BNP Paribas (formerly known as Banque National De Paris) v Polynesia Timber Services Pte Ltd and Another
[2002] SGHC 56

Case Number : Suit 152/2000

Decision Date : 26 March 2002

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Herman Jeremiah and Vivian Lim (Helen Yeo & Partners) for the plaintiffs; Michael Palmer and Chenthil Kumarasingham (Harry Elias Partnership) for the second defendant

Parties : BNP Paribas (formerly known as Banque National De Paris) — Polynesia Timber Services Pte Ltd; Another

Civil Procedure – Service – Writ of summons – Service out of jurisdiction – Substituted service – Practice Direction of Malaysian High Court – Nature of Practice Directions – Whether non-compliance with Practice Direction renders substituted service void – Whether incomplete compliance with Practice Direction warrants setting aside of writ – O 11 Rules of Court – Practice Note No 1 of 1968 of Malaysian High Court

They obtained judgment in default of appearance against the first defendant but faced difficulties serving a writ on the second defendant who was resident in Kuala Lumpur.

When asked by the second defendant to make prior appointment with his secretary, the plaintiffs' solicitors took it to mean that the second defendant was deliberately evading or delaying service. The plaintiffs then applied *ex parte* to the court for substituted service to be effected on the second defendant by advertising in some Malaysian newspapers and took the precaution of faxing copies of the advertisements to the second defendant to ensure that he had actual notice of the writ.

The second defendant did not enter appearance to the writ of summons. Consequently, the plaintiffs entered judgment in default of appearance against him. The second defendant applied to set aside the substituted service as well as the default judgment and the application was granted by the Deputy Registrar. The plaintiffs appealed.

The second defendant's counsel submitted that the plaintiffs had not shown that it was impractical to serve the writ personally on the second defendant, relying on O 62 r 5(1) of the Malaysian Rules of the High Court 1980. He further submitted that the service was bad as it did not comply with Practice Note No. 1 of 1968 of the Malaysian High Court governing substituted service, and the plaintiffs had failed to disclose certain material facts in their affidavits. Reliance was also placed on O 11 r 3(3) which required service to be 'in accordance with the law of the country in which service is effected'.

The plaintiffs submitted that their non-compliance with the Practice Direction was only an irregularity which did not nullify the proceedings since practice directions or notes do not have the force of law and are intended to be no more than directions for administrative purposes. Furthermore, since service was not effected by the plaintiffs but through the Malaysian judicial authorities, the process of service was beyond the control of the plaintiffs.

Held

, allowing the plaintiffs' appeal:

(1) The following orders were made: (a) the plaintiffs were to re-serve the wit of summons within jurisdiction for which purpose the second defendant would appoint solicitors to accept service; (b) failing his appointment of solicitors, the default judgment against the second defendant would stand; (c) if the second defendant appointed solicitors to accept service, it would be without prejudice to his right to take fresh steps to set aside the writ; (d) pending appointment of solicitors by the second defendant to accept service, all execution proceedings by the plaintiffs were stayed (see 30).

(2) Service through Malaysia judicial authorities, of writs issued in Singapore, came about as a direct result of the ruling in *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474, extending the holding in *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146 (see 31 and 32).

(3) Non-compliance with para 5 of the Practice Direction is not fatal and would not automatically render service thereafter by way of substituted service null and void. The Practice Direction is not law but merely a direction for administrative purpose and incomplete compliance would only amount to an irregularity, not the setting aside of service of the writ (see 34 to 37); *Re S Nirmala ex-parte: The New Straits Times Press* [1988] 2 MLJ 616; *Karen Ahmad v Standard Chartered Bank* Mallal's Digest vol 2(2) 4 ed (1998 reissue); *Re Yeap Chee Fun ex-parte Pernas Trading* [2000] 5 MLJ 510; and *Koh Thong Kuang United Malayan Banking Corporation Bhd* [1994] 3 MLJ 509 followed.

(4) Where Singapore plaintiffs are dependant on service being effected by the Malaysian judicial authorities, it would be unduly harsh to penalise the plaintiffs and or their solicitors for the acts/ omissions of the process server (see 37).

(5) Here, it cannot be disputed that the second defendant was fully aware, even before substituted service was effected, that a writ had been issued against him by the plaintiffs. There was thus no question of his having suffered any prejudice as a result of not knowing of the advertisements (see 38 and 39).

(6) The purpose of the appointment requirement at both the second defendant's office and home could be either to ensure that the service was successful or equally to ensure that it was unsuccessful as the second defendant could absent himself from the appointed venue at the appointed time. It seemed strange that a defendant, whose liability to the plaintiffs as guarantor had crystallised because judgment had been obtained against the principal debtor, could be in a position to dictate terms to the plaintiffs on how he wished to be served with their legal process (see 40).

