Tao Commodity Trader Inc v Fortis Bank (Nederland) N.V.
[2004] SGHC 30

Case Number : Suit 1068/2003

Decision Date : 19 February 2004

Tribunal/Court : High Court

Coram : Dawn Tan Ly-Ru AR

Counsel Name(s) : Toh Kian Sing (Rajah & Tann) for the applicants/defendants; Nazim Khan (UniLegal LLC) for the plaintiffs

Parties : Tao Commodity Trader Inc — Fortis Bank (Nederland) N.V.

19 February 2004

Judgment reserved.

Assistant Registrar Dawn Tan Ly-Ru:

1. This was an application made by way of summons-in-chambers ("the SIC") for an order that the "purported service" on 31 October 2003 of the writ of summons of even date ("the writ") on the defendants be set aside; alternatively, that the High Court did not "by virtue of such purported service" obtain jurisdiction over the defendants.

2. I allowed the application and now give my reasons.

The facts

3. The essential facts were not in dispute. The defendants are a bank incorporated in The Netherlands, and have a registered office at their place of incorporation in Rotterdam, The Netherlands. The defendants were formerly registered under Part XI, Division 2 of the Companies Act (Cap. 50) ("the Act") as a "foreign company" (as defined in section 4 of the Act) on 19 June 2000. In compliance with section 368(1)(e) of the Act, the defendants named as their agents two employees, Gijsbert Schot ("Schot") and Petrus Adrianus de Ruijter ("de Ruijter"), who were "authorised to accept on [their] behalf service of process and any notices required to be served" on the defendants. Schot and de Ruijter were also the Deputy General Manager and General Manager respectively of the defendants.

4. On 23 June 2000, the Monetary Authority of Singapore granted to the defendants a licence to transact banking business in Singapore. In 2001, due to a "global rationalisation" of the defendants' overseas banking operations and pursuant to a Business Transfer Agreement dated 10 October 2001 ("the BTA"), the defendants sold and transferred their business operations in Singapore to Fortis Bank S.A./N.V., the parent company of the defendants. The BTA provided, inter alia, that the defendants' employees would be employed by Fortis Bank S.A./N.V., and Schot was named as one such employee.

5. Subsequent to the conclusion of the BTA, the defendants closed their Singapore branch. The defendants stated, and it is not disputed, that since 31 March 2002, the defendants have not had a place of business in Singapore nor have they carried on any form of business in Singapore. Accordingly, and in accordance with section 377 of the Act, the defendants lodged with the Registrar a Form 90 notice ("Notice by Foreign Company of Cessation of Business") on 1 April 2002 informing that they had ceased to have a place of business or to carry on business in Singapore. The Registry of Companies and Businesses ("RCB") acknowledged the lodgement of the notice on 4 April 2002, and the defendants' name was duly removed from the register upon the expiry of 12 months from that date, by 4 April 2003. The defendants did not, however, lodge a Form 81 ("Notice by Foreign

Company of Cessation of Agency") or Form 82 notice ("Notice by Agent of Foreign Company of Cessation of Agency"), as they believed that this was not necessary.

6. On 31 October 2003, the plaintiffs purported to serve the writ indorsed with a Statement of Claim on the defendants in Singapore by serving the same on Schot at his residential address at 14 Bin Tong Park, Singapore 269795. The plaintiffs say that Schot allegedly accepted service of the writ without any protest, but the defendants say that the circumstances surrounding the purported service were such that Schot could not reasonably be expected to protest. The writ was enclosed in an envelope addressed personally to Schot, and Schot did not know that the writ was inside when he acknowledged receipt of the envelope and its contents thereon. In any event, on 7 November 2003, Messrs Rajah & Tann, solicitors for the defendants, informed UniLegal LLC, solicitors for the plaintiffs, that the defendants had ceased to be registered under the Act. This was followed by Messrs Rajah & Tann's letter of 11 November 2003 protesting the validity of the purported service of the writ and inviting the plaintiffs to withdraw the same, failing which their instructions were to take out an application to set aside service.

