

WHEN IS SERVICE GOOD SERVICE? COMMON DIFFICULTIES IN EFFECTING PROPER SERVICE OF ORIGINATING PROCESS WITHIN THE JURISDICTION

■
Christine N. Booth*

The next critical step in the judicial process after issue of originating process is service of that process. In order to be valid, service must be carried out in accordance with the rules or in exceptional cases in accordance with an express agreement between the parties (“consensual service”). If service is not properly effected, the impact on the plaintiff may be significant. Any default judgment he has obtained will usually be classified as an “irregular” judgment and the defendant will be entitled to have the judgment set aside by the court, without an inquiry into the merits of the defendant’s defence. The costs of the application to set aside will be borne by the plaintiff. The issue of whether or not service has been properly effected is topical in Hong Kong, as reflected by the recent spate of cases on this subject. This article (a) examines the procedural rules regulating service of originating process upon an individual within the jurisdiction, and (b) identifies some of the more common difficulties that have arisen in effecting proper service in light of the relevant case law. The article also considers whether the Hong Kong courts have adopted a consistent approach in applying the procedural rules.

Introduction

Enshrined in the common law is the fundamental principle that any person against whom proceedings have been launched must be given fair notice of those proceedings to enable him to answer and defend them.¹ It is this principle that underpins the rules governing service of originating process² within the jurisdiction.

The rules regulating service of originating process³ upon an individual are the same in both the Court of First Instance and the District Court. The

* Assistant Professor, Department of Professional Legal Education, University of Hong Kong.

¹ *Craig v Kanssen* [1943] 1 All ER 108, p 113; *R v London County Quarter Sessions Appeals Committee, ex p. Rossi* [1956] 1 All ER 670, p 674.

² Originating process is the means by which civil proceedings are commenced in the Court of First Instance or the District Court. In the Court of First Instance, civil proceedings may be begun by (i) writ, (ii) originating summons, (iii) originating motion or (iv) petition: RHC Ord 5, r 1. Note that in the District Court, civil proceedings may only be begun by writ or originating summons: RDC Ord 5, r 1.

³ Note 2 above.

general principle is embodied in Order 10, rule 1(1),⁴ which states that a writ⁵ must be served personally on each defendant by the plaintiff or his or her agent. However, as an alternative to personal service, Order 10, rule 1(2)⁶ permits a plaintiff to serve the writ or other originating process⁷ by two other methods. These are by sending a copy of the process by registered post to the defendant's usual or last known address, or by inserting the same through a letter box at that address.

Once service has been effected, the defendant has 14 days⁸ in which to file an acknowledgment of service, stating whether or not he intends to contest the proceedings. Generally, the defendant has a minimum of 28 days⁹ after service of the writ in which to file his defence. If the defendant fails to give notice of intention within the prescribed period, the plaintiff is entitled to obtain judgment in default¹⁰ provided that his claim falls within the category of claims specified in Order 13.¹¹ Similarly, if the defendant fails to serve his or her defence within the prescribed period, the plaintiff will again seek judgment in default¹² provided that his claim falls within the scope of Order 19.¹³ In this situation, the question as to whether or not service has been properly effected is crucial. If service has been validly effected, the courts will treat the judgment as a "regular" judgment. A defendant who applies to set such a judgment aside must first satisfy the court that his defence carries a real

⁴ RHC and RDC Ord 10, r 1.

⁵ The provisions of RHC Ord 10, r 1(1) apply to (i) an originating summons (other than an *ex parte* originating summons or an originating summons under RHC Ord 113) (RHC Ord 10, r 5(1)), (ii) an originating motion and (iii) a petition (RHC Ord 10, r 5(2)). Similarly, the provisions of RDC Ord 10, r 1(1) apply to an originating summons (other than an *ex parte* originating summons or an originating summons under RDC Ord 113) (RDC Ord 10, r 5).

⁶ RHC and RDC Ord 10, r 1(2).

⁷ The provisions of RHC Ord 10, r 1(2) apply to (i) an originating summons (other than an *ex parte* originating summons or an originating summons under RHC Ord 113) (RHC Ord 10, r 5(1)), (ii) an originating notice of motion and (iii) a petition, other than a bankruptcy petition (which according to the Bankruptcy Rules (Cap 6, sub leg A) must be served personally to ensure receipt). RDC Ord 10, r 1(2) applies to an originating summons (other than an *ex parte* originating summons or an originating summons under RDC Ord 113) (RDC Ord 10, r 5).

