

**IN THE DISTRICT COURT
AT MANUKAU**

**I TE KŌTI-Ā-ROHE
KI MANUKAU**

**CIV-2019-092-003997
[2021] NZDC 1009**

BETWEEN

MONSOON BEVERAGES LLC
Plaintiff

AND

FOLAU HAVEA
Defendant

Hearing: 22 January 2021

Appearances: O Towle for the Plaintiff
N King for the Defendant

Judgment: 22 January 2021

ORAL JUDGMENT OF JUDGE DAVID J HARVEY

[1] The plaintiff, Monsoon Beverages LLC has issued summary judgment proceedings against the defendant, Mr Havea, to recover the sum of \$40,935.28 USD, being monies that were paid by the plaintiff to the defendant for a shipman of kava, which has not been delivered to Monsoon.

[2] Summary judgment application proceedings were filed and were served on Mr Havea in New Zealand. Shortly before the first call of the application for summary judgment, Mr Havea filed a protest to the jurisdiction to hear the summary judgment. Mr Havea says that the matter should be heard in Tonga. He is represented today by Mr King. Mr Towle represents the plaintiff.

[3] The first point is that the defendant was served with the summary judgment proceedings in New Zealand and as far as that is concerned, that clearly grounds jurisdiction in this country. The Laws of New Zealand text states, regarding serving

on a defendant present in New Zealand, the High Court or the District Court has jurisdiction in a proceeding against the natural person of whom personal service and documents commencing the proceeding has been affected in New Zealand. This applies however temporary the presence of that person in this country.

[4] To make matters a little bit clearer, it is not as though Mr Havea was making a fleeting visit to New Zealand although process servers were awaiting him at the airport and delivered the proceedings to him. He has an address in Mt Wellington. He has been involved in corporate activity in this country. The dealings between Mr Munsell who was an officer of Monsoon and Mr Havea appear to have taken place in New Zealand.

[5] As far as jurisdiction is concerned, it is quite clear that the New Zealand Court prima facie has jurisdiction and the only issue for this Court to determine really is one of whether or not the New Zealand Court is the most convenient jurisdiction to hear the case, or whether or not the courts in Tonga are a more convenient jurisdiction to hear the case.

[6] Mr King has argued that there are elements of this particular transaction that have connections with Tonga. There are also elements where the transaction has connections with New Zealand and elements of the transaction that have connection with the United States. Any one of those three jurisdictions could well provide the forum, but the question is, what is the most convenient forum?

[7] Mr King argues that in fact the primary connection with the contract is Tonga and he relies upon an invoice which shows Mr Havea's address as being that in Tonga. However, it transpires the payments that were made initially by Monsoon, that they claim should be refunded, were to bank accounts that were allocated here in New Zealand.

[8] The kava, on the other hand, which is the subject matter of the contract, was to be sourced in Tonga and was to be delivered to San Francisco. So, performance of the contract was to take place in San Francisco in the United States.

[9] What is it about this particular matter that makes New Zealand a better forum for hearing the case than the courts in Tonga? Mr King says that the agreement was made within the jurisdiction of Tonga, and certainly given the invoice with the address upon it, there is no doubt that that particular documentation supporting the contract has a connection to Tonga, but there seem to be, as far as the affidavit of Mr Munsell is concerned, other negotiations and discussions which took place in this country. Part of the agreement was to be performed in Tonga. That is the shipping of the product to San Francisco, but another part of the agreement was that it was supposed to be delivered to San Francisco, so it was not all to be performed in Tonga. It does appear that payment (consideration) was to be made in New Zealand.

[10] Mr King suggests that the cause of action and the alleged breach occurred in Tonga, but he refers to an email chain which suggests that there was some difficulty with providing the product arising from water damage, and, therefore, that the breach occurred in Tonga, but simply because the breach occurred in Tonga does not necessarily exclude the New Zealand Court from hearing the matter.

[11] Certainly, the product was to be sourced in Tonga. I do not have any evidence that the defendant was normally domiciled in Tonga, but certainly he has business connections and other connections with New Zealand. As I have already said, the invoice for the goods says that his address was in Tonga. Mr King suggests that all of the witnesses and evidence for the defendant are in Tonga, but there is no evidential foundation for that.

[12] The background to the particular matter is that the agreement between the parties was in October of 2017 and in return for payment of \$42,000 USD, Mr Havea would ship 600 kilograms of kava from Auckland to San Francisco. Payments were made by bank transfer, dated 16 October 2017 and 17 October 2017. Unfortunately, delivery of the kava did not take place.

[13] In June of 2018, Mr Havea spoke with Mr Munsell on the telephone and indicated that the kava was not going to be delivered and he agreed to refund the sum of \$42,000. He undertook to pay instalments in respect of that agreement, but he only made two such payments, amounting to \$1,064.72 USD.

[14] Clearly, the Court, as I have said, has jurisdiction and the question is whether or not the New Zealand Court was the more appropriate form. Certainly, the evidence that I have before me, primarily from the affidavit of Mr Munsell, is that Mr Havea does have a personal and commercial presence in New Zealand, which supports the contention that New Zealand would be the appropriate forum to hear the application.

[15] It appears that as far as the greater number of contacts and communications in this transaction are concerned, Mr Havea seems to have been based in Auckland, and on the one occasion that Mr Munsell met with Mr Havea, it was in Mt Wellington.

[16] Records that appear in the affidavit are that Mr Havea has been a director, now removed, of five New Zealand companies. He holds out online on his LinkedIn page that he is based in Auckland. His business has involved shipping kava through Mt Wellington in Auckland and there was a Mt Wellington address on the bill for the kava shipment. He holds a New Zealand bank account and requested that Monsoon transfer part of the funds for the kava to a New Zealand Westpac bank account in his name. He was located for the purposes of service at an address in Mt Wellington.

[17] As far as New Zealand law is concerned, a New Zealand Court does have jurisdiction as I have already said primarily as a result of service upon Mr Havea in this country.

[18] Mr Towle in his written submissions argues that there is no utility in proceedings being determined in Tonga. Mr Havea has not disputed liability to refund the amount for the kava shipment and he has stated that he was obliged to repay the money, although, Mr King has suggested that there may be an aspect of frustration of contract.

[19] It may well be that there is some difficulty, as far as Mr Havea is concerned, in supporting a contention that the product was damaged by water, but in these days, there is little difficulty in having evidence provided from an offshore location by way of video conferencing or audio visual links, and that type of process is becoming very familiar, as far as the Courts are concerned. The argument about the location of

witnesses might have had some force 10 years ago, but it lacks force now given modern communication systems and the Internet.

[20] As far as Mr Havea is concerned, given his contacts in New Zealand, it does not appear that there is any unnecessary prejudice and certainly as far as Monsoon is concerned, they are entitled to elect their jurisdiction and that must carry some weight as far as a decision about forum is concerned.

[21] I am not going to embark upon a consideration as to whether or not the protest was a strategic one and that is probably something that should be explored further when the issue comes to costs, but what I am prepared to do is set the protest to jurisdiction aside. I direct that the defendant is to file an opposition to the summary judgment application, together with affidavits in support within 10 working days of today's date.

[22] I am going to reserve costs, primarily because it may well be that this was a strategic ploy on the part of the defendant. Perhaps an absence of evidence at this stage is a benefit to the defendant as far as that is concerned, and I think that the issue of costs and any question of whether or not the protest to jurisdiction had been validly made, is something that could be further explored once the quality of the evidence surrounding the substantive matter has been considered. So I am going to reserve costs.

Judge D Harvey
District Court Judge

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