ITC Global Holdings Pte Ltd (In liquidation) *v* ITC Ltd and others
[2011] SGHC 150

Case Number : Suit No 1344 of 2002 (Registrar's Appeal Nos 465 of 2010 and 466 of 2010)

Decision Date : 09 June 2011

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Andre Maniam SC and Cheryl Fu (Wongpartnership LLP) for the plaintiff; Edwin Tong and Colin Chow Zhiquan (Allen & Gledhill LLP) for the defendant.

Parties : ITC Global Holdings Pte Ltd (In liquidation) — ITC Ltd and others

Civil procedure

Conflict of laws

9 June 2011 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 The present cross-appeals arise from the assistant registrar's ("the AR") decision in respect of the first to third defendants' ("the three defendants") application in summons no 271 of 2010 for the following orders: first, the order of court dated 13 May 2009 granting the plaintiff ("Global") leave to effect service out of jurisdiction to India be set aside; secondly, that Global's service of its amended writ of summons ("the Writ") on the three defendants be set aside; and thirdly, all proceedings in this suit be stayed on the ground of *forum non conveniens*.

2 The AR dismissed the application to set aside the order of court granting leave to serve the writ out of jurisdiction because Global's claims raised serious issues to be tried, there was no non-disclosure of material facts, and Singapore was the most appropriate forum to hear the dispute. The AR also dismissed the application to set aside the service of the Writ *vis-à-vis* the first defendant ("ITC") since the Writ was validly served on ITC in accordance with Indian law. However, the AR held that the Writ was not validly served on the second and third defendants ("Deveshwar" and "Vaidyanath" respectively) and that the Singapore court had no discretion to cure this irregularity. Finally, a temporary stay of proceedings in Singapore was ordered until such time as Global could show evidence that a claim brought by Global on similar facts and grounds in the United States in November 1995 had been withdrawn. ITC was ordered to pay costs to Global, and Global was ordered to pay the costs of Deveshwar and Vaidyanath.

3 In registrar's appeal no 466 of 2010, Global appealed against the setting aside of the service on Deveshwar and Vaidyanath. The three defendants' appeal in registrar's appeal no 465 of 2010 is against the AR's refusal to set aside the service on ITC and the order of court dated 13 May 2009, and also his refusal to order a stay of proceedings. Both sides also appealed against the consequent costs orders of the AR.

4 Before me, counsel for the parties rightly focused on the issue of whether Singapore was the *forum conveniens*. That was an essential criterion for leave to effect service out of jurisdiction, and if

decided in the three defendants' favour, would also justify a stay of proceedings. The other issues raised on appeal were not in serious contention, *eg* whether there was non-disclosure of material facts in Global's *ex parte* application for leave. Counsel also addressed the issue of whether the service effected on the three defendants were valid, which is the consequent issue should Singapore be held to be the *forum conveniens*.

Background

5 In 1992, ITC incorporated Global as a commodities trading company in Singapore. ITC was incorporated in India and the sole shareholder of Global. [note: 1] In November 1996, Global was placed under judicial management. [note: 2] It was put into liquidation on 30 November 2007. Deveshwar and Vaidyanath are directors of ITC, and were based in India at the material times. They are also Indian nationals and resident there.

6 In addition to the three defendants in the present appeals, there are twelve other defendants named in the suit. The fourth to thirteenth defendants are implicated either as employees of ITC, or directors or employees of Global at the material time. The fourteenth and fifteenth defendants ("the Chitalias") are citizens of the United States of America ("USA"); they controlled a group of companies incorporated in the USA and Liechtenstein ("the Chitalia Group").

7 The Chitalia Group was one of Global's trading partners. In the course of business, Global gave loans or made advances to the Chitalia Group. In the suit, Global alleges that the defendants are liable for its losses which stemmed from two sets of transactions with the Chitalia Group. These will be referred to as "the Trade Advances" and "the Colombo Rice Transactions".

8 In relation to the Trade Advances, Global alleged that ITC, acting through one or several of the second to eleventh defendants, had caused Global to grant several advances totalling US$9.1m to the Chitalia Group with no commercial benefit to Global. [note: 3] The Trade Advances, it is alleged, were made for the benefit of ITC. ITC had sold certain commodities at inflated prices to the Chitalia Group which then on-sold them to other parties at substantially lower prices. By doing so, ITC was able to generate paper profits, whereas the Chitalia Group would book paper losses. [note: 4] Global's case is that it was instructed to make the Trade Advances in order to put the Chitalia Group in funds for them to make payment to ITC. This was necessary because the Indian foreign exchange regulations required ITC to collect payment for the invoiced sales of commodities from the Chitalia Group within 180 days, and the Chitalia Group lacked the means to do so.

