

THE CHINA NAVIGATION CO. LTD, AND OTHERS -V- SANWA TADING CO. LTD AND SOLGREEN ENTERPRISES LIMITED

High Court of Solomon Islands
(Muria, CJ.)

Civil Case No. 024 of 2001

Hearing: 3 April 2001

Ruling: 4 July 2001

J. Katahanas for the Plaintiffs

MURIA CJ: On 6th April this year, I granted an order giving leave to the plaintiff to serve the Writ of Summons in this action upon the first defendant, Sanwa Trading Co. Ltd. in Japan. That leave was granted pursuant to the power of this Court under Order 11 r r 1 and 5 of the *High Court (Civil Procedure) Rules* which provide:

"1. Service out of jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court whenever –

.....
(e) the action is one brought against a defendant to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract -

(h) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction"

and rule 5

"5. When the defendant is not a British subject living within the Commonwealth, notice of writ and not the writ itself, is to be served upon him."

Having granted leave, I enquired of Counsel as to what manner of service should be adopted. Mr. Katahanas had helpfully submitted that there were two procedures which could be adopted, either, under the High Court Rules or under private international law (Convention). Having considered Counsel's submission, I feel that he was correct in saying that service out of jurisdiction could be effected in either of the two ways mentioned.

Under the High Court Rules, where leave has been granted, the party seeking to serve the document in any foreign country may effect service of such document in the manner provided under Rule 7 of Order

11. The terms of that Rule are:

- (1) The document to be served shall be sealed with the seal of the Court for use out of the jurisdiction, and shall be forwarded by the Judge to the Chief Secretary or to the Resident Commissioner as the case may be for transmission to Her Majesty's Secretary of State for the Colonies, together with a copy thereof translated into the language of the country to which service is to be effected, and with a request for the further transmission of the same to the Government of the country in which leave to serve a document has been given. Such request shall be in Form numbered 4, in Appendix A, Part V, with such variations as circumstances may require.
- (2) The party bespeaking a copy of a document for service under this rule shall, at the time of bespeaking the same, file a praecipe in Form numbered 5, in Appendix A, Part V.
- (3) An official certificate, or declaration upon oath, or otherwise, transmitted through the diplomatic channel by the Government or Court of a foreign country to which this rule applies, to the Court, shall, provided it certifies or declares a document to have been personally served, or to have been duly served upon a defendant in accordance with the law of such foreign country, or words to that effect, be deemed to be sufficient proof of such service, and shall be filed of record as, and be equivalent to, an affidavit of service within the requirements of these Rules in that behalf.
- (4) Where an official certificate or declaration, transmitted to the Court in manner provided in the last proceeding section of this rule, certifies or declares that efforts to serve a document have been without effect, the Court may, upon the ex parte application of the plaintiff, order that the plaintiff be a liberty to bespeak a request for substituted service of such document. Such order shall be in Form numbered 6, in Appendix A, Part V, with such variations as circumstances may require."

This Rule clearly envisages a facility whereby service of Court documents may be effected in a foreign country with whom Solomon Islands can deal without the need for following the procedure provided by Convention. These countries in my view are in the main, Commonwealth Countries or countries with whom Solomon Islands shares a similar legal system. Under this procedure, the party who has been granted leave, files a Request for service abroad signed by that party or his advocate in the High Court Registry. That Request together with the sealed copy of the document to be served and a Request for Transmission of the document to

Foreign Government signed by the Court are then forwarded to Ministry of Foreign Affairs for transmission to the Government of the foreign country. Service of the document upon the party in that foreign country is then affected according to the law of that foreign country. A certificate or declaration on oath that service has been affected is then forwarded through the Government or Court of that foreign country to the Court in Solomon Islands, evidencing proof of service or the lack of it. Where service has not been effect, the party seeking service may apply for substituted service under sub-rules (4) and (5) of Rule 7.

The other procedure of service of documents out of jurisdiction is that envisaged under Rule 11 of Order 11 which provides for service of documents in *any other* foreign country. Rule 11 speaks of *any other* foreign country. This clearly entails service of documents to be effected in countries that cannot be covered by Rule 7.

The Rules obviously had in mind the use of private international law to effect service of Court documents upon parties who cannot be served under commonly recognised Rules of Courts. Thus Rule 11 allows for a procedure where after leave to serve Court documents out of jurisdiction has been granted, a party may effect service of the documents in any other foreign country with which a Convention on such a process has been made. The applicable private international law here is the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 1965)*.

The procedure for serving Court documents in a foreign country under the Convention is set out in Rule 11 of the Order and I need only set out the relevant provisions of the Rule to show what that procedure is.

"11. Where leave is given in a civil or criminal cause or matter or where such leave is not required, and it is desired to serve any writ of summons, originating summons, notice or other document in any other foreign country with which a Convention in that behalf has been or shall be made,

the following procedure shall, subject to any special provisions contained in the Convention, be adopted :-

(1) The party bespeaking such service shall file in the Registry a Request in the Form No. 9 in Appendix A, Part V, which form may be varied as may be necessary to meet the circumstances of the particular case in which it is used. Such request shall state the medium through which it is desired the service shall be effected, i.e. whether (a) directly through the British Consular or (b) the foreign judicial authority, and shall be accompanied by the original document and a translation thereof in the language of the country in which service is to be effected certified by or on behalf of the person making the request and a copy of each of every person to be served and any further copies which the convention may require, unless the service is required to be made on a British subject directly through the British Consular in which case the translation and copies thereof need not accompany the request unless the convention expressly requires that they should do so.

