IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 83 of 2013

BETWEEN : RAJINESH NAND of Lot 173 Tovata Road, Makoi, Fiji, Market Vendor.
PLAINTIFF

AND : DAVID PRASAD of Lot 172 Tovata Road, Stage 3, Makoi, Nasinu.
DEFENDANT

BEFORE : Justice Deepthi Amaratunga

COUNSEL : Ms. Devan R. S. S. for the Plaintiff

Date of Submission : 24th April, 2013
Date of Ruling : 26th August, 2013

RULING

Catch Words – Email service of writ of summons and statement of claim.

A. INTRODUCTION

1. The issue is whether the Plaintiff could serve the writ of summons through an email. The Plaintiff's solicitors state that Plaintiff is unaware of the whereabouts of the Defendant, but had obtained the email from the former solicitor. The present solicitors have sent an email and had received a response relating to issues of this litigation, prior to the institution of the action, but when the solicitors inquired about the address of the Defendant to serve the legal documents the Defendant had not replied to the said email. Now the Plaintiff is seeking to serve the writ of summons to the Defendant through the same email, which the Defendant had allegedly replied earlier. High Court Rules of 1988 do

not contain provisions to deal with such a request, but 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.

B. FACTS

2. The Plaintiff instituted action on 26th March, 2013 by way of writ of summons seeking specific performance. Before institution of the action the Plaintiff's solicitor had obtained the email from the Defendant' former solicitor and had also emailed to the Defendant prior to the institution of the action in regard to the matter in dispute, and requested for the address of the Defendant in order to prepare the documents relating to the transaction and he had replied to that email, without providing address and indicated that transfer will not be effected due to reasons given in the said email. Since there could not be an agreement between the parties the solicitors for the Plaintiff had requested the present address of the Defendant to serve the legal documents including the writ of summons, for an action for specific performance, but the Defendant had not replied to the said email, and there is no communication after the said email requesting address of the Defendant.

C. THE ANALYSIS

3. The Plaintiff filed the ex-parte motion on 2nd April, 2013 seeking to serve the writ of summons filed on 27th March, 2013 by way of an email to the Defendant. The Plaintiff does not know where the Defendant is residing and only obtained an email from the former solicitor of the Defendant. The plaintiff had not stated whether the said email was provided to the former solicitor as a means of service of legal documents or not. No affidavit was filed either from the said solicitor and or from the Plaintiff. The affidavits in support of this application was filed by a legal executive of the present solicitor.

4. According to the said affidavit, the Plaintiff is unaware whether the Defendant is residing within the jurisdiction or not, but had obtained a web based email which was allegedly operational and had replied when the Plaintiff's solicitors had sent an email regarding the matter in dispute, but failed to provide an address for service of the legal documents, when requested.

5. The present solicitors had annexed an email sent by a partner of the law firm to both Defendant and a person by the name of Sadhana presumably the spouse of the Defendant dated 25th March, 2013 requesting the postal address of the Defendant in order to serve the legal documents. Before this, on 20th March, 2013 an email requesting postal address to finalize the transaction between the parties was sent, though there was a reply to the said email, they did not provide the postal address.

6. Now, the Plaintiff is requesting that the writ of summons and statement of claim issued in this action in the form annexed, be served on the Defendant by sending a scanned copy of the documents to the Defendant by electronic mail in the order (A) and also seeks an additional order in order(B).

7. The ex-parte summons sought the following order (B);

> 'B. That the electronic mail of the documents shall be deemed to be good and sufficient service of the said Writ of Summons and Affidavit of service upon the Defendant'

8. 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)

9. In the circumstances the order 'B' sought in the ex parte summons is superfluous, considering the above legal position contained in the Supreme Court Practice of UK,[White Book] (1999). If the order for substituted service as sought in the order 'A' of the ex parte summons is granted it will have all the effects of personal service and no additional order is required as prayed in (B).

