

## SUPREME COURT OF SINGAPORE

5 October 2018

### Case summary

*BNP Paribas SA v Jacob Agam and another [2018] SGCA(I) 07*  
*Civil Appeal No 224 of 2017 (Summons No 64 of 2018)*

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### Decision of the Court of Appeal (delivered by David Edmond Neuberger IJ):

**Outcome:** CoA held that an appeal is deemed withdrawn pursuant to O 57 r 9(4) of the Rules of Court as a result of non-compliance with O 57 r 9(1).

### The material facts

1 BNP Paribas SA (“the Bank”) is the substituted plaintiff in a suit against Mr Jacob Agam (“Mr Agam”) and Ms Ruth Agam (“Ms Agam”) (collectively, “the Agams”) in the Singapore International Commercial Court (“SICC”). On 17 November 2017, a three-judge coram of the SICC delivered judgment in favour of the Bank (“the Judgment”).

2 In December 2017, after receiving correspondence from the Agams indicating an intention to appeal against the Judgment, the Registry stated that it was willing to assist the Agams in the recording of their Notice of Appeal subject to terms and limitations, including that the responsibility for filing all future documents in the appeal would rest on the Agams. The Agams duly acknowledged and the Registry subsequently confirmed that it had recorded the Agams’ Notice of Appeal in the court’s electronic filing system.

3 In January 2018, the Registry sent a notice to the Agams stating that the Record of Proceedings was available for collection. The notice also identified the obligations with which the parties to an appeal are required to comply and the consequences of non-compliance. The Agams’ attention was drawn specifically to O 57 rr 9(1) and 9(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“ROC”). Order 57 r 9(1) requires the appellant to file and serve a copy of the Record of Appeal, the Appellant’s Case, and the Core Bundle of documents (collectively, “the Appeal Documents”) within two months after the service of the Registry’s notice. Order 57 r 9(4) provides that where an appellant omits to comply with O 57 r 9(1), the appeal “shall be deemed to have been withdrawn, but nothing in this Rule shall be deemed to limit or restrict the powers of extending time conferred upon the Court of Appeal.”

4 In March 2018, Mr Agam e-mailed the Registry, on behalf of Ms Agam and himself, a draft Summons seeking an extension of time to file the Appeal Documents (“the Purported EOT Application”). The supporting affidavit stated, as one reason for the application, that according to the Registry’s letter in January 2018, the Appeal Documents must be filed and served within two months failing which the appeal would be deemed to have been withdrawn. The Registry informed Mr Agam that the application would only be processed when it has been filed in accordance with the prescribed procedure for filing through nominated filing agents. The Agams did not eventually file the application.

5 Subsequently, Mr Agam sent an e-mail to the Registry attaching a 466-page document entitled “Appellant’s Case” which he requested to be filed on his and Ms Agam’s behalf. The Registry stated that this did not accord with the prescribed procedure. The Registry further stated that although the two-month timeline for the filing of the Appeal Documents had passed,

a final extension until 24 April 2018 to comply with O 57 r 9(1) of the ROC had been granted by the Court of Appeal. The Appellant's Case was eventually filed on 3 May 2018 and backdated to 24 April 2018, without prejudice to the Bank's right to object to the backdating.

6 On 8 May 2018, the Bank wrote in by letter to object to the acceptance and backdating of the Appellant's Case, stating that pursuant to O 57 r 9(4) of the ROC, the appeal should have been deemed withdrawn. The Court of Appeal directed that the Bank make a formal application in this regard, with the Agams having a right to respond by affidavit and submissions, within prescribed timelines for both parties. The Bank duly filed an application for a declaration that the Agams' appeal be deemed to have been withdrawn ("the Application"). However, subsequently, the Agams stated that they could not comply with the prescribed timelines on their part as the Bank had not served the Application on them. The Court of Appeal granted the Agams an extension of time and directed the Bank to file an Affidavit of Service addressing all the issues concerning the service of the Application.

7 Mr Agam subsequently confirmed that he had been served the Application, but stated that Ms Agam had not been served as of 11 June 2018. The Agams did not attend the hearing before the Court of Appeal on 6 July 2018, whether in person, by representation, or through video-conference as they had requested.

