Mitora Pte Ltd *v* Agritrade International (Pte) Ltd
[2013] SGCA 38

Case Number : Civil Appeal Nos 85 and 86 of 2012
Decision Date : 03 July 2013
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; V K Rajah JA; Tan Lee Meng J
Counsel Name(s) : Peter Madhavan and Walter Ferix Justine (Joseph Tan Jude Benny LLP) for the appellant; Kelly Yap and Morgan Chng (Oon & Bazul LLP) for the respondent.
Parties : Mitora Pte Ltd — Agritrade International (Pte) Ltd

CIVIL PROCEDURE

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 178.]

3 July 2013 Appeal allowed.

Introduction

1 These appeals related to the Appellant's breach of two "unless orders" which resulted in the striking out of its Statement of Claim despite its belated and clumsy efforts at compliance.

2 Mitora Pte Ltd ("the Appellant"), was a company incorporated in Singapore providing business and management consultancy services. In late 2009 the Appellant's director, Mr Andreas Thanos ("Mr Thanos"), met with one Mr Takeshi Sawanobori ("Mr Takeshi"), the managing director of Senamas Far East Inc ("Senamas"), through mutual associates. [note: 1] Senamas was incorporated in Japan (*circa* March 2005) and operates out of Tokyo. [note: 2] Broadly, it provides consultancy services to companies involved in the development of coal resources. According to Mr Takeshi, however, Senamas was set up primarily to provide consulting services to Agritrade International (Pte) Ltd ("the Respondent"). This arrangement purportedly arose out of discussions between Mr Takeshi and the Respondent's director, Mr Ng Say Pek ("Mr Ng"). [note: 3]

3 Mr Thanos was informed by Mr Takeshi that Senamas was having difficulty enforcing a debt against the Respondent. They decided that they could work together. "To keep matters simple" – a phrase made ironic by the proceedings which led to this appeal – it was agreed that Senamas would assign its debt against the Respondent to the Appellant. [note: 4] A deed of assignment was entered into on 9 April 2010 ("Deed of Assignment") in consideration of US$100,000. [note: 5]

4 The Respondent was a company incorporated in Singapore and engaged in the business of, *inter alia*, coal trading. [note: 6] In a consultancy agreement with Senamas dated either 3 March 2005 or 5 March 2005 ("the Consultant Agreement"), the Respondent appointed Senamas as a consultant in the development of the Respondent's coal mines in the Republic of Indonesia. Senamas was also to act as the Respondent's exclusive agent to develop and market the Respondent's coal to Japan and Korea. [note: 7] The Appellant asserted that the Consultant Agreement provided that: [note: 8]

(a) the Respondent was to pay Senamas a commitment fee of US$50,000 per year starting

1 April 2005 up to April 2009; and

(b) the Respondent was to pay Senamas a monthly consultancy fee of US$12,500 on the first of each month starting from April 2005.

5 The Appellant's main suit [note: 9] was founded on a sum of US$625,000 which purportedly remained unpaid to Senamas under the the Consultant Agreement. [note: 10] It claimed that the Respondent ceased performance of its payment obligations after September 2007. [note: 11]

6 The Respondent denied that the Consultant Agreement consisted of any commitment fee, and further argued that the Consultant Agreement had been terminated in or around September 2008. [note: 12] A counterclaim was also advanced on the basis that Senamas had breached its obligations as the Respondent's exclusive agent in Japan by providing consultancy services to other companies. [note: 13]

Background to the appeal

7 The Appellant commenced its action on 22 July 2010. [note: 14] The first List of Documents and Affidavit verifying the same were filed on 31 March 2011. On 9 May 2011 the Respondent filed an application for discovery in Summons No 1960 of 2011 ("SUM 1960/2011") which was heard before Assistant Registrar ("AR") Sngeetha Devi. [note: 15] The application was granted on 26 May 2011 and the Appellant was ordered to file and serve a Supplementary List of Documents by 10 June 2011, disclosing the following eight categories of documents ("the 26 May 2011 Order"):

(a) all documents, including but not limited to correspondence exchanged between Mr Takeshi and/or Senamas and the Respondent, payment vouchers, invoices and receipts, in relation to Senamas' and/or Mr Takeshi's visits to Indonesia;