10. The issue is whether the substituted service of the writ of summons through an email can be allowed under the High Court Rules of 1988. The Plaintiff relied on Order 65 rule 5 and rule 5(1) (c) of the High Court Rules of 1988. Apart from this, Order 11 also needs a consideration as it deals with service of writ outside the jurisdiction. If the service of writ through an email is granted it cannot be certain whether the service would be local or otherwise depending on the circumstances of the case. In this case the affirment of the affidavits in support states that Plaintiff is unaware of the address of the Defendant, so the service of the Defendant may be outside the jurisdiction and consideration of the provision relating to service outside the jurisdiction is needed.

11. The affidavit in support at paragraph 9 states that the Plaintiff had informed 'them' that Defendant was residing abroad however; the Plaintiff did not know the address. This is hearsay and should not be included in an affidavit in support when the Plaintiff could have sworn to the facts known to him. Though I could reject this affidavit on that ground alone I do not wish to do so

considering the importance of the issues involve, and I do not wish to reiterate the legal position of such affidavits in Fiji as it is a trite law not to aver hearsay evidence in affidavits sworn by legal executives or legal clerks, or otherwise.

Substituted Service through E-mail.

12. The first consideration is the Order 65 of the High Court Rules of 1988, which empowers substituted service in certain circumstances. The substituted service is not the general rule and this is an exception to the personal service. Order 65 of the High Court Rules of 1988 states as follows

> ***"Order 65***
>
> ***Service of Documents***
>
> 1(1) Any document which by virtue of these Rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these Rules or by order of the Court is required to be so served.
>
> (2) Paragraph (1) shall not affect the power of the Court under any provision of these Rules to dispense with the requirement for personal service.
>
> ***Personal service: how effected***
>
> 2. Personal service of a document is effected by leaving a copy of the document with the person to be served.
>
> ……..
>
> ***Substituted service***
>
> 4. (1) If, in the case of any document with by virtue of any provision of these Rules is required to be served personally or a document to which Order10, rule 1, applies, it **appears to the Court that it is impracticable for any reason to serve the 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.**

Ordinary service: how effected (O.65, R.5)

5. (1) Service of any document, not being a 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, may be effected –

(a) By leaving the document at the proper address of the person to be served, or

(b) By registered post, or

(c) In such other manner as the Court may direct.

(2) For the purpose of this rule the proper address of any person on whom a document is to be served in accordance with this rule shall be the address for service of that person, but if at the time when service is effected that person has no address for service his proper address for the purposes aforesaid shall be-

(a) in any case, the business address of the barrister and solicitor (if any) who is acting for him in the proceedings in connection with which service of the document in question is to be effected, or

(b) in the case of an individual, his usual or last known address, or

(c) In the case of individual who are suing or being sued in the name of a firm, the principal or last known

place of business of the firm within the jurisdiction, or

(d) In the case of a body corporate, the registered or principal office of the body.

(3) Nothing in this rule shall be taken as prohibiting the personal service of any document or as affecting any enactment which provides for the manner in which documents may be served on bodies corporate.

Service of documents on Government, etc. (O.65, r.6)

6. Where for the purpose of or in connection with any proceedings in the High Court, not being civil proceedings by or against the State within the meaning of Part II of the Sate Proceedings Act, any document is required by any enactment or these Rules to be served on the Government of Fiji, a Minister, a government department or a public officer within the meaning of the Constitution, the document must be served on the Attorney – General in accordance with the provisions of Order 77, rule 3.

Effect of service after certain hours *(O.65, r.7)*

7. Any document (other than a writ of summons or other originating process) service of which is effected under rule 2 or under rule 5 (1) (a) between 12 noon on a Saturday and midnight on the following day or after 4 in the afternoon on any weekday shall, fir the purpose of computing any period of time after service of that document, be deemed to have been served on the Monday following that Saturday or on the day following that other weekday, as the case may be.

Affidavit of Service (O.65, R.8)

8. Except as provided in Order 10, rule 1 (3) (b) and Order 81, rule 3(2) (b), an affidavit of service of any document must state by whom the document was served, the day of the week and date on which it was served where it was served and how.

No service required in certain cases (O.65, r.9)

9. Where by virtue of these Rules any document is required to be served on any person but is not required to be served personally or in accordance with Order 10, rule 1(2) and at the time when service is to be effected that person is in default as to acknowledgment of service or has no address for service, the document need not be served on that person unless the Court otherwise directs or any of these Rules otherwise provides.

