FEFLAR LIMITED v. BENNETT

SUPREME COURT (Schofield, C.J.): March 19th, 1996

Conflict of Laws—companies—legal proceedings—Gibraltar forum conveniens for action by Gibraltar-registered company to recover debt from foreigner—debtor has duty to make payment at creditor's place of business

Civil Procedure—service of process—service out of jurisdiction—applicant for service out of jurisdiction to show good arguable case that will obtain judgment in terms sought

Civil Procedure—service of process—personal service—under Rules of Supreme Court, O.65, r.2, personal service requires process-server to inform recipient refusing to accept service of nature of document and to leave it close to recipient

Civil Procedure—service of process—service out of jurisdiction—compliance with foreign procedure—court has discretion under Rules of Supreme Court, O.2, r.1 to set aside service out of jurisdiction for non-compliance with foreign law contrary to O.11, r.5(2), e.g. service by unqualified agent or at wrong time

Civil Procedure—service of process—leave to set aside service—court may give leave retrospectively to apply under Rules of Supreme Court, O.12, rr. 6 and 8 to set aside service out of jurisdiction following judgment, particularly if applicant's delay caused by lack of notice of proceedings due to non-service

The plaintiff company brought an action to recover money loaned by its beneficial owners to the defendant in respect of a building contract in Spain.

The statement of claim contained alternative claims for two different sums, the first for the amount of the original loan, which had been assigned by the lenders to the plaintiff, and the second for a lesser amount stated in an account which had been prepared by the defendant in favour of the plaintiff.

The plaintiff obtained leave from the court to serve the writ on the defendant in Spain and, according to the affidavit of the process-server, a copy of the writ was duly served on the defendant personally. The plaintiff obtained judgment in default of defence for the larger of the two sums claimed and three years later the court made a charging order *nisi* over assets belonging to the defendant.

The defendant applied for orders to set aside the judgment and the charging order, to discharge the court's leave to serve the writ outside the jurisdiction, and to set aside the writ, and sought declarations that the writ had not been served and that the court had no jurisdiction over the subject-matter of the proceedings.

The defendant submitted that (a) the court had no jurisdiction to hear the claim, since the loan was made in connection with a contract between himself and the plaintiff's owners for construction work in Spain; (b) even if the court did have jurisdiction, it should not have granted the plaintiff leave for service outside the jurisdiction, since the affidavit evidence accompanying the writ did not support the plaintiff's claim for the sum of the original loan and failed to reveal that the debt had been reduced by agreement between the parties in consideration for the assignment of the loan to the plaintiff; (c) the court should, in any event, set aside the service of the writ, since under the Rules of the Supreme Court, O.10, r.1 personal service was required, which under O.65, r.2 involved informing a defendant who refused to take delivery of a copy of the writ of the nature of the document and leaving it with him, neither of which the process-server had done; (d) furthermore, since the process-server was not an officer of the court, but only a non-official acting as a process-server, who attempted to effect service on a Sunday, the service was invalid under Spanish law and should be set aside as contravening the laws of the jurisdiction in which it was made, under O.11, r.5(2); and (e) for all these reasons, the writ of summons and the judgment entered on it should be set aside, together with the charging order purporting to enforce the judgment.

The plaintiff submitted in reply that (a) the court's jurisdiction to hear the proceedings was based on the fact that the plaintiff was a Gibraltar-registered company and that the terms of the loan provided for repayment in Gibraltar or England; (b) the court had properly granted it leave to serve the writ on the defendant in Spain, since there was evidence that it had an arguable case at least in respect of the lesser sum contained in the defendant's account; (c) the court could not set aside service of the writ since the defendant had not obtained leave to apply to have service set aside following judgment, as required by O.12, rr. 6 and 8, and in view of the long delay between service and the defendant's application, leave to

do so should be refused; (d) in any event, valid service had been effected under O.65, r.2 by leaving the envelope containing the copy of the writ within the sight of the defendant, who was well aware of its contents and who had sought to avoid service; (e) the fact that the service did not comply with Spanish law did not make it ineffective to commence proceedings in Gibraltar, and the court should exercise its discretion in the plaintiff's favour by allowing the service to stand; and (f) even if judgment were to be set aside, the plaintiff should be permitted to amend its statement of claim and recommence proceedings since the defendant had acknowledged a debt owed to it.

