Terrestrial Pte Ltd *v* Allgo Marine Pte Ltd and another
[2013] SGHC 57

Case Number : Suit No 827 of 2011 (Registrar's Appeals Nos 209 and 311 of 2012)

Decision Date : 06 March 2013

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Lim Yee Ming and Amy Tan (Kelvin Chia Partnership) for the plaintiff; Govindarajalu Asokan (RHTLaw Taylor Wessing LLP) for the defendants.

Parties : Terrestrial Pte Ltd — Allgo Marine Pte Ltd and another

Civil Procedure

6 March 2013

Lai Siu Chiu J :

Introduction

1 The two Registrar's Appeals in this case primarily related to the controversy surrounding the service of the writ of summons filed on 18 November 2011 ("the Writ") by Terrestrial Pte Ltd ("the plaintiff") against Allgo Marine Pte Ltd ("the first defendant") and Koh Lin Yee ("the second defendant"). Both Registrar's Appeals were filed by the defendants.

2 The plaintiff had sued the first and second defendants for breach of two sale and purchase agreements (made in 2009 and 2010 respectively) between the plaintiff and the first defendant for the sale to the plaintiff of two flat-top barges to be built by the first defendant. The plaintiff alleged that the first defendant failed to deliver the barges. The plaintiff also sued both defendants for advances that it had made for the construction of the barges, totalling $350,000, under a loan agreement dated 3 January 2011 ("the loan agreement"). There was a separate claim against the second defendant for a personal loan of $56,000. The second defendant is both a director and shareholder of the first defendant.

3 Registrar's Appeal No 209 of 2012 ("the first appeal") was against the decision of an assistant registrar in refusing to grant a stay of execution on the judgment in default of appearance which the plaintiff had obtained against the defendants on 4 January 2012 ("the Default Judgment"), while Registrar's Appeal No 311 of 2012 ("the second appeal") was against the decision of another assistant registrar in refusing to set aside the service of the Writ on the defendants.

4 I allowed the first as well as the second appeals. In relation to the second appeal, I *inter alia*:

(a) set aside the Default Judgment that the plaintiff had obtained against the defendants; and

(b) ordered the defendants to appoint solicitors within seven days of the date of my order to accept service of the Writ, failing which the Default Judgment would stand and the order that I had made in sub-para (a) above would have no effect.

5 The defendants are unhappy with my order in [4(b)] above and have filed a notice of appeal (in

Civil Appeal No 131 of 2012) against that and other directions which I made, as well as against my decision that the service of the Writ on the two defendants was an irregularity and did not amount to a nullity.

The chronology of events

6 The Writ was served by registered post and by certificate of posting on the first defendant on 25 November 2011. On 8 December 2011, the plaintiff applied for and obtained an order for substituted service of the Writ on the second defendant. The relevant extracts from the order of court state:

> Service of the Writ of Summons dated 18 November 2011 in this action be effected on the 2nd Defendant:
>
> (a) by mailing a copy each of the Writ of Summons and a copy of the Order of Court made herein to the 2nd Defendant's address at Blk 27, Still Road South #05-09 and #03-09, D'Ecosia, Singapore 423936 by way of both registered post and certificate of posting; and
>
> (b) by posting a copy of the Writ of Summons and a copy of the Order of Court made hereon on the Notice Board of the Honourable Court House, Singapore.

7 I should point out that prior to obtaining the above order of court for substituted service, the court clerk of the plaintiff's solicitors, one Md Azahar Bin Ismail ("Ismail"), had spoken to the second defendant on the telephone on 24 November 2011. As the second defendant then said that he was busy, he requested Ismail to contact him again the following week. Ismail duly contacted the second defendant on his handphone on 28 November 2011, but received no answer. Later that same day, the second defendant returned Ismail's call and requested the latter to contact him again on the following day (29 November 2011). Nothing was said by Ismail as to whether he contacted the second defendant on 29 November 2011 and, if so, what transpired. Neither did Ismail reveal the contents of his conversations with the second defendant in his first affidavit filed on 6 December 2011 in support of the plaintiff's application for substituted service.

8 In his first affidavit, Ismail deposed that he had been unable to effect personal service of the Writ on the second defendant at either No 27 Still Road South, #05-09, D'Ecosia, Singapore 423936 or No 27 Still Road South, #03-09, D'Ecosia, Singapore 423936 (collectively, "the Still Road addresses"). The Still Road addresses were those of the second defendant as stated in the loan agreement referred to at [2] above. Ismail deposed that he had not been able to go to either of the units at the Still Road addresses because access cards were required to gain entry to the lifts leading to the relevant floors. When Ismail attempted to contact the occupants of both units by intercom, he received no response.

