Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd
[2002] SGHC 173

Case Number : Suit 921/2001, RA 38/2002

Decision Date : 08 August 2002

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Johnny Cheo (Cheo Yeoh & Associates) for the appellants/defendants; Lee Eng Beng and Meah Tze Hua (Rajah & Tann) for the respondents/plaintiffs

Parties : Oversea-Chinese Banking Corp Ltd — Measurex Corp Bhd

Civil Procedure – Amendments – Default judgment – Application by plaintiffs to amend default judgment to remove ambiguities – Deputy registrar allowing application – Whether defendants suffering injustice – Whether deputy registrar's decision justifiable – O 2 r 1 & O 20 r 11 Rules of Court

Civil Procedure – Judgments and orders – Default judgment – Setting aside on merits of defence – Principles governing court's discretion to set aside default judgments – Whether defendants' defence having real prospect of success

Civil Procedure – Pleadings – Writ – Application to set aside irregular writ – Time for entering appearance starting from day of service – Defendants actually having 23 days to enter appearance – Whether defendants suffering prejudice or injustice – When court can set aside irregular writ – O 3 r 2(2) & O 12 r 4 Rules of Court

Civil Procedure – Service – Service of writ on defendants' process agent – Nomination of process agent by plaintiffs and defendants – Process agent under judicial management – Defendants not entering appearance – Plaintiffs obtaining default judgment – Whether service of writ proper – Whether judicial managers at liberty to adopt nomination – Whether to set aside writ

default judgment – Whether there was merit in defence raised – Whether defence had real prospect of success.

Facts

The plaintiffs offered Measurex Engineering Pte Ltd ("M-Singapore") various banking facilities, subject to the latter procuring two Deeds of Guarantee from its parent company Measurex Corporation Berhad ('the defendants'). Later, the plaintiffs sent to the defendants a letter demanding repayment of the loan with interest. Subsequently, the plaintiffs filed a writ against the defendants and served it on M-Singapore. M-Singapore, at the time the writ was served, was under judicial management. The judicial managers, it was alleged, did not forward or notify the defendants of the writ. The plaintiffs applied for and obtained judgment in default of appearance. The defendants appealed.

The defendants alleged that it came to know of the writ and default judgment only some time later. The defendants applied to have the writ and the service set aside on the grounds that: (a) the writ was irregular; (b) the service was irregular; and (c) the default judgment was ambiguous. Alternatively, the defendants sought to have the default judgment set aside and leave to file and serve a Memorandum of Appearance and thereafter file and serve its defence.

On (c), the plaintiffs conceded that the two paragraphs of the default judgment were ambiguous and applied to the Deputy Registrar ("DR") for leave to amend the default judgment so as to remove the ambiguity. The DR allowed this application and dismissed all applications made by the

defendants with costs. The defendants appealed against the amended default judgment.

Held

, dismissing the defendants' appeal:

(1) On the scope of O 2 r 1 and O 20 r 11 of the Rules of Court, every omission or mistake in practice or procedure is to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice: *Harkness v Bell* followed. In this case, the amendments the DR allowed in the default judgment merely removed the ambiguity that existed in the previous default judgment, caused no injustice to the defendants and were supported and justified by Order 2, r 1, and Order 20, r 11 of the Rules of Court (see 7 and 8).

(2) A court will only set aside a writ on the grounds of irregularity if the circumstances of the case – including the nature of the irregularity – warrant such course of action. The defendants had not in any way been prejudiced by the mistaken statement on the writ that they had 21 days, counting the day of service, to enter appearance. There was no injustice caused to any party by the error in the writ and therefore it would not be set aside (see 11).

(3) There was no irregularity in the service of the writ – cl 33(2) of one of the Deeds of Guarantee specifically provided that service shall be deemed completed on delivery to M-Singapore whether or not the documents were forwarded to the defendants. OCBC had complied with the requirements of cl 33(2) (see 14).

(4) To invoke the court's discretion to set aside the default judgment on the ground that there was merit in the defence raised, it was not sufficient for the defendants to show that they had an 'arguable' defence; they would have to show that the defence had a 'real prospect of success' and 'carried some degree of conviction'. Under cl 8(d) of the Deeds of Guarantee, the plaintiffs' release of the Singapore dollar guarantee given by one co-guarantor did not lead to the release of the other co-guarantor (who were the defendants) or in any other way prejudice the plaintiffs' rights under the Deeds of Guarantees given by the defendants. There was therefore no defence to the plaintiffs' claims under the two guarantees that had a real prospect of success (see 16,17 and 22).

