

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBM 188 of 2019**

BETWEEN : **MAGNA EXTERIORS INC.** carrying on business as
PLASTCOAT

PLAINTIFF

AND : **ASHWEEN KUMAR, ASHWEEN KUMAR** carrying on
business as **MTS INDUSTRIES, AIM SUPPLIES INC.,**
JOVANE SHANE MARAGH, JOVANE SHANE MARAGH
carrying on business as **GTA PRODUCTS & SERVICES,**
FIDIA SUPPLIER LTD., PALLAV MAGGU, SUMEET
ARORA, SUMAN ROY, LASHAUNA HYPOLITE,
BRIANNA RUSSELL-HYPOLITE, EFFYGENE GRAY and
AARON GRAY

DEFENDANTS

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Ms. P. Low for the Plaintiff**

Date of Decision : **23 September 2020**

DECISION

RULES OF THE HIGH COURT:

Request by foreign court to examine witness in Fiji – Letters rogatory – Evidence on commission – Whether request from foreign court available to examine a judgment debtor – Compellability of a witness – Discovery of documents – Application of Fijian law – International comity – Orders 24, 38, 39 & 70 of the High Court Rules 1988 – Electronic Transactions Act 2008 & Electronic Transactions (Amendment) Act 2017

The following cases are referred to in this decision:

- a. *Robert Tweedie Macahill v Metro-Goldwyn-Mayer Inc.* [1979] FJCA 5; Civil Appeal No.31 of 1979 (28 November 1979)
 - b. *Radio Corporation of America v Rauland Corporation* [1956] 1 Q.B 618
 - c. *S v E* [1967] All ER 593
 - d. *Re State of Norway's Applications (Nos. 1 & 2)* [1989] 1 All ER 745
 - e. *J Barber & Sons v Lloyd's Underwriters* [1986] 2 All ER 845
 - f. *Blunt v Park Lane Hotel Ltd and Briscoe* [1942] 2 All ER 187
 - g. *Triplex Safety Glass Company Limited v Lancegaye Safety Glass Limited* [1939] 2 K.B 395
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1. This is an *ex-parte* application, initially filed by the plaintiff on 29 November 2019, and amended on 4 December 2019, on the basis of a request by the Superior Court of Justice in Ontario, Canada, seeking the assistance of the judicial authorities of this country to compel one of the defendants, Mr. Ashween Kumar, to attend an examination under oath and produce documents to be used as evidence in an action pending before the court in Ontario. The application was supported by the affidavit of Ashley Thomassen, an Ontario lawyer for the plaintiff, on whose behalf a supplementary affidavit was also filed. No relief is sought against the other defendants.
2. The request, issued by the registrar of the Ontario Superior Court of Justice, followed an order by Justice Conway of that court, allowing the plaintiff's counsel to conduct an examination in person, by video conference or by other means, in accordance with the law of evidence and rules of civil procedure of Ontario and the commission issued by that court. The plaintiff states that the Ontario Superior Court of Justice is a superior court of general jurisdiction in

Canada and is competent to issue the letter of request and commission by virtue of its inherent jurisdiction over civil proceedings.

