

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

**Civil Action No. HBC 43 of 2013**

**BETWEEN** : **WESTPAC BANKING CORPORATION** a body corporate registered under the Banking Act, having its registered office at 1 Thompson Street, Suva in the Republic of Fiji Islands.

**PLAINTIFF**

**AND** : **COLIN SIBARY** formerly of Vinod Karsanji Road, Suva, Fiji present address not known to the Plaintiff, Company Director.

**AND** : **MARK MATTHEWS** formerly of 9 Marion Street, Suva, Fiji presently of Melbourne, Victoria Australia, Company Director.

**AND** : **GLENN DESMOND KABLE** formerly of Vinod Karsanji Road, Suva, Fiji presently of Sunshine Coast, Brisbane, Australia.

**DEFENDANT**

**BEFORE** : **Justice Deepthi Amaratunga**

**COUNSEL** : **Mr. Jamnadas K.** for the Plaintiff

**Date of Hearing** : 17<sup>th</sup> May, 2013

**Date of Ruling** : 26<sup>th</sup> August, 2013

**RULING**

**A. INTRODUCTION**

1. This is a summons filed by the Plaintiff seeking leave of the court to serve the writ of summons outside the jurisdiction of Fiji, by way of substituted service by way of advertisement. The Plaintiff which is a financial institution allegedly granted a credit facility to a Company which is now in liquidation and for that the Defendants were the personal guarantors and both were foreigners and had left Fiji. According to affidavit in support the Defendants had left Fiji and the Plaintiff had not obtained their overseas addresses or places of permanent

domicile abroad and states that one Defendant is believed to be in UK and the other Defendants are believed to be in Australia and seeks to advertise in papers in both UK and Australia by way of substituted service. No addresses of permanent residences were obtained at the time of they being accepted as guarantors, and their nationality is being used to serve the writ, in respective countries.

## **B. LAW AND ANALYSIS**

2. Order 65 rule 4 of the High Court Rules of 1988 states as follows

‘4(1) If, in the case of any document which by virtue of any provisions of these Rules is required to be served personally or 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 and 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.’ (emphasis is mine)

3. In Supreme Court Practice 1999(White Book) p 1291 65/4/5 it is stated as follows

‘Effect of substituted service under order- When effected in accordance with the order of the Court substituted service has all the effects of personal service (Re Urquhart (1890) 24 Q.B.D. (723 at 726). **Such service is equivalent in all respects to personal service, and judgment thereon is**

**regular though the defendant had no knowledge of the action.** He can only be admitted to defend if he can show that he has defence on the merits (Watt v Barnett (1878) 3 Q.B.D 363 at 366).’ (emphasis is mine)

4. The consequence of allowing a substituted service is that the compliance of such order is all what the Plaintiff has to satisfy and irrespective of actual service to the Defendant or not a default judgment can be obtained and the Defendant needs to set aside it on merits before entering in to the action to file a defence. So, the alternate service is an exception to the general rule as stated in Nigel Peter Albon Vs Naza Motor Trading SDN BHD and Tan Dato Nasimmuddin Amin [2007] EWHC 327(Ch) Justice Lightman at paragraph 35 stated

‘35. It is necessary to say something on CPR Part6.8. **An alternative service order is an exceptional order.** For there to be jurisdiction to make such an order, the court must be satisfied at the time of the hearing before the court that “there is a good reason to authorize service by a method not permitted by these Rules”. Once satisfied that jurisdiction exists the court must decided whether in the exercise of its discretion it ought to make the order. At both stages it is for critical importance that the court has in mind CPR Pat 1.1(1) and (2).’ (emphasis added)

5. It is not the general rule to apply substituted service and it should be done with caution and if not the alternate service may become order of the day in litigation. In Re Conan Doyle’s Will Trusts Harwood v Fides Union Fiduciaire [1977] 2 All ER 1377 Goulding J compared the earlier provision before the amendment to the existed provision in 1977 which is similar to the present provision contained in High Court Rules of 1988, and stated that impracticability of personal service was different and more demanding requirement than the former one of inability to effect prompt personal service; it was no longer sufficient for a plaintiff to show that prompt personal service could not be effected and the plaintiff must show that personal service was for one reason or another impracticable at the time when the request for the order for substituted service was made and it was further held, at p 1379 as follows

‘In my judgment; the requirement of RSC Ord 65, r4, that personal service must be shown to be impracticable for one reason or another has to be tested according to the circumstances of any particular case at the time when the request for an order for substituted service is made.’

