BARI PROPERTIES LIMITED v. BECKETT

COURT OF APPEAL (Neill, P., Russell and Waite, JJ.A.):
March 12th, 1998

Civil Procedure—service of process—personal service—technical defects in personal service may be remedied under Rules of Supreme Court, O.2, r.1 if injustice suffered—on appeal, Court of Appeal may permit defects to be cured but refuse leave to defend if proposed defence clearly unarguable

The appellant sought to obtain payment of rent arrears from the respondent.

The appellant brought an action for arrears of rent from a company of which the respondent was the director and principal shareholder. In that action, the company unsuccessfully pleaded that it owed the appellant no money because its "lease" with the appellant had in fact only been an agreement for a lease and it was therefore entitled to give one month's notice of termination of the agreement, rather than abide by the terms of the lease itself.

The company ceased to trade and the appellant brought the present proceedings against the respondent, who had acted as guarantor of the lease. Its agent sought to effect personal service of the proceedings on him at his home, but there was conflicting evidence as to whether personal service had been precisely and properly effected. The process-server gave evidence that he had identified himself and explained the contents of the documents, and that the respondent had taken them when they had been pushed through his letter-box. The respondent denied this and alleged that although he had accepted receipt of the documents, he had not acknowledged them because he did not believe service had properly been effected; instead, he returned them to the Registry.

Judgment was given against the respondent in default of appearance. The respondent then successfully applied for that judgment to be set aside, the Supreme Court (Pizzarello, A.J.) holding that the attempted service had been totally void and could not therefore be cured under O.2, r.1 of the Rules of the Supreme Court.

On appeal, the appellant submitted that (a) the judge had been wrong to rule that the defective service could not be cured by applying O.2, r.1 and it was now open to the Court of Appeal to cure the defect; and (b) because the respondent's defence was totally unarguable and merely an attempt to avoid his liabilities, it was in the interests of justice that the default judgment be restored.

The respondent submitted in reply that (a) the judge had properly ruled

that the service had been so defective as to be no service at all and it was not therefore curable under O.2, r.1; and (b) if it were curable, the present hearing should be treated as an application for leave to defend, which the court should allow, since it was arguable that if the lease agreement had been properly terminated, the respondent's liabilities as guarantor had been discharged.

Held, allowing the appeal:

Order 2, r.1 allowed the court to prevent injustice being suffered as a result of undue technicality in the application of the rules. In the circumstances of the present case, the judge had been wrong to hold that the case was one of non-service and that he had no discretion to regularize the irregular service by the application of that rule. Accordingly, the discretion to do so now lay with the Court of Appeal. The court would therefore allow the defects in the service of process to be cured but because the respondent's defence was clearly unarguable, he would be refused leave to defend the action (page 251, line 32 – page 252, line 4; page 252, line 45 – page 253, line 26).

Cases cited:

(1) *Feflar Ltd.* v. *Bennett*, 1995–96 Gib LR 232, considered.
(2) *Golden Ocean Assur. Ltd.* v. *Martin, The Golden Mariner*, [1990] 2 Lloyd's Rep. 215, applied.
(3) *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; 46 L.T. 858, followed.

Legislation construed:

Rules of the Supreme Court, O.2, r.1: The relevant terms of this rule are set out at page 250, lines 18–33.

J.E. Restano for the appellant;
S.J. Bullock for the respondent.

WAITE, J.A.: This is an appeal from an order of Pizzarello, A.J. of December 1st, 1997, setting aside a judgment for rent obtained by the appellant landlord against the respondent, Mr. Beckett. He was not the direct tenant of the premises, but he was the principal shareholder and director of the tenant company and he was, so the landlord claimed, liable as guarantor for due payment of rent under the lease to which he was alleged to have been a party by way of surety. The writ was issued on March 31st, 1995, naming the tenant, Guy Mark Associated International Ltd., as first defendant and the respondent, Mr. Beckett, as second defendant. It was endorsed with a statement of claim asserting that Mr. Beckett had guaranteed the due payment of rent owing to the appellant lessors under a lease of commercial premises in Gibraltar, that Guy Mark had defaulted to the point that rent of £7,285 was in arrears and unpaid, and that Mr. Beckett was accordingly liable for that sum,

with interest. On May 25th, 1995, the appellant landlord obtained leave from the Chief Justice to serve the writ on Mr. Beckett outside the jurisdiction at a named address in Cadiz, or elsewhere in Spain. On August 16th, 1995, an investigations manager named Carl Duarte, engaged by the appellants, swore an affidavit in these terms:

> "On June 22nd, 1995, I personally served the above-named second defendant with a true copy of the writ of summons dated March 31st, 1995 in this action. The said copy writ was duly sealed with the seal of the court office from which it was issued and was accompanied by the prescribed form of service. The said writ was served on Mr. Beckett at his house at Jincaleta 3, Jimena, Cadiz, Spain. I drove to the house and when I arrived I rang the doorbell. On doing so a gentleman in his fifties, with brown, greying hair, came out on the first floor balcony and looked down on me. The gentleman confirmed to me that he was Ian Beckett. I then proceeded to explain to him that I had a writ of summons which I was serving on behalf of J.A. Hassan & Partners. Mr. Beckett asked me not to hassle him but then agreed to accept service of the writ. Mr. Beckett asked me to put the envelope through the letter-box and as I did so I felt that he retrieved it from the inside of the house."

On September 1st, 1995, on the strength of that affidavit, the appellants obtained judgment in default of defence in the sum of £7,285 plus £217 interest and £216 costs ("the default judgment"). On February 5th, 1996, the appellants obtained leave from the Gibraltar court to serve a bankruptcy notice in respect of the default judgment on Mr. Beckett outside the jurisdiction. That bankruptcy notice was received by Mr. Beckett, according to evidence to which I shall be referring in a moment, on April 29th, 1996, but I should add in passing that although he accepts receipt of it, he by no means accepts that it was the subject of valid personal service upon him, although an assertion as to the valid personal service of that bankruptcy notice is contained in a further affidavit sworn by Mr. Duarte, to which I need not refer because the bankruptcy proceedings are not before this court today.

On June 6th, 1996, Mr Beckett applied under O.13, r.9 of the Rules of the Supreme Court, which are, of course, applicable in this jurisdiction, for an order setting aside the default judgment. His affidavit in support, sworn on September 18th, 1996, so far as relevant, after referring to the affidavit of service of Mr. Duarte from which I have already quoted, reads as follows:

> "I remember that on or about June 22nd, 1995, two telephone calls were received by my wife at our address early that morning by a man asking for Ian. Upon my wife asking the caller who he was he said: 'Tell Ian it's his old mate, John.' My wife replied: 'I don't know you,' the caller repeated that he was my old mate John. A few minutes later there was a knock at the main door. Neither me nor my

wife answered since we had been plagued with a number of door-to-door salesmen and religious proselytizers since we live on the corner of the main street in the village. Someone, apparently the same person who had knocked at the door, then started shouting up to the balcony of the house saying: 'Is Ian there?' I went out on to the balcony and asked who he was. At no time did he identify himself or the purpose of his visit except that he said that he had a package for me. He did not explain the contents of the package. I asked him if he was a policeman to which he replied 'No.' Consequently I did not identify myself to him. However, I did tell him that if he did not stop causing a nuisance by shouting in the street, I would call the police and denounce him for causing a disturbance. However, I did tell him that if he had anything to deliver to this address then he should put it through the letter box. He then shoved what we later found to be a brown envelope with my name on it through the letter box. Upon opening the envelope I found a copy writ of summons which I believe was in Action No. 1995–B–No. 77, together with an acknowledgment of service. Upon advice from my solicitors I returned the documents to the Supreme Court Registry in Gibraltar since they had not been personally served upon me in accordance with either the rules of service in Gibraltar or in accordance with the rules for service in Spain. For the reasons and under the circumstances aforesaid I did not acknowledge service of the said writ of summons nor give notice of my intention to contest the proceedings."

After making reference to the bankruptcy notice, the affidavit then continues: "The writ action 1995–B–No. 77 has been defended by the first defendant and I refer to the defence filed and served by the first defendant on April 28th, 1995" and he exhibits a copy of it.

The defence of the second defendant would adopt exactly the same arguments as that raised by the first defendant:

"For the reasons and in the circumstances aforesaid I am advised and verily believe that I have a good defence to this action upon the merits and respectfully ask that the default judgment signed herein and the execution issued thereon may be set aside and that I may acknowledge service of the writ and give notice of intention to defend."

