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THE EFFECT OF NON-COMPLIANCE WITH THE RULES OF PROCEDURE: A SURVEY OF RECENT CASES

This article is concerned with recent cases in which the Courts have made pronouncements on the scope and effect of Order 2 of the Rules of the Supreme Court. Order 2 governs the orders and directions which a court may give when there has been a failure to comply with the requirements of the rules of court.

THE observance of the rules of procedure is fundamental to the course of litigation for they provide the necessary framework for the achievement of justice between the parties. At the same time courts are aware that too rigid an adherence to the rules in certain circumstances may inappropriately and unjustly deprive a party of his rights. More than a century ago, in *Cropper* v *Smith,*[1] Bowen LJ thought it "a well established principle that the object of the courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights."[2] His Lordship added: "I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party."[3] Order 2, rule 1 of the Rules of the Supreme Court (RSC) specifically concerns the discretion exercisable by the court when it is faced with non-compliance. The three paragraphs of this rule provide as follows:

> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

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1 (1884) 26 Ch D 700.
2 *Ibid,* at 710.
3 *Ibid.*

> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
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> (3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

Non-compliance with a rule of procedure (by action or omission) at whatever stage of the proceedings[4] "whether in respect of time, place, manner, form or content or in any other respect" is treated as an irregularity. It does not "nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein."[5] Nevertheless the court is empowered to set aside "wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein" or to allow an amendment or "to make such order...generally as it thinks fit."[6] The court may also make an ancillary order as to costs or other terms as may be just. These rules were enacted in England as a result of the decision in *Re Pritchard deed.*[7] In this case proceedings under the Inheritance (Family Provisions) Act[8] had been commenced by originating summons in the district registry instead of the Central Office. A majority of the Court of Appeal held that the error constituted a fundamental defect which rendered the proceedings a nullity *ab initio.* The decision was based on the existing approach of the courts that where a procedural irregularity or defect was of a particular type the proceedings would, necessarily and automatically, without further examination by the court, be regarded as void *ab initio.*[9] In these instances the court had no discretion to examine the circumstances to determine whether the result of the automatic invalidity was justified by considerations of justice

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4 Whether "in beginning or purporting to begin any proceedings" or at any subsequent stage of the proceedings: see Ord 2, r 1(1).

5 Ord 2, r 1(1).

6 Ord 2, r 1(2). An exception applies in the event of the use of the wrong originating process: see Ord 2, r 1(3).

7 [1963] Ch 502.

8 Cap 138, 1985 Rev Ed.

9 See the comments of Sir John Megaw in *The Golden Mariner* [1990] 2 LLR 215, at 224.

which might apply to the case. In a forceful dissenting judgment Lord Denning MR regretted that the "proud boast" of Bowen LJ – "it is not possible in the year 1887 for an honest litigant ... to be defeated by any mere technicality, any slip, any mistaken step" – could no longer be made.[10] The rule was changed in the following year. In *Harkness* v *Bell's Asbestos and Engineering Ltd,*[11] a case decided shortly after this reform, Lord Denning noted that the boast could once again be made as a result of the new rule. His Lordship said of it:

> This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.[12]

The position is that no irregularity or defect, whatever its nature, automatically renders the proceeding a nullity. The court is entitled to consider each case according to the circumstances and make whatever decision it deems just. The approach of the court to the exercise of discretion was stated as follows by Cumming-Bruce LJ in *Metroinvest Ansalt* v *Commercial Union*:[13]

> I would say that in most cases the way in which the court exercises its powers under Order 2, rule 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe Order 2, rule 1(2) as being so framed as to give the court the widest possible power in order to do justice....[14]

This test was specifically adopted by McCowan LJ in *The Golden Mariner*[15] and echoed by Lloyd LJ in the same case when the learned judge said that the rule "should be given wide, though not unlimited effect." The case involved claims under various contracts of insurance and the main issue before the Court of Appeal was the effect of irregular service on certain American companies outside the jurisdiction. One of these defendants, the tenth defendant, had been served with a form of acknowledgment of

