Omae Capital Management Pte Ltd *v* Tetsuya Motomura
[2015] SGHCR 8

Case Number : Suit No 1053 of 2014 (Summons No 5893 of 2014)

Decision Date : 08 April 2015

Tribunal/Court : High Court

Coram : Justin Yeo AR

Counsel Name(s) : Mr Arvind Daas Naaidu (Arvind Law LLC) for the Plaintiff; Mr Walter Ferix Silvester (Joseph Tan Jude Benny LLP) for the Defendant.

Parties : Omae Capital Management Pte Ltd — Tetsuya Motomura

Civil Procedure – Service

8 April 2015

Justin Yeo AR:

1 This is an application by Mr Tetsuya Motomura ("the Defendant") to set aside the Writ of Summons ("the Writ") or the service of the Writ on him by Omae Capital Management Pte Ltd ("the Plaintiff").

Background facts

2 The Plaintiff procured the issuance of the Writ on 2 October 2014, claiming substantial loss and damage against the Defendant on account of the Defendant's alleged fraudulent misrepresentations and/or deceit during the latter's brief tenure as the Plaintiff's Chief Investment Officer. The Plaintiff alleged that the Defendant had deliberately concealed investigations by the Department of Justice, United States of America, into the Defendant's participation in London Interbank Offered Rate ("LIBOR") manipulation. The Plaintiff further alleged, *inter alia*, that in employing the Defendant as the Plaintiff's Chief Investment Officer, it had relied on the Defendant's representation that he was not subject to any proceedings of a disciplinary or criminal nature.

3 Pursuant to an *ex parte* Order of Court dated 16 October 2014, the Plaintiff obtained leave to serve the Writ on the Defendant out of jurisdiction at the Defendant's residence in Tokyo. The Writ was served on 23 October 2014 by registered mail.

4 On 26 November 2014, the Defendant filed the present summons challenging the jurisdiction of the High Court of Singapore. On 11 December 2014, the Plaintiff's Japanese solicitor served the Writ and a Japanese translation thereof on the Defendant via registered mail.

5 At the hearing on 9 January 2015, counsel for the Defendant, Mr Walter Ferix ("Mr Ferix") withdrew the prayer for an order to set aside the Writ, but maintained that service of the Writ ought to be set aside due to irregularity in service.

Issues

6 It was undisputed that there was no Civil Procedure Convention providing for service of court processes between Singapore and Japan. As such, the parties agreed that the Writ may be served on

the Defendant in accordance with O 11 r 4(2)(c) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court").

> **4. Service of originating process abroad through foreign governments, judicial authorities and Singapore consuls or by other method of service (O. 11, r. 4)**
>
> …
>
> (2) Where in accordance with these Rules an originating process is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the originating process may be served —
>
> …
>
> (c) by a method of service authorised by the law of that country for service of any originating process issued by that country.
>
> …

7 The Plaintiff additionally relied on O 11 r 3(3) of the Rules of Court, which provides:

> **3. Service of originating process abroad: Alternative modes (O. 11, r. 3)**
>
> …
>
> (3) 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.
>
> …

8 The parties also recognised that pursuant to O 11 r 3(2) of the Rules of Court, the court may not make any order or direction which "shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country".

9 Two issues arose for consideration in the present application:

(a) First, whether the Plaintiff's service of the Writ was irregular; and

(b) Second, if so, whether this court should exercise its discretion to cure the irregularity.

The first issue: Whether the Plaintiff's service of the Writ was irregular

10 Mr Ferix argued that service of the Writ was irregular. He raised three arguments in this regard:

(a) First, he pointed out that service in Japan had to be effected by a competent district court of Japan, through a "special delivery", with a Japanese translation of the Writ. According to the Defendant's expert, Mr Genta Irie ("Mr Irie"):

> ***A foreign complaint shall be sent by a competent court, central authority or designated authority.*** Page 233 of International Judicial Cooperation Manual regarding a

