovo Bay Resort Limited*
Investment Approval

Dinesh Shankar, Anthony John O' Farrell, David Gemmell and Isoa Kaloumaira – May 2006 – which is stated in page 11 of the Report.

FNPF/FIL personnel involved

Isoa Kaloumaira – May 2006 – which is stated on page 12 of the Report.

iii) *Tropichealth Incorporated (Fiji) Limited*
Investment Approval

Dinesh Shankar, David Gemmell, Isoa Kaloumaira, Epenesa Wilson – 17 November 2006 – which is stated on page 13 of the Report.

FNPF/FIL personnel involved

Isoa Kalaoumaira, Epenesa Wilson – November 2006 – which is stated on page 14 of the Report.

According to the Management Agreement, the members of the Investment Committee needed to notify the Plaintiff which included its Chief Investment Managers, Investment Managers and Directors of the Plaintiff of each and every investment and all necessary reporting under Clause 4.02 and 4.03 of the Agreement. This included liaising with Viliame Vodonaivalu who worked under Thomas Cottam and who was solely responsible for the hold-back on the Malthouse loan.

The Plaintiff intends to join Felix Anthony who was the trustee of the Plaintiff at the material time with the Daniel Uraia as employee representatives and who also sat on the Plaintiff's Board.

The Management Agreement at Clause 10 deals with indemnities which extend to the Second Defendant who is sued in two capacities - initially being sued in his capacity as a director of the First Defendant and secondly as a director of a Portfolio company.

The parties agreed to the terms of the Management Agreement which included an Investment Committee required the approval of the Plaintiff's Chief Investment Manager, Investment Manager and its directors/members of the Board for every decision that the Investment Committee made so the Second Defendant cannot be held responsible for the investments he is being sued for in these civil proceedings. The Second Defendant is entitled to an indemnity or alternatively contribution by the proposed Third parties towards Judgment and/or Orders made by this Honourable Court in favour of the Plaintiff.

The Amended Statement of Defence filed 8th June 2017 at paragraph **15, 16, 27** and **37** denies all the claims of the 3 investments and clearly states that each of the investments were approved by the Investment Committee after which was reviewed and approved by the Plaintiff and its Board of Directors. So, the other directors of the First Defendant, the members of the Investment Committee and the members of the Plaintiff's Board were all part of the decision-making process and this is why they need to be joined as third parties to this proceeding as these funds are those of every working individual of the country.

According to the Plaintiff, the Second Defendant at the Court of Appeal was given option to join other parties and to plead the indemnities.

The Plaintiff is also asking for extension of time be given to join the Third parties as there would be greater prejudice if it was disallowed as the 3rd parties approved the investments that the Second Defendant is being sued for.

OPPOSITION TO THE APPLICATION

5. The Plaintiff's Counsel submits that as per the Management Agreement the only indemnity that is allowed is in Clause 10.2 which pertains to any indemnity the Plaintiff is obliged to extend to the First Defendant and its managers and employees.

The Clause does not state that a Manager or Employee of the First Defendant is granted any indemnity by other employees or officers of the First Defendant or any employees or agents of the Plaintiff.

Clause 10.7 relates to indemnity the First Defendant or its officer can seek from the Plaintiff.

Hence the Second Defendant does not have a right to claim indemnity or contribution from other persons under the Management Agreement.

The Plaintiff's Counsel further submitted that the Second Defendant had six years from 2011 to file an application however failed to do so under Section 4 of the Limitation Act.

The Second Defendant has failed to provide any acceptable explanation why court should allow him to join other parties outside the limitation period.

The Second Defendant has also failed to set out what cause of action exists against each of the individuals who are employees or former employees of the Plaintiff whom the Second Defendant wishes to join as a party.

The Management Agreement does not allow for indemnity by these intended Third Parties nor has the Second Defendant shown evidence that the intended parties agreed to provide him with indemnities.

According to Plaintiffs' Counsel, this application is only made to delay the matters and create complication.

LAW

6. Order 16 of the High Court Rules is relevant which deals with third party and similar proceedings.

Sub-rule 1 allows a Defendant who has given its Notice of Intention to defend to:

- (a) *claim against a person not already a party to the action any contribution or indemnity; or*
- (b) *claim against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the Plaintiff; or*
- (c) *requires any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the Plaintiff and the Defendant but also as between either or both of them and a person not already party to the action.*

7. The Third Party Notice should contain a statement of the nature of the claim made against Defendant and as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

No leave is required if the action was begun by Writ and the notice is issued before service of a defence on the Plaintiff - sub rule (2).

8. In the Affidavit the Defendant must state:

- a) *the nature of the claim by the Plaintiff in the action;*
- b) *the stage which proceedings in the action have reached;*

- c) *the nature of the claim made by the applicant or particulars of the question or issue required to be determined, as the case may be, and the facts on which the proposed third party notice is based; and the name and add of the person against whom the 3rd party notice is to be issued"*
- Order 16 rule 2 (2).