(2) The documents to be served shall be sealed with the seal of the Court for use out of the jurisdiction and shall be forwarded by the Registrar to the Secretary of State for the Colonies for transmission to the foreign country.

(3) An official certificate, transmitted through the diplomatic channel by the foreign judicial authority, or by a British Consular authority, to the Court, establishing the fact and the date of the service of the document, shall be deemed to be sufficient proof of such service and shall be filed of record as, and be equivalent to, an affidavit of service within the requirements of these Rules in that behalf.

The authority who is empowered to receive Request for service under this Rule is the Registrar of High Court who is also the authority empowered to transmit the sealed documents to the foreign country. Under the Convention the Registrar of the High Court is the designated authority to whom all documents for service under the provisions of the Convention are to be sent. Again I can do no better than to show this procedure by setting out the relevant provisions of the Convention.

“ CHAPTER 1 – Judicial Documents

- Article 2. Each Contracting State shall designate a Central Authority which will undertake to receive request.
- Article 3 The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
- Article 4 If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5 The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by appropriate agency, either

- a) by a method prescribed by its internal law for the service of documents in domestic actions upon person who are within its territory, or
- b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6 The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention."

A question was raised whether the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 1965)* applies in Solomon Islands. The traditional view, and it is the general rule adopted in common law countries which follow the English legal tradition, with the exception of the United States, is that treaty law is not part of the domestic law unless incorporated into domestic law. Thus mere ratification of the treaty is insufficient to have treaty law become part of such countries' domestic law (although arguably with regard to human treaties, a state who being a member of the United Nations and subscribed to the UN Charter, is bound to apply the international human rights treaties under its domestic legal order even if such treaties have not been formally incorporated into its domestic law). The Australian case of *Koowarta v Bjelke-Petersen* (1983) 153 CLR 168 clearly demonstrated the traditional view. In that case Mason J (as he then was) said:

It is a well stated principle of common law that a treaty not terminating the state of war has no legal effect upon Australian citizens and is not incorporated into

Australian law by its ratification by Australia. ... In this respect Australian law differs from that of the United States where treaties are self-executing and created rights and liabilities without the need for legislation by Congress. *Foster v Neilson* 2 Pet. 253 at 314, 27 US 164, 202 (1829). As Barwick CJ and Gibbs J observed in *Bradley v The Commonwealth* (1973) 138 CLR at DP 582-3, the approval by the Commonwealth Parliament of the Charter of the United Nations in the Charter of the United Nations Act 1945 (Cth) did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law whether by commonwealth or State statute. Section 51(xxix) [the external affairs power] arms the Commonwealth to bring this about. That power enables the Commonwealth Parliament to legislate so as to incorporate into our law the provisions of [international] conventions.

The New Zealand case of *Ashby v Minister of Immigration* [1981] 1 NZLR 222 and the English case of *Brind v Secretary of State for Home Department* [1991] AC 696 have both adhered to this traditional rule.

The United Kingdom signed the Convention on 10 December 1965, ratified it on 17 November 1967 and enforced it on 10 February 1969. The Convention was extended to Solomon Islands (then a British Protectorate) on 20 May 1970 and entered into force for Solomon Islands on 19 July 1970. Although on independence on 7 July 1978, no declaration had been made on the continuing application of the Convention, it must be taken to have continued to apply in Solomon Islands by virtue of section 5 of the *Solomon Islands Independent Order 1978* which preserved the continuing effect of "existing laws" as part of the law of Solomon Islands. The Convention here concerned is an international Instrument which had become part of the law of the UK by legislative incorporation and extended to Solomon Islands. Its application has been preserved under s.5(1) and (5) as read with section 2 of the *Solomon Islands Independence Order, 1978*. Further, Order 11 rule 11 of the High Court (Civil Procedure) Rules 1964 has included the operation of the Convention and thereby, not only preserving the continuing effect of the Convention but also preventing any

lacunae in the application of the Convention to individual countries to ensure its effectiveness. See the "*Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth*," A Report of a Working Meeting held in Nairobi, Kenya, 9-14 January 1980 (Commonwealth Secretariat, 1980), 2. In my opinion the Convention continues to apply in Solomon Islands. Whether Solomon Islands wishes to formally notify the Ministry of Foreign Affairs of the Kingdom of the Netherlands which is the depository of the Convention, of its continuing acceptance of the convention (as Antigua and Barbuda had done after it attained independence in 1981) is a matter for the Executive Government. But I am left in no doubt of the continuing effect of the Convention in Solomon Islands.

Article 5 of the Convention sets out the modes of service which the applicant may choose when making the Request for service: firstly, service in accordance with the normal domestic rules of the receiving state, or secondly, service by a particular method requested by the applicant or thirdly, service by delivery to the addressee who accepts it voluntarily. As Rule 11 of Order 11 of our High Court Rules is subject to the Convention, the application of our Rules in this regard must conform to international law.

Thus is the position in the present case, the plaintiffs having been granted leave to serve out of jurisdiction, are entitled to effect that service upon the first defendant in the manner discussed in these Reasons.

(Sir John Muria)
CHIEF JUSTICE