(b) all correspondence exchanged between Mr Takeshi and/or Senamas and the Respondent and/or Taiheyo Cement Corporation in relation to the shipment on board "MV Clipper Lagoon";

(c) all correspondence between Mr Takeshi and/or Senamas and a further list of companies in relation to the promotion of the sale of the Respondent's coal to the Japanese/Korean market;

(d) all correspondence exchanged between Mr Takeshi and/or Senamas and JFE Trading Co Ltd between 2005 to 2010, including but not limited to e-mail, letters, faxes, SMS and communications sent via Instant Messaging Clients;

(e) Senamas' income tax statements for the years 2005 to 2010;

(f) Senamas' monthly bank statements from April 2005 to April 2010;

(g) Senamas' financial statements for the years 2005 to 2010, including but not limited to their financial reports, audited accounts, balance sheets and profit and loss statements; and

(h) all documents evidencing the incorporation of Senamas, including but not limited to the Memorandum and Articles of Association.

8 On 15 June 2011, AR Terence Tan granted an "unless order" which required the Appellant to

comply with the 26 May 2011 Order by 20 June 2011 ("the first Unless Order"). [note: 16] On 20 June 2011 the Appellant filed the first Supplementary List of Documents which disclosed 290 documents pertaining to the documents and correspondence adumbrated from (a) to (d) above. In relation to the income tax statements, monthly bank statements, financial statements and Certificate of Incorporation, the Appellant filed Summons No 2680 of 2011 ("SUM 2680/2011") seeking both an extension of time and a variation of the 26 May 2011 Order so that these documents need not be disclosed.

9 SUM 2680/2011 was heard by AR Lim Jian Yi who granted the Appellant a final extension of time to 4 July 2011 but preserved the extent of the discovery obligations stipulated in the 26 May 2011 Order ("the second Unless Order"). [note: 17] On the same day that the second Unless Order was granted, the Appellant filed a second Supplementary List of Documents which consisted of 490 items. [note: 18] These included Senamas' Certificate of Origin (item 356) and its Memorandum and Articles of Association (item 444). However, the Appellant did not disclose any further documents until after the final deadline of 4 July 2011 had elapsed.

10 Instead, the Appellant filed Summons No 2997 of 2011 ("SUM 2997/2011") to strike out the Respondent's counterclaim on 8 July 2011. The Respondent retaliated with its own striking out application (Summons No 3159 of 2011 ("SUM 3159/2011")). These applications were fixed before AR Shaun Leong ("AR Leong"). The first hearing was adjourned to allow the Appellant to file reply affidavits by 10 August 2011. On 10 August 2011, however, the Appellant filed its third Supplementary List of Documents, disclosing Senemas' financial statements from March 2005 to April 2009; tax payments from March 2005 to April 2009; the passbook for Senamas' Mitsui Sumitomo Banking Corporation Account; and text messages from Mr Takeshi. [note: 19]

11 At the re-fixed hearing on 31 August 2011, counsel for the Respondent made an oral application for the third Supplementary List of Documents to be struck out as no extension of time had been granted to file it. [note: 20] The hearing was then adjourned to 20 September 2011. On 14 September 2011 the Appellant filed its fourth Supplementary List of Documents disclosing Senamas' Accounts from 1 April 2010 to 31 March 2011 and a Certificate of Existence. [note: 21] It also filed Summons No 4115 of 2011 ("SUM 4115/2011") seeking an extension of time to comply with the first and second Unless Orders.

12 AR Leong gave judgment in favour of the Respondent on 6 October 2011, dismissing SUM 2997/2011 and granting SUM 3159/2011 in terms. Accordingly, SUM 4115/2011 was also dismissed and both the third and fourth Supplementary Lists of Documents were struck out for being an abuse of process. [note: 22]

The decision below

13 The Appellant filed three Notices of Appeal on 10 October 2011:

(a) Registrar's Appeal No 321 of 2011 ("RA 321/2011"), against the dismissal of the Appellant's application to strike out the Respondent's counterclaim (SUM 2997/2011);

(b) Registrar's Appeal No 322 of 2011 ("RA 322/2011"), against the decision to allow the Respondent's application to strike out the Appellant's Statement of Claim (SUM 3159/2011); and

(c) Registrar's Appeal No 323 of 2011 ("RA 323/2011") against the dismissal of the Appellant's application for an extension of time to file its third and fourth Supplementary List of Documents

(SUM 4115/2011).

