International SOS Pte Ltd v Overton Mark Harold George
[2001] SGHC 226

Case Number : Suit 514/2001

Decision Date : 17 August 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Randolph Khoo and Bernetter Meyer (Drew & Napier LLC) for the plaintiffs/appellants; Edwin Tong and Lee Kuan Wei (Allen & Gledhill) for the defendant/respondent

Parties : International SOS Pte Ltd — Overton Mark Harold George

Civil Procedure – Originating processes – Writ – Writ not served properly on defendant – Defendant entering appearance – Application by defendant to set writ aside – Conduct of defendant in proceedings – Whether defendant has taken step in proceedings barring him from applying under O 12 r 7 – Principles applicable – O 10 r 1(3) & O 12 rr 6, 7 Rules of Court

Civil Procedure – Originating processes – Writ – Setting aside – Delay in taking out application to set aside writ – Whether adverse inference should be drawn against defendant

: This is an action by the plaintiffs against the defendant doctor seeking to restrain him from practising in Beijing, China on the ground that the defendant who was previously employed by the plaintiffs had signed an employment contract with a non-competition clause. The plaintiffs allege that the defendant is in breach of that agreement by working for a competitor in Beijing. The plaintiffs sought, among other prayers, an injunction against the defendant from working for Global Doctor Ltd, his present employers. The period specified in the non-competition clause expires at the end of August 2001, that is about three weeks from this hearing before me.

The plaintiffs obtained an order for the writ to be served in New Zealand where the defendant comes from but service was not effected because the defendant was not there. Eventually, on 4 June 2001, a copy of the writ and claim was handed to the defendant by a Chinese lawyer in China. On 22 June 2001 Allen & Gledhill entered appearance on behalf of the defendant. On 29 June 2001 the plaintiffs applied for an injunction as well as for summary judgment. On 2 July Allen & Gledhill wrote to Drew & Napier, the solicitors for the plaintiffs, asking for sight of the plaintiffs` application for service of the writ on the defendant in China. Drew & Napier replied saying that no such application was made and that on the defendant having entered appearance `all efforts at effecting service have ceased`. On 3 July Allen & Gledhill wrote to the Registrar of the Supreme Court stating that they will be seeking an adjournment of the plaintiffs` application for injunction which had been scheduled for hearing on the next day, 4 July 2001, so that the defendant may file an affidavit in reply. The application was heard by Justice Kan on 4 July. The defendant was given three weeks to file an affidavit in reply. However, no affidavit was eventually filed because the defendant applied two days later (6 July) under O 12 r 7 of the Rules of Court to dispute the jurisdiction of the court. Counsel for the plaintiffs, Mr Khoo, applied for an interim injunction but it was not granted. There is a dispute as to whether the defendant`s counsel, Mr Tong, argued against the application for an interim injunction before Justice Kan. I shall revert to this point shortly.

The defendant`s application of 6 July was heard by the assistant registrar who granted prayer 1 of the application and ordered that the writ of summons be set aside. The plaintiffs appealed before me against that order. They concede that the writ was not served, but contended that by virtue of the defendant having entered appearance, the writ is deemed to be duly served under O 10 r 1(3) which provides as follows:

> *Subject to Order 12, Rule 6, where a writ is not duly served on a defendant but he enters an appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered the appearance.*

Order 12 rule 6 provides that a party who enters an appearance shall not be treated as having waived any irregularity in the writ or service thereof. Thus, he is entitled to apply under O 12 r 7 to set aside the writ.

The main issue before me in this appeal concerned the question whether the defendant had taken a step in the proceedings which disentitles him to proceed with his application under O 12 r 7. Mr Khoo`s arguments were based on three acts of the defendant, namely, that he: (a) applied to adjourn the plaintiffs` application to 25 July 2001; (b) applied for leave to file an affidavit in reply to the plaintiffs` affidavit; and (c) argued against the plaintiffs` application for an interim injunction until 25 July 2001. These acts were alleged to have been done on 4 July 2001 when parties appeared before Justice Kan on the plaintiffs` application for an injunction. It will be useful to note that O 12 r 7 does not refer to taking steps inconsistent with an application under it. For ease of convenience I shall set out O 12 r 7(1):

> *A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in Rule 6 or on any other ground shall enter an appearance and within the time limited for serving a defence apply to the Court for -*
>
> *(a) an order setting aside the writ or service of the writ on him;...*

The above provides a list of other reliefs which he might pray for. Order 12 itself does not provide any exception based on the concept of waiver. However, the courts in the UK and Australia have developed an exception in certain circumstances in which a defendant will not be permitted to make an application under O 12 r 7. This is neatly summarized by the editors of **Norton Rose on Civil Jurisdiction and Judgments** [1993] at p 221 as follows:

> *... He must then take only those steps which are consistent with his contentions (i) that the court does not have substantial jurisdiction, and (ii) that the technical jurisdiction should be annulled by the setting aside of service. If he goes beyond this he will have taken a step in the proceedings to decide the merits, and he will have thrown away his right to challenge the jurisdiction. He may not participate, even in the smallest way, in the procedure for resolution of the merits of the case and still be heard to say that the court does not have jurisdiction to determine those merits. He must rigidly maintain his position that the court has no substantial jurisdiction over him,* ***and say and do nothing*** *which qualifies this stance. The only safe path is the straight and narrow one.*

