Pacific Assets Management Ltd and Others v Chen Lip Keong
[2005] SGHC 228

Case Number : Suit 295/2005, RA 207/2005

Decision Date : 09 December 2005

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Mervyn Foo (Lee and Lee) for the plaintiffs; Michael Lai (Haq and Selvam) for the defendant

Parties : Pacific Assets Management Ltd; Double Assets Investments Ltd; Avia Growth Opportunities Ltd; Lee Heng Ghee Henry; Kua Phek Long; Huang Yu Zhu Wendy — Chen Lip Keong

Civil Procedure – Service – Defendant appointing Malaysian solicitors to accept service in Malaysia – Plaintiffs' Malaysian solicitors serving writ on defendant's Malaysian solicitors – Whether service of writ in Malaysia through private agent valid – Appropriate forum to determine such validity

Civil Procedure – Service – Parties agreeing on accepted mode of service out of jurisdiction – Whether service of writ pursuant to ad hoc agreement sufficient to invoke courtÂ's jurisdiction – Order 11 r 3(8)(a), O 11 r 4(2)(c) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

9 December 2005

Belinda Ang Saw Ean J:

1 This action arose out of a convertible loan agreement entered into between the plaintiffs and the defendant on 24 April 2003 ("the Convertible Loan Agreement") and the defendant is being sued for breach of the agreement in failing to redeem conversion shares in the sum of $3,921,300. The question in this appeal is whether in the circumstances related below there had been valid service of proceedings commenced in Singapore on the defendant in Malaysia.

2 I begin with a short introduction to the background to the dispute. Although M/s Haq & Selvam are the defendant's solicitors in Singapore, they had no authority to accept service of process on behalf of the defendant in Singapore. By an Order of Court dated 18 May 2005, the plaintiffs obtained permission to serve the Writ of Summons dated 3 May 2005 ("the Writ") on the defendant in Malaysia. In the event, M/s Lee & Lee for the plaintiffs enquired of Haq & Selvam whether the defendant would prefer to appoint solicitors in Malaysia to accept service of process on the defendant's behalf. In the same letter of 24 May 2005, Lee & Lee advised that they would go ahead with the appointment of Malaysian solicitors to serve the Writ on the defendant in Malaysia and wanted the name and address of the defendant's Malaysian solicitors by close of business on 29 May 2005. Haq & Selvam confirmed on 26 May 2005 that the defendant would appoint Malaysian solicitors to accept service on his behalf in accordance with Malaysian law. The defendant appointed M/s Shaikh David Raj. The latter's appointment was communicated to Lee & Lee by Haq & Selvam in their second letter of 26 May 2005. Separately, Shaikh David Raj wrote to Lee & Lee on 27 May 2005 confirming the firm's authority in the following terms:

> **Re: Singapore Suit No. 295 of 2005/T**
>
> We refer to the above matter.
>
> We are instructed to accept service of process on behalf of Tan Sri Dr. Chen Lip Keong. However, our client does not accept Singapore as the proper jurisdiction for the suit. All our client's rights,

including but not limited to the right to apply for a stay of proceedings, is expressly reserved and will be vigorously pursued in due course.

3 Service was effected by the court clerk of the Malaysian law firm of M/s Skrine who attended at the office of Shaikh David Raj for that purpose on 6 June 2005. The firm acknowledged the service by signing on a copy of the Writ and the Order for service out. Earlier, by letter dated 30 May 2005, Lee & Lee transmitted by facsimile, and separately despatched by post, a copy each of the Writ, the plaintiffs' application for service out of jurisdiction together with the supporting affidavit, Order of Court dated 18 May 2005 and Notice of Pre-Trial Conference dated 24 May 2005 about a pre-trial conference fixed for 29 June 2005 at 9.00am. Mr James Premkumar David, a partner of Shaikh David Raj and the solicitor having conduct of the matter, received the facsimile transmission with enclosures on 31 May 2005. The same communication and documents sent by post were received on or about 6 June 2005. On 23 June 2005, Mr David returned the documents served on his firm and cancelled the acknowledgment stamped at the back of the documents. He did so as he did not know who had served the documents. Curiously, Lee & Lee chose not to answer Mr David who had sought clarification twice as to the identity of the person who had earlier attended at his office. The apparent intransigence fuelled the arguments over service that eventually led (rather unconventionally) to the defendant's *ex parte* application to the High Court of Malaya at Kuala Lumpur. The defendant on 6 July 2005 obtained *ex parte* a declaration that the service of the Writ was irregular ("the Malaysian *ex parte* order"). I gathered from Mr David's affidavit in support of the *ex parte* application that he had discounted the documents served on his firm on 6 June 2005. That left the documents which Lee & Lee had sent to him by fax and post, and he deposed that such a mode of service did not constitute proper service on the defendant.