Case(s) referred to

Harkness v Bell's Asbestos and Engineering Ltd

[1967] 2 QBD 729 (folld)

Philip Securities (Pte) v Yong Tet Miaw

[1988] SLR 594 (folld)

Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co ("The Saudi Eagle")

[1986] 2 LLR 221 CA (folld)

Legislation referred to

Rules of Court 1997 O 2 r 1, O 20 r 11, O 12 r 4, O3 r 2(2)

English Rules of Court O 2

Companies Act s 227I

Judgment

GROUNDS OF DECISION *Cur Adv Vult*

1. The plaintiffs, Oversea-Chinese Banking Corporation Ltd ("OCBC"), by a letter of offer dated 30 April 1996, offered to Measurex Engineering Pte Ltd ("M-Singapore") various banking facilities. M-Singapore was a subsidiary of Measurex Corporation Bhd ("M-Bhd"). The facilities were subject, inter alia, to M-Singapore procuring two Deeds of Guarantee (for S$3,300,000 and US$2,918,300) from M-Bhd in the form prescribed by OCBC. The Deeds of Guarantee provided, inter alia, that:

(a) a certificate by an officer of OCBC as to the monies and liabilities at any time due and owing to M-Singapore would be accepted by M-Bhd as conclusive evidence of that fact;

(b) the guarantee shall be the primary obligation and OCBC was not obliged, before enforcing the guarantee, to make any demand on, take proceedings against or file any claim in judicial management of M-Singapore and that M-Bhd shall be deemed to be principal debtors in respect of all the obligations and liabilities of M-Singapore to OCBC; and

(c) any notice or demand under that guarantee made by OCBC, if sent by post to M-Bhd at their last known address or place of business or residence, would be deemed to have been made on the day following that on which it was posted.

(d) that service of process in any legal action or proceedings in Singapore against M-Bhd shall be deemed to be good service on M-Bhd if served on M-Singapore which was named the process agent in Singapore for the purpose of receiving such process on behalf of M-Bhd.

The two Deeds of Guarantee were duly executed by M-Bhd and received by OCBC in June 1998.

2. On 24 July 2000, OCBC sent to M-Bhd a letter demanding repayment of the sum of US$937,500 together with all interest accruing to date of payment. On 1 September 2000, M-Singapore was placed under judicial management. As at 9 July 2001, the amount remaining unpaid by M-Singapore stood at US$524,333.24 (inclusive of interest). Further contractual interest was chargeable thereon at 3% per annum above the SIBOR rate from 10 July 2001 to the date of payment.

3. OCBC, in a writ against M-Bhd filed on 23 July 2001 and served on 24 July 2001 on M-Singapore as process agent of M-Bhd, claimed:

(i) The sum of US$524,333.24;

(ii) Interest on the sum of US$524,333.24 at the rate of 3% per annum above the SIBOR rate from 10 July 2001 to date of payment;

(iii) Banker's charges and all other applicable dues from 10 July 2001 until date of full payment;

and costs on an indemnity basis.

4. M-Singapore, at the time the writ was served, was under judicial management. The judicial managers, it was alleged, did not forward or notify M-Bhd of the writ. OCBC, on 16 August 2001,

applied for and obtained judgment in default of appearance in terms of the claim. M-Bhd alleged that it came to know of the writ and the default judgment only in October 2001. After obtaining copies of the relevant documents from OCBC, M-Bhd, by way of SIC No. 3170/01, applied, under Order 13, rule 8, to have the writ and the service thereof set aside on grounds that:

(a) the writ was irregular;

(b) the service was irregular; and

(c) the default judgment was ambiguous.

Alternatively, M-Bhd sought to have the default judgment set aside and M-Bhd given leave to file and serve a Memorandum of Appearance and thereafter file and serve its defence.

5. The ambiguities in the default judgment that M-Bhd complained of related to:

(a) the failure in paragraph 2 of the default judgment to quantify the interest payable; and

(b) the failure in paragraph 3 of the default judgment to quantify the amount of banker's charges and other charges claimed.