14 At the first hearing before the Judge, on 4 April 2012, two categories of documents remained ostensibly undisclosed – Senamas' income tax statements from May 2009 to 2010 and financial statements from May 2009 to 2010. The Appellant was given time to furnish these documents "[a]s a final opportunity to redeem itself" (*Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2012] SGHC 178 at [4]). It should be noted, however, that both the financial statements from April 2009 to March 2010 and the income tax statements from May 2009 to 2010 had already been included in the Plaintiff's Bundle of Documents for the 4 April 2012 hearing.

15 The Appellant then filed an affidavit on 9 May 2012 which contained Senamas' income tax statements from 1 April 2009 to 31 March 2011 along with letters certifying that they had been translated from Japanese to English. However, only the English translated versions were exhibited. [note: 23] At the resumed hearing on 16 May 2012 it was clarified that the financial statements from April 2009 to March 2010 had already been provided, but could not be filed as a Supplementary List of Documents when the Appellant's new solicitors took over. [note: 24]

16 The judge below ("the Judge") then granted a second adjournment to 23 May 2012 for the Appellant to file all documents required. The Appellant provided all the remaining documents, including translations, to the Respondent in a letter on 18 May 2012. [note: 25]

17 At the third hearing before the Judge, however, the Respondent sought leave to amend its submissions to include two new arguments – first, that the Appellant had only disclosed Senamas' bank passbooks (see [22] below) and not its monthly bank statements, which was unsatisfactory because the passbooks might not have been updated; second, that the Mitsui Sumitomo Bank passbook only covered the period from March 2007 to October 2008 and not from April 2005 to April 2010 as ordered. The Judge gave the Respondent leave to amend its submissions and granted the Appellant the right to a short reply.

18 On 25 June 2012 the Judge granted the Appellant's application to withdraw RA 321/2011 and dismissed RA 322/2011 and RA 323/2011. The latter dismissals gave rise to the two appeals which were heard on 6 February 2013.

19 We allowed the appeals and now provide our reasons.

Identifying the tipping point in the decision below

20 In dismissing RA 322/2011 and RA 323/2011, the Judge was apparently unconvinced that there were extraneous circumstances which prevented the Appellant from complying with the court orders. The Judge was of the view that the Appellant should have taken steps to enforce its rights under the Deed of Assignment against Mr Takeshi, who was obliged to assist the Appellant in enforcing the debt. [note: 26] Further, it was thought that the Appellant's proffered excuses of inadvertence and misunderstanding were simply too feeble to justify its repeated failure to comply.

21 However, the Judge granted two adjournments for the Appellant to file all the necessary documents. This suggested a favourable disposition towards the Appellant up to the point of the third hearing. It was also evident from the record that the Appellant did substantively comply with all its discovery obligations by 18 May 2012. Indeed, by the time of the *first* hearing of the RAs all the documents which had been requested for had been disclosed in some form, whether in the Supplementary List of Documents (which had been struck out) or in the Plaintiff's Bundle of

Documents for the appeals. The Appellant's new solicitors also took great pains to confirm with their counterparts that its discovery obligations had been fully complied with. [note: 27] Had the Respondent's solicitors confirmed the same, there was every indication that the Judge would have allowed RA 322/2011. However, the Respondents replied on the day before the third hearing to express, *without elaboration*, the objection that the Appellant had yet to fully comply with para 1(f) of the 26 May 2011 Order. [note: 28] At the third hearing before the Judge the Respondent then sought leave to amend its submissions and introduce a new contention that the passbooks did not suffice as 'monthly bank statements'. It was expressly acknowledged that this contention had not been raised below. [note: 29]

22 It is important to emphasise how late in the day this novel objection was introduced. The passbook for the Tokyo Mitsubishi account was disclosed in the second Supplementary List of Documents on 29 June 2011. The passbook for the Mitsui Sumitomo account was disclosed on 10 August 2011, in the third Supplementary List of Documents – although the Appellant claimed that it had in fact been included in the second Supplementary List of Documents but had not been separately sighted. [note: 30] The first indication that the Respondent was dissatisfied with the passbooks therefore materialised some nine months after the Respondent had had sight of them. During this time, the Respondent had five opportunities to bring its objection before the court – there were three hearings before AR Leong and two before the Judge.

