International Commercial Chamber

PARIS COURT OF APPEAL

Division 5 - 16
RG 18/21190 - No Portalis 35L7-V-B7C-B6NGC

Referral's nature: Notice of appeal for entry on the roll
Date of the notice of referral: 21 September 2018
Registration date of the referral: 24 September 2018
Nature of the case: Other applications relating to the group operation
Decision referred : No. 2014063043 handed down by the PARIS Commercial Court on 17 November 2016

Claimants :

Mr. (A), born on (…) in (…) & **Ms. (B)**, born on (…) in (…),
Having their domicile : (…)

Beneficiaries AJ [XXXX], with a Total legal aid No […] of […] granted by the PARIS legal aid office

Represented by […]

Defendants:

ZODIAC AEROSPACE HOLDING AUSTRALIA PTY LTD,
Registered [Australian Securities and Investment Commission] under the number : No 151 214 658,
Represented by its legal representatives

Represented by [ ], member of the PARIS Bar

SAFRAN, SA, having its registered office at 2 bld du Général Martial Valin, Paris 75015
Represented by its legal representatives
RCS PARIS : 562 082 909
legal successor of ZODIAC AEROSPACE SA,

Represented by [ ], member of the Bar of 5...) Havings as litigator (…) member of the Bar of (...)

PROCEDURAL ORDER BEFORE THE PRE-TRIAL JUDGE
(No 6/2019, 6 pages)

At the hearing on procedural issues of 24 June 2019,

We, Laure ALDEBERT, Pre-trial Judge ,

Assisted by Clémentine GLEMET, clerk of the court

STATEMENT OF FACTS AND PROCEDURE

1. According to an agreement dated 31 mai 2011, Mr. (A) and Ms. (B), having their domicile in

Australia, assigned the shares they owned in Swan to Zodiac Aerospace Holding Australia (ZAHA) and Zodiac Aerospace pursuant different terms.

2. In October and November 2014, spouses (A and B) sued Zodiac Aerospace Holding Australia (ZAHA) and Zodiac Aerospace for payment of an additional amount on the sale price before the Paris Commercial Court.

3. In an adversarial judgment handed down at first instance on November 17, 2016, the court dismissed all their claims for payment and ordered them in solidum to pay Zodiac Aerospace Holding Australia (ZAHA) and Zodiac Aerospace the sum of EUR 20,000 under article 700 of the Code of Civil Procedure.

4. ZAHA and Zodiac Aerospace undertook to serve the judgment in Australia at the spouses' domicile (A and B) under the provisions of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial Documents, to which France and Australia are Parties.

5. To this end, by dispatch of 16 December 2016, the [...] bailiff in Paris referred the matter to the Australian authority, the Supreme Court of New South Wales.

6. During the service of the documents, the spouses (A and B) challenged the spelling of their surnames in the judgment indicating "[...]" instead of "[...]".

7. By mail of 24 March 2017, Mr and Ms (A and B) requested the Clerk'soffice of the Commercial Court of Paris to rectify the spelling of their names.

8. By judgment of 21 April 2017, the Court granted the request for rectification of a material error.

9. By notice of 21 September 2018, spouses (A and B) appealed the judgment of 17 November 2016.

CLAIMS OF THE PARTIES

10. According to their latest submissions on procedural issues sent electronically on 20 June 2019, ZODIAC AEROSPACE HOLDING AUSTRALIA PTY LTD and SAFRAN, acting on behalf of ZODIAC AEROSPACE SA, request the Pre-Trial Judge to find the appeal inadmissible as being out of time and to order Mr and Mrs (A and B) to pay the costs.

11. According to their latest submissions in reply sent electronically on 12 June 2019, Mr and Mrs (A and B) request that the application be dismissed, that their appeal be found admissible and that the respondents be ordered to pay costs.

REASONS FOR THE DECISION

12. ZODIAC AEROSPACE HOLDING AUSTRALIA PTY LTD and SAFRAN claim in substance under Articles 538 and 643 of the Code of Civil Procedure and the provisions of the Hague Convention of 15 November 1965 that the service duly performed by the competent Australian authority at the domicile of the spouses (A and B) has caused the three-month period to appeal to start for addressees who live abroad.