4 The procedural history in Singapore is as follows. The defendant's application filed herein on the 11 July 2005 to set aside service was based on the purported service on Mr David's firm of the court documents that he had earlier discounted. Mr David stated in his affidavit of 11 July 2005 that he had "emphasized [in his letter to Lee & Lee] that the Writ … had been served on [his] firm by persons unknown and further that [he] had cancelled the acknowledgement stamp affixed at the back of the … documents". After complaining that Lee & Lee had refused to reveal the name of this person, he went on to depose that the service was not in accordance with Malaysian law.

5 At a pre-trial conference held after the hearing below, leave was granted to file further affidavits for this appeal and for affidavits not used at the hearing below to be used. At the appeal it was common ground that service was effected by the court clerk of Skrine Mr Michael Lai on behalf of the defendant contended that service of foreign process by the court clerk of Skrine was invalid as such a mode of service was not in accordance with Malaysian law.

6 The plaintiffs disagreed with the defendant's contention. Counsel for the plaintiffs, Mr Mervyn Foo, argued that the Writ was deemed duly served on the defendant as service was agreed upon. The Writ was deemed served as Shaikh David Raj had indorsed its acceptance of service on the Writ pursuant to O 10 r 1 read with O 62 r 1(3) of the Malaysian Rules of the High Court, 1980 ("RHC"). Hence, the Writ was duly served on the defendant in accordance with O 11 r 3(8)(*a*) read with O 11 r 4(2)(*c*) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("SRC"). Mr Lai submitted that Mr Foo's arguments missed the point. The agreement to accept service was not unqualified in that it did not encompass the method of service, which must still be in accordance with Malaysian law, and Malaysian law did not permit service of foreign process through a private agent.

7 The crux of the appeal was whether the fact that the Writ was served on the defendant's Malaysian solicitors pursuant to an *ad hoc* agreement to accept service was sufficient of itself to invoke the court's jurisdiction pursuant to leave granted under O 11 of the SRC. That issue depended

upon the following sub-issue: whether there was an *ad hoc* agreement to accept service on behalf of the defendant and the scope of that agreement. It bears mentioning that if a writ is served on a defendant, the court will regard itself as having jurisdiction over the defendant.

8 In my view, parties in a case can reach an *ad hoc* agreement as to the terms of valid service and that *ad hoc* agreement will then be the accepted form. Service itself will be sufficient to invoke the court's jurisdiction pursuant to leave granted under O 11 of the SRC. Contractual or consensual service of process on a person within and out of the jurisdiction is generally not prohibited under the rules of court. To illustrate, there is O 10 r 3. Order 10 r 3 deals with contractual service of process on a person within and without the jurisdiction where this contractual service is to be found in the very same contract sued upon and this contract provides for institution and service of proceedings relating to the contract. Order 10 r 3(2) requires an order to serve out before service pursuant to the contract will be recognised as deemed service. *Kenneth Allison Ltd v A E Limehouse & Co* [1992] 2 AC 105 ("*Allison*") stands as authority for the proposition that service, in accordance with an agreement reached between the parties, is good service. The majority of the law lords in *Allison* observed that O 10 r 3 of the then English Rules of the Supreme Court (which is *in pari materia* to our O 10 r 3 of the SRC) is not a "comprehensive code" and confirmed that parties could reach an agreement between themselves as to another mode of service of a writ outside the rules of court. In that case, the defendant applied to set aside service of a writ handed to a receptionist after she had been authorised by a partner to accept it. By parity of reasoning, an *ad hoc* agreement can be reached between the parties as to the terms of valid service after permission has been obtained from the court to serve out of jurisdiction and that *ad hoc* agreement will then be the accepted form of service outside the jurisdiction. On a plain reading of O 11, there is nothing in the provisions prohibiting consensual service. This is all the more so when the present form of a Singapore writ makes it clear that it is not a judicial order but a notification to an overseas defendant that an action has been commenced against him in the court in Singapore: *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd* [2000] 2 SLR 717 ("*Fortune Hong Kong*") at [30]. In context, consensual service is no different in principle from an O 10 r 3 situation. Besides, my interpretation of O 11 is not incompatible with the reasoning of the Court of Appeal in *Fortune Hong Kong* on O 65 which is elaborated on at [25] below.