⁸ RHC and RDC Ord 12, r 5(a) (writ); RHC and RDC Ord 12, r 9(3) (originating summons).

⁹ RHC and RDC Ord 18, r 2(1).

¹⁰ Pursuant to RHC and RDC Ord 13. Note that the provisions contained in RHC and RDC Ord 13 apply only to proceedings begun by writ. As to the position of proceedings commenced by originating summons, see RHC and RDC Ord 28, r 6.

¹¹ The following claims fall within the scope of RHC and RDC Ord 13: (i) a claim for a liquidated demand (RHC and RDC Ord 13, r 1), (ii) a claim for unliquidated damages (RHC and RDC Ord 13, r 2), (iii) a claim relating to detention of goods (RHC and RDC Ord 13, r 3), (iv) a claim for possession of land (excluding mortgage actions) (RHC and RDC Ord 13, r 4) and (v) mixed claims (RHC and RDC Ord 13, r 5).

¹² Pursuant to RHC and RDC Ord 19.

¹³ The following claims fall within the scope of RHC and RDC Ord 19: (i) a claim for a liquidated demand (RHC and RDC Ord 19, r 2), (ii) a claim for unliquidated damages (RHC and RDC Ord 19, r 3), (iii) a claim relating to detention of goods (RHC and RDC Ord 19, r 4), (iv) a claim for possession of land (excluding mortgage actions) (RHC and RDC Ord 19, r 5) and (v) mixed claims (RHC and RDC Ord 13, r 6).

prospect of success.¹⁴ However, if service is invalid, the judgment will be treated as an “irregular” judgment. The defendant in such a case faces no such obstacle in applying for the judgment to be set aside. The court will set aside the judgment without an inquiry into the merits of the defence, although the court may attach conditions to the order for leave to defend.¹⁵

Personal Service

According to Order 65, rule 2,¹⁶ personal service is effected by leaving a copy of the writ or other originating process¹⁷ with the person to be served. The manner of effecting personal service was laid down in *Goggs v Huntingtower (Lord)*¹⁸ by Alderson B:

“To effect personal service, the clerk or other person entrusted with the task should first satisfy himself that he has found the right man. He should then hand to, or leave with, the person to be served a copy of the writ. If the person served will not take the copy, he should tell him what it contains and leave it as nearly in his possession or control as he can.”

One of the main difficulties in effecting personal service is the refusal by the defendant to accept the papers or perhaps even to answer the door. Where the defendant refuses to accept the writ, it is not good service simply to put the writ through the crevice of the door of the room where the defendant is, at the same time telling him or her what the document is.¹⁹ The writ must be left in the defendant’s control or possession, although it is not necessary to leave the writ in the defendant’s actual corporeal possession.²⁰ Thus, if the process server informs the defendant of the writ’s nature and throws it down in the defendant’s presence²¹ or puts it in the defendant’s coat pocket²² this will be sufficient to effect proper service. Similarly, if the intended recipient

¹⁴ *Premier Fashion Wear Ltd v Li Hing Chung* [1994] 1 HKLR 377; *Guangdong International Trust & Investment Corp v Yuet Wah (Hong Kong) Wah Fat Ltd and Another* [1997] HKLRD 489; *Mark Polyethylene Products Factory Ltd v Reap Star Ltd* [2000] 2 HKC 330.

¹⁵ See *Honour Finance Co Ltd v Chui Mei Mei* [1989] 2 HKLR 146; *Fok Chan Hung v Lo Yuk Shi* [1995] 1 HKLR 420; *Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd* [1997] 3 HKC 509; *Chu Kam Lun v Yap Lisa Susanto* [1999] 3 HKC 378. For an in-depth analysis of the approach taken by the Hong Kong courts in setting aside irregular default judgments, see Camille Cameron, “Irregular Default Judgments: Should Hong Kong Discard the ‘As of Right’ Rule?” (2000) 2 HKLJ 245.

¹⁶ RHC and RDC Ord 65, r 2.

