Serafica Rogelio T and others *v* Transocean Offshore Ventures Limited [2013] SGHC 118

Case Number	: Suit No 87 of 2009 (Registrar's Appeal No 80 of 2013)
Decision Date	: 24 June 2013
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Ong Ying Ping and Susan Tay (OTP Law Corporation) for the appellants; Ian Teo and Ting Yong Hong (Rajah & Tann LLP) for the respondent.
Parties	: Serafica Rogelio T and others — Transocean Offshore Ventures Limited

Civil Procedure – Service

[LawNet Editorial Note: The appeals to this decision in Civil Appeals Nos 48 and 55 of 2013 were allowed by the Court of Appeal on 14 May 2014. See [2014] SGCA 24.]

24 June 2013

Tay Yong Kwang J:

1 This was an appeal against an Assistant Registrar's ("the AR") order dismissing an application to set aside an order of court dated 4 January 2013 granting liberty to the respondent, Transocean Offshore Ventures Limited ("Transocean"), to effect substituted service of examination of judgment debtor orders on the appellants (hereafter referred to as "the Directors"), who are the directors of Burgundy Global Exploration Corporation ("Burgundy"). At the conclusion of the hearing, I dismissed the appeal. The Directors have filed an appeal against my decision and I now give my reasons.

Background facts

2 The history of the protracted legal proceedings between Transocean and Burgundy is set out in my grounds of decision for Burgundy's appeal against Assistant Registrar Jordan Tan's ("AR Tan") assessment of damages awarding Transocean damages in the sum of US$105,536,922 plus interest following an order for summary judgment against Burgundy under O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"): see *Transocean Offshore International Ventures Limited v Burgundy Global Exploration Corporation* [2013] SGHC 117. I set out below only the facts and proceedings that are germane to the present appeal.

3 Following AR Tan's decision, Transocean entered final judgment against Burgundy on 25 April 2012. Burgundy filed an appeal against the assessment of damages in Registrar's Appeal No 158 of 2012, which I dismissed on 26 March 2013.

4 On 7 June 2012, Transocean filed an *ex parte* application in Summons No 2826 of 2012 for examination of judgment debtor orders ("the EJD Orders") against the Directors as officers of Burgundy pursuant to O 48 r 1 of the Rules. The EJD Orders were granted and affixed with the following Notice under O 45 r 7:

NOTICE

(UNDER ORDER 45 RULE 7 OF THE RULES OF COURT)

> If you, the within-named [the Directors], neglect to obey this Order, you will be liable to process of execution for the purpose of compelling you to obey the same.

5 Between June and November 2012, Transocean made four unsuccessful attempts to effect personal service of the EJD Orders on the Directors, who were ordinarily resident in the Republic of the Philippines ("the Philippines"), through a Philippines law firm. [note: 1]

6 On 3 October 2012, Transocean filed Summons No 5064 of 2012 which contained the following prayers:

> 1. [Transocean] be at liberty to effect Service of any Order for Examination of Judgment Debtor in SUM 2826/2012/A (the "**EJD Order**") on the directors and/or officers of [Burgundy] as named herein by way of (i) service on [Burgundy's] Singapore lawyers, Gomez & Vasu LLC and/or (ii) advertisement of the aforesaid the EJD Order ... in an English language newspaper with nation-wide circulation in the Republic of the Philippines for three consecutive days. ...
>
> 2. That such service and/or advertisement shall be deemed good and sufficient service of the said EJD Order on the said directors and/or officers of [Burgundy].
>
> ...

At the *ex parte* hearing on 4 January 2013, counsel for Transocean submitted that if the EJD Orders were served on Burgundy's Singapore solicitors, Gomez & Vasu LLC, the Directors would probably be notified of the EJD Orders as Gomez & Vasu LLC was representing Burgundy in the ongoing appeal against AR Tan's assessment of damages and would have continuing contact with the Directors. One of the Directors, Mr Rogelio T. Serafica, had also previously filed an affidavit dated 5 September 2012 for the main proceedings making reference to his knowledge of the EJD Orders. Assistant Registrar Ruth Yeo ("AR Yeo") granted Prayer 1(i) (*ie*, substituted service of the EJD Orders by way of service on Gomez & Vasu LLC) and Prayer 2. No order was made on Prayer 1(ii).

7 Transocean subsequently served the EJD Orders on Gomez & Vasu LLC on 14 January 2013. On 18 February 2013, the Directors filed Summons No 851 of 2013 to set aside AR Yeo's order for substituted service. The summons was dismissed on 4 March 2013.