9 Mr David's letter of 27 May 2005 is the important communication. Following that letter, the Writ was served on his firm. Implicit in that communication was the agreement that the service itself was not going to be an issue between the parties. The letter expressly reserved the defendant's right to object, not to service as such but to Singapore as the appropriate forum to adjudicate on the substantive merits of the claim. That letter has to be read against the background where, as early as 27 April 2005, the defendant made the point through Haq & Selvam that the Convertible Loan Agreement had been superseded by events and there was no longer an agreement by the defendant to submit to the jurisdiction of the Singapore court. Mr Lai in the same vein advised Lee & Lee that the defendant did not reside in Singapore nor did he have any assets within the jurisdiction. In his letter, Mr Lai reserved his client's right to challenge any order for service out and asked that the letter be disclosed in the plaintiffs' *ex parte* application for leave to serve out of jurisdiction.

10 Service involves the transmission and receipt of a writ: see *Singapore Civil Procedure* (Sweet & Maxwell, 2003) para 10/1/12. Given the terms of Mr David's letter, the *ad hoc* agreement to accept service itself was not limited to the receipt of the Writ. It equally encompassed the method of service. This view is apparent from a comparison of the letter of 27 May 2005 with a later communication sent to Lee & Lee after the Malaysian *ex parte* order declaring the service irregular. By then the defendant's battle lines were drawn. It is evident that the position in May had materially changed after the Malaysian *ex parte* order. Mr David's letter of 11 July 2005 to Lee & Lee which enclosed the Malaysian *ex parte* order sought to renew the defendant's consent to accept service

and in my view on terms different from the previous one:

> **Re: Kuala Lumpur High Court Originating Summons No. D8-24-233-2005**
> **Tan Sri Dr Chen Lip Keong .... Applicant**
>
> We hereby give you notice of the Order of the High Court of Malaya at Kuala Lumpur dated 6th July 2005, a certified true copy of which is enclosed hereto. …
>
> Please note that we continue to be authorised to accept service on behalf of the Applicant above and that service is to be effected in accordance with the rules of service of foreign process as provided in the Malaysian Rules of the High Court 1980.

11 In my judgment, Mr David's earlier non-communicated intention on service could not affect the *ad hoc* agreement and the rights of the plaintiffs to the *ad hoc* agreement. This *ad hoc* agreement affected the defendant's right under O 12 rr 7(1)(*a*) and 7(1)(*b*) of the SRC to challenge service itself, leaving open the prospect of objecting to the order for service out including seeking in the alternative a stay of proceedings. The court documents were served on Shaikh David Raj who indorsed the same to acknowledge service. That must have been the purpose of his firm's indorsement. Otherwise, there would have been no reason for Mr David to unilaterally withdraw the acknowledgement. Equally, there would be no reason to consider that because Mr David did not know who had served the documents, service had not been completed. In this regard, the unilateral withdrawal of the acknowledgement of service did not alter the position that service was effected and completed. In the premises, I did not accept the argument that the defendant had agreed to accept service but the manner of service was not agreed upon.

12 Even if a different view is taken on the effect of the *ad hoc* agreement, for the reasons given below, the defendant had not established before me his case that the service of the Writ in Malaysia through a private agent was not in accordance with Malaysian law and hence invalid.