13. They submit that it is immaterial that the spouses (A and B) refused the document on the ground of an error in the spelling of their names, since they were indeed the persons referred to in the decision of 17 November 2016 and service was effected in accordance with the applicable

legislation referred to above, the date to be taken into account being that of 21 March 2017 for Ms (B), the date of delivery to her person, and that of 10 March 2017, the date of the attempt for Mr (A), according to the statements issued by the Supreme Court of New South Wales which were returned to them.

14. They also argue that throughout the proceedings, spouses (A and B) did not protest against the spelling of their names, pointing out that (...) and (...) are equivalent, the former being the diminutive of the latter and meaning "(...)".

15. They contest any irregularity in the personal service of Ms (B) under Australian law and argue that the attempt to serve Mr (A) who refused the document shall be the starting point of the deadline to appeal in accordance with the case law on international service under the Hague Convention. (French Supreme Court, civil division 1, 23 June 2011; n°09-11.066)

16. They conclude that the appeal regularized on 21 September 2018 is late and shall therefore be found inadmissible.

17. In reply, Mr and Mrs (A and B) submit that the documents for service are vitiated by an irregularity and are invalid since the companies have undertaken to serve a judgment in which they are not the persons named as the name in the decision is (...) and not their surname (...), what they had already pointed out in the course of the proceedings.

18. They further submit, on the basis of Article 5 of the Hague Convention, that it is the law of the requested State, namely Australian law, which is applicable to the service on Ms (B), the irregularity og which they raise.

19. They state that under the Australian Code of Civil Procedure (Rule 10.21 Uniform Civil Procedure Rules 2005) *"Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document “.*

20. They note that the documents were not hand-delivered to Ms. (B), as the sheriff officer merely put the document to be served down on the floor without telling the nature of the document.

21. They consider, with regard to Mr (A), that the certificate of non-servicing of a judgment which does not mention his name cannot have caused the deadline for appeal to start.

22. They deduce from this that deadline for appeal could neither begin to run nor expire.

23. Finally, they submit that, since the rectifying judgment was never served, the deadline for appeal did not begin to run.

Thereupon,

24. Spouses (A and B) who live abroad had a three month deadline to appeal the decision from the date of service of the judgment, the international service of which is being challenged.

<u>On the decision forwarded for service in Australia:</u>

25. The service of the decision on spouses (A and B) at their address in Australia had to comply with the rules of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, to which France and Australia are

parties.

26. The Convention provides for the channels of transmission to be used when a judicial document has to be transmitted from one Contracting State to the Convention to another Contracting State to be served in that State.

27. The documents to be served are transmitted under the control of the requesting authority to the State addressed, which does not have to assess their content, since there is no provision in the Convention on this point.

28. At the request of Zaha and Zodiac Aerospace, an application for service in accordance with the Convention with attached documents to be served was addressed by (...), bailiff in Paris, to the competent territorial authority in Australia according to the statement dated 7 December 2016, in which the bailiff certifies having addressed to the Supreme Court of New South Wales form F2 and a draft document entitled "Service of a judgment at first instance" in duplicate and its translation into English for each of the addressees.

29. It is understood that the decision addressed by the bailiff to the Supreme Court of New South Wales is in conformity with the decision issued by the Clerk's office of the Commercial Court which included the names of the plaintiffs under the spelling "(...)" instead of (...) which is their surname.

30. The spouses (A and B) infer from this that the decision as worded did not concern them and could not therefore be served on them.

31. However, spouses (A and B) do not dispute that the discrepancy of a letter in their names is a simple material error in the decision which they only thought to have rectified a few days after the sheriff's passage with the documents to be served at their home on 10 and 21 March 2017, by sending a letter to the Clerk's office of the Paris Commercial Court on 24 March 2017.

32. It is also clear from the proceedings at first instance and from the judgment that the spelling (...) and (...) is used alternatively in an equivalent manner, being observed that the contraction of "(...)" in the prefix of a name beginning with (...) is customary.

33. Furthermore, it has not been shown that this deviation of a letter created confusion in the identification of the applicants who appeared under that name at the various stages of the proceedings, nor that it caused any grievance, since the applicants did not make any protest in this respect in the context of an appeal for review which they had attempted to lodge against the decision at the end of 2016 (Exhibit 16).

34. It thus follows from the foregoing that the decision, regardless of the spelling of their names on the document, could be served on the spouses (A and B) under the conditions laid down in the Hague Convention.

