

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

**Civil Action No. HBC 333 of 2023**

**BETWEEN:** **RESENE PACIFIC PTE LIMITED** a limited liability company duly registered under the Companies Act 2015 having its registered office situated at 33 Wailada, Lami, Fiji.

**PLAINTIFF**

**AND:** **GALE NOELENE GIBB** as Administratrix of the Estate of Desmond Walter Gibb of address unknown.

**DEFENDANT**

**Representation:**

**Plaintiff:** Mr. Z. R. Lateef (Lateef & Lateef).

**Defendant:** Not Served.

**Date of Hearing:** 27<sup>th</sup> November 2024.

**Ruling**

**A. Introduction**

[1] On 3<sup>rd</sup> November 2023 an Originating Summons and affidavit in support of Rakesh Kumar Malhotra was filed seeking the following orders:

- “1. Service of th[e] Originating Summons on the Defendant be dispensed with;
2. The dollar value of one (1) share in Ciwa Pte Limited owned by Desmond Walter Gibb be paid into Court forthwith;
3. The Chief Registrar to sign the Share Transfer document and all other documents necessary on behalf of the Defendant to facilitate the transfer of the remaining one (1) share in Ciwa Pte Limited to the Plaintiff.
4. SUCH further or other relief as this Honourable Court may deem just and expedient.”

The application by the Plaintiff is made pursuant to **Order 28 Rule 1, Order 28 Rule 2 (8) and Order 65 Rule 1 (2) of the High Court Rules 1988.**

[2] The matter was first called on 17<sup>th</sup> November 2023. On that day I asked the lawyer for the Plaintiff two questions. These were in relation to the Companies Act and the power to direct the Chief Registrar to sign. The lawyer sought adjournment to respond to the questions. The response to the questions were not provided at each adjournment. Numerous adjournments were granted for the submission. A year later, the Plaintiff's lawyers took a hearing date. They have made written submissions. They have been heard.

**B. The Submissions**

- [3] On the issue of service on the Defendant, Gale Noelene Gibb, the plaintiff relies on Order 65 Rule 1 (1) and Rule 1 (2) of the High Court Rules 1988. The submission is that the Court has power to dispense with the requirement for personal service. According to Rakesh Kumar Malhotra "*no one in the Plaintiff Company has had any contact with [the Defendant] and [they] are unaware of her current location.*" They say that they do not have her contact details. They do not believe she is alive as in 1998, she was in her late 60's.
- [4] Desmond Walter Gibb (husband of Defendant), who is now deceased held 1 share in Ciwa Pte Limited ("Ciwa"). The Plaintiff holds 15,167 shares in Ciwa. Mr. Gibb passed away in April 1996. The Defendant is the Administrator of the Estate of Mr. Gibb. Ciwa owns an unencumbered property in Wailada, Lami. The single share of Mr. Gibb according to the Plaintiff was overlooked at the time of the share sale as everyone forgot that the company existed. The Defendant had also transferred Mr. Gibb's shares in the plaintiff company to Resene Paints Limited in New Zealand and had no further dealings with the Plaintiff since 1998.
- [5] The Plaintiff has obtained a valuation for the property owned by Ciwa. The value of each share is \$157.57. The Plaintiff is willing to pay \$157.57 to the High Court or the Consolidated Fund and in the event the Defendant ever becomes aware of the share, she would be able to retrieve the funds.
- [6] The Plaintiff is seeking that the Chief Registrar sign all documents necessary to transfer the one share in Ciwa Pte Limited to the Plaintiff. They are also seeking that the Court make orders that the Chief Registrar sign the share transfer along with all forms necessary to obtain a Capital Gains Tax Certificate from Fiji Island Revenue and Customs Service.

**C. Determination**

- [7] The issues before me relate to shares in a company, Ciwa PTE Limited. The Plaintiffs are seeking to transfer one share of Desmond Walter Gibb in Ciwa to the Plaintiff (Resene Pacific PTE Limited). I would firstly deal with the issue of service. The Plaintiffs are seeking dispensation of service.
- [8] The Plaintiffs are seeking dispensation of service on the Defendant as they are not certain of the current location of the Defendant. The affidavit of Rakesh Kumar Malhotra averred that the Defendant moved to Brisbane, Queensland, Australia in 1998. From the submission I note that the counsel has relied on Order 65 Rule 1 (1) and 1 (2) of the High Court Rules 1988. The submission is that I have the power to dispense with requirement of personal service. That submission is correct. What the Plaintiffs are seeking is total dispensation of service. The submission states that they have not sought substituted service as they do not know where the Defendant is living. They go on to submit that "*she could be residing anywhere in the world.*" The Court has a discretion to dispense with personal service. That is not the same as total dispensation of service. If personal service is not possible. Then substituted service is an option. This has not been sought or explored.