At the hearing of the application to set aside the default judgment, it was necessary for the judge to decide where the truth lay as between the very different accounts that had been given by Mr. Duarte on the one hand and by Mr. Beckett on the other, as to what had really happened when service or purported service was thought to be effected. That was a difficult task for him in the absence of cross-examination, but doing the best he could on the basis of the affidavits, he stated his conclusion on the differences of testimony in these terms:

"These differences are difficult to explain except under cross-examination but this I am loath to do. It seems to me that Mr. Duarte's final explanation indicates that he is not sufficiently precise and that he tends to assume things. How else can he feel that he retrieved it from inside the house? I am not satisfied that personal service was effected as required by the rules."

It is unnecessary to say exactly what the requirements of personal service are. They are set out in O.65 of the Rules of the Supreme Court and also noted against that rule in the *White Book* are a number of the old cases that were decided in the days when debtors made almost a game out of the exercise of eluding service of process. In the circumstances of the present case, the judge found as a fact on the affidavit evidence that the requirements for personal service had not been effected. The appellant does not seek before this court to challenge that finding. To appreciate precisely what the appellant's challenge before our court this morning amounts to, it is necessary to refer to O.2, r.1(1) and (2) of the Rules of the Supreme Court:

"(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) . . . [T]he 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 steps 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."

Notwithstanding the wide powers, curative powers as they undoubtedly are, which are contained in that order, the judge below took the view that it was impossible for him to invoke it in the present case because this was an instance not of irregular service but of non-service, that is to say, no service at all. I have already quoted his words, but I will repeat them: "I am not satisfied that personal service was effected as required by the rules."

He therefore held that he had no discretion in the matter at all. The effect of his finding was that he was satisfied that the deficiencies in service had been so radical as to render the proceedings a nullity. The question in this appeal is: Was he right so to rule? Mr Bullock, although he bows to the force of the tide running against him on this aspect of the

case, has submitted that he was. He relies, in the skeleton argument with which he has assisted the court, upon the cases decided under the old rules, which I have already mentioned, as noted under O.65, and also upon the decision of the Chief Justice in *Feflar Ltd.* v. *Bennett* (1). That was a case in which a friend of the plaintiff, who was not a process-server but a plumber, approached the defendant and without identifying himself tried to hand him an envelope containing the writ but did not explain its contents. When the defendant declined to accept it he left it on the ground at his feet. The defendant arranged for the envelope to be returned to the bearer without opening it. Schofield, C.J. held that he had no discretion to exercise because "I am satisfied that service was not in fact effected. The defective service may be remedied, non-service cannot be remedied" (1995–96 Gib LR at 238). For that reason, he held that he had no jurisdiction to consider whether any failure on the part of the defendant to apply expeditiously to set aside the writ after he had become aware of its existence could be taken into account in granting or refusing him leave to apply to set it aside.

Mr. Restano for the appellant relies on the decision of the English Court of Appeal in *Golden Ocean Assur. Ltd.* v. *Martin, The Golden Mariner* (2). That was a case of procedural defects in service resulting from the service of writs in a case of multiple defendants, where in a number of instances the writs served were the wrong writs in the sense that they were not served on the defendants whom they impleaded. Phillips, J. held that no service of the relevant process took place at all. The Court of Appeal disagreed, holding that it was a case of irregularity capable of being cured in the court's discretion under O.2, r.1. The view taken by the court is well illustrated by the following brief quotation from the judgment of Lloyd, L.J. ([1990] 2 Lloyd's Rep. at 219): "I would respectfully disagree with the Judge when he said that 'no service of the relevant process took place at all'. The service was grossly defective. But service, or purported service, it remained."

That decision has left the law, in my judgment, in a clear and well-settled state. It amounts to this. Order 2 is a benevolent rule designed to avoid injustice being suffered, when there has been non-compliance with the strict rules of service, as a result of technical points being taken unmeritoriously by the defendant whom it is sought to serve. It was designed to avoid all the monkey tricks which are referred to in the authorities noted against O.65. It was designed to enable broad justice to be done by the court in the circumstances of each particular case. It follows inevitably, therefore, that with respect to the learned judge, he was, in my view, wrong in holding that this was a non-service case which robbed him of any discretion in the matter altogether. It was, according to his findings of fact on the evidence before him, a case which he ought to have treated as an irregular attempt to effect personal service. It was an irregularity capable of being cured if justice so required, and (if justice

required that also) of being cured by imposing whatever terms as to costs or otherwise might be appropriate upon the defendant.