The AR's decision

8 The AR held that service of the EJD Orders was governed by O 11 r 8, O 48 r 1(2) and O 62 r 5 of the Rules (read cumulatively) and that these requirements had been satisfied by the order for substituted service of the EJD Orders on Gomez & Vasu LLC.

9 The AR also emphasised that counsel for Transocean had informed AR Yeo that Gomez & Vasu LLC did not have express instructions to accept service on behalf of the Directors and that AR Yeo must have been aware of this fact when the order for substituted service was made. The order for substituted service was not improper or inadequate as it sufficed to bring the EJD Orders to the attention of the Directors following the extensive but futile attempts by Transocean to effect personal service on the Directors in the Philippines.

The parties' submissions on appeal

10 The Directors submitted that Gomez & Vasu LLC did not represent or act for the Directors in their personal capacities; service of the EJD Orders on Gomez & Vasu LLC was therefore improper service under O 62 r 6(2)(a) of the Rules. The Directors also relied on the cases of *Consistel Pte Ltd and another v Farooq Nasir and another* [2009] 3 SLR(R) 665 ("*Consistel*") and *P T Makindo (formerly known as PT Makindo TBK) v Aperchance Co Ltd and others* [2010] 4 SLR 954 ("*PT Makindo*") as authorities for the proposition that the proper course was for Transocean to seek leave to serve the EJD Orders out of jurisdiction under O 11 before applying for substituted service. It was argued that as the Directors were not parties to the substantive proceedings, by obtaining the order for substituted service for service within Singapore, Transocean had effectively evaded the requirements of O 11 of the Rules. O 11 r 8(1) did not apply to the EJD Orders as the EJD Orders were "in truth and substance" the originating processes where the Directors were concerned. The Directors further contended that service out of jurisdiction of the EJD Orders was contrary "in effect and substance" to O 38 r 18, which prohibits the service of a subpoena on a witness outside the jurisdiction.

11 In response, Transocean submitted that it was not a necessary precondition under the Rules for Transocean to have obtained leave to serve out of jurisdiction under O 11 as leave was "not required in any proceedings in which leave for service of the originating process [had] already been granted" pursuant to O 11 r 8(1). Both *Consistel* and *PT Makindo* were clearly distinguishable from the facts of the present case. Transocean also submitted that O 38 dealt only with witness subpoenas and was irrelevant.

The decision of the court

The specific provisions for service of an order for the examination of a judgment debtor

12 The service of orders for the examination of a judgment debtor is governed by O 48 r 1(2), which provides as follows:

> An order under this Rule must be in Form 100 and *must be served personally on the judgment debtor and on any officer of a body corporate* ordered to attend for examination. [emphasis added]

Under O 62 r 5, substituted service may be ordered where any provision of the Rules directs that a document is to be served personally:

> **5. Substituted service (O. 62, r. 5)**
>
> (1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, *it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order in Form 136 for substituted service of that document.*
>
> (2) An application for an order for substituted service must be made by summons supported by an affidavit in Form 137 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*.
>
> ...

[emphasis added]

Whether the substituted service was improper because Gomez & Vasu LLC did not act for the Directors

13 The Directors' first objection was that service was improper because Gomez & Vasu LLC did not act for them in their personal capacities. The Directors relied on O 62 r 6(2)(a) as the basis for the submission that documents could only be properly served at the address of the solicitors who were acting for them. Order 62 r 6(2)(a) provides as follows:

> **6. Ordinary service: How effected (O. 62, r. 6)**
>
> ....
>
> (2) For the purpose of this Rule, and of section 2 of the Interpretation Act (Chapter 1), in its application to this Rule, the proper address of any person on whom a document is to be served in accordance with this Rule shall be the address for service of that person, but if at the time when service is effected that person has no address for service his proper address for the purpose aforesaid shall be —
>
> (a) in any case, *the business address of the solicitor (if any) who is acting for him* in the proceedings in connection with which service of the document in question is to be effected...
>
> [emphasis added]

14 In my view, this reliance on O 62 r 6(2)(a) was misplaced. Order 62 r 6(2)(a) does not apply to an order for substituted service where personal service is impracticable. O 62 r 6 is a general provision dealing with the methods of *ordinary service* where personal service is not required under the Rules. The requirements for substituted service are set out in O 62 r 5 and the only principle governing the court's discretion as to the method of service in O 62 r 5(3) is that the steps directed should bring the document to the notice of the person to be served.

