

IN THE HIGH COURT OF FIJI AT SUVA

IN THE CENTRAL DIVISION

CIVIL JURISDICTION

Civil Action No. HBC 50 of 2019

BETWEEN: **LARRY CLAUNCH**

PLAINTIFF/APPLICANT

AND: **ONE HUNDRED SANDS LIMITED**

FIRST DEFENDANT/RESPONDENT

AND: **TIMOTHY MANNING**

SECOND DEFENDANT/RESPONDENT

Date of Hearing : 2 August 2024
For the Plaintiff : Mr Haniff. F
Counsel for the Defendants : Mr Singh. S
Date of Decision : 25 November 2024
Before : Waqainabete-Levaci S.L.T.T, J

R U L I N G

(APPLICATION FOR LEAVE TO JOIN PARTY AND SERVE OUTSIDE OF JURISDICTION)

BACKGROUND

1. There are three interlocutory applications pending before me. They were heard simultaneously and stems from the same facts of this case.
2. The initial application for striking out of the 2nd Defendant was heard on the 15th July 2024.
3. The two applications for Joinder of Party and Leave to Serve Outside of Jurisdiction was heard together on 2 August 2024.
4. I had initially announced in Court that I would deliver my Rulings together, in hindsight, I find this appropriate in these circumstances.
5. The Plaintiff/Applicant had file an Amended Summons seeking Leave for the following Orders:
 - (i) That One Hundred Sands LLC, a private company organized under the laws of the State of Delaware, United States of America and having its registered office in the State of Delaware at 160 Greentee Drive, Suite 101, City of Dover, DE 19904 be added as Second Plaintiff to these proceedings by consent.
 - (ii) That High Growth Wealth International Limited, a New Zealand Limited Company incorporated under the New Zealand Companies Act 1983, of Level 11, 19-21 Cosmo Street, Takapuna, Auckland, 0740, New Zealand be added as the Second Defendants in these proceedings;
 - (iii) That the Plaintiff be given leave to issue and serve the Summons together with the Affidavit in Support and all other Court Documents filed in Civil Action HBC 50 of 2019 herein on HIGH GROWTH WEALTH INTERNATIONAL LIMITED out of the jurisdiction at Level 11, 19-21 Cosmo Street, Takapuna, Auckland, 0740, New Zealand;
 - (iv) That service of a copy of any order made on this summons, a copy of the summons together with the Affidavit in Support and all other Court documents filed in Civil Action HBC 50 of 2019 herein by delivery thereof by courier to the Second Defendant at Level 11, 19-21 Cosmo Street, Takapuna, Auckland, 0740, New Zealand shall be deemed to be good and sufficient service on the Second Defendant.

- (v) That HIGH GROWTH WEALTH INTERNATIONAL LIMITED be granted forty-two (42) days after service of the Summons together with the Affidavit in Support and all other Court documents filed in Civil Action HBC 50 of 2019 herein to enter its appearance.
6. The Plaintiff is a Director and holds majority shares of One Hundred Sands LLC, a company incorporated in the State of Delaware, USA, which has 50% shares in the First Defendant together with HGW International Ltd.
 7. HGW International Limited, a company incorporated in New Zealand, is owned by the Second Defendant.
 8. On 7 October 2011, a Sale and Purchase Agreement was entered between Te Arawa Limited and the First Defendant for the purchase of Native Lease No. 434878. The Plaintiff had intended to establish a Hotel and Casino with Joint Venture from another investor.
 9. The purchase price was \$1.2 million (FJD) with \$200,000 (FJD) as option fee payable on execution and \$1 million (FJD) payable when the option was exercised.
 10. The Plaintiff had personally paid the \$1.2 million (FJD) to the First Defendant.
 11. On 17 April 2013 a Heads of Agreement was entered into where the First Defendant would obtain all the required licences and permits, Norwich Properties Limited would give the First Defendant \$30 million USD as their equity contribution to the casino project in exchange for 50% share ownership in the First Defendant. A Funding and Investment Proposal was entered on 30 October 2013 by the two companies to further the Heads Agreement.
 12. A Subscription Agreement in respect of Ordinary Shares was entered into on 19th November 2013 between the First Defendant, HGW International Limited, and One Hundred Sands LLC.
 13. HGW International Limited had agreed to provide funding of \$30 million USD to First Defendant for the development and management of the casino in Suva and Nadi in exchange for 2.4 million ordinary shares from First Defendant.
 14. The purchase of the casino site did not eventuate and no settlement was finalized as per the Sale and Purchase Agreement entered into on 7 October 2011 with Te Arawa Limited refusing to return the deposit paid by the First Defendant.