9 As for the Colombo Rice Transactions, Global alleged that in 1994, ITC directed it to purchase from the Chitalia Group about 34,000 metric tons of rice held in Colombo, Sri Lanka. This rice was originally sold by ITC to the Chitalia Group in March 1993. [note: 5] Global further alleged that it derived no commercial benefit from purchasing this rice, and ITC had agreed to indemnify Global regarding any losses it suffered in relation to this purchase. [note: 6] Global claimed it suffered losses of US$9m as a direct consequence of this purchase – from the resale of the rice to third parties and from being unable to trade in other profitable commodities because of having committed its resources to the Colombo Rice Transactions. [note: 7]

10 Global commenced this suit in November 2002 through its liquidators. The causes of action pleaded against the three defendants arising from the Trade Advances include tort, [note: 8] contract, [note: 9] restitution, [note: 10] breach of fiduciary duties [note: 11] and breach of statutory duties under the Companies Act (Cap 50, 1994 Rev Ed) ("Companies Act"). [note: 12] Global's claim arising from the

Colombo Rice Transactions is for an indemnity given by ITC for its losses. [note: 13]

The law on service out of jurisdiction

11 The requirements to be satisfied before the court will grant leave for service out of jurisdiction are well-settled. First, the claim must come within the scope of one or more of the paragraphs of O 11 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"). Second, the claim must have a sufficient degree of merit. Third, Singapore must be the *forum conveniens*.

12 As indicated earlier, there was no serious challenge that the first and second requirements were satisfied. Reading the Writ together with Mr Neo Ban Chuan's ("Mr Neo") affidavits filed on behalf of Global as Global's liquidator, it was clear that there is a good, arguable case that at least rules 1(*f*)(i), 1(*f*)(ii), 1(*o*), 1(*q*) and 1(*s*) of O 11 of the ROC have been made out. The defendants' objections lay mainly in what they claimed was a lack of particulars regarding the offending acts, the link between those acts and the defendants, and the causal link between the acts and Global's losses. These objections, however, were refuted by the obvious and consistent evidence in the form of various documents provided by Nr Neo which suggested that ITC had instructed Global to make the Trade Advances to the Chitalia Group [note: 14] and that ITC would indemnify Global for losses it may sustain in respect of the Colombo Rice Transactions. [note: 15]

13 There was also no non-disclosure of material facts, contrary to what counsel for the three defendants ("Mr Tong") argued. The material fact concerned was a decision made by Belinda Ang J on 30 January 2009. She had refused to grant leave for service out of jurisdiction on Global's previous application for such leave because the Writ had lacked sufficient particulars for the court to make out whether there was a good, arguable case. Counsel for Global ("Mr Maniam") pointed out that Belinda Ang J's grounds of decision were neither available at the time the fresh application for leave was made nor at the time of the hearing of the *ex parte* application. In any event, I am satisfied that Mr Neo's affidavit [note: 16] filed on 9 April 2009 and the documents it exhibited have since cured the defects highlighted by Belinda Ang J. It is the third requirement which requires greater evaluation, to which I now turn.

Whether Singapore is the *forum conveniens*

14 The purpose of the *forum conveniens* analysis is to identify the most appropriate forum to hear the substantive dispute. "It is not an exercise in comparing the sheer number of connecting factors which point to this or that jurisdiction. What matters is the weight to be given to each connecting factor in the light of all the circumstances of the case": *per* Chao Hick Tin JA in *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [19]. In that decision, the Court of Appeal stated (at [8]) that the doctrine seeks to identify the most appropriate forum to try the dispute, and it does not matter whether it is most appropriate "by a hair or by a mile". The main connecting factors to be considered here are the parties' and witnesses' personal connections, the connections to the relevant events and transactions, and the governing law of the claims.

15 The personal connections of the parties are these. While Global is a company incorporated in Singapore and is placed under liquidation in Singapore, ITC is an Indian company and most of the other defendants are Indian nationals and ordinarily resident there. Mr Tong submitted that on the whole, India would be a more convenient forum given that the majority of the key witnesses are located there. I, however, do not think the circumstances of this case point unequivocally towards a most appropriate forum in respect of the parties' personal connections. The fact that Global is a Singapore company under liquidation, and the liquidator is in Singapore, is also a factor which must be

given due weight: see *Kaki Bukit Industrial Park Pte Ltd v Ng Man Heng and Others* [2004] SGHC 60. Additionally, the Chitalias, who are also key parties in this dispute, are located in the United States.

