Consistel Pte Ltd and Another v Farooq Nasir and Another
[2009] SGHC 82

Case Number : Suit 729/2008, RA 11/2009

Decision Date : 07 April 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : N Sreenivasan and Collin Choo (Straits Law Practice LLC) for the plaintiffs; Liew Yik Wee and Wong Baochen (WongPartnership LLC) for the defendants

Parties : Consistel Pte Ltd; Consistel Pakistan (Pvt) Ltd — Farooq Nasir; Tania Jehangir

Civil Procedure – Service – Defendants out of jurisdiction when writ issued – Defendants in contact with friend in Singapore – Whether order for substituted service valid

7 April 2009

Andrew Ang J:

1 The principal issue in this case is whether substituted service had been properly ordered by the Senior Assistant Registrar ("SAR") on 23 October 2008 against the respondents (the defendants below who were resident outside the jurisdiction when the writ was issued) leave for service out of jurisdiction not having been obtained. In Summons No 5067 of 2008 ("Sum 5067/2008"), the respondents applied for the order for substituted service upon them to be set aside. This was granted by the Assistant Registrar ("AR") on 14 January 2009. Before me, the appellants (the plaintiffs below) sought a reversal of the AR's decision.

Background facts

2 The following facts were, in the main, undisputed before me. Where they were disputed, it is so indicated.

3 The first appellant, Consistel Pte Ltd, is a company incorporated in Singapore and provides services as system integrators for wireless and wired lines projects. It is also the parent company of a group of companies incorporated around the region, including the second appellant, Consistel Pakistan (Pvt) Ltd.

4 The first respondent, Nasir Farooq, was an employee of the first appellant from July 2000 until he resigned on or about 10 February 2007. He worked both in Singapore and around the region and, just prior to his resignation, served as concurrent country manager of Pakistan and Bangladesh. He became a Singapore citizen in November 2004. The address on his National Registration Identity Card cited an address in the United Arab Emirates ("UAE") and the first respondent claimed that he had been residing in the UAE since 2004. The second respondent, Tania Jehangir, is the wife of the first respondent. At all material times, she was (and still is) a Pakistani citizen but had obtained Singapore permanent resident status.

5 On 9 October 2008, the appellants filed a Writ of summons ("the Writ") against the respondents alleging, *inter alia*, breach of the first respondent's employment contract, breach of various declarations made by the first respondent to the appellants, conspiracy to defraud and misuse of confidential information. The appellants sought damages for various sums as well as an injunction to

prevent the respondents from revealing confidential information. The gravamen of the appellants' allegations was that the first respondent caused the appellants to enter into contracts with companies which the respondents themselves beneficially owned or had an indirect interest in. The respondents had thereby profited from the first respondent's position with the first appellant. It was also claimed that the first respondent had unlawfully made use of confidential information provided to him by the appellants thereby causing the appellants to suffer harm. (Although I have briefly described the appellants' claims, the gravity of the appellants' allegations has No bearing on the outcome of the appeal.)

6 On 10 October 2008 at 7.30pm, a clerk working for Straits Law Practice LLC ("Straits Law"), counsel for the appellants, visited Block 462, Crawford Lane, #04-25, Singapore 190462 ("the Flat") to serve the Writ on the respondents. According to the appellants' director, one Masoud Bassiri ("Bassiri"), the first respondent had informed Bassiri that the first respondent would stay at the Flat whenever the first respondent was in Singapore and that the Flat was the first respondent's forwarding address in Singapore for the receipt of any written correspondence. These claims were disputed by the respondents. In any case, on this first attempt the clerk did not receive any response when he knocked on the door.

7 The next day, the clerk visited the Flat again at 1.40pm. This time, one Sridhar Potluri ("Potluri") answered the door and informed the clerk from Straits Law that the respondents did not reside there. Thereafter, the clerk left the contact particulars of Straits Law with Potluri. The respondents testified that Potluri then called them and informed them of the above visit and passed the contact details of Straits Law to them.

8 On 13 October 2008, the first respondent called Straits Law to enquire about the attempted service. Straits Law then informed the first respondent that the appellants had initiated legal proceedings against him and his wife in the Singapore courts. As the respondents had not been served, Straits Law would have to take the appellants' instructions as to whether they would be willing to reveal any details of the claim. Straits Law then requested for, and obtained, the respondents' fax number.