¹⁷ Note 2 above.

¹⁸ (1884) 12 M & W 503.

¹⁹ *Christmas v Eicke* (1848) 6 Dow & L 156.

²⁰ *Thomson v Phenev* (1832) 1 Dowl 441.

²¹ *Ibid.*, p 443.

²² *Rose v Kempthorne* (1910) 103 LT 730.

of the writ, having knowledge of its nature, has been given a sufficient opportunity to possess the writ to enable him or her to exercise dominion over it for any period of time, however brief, the writ will have been validly served.²³ However, service is invalid if the writ is left with the defendant's spouse, servant or known agent of the defendant even though that person undertakes to convey it to the defendant.²⁴

Service by Registered Post or Insertion Through the Defendant's Letter Box

Order 10, rule 1(2) permits two alternatives to personal service. Order 10, rule 1(2) states:

“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 registered 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.”²⁵

The defendant must be physically present within the jurisdiction – coupled with actual knowledge of the writ.

The words “within the jurisdiction” were considered by the House of Lords in *Barclays Bank of Swaziland v Hahn*,²⁶ where it was held that the words refer to the defendant himself or herself and not to the service of the writ by post or by insertion through the letter box. This means that in order for service to be properly effected under this provision, the defendant must be physically present within the jurisdiction. Does this requirement mean that the defendant must be in the jurisdiction at the precise moment that the writ is sent or inserted through his or her letter box? The answer is clearly no. As the Court of Appeal noted,²⁷ and the House of Lords emphasised in *Hahn*,²⁸ it would be an absurd result if a defendant living in the northern part of Cumbria, who crossed the border between England and Scotland every day to have his lunch, could

²³ *Nottingham Building Society v Peter Bennett & Co (a firm)* (1997) *The Times*, 26 Feb, CA. Here the process server put the writ into the hands of the person to be served, the person knew it was a writ and read the description of the parties. However, he handed the document back to the process server, saying that he would not accept service. The Court of Appeal held that good service had been effected.

²⁴ *Davies v Morgan* (1832) 2 C & J 237.

²⁵ Emphasis added.

²⁶ [1989] 2 All ER 398 (hereinafter referred to as *Hahn*).

²⁷ [1989] 1 All ER 193, p 196.

²⁸ Note 26 above, p 402.

argue that service was bad simply because he or she was not within the jurisdiction at the exact moment the writ was posted or put through his or her letter box.

In *Hahn*,²⁹ the writ was served by insertion through the letter box of the defendant's United Kingdom (UK) address on 14 April 1987. However, at the time of such service, the defendant was on a flight bound for London airport. Upon arrival two hours later, the defendant was met by the caretaker of his apartment who warned him that an envelope addressed to him had been placed through his letter box. Instead of returning to his flat, the defendant spent the night at a hotel and left the jurisdiction the following day. The House of Lords held that the writ had been properly served. The defendant clearly had knowledge of the writ when he was within the jurisdiction on 14 April 1987. This means that for service to be effective under this provision, two essential elements have to be established. First, the defendant must be physically present within the jurisdiction. Second, he or she must have actual knowledge of the writ. Service will then occur at the moment when presence within the jurisdiction and knowledge of the writ coincide.³⁰

In *Hahn*,³¹ the defendant acquired knowledge of the writ after he had landed in the jurisdiction. What is the position where the defendant acquires notice of the proceedings while out of the jurisdiction and subsequently returns to the jurisdiction? This question was addressed in *India Videogram Association v Patel*.³² The writ in this case was inserted through the letter box of the defendant's UK home on 5 September 1988. However, at the time of the service, the defendant was not within the jurisdiction, having left for India 10 days earlier. The defendant did not return to England until 29 May 1989. The evidence showed that between her return to the UK and the expiry of the writ, the defendant obtained knowledge of the existence of the proceedings against her. Hoffman J held that clearly service would have been effective but for the fact that the plaintiff had failed to swear an affidavit in the terms prescribed by Order 10, rule 1(3)(b)(i). In his judgment, Hoffman J also went on to consider, albeit in *obiter*, what the position would have been had the defendant been informed of the service of the writ whilst still in India, and then subsequently returned to the UK. In his view, service would then have taken place at the exact moment when the defendant set foot in the UK.³³ This view accords with the approach taken by the House of Lords in *Hahn*,³⁴

²⁹ Note 26 above.

