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Article

Reform regarding the law on substituted service: "impracticability" vs "good reason"
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Article

Reform regarding the law on substituted service: "impracticability" vs "good reason"

Summary

The Rules of the High Court (Cap.4A, Sub.Leg.) permit plaintiffs to apply to court to deviate from the usual methods of service, from which courts may direct alternative methods of service (i.e. substituted service). The test for an order for substituted service in Hong Kong is that it is "*impracticable for any reason*" to effect service under the usual means. By contrast, the test in England and Wales[1] only requires "*good reason*" to be shown for alternative service to be authorised.

The good reason test has been regarded to be a lower standard, conferring courts with broader discretion in permitting substituted / alternative service. The key challenge faced by service of originating process is the difficulty in locating the defendant, particularly where the defendant is evading service, or in service out of jurisdiction cases. In service out cases, delays and costs are to be expected for compliance with the procedural hurdles imposed under Hong Kong law as well as those of the foreign jurisdiction.

The current "impracticability" test can exacerbate delay and costs of commencing proceedings by requiring proof of unsuccessful attempts at service before courts can be satisfied that impracticability exists. Since service of originating process is the foundation of all civil litigation, and in light of the procedural difficulties that may be experienced in locating the defendant, it is worth considering whether the Hong Kong "impracticability" test should be replaced with the "good reason" test.

Background

Service of originating process signifies the commencement of the court's jurisdiction over the defendant. The trite principle underlying the law on service is that a party should be given due notice of proceedings that have been instituted against them so as to enable them to respond.[2] The procedural requirements relating to the usual methods of service of originating process in Hong Kong, being personal service, service by post, and service by insertion through letterbox at the defendant's last known address, are largely similar to that in the United Kingdom.[3] However, the two jurisdictions differ in their allowance for, and treatment of, applications for substituted (or 'alternative') service. In Hong Kong, substituted service will only be ordered where the applicant shows the usual methods of service was "*impracticable for any reason*"[4]. By contrast, England's Civil Procedure Rules (CPR) merely requires "good reason" to be shown.[5]

The diverging standards for substituted/alternative service can be attributed to the Woolf Reforms in England and Wales in the late 1990s, under which the CPR replaced the Rules of the Supreme Court (RSC) as the rules of civil procedure to permit greater equality, efficiency and economy in civil litigation.[6] The current Hong Kong position remains modelled on the old English rules of civil procedure (being the RSC). It has been suggested in recent versions of the *Hong Kong White Book* for possible reforms to the law on substituted service for replacement of the "impracticability" test for substituted service with the "good reason" test under the CPR, at least for service out of jurisdiction cases.[7]

The Hong Kong position

Rules

Order 65 r.4(1) provides that: "If, in the case of any document which by virtue of any provision of these rules is required to be served personally or in the case of a document to which Order 10, rule 1, applies, it appears to the Court that it is *impracticable for any reason* to serve that document in the manner prescribed on that person, the Court may make an order for substituted service of that document." (Emphasis added.)

Application for an order under O.65 r.4(1) is made by affidavit stating the facts on which the application is founded,[8] and if granted, substituted service is effected by "*taking such*

1 For ease of reference, albeit the jurisdiction is England and Wales, herein that will be abbreviated to 'England' or 'English', as the context requires.

2 *Craig v Kanssen* [1943] KB 256, 262 (CA).

3 RHC O.10 r.1(1), 1(2); CPR Part 6.

4 RHC O.65 r.4(1).

5 CPR Rule 6.15(1). The gaps between the procedural laws emerged with the bringing into force of England's Civil Procedure Rules 1998 consequent upon Lord Woolf's report: *Access to Justice Report 1996.*

6 CPR Rule 1.1.

7 See relevant paragraphs in *Hong Kong Civil Procedure 2016 to 2020* editions; *Hong Kong Civil Procedure 2021*, Volume 1, para.11/0/2, para.(viii).

8 RHC O.65, r.4(2).

steps as the Court may direct" to bring the document to the recipient's attention.[9] The applicant's affidavit should include efforts that have been made to locate the defendant, and if applicable, the reason for believing the defendant is evading service.[10]

Case law

In deciding whether to grant an order for substituted service, the approach of the Hong Kong courts can be informally categorized into two steps.

First, the applicant must prove as a matter of fact, the existence of an impediment to service of documents by the usual means under O.10, and that such impediment had in actual fact rendered service by the usual means unsuccessful.