13 The court clerk of Skrine had confirmed that service was effected at the office of Shaikh David Raj and the firm's letter confirming instructions to accept service was shown before the Writ was accepted and the indorsement made on the Writ. Mr David's staff had denied being shown the aforesaid letter. The starting point is that Shaikh David Raj indorsed the Writ. In response, Mr Lai relied on the Malaysian *ex parte* order declaring the service irregular and the opinion of Mr David as evidence of invalid service under Malaysian law. The plaintiffs had not filed an affidavit from a Malaysian lawyer and that prompted Mr Lai's argument that foreign law is treated as a question of fact and evidence must given on a matter of foreign law.

14 I was sceptical as to how the Malaysian *ex parte* order could have assisted the defendant. Matters relating to the service of originating process are procedural: see *Hong Kong Housing Authority v Hsin Yieh Architects & Associates Ltd* [2005] 1 HKLRD 801 at [85]. This court as the *lex fori* follows its own rules of evidence and procedure, and not those of the foreign country. Mr Lai appreciated this and at the hearing, he accepted that validity of service was a matter for the Singapore court as the *lex fori*. The other point concerns the evidential value of the Malaysian *ex parte* order. Notably, the plaintiffs were not made a party to the originating proceedings for a declaration. The plaintiffs were not told beforehand about the proceedings that were *ex parte*. They were absent at the hearing. The Malaysian *ex parte* order did not bind the plaintiffs and they were not prevented from denying what the order itself established and the grounds upon which it was founded. That was what Mr Foo sought to do at the hearing of the appeal. I have already mentioned that Mr David's affidavit in support of the Malaysian *ex parte* application complained about service being irregular as it was effected by facsimile and post. In his second affidavit filed herein on 14 September 2005, he stated

that the arguments before the judge involved a consideration of whether the manner of service of foreign process, be it by ordinary facsimile and post or by a private agent, was in accordance with Malaysian law. Before the judge, arguments were canvassed on what constituted proper and valid service of foreign process in Malaysia. He also stated that the conflicting decisions on service by private agent were brought to the judge's attention.

15 However, I noted from the Malaysian *ex parte* order that Mr David did not attend the hearing and nowhere in his affidavit had he identified the source of his information and belief as to what transpired at the hearing. This omission has serious consequences in that I had to discount part of his deposition. Hence, there was no evidence before me as to what transpired before the judge at the hearing of the *ex parte* proceedings. The importance of complying with O 41 r 5(2) of the SRC was stressed by Chao Hick Tin JC (as he then was) in *Dynacast (S) Pte Ltd v Lim Meng Siang* [1989] SLR 840 at 846–847, [22]:

> Order 41 r 5(2) is an exception to the general rule that a person can only depose to what he knows. If a deponent does not comply with O 41 r 5(2), then his evidence is no evidence at all and cannot be relied upon. It is a defect of a fundamental nature.

16 Separately, Mr David opined that service of foreign proceedings by a private agent was not permissible under Malaysian law. Service of foreign process in Malaysia may only be in accordance with O 65 of the RHC. Service of foreign process through a private agent is not a manner prescribed by O 65. He relied on a recent decision of the Malaysian Court of Appeal in *Ngan Chin Wen v Panin International Credit (S) Pte Ltd* [2003] 3 MLJ 279 in support of the proposition that service of a foreign writ through a private agent is *ultra vires* O 65 of the RHC and hence invalid.

17 As stated earlier, Mr David is the defendant's solicitor having the conduct of the matter in Malaysia and he affirmed two affidavits in that capacity. There was no mention in his affidavits as to how long he has been in practice in Malaysia. On the matter touching on Malaysian law for service of documents in foreign and domestic actions upon persons who are within its territory, Mr David was not put forward as an expert on Malaysian law. He mentioned conflicting Malaysian decisions on the matter of service of foreign process by private agents but did not elucidate and explain the differing approaches to the issue and what status the differing judgments have as sources of foreign law. There was no attempt to explain the Malaysian courts' approach to service of foreign process in the light of amendments to O 11 r 6(2) of the RHC which permit service out of Malaysian proceedings through private agents. Whatever edge Mr Lai seemingly thought he had over the plaintiffs, who did not file any affidavit from a Malaysian lawyer on the position, disappeared on a closer scrutiny of the affidavits. In any case, no mileage was gained from the submission that the plaintiffs could not refer to the Malaysian decisions in their favour since foreign law must be proved as a fact and thus contained in an affidavit. Since Mr David's evidence was unsatisfactory for the reasons given, this court is entitled to examine the reported decisions referred to in his affidavit to form its own conclusion on them to arrive at a decision on the issue: see *Halsbury's Laws of England* (Butterworths, 4th Ed Reissue, 2002) vol 17(1) at para 555.