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[10] [1963] 1 Ch 502, at 518.
[11] [1967] 2 QB 729.
[12] *Ibid,* at 736.
[13] [1985] 1 WLR 513.
[14] *Ibid,* at 521.
[15] 1990] 2 LLR 215, at 223.

service without the actual writ.[16] Both McCowan and Megaw L JJ held that the defendant had not suffered prejudice. Their Lordships found that although the service of the form of acknowledgment of service alone could not possibly constitute valid service without the writ, the defendant was aware of the issue of the writ and of the plaintiffs' intention to serve the two documents. Accordingly, their Lordships exercised their discretion against setting aside the service.

The decision of the majority of the Court of Appeal appears to have been based solely on lack of prejudice. This was not the approach of Lloyd LJ who dissented. His Lordship stated that although prejudice was "always a factor to be taken into account absence of prejudice is by no means conclusive in favour of the plaintiffs."[17] In his Lordship's view, there had been no service on the defendant. His Lordship concluded: "the failure to serve the 10th defendant with anything at all, except an acknowledgment of service is an omission which is so serious that in my judgment it cannot be cured under Order 2, rule 1."[18] Support for this approach can be found elsewhere. In *Leal* v *Dunlop Bio-Processes,*[19] Stephenson LJ indicated that the seriousness of the irregularity could be a basis for not exercising the discretion to cure it, whether real prejudice was caused or not.[20] His Lordship said: "the court's restraining hand is an important restriction on the misuse of ... procedure."[21] In *Metroinvest Ansalt* v *Commercial Union*[22] Cumming Bruce LJ stated that although prejudice often justifies the exercise of discretion to cure, this is not always the case.[23] In Singapore, the Court of Appeal made a clear pronouncement to this effect in *Kuah Kok Kim* v *Chong Lee Leong Seng Co (Pte) Ltd*:[24] "Notwithstanding the very wide powers given to the court to remedy non-compliance with the rules ... there may be failure or non-compliance with the rules which is so fundamental or serious that the court ought not to exercise its discretion under rule 1 to remedy it."[25] These statements of principle can be justified on the basis that certain breaches of the rules may go to the very root of the legal

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[16] The normal practice under the English rule is to serve the writ together with the acknowledgment of service which is to be returned by the defendant.

[17] [1990] 2 LLR 215, at 219.

[18] *Ibid,* at 218. The Court of Appeal was also concerned with irregularity of service in respect of the remaining defendants. Although the defendants were correctly named on the writs, they were served with copies intended for different defendants. Lloyd LJ again disagreed with the majority view that the discretion should be exercised in favour of the plaintiffs.

[19] [1984] 1 WLR 874.

[20] *Ibid,* at 882.

[21] *Ibid.*

[22] [1985] 1 WLR 513.

[23] *Ibid,* at 521.

[24] [1991] 2 MLJ 129.

[25] *Ibid,* at 134. Also see *Bernstein* v *Jackson* [1982] 1 WLR 1082, at 1089.