<u>On the regularity of service in Australia by the authority addressed:</u>

35. Article 5 of the Convention provides that the Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either:

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

36. According to Article 6 of the Hague Convention, the Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention. The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. Where appropriate, it shall set out the reasons which have prevented service. The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities. The certificate shall be forwarded directly to the applicant.

37. It follows from these provisions that the authority shall serve the document, or shall arrange to have it served, in accordance with the forms prescribed by the law of the State addressed for the service of documents in that State to persons in its territory.

38. The Convention does not deal with or include substantive rules relating to the actual service of documents to be served.

39. It is for the court of the State of origin to determine whether service has been validly effected under the law of the State addressed.

40. In the absence of provisions in the Convention on the determination of the date of international service where it has not been possible to deliver the document to the addressee, service shall be deemed to have been effected on the date on which the competent foreign authority attempted to deliver the document or, where that date is not known, on the date on which the foreign authority notified the French authority.

41. In the present case the Australian authority sent in return as regards the steps taken on 10 March and 21 March 2017 to the spouses' home (A) two sworn statements completed in accordance with the provisions of Article 6 of the Convention (exhibits 13 and 14).

42. With regard to M.(A) the Australian authority has completed a certificate of non-service in which it certifies "*in accordance with Article 6 of the Convention that service of documents as attached has been attempted on (A), that the report sets out the reasons which have prevented service".*

43. Attached to the certificate of Non-Service are the following explanations by Sergent ... of the NSW Sheriff's Office in Sydney "*attempted service on ... 10/03/2017". The officers "had an interview with (A) who stated that he was not the person named in the document and that he had no knowledge of this matter".*

44. For the reasons set out above, the decision containing the misspelled name of Mr. (A) did not preclude the transmission of the decision to the competent authority, whose attempt to serve it, certified by the authority on 10 March 2017, caused the deadline for appeal to start.

45. Concerning Ms (B), the certificate of service from the Australian authority states that *"in accordance with Article 6 of the Convention, the documents were served personally on Ms (B) on 21 March 2017 by handing them over to ...".* It is testified by Sergent ... that to the question *"Are you (B)? "she replied "these are foreign documents and it's all wrong, yes it's me";* he asked her to provide identification and she presented her driver's licence and her medicare card*; "she showed her two documents through the closed door equipped with a security screen",* according to his

statement, he asked her to show them when she opened the door. *The name was (B). It was indicated (to him)that the spelling of the last name was different despite the fact that the defendant had not seen the documents I was holding" I declared: "I was able to establish that you were the person named in the documents served on you" the defendant did not open the door to accept the documents I deposited as close to her person as possible".*

46. Ms (B) then argues that the provisions of Australian law have not been complied with the rule (Rule 10.21 Uniform Civil Procedure Rules 2005) "*10.21 How personal service effected generally"* (cf. SCR Part 9, rule 3; DCR Part 8, rules 3 and 14; LCR Part 7, rules 3 and 14) which provides :

(1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.

47. She claims that the document was not filed in her presence and that she was not informed in a clear and intelligible manner of the nature of the document, contrary to the above-mentioned provisions of Australian law.

48. However, it appears from the sworn affidavit of the Supreme Court of New South Wales and the affidavit containing her statements that she was indeed present at her home when the Sheriff's officer delivered the document to her door after having verified her identity and that she challenged the spelling of her name before she had even seen the documents he was holding in his hand, which confirms, if need be, that she was fully aware of them.

49. It follows from all these hat the document was duly served on Ms (B) on 21 March 2017 in accordance with the forms provided for by the State addressed and that, as it could not be delivered to Mr (A), who refused it, it is the date on which the competent foreign authority attempted to deliver the document to him, namely 10 March 2017, that shall be taken as the date on which the deadline for appeal started, with the result that the appeal of 21 September 2018 was lodged late.

50. The rectifying judgment is subject to the same rules as the main judgment and cannot be appealed as long as the main judgment cannot itself be appealed. Accordingly, the absence of service of the rectifying judgment does not affect the admissibility of the appeal against the main judgment.

On these grounds,

Ruling by an adversarial decision subject to appeal

1 – Finds the appeal inadmissible
2 - Orders Mr and Mrs (A) to pay the costs of the proceedings to be recovered in accordance with the provisions of Article 699 of the Code of Civil Procedure.

Order made by Laure ALDEBERT, Pre-Trial Judge, assisted by Clémentine GLEMET, Clerk, present at the time the order was made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.

Paris, 10 September 2019

The clerk **Pre-Trial Judge**