> Civil Case (Hosokai, Minjijiken ni kansuru Kokusaishihohujo Manual 233) (1999), the authoritative book in Japan under the supervision of the Supreme Court of the Administration Office of a Civil Case, has clearly stated the way of the service of process regarding an international civil case. ***Accordingly, a defendant shall receive a foreign complaint by a competent district court of Japan*** (*Id*, at 233) ***through a special delivery*** (*Tokuybetsusotatsu)*. ***In addition, the complaint shall be sent with a translation of the complaint*** . [emphasis added in bold italics]

The method of service of a Singapore writ in Japan was also very recently considered in *SRS Commerce Ltd and another v Yuji Imabeppu and others* [2015] 1 SLR 1 ("*SRS Commerce*") at [6], where Choo Han Teck J noted that:

> There is little doubt that the service was not properly effected. Under Japanese law, the writ (and accompanying documents) ***must be served through Japan's Ministry of Foreign Affairs and then through court clerks authorised by the Japanese courts*** . The writ (and its accompanying documents) in the present case was not served by a court clerk authorised by the Japanese court. [emphasis added in bold italics]

(b) Second, Mr Ferix argued that delivery by mail is an "unlawful" method of service in Japan. In support of this argument, Mr Irie cited a Japanese textbook titled *International Civil Procedure Law* (2005) ("*International Civil Procedure Law*"), which stated (as translated into English) at p 119:

> If service of process is made to a country with which no treaty exists or bilateral judicial assistance agreement has been executed, the service lacks legal foundation under international laws. As such, *personal delivery and personal delivery by mail as previously described are clearly unlawful methods of service under Japanese law*. [emphasis added]

Another passage found in *International Civil Procedure Law* stated:

> 3. Services by Direct Delivery and Direct Mailing
>
> What becomes the most significant issue in services performed in Japan for foreign cases is the legality of services by direct delivery and direct mailing to the recipient of the service, which often occurs in the services from common law nations, where the method of service is different from that of Japan.
>
> As described above, for services for countries with which Japan has no treaty or arrangement for bilateral judicial assistance, since there are no grounds related to international law, *such direct delivery and direct mailing are clearly an illegal service under Japanese law*. …
>
> [emphasis added]

(c) Third, Mr Ferix contended that the Plaintiff's reliance on the decision of the Supreme Court of Japan in *Kishinchando Naridas Sadhwani, Sadhwanis Japan v Sadhwani, Gobindram Sadhwani* (Case No 1838(O) of 1994 dated 28 April 1998) ("*Sadhwani*") was misplaced, as *Sadhwani* was a case relating to the enforcement of foreign judgments rather than to the service of originating processes. Mr Irie agreed that in the context of enforcement of a foreign judgment, irregularities in service could be cured if the defendant knew about the proceedings and had an unobstructed right to defend. However, he opined that there were "very different considerations when

examining irregular service at the enforcement stage as opposed to commencement of action". [note: 1] This was because, at the enforcement stage, refusing enforcement on the ground of an irregularity in service would involve substantial prejudice to the plaintiff since the plaintiff had already obtained a judgment and had (it is presumed) gone through the legal process. In contrast, at the commencement stage, the defendant has not yet substantively contested the proceedings. Irregularities at the commencement stage should therefore "be more closely scrutinised so as to allow the Defendant his full due process". [note: 2]

11 Counsel for the Plaintiff, Mr Arvind Daas Naaidu ("Mr Naaidu") raised three arguments to support his contention that service of the Writ was regular.

(a) First, he argued that Mr Irie's reliance on the *International Judicial Cooperation Manual* (see [10(a)] above) was misplaced, because according to the Plaintiff's expert, Mr Iida Toyohiro ("Mr Toyohiro"), the manual applied only to instances of service of a foreign originating process in Japan "if and only if there subsists a Civil Procedure Convention and/or exists a concluded or executed bilateral judicial assistance agreement between that foreign country and Japan" [emphasis in original]. [note: 3] However, it should be noted that Mr Irie conceded that the manual was not strictly applicable in situations where there is no Civil Procedure Convention between the foreign country and Japan, but emphasised that the point he was trying to make was that regular service in Japan can only be achieved by a central authority, a designated authority or by a court with jurisdiction. [note: 4]

