



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 94

CA64/17

OPINION OF LORD ERICHT

In the cause

DANIEL MIKHAIL ZIGAL

Pursuer

against

GORDON ALEXANDER BUCHANAN

Defender

**Pursuer: A J Murphy; Alexander Moffat & Co**

**Defender: R G Anderson; TLT LLP**

18 September 2018

**Introduction**

[1] This is an action of decree conform seeking to enforce a judgment of the High Court of the Hong Kong Special Administrative Region.

**Background**

[2] The pursuer and the defender were business associates in Hong Kong. During 2015 the parties were in dispute about various matters relating to their business association. On 8 June 2015 a meeting was held at the defender's solicitors in Hong Kong, Haldanes. The

meeting was attended by the pursuer and his father and the defender. At that meeting there was discussion of monetary claims being made both by and against the defender.

[3] The pursuer brought proceedings against the defender in Hong Kong. A Writ of Summons (the "Hong Kong Writ") was issued by the Registry of the High Court of the Hong Kong Special Administrative Region on 27 January 2016. The Hong Kong Writ states that it may not be served later than 12 calendar months beginning with that date, unless renewed by order of the court. In the Hong Kong Writ the defender was designed as:

"of Flat D, 3/F, Block 16, Providence Peak, 8 Fo Chun Road, Tai Po, New Territories, Hong Kong; 21 Loanhead Avenue, ML1 5DB, United Kingdom; Flat 1, 4 Park Gardens, Glasgow, G37YE."

The Writ bore a stamp which stated "Not for service out of the jurisdiction". It was signed by Messrs Haldanes as the pursuer's solicitors.

[4] This court is not concerned with the substance of the matters raised in the Hong Kong Writ. It is sufficient to note by way of background that the pursuer was claiming repayment of loans alleged to have been made to the defender by oral agreement in Hong Kong in around February 2014.

[5] On 6 October 2016 the Hong Kong High Court pronounced a final judgment in favour of the pursuer in the following terms:

**"Final Judgment**

...

No notice of intention to defend having been given by the Defendant herein, IT IS THIS DAY ADJUDGED that the Defendant do pay the Plaintiff:

- (1) the sum of HK\$774,430 and US\$ 99,927 (or its Hong Kong Dollar equivalent at the time of payment);
- (2) interest on the sum of HK\$774,430 and US\$99,927 (or its Hong Kong Dollar equivalent at the time of payment) at the rate of 8% per annum from 27<sup>th</sup> January

2016 to the date hereof and thereafter at judgment rate until payment in full;  
and

(3) HK\$11,045.00 fixed costs.”

[6] The judgment is a decree in absence. The Hong Kong High Court proceeded on the basis that the Writ had been personally served on the defender in Hong Kong on 14 July 2016. The Hong Kong High Court accepted affidavits (the “Hong Kong Affidavits”) by the pursuer’s father, Mr Daniel Leon Zigal (“Mr Zigal Senior”) and Mr Ravinder Singh Beryar narrating that the Hong Kong Writ was personally served in Hong Kong on that day. The defender has not challenged in the Hong Kong High Court the validity of the service of the Writ nor the decree in absence following on from it. Instead, he seeks to challenge the validity of the service in this action of decree conform. He has the following pleas in law:

- “3. The judgment of the High Court of the Hong Kong Special Administrative Region being a judgment of a court without jurisdiction over the defender, the judgment should not be recognised and decree of *absolutor* should be granted.
4. *Esto* personal service was effective and sufficient to establish jurisdiction recognition should be refused on grounds of public policy.”

[7] The case called before me for a Proof Before Answer. The pursuer led one witness, Ravinder Singh Beryar. The defender gave evidence personally but led no other witnesses. A Joint Minute agreed certain other evidence.

[8] There were two main areas of factual dispute between the parties. The first was whether the Writ had been lawfully served personally upon the defender on 14 July 2016. The second of these related to whether and when the defender ceased to be resident in Hong Kong.

[9] In order to set out a legal framework to inform consideration of these factual disputes, I shall firstly set out the parties’ submissions.