process. In these instances the court is generally unwilling to exercise its discretion in favour of validation. In *Bernstein* v *Jackson*[26] the Court of Appeal held that the failure to renew a writ within the time specified in the rules was "such a fundamental defect in the proceedings" that it was not a proper case for the exercise of discretion under the Order 2, rule 1.[27] In *Leal* v *Dunlop Bio-Processes*[28] the plaintiff had issued and served a writ out of the jurisdiction without obtaining the leave of the court. The defendant applied to have the service set aside and the action dismissed. By this time, the limitation period had expired and the plaintiff applied for the renewal of the writ and for leave to serve it outside the jurisdiction. The Court of Appeal held that in the circumstances the writ could not be renewed under Order 6,[29] and the purported service could not be made good under Order 2, rule 1. According to Stephenson LJ the "irregularity was not fit to be cured under Order 2, rule 1."[30] Irregularity in service out of the jurisdiction was also the basis of the Singapore High Court's refusal to exercise its discretion in *Ong & Co Pte Ltd* v *Carl Y L Chow*.[31] Chan Sek Keong J said that, by failing to comply with the pertinent provisions,[32] "the plaintiff had in fact disregarded the legal basis upon which judicial power in Singapore may be exercised in Malaysia .... That must render the purported service a nullity."[33] The legal basis for bringing a suit was very much in issue in *Dubai Bank Ltd* v *Galadari (No 4)*.[34] Morrit J held that the legal capacity of the plaintiff to pursue an action was a basic legal principle on which the rules were grafted. Therefore, the lack of legal capacity was not a matter which could be remedied by an order under Order 2, rule 1.[35] The legality of the contents of an affidavit was the concern of the Singapore High Court in *Dynacast (S) Pte Ltd* v *Lim Meng Siang & Ors*.[36] In this case Chao Hick Tin J held that the failure to comply with Order 41, rule 5(2) of the RSC (which requires the deponent to state the sources and grounds of his information and belief), rendered the offending paragraphs of the affidavit valueless. His honour expressed the view that an error of this kind (which had the effect that "there was no evidence before the court warranting the grant of the interim order") was a "defect

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[26] [1982] 1 WLR 1082.
[27] *Ibid,* at 1089.
[28] [1984] 1 WLR 874.
[29] This aspect of the case is considered *infra.*
[30] [1984] 1 WLR 874, at 882.
[31] [1987] 2 MLJ 430.
[32] Ord 11, rr 5(8), 6(2) RSC.
[33] *Ibid*, at 432.
[34] *The Times*, 23 February 1990.
[35] The matter of the plaintiff's legal capacity was ordered to be tried as a preliminary issue.
[36] [1989] 3 MLJ 457.

of a fundamental nature" which could not be cured.[37] The court is also unlikely to exercise its discretion in favour of a party where his conduct amounts to an abuse of the rules. In *Camera Care Ltd* v *Victor Hasselblad Aktiebolag,*[38] the court granted leave to the plaintiff to serve a concurrent writ despite the non-existence of an original writ. The affidavit in support of the application had included an erroneous statement that a writ had already been issued. After obtaining the order, the plaintiff issued an original writ endorsed with a statement that it had been issued pursuant to the court order. Again, this was untrue as the order concerned the issue of a concurrent writ. The court refused to exercise its discretion to cure the irregularities under Order 2, rule 1. Sir Roger Ormrod said: "I do not think it would be a proper exercise of the discretion for the court to put right the egregious mistakes of the plaintiff's solicitors...."[39] Clearly, the nature of the defaults was such that to have allowed his application would have involved a mockery of the rules.[40]

The seriousness of the irregularity may, in certain instances, be overidden by other considerations of justice so that the discretion to cure is exercised. In *Harkness* v *Bell's Asbestos and Engineering Ltd*,[41] the plaintiff, who was suffering from the disease of asbestosis, alleged that this had been caused by the defendants' failure to provide him with protective clothing while he was employed by them. As his claim was barred by the applicable limitation statutes, his solicitors applied for leave to issue the writ out of time. The district registrar ordered that the sections "shall not afford a defence to the action". There were two errors here. In the first place, the jurisdiction to grant leave to proceed was vested in a judge in chambers and therefore the district registrar had no jurisdiction to grant leave. Secondly, the form of the order was incorrect as even a judge in chambers could not declare that the sections would not afford a defence (all he could do was to grant leave to proceed). The Court of Appeal considered the nature of the errors. On the jurisdiction point, there had been a very recent change of law which had yet to be properly publicised, and therefore the plaintiff's solicitor and the registrar were unaware of it. Lord Denning MR said that their "ignorance was very pardonable."[42] As to the second error, this was a "slip", a "mere misreading" of the Act, and therefore "quite pardonable."[43] The Court of Appeal regarded both errors as curable and