³⁰ See *India Videogram Association v Patel* [1991] 1 All ER 214, p 217.

³¹ Note 26 above.

³² Note 30 above.

³³ Note 30 above, p 217. This is, of course, provided that the plaintiff has filed the requisite affidavit under RHC and RDC Ord 10, r 1(3)(b)(i) swearing to a reasonably held opinion that the writ will come to the defendant's knowledge within seven days of service. This point is discussed further below.

³⁴ Note 26 above.

that service of process takes place once there is knowledge of the proceedings coupled with physical presence within the jurisdiction.

In Hong Kong a number of plaintiffs seeking to effect service under this provision have been thwarted because one of the two essential elements has been missing. In *Desirable International Fashions Ltd v Chaing Shi Chau*,³⁵ the writ was sent by registered post on 18 July 1995 to an office address at which the defendant had previously worked. However, the defendant, who was a resident of China, was not in Hong Kong at the time that service was purported to be effected. The plaintiff then proceeded to obtain default judgment on 14 August 1995, on the basis that no notice of intention to defend had been given by the defendant. The defendant had come into Hong Kong on 9 August but had left on the same day, at no time acquiring any knowledge of the proceedings. The court ruled that service was defective. Accordingly, the default judgment obtained by the plaintiff was set aside and an order for costs made against the plaintiff.

The Hong Kong Court of Appeal reached a similar result in *Chu Kam Lun v Yap Lisa Susanto*.³⁶ In this case the writ was inserted through the letter box of the defendant's Hong Kong address on 15 July 1998. No notice of intention to defend having been received from the defendant, the plaintiff proceeded to obtain default judgment on 11 August. The evidence showed that at the time of service the defendant was not in Hong Kong and that she did not in fact return to the jurisdiction until 30 August, after judgment in default had been obtained. The Court of Appeal had little hesitation in holding that service was defective. Clearly, the defendant had only become aware of the proceedings after judgment in default had been obtained against her.

There are, however, two decisions where the Hong Kong courts appear to have gone astray in applying these principles. Both are first instance decisions. The first case is *Honest Billion Investment Ltd v Wang Xian Chu*.³⁷ The writ in this case was served by inserting it through the letter box of the defendant's premises on 5 July 1996. Although the defendant was within the jurisdiction at the time of service, the evidence showed that he never went to his flat, but instead stayed in a hotel, and so he had no knowledge of the writ. The defendant subsequently left the jurisdiction on 6 July 1996. No notice of intention to defend having been received from the defendant, the plaintiff proceeded to obtain default judgment on 5 August 1996.

³⁵ [1997] 3 HKC 170.

³⁶ Note 15 above. See also *Carrefour Korea Ltd v Wordplex Industrial Ltd & Others*, unrep., HCA No 166812 of 1998 and *Companies Winding-up No 77 of 1999* (Court of First Instance, 29 Mar 2000). In this case, it was shown that at no time was the defendant within the jurisdiction. Service was held to be invalid on this basis.

³⁷ [1997] 3 HKC 161.

The court held that there had been “regular”³⁸ service and proceeded to deal with the case on its merits. The court appears to have based its finding that service was effective on the fact that the defendant was within the jurisdiction at the time that the writ was inserted through his letter box.³⁹ However, the court failed to take into account the critical fact that the writ had never come to the defendant’s notice. On this basis alone, service should not have been allowed to stand. If this view is correct, it also follows that the default judgment obtained by the plaintiff was irregular, and, accordingly, should have been set aside *without* an inquiry into the merits of the defence.⁴⁰

The second case is *Penrose Industries Limited v Tam Yan Lung*.⁴¹ Here, the writ in question was also delivered through the letter box of the defendant’s Hong Kong address. The defendant was not within the jurisdiction at the time of service. No notice of intention to defend having been received, the plaintiff obtained judgment in default on 6 July 2000. However, it appeared that the defendant acquired notice of the proceedings as he spoke to the plaintiff’s solicitors on 20 June 2000. Whilst it is not entirely clear from the judgment, it appears that at this time the defendant was still in the United States. The court held that irrespective of where the defendant was at the time of service, since he had acquired knowledge of the proceedings, service was effective. It is respectfully submitted, however, that notice by itself is not sufficient to render service effective unless the defendant was also present within the jurisdiction or returned to the jurisdiction with notice. It is not clear from the judgment when the defendant returned to the jurisdiction. The fact that the court did not take cognizance of this fact appears to show that it did not take this factor into account when clearly it should have done so.