DETERMINATION

9. In the case of **Housing Authority v Delana & Ors a Suva High Court Civil File 283 of 2006** Calanchini J referring to *The Supreme Court Practice 1991 Volume 1 paragraph 16/2/3* had stated that :

The Court has a discretion under Order 16 Rule 2 in all cases whether or not to allow the Defendant to issue a third party notice. Usually, if a prima facie case is established which would bring the matter within any paragraph of Rule 1 (1) leave will be granted to issue the notice and the Court will not in granting leave consider the merits of the claim.

10. Under the Proposed Third Parties Notice, the Second Defendant's claim against the proposed Third parties is to be indemnified by them to the extent of any Judgment in favour of the Plaintiff against the Second Defendant or to the extent as may be determined by the Court together, alternatively a contribution in respect thereof with the costs of the action on a full indemnity basis.
11. According to the Second Defendant the grounds for holding the Third Parties liable are pursuant to Management Agreement dated 15 April 2005 until 31 March 2010 when it was in force.
12. Said Agreement is between Fiji National Provident Fund (FNPF) Investments Limited being the Company and Venture Capital Partners (Fiji) Limited being the Manager.

The Manager was requested to act as investment manager of the Company's fund as per the terms and condition of the agreement.

13. The basis on which the Second Defendant is sued is that he was a Director of the First Defendant and was the Principal Officer and Agent of the First Defendant in Fiji and acted as the liaison between the Plaintiff and the First Defendant.

There are also allegation of mismanagement by the Second Defendant when he was appointed as a Director of Tropichealth.

14. For the Fiji Malthouse Brewery Company Limited, the investment committee consisted of Dinesh Shankar, David Gemmell, Isoa Kaloumaira and Neale Wright.

Isoa and Neale were FIL representatives. For the third round share purchase, the FIL representatives were Epenesa Wilson and Isoa.

For the loan financing for the company, FIL representatives were Thomas Cottam and Daniel Uraia.

15. For the Taunovo Bay Resort Limited investment Isoa Kaloumaira was the FIL representative.
16. For the Investment of Tropichealth Incorporated (Fiji) Limited Isoa Kaloumaira and Epenesa Wilson were FIL representative.
17. However in addition to these representatives of FIL, Second Defendant has named Viliame Vodonaivalu, Avinesh Lal, Daniel Uraia and Felix Anthony who have not been named by the KPMG report relied on by the Second Defendant as representative present in meetings approving the 3 investments.
18. What the Second Defendant claims is that according to the Management Agreement members of the Investment Committee had to notify the Plaintiff including its Chief Investment Managers, Investment Managers and directors of the Plaintiff of each and every investment and all necessary reporting under Clause 4.02 and 4.03 of the agreement.
19. Pursuant to Clause 10.02 of the Management Agreement, it is the company who agrees to indemnify the Manager and any of its Affiliates and any officer, director, partner, or employee if any of them.
20. Accordingly I would agree with the Plaintiff's Counsel's submission that the Second Defendant's reliance on the Management Agreement to seek indemnity and contribution from the FIL persons present when investment decision were made for the 3 investments or the Plaintiff's Chief Investment Managers, Investment Managers and directors is misconceived.

Joining The Non Resident Directors Of The First Defendant

21. The Second Defendant failed since 19 April 2011 to file its application for Third Party proceedings.
22. The Counsel submits that they had on 13 May 2011 [a period beyond the limited time for them to file and serve their Statement of Defence] filed its application for striking out which was heard and a ruling delivered on 22 March 2013.

On 4 April 2015, they filed their application for leave to appeal which was heard and a ruling was delivered on 29 March 2016.

They then appealed to the Court of Appeal and a ruling was not delivered until in 2017.

23. After the Ruling of the Striking Out application the Second Defendant on 12 April 2013 filed its Statement of Defence.
24. The Second Defendant's Counsel relies on the delay in determination of their application of Striking Out and leave to appeal decision, being reason for not making a timely application for Third Party Proceedings.
25. However the High Court Rules allowed then at the very initial stage before service of a defence on Plaintiff to file a Third Party Notice.

Later they had opportunity in April 2013 to file the Notice prior to filing of Defence and/or to make the application for leave after filing of their Defence.

26. The Second Defendant's Counsel relies on Section 23 of the Limitation Act for leave to issue the Third Party Notice out of the limitation period.
27. However when one looks at the Limitation Act, Section 23 falls under Part III – Extension of Limitation Periods in Certain Cases, Sub part D – Provisions Applicable to Certain – Actions in Respect of Personal Injuries.
28. Hence I find the Second Defendant cannot make reliance on Section 23.
29. The Second Defendant has failed to show any good reason why he did not file a Third Party Notice or Application for Leave for Third Party Notice earlier.
30. Hence I refuse make orders as per the Second Defendants application motion dated 19 February 2018 to join the directors of the First Defendant, Members of the Investment Committee and the Members of the Plaintiff's Board as Third Parties under prayers (a) – (c).

Subsequently prayers (d) and (e) shall fail.

31. Further I order cost summarily assessed at \$1,500 to be paid by the Second Defendant to the Plaintiff in 14 days from to-date.




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Vandhana Lal [Ms]
Acting Master
At Suva.