(7) It was not unreasonable under the circumstances for the plaintiffs to think that the second defendant was avoiding service (see 41 and 42).

(8) The second defendant at no time raised the merits of any defence he may have had to the plaintiffs' claim against him. His entire complaint was focussed on the fact that he had been embarrassed and felt that his reputation had been somehow maligned by the advertisements (see 43).

NB: 2nd defendant's appeal vide CA 600150 of 2001 was dismissed on 24 July 2002.

Case(s) referred to

Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor

[1996] 2 MLJ 54 (refd)
Raja Guppal a/l Ramasamy v Sagaran a/l Pakiam [1999] 2 MLJ 677 (refd)
Capital Insurance Bhd v Kasim bin Mohd Ali [2000] 1 MLJ 193 (refd)
Re S Nirmala a/p Muthiah Selvarajah t/a Shamin Properties; ex-parte The New Straits Times Press [1988] 2 MLJ 616 (folld)
Lee Tain Tshung v Hong Leong Finance Bhd [2000] 3 MLJ 364 (refd)
Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd [1995] 3 MLJ 465 (refd)
Karen Ahmad Aliyuddin v Standard Chartered Bank Mallal's Digest vol 2(2) 4 ed (1998 reissue) para 4141 (folld)
Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd [1995] 4 MLJ 741 (refd)
Re Yeap Chee Fun: ex-parte Pernas Trading Sdn Bhd [2000] 5 MLJ 510 (folld)
United Overseas Bank Ltd v Wong Hai Ong [1999] 1 MLJ 474 (folld)
Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd [1992] 2 MLJ 146 (folld)
Koh Thong Kuang v United Malayan Banking Corporation Bhd [1994] 3 MLJ 509 (folld)

Legislation referred to

Rules of Court 1997 O 11 rr 3(3) and 4, O 2 rr 1(1) and 1(3)
Malaysian Rules of the High Court 1980 O 62 r 5(1), O 11 r 6(2), O 2 rr 1(1) and 1(3)
Malaysian High Court Rules Practice Note No. 1 of 1968
Rules of the Court of Appeal 1994 Practice Directions No. 2 of 1991, No. 1 of 1996 and No. 1 of 1992
Rules of Supreme Court 1957 O 10 r 2

Judgment

GROUNDS OF DECISION

The facts

1. The plaintiffs in this case are a French bank with a branch in Singapore operating at No 20 Collyer Quay #01-01, Tung Centre, Singapore 049319. The first defendants (the company) were a customer of the plaintiffs in 1998. Its loan facilities from the plaintiffs were guaranteed by the second defendant, who is both its director and shareholder. The company markets timber logged inter alia, in Sarawak and The Cameroons.

2. Due to the decline in the demand for logs in Japan and other markets, the company was unable to repay the loan facilities to the plaintiffs by the due date. Consequently, the plaintiffs' solicitors gave notice to the company on 12 February 1999, that its loan facilities had been cancelled and demanded immediate repayment of the sum of US$3,616,172.15 due and outstanding as at that date. By a separate letter also dated 12 February 1999 to the second defendant, the plaintiffs' solicitors made a demand on the second defendant as guarantor.

3. Thereafter the plaintiffs gave the company more time to pay. Pursuant to a revised schedule of repayments, the company made 3 instalment payments (albeit late) totalling US$288,750 as principal and US$130,105.03 as interest. No further payments were made after 9 July 1999.

4. Consequently, the plaintiffs commenced these proceedings against both defendants on 12 April 2000. As against the company, the plaintiffs' solicitors had no difficulty in effecting service on its registered office at No. 190, Middle Road #16-03, Fortune Centre, Singapore 188979; this was done on 28 April 2000 by the service clerk of the plaintiffs' solicitors. No appearance was entered to the writ of summons by the company within the deadline of 8 (eight) days. Accordingly, the plaintiffs obtained judgment in default of appearance against the company on 4 July 2000.

5. Service on the second defendant was considerably more difficult and complicated than on the company. According to the address stated on the writ of summons, the second defendant is resident in Kuala Lumpur at No. 2109, High Rise 2, Riana Green Condominium, Jalan Tropicana Utara, 47410, Tropicana, Petaling Jaya Selangor. The address was furnished to the plaintiffs' solicitors by a staff member of the company when the plaintiffs made unsuccessful attempts to serve letters on him at the company's office. The second defendant had also written to the plaintiffs' solicitors on 17 July 2000 to confirm that he was residing at his Kuala Lumpur address; he further requested the plaintiffs to fix an appointment through his secretary, to effect service on him at his residence, furnishing a telephone number for the purpose.