16 With respect to the witnesses required at the trial, the availability of non-party witnesses does not appear to be a substantial factor for consideration. Most of the relevant witnesses for the defendants' case are the defendants themselves, and I have already considered the parties' personal connections to be an equivocal factor. Mr Tong has argued that non-party witnesses of fact are potentially required to testify for the defence's case. These witnesses are located in India and cannot be compelled to appear before a Singapore court because the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters does not apply between Singapore and India.

17 I do not place much weight on this argument simply because the three defendants have not, in their affidavits, materially refuted the tenor of Global's case which relies mainly on the available documentary evidence. Global's liquidator, Mr Neo, had produced contemporaneous letters and minutes of meetings that showed that ITC had procured the payment of Global's monies to the Chitalia group for the purpose of enabling ITC to receive payment on its invoices to avoid contravening the Indian foreign exchange regulations. Global's pleaded case against the defendants rests on this factual situation, which is eminently supported by those documents. The three defendants have not said that the documents exhibited by Mr Neo actually meant something else, or that they portrayed a different factual situation. Therefore, there is no basis for believing that the documents mean anything other than what they purport to say. In the circumstances, the witness factor (regarding the non-party witnesses) is not as significant as in a case where there are substantial disputes of fact and the availability and credibility of non-party witnesses are crucial to a fair determination of the case. In any event, O 39 r 2 of the ROC will adequately address the defendants' concerns by providing a means of seeking the Indian courts' assistance to take the evidence of these Indian witnesses if that is thought to be necessary.

18 In relation to Global's primary claim against the three defendants, *viz* the Trade Advances, the causes of action concerned are in tort (*eg* procuring the other defendant directors to breach their contractual, fiduciary and statutory duties, conspiracy to unlawfully cause Global to make the Trade Advances, and unlawful interference with Global's business); for breach of directors' duties under common law; and statutory claims under ss 157 and 340(1) of the Companies Act.

19 Mr Tong submitted that the substance of the torts lay in India. He argued that the three defendants were based in India at the material times and many of Global's board meetings were convened and held in India. Hence, if there were any acts constituting the alleged torts, they would have taken place in India and governed by Indian law. Mr Maniam argued otherwise. He asserted that Global obtained the funds to make the Trade Advances from Singapore banks; the Trade Advances were made out of Singapore bank accounts; the procuring of breaches by other directors were of legal duties governed by Singapore law; and the torts were committed against a Singapore company. I am persuaded by Mr Tong on this point. There is no evidence that the advances made were derived from Singapore bank accounts. Even if there was, I do not think it is material because the source of the funds cannot be as significant as where the tort was planned and effectively carried out. There is also no evidence that the Trade Advances directly caused any damage to the Singapore bank creditors of Global. Also, Mr Maniam's argument that the legal duties breached by the other directors were governed by Singapore law is misplaced because the material factor must be where the three defendants' procurement of these breaches was planned and carried out instead.

20 However, the other claims regarding the Trade Advances brought by Global are what tip the overall balance in favour of Singapore as the more appropriate forum. Global's allegations that Deveshwar and Vaidyanath are shadow directors of Global and have breached the fiduciary duties

which attach to these posts under the Companies Act require consideration of Singapore law, especially in the light of the difficult definition of a "shadow director" under the Companies Act. In this case, a Singapore court is better placed to determine this issue. Furthermore, Global's claim for relief under s 340(1) of the Companies Act can only be pursued in Singapore. It is important for insolvent companies undergoing liquidation to be able to prosecute claims of fraudulent trading against former directors of the company as a matter of discouraging abuse of limited liability by irresponsible trading.

21 The claims pertaining to the Colombo Rice Transactions are also better dealt with by a Singapore court. The key wrongful acts which gave rise to these transactions appear to be committed in Singapore. This means that the governing law of the indemnity agreement Global asserts exists is likely to be Singapore law. After considering all the factors, I find that the AR had not exercised his discretion incorrectly, and that Singapore is the *forum conveniens*.

Whether the service of the Writ on the three defendants was regular

22 In view of my finding that Singapore is the *forum conveniens*, it is necessary to address the issue of the validity of service. For service to be properly effected out of jurisdiction, according to O 11 r 4(2) of the ROC, the method of service must comply strictly with the foreign jurisdiction's rules and laws regarding service. Additionally, O 11 r 3(2) of the ROC states that the court may not make any order or direction which shall authorise or require the doing of anything in which service is effected which is contrary to the law of that country. The issue here is whether the manner in which the Writ was served on the three defendants is in compliance with Indian law.

