

Reemtsma Cigarettenfabriken GmbH v Hugo Boss AG
[2003] SGHC 4

Case Number : OM 600007/2002; OM 600008/2002; SIC 601558/2002; SIC 601559/2002
Decision Date : 15 January 2003
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Kung Wee Teck Edwin and Catherine Lee (Rodyk & Davidson) for Applicants; Tan Chau Yee (Tan JinHwee Eunice & Lim ChooEng) for Respondents
Parties : Reemtsma Cigarettenfabriken GmbH — Hugo Boss AG

Civil Procedure – Service – Service of Notice of Originating Motion out of jurisdiction – Whether Notice of Originating Motion duly served – Jurisdiction of court – Certificate of service as evidence of facts stated therein – Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) s 16(1)(a)(ii), Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 11 r 3(5), O 12 r 7

1. The Applicants, Reemtsma Cigarettenfabriken GmbH, a company incorporated in Germany, on 5 February 2002 filed Origination Motion nos. 600007 of 2002 and 600008 of 2002 to rectify the Singapore register of Trade Mark by revoking therefrom the entry relating to Trade Mark No. T87/05010G "HUGO BOSS" and T74/59825G "BOSS" (collectively and individually referred to as "the subject mark") on the ground that the Respondents had not within the period of 5 years following registration put to genuine use, in the course of trade of the Respondents, goods for which the respective trademark was registered and/or that such use of the subject mark has been suspended for an uninterrupted period of 5 years, and there are no proper reasons for non-use. On 19 February 2002, the Applicants were granted leave to serve out of the jurisdiction on the Respondents in Germany a true copy each of Notice of Originating Motion no. 600007 of 2002 and Notice of Originating Motion no. 600008 of 2002.

2. On 12 October 2002, the Respondents filed two separate applications pursuant to RSC Order 12 r 7 for, inter alia, an order declaring that Notice of Originating Motion no. 600007 of 2002 and Notice of Originating Motion no. 600008 of 2002 have not been duly served on them outside of the jurisdiction. At the conclusion of the hearing, I made no order on both applications. The Respondents have appealed against my decision.

3. Judith Eckl, the Respondents' legal counsel on 8 October 2002 swore two similar affidavits in support of the Order 12 r.7 applications. She deposed that the Respondents had not received a copy each of the relevant Notice of Originating Motion as they were not amongst the documents inside the two packages left by the process server Mr. Buck of the Bailiff's office of the local court at Bad Urach. She further deposed that the document, which she described as a "letter of service", signed by Mr. Buck before he left the premises made no mention that the relevant Notice of Originating Motion was included in the respective package of documents.

4. It was submitted that in the circumstances, the Applicants by error failed to serve the Respondents and as no service of the relevant process took place at all, the court has no jurisdiction to hear and try the originating motions. Moreover, it was argued that such a fundamental omission could not be categorised as an irregularity capable of cure under Order 2 r.1.

5. I accepted the Respondents' submission that the basis of jurisdiction of the court depended on

service. This is clear from Section 16 (1)(a)(ii) Supreme Court of Judicature Act (cap 322), which provides:

"(1)The High Court shall have jurisdiction to hear and try any action in personam where -

(a)the defendant is served with a writ or other originating process -

...

(ii) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court;..."

6. From the affidavit evidence filed by the Applicants, the Applicants had adequately demonstrated that they had complied with Order 11 r.4. As proof of service of Originating Motion nos. 600007 and 600008, M/s Rodyk and Davidson, solicitors for the Applicants exhibited in the affidavit of Lee Su Yee filed on 14 October 2002, a certificate of service, which the firm received on 7 August 2002 from the Registry, Supreme Court. The certificate was issued by the judicial authorities of the District Court at Bad Urach. The English translation of the Service Certificate was exhibited in Lee Su Yee's 3rd affidavit filed on 28 October 2002. Accompanying the English translation of the certificate is Mr. Jörn Gaedcke's certification confirming the correctness of the translation together with a certification from the Embassy of the Federal Republic of Germany in Singapore of Mr. Gaedcke's signature and qualification for making the translation in his capacity as registered translator for English and German languages at the Embassy of the Republic of Germany in Singapore. By contrast, the document described in Judith Eckl's affidavit as "letter of service" was not accompanied by any official certification of the translation. I would mention that not the entire document was translated into the English language. Only selected segments were translated. The identity of the translator was also unknown.

7. At the hearing, both parties accepted the accuracy of the translation and took no procedural objection that the two documents translated into the English language did not satisfy the requirements of Order 92 r.1.

8. It is helpful to set out in full the English translation of the Service Certificate:

"10 AR 37/2002 and

10 AR 38/2002

Service Certificate

The service of the court documents attached to the application of the Embassy of Singapore dated 5.7.2002:

One letter each of the lawyers Rodyk & Davidson dated 10.6.2002, File No. IAN/LSY/01-03371-2

concerning the applications No. 60007 (sic) and 60008 (sic) including appendices.

Originating motion No. 60007 (sic) of the year 2002 with regard to the Markenschutzgesetz (approx. Trademark Registration Act] (Chapter 332) and with regard to the trademark No. T87/05010G between Reemtsma Cigarettenfabrik GmbH and Hugo Boss AG dated 5.2.2002 including appendices.

Originating motion No. 60008 (sic) of the year 2002 with regard to the Markenschutzgesetz (approx. Trademark Registration Act] (Chapter 332) and with regard to the trademark No. T74/59825G between Reemtsma Cigarettenfabrik GmbH and Hugo Boss AG dated 5.2.2002 including appendices.

- each in English with a German translation -

to company Hugo Boss AG, Dieselstr.12, 72555 Metzingen, was carried out on **24.7.2002** through the handing over to the employee, Mrs. Eckl, after an authorised representative of company Hugo Boss AG was not found on the business premises.

72574 Bad Urach 25.7.2002

District Court

[Signature]

Wezel

Master at Common Law"

9. The Respondents did not take issue with the genuineness of the Service Certificate. Under Order 11 r.3(7), the document is deemed to be an Order 11 r 3(5) certificate of service. Counsel for the Respondents submitted that it is not clear from the language used that the origination motions were served. It did not list the documents served. I disagreed with Counsel. It is apparent from the English translation of the Service Certificate that Originating Motion nos. 600007 and 600008 were served on the Respondents on 24 July 2002. By Order 11 r 3(5), the certificate of service is evidence of the facts as stated in the certificate and of the facts on which they are based. To say that the statement in the certificate is "evidence" means that it is prima facie evidence of the fact stated. And, it is sufficient evidence for a court to find that fact proved.

10. From the outset, the Respondents had the task of proving non-service. The legal burden remained throughout on the Respondents to satisfy the court on the balance of probabilities that the originating motions were not served. In the course of the case, the Applicants adduced the Service Certificate as evidence to show service. That evidence passed the evidential burden of proof on to the Respondents. The weight to be given to the Respondents' affidavit evidence was undermined by the Service Certificate. The Respondents neither challenged the validity of the Service Certificate nor

adduced further counter-evidence to displace the Service Certificate. In view of the conflicting evidence before me, the Respondents had not satisfied me on a balance of probabilities that the originating motions were not served at all. I therefore made no order on their applications.

11. On the view which I have taken, it was not necessary to discuss the arguments that the failure to serve the Respondents was a mere irregularity.

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