

PART B: AFFIDAVIT

3. In their Affidavit, The Plaintiff/Applicant deposes as follows –

“4. The Plaintiff has filed this action against the Defendant in relation to caveats that the Plaintiff asserts has been wrongly and maliciously registered against the Plaintiff’s properties. The full extent of the claim is contained in the Statement of Claim.

5. Mr Amish Pal the principal of AP Legal was communicating with the Defendant in relation to the disputes between the Defendant and various clients of the Plaintiff via the email address ned.attie@gmail.com.

6. The Defendant as per our file records is a business consultant operating in Australia and Fiji. During the entire conversation the Defendant wilfully and deliberately refused to provide an address for service despite being put on express notice that if he failed to provide the address for service, the Plaintiff would make an application for substituted service. A copy of the email trial is annexed hereto and marked as B.

7. In the absence of any confirmation of address for service by Ned Attie, the Plaintiff has no practical means of service on the Defendant. Service via a newspaper advertisement may not be practical as the Defendant appears to be a regular traveler and hence may not be present in the jurisdiction where newspaper advertisement is published.

8. For this reason I am of the belief that the fairest and just way of service is via email on the address ned.attie@gmail.com.”

PART D: LAW ON LEAVE FOR SUBSTITUTED SERVICE

4. The Applicant has relied upon Order 64(4) and 32 (1) of the High Court Rules.

5. Order 65 (4) of the High Court Rules provides that:

“4-(1) If in the case of any 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, it appears to the Court 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 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.”

6. In the Supreme Court Practice 1988 Vol 1 Part 1 (Sweet and Maxwell Ltd, 1987) para 65/4/4 page 1043 states:

“ If at any time of the issue of a writ for service within the jurisdiction, there could at law have been personal service or other prescribed mode of service of the Writ upon the defendant ought to be served, but circumstances prevented such service being made, then substituted service of such writ may be allowed (Trent Cycle –v- Beattie (1899) 15 T.L.R 176, C.A) But if at the time of issue personal service or such other mode of service of such writ could not at law have been made, then (save as herein after mentioned in n. Evading service”, para 65/4/5) substituted service cannot be ordered (Fry –v- Moore ((1889) 23 Q.B.D 395, CA)

7. In paragraph 65/4/6 on page 1044 states:

8. An order for substituted service ought only to be made where it is impracticable for the plaintiff to effect personal service or to effect service in one or other of the alternative modes prescribed by O10 r. 1 (2) and the affidavit of evidence must show the effort which had been made, and therefore where the directors of the defendant company reside in this country and could have been served, the orders for substituted service on the defendant company out of the jurisdiction should be justified.”

9. The Affidavit confirms that contacts were made by email between the Counsel for the Plaintiff/Applicant and the Defendant himself. There was no other form of contact made directly with the Defendant as he had refused to provide any information on contact for service purposes.

10. In Kumaran -v- University of Southern Queensland [2011] FJHC 631; Civil Action 025.2011 (30 September 2011) Master Tuilevuka (as he was then) had this to say about substituted service by emails:

“[2]. Mishra Prakash & Associates had obtained leave to serve by way of e-mail and out of jurisdiction to USQ the Writ of Summons and Statement of Claim. The e-mail address that was stated was international@usq.edu.au. In hindsight and with the benefit of detailed submissions on the point by Mr. Gordon, that leave was, admittedly, ill-considered.

[3]. The substituted service of an originating process by e-mail should only be allowed in the rarest of cases.

[4]. If I may sidetrack a little just to illustrate how some Courts are more technologically advanced in the area of service of court documents, at least in so far as interlocutory processes go, Master Harper of the Australian Capital Territory Supreme Court recently ordered that a default judgement could be served on defendants by notification on their **Facebook** pages. And on another occasion, the same Court had

granted **leave for substituted service** by allowing certain court documents to be served by **text message to a mobile phone [1]**.

[5]. In this case before me, Mr. Candy deposes that the e-mail went directly to USQ’s spam folder on 16 March 2011. It was not processed into any USQ staff member account. USQ was therefore not served at all. USQ was only alerted after it accepted service of the default judgement whence upon it requested its IT section to retrace and locate the service mail. Mr. Candy asserts that USQ has a meritorious defence. The plaintiff was employed by a Chandra Williams Limited (“**CWL**”) and not by USQ.”

11. The Supreme Court Practice 1999 at 65/4/2, p. 1290 states that

“Substituted service may take the form of service by letter, advertisement, or otherwise, as may seem just (Jay v Budd [1897] UKLawRpKQB 142; [1898] 1 Q.B. 12 at 16)

The steps which the Court may direct in making the order for substituted service must be taken to bring the document to the notice of the person to be served.”

PART E: ANALYSIS

12. The Affidavit seeks for leave to substitute service within jurisdiction by email on the basis that the Defendant is attempting to evade service.
13. However there is no evidence that other attempts were made to serve the Defendant apart from by way of email. As stated by Master Tuilevuka, which I concur with, service by emails should only be granted in the rarest of cases.
14. Since 2011 and with advent of technology, there is nothing to show that service may be affected if there is inconsistent provision of internet. Fiji is now on the cusp of 5G network data, many light years from when Master Tuilevuka first dealt with the matter in his court.
15. The Affidavit shows that the Defendant was aware of the intention to serve him documents. He did not cooperate to provide the appropriate address for service although he was asked to do so.
16. The Court finds that in this instance, it is satisfied that service by way of email is necessary in order to ensure that the Defendant is properly served.
17. Although the document is served within jurisdiction, the Defendant has shown lack of interest and attempted to evade service. Therefore it is crucial that service by email be granted.

Costs

18. The Applicant/Plaintiff has sort for costs of \$1000 on the basis that they have had to resort to such means to serve the Writ. The Court finds this exorbitant and costs should be in the cause.

Orders of the Court:

19. The Court orders as follows:

- (a) That Leave be granted to serve Writ by way of email;*
(b) That costs of in the cause to the Applicant/Plaintiff.



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

Mrs Senileba LWTT Levaci

Acting Puisne Judge