15. In a decision on 3 May 2018, the Court determined that the deposit was to be refunded back to the First Defendant.
16. In my subsequent decision today, I have determined that the 2nd Defendant be struck off the claim as there is no cause of action or claim against him personally.
17. The Plaintiff/Applicant is now seeking to join two more parties to the proceedings, One Hundred Sands LLC as well as High Growth Wealth International Limited.
18. The Plaintiff seeks that Leave be granted to serve the Defendants outside of jurisdiction their Claim.
19. This application is made pursuant to Order 15 Rule 6 (2) (b) (i) and (ii), Order 11 Rule 1 (1) (e), Order 6 Rule 6 (1) of the High Court Rules 1988.

SUBMISSION BY THE PARTIES

20. In their application, the Plaintiff/Applicant deposes that both the Plaintiffs Company and the Second Defendants Company have 50% share each in the First Defendant.
21. The Plaintiff/Applicant is a majority shareholder in One Hundred Sands LLLC and the Second Defendant owns shares in High Growth Wealth International Limited.
22. The companies have entered into Subscription Agreements for an equitable investment of \$30million in exchange for 2.4 million in shares in the First Defendant for the purposes of a resort and casino project.
23. That there are reasons for the joining of these two companies as parties to the proceedings.
24. That the Second Defendant, as the Director of Norwich Company and shareholder of High Growth Wealth International Limited entered into Agreements for the Head Agreement which effected the Sale of Shares in the First Defendant in return for equitable investment by the Plaintiff.
25. The Plaintiff argues that the Second Defendant should remain in the proceedings as the Second Defendant had taken some proceed from the deposit of \$1.2 million which was returned by Court Order to the First Defendant.
26. In response, Counsel for the Second Defendant argued that the Second Defendant is not personally liable nor is there a claim for fraud as a Director or Shareholder of the company and that the claim is directly against the companies themselves.

27. The application to substitute parties implies that the Plaintiff does not object to the withdrawal of the Second Defendant from the claim.
28. Furthermore, joining the parties will means that the cause of action against them is outside of the Limitations Act.
29. The Second Defendant argued that the Plaintiff has not sort to amend the Originating Summons as well and therefore this is fatal to the application. The application should be dismissed with costs.
30. In reply the Plaintiff argues that after joining the parties, there is an option to amend or not the Originating Summons. It is not fatal to not amend at this point and that parties be joined.

LAW ON JOINING PARTIES

31. Order 14 rule (4) of the High Court Rules provides:

4.- (1) Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where –

- (a) If separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all of the actions; and
- (b) All rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.

(2) Where the Plaintiff in any action claims any relief to which another person is entitled jointly with him, all persons so entitled must, subject to the provisions of this Act and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to be joining as a plaintiff, must subject to any order made by the Court on an application for leave under this paragraph, be made a defendant.”

32. In the Supreme Court Practice (1988, Sweet and Maxwell, London, Vol 1) page 172 para 15/4/1:

“Under this rule, joinder of parties is allowed as of right, subject to the discretionary power of the Court under r. 5, where the conditions mentioned in sub-paras (a) and (b) exists and may be allowed with leave in all other cases. The joinder of parties, whether as plaintiff or as defendants is subject to two conditions:

- (i) The right to relief must in each case be in respect of or arise out of the series of transactions; and
- (ii) There must be some common question of fact and law.

The whole of a transaction or series of transactions need not be implicated in the relief sought by each plaintiff 'where the investigation would to a great extent be identical' (see per Fletcher Moulton L.J in Marki & Co -v- Knight Steamship [1910] 2 K.B 1021 and see Stroud -v- Lawson [1898] 2 Q.B 54)

The 'relief' in respect of which parties may be joined must be relief arising out of the same set of circumstances (see per Swinfen Eady M.R in Re Beck) or circumstances involving common question of law or fact (see Thomas -v- Moore); see also Green -v- Berliner [1936] 2 K.B 477 claimed by common informer).

The rule should be construed in a liberal sense (see per Swinfen Eady M.R in Re Beck (1918) 87 L.J Ch 335; Payne -v- British Time Recorder Co [1921] 2 KB, 1)

33. In Bubble Up Investment Company Limited -v- National MBF Finance Limited [1999] FJCA 38; ABU 0021d.98s(5 August 1999) Where Justice Byrnes on Appeal held that:

"The scope of this rule and its predecessor has been considered in numerous cases, the earliest of which appears to be Attorney-General v. Corporation of Birmingham [1880] UKLawRpCh 219; 15 Ch.D 423 and in later cases such as Amon v. Raphael Tuck & Sons Ltd. (1956) 1 Q.B. 357, The Result (1958) P. 174 and Re Vandervell Trusts (1969) 3 All E.R. 496 which was over-ruled by the House of Lords in Vandervell Trustees Ltd. v. White And Others (1971) A.C. 912.