Held, making the following orders:

(1) The court had jurisdiction to hear the proceedings not only because the plaintiff was a Gibraltar-registered company, but also because payment was due in Gibraltar, since it was the defendant's duty to seek out the plaintiff at its place of business to pay the debt, and the defendant had failed to do so (page 241, lines 17–26).

(2) However, it was clear from the evidence of both parties that the amount of the debt stated in the statement of claim did not represent the sum now due to the plaintiff but rather the amount of the original loan, which had been superseded by events. Accordingly, the plaintiff had no good arguable case that judgment would be entered in its favour in the terms sought, and leave to serve the writ outside the jurisdiction ought not to have been given (page 239, line 38 – page 240, line 3; page 241, lines 5–12).

(3) Moreover, there had been no valid personal service of the writ in this case, since there was insufficient evidence that the process-server had informed the defendant that the envelope which he had left on the ground outside the defendant's house contained a copy of the writ, as he was required to do under O.65, r.2 of the Rules of the Supreme Court. And even if this did not nullify service of the writ, the court had a discretion under O.2, r.1 to set it aside on the basis that it had been effected contrary to the law of Spain and therefore in breach of O.11, r.5(2). Accordingly, service would be set aside (page 237, line 23 – page 238, line 15).

(4) Since the defendant's delay in applying for the judgment to be set aside was caused by his lack of formal notice of the proceedings because of non-service, the court had no reason to refuse him leave to apply to set aside service. Leave would be given, and the judgment against the defendant and the charging order enforcing it would therefore be set aside. Since it was not the court's function to try the plaintiff's claim, the writ itself would not be set aside, and the plaintiff would be permitted to amend its statement of claim and to reapply for leave to serve the defendant in Spain (page 238, line 31 – page 239, line 2).

Cases cited:
(1) *Banque Russe et Française* v. *Clark*, [1894] W.N. 203, applied.
(2) *Ferrarini S.p.A.* v. *Magnol Shipping Co. Inc., "Sky One"*, [1988] Lloyd's Rep 238, *dicta* of Kerr, L.J. applied.
(3) *Robey & Co.* v. *Snaefell Mining Co. Ltd*. (1888), 20 Q.B.D. 152; 57 L.J.Q.B. 134, applied.

Legislation construed:
Rules of the Supreme Court, O.2, r.1: The relevant terms of this rule are set out at page 238, lines 12–13.
O.10, r.1(1): The relevant terms of this paragraph are set out at page 237, lines 20–21.
O.11, r.5(2): "Nothing in this rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country."
O.12, r.6(1): "Except with the leave of the Court, a defendant may not give notice of intention to defend an action after judgment has been obtained therein."
O.12, r.8(1): "A defendant who wishes to dispute the jurisdiction of the court in the proceedings by reason of any irregularity [in the writ or service thereof or in any order giving leave to serve the writ out of the jurisdiction] . . . shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence, apply to the Court for—
(a) an order setting aside the writ or service of the writ on him, or
(b) an order declaring that the order has not been duly served on him, or
(c) the discharge of any order giving leave to serve the writ on him out of the jurisdiction, or
. . .
(g) a declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject matter of the claim . . . ."
O.65, r.2: The relevant terms of this rule are set out at page 237, lines 22–23.

H.J.M. Levy and *J.E. Restano* for the plaintiff;
J.E. Triay for the defendant.

SCHOFIELD, C.J.: The writ in this action was issued on December 23rd, 1991. The plaintiff's claim is for Pta. 8m. or its equivalent as repayment of money lent to the defendant by Linda Jill Keohane, which loan was, according to the statement of claim, subsequently assigned
45 and/or transferred to the plaintiff company ("Feflar"). There is an

alternative claim for Pta. 6,750,000 or its equivalent on an account stated by the defendant in favour of Feflar.

By an order of this court dated June 23rd, 1992, leave was granted to Feflar to serve the writ of summons on the defendant out of the jurisdiction at an address in Spain. An affidavit of service sworn by one Roger Jennings shows that a copy of the writ was served personally on the defendant on June 28th, 1992. On July 28th, 1992 judgment was entered against the defendant in default of notice of intention to defend for Pta. 8m. together with interest and costs. On March 17th, 1995 an order *nisi* was made charging the assets of four companies in which it is alleged that the defendant owns shares. An application has been filed by a third party seeking the setting aside of the charging order in respect of two of the named companies. The progress of that application depends upon my decision in this application.