6. In accordance with O 11 of the Rules of Court (the Rules), the plaintiffs applied for and obtained, an order of court (on 9 June 2000) for service to be effected outside jurisdiction on the second defendant, at his aforementioned address or elsewhere as he may be found in Malaysia. The time for entry of appearance by the second defendant was fixed at 21 days after service of the writ.

7. Pursuant to the order of court and pursuant to O 11 r 4 of the Rules, the plaintiffs made a request on 6 July 2000 (through the Registrar) to the Registrar of the High Court at Kuala Lumpur, for service on the second defendant to be effected at his Kuala Lumpur residence. The plaintiffs made inquiries on the status of service, by letters dated 6 September and 5 December 2000 addressed to the Registrar's Malaysian counterpart and forwarded through the Registrar. On 11 January 2001, the plaintiffs' solicitors also wrote to the Registrar stating that the second defendant may be located at the office of a Malaysian company, apart from the address stated in the writ. Finally, on 18 January 2001, the plaintiffs' solicitors received from the Registrar, a reply dated 11 January 2001 from the process server (of the Sessions and Magistrates' Courts in Petaling Jaya), advising that his service attempts on the second defendant were unsuccessful and enclosing therewith his affidavit to that effect.

8. According to the process server's affidavit, he had called at the second defendant's residence on 20 December 2000 at 12.20pm, and was told by a female Chinese there was no such person there by the name of the second defendant. Two (2) days later, the deponent attempted service again and found the door locked. Similarly, the door was locked when the process server attempted a third service on 23 December 2000. In a second affidavit filed on 19 October 2001, the process server clarified his earlier affidavit as regards the first service attempt -- he said he was told by a female Chinese that she did not know the second defendant and there was no such person by his name at the address.

9. On 14 February 2001, the plaintiffs' officer Danny Chia spoke with the second defendant (who was in Malaysia) on the telephone. When Danny Chia inquired whether he was prepared to meet with the plaintiffs to discuss the claim under the guarantee, the second defendant declined; he pointed out that the plaintiffs had already issued a writ which (he repeated) could be served on him at his Kuala Lumpur residence or, at his office by prior appointment with his secretary, Elaine.

10. According to the (second) affidavit filed by the plaintiffs' solicitor Herman Jeremiah (Jeremiah) on 15 February 2001 to support the plaintiffs' application for substituted service, the plaintiffs' solicitors interpreted the above paragraph to mean that the second defendant was deliberately evading or at least delaying, service (by asking for prior appointment to be first made through his secretary).

11. Accordingly, the plaintiffs applied (*ex-parte*) to court on 15 February 2001 for substituted service to be effected on the second defendant by advertising in one issue of the New Straits Times and in one issue of the Malaysian Business Times, the English and business dailies respectively, circulating in Malaysia. The plaintiffs' application was granted on 22 February 2001 and pursuant thereto, notice of the writ of summons was advertised in the two (2) Malaysian newspapers on 21 March 2001. As an extra step, the plaintiffs took the precaution of faxing copies of the advertisements to the second defendant to make sure he had actual notice of the writ.

12. On 10 April 2001, the second defendant wrote to the plaintiffs' solicitors (copied to the Registrar) to object to the mode of service; he indicated he would not be entering an appearance to the writ as his stand was that service had not been validly effected on him. The plaintiffs' solicitors replied on 19 April 2001 by forwarding to the second defendant's Kuala Lumpur residence (besides the writ) copies of the affidavit, application and order of court for substituted service as well as his personal guarantee. The second defendant was given time until 27 April 2001 to enter an appearance to the writ. The second defendant was separately notified about the documents which had been forwarded to him, by a fax from the plaintiffs' solicitors on 30 April 2001. The second defendant did not enter an appearance to the writ. Accordingly, on 28 May 2001, the plaintiffs entered judgment in default of appearance against the second defendant.

13. On 8 August 2001, the second defendant applied to set aside the substituted service as well as the default judgment, in Summons in Chambers no. 1851 of 2001 (the application) on the following grounds:

> (i) the plaintiffs had failed to satisfy the aspects of Malaysia law that relate to the service of originating process;
>
> (ii) at all material times the plaintiffs had actual knowledge of the whereabouts of the second defendant for the purpose of effecting personal service of the writ of summons;
>
> (iii) the plaintiffs failed to make frank and full disclosure in their application for the order allowing substituted service against the second defendant and
>
> (iv) the second defendant had offered by letter dated 17 July 2000 to make an appointment to accept service of the writ of summons.

The application was heard and granted by the Deputy Registrar on 18 October 2001, against whose decision the plaintiffs appealed by way of Registrar's Appeal No. 210 of 2001 (the Appeal).

14. The Appeal came up for hearing before me on 6 November 2001 and I allowed it; parties also appeared before me on 8 November 2001 to clarify the orders I had made earlier. The second defendant has now appealed against my decision (in Civil Appeal No. 600150 of 2001).

