

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

**Civil Action No. 153 of 2022**

**BETWEEN** : **PACIFIC GREEN INDUSTRIES (FIJI) LIMITED** a limited liability company having its registered office at Queens Road, Malaqereqere. Sigatoka.

**1<sup>ST</sup> PLAINTIFF**

**AND** : **DOMINIC RYAN** of 70 Pacific Road, Palm Beach, NSW 2108, Australia.

**FIRST DEFENDANT**

**AND** : **BROOKE RYAN** of 70 Pacific Road, Palm Beach, NSW 2108, Australia, as the Executor and Trustee of the Estate of Peter Ryan.

**SECOND DEFENDANT**

**AND** : **PACIFIC GREEN INDUSTRIES LIMITED** a limited liability company duly registered with the registrar of companies for England and Wales and having its registered office at D-Ryan 11-13 Danford St, London SE17 3UQ.

**THIRD DEFENDANT**

**AND** : **POST AND RAIL LIMITED** a limited liability company duly incorporated company in Australia and has its registered office at "U17" Baker Street, Banksmeadow NSW 2019, Australia.

**FOURTH DEFENDANT**

**BEFORE:** : Hon. A.M. Mohammed Mackie J.

**APPEARANCE:** : Mr. Samuel K. Ram – For the Plaintiff.  
: Ms. Prasad M. For the Defendants.

**HEARING** : On 28<sup>th</sup> May 2024.

**WRITTEN SUBMISSIONS:** By the Plaintiff filed on 25<sup>th</sup> June 2024.  
: By the Defendants filed on 26<sup>th</sup> June 2024.  
: By the Plaintiff (reply) filed on 11<sup>th</sup> September 2024.

**RULING** : **On 8<sup>th</sup> October 2024.**

# **RULING**

**(On Summons under Order 33 Rule 3 & Order 34 of the HCR)**

## **A. INTRODUCTION:**

1. Before me is a Summons preferred by the Plaintiff Company on 25<sup>th</sup> January 2024, supported by an Affidavit, sworn on 23<sup>rd</sup> January 2024 by, RAVIN CHANDRA, the Director of the Plaintiff Company, and filed with annexures marked as “RC-1 “to “RC-7”, **seeking** ;
  1. *That the following questions be tried as preliminary issues;*
    - 1.1 *Whether the Plaintiff has filed this action in the wrong jurisdiction because the Defendants reside outside Fiji?*
    - 1.2. *Whether the alleged causes of action arose outside of Fiji?*
    - 1.3. *Whether or not, in the circumstances, this Honorable Court has jurisdiction to determine this matter?*
    - 1.4. *Whether the issues in paragraphs 1.1, 1.2, and 1.3 must be raised in accordance with Order 12 Rule 7 of the High court Rules, 1988 and whether they can be raised at the trial of the matter?*
  2. *That the pre-Trial conference be suspended till the determination of this application.*
  3. *That the costs of this action be paid by the defendants.*
2. The Plaintiff filed this Summons pursuant to Order 33 Rule 3 & Order 34 of the High Court Rules 1988, and the inherent jurisdiction of this Court. The Summons is opposed by the First, Second and Third Defendants by an Affidavit sworn by the First Defendant, namely, DOMINIC RYAN, and filed along with annexures marked as “DR-1” to “DR-4”. The Plaintiff on 16<sup>th</sup> April 2024 filed its Affidavit in reply with no annexures.

## **B. HISTORY:**

3. As per the Statement of Claim (SOC) filed on 26<sup>th</sup> May 2022, with prior leave of the Court to issue and serve out of Fiji, the claim involves intellectual property rights, fiduciary duties, and corporate governance issues, highlighting significant misconduct, allegedly, committed by the Defendants, which the Plaintiff claims to have caused harm to its business interests.
4. The SOC states, inter alia, THAT;
  - a. the First Defendant on 18<sup>th</sup> June 2010 agreed to join the management team of the Plaintiff, PACIFIC GREEN INDUSTRIES (Fiji) Limited as an alternate Director and undertook to do the marketing works for the Plaintiff.