Usual or Last Known Address

Not only must the defendant be physically present within Hong Kong at the time of service but the process must also have been sent to the defendant’s *usual* or *last known* address. The words *last known* means the address last known to the plaintiff rather than last known to the public at large.⁴² Where the defendant is self-employed or a professional person, it appears that usual or last known address can include his or her usual or last known business address.⁴³ More recently,

³⁸ *Ibid.*, p 164.

³⁹ *Ibid.*

⁴⁰ The judge in this case, however, proceeded to consider the merits of the defendant’s defence and then went on to hold that the plaintiff’s judgment should stand.

⁴¹ Unrep., High Court Action No 5783 of 2000 (Court of First Instance, 10 May 2001).

⁴² *Austin Rover Group Limited v Crouch Butler Savage Associates (a firm)* [1986] 3 All ER 50, [1986] 1 WLR 1102, applied in *Guangdong International Trust & Investment Corp v Yuet Wah (Hong Kong) Wah Fat Ltd and Another* (n 14 above).

⁴³ *Robertson v Banham & Co (a firm)* [1997] 1 All ER 79. Note that this decision is at odds with the Court of Appeal decision in *Marsden v Kingswell Watts (a firm)* [1992] 2 All ER 239.

the Hong Kong courts have had an opportunity to consider the meaning of these words.

In *Law Kwok Hung v Tse Ping Man*,⁴⁴ the plaintiff had attempted service at the office address of the first defendant, but on attending the premises the process server found that the first defendant was no longer occupying the premises in question. The plaintiff then located the first defendant's residential address from the directory of the Hong Kong Society of Accountants and subsequently sent the writ by registered post to this address. The evidence before the court showed that the flat to which the writ had been sent had been sold about a year earlier. The first defendant sought to argue that service was defective as the writ had not been sent to the address (being the office address) that he had last made known to the plaintiff. The court rejected this argument, holding that a plaintiff is entitled to acquire knowledge of the defendant's address by any means known to him or her. Accordingly, service was held to be valid.

In *Hecny Transportation (Thailand) v Tam Suet Fong Amadeo*,⁴⁵ the court also found that service had been properly effected. The writ in this case was sent by registered post to an address that the plaintiff alleged was the defendant's *last known* address. The evidence showed that the writ could not be received at that address but that a third party attended at the post office and signed for the document as the defendant's duly authorised agent. In an affirmation filed by the defendant, the defendant claimed that she lived in Thailand most of the time and returned to Hong Kong infrequently. However, she referred to the address to which the writ had been sent as "my place". The court had little reservation in concluding that it was at this address that the defendant stayed whenever she returned to Hong Kong and it was this address that was last known to the plaintiff, there being no other address at which it would have been appropriate to serve the writ.

However, service at the last known address will not be effective if the plaintiff actually knows that the defendant is not living or working at that address. In *Al-Tobaishi v Aung*,⁴⁶ the UK Court of Appeal took the view that service in such circumstances is so overwhelmingly prejudicial to the defendant that any default judgment subsequently obtained by the plaintiff could not be allowed to stand.

In Hong Kong, the courts have adopted a similarly robust approach. In *Desirable International Fashions Ltd v Chaing Shi Chau*,⁴⁷ a writ was sent on 18 July 1995 to an address at which the plaintiff had previously worked. However, the evidence showed that the plaintiff knew that the defendant

⁴⁴ [1999] 4 HKC 397.

⁴⁵ [1999] 1 HKC 833.

⁴⁶ (1994) *The Times*, 10 Mar, CA.

