

Storey, David Ian Andrew v Planet Arkadia Pte Ltd and others
[2016] SGHCR 7

Case Number : Suit No 1092 of 2015 (Summons No 1030 of 2016)
Decision Date : 23 May 2016
Tribunal/Court : High Court
Coram : Zhuang WenXiong AR
Counsel Name(s) : Andy Leck Kwang Hee, Cheah Yew Kuin and Faith Lim Yuan (Wong & Leow LLC) for the plaintiff.
Parties : David Ian Andrew Storey — (1)Planet Arkadia Pte Ltd — (2)Dobson David Michael — (3)Peter Lawrence Dobson

Civil Procedure – Service – Substituted service – Social media

Civil Procedure – Service – Substituted service – Instant messaging

23 May 2016

Zhuang WenXiong AR:

1 I granted an application for substituted service through email, Skype, Facebook and an internet message board. There does not appear to be any local authority on service through the latter three modes, and I therefore give detailed grounds for my decision.

2 The dispute centres on a virtual planet, Planet Arcadia, within a massively multiplayer online game, the Entropia Universe. The plaintiff, David Ian Andrew Storey, is a professional online gamer and freelance software developer. The first defendant, Planet Arkadia Pte Ltd, is a Singapore company in the business of developing computer games. The second defendant, Dobson David Michael, is the managing director of the first defendant. The third defendant, Peter Laurence Dobson, is a director of the first defendant. The plaintiff alleges that he is the copyright holder, either solely or jointly, of various literary and artistic works, and that these works were used both promotionally and in-game without his permission. The plaintiff also pleads that there was a breach of a contract for delivery up of in-game land.

3 The plaintiff obtained leave to serve the writ *ex juris* but was not able to serve the second defendant personally in Australia. The plaintiff thereafter took out this summons for substituted service.

4 The controlling provision is O 62 r 5 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed); in particular, O 62 rr 5(3) and 5(4) state that

(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.

(4) For the purposes of paragraph (3), the steps which the Court may direct to be taken for substituted service of a document to be effected include the use of such electronic means (including electronic mail or Internet transmission) as the Court may specify.

5 I will not deal at length with substituted service by email. This mode is uncontroversial: electronic mail is specifically mentioned in O 62 r 5(4), while para 33(6) of the Supreme Court Practice Directions states that

If substituted service is by electronic mail, it has to be shown that the electronic mail account to which the document will be sent belongs to the person to be served and that it is currently active.

6 I turn to substituted service through Skype, Facebook and internet message boards. I allowed service through the mentioned modes for five reasons.

7 Firstly the language of O 62 r 5 is wide enough to encompass service through Skype, Facebook and internet message boards. O 62 r 5(4) refers to service being effected through the use of such *electronic* means as the Court may specify. The use of “including” indicates that electronic mail and internet transmission are not meant to be exhaustive examples of service by electronic means. To be technically precise, O 62 r 5(4) utilises an extensional definition, but not an enumerative definition.

8 Secondly O 62 r 5(4) was only introduced in 2011 by the Rules of Court (Amendment No 4) Rules of Court 2011 (S 513/2011). The Rules Committee cannot foretell exactly which electronic platforms would be in vogue. Anecdotally speaking, users that were using MSN Messenger and Friendster in the past would today be using Skype and Facebook. It made eminent sense for the Rules Committee to merely state that substituted service could be effected electronically, but without descending into the details as to which platforms or applications were permissible and which were not — details which would be left to the court of the day.

9 Thirdly the impracticability of personal service is a prerequisite for *substituted* service; and flowing from this the proposed method of service must “in all reasonable probability, if not certainty, be effective to bring knowledge of the writ... to the defendant” (*Porter v Freudenberg* [1915] 1 KB 857 at 889). This is today reflected in O 62 r 5(3), and the principle behind the mentioned rule is that “the steps directed should bring the document to the notice of the person to be served” (*Serafica Rogelio T and others v Transocean Offshore Ventures Ltd* at [14]). Other electronic means of service could be more effective than email at bringing a document to the notice of the person to be served. For instance, Amanda Lenhart *et al*, “Teens, Technology & Friendships” Pew Research Centre, August 2015 found that 88% of the teenagers surveyed texted their friends; 79% used instant messaging; 72% used social media while only 64% emailed their friends. If the cornerstone of substituted service is efficacy at bringing notice then a court must be open to substituted service through electronic means other than email.

10 Fourthly foreign case law has allowed substituted service through electronic means other than email. The following jurisdictions have allowed substituted service by Facebook: Australia (*MKM Capital Pty Ltd v Corbo & Poyser* (Supreme Court (ACT), 12 December 2008 (unreported)); Canada (*Burke v John Doe* 2013 BCSC 964); England (*AKO Capital LLP v TFS Derivatives*, February 2012 (unreported)); New Zealand (*Axe Market Gardens v Axe* (High Court (New Zealand), 16 March 2009, CIV: 2008-845-2676); and South Africa (*CMC Woodworking Machinery (Pty) Ltd v Pieter Odendall Kitchens* [2012] ZAKZDHC 44).