(b) Second, Mr Toyohiro interpreted the *Sadhwani* decision to mean that in the absence of a Civil Procedure Convention subsisting between an originating country and Japan, the service of a foreign process from the originating country need not comply with the requirements of the Japanese Code of Civil Procedure ("CCP") so long as the defendant knew about the commencement of the foreign proceedings and his right of defence was not obstructed. [note: 5] Mr Naaidu emphasised that similar observations had been made by Professor Nozomi Tada (in an article titled "Recognition and Enforcement of Foreign Judgments" (2003) 46 Japanese Annual of International Law 75 ("Professor Tada's article")) and Mr Masahiro Nakatsukasa (for the "Japan" entry in Mark Moedritzer & Kay C Whittaker, gen ed, *Enforcement of Foreign Judgments in 28 jurisdictions worldwide 2013* at p 71). [note: 6] While *Sadhwani* was a case decided in the context of the enforcement of foreign judgments, the issue of service was considered by the Supreme Court of Japan and the decision was therefore relevant to the present case. Mr Toyohiro disagreed with Mr Irie's reliance on *International Civil Procedure Law* on the basis that the commentary by the authors of that textbook was "plainly contrary to the decision of the Supreme Court of Japan [in *Sadhwani*]". [note: 7]

(c) Third, Mr Naaidu pointed out that in a 1989 meeting of the Hague Conference on Private International Law Special Commission ("the 1989 Hague Conference"), the Japanese Government stated that it did not consider the use of mail or postal channels to send judicial documents to be an infringement of its sovereign power. [note: 8]

12 In my view, the Plaintiff's service of the Writ by registered mail was irregular.

(a) First, the authorities cited by Mr Naaidu and Mr Toyohiro (see [11(b)] above) related to the enforcement of foreign judgments, rather than the setting aside of service of process at the commencement of proceedings. They were therefore not directly relevant to the issue before this court. In this regard, it should be noted that in *SRS Commerce*, Choo J had expressly considered

Sadhwani and observed that the provision relied upon in *Sadhwani* (*ie*, Article 118 of the CCP) applied only to "final and binding" judgments (see also *SRS Commerce* at [7]). Choo J emphasised that *Sadhwani* did not stand for the proposition that "defendants who contest proceedings with actual knowledge of the commencement of actions cannot raise arguments on irregular service" (*SRS Commerce* at [8]). Before me, the parties agreed that the positions taken in *SRS Commerce* concerning the validity of service by mail in Japan (in general) and the applicability of *Sadhwani* (in particular) were findings of fact and therefore not strictly binding on this court. However, that did not preclude me from adopting Choo J's compelling reasoning, particularly since *SRS Commerce* concerned the very same decision of the Supreme Court of Japan. Furthermore, Choo J's findings did not seem contradicted by the evidence before me, and indeed, appeared to be supported by the expert opinion provided by Mr Irie. This was so, for instance, with regard to the point that there is a principled distinction between (a) resisting enforcement on the ground that the originating process had not been validly served; and (b) setting aside the service of a writ at the commencement of proceedings on the same ground (see [10(c)] above). I would also add, for completeness, that in Professor Tada's article (which was cited by Mr Toyohiro in support of the Plaintiff's position), the learned author in fact recognised that service by "mailing of judicial documents to a defendant by plaintiff's lawyers is not valid under Japanese domestic law", and cautioned that one "might encounter problems in Japan if service were accomplished by mail".