The application

15. Before I consider the submissions raised in the court below, it would be useful at this juncture to set out the rule governing service outside jurisdiction; O 11 r 4(1) of the Rules states:

> (1) Where in accordance with these Rules, an originating process is to be served on a defendant in any country with respect to which there subsists a Civil Procedure Convention providing for service in that country of process of the High Court, the originating process may be served —
>
> > (a) through the judicial authorities of that country; or
> >
> > (b) through a Singapore consular authority in that country (subject to any provision of the convention as to the nationality of persons who may be so served).

16. I turn next to the arguments canvassed below on behalf of the second defendant. In brief, his counsel submitted that the plaintiffs had not shown that it was impractical to serve the writ personally on the second defendant, relying on O 62 r 5(1) of the Malaysian Rules of the High Court 1980 (the High Court Rules) which states:

> 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 135 for substituted service of that document.

I should point out that the above Order was in *pari materia* with our O 62 r 5(1) until the latter was removed from the Rules with effect from 18 June 2001. Counsel also submitted that service on the second defendant did not comply with Practice Note No. 1 of 1968 of the Malaysian High Court (the Practice Direction) governing substituted service; therefore service was bad. The plaintiffs had failed to disclose certain material facts in their affidavit in support of their application for substituted service and in their affidavit filed to obtain default judgment.

17. Reliance was also placed on O 11 r 3(3) of the Rules which states:

> An originating process which is to be served out of Singapore need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected.

18. The Practice Direction states:

> The practice governing applications for substituted service in the High Court in Malaya shall follow that in the High Court in England, as provided for in Order 10 Rule 2 of the Rules of the Supreme Court 1957. The practice, taken from the 1957 White Book (page 88) is here reproduced:
>
> 1. Two calls should be made
>
> 2. The calls should be made at the defendant's residence, permanent or temporary, if known otherwise, or if the claim relates to the defendant's business, at his business address. If the defendant has left the address given on the writ, this should be stated in the affidavit. If a copy of the document to be served is left, it must be in a sealed envelope addressed to the defendant.
>
> 3. The calls should be made on weekdays and at reasonable hours.
>
> 4. Each call should be on separate days.
>
> 5. The second call should be made by appointment by letter sent to the defendant by ordinary prepaid letter post, giving not less than two clear days' notice, enclosing a copy of the document to be served, and offering an opportunity of making a different appointment.
>
> 6. On keeping the appointment, the process server should inquire whether the defendant has received the later of appointment with the copy document, and if it is stated that the defendant is away, inquiry should be made whether or not letters are being forwarded or should have been forwarded to an address within the jurisdiction; the object is to show that the defendant has received communications sent to him.
>
> 7. The affidavit in support of the application should deal with all the foregoing requirements and should further state whether the letter of appointment has been returned or not, and any answer received should be exhibited. A copy of the document to be served should accompany the affidavit.
>
> No prescribed form is necessary for the letter of appointment.

> The letter of appointment should ordinarily be sent by the solicitor for the plaintiff after ascertaining from the process server in the High Court and other courts their available times and dates for the second call. The facts regarding the letter of appointment should be stated in the affidavit in support.

19. The second defendant's counsel submitted that the plaintiffs'/the process server's non-compliance with paras 5 and 7 of the Practice Direction was fatal to their application for substituted service. The second defendant had (in para 8 of his supporting affidavit for the application) deposed that he runs a large conglomerate of companies and would usually be at his office or the offices of his business associates or consultants during normal business hours. As such, it was unrealistic to hope to serve the writ of summons on him at his home during normal business hours. He went further to say that the plaintiffs should be aware of this fact as they knew the extent of his business interests. Despite knowing his office address (as reflected in their letter dated 11 January 2001 to the Registrar stating that the second defendant may be located at the offices of Pan Pacific Asia Bhd), the second defendant complained that the plaintiffs' solicitors made no attempts at service at his office. The second defendant also alleged that the plaintiffs' solicitor Jeremiah had deliberately omitted mention of his office address as an alternative place for service in his second affidavit (para 10 *supra*). This allegation was rebutted by Jeremiah in another affidavit he filed on 17 September 2001, which I shall advert to later.

20. The second defendant's affidavit was reinforced by an affidavit of a Kuala Lumpur lawyer Jayne Koe Gaik Bee (Koe) who was called to the Malaysian Bar in January 1993. Koe referred to the second defendant's letter of 17 July 2000; she observed that the plaintiffs had refused to make an appointment for service as requested by the second defendant in his aforesaid letter. According to the second defendant, he received no reply to this letter.