9 The following day, Straits Law inquired (via fax) whether the respondents would be in Singapore to accept personal service of the Writ or appoint Singapore solicitors to accept service on their behalf. The respondents were warned that if Straits Law did not hear from them by 17 October 2008, Straits Law would apply to effect service of the Writ "through the Singapore and Dubai court process". The respondents ignored this fax.

10 As stated in [1] above, the appellants applied, *ex parte*, for service of the Writ by substituted service on 23 October 2008. The SAR granted the application and ordered service to be effected in the following manner:

> (1) By posting the Writ of Summons together with this Order of Court For Substituted Service to be made hereon on the front door of the Defendants' last known address at Block 462 Crawford Lane #04-25 Singapore 190462;
>
> (2) by posting similar copies of the Writ of Summons and this Order of Court For Substituted Service on the Notice Board of this Honourable Court, Singapore; and
>
> (3) by sending a copy of the Writ of Summons and this Order of Court For Substituted Service via facsimile to the 1st defendant at fax number: 97165223745;

and such service on the Defendants by way of posting and facsimile be deemed good and sufficient service of the Writ of Summons on the Defendants.

11 The substituted service was carried out, as ordered above, on 29 October 2008. Pursuant to order (3), Straits Law attempted to fax the Writ to the respondents at the fax number they had provided. However, the respondents only received nine out of 23 pages successfully. On 30 October 2008, the respondents called Straits Law and requested for the Writ to be faxed again. Only then did the respondents receive the complete Writ. The respondents then appointed Singapore solicitors who thereafter entered appearance on their behalf on 4 November 2008.

12 On 18 November 2008, the respondents filed Sum 5067/2008, applying for the following orders:

1. That the service on the Defendants of the writ filed in this action by the Plaintiffs be set aside;

2. That the order for substituted service made on 23 October 2008 (including the order as to costs of the application) be set aside and/or discharged;

3. A declaration that the said writ had not been duly served on the Defendants, by reason of non-compliance with the Rules of Court;

4. That leave be granted to the Defendants to withdraw their appearance in this action, if necessary;

5. That, pending final disposal of this application (including any appeals therefrom), all proceedings be stayed and No further action/step need be taken by the Defendants in these proceedings;

6. That the time for service of this application be abridged, if necessary;

7. That the Plaintiffs pay the Defendants' costs of this application and the action; and

8. Such further and other relief be granted as this Honourable Court deems fit.

13 On 14 January 2009, the AR made an order in terms of prayers (1) and (2), as stated above, and reasoned as follows:

> In my view, substituted service in the manner sought should not have been granted.
>
> The 1st defendant may be a citizen but neither he nor the 2nd defendant was ordinarily resident in Singapore, and the plaintiffs knew this. The place of residence which was served did not belong to the defendants or even to the defendants' family members. It belonged to the defendant's friend. As it happened, the defendant's friend did get in touch with the 1st defendant, and the 1st defendant then contacted the plaintiff's solicitors. However, it is not in contention that when the 1st defendant contacted the plaintiff's solicitors and left him his fax number, that did not constitute agreement to accept service by fax. In my view these fortuitous circumstances are not sufficient to constitute a basis for effective service. Where defendants are ordinarily resident overseas, the more stringent requirements of Order 11 must be complied with in order for jurisdiction to be properly established. Even though service was effective in the present case, it was not legally sound. Until Legislature and/or the Rules Committee decide to fundamentally alter the current provisions relating to service, their structure, purpose and intent must be abided by. As such, I am of the opinion that [it] must be set aside.

The appellants appealed against the above decision before me.

Decision of the court

14 While rules regarding service are procedural in nature, they merit serious consideration nonetheless. After careful deliberation, I decided in favour of the respondents and dismissed the appeal. I now set out the reasons for my decision.

Preliminary objections

15 I shall deal with the appellants' preliminary objections first. Counsel for the appellants, Mr Sreenivasan, submitted that under O 10 r 1(3) of the Rules of Court (Cap 322, 2006 Rev Ed) ("ROC"), even if a writ was not duly served, the writ should be deemed to have been duly served if the defendant entered an appearance. This principle, however, is subject to O 12 r 6 of the ROC which states as follows:

> **Appearance not to constitute a waiver (O. 12, r. 6)**
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> 6. The appearance by a defendant in an action shall not be treated as a waiver by him of any irregularity in the writ or service thereof or in any order giving leave to serve the writ out of jurisdiction or extending the validity of the writ for the purpose of service.