The arguments

7. The defendants contended that when they ceased to be registered under the Act, both Schot and de Ruijter also ceased employment with them (although Schot is currently the General Manager of Fortis Bank S.A./N.V.) and hence ceased to have any authority to accept service of process in Singapore on behalf of the defendants. The fact that the defendants had ceased to maintain a place of business or to carry on any form of business was significant because this meant that service of the writ was effected on a company which to all intents and purposes no longer maintained a corporate presence in Singapore.

8. Moreover, service was purportedly effected pursuant to section 376(b) of the Act, which provides for service of any document required to be served on a foreign company by addressing the same to an agent of the company and leaving it at or sending it by post to his registered address. This mode of service was not available to the plaintiffs, and such service was not good service, because section 365 made it clear that section 376 and the other provisions in Division 2 applied only to companies that were registered. As such, section 376(b) was not applicable to the defendants as they had ceased to be registered at the time of the purported service of the writ. To hold that section 376(b) was applicable would also make no sense in light of section 376(c), which specifies how service on a company that has ceased to maintain a place of business in Singapore is to be carried out (addressed to the foreign company and left at or sent by post to its registered office in the place of its incorporation). If a company such as the defendants could be served pursuant to section 376(b), this would render section 376(c) otiose.

9. It followed that section 370, and in particular section 370(2), (3), (4) and (5) (which deals with the procedures for the appointment and replacement of agents), being a provision in Division 2, was not applicable once the defendants had ceased to be registered. Accordingly, section 370(2)(a) (an agent shall continue to be the agent of the company until he ceases to be such in accordance with section 370(4)) was not applicable, nor was the cessation of an agent's status governed by section 370(4). The defendants were not obliged to comply with either section 370(3) (lodging with the Registrar a written notice stating that the agent has ceased to be or will cease to be such) or section 370(5) (appointing another agent where the company is left with only one agent in Singapore). Consequently, the defendants were under no obligation to lodge Forms 81 or 82, these notices not being documents that "ought to have been lodged" before the date the Form 90 notice was lodged (section 377).

10. Finally, once the defendants ceased to be registered because they no longer maintained a place of business or carried on any business in Singapore, the nexus for obtaining jurisdiction in Singapore also ceased to exist.

11. The plaintiffs, in contrast, submitted that the status of the defendants' agents as such could only be terminated in accordance with the provisions of the Act, that is, section 370(2), (3) and (4). This was not done in the instant case. In addition, the defendants' cessation of business did not affect the status of the agents: sections 368(1)(e) read with 370(2)-(4), together with sections 376(b), (c) and 377(1). The plaintiffs also relied on the English decisions of *Rome and another v Punjab Bank* (No. 2) [1990] BCLC 20, *Sabatier v The Trading Company* (1927) 1 Ch 495 and *Employers' Liability Assurance Corporation, Limited v Sedgwick, Collins and Company, Limited* (1927) AC 95.

12. On a plain reading of the authorities cited and the relevant provisions, in particular sections 370(2)-(4) and 376(b), until an agent ceases to be such by filing the requisite notice, service on such an agent by addressing the writ to him and leaving it at or sending it by post to his registered address is good service. Service of the writ on Schot, whose name remained on the RCB's records as the defendants' agent as at the date of service, was thus good service. Additionally, even after the defendants ceased to maintain a place of business or to carry on business in Singapore and had filed a Form 90 notice under section 377, a literal interpretation of section 370(2)-(4) mandated the filing of either a Form 81 or Form 82 notice; the status of an agent was independent of the defendants' cessation of business in Singapore or otherwise.

13. Further, the defendants' position that neither Schot nor de Ruijter had the authority to accept service of process on behalf of the defendants was untenable, in view of de Ruijter's filing on 9 July 2002 (some three months after the defendants lodged their Form 90 notice) of a "Statutory Declaration Verifying Balance Sheet." In any case, the defendants' belief that the lodgement of Forms 81 or 82 was unnecessary, or their ignorance of the need to do so, was irrelevant because the requirement was strict and the defendants' erroneous belief did not mitigate their duty to comply.

