IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 02(i)-35-04/2019(W)

BETWEEN

1. GOH TENG WHOO

2. TAN HWA CHENG … APPELLANTS

AND

AMPLE OBJECTIVES SDN BHD … RESPONDENT

CORAM

ABDUL RAHMAN SEBLI, FCJ

HASNAH MOHAMMED HASHIM, FCJ

MARY LIM THIAM SUAN, FCJ

JUDGMENT OF THE COURT

[1] The question of law for our determination concerns the service of a writ and statement of claim ("the writ" for convenience). The question is as follows:

> "Whether, considering the relevant provisions in Orders 10,13 and 62 of the Rules of Court and S. 114(f) of the Evidence Act and S. 12 of the Interpretations Acts 1948, 1967, where service of a Writ is alleged to have been carried out by way of sending the same to a Defendant by A.R. Registered Post pursuant to O. 10, R. 1(1) of the Rules of Court, 2012, can the Court seal a judgment in default of appearance

> notwithstanding that the Affidavit of Service does not exhibit the A.R. Registered Card containing an endorsement as to receipt by the Defendant himself or someone authorized to accept service of the same on his behalf?"

[2] The proposition behind the question is that where the plaintiff elects to effect service of a writ by AR registered post rather than by personal service, he must produce the acknowledgement of receipt card ("AR card") as proof of such service before the court can enter final judgment in default of appearance ("JID") against the defendant.

[3] The appellants' submission is that the answer to the leave question should be in the negative, i.e. the court cannot seal a JID in the absence of proof of service and that this proof can only come by:

(a) the affidavit of service exhibiting the AR card;

(b) the AR card showing an endorsement acknowledging receipt by the defendant himself;

(c) or, if the endorsement is not made by the defendant himself, the affidavit of service showing that the indorser was someone authorized by the defendant to accept service of the writ on his behalf.

[4] The facts material to the issue are as follows. The appellants were the 4th and 5th defendants respectively in the High Court. The respondent filed the writ on 11.8.2016. Upon extraction, the respondent by its solicitor attempted to serve the writ separately on the appellants by AR registered post on 22.8.2016. This was done pursuant to O. 10 r. 1(1) of the Rules of Court 2012 ("the Rules") which provides:

> "(1) Subject to the provisions of any written law and these Rules, a writ shall be served personally on each defendant or sent to each defendant by prepaid A.R. Registered post addressed to his last known address and in so far as is practicable, the first attempt at service must be made not later than one month from the date of issue of the writ."

[5] The provision is clear and unambiguous. It says that subject to the provisions of any written law and the Rules, it is mandatory for a writ to be served on the defendant either personally or sent by AR registered post. Where the plaintiff elects to effect service by AR registered post instead of personal service, he must send the

writ to the last known address of the defendant within the specified period.

[6] As a step towards entering JID against the appellants, the respondent's solicitor affirmed an affidavit of service stating that he had posted the writ by AR registered post to the appellants' last known addresses. But he did not exhibit the AR cards, nor did he inform the court whether the AR cards were returned or otherwise. He merely exhibited ***proof of posting*** by indorsing the day and date of service on the flip side of the writ. This is what he said in paragraph 6 of his affidavit of service:

> "[6] Saya juga telah pada tarikh yang sama membuat suatu pengindorsan tentang hari dan tarikh penyampaian di belakang Writ tersebut."

[7] The indorsement was to comply with O. 62 r. 9 of the Rules which provides that the affidavit of service shall state *inter alia* the day of the week and date on which the writ was served. It is in fact a requirement of O. 10 r. 1(4) of the Rules which if not complied with disentitles the plaintiff from entering final or interlocutory judgment against the defendant. The provision reads:

"(4) Where a writ is duly served on a defendant otherwise than in accordance with paragraph (2) or (3), then subject to Order 11, rule 5, unless after service the person serving it endorses on it the following particulars, that is to say, the day of the week and date on which it was served, where it was served, the person on whom it was served, and, where he is not the defendant, the capacity in which he was served, the plaintiff in the action begun by the writ is not entitled to enter final or interlocutory judgment against that defendant in default of appearance or in default of defence, unless the Court otherwise orders."

[8] It is worth noting that the provision speaks of a writ that is "duly served" on the defendant. As for proof of service, O. 13 r. 7 of the Rules provides as follows:

"(1) A judgment shall not be entered against a defendant under this Order unless –

(a) the plaintiff produces a certificate on non-appearance in Form 12; and

(b) either an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant, or the plaintiff produces the writ endorsed by the defendant's solicitor with a statement that he accepts service of the writ on behalf of the defendant.