Thus, the entering of an appearance does not constitute a waiver of any irregularity in the service of a writ.

16 However, Mr Sreenivasan contended that the respondents, by filing Sum 5067/2008, were not challenging an irregularity in *the service of the Writ*. After all, service on 29 October 2008 was carried out in accordance with the order made by the SAR on 23 October 2008. Under O 62 r 5 of the ROC, service in accordance with an order for substituted service is regular service. The respondents were, in fact, challenging an irregularity in *an order for substituted service*. This, according to Mr Sreenivasan, is not one of the grounds provided for under O 12 r 6. Thus, by the respondents' act of entering appearance on 4 November 2008, "the writ [is] deemed to have been duly served on [that defendant] and to have been so served on the date on which he entered the appearance": see O 10 r 1(3). The respondents could not subsequently challenge the service of the writ.

17 At the same time, Mr Sreenivasan also contended that O 12 r 7 of the ROC makes it clear that a defendant can only dispute "the jurisdiction of the Court" by reason of any such irregularity as mentioned in O 12 r 6. Rule 7 states as follows:

> **Dispute as to jurisdiction, etc (O.12, r.7)**
>
> 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 …

In Sum 5067/2008, the respondents' main grievance was that the facts did not warrant the SAR granting an order for substituted service. This was a dispute with respect to the *exercise* of the SAR's discretion, not the *existence* of his jurisdiction to grant such an order. As such, the appeal should not have been allowed by the AR on 14 January 2009.

18 These submissions were adroit but they did not persuade me. I will deal with the latter submission (in [17] above) first. It was clear to me that Mr Sreenivasan had misunderstood the import of O 12 r 7. The reference to "jurisdiction of the Court" in O 12 r 7 means the jurisdiction of the High Court to hear the substantive dispute, not the High Court's jurisdiction to make an order for substituted service. Under s 16 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"), jurisdiction of the High Court is founded, in the main, through service of the writ (see [23] below). Hence, any dispute as to service of the writ, whether it be with regard to the order for service or the manner in which service was carried out, would be a dispute as to the jurisdiction of the High Court to hear the substantive case. Accordingly, when the respondents argued in Sum 5067/2008 that the SAR should not have ordered substituted service in jurisdiction, they were in fact disputing the jurisdiction of this Court to hear the present case.

19 Furthermore, Mr Sreenivasan's understanding of the phrase "irregularity in the … service thereof" in O 12 r 6 was too simplistic. In my view, that phrase did not just refer to irregularities in the manner in which service of the writ was carried out. It also included situations where substituted service was wrongly ordered. It would be incongruous and totally illogical to allow a defendant to challenge a wrongly served writ but not an order for substituted service that was wrongly made. In fact, to my mind, the latter mistake was of a more serious nature since the very basis for which substituted service was ordered was being contested and not merely the manner of carrying it out. I was fortified in my view by O 12 r 7 which, as explained earlier, required any dispute to be about the jurisdiction of the High Court to hear the substantive dispute. A challenge against the making of an order for substituted service is, at least, as much a dispute as to jurisdiction as a challenge against the manner of carrying out that order. Therefore, in order for O 12 r 6 to be conceptually coherent internally and with O 12 r 7, the phrase "irregularity in the … service thereof" must be read to include irregularity with regard to the making of an order for substituted service. Hence, the respondents were well within their rights to challenge service of the writ.

The relationship between substituted service and service out of jurisdiction

20 I now turn to the crux of the appeal. On behalf of the appellants, it was submitted that when a defendant was not in Singapore at the time of the issuance of the writ (as was the case here), service out of jurisdiction was not the only recourse open to the plaintiff. Substituted service within Singapore could also be applied for to effect proper service. The test for whether substituted service should be ordered in this scenario was whether such service would bring the writ to the attention of the defendant. If so, such substituted service within jurisdiction was justified.

21 The respondents countered that when a defendant was not in Singapore at the time of the issuance of the writ, it was incumbent upon the plaintiff to seek leave for personal service out of jurisdiction. Only when personal service out of jurisdiction was attempted but failed could the court order substituted service within jurisdiction.