The application

14. For the avoidance of doubt, I should clarify at the outset that the sole question raised in the SIC and submitted to this court for determination, and correspondingly the ambit of this decision, was the validity of the purported service of the writ. Counsel for the plaintiffs, Mr Nazim Khan, thought that by the second prayer in the SIC the defendants were taking the position that Singapore was not the appropriate or convenient forum for the resolution of the dispute between the parties. Mr Khan therefore sought to show, in paragraphs 34-59 of the first affidavit of the plaintiffs' Chief Executive Officer, Julio D. Sy. Jr. filed on 3 December 2003, why Singapore was the appropriate forum.

15. I did not think that the second prayer admitted of the interpretation Mr Khan placed upon it, and nor did the defendants. In an affidavit affirmed by one of their solicitors, Mr Ian Teo and filed on 12 December 2003, the defendants confirmed that the question whether or not Singapore is the appropriate forum did not arise at all, although the defendants reserved their right to raise any issue pertaining thereto in a subsequent application. I would only add, in response to the explanation of counsel for the defendants, Mr Toh Kian Sing that the first and second prayers were two sides of the same coin, that it was preferable to delete the word "alternatively" from the second prayer. If the purported service was held to be invalid and set aside, it would stand to reason that the High Court did not by virtue of such service obtain jurisdiction over the defendants.

The common law and statutory regimes

16. To put it another way, the distinction is between the *existence* of jurisdiction (which depends on a concurrence of ground or nexus and service of writ) and the *exercise* of jurisdiction, over which the court in its inherent jurisdiction always exercises control – it may choose for various reasons not to exercise the jurisdiction which exists, including according to the doctrine of *forum non conveniens*: see Tan Y.L. [1993] *Singapore Journal of Legal Studies* 557 at 564.

17. The basis of jurisdiction in Singapore is statutory, as has been the case in England since 1873, but that does not preclude the application of the relevant common law cases and principles. Indeed, the orthodox conception of *in personam* jurisdiction established (or reinstated) by the 1993 amendments to section 16 of the Supreme Court of Judicature Act (Cap. 322) ("SCJA") is such as to resemble conceptions of *in personam* jurisdiction at common law. The existence or absence of jurisdiction as defined herein, which is a question of law, was the question on which the fate of this application turned.

18. Both parties proceeded on the basis, and it was not in doubt, that the governing statutory regimes were section 16 of the SCJA and Part XI, Division 2 of the Act. The starting point is section 16(1), which sets out the civil jurisdiction of the High Court in *in personam* actions. Section 16(1) directs that the *in personam* jurisdiction is well-founded regardless of whether the defendant is served in Singapore or outside Singapore, so long as he is served in the manner prescribed by or the circumstances authorised by the Rules of Court (section 16(1)(a)(i), (ii)); jurisdiction is also well-founded where the defendant submits to the jurisdiction of the High Court (section 16(1)(b)). It is also stipulated that the civil jurisdiction of the High Court extends to "such jurisdiction as is vested in it by any other written law" (section 16(2)). Section 16(2) has been understood to include any other statutory provisions conferring jurisdiction on the High Court which, in relation to foreign companies, would refer to Part XI, Division 2 of the Act.