18 In Mr David's view, the Malaysian Court of Appeal in *Ngan Chin Wen v Panin International Credit (S) Pte Ltd* ([16] *supra*) had ruled that service of a foreign writ through a private agent was *ultra vires* O 65 of the RHC. The issue before the Malaysian Court of Appeal was whether a stay of execution should be granted pending the hearing of an appeal to the Court of Appeal against an order of the High Court registering a judgment obtained in Singapore. A stay of execution pending appeal would be granted if the appellant had an arguable case. An issue on appeal was whether the service of the Singapore writ in Malaysia through a private agent was invalid. It is clear from a reading of the report that the majority of the Court of Appeal (Mohd Saari and Mokhtar Sidin JJCA) did not actually

rule that service of foreign process through a private agent was *ultra vires* O 65 but merely held that given the conflicting High Court decisions as to whether such service was valid, an arguable case for a stay of execution pending appeal had been made out. Mohd Saari JCA at 287 said:

> However, in *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416, the learned trial judge disagreed with the ratio in *United Overseas Bank*. Be that as it may, for purpose of this proceeding, in view of the conflicting decision, it affords a ground for the appellate court to determine the issue, meaning the applicant had an arguable case.

19 In *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474, the plaintiff bank in Singapore sued the defendant who was resident in Kuching on an outstanding loan. The Singapore writ was served on the defendant in Kuching by the bank's agents. As no appearance was entered, default judgment was entered against the defendant. Consequently, the bank sought to register the default judgment in the High Court of Sabah and Sarawak. The defendant applied to set aside registration, *inter alia*, on the ground that service of the writ had not been properly effected on him. Ian Chin J held that service of foreign process in Malaysia through a private agent was irregular. Such a mode of service was an exercise of the judicial powers of a foreign court beyond its territorial limits and an encroachment on the sovereignty of Malaysia. Therefore, service of a foreign writ must be through the prescribed official channels. That as stated was the reasoning in *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146 ("*Sunkyong*") which Chin J followed and extended to apply to the service of foreign process in Malaysia so that service must be effected either through O 65 of the RHC or by a Malaysian judicial officer as provided for under O 11 r 3(8) of the SRC.

2 0 *Sunkyong* was a case where a Malaysian third party notice was to be served on the first defendant in New York through the agents of the second defendants. It was not concerned with O 65 of the RHC. The Malaysian Supreme Court held that service on an agent in a foreign country in the absence of a civil procedure convention between the two countries could only be effected through the Government of that country or a Malaysian consular authority in that country pursuant to O 11 r 6(2) of the RHC. Service of Malaysian legal process through a private agent was not valid as it constituted the exercise of judicial powers of the Malaysian court beyond its territorial limits. I should mention that since that decision, O 11 r 6(2)(b) of the RHC has been amended to include, as a mode of service, service by the plaintiff or his agent. I shall come to this below.

21 The Singapore Court of Appeal in *Fortune Hong Kong* ([8] *supra*) dealt with the sovereignty point which was the critical reasoning on which *United Overseas Bank Ltd v Wong Hai Ong* ([19] *supra*) laid stress. As far as Singapore law is concerned, service of process out of the jurisdiction is not an assertion by the court of an extra-territorial jurisdiction for two reasons. First, L P Thean JA, who delivered the judgment of the appellate court, pointed out in [30] that since 1 February 1992, the form of our writ:

> … is no longer structured in the form of a command to the defendant and does not contain any reference to the President of the Republic of Singapore and is not tested or witnessed by the Chief Justice. In its present form, the writ is more of a notification to the defendant that an action has been commenced against him in the court in Singapore than a command to him issued by the court. It seems to us that this change in the content of the writ has made it 'compatible with international comity to allow service out of jurisdiction' of the writ: (per the commentary at para 6/1/1C of the 1982 edition of *The Supreme Court Practice*). In its present form, the writ has lost its meaning of a judicial order, and it can hardly be contended that the service of our writ abroad would interfere with or encroach upon the sovereignty of the country in which the writ is served.