22 The issue to be resolved before me then was this: whether the court had first to order personal service out of jurisdiction before allowing substituted service within jurisdiction, in a situation where the defendant was outside the jurisdiction before the writ was issued and attempts at personal service within jurisdiction had failed. In short, did the ROC stipulate a hierarchy of service processes? Or did the court have a discretion to decide which service process to use based on its perceived effectiveness? To answer this issue, I shall briefly examine the role that service of writs plays in our civil procedure before returning to the parties' submissions.

23 The basis of the Singapore High Court's general jurisdiction to adjudicate a civil matter is encapsulated in s 16 of the SCJA, reproduced as follows:

> **Civil jurisdiction – general**
>
> 16. — (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 –
>
> (i) in Singapore in the manner prescribed by Rules of Court; or
>
> (ii) outside Singapore in the circumstances authorised by and in the manner prescribed by the Rules of Court; or
>
> (b) the defendant submits to the jurisdiction of the High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as is vested in it by any other written law.

Thus, leaving sub-s (2) aside, apart from rare cases where the defendant voluntarily submits to the High Court's jurisdiction, the High Court only has jurisdiction to hear a civil claim if the defendant is served with a writ in the manner prescribed by law. In this way, service of a writ becomes critical.

24 The ROC stipulates that a writ must, generally, be served personally. Order 10 r 1(1) states as follows:

> 1. — (1) Subject to the provisions of any written law and these Rules, a writ must be served personally on each defendant.

This is so whether jurisdiction of the High Court is to be established by service of a writ within Singapore under s 16(1)(a)(i) or outside Singapore under s 16(1)(a)(ii) of the SCJA. The reason for the strictness of this general standard is not far to find. If a defendant fails to enter an appearance in answer to a writ filed against him, O 13 of the ROC allows the plaintiff to enter either final or interlocutory judgment against the defendant, depending on the type of claim. Such a consequence for failure to enter an appearance would be harsh where the respondent had No knowledge of the writ at all. Hence, in order to mitigate the severity of O 13 and to balance the scales of justice, the defendant has to be informed of the proceedings against him and, thus, be given an adequate opportunity to consider whether or not to defend himself. This can only be provided for through

personal service of the writ. Any lower standard will leave open the possibility that default judgment may be entered against a defendant who is unaware of the writ filed against him.

25 However, this general rule, while strict, is not absolute. The ROC also provides for many specific situations where the general rule of personal service need not be adhered to. In this regard, I quote Professor Jeffrey Pinsler in his book, *Civil Justice in Singapore* (Butterworths Asia, 2000 Ed) ("Pinsler"), as follows (at p 175):

> Although personal service is the pre-eminent method by which persons concerned, or about to be concerned, in litigation are notified of their respective intentions, it would be inconvenient, impractical or unnecessary to require its application to all circumstances. The rationale for allowing exceptions to rule of personal service is that a 'lesser' form of service may be entirely appropriate in the circumstances, in which case it would not be fair to require the serving party to attend to the more painstaking conditions of the former. ... If personal service is not possible because the defendant cannot be found, it would be unjust to insist on the application of the general rule. Indeed, substituted service by the appropriate mode may be available in these circumstances.

26 Substituted service is provided for in O 62 r 5 of the ROC. The relevant provision is reproduced as follows:

> **Substituted service (O. 62, r.5)**
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> 5. — (1) 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 136 for substituted service of that document.
>
> (2) An application for an order for substituted service must be made by summons supported by an affidavit in Form 137 stating the facts on which the application is founded.
>
> (3) Substituted service of a document, in relation to which an order is made under this Rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.

Hence, if "it is impracticable for any reason to serve [a writ] personally on that person", a plaintiff may apply for substituted service to be effected instead. Such substituted service may, amongst others, take the form of service by posting on the front door of the defendant's home, advertisement, and/or registered letter.

27 That substituted service was intended to be a very limited exception to the general rule of personal service is further emphasised by the way the device of substituted service was employed historically. While the phrase "impracticable for any reason" suggested that the court had a wide discretion to decide when substituted service was appropriate, an order for substituted service would traditionally only be made if the writ, but for the circumstances giving rise to impracticability, could have been served personally. If the writ could not have been served personally to begin with, substituted service would not be ordered. This was the case where the defendant was out of the jurisdiction when the writ was issued. In *Fry v Moore* (1889) 23 QBD 395, Lindley LJ held that (at 397 – 398):

> [T]there are certain principles which govern the rules, and in *Field v Bennett* [(1886) 56 LJ (QB)

> 89] the Queen's Bench Division laid down the principle, that, if a writ could not be served personally at the time when it is issued, there cannot be substituted service.