11 Fifthly the Supreme Court of Singapore issued a consultation paper entitled “Use and Impact of Social Media in Litigation” (August 2010) which concluded that substituted service is “the most appropriate manner of engaging social media” (at para 3.2) and “there is no reason why we should not consider [substituted service by social media] since it is permissible under our existing laws” (at para 3.13).

12 I add that I construe electronic means to include WhatsApp and other smart phone messaging platforms linked to mobile phone numbers. WhatsApp was recently updated and can now be used to send PDF attachments (see eg, "WhatsApp update includes easier photo sharing, PDF support, new backgrounds and more", <http://www.independent.co.uk/life-style/gadgets-and-tech/news/whatsapp-new-update-ios-android-photo-sharing-pdf-change-background-a6924821.html>, accessed on 17 May 2016).

13 The main counterargument against allowing substituted service through electronic means other than email is the fear that such means may not be effective at bringing notice to the person to be served. But this fear should not be overblown. The only completely certain way of bringing notice is actual physical service. The law dispenses with physical service and allows substituted service when it would be impracticable to do so, but this is a trade-off and substituted service carries the risk that a document will not actually be brought to the notice of the person to be served. This is true for conventional methods. Posting on the front door may not be effective because an owner is not habitually resident at that particular property; or he has moved out in the interim; or a mischievous neighbour has detached the notice, and so on. Advertising in a national newspaper may not be effective because the person to be served is not in the habit of reading that particular newspaper; even if he does, he may not read the notice section of that newspaper.

14 The risk that electronic means of substituted service will not be effective at bringing notice can be curtailed by a court imposing the following requirements:

(a) Ordering electronic service to be accompanied by either posting on the front door or AR registered post. The mentioned two methods should only be dispensed with if the address of the person to be served is attested to be unknown or if there is proof that the person no longer owns or is no longer resident at a known address;

(b) Proof that the electronic platform in question is used by the person to be served:

(i) For email, instant messaging, internet message boards, or smart phone messaging platforms, proof of a message whereby the user has explicitly self-identified or signed off as the person to be served; or a message that shows, in the context of the dispute, that the user is the person to be served.

(ii) For social media platforms, the profile name and profile picture (or other posted pictures) should match the person to be served, and if the parties have met the profile picture (or other posted pictures) should be attested to match.

(c) Proof that the electronic platform in question was recently used by the person to be served:

(i) For email, instant messaging, internet message boards, or smart phone messaging platforms, proof that a message has been sent within a reasonable timeframe from the date of service; or for instant messaging, internet message boards or smart phone messaging platforms, proof that the user was last seen online within a reasonable timeframe.

(ii) For social media platforms, proof that there has been activity within a reasonable timeframe; this can entail the sharing of photos, the posting of publically-accessible messages, or the sending of private messages, and so on.

15 Finally I reiterate the proposition that substituted service cannot be used to circumvent O 11 of

the Rules of Court. If a putative defendant is outside of the jurisdiction when a writ is issued, substituted service should not be ordered, and if so ordered service is liable to be set aside (see eg, *Consistel Pte Ltd v Farooq Nasir* [2009] 3 SLR(R) 665 especially at [31]–[34]). If a putative defendant is outside the jurisdiction, the plaintiff should first apply for leave to serve the writ *ex juris*, and only apply for substituted service thereafter if personal service is impracticable (O 11 r 3(1) read with O 62 r 5; *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK* [2015] 4 SLR 625 (“*Humpuss*”) at [59(b)]). Substituted service *ex juris* may then be challenged by the putative defendant on the basis that the service contravenes the law of the foreign jurisdiction (O 11 r 3(2); *Humpuss* at [59(b)]) or that service was effected in a manner not provided for in the order granting leave for substituted service (*Humpuss* at [110(a)]).

16 The applicants had earlier successfully applied for service *ex juris* of the writ in Australia. They could not serve the writ on the second defendant at his last known address and a neighbour asked if the process server was looking for the Colegraves; when quizzed on the second defendant, she said that she had not heard of him. The applicants also adduced evidence that the second defendant operated two email accounts, a Skype account which belonged to “David Dobson” along with a previous conversation pertaining to Planet Arcadia, a Facebook profile which belonged to “David Dobson” and an internet message board administrator account “David | Arkadia” on the domain arkadiaforum.com, which as the name indicates is a forum for the virtual inhabitants of Planet Arkadia. The profile pictures for the Facebook and arkadiaforum.com accounts were identical, while the profile picture for the Skype account was a different picture of the same person. There was also evidence that the mentioned platforms were recently used; in particular, the Facebook profile had recent activity: a video was shared and photos were added; while the Skype and arkadiaforum.com accounts showed that he was very recently online.

17 The requirements listed at [14] above were met, and I accordingly allowed substituted service through email, Skype, Facebook and arkadiaforum.com without being accompanied by posting on the front door or AR registered post. Costs were ordered to be in the cause.