Plaintiff’s Application for Leave to Proceed when no Appearance by Defendant: Recent Developments in New South Wales Australia

If a defendant is not present in Australia, **Uniform Civil Procedure Rules** ("UCPR") of New South Wales provides that service outside of Australia is permitted if the plaintiff's claim falls within UCPR Schedule 6 or if a leave is granted under UCPR rule 11.5. If a defendant does not respond within 42 days after being served successfully (rule 11.8), the plaintiff must apply for leave to proceed (rule 11.8AA). A defendant can challenge the jurisdiction of the court and apply to set aside service (rule 12.11). The court has discretion to decide whether to assume jurisdiction (rule 11.6).

AGC Capital Securities v Jaijaifu Modern Agriculture (HK) Limited [2019] NSWSC 62, a case decided by NSW Supreme Court in 2019 provides a test to determine a plaintiff's application for leave to proceed when no appearance by defendant. The test includes four components:

1. Whether the defendant has been properly served;
2. Whether the claim in the originating process falls within UCPR Schedule 6;
3. Whether it be demonstrated that there is a real issue to be determined (this requirement as being that the plaintiff has an arguable case being one that would be sufficient to survive an application for summary judgment); and
4. Whether this Court is not a clearly inappropriate forum.

The same test is adopted by ***Yoon v Lee [2017] NSWSC 1338*** and ***Rossiter v. Core Mining [2015] NSWSC 360***.

The application for leave in *AGC Capital Securities, Yoon,* and *Rossiter* is not related to UCPR r 11.5. r 11.5 is to determine whether a leave to serve outside of Australia should be granted. However, these three cases are cases where service outside of Australia has been completed. They are concerned with leaves under r 11.8AA, which provides:

UCPR 11.8AA Leave to proceed where no appearance by person

(1) If an originating process is served on a person outside Australia and the person does not enter an appearance, the party serving the document may not proceed against the person served except by leave of the court.

(2) An application for leave under subrule (1) may be made without serving notice of the application on the person served with the originating process.

R11.8AA does not specify a test. In Australia, the leading case for leave to proceed where no appearance by defendant is ***Agar v Hyde [2000] HCA 41***. In *Agar,* two rugby players at the NSW brought a personal injury claim against the International Rugby Football Board and several national representatives at the Board, alleging that the Board and its representatives own a duty of care for the plaintiffs. The defendants were served outside of Australia and applied to set aside the service. *Agar* holds that different tests should be adopted for the plaintiff's application for leave to proceed where no appearance by defendant and for the defendant's application to set aside the service.

According to *Agar,* the test for the plaintiff's application for leave to proceed when no appearance by defendant should focus on the jurisdictional nexus between the plaintiff's pleading and the forum and should not consider the merits of the case. The High Court considers:

"is the claim a claim in which the plaintiff alleges that he has a cause of action which, according to those allegations, is a cause of action arising in the State? The inquiry just described neither requires nor permits an assessment of the strength (in the sense of the likelihood of success) of the plaintiff's claim." (*Agar*, para 50)

The Court of Appeal required the plaintiff to establish a good arguable case. However, the High Court held that "[t]he Court of Appeal was wrong to make such an assessment in deciding whether the Rules permitted service out." (*Agar,* para 51) Instead, the High Court only requires the plaintiff to establish a *prima facie* case, saying

"[t]he application of these paragraphs of r1A depends on the nature of the allegations which the plaintiff makes, not on whether those allegations will be made good at trial. Once a claim is seen to be of the requisite kind, the proceeding falls within the relevant paragraph or paragraphs of PT 10 r 1A, service outside Australia is permitted, and prima facie the plaintiff should have leave to proceed." (*Agar,* para 51)

PT 10 r 1A is functionally equivalent to the current UCPR Sch 6 although their contents differ to some extent. In contrast, the test of "real issue to be determined" held in *AGC Capital Securities, Yoon, and Rossiter* is on the merits of the case, which is excluded by *Agar.*

Regarding the defendant's application to set aside the service, *Agar* adopts three common grounds:

• Service is not authorized by the rules (ie, does not fall within UCPR Sch 6 and not otherwise authorised),

• The Court is an inappropriate forum,

• The claim has "insufficient prospects of the success to warrant putting an overseas defendant to the time, expense and trouble of defending the claims." This requires the Court to assess the strength of the claim and the test is the same for summary judgment lodged by a defendant served locally.