(b) Second, while the Japanese Government had taken the position at the 1989 Hague Conference that service by mail did not infringe its sovereign power, it is necessary to have regard to the fuller context in which the Japanese delegation indicated its position:

> Japan has not declared that it objects to the sending of judicial documents, by postal channels, directly to persons abroad. In this connection, Japan has made it clear that no objection to the use of postal channels for sending judicial documents to persons in Japan *does not necessarily imply that the sending by such a method is considered valid service in Japan*; it merely indicates that Japan does not consider it as infringement of its sovereign power. [emphasis added]

From the extract, the Japanese delegation appeared to emphasise that while Japan was not objecting to the use of postal channels, this did not imply that sending documents by mail was considered valid service in Japan. A plain textual interpretation of this statement appeared to lend support to the position that service by mail was not valid service in Japan. Indeed, it should be noted that in Professor Tada's article, the learned author cited a decision of the Tokyo District Court (referred to by Professor Tada as "Tokyo District Court, Judgment, March 25, 1990, *Kinyu Shoji Hanrei* No. 857 p. 39") which held that the Japanese Government's position, as expressed at the 1989 Hague Conference, is "not to be understood as having positively introduced a new method of service which foreign States are to follow". Mr Naaidu submitted, in response to a query by this court, that the Japanese Government was simply being "mindful not to declare such service *ipso facto* valid in all circumstances", and that the validity of service should be assessed "on the particular circumstances of each case". [note: 9] However, apart from Mr Toyohiro's personal interpretation of *Sadhwani* and several articles on the enforcement of foreign judgments in Japan, no evidence was adduced to support Mr Naaidu's submission.

13 I therefore found that the Plaintiff's service of the Writ by registered mail was irregular, and now turn to consider if this court should exercise its discretion to cure the irregularity in service.

The second issue: Whether this court should exercise its discretion to cure the irregularity

14 That there is discretion to cure the irregularity in service is undisputed by the parties. If authority is needed, it may be found in *SRS Commerce* at [9]–[15], citing *ITC Global Holdings Pte Ltd (In Liquidation) v ITC Ltd and others* [2011] SGHC 150 ("*ITC Global Holdings*") at [42]–[50] (in turn citing the English cases of *Golden Ocean Assurance Ltd and World Mariner Shipping S A v Christopher Julian Martin and others* [1990] 2 Lloyd's Rep 215 ("*The Goldean Mariner*") and *Phillips and another v Symes and others (No 3)* [2008] 1 WLR 180 ("*Phillips*")).

15 While the court clearly has discretion to cure irregularities in service, the validation of a breach of a procedural rule must depend on all the circumstances of the case (*ITC Global Holdings* at [42]). It is therefore useful to consider the pertinent facts of each of the abovementioned cases, in order to discern how the courts have exercised discretion to cure irregularities in service.

(a) In *SRS Commerce*, Choo J found that service by post was invalid under Japanese law. However, he noted that the defendants had actually taken steps to defend the proceedings (*SRS Commerce* at [11]). After entering appearance, the 1st defendant had filed an affidavit and, in compliance with a freezing order, had also filed a list of assets (*ibid*). There were also exchanges of correspondence between the parties' solicitors (*ibid* at [12]–[14]). Choo J noted that the defendants had already been given substantive advice "not only in respect of the claim, but also on the freezing order" (*ibid* at [14]). In the circumstances, Choo J exercised his discretion to cure the irregularity because the defendants "knew that process had been instituted against them in Singapore", and were "constantly advised by Singapore lawyers and cannot now say that the irregularity in service justified their application to set aside the process" (*ibid*).

(b) In *ITC Global Holdings*, the plaintiff filed a request for service of the writ out of Singapore with the Supreme Court of Singapore, and specifically requested that the relevant documents be sent to the relevant authorities in India (*ITC Global Holdings* at [23]). Thereafter, the plaintiff played no role in the service of the writ, and left matters entirely to the Registry of the Supreme Court of Singapore, the Ministry of Foreign Affairs and the relevant Indian authorities (*ibid*). The plaintiff was subsequently provided with a copy of an endorsement from the process server, stating that the writ had been served on the defendants (*ibid* at [24]). However, it transpired that the service was irregular because the plaintiff failed to show that the entity that it served the writ on was in fact an agent for the defendants (*ibid* at [35]). Lee Seiu Kin J exercised his discretion to cure the irregularity in service because (i) the defendants were apprised of the proceedings and had taken steps to contest them, thus suffering no prejudice; and (ii) the plaintiff had "done all that he could to effect service" (*ibid* at [49]). Indeed, the plaintiff had even received a copy of an endorsement from the process server indicating that the writ had been successfully served (*ibid*). Lee J further noted that the parties had been involved in the suit for "almost a decade" and that "in the light of the several assiduous attempts at service and the defendants' knowledge of such attempts and of the proceedings, the procedural defects are illusory" (*ibid* at [50]). To fail to cure the irregularities "would cause undue prejudice to [the plaintiff] by denying its right to a hearing" (*ibid*). It should be noted that the factors considered by Lee J in deciding whether to exercise discretion to cure irregularities in service were also cited in *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [61].