19. There are two other provisions touching on the question of service on foreign companies which, for completeness, are dealt with briefly. The first is Order 62 rule 4 of the Rules of Court, which provides that service of a document on a body corporate may be effected by serving it on the chairman or president of the body, or the secretary, treasurer or other similar officer. Order 62 rule 4 does not apply because it can be employed only "in cases for which provision is not otherwise made by any written law," which in the present case takes the form of section 376. (An attempt to apply Order 62 rule 4 would also run into interpretational difficulties as to whether Schot came within the phrase "other similar officer," bearing in mind the *ejusdem generis* rule.) Second, there is Order 10 rule 2, which provides for service with leave of court on an agent or manager of the person served. This provision can be employed only if its special criteria are fulfilled: the agent or manager must have "control or management" (Order 10 rule 2(1(b)) and the action must relate to "any business or work" over which such agent or manager has control or management (Order 10 rule 2(1)(a)). It is uncertain if both these criteria are satisfied on the facts, nor was leave of court sought and obtained. Therefore, it was accepted that the application would proceed, and stand or fall, on the basis of section 16 of the SCJA and the provisions of Part XI, Division 2 of the Act.

20. It will be convenient to begin with the defendants' contention that the provisions in Part XI, Division 2 of the Act, including the provisions relating to service on an agent (section 376(b)) and cessation of agency (section 370), were not applicable because the defendants had ceased to be registered. This proposition, which was premised on section 365 of the Act, was as disingenuous as it was startling. Section 365 states:

> This Division applies to a foreign company which, before it establishes a place of business or commences to carry on business in Singapore, complies with section 368 and is registered under this Division.

Ergo, once the defendants were de-registered, they had no obligation to file the Form 81 or 82 notices in accordance with section 370, and service on Schot pursuant to section 376(b) was not good service.

21. Plainly, section 365 could not have the effect that was contended for. Leaving aside for the time being the meaning of the expressions "place of business" and "carry on business," it did not follow from the requirement of registration that when a company became de-registered, the entire Division and all the provisions therein ceased to be applicable. This was evident both as a matter of logic and upon consideration of the various provisions in context. Section 365, together with section 368, mandated the duty to register "before" a foreign company established a place of business or commenced business, but that did not mean that once that company ceased to be registered, all the provisions in Division 2 ceased to operate.

22. A simple illustration will suffice. For instance, in their written submissions, the defendants seem to suggest that in the present circumstances, where they have from a certain date ceased to be registered under the Act, service can be effected on them in accordance with section 376(c) (which would necessitate service out of the jurisdiction at the defendants' place of incorporation) but not section 376(b). Assuming that the defendants are right in their view of section 365, this cannot be so since there is nothing in section 365 that mandates giving preference to the mode of service envisaged in section 376(c) over that in section 376(b) – both must be equally inapplicable on the defendants' view. Going further, section 377 itself must also fall, and there is no need to consider whether the Form 81 or 82 notices must be filed. In fact, the obligation to lodge the Form 90 notice established by section 377(1) by which the company becomes de-registered would be rendered inapplicable on this reading of section 365. The defendants' argument based on what could only be called a most peculiar construction of Division 2, was thus rejected.

23. Of greater interest and pertinence was the defendants' other contention that section 376(b) was not applicable because they were no longer registered under the Act at the time of the purported service, in contradistinction to the plaintiffs' position that section 376(b) was applicable because the status of the agents as such and their authority to accept service of process on behalf of the company were independent of and survived the defendants' cessation of business.

24. Section 370(2) states that an agent registered under section 368(1)(e) "shall continue to be the agent of the company" until lodgement of the written notice referred to in section 370(3) and (4) informing of the cessation of agency. It may be noted that section 370(3) does not use the peremptory "shall" as opposed to "may," but that does not mean that lodgement of the notice is permissive only; rather, section 370(3) simply means that a foreign company that is desirous of terminating the agency of an agent "may" lodge the requisite notice. In fact, section 370(5) affirms the requirement in section 368(1)(e) for the company to have at any time two agents resident in Singapore authorised to accept on its behalf service of process. In this connection, section 370(4) spells out when an agent ceases to be such; admittedly, the manner in which this section was drafted is somewhat curious, but that does not affect the determination of the issue at hand. See Walter Woon, *Butterworths' Annotated Statutes of Singapore* (Vol. 1, 1997 Issue) at 907-8. It therefore appears, as the plaintiffs say, that a positive act is required to terminate the agent's authority, and as this was not done in the present case, service of the writ on Schot was good service. See also Walter Woon, "Jurisdiction Over Foreign Companies in Singapore Law," (1987) *Malayan Law Journal* xxviii, xxxiv.