9 On 14 December 2011, the Writ was served on the second defendant by posting on the notice board of the Supreme Court and by mailing copies to the second defendant at the Still Road addresses.

10 On 4 January 2012, the plaintiff obtained the Default Judgment against the two defendants for the sums of $350,000, $12,891.68 and $10,000, together with contractual interest and costs on an indemnity basis. On the same day, Ismail filed his second affidavit to confirm that substituted service had been effected on the second defendant at the Still Road addresses by way of registered post and certificate of posting, as well as by way of posting on the notice board of the Supreme Court.

11 On 6 January 2012, the plaintiff received an email from the second defendant proposing a settlement which the plaintiff rejected. On 1 February 2012, the defendants' (former) solicitors wrote for the first time to the plaintiff's solicitors.

12 On 26 January 2012, by way of execution on the Default Judgment, the plaintiff obtained Writs of Seizure and Sale Nos 10 and 12 of 2012 ("the Writs of Seizure and Sale") against the second defendant's properties situated at, respectively, No 33 Oxley Rise, #04-02, Visioncrest, Singapore 238710 ("the first property") and No 10 Gopeng Street, #17-19, The Icon, Singapore 078878 ("the second property"). The Sheriff seized the first and second properties on 20 March 2012 and 12 April 2012 respectively, and fixed them for auction on or about 19 April 2012 and 12 May 2012 respectively.

13 On 24 April 2012, the second defendant applied in Summons No 2043 of 2012 ("the First Stay Application") for a stay of execution on the Writs of Seizure and Sale. An assistant registrar granted a temporary stay on 9 May 2012, conditional upon the defendants delivering to the plaintiff a cashier's order for $200,000 by 16 May 2012. The defendants were unable to comply with the condition and could only provide a cashier's order in the sum of $50,000. In the result, on 18 May 2012, the stay of execution was lifted and the First Stay Application was dismissed with costs fixed at $600.

14 On 29 May 2012, the defendants filed the first appeal against the dismissal of the First Stay Application.

15 On 8 June 2012, the defendants applied in Summons No 2859 of 2012 ("the Setting-Aside Application") to, *inter alia*: (a) set aside the order of court for substituted service dated 8 December 2011; (b) set aside the substituted service of the Writ; and (c) set aside the Default Judgment and the Writs of Seizure and Sale.

16 On 13 June 2012, this court heard the first appeal and allowed a temporary stay of execution on the Writs of Seizure and Sale until 10 August 2012 on condition that the defendants furnished security to the plaintiff in the total sum of $200,000 by two timelines, which condition was complied with by the defendants. The plaintiff was awarded the costs of the first appeal fixed at $750.

17 The Setting-Aside Application was dismissed by an assistant registrar on 13 July 2012 with costs fixed at $7,000 to the plaintiff, excluding disbursements. On 25 July 2012, the defendants filed the second appeal against the dismissal of the Setting-Aside Application.

18 By Summons No 3683 of 2012 ("the Second Stay Application") filed on 20 July 2012, the defendants applied for a further stay of execution on the Writs of Seizure and Sale beyond 10 August 2012 pending the disposal of the second appeal against the dismissal of the Setting-Aside Application. This court also granted the Second Stay Application.

19 Both sides filed affidavits in support of their respective positions, to which affidavits I now turn, starting with those filed by the defendants.

The defendants' submissions

20 The second defendant filed several affidavits in support of both the Stay Applications as well as the Setting-Aside Application. He dealt with the merits of the plaintiff's claim *in extenso* and deposed that the first defendant had a counterclaim against the plaintiff. I shall, however, only focus on those affidavits pertaining to the Setting-Aside Application. For the purposes of the defendants' appeal to the Court of Appeal, it would not be necessary to consider the merits of the plaintiff's claim or the

defendants' prospective defence and the first defendant's proposed counterclaim either.

21 In his (third) affidavit filed on 13 June 2012, the second defendant claimed that in Ismail's telephone conversations with him in November 2011, the latter did not mention a writ. However he did not go on to elaborate on the contents of their conversations.

22 In his seventh affidavit filed on 25 July 2012, the second defendant referred to Ismail's second affidavit (see [10] above) and exhibited (in Exhibit "KLY-7") copies of the certificates of posting issued by Singapore Post. At p 89 thereof, the second defendant exhibited the two envelopes addressed to him at the Still Road addresses showing that they had been returned to the plaintiff's solicitors with the remark "Unclaimed". In fact, service on the first defendant had also not been effected as the envelope containing the Writ had similarly been returned to the plaintiff's solicitors with the remark "Unclaimed". Hence, the second defendant contended, no valid service of the Writ had been effected on either the first defendant (under s 387 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act")) or on him.