3. The commission dated 26 November 2019, issued by the Ontario Superior Court of Justice, is addressed to William Clarke of Howards Lawyers in Suva. Mr. Clarke was appointed a commissioner for the purpose of taking evidence in proceedings before the Ontario court. He was directed to send a transcript of the evidence taken, and to follow the terms of the commission and that of the order attached to the commission.
4. Order 70 Rule 2 of the High Court Rules 1988 permits an *ex-parte* application to the High Court, supported by affidavit, to obtain evidence for a foreign court. An application could be made pursuant to a request – commonly known as *letters rogatory* – issued by a foreign court seeking an order for the examination of witnesses, their attendance and for the production of documents. The Plaintiff's *ex-parte* summons was initially under the heading Evidence by Commission Act 1859 (UK), which needed rectification, as the relevant provisions are now contained in the High Court Rules. References to the Foreign Tribunals Evidence Act 1856 and the Evidence by Commission Act 1859 were omitted by the Fiji Supreme Court Rules (Cap.13 Ed.1978).
5. When the matter was initially taken up for hearing, the court sought a clarification from the plaintiff in regard to the foreign request for using such evidence, "on examination for discovery and/or at trial in the proceedings of that court". The plaintiff sought to clarify this through its supplementary affidavit and submissions.
6. After the initial hearing on 12 December 2019, and following further submissions on 31 January 2020, counsel for the plaintiff moved for an adjournment to 14 February 2020. On that day, she informed court that the action in the Ontario Superior Court of Justice was on foot, and sought time as the plaintiff was in a position to enter default judgment in the Ontario action, following the failure of the defendant to file a statement of defence in response to the plaintiff's statement of claim. Hence, counsel submitted she would

inform court on 5 May 2020 whether this application was to be proceeded with. On that day, the plaintiff submitted that default judgment was entered in the Ontario court on 26 February 2020, and sought the orders prayed for in the amended summons dated 14 December 2019, and in response to a query by court, wanted time to make oral submissions on the Fiji Court of Appeal decision of *Robert Tweedie Macahill v Metro-Goldwyn-Mayer Inc*¹; hearing was fixed for 12 May 2020, on which day the plaintiff moved for another adjournment to obtain instructions. Though submissions were fixed for 18 May 2020, the matter was adjourned once more and submissions were concluded on 21 May 2020.

7. Although default judgment was entered in the Ontario action on 26 February 2020, the plaintiff did not seek a change in the reliefs that were sought from court. There was also no attempt to amend the letter of request of 26 November 2019, though much of the information requested by the registrar of the Ontario court might have ceased to be of relevance with the passing of the trial stage in that action. A supplementary affidavit and supplementary submissions were filed by the plaintiff urging that the orders sought were essential in the interests of justice and in the context of the fraud allegedly committed by this defendant, and as the whereabouts of the moneys are known only to him, notwithstanding that default judgment was entered while the current proceeding was pending in this court.
8. In light of the default judgment, this court must decide whether the letter of request is currently of moment.
9. The plaintiff's case is that the Ontario action arose out of fraud perpetrated against the plaintiff by its former employee, Mr. Kumar, and others by operating a number of fraudulent suppliers over a period of two and a half years and caused massive losses to the plaintiff. The plaintiff filed a statement of claim on 10 May 2019, and later amended, in which, the plaintiff pleaded various causes of action based on fraud, but claimed that the defendant concerned had left Canada for Fiji, necessitating a letter of request to be issued.

¹ [1979] FJCA 5; *Civil Appeal No.31 of 1979 (28 November 1979)*

10. According to the plaintiff, on 16 May 2019, the Ontario Superior Court of Justice granted a *mareva* injunction, a disclosure order, a certificate of pending litigation and a confidentiality and protective order (referred to as the “*Mareva* order”); and, an order to allow entry and search of premises (referred to as the “AP order”). The plaintiff declared that the *Mareva* order restrained Mr. Kumar from dealing with any assets worldwide and required him, within five days of the date of the order, to provide the plaintiff’s lawyers with a sworn affidavit setting out particulars of the nature, value and location of his assets worldwide and, within five further days, submit to an examination under oath in respect of his affidavit, accounts and assets.
11. The AP order is described as a civil search order that permits certain authorised persons to enter and search the premises of the defendants – including Mr. Kumar – and to locate and remove evidence relevant to the Ontario action. The plaintiff states that the AP order required Mr. Kumar to *inter alia* (i) forthwith disclose, deliver up and grant access to evidence relevant to the Ontario action (ii) provide passwords and information necessary to access data, (iii) provide access to his email, social media, and other accounts, and (iv) provide access to his computers, smartphones and other devices that may contain the evidence.
12. The plaintiff asserted that Mr. Kumar failed to comply with the *Mareva* order and the AP order made by the Ontario court.
13. After service by electronic means, initially, the plaintiff states, on 4 November 2019, Mr. Kumar was personally served with the statement of claim, orders, and other court materials from the Ontario action in Fiji, but that he had not responded to the statement of claim or complied with the court’s orders. It was after this that the court in Ontario issued a request to compel Mr. Kumar to attend before the commissioner, “*by the means ordinarily used in Fiji, if necessary to secure attendance, to answer questions under oath or affirmation, and to produce at the examination the documents and things identified in Schedule “A” to the letter of request*”.

