

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 170 of 2024

BETWEEN: **CHRISTIAN JAGODZINSKI** of 929 Alton RD, Suite 500,
Miami Beach, Florida FL 33139, Investor

PLAINTIFF

AND: **LE GROUP DES INSULAIRES LIMITED** a Company
having its registered office at Avarua, Rarotonga, Cook Islands

DEFENDANT

For the Plaintiff: **Mr. D. Sharma and Ms. G Fatima**

For the Defendant: **Mr. J. Liganivai**

Date of Hearing: **22nd November 2024**

Date of Ruling: **11th December 2024**

RULING ON SUMMONS TO SET ASIDE SERVICE OF THE ORIGINATING
SUMMONS AND AFFIDAVIT IN SUPPORT OF
CHRISTIAN JAGODZINSKI

1. This is the Ruling on the Defendant's Summons dated 9th August 2024, seeking the following orders: -

- i. Service on the Defendant by letter dated 20 June 2024 from R Patel Lawyers of the Originating Summons dated 27th May 2024 and Affidavit in Support of Christian Jagodzinski dated 21 May 2024 be set aside.
- ii. All further proceedings in the action be stayed.
- iii. The Plaintiffs pay the Defendants' costs.
- iv. Such further other relief as may be just and fair.

UPON THE GROUNDS THAT:

- a) That the Plaintiff has not complied with the order dated 30th May in relation to service of the proceedings as it has not served on the Defendants "*all other documents filed in this action*" and in particular:

- (i) The Ex Parte Notice of Motion for service of the Defendant out of jurisdiction and
 - (ii) The affidavit in support of the Notice of Motion in (i) above
- b) As otherwise appears in the evidence in the affidavit of John Scott Miller filed in support of the Motion.
- 2. The Summons was first called on the 4th of September 2024 and directions were made for affidavit in opposition to be filed and the matter was adjourned for hearing on the 22nd of November 2024.
- 3. The parties prepared written submissions for the hearing and made oral arguments as well and the matter is now adjourned for Ruling.

The Submissions for the Applicant

- 4. The application is supported by the affidavit of John Scott Miller deposed on the 8th of August 2024.
- 5. The Plaintiff had sought and obtained an order ex parte to serve the Defendant/Applicant out of the jurisdiction by substituted means, particularly by way of registered post.
- 6. The Plaintiff served the following documents: -
 - (i) Cover letter by R. Patel & Co dated 20 June 2024
 - (ii) Ex Parte Order
 - (iii) Originating Summons; and
 - (iv) Affidavit of Christian Jagodzinski in support of the Originating Summons.
- 7. On the 11th of July 2024, Ms. Raylene Julian Ponia, Relationship Manager, emailed R. Patel & Co acknowledging receipt of the documents.
- 8. The Applicant submits that the Plaintiffs have not complied with the Court's orders as they have not served all of the documents, including the ex parte application and affidavit in support that led to leave being granted by the Court to serve outside the jurisdiction.

9. The Applicant relies on Order 12 Rule 7 of the High Court Rules 1988, which provides as follows: -

“Dispute as to jurisdiction (O.12, r.7)

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 limited for service of a defence apply to the Court for –

(a) an order setting aside the writ or service of the writ on him, or”

10. The Applicant cites the authority of **Patel vs Patel** [1991] FJHC 171 where the High Court cited the case of the Hagen (1908 -10) All ER 21 which provided for service out of jurisdiction as follows: -

“the first principle was whether or not a foreigner who owes no allegiance to these Courts, should be brought to this country to contest his rights, should be considered a very serious issue. The second principle was that if there was any doubt the appropriate jurisdiction that doubt ought to be resolved in favour of the foreigner. The third principle was that since an ex parte application was normally made for service out of the jurisdiction, the fullest disclosure was necessary, and failure to make a full disclosure would justify a discharge of the order.” (Emphasis added.)

11. The Plaintiffs have failed to include the documents relied on to obtain leave to serve the documents outside of the jurisdiction, and this leaves them open for this application, for the Court to discharge the leave for service out of jurisdiction.

12. The Applicant therefore submits that the Court should order the Plaintiff to supply the remaining unserved documents with costs to be paid by the Plaintiff.

13. Those were the submissions from the Applicant/Defendant.

Submissions from the Respondent/Plaintiff

14. The Plaintiff submits that the Defendant is a company registered in the Cook Islands and this was the proper place to serve the Court documents.

