

No. 15 of 1980

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

HOE JOO SAWMILLS
(sued as a firm)Appellant
(Defendant)

- and -

10 SIGMA (AIR CONDITIONING)
SDN BHDRespondent
(Plaintiff)

CASE FOR THE RESPONDENT

RECORD

1. This Appeal from the Federal Court of Malaysia raises the question of service of notice of appeal under the Federal Court (Civil Appeals) (Transitional) Rules 1963 and the practice of the Federal Court in deciding whether or not to grant special leave to bring an appeal out of time.

20 2. The case comes before Your Lordships' Board in the following circumstances. By a Writ of Summons endorsed with a Statement of Claim dated 17th January 1978 the Respondent ("Sigma") brought an action in the High Court in Malaya at Kuala Lumpur against the Appellant Defendant ("Hoe Joo Sawmills") claiming a declaration, an injunction and certain other relief in connection with Hoe Joo Sawmills' possession of certain property in Kuala Lumpur which

30 Sigma alleged was unlawful. Hoe Joo Sawmills' Statement of Defence and Counterclaim was served on 15th February 1978 and Sigma's Reply and Defence to Counterclaim on 22nd February 1978. The merits of the various contentions raised in the Pleadings are not relevant to this

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p.9	Appeal. On 16th March 1978 Sigma took out a Summons applying for the Statement of Defence and Counterclaim to be struck out and for leave to sign judgment against Hoe Joo Sawmills. At the hearing of that Summons on 13 April 1978 (at which Affidavit evidence not included in the Record was considered) Harun J granted Sigma's application, ordered that the Statement of Defence and Counterclaim be struck out and further ordered that Sigma be at liberty to sign final judgment for the relief claimed in the Statement of Claim. Harun J gave Hoe Joo Sawmills leave to appeal to the Federal Court of Malaysia.	
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p.11, 11.16-18		
	3. By Rule 13 of the Federal Court (Civil Appeal) (Transitional) Rules 1963 the time limit for the bringing of an appeal is one month from the date of the judgment or order appealed against. This appeal to Your Lordships' Board arises because although Hoe Joo Sawmills filed Notice of Appeal on 27th April 1978 in the Registry of the Federal Court, it did not serve the Notice of Appeal on Sigma within the relevant period. In the circumstances described below the Federal Court has held that since service of the Notice of Appeal had not been effected within that period, the Appeal had not properly been brought and there were no grounds upon which the Court should grant Hoe Joo Sawmills special leave to appeal out of time. Hoe Joo Sawmills appeal to Your Lordships' Board from that decision of the Federal Court, final leave to appeal having been granted by the Federal Court on 19th September 1979	20
p.13		30
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p.36		
	4. The main provisions of the Federal Court (Civil Appeals) (Transitional) Rules 1963 relevant to the present appeal are as follows:	

"6(1) Appeals to the Court shall be by way of re-hearing and shall be brought by giving notice of appeal ...

7. Notice of Appeal shall be served on all parties directly affected by the appeal or their solicitors respectively at the time of filing the notice of appeal ...

10 13. No appeal shall, except by special leave of the full Court, be brought after the expiration of one month -

...

(c) ... from the date on which the judgement or order appealed against was pronounced."

5. The matter came before the Federal Court by Hoe Joo Sawmills' application by Notice of Motion seeking an order that:

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- 20 (a) the service of the Notice of Appeal on Sigma on 5th May 1978 be deemed valid and effectual service on Sigma; or
- (b) the time for service of the Notice of Appeal on Sigma be extended; or
- (c) for special leave.

The application for "special leave" was added to the Notice of Motion by amendment.

