

The Melati
[2003] SGHC 254

Case Number : Adm in Rem 600072/2002, RA 600018/2003
Decision Date : 21 October 2003
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Tan Hui Tsing (Joseph Tan Jude Benny) for the plaintiffs/sPELLANTS; Lim Tean and Probin Dass (Rajah & Tann) for defendants/respondents
Parties : —

Civil Procedure – Discontinuance – Whether service of Statement of Claim out of time and without leave of court invalid – Whether action deemed discontinued – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 21 r 2(6)

Civil Procedure – Extension of time – Statement of Claim served outside prescribed period and without leave of court – Whether court should extend time for service of Statement of Claim – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 3 r 4

Civil Procedure – Rules of court – Non-compliance – Whether service out of time and without leave an irregularity capable of being cured especially if prejudice to defendants can be compensated by costs – Rules of Court (Cap 322, R5, 1997 Rev Ed) O 2 r 1

1 On 5 March 2002, the Plaintiffs who are cargo interests commenced in rem proceedings against the vessel *Melati*. The claims arose out of a casualty sustained by the *Melati* on 24 December 2000 in the course of a laden voyage from Buatan, Indonesia, to Huangpu and Shanghai, China. The vessel suffered a severe list to port and she drifted unmanned after her master and crew abandoned the vessel. Salvage services were rendered under Lloyds Open Form. The salvors were Wijsmuller Salvage BV who towed the *Melati* to Singapore. After her stability was restored, the *Melati* continued on her voyage in March 2001 to Huangpu and Shanghai. Since the Defendants declared general average, the Plaintiffs provided general average bond and salvage guarantee to the Defendants.

2 The in rem writ was served on 12 March 2002. An appearance was entered on behalf of the Defendants as owners of the *Melati* on 20 March 2002. Some eleven months after appearance was entered, the solicitors for the Plaintiffs on 18 March 2003 served the Statement of Claim. It is not disputed that the Statement of Claim was served outside the period required by Order 18 r 1 and without leave of court. The Defendants' solicitors objected to the service on 21 March 2003. With the invalid service, their stand is that by operation of Order 21 r 2(6), the action is deemed discontinued since 21 March 2003. Order 21 r 2(6) states:

"Subject to paragraph 6A, if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (6B), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have been discontinued."

3 On 4 April 2003, the Plaintiffs applied for an extension of time to serve the Statement of Claim or in the alternative for the action to be reinstated. The AR Registrar, Mr. Kenneth Yap, dismissed the application and the Plaintiffs filed this appeal.

4 The Plaintiffs contend that the service out of time and without leave must be treated as an irregularity, and is capable of cure under Order 2 r 1. Furthermore, the Court has power under Order 3 r 4 to extend time for service of the Statement of Claim. The Plaintiffs argue that they should not

be deprived of the opportunity to prosecute their claim as a punishment for breach of the Rules especially where prejudice, if any, to the Defendants could be adequately compensated by costs. In support of her arguments, Ms Tan Hui Tsing, Counsel for the Plaintiffs, referred me to the case of *The Tokai Maru* [1998] 3 SLR 105 where the Court of Appeal followed the principles in *Costellow v Somerset County Council* [1993] 1 All ER 952.

5 Counsel for the Defendants, Mr. Lim Tean, maintains that Order 2 r 1 and Order 3 r 4 have no application to an action that has been deemed discontinued. Mr. Lim argues that the application for time extension is made outside the deadline of 20 March 2003. This situation calls for the application of the tests laid down in *Rastin v British Steel Plc* [1994] 2 All ER 641. The Plaintiffs are unable to show that the litigation was conducted at least with reasonable diligence. The principles of *Rastin* were applied in *Bannister v SGB Plc* [1997] 4 All ER 129. The Plaintiffs' response is that the principles in *Rastin* are applicable to a situation in which the action was automatically struck out under Order 17 r 11(9) of the English County Court Rules. They are inapplicable to this case. Ms Tan invites the court to apply the ordinary principles that is applied to any application for an extension of time. As is apparent from my judgment, Mr. Lim's contention above does not arise. The premise of the contention is not established.