Service of process on Sunday (O.65, r.10)

10. (1) No process shall be served or executed within the jurisdiction on a Sunday except, in case of urgency, with the leave of the Court.

(2) For the purpose of this rule "process" includes a writ, judgment, notice, order, petition, originating or other summons or warrant." (emphasis added)

13. Order 10 of the High Court Rules of 1988, deals with the general provisions regarding the service and rule 1(1) states that a writ of summons must be served personally on the each defendant by the plaintiff or his agent. In rule 1(2) lays down other methods of service in lieu of personal service. Order 11 of

the High Court Rules deal with the service of process out of jurisdiction and states as follows:

"ORDER 11

SERVICE OF PROCESS, ETC., OUT OF THE JURISDICTION

Principal cases in which serviced of writ out of jurisdiction is permissible *(O.11, r.1)*

1. –(1) If a writ is not a writ to which paragraph (2) of this Rule applies, service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ –

(a) relief is sought against a person domiciled within the jurisdiction;

(b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

(c) the claim is brought against a person duly serviced within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;

(d) the claim is brought to enforce, rescind, dissolve, annual or otherwise affect a contract, or to recover damages, or obtain other relief in respect of the breach of a contract, being (in either case) a contract which –

(i) was made within the jurisdiction, or

(ii) was made by or through an agent trading or residing or residing out of the jurisdiction, or

(iii) is by its terms, or by implication, governed by the law of Fiji, or

(iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract;

(e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;

(f) the claim is founder on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction;

(g) the whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits) or the perpetuation of testimony relating to land so situate;

(h) the claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction;

(i) the claim is made for a debt secured on immovable property or is made to assert, declare or determine proprietary or possessory rights, or rights of security, in or over movable property, or to obtain authority to dispose of movable property, situate within the jurisdiction;

(j) the claim is brought to execute the trusts of a written instrument being trusts that ought to be executed according to English law and of which the person to be served with the writ is a trustee or for any relief or remedy which might be obtained in any such action;

(k) the claim is made for the administration of the estate of a person who died domiciled within the jurisdiction or for any relief or remedy which might be obtained in any such action;

(l) the claim is brought in a probate within the meaning of Order 76;

(m) the claim is brought to enforce any judgment or arbitral award,

(2) Service of a writ out of the jurisdiction is permissible without the leave of the Court provided that each claim made by the writ is a claim which by virtue of any enactment the high Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.

(3) where a writ is to be served out of the jurisdiction under paragraph (2), the time to be inserted in the writ within which the defendant served therewith must acknowledge service shall be 42 days.

Application for, and grant of, leave to serve writ of out of jurisdiction *(O.11, r.2)*

2. (1) An application for the grant of leave under rule 1(1) must be supported by an affidavit stating –

(a) the grounds on which the application is made ,

(b) that in the deponent's belief the plaintiff has a good cause of action,

(c) in what place or country the defendant is, or probably may be founded, and

(d) where the application is made under rule 1(1) (c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try.

(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.

(3) An order granting under rule 1 leave to serve a writ out of the jurisdiction must limit a time within which the defendant to be served must enter an appearance.

Service of writ abroad: general (O.11, r.3)

3.(1) **Subject to the following provisions of this Rule, Order 10 rule 1(1), (4), (5) and (6) and Order 65. Rule 4, shall apply in relation to the service of a writ, notwithstanding that writ is to be served out of the jurisdiction, save the accompany form of acknowledgment of service shall be modified in such manner a may be appropriate**.

(2)Nothing in this rule or in any order or direction of the Court made by virtue of it **shall authorize or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.**

(3) A writ which is to be served out of the jurisdiction –

(a) need not be served personally on the person required to e served so long as it is served on him **in accordance with the law of the country in which service is effected;** and

(b) need not be served by the Plaintiff or his agent if it is served by a method provided for by Rule 4.

(4) An official certificate stating that a writ as regards which Rule 4 has been complied with has been served on a person personally, or in accordance with the law of the country in which service was effected on a specified date, being a certificate –

(a) by a Fiji consular authority in that country, or

(b) by the government or judicial authorities of that country, or

(c) by any other authority designated in respect of that country shall be evidence of the facts so stated.