23 According to Mr Neo, after the order of court dated 13 May 2009 granting leave to serve the Writ out of jurisdiction was made, Global filed a request for service of the Writ out of Singapore ("Request for Service") with the Singapore Supreme Court. Global specifically requested the relevant documents (a) to be sent to the Court of Small Causes in Kolkata for service on ITC and that the documents be served on the secretary, or on any director, or other principal officer of ITC or by leaving it at the registered address of ITC; and (b) to be sent to the appropriate Indian Courts and served, as if they were summons issued by such courts, on the second to thirteenth defendants. Thereafter, Global played no role in the service of the Writ and left matters entirely to the Singapore Supreme Court Registry, the Ministry of Foreign Affairs and the relevant Indian authorities.

24 On 26 January 2010, Global was provided with a copy of an endorsement from the process server dated 15 December 2009 ("the Endorsement"). [note: 17] It stated that the Writ had been served on the three defendants. However, Global had not received an official certificate from the Indian government or judicial authorities which, pursuant to O 11 r 3(5) of the ROC, would be conclusive evidence of the date of service and that service was in accordance with the law of the country in which service was effected.

25 The only available account of how service was in fact effected in India was provided by Mr Bishwa Behari Chatterjee ("Mr Chatterjee") who is the company secretary of ITC. [note: 18] According to Mr Chatterjee, on 14 December 2009, a delivery person ("the delivery person") arrived at the mailing department of ITC's office and wanted to leave behind several sets of binders. The delivery person was directed to ITC's corporate secretarial department. There, he informed the staff that the binders were from the High Court of Calcutta, and that he wished to leave behind five sets of binders meant for ITC, Deveshwar, Vaidyanath, and the fifth and tenth defendants. A sixth binder was to be acknowledged and returned on behalf of the said defendants.

26 When asked to identify himself, the delivery person stated he was from the City Civil Court, Calcutta. The delivery person, however, refused to provide any credentials. ITC's corporate

secretarial staff took delivery of three sets of the binders (for the three defendants) and acknowledged the sixth binder. Each set of the binders contained (a) the Request for Service (filed on 13 August 2009); (b) the Writ (re-dated 20 January 2003); (c) *ex parte* orders of the Singapore High Court extending the validity of the Writ, the last being an order dated 13 October 2008; and (d) the order of court dated 13 May 2009 granting leave to serve the writ out of jurisdiction.

27 Both Global and the defendants had adduced expert evidence by way of affidavit on the validity, under Indian law, of the service described above. The defendants' experts are Mr Marezban Padam Bharucha ("Mr Bharucha") and Mr Prafullachandra Natwarlal Bhagwati ("Mr Bhagwati"). They opined that the service carried out on 14 December 2009 was invalid on four grounds. First, there was no proof that the documents were delivered through the judicial authorities of India. Secondly, the Writ was invalid as it had expired. Thirdly, service was not effected through the Court of Small Causes in Kolkata which they opined was the requirement under Indian law. Lastly, as against ITC, the Writ was not served on its secretary, director, or principal officer; and as against Deveshwar and Vaidyanath, the Writ was not served on them personally. Global's expert on Indian law is Mr Manish Mohan ("Mr Mohan"), and he disagreed with the three defendants' experts.

28 With respect to the first ground, Mr Bharucha noted that the delivery person did not provide his credentials and, therefore, there was no proof that the documents were delivered through the judicial authorities of India. [note: 19] But Mr Bharucha did not consider all the material evidence in forming that opinion. There was no analysis of the significance of the endorsement received by Global on 26 January 2010. The endorsement must be treated as *prima facie* evidence that the documents were delivered through the judicial authorities of India since Global had sent the Request for Service to the Indian judicial authorities through the proper Singapore channels. In the absence of rebuttal evidence, I find that the documents were delivered through the rightful Indian authorities.

29 On the second ground, Mr Bharucha [note: 20] and Mr Bhagwati [note: 21] were of the common opinion that on the face of the Writ, it had "become stale and was, as such invalid". Therefore, it could not have been validly served. It is undisputed that on the face of the Writ, it was only valid until 7 November 2009 while service was effected on 14 December 2009. But it is also undisputed that the Writ's validity had actually been extended by a further order (dated 26 October 2009) from the Singapore High Court to 8 November 2010, and that indorsement of the extension of the validity of the Writ had been dispensed with. [note: 22]

30 I prefer the opinion of Global's expert, Mr Mohan. The validity of the Writ must be a matter of Singapore law. [note: 23] It cannot be reasonably contemplated that an Indian lawyer would advise his client who receives a writ which originated from a foreign jurisdiction to ignore it on the basis that it appears to be stale. As a matter of commonsense, any extension of validity cannot be reflected on a writ once it leaves its originating jurisdiction, and it is common knowledge that serving a writ out of jurisdiction may be a very lengthy process during which the writ may have to be renewed. It also bears noting that once a plaintiff serves a writ out of jurisdiction, there is nothing much he can do to expedite the process. It is unfair to permit conditions which are beyond the control of a plaintiff to frustrate an otherwise legitimate attempt of service, *eg* the unpredictable period of time before a writ is served.