25. It was, however, necessary to go further and consider the effect of the defendants' cessation of business on the authority of their agents; the mere assertion that the status of an agent was independent of the fact of cessation of business was not sufficient. In this regard, there was a

good argument that the presence on the register of the names of the defendants' agents, including Schot's, amounted to a holding out or representation that that agent had authority (or at least apparent authority) to accept service of process on behalf of the defendants. This was especially so in light of the provisions of section 370, which requires a positive act in order to terminate the agent's authority. Mr Toh was hard pressed to come up with a reply to this point when inquiry was made of him in the course of oral submissions, save to say that the onus was on the plaintiffs to show that they had relied on the representation, if it was such. I did not think that the element of reliance would prove to be a stumbling block – indeed, the plaintiffs by purporting to serve the writ on Schot had amply demonstrated reliance. Whether or not such reliance was reasonable, as it was also apparent on the face of the register that the defendants had ceased to be registered, was a separate question. But Mr Toh did make a most crucial point to which I shall return, which was that reliance *per se* cannot create a basis for jurisdiction where there is none, as where the company has been de-registered.

26. The plaintiffs, relying on statements in the commentaries by Woon (*supra*) and a line of English decisions which held that cessation of business was no impediment to service through section 376, took the following position. First, the fact that a company was no longer doing business in Singapore was insufficient to terminate the agent's authority to accept service on its behalf: *Sabatier* (*supra*); *Employers' Liability Assurance* (*supra*); *Rome v Punjab Bank* (*supra*). Second, and following from this, until the agent's name was removed from the register, service on him was good service even if he did not wish to continue as agent: *Employers' Liability Assurance*. Third, service on an agent was good service even though the foreign company had abandoned its place of business within the jurisdiction: *Sabatier*.

The English decisions

27. It is proposed to examine the decisions that have consistently held that service is not affected by cessation of business.

28. In *Employers' Liability Assurance Corporation v Sedgwick*, a registered Russian company which was in the process of liquidation ceased to carry on business within the jurisdiction, but did not remove the name of its agent, C, from the register. The majority of the House of Lords held that service of the writ on C was valid; the company by placing on record the name of a person authorised to accept service of process on its behalf had agreed to submit to the jurisdiction and such submission continued notwithstanding its cessation of business. This decision was followed in *Sabatier*, where it was held in *dicta* (per Clauson J) that even where there was cessation of business and abandonment of the place of business, retention on the register of the name of an agent made the company amenable to service. The last and most extreme of this line of cases is *Rome v Punjab Bank*, where the same result was arrived at despite cessation of the company's business, closure of its place of business, closure of the registrar's file on the company upon request made for cancellation of registration and the withdrawal from the jurisdiction of the company's agents, B and G, whose names, unfortunately, continued to remain on file.

29. The result in *Punjab Bank* is somewhat less drastic, commented Mr Toh in an article aptly titled "Obtaining Jurisdiction Over Foreign Companies," (1995) 7 *Singapore Academy of Law Journal* 103, 119, when it is remembered that the court may exercise its discretion to stay the action on the ground of *forum non conveniens*. This was alluded to previously and was a major, but by no means decisive factor in considering the question herein, and on which more will be said in due course. The result in the English authorities is explicable also, opined Mr Toh, from the policy perspective of preventing a foreign company from uprooting itself with jurisdictional impunity (apart from being pursued to its place of incorporation), leaving behind a trail of local creditors. However, argued Mr

Toh, this rationale only covered local creditors and did not extend to foreign creditors such as the plaintiffs, who were a Filipino company seeking to take advantage of local provisions to obtain jurisdiction in the Singapore courts over another foreign company, the defendants. I was not convinced that the nationality of a creditor or plaintiff made any difference, if the true object behind the policy was to prevent foreign companies from uprooting themselves with impunity. There was no reason why different rules should apply depending on whether or not the plaintiffs were a local company, if the jurisdictional question could be answered in the affirmative.