30 6. Hoe Joo Sawmills supported their application by two Affidavits of G. Ambiavagor and Sally Lim. Sigma adduced evidence in the form of an Affidavit by Andrew Ho Hock Lye. In short, the case for Hoe Joo Sawmills was that the Notice of Appeal, having been filed on 27th April 1978, was on 5th May 1978 (well within the time allowed) sent by ordinary post to Sigma's Solicitors. It was not contended by Hoe Joo Sawmills that the Notice of Appeal was ever received by Sigma's Solicitors and the evidence of the latter (in Mr. Andrew Ho's Affidavit) was that it was never received. The reason given for the Notice of Appeal being sent by ordinary and not registered post was that it was due

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p.15,
11.16-end
p.21,
11.5-end
p.25,
11.6-end
p.18,
11.31-end

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to an error at the office of Hoe Joo Sawmills' solicitor. It was further said that Sigma had suffered no prejudice by reason of the non-receipt of the Notice of Appeal since their solicitors knew that such notice had been filed.

7. In the absence of any provision in any Rules to the contrary, a Notice of Appeal is not served on a party until it is received by that party. Rule 32 of the Federal Court (Civil Appeals) (Transitional) Rules 1963 contain certain provisions with regard to service by registered post but these do not apply to purported service by ordinary post. Hoe Joo Sawmills were therefore unable to assert that their Notice of Appeal had been served in time. It followed from this and from the combined effect of Rules 6, 7 and 13 that they had not brought their appeal in time within the meaning of the Rules (see Tong Lee Hwa and Anor v. Malayan Banking Bhd [1978] 1 M.L.J. 257). The relief sought by the Hoe Joo Sawmills in their Notice of Motion implicitly accepted that as correct: however they sought to circumvent this problem in the following manner:

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11.1-4

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p.33,
11.19-35

(a) First, Hoe Joo Sawmills sought an order effectively deeming the posting of the Notice of Appeal on 5th May 1978 to be valid and effectual service of that Notice. The Federal Court cast doubt on the credibility of the story put forward by Hoe Joo Sawmills: but went further and held that since Rule 32 (supra) had no application to service by ordinary post the Court had no power to "deem" the posting of the Notice of Appeal to be valid and effectual service in the absence of proof of receipt.

Sigma respectfully submit that this reasoning is correct. Unless the Notice of Appeal is served by registered post in accordance with Rule 32, it must be shown to have been received by Sigma. If, as here, it was not received by a certain time it was not served within that time: no question of deeming it to have been served in time can arise.

- 10 (b) In the alternative Hoe Joo Sawmills applied for leave, alternatively special leave, to bring the appeal out of time. The Federal Court held, following an earlier decision (Hendry v. De Cruz [1949] M.L.J. Supp 25), that the excuse given for failing to serve the Notice of Appeal in time did not justify the granting of special leave and therefore refused the relief sought. Sigma
20 respectfully submit that this decision was a correct exercise by the Federal Court of its discretion.

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11.36-47

8. Your Lordships have stated before that on questions of procedure the Board is slow to interfere with the discretion exercised by a local court: Thambo Ratnam v. Thamboo Cumarasamy and Cumarasamy Ariamany D/O Kumasara [1965] 1 W.L.R. 8. Sigma
30 respectfully submit that in any event Your Lordships should only interfere with the Federal Court's exercise of discretion if satisfied that the Federal Court exercised that discretion on a wrong principle or that there has been some miscarriage of justice on the application leading to a wrong exercise of discretion. Sigma further respectfully submit that neither of these grounds exists in the present case.

- 40 9. It is therefore submitted on behalf of Sigma that Your Lordships' Board should report its opinion to His Majesty the Yang Di Pertuan Agong that Hoe Joo Sawmills' Appeal should be dismissed with costs for the following among other

R E A S O N S

- (1) BECAUSE the Notice of Appeal was not served upon Sigma within the time

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allowed and that therefore the appeal was not brought within that time; and

- (2) BECAUSE Hoe Joo Sawmills advanced no adequate reasons why they should be granted leave to serve the Notice of Appeal out of time or special leave to bring the Appeal out of time; and the Federal Court in refusing to grant such leave did not exercise its discretion on any wrong principle.

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MARK SAVILLE

ANGUS GLENNIE

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Appellant
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- and -

SIGMA (AIR CONDITIONING)
SDN BHD

Respondent
(Plaintiff)

CASE FOR THE RESPONDENT

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