## **Submissions and Onus**

### *Pursuer's submissions*

[10] Counsel for the pursuer submitted that this court could not enquire into the facts behind the Final Judgment of the Hong Kong High Court nor into the procedure which went on in Hong Kong: these would be a matter for the defender to raise in Hong Kong to have the decision set aside or challenged there. (*Anton's Private International Law* paras 9.52 and 9.60, *Crawford & Carruthers International Private Law: A Scots Perspective* para 9.13.) This court could not look into the events of 14 July 2016 and decide whether the Writ was validly served. In any event the events of that day conformed to Scottish practice and jurisprudence in the circumstances where a party is deliberately avoiding service (*Stair* 4.38.15; *Busby v Clark* (1904) 7 F 162). There was no evidence of an assault, and no evidence of anything which would be contrary to public policy.

### *Defender's submissions*

[11] Counsel for the defender submitted that the factual crux of the pursuer's case was that the defender was (a) present and resident in Hong Kong on 27 January 2016 when the proceedings commenced; (b) present and resident in Hong Kong on 14 July 2016; and (c) personally served on 14 July 2016. He submitted that the pursuer had not proved these matters. The onus of proof of foreign law was on the pursuer and the pursuer had not led evidence of the law of Hong Kong on effective service. In a case of decree conform where jurisdiction is based on personal service, proof of compliance with the foreign law is central to the question of the jurisdiction of the foreign court. As he had not proved what the basic requirements of service and the law of Hong Kong were, the pursuer was bound to fail. If the law of Hong Kong was to be deemed to be the same as Scots law, that would be of no

assistance as Scots law required personal citation (*Kerr v R & W Ferguson* 1931 SC 736 and *Dallas & Co v McArdle* 1949 SC 481 at 491), and personal service in Scotland required to be effected by a messenger at arms (Rules of the Court of Session Rule 16.1). In any event, the pursuer had failed to prove that the events of 14 July constituted service under Hong Kong law: Mr Beryar's evidence was not reliable and in certain respects not credible. The court should accept the defender's account of these events and find the defender credible and reliable. It appeared that an essential requirement of service in Hong Kong was that a copy of the document required to be left with the person to be served. In any event as a matter of public policy, the judgment should not be recognised. The Hong Kong Court had been misled as to the circumstances of service: Mr Beryar had not sworn or affirmed the statement and had no factual basis for identifying one of the men who was part of the service party, there were material non-disclosures in Mr Beryar's affirmation and the defender was assaulted in the course of service. The court should therefore refuse to recognise the judgment (*Clarke v Fennoscandia Limited (No 2)* 2011 SLT 1311 paragraphs 28 – 31.)

## **Discussion**

[12] The question which is before this court is the same question which was posed in *Gladstone v Lindsay* (1868) 6 SLR 71 at page 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.”

[13] The argument for the defender in the current case relied heavily on the onus of proof of Hong Kong law, residence and valid service being on the pursuer. That reliance was misplaced. It is clear from *Gladstone* that the onus is on the defender. In this case the pursuer holds a judgment of the Hong Kong High Court. The onus is on the defender to satisfy this court that that judgment should not be given effect to.

### **Events of 14 July 2016**

[14] The default decree of the Hong Kong High Court proceeded on the basis that the Writ of Summons had been personally served on 14 July 2016, all as set out in affidavits (the “Hong Kong Affidavits”) sworn by Mr Zigal Senior and Mr Beryar for the purposes of the Hong Kong litigation.