- [9] The affidavit of Mr. Malhotra states that the Defendant moved to Brisbane, Australia. This is not acknowledged in the submissions. The submission states that she could be residing anywhere in the world. The starting point of the submission should have been that her last known residence was in Brisbane. The submissions clearly do not reflect what is stated in the affidavit. Whatever they are relying on is the information from 1998. The Plaintiff have not shown that recently any attempt was made to locate the Defendant.
- [10] Service is personal. Substituted service is not a general rule but an exception to personal service: per **Amratunga J in Rajinesh Nand v. David Prasad (2013) FLR 533 HBC 83/13S**. No attempt has been made to serve the Defendant. I see no reason to allow dispensation of service.
- [11] The other order that is being sought by the Plaintiff is that the “...*dollar value of one (1) share in Ciwa Pte Limited owned by Desmond Walter Gibb be paid into Court...*” and that the Chief Registrar “...*sign the Share Transfer document and all other documents necessary on behalf of the Defendant to facilitate the transfer of the remaining one (1) share in Ciwa Pte Limited to the Plaintiff*”.
- [12] According to Mr. Malhotra, Desmond Walter Gibb “*held an individual share in Ciwa Pte Limited for administrative purposes only as the majority shareholder was a company whose Directors permanently resided in New Zealand. It was practical at the time to have the Chief Executive Officer of the Plaintiff Company hold an individual share in Ciwa Pte Limited so he could attend to anything in Fiji that needed a shareholders attention.*”.
- [13] Mr. Lateef’s submission was contrary to what is averred to in the affidavit of Mr. Malhotra. He submitted that when Ciwa was registered, the law required a minimum of 2 shareholders. The Plaintiff could not own all the shares in Ciwa. It was not for administrative purposes as was stated in the affidavit of Mr. Malhotra. The other submission on behalf of the Plaintiff is the Mr. Malhotra was not informed about the law in force in Fiji at the time.
- [14] The submission is that the deponent (Mr. Malhotra) was ill advised. The submission of Mr. Lateef should be in line with the sworn affidavit of Mr. Malhotra. If Mr. Malhotra’s sworn affidavit was to be corrected a supplementary affidavit should have been filed. The contrary submission of Mr. Lateef is evidence from the bar table. By his submissions Mr. Lateef is trying to change Mr. Malhotra’s sworn affidavit evidence.
- [15] Ciwa Pte Limited is a company. Any company that is formed or registered in Fiji is regulated by the Companies Act 2015: **Section 4**. The legal capacity and powers of a company is subject to Section 44 (2) and to any restrictions in a company’s articles of association. A company has the legal capacity of an individual in and out of Fiji. The Articles of Association of a company governs the internal management of a company. A company’s articles of association have effect as a contract: (a) between the company and each member; (b) between the company and each director and company secretary; and (c) between a member and each other member, under which each person agrees to observe and perform the articles of association so far as they apply to that person: **Section 47 (1) Companies Act 2015**.

