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CASE NOTES

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SERVICE OF PROCEEDINGS ON FOREIGN COMPANIES: THE RELATIONSHIP BETWEEN THE COMPANIES ACT AND THE CIVIL PROCEDURE RULES

Sea Assets Ltd v. *PT Garuda Indonesia (No. 1)*

[2000] 4 All E.R. 371 (Q.B.D. (Comm. Ct.)), (Longmore J.)

Since 1 January 1993, the Companies Act has contained two parallel, although very similar, sets of provisions for service of proceedings on foreign companies. In simple terms, one regime deals with foreign companies with a branch office in the United Kingdom and the second with foreign companies that have a place of business in the United Kingdom but no branch office.

One problem with the "branch office" regime is the lack of a statutory definition of a branch. A further complication arises from the provisions in Part 6 of the Civil Procedure Rules 1998 ("CPR")[1] concerning permitted methods of service on companies. These issues, especially the latter, arose for consideration in the present case.

THE FACTS

The claimant, S Ltd, commenced proceedings in England against G, an Indonesian company with a branch in London. The claim related to promissory notes issued by G and subsequently dishonoured on presentation. G was subject to section 694A of the Companies Act 1985, which provided that service of process on an "oversea company" *in respect of the carrying on of the business of a registered branch* was "sufficiently served" if left at or sent to the address of the branch. The dispute in this case did not arise out of the carrying on of the business of G's London branch and accordingly S Ltd sought to serve G in accordance with CPR Part 6 which set out methods of service alternative to those specified in the Companies Act.[2] In particular, CPR r. 6.5(6) provided that any company other than one registered in England and Wales could be served at any place of business of the company within the jurisdiction. S Ltd therefore served proceedings at G's London branch on the basis that G was a company other than one registered in England and Wales and that its London branch was a place of business within the jurisdiction.

[1] S.I. 1998/3132.

[2] Detailed below.

G applied to have service set aside, contending that section 694A set out the statutorily required method for service on such a company and that CPR Part 6 was *ultra vires* to the extent that it purported to provide for an alternative method of service. Alternatively, G contended that it was a company registered in England and Wales within the meaning of rule 6.5(6) in which case it could only be served at its principal office or a place with a real connection with the claim, of which its London branch was neither.

THE STATUTORY PROVISIONS

These are contained in Part XXIII of the Companies Act 1985, entitled "Oversea Companies". Section 691 of the 1985 Act requires companies incorporated outside the United Kingdom that establish a place of business in Great Britain to lodge various documents with the Registrar of Companies and provide the Registrar with the name and address of a person authorised to accept service of proceedings on the company's behalf. Section 695 provides that proceedings against the company are sufficiently served if left at or sent to that address. Importantly, there is no requirement that the proceedings must relate to the carrying on of the company's business at that address.

Various additional sections of the Act were inserted by means of statutory instrument[3] in order to implement an EC Directive concerning disclosure requirements for company branch offices. Although the Directive applied only to EC companies, the new sections of the Act apply to all oversea companies. The two regimes are mutually exclusive.[4]

The parallel provision to section 695 (service on oversea companies with a place of business in the United Kingdom) is found in section 694A which provides that:

> (2) Any process or notice required to be served on a company to which this section applies in respect of the carrying on of the business of a branch registered by it under paragraph 1 of Schedule 21A is sufficiently served if-
> (a) addressed to any person whose name has, in respect of the branch, been delivered to the registrar . . ., and
> (b) left at or sent by post to the address for that person which has been so delivered.

CIVIL PROCEDURE RULES PART 6

CPR rule 6.2(2) provides that a company may be served by any method permitted under Part 6 as an alternative to those set out in sections 695 and 694A of the Companies Act. Rule 6.5(6) sets out permitted methods of service on various types of party in circumstances where no address for service has been given and no solicitor is acting for the party to be served.

In respect of a company registered in England and Wales, the permitted places of service are the principal office of the company or "any place of business of the company within the jurisdiction which has a real connection with the claim". In respect of "any other company" the permitted place is "any place of business of the company within the jurisdiction".

[3] Oversea Companies and Credit Financial Institutions (Branch Disclosure) Regulations 1992, S.I. 1992/3179.

[4] Section 690B of the 1985 Act.

THE COURT'S DECISION

Longmore J. determined that he was concerned with two questions. The first was whether section 694A of the 1985 Act was the only permissible method of service for oversea companies with a branch in the United Kingdom, or whether rules of court could provide for an alternative method of service.

The second question was whether, if the statutory provisions were not exclusive, CPR Part 6 entitled the claimant to serve proceedings at the defendant's London branch. This depended on whether the defendant was to be treated as a company registered in England and Wales by virtue of having a branch in London – in which case by virtue of Part 6 it could only be served at its principal office or a place of business within the jurisdiction with a real connection with the claim – or whether it was not so registered, in which case it could be served at any place of business within the jurisdiction. It was common ground that the London branch fell within the latter of these possibilities but not the former.