Order 15 Rule 6 was amended in England by R.S.C. (Amendment No. 4 of 1971) and R.S.C. (Amendment 1981) after the decision of the House of Lords in Vandervell Trustees Ltd. v. White. In that case the House of Lords disagreed with the interpretation of the then rule given by Lord Denning in the Court of Appeal where at (1963) 3 All E.R. 499, quoting Rule 6(2) as it then stood he said these words should be given a liberal construction. He cited with approval the remarks of Lord Esher, M.R. in Byrne v. Brown (1889) Q.B.D. 657 at p.666 who said:

"One of the chief objects of the Judicature Acts was to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same, and the Court then has power to bring in the new parties, and to adjudicate in one proceeding upon the rights of all the parties before it."

According to the Supreme Court Practice 1993 at p.202, Para. 2(b)(ii) confers on the Court the wider jurisdiction which it was thought the Court had under the former para. 2(b) but which the House of Lords in Vandervell's case held that it did not. It is clear to me that the amendment was intended to give effect to the remarks of Lord Denning in the Court of Appeal. The White Book at p.203 remarks that in the latter case of Tetra Molectric Ltd. v. Japan Imports Ltd. (1976) R.P.C. the English Court of Appeal expressly held that para 2(b)(ii) widened the Court's power consequent upon the decision in Re Vandervell and that the Court has power to add a party between whom and one of the parties to the action there is an issue. The question before me is whether there is such an issue in the present case."

ANALYSIS

34. The Court considered the submissions by both parties as well as their oral arguments in Court. The Court must be satisfied based on the two conditions to determine whether to grant the application or not.
35. From the facts and claim by the Plaintiff/Applicant, it is clear that that the two companies, One Hundred Sands LLC and High Growth Wealth Limited are both involved either as shareholders or parties to the Agreements entered into.
36. The company One Hundred Sands LLC is owned by the Plaintiff/Applicant and seeks to include the company as it had entered into the alleged Agreement with the First Defendant.
37. Furthermore the company Defendant that the Applicant/Plaintiff seeks to include was also involved in the alleged Agreement for which the parties are now in dispute about.

38. I find that the facts in the Claim against the Defendant are directly related to the alleged conduct and act of the two companies for which the Applicant/Plaintiff seeks to join and find no reason not to grant the application.

39. I am satisfied that the grounds for joinder of parties is satisfied.

40. I will also grant leave for the Summons together with all other documents including Affidavits and any interlocutory orders be served outside of jurisdiction.

COURT ORDERS

41. Court will therefore Order that:

- (i) That One Hundred Sands LLC, a private company organized under the laws of the State of Delaware, United States of America and having its registered office in the State of Delaware at 160 Greentee Drive, Suite 101, City of Dover, DE 19904 be added as Second Plaintiff to these proceedings by consent.**
- (ii) That High Growth Wealth International Limited, a New Zealand Limited Company incorporated under the New Zealand Companies Act 1983, of Level 11, 19-21 Cosmo Street, Takapuna, Auckland, 0740, New Zealand be added as the Second Defendants in these proceedings;**
- (iii) That the Plaintiff be given leave to issue and serve the Summons together with the Affidavit in Support and all other Court Documents filed in Civil Action HBC 50 of 2019 herein on HIGH GROWTH WEALTH INTERNATIONAL LIMITED out of the jurisdiction at Level 11, 19-21 Cosmo Street, Takapuna, Auckland, 0740, New Zealand;**
- (iv) That service of a copy of any order made on this summons, a copy of the summons together with the Affidavit in Support and all other Court documents filed in Civil Action HBC 50 of 2019 herein by delivery thereof by courier to the Second Defendant at Level 11, 19-21 Cosmo Street, Takapuna, Auckland, 0740, New Zealand shall be deemed to be good and sufficient service on the Second Defendant.**
- (v) That HIGH GROWTH WEALTH INTERNATIONAL LIMITED be granted forty-two (42) days after service of the Summons**

together with the Affidavit in Support and all other Court documents filed in Civil Action HBC 50 of 2019 herein to enter its appearance.

(2) Costs in the Cause.



A handwritten signature in blue ink, consisting of a large, stylized 'S' followed by a loop and a horizontal line.

Mrs Senileba LTT Waqainabete-Levaci
Puisne Judge