8 The issues for consideration by the Court of Appeal were: (a) whether the Application had been properly served on both of the Agams; (b) whether the Application should be allowed such that the appeal is deemed to have been withdrawn; and (c) the appropriate order as to costs and direction as to payment out of the security for costs.

### **Decision on appeal**

9 The Application was allowed. The Court of Appeal granted a declaration that the Agams' appeal is deemed to have been withdrawn pursuant to O 57 r 9(4) of the ROC. The Bank's costs of the Application were to be paid on an indemnity basis by the Agams, jointly and severally, to be taxed if the parties are unable to reach agreement within 14 days from the date of this judgment. No order was made as to the costs of the appeal. The money paid into court by the Agams as security for costs of the appeal was to be used to satisfy the Bank's costs of the Application, before the balance was to be repaid to the Agams.

### **Reasons for the judgment**

10 There was a strong case for saying that, if an appellant failed to comply with O 57 r 9(1) of the ROC, then, without any application having to be made by any party, the effect of O 57 r 9(4) is that the appeal is automatically treated as withdrawn (at [55]). However, it would not be right to decide the Application on this ground because, amongst other reasons, the point had not been expressly argued or examined by the parties (at [56]).

11 The general rules in the ROC relating to the service of non-originating processes in a non-SICC context governed the service of the Application in the present case (at [61]).

12 So far as Mr Agam was concerned, he had accepted in his correspondence dated 29 May 2018 that he had received proper service of the Application and raised no further objections in this regard (at [66]).

13 As for Ms Agam, she was properly served the Application in three ways. First, it was overwhelmingly likely that Ms Agam had actual notice of the Application on or shortly after

29 May 2018, on the basis that notice to Mr Agam as to the Application should be considered notice to Ms Agam of the same since Mr Agam was acting for himself and as Ms Agam’s agent in the proceedings (at [71]). Second, the Application was sent to an address which Ms Agam herself had stated as her address in the Notice of Appeal. This must be considered her “proper address” within the meaning of O 62 r 6(2), and in any event her “usual or last known address” under O 62 r 6(2)(b) of the ROC. Accordingly, in the absence of contrary evidence, Ms Agam was properly served with the Application by 5 June 2018 which was the date that the postage receipt of the registered post sent to her stated address was signed (at [72] and [73]). Third, under O 62 r 6(1)(b) of the ROC, read with the presumption in s 2(5) of the Interpretation Act (Cap 1, 2002 Rev Ed), service by posting to Ms Agam’s stated address was deemed to be effected at the time at which the letter would be delivered in the ordinary course of posting, which was on or around 30 May 2018 (at [75]).

14 The Agams’ non-compliance with O 57 r 9(1) of the ROC would without more warrant their appeal against the Judgment being deemed to have been withdrawn pursuant to O 57 r 9(4) (at [90]).

15 This was not a case where an extension of time should be granted for the Agams to comply with O 57 r 9(1) of the ROC, in the light of the combined effect of a number of different factors (at [91]). Amongst other reasons, the Agams did not file any application for an extension of time, the extent of non-compliance in this case was egregious, and the Court of Appeal had already granted them a final extension of time to file and serve the Appeal Documents (at [92]–[97]).

16 Although the Agams were litigants in person, an indulgence in respect of their compliance with procedural obligations was inappropriate on the facts. Amongst other reasons, the relevant rules were plain and factual, and the Agams’ supporting affidavit in the Purported EOT Application showed that they in fact understood the consequences of non-compliance with O 57 r 9(1). The Agams were also legally and commercially savvy (at [105]).

17 Having regard to the clauses providing for indemnity costs in the guarantees which were the subject of the suit between the Bank and the Agams, it was appropriate that costs of the Application be paid by the Agams jointly and severally to the Bank on an indemnity basis (at [110]).

18 It would be right to accede to the Bank’s request for money paid into court by the Agams as security for the costs of the appeal to be used to satisfy the costs order in respect of this Application before the balance, if any, was returned to the Agams. This was so taking into account the Bank’s right to have the costs order satisfied without undue delay, the Agams’ persistent unwillingness to cooperate in these proceedings and to comply with court orders, and the likely difficulty of a practical enforcement of the costs order otherwise (at [114]).

*This summary is provided to assist in the understanding of the Court’s grounds of decision. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court’s grounds of decision.*