This application by the defendant is made pursuant to the Rules of the Supreme Court, O.12, r.8 seeking orders: (a) that the writ be set aside; (b) declaring that the writ has not been served on the defendant; (c) discharging the order giving leave to serve the writ out of the jurisdiction; (d) declaring that the court has no jurisdiction over the defendant in respect of the subject-matter of the claim; (e) that the judgment of July 28th, 1992 be set aside; and (f) that the charging order of March 7th, 1995 be set aside.

The defendant denies that the writ was served upon him and, in a declaration sworn before a Spanish notary, says that he only came to learn of the action when his colleague, who is the person applying to set aside the charging order, told him in April 1995 of the existence of such order. The affidavit of service shows that the writ was served by Roger Jennings, a plumber, of 23 Engineer Lane, Gibraltar. The relevant portion of his affidavit is brief and reads: "I did on Sunday June 28th, 1992, at La Acedia, 29690 Casares, Malaga, Spain personally serve Aubrey Marcos David Bennett, the above named defendant, with a true copy of the writ of summons in this action." This is, of course, proof of service in its sparest terms, tendered by a person who cannot be expected to know the rules relating to service.

The defendant, having denied receipt of the writ, had this to say:

> "I can only remember that a few years back, possibly in 1992, an unknown person, who denied his identification and who came accompanied by a neighbour, tried to hand over to me an envelope without explaining its contents. I refused the said envelope and the person who brought it left it on the ground outside my house. Then I asked a relative of mine to return the envelope to the neighbour who had accompanied the bearer of the envelope but without accepting it, keeping it in my possession or getting to know its contents. I did not even touch it."

In response to that declaration, Feflar filed an affidavit of Lionel Earnshaw who accompanied Mr. Jennings to the defendant's house on June 28th, 1992 to show Mr. Jennings where the defendant lived. He said this:

> "On the way to the defendant's house I noticed that Mr. Jennings had an envelope with him, which he told me was the writ of summons in this action. When we arrived at the defendant's house I parked outside and waited whilst Mr. Jennings walked in with the envelope. A few minutes later Mr. Jennings came out of the house without the envelope and followed by the defendant. When the defendant saw me he told me to get off his land."

Two things are immediately apparent from the defendant's declaration and Mr. Earnshaw's affidavit. The first is that whilst their versions of the service do not entirely correspond, some credibility is lent to the defendant's version that the writ was in an envelope and that the envelope was left with him. Secondly, the defendant must have known or suspected that Mr. Jennings was delivering an unwelcome package to him. From other statements made in the affidavits filed on behalf of Feflar it is likely that the defendant would have sought to avoid that package.

The writ in this suit had to be "served personally on each defendant by the plaintiff or his agent" (see the Rules of the Supreme Court, O.10, r.1). Under O.65, r.2, "personal service of a document is effected by leaving a copy of the document with the person to be served." A note to O.65, r.2 in 1 *The Supreme Court Practice 1995*, para. 65/2/1, at 1175 reads:

> "To effect personal service the clerk or other person entrusted with the task should first satisfy himself that he has found the correct person. He should then hand to or leave with the person to be served a copy of the writ. If the person served will not take the copy, he should tell him what it contains and leave it as nearly in his possession or control as he can."

A further note (*op. cit*.) cites the case of *Banque Russe* v. *Clark* (1) for the proposition that "it is not sufficient to hand the defendant the copy writ enclosed in an envelope without informing him that it is a copy writ." This proposition is consistent with the passage from *The Supreme Court Practice* quoted above.

In the present case, we know that the copy writ was contained in an envelope and that the envelope was left with the defendant. There is nothing before me to support a finding, even on the balance of probabilities, that when he handed the copy writ to the defendant, Mr. Jennings took it out of the envelope or told the defendant what the envelope contained. It is doubtful, from the material before me, that the process-server handed the copy writ to the defendant. Therefore I cannot be satisfied that personal service was effected.

Even if I were so satisfied, which I am not, service would have been defective. Nothing must be done in the process of service which is

contrary to the law of the country where service is effected (see the Rules of the Supreme Court, O.11, r.5(2)). The defendant's counsel has produced the advice of Jose Antonio Romero Fernandez, a Spanish lawyer, which is to the effect that art. 262 of the Spanish Law of Civil Proceedings provides that a writ cannot be served by a person who is not attached to the court and who does not hold the office of Secretary or Authorized Official. Furthermore, art. 256 of the same Law as read with art. 182 of the Constitutional Law of Judicial Power precludes service of a writ on a Sunday. Service of the copy writ in this case therefore offended against Spanish law. Such a defect "shall be treated as an irregularity and shall not nullify the proceedings" but rather I have a discretion as to whether to "set aside either wholly or in part the proceedings or any document or order therein" or to allow service to stand (see O.2, r.1 and the accompanying notes at 1 *The Supreme Court Practice 1995*, paras. 2/1/1–2/1/2, at 9–11).