- b. The Second Defendant , at all material times, was a Director and, on several occasions , served as a Chairman of the Board of Directors of the Plaintiff and had agreed to serve the interest of the Plaintiff, including carrying out the marketing works either on his own or together with the First Defendant. Additionally, he was responsible for and directly involved in carrying out several business activities of the Plaintiff.
  - c. The Third Defendant Company was registered in LONDON by the Second Defendant on or about 2<sup>nd</sup> November 2000 and neither the First Defendant nor the Second Defendant informed the Plaintiff about the existence and registration of the Third Defendant, despite having financial interest in the Third Defendant. That on 5<sup>th</sup> February 2012, 10<sup>th</sup> January 2013, 17<sup>th</sup> March 2014 and 29<sup>th</sup> April 2014, the Trademarks were registered in the name of the Third Defendant.
  - d. The Fourth Defendant Company was registered in AUSTRALIA on 13<sup>th</sup> March 2014 by the First and Second Defendants, which is named on the Website as the entity responsible for the sales and marketing of the products, and also expressed to be “PACIFIC GREEN”. By a letter dated 15<sup>th</sup> October 2021 , sent through lawyers for the Second and Fourth Defendants, the Fourth Defendant claimed that it is the Registered owner of the Trademarks and put one of the Plaintiff’s Directors on notice that he cannot sell or market furniture in Australia using the Trademarks and threaten to take legal action against him , if he did so.
5. The plaintiff from paragraphs 29 to 42.8 of the SOC alleges that the Defendants were involved in several breaches of duty and fiduciary responsibilities, including improper registration and use of trademarks, unauthorized management of Company’s website and misrepresentation. Accordingly, in paragraph 43, the Plaintiff alleges that as a result of the breaches pleaded, it has suffered loss and damages. The Plaintiff claims for damages from the Defendants as per the prayers to the SOC.
  6. The Defendants filed their Statement of Defence on 27<sup>th</sup> June 2022 and moved for the dismissal of the action on the following grounds.
    - a. *The Plaintiff’s claim is statute barred,*
    - b. *The Plaintiff is guilty of laches,*
    - c. ***The Plaintiff has made jurisdictional error and its claim is wrongly filed in Fiji.***
    - d. *The Plaintiff’s claim is not properly pleaded and does not disclose a reasonable cause of action.*
    - e. *The Plaintiff’s claim is scandalous , frivolous and vexatious ,*
    - f. *The Plaintiff’s claim will prejudice , embarrass or delay the fair trial of this action, and*
    - g. *It is an abuse of process. ( Emphasis mine)*
  7. After filing of the reply to Defence, summons for direction, and Affidavits verifying lists of documents by both parties, when the parties were engaged in the process of finalizing the PTC minutes, the Defendants took up a position that the jurisdiction is an issue which needs to be determined at the trial, which the Plaintiff objected to and filed the current Summons seeking orders therein, which are reproduced in paragraph 1 of this Ruling.

**C. RELEVANT ORDERS , RULES & LAW;**

8. The Plaintiff in its Summons relied on the Order 33 Rule 3, Order 34 and at the oral hearing and in its written submissions, also relied on Order 12 Rule 7, Order 21 Rule 1 of the High Court Rule 1988.

**Plaintiff's Submissions:**

9. The Plaintiff in its submissions drew the attention of the Court to the case of ***Huong – Lee v Air Fiji Ltd [2003] FJHC 28*** wherein the Court referred to the case of ***Hampshire cc v Shonleigh Nominee Ltd*** , where Plowman –J pointed out that the decision to order a trial of a preliminary issue is essentially directory. One factor to be considered was the savings in costs that could flow from a preliminary hearing.
10. It was also submitted on behalf of the Plaintiff that, if the Court does not have the jurisdiction, as alleged by the Defendants, there will be no need for trial and no need to spend time, cost, and resources in going through for same. Counsel for the Plaintiff points out that the purpose of Order 12 Rule 7 is to ensure that a matter filed in the **incorrect** jurisdiction does not proceed beyond the filing of the acknowledgment of service, let alone trial.
11. It is also argued on behalf of the Plaintiff that by filing the Statement of Defence and participating in the proceedings up to the pre-trial stage, the Defendants have submitted themselves to the jurisdiction of Fiji Courts.
12. The Plaintiff's Counsel also alluded to the Rule 1.1 of the 1999 English Civil Procedure Rules, referred to in ***Huong – Lee*** , (Supra), to discuss the modern way of case management , wherein the court observed;

*“(1) These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly;*

*(2) Dealing with cases justly includes, so far as practicable –*

*(a) Ensuring that the parties are on the equal footing,*

*(b) Saving expense*

*(c) Dealing with the case in ways which are proportionate,*

*i. to the amount of money involved,*

*ii. to the importance of the case,*

*iii. the complexity of the issues; and*

*iv. the financial position of each party,*

*(d) Ensuring that it is dealt with expeditiously and fairly; and*

*(e) Allotting to it an appropriate share of the Courts resources while taking into account the need to allot resources to other cases”.*

13. The Plaintiff heavily rely on Order 12 Rule 7 and Order 21 Rule 1 of the High court Rule to substantiate its argument in relation to its Summons.