[15] The Hong Kong Affidavit of Mr Zigal Senior bore to have been affirmed by him at a Hong Kong solicitor’s office on 24 August 2016 before a Hong Kong solicitor. It was in the following terms:

#### “Personal Service of the Writ of Summons

3. At around 11.30 pm on 14 July 2016, I arrived at a bar called Tonic located at 43 Wyndham Street, Hong Kong (‘Tonic’) and met up with Mr Harry Dewhirst and Mr Ravinder Singh Beryar (‘Ravi’), for the purpose of personally serving the Defendant a sealed copy of the writ of summons in this action (‘the Writ’).
4. I personally know the Defendant and was able to identify him at Tonic. I approached the Defendant and talked to him outside the entrance of Tonic, while Ravi handed the Writ to the Defendant. I informed the Defendant that this is a court document and that he is now served.
5. The Defendant held the Writ and dropped it once he heard it is a court document. The Defendant then walked away, Ravi picked up the Writ and touched it on the Defendant again, but he refused to hold it and the Writ was dropped on the floor.
6. I again informed the Defendant that it was a court document and repeatedly told him that he was served. However, the Defendant ignored me and left.”

[16] Mr Beryar's Hong Kong Affidavit bore to be affirmed by him at a different solicitor's office in Hong Kong before a different solicitor on 25 August 2016. It was in the following terms:

"Personal Service of the Writ of Summons

3. I did on 14 July 2016 at a bar called Tonic located at 43 Wyndham Street, Central, Hong Kong ('Tonic') personally served the Defendant with a sealed copy of the writ of summons in this action.
4. The said copy writ duly sealed with the seal of the High Court of Hong Kong out of which it was issued and was accompanied by a prescribed form of Acknowledgement of Service and a form of Admission (liquidated amount) in Form No. 16 and a form of Direction for Acknowledgement of Service.
5. On 14 July 2016 at around 11.30 pm, I attended Tonic and met up with Mr Daniel Leon Zikal ('Mr Zikal Sr') and Mr Harry Dewhirst ('Mr Dewhirst'). I was instructed by the Plaintiff to serve the document with the Defendant.
6. Mr Zikal Sr, Mr Dewhirst and I saw the Defendant outside the entrance of Tonic. Copies of photographs of the Defendant taken at Tonic are now produced and shown to me marked exhibit 'RSB-1'.
7. Mr Zikal Sr approached the Defendant and I served the Defendant with a sealed copy of the Writ of Summons in this action enclosed in a sealed envelope ('the Writ'). Mr Zikal Sr informed the Defendant that this is a court document and that he is now served.
8. The Defendant held the Writ and dropped it once he heard it is a court document. The Defendant then walked away, I picked up the Writ and touched it on the Defendant again, but he refused to hold it and the Writ was dropped on the floor.
9. Mr Zikal Sr again informed the Defendant that it was a court document and repeatedly told him that he was served. However, the Defendant ignored Mr Zikal Sr and left."

[17] The Hong Kong Affidavits were accepted by the Hong Kong High Court as proof that personal service had been effected. The defender did not challenge the validity of the service in the Hong Kong High Court. He made no challenge in the Hong Kong High court that the facts as narrated in these affidavits, could not, if accepted as true, constitute valid

legal service. He made no challenge in the Hong Kong High Court that the facts set out in these affidavits were not true.

[18] Both the pursuer and the defender led evidence before me as to the events of 14 July.

[19] The pursuer led the evidence, both affidavit and oral, of Mr Beryar. Mr Beryar had been born in Hong Kong and educated in the USA. He had a master's degree in engineering. He currently works in Hong Kong as an entrepreneur managing businesses in the food and beverage industry. He had known the Zigals for around 12 years, not socially but in relation to business. On 14 July he was asked to assist Mr Zigal Senior in serving court documents on the defender. He had not met the defender before that night. He was to be accompanied by Mr Zigal Senior who would be making a video recording on a mobile phone and a Chinese gentleman who would also be making such a recording. He went with Mr Zigal Senior to the Tonic Bar in Wyndham Street, Hong Kong around 11.30 pm on 14 July. Mr Beryar approached the defender and said to him "Mr Buchanan how are you?" to make sure that this was the right person. The defender responded "Yes do we know each other?" Mr Beryar placed the envelope which he had been told contained the court documents in the defender's hand and said "you've been served". The defender looked around and saw Mr Zigal Senior holding his phone. He dropped the envelope of documents on the floor. Mr Buchanan was sober and said "I don't want this". Mr Zigal Senior shouted that these were official court documents and that Mr Buchanan needed to receive the papers. Mr Zigal Senior informed Mr Beryar that not everything had been recorded on video and asked him to touch the defender with the documents again, as touching a person with the documents was a form of service. The defender touched the defender with the Writ again on the upper body area. The defender made off down the street towards the Lan Kwai Fong Hotel. Video clips of parts of the incident were played in

court. Mr Beryar confirmed that these clips had been made during the incident, and explained what was happening during the video clips.