23 I should point out that when the plaintiff applied for default judgment against both defendants, the court was not informed of the facts in [22] above. At the hearing before me, I pointed out to counsel for the plaintiff that had the assistant registrar been apprised of the true position, *viz*, that substituted service of the Writ by certificate of posting had not been successful, the court might not have granted the Default Judgment.

24 Counsel for the defendants contended that this court should not have ordered his clients to appoint solicitors to accept service of the Writ as the defective service rendered the Writ a nullity. He relied on s 16(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"), which states:

> **Civil jurisdiction — general**
>
> **16.**—(1) The High Court shall have jurisdiction to hear and try any action in personam where —
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> (*a*) the defendant is served with a writ of summons or any other originating process —
>
> (i) in Singapore in the manner prescribed by Rules of Court; or
>
> (ii) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court; or
>
> (*b*) the defendant submits to the jurisdiction of the High Court.

Counsel contended that the High Court's jurisdiction was invoked only upon proper service being effected, without which the High Court had no jurisdiction. The actual fact of service had to be first established by the plaintiff before the claim could be pursued, citing in support *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453, *T O Supplies (London) Ld v Jerry Creighton Ld* [1952] 1 KB 42, *Central Provident Fund Board v Ho Bock Kee* [1981–1982] SLR(R) 84 and *Regina v County of London Quarter Sessions Appeals Committee, Ex parte Rossi* [1956] 2 WLR 800.

The plaintiff's submissions

25 The plaintiff filed an affidavit (on 26 June 2012) by its Myanmese director, Maung Aung Ko Ko Tin Win ("Maung"), to counter the second defendant's allegations. In his affidavit, Maung pointed out

that the second defendant's address as given in his numerous affidavits was No 27 Still Road South, #03-09, D'Ecosia, Singapore 423936 and care of No 27 Still Road South, #05-09, D'Ecosia, Singapore 423936, the very same Still Road addresses to which the Writ had been posted both by certificate of posting and by registered post. Maung added that the second defendant had not challenged the validity of the service of the Writ on the first defendant at No 27 Still Road South, #03-09, D'Ecosia, Singapore 423936. Consequently, the second defendant must have known of the Writ and of the fact that the plaintiff's solicitors were trying to serve the same on him. This was reinforced by the second defendant's email to the plaintiff dated 6 January 2012 proposing a settlement (see [11] above).

26 Counsel for the plaintiff argued that the defendants' delay in filing the Setting-Aside Application precluded them from obtaining any relief from the court. He referred to the four months' delay between 1 February 2012, when the defendants' former solicitors first wrote to the plaintiff's solicitors (see [11] above), and 8 June 2012, when the Setting-Aside Application was filed, citing the English case of *Singh v Atombrook Ltd* [1989] 1 WLR 810 to support his proposition. Counsel further relied on O 2 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC"), which states:

> **Non-compliance with Rules (O. 2, r. 1)**
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> **1.**—(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
>
> (3) The Court shall not wholly set aside any proceedings or the originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

to argue that the effect of non-compliance with the service requirements did not nullify these proceedings as counsel for the defendant contended. He also relied on *AlliedBank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1. In other words, this court could and should exercise its discretion to overlook the irregular service.

My decision

27 The mode of service on a company is set out in s 387 of the Companies Act, which states:

> A document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

28 For substituted service on the second defendant, O 62 r 5 of the ROC is applicable. That rule states:

Substituted service (O. 62, r. 5)

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.

…

29 It should be noted that s 387 of the Companies Act does not require anything more than that the document to be served is left at the registered office of the recipient company. However, for substituted service on an individual, O 62 r 5(3) of the ROC goes further to require that the document must be brought to the notice of the person to be served. In addition, s 16(1)(*a*)(i) of the SCJA (see [24] above) stipulates that service on a defendant must be in the manner prescribed by the ROC. In this case, that would refer to the order of court for substituted service mentioned at [6] above, which spelt out that service on the second defendant would be by way of both registered post and certificate of posting, as well as by way of posting on the notice board of the Supreme Court.

30 As the postal authorities had returned to the plaintiff's solicitors the three letters posted to the Still Road addresses with the remark "Unclaimed" (see [22]) above), service by certificate of posting was obviously unsuccessful.