The first question: Exclusivity of Section 694A

Longmore J. accepted the defendant's argument that provisions relating to oversea companies with a place of business within Great Britain were expressly prohibited from applying to the "new" concept of oversea companies with a branch in the United Kingdom. However, he did not accept that it followed that the effect of the "branch office" provisions was that service could only be effected pursuant to section 694A. The section did not say so in terms, merely stating that proceedings in relation to the carrying on of the business of the branch were "sufficiently served" if served at the branch. That did not prevent some other statutory provision, whether original or subordinate legislation, from making other provision for service which is what the CPR had purported to do.

Longmore J. rejected the defendant's argument that the CPR provisions were *ultra vires*. That could only be the case if section 694A was the statutorily required method of service. Longmore J. decided that the statute was permissive, not mandatory. In reaching his conclusion, the judge relied on the dicta of Clarke L.J. in *Saab* v. *Saudi American Bank*[5] (which he accepted were not part of the ratio of the case):

> The importance of the new rule[6] is of course that it appears that the position has now reverted to what it was before section 694A was enacted, namely that process can be served on a foreign company with a place of business in, say, London without the necessity for establishing any link between the process and the business being conducted in London.

The second question: service under Part 6

The defendant argued that it was not open for the claimant to have used the "any other company" method of service in rule 6.5(6) since the effect of registration of the branch office was that the defendant was a company registered in England and Wales. The defendant's argument rested in part on the fact that the word "registered" rather than "incorporated" was used.

Longmore J. dealt with the point briefly, holding that an oversea company that complied with its obligations to submit particulars to the registrar and an address for service in relation to its branch did not become a company registered in England. It was a company whose essence was overseas.

Accordingly the defendant's application to have service set aside was dismissed.

[5] [1999] 4 All E.R. 321 at 324–325.

[6] *i.e.* CPR r. 6.5(6).

COMMENT

One of the questions left unanswered by this case is why section 694A requires the claim to be in respect of the business of the branch (it will be recalled that the parallel provision for companies with a place of business but no branch, section 695, contains no such restriction). Longmore J. described this as a new requirement in English law and stated that it was not immediately obvious why Parliament decided that all oversea companies with a branch should only be capable of being served with proceedings relating to the business of the branch while companies carrying on business in the Untied Kingdom other than at a branch could be served with any kind of proceedings. The judge went on to state that this was not a matter on which he needed to express a view since it was common ground that the defendant company in the present case did have a branch.

It is submitted that the distinction between section 694A and section 695 was in fact relevant. The fact that the defendant *had* a branch was not in any way determinative of the central issue in the case, which was whether section 694A was mandatory or permissive. That issue surely requires an analysis of the two parallel provisions and the reasons for the differences between them.

If the decision in *Sea Assets* is correct, one has to question whether the words "in respect of the carrying on of the business of the branch" in section 694A are left with any meaning. Since CPR rule 6.5(6) permits service on a foreign company at *any* place of business it has in the jurisdiction, it matters not (if the decision is correct) whether one serves at a branch or not and what the proceedings are about. In the aforementioned *Saab* v. *Saudi American Bank*, as we have seen, Clarke L.J. suggested that the position had "reverted to what it was before section 694A was enacted". Did the CPR draftsmen intend to override the effect of the statute in that way?

One might argue that the matter is rescued by the possibility of a stay due to *forum non conveniens*. Not necessarily: the facts of the present case, whereby the dishonoured promissory notes were payable in London, are such that permission to serve out of the jurisdiction would probably have been given. Although the outcome might therefore have been the same, the point is whether jurisdiction based solely on service on a foreign company should be so widely drawn as it was in *Sea Assets*.

In *Saab* v. *Saudi American Bank*, the court at first instance held that the claim in that case related "in part" to the carrying on of the business of the branch and that was sufficient for the purpose of section 694A. Longmore J. appears simply to have followed the *dicta* of Clarke L.J. in that case, which he accepted were *obiter*. There is no substantive reasoning to be found in his decision. Indeed, there is a similar lack of reasoning in relation to the second question. Although it is submitted that his conclusion "feels right", Longmore J. offers no explanation as to why an oversea company with a registered branch is not a company registered in England and Wales.

Finally, the two relevant notes in the White Book[7] should be considered. The first, at 6.2.6, merely recites the decision in *Sea Assets*. The second, at 6.5.5, states that:

> the use of methods of service allowed by the new rules as an alternative to those prescribed by the Companies Act 1985 should be exercised with caution where the consequences of failing to prove good service could be serious for the claimant ... Service using the statutory procedure is usually conclusive. However, the court will interpret Part 6 in accordance with the overriding objective. Service is not an end in itself but a means of bringing process ... to the attention of the company.

[7] *Civil Procedure* (Sweet & Maxwell, 2002).

Although headed "Service on *registered* companies" (emphasis added) the comment is of relevance to the present point.

It is submitted that the relationship between the CPR and the Companies Act is unclear. *Sea Assets* appears to be the only current authority on the point. It is clear that the point would merit further consideration.

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