Counsel referred extensively to a number of authorities as to what constitutes a `step`. The authorities are, as one textbook author (Marcus Jacobs) writes, `legion, and are not always reconcilable`. It is important that we keep in focus some basic principles. First, the Rules of Court are intended to facilitate the fair and expedient disposal of cases before the courts. To this end, they

must not be looked upon or used as technical traps for the unwary - who are also legion. Secondly, when a party has applied under O 12 r 7 to dispute the jurisdiction of the court, he must not have previously taken a step that is inconsistent with his application. Thirdly, the question whether any particular conduct constitutes such a step must be considered in the context and circumstances of the case, and is in that sense, a question of fact. That is why many of the cases appear irreconcilable. The facts and circumstances differ from case to case which is why it was said in **Rendell v Grundy** [1895] 1 QB 16 that the extent of a waiver depends on the nature of the irregularity. In that case counsel complained that his client was not served with the affidavits that ought to have accompanied the application. The matter was adjourned and the affidavits shown to counsel. In those circumstances, the party concerned cannot be heard to assert that he was entitled at law to be served the affidavits. As Lord Esher MR there said: `He has in reality had everything to which he was entitled.` So it is not simply a question to be answered by noting that an affidavit has been filed or a letter written or an application had been made to the court. It is therefore unnecessary for me to review each case that was cited by counsel on both sides in support of their submissions save those that pertain to relevant points of law or require clarification in so far as their ostensible applicability to the present case is concerned. Mr Khoo and Mr Tong submitted at some length on the applicability of two cases, namely, **Zalinoff v Hammond** [1898] 2 Ch 92 and **Turner & Goudy v McConnell** [1985] 2 All ER 34[1985] 1 WLR 898. In ***Zalinoff*** , the defendant was held not to have taken `a step in the proceedings` merely by filing affidavits in response to the plaintiff`s motion for the appointment of a receiver. Stirling J`s opinion that by `such a step is meant a substantive step taken by a party` has over the years been interpreted in some cases to refer to cases in which it is the defendant himself who initiates the application. The Court of Appeal in ***Turner & Goudy*** held that if that was the effect of ***Zalinoff*** then it was plainly wrong. In ***Turner & Goudy*** the defendant filed an affidavit challenging an O 14 application by the plaintiffs for summary judgment. And although their affidavit referred to an arbitration clause in the contract, the Court of Appeal found that by the filing of that affidavit to show cause why summary judgment ought not be entered the defendants had taken a step in the proceedings, and were therefore not permitted to make an application for a stay of proceedings under s 4 of the Arbitration Act. The other cases which counsel made substantial reference to all turn on the facts. Thus **Binning Bros (in liquidation) v Thomas Eggar Verrall Bowles** [1998] 1 All ER 409, **Williams v The Society of Lloyd`s** [1994] 1 VR 274, **County Theatres and Hotels v Knowles** [1902] 1 KB 480, **Esal (Commodities) v Mahendra Pujara** [1989] 2 Lloyd`s Rep 479, and **Ford`s Hotel Co v Bartlett** [1896] AC 1 are all distinguishable on the facts.

A step in the proceedings in the context of an application under O 12 r 7 must be a step which is inconsistent with the stand taken by the party who alleges that the court has no jurisdiction over the matter. Any step taken towards challenging the opposite party`s action will generally be regarded as such a step in the proceedings. However, I use the word `generally` because there are instances in which the party may have no alternative but to do so. The present case before me is an example. The plaintiffs here applied for an injunction against the defendant which, if successful, will result in the defendant having to resign from his job. The non-competition clause which binds him (if proved to be applicable) will expire in three weeks. Unless there is clear evidence that the defendant had taken a step in the proceedings before he made his O 12 application, the mere opposition to the plaintiffs` application for an interim injunction is essentially an act of self-defence to save his job and reputation; or, as Graham J said in **Roussel-Uclaf v GD Searle & Co** [1978] RPC 747 at 756:

> *On the whole, I think that the statute in contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction.*

Obikoga v Silvernorth (The Times, 6 July 1983) is another example. It was there held that a defendant did not take a step in the proceedings merely by applying to discharge an ex parte Mareva injunction. I should add that these two cases are not to be interpreted as authority for the proposition that defensive acts cannot amount to a step in the proceedings. That aspect has been dealt with in the ***Zalinoff*** and ***Turner & Goudy*** cases discussed above. There is also some dispute in the present case before me as to the extent to which the defendant`s counsel resisted the plaintiffs` application for an interim injunction on 4 July. What is clear is that no affidavit was filed although his counsel obtained leave at that hearing to file it, as well as an adjournment of the application. An affidavit is only a shell. The substance is in its contents. So, until the affidavit is filed it means nothing for we do not know what it will say. It is also quite clear that Mr Khoo tried valiantly to persuade Justice Kan to grant the plaintiffs an injunction until the resumed hearing of the application. Mr Tong informs me that he did not have to put up much resistance because the judge was unmoved by Mr Khoo`s effort. But even if he had, to argue against an application for an injunction at that point would be an act of survival. The defendant then filed his O 12 application within two days. In these circumstances, I do not, therefore, regard the conduct of the defendant before Justice Kan on 4 July to constitute taking a step in the proceedings such as to bar him from taking out an O 12 r 7 application.

Finally, I do not think that there is any adverse inference to be drawn against the defendant for taking out the application on 6 July 2001 when he had a copy of the writ on 4 June 2001. It does seem to me that he was unaware that the writ was not properly served, and from the chronology of events and the explanation of his counsel I do not think that the defendant had been dilatory in taking out the O 12 application.

For the reasons above, I am satisfied that the defendant did not take a step in the proceedings prior to his application under O 12 r 7. This appeal is therefore dismissed.

Outcome:

Appeal dismissed.