

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

**Civil Action HBC: 154 of 2015**

**BETWEEN** : **PETER ALLAN LOWING** of Unit 6.2, Fairfax Apartments,  
Hunter Street, Port Moresby, Papua New Guinea, Legal  
Practitioner.

**PLAINTIFF/RESPONDENT**

**A N D** : **PETER HOWELL** of 30A Lynwood Avenue, Killara, New  
South Wales, Australia.

**DEFENDANT/APPLICANT**

Counsel : Ms Barbara Doton for defendant/applicant  
Ms Salote Tabuadua-Seru for plaintiff/respondent  
Date of Hearing : 10 May 2016  
Date of Ruling : 28 June 2016

## **R U L I N G**

### **Introduction**

[01] This ruling relates to an application to set aside the writ.

[02] Peter Howell, the defendant/applicant ("the applicant") by the application filed on 22<sup>nd</sup> December 2015 seeks the following orders:

- “1. **An ORDER** that the service of the Writ of Summons on the defendant to be set aside on the grounds that service is irregular.
2. **An ORDER** that the Writ of Summons filed by the Plaintiff in the proceedings herein on the 10<sup>th</sup> day of September 2015 be set aside on the grounds that it is

irregular and the convenient forum of trial is in the Local Court of Ryde, New South Wales where the Defendant has instituted case no. 2015/00113044 against the Plaintiff.

3. **A DECLARATION** that the Honourable Court has no jurisdiction over the Defendant in respect of the subject matter of the claim or the remedy sought in the action.

4. **An ORDER** that the Plaintiff pay for the cost of this application on a solicitor/client indemnity basis.

5. **Any other ORDER** that the Honourable Court deems just and appropriate in the circumstances.”

[03] The application has been made under Order 12, rule 7 of the High Court Rules 1988 (“HCR”)

[04] In support of this application, the applicant relies on two affidavits sworn by him and filed on 22 December 2015 and on 8 April 2016 respectively.

[05] Peter Allan Lowing, the plaintiff/respondent (“the respondent”) opposes the application. He has also filed two affidavits. One was filed on 17 February 2016 and the other on 16 March 2016.

[06] When the matter came on for hearing, both counsel made oral submissions and also tendered their respective written submissions. In addition, both parties have also filed supplemental written submissions.

### **Background**

[07] The Plaintiff, Peter Allan Lowing is a legal practitioner in Papua New Guinea and Fiji. He is citizen of Fiji as well as Australia. He ordinarily resident in PNG. He is operating a law firm under the name and style of Lowing and Associates (“the *Firm*”). Peter Howell, the defendant is also a legal practitioner in Sydney, Australia and a barrister and solicitor admitted to the High Court of Fiji. He is a citizen of Australia

and ordinarily resident in Australia. In March 2014 the plaintiff entered into a written contract with the defendant (‘the *Employment Contract*). The Employment Contract provided, *inter alia*, that the defendant would practise as barrister and solicitor and manage the Firm for a period of three years from the date of the defendant’s arrival in Fiji (the *Term*). The defendant arrived in April 2014 to commence employment with the plaintiff at the Firm. Clause 14 of the Employment Contract states that, ‘*this agreement is governed by the laws of Fiji. Each party irrevocably submits to the exclusive jurisdiction of the Courts of Fiji.*’ In September 2014 dispute emerged between the parties. The defendant gave notice to the plaintiff that the defendant intended suing the plaintiff for damages for breach of the Employment Contract. On 24 July 2015 the plaintiff brought these proceedings against the defendant and sought declaration, injunction and damages for breach of the employment contract. On 10 December 2015 the defendant filed acknowledgement of service and on 22 December 2015 summons to set aside the writ of summons. On 2 February 2016 the plaintiff filed affidavit in opposition to the defendant’s application to set aside together with notice of motion to enter judgment against the defendant.

[08] Before commencement of these proceedings, the defendant had brought foreign proceedings in Australia against the plaintiff for breach of contract. The plaintiff filed an application seeking that the foreign proceedings be permanently stayed. The foreign court refused that application. The plaintiff did not file an appeal.