[20] The defender gave evidence by affidavit and orally. He was in Hong Kong in July 2016. On 14 July 2016 he met a friend Shaman Challaram for dinner and they then went to Lang Kwai Fong, an area of Hong Kong full of bars and restaurants, including the Tonic Bar. Later in the evening they left the Tonic Bar looking for somewhere else to go but then doubled back towards the Tonic Bar. Sometime around 11.00 pm Mr Challaram and the defender were approached by a group of men, five or six in total, dressed in black. Some of them were in front of him and some were behind. The men started to push, pull and grab him, first from behind. Then as Mr Challaram tried to help him the men also started to push, pull and grab Mr Challaram. There was a bit of a struggle and the defender was wrestled to the ground. He scuffed his elbow and scratched his left cheek on the pavement when he fell. He was able to get away from the men and he and Mr Challaram made their way to the Lang Kwai Fong Hotel, while being chased down the street by the men.

Mr Challaram and the defender entered the hotel and the men did not follow him in. The defender made a complaint of assault to the police and was given a crime report number. The defender was shaken up by the incident and changed his travel plans, travelling to Scotland on the day after the incident, rather than the following Sunday. He confirmed that Mr Zikal Senior was seen in the video clips, but maintained that he had not seen Mr Zikal Senior that evening. The pursuer accepted that he could be heard on the video clip saying "I don't want it". He accepted that a man could be heard on the video clip saying "you have been served" but maintained that on the evening he had not heard what was being said because there was loud music outside the bar. His position was that the video clip showed

an assault. He was doing his best to get away from six men assaulting him with no known reason. He did not take the envelope because he thought it contained drugs.

[21] I preferred the evidence of Mr Beryar to that of the defender.

[22] Mr Beryar gave his evidence in a calm and considered manner. His evidence was supported and corroborated by what could be seen on the video clips. Although not all of the parts of the incidents which were spoken to by Mr Beryar were filmed or clearly filmed, the video clips support the essential and central parts of his evidence that Mr Beryar touched the defender with the documents, that the defender said he did not want it, and that the defender was told that he had been served.

[23] I find the defender to be neither credible nor reliable. In giving his evidence he was argumentative and evasive. He refused to answer questions. He made out that he did not understand questions, even when they were straightforward and clear. The answers he gave were often not answers to the questions which he had been asked. I required to intervene on a number of occasions to direct him to answer the question. He gave contradictory answers. Had his evidence continued any longer in the vein in which he did, I would have given him a formal warning about prevarication which may have led to a finding of contempt.

[24] Moreover, the defender led no evidence which might have supported or corroborated his account: for example he did not lead Mr Challaram, who by the defender's account was present throughout the incident and was himself assaulted during the course of the incident. He did not produce any police report or other evidence supporting his claim that he had made a complaint of assault to the police.

[25] Further, the defender's evidence was inconsistent with the video clips. The video clips do not show him being assaulted by six strangers. They show Mr Beryar, accompanied

by Mr Zigal Senior, trying to give an envelope to the defender and touching him with it, while Mr Zigal clearly states that the defender has been served. There is a portion of the video clip where two men in black appear to be very briefly touching the defender while Mr Beryar is attempting service. However this is not an assault of the nature described by the defender. I also find it remarkable that if the defender was indeed attacked by six men outside the Tonic Bar, the bouncer (who can be seen in the video clip) did not intervene.