30. Nonetheless, the consequent hardship to a registered foreign company that has long ceased to maintain a place of business or carry on business in the forum if it were to be sued on a cause of action which had nothing to do with its local commercial operations (*ibid*), is a real concern. This perhaps explains the decision of the Australian High Court in *Gillett v National Benefit Life and Property Assurance Company Limited* (1918) 24 CLR 374, where on facts similar to those in *Sabatier* and *Punjab Bank* it was held that a company that had ceased to carry on business was not present or resident within the jurisdiction for the purposes of service.

31. The preponderance of authorities, therefore, suggests that cessation of business without the concomitant removal from the register of the agents' names is no immunity to jurisdiction. These authorities were certainly persuasive, but not binding. Before me, Mr Toh sought to distinguish them on the basis that the governing provisions, Part XXIII of the English Companies Act 1985 ("the English Act"), were quite different from the provisions of Division 2 of the Act. To begin with, there was no equivalent in the Act of section 695 of the English Act (which requires a company incorporated outside Great Britain, when it establishes a place of business in Great Britain, to deliver to the registrar of companies within one month certain documents for registration); the closest provision was section 365 which was not in the same terms. Then, while the Act has a clear de-registration provision in section 377, the English Act only has section 696(4). More importantly, there was no provision parallel or analogous to section 695, in particular section 695(1) and the proviso contained in section 695(2). The only provision that bore any resemblance to section 695 was section 376 of the Act, but the proviso in section 695(2) was not applicable. Therefore, the English position was very different: the applicability of the relevant provisions was not confined to the situation where the company was still registered; a company that had ceased to carry on business could still be caught, so long as it had a place of business within the jurisdiction.

32. It would be instructive to set out in full the text of section 695(1) and (2) of the English Act. It reads as follows:

> 695(1) Any process or notice required to be served on an overseas company is sufficiently served if addressed to any person whose name has been delivered to the registrar under preceding sections in this Part and left at or sent by post to the address which has been so delivered.
>
> (2) However – (a) where such a company makes default in delivering to the registrar the name and address of a person resident in Great Britain who is authorised to accept on behalf of the company service of process or notices, or (b) if at any time all the persons whose names and addresses have been so delivered are dead or have ceased so to reside, or refuse to accept service on the company's behalf, or for any reason cannot be served, a document may be served on the company by leaving it at, or sending it by post to, any place of business established by the company in Great Britain.
>
> Before the Court of Appeal in *Punjab Bank*, it was submitted on behalf of the appellant bank that section 695(1) must be construed in the context of sections 691 to 696; if this was done then on a proper construction a nomination made in a return pursuant to section 691 could not continue

to have effect after the company had ceased to have an established place of business in Great Britain, at least where first, it had notified the registrar of that fact, second, that fact had been recorded on the register and third, the registrar had marked the company's file as closed. Further, the construction contended for by the respondents (which could be summarised as "once registered, always registered") was contrary to other well-established principles, such as that in the field of private international law that the *in personam* jurisdiction of the English courts over foreigners was based on the fact of residence or presence. To hold that jurisdiction should continue after cessation of residence or presence, as occurs when a foreign company ceases to have an established place of business, was in clear conflict with such principle.

33. The Court of Appeal acknowledged that there was considerable force to these arguments, but affirmed the decision of the judge below and dismissed the bank's appeal. Sir John May, delivering the judgment of the court, agreed that the wording of section 695(1) was clear and explicit and further, that although section 695(2) was not worded as a proviso, it was clearly tantamount to one. That being the case, on well-established principles, section 695(2) was not capable of qualifying the clear words of section 695(1) – which stood on its own as an unequivocal statutory declaration that service in the manner described (which was in fact performed on the facts of *Punjab Bank*) was sufficient service.