Rather than try to justify these two paragraphs, OCBC, at the hearing below, conceded that the two paragraphs were ambiguous and applied to the DR for leave to amend the default judgment so as to remove the ambiguity. The DR allowed this application. The default judgment (with the amendments) read as follows:

"No appearance having been entered by the Defendants herein IT IS THIS DAY ADJUDGED that the Defendants do pay the Plaintiffs:-

1. the sum of US$524,333.24;

2. interest on the said sum of US$524,333.24 at the rate of 3% per annum above the SIBOR rate from 10 July 2001 until ~~the date of full payment.~~ 16 August 2001, being the sum of US$3,956.36;

~~3. Banker's charges and all other applicable dues from 10 July 2001 until the date of full payment; and~~

3. post-judgment interest at the rate of 3% per annum above the SIBOR rate from 17 August 2001 to the date of full payment; and

4. costs on an indemnity basis.

Dated this 16th day of August 2001.
Re-dated this 26th day of February 2002.

Sgd: Seah Chi-Ling
Asst Registrar "

After allowing the amendments, the DR dismissed all the applications made by M-Bhd in SIC No. 3170/01 and fixed the costs to be paid to OCBC at $5,000. Dissatisfied with those decisions, M-Bhd

appealed.

Ambiguity in the default judgment

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6. Mr Johnny Cheo who appeared for M-Bhd at the hearing of the appeal argued that the DR ought not to have allowed the amendment to paragraphs 2 and 3 of the default judgment. Order 2, r 1, and Order 20, r 11, of the Rules of Court (1997 Ed) give the court wide discretion to put right any failure to comply with the Rules.

7. The scope of Order 2 of the English Rules of Court (which is in pari materia with ours) – referred to as a "new rule" by Lord Denning MR in the case of *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QBD 729 – was explained by Lord Denning in that case at 835G as follows:

> "This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify *so long as it can do so without injustice*. It can at last be asserted that 'it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.' "
>
> (Emphasis added.)

The DR had obviously come to the conclusion that no injustice would be caused to M-Bhd if he exercised his discretion to allow the amendments. The amendments he allowed to paragraph 2 of the default judgment merely removed the ambiguity that existed in the previous paragraph 2 and could cause no injustice to M-Bhd. Similarly, the deletion of the existing paragraph 3 and the insertion of the new paragraph 3 removed the ambiguity in the phrase "Banker's charges and all other applicable dues" and could cause no injustice to M-Bhd.

8. The decision of LP Thean J in *Philip Securities (Pte) v Yong Tet Miaw* [1988] SLR 594 is instructive in this context. In that case, the defendant applied to set aside a judgment in default of defence obtained by the plaintiffs, contending that the judgment was signed for a sum greater than what was due to the plaintiffs. The plaintiffs were alerted to the irregularity in the judgment entered and applied for it to be amended. Both applications were heard by the Registrar and at the conclusion the Registrar dismissed the defendant's application and allowed the plaintiffs' application to amend the judgment. The defendant appealed against the decision of the Registrar. Thean J dismissed the appeal and held (as appears in the headnotes):

> "(1) Where a judgment has been entered in default of defence for an amount in excess of that which was due, the court had jurisdiction to amend the judgment instead of setting it aside. Order 19 r 9 of the Rules of the Supreme Court 1970 empowered the court to set aside or vary a judgment entered in default of pleadings on such terms as the court thought fit. The registrar was entitled under this rule to amend the judgment.
>
> (2) Amendment made by the learned registrar could also be supported and justified under O 20 r 11."

I was of the view that the decision of the DR in the present case was supported and justified by Order 2, r 1, and Order 20, r 11, of the Rules of Court (1997 Ed).

Writ irregular

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9. In the writ issued by OCBC, it was specified that M-Bhd can enter appearance 21 days after service of the writ, "*counting the day of service*". The words highlighted were clearly in error because under Order 12, r 4, read with Order 3, r 2(2), the 21-day period should exclude the day of service. Mr Cheo submitted that because of this irregularity the writ ought to have been set aside.

