

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 265 OF 2016

BETWEEN : **CEE CEE VEE INVESTMENTS LIMITED** a limited liability company having its registered office at Clopcott Street, Ba, Fiji.

FIRST PLAINTIFF

AND : **VINOD CHANDRA SHANKARBHAI PATEL** of Varadoli, Ba, Fiji
Businessman.

SECOND PLAINTIFF

AND : **GUO LIANG CHAN aka COLIN CHAN** Businessman and Night Club Operator, **QUNFANG LI** of Guangzhou, Guangdong Province of China Businessperson and **GUANXIN LIANG** Guangzhou, Guangdong Province of China, Businessperson.

DEFENDANTS

Appearances : Ms A. Chand for the plaintiff
Mr A. J. Singh for the first named defendant

Date of Hearing : 16 October 2019

Date of Ruling : 12 February 2020

R U L I N G

[on strike-out]

Introduction

[01] This ruling concerns with a striking out the statement of claim.

[02] At the trial stage, the first defendant made an oral application to strike out the claim on two grounds, i.e.: -

1. The plaintiff did not effect personal service of the writ of summons on the second and third named defendants.
2. The action is an abuse of process (O 18, R 18 (1) (d)).

[03] The parties opted to file written submission on the issues raised by the first named defendant. Accordingly, both parties have filed their respective submission. In addition, the plaintiff has also filed a supplementary submission. I have considered all the submission filed by the parties.

[04] Briefly, the background facts are as follows.

[05] The trial of the matter was listed on 14 to 16 October 2019, inclusive.

[06] On the first day of the trial, the first named defendant made a walk-away offer to the plaintiffs as a gesture of settlement. Mr Naivalu, counsel who appeared for the plaintiffs confirmed receiving an email last afternoon regarding the offer and made an application to have the matter stood down till 11 am. The court allowed that application, and took up the matter again at 11 am. Then Ms Chand who appeared with Mr Naivalu informed the court that: *"we had discussions we need to have a scene visit to sort out other issues they are complaining. We seek an adjournment – 30 days"*. The court considering the application adjourned the matter till 9.30 am Wednesday 16 October 2019. At the same time, I found that Mr Mishra not only a solicitor for the plaintiffs but was also a witness (as one of the directors of the plaintiffs) in the proceedings. I brought this fact to Mr Mishra and the plaintiffs.

[07] Thereafter, Anishini Chand Lawyers filed a notice of change of solicitor on behalf of the plaintiff in place of Mishra Prakash & Associates, Solicitors for the plaintiffs.

- [08] On 16 October 2019, when the matter came up for trial, Ms Chand sought to have the matter stood down on the ground that she needed to prepare her witness.
- [09] The court then asked Ms Chand if she has got any document proving payment of VAT in respect of the property to Fiji Revenue and Custom Services ('FRCS'), to which she said no such document was available.
- [10] After the matter was stood down a few times on 16 October 2019, the plaintiffs were able to make their opening statement at 2.45 pm that day.
- [11] Immediately after the conclusion of the plaintiff's opening speech, the first defendant orally made an application as mentioned above in para 02 of this ruling, to strike out the claim.

The legal framework

- [12] The High Court Rules 1988, as amended ("HCR") under O 10 contains general provision respecting services of originating process. The HCR, O 10, R 1 so far as relevant states:

General provisions (O 10, R 1)

- 1.-(1) *A writ must be served personally on each defendant by the plaintiff or his or her agent.*
- (2) *A writ for service on a defendant within the jurisdiction may, instead of being served personally on him or her, be served—*
- (a) *by sending a copy of the writ by ordinary post to the defendant at his or her usual or last known address; or*
- (b) *if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant. [Emphasis provided]*

...

[13] R 3 (1), HCR provides:

Service of writ in pursuance of contract (O 10, R 3)

3 (1) *Where—*

(a) a contract contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of a contract or, apart from any such term, the High Court has jurisdiction to hear and determine any such action, and

(b) the contract provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the defendant, or on such other person on his or her behalf as may be specified in the contract, in such manner, or at such place (whether within or out of the jurisdiction), as may be so specified, then, if an action in respect of the contract is begun in the High Court and the writ by which it is begun is served in accordance with the contract, the writ shall, subject to paragraph (2), be deemed to have been duly served on the defendant.

[14] The HCR, O 65, R 4, provides:

Substituted service (O 65, R 4)

4 (1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally or a document to which Order 10, Rule 1, applies, it appears to the Court that it is impracticable for any reason to serve that document in the manner prescribed on that person, the Court may make an order for substituted service of that document.

(2) An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.

(3) Substituted service of a document, in relation to which an order is made under this Rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.