Such a restriction on the use of substituted service indicated that substituted service was intended to be an exception, and not an alternative, to the rule of personal service.

28 The regime of service out of jurisdiction, as provided for in Singapore under O 11 of the ROC, was eventually introduced to deal with the situation where the defendant had left the jurisdiction before the writ was issued. Even so, service out of jurisdiction was not intended to derogate from the general requirement for personal service. This is clear from the fact that O 11 does not stipulate *how* service out of jurisdiction is to be effected but *when* service out of jurisdiction may be ordered. Pinsler wrote as follows (at p 180):

> Order 11 sets out, as it did prior to the 1991 amendments, the categories of circumstances in which the court will assume jurisdiction over a defendant served abroad. The circumstances are prescribed in paragraphs (a) to (s) of Order 11, rule 1 [ROC]. Rule 2 governs the manner of application, the affidavit requirements and the basis on which the court is to consider granting leave.

Hence, O 11 of the ROC was meant to supplement s 16(1)(a)(ii) of the SCJA and not to detract from the primary requirement of personal service. Personal service should, generally, still be applied to cases where the defendant was not in Singapore.

29 What O 11 of the ROC is an exception to is the rule that defendants should generally be served within jurisdiction before a court has jurisdiction to hear the case. At common law, jurisdiction apropos an action *in personam* was founded upon the physical presence of a defendant in that jurisdiction. In Cheshire, North & Fawcett's *Private International Law* (Oxford University Press, 14th Ed, 2008), the learned authors stated the common law position as follows (at p 354):

> Jurisdiction accordingly depends on the presence of the defendant in England. Once the court has asserted its power by service of process on the defendant it is not rendered incompetent by his subsequent departure from the country. The corollary to this is that if a defendant escapes service, by reason of his absence abroad, No proceedings can be brought against him.

However, s 16(1)(a)(ii) of the SCJA (see [23] above) provides that the Singapore High Court shall have jurisdiction if the writ is served on the defendant outside Singapore in the circumstances authorised by and in the manner prescribed by the ROC. This was intended to be the exception to and in mitigation of the requirement for service in Singapore in s 16(1)(a)(i). This is evident from the fact that O 11 of the ROC demands that leave of court be required before a plaintiff may serve a writ out of jurisdiction. Furthermore, there are stringent requirements to be fulfilled before leave will be granted. Satisfaction of such requirements is not necessary for writs served in Singapore. Thus, while O 11 was not intended to be an exception to the general rule of personal service, it is an exception to the general rule of service in jurisdiction.

30 Applying the principles above, I agreed with the respondents that where a defendant had left Singapore before a writ was issued against him, the plaintiff had to seek leave to serve the writ out of jurisdiction before resorting to substituted service. The reasons for my view were as follows.

31 First, O 62 r 5 (see [26] above) clearly states that substituted service is to be employed only when personal service is impracticable. It cannot be said, absent other considerations, that personal service is impracticable just because the defendant is out of jurisdiction. Order 62 r 5 establishes a

hierarchy of service which must be adhered to. Notably, O 62 r 5 does not apply only to writs to be served in Singapore but also to writs to be served outside.

32 That service out of jurisdiction should first be resorted to when the defendant was out of the jurisdiction when the writ was issued was also the view of the English Court of Appeal in *Porter v Freudenberg* [1915] 1 KB 857 which approved of Collins LJ's statement in *Jay v Budd* [1898] 1 QB 12 as follows (at 19):

> [I]f the writ had not been issued until after the defendant had left this country, the only way in which the defendant could have been properly served would have been by proceeding under the practice as to writs for service out of the jurisdiction.

This was reaffirmed in *Myerson v Martin* [1979] 1 WLR 1390 where Lord Denning MR stated (at 1395):

> [I]f the defendant was in fact outside the jurisdiction when the writ was issued – and is likely to remain outside – the proper course for the plaintiff is to apply for leave to serve out of the jurisdiction: in which case he can only get it if the case comes within R.S.C., Ord. 11.

The only exception to the rule was if, by leaving the country before the writ was issued, a defendant was trying to evade service: see *Re Urquhart* (1890) 24 QBD 723. However, where such evasion of service cannot be demonstrated, substituted service will not be ordered.

