IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. 50 of 2019

BETWEEN

LARRY CLAUNCH of 12900 Beck Road, Dallas, Oregon 97338,
United States of America as Director and Shareholder of
One Hundred Sands Limited.

PLAINITFF /RESPONDENT

AND

ONE HUNDRED SANDS LIMITED a Private Limited Company incorporated
under the Laws of the Republic of Fiji of Aliz Pacific, Level 8,
BSP Life Centre, 3 Scott Street, Suva, Fiji.

FIRST DEFENDANT / INTENDED 1ST APPELLANT

AND

TIMOTHY MANNING of 19-21 Como Street, Takapuna, Auckland,
New Zealand as Director and Share Holder of
One Hundred Sands Limited.

SECOND DEFENDANT / INTENDED 2ND APPELLANT

Counsel	:	Mr. Haniff F. & Mr. Mohammed W. for the Plaintiff Mr. Sing A. for the Defendants
Date of Hearing	:	25th September 2019
Date of Ruling	:	18th October 2019

RULING

(On the application for Leave to Appeal)

[1] On 21st May 2019 the 2nd defendant filed summons the have the Originating Summons filed against him set aside on the following grounds:

(a) The originating Summons was issued without the leave of the Court.

(b) Alternatively, notice of the said Originating Summons by service was effected out of jurisdiction without leave of the Court for service of such Originating Summons out of jurisdiction.

(c) That the service of the Originating Summons irregular and not in compliant with RHC, and purported Originating Summons is a nullity for want of proper leave for service out of jurisdiction in New Zealand.

(d) AND the costs of and incidental occasioned by this application be the 2nd defendants costs in any event.

[2] After hearing the parties the court on 29th July 2019 refused the application of the 2nd defendant.

[3] The present application is made by the defendants seeking the following orders:

1. That the 1st and 2nd defendants / intended 1st and 2nd appellants be granted leave to appeal against the ruling pronounced by Justice Lyone Seneviratne in the High Court in Suva on 29 July 2019.

2. The 1st and 2nd defendants / intended 1st and 2nd appellants be granted an enlargement of time to file Notice and Grounds of Appeal appealing

the Decision of Mr. Justice Seneviratne delivered on 29th of July 2019 within fourteen (14) days from the date on which leave is granted to appeal the aforesaid Decision of Mr Justice Lyone Seneviratne to the Court of Appeal.

3. That the Ruling including the order for cost payable made by Justice Lyone Seneviratne and these proceedings being Civil Action 50 of 2019 be stayed pending the hearing and determination of the 1st and 2nd defendants / intended 1st and 2nd appellants to Fiji Court of Appeal.

4. And such other orders and directions as the Court may determine an Order for provision for the costs for the appeal.

[4] The defendants seek to challenge the ruling of this court on the following grounds:

I. The learned Trial Judge erred in law and in fact when he erroneously held that the failure to obtain leave of court prior to issuing and sealing of a Originating Summons for service out of jurisdiction made the issued originating summons irregular and thereafter wrongly held that the failure was amenable to a discretionary relief by the court on an application under Order 2 rule 1 of the High Court Rules.

II. Further or alternatively, the learned Trial Judge failed to consider and uphold the failure to obtain leave of the court prior to the issuing of the proceedings was a fundamental defect that did not lend itself to curative orders under Order 2 rule 1.

III. The learned trial Judge erred in not considering the following circumstances prior to the exercise of his purported discretion under Order2 rule 1 of the High Court Rules

(a) The plaintiff in the proceedings had issued the originating summons first prior to seeking and obtaining of the leave for service out of jurisdiction.

(b) The plaintiff in the proceedings had served the originating summons on the 2nd defendant (appellant Timothy Manning) out of jurisdiction in Auckland New Zealand on 1st May 2019 whereas;

(c) The purported order granting leave was sealed by the High court on 23rd of May 2019 {thus making the service defective without the sealed order].

[5] Although the 1st and 2nd defendants have been named as intended appellants the submission of the learned counsel is that the party seeking leave to appeal is only the 2nd defendant.