[26] The events of 14 July must be seen against the background of the business dispute between the defender and the pursuer and his father. The defender was well aware from the meeting at the Zigal's solicitors on 8 June 2015 referred to above that the Zigals were claiming money from the defender. On 14 July the defender must have been aware, from the words said and the presence of Mr Zigal Senior, that the Zigals were seeking to make personal service of a court writ on him. In all the circumstances I find that on 14 July the defender was seeking to evade service.

[27] The High Court of Hong Kong has accepted the personal service as valid. The defender has failed to discharge the onus on him to establish that the service was not valid. The defender has led no evidence which would enable this court to find that the personal service was not effective under Hong Kong law: the defender has led no evidence as to what is required by Hong Kong law in order to constitute a valid service. Even if the defender had led such evidence, error in law by the Hong Kong High Court as to Hong Kong law is not a defence which is available to the defender in an action of decree conform (Anton para 9.59; Crawford & Carruthers para 9-13(3)).

[28] Accordingly, I find that the defender's challenge to the jurisdiction of the Hong Kong court based on invalid service fails.

## Residence

[29] Scots law as to the recognition of foreign judgments in actions *in personam* was set out by Lord Cullen in *Wendel v Moran* 1993 SLT 44 as follows:

“I am not persuaded that there is any significant difference between the approach which would be followed in Scotland and the approach which has been taken in England. Leaving aside cases of express or implied submission to the jurisdiction of the foreign court, with which the present case is not concerned, these rules require that the defender was resident or at any rate present in the territory of the foreign court when the action was commenced. The principle which appears to underlie this ground of recognition is that by his residence or presence at the relevant time he has rendered himself subject to the orders of the foreign court so that in this sense the foreign court possessed an effective jurisdiction over him.” (p48A-B)

[30] The present case is not one of submission to the jurisdiction. Nor is it one, such as *Pick v Stewart, Galbraith & Co Limited* [1907] 15 SLT 447, of attempted citation of a limited company by accidental presence and citation of a company director.

[31] In this case there was a close connection with Hong Kong. The defender was working in Hong Kong under a work visa until it expired in May 2015. The pursuer and the defender were business associates in Hong Kong. The subject matter of the Hong Kong Writ was an oral contract alleged to have been made in Hong Kong. The defender was resident in Hong Kong at the time of the making of the alleged contract.

[32] The defender’s position was that he was not resident in Hong Kong at the time of commencement of the Hong Kong action. In his affidavit sworn for the purposes of this action for decree conform, his evidence was that he resided in Hong Kong with his residential address being 3/F, Block 16, Providence Peak, 8 Fo Chun Road, Tai Po from March 2014 to July 2015. His working visa expired on 31 May 2015. He suffered a stroke at the end of June 2015 and was in hospital for three to five days in Hong Kong and left Hong Kong between 5 and 10 or 12 July. From July 2015 to February 2016 he resided at Flat 0/1 4 Park Gardens, Glasgow G3 7YE. He got married in the UK in August 2015. His

wife was from Hong Kong and was not able to live in the UK. She did not come to live with him in the UK until she received a spouse's visa in late January 2017. His evidence was that he sold the Park Gardens property in January 2016, and then went on holiday to travel in Europe with his wife. When he returned he resided at his parents' property 21 Loanhead Avenue, Newarthill, Motherwell from March 2016 to December 2016.

[33] The defender's evidence in relation to residence strengthened my view that he was not a credible and reliable witness. He could not recall whether he had gone back to Hong Kong subsequent to January 2016. He could not recall how long he had been in Hong Kong before the incident at the Tonic Bar on 16 July 2016. In cross-examination he gave evidence that he had moved into the Tai Po address in May or June 2015 and had lived there for 14 months. When the pursuer's counsel put to him the obvious conclusion from his evidence that he was still there in 2016 he repeatedly refused to answer questions and had to be directed by me to do so and he eventually answered that he was not resident in Hong Kong in January 2016. He gave evidence that he had no legal rights to be or live in Hong Kong after expiry of his business visa on 31 May 2015. When counsel for the pursuer challenged that by suggesting that he could have obtained a long term visitor's visa for six months at a time and that it was possible to get such a visa, the defender emphatically stated that it was not. He contradicted himself later in his evidence when he was giving evidence about being at the Tonic Bar in Hong Kong on 14 July 2016 when in response to my question about the visa arrangements for that he said that as a British citizen he could live for six months in Hong Kong as a tourist.