(c) In *The Goldean Mariner*, there were two categories of defendants who had experienced procedural irregularities in service: (i) defendants who received wrongly addressed writs which were meant for other defendants in the suit, although the writs were accurate in every other respect; and (ii) defendants who were only served with a form of acknowledgement of service, with no writ actually served on them. The English Court of Appeal emphasised that the court's exercise of discretion to cure irregularities in service "is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular

irregularity". On the facts, the defendants frankly accepted that they could not point to any prejudice suffered. The court (by a majority) exercised its discretion to cure the irregularity in the first category. The majority judges noted that the defendants had each received a copy of the writ, were parties to the contract in question, and knew about the cause of action. They emphasised that "[the defendants] all took the same prompt action" by putting the matter in the hands of their London solicitors, and that "[none of the defendants] was in any way misled by the mistake; and, indeed, none of them has ever suggested that it was". The majority judges also cured the irregularity in the second category because the there was no doubt in the minds of those defendants regarding the proceedings that were initiated against them. In contrast, the dissenting judge opined that the defect in service was "very serious", that the "conduct of the plaintiffs excites little sympathy", and that it was "important" to remain cognisant that the matter at hand involved service out of jurisdiction on defendants who "owe[d] [the English courts] no allegiance". The dissenting judge also surmised that the judge below, who was "an experienced commercial judge", would have agreed with his refusal to cure the irregularity.

(d) In *Phillips*, documents required to be served on the defendants were forwarded by an English court to the relevant legal authorities in Switzerland. However, the enclosed English language claim form was erroneously stamped "[n]ot for service out of the jurisdiction". The error was noticed by the claimants' solicitors and the official at the foreign process section of the English court (who proceeded to accept the document for service). The documents were then forwarded to the relevant legal authorities in Switzerland for service. It transpired that the Swiss court removed the English language claim form (but not the German translation of it) from the package before serving the documents on the 2nd defendant. It also transpired that no documents were served on the 3rd defendant due to an error on the part of the Swiss Post Office. The House of Lords found that the "essential faults" in service were those of the Swiss authorities rather than the plaintiffs, and that to deny the effectiveness of service would lead to part of the claims being compromised because neither the English nor the Swiss courts would have had jurisdiction over the entire set of claims (see *Phillips* at [38]). The House of Lords considered the power to dispense with service under r 6.9 of the English Civil Procedure Rules ("CPR"). However, Lord Brown observed in his leading judgment (with which the other members of the court agreed) that even without resort to the dispensation with service, it was "at least arguable" that the court could simply order under r 3.10(b) of the CPR (*ie*, the English equivalent of O 2 r 1(2) of the Rules of Court) that the defendants "be regarded as properly served" (*Phillips* at [31]).

16 From the above analysis, it appeared that there were at least three factors to be considered in deciding whether or not to cure an irregularity in service out of jurisdiction.

(a) The first factor concerned whether the *defendant* was apprised of the proceedings. This is a "highly significant" factor; if the defendant was in fact apprised of and took steps to contest the proceedings, he would probably have suffered no prejudice (*ITC Global Holdings* at [49]). While the Defendant in the present case did come to know of the Writ, he did not actually take any active steps to contest the proceedings at all. This was unlike the defendants in *SRS Commerce*, who entered into correspondence with the plaintiffs and were found to have taken active steps in the proceedings (including filing affidavits concerning their assets). While the Defendant did enter an appearance, this was mandated by the rule concerning a dispute as to jurisdiction (see O 12 r 7(1) of the Rules of Court). The Defendant's immediate step after entering appearance was, as is also prescribed in the said rule, to file the present application to set aside service of the Writ on grounds of irregularity. The present situation therefore appeared to be different from that in *SRS Commerce*.