(5) A document purporting to be such a certificate as is mentioned in paragraph (4) shall, until the contrary is proved, be deemed to be such a certificate.

(6) In this rule and rule 6 "the Hague Convention" means the Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters signed at the Hague on November 15, 1965.

Service of writ abroad through foreign government, judicial authorities and Fiji consuls *(O.11, r.4)*

4. (1) Where in accordance with these Rules a writ is to be served on a defendant in any country with respect to which there subsists a Civil Procedure Convention (other than the Hague Convention) providing for service in that country of process of the High Court, the writ may be served –

(a) through the judicial authorities of that country; or

(b) through a Fiji Consular authority in that country (subject to any provision of the convention as to the nationality of persons who may be so served).

(2) where in accordance with these Rules, a writ is to be served on a defendant in any country which is a party to the Hague Convention, the writ may be served –

(a) through the authority designated under the Convention in respect of that country; or

(b) if the law of that country permits –

(i) through the judicial authorities of that country, or

(ii) through a Fiji consular authority in that country.

(3) Where in accordance with these Rules a writ is to be served on a defendant in any country **with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the writ may be served –**

(a) through the government of that country, where that government is willing to effect service; or

(b) through a Fiji consular authority in that country, except where services through such an authority is contrary to the law of that country.

(4) A person who wishes to serve a writ by a method specified in paragraph (1), (2), or (3) must lodge in the Registry a request for service of the writ by that method, together with a copy of the writ and an additional copy thereof for each person to be served.

(5) Every copy of a writ lodged under paragraph (4) must be accompanied by s translation of the writ in the official language of the country in which service is to be effected

or, if there is more than one official language of that country, in any one of those languages which is appropriate to the place in that country where service is to be effected:

Provided that this paragraph shall not apply in relation to a cop[y of a writ which is to be served in a country the official language of which is, or the official languages of which include, English, or is to be served in any country by a Fiji consular authority on a Fiji subject, unless the service is to be effected under paragraph (2) and the Civil Procedure Convention with respect to that country expressly required the copy to be accompanied by a transaction.

(6) Every translation lodged under paragraph (5) must be certified by the person making it to be a correct translation; and the certificate must contain statement of that person's full name, of his address and of his qualification for making the translation.

(7) Documents duly lodged under paragraph (4) shall be sent by the Registrar to the Minister with a request that he arrange the writ to be served by the method indicated in the request lodged under paragraph (4) or, where alternative methods are son indicated, by such one of those methods as is most convenient.

Undertaking to pay expenses of service *(O.11, r.5)*

5. Every request lodged under rule 4(4) must contain an undertaking by the person making the request to be responsible for all expenses incurred by the Minister in respect of the service requested and, on receiving due notification of the amount of those expenses, to pay that amount to the Minister and to produce a receipt for the payment to the Registrar.

Service of originating summons, petition, notice of motion, etc (O.11, r6)

6.(1) Subject to Order 73, rule 4, rule 1 of the Order shall apply to the service out of the jurisdiction of an originating summons, notice of motion or petition as it applies to service of a writ.

(2) Subject to Order 73 rule 4, service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the Court, but leave shall not be required for such service in any proceedings in which the writ, originating summons motion or petition may be these RULES OR UNDER ANY Act be served out of the jurisdiction without leave.

(3) Rules 2 shall, so far as applicable, apply in relation to an application for the grants of leave under this rule as it applies in relation to an application for the grant of leave under rule 1.

(4) An order granting under this rule leave to served out of the jurisdiction an originating summons must limit a time within which the defendant to be served with the summons must acknowledge service.