[34] The defender led evidence which might support his contention that he was resident in the United Kingdom from July 2015. He produced a single letter forming the part of solicitor's missives for the sale by him of the Park Gardens property. The letter, dated

19 January 2016, specified the date of entry as 28 January 2016 but was not the final letter concluding the bargain. He produced a letter from Woolwich dated 5 January 2016 confirming that they had received a payment of £2,547.67 and applied it to his mortgage account for the Park Gardens property. He also produced a Scottish Power utility bill for the period 23 September 2015 to 23 December 2015 for the Park Gardens address which showed charges of £241.41 for that period and £172.61 for the previous period. His position was that the energy bill proved that someone was in the house using electricity and that it was him. I did not find the evidence led by him to be persuasive. I found the missive letter to be of little assistance as it goes only to his ownership, and not to where he was residing. Nor did I find the utility bill to be of any assistance: all it demonstrates is that energy was being used, and it does not assist on whether it was being used by the defender residing there, another person residing there or even just for the maintenance of an empty flat during the cold winter weather. The defender led no other evidence to corroborate or support his position. There was no evidence from his parents, who would have been able to express a view as to whether he did indeed live with them from March 2016, and may well also have been able to express the view as to whether prior to that he was living in the Glasgow flat. There was no evidence from his wife as to where he was living. The first independent evidence of him being resident in the UK is a lease of a residential property to the defender which did not commence until December 2016. He maintained that after suffering a stroke in Hong Kong in June 2015 he was advised by his doctors not to fly. He did not produce any travel tickets or other travel documentation showing his departure from Hong Kong, although when challenged in cross-examination he said that he had these. The Tai Po address was a property rented by him. He did not produce any documentation to show that after June 2015 he had ceased to occupy the Tai Po property, such as documentation terminating

the lease, or notifying the landlord that the property was now unoccupied. He did not produce a copy of the lease, maintaining that it was on his computer which he left in his office when his employment was terminated in June 2015. When asked if he had lawyers in Hong Kong who could have obtained a copy of the lease he first of all denied that he had lawyers in Hong Kong and then confirmed that he had several. He said the lawyers could not have obtained a copy of the lease as they did not know the address and telephone number of the landlord, only to then accept that he could have contacted the letting agency and eventually say that he could have obtained a copy of the lease but that it was not relevant.

[35] The onus is on the defender to satisfy the court that the defender was not resident and present in Hong Kong at the commencement of the action. He has failed to discharge that onus. I am satisfied on the evidence before me that the defender was resident in Hong Kong until the end of June 2015. I am not satisfied on the evidence that the defender ceased to be resident in Hong Kong at the end of June 2015. I am also satisfied on the evidence before me that he was present in Hong Kong on 14 July 2016. I am not satisfied on the evidence that the defender ceased to be resident in Hong Kong between June 2015 and 14 July 2016. I find that the defender was resident in Hong Kong until at least 14 July 2016 and was therefore resident and present in Hong Kong at the commencement of the action.

[36] Accordingly, I find that the defender's challenge to the jurisdiction of the Hong Kong Court based on lack of residency and presence fails also.

**Public Policy**

[37] Counsel for the defender submitted that the facts and circumstances of service were such that the judgment should not be recognised on grounds of public policy, founding in particular on the defender having been assaulted in the course of service.

[38] I have rejected the defender's evidence that he was assaulted by six men. I have found that the defender was trying to evade service. In my opinion no issue of public policy arises out of the facts and circumstances of the service on 14 July 2016.

[39] Accordingly, the defender's challenge based on public policy fails also.

**Conclusion**

[40] I uphold the pursuer's second plea-in-law and repel the defender's pleas-in-law numbers 3, 4 and 5 and grant decree conform. I reserve all questions of expenses in the meantime.