15. The High Court Rules allows for Originating Summons to be served by way of registered post as well. This is provided for by Order 11 Rule 6, which provides: -

“Service of originating summons, petition, notice of motion, etc. (O.11, r.6)

6.-(1) Subject to Order 73, rule 4, rule 1 of this 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.”

16. According to the Plaintiff, the only document required to be served under the Rules is the Writ, and in this case, the Originating Summons and the Affidavit in Support.

This is provided for at Order 11 Rule 6 (2) which provides: -

“(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 by these Rules or under any Act be served out of the jurisdiction without leave.”

17. The Plaintiff submits that the Rules do not state anywhere that in addition to the Originating documents, the Ex Parte Summons and affidavit in support must also be served. The Plaintiff submits that he has fully complied with the orders of the Court.

18. The Plaintiff submits that these additional documents were made ex parte, in the absence of the other parties to this action and once the order has been made, then the application is spent and there is nothing more to do with the application.

19. The Plaintiff submits that there is no prejudice to the Defendant since they are only required to answer to the Originating Summons and the affidavit in support.

20. The Order that was served on the Defendant’s agents states that all of the documents that were filed were to be served on the Defendant by registered post. The Defendant submits that in the context of the Rules, the “other documents” referred to only meant the sealed order together with the Originating Summons and affidavit in support.

21. The Plaintiff therefore submits that no prejudice has been caused to the Defendant and the application should be dismissed and a hearing date be assigned to the Plaintiff’s Originating Summons.

22. Those were the submissions from the Plaintiff.

Analysis

23. These proceedings were instituted on the 28 May 2024 by the filing of the Originating Summons and the affidavit of Lemeki Sevutia annexing the affidavit of Christian Jagodzinski in support.

24. In addition to the originating documents, the Plaintiff also filed an Ex Parte Notice of Motion for substituted service dated 28 May 2024. This was supported by the affidavit of Christian Jagodzinski deposed on the 21st of May 2024.

25. The ex parte Motion was heard on the 30th of May 2024 and the Court made the following orders: -

(a) Leave is granted for service of the Originating Summons and affidavit in support of Christian Jagodzinski and all other documents filed in this action on the Defendants out of jurisdiction by way of registered post on the office of Portculis Trustnet (Cook Islands) Limited being the registered office of the Defendant. The address is as follows:

PO Box 208 Avarua, Rarotonga, Cook Islands

(b) That the Defendant be given 42 days from the date of service of the documents to file the Acknowledgement of Service.

(c) That the Defendant shall be served by substituted means more particularly by post at their registered postal address.

(d) That the matter is adjourned to the 10th of July 2024 for mention.

26. Those were the orders made by this Court. In drawing up orders, it is incumbent on a Court to ensure two things – that the orders are very clear and that the orders are capable of being complied with.


27. In this case Order 1 is very clear in its terms – that the Plaintiff serve the Defendant with all the documents filed in this matter and that includes the ex parte notice of motion and affidavit in support.

28. It is not for any of the parties to pick and choose which part of the orders they comply with. The provisions of Order 11 Rule 6 are very clear although it does not assist the Plaintiff's arguments that they have fully complied with the Court's orders.
29. The only provision that is mandatory is Order 11 Rule 6 (4), which sets out the time limit for the service to be acknowledged.
30. I find that my orders of the 30th of May have not been complied with therefore the Summons will succeed to that extent. The matter will take its own course and parties are to expedite the matter to Trial.
31. This issue was raised by the Defendant at the first call of this matter and was opposed, so the Defendant has had to file this Summons. They are therefore entitled to the costs which will be summarily assessed.

This is the Ruling of the Court

1. **The application to set aside the service is refused.**
2. **The application for a stay of these proceedings is refused.**
3. **I direct that the Plaintiff serve the Defendant with the ex parte motion and affidavit in support within 7 days.**
4. **This application was unnecessary and could have been resolved much earlier in these proceedings therefore the Plaintiff will pay costs to the Defendant, summarily assessed at \$700, costs to be paid in 14 days.**
5. **The matter is to take its own course hereinafter.**





Mr. Justice U. Ratuville
Puisne Judge

cc: - *R. Patel Lawyers*
- *Munro Leys*