31 However, as regards service by registered post, Ismail had in para 9 of his (second) affidavit deposed that he had mailed the Writ and the order of court for substituted service to both the first and second defendants on 24 November 2011. As was rightly pointed out by counsel for the plaintiff, the second defendant was noticeably silent on this mode of service. Neither did the second defendant depose in *any* of his affidavits that he or the first defendant had *not* received the registered letters of the plaintiff's solicitors forwarding the Writ and the order of court for substituted service. Consequently, it can reasonably be inferred that service by registered post on the two defendants was successful. My belief is reinforced by the second defendant's approach to the plaintiff on 6 January 2012 to negotiate a settlement.

32 How then can it be said, as counsel for the defendants sought to argue, that the service of the Writ was a nullity? The plaintiff had clearly complied with O 62 r 5(3) where the second defendant was concerned as the Writ had been brought to the notice of the person to be served.

33 I turn now to consider the cases that were cited by the parties, starting with the defendants' authorities in [24] above. *Lee Hsien Loong v Review Publishing Co Ltd* stands for the proposition, which I accept, that the burden to prove proper service lies on the plaintiff. I was satisfied in this regard that the plaintiff had effected service on the defendants by registered post.

34 *T O Supplies (London) Ld v Jerry Creighton Ld* dealt with service of a writ on a limited company under s 437 of the Companies Act 1948 (c 38) (UK), which section is similar to s 387 of our Companies Act (see [27] above), save that instead of service by registered post, a document may be

served on a company by leaving it at or sending it "by post" to the registered office of the company. The court there held that the word "post" in the section was wide enough to include both ordinary and registered mail.

35 As for *Central Provident Fund Board v Ho Bock Kee*, the dispute between the parties in that case centred on a building contract awarded by the Central Provident Board ("the Board") to the respondent contractor, which the Board subsequently sought to terminate. The contractor disputed the notice of termination that was hand-delivered to him because the contract provided for notice of termination to be delivered by registered mail. The Court of Appeal held in the contractor's favour and ruled that it was mandatory for the termination notice to be delivered by registered mail. As such, the contractor's services had not been validly terminated. Again, on the facts of that case, I have no disagreement with the appellate court's ruling.

36 The 1956 English case of *Regina v County of London Quarter Sessions Appeals Committee, Ex parte Rossi* was in the same vein. There, the issue was whether a court clerk had served a notice of hearing on the appellant ("Rossi") *vis-à-vis* a complaint by a woman who claimed that he was the father of her child. The relevant statutory provision was s 3(1) of the Summary Jurisdiction (Appeals) Act 1933 (c 38) (UK), which states:

> In the case of an appeal to which this Act applies, on receipt of any notice of appeal required by rules made under section 15 of the Justices of Peace Act, 1949, to be sent by a clerk to justices to the clerk of the peace, the clerk of the peace shall enter the appeal, and shall in due course give notice to the appellant, to the other party to the appeal, and to the clerk to the court of summary jurisdiction as to the date, time and place fixed for the hearing of the appeal. A notice required by this subsection to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode.

37 The clerk of the peace sent letters by registered post to both the complainant and Rossi giving notice of the hearing date of the appeal. The letter to Rossi was addressed to him at his usual address, but it was returned to the sender by the postal authorities marked "Undelivered for reason stated … No response … 22.9.54". At the hearing on 28 September 1954, Rossi was absent. The hearing proceeded in his absence, after which the court ordered Rossi to pay support to the complainant's child. Rossi subsequently appealed.

38 The English Court of Appeal allowed Rossi's appeal and granted a certiorari to quash the proceedings in the court below on the ground that there had been a defect in the procedure as Rossi had been unaware of the hearing. I do not quarrel with the ruling in that case either. However, as pointed out earlier at [31], the second defendant in our case was aware of the Writ.

39 I move next to the plaintiff's authorities. *Singh v Atombrook Ltd* was a case not on service of a writ, but rather, on whether a writ should be set aside as the defendant named in the writ (*viz*, "Sterling Travel (a firm)") was not the correct party to be sued; the correct defendant should have been Atombrook Ltd, which was the proprietor of Sterling Travel. Although the plaintiff's solicitors invited Sterling Travel's solicitors to set aside the default judgment entered against Sterling Travel, Sterling Travel did not do so until some months later, and it relied then on the ground that the judgment had been irregularly obtained.

40 Even so, Hutchinson J held at first instance that the irregular judgment should not be set aside under O 2 of the Rules of the Supreme Court ("the UK Rules of Court"), although it would be set aside under O 13 r 9 on condition that the defendant brought the full sum claimed into court. He also gave the plaintiff leave to amend the writ by substituting "Sterling Travel (a firm)" with "Atombrook Ltd

trading as Sterling Travel" as the defendant's name.