The judge having fallen into that fundamental error, the discretion, which it was for him to exercise, now arises in this court. In substance, Mr. Bullock has explained, on behalf of Mr. Beckett, that this is an application for leave to defend. His client, he asserts, has a good, or at least an arguable, defence and he should be allowed to raise it. In order that I can do justice to that submission, it will be necessary for me to say a little more about the procedural history in this case.

There have been three sets of proceedings altogether. In the first, bearing the serial number 1994–B–No. 141, the plaintiffs sought arrears of rent from Guy Mark alone. Guy Mark raised a defence asserting that the original lease had been the subject of an agreement for a lease only, made between the appellant's predecessor in title, Pall Mall Ltd., and Guy Mark. The agreement provided for the execution of a formal lease in which there would be joined as parties not only the landlord and the tenant, but also Mr. Beckett as surety for Guy Mark (which, as I have said, is his company). By some oversight or mischance, that formal lease was never executed—notwithstanding that Guy Mark entered into possession of the premises, had the use and benefit of occupation and for a time paid rent. The absence of execution of any formal lease was relied on in the defence in those proceedings as non-suiting the lessors against the company.

That plea wholly failed when this first action came for trial before Harwood, A.J. on February 13th, 1995, when he gave judgment for £1,304 in respect of the rents then in arrears against Guy Mark. A second set of proceedings followed between the appellants and two defendants this time, that is to say, Guy Mark as first defendant and Mr. Beckett as second defendant. To those proceedings there was assigned the serial number 1995–B–No. 77. In that second action, a defence to precisely the same effect was entered by Guy Mark. The absence of execution of any tenancy was relied on, and the assertion made that Guy Mark was entitled to terminate the tenancy on one month's notice so that all liability for rent ceased thereafter. Judgment was eventually recovered in those proceedings against the company, but the appellants have found it valueless to pursue their judgment because the company, though it still formally exists, does not trade. Then a third set of proceedings followed, bearing the serial number 1995–B–No. 78, containing the writ and statement of claim in the current action. The nature of the relief sought is, as I have described, a claim for rent from Mr. Beckett as surety.

Against the background of that narrative, I can now explain the application which Mr. Bullock makes to the court today. He asks that our discretion should be exercised so as to give Mr. Beckett the opportunity of raising precisely the same defence, *i.e*. non-execution of what was supposed to be a formal tenancy. The jurisdiction under O.2 is designed,

as I have said, to be administered as a benevolent jurisdiction. This means that any defendant who comes before the court, on an application such as this to set aside a judgment, is entitled to consideration as to whether the defence which he proposes ought to be allowed in the interests of justice to run. If it is merely a colourable and faintly arguable defence, he may be put on terms as to leave to defend, for example, by payment into court if any money is claimed. If, on the other hand, the defence is merely shadowy and without substance, then justice will require that he be denied the opportunity of raising it.

With all respect to Mr. Bullock's submissions, which have been very fully and carefully urged upon us, I would, for my part, regard this as a case in which the proposed defence is utterly hopeless. Whether or not the matter is regarded as concluded as *res judicata* by the decision in the first action, it seems to me that there could be no possibility at all of success in raising the assertion that merely because the contemplated lease had never been executed as a deed, there is no liability on the part of the surety. The arm of equity, as represented by the hallowed decision in *Walsh* v. *Lonsdale* (3), can never be so short as to allow a defence of such hopeless technicality to be raised. Mr. Beckett knew full well that his company would only be acceptable to the landlord if he were to enter into the transaction as a surety; it cannot lie in his mouth now successfully to argue that he is to be discharged of all liability. For these reasons, I would propose that this appeal be allowed, that (on the basis that a discretion arises in this court) we should treat the purported personal service of the writ as an irregularity which is curable, but that on the merits of the case, we should refuse leave to defend and we should dismiss the application. I should add, for the sake of completeness, that the issue of the bankruptcy notice and the validity or otherwise of any attempt to serve it is not before this court and nothing that we have decided today should be taken as affecting that issue.

NEILL, P. and **RUSSELL, J.A.** concurred.

Appeal allowed.