34. Hence, an examination of the reasoning of the Court of Appeal in *Punjab Bank* revealed that, far from supporting the plaintiffs' submission that the English authorities were in their favour, the conclusion to be drawn from them was that the result in all the cases, with particular reference to *Punjab Bank*, was based squarely on the wording of section 695(1) of the English Act. It bears mentioning that in that case Parker LJ, like Sir John May, felt constrained by the wording of that section to arrive at the same result, but not without pointing out that the issue of construction would result, whichever way it was decided, in an absurdity. The learned judge also expressed the hope that the unsatisfactory situation would soon receive legislative attention leading to an amendment restricting resort to section 695(1). I therefore accepted that *Punjab Bank* and the other English authorities were of limited assistance as having been decided on a different basis, and accordingly placed little reliance upon them.

Submission to jurisdiction

35. Expanding on the distinction between the existence as opposed to the exercise of jurisdiction, it has often been remarked that the term "jurisdiction" is ambiguous. This ambiguity is apparent from an oft-quoted definition proffered by Diplock J, as he then was, in *Garthwaite v Garthwaite* [1964] P 356, as follows:

> In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its "jurisdiction" (in the strict sense), or as to the circumstances in which it will grant a particular kind of relief which it has "jurisdiction" (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances.

It could be said that this definition really went to the difference between jurisdiction and power but, as noted by Tan (*supra*, at 569), "jurisdiction" proper means a concern with matters that go to jurisdiction, the lack of which vitiates it, whereas power connotes matters which affect the exercise

of jurisdiction.

36. It also axiomatic that powers may be exceeded and that such excess may be cured, unlike a want of jurisdiction for which there is no cure; parties cannot, for instance, by consent create jurisdiction where no jurisdiction exists. This is a point of some significance and bears repeating, when the defendants' argument that there was no jurisdictional nexus once they ceased to maintain a place of business or to carry on business and to be registered, is considered shortly.

37. But the meaning of the term "jurisdiction" arises, additionally, in another sense, namely whether or not the presence on the register of the names of the defendants' duly appointed agents after the defendants had de-registered themselves amounted to a submission to jurisdiction. In *Employers' Liability Assurance v Sedgwick*, Lords Sumner and Parmoor took the view that the act of registration amounted to a submission to the territorial jurisdiction of the English courts; this view was subsequently followed in *Sabatier*. It is not necessary for this court to decide the point, as it was not raised by either the defendants or the plaintiffs in both their written and oral submissions. It will be sufficient to say that an argument to this effect faces formidable hurdles to success: registration on pain of a fine (failure to register attracts a maximum fine of $1,000 under section 386) hardly connotes any notion of voluntariness which must underlie a submission to jurisdiction; it may also be noted that voluntary submission alone as a ground of jurisdiction was rejected by Michael Hwang JC in *Indo Commercial Society (Pte) Ltd v Ebrahim Yusef Abdul Rahman Rahmani* [1992] 2 SLR 1041 (unless one of the grounds in section 16 was first satisfied). In any case, any such submission would probably be implied, a notion which has been largely rejected in English and local cases (Toh, *supra*, at 109). Last but not least, if the ground of submission in section 16 refers to the *in personam* jurisdiction based on presence, submission must be the conferring of presence which was otherwise lacking. Such conferment could not possibly be achieved on the facts when the defendants had ceased to maintain a corporate presence and/or to be registered.