23 It is equally significant that the objection changed the very complexion of the Respondent's motion to strike out the Appellant's Statement of Claim. Up to the commencement of the very last hearing before the Judge, the Respondent's position had been that disclosure was *incomplete*, not *inadequate*. The objection was also raised at a juncture where the Appellant, having already tested the patience of the court, could not realistically have asked for further adjournments. The sufficiency of the bank passbooks was therefore left as a matter for written submissions, when it effectively constituted a separate basis for striking out against which the Appellant should have had the full opportunity to furnish a defence.

24 The significance of the Respondent's *volte-face* is well-captured by the exposition offered in Paul Matthews and Hodge M Malek, *Disclosure* (Sweet & Maxwell, 4th Ed, 2012) ("*Disclosure*") at para 17.04:

> In relation to applications arising out of a failure to comply with an order, practice direction or rule relating to disclosure, it will depend on the circumstances, including *the nature of the default*, as to whether or not evidence needs to be filed. Thus, *if there has been a failure to provide a list of documents, an affidavit (or witness statement) from the applicant will generally be unnecessary. If it is contended that the discovery provided is inadequate, then evidence will usually be appropriate*; such evidence should set out the history of the matter, identify the inadequacies in the disclosure provided and the defaults relied upon. *The party alleged to be in default will often need to file evidence*. [emphasis added]

Quite clearly, there were evidential implications arising from the Respondent's objection of inadequate disclosure which could not have been adequately addressed by submissions alone. These implications are a corollary of the qualitative assessment which must be undertaken when disclosure is alleged to be inadequate. The bare technical argument that bank passbooks are not 'monthly bank statements' cannot suffice to show that there was a substantive breach which resulted in prejudice to the Respondent's case.

25 As the matter panned out, the Judge dismissed the RAs after considering the amended written

submissions from both parties. Given that the Appellant had provided complete discovery of the requested documents by the third hearing, it was evident that the tipping point had been the novel objection introduced at the eleventh hour. Yet it seemed to us that there was little merit in the Respondent's argument as to the inadequacy of the bank passbooks, which amounted to little more than a formalistic declamation that monthly bank statements had been ordered and only passbooks were disclosed. As the passbooks covered the same period of time, it could not be said that they were not an up-to-date representation of Senamas' bank accounts. Mr Takeshi also confirmed that the practice in Japan was for customers to rely on bank passbooks to keep track of their accounts and that there would be no gaps in the entries between updates. In addition, Mr Takeshi was unequivocal that Japanese banks simply did not issue monthly bank statements in the form requested by the Respondent. [note: 31] As such, the picture which emerged was that the RAs had been dismissed on account of the Appellant's failure to produce documents which circumstantially *did not exist*, even though an adequate substitute had been disclosed in their stead. With this in mind we were hard-pressed to uphold the striking out of the Appellant's Statement of Claim. It would not have been in the interests of justice for the Appellant's suit to have been stillborn due to a false-positive diagnosis of evidential deficiency.

26 It would be apposite at this point to include further observations as to counsel's duty to take up all objections at the right time. In the present case the timing and manner of the Respondent's belated objection resulted in the Appellant's Statement of Claim being struck out on a technicality. It is precisely to avoid such disproportionate and circumstantially-driven outcomes that parties should take up all points at the right time. The same reasons which underpin the species of *res judicata* based on abuse of process come to mind. The *locus classicus* of this doctrine is found in the decision of Sir James Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313 (*id* at 115; 319):

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

27 The doctrine now has a firm place in the canon of English law (see the decisions of the Court of Appeal in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 and the House of Lords in *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 529). It has been acknowledged by this court in *Lee Hiok Tng and another v Lee Hiok Tng* [2001] 1 SLR(R) 771 at [24]–[26] and *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 at [58], and applied in *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565 at [62]–[65]. The considerations which go to such an abuse of process are succinctly set out in the decision of Sundaresh Menon JC (as he then was) in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [53]:

> To put it shortly, a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance *is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are* bona fide *reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special*

circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant. [emphasis added]

28 Turning to the circumstances of the present appeal, the late employment of the inadequate disclosure objection functioned – intentionally or otherwise – as an ambush on the Appellant after it had finally overcome the first level of obstacles. Counsel for the Respondent was unable to offer a better explanation than inadvertence in the face of voluminous disclosure as to why the objection had not been raised earlier when it had numerous opportunities to do so. The Respondent also conceded that it had had sight of the bank Passbooks for fully nine months before the objection was made. In consideration of these factors, the Appellant would have been thoroughly justified to complain that the belated introduction of inadequate disclosure as a basis for striking out was itself an abuse of process.

29 We would add that it is all the more incumbent upon the applicant for an 'unless order' to raise all its arguments at the earliest opportunity. An analogy can be drawn to applications for summary judgment under O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"), which also entails the peremptory foreclosure of a statement of claim or defence. In *Chun Thong Ping v Soh Kok Hong and another* [2003] 3 SLR(R) 204 ("*Chun Thong Ping*") at [10], Tay Yong Kwang J held that a plaintiff in an O 14 application cannot rely in an appeal on a new cause of action added after the matter was decided at first instance, as that would leave the defendant without an answer in his defence to the amended claim. This aspect of *Chun Thong Ping* was affirmed by Woo Bih Li J at [104] of *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2009] 1 SLR(R) 177, which was upheld by this court in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52. Where an applicant is seeking to strike out a statement of claim on the basis of a breach of an 'unless order', similar concerns arise. If, after an 'unless order' has been obtained, a separate breach of the original order of court is identified as the basis for the striking out application, the defendant would have been denied the opportunity to rectify that breach or to prove its *bona fides* in attempting to do so. This was effectively what transpired in the present case – the Respondent raised, at the eleventh hour, an entirely new breach of the 26 May 2011 Order after having relied on the default committed by incomplete disclosure as the basis for the first and second Unless Orders as well as its striking out application.

30 In the premises, we were of the view that the Respondent should not have been permitted to introduce a novel objection at such an advanced and irretrievable stage of proceedings, and should instead have had to file a fresh application to strike out the Appellant's Statement of Claim based on inadequate disclosure.

Procedural irregularities

31 A further point which appeared to have eluded the attention of the Appellant was that the documents referred to in the 26 May 2011 Order pertained principally to the Respondent's counterclaim rather than its defence in the main suit. As much was acknowledged by counsel for the Respondent in oral submissions before AR Leong on 31 August 2011: [note: 32]

> Mr Ooi said that they have provided a lot of documents, the point is that the undisclosed documents are significant. One of the pleaded position in the Counterclaim is that the Plaintiff

had acted in breach of an exclusive agency agreement, *one way to find out whether there was a breach is to look at the bank account statements*, *the income tax statements and the financial statements*, to show whether the Plaintiff had been earning an income in breach of the exclusive agency agreement. We had pleaded in the Counterclaim that there was at least one party which whom [*sic*] the Plaintiff was contracting with. An adverse inference should be drawn. [emphasis added]

32 It stands to reason that the Appellant's application to strike out the Respondent's counterclaim (SUM 2997/2011) should have been heard first. If the counterclaim had been struck off then the documents would no longer have to be disclosed. Equally, if the striking out application against the counterclaim had been dismissed, the court could then determine whether the documents contained in the third and fourth Supplementary List of Documents were relevant *in relation to the main suit*. If it transpired that the documents were irrelevant, there would have been no basis for the Respondent's application (SUM 3159/2011) to strike out the Appellant's Statement of Claim for breach of the first and second Unless Orders. On the other hand, if the documents had been relevant to the main suit then the Appellant's application for an extension of time (SUM 4115/2011) would have to be considered. In the premises, the three summonses were considered in tandem. This produced the irregular result wherein the Appellant's suit was peremptorily terminated without taking the third and fourth Supplementary Lists of Documents into account, whilst the application to strike out the Respondent's counterclaim was "consequently dismissed". [note: 33]