31 On the issue of which Indian court must the service be effected through, the parties' experts agreed that the Indian Code of Civil Procedure, 1908 (5 of 1908)(2004 Rev Ed) ("the Code") was applicable, but differed on which are the applicable provisions. The Code comprises sections, followed by orders, and each order consists of various rules. The Code's orders are ancillary to the sections. [note: 24] The defendants' argument that the service must be through the Court of Small Causes in

Kolkata is founded upon O 5 r 22 of the Code which states that: "Where a summons issued by *any Court* established *beyond the limits of the towns of Calcutta*, Madras [and Bombay] is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served" [emphasis added]. [note: 25] However, Mr Mohan opined that O 5 r 22 does not apply here despite its mandatory language simply because the term "any court" must mean an Indian court and not a foreign court. I find in favour of his opinion because there is indeed a separate provision in the Code which deals with the treatment of foreign summonses. This is found in s 29 of the Code which deals with service of summonses and other processes of foreign courts. These provisions would apply to summonses issued by Singapore courts by virtue of Government of India Gazette notification dated 29 May 1956. [note: 26] It is agreed by the parties' experts that s 29 of the Code applied in this case. Section 29(c) of the Code states: "Summonses and other processes issued by any other Civil or Revenue Court *outside India* to which the Central Government has, by notification in the Official Gazette, declared the provisions of this section to apply, may be sent to the Courts in the territories to which this Code extends, and served *as if they were summonses issued by such Courts*" [emphasis added]. Thus once the Writ is sent from the Singapore governmental or judicial authorities to their Indian counterparts in an Indian court in Calcutta, insofar as service under Indian law is concerned, the Writ would be deemed as a writ issued by that Calcutta court which received it. There is no evidence from the defendants' experts that a writ or summons issued by any court in Calcutta must be served by a process server from the Court of Small Causes in order to be valid. Hence, I find that the Writ was served by the correct Indian court.

32 The defendants' last objection is that the Writ was served on parties who were not entitled to receive service on their behalf. A distinction must be drawn between ITC which is a corporate entity, and Deveshwar and Vaidyanath who are natural persons. With respect to ITC, it is agreed that this depends on whether it was served in accordance with O 29 r 2 of the Code. Order 29 r 2 of the Code consists of two limbs. It states:

> Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served –
>
> (a) on the secretary, or on any director, or other principal officer of the corporation, or
>
> (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

33 Both Mr Bhagwati and Mr Bharucha cited the Supreme Court of India case *Shalimar Rope Works Ltd v Abdul Hussain H M Hasan Bhai Rassiwala and ors* [1980] 3 SCR 1028 ("*Shalimar Rope Works*") [note: 27] which had construed O 29 r 2 of the Code. They were of the opinion that, applying *Shalimar Rope Works*, the delivery person had not effected valid service because he should have first attempted to serve the Writ on the "Secretary or any Director or other Principal Officer" before he can leave the Writ at ITC's registered office. In *Shalimar Rope Works*, the respondent served the summons on a "mere Office Assistant in the Sales Department of the [appellant] company". The office assistant was not a company secretary, director or principal officer of the appellant authorised to receive summons in the suit. He also did not bring the fact of the receipt of summons by him to the knowledge of any responsible officer of the appellant. As a result, judgment in default was obtained by the respondent and the appellant only knew of the proceedings when the respondent sought to enforce its judgment. The lower court, however, held that since the office assistant was an employee of the appellant found in its registered office, the summons was deemed to have been duly served within the meaning of the first part of limb (b) of O 29 r 2 of the Code (*ie* leaving it at the

corporation's registered office). The Supreme Court of India thought that this analysis was wrong. It held that the first part of limb (b) ("leaving" the summons at the registered office) must be read in the light of O 5 r 17 of the Code which applies to service of summons on natural persons. Order 5 r 17 N4-N6 of the Code states that the serving officer must first use all "due and reasonable diligence" to find the defendant or agent empowered to accept service before he can affix a copy of the summons on a conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. Hence, to maintain consistency across the Code's provisions, the Supreme Court of India held (at 1032C-D) that "if the serving peon or bailiff is not able to serve the summons on the Secretary or any Director or any other Principal Officer of the Corporation because either he refuses to sign the summons or is not to be found by the serving person even after due diligence *then* he can leave the summons at the registered office of the company and make a report to that effect" [emphasis added].