(2) Where an application is made to the Court for an order affecting a party who has failed to enter an appearance, the Court may require to be satisfied in such manner as it thinks fit that the party is in default of appearance."

[9] Obviously the intention behind the provision is to ensure that the action has been brought to the knowledge of the defendant or someone authorised by him to accept service of the writ before the court takes the drastic step of sealing the JID with all the attendant consequences.

[10] It must be remembered that this mode of service, although allowed by the law, has the potential to cause hardship to unsuspecting defendants. It is therefore necessary for the court to exercise caution before entering JID against a party who fails to enter appearance. The object of the provision will be defeated if the court were to mechanically accept without question the plaintiff's assertion that the writ has been served on the defendant.

[11] Coming back to the facts of the case, no appearance was entered by the appellants. Accordingly the respondent entered JID against the appellants on 14.9.2016. It was only at the setting aside application that the respondent in its affidavit in reply:

(i) exhibited the AR card in respect of service on the first appellant, but the AR card disclosed that the AR postage was received by a person by the name of "Goh Tiow

Beng", later identified as the first appellant's brother. It was not received by the first appellant himself as the defendant;

(ii) explained that the AR card in respect of service on the second appellant was not returned.

[12] The appellants applied to set aside the JID but their application was dismissed by the High Court on 21.3.2018. Their appeal to the Court of Appeal against the decision was likewise dismissed on 17.4.2018, hence the present appeal before us, leave having been granted on 27.3.2019.

[13] The appellants' case in both courts below was that the JID were not regularly entered and ought to be set aside *ex debito justitiae* as the AR cards were not exhibited in the solicitor's affidavit of service. It was submitted that in the absence of the AR cards, service of the writ had not been proved by the respondent. Both courts below rejected the argument and held that there was no requirement for the AR cards to be exhibited in the affidavit of service.

[14] The respondent's case, which found favour with both courts below was that for the purposes of O. 10 rr. 1(1) and 1(4) read with O. 13 r. 7 of the Rules, it was entitled to rely on the postal receipt issued by the post office to prove service without further proof. In other words, proof of posting is conclusive proof of service.

[15] For this proposition, reliance was placed on section 12 of the Interpretation Acts 1948 and 1967 ("the Interpretation Acts") which provides as follows:

> "12. Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service –
>
> (a) shall be **presumed to be effected** by properly addressing, prepaying and posting by registered post a letter containing the document; and
>
> (b) shall be presumed to have been **effected at the time** when the letter would have been delivered in the ordinary course of the post."
> (emphasis added)

[16] It is a double presumption – presuming both service and time of service. The following authorities were cited by the respondent to support its argument that mere posting is sufficient to prove service:

(1) The Supreme Court case of *Amanah Merchant Bank Bhd (formerly known as Amanah Chase Merchant Bank Berhad) v Lim Tow Choon (through the official assignee)* [1994] 2 CLJ 1 which held that it was sufficient to prove service of the notice of demand by sending the letter of guarantee through the post in an envelope addressed to the last known address of the guarantor, and that it was irrelevant whether it was sent by registered post or by AR registered post.

Obviously it was not a case on O. 10 r. 1(1) of the repealed Rules of the High Court 1980 which was similar word for word with O. 10 r. 1(1) of the Rules. It was a case on the construction to be given to a clause in the letter of guarantee and not on the construction of statutory provisions as is the case in the present appeal;

(2) The decision of this court in *Maxland Sdn Bhd v Timatch Sdn Bhd* [2014] 7 CLJ 149 where the questions of law for this court's determination were as follows:

(i) Where a writ is endorsed generally with claims for damages and restraining order, whether it is mandatory for the plaintiff to serve a statement of claim on the defendant and to proceed with the action as if the defendant had entered an appearance under O. 13 r. 6(1) of the Rules of the High Court 1980;

(ii) If the answer is in the affirmative, whether a judgment in default of appearance obtained before the statement of claim is served is therefore irregular and may be set aside *ex debito justitiae*.