22 Second, there are safeguards in the rules against encroachment upon sovereign rights of a foreign country. Where there is no consensual service, service of process is controlled by O 11 of the SRC. For instance, O 11 r 4(2)(*c*) requires service to be in accordance with any method of service authorised by the foreign country's domestic laws for service of its originating process: see Thean JA in *Fortune Hong Kong* at [32].

23 It is not disputed that service by way of a private agent is an authorised method of service in Malaysia of originating process issued there under O 10 of the RHC. Since 22 September 2000, service of Malaysian process abroad by the plaintiff or his agent whenever authorised by the law of that country is permissible under O 11 r 6(2)(b) of the RHC. It is clear from *Malayan Banking Berhad v Ng Man Heng* [2005] 1 MLJ 470 that the amendment would turn the critical reasoning in *United Overseas Bank Ltd v Wong Hai Ong* ([19] *supra*).

24 Syed Ahmad Helmy J in *Malayan Banking Berhad v Ng Man Heng* held that service of foreign process through a private agent on a defendant in Malaysia is valid service. He reasoned that the wording of O 65 r 2(1) of the RHC did not prohibit service of foreign process by a private agent and the Courts of Judicature Act 1964, which was the enabling legislation, contained no such prohibition. On the sovereignty issue, Syed Ahmad Helmy J dealt with it in the light of the amendment to O 11 r 6(2)(b) which came into effect on 22 September 2000. He reasoned at [54]:

> In addition, one cannot begin to fathom how the Rules Committee could, on the one hand, authorise the service of a Malaysian writ on foreign soil through a private agent, while on the other hand, refuse to accord reciprocity of treatment to foreign writs served on a defendant in Malaysia by a private agent. If the Rules Committee viewed the service of a foreign writ in Malaysia as an encroachment on Malaysian sovereignty, it would likewise not intentionally authorise encroachment on the sovereignty of a foreign state by authorising the service of a Malaysian writ in a foreign state by a private agent. It is evident from this that the Rules Committee never did enact a rule prohibiting the service of a foreign writ in Malaysia by a private agent. What the Rules Committee provided for was merely the procedure to be adopted by the Malaysian court when a request is received from a foreign tribunal requesting assistance to effect service. That is all that can be said of O 65 r 2 of the RHC.

25 That O 65 r 2 of the RHC applies when a request is received is similar to the position taken by the Court of Appeal in *Fortune Hong Kong* ([8] *supra*). In that case, the Court of Appeal, in construing O 65 r 2 of the SRC and giving the rule its plain and ordinary meaning, held that O 65 r 2 only applies where a letter of request for service from a foreign court or tribunal is received by the Minister for Law and is subsequently sent by him to the Supreme Court with an intimation that it is desirable that effect should be given to the request. In other words, O 65 is not a comprehensive code governing service in Singapore of *all* foreign processes issued by the courts or tribunals of non-convention countries. In cases where no letter of request is received, it simply means that r 2 does not apply. The fact that no procedure under the rules for service of foreign processes has been provided in the absence of a letter of request does not mean that the foreign processes cannot be served in Singapore.

2 6 With the two authorities (*Ngan Chin Wen v Panin International Credit (S) Pte Ltd* and *United Overseas Bank Ltd v Wong Hai Ong)* cited by Mr Lai in the defendant's favour out of the way, and taking into account the other criticisms of the evidence on Malaysian law adduced by the defendant, the defendant had not satisfied me that the service of the Writ was invalid under Malaysian law.

27 For these reasons I dismissed the appeal with costs fixed at $1,500.