

HONG KONG / JUDGMENT

ATTORNEY GENERAL v. GEOFFERY WATSON

COURT

Court of First Instance

DECIDED

18 November 1988

CASE / FILE NUMBER

HCA3161/1988

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HCA003161/1988

1988, No. A3161

IN THE HIGH COURT OF HONG KONG

HEADNOTE

The plaintiff instituted an action against the defendant on 30th April 1988, claiming possession of certain premises and also claiming mesne profits. The defendant vacated the premises on 3rd May 1988. The writ was posted to the premises (then the defendant's last known address) on 5th May 1988, by way of service, but the defendant in fact never received it. On 27th May 1988, the plaintiff obtained a default judgment against the plaintiff, which the master, holding that it was a regular judgment, refused to set aside. The defendant appealed, claiming that the judgment was irregular and that he had a good arguable defence to the plaintiff

s claim :

HELD : allowing the appeal and setting aside the default judgment :

(1) That the defendant, having shown that he had never received the writ, was entitled to have the default judgment set aside ex debito justitiae; but

(2) That, if the defendant had had to show merits, it would not have been enough for him to show that he had a good arguable defence; he would have had to show that his defence had a real prospect of success (*Alpine Bulk Transport Co, v. Saudi Eagle Shipping Co*, [1986] 2 Lloyd's Law Reports 221 followed).

Per curiam : In the light of the *Saudi Eagle* case, it seems that the notes at 13/9/5 of the Supreme Court Practice 1988 may require revision.

1988, No. A3161

IN THE SUPREME COURT OF HONG KONG

HONG KONG

BETWEEN

ATTORNEY GENERAL Plaintiff

and

GEOFFREY WATSON Defendant

Coram : The Hon. Mr, Justice Godfrey in Court
Date of Hearing : 4th November 1988
Date of Delivery of Judgment : 18th November 1988

JUDGMENT

This is an appeal from an order of Master O Donnell of 18th August 1988, dismissing an application on the part of the defendant under Order 13 rule 9 of the Rules of the Supreme Court to set aside a judgment dated 27th May 1988 and obtained by the plaintiff against the defendant in default of any notice of intention to defend. The appeal was argued in Chambers; but since the case raises procedural and substantive points of some general importance. I deliver this judgment in open Court. The facts are as follows. With effect from 7th April 1982, the defendant was appointed a magistrate. On 14th March 1983, the defendant was granted a licence to occupy as his quarters premises known as House No. 65, 5th Street, Hong Lok Yuen, Tai Po, New Territories (the premises). The defendant was supplied with Government furniture for his use at the premises. Under Civil Service Regulation 811 (2) the defendant became responsible for the cost of making good any damage or loss which might occur to the furniture during his occupancy of the premises. Immediately before the events occurred which have given rise to this action, the defendant held office for a term which was due to expire on 6th April 1988. On 27th November 1987, the defendant was notified that his tenure of office would not be renewed for a further term. On 30th December 1987, the Quartering Officer wrote to the defendant about vacating the premises. He wrote I note that you will be vacating [the premises] on or about 8/1/88 . (This seems to be erroneous; but the error is not explained in the evidence and neither party referred to it before me.) The Quartering Officer went on : The enclosed notes give details of actions to take and points to remember in respect of your quarter before you leave . The notes stated (among other things) : Civil Service Regulation 881 is relevant . The notes do not set out any part of that Regulation; but sub-paragraph (5) of the Regulation does now appear to be relevant. It reads as follows : To enable the Director of Government Supplies to carry out an inspection of furniture and to take any necessary follow-up action prior to an officer s vacation of quarters, Heads of Departments are required to give the Director of Government Supplies at least 28 working days notice prior to an officer s vacation of a quarter. This Regulation plainly contemplates that the inspection of furniture to which it refers will take place prior to the officer s vacation of his quarters. Finally, the notes made a reference to keys, in these terms : Keys should be handed to the watchman if there is one or failing that to the Clerk of Works for the district concerned. If you are forced to leave the keys with friends or elsewhere please tell the Clerk of Works by phone that you have done so. On 12th February 1988, and 15th March 1988, the Quartering Officer appears to have written again to the defendant in relation to the premises. His letters of those dates are not in evidence and I do not know what they contained, Whatever they contained, it does not appear that the defendant troubled himself to reply to them (he does not

suggest that he did not receive them). On 24th March 1988, the Quartering Officer wrote again to the defendant. He said : I refer to my letters of 12th February and 15th March 1988 to which regrettably you have not responded so far. I understand from the Registrar, Supreme Court that your last day of leave is 6.4.1988. Accordingly you are asked to deliver vacant possession of [the premises] on 7.4.1988. As you are aware, government quarters are provided to eligible officers only. You will cease to be so eligible upon your leaving the service on 7.4.1988. Any overstay beyond that date will be subject to full market rent of \$16,290 per month being payable. Your co-operation in vacating the above quarter promptly on 7.4.1988 would be appreciated . The defendant does not appear to have replied to this letter either. On 6th April 1988, the defendant s appointment ceased; and, on 7th April 1988, it was formally revoked. The defendant asserted in evidence that he was all along prepared to surrender vacant possession of the premises on or after 7th April 1988 . That assertion was not challenged. The defendant further asserted in evidence as follows : I have been staying on the said premises most of the time on 7th April 1988 awaiting for the completion of the formalities relating to the handing over. There was however no representative from any of the Government Departments attending on that day or any signs or notes indicating their attendance . Those assertions were not challenged either. It is plain that at this stage the defendant had been called on to vacate the premises on 7th April 1988; but it does not appear that any arrangements had been made before that date for the Director of Government Supplies to carry out the inspection of furniture prior to an officer s vacation of quarters to which reference is made in C.S.R. 881(5). However, on 13th April 1988, the Director of Government Supplies sent a memorandum to the defendant referring to the Quartering Officer s letter of 30th December 1987 and informing the defendant that the Government furniture at the premises would be checked on 3rd May 1988. The defendant was told that, if he was unable to be present at the inspection, he should authorise a representative to sign the furniture inspection report in which damage or loss of Government furniture (if any) would be recorded by the inspecting officer during inspection. On 14th April 1988, a senior assistant Crown solicitor (Mr. Strawbridge) acting on behalf of the plaintiff wrote to the defendant in the following terms : I am instructed by Government s Quartering Officer that vacant possession of the Government quarter that you presently occupy should have been delivered to the Government on 7th April and that on that date you have not delivered that vacant possession. I am instructed therefore to seek an order of eviction and to claim mesne profits on a daily basis at the market rate at which the property can be let after the date that you vacate. The market rate has been assessed at \$16,290 per month. The Quartering Officer wrote to you on 24th March setting out the position. Unless you vacate within 7 days proceedings will be issued against you without further notice. The defendant asserted in evidence : My understanding of the memo [of 13th April 1988] is that I was considered by the Government as an insurer and caretaker of the said premises being responsible for the state thereof and the contents therein until the date specified in the memo [that is to say, 3rd May 1988] . If that is supposed to mean that the defendant understood he was required or entitled to stay on at the premises, that understanding could not have survived, in the mind of any reasonable person, the letter from Mr. Strawbridge of 14th April 1988 to which I have referred, which, in unmistakable terms, required the defendant to vacate the premises within 7 days, that is to say, by 21st April 1988, a date before the date of the proposed inspection.

Nevertheless, the defendant did not reply, or react in any other way, to the letter of 14th April 1988. He simply stayed on at the premises. There is no suggestion that he did not receive the letter of 14th April 1988; and by the time the period of 7 days therein limited had expired, on 21st April 1988, the defendant could not have been in any doubt but that, since he had not by then vacated the premises, he was at risk of having proceedings for possession and mesne profits instituted against him. That said, and although it does more credit to the defendant's perversity than to his intelligence, I am prepared to accept that the defendant did believe that he had to stay on at the premises until after 3rd May 1988. But that belief was unreasonable, And it was not a belief that had been induced by the plaintiff's conduct. The plaintiff had made its position perfectly clear to the defendant. On 30th April 1988, the plaintiff, not having heard anything whatever from the defendant at any stage, instituted this action. He issued the writ, endorsed with a Statement of Claim for the appropriate relief, including in particular a claim for mesne profits at the rate of \$16,290 per month from 7th April 1988 up to and including the date of delivery up of vacant possession. On 3rd May 1988, a representative of the Director of Government Supplies duly attended at the premises to inspect the Government furniture there. The defendant met him and offered him the keys to the premises; but, no doubt because the representative had no authority to do so, he declined to accept the keys. So the defendant hung the keys on the outside of the door and vacated the premises, telling nobody that he had done so. On 5th May 1988, one Leung Wing-hung, an assistant of the bailiff, attended at the premises, which, so far as he (and the plaintiff) then knew, was the usual or last known address of the defendant. On arrival, he found that the outer door of the premises was locked. (By now, of course, as mentioned above, the defendant had vacated the premises.) In the circumstances, the bailiff's assistant was unable to carry out his original purpose, which was personally to serve two sealed copies of the writ in this action on the defendant. Accordingly, the bailiff's assistant, by way of service of the writ, on the same day sent a sealed copy of the writ by pre-paid ordinary post addressed to the defendant at the premises (he also affixed a sealed copy in a conspicuous place at the main entrance to the premises). It appears (as I shall show in a moment) that by about the middle of May the Quartering Officer was aware that the defendant had already vacated the premises. Nevertheless, on 25th May 1988, Leung Wing-hung, in a further affirmation, deposed that, in his opinion, the writ posted to the defendant on 5th May 1988 would have come to the knowledge of the defendant within 7 days after the date of posting thereof; and that, up to 25th May 1988, the writ had not been returned to the bailiff. In fact the writ did not come to the knowledge of the defendant within 7 days after the date of posting thereof; it did not come to his knowledge at all until after 27th May 1988, when the plaintiff obtained the judgment which the defendant now applies to have set aside and Mr. Strawbridge wrote to the defendant about it. It is to be observed that Mr. Strawbridge addressed his letter to the defendant, not at the premises, but at another address, where, in fact, the letter did reach the defendant, Mr. Strawbridge enclosed a copy of the judgment and called on the defendant to give up possession under its terms. He added : I understand from the Quartering Officer that it appears that you have already vacated the premises in that there is no sign of any of your personal possessions about the property and there has been no sign of occupation for the last fortnight or so. If you have already given up possession of the [premises] I would be grateful if you could let me have by Tuesday 31st May the

keys of the [premises] so that this matter can be brought to an end. I trust it will not be necessary for me to make an application for a writ of possession - that would only prolong the issue and run up unnecessary costs. If you are unable to let me have the keys then I would be more than happy if you will give them to the caretaker at Hong Lok Yuen or to the Government's Quatering Officer at his office in Hang Chung Building, Room 202, 5 Queen's Road Central, Hong Kong. As I have said, this letter did reach the defendant; but, once again, he did not reply to it, or otherwise react to it, in any way. On 10th June 1988, the plaintiff, although apparently by now aware that the defendant was no longer in possession of the premises, applied for leave to issue a writ of possession against the defendant and a writ of possession was accordingly issued. On 15th June 1988, the defendant's solicitors notified the plaintiff of their instructions to act in the matter. On 16th June 1988, the writ of possession was executed (since the premises were, by then, vacant, this could have been no difficult task). On 7th July 1988, the defendant's solicitors gave formal notice to act on behalf of the defendant, and applied to set aside the judgment. On 18th August 1988, the Master dismissed that application. On 24th August 1988, this appeal was instituted. The notice of appeal takes the following points :

- (1) The judgment of 27th May 1988 was irregular in that the plaintiff knew that the defendant was no longer in occupation of the premises after 3rd May 1988 and that accordingly the writ sent to the premises by post could not have come to the knowledge of the defendant within 7 days after its posting; and
 - (2) That the Defendant has a good arguable defence to the plaintiff's claim. I shall refer to these two points respectively as the procedural point and the substantive point. At the hearing before me, the issues were narrowed. First, the defendant made it clear that he was not seeking to assert a right to possession of the premises; his only object was to resist the plaintiff's claim for mesne profits. Secondly, the plaintiff made it clear that he was prepared to limit his claim for mesne profits to the period commencing on 7th April 1988 and ending on 3rd May 1988 when, as the plaintiff was for present purposes prepared to accept, the defendant went out of occupation of the premises. Thirdly, the Defendant accepted that on the substantive point the burden on him was higher than the words a good arguable defence mentioned in the notice of appeal would suggest. In the course of the submission addressed to me by counsel on behalf of the defendant. I drew his attention to the case of *Alpine Bulk Transport Co. v. Saudi Eagle Shipping Co.* [1986] 2 Lloyd's Law Reports 221. That case reaffirms that a defendant who is asking the Court to exercise its discretion in his favour on an application to set aside a default judgment regularly obtained should show that he has a defence which has a real prospect of success : see per Sir Roger Ormrod, at p. 223 (it seems that, in the light of this case, the notes at 13/9/5 of the Supreme Court Practice 1988 may require revision). I deal first with the procedural point. In this connection. I must set out the relevant provisions of the Rules of the Supreme Court, that is to say. Order 10 rule 1(1)(2) and (3) and Order 13 rule 7(1). First, rule 1 (1)(2) and (3) of Order 10.
1. (1) A writ must be served personally on each defendant by the plaintiff or his agent.

- (2) A writ for service on a defendant within the jurisdiction may, instead of being served personally on him, be served --
 - (a) by sending a copy of the writ by ordinary post to the defendant at his usual or last known address, or
 - (b) if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant. In sub-paragraph (a) ordinary post means post which has been pre-paid or in respect of which prepayment is not required.
- (3) Where a writ is served in accordance with paragraph (2) --
 - (a) the date of service shall, unless the contrary is shown, be deemed to be the seventh day (ignoring Order 3, rule 2(5) after the date on which the copy was sent to, or as the case may be, inserted through the letter box for, the address in question;
 - (b) any affidavit proving due service of the writ must contain a statement to the effect that --
 - (i) in the opinion of the deponent (or, if the deponent is the plaintiff's solicitor or an employee of that solicitor, in the opinion of the plaintiff) the copy of the writ, if sent to, or as the case may be, inserted through the letter box for, the address in question, will have come to the knowledge of the defendant within 7 days thereafter; and (ii) in the case of service by post, the copy of the writ has not been returned to the plaintiff through the post undelivered to the addressee. Secondly, rule 7(1) of Order 13.
- 7. (1) Judgment shall not be entered against a defendant under this Order unless --
 - (a) the defendant has acknowledged service on him of the writ; or
 - (b) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant; or
 - (c) the plaintiff produces the writ indorsed by the defendant's solicitor with a statement that he accepts service of the writ on the defendant's behalf. The defendant has raised two objections (neither of them, incidentally, the objection adumbrated in the notice of appeal) to the affirmations of service. He says that in the present case (1) the opinion to which the person making the affirmation had to depose, under Order 10 rule 1(3)(b)(i), had to be the opinion, not of the deponent himself, but of the plaintiff; and (2) the person making the affirmation had to depose, under Order 10 rule 3(b)(ii), that the copy of the writ had not been returned to the plaintiff, proof that it had not been returned to the bailiff being insufficient. As to objection (1), in my judgment the deponent was correct in deposing to his own opinion and not that of the plaintiff. The deponent was an assistant of the bailiff. He was not the plaintiff's solicitor, nor an employee of that solicitor; and it is only in those two cases that the deponent must depose to the opinion of the plaintiff and not to his own opinion. As to objection (2), in my judgment proof that the copy of the writ had not been returned to the bailiff (who had posted it, on behalf of the plaintiff, to the defendant) is, on a proper construction of Order 10 rule 3(b)(ii), proof that the copy of the writ had not been