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[37] *Ibid,* at 460.
[38] [1986] 1 FLTR 348.
[39] *Ibid,* at 354.
[40] Note that the decision was also based on the fact that a foreign jurisdiction was involved. See *infra* for comments on this aspect of the case.
[41] [1967] 2 QB 729.
[42] *Ibid,* at 735.
[43] *Ibid,* at 734.

directed that proper leave be deemed to have been granted to issue the writ. Although the errors were fundamental in that they concerned the very jurisdiction of the court, the circumstances were such that it would have been unjust to deprive the plaintiff of his right of action. The Court of Appeal also pointed out that although no legal process had been commenced at the time the errors occurred, Order 2, rule 1 operated to remedy the errors because the application to the district registrar constituted a proceeding for the purpose of the rule.

In *Harkness,* the question of whether the defendants suffered prejudice as a result of being deprived of the limitation defence was not considered. Yet, the issue of prejudice has been the key issue in many of the subsequent cases. In "*The Golden Mariner",*[44] the absence of prejudice to the defendants resulted in a majority of the Court of Appeal exercising their discretion under Order 2 in favour of the plaintiffs. In *Metroinvest Ansalt* v *Commercial Union*,[45] prejudice was the basis on which the court refused to validate an irregularity in procedure. The case involved a claim against the defendant insurers in respect of a fire which occurred on the plaintiff's premises. The defendants had made a payment into court in satisfaction of the plaintiff's claim. The plaintiff's solicitors gave notice of acceptance of the money paid in but the notice did not comply with the prescribed form. At about this time, the defendants found out from certain documents (not available previously) that the value of the insured property at the time of the fire could be significantly less than the sum paid into court. Both parties applied for an order allowing them to take the money out of court. The Court of Appeal held that in view of the newly discovered information concerning the value of the property it would be unjust to order payment out to the plaintiffs, and just to order payment out to the defendants.[46] Cummings-Bruce LJ construed Order 2, rule 1 in the following manner: "from the moment a step in the proceedings is tainted by irregularity through failure to comply with the rules, the irregular step or document remains irregular *inter partes* until the matter has been brought before the court and the court has decided in which way to exercise the jurisdiction conferred by Order 2, rule 1(2)."[47] Accordingly, in the absence of such rectification, the plaintiffs could not rely on the irregular notice of acceptance for the purpose of payment out. In *Bondy* v *Lloyd's Bank*,[48] the Court of Appeal considered the prejudice which might be suffered by the defaulting party if his error was only technical in nature. In that case the plaintiff

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[44] *Supra.*
[45] [1985] 1 WLR 513.
[46] *Ibid,* at 522.
[47] *Ibid,* at 520.
[48] *The Times,* 13 March 1991.

had not appended an acknowledgment of service to the writ for the purpose of service. Woolf LJ noted that as the service had been effected on experienced solicitors there would be no prejudice.[49] As for the plaintiff, the limitation period had expired and therefore it would have been unjust to penalise him for the minor error by setting aside the proceedings. In *Singh* v *Atombrook Ltd (trading as Sterling Travel),*[50] the plaintiff had obtained judgment in default of appearance. The judgment was irregular because the defendants had been misdescribed in the writ. The name in the writ was the defendant's trading name (Sterling Travel), whereas the actual company was Atombrook Ltd. Kerr LJ refused to set aside the proceedings under Order 2.[51] There had been no prejudice in this case as the defendant, who had received the writ, knew that the proceedings were against them. Kerr LJ pointed out that if the named defendant had been non-existent, as opposed to being misdescribed, his decision would have been different. It would seem that where no prejudice is suffered the court may be willing to validate relatively serious breaches of procedure. In *Carmel Exporters* v *Sea-Land Inc*,[52] the defendants applied to set aside the writ on the ground that the court had no jurisdiction. The defendants failed to state the grounds of the application and to file the affidavit in support of the application. Goff J held that despite the nature of these errors no prejudice would be caused by allowing the defendants to proceed with their application.[53] Similarly, in *Maritime (Pte) Ltd* v *ETPM* SA[54] Thean J confirmed the decision of the assistant registrar to cure the irregularity in service of the writ (leave had not been obtained pursuant to Order 10, rule 2), because the validity of the writ had not expired, and therefore the order would not deprive the defendants of the defence of limitation.[55]