### **The Defendant's Submission:**

14. The Defendants on the other hand submit that since they have pleaded the issue of "jurisdiction" it can be determined at the trial. They alluded to paragraphs 7(a) and (b) of their Affidavit in opposition, which read as follows.

(a). *The Statement of Defence filed on 27<sup>th</sup> June 2022 clearly pleads in paragraph 31 (iii) that the plaintiff made a jurisdictional error and that its claim was wrongly filed in Fiji.*

(b) *The reply to Statement of Defence filed by the Plaintiff on 11<sup>th</sup> of July 2022, clearly shows in paragraph 5 that the issue of jurisdiction is contested and denied by the Plaintiff, which forms part of the issue to be determined at trial.*

15. Accordingly, the Defendants' Lawyers wanted to include the following issues in the PTC minutes on the question of jurisdiction in order to be tried at the substantial trial;

- a. ***Whether the Plaintiff has filed this action in the wrong jurisdiction because the Defendants reside outside the jurisdiction?***
- b. ***Whether the alleged causes of action arose outside of Fiji?***
- c. ***Whether or not, in the circumstances, this Honorable Court has jurisdiction to determine this matter?***

16. It appears that the Defendants have now chosen to dispute and oust the jurisdiction of this Court on the basis that the Defendants are residents outside of Fiji and no causes of action arose within the jurisdiction of Fiji.

17. The Defendants also took up the position that as the "Agreement" referred to in paragraph 15, and several Agreements referred to in paragraphs 20.9 and 20.9.4 of the SOC are not before the Court, this Court is unable to decide the issue of jurisdiction under Order 33 Rule 3 & 7 and it will have to proceed for the trial to try and decide the said issues by calling evidence.

18. The Defendants in their written submissions, relied on the following case Authorities to justify their arguments before this Court. They are;

- a. ***Te Arawa Ltd v One Hundred sands Ltd [2019] FJHC 5; ABU 34.2018 (5 February 2019).***
- b. ***Armstrong v Tuimaleali'infano [2023]FJHC 570;HBC 179.2020(11 August 2023)***
- c. ***Yeates v Muscat Cove Resorts Ltd [2023] HBC 236, 2018 (12 May 2023).***
- d. ***Devan v Sodexo Laos Pvt Sole Co [2017] FJHC 589;HBC 113 of 2016 (27 July 2017) .and***
- e. ***Baba v Lautoka City Council [2010] FJHC 504; Civil Action No- 359 of 2002 (16 November 2010)***

### **D. DISCUSSION:**

19. What this Court has been called upon to decide, for the time being, is ***whether this Court's jurisdiction to adjudicate on the substantive matter could be determined at the trial as argued by the Defendants?***, and ***whether the Defendants, by their conduct, have already submitted to the jurisdiction of this Court, and, therefore, cannot raise it as an issue?***