10. The writ was served on the process agent of M-Bhd on 24 July 2001 and OCBC entered default judgment on 16 August 2001. M-Bhd therefore in fact had 23 days – not just 21 days – to enter appearance. Mr Lee Eng Beng, who appeared for OCBC, admitted that there was an error on the face of the writ prepared by the solicitors but submitted that it was an inadvertent error and that as judgment in default had been entered 23 days after the service of the writ no prejudice had in fact been caused to M-Bhd by that error and the writ should not therefore be set aside.

11. A court will set aside a writ on the grounds of irregularity only if the circumstances of the case – including the nature of the irregularity – warrant such a course of action. In the present case, M-Bhd had not in any way been prejudiced by the mistaken statement on the writ that M-Bhd had 21 days, counting the day of service, to enter appearance. That mistake was an irregularity which the court should, to trace the words of Lord Denning quoted above, rectify so long as it can do so without injustice. There was, in this case, no injustice caused to any party by the error in the writ. I was of the view that the decision of the DR not to set aside the writ on account of that irregularity could not be faulted.

That services of writ was irregular

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12. Mr Cheo submitted on behalf of M-Bhd that when judicial managers were appointed on 1 September 2000 the judicial managers were at liberty (under s 227I(2) of the Companies Act) to have adopted the provisions in cl 33(2) of the Deeds of Guarantee wherein M-Singapore had been appointed process agent of M-Bhd. He submitted that as the judicial managers had chosen not to adopt cl 33(2), the appointment therein of M-Singapore as process agent of M-Bhd ceased to be operative and, accordingly, the service of the writ on M-Singapore was not good service insofar as M-Bhd was concerned.

13. The nomination of M-Singapore as process agent by M-Bhd was not made in a contract entered into between M-Singapore and OCBC but a contract entered into between M-Bhd and OCBC. As that appointment was not made in a contract to which M-Singapore was a party, the question of the judicial managers adopting or rejecting the contract under s 227I of the Companies Act did not arise.

14. It will be useful to set out in full the provisions of cl 33(2). It reads:

> "33(2) We *irrevocably appoint* Measurex Engineering Pte Ltd at its address in Singapore which at the date hereof is at 994 Bendemeer Road #05-03, Kallang Basin Industrial Estate, Singapore 339943, Singapore (the 'process agent') *to receive, for us and on our behalf, service of process in any legal actions or proceedings in Singapore*. Such service shall be deemed completed on delivery to the process agent (*whether or not it is forwarded to and received by us*) and we hereby authorise and declare that such service in the manner aforesaid shall be deemed to be good and effectual service of the writ or legal process or judgment on us. *If for any reason the process agent ceases to be able to act as such or no longer has an address in Singapore, we irrevocably agree to appoint a substitute process agent acceptable to you, and to deliver to you a copy of the new process agent's acceptance of that appointment, within 30 days*."

(Emphasis added.)

A "process agent" clause is normally to be found in agreements where one or more parties to the agreement are outside the jurisdiction of the court. It is a device by which the party outside the jurisdiction agrees contractually that service of process on a nominated agent within jurisdiction shall be deemed good service. In the present case, cl 33(2) specifically provided that the service shall be deemed completed *on delivery* to the process agent whether or not the documents were forwarded to M-Bhd. OCBC had complied with the requirements of cl 33(2) in that the writ had been delivered to M-Singapore. Once delivery has been effected, whether M-Singapore forwarded the writ to M-Bhd or not is not the concern of OCBC. That is a matter between M-Bhd and M-Singapore.

15. When M-Singapore was placed under judicial management, M-Bhd could, if the judicial managers showed reluctance for M-Singapore to carry on the role of process agent, have requested OCBC, under cl 33(2), to allow another person or entity to be substituted as the process agent in place of M-Singapore. M-Bhd, however, made no attempt to ascertain this. M-Bhd was content that M-Singapore remain its process agent inspite of the appointment of judicial managers. Having allowed M-Singapore to continue to be its nominated process agent despite the appointment of judicial managers, M-Bhd cannot – particularly in the light of the express provision in cl 33(2) that service on the process agent was good whether or not the documents were forwarded to or received by M-Bhd – be heard to complain that it had in fact not received the documents.

Merits of defence

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16. I now turn to the last ground raised in this appeal: that even if the default judgment was regular the DR in the exercise of his discretion should have set it aside as there was merit in the defence raised.