(5) Rules 3, 4 and 5 shall apply in relation to any document for the service of which out of the jurisdiction leave has been granted under this rule as they apply in relation to a writ." (emphasis added)

14. Order 65 rule 4(1) empowers the court if it '**appears to the Court that it is impracticable for any reason to serve the document in the manner**

prescribed on that person,' to order '**for substituted service of that document'.** In terms of Order 65 rule 4(3) the requirement is that the applicant for substituted service should take necessary means '**by taking such steps as the Court may direct to bring the document to the notice of the person to be served.'** The directions as to the method of service has to be given by the court after it appears that the method provided in the High Court Rules are impracticable. I do not think that there is an obligation on the court to prescribe alternative steps on every instance when such application is made, because it would encourage parties to allege difficulty to justify that it is impracticable to serve, rather than making any genuine effort to find out the whereabouts of the Defendant and or to serve the writ personally. It is also hard for a court to find out the truthness of the statements in affidavits in support of such applications since they are made ex-parte. First the court should consider that it is impracticable to serve the document in the manner prescribed on the other party and then the obligation is on the party requesting to take such steps as the court may direct to bring the document to the notice of the person to be served. It is pertinent to give directions so that the documents are brought to the notice of the person to be served by way of substituted service.

15. 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 a 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.'

16. The Plaintiff has not sworn an affidavit, but the affidavit of legal executive of the Plaintiff's solicitor state that when they communicated to the Defendant regarding the dispute contained in the writ of summons the Defendant had replied. This can be considered part of communication in an attempt to settle the matters outside the court and should be encouraged rather than hindering such process. The reply to such communication would not necessarily qualify the Plaintiff to serve the writ of summons in the same manner, if not expressly consented. Parties are free to explore the mechanisms to negotiate and or mediate the issues the way they choose, but this does not necessarily mean the same methods can be applied when the action is instituted. If not parties will be discouraged even to reply to any communication that will hamper ADR's.

17. When the Plaintiff's solicitors communicated with the Defendant the Defendant replied and indicated their position on the issue of contention, but when the Plaintiff sought the address from the Defendant did not reply to the said email. There are no emails after this communication and one cannot be certain as to the receipt of the email, but under normal circumstances it can be presumed that the request for the address for the service reached the Defendant's email address. Whether the request for address, was brought to the attention or not is not clear. An email can reach junk mail or the plaintiff might not have opened it due to technical difficulty. In any event before the last email there was another email dated 20th March, 2013 which was promptly replied and it is noteworthy that even in the said reply the there was no address given though it was requested in the said email dated 20th March, 2013 . Despite this the Plaintiff's solicitors had requested for address on 25th March, 2013 specifically informing the intending legal action and requested for address but this email was not replied. From the circumstance, it may be presumed that the Defendant had deliberately refrain from his address to the Plaintiff, but even this does not warrant the service of writ of summons, statement of claim and other documents in the scanned form to the said email. The scanning and compressing of the documents are done in certain formats which cannot be

read by all the recipient and the size of the annexed documents (attachments to the documents) are also issues that needs consideration, before allowing email service of documents indicating institution of legal actions. In UK such considerations are being addressed before embracing electronic medium as a method of service. The presently applicable UK CPR requires a 'good reason' for seeking alternative service as opposed to 'impracticable' service under High Court Rules of 1988.

18. 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).'

19. The High Court Rules of 1988 is analogous to the UK Supreme Court Rules of 1988 and not the presently applicable UK ,CRP which was discussed in the said decision, but the rational can be applied with due regard to the differences in the presently applicable law in UK. Albon Vs Naza Motor Trading SDN BHD and Tan Dato Nasimmuddin Amin [2007] EWHC 327(Ch) Justice Lightman, at paragraph 37 stated

> '…an alternative method of service must be interpreted and applied in a manner which gives effect to the overriding objective. In particular the court must have in mind the horrendous cost of litigation today, the hurdles thereby created in the way of obtaining justice on the part of those with limited means (and in particular those with limited

means facing litigation with abundant means) and the need to ensure that case proceed expeditiously.'

20. So, the court should be mindful of the costs involved and the hardships a litigant has to undergo when personal service is required, but at the same time there should be sufficient safeguards to guarantee that such alternative service would bring the documents to the notice of the Defendant. If not the same rationale in saving the cost for the Plaintiff would increase the cost of litigation of the Defendant, who may need to first seek setting aside of default judgment before a defence is filed.