⁴⁷ Note 35 above.

had not worked at that address since 1993. Service was held to be bad on this basis. Further, Waung J was emphatic in his resounding disapproval of practitioners trying to effect service on behalf of their clients in these circumstances:

“I must say that I find it astonishing that the professional accountants and solicitors dealing with the matter could ever allow service to be effected at an address where they knew that the defendant was no longer working, and what is even worse, that they could allow an affidavit of service to be filed which they know is untrue.”⁴⁸

The same issue arose in *Chu Kam Lun v Yap Lisa Susanto*.⁴⁹ The defendant in this case had entered into a provisional agreement to purchase a property from the plaintiff. When the parties fell into dispute, the plaintiff commenced proceedings against the defendant. The writ was delivered to the defendant's Hong Kong address. However, prior to service of the writ, the plaintiff knew that the defendant had gone to Indonesia. Furthermore, in the provisional agreement, the address supplied by the defendant was an address in Indonesia. The court concluded that the plaintiff must have known that the defendant's Hong Kong address could no longer be regarded as the defendant's usual address and held that service was defective.⁵⁰

Affidavit Proving Due Service

In order for service to be validly effected under Order 10, rule 1(2), not only must the originating process be posted or inserted through the letter box in the manner specified by the rule, but the plaintiff must also swear an affidavit proving due service in the terms prescribed by Order 10, rule 1(3)(b)(i).⁵¹ This conclusion was reached by Hoffman J in *India Videogram Association v Patel*,⁵² where the court held that an affidavit in the terms prescribed by Order 10, rule 1(3)(b)(i) was a mandatory requirement of Order 10, rule 1(2), although not expressly so stated in the rule itself. Under Order 10, rule 1(3)(b)(i), an affidavit must contain a sworn statement that in the deponent's opinion (or if the deponent is the plaintiff's solicitor, or an employee of the solicitor, in the opinion of the plaintiff) the copy of the writ, if sent to or inserted through the letter box for the address in question, will have come to the defendant's knowledge within seven days thereafter.

⁴⁸ Note 35 above, p 175.

⁴⁹ Note 15 above.

⁵⁰ On the issue of last known address, see also *Yongcheng Nevada International Co Ltd v Chan Man Tak* [2000] 2 HKC 584. In this case, the writ was also delivered to an address where the plaintiff knew the defendant no longer resided. The court ruled that service was invalid. See also *Cosec Nominees Ltd & Another v Lau Hon Ming Alan* [2001] 3 HKC 290.

⁵¹ RHC and RDC Ord 10, r 1(3)(b)(i).

⁵² Note 30 above.

Furthermore, the opinion expressed in the affidavit that the writ will come to the defendant's knowledge within seven days must be reasonably held by the plaintiff. In *Law Kwok Hung v Tse Ping Man*,⁵³ the court stated that if a defendant seeks to impeach the good faith of the opinion asserted in the affidavit, it is open for the court to determine whether or not the plaintiff had reasonable grounds for the opinion asserted in the affidavit. If it transpires that the plaintiff does not have reasonable grounds for believing that the writ would come to the defendant's attention, then service will be defective. The plaintiff in this case had located the defendant's residential address from the Directory of the Hong Kong Society of Accountants and had sent the writ by registered post to this address. The court ruled, *inter alia*, that as this was the address given by the defendant to his professional body, clearly the plaintiff had reasonable grounds for believing that the writ would come to the defendant's knowledge. Accordingly, the writ had been properly served.

The issue of whether or not the plaintiff has reasonable grounds for the belief expressed in an affidavit proving due service was also raised in *Kwan Kam Wah v Chan Wai Ming*.⁵⁴ This case also raises the interesting question as to the circumstances in which a court will permit cross-examination of the plaintiff's process server by the defendant.

The writs in that case were served on 4 and 6 August 1999 respectively by insertion through the letter box of a residential address from which the defendant had moved several months earlier. Both the plaintiff and the defendant were directors of the same company. The evidence showed that the defendant had filed a notice of change of address with the Companies Registry on 28 July 1999, about four months after the defendant had moved. The plaintiff's solicitors had conducted a company search of the company in question in early July 1999 and it was to the defendant's residential address stated in the records that the writs had been sent. The defendant sought to impugn the good faith of the opinion asserted in the plaintiff's affirmation of service on two grounds. First, the defendant contended that the plaintiff ought to have known that the defendant was no longer living at this address. Second, the defendant stated that the plaintiff had deliberately adopted this method of service instead of serving the writ by registered post so as to avoid the risk of the writ being returned through the post. The defendant also applied to cross-examine the process server, a clerk employed by the plaintiff's solicitors.