6. The starting point in any application for substituted service is that it should appear to the court that it is impracticable to serve the document in the manner prescribed to the person or persons concern. The word ‘impracticable’ though not to be considered as impossible the degree of impracticability may depend on the facts and circumstances. No rigid rules can be made and it can be interpreted widely, depending on the circumstances of the case, but this has to be done with caution. One obvious and more prevalent reason may be the absconding of the service, in order to avoid the claim against that party. This may be prior to the institution of litigation or after the institution of the action. Sometimes the reason for impracticability may be due to the Plaintiff’s own negligence or laches or even lethargic attitude towards finding the address of the Defendant.
7. It has now become a practice among the financial institutions to seek substituted service more often than not, due to their own laches when granting loans of significant amounts without securing adequate collateral. According to the affidavit in support of the Relationship Manager of the Plaintiff, which is double hearsay, the bailiff had informed that the neighbours of the Defendant’s local address had indicated that both of them had migrated overseas, namely to UK and Australia. So, not only the Defendants could not be located at the last known address and the neighbours had allegedly stated that they had gone abroad and the Plaintiff relied on the alleged statement of the neighbours to seek substituted service in UK and Australia by way of paper advertisement.
8. The Supreme Court Practice (UK) 1999 Vol 1 (White Book) at page 1292, 65/4/16, deals with the issue of substituted service by an advertisement and states as follows

“Service by advertisement- Service by advertisement may be ordered, but only where there is some reason for believing that it will come to the defendant’s knowledge. This method of service is sometimes necessary, especially in Queen’s Bench actions, e.g. where the defendant’ residence is not known, and in cases where there is no reason to believe that he is keeping out of the way to evade service, and it is not possible to name any person, service on whom in substitution was probably be effective in reaching the defendant. **In practice, an order for service by advertisement will not be made save in an exceptional case where there is good reason to believe that the advertisement will be seen by the defendant.** See Cook v Dey (1876)2 Ch. D. 218; Wrays v Wray [1901] P.132.” (emphasis added)

9. The Plaintiff’s affidavit in support is not in compliance with the High Court Rules and the court cannot rely on double hearsay evidence in the averments in the affidavit in support. Though I am not inclined to strike out this application on the basis that averments in the affidavit are double hearsay and not the facts known to have been perceived by the affirment, this should not be considered that such non compliance of basic rules are condoned.
10. The evidence before me is grossly inadequate to come to a conclusion that the Defendants had gone to UK and Australia respectively. The evidence is double hearsay, and relying on the statement of neighbor without verifying the correctness of the said statements of third parties are most unreliable though it can be a starting point for further investigations by the Plaintiff. The Plaintiff has produced the copy of particulars of persons of Directors of the defunct Company where all three Defendants were Directors, but the particulars not indicate any permanent residence of the Defendants, instead it indicate the Nationalities of the three Defendants which is not the same as their place of permanent residence. Nationality of a person under the present circumstances is not sufficient to grant a substituted service in UK and Australia by way of newspaper advertisement.

11. In the circumstances the Plaintiff had not established through affidavit evidence that the Defendants had left Fiji. There is no evidence that Defendants are at least residing in UK and Australia at this moment or prior to this application. There is no evidence of any permanent residence in UK or Australia. In the circumstances there is clearly no evidence to believe that if advertisements are ordered it would come to the notice of the Defendants. The evidence presented to me through affidavit in support falls short of establishing such requirement, which is the primary consideration of court.
12. According to White Book (1999) p 1290 65/4/2 ‘substituted service may take the form of service by letter, advertisement, or otherwise, as may seem just (Jay v Budd [1893] 1 Q.B. 12 at 16).’ The word “just” grants unfettered discretion to the court, specially considering that such application for substituted service is made ex-parte and there is little or no verifications of the facts contained in such ex-parte applications, but that does not absolve the responsibility of the court to exercise the discretion granted, rather than being a rubber stamp without considering the facts before the court. Such practice would be inherently unjust and cannot be considered judicial discretion. The word ‘just’ means that the decision of the court needs considerations of all parties who will be affected and includes the parties against whom the substituted service is ordered. In White Book (1999) p 1250 65/4/2 it further states ‘The steps which the Court may direct in making an order for substituted service must be taken to bring the document to the notice (r.4(3)).’ So, being ‘just’ means the exercise of judicial discretion in order to be satisfied that such documents will come to the Defendants’ notice and I do not have such evidence before me.

### **C. CONCLUSION**

13. The Plaintiff has not established through the affidavit in support the primary requirement of substituted service. The Plaintiff at the time of accepting Defendants as guarantors could have easily obtained the permanent addresses of the Defendants who were foreign nationals. There is no evidence to support that they had even left Fiji, the Plaintiff is relying on double hearsay averment in the affidavit in support. Even assuming that the Defendants had returned to their respective countries of their nationality (there is no evidence of their

permanent residency as opposed to nationality) there is no evidence to support the method of substituted service requested will bring the present action to the notice to the Defendants. The summons seeking leave of the court to serve the Defendants outside this jurisdiction by way of paper advertisement is struck off and dismissed. No costs.

**D. FINAL ORDERS**

- a) Ex parte motion dated 27<sup>th</sup> March, 2013 for substituted service is struck off.
- b) No Costs.

Dated at **Suva** this **26<sup>th</sup> day of August, 2013.**

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**Justice Deepthi Amaratunga**  
**High Court, Suva**