Jurisdictional nexus under Part XI, Division 2 and section 16

38. In comparison, the authorities are largely in agreement that registration as a statutory parallel to or substitute for the common law criterion of corporate presence within jurisdiction, coupled with service of a writ on a foreign company that is so registered, is sufficient to found jurisdiction over such company. It has never been doubted that the cases were to be read together with the common law principle that the foundation of *in personam* jurisdiction is service of a writ on a defendant that is present within the jurisdiction: see, *eg*, the commentaries by Dicey and Morris, *The Conflict of Laws* (13th ed., Vol 1) at 298 and Sykes and Pryles, *Australian Private International Law, Conflict of Laws* (2nd ed., 1987) at 27-8. There was thus no need for Part XI, Division 2 of the Act to expressly state that service in the forum on a duly registered foreign company confers jurisdiction; it was clear from the terms of section 16 that the provisions of Part XI, Division 2 created a source of jurisdiction. But this merely reiterates the point made earlier, that the conceptual premise of the *in personam* jurisdiction encapsulated in section 16 mirrors that at common law.

39. That being the case, it stands to reason that the concept of corporate presence at the time of service, in the sense of the corporate defendant being present in Singapore through its conduct of business for a definite period at a fairly fixed or permanent place, is an implied requirement of section 16(1)(a)(i). This proposition is supported by the legislative intent behind the 1993 amendments to section 16, which was to re-introduce a jurisdictional framework similar to that which exists at common law and based, in part, on service on a defendant within jurisdiction: Toh, *supra*, at 122. In this respect, reference is made to the Parliamentary debates on the amendments, during which the Minister for Law in explaining the effect of the amendments stated:

> Prior to 1964, the general civil jurisdiction of the High Court in actions *in personam* was unlimited and founded on service of a writ on a defendant either in Singapore or abroad … The amendment of section 16 will place the High Court in exactly the position as it was before 1964 and in the position of the High Court of Judicature in England today in relation to countries outside the European Economic Community.

See Parliamentary Debates Singapore, Official Report, Vol. 61, No. 1 at col. 95.

40. It will not be necessary to analyse the meaning of the term "corporate presence," which has been extensively considered (albeit under different names: "place of business within jurisdiction," "carrying on business within jurisdiction," "resident within jurisdiction") in various judicial pronouncements. The only points to be emphasised in this regard are that it is the company's territorial connection with the forum that matters, and the relevant time for assessing corporate presence is the time of service of process, so that if by that time the company has ceased to carry on business, it cannot be served within jurisdiction.

41. On the facts, it was clear that at the time of the purported service, the defendants had already de-registered themselves and had ceased to either maintain a place of business or to carry on any business – Schot and de Ruijter remained on the RCB's register as agents, but there was no evidence to show that the defendants were conducting any business through them. Nor did the plaintiffs seek to establish otherwise. The plaintiffs' point that de Ruijter had on 9 July 2002 filed a statutory declaration verifying the balance sheet of the defendants, and the defendants' response that it was Schot and not de Ruijter on whom service was purportedly effected, were really of no consequence; it was not argued that the act of filing was anything but administrative in nature. Therefore, once the defendants ceased to be registered because they had ceased to trade in Singapore, the nexus for obtaining jurisdiction over them in Singapore also ceased to exist. There was no concurrence of ground or nexus and service of writ, and such purported service was accordingly set aside.

Concluding remarks

42. I conclude by observing that the view I have taken is consonant with common sense: there is an argument for saying that where the name of the company has been removed from the register, even if its agents' names have not, it should not be left susceptible to service where the very effect of registration has been reversed. This is contrary to the view taken by some commentators far more learned than I, to the effect that any resulting injustice can be remedied by a stay of the proceedings under the inherent jurisdiction of the court. See, *eg*, Woon, "Jurisdiction Over Foreign Companies in Singapore Law," (*supra*) at xxxiii where the distinguished author took the view that as a matter of policy, it is probably better to have a wide rather than a narrow jurisdiction – if Singapore turns out to be an inconvenient forum, that can be dealt with by staying the action; this was to be preferred over precluding the courts from dealing with the matter at all. I would merely say that the courts cannot of their own accord create jurisdiction where there is none: in the present case there was no nexus or ground *in law* to establish jurisdiction, and the purported service of the writ could not cure that defect.

43. I will hear the parties on the question of costs.