[09] In the meantime, the foreign proceedings have been settled and judgment by consent has been entered.

### **Issues**

[10] The following issues were raised for determination by the court:

#### **Issue of Writ of Summons**

- a. Whether the issue of the Writ of Summons out of the High Court was irregular;
- b. Whether the Writ of Summons having been irregularly issued ought to be set aside on that ground;

#### **Service of Writ of Summons**

- a. Whether the service of the Writ of Summons on the non-resident defendant was irregular;
- b. Whether service having been irregular, the Writ of Summons ought to be set aside on that ground.

#### **Jurisdiction of the Court: Forum Non Convenience**

- a. Whether the convenient forum of trial is in Sydney;
- b. Whether the Writ of Summons ought to be set aside on this ground;

#### **The Law**

[11] The application is made pursuant to O.12, r.7, HCR, which provides:

“Dispute as to jurisdiction (O.12, r.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 limit for service of a defence apply to the Court for:*

***(a) An order setting aside the writ of 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 added)

## **Determination**

### **Whether the writ of summons has been issued out of High Court irregularly:-**

[12] Firstly, I will deal with the issue of writ of summons.

[13] The applicant seeks to set aside the writ on the ground that it has been issued irregularly. He has relied on Order 6, rules 6 and 11 (1) & (2) of HCR.

[14] O.6, r.6 provides that writ which is to be served out of jurisdiction shall not be served without leave of the court.

[15] The meaning of ‘issue of a writ’ is defined under O.6, rule 6 (2) which states that **issue of a writ takes place upon its being sealed by an officer of the Registry.**

[16] As regards the service of a writ, Order 11 Rule 3 is also relevant. Rule 3 provides:

*“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 the writ is to be served out of the jurisdiction, save that the accompanying form of acknowledgment of service shall be modified in such manner as may be appropriate.”*

[17] Moreover, Order 10 Rule 1 (6) states:

*“(6) Every copy of a writ for service on a defendant shall be sealed with the seal of the High Court and shall be accompanied by a form of acknowledgment of service in Form No. 2 in Appendix A, in which the title of the action and its numbers has been entered.”*

[18] Counsel for the applicant, Ms Doton submits that the writ of summons states that it was issued from the High Court registry on 10<sup>th</sup> day of September 2015 and this has been sealed by an officer of the registry. She also submits that the writ has been issued prior to leave being granted which is contrary to the rules of the Court.

[19] Conversely, counsel for the respondent argues that leave granted to issue the Writ of Summons was an exercise of the Court’s discretion under Order 6 rule of the HCR and that there is not an ‘irregularity’ within the ambits of Order 12 rule 7 of the HCR.

[20] The plaintiff filed his application for leave to serve the writ of summons out of the jurisdiction on 10 September 2015. The court granted the leave to serve the writ of summons out of the jurisdiction 11 September 2015. The order granting such leave was sealed on 23 September 2015.

[21] It is to be noted that the copy of the writ of summons served on the defendants states that ‘*issued from the High Court Registry at LAUTOKA this 10<sup>th</sup> day of September, 2015.*’ And there is no High Court Seal and signature of an officer of the High Court indicating it has been duly issued by the High Court. (See Affidavit of Service of Nitin Prakash filed 15 March 2016)

[22] Apparently, the writ of summons was to be served on the defendant who is non-resident because the writ of summons carries the defendant’s NSW, Australia address. The court granted leave for service out of the jurisdiction on 11 September 2015. The registry could have issued the writ of summons only thereafter, not before the granting the leave to serve out of the jurisdiction.