14. Rule 1 of Order 70² empowered the High Court under any enactment to make, in relation to a matter pending before a court or tribunal in a place outside the court's jurisdiction, an order for the examination of witnesses, their attendance and for the production of documents, and to give directions on those matters. Rule 4 (1) states that an order may be made for the examination of a witness before any fit and proper person nominated by the person applying for the order or before an examiner of the court or before another qualified person as the court sees fit.
15. Requests from foreign courts for assistance have been considered by the Courts of Fiji previously. Judicial precedents in this country, however, are rare. One such is *Robert Tweedie Macahill v Metro-Goldwyn-Mayer Inc.*³, in which the Fiji Court of Appeal heard an appeal from a decision of the High Court which related to an application pursuant to *letters rogatory* issued by the United States District Court, Eastern District of Washington, in two civil actions commenced in that court.
16. The action in the US court concerned infringement of intellectual property, damages and injunctions. Material claimed to be relevant as evidence in the civil action in the US District Court was seized in Suva, and criminal proceedings were instituted by the Fiji police. In that case, however, the material alleged to be relevant as evidence was not allowed to be released to the examiner appointed to take evidence, as there were pending criminal proceedings in Fiji, in which the same material was required as evidence.
17. I accept the plaintiff's submission that in *Robert Tweedie Macahill v Metro-Goldwyn-Mayer Inc.*, though the request concerned civil actions instituted in the US, there were also criminal proceedings against the defendants in Fiji, and the decision there in refusing the request of the US county court must be seen in the context of the facts of that case. Holding that the documents sought by the plaintiff in that case may be needed for criminal proceedings by the Fiji police, the Court of Appeal expressed the view that assistance must not be provided to a foreign court to enable the discovery of evidence which would tantamount to

² High Court Rules 1988

³ [1979] FJCA 5; Civil Appeal No.31 of 1979 (28 November 1979)

a ‘fishing expedition’ by the plaintiff, and declared that it would be oppressive to require the defendants to testify and produce documents.

18. Though the letter of request in the present matter was couched in rather broad terms – a point conceded by the plaintiff in submissions – and requested numerous documentation and information, the plaintiff submitted at the hearing that it did not seek discovery as judgment was already entered. The plaintiff also submitted that there are provisions in the Canadian law that militated against criminating oneself. This later position of the plaintiff on discovery accorded with the court’s own thinking on the matter that the letter of request, couched in those general terms would stretch the limits of this court to oblige the request from Ontario.
19. By its judgment dated 26 February 2020, the Ontario Superior Court of Justice ordered Mr. Kumar to pay the plaintiff damages in a sum of Canadian \$2,236,421.64, punitive damages of Canadian \$ 25,000.00 and special damages of Canadian \$12,468.44. The court made several other orders, and also awarded pre and post judgment interest and costs. The court declared that the plaintiff was entitled to an equitable tracing order to trace its funds and that the defendants deliver an accounting of the funds received by them from the plaintiff. The *mareva* order, granted on 16 May 2019, and which required Mr. Kumar to provide particulars of the nature, value and location of his assets worldwide, continued to be in force.
20. It is averred in the plaintiff’s supplementary affidavit that for the purpose of executing a judgment, a debtor may be examined under the Ontario rules of procedure. In terms of those rules, the plaintiff states, a judgment creditor may examine the debtor in relation to the reason for non-payment or non-performance of the order; the debtor’s income and property; the debts owed to and by the debtor; the disposal the debtor has made of any property either before or after the making of the order; the debtor’s present, past and future means to satisfy the order; whether the debtor intends to obey the order or has any reason for not doing so; and any other matter pertinent to the enforcement of the order.