21. Koe opined that Practice Directions in Malaysia are to be strictly adhered to and non-compliance was fatal; she cited the appellate court's decisions in *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54, *Raja Guppal a/l Ramasamy v Sagaran a/l Pakiam* [1999] 2 MLJ 677 and *Capital Insurance Bhd v Kasim bin Mohd Ali* [2000] 1 MLJ 193 to support her proposition. The cases came after *Re S Nirmala a/p Muthiah Selvarajah t/a Shamin Properties; ex-parte The New Straits Times Press* [1988] 2 MLJ 616 first gave the Practice Direction judicial recognition. I shall revert to these cases later and likewise on the authorities cited by the plaintiffs.

22. Koe said she could not understand why the plaintiffs could not fix an appointment with the second defendant for service of the writ when the parties were in communication (according to Danny Chia's affidavit) by telephone and fax. She had been informed by the second defendant (and she verily believed) that the plaintiffs knew that the former was and still is a director of a public company Pan Pacific Asia Bhd, to which office the plaintiffs had in fact forwarded copies of the newspaper advertisements. Koe pointed out that an order for substituted service is only necessary if the plaintiffs had difficulties in serving the writ of summons on the second defendant but, this had not been made out by the plaintiffs. Consequently, the affidavit of Jeremiah, alleging that the second defendant was deliberately evading service and all reasonable methods/means had been used to effect personal service on him, could not hold water. She opined that the courts in Malaysia take a very dim view of orders obtained *ex-parte* without full and frank disclosure and have on many occasions set aside such orders. In all likelihood therefore, she was of the view that courts in Malaysia would set aside the aforesaid order for substituted service and by extension, the default judgment *ex debito justitiae.*

23. The plaintiffs countered Koe's affidavit and the second defendant's submissions with an affidavit from a Malaysian lawyer (Adrian Hii Muo Teck [Hii] who has been in practice since 1995) to say that

their non-compliance with the Practice Direction was only an irregularity which did not nullify the proceedings. Hii relied on the Malaysian Court of Appeal decision in *Lee Tain Tshung v Hong Leong Finance Bhd* [2000] 3 MLJ 364 for his proposition. He opined that practice directions/notes do not have the force of law and are intended to do no more than directions for administrative purposes, citing *Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd* [1995] 3 MLJ 465.

24. Hii pointed out that service was not effected by the plaintiffs but through the Malaysian judicial authorities. Consequently, the process of service was beyond the control of the plaintiffs and the charge of non-compliance by the plaintiffs with the Practice Direction was misconceived. The attempts at service by the court process server were an official action of the Malaysian judicial authorities outside the control of the plaintiffs; any omission should not be a ground to challenge the validity of the proceedings. In any case, according to the holdings in *Karen Ahmad Aliyuddin v Standard Chartered Bank* Mallal's Digest vol 2(2) 4 ed (1998 reissue) para 4141, *Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd* [1995] 4 MLJ 741 and, *Re Yeap Chee Fun: ex-parte Pernas Trading Sdn Bhd* [2000] 5 MLJ 510, courts had specifically stated that non-compliance with para 5 of the Practice Direction was at most an irregularity which did not nullify proceedings.

25. On the issue that the plaintiffs made no attempts to effect service at the second defendant's office, Hii pointed out that para 2 of the Practice Direction contemplated that service should be effected at the defendant's residence, if known and this was affirmed in the case *Re S Nirmala ex-parte The New Straits Times Press* (para 21 *supra*). Hii noted that except for one occasion, the second defendant himself had requested (even in his letter dated 17 July 2000 to the plaintiffs' solicitors) for service to be effected on him at his residence. Consequently, there was no requirement to effect service on the second defendant at his office address.

26. Hii also relied on O 62 r 5(1) of the High Court Rules (para 16 *supra*) for his comment that the court may make an order for substituted service if it appears to the court that it is impracticable for any reason to serve the same personally. He argued that it was for the plaintiff to satisfy the court that personal service had been unsuccessful and once that burden was discharged and an order granted, in an application for substituted service, the order will not be subject to challenge; *a fortiori*, if the defendant as in this case, came to know of the writ before judgment was entered against him. Advertisements of notices of the writ were one of the usual methods of effecting substituted service of process in Malaysia.

27. Before I set out the reasons for my decision, I should also refer to two (2) other affidavits filed by the parties. The first was an affidavit filed on the second defendant's behalf by one Safiah Wong (Safiah) who deposed that she was/is a friend of his bodyguard (Lau Kueng Chai). Safiah admitted she was the female Chinese referred to by the court process server (Shah). She had a different version from Shah of what transpired at the service attempt on 20 December 2000 – she denied telling Shah there was no such person as the second defendant at the address; she had in fact told Shah that the second defendant was not in but was at his office. Shah did not ask her for the address of the second defendant's office nor when he was expected to be home. She had inquired of Shah why he was looking for the second defendant and was told that Shah had some documents to serve on the second defendant relating to a case of a Singapore bank loan; Shah then left.