21. In Knauf UK Gmbh v British Gypsum Ltd [2002] 1 WLR 907 was a case where the UK CPR was interpreted in relation to the alternate service, regarding arbitration where Hague Visby Rules applied. It was held

> 'It may be necessary to make exceptional orders for service by an alternative method where there is "good reason"; but a consideration of what is common ground as to the primary method of service of English process in Germany suggests that a mere desire for speed is unlikely to amount to good reason, for else, since claimants nearly always desire speed, the alternative method would become the primary way".
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> In paragraph 59 of the judgment it was held
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> 'In our judgment there cannot be a good reason for ordering service in England by an alternative method on a foreign defendant if such an order subverts, and it designed to subvert in the absence of any difficulty about effecting service the principles upon which the service and jurisdiction are regulated by agreement between the United Kingdom and its convention parties. This is not a matter of mere discretion, but of principle.'

22. Knauf UK Gmbh v British Gypsum Ltd [2002] 1 WLR 907 cannot be applied to the present scenario, as there was no bi-lateral or multilateral agreement in issue of this case, and in fact the Plaintiff is unaware of the domicile of the Defendant and in any event if a web based email is used to serve the writ of summons can be anywhere in the world as the email can be accessed by the person irrespective of where he is domiciled as long as there is access to internet. So, even the service may be in a country where bi-lateral or multilateral agreements on service applies. This makes the issue regarding the grant of service by alternative method, though electronic means, even more complex. There may be even such agreements with specific methods of service depending on where the Defendant resides, and or depending on the type of litigation, and email service of writ of summons and or statement of claim may conflict with such special methods contained in bi-lateral or multilateral agreements relating to service, but I cannot decide these issues on available facts before me, as the place of service cannot be restricted in service through an email and the Plaintiff is uncertain as to the Defendant's domicile. The Order 11 deals with the service of the writ outside the jurisdiction, and Order 11 rule 3 (1) states that Order 10 rule 1(1),(4),(5), (6) and Order 65 rule 4 applies to service of writs outside jurisdiction. In Order 11 rule 3 (2) it states

> "Nothing in this rule or in any order direction of the Court made by virtue of it shall authorize or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country"

23. In Order 11 rule 3 (3) states that there is no need to serve the writ of summons if the writ is served in accordance with the law of the country in which service is effected or if served by a method provided by Order 11 rule 4 . So, the Plaintiff can either serve the Defendant personally or in accordance with the law of the country when it relates to service outside the jurisdiction. The Order 11 rule 4 is not applicable to the present request to serve the writ by way of an email. When the Plaintiff is unable to state the country where the Defendant is residing it is not possible to find out whether the service through email is

contrary to the law of that country. At the same time if email service of writ of summons is allowed it could be accessed in any part of the world as long as there is internet connection and necessary software and hardware to retrieve such email, and may be 'served' in a country where email service of legal documents, is prohibited or not allowed by law.

24. In any event the Order 65 rule 4 specifically applied to the service outside the jurisdiction and if substituted serve is ordered, the court should consider whether the alternate method would bring the document to the notice of the Defendant. If the court is not satisfied that the method suggested by the Plaintiff would bring the document to the notice of the person to be served, then such method should not be sanctioned by the court even if the service by personal service is impracticable. What is important is that the method prescribed by the court as an alternative method should bring the documents to the notice of the Defendant. This is a consideration that needs careful thought as the legal consequence of alternative service is that it is served to the Defendant, though in actual fact it is otherwise. So a litigant might in order to steal a march on the other party will obtain default judgment by obtaining an order for service of the claim through an email which in fact never reached the other party. This is the rationale behind the safeguards introduced in UK as regards to email service of writ of summons and claims.

25. High Court Rules of 1988 of Fiji is mainly based on the Supreme Court Rules of U.K in 1988 and these rules have undergone drastic changes in U.K to suit the present environment with the advent of electronic communication including digital era specially after the usage of world wide web after 1994. It is important to consider present CPR in UK and service of documents through electronic means.