6 Mr. Lim's contention that no service at all has taken place because of non-compliance with Order 18 r 1 is flawed. This argument is akin to the notion that the procedural error would annul the proceedings. The distinction between nullities and irregularities was abolished by Order 2 r 1 in its present form. The approach taken by the Assistant Registrar below was correct in this respect. His starting point was that the last step taken within the year was in respect of the Statement of Claim and went on to consider whether the irregularity in the service of the Statement of Claim could be cured. On that point, he ruled against the Plaintiffs.

7 In my judgement, the failure to serve the Statement of Claim on time and without leave is by Order 2 r 1 "treated as an irregularity and shall not nullify...any step taken in the proceedings." In other words, the purported service on 18 March 2003 nonetheless constitutes a step taken in the proceedings. Order 2 r 1 states that

"Where, in the 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 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." [emphasis added]

8 In *The Golden Mariner* [1990] 2 Lloyd's Law Report 215, the service of the writ out of jurisdiction was defective in that by error some of the defendants received one another's writs and one had received only an acknowledgement form. The Court of Appeal disagreed with the Judge below who took the view that "no service of the relevant process took place at all". The appellate court held that "the service was grossly defective. But service or purported service it remained." More so, the filing of the Statement of Claim on 18 March 2003 was equally a step taken in the action on the face of the records maintained by the Courts within the meaning of Order 21 r 2(6). It should not be discounted per se simply because of the irregularity of the service. In view of Order 2 r 1, neither should the service itself be discounted because of non-compliance with the Rules. This would be the status of the proceedings as appears from the records maintained by the courts unless the service is set aside. If that should happen, the updated status on the records maintained by the Courts would tell a different story.

9 Before I leave this point I wish to make one observation. *Bank Bumiputra v Syarikat Gunong Tujoh Sdn Bhd & Ors* [1990] 1 MLJ 298 deals with the effect of failure to give one month's notice after a year has elapsed since the last proceeding or matter. In that case, an Order 18 application was clearly a "proceeding". *Gian Singh & Co Ltd v Super Services* [1965] 31 MLJ 256 is another case on the need to give one month's notice after a year has elapsed since the last proceeding. Notice of Change of solicitors for the defendant was deemed to be "proceeding". Although these two cases deal with the rule before the new Order 21 r 2(6) was introduced, they serve as helpful guides on how the courts have interpreted the meaning of "a proceeding in any cause or matter." The courts there defined "proceeding" as a formal step, or "a proceeding which has the effect of continuing the action, not a proceeding which has the effect of putting an end to the action". Winslow J in *Gian Singh* took "proceeding" to mean "something which has both formality and significance, and which is either taken or launched by the plaintiff with a view to bringing the action nearer to trial." On that view, if a frivolous step is taken merely to avoid the operation of Order 21 r 2(6), it may then be open to a defendant to apply to set aside the service on grounds that a plaintiff has been guilty of contumacious disregard of the rules, or bad faith or ulterior motives capable of being regarded as an abuse of process.

10 Given my view that the filing and service date of the Statement of Claim was a step taken within the one-year period in Order 21 r 2(6), I now turn to consider whether time for service of the Statement of Claim should be extended. In most cases of this nature, the tension is between the administration of justice and the effect the granting of relief sought would have on each party. Rules of Court have to be observed. However, the overarching consideration is to ensure that justice is done between the parties and much will turn on the facts of each particular case.

11 In this case, the Plaintiffs' continuing intention to pursue the action is apparent. They served the Statement of Claim and inquired about the Defence. The Defendants were throughout aware of the action and of its nature. The Defendants were participating in the salvage arbitration in London. The amount awarded to salvors as salvage would have a bearing on the claim amount in Singapore.