[6] In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

> It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.
>
> Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

In **Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji and Motibhai & Company Limited** Civil Appeal No. ABU 0034 of 1995 the Court of Appeal observed as follows;

> The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

In the case of **Ex parte Bucknell** (56 CLR 221 at page 224) it was held:

> At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under section 35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the

case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment.

In **Dunstan v Simmie & Co Pty Ltd** 1978 VR 649 at 670 it was held:

> "....although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the primary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd., (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand."

[7] From the decisions cited above it is clear that the courts are very much discouraged from granting leave to appeal interlocutory orders. Leave to appeal will not be granted unless the court is satisfied that substantial injustice will be done to the applicant.

[8] On 29th March 2019 the court granted the following orders sought by the plaintiff in the summons filed on 08th March 2019 and the orders which were sealed on 23rd May 2019:

(a) THAT the plaintiff is granted leave to issue and serve the Originating Summons together with the Affidavit in Support of Larry Claunch and all other Court documents herein on the Second Defendant, Timothy Manning out of Jurisdiction.

(b) THAT the Plaintiff is granted leave to issue and serve the Summons for Interlocutory Injunction together with the Affidavit in Support of Larry Claunch and all other court documents herein on the Second Defendant Timothy Manning out of Jurisdiction.

(c) THAT Timothy Manning be granted forty-two (42) days after service of the Originating Summons together with the Affidavit in Support to enter its appearance.

[9] Order 6 rule 6 of the High Court Rules 1988 provides:

> No writ which is to be served out of the jurisdiction shall be issued without the leave of the Court:

> Provided that if every claim made by a writ is one which by virtue of an enactment the High Court has power to hear and determine, notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction, the foregoing provision shall not apply to the writ.

[10] This rule is also applicable to Originating Summons.

[11] The order granting leave to issue and serve the Originating Summons was granted before it was served on the 2nd defendant. If the service was effected before sealing it, in my view, is a defect curable. It cannot be considered as an error in the ruling of this court which the 2nd defendant is seeking appeal against.

[12] In this regard the parties cited two previous decisions which I have considered in my ruling.

[13] In **Habib Bank Ltd v Raza** [2019] FJHC 308; Civil Action 53 of 2005 (21 February 2019) where it was held:

> Failure to obtain leave under Order 6 Rule 6(1) cannot be cured by Order 2 Rule 1 of HCR as the failure is fundamental defect and not irregularity: Lowing v. Howell (ante);
>
> Failure to obtain Leave to issue Writ for service out of jurisdiction makes the proceedings voidable and will be struck out on an application by the Defendant as of right.

[14] In **Tawake v Fiji Air Limited** [1996] FJHC 165 (5 December 1996) in that case the court held that this is an irregularity that could be rectified under Order 2 rule 1 of the High Court Rules 1988.

[15] Both these decision are from the courts of parallel jurisdiction. In my ruling I relied on the decision in **Tawake v Fiji Air Limited** (*supra*) for the reason that the irregularity complained on in this case, that is serving the Originating Summons before sealing but after obtaining leave of the court, does not vitiate the entire proceedings.

[16] The submission of the learned counsel for the 2nd defendant is that the plaintiff should commence proceedings afresh. The failure on the part of the plaintiff to serve the

sealed copy of the Originating Summons is not an illegality that goes to the root of the matter. It is a mere irregularity which can be cured under Order 2 rule 2 of the High Court Rules 1988. In the two cases cited above the defect was, the plaintiff served the writ of summons without obtaining leave of the court to serve it on the defendant. In the instant case as I have stated above the Originating Summons was served after obtaining leave of the court but before sealing it.

[17] The purpose of serving pleading in a matter is to give sufficient notice of the action against that party. The failure to serve the sealed copy cannot be said to have caused any injustice to the 2nd defendant.

ORDERS

1. The Application for leave to appeal is refused.
2. The 2nd defendant is order to pay the plaintiff $2000.00 as costs of this application

HIGH COURT OF FIJI SUVA

18th October 2019

Lyone Seneviratne

JUDGE