28. The other affidavit was that of Jeremiah filed on the plaintiffs' behalf. In his (third) affidavit (filed on 17 September 2001), Jeremiah specifically addressed the second defendant's allegation that he had failed to disclose material facts in his earlier (second) affidavit filed to support the plaintiffs' application for substituted service namely that:

(a) he was 'careful not to allege' that the plaintiffs' Danny Chia had told the second defendant that

the plaintiffs wanted to serve the writ on the second defendant;

(b) he did not disclose the second defendant had invited the plaintiffs to effect service by prior appointment with his secretary;

(c) he had omitted to state that the plaintiffs were aware that service was possible at an alternative (office) address.

29. Jeremiah rebutted the allegations by:

(a) referring to his second affidavit wherein (at para 6) he had set out the full text of Danny Chia's conversation with the second defendant;

(b) he had disclosed/exhibited in his second affidavit a copy of the second defendant's letter dated 17 July 2000;

(c) stating that the fact of the second defendant having his office at the address of Pan Pacific Asia Bhd was not material to the plaintiffs' application for substituted service because the plaintiffs/he had by then formed the view (albeit it may have been erroneous) that the second defendant was evading service, due to the (mis)information contained in Shah's first affidavit, that the second defendant did not reside at the address stated to be his residence. In any event, the second defendant was sued in his personal capacity as guarantor of the company, not as a director of Pan Pacific Asia Bhd or anything else to do with this company. Further, to the plaintiffs' knowledge, the second defendant had several other addresses including in Sarawak.

The fact remained, Jeremiah asserted, the second defendant had no defence on the merits to the plaintiffs' claim on the guarantee.

The decision

30. I had made the following orders when I allowed the Appeal with costs in the cause, reversing the orders made below (save for costs);

(a) the plaintiffs were to re-serve the writ of summons within jurisdiction for which purpose the second defendant would appoint solicitors by 13 November 2001 to accept service;

(b) failing his appointment of solicitors, the default judgment against the second defendant would stand;

(c) if the second defendant appointed solicitors to accept service, it would be without prejudice to his right to take fresh steps to set aside the writ,

(d) pending appointment of solicitors by the second defendant to accept service, all execution proceedings by the plaintiffs were stayed.

Order (d) was necessary as I was informed by counsel for the plaintiffs that his clients had commenced execution proceedings against the second defendant on the default judgment by seizing the second defendant's shares in the company. When the parties appeared before me on 8 November 2001 to clarify my earlier orders, the plaintiffs applied and which application I granted, to extend the writ for a further period of one (1) year. This was necessary before the original writ which expired 12 months from 12 April 2000 as against the second defendant, could be re-served on him.

31. As a preliminary point, it bears mentioning that service through Malaysian judicial authorities, of writs issued in Singapore, came about as a direct result of the ruling in *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474, following the decision by the Malaysian Court of Appeal in *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146. In *Sunkyong's* case the (local) second defendants had obtained an ex-parte order to issue a third party notice on the first defendant, a foreign company incorporated in the United States and, to effect service of their third party notice on the first defendant at a specified address in New York through agents of the second defendants. The first defendant applied to set aside the order for service outside jurisdiction and appealed when their application was refused. The Court of Appeal held that as there was no Civil Procedure Convention in subsistence in the United States, O 11 r 6(2) of the High Court Rules applied and, service would have to be effected through the government of the United States or through the Malaysian consular authority, contrary to what was ordered and done in the case. Consequently, the appeal of the first defendant was allowed and the order for service outside jurisdiction, set aside.

32. The Kuching High Court in *United Overseas Bank's* case interpreted *Sunkyong's* ratio decidendi to extend to service of foreign legal process in Malaysia having to go through Malaysian judicial authorities. In that case, the plaintiffs who are a Singapore bank, commenced action against the defendant in Singapore to recover a loan the bank had extended to him. The writ and statement of claim were served on the defendant in Kuching by the plaintiff's agents, based on an order of court for service outside jurisdiction granted by the Singapore court. Subsequently, judgment in default of appearance was entered against the defendant and the plaintiffs registered the judgment in the High Court of Sabah and Sarawak. The defendant did not attempt to set aside the judgment but applied to set aside registration of the judgment inter alia, on the ground that service of the writ had not been properly effected on him. The court extended the holding in *Sunkyong's* case. Not only was service of a Malaysian legal process in a foreign country through a private agent not valid (as it constituted the exercise of the judicial powers of the Malaysian courts beyond their territorial limits) but, service in Malaysia of foreign legal process through private agents was also not valid.