33 Furthermore, the same conclusion is reached when the doctrinal underpinnings of the concept of service are examined. As stated in [24] above, personal service is generally required because it would be unfair to order judgment in default of appearance in cases where the defendant did not even know that there were legal proceedings brought against him. The fact that the defendant was not in Singapore when the Writ was issued does not change this. The balance of justice is not tipped in favour of substituted service just because a defendant is overseas. Often, there is a perfectly reasonable explanation for the defendant being overseas. For instance, the defendant may simply have emigrated or may even have lived overseas all along to begin with. In such cases, the underlying reason for requiring personal service remains valid.

34 In addition, as explained in [29] above, civil jurisdiction *in personam* was founded at common law on the physical presence of the defendant within jurisdiction. In the interests of international comity, the court should be slow to find jurisdiction in cases where the defendant was overseas. In *Vitkovice Horni A Hutni Tezirstvo v Korner* [1951] AC 869, 882, Lord Radcliffe said that the ordinary principles of international comity were invaded when courts permitted service out of jurisdiction and that the courts should therefore approach with circumspection any application for leave to serve out of the jurisdiction. In the same vein, Scott LJ in *George Monro Ltd v American Cyanamid and Chemical Corporation* [1944] KB 432, 437 stated:

> Service out of the jurisdiction at the instance of our courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected. I have known many continental lawyers of different nations in the past criticize very strongly our law about service out of the jurisdiction. As a matter of international comity it seems to me important to make sure that No such service shall be allowed unless it is clearly within both the letter and the spirit of Or. XI.

Similarly, when a Singapore court could permit service out of jurisdiction is governed by the stringent requirements of O 11. In an application under O 11, the burden is on the plaintiff to show that Singapore is the *forum conveniens*. As stated in *Singapore Civil Procedure 2007* (Sweet & Maxwell

Asia, 2007 Ed) ("the White Book") at para 11/1/9, p 82):

> Having to determine the appropriate court, or "*forum conveniens*" is yet another matter the court in question must consider in deciding on whether it should exercise its discretion under O. 11. The test is whether the interests of justice are best served by proceedings here in Singapore or abroad.

That being so, the plaintiff should not be allowed to bypass the requirements of O 11 simply by applying for substituted service within jurisdiction. Doing so may mean that that Singapore court would be exercising jurisdiction in a situation where it would not be in the interests of justice to do so.

35 Of course, the principle stated in [30] is a general rule to which there are exceptions. One clear exception mentioned earlier is where the defendant leaves the country in anticipation that legal proceedings will be initiated against him. In such a situation, substituted service would be warranted. Another exception is when a defendant is constantly moving from country to country such that it is impossible to serve the writ on him personally. In such a case, there is No need to apply for personal service out of jurisdiction since any attempt at personal service clearly will be futile. Substituted service will suffice. There may be other exceptions but it would be unwise to speculate. Even so, these exceptions do not detract from the force of the general principle that applying for personal service out of jurisdiction should be the first port of call for plaintiffs who have to serve a writ on defendants who are outside Singapore.

36 Before me, Mr Sreenivasan argued that in a case such as the present where personal service within jurisdiction had failed, substituted service within jurisdiction, as opposed to service out of jurisdiction, should be ordered when it would be effective in bringing the writ to the attention of the defendant. In the present case, the modes of substituted service ordered by the SAR on 23 October 2008 (see [10] above) did bring the Writ to the knowledge and attention of the respondents as evidenced by the fact that the respondents requested for, and received, the complete Writ on 30 October 2008. As such, he submitted that the execution of the order by the SAR constituted proper service.

37 Mr Sreenivasan relied upon three sources for the above proposition. First, on behalf of the appellants, he cited the White Book as follows:

> Service by posting on the front door of the last known residential address of the person to be served may be ordered, but **only where there is some reason for believing that such mode of service will bring the document to the defendant's knowledge**.
>
> [emphasis added]

The appellants' reliance on the above quotation was misplaced. To my mind, the above quotation was only relevant as to the question of whether substituted service by posting on the front door of the last known residential address should be ordered as opposed to other modes of substituted service. It did not bear on the question whether substituted service within jurisdiction should, in the first place, be ordered as opposed to service out of jurisdiction.

