

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC Civil Action No. 95 of 2023

BETWEEN: **BRED BANK (FIJI) LIMITED** a limited liability company having its registered office at Suva in the Republic of Fiji.

1st Plaintiff

AND: **THIERRY CHARRAS-GILLOT** of Suva in the Republic of Fiji, Chief Executive Officer.

2nd Plaintiff

AND: **THADEUS RUFUS D'CRUZ** c/- Chacal Maritime Engineering of 3 Nababa Road, Namadi Heights, Suva in the Republic of Fiji, Managing Director.

Defendant

Counsel: Mr A. Patel (Sherani & Co) For the Plaintiffs.

Date of Submission: 9th June 2023.

RULING

A. Introduction

1. The Plaintiffs have filed an Ex Parte Notice of Motion seeking an order that service in this action upon on the Defendant, Thadeus Rufus D'Cruz of the Writ of Summons and all other necessary subsequent Court documents be via the Defendant's wife's email address. It is accompanied with an Affidavit in Support of the 2nd Plaintiff, Thierry Charras-Gillot.

2. The Motion filed by the Plaintiffs is pursuant to Order 65 Rule 4 (1) and (3) of the High Court Rules 1988 and the inherent jurisdiction of this Court.

B. Analysis

3. The Plaintiffs have relied on Order 65 Rule 4 (1) and (3) of the High Court Rules 1988 in this application. Order 65 Rule 4 (1) provides for substituted service as follows “*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.*”. Order 10 Rule 1 requires that a Defendant must be personally served. Order 65 Rule 4 (3) meanwhile provides that “*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.*”
4. Mr Thierry Charras-Gillot, the 2nd Plaintiff, who is authorised by the 1st Plaintiff to make the affidavit in support of the motion deposes that he is informed by his Lawyers that several attempts were made to serve the Writ of Summons and the Statement of Claim on the Defendant at his given address. They found that the Defendant is not residing at the given address and his present whereabouts is not known. Furthermore the 2nd Plaintiff avers that several enquiries and attempts were made to locate the Defendant in Suva and the exact whereabouts of the Defendant is not known to him and the staff of the 1st Plaintiff. The Plaintiffs are so seeking to serve the Defendant using the Defendant’s wife’s email address. The Plaintiffs believe the Defendant is using his wife’s email address. The 2nd Plaintiff, Mr Thierry Charras-Gillot in his affidavit has annexed an email which according to them was sent by the Defendant to the 1st Plaintiff’s CEO.
5. The High Court Rules 1988 does not contain provisions dealing with service via email. The High Court Rules 1988 are largely based on the UK Supreme Court Practice 1988. Overtime the UK Supreme Court Practice have undergone changes and

have been updated to accommodate electronic communication and service of documents through electronic means.

6. In **Nand v. Prasad (HBC 83 of 2013) 2013 FLR 533**, Justice Amaratunga in dealing with a similar application looked at the Supreme Court Practices 1988 (UK) and stated as follows “...if one were to draw any directions from the Civil Procedure Rules (CPR) of UK in 2011, the electronic service of documents including writ of summons are allowed in EEA states, but this is only when the solicitors of the other side or the party intending to be served had expressly consented to such service through electronic means. The electronic means specially the digital media needs special requirements as the medium of transmission as well as the receipt is peculiar to it, and the requirements similar to the what was introduced in the Practice Directions of UK are a good guideline for the countries where there is no express prohibition of service of documents through electronic means, including Fiji. In the circumstances it is not possible to serve the writ of summons and the statement of claim along with the other necessary documents through an email, unless such service is expressly consented by the other party and the UK Practice Directions regarding electronic service can be a guide line until High Court Rules of 1988 is amended and or new Practice Directions are made, to accommodate such service of writ and claim, through an email in Fiji.”

7. In **Nand** (supra), Justice Amaratunga, eloquently set out the Practice that has been developed in UK which allows for electronic service of documents. He also laid out the **Practice Directions 6A – Service within United Kingdom** that have been developed to set out service through electronic means. The Practice Directions supplements the **Civil Procedure Rules (UK)**. The part dealing with service by fax or other electronic means in the **Practice Directions 6A (UK)** is as follows:

“**4.1** Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –
(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –
(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
(b) the fax number, e-mail address or e-mail addresses or other electronic identification to which it must be sent; and

(2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –

(a) a fax number set out on the writing paper of the solicitor acting for the party to be served;

(b) an e-mail address or e-mail addresses set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address or e-mail addresses may be used for service; or

(c) a fax number, e-mail address or e-mail addresses or electronic identification set out on a statement of case or a response to a claim filed with the court.

(3) Where a party has indicated that service by email must be effected by sending a document to multiple e-mail addresses, the document may be served by sending it to any 2 of the e-mail addresses identified.

4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).

4.3 Where a document is served by electronic means, the party serving the document need not in addition send or deliver a hard copy."

8. The Plaintiffs through the motion are seeking to serve the Defendant via email of the Defendant's Wife. The Defendant has not provided a written confirmation to being served through email. He has neither provided written confirmation to being served via his wife's email.
9. The Counsel for the Plaintiff argued that the Court consider Section 5 of the Electronic Transactions Act 2008 stating that "all electronic data is given legal recognition" in his argument relating to service via email. The validity of electronic transactions, documents or records provided for in Section 5 of the Electronic Transactions Act 2008 is different from the service of a Writ of Summons via email. The issue for the Court at this moment is not the validity of any electronic document or email. The issue is service via email. That to through the email of the Defendant's wife.
10. The Rules for the service of a Writ are provided in the High Court Rules 1988. There currently are no Rules for service via email. This Court has a discretion in granting substituted service. The Defendant has not consented to being served through the

email address of his wife. The minimum requirements for the Plaintiffs to follow are set out in the Practice Directions 6A (UK). These need to be followed in the absence of any Rules relating to service via email in the High Court Rules 1988.

C. Conclusion

11. The Plaintiff has not fulfilled the minimum requirements for the Court to grant service of the Writ of Summons and the Statement of Claim via the Defendant's wife's email address. The Ex-Parte Notice of Motion is struck out.

D. Orders

- (a) *The Ex-Parte Notice of Motion dated 30th May 2023 is struck-out.*
(b) *No costs.*

Dated at Suva this 16th day of June 2023.



Hon. Mr Justice Chaitanya Lakshman
Acting Puisne Judge of the High Court of Fiji
Suva