34 The concern of the Supreme Court of India was clear; that is, if the first part of limb (b) was interpreted literally, summonses might in many cases not be fairly brought to the attention of defendant companies. This concern was evident from its statement (at 1032B-C), "leaving the summons at the registered office of the corporation if it is literally interpreted to say that the summons can be *left anywhere uncared for* in the registered office of the company, then it will lead to anomalous and absurd results" [emphasis added]. Mr Mohan opined that *Shalimar Rope Works* must be understood in this context and that it can be distinguished from the facts of the present case. [note: 28] The issue is essentially about ensuring that a defendant corporation is sufficiently and fairly notified of proceedings against it. In the present case, Global has adequately addressed this concern. The delivery person in the present case had done more than what transpired in *Shalimar Rope Works*. Although the delivery person initially turned up wrongly at ITC's mailing department, he was directed to and showed up at the corporate secretarial department. He informed the staff there that the documents were for the various defendants. As a result, ITC was apprised at the outset of the relevant proceedings against it. I accept Mr Mohan's opinion that this amounted to good service on a corporate defendant under Indian law.

35 With respect to Deveshwar and Vaidyanath, it is not disputed that under Indian law, a defendant who is a natural person must be served either personally or by an agent properly empowered to accept service on behalf of such defendant. [note: 29] Given these premises, Global must show that ITC was in fact an agent for Deveshwar and Vaidyanath which was authorised to receive service on their behalf. ITC denied this is the case [note: 30] and Global had produced no evidence to prove the contrary. Thus the service on Deveshwar and Vaidyanath was irregular.

Whether the court has the power to cure the irregularities in service

36 The AR thought that the irregularity of service on Deveshwar and Vaidyanath could not be cured because any discretion to cure the irregularity lies with the Indian authorities. By precluding these breaches in service from the scope of O 2 r 1 of the ROC, the service on Deveshwar and Vaidyanath is effectively treated as a nullity, and not a mere irregularity.

37 The AR's view is supported by the High Court decision of *Ong & Co Pte Ltd v Chow Y L Carl* [1987] SLR(R) 281 ("*Ong & Co*"). In that case, the plaintiff obtained leave to issue a writ against the defendant and to serve notice of the writ on him at an address in Malaysia. The notice of the writ was served on the defendant personally by a process server employed by a Malaysian firm of solicitors. It was held that, because that mode of service was not an authorised method of service under the Rules of the Supreme Court 1970 ("the 1970 Rules"), the purported service was a nullity and not an irregularity which could be cured under O 2 r 2 of the 1970 Rules. The High Court

emphasised that, following *Afro Continental Nigeria Ltd v Meridian Shipping Co SA (The Vrontados)* [1982] 2 Lloyd's Rep 241 (at 245), the service of a writ was an exercise of judicial power. This judicial power cannot be extended or exercised extra-territorially except with consent of the foreign state. Therefore, even though the defendant in that case had actually been served and already entered an appearance, and had not suffered any prejudice, the service was characterised as a "nullity".

38 However, the currency of this view has diminished over time. It would appear that *Ong & Co* is no longer authoritative on this point and not all errors arising in the process of service out of jurisdiction would render the purported service a nullity. Rather they would constitute a mere irregularity and the Singapore courts do have jurisdiction to cure such irregularities under O 2 r 1(2) of the ROC. The reasons are as follows.

39 First, a similar situation in *Leal v Dunlop Bio-Processes International Ltd* [1984] 1 WLR 874 ("*Leal*") was not construed as a nullity, but an "irregularity", albeit one which, in the circumstances of that case, was too serious to be cured. In that case, the plaintiff had issued and served a writ out of the jurisdiction without obtaining the leave of the court. The defendant applied to set aside the service and dismiss the action. By then, the limitation period had expired and the plaintiff applied for the renewal of the writ and leave to serve it outside the jurisdiction. The English Court of Appeal held that in the circumstances, the writ could not be renewed because of the lack of exceptional circumstances. The purported service also could not be cured under the English Rules of Court O 2 r 1 because it was thought that if the plaintiff could not properly have renewed the writ, it would be improper to make good the irregular service. All three judgments of the court proceeded on the basis that the mistake in service was an irregularity capable of being cured under the English Rules of Court O 2 r 1, but declined to exercise their discretion to cure it.

40 Secondly, Singapore's O 2 r 1(2) of the ROC, which is *in pari materia* with the English equivalent, states that:

> Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, *any step* taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
>
> [emphasis added]

The House of Lords has interpreted the term "any step" to include service of proceedings out of the jurisdiction: see *Phillips and another v Symes and others (No 3)* [2008] 1 WLR 180 ("*Phillips*") at [31].