Second, upon the first step being established, the applicant must prove that the substituted service it has proposed will have a reasonable or likely prospect of bringing the proceedings to the recipient's attention. Upon satisfaction of the foregoing, the Hong Kong courts will then have a discretion on whether to make the order.[11]

On the first step, the "*impracticable for any reason*" standard has been described as a "*threshold requirement*" by Hong Kong courts.[12] This is a high threshold. The plaintiff must satisfy the court that it is "*practically impossible*" to effect service on the defendant via the usual means,[13] and "*no other mode of service was practicable*" besides the proposed substituted service.[14] For instance, impracticability can be established where the applicant is unable to contact the defendant despite almost exhausting all reasonable avenues of contacting the defendant (such as personally visiting the defendant's premises for service, attempts to send letters to all directors of the defendant, including corporate directors incorporated abroad[15]), or where it can be proved that the defendant is evading service.[16] In *Emperor Prestige Credit Ltd v King Pak Fu*,[17] it was held that a party's inability to ascertain the whereabouts of the defendant other than its Hong Kong address is in and of itself insufficient to constitute impracticability.[18] The court concluded that impracticability was not established because, amongst other things, the plaintiff "*could have at least tried to make an appointment to serve the [d]efendant personally at the HK address*", instead of surmising that letter box service alone was adequate and not attempt personal service at all.[19]

From the prevailing authorities, it appears that unsuccessful attempts to locate and serve the defendant is a critical consideration in the court's evaluation of impracticability.[20] It has been held that "*without such unsuccessful attempt, the court cannot be satisfied that it is impracticable*" to serve in accordance with the usual means.[21] Indeed as already stated above, such unsuccessful attempts should be mentioned in the application for substituted service. This is a key aspect of the "impracticability" test which does not feature in the "good reason" test.

On the second step, courts will seek to assess the effectiveness of the form of service proposed.[22] In making such a deliberation, the court will consider where the defendant is likely to be found (since service out of jurisdiction considerations under O.11 will apply where the defendant is abroad), the practical steps that can be taken to bring the documents to be served to the defendant's attention, and whether reasonable efforts have been made to ascertain the defendant's current address for service.[23] The burden lies with the plaintiff to produce evidence to satisfy the court that the

9 RHC O.65, r.4(3).

10 *Cheung Hing v Wong Chor Cheung* (HCA 336/2008, [2017] HKEC 1200), [13].

11 *Ibid.*, [14].

12 *Ibid.*, [14], citing *Chan Yeuk Mui v Ng Shu Chi* [1999] 2 HKLRD 376.

13 *Chen Ar Mee v Lee Sammy Sean* (DCCJ 1068/2004, [2006] HKEC 2707), [24].

14 *Taitexma Enterprise Corp v Tillemont Shipping Corp SA* (CACV 73/1993, [1993] HKLY 897), [10], citing *Afro Continental Nigeria v Meridian Shipping Co SA (The Vrontados)* [1982] 2 Lloyd's Rep 241.

15 *Cheung Hing v Wong Chor Cheung* (HCA 336/2008, [2017] HKEC 1200).

16 *Ibid.*, [13].

17 [2021] HKCFI 403.

18 *Ibid.*, [9].

19 *Ibid.*, [30]–[42].

20 See *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* [2016] 3 HKLRD 303.

21 *Ibid.*, [6]. Some exceptions to this position exist, for instance, in cases where proceedings begin with an *ex parte* application for an injunction, it is common practice for the judge to grant leave to serve documents abroad, without the need for the plaintiff to demonstrate difficulty in personal service (See *Hong Kong Civil Procedure 2021*, Volume 1, para.11/5/18; *Capital Wealth Holdings Ltd v 南通嘉禾科技投资开发有限公司* [2020] HKCFI 3025, [36]).

22 *Chan Yeuk Mui v Ng Shu Chi* [1999] 2 HKLRD 376, 380B.

23 *Ibid.*, 380E–F, *Chen Ar Mee v Lee Sammy Sean* (DCCJ 1068/2004, [2006] HKEC 2707), [20].

proposed method of service was appropriate in all the circumstances.[24] This may entail providing reasons as to why other more obvious forms of service have been ignored. For instance, an application for an order for substituted service was unsuccessful, in part, because the applicant failed to consider the suitability of serving the defendant's agent or solicitors instead of the entity it had proposed (the Hong Kong Solicitors Indemnity Fund Limited), nor provided any reasons in affidavit for seeking substituted service on the proposed alternative entity.[25]

Substituted service can take different forms, examples include: service on an agent or a solicitor or bankers known to be in communication with the defendant,[26] service by registered airmail at the defendant's residential address and business address,[27] service by email to the defendant at his office email address at his place of employment,[28] service by WeChat (an instant messaging service),[29] or service by advertisement in a widely-distributed newspaper in the jurisdiction.[30]

The English position

Rules

Rule 6.15(1) of the CPR provides that "Where it appears to the court that there is a *good reason* to authorise service by a method or at a place not otherwise permitted by this Part [of the Rules], the court may make an order permitting service by an alternative method or at an alternative place." (Emphasis added.)