15 As the AR observed, there was no indication that AR Yeo ordered service on Gomez & Vasu LLC because she was under the misapprehension that they were acting for the Directors. Instead, the argument advanced before her was that Transocean was seeking to serve the EJD Orders on Gomez & Vasu LLC because it believed that Gomez & Vasu LLC was still taking instructions from the Directors in relation to Burgundy's affairs and was thus able to effectively bring the EJD Orders to the notice of the Directors. It was also not disputed before me that counsel for Transocean had informed AR Yeo that Gomez & Vasu LLC did not have instructions to accept service of process for the Directors. In my opinion, there was nothing defective in the manner of substituted service that was directed by AR Yeo. Service on Gomez & Vasu LLC was ordered using the law firm as a conduit to the Directors and not in the firm's capacity as the Directors' solicitors. It may also be noted that the Directors did not at any point challenge the efficacy of the substituted service.

Whether leave to serve out of jurisdiction under O 11 was required before an order for substituted service could be made

16 I now turn to the Directors' primary submission that the order for substituted service was improper as Transocean had failed to take the prior step of seeking leave to serve the EJD Orders out of jurisdiction under O 11.

17 The Directors relied on the decision of Andrew Ang J in *Consistel* for the general proposition that substituted service in lieu of personal service could not circumvent the stringent requirement for leave to serve out of jurisdiction under O 11. In *Consistel*, the plaintiffs obtained an order for substituted service of a writ of summons against the defendants who were resident out of jurisdiction. Ang J upheld the Assistant Registrar's decision to set aside the service on the ground that the plaintiffs had not sought leave to serve the writ out of jurisdiction before obtaining an order for substituted service (at [30] of *Consistel*), and observed at [33]:

> ... personal service is generally required because it would be unfair to order judgment in default of appearance in cases where the defendant did not even know that there were legal proceedings brought against him. The fact that the defendant was not in Singapore when the Writ was issued does not change this. The balance of justice is not tipped in favour of substituted service just because a defendant is overseas. ...

The Directors submitted that the above observations were equally apposite in relation to the EJD Orders, which were akin to originating processes in relation to the Directors who were not parties to the main proceedings between Transocean and Burgundy. It was argued that the proper hierarchy of service – leave to serve out of jurisdiction followed by an application for substituted service in lieu of personal service – should also apply to service of the EJD Orders.

18 Counsel for the Directors also referred to *PT Makindo*, where one of the reasons for Tan Lee Meng J's refusal of leave to commence committal proceedings against two directors of a company was the applicant's failure to effect personal service of a copy of the court order endorsed with the requisite penal notice. Tan J cited with approval (at [33]) Chao Hick Tin JC's (as his Honour then was) statement in *Allport Alfred James v Wong Soon Lan* [1988] 2 SLR(R) 520 that where a procedural step was prescribed for the exercise of a court's jurisdiction to punish for contempt, it should be scrupulously complied with. The Directors argued that penal notices were similarly attached to the EJD Orders and non-compliance was punishable as contempt; applying the reasoning in *PT Makindo*, the proper requirements for service of the EJD Orders should be strictly observed and procedural defects could not be glossed over.

19 As a preliminary point, it was not the Directors' argument before me at this appeal that there was no basis for the court to grant leave for service out of jurisdiction of the EJD Orders. The essence of the Directors' objection was that substituted service of the EJD Orders was improper because Transocean ought to have first sought leave to serve the EJD Orders out of jurisdiction before applying for an order for substituted service in lieu of personal service, based on the analogy between an order served on non-resident officers of a corporate defendant and an originating process. The narrow question before me was whether Transocean was required under the Rules to apply for leave under the general provisions of O 11 r 1 and O 11 r 2, as applicable to the service of an originating process, to serve the EJD Orders on the Directors out of jurisdiction before applying for an order for substituted service.

20 In my view, O 11 r 8(1) governed the service of the EJD Orders out of jurisdiction; pursuant to this provision, it was not necessary for Transocean to have sought leave for service. *Consistel* and *PT Makindo* were of no assistance on the facts before me.

21 O 11 r 8 states as follows:

> **8. Service of summons, notice or order out of Singapore (O. 11, r. 8)**
>
> (1) Subject to Order 69, Rule 10, service out of Singapore of any summons, notice or order

issued, given or made in any proceedings is permissible only with the leave of the Court *but leave shall not be required in any proceedings in which leave for service of the originating process has already been granted*.