21. The examination of the judgment debtor, it can be seen in terms of the Ontario rules, must be specific to the enforcement of the judgment. In this context, the terms of the letter of request, which was initially intended for the purpose of a trial, appear excessively broad for the purpose of the debtor examination.
22. Order 48⁴ provides for the examination of a judgment debtor in this country. The High Court has jurisdiction, on an application made *ex parte* by a person entitled to enforce a judgment or order for the payment of money, to order a judgment debtor to be orally examined on the questions whether any and, if so, what debts are owing to the judgment debtor, and whether the judgment debtor has any and, if so, what other property or means of satisfying the judgment or order. The court may also order the judgment debtor to produce any books or documents in his possession relevant to the examination questions.
23. In fact, rules of civil procedure in Fiji make provision for the court to order the production of documents at any stage in an action. Order 38 Rule 13 of the High Court Rules, for instance, provides that the High Court at any stage in a cause or matter may order any person to attend any proceedings in the cause or matter and produce any document, to be specified or described in the order, the production of which appears to the court to be necessary for the purpose of that proceeding, provided it is not a document he cannot be compelled to produce at the trial of that cause or matter.
24. Similarly, Order 24 Rule 12 empowers the court at any stage of the proceedings in any cause or matter, for the purpose of fair disposal or for saving costs, to order a party to produce to the court any document in his possession, custody or power relating to such cause or matter, and the court may deal with the document as it thinks fit. Other rules under Order 38 provide for the court to order a party to make disclosure of documents, with attendant consequences in the event of default. These provisions will operate to compel a judgment debtor

⁴ High Court Rules 1988

to produce any document in his possession relevant to the examination for the purpose of satisfying the judgment.

25. In its supplementary submissions filed on 13 June 2020, the plaintiff submitted that the letter of request is “sufficient and still relevant” to its application for enforcement. The plaintiff submitted that the rules of civil procedure in Ontario allowed a witness to be examined outside the court’s jurisdiction by way of a post judgment debtor examination. The plaintiff’s position is that Mr. Kumar is the only source of information on the whereabouts of the funds alleged to be misappropriated, that it requires the requested information to pursue its investigation and trace the proceeds of the fraud, and that without such information, the plaintiff has no prospect of recovering those funds.
26. The defendant named in the request letter is a party to the action in the Ontario Superior Court of Justice. As such there can be no objection to making an order for the production of documents for the purpose of a debtor examination of this defendant. For such purpose, the evidence may either be oral or documentary. In the case of documents, their production must relate to direct proof for the purpose of the examination⁵. Such documents must be known to exist. Those known documents must be specified by the plaintiff. The debtor examination stage must not be used to engage upon an exercise of discovery.
27. The question did arise in my mind as to why the default judgment entered in the Ontario action could not be enforced in Fiji, as statutory provisions are available for that purpose. But, the availability of that route need not necessarily be a bar when a matter is pending before a foreign court or tribunal.
28. For these reasons, I cannot see anything objectionable to the plaintiff’s application for an order to examine the defendant named Ashween Kumar in consequence of the Ontario court’s request. The plaintiff has satisfied court that this is a fit case in which to render legal assistance to the Superior Court of Justice of Ontario. Rendering such assistance is an act in furtherance of the comity among nations, and Fiji respects the practices of international comity.