It will immediately be seen that the issue before the court was materially different from the issue before us in the present appeal, which is whether service of the writ by AR registered post is established by mere proof of posting. The case is therefore not authority for the proposition that posting is conclusive proof of service of the writ;

(3) The Court of Appeal case of *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor*

[2008] 4 CLJ 175 *("Yap Ke Huat")* which held that there is no requirement of law that the plaintiff must prove that the person named in the post had received the writ, and that once the writ is sent by AR registered post it is *prima facie* proof of service unless there is rebuttal evidence by the defendant. There was no reference however to section 12 of the Interpretation Acts. This is what James Foong JCA (as he then was) said in delivering the judgment of the court when he was dealing with the case for the sixth defendant:

> "[30] In respect of this defendant, the prepaid A.R. registered post acknowledgment card was not returned. But, following what we have expounded earlier, this does not mean that the service of the writ and statement of claim is deemed defective. What is demanded in O. 10 r. 1 RHC is that the writ (and in this case including the statement of claim) be sent by prepaid A.R. registered post to the defendant's last known address. When there is sufficient evidence of posting, as it is in this case, then under the rules, the writ (and statement of claim) is deemed to be served on the defendant. There is no necessity to prove that the acknowledgment of the A.R. registered posting has been returned. Of course, if it is returned by the Post Office then it is further proof that it was not only sent but also received. **But for the purpose of service, proof of sending by prepaid A.R. registered post is sufficient**";
> (emphasis added)

(4) The Court of Appeal case of *Sivamurthy Muniandy & Ors v Lembaga Kumpulan Wang Simpanan Pekerja* [2012] 9 CLJ 598 which followed *Yap Ke Huat* - that there was no necessity for the plaintiff to prove receipt of the writ by the person named in the AR registered post;

(5) The High Court case of *Pengkalen Concrete Sdn Bhd v Chow Mooi & Anor* [2003] 6 CLJ 326 where it was held that there was no need for proof that the named person in the writ must be the very same person who had received it if it was sent by AR registered post. In that case, the writ was received by one “Yanti" and not the appellant but this did not vitiate the service of the writ. The decision was approved by *Yap Ke Huat*.

[17] The appellants on the other hand relied on the following authorities to support their argument that the AR cards must be produced as proof of service before the JID could be entered against them:

(1) The Court of Appeal case of *Chung Wai Meng v Perbadanan Nasional Berhad* [2017] 1 LNS 892; [2018]

1 MLRA 331 *("Chung Wai Meng")* which held that production of the AR card is a prerequisite before JID can be entered against the defendant;

(2) The High Court case of *Tajudeen MK Syed Mohamed v ZMS Construction* [2018] 5 MLRH 72 which followed *Chung Wai Meng* – that posting is not sufficient to prove service of the writ and that actual receipt by the defendant of the envelope containing the writ must be proved at the time JID is sought to be entered. This is to avoid an unwitting defendant from being visited with the draconian and drastic consequences which may follow the JID;

(3) The High Court case of *Azhar bin Wahab v ANS Development Sdn Bhd* [2017] MLRHU where the learned judge took judicial notice of the Pos Malaysia website which explains the features of postage by AR registered post and went on to rule that the production of the AR card is a prerequisite to prove service. The learned judge further ruled that the affidavit of service must allude to the status of the AR card. The decision is consistent with *Chung Wai Meng*;

(4) The High Court case of *Ali bin Jeman v Indranika Jaya Sdn Bhd & Ors* [2016] MLJU 1485 which decided that since the AR card was never returned, most probably the writ was never served and that in any event the plaintiff bore the burden of proving service which he was unable to do conclusively in the absence of the AR card. The decision is also consistent with *Chung Wai Meng.*

[18] According to learned counsel for the appellants, which learned counsel for the respondent did not dispute, it is common knowledge that the ordinary business of delivery by AR registered post is only completed by any of the following events taking place:

(a) the return of the envelope and document to the sender and the document with the notation “tidak dituntut”; or

(b) the return of the AR card to the sender with the acknowledgment of receipt by the intended recipient; or

(c) the return of the AR card to the sender with the receipt acknowledged by a third party.

[19] It was pointed out that the respondent's affidavit of service did not allude to any of the above events having taken place. In the circumstances, it was submitted that the learned Registrar of the High Court ought not to have accepted the affidavit of service at face value and to seal the JID in the absence of the AR cards.

[20] There is substance to the argument. The affidavit of service merely alludes to the fact that the writ had been posted by AR registered post to the last known addresses of the appellants. It does not allude to the fact that the appellants or their authorised representatives had acknowledged receipt of the writ.

[21] Learned counsel emphasised the point that O. 10 r. 1(4) imposes an obligation on the plaintiff who serves pursuant to O. 10 r. 1(1) to indorse on the writ the following particulars, failing which no JID may be entered:

(i) the day of the week and the date on which it was served;

(ii) where it was served;

(iii) the person on whom it was served; and

(iv) where the person served is not the defendant, the capacity in which he was served.