(2) Rule 2 shall, so far as applicable, apply in relation to an application for the grant of leave under this Rule.

(3) Rules 3, 4 and 6 shall apply in relation to any document for the service of which out of Singapore leave has been granted under this Rule as they apply in relation to an originating process.

[emphasis added]

The general rule in O 11 r 8(1) is that leave is required for the service out of jurisdiction of any summons, notice or order issued in any proceedings but the qualifying limb obviates the requirement of leave where leave for service out of jurisdiction of the originating process has previously been granted.

22 I was not persuaded by the Directors' submission that an order for the examination of an officer of a judgment debtor issued under O 48 r 1(1) was analogous to an originating process. An order of this nature is not an independent cause of action or claim for substantive relief against the individual to whom the order is directed. It only "provide[s] a *process* for the examination of the judgment debtor so that information as to his means may be obtained for the purpose of determining the appropriate mode of enforcement" [emphasis added] (see *Singapore Court Practice 2009* (Jeffrey Pinsler, SC gen ed) (LexisNexis, 2009) at para 48/1/1). The EJD Orders were ancillary to the main proceedings between Transocean and Burgundy, issued in aid of execution of the judgment against Burgundy and served on the Directors as officers of Burgundy, albeit made against them personally. There was no legal basis to characterize the EJD Orders as "originating processes" such that they fell within the general scope of provisions requiring leave under O 11.

23 The requirement of establishing one of the threshold jurisdictional bases under O 11 r 1 expressly applies only to leave for service of an originating process. Where an originating process is concerned, the relationship between O 11 r 1 and s 16(1)(a)(ii) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) is such that the statutory basis of the High Court's civil jurisdiction to hear an action *in personam* is premised upon proper service outside of Singapore of the writ or originating process "in the circumstances authorised by and in the manner prescribed by the Rules of Court". The court could then exercise its discretion under O 11 r 2(2) if it appeared that the case was a proper one for service out of the jurisdiction, taking into consideration whether there was a good arguable case for the relief claimed and whether Singapore was the *forum conveniens*. Service cannot be divorced from jurisdiction under the rules in O 11 as applicable to originating processes.

24 In contrast, a summons, notice or order issued in the course of the substantive proceedings may not bear a similar close relation to the court's jurisdiction. The material provision for service out of jurisdiction of these ancillary court documents is O 11 r 8. O 11 r 8(2) specifically applies only the requirements of O 11 r 2 to applications for the grant of leave under O 11 r 8(1) and makes no reference to O 11 r 1; this omission appears to indicate that O 11 r 8 does not strictly mandate an applicant to establish one of the jurisdictional bases under O 11 r 1 in support of his application for leave. This, in my view, is consistent with the overall structure of O 11. The High Court would have established civil jurisdiction over the ongoing substantive action – either through service within the jurisdiction or service out of the jurisdiction with leave – prior to the service of the ancillary documents and the permissive provisions under O 11 r 8 for service out of jurisdiction therefore do not

appear to serve the purpose of invoking the court's jurisdiction. Reference to the jurisdictional bases in O 11 r 1 would thus appear to be superfluous. I therefore do not think that the underlying principles applicable to an originating process, which are primarily concerned with the critical prior question of establishing jurisdiction, can apply without modification to ancillary summonses or orders in the nature of the EJD Orders.

25 Order 11 r 8(1) is phrased in ostensibly wide terms; *any* summons, notice or order issued in the course of the substantive proceedings requires leave for service out of jurisdiction but under the qualifying limb, leave is not required if leave has previously been granted for service of *the originating process*. The Directors' argument on the scope of O 11 r 8(1) involved the reading in of an implicit caveat that the provision does not apply if the order is directed towards an individual or corporate body that is presently a non-party to the substantive legal proceedings and that the applicable regime in that case would be the general rules in O 11 for service of an originating process out of jurisdiction. On a plain and ordinary reading of the words of O 11 r 8(1), I was unable to agree with the submission that the interpretation of O 11 r 8(1) should be constrained in this manner. There is nothing in O 11 r 8(1) which states that it applies only where the summons, notice or order is directed at a party to the substantive proceedings commenced by the originating process, nor does it carve out a document directed at a non-party and subject it to a separate and additional requirement for leave. Counsel for the Directors did not direct me to any authority that supported his assertion that O 11 r 8(1) should be so limited.