- [23] The plaintiff is not entitled to put the blame on the registry that the registry has issued it irregularly before the court granting leave for service out of the jurisdiction on 11 September 2015. Moreover, there is no High Court Seal and signature of an officer of the High Court on copy of the writ of summons served on the defendant. In the circumstances, one cannot say that the writ of summons was issued by the High Court.
- [24] Even if the writ of summons was issued by the registry before leave being granted by the Court to serve out of the jurisdiction, the solicitors for the plaintiff should have known that the writ of summons could not be served out of the jurisdiction without leave of the court.
- [25] The writ of summons has been issued without leave of the Court. Therefore it contravenes O.6, r.6 that no writ which is to be served out of the jurisdiction shall be issued without leave of the Court. Furthermore, the copy of the writ of summons served on the non-resident defendant does not bear a seal affixed upon it by an officer of the Registry. Therefore it contravenes O.6, r.6 (2) that issue of a writ takes place upon its being sealed by an officer of the Registry.
- [26] The case authority of *Wellington Newspapers v Rabuka* [1994] FJCA 14; Abu0004j.93s (22 March 1994), cited by the plaintiff, is not authority for the proposition that non-compliance with the requirements of O.6, r.6 could be cured by O.2, r.1, which states that *(1) Where, in beginning or purporting to begin any proceedings, .... There has by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, ... or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings.*
- [27] The word 'shall' used in O.6 suggest that the provisions are mandatory and must be complied with. Therefore, I am of the view that failure to comply with the mandatory requirements of O.6 is fatal and could not be cured by seeking assistance of O.2, r.1. I accordingly find that the

writ of summons should be set aside on the ground that the service on the defendant is irregular.

[28] Without prejudice to the above finding, I should also consider the other ground urged by the defendant for setting aside the writ of summons, i.e. jurisdiction of the court: forum non-convenience.

### **Jurisdiction of the Court: Forum Non Convenience**

[29] I now turn to the ground that jurisdiction of the Court and forum non-convenience. The defendant applies to set aside the writ of summons on the ground that the convenient forum of trial is in the Local Court of Ryde, New South Wales where the defendant has instituted case no. 2015/00113044 against the plaintiff.

[30] The defendant seeks a declaration that this Court has no jurisdiction over the defendant in respect of the subject matter of the claim or remedy sought in the action. Such declaration is sought under O.12, r.7 (g) of HCR, which provides:

‘....

***(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***

...’

[31] In terms of O.12, r.7, 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 limit for service of a defence apply to the Court.

[32] In this case the writ of summons has been served on the defendant on 30 October 2015. The defendant filed his acknowledgement of service of



writ of summons on 10 December 2015. The defendant has filed the application to set aside the writ within the time limit for service of a defence. Therefore there has been compliance with O.12, r.7.

[33] The plaintiff claim arises out the alleged breach of the employment contract entered into between the parties. Clause 14 of the contract provides:

***‘Clause 14. This agreement is governed by the laws of Fiji. Each party irrevocably submits to the exclusive jurisdiction of the Courts of Fiji.’***

[34] When the dispute arose in respect of non-payment remuneration, the defendant initiated proceedings against the plaintiff in New South Wales Court (‘the foreign proceedings’) before the plaintiff commences these proceedings (‘the local proceedings’).

[35] In the foreign proceedings the plaintiff appeared by a lawyer and made an application to permanently stay the proceedings. The New South Wales court rejected that application and refused to stay. The plaintiff did not appeal the order refusing his application to strike out. Instead, he filed the statement of defence challenging the merits of the defendant’s case. In the plaintiff’s amended statement of defence filed in the foreign proceedings the plaintiff pleaded, amongst other things, the following defence:

*“11. The defendant pleads that the governing law of the contract between the parties is Fijian Law, and says further that the parties have expressly chosen Fijian law as the governing law of the contract pursuant to clause 14.1 of the Employment Contract.*

*20. In further answer to the entire of the amended statement of claim the defendant says that the plaintiff should not have commenced the proceedings in the State of New South Wales at all and in doing so is in breach of the express terms of the Employment Contract that he is relying on to found his claim, in particular clause 14.2 of the Employment Contract, with the defendant reserving all rights to cross-claim for breach of contract for all loss and damage caused by the commencement of the said*

*proceedings by the plaintiff in the incorrect and foreign jurisdiction.*

*24. Further and/or in the alternative, the defendant is entitled to an equitable set-off as against any amount awarded to the plaintiff, in respect of any damages for breach of contract caused by the plaintiff commencing proceedings in the Local Court of New South Wales in breach of the exclusive Jurisdiction clause as set in the Employment Contract as defined at clause 14.2”*

[36] After filing his amended statement of defence in the foreign proceedings, the plaintiff filed the local proceedings and sought anti-suit injunction against the defendant. This court refused that application.