Discussion

- [15] Mr Singh of counsel appearing for the first named defendant has brought to the notice of the court that the writ of summons and statement of claim was not served on the second and third named defendants who are residents in China.
Whether service on the second and third named defendants was proper
- [16] The writ of summons filed by the plaintiffs on 14 December 2016, clearly states that the second and third named defendants reside in China (see their address given in the writ of summons).
- [17] There is no dispute in the service of the writ on the first named defendant. He resides within the jurisdiction. Therefore, he was served personally.
- [18] On 14 December 2016, the plaintiffs filed an *ex parte* application and obtained leave to service the writ of summons and statement of claim out of jurisdiction on the second and third named defendants.
- [19] It is important to note that the plaintiffs did not obtain "*leave to issue the writ of summons and statement out of jurisdiction*".
- [20] Subsequently, on 13 March 2017, the plaintiffs filed another *ex parte* application seeking leave to serve the writ of summons and statement of claim on the second and third named defendants by way of substituted service by serving Young & Associates, Barristers and Solicitors of 2 Saku Lane, Lautoka, Fiji ("*Young & Associates*") or as directed by the Court and obtained leave of the Court for substituted service by serving Young & Associates instead of being served personally on the second and third named defendants.
- [21] A writ must be served personally on each defendant by the plaintiff or his or her agent (HCR, O 10, R 1). However, a writ for service on a defendant within jurisdiction may, instead of being served personally on him or her, be served by post or by inserting through the letter box if there is a letter box for that address (HCR, O 10, R 1(2)).

- [22] The HCR, O 10, R 1 (2), applies only to a writ for service on a defendant **within the jurisdiction**, not to a writ which is to be served out of jurisdiction.
- [23] The plaintiffs obtained leave for substituted service for the second and third named defendants by way of serving a copy of the writ on Young & Associates. This was on the basis that they (*Young & Associates*) had acted all for three defendants for the purchase of Certificate of Title No. 41542, the property in dispute. Young & Associate filed its notice of appointment for the first defendant only. They had subsequently withdrawn their appearance for the first defendant. They never filed notice of appointment on behalf of the second and third named defendants.
- [24] The court may order for substituted service, if in the case of any document including a writ of summons is required to be served personally, for it is important for any reason to serve that document in the manner prescribed on that person (HCR, O 65, R4).
- [25] It appears that the Court had made an order for substituted service of the writ of summons respecting the second and third named defendants by serving on Young & Associates.
- [26] Where a contract contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of a contract or apart from such term, the High Court has jurisdiction to hear and determine any action in respect of the contract, and the contract provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the defendant or any such other person on his or her behalf as may be specified in the contract. (see: O 10, R 3).
- [27] There is no evidence before the court that the contract (the sale and purchase agreement between the parties) provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on such other person as may be specified in the contract, as required by the HCR, O 10, R 3).

- [28] There was no basis for the plaintiffs to obtain an order for substituted service by way of serving a copy of the writ on Young & Associate, instead of personal service on the second and third named defendants. The order for substituted service had been obtained irregularly. As Mr Singh submits, that order had been obtained misleading the Court, and it has been made *per in curium*.
- [29] The writ of summons and statement of claim was not served on the second and third named defendants as prescribed by the HCR.
- [30] The service of the process goes to the root of a claim. A claim is not instituted unless service of the claim is effected on each defendant.
- [31] A claim may be struck out on the grounds that it was not served within the twelve-month period of the writ. For the purpose of service, a writ is valid in the first instance for twelve months beginning with the date of its issue (see: HCR, O 6, R 7).
- [32] There is no application to regularize the service of the writ on the second and third named defendants.
- [33] The second and third named defendants did not appear in court and take any step. Therefore, the question of waiver of the right to raise issues relating to service does not arise.

Conclusion

- [34] The plaintiffs obtained leave to serve on the second and third named defendants out of jurisdiction but not to issue proceedings out of jurisdiction. The substituted service on Young & Associates in respect of the second and third named defendants was improper. The writ of summons and statement of claim was not served on them within twelve-month validity period of the writ. It follows that the action was not properly instituted against the second and third

defendants. I would, therefore, strike out the claim against the second and third named defendants.

Striking out a claim under HCR O 18, R 18 (1) (d)

- [35] Counsel for the first defendant orally applies to strike out the claim against the first defendant under the HCR, O 18, R 18 (1) (d) that it is otherwise an abuse of the process of the court.
- [36] No evidence is admissible on an application to strike out a claim made under limb (1) (a) (of O 18, R 18) that it discloses no reasonable cause of action or defence, as the case may be.
- [37] In all applications to strike out a claim under paragraph (1) (b) that it is scandalous, frivolous or vexatious; or (c) that it may prejudice, embarrass or delay the fair trial of the action; or (d) that it is otherwise an abuse of the process of the court, evidence would be admissible.
- [38] The application by the first defendant to strike out the claim on the ground that it is an abuse of the process (limb (1) (d)) has been made at the trial stage without evidence, generally affidavit evidence. Therefore, it would be appropriate to make that application after the conclusion of the trial.
- [39] The application to strike out the claim against the first defendant on the ground of abuse of the process of court has been made without evidence. For that reason, I reject and dismiss that application. I would make no order as to costs.

The outcome

1. The claim against the second and third defendants struck out.
2. The application to strike out the claim against the first defendant declined.
3. There shall be no order as to costs.

4. The claim against the first defendant is adjourned for mention to fix hearing at 9.30 am on 14 February 2020.

M.H. Mohamed Ajmeer
12/2/20

M.H. Mohamed Ajmeer
JUDGE



At Lautoka
12 February 2020

Solicitors:

Anishini Chand Lawyers, Barristers & Solicitors for the plaintiffs
Anil J Singh Lawyers, Barristers & Solicitors for the first named defendant