20. The case record shows that Defendants, having filed their Acknowledgment of Service on 14<sup>th</sup> June 2022, have filed their Statement of Defence on 27<sup>th</sup> June 2022, which was followed by the Reply to Statement of Defence filed by the Plaintiff on 11<sup>th</sup> July 2022.
21. It was when the matter had come up for finalization of the PTC minutes, pursuant to the order in terms of the Summons for direction and filing of Affidavits verifying the List of Documents by both the parties, the question of jurisdiction arose as the Defendants' Lawyers insisted that the issues stated in paragraph 15 above should be included into the PTC minutes for those to be decided at the substantial trial, for which the Plaintiff's Lawyers objected.
22. Conversely, the Plaintiff's stern position now is that, as the Defendants have failed to dispute the jurisdiction at the proper stage and in the manner as provided for under Order 12 Rule 7 or on making an Application under Order 21 Rule 1 of the HCR, the Defendants cannot now raise issues on jurisdiction.
23. If the Plaintiff's above position is found to be correct, in my view, this Court need not be called upon to decide on any issues in relation to the jurisdiction, namely the issues sought to be included by the Defendants into the PTC minutes, which are issues No- 1;1, 1;2 & 1;3 in the Summons and also reproduced in paragraph 15 above, either as preliminary issues or as issues to be tried at the substantial trial. The only issue that begs adjudication for the disposal of this Summons is the issue No- 1; 4, which reads as ***whether the issues in paragraphs 1.1, 1.2, and 1.3 must be raised in accordance with Order 12 Rule 7 of the High court Rules, 1988 and whether they can be raised at the trial of the matter?***
24. Careful perusal of the case record and the contents of the Order 12 Rule 7 of the HCR 1988 clearly demonstrate that the Defendants have, undisputedly, passed the stage of raising issues of this caliber to be tried at the substantial trial. This matter has now proceeded towards the trial with all the formalities being complied with, except for the finalization of PTC minutes comprised of triable issues for the final determination, with evidence being led on those issues. In other words, the PTC minutes have to be devoid of any issue on the question of jurisdiction.
25. As alluded to above, the purpose of Order 12 Rule 7 is to ensure that the matter filed in the **incorrect** jurisdiction does not proceed beyond the filing of the acknowledgment of service. The Defendants in this matter, after filing the acknowledgment of service, if they were to object to the jurisdiction, they ought to have resorted to the Order 12 Rule 7. Instead they have proceeded to file the Statement of Defence, allowed the order in terms of order 34 summons and complied with orders therein by filing the Affidavit for discovery.
26. When the Defendants have failed to make use of the Order 12 Rule 7 to obtain an order under paragraph (a) or (g) thereof this Court need not take trouble in examining the those issues under Order 33 .Rule 3 of the HCR, no matter the issues on jurisdiction sought to be resolved are complicated or not. Because, the Defendants have absolved the Court from the duty of exercising its jurisdiction under Order 12 Rule 7 and thereby submitted

themselves to the jurisdiction of Fiji Courts. The Defendants have not adduced any legal argument in order to salvage them from this predicament.

27. The Order 12 Rule 7 of the High Court Rules 1988 provides;

**Dispute as to jurisdiction (O.12, r.7)**

*7.-(1) A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in Rule 6 or on any other ground shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence apply to the Court for-*

- (a) An order setting aside the writ or service of the writ on him, or*
- (b) An order declaring that the writ has not been duly served on him, or*
- (c) The discharge of any order giving leave to serve the writ on him out of the jurisdiction, or*
- (d) The discharge of any order extending the validity of the writ for the purpose of service, or*
- (e) The protection or release of any property of the defendant seized or threatened with seizure in the proceedings, or*
- (f) The discharge of any order made to prevent any dealing with any property of the defendant, or*
- (g) A declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action, or*
- (h) Such other relief as may be appropriate. (Emphasis mine)*

28. The Plaintiff had duly obtained the leave of the Court to issue the writ and serve it out of jurisdiction under Orders 6 Rule 1 and Order 11 Rules 1 and 2 of the High Court Rules. The Orders concerned made on 26<sup>th</sup> May 2022 were served on the Defendants. The Defendants were at liberty to apply to the Court moving for orders under paragraph (C) above to have discharged any order giving leave to serve the writ on them out of the jurisdiction. They did not do that either. Thus, they cannot now challenge the propriety of the orders made granting leave to issue proceedings and serve the writ out of jurisdiction.

29. In **Lincoln Refrigeration Pte Limited v City Pharmacy Limited – Civil Action HBC 190 of 2021** Justice D. Amarathunga, has summarized the law in this area. In that case the contract was formed and performed in Papua New Guinea. The Defendant filed an acknowledgment of service for the limited purpose of disputing jurisdiction. Thereafter, defendant filed inter-parte summons to protest the jurisdiction and to set aside the writ in terms of Order 12 Rule 7 of High Court Rules 1988. The Court allowed the Application as the Defendant had duly followed the Order 12 Rule 7.

30. The Court had taken into consideration the following provision from the Supreme Court Rules (UK) (White Book) 1988 12/7-8-1 p 108.