12 That there was delay in the service of the Statement of Claim is not disputed. The Plaintiffs filed on 26 May 2003 an affidavit deposed by Matthew Robinson, a case handler with W K Webster Co Ltd who are claims recovery agents for the Plaintiffs, to explain why it took the Plaintiffs eleven months to serve the Statement of Claim. Mr. Robinson explained that it was not unusual for parties to agree to solve the salvage claim before the main cargo claim. A protective writ was issued since the Defendants refused their request to extend suit time. The salvage claim took some time to resolve. The salvors had problems getting up their claim. The salvors took their first step towards arbitration in October 2002. The arbitration fixed for hearing on 3 February 2003 was adjourned by consent to 7 February 2003. Eventually, the arbitration in London involving the bills of lading in this action was settled amongst the Defendants as shipowners, salvors and the Plaintiffs as cargo interests on 17 February 2003. After that, instructions were given to the lawyers in Singapore to prepare the Statement of Claim. It was served without thinking of obtaining leave of court or consent of the Defendants under Order 3 r 4(3).

13 The delay was the result of a decision to await the outcome of the salvors' arbitration, as the Plaintiffs had wanted to quantify the indemnity sought by them in the present action. The decision to wait may not have been justified as the cargo claim in Singapore could still proceed without quantification of the claim for salvage indemnity. Right or wrong, that was the course adopted and the decision could not in the circumstances be viewed as a manifest intention not to advance the cargo claim or that the Plaintiffs were sleeping on the case.

14 The Plaintiffs would be barred from prosecuting what was represented as valid claim over

US\$1 million if they are denied the relief sought. There is need to weigh in the balance the prejudice to both the Defendants and the Plaintiffs. The court is concerned with the prejudice directly caused by the irregularity i.e. the particular failure to comply with the Rules: *Metroinvest Ansalt & Ors v Commercial Union Assurance Company Limited* [1985] 1 WLR 513 at 521.

15 In the present case, the Defendants' lawyers objected to the service. Mr. Lim explained that he was on vacation when the Statement of Claim was served and on his return to the office immediately objected to the defective service with the consequence that the Plaintiffs filed an application to extend time for service.

16 Was prejudice to the Defendants caused by the irregular service? I think not. The Defendants are not saying that they have been prejudiced in the conduct of their defence by the delay of eleven months in producing the Statement of Claim. The only prejudice raised by the Defendants is that the Defendants, as Mr Lim puts it, would be deprived of a limitation defence under the Hague Rules. This is a circular form of argument. The Defendants only have a limitation defence if the application to extend time is refused or if the action has been discontinued and consequently reinstatement is sought in either event. The argument is undoubtedly a point raised to take advantage of a technicality in the hope of the possible benefit that might accrue as a result of this procedural failure on the part of the Plaintiffs. On 18 March 2003, it made no difference at all to the Defendants whether or not the Statement of Claim was served out of time and without leave since any which way the defence of time bar was not available.

17 It is difficult in the circumstances to find that the Defendants would be prejudiced if extension of time were granted. The grant of an order to cure the irregularity cannot be viewed as prejudicial to the Defendants' interests. They still have the full opportunity to defend the action. On the other hand, a refusal of the time extension would for the Plaintiffs mean an end to the action.

18 I do not consider a refusal of extension of time in this case would be a proportionate response to the Plaintiffs' failure to serve the Statement of Claim diligently in compliance with the Rules. This is not the case where there has been wholesale disregard to the Rules. No orders of courts were breached. It has not been suggested that there were requests made to serve the Statement of Claim in the intervening eleven months and those requests were ignored. The only specific breach of procedure committed by the Plaintiffs was their failure to comply with Order 18 r 1. This is a case where I should excuse the irregularity or extend time for service of the Statement of Claim. Not to grant an extension of time to cover the service on 18 March 2003 would be a drastic and disproportionate response in the circumstances to the particular breach and would give the Defendants an unjustified tactical advantage and windfall.

19 I would therefore allow this appeal by extending the time for service of the Statement of Claim. The Statement of Claim is to stand as served on 18 March 2003. Time prescribed by the Rules for the Defence to be served is to run from the date of this order. The Assistant Registrar's decision is reversed save that the order of costs fixed at \$1,800/- is to stand. The outcome before the Assistant Registrar might have been different if the Plaintiffs had filed Mr. Robinson's affidavit earlier. I would also direct that the Plaintiffs pay the Defendants' costs of this appeal to be taxed if not agreed.