On the question of the reasonableness of the opinion expressed in the plaintiff's affirmation of service, the court held that there was evidence to suggest that the plaintiff had reasonable grounds for believing that the writ would come to the defendant's notice seven days after service. The plaintiff's solicitors

⁵³ Note 44 above.

⁵⁴ [2000] 2 HKC 378.

had conducted a company search and it was reasonable for them to regard the address stated in the records as the last known address of the defendant. Neither was there any evidence of bad faith on the part of the plaintiff.⁵⁵ Accordingly, service was not bad for this reason.⁵⁶ As to the defendant's application to cross-examine the plaintiff's process server, the court ruled that whilst a defendant is entitled to impeach the opinion asserted by a plaintiff in its affidavit of service, this does not automatically confer upon a defendant a right to cross-examine the process server. Such cross-examination would only be permitted if the defendant could show good and sufficient reasons for doing so. The defendant in this case had failed to show such reasons. In effecting service of the writs, the process server was simply carrying out the instructions of his principal and could not be expected to have any actual knowledge as to whether the defendant had moved from the address at which service had been effected.⁵⁷ The defendant's application was therefore disallowed.

Deemed Date of Service

Where the originating process is served by registered post or inserted through the defendant's letter box, by virtue of Order 10, rule 1(3)(a),⁵⁸ service is deemed to take place, unless the *contrary* is shown, on the seventh day after the date on which the writ was posted or inserted through the letter box. Where service is carried out by registered post and subsequently by personal service, service is effective from the date of personal service, and not the deemed date of service under Order 10, rule 1(3)(a).⁵⁹

Order 10, rule 1(3)(a) makes it clear that the presumption as to service may be rebutted by evidence to the contrary. Although the rule is silent on this point, it is open to either the plaintiff or the defendant to produce evidence to the *contrary*.⁶⁰ Once such evidence is shown, the deeming provision will be displaced. This means that service will have taken place on a date other than the deemed date of service (ie seven days after the date on which the writ was posted or placed through the letter box) or, perhaps, not at all. A number of cases illustrate this point.

⁵⁵ *Ibid.*, pp 382 and 384.

⁵⁶ Service was held to be invalid, however, because the defendant never received notice of the proceedings (see further below).

⁵⁷ Note 54 above, p 382.

⁵⁸ RHC and RDC Ord 10, r 1(3)(a).

⁵⁹ *Tindix Services Ltd v Cheng Wing Chun* [1998] 4 HKC 194. In this case the writ was sent by registered post to the defendant on 9 Sept. Two days later, on 11 Sept, the writ was served on the defendant personally. The court held that service took place on 11 Sept. This point was significant because it meant that the time for acknowledging service of the writ (14 days pursuant to RHC Ord 12, r 5(a)) ran from 11 Sept, and not from the deemed date of service under RHC Ord 10, r 1(3)(a). The defendant was therefore out of time in acknowledging service of the writ.

⁶⁰ *Hodgson v Hart District Council* [1986] 1 All ER 400, [1986] 1 WLR 317.

In *Hodgson v Hart District Council*,⁶¹ the writ in question was issued on 21 February 1984 and served on 15 February 1985 by ordinary first class post in accordance with the former UK equivalent to Order 10, rule 1(2)(a). According to Order 10, rule 1(3)(a), the writ was deemed to have been served on 22 February 1985. If this were indeed the case, this would have had significant repercussions for the plaintiff. Once a writ has been issued, it is valid for service for 12 months.⁶² If the writ was deemed to have arrived on 22 February 1985, two days after the writ had already expired, it would have been invalid. However, the plaintiff was saved by the defendants' own admission that they had actually received the writ on 18 February 1985, ie two days before the writ was due to expire. The UK Court of Appeal held that service was validly effected on 18 February, being the date that the defendant actually received the writ.⁶³

The contrary was also shown in the *Hahn* case.⁶⁴ Here the plaintiff bank was able to prove that that defendant had acquired actual knowledge of the writ (as opposed to receipt, as in the case above) on a date other than the deemed date of service. The writ in this case had been inserted through the letter box of the defendant's UK address on 14 April 1987. Under Order 10, rule 1(3)(a), the writ would be deemed to be served on 21 April 1987. However, the bank was able to establish that the defendant had acquired notice of the proceedings whilst within the jurisdiction on 14 April. The House of Lords therefore held that that the deemed date of service contained in Order 10, rule 1(3)(a) had been displaced as service had in fact taken place on 14 April 1987.