Rule 6.15(2) further provides that: "On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

An application made under Rule 6.15 will need to be supported by evidence, stating reasons for why an order is sought, the alternative service proposed, and why such alternative method is likely to be effective.[31]

By contrast to Hong Kong's O.65 r.4, Rule 6.15 applies specifically to 'claim forms' i.e. originating process, and is expressed to apply either prospectively to permit alternative methods of service in commencement of proceedings, or retrospectively to validate non-compliant methods of service.

Case law

Under the "good reason" test, the question before the courts for prospective cases is whether there is good reason to validate the mode of service proposed, and in retrospective cases, whether there is good reason to declare the method used, being ipso facto not a permitted method under Part 6 of the CPR, to be treated as good service.[32] The mere fact that the defendant would learn of the existence and content of the claim form is a critical factor, but cannot in itself, constitute good reason.[33] Otherwise, any unauthorized mode of service would be legitimized, even if other purposes of serving originating process remained unfulfilled.[34] As such, there had to be "*something more*" than the mere fact that the defendant had learned of the existence and contents of the claim form.[35] What constitutes 'something more' can be observed in the case law below.

The English position does not require failed attempts to locate the defendant to be a condition for an order for alternative service. However, whether the claimant had taken reasonable steps to effect service in accordance with the rules remains a key relevant factor.[36] Since the foremost purpose of service is to ensure that the contents of the document is communicated to the defendant, alternative service should not be granted prospectively unless there is a high degree of likelihood that the claim form or document will come to the intended recipient's notice.[37] In relation to retrospective alternative service, whether the defendant will suffer any prejudice as a result of the retrospective validation of a

24 *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* [2016] 3 HKLRD 303, [70].

25 *Ibid.*, [25]–[27].

26 *Hong Kong Civil Procedure 2021*, Volume 1, para.65/4/2.

27 *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* [2016] 3 HKLRD 303, [18].

28 *Ibid.*, [18].

29 *Emperor Prestige Credit Ltd v King Pak Fu* [2021] HKCFI 403, [9], [43], [44].

30 *Chan Yeuk Mui v Ng Shu Chi* [1999] 2 HKLRD 376, 380F–G, *Hong Kong Civil Procedure 2021*, Volume 1, para.65/4/7.

31 CPR Rule 6.15(3)(a); Practice Direction 6A - Service Within the United Kingdom, para.9.1–9.2.

32 *Abela v Baadarani* [2013] 1 WLR 2043, [33], *Civil Procedure 2020*, Volume 1, Section A - Civil Procedure Rules 1998, Part 6 - Service of Documents, para.6.15.1.

33 *Abela v Baadarani* [2013] 1 WLR 2043, [36].

34 *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, [16].

35 *Civil Procedure 2020*, Volume 1, Section A - Civil Procedure Rules 1998, Part 6 - Service of Documents, para.6.15.3.

36 *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, [10].

37 *Civil Procedure 2020*, Volume 1, Section A - Civil Procedure Rules 1998, Part 6 - Service of Documents, para.6.15.3.

non-compliant service of claim form will also be a relevant factor,[38] although mere absence of prejudice to the defendant will not usually in itself be sufficient reason.[39] Courts will adopt a "*rigorous approach*" in assessing Rule 6.15 applications.[40]

From the prevailing English case law, the conduct of the defendant appears to be a weighty consideration. For instance, the "good reason" test has been prospectively held to have been satisfied in a service out case in light of serious allegations of wrongdoing against the then current regime in Turkey and its control and abuse of the Turkish judicial system, coupled with the fact that one defendant was an organ of the Turkish state, which would likely render the Hague method of service to be ineffective.[41] It is noteworthy that the first ground which the applicant raised in relation to a deteriorating political situation which could cause significant delay in bringing the proceedings to trial was not regarded as a strong or compelling ground.[42] Good reason was retrospectively held to have been established where a debtor residing in Barbados had unreasonably refused to accept service by email, when he had also refused to provide an alternative address for service in the UK.[43] Likewise, where the defendant's conduct fell short of the overriding objective of the CPR (see Part 1 of the CPR), and knew the content of the claim form since a photocopy of the unsigned claim form had been delivered to them, the court held that service had been deemed by delivery of the unsigned photocopy of the claim form.[44] The foregoing cases show that whilst service by the usual means may remain possible, where there is a reasonable prospect that proceedings may be prejudiced, for example by the willful uncooperative acts of the defendant, the courts could still be prepared to find good reason for alternative service.