33. I begin my review of the cases relied on by the two (2) Malaysian lawyers by looking at those cited by Koe. Apart from *Re S Nirmala ex-parte: The New Straits Times Press*, the other three (3) cases she cited had nothing to do with the Practice Direction. *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Raja Guppal v Sagaran* and *Capital Insurance Bhd v Kasim* all concerned other practice directions namely Practice Directions No. 2 of 1991, No. 1 of 1996 and No. 1 of 1992 respectively, relating to extensions of time for filing of records of appeal. Further, the practice directions came under a different regime altogether, namely the Rules of the Court of Appeal 1994, not the High Court Rules. Consequently, I cannot accept that it was the definitive pronouncement by the Malaysian appellate court, that the Practice Direction must be strictly adhered to (as Koe had contended in her affidavit), when it was not even the subject matter of appeal in the three (3) cases. The cases cited by Hii were more in point.

34. *Re S Nirmala's* case relied on by Koe (also by Hii) in fact supported the plaintiffs' position. There, the question that arose for determination by the High Court was whether the Registrar was right to have refused to grant an order for substituted service of the bankruptcy notice on the ground that the Practice Direction had not been complied with, when the whereabouts of the person to be served were unknown to the appellant. The court held that the Practice Direction had no application.

35. Similarly, the issue in *Karen Ahmad v Standard Chartered Bank* was whether the judgment creditors were required to comply with the Practice Direction, before they could apply for an order for substituted service of the bankruptcy petition on the judgment debtor. As in our case, the process

server had failed to comply with para 5 thereof in that, he had not first made an appointment for personal service by letter with the debtor. The High Court held that it was not necessary in all cases for the Practice Direction to be complied with. Similarly, the court in *Re Yeap Chee Fun ex-parte Pernas Trading* held that there was no serious non-compliance with the substantive requirements of the Practice Direction when an order for substituted service of a bankruptcy notice was granted, based on the process server's affidavit that he was told the judgment debtor had gone out, on all three (3) occasions when he attempted service, and after three (3) further unsuccessful attempts were made at personal service, at another address furnished by the judgment debtor.

36. For completeness, I should also refer to the case of *Koh Thong Kuang v United Malayan Banking Corporation Bhd* [1994] 3 MLJ 509 which decision the court in *Re Yeap Chee Fun*'s case had followed. There, the respondent bank had obtained judgment and subsequently, an order for substituted service of their bankruptcy notice against the appellant, which was then effected. He appealed when his application to set aside the bankruptcy notice (on the ground that the order for substituted service was improperly obtained as he had resided in England for the preceding 6 years) was dismissed. The Court of Appeal held, based on the evidence, that the bank was justified in concluding that the appellant was deliberately evading service and was entitled to serve him at his last known address although it was clear that he was no longer residing there. The Court said (*per curiam*) that the Practice Direction should not be applied blindly but *mutatis mutandis* the facts of each situation.

37. From my understanding of all the Malaysian cases referred to earlier, I do not form the view that non-compliance with para 5 of the Practice Direction is fatal and would automatically render service thereafter by way of substituted service null and void; the Practice Direction is not law but merely a direction for administrative purpose. Incomplete compliance with para 5 of the Practice Direction would only amount to an irregularity under O 2 r 1(1) of the High Court Rules and under O 2 r 1(3), does not warrant the setting aside of service of the writ; those provisions are in *pari materia* with O 2 rr 1(1) and 1(3) of our Rules. I should add that in our case, where Singapore plaintiffs are dependant on service being effected by the Malaysian judicial authorities, it would be unduly harsh to penalise the plaintiffs and or their solicitors for the acts/omissions of the process server. The plaintiffs/their solicitors were in no position to dictate how or where service on the second defendant should be effected, once the process of service had begun. The suggestion made in the plaintiffs' solicitors' letter dated 11 January 2001 (for service to be attempted at the second defendant's office) may or may not be taken up by the process server. At this juncture, it would be useful to quote from a passage from the judgment in *Re Yeap Chee Fun* (at p 516) where the court said:

> Secondly, it was said that the judgment creditor has failed to comply with Practice Note No. 1 of 1968……It is intended to make sure that a defendant really gets to know of a process of the court that is to be served on him. It is aimed at preventing a plaintiff from abusing he process of the court for example, by taking a default judgment (later) when in fact the defendant really does not know of the proceedings against him…

38. Here, it cannot be disputed that the second defendant was fully aware, even before substituted service was effected, that a writ had been issued against him by the plaintiffs, because of his letter dated 17 July 2000 (see para 39 below). Consequently, there is no question of his having suffered prejudice as a result of not knowing of the advertisements. In this regard, I quote the following extract from the judgment in *Karen Ahmad v Standard Chartered* (para 35 *supra*):

> (2) the intention which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings. If this purpose is achieved, the question as to whether the application for substituted

service was in order or otherwise is no longer relevant…..