The Service of Documents Under Civil Procedure Rules (CPR) of U.K

26. In terms of CPR of UK the service of claim within EEA[1] can be through electronic means and rule 6.3(1)(d) specifically empowers the court to allow

[1] The EEA consists of the states of the EU and EFTA (except Switzerland); that is Iceland, Lichtenstein and Norway.

such service in accordance with the Practice Directions. It states as follows(Civil Procedure Vol 1, White Book Service 2011 p 170 -171)

> '6.3 Methods of Service
> 6.3(1) A claim form may (subject to Section IV of this Part an the rules in this Section relating to service out of the jurisdiction on solicitors, European Lawyers and parties) be served by any of the following methods-
>
> (a) personal service in accordance with rule 6.5;
> (b) First class post, document exchange or other service with provides for delivery on the next business day, in accordance with Practice Direction 6A;
> (c) leaving it at a place specified in rule 6.7, 6.8, 6.9 or 6.10
> (d) fax or other means of electronic communication in accordance with Practice Direction 6A; or
> (e) any method authorized by the court under rule 6.15.'

27. Though service through electronic means is possible in CPR of UK it is not a blank cheque as requested by the Plaintiff in this case and regulated by Practice Direction 6A and it states as follows

> 'Service by fax or other electronic means
> 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 than 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 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 on the solicitor acting for the party to be served.

(b) an email address 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 my be used for the service or

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

4.2 Where a party intends to serve a document by electronic means (other than by fax) the party must first ask the party which is to be served whether there are any limitations to the receipt'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.' (emphasis added)

28. If the above practice directions are anything to go by, when authorizing service through email, it was allowed with utmost caution in UK with many safeguards for a very good reason. First, it is allowed only in EEA states and not applied globally as there can be conflicts with domestic laws of other countries which might affect the sovereignty of independent states. Secondly, the service is restricted to instances where such electronic service is expressly consented by the party intending to be served and such consent has to be in the written form as opposed to electronic method. So, the evidence of consent cannot be in the form of email, but in a medium stated in 4.1(2)(a), (b), or (c) stated in paragraph above. This is important as the consent cannot be challenged easily and when consented the issues involving email service was considered sufficiently by the

party consenting to such service. Thirdly, the party indenting to serve by way of electronic means should also ask the party to be served whether there are any restrictions as to the size of the document and the format of the electronic document that they intend to be served. This again is important as this will not allow certain in built filtering of emails that prevent the desired email being diverted to junk, as well as the compatibility of the software as well as the hardware so that the document sent is also received in the same manner and could be opened and read without difficulty. This is important as the scanning and compressing documents are done using software that may not be compatible with the receiver's end. These are all considerations that needs to be addressed before allowing email service of documents and the list is not exhaustive. These are considerations that already in place in UK and it is unwise to allow the Plaintiff's request as it will not qualify any of the said requirements. Though electronic communications are allowed as evidence in courts in UK as well as in Fiji the service of claim through email is not the same such service is not specifically authorized in Fiji under High Court Rules of 1988. This may be so as internet and world wide web and email were advents after 1988 and made popular after 1994. Though the discretion is given to court, it is not desirable to expand the service of claim and or writ of summons through emails without any guidance as the abovementioned practice direction of UK or without considering the rationale behind such Practice Directions in UK as regard to electronic service of writ. Though the said practice direction in U.K is limited to EEA states, at least the said guide lines are the minimal requirements before allowing service of writ of summons and claim through email.

D. CONCLUSION

29. The affidavit in support does not state the country of residence of the Defendant. If so the court is unaware as to the actual place of service and there may be conflicting bi-lateral or multi-lateral agreements to such service and the onus is on the applicant to exclude any such conflicts. The mere fact that the email provided by a third party had responded would not warrant the service of

the writ of summons to the said email. Even assuming that the said email is correct email address of the Defendant, the said communication related prior to the institution of action and cannot be considered as any consent to serve writ of summons to the Defendant after institution of the action to the same email address. In the circumstances the present application for service through email needs to be struck off as the Plaintiff has not fulfilled the minimum requirements for the court to grant such an order. The minimum requirements are the UK Practice Directions 6A which can be used as a guide Line. No costs.

E. FINAL ORDERS

a. The ex-parte summons dated 2nd April, 2013 is struck off

b. No costs

Dated at **Suva** this **26th day** of **August, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva