FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 16
CA64/17

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion

in the cause

DANIEL MIKHAIL ZIGAL

Pursuer and Respondent

against

GORDON ALEXANDER BUCHANAN

Defender and Reclaimer

Pursuer and Respondent: Murphy; Alexander Moffat & Co
Defender and Reclaimer: Party

5 March 2019

[1] This is a reclaiming motion against the interlocutor of the Lord Ordinary dated 18 September 2018 granting decree, in favour of the pursuer, conform to the terms of a final judgment of the High Court of the Hong Kong Special Administrative Region dated 6 October 2016. The judgment is for 774,430 HKD and 99,927 USD together with interest.

[2] After a proof before answer, the Lord Ordinary found that the parties had been business associates in Hong Kong. On 8 June 2015 they had had a meeting at the offices of a firm of solicitors concerning their continued association. There was a discussion about

claims made by each party against the other. Thereafter, the pursuer brought proceedings against the defender in Hong Kong. In particular, a writ of summons was issued by the High Court on 27 January 2016 claiming the sums mentioned. On 6 October 2016, the High Court pronounced a final judgment for these sums in favour of the pursuer. That judgment was a decree in absence. It proceeded on the basis that the writ had been personally served on the defender in Hong Kong on 14 July 2016. There were affidavits from the pursuer's father and from Ravinder Singh Beryar narrating that personal service of the writ had been executed on that day. There was no challenge to the validity of the service or to the decree in absence in the High Court.

[3] The Lord Ordinary accepted the evidence given by Mr Beryar that, on 14 July 2016, he had gone with the pursuer's father to the Tonic Bar in Wyndham Street, Hong Kong at about 11.30pm. He had served the writ on the defender by placing the envelope containing a copy of the writ in the defender's hand and telling him that he had been served. The defender had dropped the envelope on the floor saying "I don't want this". He was told by the pursuer's father that the documents were official court papers. The defender left the bar and headed towards the Lan Kwai Fong hotel. The episode was partially recorded on a mobile phone, images of which were played to the Lord Ordinary. The Lord Ordinary rejected evidence from the defender that what had happened was that he had been assaulted by five or six men dressed in black and from whom he had subsequently escaped. He determined that the defender was not credible or reliable but argumentative and evasive. The defender had, in his view, refused to answer certain questions and had generally prevaricated at times.

[4] The Lord Ordinary noted that the High Court had accepted the personal service described in the affidavits as valid. The defender had failed to discharge the onus, which

was on him, to establish that it was not. He had led no evidence to state that it was not effective under Hong Kong law. The challenge made by the defender to the jurisdiction of the High Court based on invalid service thus failed.

[5] The Lord Ordinary went on to consider whether the defender had been resident in Hong Kong at the material time. He noted that, in *Wendel* v *Moran* 1993 SLT 44, it had been said that the rules required the defender to have been resident, or at any rate present, in the foreign territory when the action commenced. The Lord Ordinary held that the defender had been so resident at the material time. In doing so, he again rejected the evidence of the defender that, by that time, he had returned to live in Glasgow. He described the defender's evidence about this as evasive and commented that the defender had not led any supporting oral evidence of his residence.

[6] In a revised Note of Argument and in oral submissions, the defender contended, first, that the pursuer had failed to provide sufficient evidence that the incident at the Tonic Bar, if proved, amounted to a valid service according to the laws of Hong Kong. In the absence of evidence of what that law was, the law of Scotland ought to apply. That necessitated personal service being effected by officers of the court. Secondly, the defender argued that the Lord Ordinary had erred in holding that the burden of proof had been on him to prove that he was not resident in Hong Kong at the material time. He referred to *dicta* from the commercial judge in *Liquidator of Letham Grange* v *Foxworth Investment* 2011 SLT 1152. The burden, it was argued, was on the pursuer to prove both the validity of the service and the defender's residence in Hong Kong. The Lord Ordinary had had insufficient evidence of residence, although the defender accepted that in cross-examination he had said that he had lived in Hong Kong for 14 months after May or June 2015. He explained that he had been confused by the nature of the cross-examination and had clarified the position later

in his evidence. Thirdly, the defender referred to the existence of new evidence in the form of airline tickets and certain utility bills which, he said, demonstrated his residence in Scotland at the material time.

[7] In response, the pursuer stated that the Lord Ordinary had been correct in relation to both service and residence. It had been for the defender to challenge the procedural validity of the foreign judgment (*Gladstone* v *Lindsay* (1868) 6 SLR 71 at 73). The Lord Ordinary noted that there had been two affidavits accompanying the writ. Any inquiry by this court into the Hong Kong procedural rules was strictly irrelevant, although consideration of the procedural rules of Hong Kong, notably Rule 1 of Order 10 on Service, demonstrated that service, of the nature which occurred in the Tonic Bar, was valid in that jurisdiction. In any event the defender had not pleaded that there had been a defect of the nature complained of. The defence at the proof had been that what had happened at the Tonic Bar had been an assault and therefore public policy considerations dictated that it should not be recognised as effective service. The pursuer had previously provided the court with two opinions from a Hong Kong barrister on validity of service. If that validity was to have been challenged, that could have been done in Hong Kong. *Liquidator of Letham Grange* (*supra*) was distinguishable. It had concerned an unsuccessful attempt to reduce a standard security; the commercial judge holding that the onus was on the pursuer to prove the grounds. The Lord Ordinary was correct in holding that the burden of establishing the defender's residence, or presence, when the action was commenced had rested upon him. There had been no appeal in Hong Kong based on a lack of jurisdiction. No reason had been given as to why the Lord Ordinary's findings in fact in relation to the material matters were plainly wrong. The new material, even if competently admitted at this stage, was not of such significance that it would have affected the Lord Ordinary's decision.

[8] This court agrees essentially with the reasoning of the Lord Ordinary. It recognises that the judgment of a foreign court, which has jurisdiction over a defender by reason of residence in the foreign country at the material time, may be enforced by decree conform. The onus is on the challenger to demonstrate that the service or decree is not valid. As was said by Lord Kinloch in *Gladstone* v *Lindsay* (*supra* at 73):

> "The question before us is, whether we are to pronounce a decree-conform, where there is presented to us the judgment of a competent court *ex facie* regular and sufficient. Admittedly, we cannot enter on the merits of the judgment. The party objecting to our pronouncing a decree-conform must make out to our satisfaction that the judgment was obtained irregularly and improperly, and in such circumstances as would make it against justice to give it effect."

[9] This court may, of course, decline to recognise a judgment where the defender has had inadequate notice of the foreign proceedings. In this case, however, there was evidence that what the pursuer had said had happened in the Tonic Bar had indeed occurred. It was not pleaded as a defence to this action, nor was it submitted to the Lord Ordinary, that if what the pursuer said had occurred was proved, that did not amount to valid personal service. In any event, as the pursuer has submitted, the procedural rules of Hong Kong appear to indicate that service of the nature which occurred is valid in terms of Order 10, Rule 1.

[10] In relation to the defender's residence in Hong Kong, again there was evidence before the Lord Ordinary which entitled him to conclude that he was so resident when the action was raised and at the time of service. He himself had said that he had moved to an address in Hong Kong in May or June 2015 and had lived there for a period of 14 months. He submits that this was an error and that he had corrected himself. But the fact is that there was evidence from him, and indeed his presence in Hong Kong at the material time, from which the Lord Ordinary could infer that he was still resident when he was served in

July 2016. The defender has submitted that the new evidence, which he has proffered in documentary form and which was not presented to the Lord Ordinary because of certain legal advice which he had been given, shows that he was not so resident. His explanation for not tendering this material at the proof does not provide a sufficient basis for introducing it in the reclaiming motion.

[11] For all these reasons, the court is satisfied that the Lord Ordinary's reasoning was correct and that this reclaiming motion must be refused.