I must say that the exercise of my discretion would be finely balanced, if I were to determine the question of service on the issue of contravention of Spanish law. On the one hand, we have the *dictum* of Staughton, J. in *Ferrarini S.p.A.* v. *Magnol Shipping Co. Inc., "Sky One"* (2) ([1988] Lloyd's Rep. at 244) that "it would require a very strong case" for the exercise of the court's discretion in favour of allowing service in a foreign jurisdiction to stand which is contrary to the law of that jurisdiction. On the other hand, there was such a delay between the purported service of the writ and judgment being entered one month later, and the date of the filing of this application to set aside such service—a delay of over three years—that I should think that a strong case would have been made out to permit such service to stand. In the event, of course, I do not have to exercise my discretion because I am satisfied that service was not in fact effected. Whilst defective service may be remedied, non-service cannot be remedied.

I should mention one further point before I leave this issue. The defendant requires leave to launch his application to set aside service after judgment has been obtained (see O.12, r.8 as read with r.6). No such leave was sought in advance of the hearing and it was agreed between counsel that leave would be applied for verbally upon the defendant filing a formal application in the Registry. As part of my decision I have to determine whether such leave should be granted. The delays in the case are put forward by Feflar's counsel as a reason for refusing such leave. However, if, as I find, service was not effected on the defendant, such delays cannot be attributed to him and cannot remedy the non-service for the benefit of Feflar—the proceedings have simply not taken off. It does not serve Feflar to show that the defendant may know of the action. He may know of the existence of the action from other sources but he still requires to be served with a copy of the writ. I declare that the writ has not been served on the defendant. It follows that the judgment of July

28th, 1992 and the charging order of March 17th, 1995 should be set aside.

There is a further reason why I would set aside the judgment. Judgment was entered for the amount claimed as the original loan of Pta. 8m. given to the defendant by Linda Jill Keohane, the benefit of which was said to be subsequently assigned to Feflar. It will be recalled that the statement of claim contains an alternative claim on an account drawn by the defendant on March 23rd, 1988 which shows a balance owing of Pta. 6,750,000. In his affidavit in support of the application for leave to serve out of the jurisdiction, Mr. Levy refers to and exhibits an account prepared by the defendant on March 23rd, 1988 which starts with an entry "Paid by FEFLAR up to March 31st" of Pta. 5,336,378. There are other various figures added and deducted before we come to a summary beside which there is an entry "A.D. owes Feflar capital" and the figure of Pta. 6,750,000. At the top of second page of the account is an entry "A.D. owes Feflar" against a figure of Pta. 6,750,000. This, on its face, appears to be a clear acknowledgement by the defendant that on March 23rd, 1988 he owed Feflar Pta. 6,750,000.

Mr. Levy deposed that the Pta. 8m. had been lent to the defendant on April 17th, 1986 by Ms. Keohane and her husband Mr. Pierson who are beneficial owners of Feflar. The loan was given because the defendant was building a house for Ms. Keohane and her husband and the construction would be delayed unless the loan was given to ease the defendant's cash-flow problems. The defendant was building himself an adjoining house, the construction of which was connected with the construction of the house being constructed for Ms. Keohane and her husband. On the sale of the defendant's house the loan was to be repaid.

Mr. Levy further deposed:

> "On March 23rd, 1988 the defendant drew up an account of the net accounting position as between the parties . . . . All the parties agreed that in return for accepting the lesser sum of Pta. 6,750,000 to be paid by the defendant, the debt would be assigned and paid to the plaintiff company."

It seems, therefore, that it was not Feflar's case that the original loan of Pta. 8m. was assigned to Feflar. From this passage in Mr. Levy's affidavit, the amount of loan which was assigned to Feflar was a reduced balance of Pta. 6,750,000, the reduction being the consideration for the defendant accepting the assignment. It appears that it is not Feflar's case that it was owed Pta. 8m. Its claim was for Pta. 6,750,000 and that is the sum for which judgment should have been entered.