These grounds are not exhaustive. For example, the defendant can apply to set aside the service based on an exclusive jurisdiction clause favouring a foreign court.

However, *AGC Capital Securities*, *Yoon,* and *Rossiter* do not concern the defendant's application to set aside the service. Further, the test of "real issue to be determined" in *AGC Capital Securities, Yoon,* and *Rossiter* is not the same as the "insufficient prospects of the success" in *Agar*. The test of "insufficient prospects of the success" has been embedded in UCPR 11.6(2)(c), while *AGC Capital Securities*, *Yoon*, and *Rossiter* are not concerned with this provision. They are brought on r11.8AA.

Comparing *Agar* on one hand and *AGC Capital Securities*, *Yoon,* and *Rossiter* on the other, the latter cases consider *forum non conveniens* when determining the plaintiff's application to proceed where no appearance by defendant. Is this consistent with *Agar?* This issue should be discussed from two aspects. First, *Agar* did not consider *forum non conveniens* under a clearly inappropriate forum doctrine because parties did not raise this issue. Therefore, it may argue that this issue was not considered by High Court in *Agar*. Second, *Agar* limits courts' consideration to jurisdictional nexus with the forum when determining the plaintiff's application to proceed where no appearance by defendant. Jurisdictional nexus refers to whether the service is authorized by the UCPR. However, broadly, jurisdictional nexus may cover *forum non conveniens* considerations.

Further, *AGC Capital Securities*, *Yoon*, and *Rossiter* seem to confuse the test for the plaintiff's application for leave to proceed where no appearance by defendant with the test for the defendant's application to set aside the service. The test of "real issue to be determined" requires the court to examine the merits of the plaintiff's claim. This is permitted when determining the defendant's application to set aside the service. However, when determining the plaintiff's application for leave to proceed where no appearance by defendant, *Agar* says the court should not assess the strength of the plaintiff's claim. Further, the test of "real issue to be determined" is not equivalent to the test of "insufficient prospects of the success" decided by *Agar* and embedded in UCPR r 11.6.

Could *AGC Capital Securities*, *Yoon*, and *Rossiter* be justified on policy grounds? A proposed argument is that leave to proceed involves leave, which requires an exercise of discretion; and providing leave to proceed in circumstances where there is "no real issue" would be a waste of limited court resources. However, the difficulty of this argument is that it conflates the leave to proceed with the motion for a summary judgment. If the plaintiff only asks a leave to proceed without applying for a summary judgment, there is no ground for the court to consider the test of "no real issue" *sua sponte*.

Could *AGC Capital Securities*, *Yoon*, and *Rossiter* be distinguished from *Agar?* In both *Yoon* and *Rossiter,* the court issued a summary judgment for the plaintiff. In *AGC Capital Securities*, the court directed the plaintiff to apply for a default judgment. *AGC Capital Securities, Yoon,* and *Rossiter* are proceedings where the defendants make no appearance. However, *Agar* is a proceeding where the defendant applied to set aside the service. Although *Agar* considered the test for the plaintiff's application to proceed where no appearance by defendant, it did so for the purpose of distinguishing this test from the test for the defendant's application to set aside the service. Therefore, in this aspect, it may argue that *AGC Capital Securities, Yoon,* and *Rossiter* are distinguishable from *Agar*, because they are the cases where the plaintiff applied for both a leave and a summary judgment. Therefore, the real issue for *AGC Capital Securities*, *Yoon,* and *Rossiter* is that the court conflated the test for the plaintiff's application to proceed where no appearance by defendant and the test for summary judgment.

AGC Capital Securities, Yoon, Rossiter, and *Agar* also bring up another question: why is the test for a plaintiff's application for leave when no appearance by defendant and the test for a defendant's application to set aside the service are different? Or should the tests be the same? In the plaintiff's application for leave to proceed, is the court supposed to take care of the non-responding defendant? The answer is negative partly because the common-law court is not an inquisitorial court in civil-law countries. More important, if the plaintiff only asks a leave to proceed without applying for a summary judgment, there is no ground for the court to consider whether there is real issue to be determined in the plaintiff's claim.