26 In my view, with respect to the narrow procedural issue of service out of jurisdiction of court documents apart from originating processes, the plain language of the qualifying limb of O 11 r 8(1) encompasses, without qualification, even documents that are directed at non-parties. The qualifying limb thus applied to the EJD Orders and leave to serve these orders out of jurisdiction on the Directors was not required under O 11 r 8(1) as Transocean had previously obtained leave under O 11 to serve the writ of summons in Suit 87 of 2009 on Burgundy out of jurisdiction (*vide* Summons No 1650 of 2009).

27 Touching briefly on the two cases cited by the Directors, it follows from the preceding discussions that the principles in *Consistel* were applicable to the service out of jurisdiction of the EJD Orders. The issue in *Consistel* was whether a writ of summons had been properly served in accordance with the provisions of O 11 r 1 and O 11 r 2 for the founding of the jurisdiction of the High Court to hear an action. It did not deal directly with an ancillary summons or order that was issued in the course of subsisting legal proceedings and I did not think that Ang J's reasoning could be extended by analogy to the present facts. I have no issue with the propositions in *PT Makindo* set out above at [18] but given my findings that Transocean had complied with the procedural steps for service as outlined in the Rules, *PT Makindo* did not advance the Directors' case any further.

Whether O 38 r 18 precludes the service out of jurisdiction of an order for the examination of a judgment debtor

28 The Directors further submitted that service of the EJD Orders out of jurisdiction would be contrary to O 38 r 18 of the Rules. O 38 r 18 deals with the service of a subpoena on a witness and provides as follows:

> **18. Service of subpoena (O.38, r. 18)**
>
> (1) Unless the Court otherwise orders, a subpoena must be served personally and the service shall not be valid unless effected within 12 weeks after the date of issue of the subpoena.

(2) *A subpoena shall not be served on any person outside the jurisdiction*.

[emphasis added]

29 The comparison between a subpoena for a witness and an order for the examination of an officer of a judgment debtor does not, in relation to the narrow issue before me, add anything to the analysis. A person in the position of an ordinary witness who is directed to appear before the court to testify or produce documents may be entirely unrelated to the parties in the main proceedings. The express preclusion of the court's power to compel an individual resident outside the jurisdiction by means of a subpoena – which has its roots in the Latin phrase for "under penalty" – to attend as a witness at trial must be understood as a recognition of long-established principles of international law that define a state's extraterritorial criminal jurisdiction. An order for the examination of an officer of a corporate judgment debtor is of a different nature. It is directed at an individual who is by definition connected to one of the parties to the litigation and the scope of the oral examination or any order for the production of books or documents is limited to information relating to the property of the judgment debtor. These orders are subject to a separate regime under O 48 of the Rules.

30 For present purposes, even if I accepted in principle that some conceptual parallel could plausibly be drawn between a witness subpoena and an order for the examination of an officer of a judgment debtor, the Rules have drawn a sharp distinction between both orders. The rules governing the latter are found in O 48 and the rules in O 38 relating to subpoenas of witnesses are of no relevance. The service of the EJD Orders cannot, as a matter of logic, contravene a provision of the Rules that does not purport to deal with them.

Conclusion

31 For the foregoing reasons, I dismissed the appeal. Costs to the respondent were fixed at $1,500 plus reasonable disbursements.

A postscript

32 After my dismissal of the present appeal, the Directors filed Summons No 2375 of 2013 for a stay of the examination of judgment debtor proceedings pending the hearing of the Directors' appeal. Counsel for the Directors raised, for the first time, the decision of the House of Lords in *Masri v Consolidated Contractors International (UK) Ltd and others (No 4)* [2010] 1 AC 90, which held that under Part 71 of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) (the English equivalent of O 48 of the Rules) the court could not assume extraterritorial jurisdiction to make an order for the examination of an officer of a judgment debtor who was ordinarily resident abroad.

33 I granted the stay on the basis that there was a potentially arguable case that the EJD Orders should be set aside on the ground that the court had no power under O 48 of the Rules to order the examination of an officer of a judgment debtor who was resident out of the jurisdiction. Further, the examination of judgment debtor proceedings in the context of this case could be lengthy. The question whether the EJD Orders should be set aside on substantive grounds was never in issue in the present appeal and this argument does not impinge upon my findings on the provisions governing the *service* of the EJD Orders under the Rules. I therefore express no opinion on the legal merits of this new point.

[note: 1] First Affidavit of Joseph Christian G. Del Rosario dated 3 October 2012; Second Affidavit of Joseph Christian G. Del Rosario dated 3 January 2013.