Service out of jurisdiction

In the context of service out of jurisdiction however, even if the impracticability standard were satisfied, the court must still reconcile the decision to permit substituted service with the decision to grant leave to serve out of jurisdiction.[45] An order for substituted service cannot be made unless the court is also satisfied that O.11 requirements have also been met.[46] Under O.11, in addition to stating grounds as to why leave should be granted to serve out of jurisdiction, the plaintiff must also comply with the procedures of the foreign jurisdiction.[47] This may entail further delays to ensure due process is observed across the relevant jurisdictions. This can be seen in *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* ,[48] in which it took around eight months from date of service of concurrent writ at the defendant's residential address in mainland China for the plaintiff to be informed that service was unsuccessful, from which point it then applied for an order for substituted service. However, the applicant cannot have applied for an order for substituted service at the outset, since in its application for an order for substituted service, it must include its attempts to have contacted the defendant via the usual means. The case for lowering the threshold for service out cases is therefore particularly pressing, in light of the additional time and effort already inherent in service out cases.

Analysis

At its core, the law on substituted service seeks to strike a compromise between the lengths a plaintiff has to go to bring proceedings to the defendant's attention to satisfy the court that it had done enough, and the potential prejudice caused to an oblivious defendant if service were to be deemed effective and judgment were entered against him (even if he had legitimate reasons for being oblivious).

Viewed as a matter of principle, the "good reason" test has been interpreted to be a lower standard to satisfy as compared to the "impracticability" test. The absence of any references to "impracticability" in the CPR has been regarded as giving courts a broader discretion than that conferred by the former English rules (i.e. the RSC)[49], leaving open the possibility that applications that would have failed under the old rules may succeed under the current standard.[50]

Viewed in practice, the "good reason" and "impracticability" tests are ultimately matters for the application of judicial discretion, in which judges are at liberty to have regard to

38 *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, [10].

39 *Brown v Innovatorone Plc* [2010] CP Rep 2.

40 *Kaki v National Private Air Transport Co* [2015] 1 CLC 948.

41 *Societe Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS* [2017] EWHC 667 (Comm), following *Cecil v Bayat* [2011] 1 WLR 3086.

42 *Societe Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS* [2017] EWHC 667 (Comm).

43 *R (Hanuman) v University of East Anglia* [2015] EWHC 4122 (Admin).

44 *Abbott v Econowall UK Ltd* [2017] FSR 1.

45 *Taitexma Enterprise Corp v Tillemont Shipping Corp SA* (CACV 73/1993, [1993] HKLY 897), [12].

46 *Ibid.*, [12].

47 RHC O.11 r.5(2).

48 [2016] 3 HKLRD 303.

49 Upon which the current rules of civil procedure in Hong Kong are closely based.

50 *Civil Procedure 2020*, Volume 1, Section A - Civil Procedure Rules 1998, Part 6 - Service of Documents, para.6.15.1, *Marconi Communications International Ltd v PT Pan Indonesia Bank Ltd TBK* [2004] 1 Lloyd's Rep 594, *Knauf UK GmbH v British Gypsum Ltd* [2002] 1 WLR 907 (CA).

considerations they consider relevant, and assign weight accordingly. In actual fact therefore, the two standards may not be substantially very far apart in their application, save for three key differences:

1. Under the "impracticability" test, for Hong Kong courts to conclude that impracticability is present, an applicant must generally satisfy the court that the usual methods of service had been attempted and failed. Under the "good reason" test, prior attempts to locate the defendant via the usual methods of service is a relevant consideration, but not a prerequisite, for an order for alternative service. Under the latter therefore, it would seem that a reasonable or likely prospect of failure of service by the usual methods would be sufficient to constitute good reason;
2. The "good reason" test seemed to also enable courts to place greater weight on factors beyond the mere practicalities of service, most notably on the litigating parties' conduct during the course of effecting and acknowledging service; and
3. The Hong Kong courts reserve discretion on whether to grant an order for substituted service even where the "impracticability" test had been satisfied, whereas English courts have no such discretion where good reason had been successfully established.

The above three key differences describe a difference in judicial approach to applying the tests established by statute, and it is acknowledged that such approaches can be reformed by case law without disturbing the statutory wording. Notwithstanding the foregoing, reformation on a legislative level may have a broader impact, since it provides courts with the legal basis to review applications for substituted service with broader discretion. The greater significance of legislative reform is to permit a general (but controlled) relaxation of judicial attitude towards permitting substituted service in Hong Kong. Permitting substituted service to cases even where service by usual means is not practically impossible, but patently onerous, is conducive to the objectives of expeditiousness and cost-effectiveness under the Rules of the High Court.[51] A relaxed attitude does not mean proper service be dispensed altogether. Applications remain subject to judicial discretion from the outset, and further as with any *ex parte* order, courts will still have power to review the order *inter partes*.[52] If the application had been defective or had been made on the basis of evidence which was shown to be wrong, the courts have power to set aside the order.[53] As such, reform to replace the "impracticability" test with the "good reason" test would be a welcome prospect in Hong Kong.

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51 RHC O.1A.

52 *Chan Yeuk Mui v Ng Shu Chi* [1999] 2 HKLRD 376, 380I.

53 *Ibid.*, 380I.