[22] The contention was that irrespective of whether service is personal or by AR registered post, it is incumbent on the plaintiff to indorse on the originating process the above four requirements. It was argued that only the production of the AR card will allow the process server to comply with O. 10 r. 1(4) of the Rules, namely to state the name of the person on whom it was served, and if such person is not the defendant, the capacity in which he was served.

[23] Dato' Kirubakaran for the appellants conceded that it is impractical for the plaintiff to seek out the postman who delivers the AR registered post to indorse on the writ those particulars but argued that considering the drastic consequences of a JID, service on the person named in the AR registered post must be strictly proved.

[24] The Court of Appeal in *Chung Wai Meng* quoted with approval the following observations by Siti Norma Yaacob J (as she then was) in *Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors* [1988] 1 LNS 170 *("Rasatulin")*:

> "In this instant case, rather than sending the notices by ordinary post, the solicitors for the plaintiff chose to send them by way of AR registered post and by doing so, the plaintiff has varied cl 8 of both guarantees. By so choosing, the plaintiff has also burdened themselves with the added responsibility of seeing that the AR cards shall be returned to them duly acknowledged by the fourth and fifth defendants, for there to be proper service of such notices on them. In this case both the AR cards were returned with the endorsements 'kembali tidak boleh dituntut'. As there is no proper and effective service of such notices on the fourth and fifth defendants, this in itself affords a defence to both of them."

[25] Like the case of *Amanah Merchant Bank*, *Rasatulin* was a case on the construction to be given to a clause in the letter of guarantee and not on the construction to be given to the provisions of the repealed Rules of the High Court 1980 read with section 12 of the Interpretation Acts. The case is therefore of little assistance to the appellants except perhaps for the persuasive reasoning of the learned judge on the need for the AR cards to be duly acknowledged by the defendants in that case.

[26] It was the submission of learned counsel for the appellants that the courts below should have adopted the purposive approach in interpreting O. 10 r. 1(1) of the Rules in deciding whether service had been properly effected, for the following reasons:

(i) Service of the writ, whether in person or by AR registered post must be effected personally on the named defendant;

(ii) When the respondent elected to serve the writ by AR registered post, it was incumbent on the respondent to produce the AR card evidencing receipt of the writ by the named defendant.

[27] According to counsel, it would be an unsafe practice in litigation to allow a plaintiff who elected to serve an originating process by AR registered post to enter default judgment without producing the AR card which would indicate whether the originating process had indeed been received by the intended recipient. We were referred to *Malaysian Civil Procedure 2013* where the learned authors opine that the AR card must be produced to prove service.

[28] On the authority of *Chung Wai Meng*, it was submitted that the High Court had fallen into error in holding as a matter of law that service by AR registered post is deemed to have been effected by the posting receipt issued by the post office. It was

argued that service is only duly effected upon production of the AR card as proof that the intended defendant had acknowledged receipt of the writ by signing on the AR card. It was thus urged upon us that the later decision of the Court of Appeal in *Chung Wai Meng* is to be preferred over *Yap Ke Huat*.

[29] This brings us to the crux of the matter, which is the respondent's contention that where service is effected by AR registered post, service is presumed by section 12 of the Interpretation Acts to have been effected and no further proof is required other than proof of posting.

[30] It does not escape us that section 12 of the Interpretation Acts speaks of "registered post" whereas O. 10 r. 1(1) of the Rules speaks of "A.R. Registered post" but in our view that makes no difference to our final analysis as both are "registered post". Surely "registered post" is wide enough to include "AR registered post". More importantly, section 12 of the Interpretation Acts is more concerned with service of a document by post rather than with the type of post.

[31] Section 12 of the Interpretation Acts must be read in its proper context. What it says is that where a document is served by registered post, service and time of service are *"**presumed**" "**until the contrary is proved**"*. There is nothing in the section to say that posting by registered post is conclusive proof of service. What is clear is that it is a rebuttable presumption of law that can be displaced by evidence to the contrary. It is not an irrebuttable presumption that shuts out all forms of defence to the proof of posting.

[32] Thus, if there is evidence that the defendant has not been served with the document, the presumption is rebutted and the court will make a finding that there has been no service of the document in an application for setting aside. It is anathema to the concept of justice and fair play that a defendant who has no knowledge of the action is attached with liability without being given the opportunity to explain why the default judgment should not be entered against him.

[33] It must be appreciated that the presumption of service under section 12 of the Interpretation Acts only kicks in if the document has been sent by registered post to the proper address of the

defendant, in the case of O. 10 r. 1(1) of the Rules to his last known address. Failure to do so will render the service bad in law and consequently no JID can be entered against the defendant, unless there is evidence direct or circumstantial to prove that service by post had been effected without the aid of the presumption.