38 Second, Mr Sreenivasan read O 62 r 5(3) of the ROC (see [26] above) to mean that substituted service would be justified if the writ was brought to the notice of the person to be served. This was inaccurate. Order 62 r 5(3) clearly refers to an issue subsequent: when substituted service, after the order had been made and executed, would be considered effected. It had No relevance to the

question whether an order for substituted service should be made in the first place.

39 Finally, Mr Sreenivasan cited the Court of Appeal case of *Ng Swee Hong v Singmarine Shipyard Pte Ltd* [1991] SLR 165 ("*Ng Swee Hong*"). In that case, Ng was sued as a guarantor. Before the writ and statement of claim was filed, Ng had already left Singapore. He was, however, in regular contact with his family members who resided at Ng's last known residential address. Between 9 October and 14 October 1984, attempts were made at personal service but they were (obviously) unsuccessful. On application, it was ordered on 16 October 1984 that service of the writ be effected by posting a copy of the writ at Ng's last known residential address and on the notice board of the High Court. On 19 January 1984, counsel for Ng applied unsuccessfully to the High Court for service of the writ to be set aside. The Court of Appeal dismissed his further appeal.

40 Mr Sreenivasan argued that *Ng Swee Hong* revolved around "the effect of substituted service when the defendant was out of the jurisdiction at the time the writ was issued": see *Ng Swee Hong* at 166. According to Mr Sreenivasan, this was also the precise issue to be answered in the present case. On this issue, the Court of Appeal held that since it was clear that Ng was in contact with his family and that the Writ and statement of claim posted at his last known residential address brought notice of the Writ to Ng, the appeal ought to be dismissed. Mr Sreenivasan therefore submitted that substituted service within jurisdiction can be validly ordered if such service would be effective in bringing the Writ to the defendant's attention.

41 It seems unlikely that *Ng Swee Hong* stands for the principle that an order for substituted service would be valid if it would be effective in bringing the writ to the attention of the defendant since such a principle is conceptually objectionable. First, whether substituted service was effective in providing notice of the writ to the defendant may be a matter of fortuity. Two different outcomes may arise from the same circumstances. For instance, in *Ng Swee Hong*, it was not inconceivable that Ng's family might have failed to inform him of the Writ even though they were in contact. Had such a situation arisen in *Ng Swee Hong*, and based on Mr Sreenivasan's understanding of what that case stood for, the order for substituted service would have been deemed improper. That the validity or otherwise of an order for substituted service is dependent on contingent circumstances is too unreliable a proposition to be adopted as a legal principle.

42 Second, adopting such a proposition as a legal principle will also mean that substituted service will No longer be a limited exception to the primary requirement of personal service. In effect, Mr Sreenivasan was suggesting that where a defendant was out of jurisdiction at the time the writ was issued, the plaintiff may choose to apply for substituted service within jurisdiction rather than personal service out of jurisdiction, if it was propitious to do so. This goes against the whole spirit of O 10 r 1(1) of the ROC (see [24] above). Furthermore, if Mr Sreenivasan was right, O 11 of the ROC would be rendered otiose. On that view, a plaintiff could circumvent the requirement for the court's careful consideration whether the Singapore court was the *forum conveniens*. This could not have been the intention behind the enactment of the ROC.

43 Finally, Mr Sreenivasan's proposition seems to me to put the cart before the horse. Allowing the validity of an order for substituted service to be determined by the effects of the substituted service would make it difficult, if not impossible, for the court to determine whether substituted service should be ordered as its effect would not be known until after the order was made and executed. The Court of Appeal in *Ng Swee Hong* could not have intended such a proposition.

44 Counsel for the respondents, Mr Liew Yik Wee, sought to distinguish *Ng Swee Hong* on the basis that the jurisdiction of the High Court was not in issue in that case. When *Ng Swee Hong* was decided, jurisdiction of the High Court was governed by s 16(1) (prior to its amendment in 1993) of

the SCJA (Cap 322, 1985 Rev Ed). It read then as follows:

> 16. — (1) The High Court shall have jurisdiction to try all civil proceedings where –
>
> (a) the cause of action arose in Singapore;
>
> (b) the defendant or one of several defendants resides or has his place of business or has property in Singapore;