The court is more reluctant to interfere under Order 2, rule 1 where separate rules, and the cases which have interpreted them, set out the principles governing non-compliance and rectification of the irregularity. In this respect, the renewal of the writ after the expiry of the limitation period has been a recurrent issue in relation to Order 2, rule 1. Under Order 6, rule 4 the court's power is limited to extending the validity of the writ

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[49] *Ie,* the solicitors would have been aware of the need to file and serve an acknowledgment of service even though no such document had been appended to the writ.

[50] [1989] 1 WLR 810.

[51] Although the judgment was set aside under Ord 13 (on the fulfilment of certain conditions) so that the defendants could defend the claim.

[52] [1981] 1 WLR 1068.

[53] The defendants were given leave to amend the summons so that the grounds of the application could be included.

[54] [1988] 2 MLJ 289.

[55] *Ibid,* at 292. *Leal* v *Dunlop Bio-Processes* [1984] 1 WLR 874 *(supra)* was distinguished on this basis.

for a maximum of twelve months at any one time. This means that renewal must be made within twelve months of the expiry of the writ. In *The Official Receiver, Liquidator of Jason Textile Industries Pte Ltd* v *QBE Insurance (International) Ltd*,[56] an application was made in 1985 to extend the validity of the writ for five successive twelve-month periods from December 1981 to December 1986. The plaintiffs were granted the order and served the writ. Both the High Court and the Court of Appeal affirmed the decision of the registrar to set aside the writ. The Court of Appeal considered whether the non-compliance with Order 6, rule 4[57] (the extension of the validity of the writ for five successive twelve-month periods) could be cured under Order 2, rule 1. The Court held that in principle, Order 2, rule 1 was wide enough to cover the irregularity but in the circumstances, it would not exercise its discretion to cure it.[58] The discretion could only be exercised if the registrar could have properly granted an order for renewal. This he could not have done because more than twelve months had elapsed since the validity of the writ last expired (1981), and because the plaintiffs failed to show any "good reason" why the validity of the writ ought to be extended.[59] As Wee CJ put it, "the power in Order 2, rule 1 to cure irregularities is subject to the same principles which govern an ordinary application made under the relevant rule."[60] In the words of Slade LJ in *Leal* v *Dunlop Bio-Processes*[61] a party who "cannot properly enter through the front door of Order 6, rule 8, ... should not be allowed to enter through the back door of Order 2, rule 1."[62]

The courts have also shown a restrained approach in relation to proceedings against defendants outside the jurisdiction. In *Camera Care Ltd* v *Victor Hasselblad Aktiebolag,*[63] Sir Roger Ormrod stated: "service of process out of the jurisdiction is an unusual assertion by this court of an extra-territorial jurisdiction which could have international repercussions, and so is carefully controlled by the rules of court.... It is consequently very important to ensure compliance with the rules."[64] His Lordship added that irregularities should only be cured in "exceptional cases."[65] In *Leal* v *Dunlop Bio-Processes,* the Court of Appeal refused to cure the failure

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[56] [1989] 1 MLJ 1.
[57] At the time of the case, r 7.
[58] On this point the Court of Appeal accepted the views of Stephenson and Slade L JJ in *Leal* v *Dunlop Bio-Processes* [1984] 1 WLR 874, rather than that of Dunn LJ in *Bernstein* v *Jackson* [1982] 1 WLR 1082.
[59] *Ibid,* at 3-4.
[60] *Ibid,* at 3.
[61] [1984] 1 WLR 874.
[62] *Ibid,* at 885.
[63] [1986] 1 FLTR 348.
[64] *Ibid,* at 354. The facts of this case are set out *supra.*
[65] *Ibid,* at 354.