[34] In the context of the present appeal, the question is whether the respondent had sent the writ by AR registered post addressed to the last known addresses of the appellants as required by O. 10 r. 1(1) of the Rules. If that had been done, service by post would be presumed to have been effected by operation of section 12 of the Interpretation Acts and the burden would then shift to the appellants to prove to the contrary that they had not been served with the writ.

[35] Whether or not the respondent had complied with O. 10 r. 1(1) of the Rules by sending the writ by AR registered post addressed to the last known addresses of the appellants and whether the appellants had rebutted the presumption of service under section 12 of the Interpretation Acts by proving that they did not receive the writ were matters for the trial court to determine, being questions of fact.

[36] In the present case, the approach taken by both courts below was that posting of the writ by AR registered post was conclusive proof of service, thus leaving no room for the appellants to discharge their burden of proving that they did not receive the writ, in rebuttal of the presumption under section 12 of the Interpretation Acts.

[37] We have to say with regret that this is a wrong approach which had occasioned a serious miscarriage of justice to the appellants in that they had lost the chance of having the JID set aside *ex debito justitiae* on the ground that they were irregularly obtained for failure of service. The error is serious enough to vitiate the judgments entered against them.

[38] The appellants' case had been that they had succeeded in rebutting the presumption of service as established by the following facts:

(a) The first appellant exhibited evidence that he was not residing at the address of service at the material time. His estranged brother had signed on the AR card and did not inform him of the same;

(b) The second appellant admitted residing at the stated address but denied receiving the writ. No AR card was ever produced by the respondent in respect of the second appellant.

[39] In our view, there is sufficient merit in the point raised. Since the appellants denied receiving the writ, which denials were corroborated by the respondent's failure to produce the AR cards duly signed by the appellants or their authorised representatives, the presumption of service under section 12 of the Interpretation Acts had been rebutted by the appellants on the balance of probabilities.

[40] The appellants had asserted under oath that they did not receive the writ but the respondent chose not to contradict the assertions by producing the AR cards duly signed by the appellants or their authorised representatives. In the case of the first appellant, the AR card was signed by his brother who was not his authorised representative and in the case of the second appellant, the AR card was not even returned. On the facts

therefore, it is more probable than not that the appellants did not receive the writ.

[41] It would have been easy for the respondent to produce the AR cards to prove service but no explanation was given as to why this was not done except to say that it was not required by law to do so.

[42] Therefore, the respondent's failure to contradict the appellants' assertions that they did not receive the writ must be taken as an admission of the fact so asserted: See *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] CLJ Rep 45 *("Alloy Automative")* which the Court of Appeal applied in *Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 CLJ 609. In *Alloy Automative*, this is what Lee Hun Hoe CJ (Borneo) delivering the judgment of the Supreme Court said:

> "In his affidavit dated 30 April 1984 Choo Chak Low did not answer the matters raised in the above affidavit of Liew Mook. There is force in the appellant's contention that an affidavit must reply specifically to the allegations, and if it does not, then those allegations not replied must be

taken to have been accepted. In *Dawkins v Prince Edward of Saxe Weimar* [1875-76] 1 QBD 499 Blackburn J stated:

> … Now, upon that, if that is the true state of the case, we are of opinion that no cause of action can be shewn. Colonel Dawkins does not meet that in the affidavit in reply….."

[43] For all the reasons aforementioned, our answer to the leave question is in the negative, that is to say, where service of a writ is alleged to have been effected by way of sending the same to a defendant by A.R. Registered post pursuant to O. 10 r. 1(1) of the Rules of Court 2012, the court cannot seal a judgment in default of appearance where the affidavit of service does not exhibit the A.R. Registered card containing an endorsement as to receipt by the defendant himself or someone authorized to accept service of the same on his behalf.

[44] In the circumstances, the appeal is allowed. The decisions of the courts below are aside and the appellants' application to set aside the JID is allowed. My learned sisters Hasnah Mohammed Hashim FCJ and Mary Lim Thiam Suan FCJ have had sight of this judgment in draft and have agreed to it. Costs to the appellants, subject to payment of the allocator fee.

-Signed-

ABDUL RAHMAN SEBLI
Judge
Federal Court of Malaysia
Dated: 5 March 2021.

For the Appellants: Dato' Kirubakaran and Jasvinjit Singh of Messrs Au & Jasvinjit.

For the Respondent: Mansur Ussaimi Bin Mohd Salleh and Mohd Shahir Bin Mohd Isa of Messrs Mansur & Yazrudin.