41 Thirdly, the strict view that service out of jurisdiction is an encroachment of another nation's sovereignty has been departed from in Singapore. In *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd* [2000] 1 SLR(R) 962, the Court of Appeal opined (at [30]):

> Our writ in the present form is no longer structured in the form of a command to the defendant … In its present form, the writ is more of a *notification* to the defendant that an action has been commenced against him in the court in Singapore than a *command* to him issued by the court. … In its present form, the writ has lost its meaning of a judicial *order*, and it can hardly be contended that the service of our writ abroad would interfere with or encroach upon the sovereignty of the country in which the writ is served. [emphasis added]

Although that case was about an attempt at service out of jurisdiction from England in Singapore, the above observation was one of general principle. Developing the thesis of that general observation, the question whether the attempt to serve the writ was or was not effective under O 11 of the ROC is a question purely of domestic law, and not foreign law. The approach of characterising this issue as purely a question of domestic law has also been adopted by the English courts: see *Golden Ocean Assurance Ltd and World Mariner Shipping S A v Christopher Julian Martin and others ("The Goldean Mariner")* [1990] 2 Lloyd's Rep 215 and *Phillips* (both cases discussed below).

Whether the court should cure the irregularities in service

42 Professor Jeffery Pinsler SC wrote in Singapore Court Practice 2009 (LexisNexis, 2009) (at para 2/1/2) that where a procedural rule is framed in a manner which requires strict compliance, an application for the validation of a breach is very much less likely to succeed. The rules governing service out of jurisdiction have often been construed as mandatory in the context of the court's assertion of extra-territorial jurisdiction, *eg* in *Leal* , Slade LJ said (at 885), "most cases breaches of the requirements of … Ord. 11, r. 1, … are not in my opinion likely to be breaches which can be lightly disregarded."

43 However, the validation of a breach must still depend on all the circumstances of the case. It is not impossible to persuade the court to cure irregularities in an attempted service out of jurisdiction in deserving cases. There are at least two English cases in which the plaintiffs have succeeded. *The Goldean Mariner* was one of them, in which there were, *inter alia*, two categories of defendants where there were procedural irregularities in the service upon them. The first category received wrongly addressed writs which were meant for other defendants in the suit. But each writ was impeccable in form, content and in every other respect. The second category of defendants was only served with a form of acknowledgement of service. No writ was in fact served on them.

44 The English Court of Appeal unanimously thought that the error affecting the first category was a mere irregularity and cured it (with Lloyd LJ dissenting on whether to cure it). The majority judges exercised their discretion that way since the defendants were all parties to the relevant contract which was the subject-matter of the suit, they all knew of the particulars of the incident founding the cause of action, and all of them got a copy of the writ. None of them were unaware of the proceedings. In short, they were not misled and did not suffer any prejudice. They also distinguished *Leal* on two grounds. First, the case before them concerned an irregularity which was not as grave. Second, they construed *Leal* as one which did involve prejudice to the defendant because the writ had expired and renewal was conditioned on "exceptional circumstances" which did not exist. Furthermore, to regularise the earlier service out of jurisdiction before the expiry of the writ would have deprived the defendant in *Leal* of a substantive defence.

45 The majority in *The Goldean Mariner* also thought that the error affecting the second category of defendants was an irregularity and went on to exercise their discretion to cure it. But only one of them provided reasons for doing so. McCowan LJ's analysis focused heavily on the fact that the defendants who received the form of acknowledgement of service reacted no differently from the defendants who received the wrongly addressed writs. There was never any doubt in the minds of those defendants regarding the proceedings that were initiated against them, and therefore they suffered no prejudice. This was sufficient to constitute "special circumstances".

4 6 *The Goldean Mariner* was recently followed by the House of Lords in *Phillips*. The issue before the House of Lords was whether, in the light of Swiss proceedings initiated by the defendants, the English court must now decline jurisdiction over similar English proceedings and impose a stay. That depended on which court was first seised of proceedings under the Lugano Convention. That in turn

depended on whether the defective service out of jurisdiction (due to incomplete documentation) by the plaintiffs in Switzerland was valid. The House of Lords agreed that for the purposes of both English law and the Lugano Convention, effective service of the proceedings out of the jurisdiction may have been made on the defendants without any need for retrospective validation by way of dispensation of service under r 6.9(1) of the English Civil Procedure Rules ("CPR"). Instead, Lord Brown thought (at [31]) that it was "at least arguable" that the court could instead remedy the irregularity under r 3.10(b) of the CPR which is *in pari materia* with our O 2 r 1(2) of the ROC.