⁵ Radio Corporation of America v Rauland Corporation [1956] 1 QB 618

Although Fiji is not a signatory to the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (The Hague Convention of 1970), it needs to be emphasised that the Parliament of Fiji has made express provision for the purpose of giving such assistance when requested by foreign courts and our courts will be considerate to such requests. A witness resident in Fiji is not only competent but also compellable⁶ to be examined upon a request by a foreign court. That position need not be different in a post judgment proceeding for the purpose of enforcing a judgment of a foreign court.

29. In the stated circumstances, this court is of the view that the request made by the foreign court seeking the appointment of an examiner to obtain evidence from Mr. Ashween Kumar is reasonable and properly within the laws of the land. The plaintiff must, however, furnish an amended letter of request, specifically an amendment to the schedule of the letter issued by the registrar of the Ontario Superior Court of Justice. The amendment must reflect the narrower purpose, viz. evidence for the debtor examination in terms of the rules of civil procedure in Ontario. Mr. William Clarke's appointment will take effect subject to the court's approval of the amended letter.
30. It is possible that the proposed examination could give rise to questions related to relevancy and admissibility of evidence. These though are matters for the court in Ontario. The nature of the proceeding in the Ontario court also depends upon the classification used by that court in terms of the rules obtaining in Ontario⁷. However, the mode of Mr. Kumar's examination should follow the procedural norms in this country.⁸
31. A couple of matters may need further elucidation.
32. With the Ontario action premised on matters such as fraud and breach of trust, there is the possibility that criminal proceedings could follow. Mr. Kumar, therefore, is entitled to refrain from answering incriminating questions. The privilege to do so was explained by Lord Goddard in this way: "*the rule is that*

⁶ S v E [1967] All ER 593

⁷ Re State of Norway's Applications (Nos. 1 & 2) [1989] 1 All ER 745

⁸ J Barber & Sons v Lloyd's Underwriters [1986] 2 All ER 845

no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for”⁹. In a debtor examination, in particular, the examination must relate to the enforcement of the judgment.

33. The request from Ontario is to conduct the examination of the witness in person, by video conference or by other means. The Electronic Transactions Act 2008 as amended permits the use of evidence stored by electronic means. Section 18 of the principal Act was amended by the Electronic Transactions (Amendment) Act 2017 to provide for the admissibility of evidence contained in electronic form, and the courts are required, unless the contrary is proved, to presume the truth of information contained in a data message, electronic document, electronic record or electronic communication and that these were made by the person purported to have made them. The use of the requested technology will not be contrary to the laws of this country. Therefore, the examiner may conduct the examination by video conference provided a written record of the deposition is maintained.

ORDER

- A. Mr. William Clarke of Howards Lawyers in Suva is appointed as Examiner in terms of O 70 Rule 1 of the High Court Rules 1988. The appointment is to take effect upon the court’s approval of an amended letter of request.
- B. The plaintiff is directed to submit for the court’s approval an amended letter of request from the Ontario Superior Court of Justice clearly specifying the documents it seeks to rely upon for the purpose of the proposed debtor examination. The amended request is to be provided to court within 4 weeks of this decision.

⁹ *Blunt v Park Lane Hotel Ltd and Briscoe* [1942] 2 All ER 187; this concern was also addressed by the Court of Appeal in *Triplex Safety Glass Company Limited v Lancegaye Safety Glass Limited* [1939] 2 K.B 395.

- C. The defendant may be examined in accordance with Order 39 Rules 5 to 10 and 11 (1) to (3) of the High Court Rules 1988. The examination must comply with the rules of civil procedure and evidence obtaining in Fiji. The original deposition is to be sent to the registry for filing.
- D. The Examiner is to keep the court informed of the date and place where the examination is to take place.
- E. The plaintiff is to serve a copy of this order on the examiner, together with the letter of request from the registrar of the Ontario Superior Court of Justice.
- F. The registrar is to ensure payment of fees and expenses of the examination in terms of Order 39 Rule 16.

Delivered at Suva this 23rd day of September, 2020




M. Javed Mansoor
Judge