That raises the question of whether leave should have been granted for a writ to be served out of the jurisdiction where the main claim was, on the affidavit evidence before the court in support of such leave, not shown to be arguable but where a good arguable case was made out on the alternative claim. This is a point upon which I have not been addressed

but it is undoubtedly a factor to be considered by the court when it comes to exercising its discretion whether to allow service to be effected outside the jurisdiction.

I now have before me not only Mr. Levy's affidavit in support of the application for leave but the declaration under oath of the defendant and an affidavit in reply of Linda Jill Keohane. I have read and re-read these documents and I must say that I am still unclear on what exactly Feflar is contending. I accept that this lack of clarity in my mind may not be the total responsibility of the drafters of Ms. Keohane's affidavit and may be no indication of lack of merit in Feflar's case. Be that as it may, it seems clear that Mr. Levy's affidavit in support of the application for leave to serve out of the jurisdiction did not contain the whole story of the relationship between the parties. The defendant maintains that Ms. Keohane and Mr. Pierson entrusted him with the construction of their house in La Acedia and moneys were advanced in respect of that construction. He says that Ms. Keohane and Mr. Pierson increased the costs of construction considerably and the final cost was much greater than that originally envisaged. Ms. Keohane and Mr. Pierson alleged that they had advanced more money than the amounts spent on the construction and requested a return of the balance. The defendant claims that the account prepared by him showing a balance owing of Pta. 6,750,000 was not his acceptance of a debt due but was a summary of the claims being made by Ms. Keohane and Mr. Pierson. That statement does not represent, says the defendant, an acceptance by him of the financial position as between the parties.

Whatever one may think of this latter assertion by the defendant, it is Ms. Keohane's response to his assertion which is significant. The defendant gave some details of payment passing between the parties. In her affidavit Ms. Keohane refers to, and exhibits, a letter from the defendant of April 16th, 1988 in which he acknowledges that he owes her money. Of course this is after the purported assignment of the debt to Feflar and, whilst it is an acknowledgement of a debt to Ms. Keohane, it is probable that Feflar and Ms. Keohane would be regarded as one and the same person in the defendant's eyes. I do not attach significance to the fact that in such letter the defendant did not acknowledge that the debt was owed to Feflar. The defendant promised to repay Pta. 3,600,000 forthwith. Ms. Keohane acknowledges in her affidavit that the defendant repaid Pta. 2m. of that amount. That repayment was not referred to in Mr. Levy's affidavit in support of his application for leave. It may be that this repayment of Pta. 2m. was swallowed up in interest but it is not apparently included in the defendant's statement of account relied on in the alternative claim. Nor is it reflected in the claim for Pta. 8m. which is the main claim in the suit. The financial transactions between the parties warranted greater detail than was supplied by Mr. Levy's first affidavit. Whilst Feflar claims that the loan of Pta. 8m. was not related to the

building of the house for Ms. Keohane and her husband, Ms. Keohane accepts in her affidavit that there were extra costs involved in the construction of her house and that it was agreed that the loan of Pta. 8m. would be reduced by the "agreed overspending."

The upshot of this is to leave me dissatisfied that there is a good arguable case on the claim as it now stands. From the evidence before me, Feflar has a good arguable case that the defendant owes it money, but it has not made out a good arguable case that the writ in its present form will result in judgment being granted in Feflar's favour in the terms sought. It may be that a claim for an account is the proper claim to make. In the circumstances, therefore, I must set aside the leave to serve out of the jurisdiction.

This does not mean that I will set aside the writ. I am not trying the action and Feflar must be given an opportunity to amend its claim or put its affidavits in order on a further application for leave. And I am satisfied that this court has jurisdiction to try the action. The defendant has acknowledged that he owes Feflar money. Feflar is a company registered in this jurisdiction. It is Feflar's case that the terms of the original loan were that repayment was to be made in Gibraltar or England. Even if I were not to accept that evidence, it is the duty of the debtor to seek out the creditor at his residence or place of business and a failure to pay Feflar within Gibraltar gives this court jurisdiction (see *Robey & Co.* v. *Snaefell Mining Co. Ltd.* (3)).

In the event, I do not grant the applications for the writ to be set aside and for a declaration that this court lacks jurisdiction over the defendant in respect of the subject-matter of the writ. I do, however, declare that the writ has not been served on the defendant, and I set aside the order for leave to serve out of the jurisdiction. I also set aside the judgment entered in the suit and the charging order made therein.

As the defendant has substantially succeeded in this application I award him his costs.

Orders accordingly.