The deeming provision will also be ousted if the defendant can establish that he never received notice of the writ. In *Forward v West Sussex County Council*,⁶⁵ the English Court of Appeal held that service of proceedings under Order 10, rule 1(2)(a) is duly effected only when the defendant has notice of the proceedings and not on mere delivery. This means that even where the plaintiff has complied with all the formal requirements of the rules, if the defendant does not actually receive notice of the writ, service will not have taken place. The Hong Kong courts, in a number of recent decisions,⁶⁶ have overwhelmingly endorsed this view, thus reaffirming the fundamental principle that it is the essential element of notice that is the key in determining whether or not service has been validly effected.

⁶¹ *Ibid.*

⁶² RHC and RDC Ord 6, r 8. This meant that the writ would have expired on 20 Feb 1985.

⁶³ This decision shows that where a plaintiff elects to effect service under RHC and RDC Ord 10, r 1 (2), the writ must be served at least 12 months less seven days from the date of its issue.

⁶⁴ Note 26 above.

⁶⁵ [1995] 4 All ER 207, [1995] 1 WLR 1469.

⁶⁶ *Wing Lung Bank v Ho Man Lam* [1999] 3 HKC 368; *Desirable International Fashions Ltd v Chiang Shi Chau* (n 35 above); *Chu Kam Lun v Yap Lisa Susanto* (n 15 above); *Yongcheng Nevada International Co Ltd v Chan Tak Mak* (n 50 above); *Kwan Kam Wah v Chan Wai Ming* (n 54 above); *Au Yeung Kun v Greenfield Property Ltd & Others*, unrep., High Court Action No 1024 of 1999 (Court of First Instance, 30 May 2001); *Cosec Nominees Ltd & Another v Lau Hon Ming Alan* (n 50 above).

Conclusion

The prime objective of the rules regulating service of originating process is to ensure that the defendant receives proper notice of the proceedings to enable him to answer and defend the allegations made against him, if he wishes. The question of whether or not proper service has been effected has given rise to substantial litigation in Hong Kong. Most of the difficulties in effecting proper service have arisen where the plaintiff has elected not to effect personal service but has instead sought to rely on one of the two alternative methods of service permitted by Order 10 rule 1(2). In so doing, the plaintiff faces certain hurdles he must overcome in order for service to be validly effected under this provision.

The Hong Kong courts have adopted a number of general principles that have been consistently applied when interpreting the procedural rules. First, the defendant must be within the jurisdiction for service to take place. For this purpose, the defendant need not be physically present within the jurisdiction at the precise moment the writ is sent or placed through the letter box. Provided that the defendant receives actual notice of the proceedings (whether whilst abroad or on return to the jurisdiction), service will take place at the intervening moment when presence and knowledge coincide.⁶⁷ Thus, actual knowledge of the proceedings is as essential an ingredient as presence within the jurisdiction. Second, the writ must have been sent or placed through the letter box of the defendant's last known address. However, it is pointless for a plaintiff to try and effect service at such an address where he knows that the defendant is no longer working or residing. Third, the plaintiff is required to file an affidavit proving due service. Such an affidavit may be the subject of scrutiny by the court and the plaintiff must have reasonable grounds for believing that the process will come to the defendant's notice within seven days otherwise service will not be allowed to stand.

Finally, the cases emphasise that if a defendant establishes that at no time did he ever receive notice of the writ, service will not have been validly effected at all. Thus, even where the plaintiff has complied with all the technical requirements of Order 10, rule 1(2), he will falter at this final hurdle if the defendant shows that he never received notice of the writ. It is therefore this key element of notice that lies at the core of the rules governing service in Hong Kong and which provides the necessary foundation for the courts to assert jurisdiction over an individual served with originating process in Hong Kong.

⁶⁷ *India Videogram Association v Patel* (n 30 above), p 217.