CIVIL PROCEDURE

SERVICE OF WRIT BY WAY OF AR REGISTERED POST: IS PROOF OF POSTING A CONCLUSIVE PROOF OF SERVICE? … Very recently on 5.3.2021, the Federal Court in the case of Goh Teng Whoo and Tan Hwa Cheng ("Appellants") v Ample Objectives Sdn Bhd ("Respondent") decided that where the service of writ is effected by way of AR Registered Post pursuant to Order 10, rule 1(1) of the Rules of Court 2012 ("ROC 2012"), a judgment in default of appearance cannot be sealed by the Court if the Affidavit of Service does not exhibit the AR Registered card ("AR Card") containing an endorsement as to the receipt by the defendant himself, or someone else authorised to accept the service on his behalf.

In short, mere proof of posting is insufficient to establish the service of a writ by AR Registered Post. This decision would invariably affect the litigation practice in Malaysia, as far as service of writ by AR Registered Post is concerned.

We will dissect the rationale behind this decision as well as its effect to the litigation practice in Malaysia.

RELEVANT PROVISIONS & ISSUE

This case pertains to the service of a writ by way of AR Registered Post. Before we delve into the decision of the Federal Court, it may be helpful to first highlight the provisions relevant in this case for better understanding and clarity.

Order 10, rule 1(1) of the ROC 2012 essentially provides that subject to the provisions of any written law and the Rules, it is mandatory for a writ to be served on the defendant either personally or sent by prepaid AR Registered Post addressed to his last known address.

Order 10 rule 1 of the ROC 2012 is often read together with section 12 of the Interpretation Acts 1948 and 1967 ("Interpretation Acts"), which provides as follows:

"Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service-

(a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and

(b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post."

Many tend to interpret these two provisions to mean that proof of posting is conclusive proof of service of a writ, even if there is no evidence to show that the action has been brought to the knowledge of the defendant.

In this case, the leave question posed to the Federal Court for determination is:

"Whether, considering the relevant provisions in Orders 10, 13 and 62 of the Rules of Court and S. 114 (f) of the Evidence Act and S. 12 of the Interpretation Acts 1948, 1967, where the service of a Writ is alleged to have been carried out by way of sending the same to a Defendant by A.R. Registered Post pursuant to O. 10, R. 1(1) of the Rules of Court, 2012, can the Court seal a judgment in default of appearance notwithstanding that the Affidavit of Service does not exhibit the A.R. Registered Card containing an endorsement as to receipt by the Defendant himself or someone authorised to accept service of the same on his behalf?"

BACKGROUND FACTS

On 14.9.2016, the Respondent entered a judgment in default ("JID") against the Appellants (4th and 5th Defendants in the High Court) respectively as no appearances were entered by them. The Respondent's solicitors merely affirmed an affidavit of service stating that the Writs were posted by AR Registered Post to the last known addresses of the Appellants without exhibiting the AR Cards and without informing the Court whether the AR Cards were returned or otherwise. The Respondent's solicitors merely exhibited proof of posting by indorsing the day and date of service on the flip side of the Writs in compliance with Order 62 rule 9 of the ROC 2012.

In gist, the affidavit of service merely alludes to the fact that the Writs had been posted by AR Registered Post to the Appellants at their last known addresses, but it does not allude to the fact that the Appellants or their authorised representatives had acknowledged receipt of the Writs.

The Appellants applied to set aside the JIDs on the basis that they were irregularly entered by the Respondent. It was submitted that in the absence of the AR Cards, service of the Writs had not been proved by the Respondent.

It was only at the stage of the application to set aside JID that the Respondent in its affidavit in reply:

(a) exhibited the AR Card in respect of the service on the 1st Appellant, but the AR card disclosed that the Writ was received by the 1st Appellant's estranged brother, who was not the authorised by the 1st Appellant to accept service of the Writ on his behalf;
(b) explained that the AR Card in respect of the service on the 2nd Appellant was not returned.

The Respondent's case was that for purposes of Order 10, rules 1(1) and 1(4) read with Order 13 rule 7 of the ROC 2012, it was entitled to rely on the postal receipt issued by the post office to prove service without further proof. In other words, proof of posting is conclusive proof of service. The Respondent further relied on the presumptions set out in section 12 of the Interpretation Acts to support its argument that mere posting is sufficient to prove service.

On 21.3.2018, the High Court dismissed the Appellant's application to set aside the JIDs and held that there is no requirement for the AR Cards to be exhibited in the affidavit of service. Similarly on 17.4.2018, the Appellants' appeal to the Court of Appeal against the High Court's decision was dismissed.

Decision of the Federal Court

The Federal Court held that section 12 of the Interpretation Acts must be read in its proper context. Section 12 of the Interpretation Acts provides that where a document is served by registered post, service and time are "presumed" "until the contrary is proved". There is nothing in the section to say that posting by registered post is conclusive proof of service. Instead, section 12 of the Interpretation Acts provides a rebuttable presumption of law that can be displaced by evidence to the contrary. It is not an irrebuttable presumption that shuts out all forms of defence to the proof of posting.

It is also worth noting that Order 10 rule 1(4) and Order 13 rule 7 of the ROC 2012 both envisage the due service of a writ on the defendant as well.

The Federal Court ruled that the intention behind the said provisions is to ensure that the action has been brought to the knowledge of the defendant or someone authorised by him to accept service of the writ before the Court takes the drastic step of sealing the JID.

In this regard, the Federal Court found that the Appellants had succeeded in rebutting the presumption of service as:

(a) The 1st Appellant exhibited evidence that he was not residing at the address of service at the material time. The AR Card was signed by his estranged brother who did not inform him of the same;
(b) The 2nd Appellant admitted residing at the stated address but denied receiving the Writ. No AR Card was ever produced by the Respondent in respect of the 2nd Appellant.

By virtue of the above, the Federal Court answered the leave question in the negative and allowed the Appellants' appeal. Following therefrom, the JIDs were set aside.

Effect of Decision

It is evident that with this decision of the Federal Court, a plaintiff is now required to exhibit the AR Card in his affidavit of service if he elects to serve a writ by way of AR Registered Post, in order to show conclusive proof of service.

Conclusion

Prior to this Federal Court decision, there have always been cases of two divergences, with one being that proof of posting is sufficient, while the other being that production of the AR Card is a prerequisite before JID can be entered against the defendant.

It is the author's personal opinion that the decision of the Federal Court merely recites the correct position of law. For personal service of a writ, one must always show that the writ has been duly served on the defendant. A substituted service ought to be effected after three attempts of personal service being made.

There is no reason why one ought not to produce an AR Card to show that a writ has been duly served on the defendant when it comes to service by way of AR Registered Post.

It would be an unsafe practice in litigation if a mere proof of posting is sufficient to be constituted as conclusive proof of service. It would be subject to abuse and would render the mode of service by way of personal service wholly redundant. The object behind all the provisions as discussed above, which is to ensure that the defendant has knowledge of the action brought against him, ought not to be defeated.

Authors:

Susan Tan Shu Shuen
Partner
susan.tan@zulrafique.com.my

Koh Shien Lin
Legal Associate
shienlin.koh@zulrafique.com.my

Noor Sumaeya Sofea Shamsudin
Legal Associate
sumaeya.shamsudin@zulrafique.com.my

Zul Rafique & Partners
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