47 Lord Brown also held that what took place in *The Goldean Mariner* and in the case before them raised essentially the same question, *viz* whether the attempt to serve the writ was effective. It was not about retrospective validation and, therefore, "[t]he question is purely one for [English] domestic law" to answer (at [33]). Lord Brown went on to analyse the situation on the assumption that it was necessary to invoke r 6.9 of the CPR to dispense with service of the claim form before the service in fact effected can be declared valid. His Lordship conceded that the invocation of r 6.9 of the CPR might in one sense be regarded as "retrospective validation" of ineffective service. Given that the "effect would then be to alter the jurisdictional precedence under an international Convention" (at [35]), Lord Brown thought (at [37]) that "the power is one to be exercised sparingly and only in the most exceptional circumstances". Therefore, it was clear to his Lordship that the court's discretion under r 6.9 of the CPR should be exercised, but with greater circumspection than under r 3.10(b) of the CPR.

48 Notwithstanding this high threshold, His Lordship thought that the case was deserving of cure because of its "exceptional" circumstances. The relevant factors were (a) the defendants suffered no prejudice by the failure to serve the original claim form but sought to exploit it; (b) the essential faults were those of the Swiss authorities and not the plaintiffs; and (c) to deny the service effectiveness would lead to part of the claims being forsaken because in that event, neither the English nor the Swiss courts would have jurisdiction over the entire claim.

49 These two English cases illustrate that amongst the various factors that are relevant in considering whether or not to cure the irregularity in an attempt at service out of jurisdiction, the fact of whether the defendant was apprised of the proceedings is highly significant. If the defendant was in fact apprised of and took steps to contest the proceedings, he would have suffered no prejudice. Another factor which was considered is whether the plaintiff had properly done all that he could to effect service, as was the situation in *Phillips* where it was the Swiss authorities who had failed. Both factors exist in favour of Global in the present case, especially since it had even received a copy of an endorsement from the process server indicating that the Writ had been served on the three defendants.

50 Even assuming that both factors are not determinative, the call on the exercise of the court's discretion is compelling here. Global and the defendants have been involved in this suit for almost a decade. Yet substantive proceedings have not gotten off the ground because of myriad procedural obstacles. It can be said that in the light of the several assiduous attempts at service and the defendants' knowledge of such attempts and of the proceedings, the procedural defects are illusory. To fail to cure the irregularities in the present case would cause undue prejudice to Global by denying its right to a hearing. I will therefore exercise my discretion and cure the irregularities in service on Deveshwar and Vaidyanath. Accordingly, Global's appeal in Registrar's Appeal No 466 of 2010 is allowed, and the three defendants' appeal in Registrar's Appeal No 465 of 2010 is dismissed. As the outcome requires the exercise of the court's discretion to cure irregularities of service on two of the defendants, I will hear counsel on the question of costs.

[note: 1] Bishwa Behari Chatterjee's ("Chatterjee") 7th affidavit, para 5(b).

[note: 2] Neo Ban Chuan's ("Neo") 1st affidavit, exhibit BCN-6.

[note: 3] Statement of Claim ("SOC"), para 23

[note: 4] SOC, para 21

[note: 5] SOC, para 78

[note: 6] SOC, para 79

[note: 7] SOC, para 80

[note: 8] SOC, paras 35, 52-53, 58-59, 63 and 67.

[note: 9] SOC, paras 71, 73, 75 and 77.

[note: 10] SOC, paras 38, 40-41.

[note: 11] SOC, para 42.

[note: 12] SOC, paras 47 and 49-50.

[note: 13] SOC, para 82.

[note: 14] *Eg* Neo's 2nd affidavit, exhibits BCN-57, BCN-63, BCN-64; Neo's 1st affidavit, exhibit BCN-17; Neo's 3rd affidavit, exhibit BCN-82.

[note: 15] *Eg* Neo's 1st affidavit, exhibit BCN-1, Neo's 2nd affidavit, exhibits BCN-70, BCN-71, BCN-64.

[note: 16] Neo's 1st affidavit.

[note: 17] Neo's 2nd affidavit, exhibit BCN-53.

[note: 18] Chatterjee's 6th affidavit, paras 19-29.

[note: 19] Bharucha's 7th affidavit, para 10

[note: 20] Bharucha's 7th affidavit, paras 12-13

[note: 21] Bhagwati's 1st affidavit, para 14

[note: 22] Neo's 2nd affidavit, exhibit BCN-49 at pg 180.

[note: 23] Mohan's 2nd affidavit, paras 14 and 15.

[note: 24] Bhagwati's 1st affidavit, para 7.

[note: 25] Bharucha's 8th affidavit, paras 10-11.

[note: 26] Bhagwati's 1st affidavit, para 8 and exhibit PNB-2.

[note: 27] Bhagwati's 1st affidavit, exhibit BNP-3.

[note: 28] Mohan's 2nd affidavit, para 20.

[note: 29] Mohan's 2nd affidavit, paras 18-19.

[note: 30] Chatterjee's 8th affidavit, paras 5 and 7.