(b) The second factor concerned whether the *plaintiff* had properly done all that he could to effect service (*ITC Global Holdings* at [49]; and see *Phillips* at [38]). If a plaintiff had done all that he could, the court may be more amenable to exercising its discretion to cure irregularities in service (see [15(b)] and [15(d)] above). In the present case, the Plaintiff had, on its own volition, simply sent the Writ to the Defendant by registered mail. This should be contrasted with the effort expended by the plaintiffs in both *ITC Global Holdings* and *Phillips.* On balance, in the present case, I did not think it could be said that the Plaintiff had done all that it could to serve the Writ.

(c) The third factor concerned whether the *plaintiff* would be unduly prejudiced should the court refuse to cure the irregularities in service. A plaintiff would likely be unduly prejudiced where, for instance, a defendant attempts to set aside service on the ground of irregularity after proceedings have already run their course (such as in *Sadhwani*; and see [10(c)] and [12(a)] above). There might also be undue prejudice to the plaintiff if the failure to cure irregularities in service would result in claims (or part thereof) being forsaken (see *ITC Global Holdings* at [48]; and see [15(d)] above), if substantive proceedings have been unnecessarily delayed due to a "myriad [of] procedural obstacles" (*ITC Global Holdings* at [50]), or if it would effectively amount to "denying [a plaintiff's] right to a hearing" (*ibid*). In the present case, the Plaintiff was unable to show how it would be unduly prejudiced in the event that service of the Writ is set aside.

17 Having considered these factors, I declined to exercise the discretion to cure the irregularity in service of the Writ. While the fact that the Defendant was aware of the Writ is certainly an important factor, it should be noted that this was not the *only* factor considered in both *ITC Global Holdings* and *Phillips*. Should the irregularity in the present case be cured, it might suggest that a plaintiff is entitled to serve a Singapore originating process on a defendant in Japan in whatever manner the plaintiff so desires, and that so long as the defendant becomes aware of the originating process, there will not be a need to comply with any rules on service. Indeed, this was precisely what the Plaintiff did in this case. If the Plaintiff's actions were countenanced and the irregularity in service cured, it may well suggest that rules on service of process out of Singapore (such as O 11 rr 3(3) and 4(2)(c) of the Rules of Court) may be flouted with impunity and the door will be open to methods of service of originating processes that have not hitherto been contemplated.

Conclusion

18 For the reasons above, I granted the Defendant's application for setting aside the service of the Writ.

19 On the issue of costs, I noted that additional rounds of affidavits and hearings were necessitated because the Defendant had failed to exhibit some of the evidence of foreign law that he had sought to rely on. I had earlier asked parties to make submissions on costs prior to the outcome of the present decision. Having considered those submissions as well as the circumstances of the case, I fixed costs to the Defendant of $3,000, all inclusive.

[note: 1] Para 12 of the Affidavit of Genta Irie dated 23 February 2015, attached to the Affidavit of Walter Ferix Silvester dated 23 February 2015 ("Mr Irie's Affidavit dated 23 February 2015")

[note: 2] Para 13 of Mr Irie's Affidavit dated 23 February 2015

[note: 3] Para 4 of the 3rd Affidavit of Iida Toyohiro dated 10 February 2015

[note: 4] Para 3 of Mr Irie's Affidavit dated 23 February 2015

[note: 5] Para 9 of the 3rd Affidavit of Iida Toyohiro dated 10 February 2015

[note: 6] Paras 11 and 12 of the 3rd Affidavit of Iida Toyohiro dated 10 February 2015

[note: 7] Para 9 of the 3rd Affidavit of Iida Toyohiro dated 10 February 2015

[note: 8] Para 15 of the 3rd Affidavit of Iida Toyohiro dated 10 February 2015

[note: 9] Para 6 of the letter from Arvind Law LLC dated 16 March 2015