41 The English Court of Appeal dismissed the defendant's appeal. It held that: (a) there was nothing in the wide wording of O 2 rr 1(1) and 1(2) of the UK Rules of Court and no reason in principle that precluded the court in an appropriate case from permitting pleadings to be amended after final judgment; (b) even if it were mandatory under s 725(1) of the Companies Act 1985 (c 6) (UK) ("the UK Companies Act 1985") for service on the defendant to be effected at the defendant's registered office, failure to so serve the writ did not render the proceedings a nullity entitling the defendant to have them set aside *ex debito justitiae*; and (c) although the defendant would be entitled to have the proceedings set aside if there was a real doubt as to the party being sued, since the defendant was aware that it was the party whom the plaintiff intended to sue, the proceedings were to be treated as a case in which there was a misnomer of the defendant and one to which O 2 rr 1(1) and 1(2) as well as O 20 r 5 of the UK Rules of Court applied, such that the irregularities did not invalidate the proceedings. I should add that O 2 rr 1(1) and 1(2) and O 20 r 5(3) of the UK Rules of Court are *in pari materia* with the corresponding provisions of the ROC, while s 725(1) of the UK Companies Act 1985 is the equivalent of s 387 of our Companies Act. I adopted and applied the reasoning of the English Court of Appeal to this case as the facts were similar.

42 The Malaysian case of *AlliedBank (Malaysia) Bhd v Yau Jiok Hua* (see [26] above), however, is unhelpful to the plaintiff's case. There, the plaintiff bank granted overdraft facilities to the defendant and subsequently instituted proceedings to recover advances which it had made to the defendant. The defendant did not dispute the overdraft facilities that had been extended to him, but contended that no demand had been made with regard to the claim made against him. The bank claimed that it had served notice of default and demand on the defendant by post. The court held that as there was no agreement to the contrary between the parties, there must be personal service of the notice of demand on the defendant. As the bank could not prove service of the notice of demand even on the mode of service that it adopted, the bank had no cause of action against the defendant and its claim was disallowed.

43 I had, in addition to the orders set out in [4] above, given the following directions when I allowed the second appeal:

(a) The security of $200,000 furnished by the defendants (see [16] above) would be returned to the defendants only when service of the Writ had been effected on the defendants' solicitors.

(b) The costs of the second appeal would be in the cause, but fixed at $7,000. The costs order made against the defendants by the assistant registrar for the dismissal of the Setting-Aside Application (see [17] above) was set aside, but was not reversed in the defendants' favour.

(c) The costs of $600 awarded to the plaintiff for the First Stay Application would remain.

(d) The costs awarded by this court in the plaintiff's favour for the first appeal (see [16] above) would remain.

The reasons that prompted me to make the above costs orders are set out below.

44 This suit was filed on 18 November 2011, more than a year ago. The protracted history of this suit made me believe very strongly that the second defendant both on his own behalf and on behalf of the first defendant was deliberately evading personal and, later, substituted service of the Writ.

45 The second defendant's own affidavits filed in these proceedings stated his address to be at No 27 Still Road South, #05-09, D'Ecosia, Singapore 423936, while that of the first defendant was stated to be at No 27 Still Road South, #03-09, D'Ecosia, Singapore 423936. Yet, the letters mailed to the Still Road addresses by certificates of posting were deliberately unclaimed by the second defendant from Singapore Post when he was requested to claim them because he knew who the sender was. The second defendant's intention in disputing service was not *bona fide* – it was to avoid and/or delay the plaintiff's claim for as long as he could, which intention he appears to have succeeded in achieving to date.

46 I am reinforced in the above conclusion by the fact that despite the assertion in the second defendant's many affidavits (particularly the third and fifth affidavits filed on 13 June 2012 and 5 July 2012 respectively) that the first defendant had a counterclaim against the plaintiff's claim, the second defendant did not seem to want to pursue the counterclaim. That is puzzling if the counterclaim is indeed genuine as it would set off the plaintiff's claim in part or wholly.

47 No credible explanation was forthcoming from the second defendant in all his affidavits for his delay in making the Setting-Aside Application. His excuses (in his fourth affidavit filed on 18 June 2012) – namely, that: (a) his delay had been because he had been attempting to reach an amicable settlement with the plaintiff; and (b) he was not in good health – were lame and unconvincing. The second defendant was galvanised into action only because the plaintiff had seized the first and second properties and had scheduled them for auction.

48 The second defendant was capitalising on the plaintiff's defective service of the Writ to delay the plaintiff's claim from coming on for trial for as long as he could. No court should condone such tactics, hence the unusual order that I made in [4(b)] above and my refusal at [43] above to award costs to the defendants for the first and second appeals, notwithstanding that both appeals were allowed.

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