[37] The defendant has now obtained a judgment by consent in the foreign proceedings for payment of money. The plaintiff filed an application to stay of execution of the consent judgment in this court. This Court also refused that application.

[38] Counsel for appearing for the applicant submits that the issues in contention are now resolved by the consent judgment and hence the this Court has no jurisdiction over the Defendant in respect of the subject matter of the claim or the remedy sought by the Defendant for alleged breach of clause 14 as the Plaintiff has consented to the judgment in the Foreign Proceedings therefore has waived strict compliance with clause 14.

[39] On the other hand, counsel appearing for the respondent submits that the Plaintiff was forced to defend the Foreign Proceedings as the NSW Magistrates court did not agree that the choices of jurisdiction was sufficient to warrant the stay sought at the time by the Plaintiff. If the Plaintiff had not defended the suit he would have had a default judgment entered against him. He Further submits that it does not matter what happened in the Foreign Proceedings. The simple fact is that by instituting the Foreign Proceedings the Defendant has caused the Plaintiff to expend substantial funds fighting in the foreign and incorrect jurisdiction.

[40] It will be noted that the respondent is contesting this case after filing his amended statement of defence in the foreign proceedings and after consenting to judgment to be entered in favour of the applicant.

[41] Appearing to contest the merits will amount to submissions of the court. In *Marc Rich & Co. AG v. Societa Italiana Impianti PA* (No.2) [1992] 1 Lloyd's Rep 624, where the defendant was held to have submitted to the jurisdiction of the Court in Itali by delivering statement of case disputing the merits of the claim.

[42] It is true Fiji Courts had jurisdiction over the defendant in respect of the subject matter of the claim or the remedy sought in the action. However, the respondent has submitted to the jurisdiction of the court in New South Wales by filing in the foreign proceedings the statement of defence disputing the merits of the claim and subsequently by consenting to the judgment to be entered in favour of the applicant (the plaintiff in the foreign proceedings).

[43] I respectfully reject the contention that the respondent was forced to defend the foreign proceedings as the NSW Magistrates court did not agree the choice of jurisdiction was sufficient to warrant the stay sought at the time by the respondent. The respondent did not appeal the order refusing to stay the foreign proceedings.

[44] Both the foreign proceedings and local proceedings are based on the same agreement entered into between the parties. This gives rise to the duplication of proceedings and brought into play the question of forum convenience.

[45] The conducts of the respondent in the foreign proceedings constituted voluntary submission to the jurisdiction of the foreign court, NSW court. As a result of this submission NSW court has become forum convenience. Therefore the respondent is not entitled to claim that the

applicant has breached clause 14 of the agreement by bringing action in the foreign court. He has waived that right.

[46] For the foregoing reasons, I would declare that this court had jurisdiction over the defendant in respect of the subject matter of the claim, but the respondent by his conduct had chosen foreign court as forum convenience. I therefore set aside the writ of summons filed in this court by the respondent.

### **Costs**

[47] The applicant seeks costs on full solicitor/client indemnity basis. He states that the respondent has caused him to contest the proceedings herein and incurred legal costs. The applicant has made a few appearances through counsel to contest this matter and filed comprehensive affidavits and also filed written submissions. I exercise my discretion in this regards. The court has unfettered discretion in relation to costs. I therefore, taking all into my account, summarily assessed the costs at \$3,500.00. Accordingly the respondent will pay the summarily assessed costs of \$3,500.00 to the applicant.

### **Final outcome**

- 1) The writ of summons filed by the plaintiff on 10 September 2015 is set aside.
- 2) The plaintiff will pay summarily assessed costs of \$3,500.00 to the defendant.

.....  
*M.H. Mohamed Ajmeer* 28/6/16  
**M.H. Mohamed Ajmeer**

**JUDGE**



**28 June 2016**

**At Lautoka**