

## Innovative modes of service approved by HK Courts

June 2020

In the recent decision of *Hwang Joon Sang & another v Golden Electronics Inc. and Ors*<sup>1</sup> (**Decision**), the Court of First Instance approved the use of a relatively novel mode of ordinary service of documents under Rules of the High Court (RHC) Order 65 rule 5(1)(d)<sup>2</sup> by way of access to a data room. In this briefing we will discuss the features of service by access to a data room, the considerations involved as well as the trend of using innovative modes of service in the modern era.

### The facts

A businessman commenced legal proceedings in the High Court of Hong Kong, asserting proprietary claims over funds allegedly misappropriated by his former lover and transferred through bank accounts held by various defendants. In the action, the businessman and his company seek declarations as to the defendants holding the funds on constructive trust, and as to liability to account and orders for payment of sums due on taking of the account. When the action commenced in August 2019, there were only 6 defendants. Since then it was discovered that monies had gone into other bank accounts, which necessitated the addition of other defendants in the proceedings. As at the date of the Decisions, there were 28 defendants in total, 16 of whom are located in Taiwan. Leave

for service out of the jurisdiction on these 16 defendants (**Overseas Defendants**) has been obtained.

Between February and May 2020, the plaintiffs attempted to serve court documents to the Overseas Defendants (including an interim injunction granted by the Court) by engaging a firm of attorneys-at-law in Taiwan. Whilst each of these defendants were served with an individual package of court documents at various different addresses in Taiwan, the plaintiffs' solicitors subsequently received five similarly wrapped boxes or parcels containing the court documents served, all sent from Taiwan. It was apparent that all of the returned documents had been opened and re-organised before they were returned. Given the unusual circumstances of the return of the documents, the Court was satisfied that the Overseas Defendants must have had the documents in their possession at some point in time, and had a reasonable opportunity to read and inspect them. Therefore, the Court found that despite their efforts in refusing or evading service, each of the defendants was informed of the proceedings against him in Hong Kong and decided not to participate.

---

<sup>1</sup> [2020] HKCFI 1084

<sup>2</sup> RHC Order 65 rule 5(1) specifies that ordinary service of documents, i.e. service of documents not being an originating process such as writs and originating summons or not specifically required to be served personally, may be

effected by physical delivery at a proper address, by post or by leaving the documents at a document exchange. That said, subsection (d) of O.65 r.5 gives the Court the power to direct service to be effected in any other manner as it deems fit.

## Access to data room approved as an acceptable mode of service

As the action proceeds further, there will be voluminous documents to be served on the defendants and other relevant parties, for example, the banks concerned. Given also the large number of defendants and the potential addition of further defendants to the proceedings, the plaintiff sought directions from the court as to the future mode of service of documents. More specifically, the plaintiffs sought permission of the Court to serve court documents by hosting the documents in an online data room and providing persons to be served with access to the data room.

The proposed mode of service had never been used in Hong Kong. It has nonetheless been approved by the English court in *CMOC Sales & Marketing Ltd v Persons Unknown and 30 others*<sup>3</sup>, a case concerning email scams and fraudulent transfers of funds. The English court ordered the following steps to be taken for future service of documents:

- the serving party shall create an online data room containing all of the relevant documents;
- a link to the data room shall be sent to the intended recipient through a previously approved court method (for example, by email or hardcopy or other court-approved methods); and
- an access code to the data room and instructions to access shall be sent by way of a separate post or email to the recipient so that the recipient can gain access to the relevant court documents hosted in the data room.

The Hong Kong court recognised that there are similarities between this case and the *CMOC* case which might justify adopting a similar approach of service. During the course of tracing the funds, numerous interlocutory applications and orders have been made and a large number of additional defendants have been added. As the tracing exercise goes and more information is revealed, there will be further interim orders and more defendants will be added. Court documents which require service on the banks and the Overseas Defendants would likely be voluminous. In particular, for the banks concerned, they were joined solely for the purpose of implementing the interim injunctive orders and facilitating tracing and as such, they would unlikely wish to be deluged with reams of paper which are mostly irrelevant to them.

Having considered the circumstances of the case (including the particular behaviour of the defendants concerned), in order to further the underlying objectives of the RHC and to actively manage the case, the Court concluded that an innovative mode of ordinary service adopted in *CMOC* was clearly justified in this case.

The Court was satisfied that service by access to data room would be efficient and cost-effective in bringing the process and the relevant documents to the notice of the persons to be served given the provision of the link to the data room is, in some ways, akin to an envelope or package containing documents, and the access code or password to use on that link is akin to the method by which the envelope or package can be opened. The combination of the link and the access code will provide ready access to the documents.

---

<sup>3</sup> [2018] EWHC 2230 (Comm)

Having said that, the Court stressed that the innovative method of service should be or remain authorised by the Court on each occasion and any first occasion of service on any defendant or third party should be affected by another Court approved method<sup>4</sup>, before an alternative is mooted. Further, such a method might not be suitable for some individuals for whom technology would be a hurdle rather than an aid.

### The trend and considerations of using innovation modes of service

In line with the underlying objectives in the RHC to increase cost-effectiveness and promote procedural economy, as shown in the Decision, the Hong Kong courts nowadays seem to be more ready to allow alternative modes of service. In

recent years, the methods of service by fax<sup>5</sup>, email, WhatsApp Messenger and Facebook Messenger<sup>6</sup> have been approved by the courts. However, when considering whether an alternative mode is justified, the courts need to be satisfied that good service could still be effected in the particular circumstances. For instance, some instant messengers such as WhatsApp have the feature of showing the sender of a message when the message has been sent to the addressee, and when it has been read by the addressee. This would give the Court some comfort that the process and documents would be effectively brought to the attention of those to be served. However, the Court also reminds us that there is no 'one size fits all' approach as the use of modern technology in service might not be suitable for everyone.



**Wynne Mok**

**Partner**

T +852 2901 7201

E [wynne.mok@slaughterandmay.com](mailto:wynne.mok@slaughterandmay.com)



**Jason Cheng**

**Associate**

T +852 2901 7211

E [jason.cheng@slaughterandmay.com](mailto:jason.cheng@slaughterandmay.com)

© Slaughter and May 2020

**This material is for general information only and is not intended to provide legal advice. For further information, please speak to your usual Slaughter and May contact.**

---

<sup>4</sup> In this case, service by post and email are the methods approved by the Court.

<sup>5</sup> See *AXA China Region Insurance Co Ltd v Leong Fong Cheng* [2016] HKEC 2327.

<sup>6</sup> See also *Gray v Hurley* [2019] EWHC 1636 (QB) in which the English court permitted the use of WhatsApp Messenger to serve a claim form to the defendant.