of the plaintiff to obtain the leave of the court prior to the issue and service of the writ out of the jurisdiction.[66] Slade LJ admonished: "Breaches of ... Order 11, rule 1 relating to the leave of the court are not in my opinion likely to be breaches which can be lightly disregarded."[67] His Lordship agreed with May LJ that "only in an exceptional case should the court ... validate, after the event, the purported service in a foreign country without leave of process issued by an English court."[68] These statements were fully endorsed by Lloyd LJ in *The Golden Mariner.*[69] Chan Sek Keong J expressed the same principle in *Ong & Co Pte Ltd* v *Carl Y L Chow*[70] when his honour held that as the service of a writ in Malaysia did not comply with certain requirements laid down by Order 11, the Singapore Court had no legal basis on which to exercise its jurisdiction over the foreign defendant.[71]

It is apt to conclude with the principles recently laid down by the Singapore Court of Appeal in *Kuah Kok Kim* v *Chong Lee Leong Seng Co (Pte) Ltd.*[72] The appellants were minority shareholders of a company (Chong Lee Leong Seng Co (Pte) Ltd). They commenced proceedings under section 216 of the Companies Act by way of petition pursuant to the Company (Winding Up) Rules, 1969. The question arose as to whether the proceedings were properly brought under those rules, or whether the appellants ought to have brought the proceedings by way of originating petition pursuant to Order 88 of the RSC. The Court of Appeal held that the Company (Winding Up) Rules had no application to an application made under section 216, and the appellants should have proceeded according to Order 88, rule 5(h). As this rule also provides for proceedings to be brought by petition, the Court of Appeal held that the basic procedure followed by the appellants was correct. Thean J, who delivered the judgment, said: "The only defect is that it bears the heading or title of a companies winding-up petition and was filed as such in the registry. The heading or title should have been that of an originating petition and should have been filed as such."[73] Accordingly, the Court of Appeal ruled that the irregularity was not "such a fundamental or serious one that it ought not to be remedied under Order 2, rule I."[74] In exercising its discretion to allow the amendment

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[66] The facts of this case are set out *supra.*
[67] *Ibid,* at 885.
[68] *Ibid.*
[69] The case is referred to *supra.*
[70] [1987] 2 MLJ 430.
[71] *Ibid,* at 432.
[72] [1991] 2 MLJ 129.
[73] *Ibid,* at 134.
[74] *Ibid.* Note, however, the different view of Chan Sek Keong J in the High Court: see [1989] 3 MLJ 343.

of the petition, the Court of Appeal noted that any injustice (in the form of embarrassment), which might have been caused by the advertisement of winding-up proceedings against the company, "would not be alleviated any more by the drastic remedy of striking out the petition than by the simple remedy of amending it."[75] The Court also made the significant point that although the Company (Winding Up) Rules and the RSC are mutually exclusive in their operational effect, an irregularity in proceedings brought pursuant to the Company (Winding Up) Rules (as in this case), could be cured under Order 2, rule 1,[76] The same approach was adopted by the English Court of Appeal in *Boocock* v *Hilton International Co.*[77] Section 695 of the Companies Act required that the writ be served on an overseas company in a particular manner. The Court concluded that service was governed exclusively by the provision. Nevertheless, the court held that although the writ was not served in the prescribed manner, the irregularity could be cured pursuant to Order 2, rule 1. The Singapore Court of Appeal endorsed its position in *Kuah Kok Kim* v *Chong Lee Leong Seng Co (Pie) Ltd* in *Tan Han Yong* v *Kwangtung Provincial Bank.*[78] In this case the court allowed the originating summons, which had been brought pursuant to section 4 of the Conveyancing and Law of Property Act, to be converted into an ordinary originating summons (by deleting the reference to the statutory provision), so that a claim for damages could be proceeded with.

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[75] *Ibid.*

[76] *Ibid.* Again, note the contrary opinion of Chan Sek Keong J in the High Court: see [1989] 3 MLJ 343.

[77] *The Times,* 26 January 1993.

[78] [1993] 1 SLR 971.

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