returned to the plaintiff, and is accordingly proof which satisfies the requirements of Order 10 rule 3(b)(ii). These objections accordingly fail; but nevertheless I am satisfied that in fact the supposed service was ineffective to bring the proceedings to the notice of the defendant before the plaintiff obtained this judgment. As is pointed out in the Supreme Court Practice 1988, 10/1/8, it is always open to a defendant to show that he did not in fact receive the copy writ at all; and in the present case the defendant has, in my judgment, done that. I accept the submission made on behalf of the defendant and supported by the authority of *Austin Rover Group Ltd. v. Crouch Butler Savage Associates* [1986] 1 W.L.R. 1102 (see especially per May L.J. at p.1111) that the service of a writ cannot be completed until the writ is actually received or is deemed to have been received under the terms of the rules. Proof positive that the writ was not actually received defeats any suggestion that it was actually received or should be deemed to have been received : in the words of Order 10 rule 1 (3) (a) the contrary is shown . The writ not having been effectively served, the result is that the judgment was not regularly obtained and the defendant is entitled to have it set aside, under Order 13 rule 9, *ex debito justitiae* : cp. *White v. Weston* [1969] 2 QB 647 (a case concerned with different rules but with some useful observations on the principles involved). He does not therefore need to show that he has a defence which has a real chance of success (this is the substantive point) but the point was raised by the defendant and was fully argued before me. In case the matter goes further and I am held to be wrong on the procedural point, I will deal with the substantive point now, although in the light of my holding on the procedural point it is strictly speaking unnecessary for me to do so; and nothing I say about the substantive point will be binding on any court which may have to try the case hereafter. The defence of the defendant to the claim of the plaintiff for mesne profits appears to be that he (the defendant) remained in possession of the premises after 7th April 1988 as an insurer and caretaker of the premises; that he stayed on only on behalf of the Government or for the Government s convenience and not for himself. This is preposterous. The defendant was never asked so to act. On the contrary, before 7th April 1988 he had been asked to vacate the premises on that day. No one with an ounce of common sense could have reasoned, in these circumstances, that the memorandum of 13th April 1988 about the Government furniture from the Director of Government Supplies was intended as a request to him so to act as the Government insurer and caretaker ; and even someone without an ounce of common sense could not have continued in such a belief after receiving the letter of the 14th April 1988 from Mr. Strawbridge to the defendant. If the defendant s claim had been supported by the evidence, it would, in my judgment, have had a real chance of success; but the truth is that all the evidence goes to contradict it. The defendant can derive no assistance from the fact that, due to the defendant s unco-operative attitude in failing to reply to any of the Government s letters, the inspection to be made on behalf of the Director of Government Supplies of the government furniture had to be postponed to a date after that on which the defendant had been required to give up possession of the premises. And in any case, the defendant did have the benefit of the use and occupation of the premises from 7th April 1988 to 3rd May 1988. Suppose that because the inspection did not take place until 3rd May 1988 his licence to occupy the premises is to be treated as having subsisted until 3rd May 1988.

This would mean that he would not be liable to a claim for mesne profits (which are damages for trespass) during that period. But he would instead be liable to the plaintiff for the equivalent sum in an action for compensation for use and occupation. In the absence of some express agreement on the part of the plaintiff to allow him so to continue to occupy the premises rent free, there cannot be any justification for depriving the plaintiff of a claim to this compensation for use and occupation. Whether the claim is for mesne profits (on the footing that the defendant had no right to occupy the premises between 7th April 1988 and 3rd May 1988) or for compensation for use and occupation (on the footing that the defendant was permitted by the Government to occupy the premises until 3rd May 1988) the financial result would be the same. There would be no merit in setting aside this judgment for the purpose of enabling the defendant to prove (if he can) that he is not liable to the plaintiff for mesne profits, but for the identical sum by way of the compensation for use and occupation. To take that course would be an arid exercise of no assistance to the defendant. It would not give him any success worthy of the name. It would simply run up costs. However for the reasons I have endeavoured to state, I must allow this appeal, and set aside the judgment of 27th May 1988, on the simple ground that the defendant has proved that he was not served with the writ before the judgment was obtained. (G. M. Godfrey) Judge of the High Court Representation: Mr. Patrick O Sullivan, Crown Counsel, of the Attorney General s Chambers, for the Plaintiff. Mr. Albert Yau instructed by Messrs. Kwan & Kwan for the Defendant. PAGE PAGE

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Prepared on 28 October 2026 · Esheria