It was not disputed that the defendant in *Ng Swee Hong* resided in Singapore. Thus, the court clearly had jurisdiction to hear the substantive case. Since that was so, allowing substituted service (as long as such service would be effective to inform Ng of the writ) would not have appeared to be a momentous decision. However, the position is different now in view of the amendment to s 16 of the SCJA. This can be seen from Professor Jayakumar's explanation of the rationale for the amendments [in Singapore Parliamentary Debates, Official Report (12 April 1993), vol 61 at col 95] on the Second Reading of the Supreme Court of Judicature (Amendment) Bill, as follows:

> [C]lause 10 amends section 16 of the Act to re-define the original civil jurisdiction of the High Court.
>
> Sir, the basis of the existing general civil jurisdiction of the High Court as set out in section 16 is really not satisfactory in principle or in practice. That provision is modelled after a similar provision in the Malaysian Courts of Judicature Act 1964 …
>
> 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. When the defendant was abroad, leave of the court was required to ensure that the case was a proper one for service out of the jurisdiction. The court exercised caution in granting leave, as service of a writ on a defendant in another country might cause injustice or hardship to a foreign defendant. The requirement for leave of court was in effect removed by the present section 16 so that service of a writ outside Singapore is allowed so long as the conditions specified in section 16 are satisfied.
>
> 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.

45 It is not possible to discern from the judgment in *Ng Swee Hong* whether that was the underlying premise based upon which the Court of Appeal decided as it did. From a perusal of the case, it seemed to me that the basis of the Court of Appeal's decision had more to do with the fact that Ng was not in any jurisdiction long enough to be served than with the fact that the substituted service was effective. In the very last paragraph of *Ng Swee Hong*, Yong Pung How CJ stated as follows:

> From **the affidavits and the evidence of the appellant's son, it is clear that the appellant travels extensively. No process server would be able to catch up with him**. It is **also** clear that he is in contact with his family. He is able to send them photocopies of his passport. He has called from Argentina. It is **also** clear to us that the writ and statement of claim served at No 66 Chun Tin Road were brought to the appellant's notice. The requirement of O 62 r 5 being satisfied, we therefore dismissed the appeal.

[emphasis added]

Given that No process server could keep up with Ng, it was not unreasonable in the circumstances to order that substituted service within jurisdiction be employed rather than service out of jurisdiction. That was especially so since substituted service within jurisdiction had a very good chance of bringing the writ to the attention of Ng as he was in contact with his family. That perhaps explains why the Court of Appeal upheld the order for substituted service in *Ng Swee Hong*.

46 For the sake of completeness, I must mention the case of *PT Garuda Indonesia v Birgen Air* [2001] SGHC 262 ("*PT Garuda*"). Mr Liew had raised this case in support of his submission that *Ng Swee Hong* should be distinguished. In that case, Woo Bih Li JC distinguished *Ng Swee Hong* on the facts: the defendant in *PT Garuda* had never been within the jurisdiction.

47 Applying the facts of the present case to the principles above, it was my view that substituted service was wrongly ordered on 23 October 2008. Since the defendants were not in Singapore when the Writ was issued and were not likely to return in the near future, personal service out of jurisdiction should have been applied for instead. There was No evidence to suggest that personal service out of jurisdiction would be ineffectual. In fact, the evidence suggested otherwise. The respondents had lived in the UAE since 2004 and were not peripatetic like the defendant in *Ng Swee Hong*. Moreover, the respondents had made inquiries regarding the attempted personal service at the Flat when informed of it, demonstrating that they had No intention to evade service.

48 The one factor against the respondents was the fact that they had ignored Straits Law's fax of 14 October 2008, requesting information on how they should be served (see [9] above). However, this inaction did not, to my mind, go so far as to suggest that the respondents were trying to evade service. This was especially so since Straits Law had informed them that if Straits Law did not hear from them they would "apply to effect service … through the Singapore and Dubai court process".

49 Mr Sreenivasan also pointed out that the respondents were in contact with Potluri who resided at their last known residential address, that they clearly had notice of the Writ and that the first respondent was a Singapore citizen. In my opinion, these were only relevant, if at all, to determine how substituted service should be effected. That issue would only arise after personal service out of jurisdiction had been unsuccessfully attempted or if the appellants could prove that personal service out of jurisdiction would be futile. In the absence of such, substituted service should not have been ordered.

Conclusion

50 In the result, I upheld the decision made by the AR on 14 January 2009 (see [13] above) and dismissed the appeal. Costs were fixed at $3,200.