39. On the related issue of prior appointment before service, I shall first set out the contents of the second defendant's letter dated 17 July 2000 (marked without prejudice) to the plaintiffs' solicitors, it states:

> Dear Sirs,
>
> In the High Court of the Republic of Singapore 152/2000/X
> Banque National De Paris vs
> 1. Polynesia Timber Services Pte Ltd
> 2. Philip Ling Lee King
>
> I refer to the above.
>
> I understand that you have on behalf of Banque National de Paris filed the above Writ of Summons against me in the above Court.
>
> Kindly be informed that I am residing in the above address. As such, if you wish to serve the writ on me, I request that you fix an appointment through my secretary, (Tel. No.03-77278168) to serve the writ on me at my residence.
>
> For the avoidance of any doubt, this letter shall not be treated as an admission of your client's claim or a waiver of any of my legal rights.
> Kindly take note.

I have several pertinent observations to make on the above letter. First, as the attempts at personal service of notice of the writ on him were only made five (5) months later in December 2000, the second defendant's knowledge of the writ could only have come from the staff of the company, when the writ was served on its registered office on 28 April 2000. He would also have been party to the decision by the company not to enter an appearance to the writ thereby entitling the plaintiffs to enter default judgment by 4 July 2000. I say this because a search from the Registry of Companies on the company (exhibited to Jeremiah's third affidavit as **HJ-4**) revealed that the second defendant was/is a majority shareholder of the company holding 599,999 shares (or 59.99%) of its issued 1 million shares of $1.00 value per share. I am certain therefore that the second defendant would have been consulted on the company's decision not to resist the plaintiffs' claim. That can only mean that the company, as the principal debtor, accepted that it had no defence to the claim.

40. It is also noteworthy from the aforesaid letter that the second defendant asked to be served with process at his residence (albeit by prior appointment), not at his office, contrary to the stand he took in his affidavit (para 8) that he was unlikely to be home during office hours. Consequently, there was nothing objectionable about Shah's attempts at service at his home. It was only in his telephone conversation with the plaintiffs' Danny Chia on 14 February 2001, that the second defendant indicated he could also be served at his office, again by prior appointment with his secretary. The question then arises – if prior appointment with his secretary was required for service at his residence (as the second defendant would otherwise be at his office during office hours), why was there a need for the same requirement if service was going to be effected at his office at Pan Pacific Asia Bhd? The purpose of the appointment requirement at both venues could be:

(a) to ensure service was successful; or

(b) equally, to ensure that service would be unsuccessful as the second defendant would absent himself from the appointed venue at the appointed time.

It seems to me strange that a defendant, whose liability to the plaintiffs as guarantor has crystallised because judgment has been entered against the principal debtor, can dictate terms to the plaintiffs on how he wished to be served with their legal process.

41. From his third affidavit, it is noted that the plaintiffs/Jeremiah had concluded that the second defendant was evading service, based on what they understood Shah was told at the first service attempt. Jeremiah had also deposed that contrary to what the second defendant had stated in his letter dated 17 July 2000, Shah was not informed that he could return to the residence by prior appointment to effect service on the second defendant. It was not unreasonable under the circumstances, for the plaintiffs/their solicitors to think the worse of the second defendant – that he was avoiding service.

42. I next refer to Safiah's affidavit. I note that although she affirmed in her para 5(iv) that she understood from Shah he had some documents to pass to the second defendant in connection with some Singapore bank loan case, she did not elaborate further on what she did with that information – whether she conveyed it to the second defendant's bodyguard Lau Kueng Chai and or to the second defendant in turn.

43. The last significant factor to note is that, in his letter dated 10 April 2001 to the plaintiffs' solicitors (couched in language which would make any lawyer proud), the second defendant at no time raised the merits of any defence he may have, to the plaintiffs' claim against him. His entire complaint was focussed on the fact he had been embarrassed and he felt that his reputation had been maligned or somehow sullied, by the advertisements in the Malaysian dailies which he variously described as *wrongful, improper, uncalled for* and *unwarranted*.

Conclusion

44. I had allowed the Appeal because in short, the second defendant had not made out the four (4) grounds set out in the application (see para 13 *supra*). As the main focus of his grievances appeared to be the issue of improper service, I directed the plaintiffs to re-serve the writ within jurisdiction on the second defendant, without prejudice to his rights to take fresh steps to set aside the writ. Indeed, I went further and ordered the plaintiffs to stay execution proceedings on their default judgment against him. Instead of availing himself of the orders I had granted, the second defendant chose to appeal against my decision.

Sgd:

LAI SIU CHIU
JUDGE