17. It was not in dispute between the parties that to invoke the court's discretion on this ground it was not sufficient for the defendants to show that they had an "arguable" defence: the defendants would have to go further and show that the defence had "a real prospect of success" and "carried some degree of conviction" (*Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co ("The Saudi Eagle")* [1986] 2 LLR 221 CA).

18. M-Bhd attempted to discharge that burden by pointing out that the letter of offer of facilities to M-Singapore requesting the guarantees from M-Bhd had also requested that Goldtron Ltd ("Goldtron") – an existing guarantor – execute two fresh guarantees for the reduced amounts of US$437,745 and S$495,000. Goldtron did not in fact execute any fresh guarantees. It was submitted that M-Bhd had executed its guarantees on the basis that Goldtron would be executing two fresh guarantees and would be entitled to avoid the guarantees it gave.

19. The shortcoming in the above argument was that the letter of offer relied on by M-Bhd was not a letter addressed to M-Bhd. It was addressed to M-Singapore. There was therefore no representation from OCBC to M-Bhd that M-Bhd would be a co-guarantor of the facilities with Goldtron. In the two Deeds of Guarantee executed by M-Bhd, there is no reference whatsoever to any guarantee by Goldtron or by anyone else. Nor was there any such reference in the Directors' Resolution of M-Bhd authorising the execution of the two Deeds of Guarantee. M-Bhd tried to get around this difficulty by arguing that for the purposes of obtaining the guarantees from M-Bhd, M-Singapore was an agent of OCBC and that the letter of offer sent to M-Singapore was a letter that OCBC intended M-Singapore to show to M-Bhd. I did not see much merit in this argument. It was

tenuous at best.

20. The allegation that Goldtron had not executed a fresh guarantee, whilst true, did not however reflect the whole truth. What had happened was that, instead of executing fresh guarantees, it was agreed between OCBC and Goldtron that the existing two guarantees from Goldtron in the sum of US$6.8 million and S$3.3 million would remain valid and enforceable but for the agreed reduced sum of US$437,745 and S$495,000 respectively. Goldtron subsequently faced financial difficulties and a Scheme of Arrangement was put in place for Goldtron. OCBC under that scheme lodged a claim against Goldtron for US$437,745 and released the Singapore dollar guarantee of S$495,000.

21. Mr Cheo relied on this release of the Singapore dollar guarantee of Goldtron as also founding a basis on which leave to defend ought to have been granted to M-Bhd. To quote from his submission: "At law a guarantor is entitled to be subjugated to any securities held by a creditor for the enforcement of the principal debt. As such if the creditor interferes or impairs the value of such securities, the guarantor may be wholly or partially released from liability under the guarantor". In support, Mr Cheo relied on O'Donovan and Phillips: *The Modern Contract of Guarantee* (3rd Ed), pages 390 to 393.

22. The above submission, in my view, did not sufficiently take into account the effect of cl 8(d) of the two Deeds of Guarantee executed by M-Bhd. Clause 8(d) provided:

> "8. This guarantee and our obligation hereunder shall not be prejudiced diminished or affected or discharged or impaired nor shall we be released or exonerated by any of the matters following:-
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) any time forbearance abandonment release or discharge (wholly or partially) concession or other indulgence given or extended to the Customer and/or to any party to any guarantee indemnity security or other instrument in respect of any monies hereby guaranteed all of which you are at liberty to give whether with or without our consent or notice to us; "

Under cl 8(d), OCBC reserved to itself the right to release any guarantee given in respect of the facilities granted to M-Singapore. The release of the Singapore dollar guarantee given by Goldtron could not therefore give rise to any claims against OCBC by M-Bhd or in any other way prejudice OCBC's rights under the two Deeds of Guarantees given by M-Bhd.

23. I was not satisfied at the conclusion of the hearing and the further hearing (requested by M-Bhd) that M-Bhd had any defence to OCBC's claims under the two guarantees that had a real prospect of success. I was also satisfied that the DR had properly granted the amendments to the default judgment sought by OCBC; that the service of the writ on M-Singapore, as process agent of M-Bhd, was a sufficient service on M-Bhd and that the irregularity on the writ did not vitiate the writ. I therefore dismissed with costs the appeal brought by M-Bhd against the decision of the DR.

Sgd:

S. RAJENDRAN

Judge