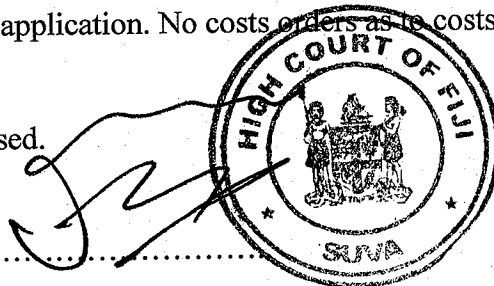
- [16] The meaning and effect of **Section 47 (1) of the Companies Act 2015** is that each member is bound to the company; the company is bound to each member; and each member is bound to other members. This being the statutory position and it being contract between the company and the members, it did not cause the contract to impose duties on outsiders. Neither does the Companies Act create a deemed contract for the benefit of anybody other than the company and its members. The Companies Act reinforces the concept of privity of contract. The contract is between a member and the company. A Court will not interfere with that. I also see no reason for me to interfere and ask that the Chief Registrar sign the transfer documents.
- [17] **Section 250 of the Companies Act 2015** provides for the registration of shares in the name of a trustee, executor or administrator. The trustee, executor or administrator of the estate of the dead person is entitled in equity to shares: **Section 250 (2) of the Companies Act 2015**. Following the demise of Desmond Walter Gibb, his executors, trustees or administrator is entitled to his share. A court will not assume the role of the trustee, executor or administrator or grant that power to the Chief Registrar to act on their behalf.
- [18] The obligation is on the Plaintiff is to act prudently. The Plaintiff in its submission accepts that the Companies Act 2015 does not give this court powers to direct the Chief Registrar to sign share transfer. The submission then is made is that this court has inherent jurisdiction to do what is just and expedient in all circumstances. This court will be just and expedient. In this matter I do not find that I am being unjust or inexpedient. No attempt to locate the Defendant has been made by the Plaintiff. Neither have they attempted or sought substituted service. Without any effort or proper service, the Plaintiff is seeking the court to do its work.
- [19] It should be noted that **Section 237 of the Companies Act 2015** provides that a share is a personal property, is transferable or transmissible in accordance with the company's articles of association and capable of devolution by will or by operation of law. This Court does not have the power to direct anyone to transfer the shares in a company. I will not direct the Chief Registrar to sign the share transfer in Ciwa Pte Limited. What the Plaintiff is requesting is contrary to the Companies Act 2015. I will not act contrary to the Companies Act 2015.
- [20] Mr. Lateef has referred to Section 168 of the Land Transfer Act where Court can make orders for the Chief Registrar to sign documents. Section 168 of the Land Transfer Act deals with court proceedings. There are no analogous provisions in the Companies Act 2015. There is no provision in the Companies Act 2015 which allows a Court to deal with transfer of shares. The principles of Section 168 of the Land Transfer Act cannot be applied to company shares.
- [21] The other submission and reliance for the Plaintiff is on Order 15 Rule 15 of the High Court Rules 1988. It is submitted that Order 15 Rule 15 (1) allows the court to appoint the Chief Registrar to look after and represent the interests of the Defendant and the Estate of Desmond Walter Gibb where the Court believes it would be expedient to do so. Order 15 Rule 15 is titled representation of interested persons who cannot be ascertained. This rule deals with the making of a representation order appointing a person to represent a person or class of persons in the proceedings specified in paragraph (1) of the Rule and paragraph (4) of the Rules deals with the sanction of a

compromise by the Court in such proceedings so as to bind interested or affected but absent persons.

- [22] The procedure under Order 15 Rule 15 is not intended to deal with the difficulties that obviously arise by not being able to find the defendant to a proceeding that raises issues of fact, and this procedure is therefore not apt to resolve disputes involving issues of fact and law, between one plaintiff and one defendant where the single defendant cannot be found: per **Knox J** in *Cotton v. Official Solicitor [1989] C.L.Y 3045*. **Buckley J** in *Morgan's Brewery Co. v. Crosskill [1902] 1 Ch. 898* declined to appoint S, sole defendant, or any other person, to represent the class of preference shareholders until a meeting had been called of such class and some person nominated to represent them. Justice Buckley decided the question as between the company and the defendant. The point being privity of contract.
- [23] Some other issues have been raised in the submissions by the counsel that need to be addressed. It is submitted by counsel that *"the amount the Plaintiff has spent to obtain a solution to this simple matter is most unfair. Thus, we believe it is only fair and right for this Honourable Court to exercise its jurisdiction and grant the Orders it seeks for the main purpose of saving expense. We submit that it would be most unfair and unjust for this Honourable Court to refuse the Plaintiff's application and force the Plaintiff to spend more thousands of dollars to take this matter to the Court of Appeal.....we submit that there is no difficulty whatsoever in this matter. It is a simple matter of \$157.57 where the share can be transferred to the Plaintiff and the monies paid into Court or into the Consolidated Fund."*
- [24] A Counsel needs to assist the court with relevant laws and reference to appropriate cases. The transfer of shares is that of a company. The starting point is the Companies Act 2015. The provisions for the transfer of shares of a company is contained in the Companies Act 2015 and the Articles of Association. They must be relied upon. The basic requirement of any proceedings is that it must be served on the other party. This has not been complied with. The evidence before me is that no attempt was made to serve the Defendant. The easy solution sought for the plaintiff was dispensation. This cannot be granted in the absence of any attempt to serve or any application for substituted service.
- [25] The other point for the Plaintiff is the issue of taking the matter to Court of Appeal. An appeal is a right of a party. If they are aggrieved with a decision, they have the right to appeal. The Plaintiff need not remind me of that. I am aware of the appeal processes.
- [26] For the reasons given I dismiss the application. No costs orders as to costs.

**D. Court Orders**

The Originating summon is dismissed.



Chaitanya S.C.A. Lakshman  
**Puisne Judge**  
30<sup>th</sup> January 2025