*“ These rules, which should be read together provide machinery enabling the defendant to contend that the Court has no jurisdiction over him or over the claim or any part thereof*

*made against him by the Plaintiff or that there has been an irregularity in the issue of writ or the service thereof or that any other giving leave to serve the writ out of the jurisdiction or extending the validity of the writ for the purpose to discharge orders seizing his property or restraining his use of it “*

31. If the Defendants had made an appropriate Application under Order 12 Rule 7 , then they are not treated as having submitted to the jurisdiction of the High Court by reason of giving notice of intention to defend. Order 12 Rule 7 (5) says ;-

*“(5) A defendant who makes an application under paragraph (1) shall not be treated as having submitted to the jurisdiction of the Court by reason of his having given notice of intention to defend the action; and if the Court makes no order on the application or dismisses it, the notice shall cease to have effect, but the defendant may, subject to rule 6(1), lodge a further acknowledgment of service and in that case paragraph (6) shall apply as if the defendant had not made any such application”.*

32. The above provision means that if an Application is not made, the Defendant is treated as submitting to this court’s jurisdiction. The only way that does not apply is if an Application is made under Order 21 Rule 1 to withdraw the acknowledgment of service.

33. Order 12 Rule 7 (6) provides;

*“(6) Except where the defendant makes an application in accordance with paragraph (1), the acknowledgment by a defendant of service of a writ shall, unless the acknowledgment is withdrawn by leave of the Court under Order 21, rule 1, be treated as a submission by the defendant to the jurisdiction of the Court in the proceedings”.*

34. The Defendant has now passed the stage of applying for the withdrawal of the acknowledgment. They did not apply under Order 12 Rule 7 (a), (c) or (g) either. Instead, they have now filed the Defence and have substantially complied with the Orders made on summons for directions and thereby submitted themselves to the jurisdiction of this Court. Now they cannot move the Court to go into the question of jurisdiction.

35. Without prejudice to the above findings , I observe the Defendants have not said anything , or given any evidence to suggest why Fiji is not the correct jurisdiction or it would be elsewhere other than Fiji where the Defendants ought to be tried .

#### **E. CONCLUSION:**

36. The Defendants cannot, at this stage, move for the issue of jurisdiction to be tried at the trial. Jurisdictional issues must be moved to be tried as preliminary issues by following the procedure provided for it. By failing to do so, the Defendants have submitted themselves to the jurisdiction of this Court. The Defendants’ move to have the jurisdictional issues at the trial must necessarily fail.

37. The burden is squarely on the Defendants to prove that this Court has no jurisdiction, by following the prescribed methods under Order 12 Rule 7. They have not exercised this



option by presenting necessary Application. Having failed to do so, they cannot simply move to have the issue of jurisdiction to be tried at the substantial trial.

38. The judicial discretion must be exercised to prevent injustice and promote the efficient case management. Reserving the issues on jurisdiction to be tried at the substantive trial would be contrary to these principles and to the established legal framework.
39. In view of the above, this Court answer the issue No-1;4 in favor of the Plaintiff to the effect that the issues 1;1, 1;2 and 1;3 of the Summons should have been raised in accordance with Order 12 Rule 7 of the HCR 1988, and those issues cannot be tried at the substantive trial.
40. Considering the circumstances, it is justifiable to order the Defendants to pay the Plaintiff a cost in a sum of \$2,000.00, being the summarily assessed, within 28 days of this ruling.
41. The matter should proceed for trial with no issues on the question of jurisdiction.

**F. FINAL ORDERS:**

1. The dispute as to jurisdiction of this Court, should have been raised by the Defendants under Order 12 Rule 7 of the High Court Rules 1988.
2. The Defendants have failed to dispute the jurisdiction in the manner so provided. Thus, they have waived their objection to the jurisdiction of this Court.
3. The substantial action will proceed for trial, with the finalization of PTC minutes.
4. Parties are directed to finalize the PTC minutes, without any issue on jurisdiction.
5. The Plaintiff is entitled to summarily assessed costs in a sum of FJ \$2,000.00 (Two Thousand Fijian Dollars) to be paid by the Defendants in 28 days from today.
6. Parties to appear before the learned Master for the finalization of PTC minutes and other formalities before allocation for trial.

  
A.M. Mohamed Mackie  
Judge



At High Court Lautoka this 8<sup>th</sup> October 2024.

**SOLICITORS:**

For Plaintiff:  
For 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants.

Messrs. Samuel K. Ram Lawyers- Barristers & Solicitors.  
Messrs. Sherani & Company – Barristers & Solicitors.