33 The irregularity was amplified by the fact that the Respondent's counterclaim might well have been directed against the *wrong party*. The Deed of Assignment between the Appellant and Senamas did not purport to transfer any of the latter's obligations or liabilities under the Consultant Agreement along with the debt. Clause 4 of the Deed of Assignment stated:

> 4. If and so far as is necessary for the purpose of this Assignment the Assignor shall do execute and/or perform all things necessary including appointment of the Assignee as the attorney of the Assignor *to demand sue for recover receive and give effectual discharge for the Debt hereby assigned or any part thereof*.
>
> [emphasis added]

34 On the face of the Deed of Assignment, therefore, the Appellant was *stricto sensu* a non-party to the Respondent's counterclaim. Be that as it may, the Appellant did not raise any protest to being designated as the defendant to the Respondent's counterclaim. Indeed, it had positively conducted itself as though it was the proper defendant to the counterclaim. Nevertheless, had the court realised that the counterclaim ought to have been directed at Senamas instead of the Appellant, it would have kept a clear distinction between the main suit and the counterclaim. In particular, it was important not to elide the two actions where a peremptory order was being sought for breach of discovery obligations which an assignee might find more difficult to fulfil.

Proportionality

35 It is self-evident that the breach of an 'unless order' will automatically trigger its specified adverse consequences (see Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 01.032). The onus will then be on the defaulting party to demonstrate that the breach had not been intentional and contumelious so as to avoid those consequences. The *locus classicus* for this proposition is traceable to Sir Nicolas Browne-Wilkinson VC's decision in *In re Jokai Tea Holdings* [1992] 1 WLR 1196 ("*In re Jokai Tea Holdings")* at 1203B*:*

> In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless" order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

36 The same criteria has been affirmed in the Singapore courts, notably by this court in *Syed Mohamed Abdul Muthaliff and another v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 ("*Syed Mohd*"). However, in *Syed Mohd* the judicial discretion to grant extensions of time was also emphasised by the interpolation that the 'intentional and contumelious' test was not exhaustive. The following exposition was offered at [14] of *Syed Mohd*:

> Whether or not the default was "intentional and contumelious" is not the sole criterion upon which the discretion of the court in deciding whether or not to strike out is exercised. ...
>
> The *crux of the matter is that the party seeking to escape the consequences of his default must show that he had made positive efforts to comply but was prevented from doing so by extraneous circumstances*.
>
> [emphasis added]

37 Indeed, even where it has been established that an intentional and contumelious breach of an 'unless order' had been committed, the court must nevertheless determine what sanction should be imposed as a result. In *In re Jokai Tea Holdings*, Parker LJ opined at 1206 that:

> I have used the expression "so heinous" because it appears to me that there must be degrees of appropriate consequences even where the conduct of someone who has failed to comply with a penal order can properly be described as contumacious or contumelious or in deliberate disregard of the order, just as there are degrees of appropriate punishments for contempt of court by breach of an undertaking or injunction. Albeit deliberate, one deliberate breach may in the circumstances warrant no more than a fine, whilst another may in the circumstances warrant imprisonment.

38 The same passage was also cited with approval by this Court in *Syed Mohd* at [24], *en route* to over-turning the High Court's decision to uphold a striking-out order. It was also noted at [22] of *Syed Mohd* that in taking all circumstances of the case into account, the court must also include the prejudice suffered by the respondent.

39 The judicial philosophy espoused in these cases clearly reveals a tendency to be guided by considerations of proportionality in assessing breaches of 'unless orders'. The clearest expression of this approach can perhaps be found in *Teeni Enterprise Pte Ltd v Singco Pte Ltd* [2008] SGHC 115, wherein Chan Seng Onn J opined at [64]:

> Clearly, the court must balance the need to ensure compliance with court orders which are made to be adhered to and not ignored, and the need to ensure that a party would not be summarily deprived of its cause of action or have default judgment entered against it without any hearing of the merits especially when the non-compliance or breach, having regard to all the relevant circumstances, was not so serious or aggravating as to warrant such a severe consequence: see

Wellmix Organics (International) Pte Ltd v Lau Yu Man [2006] 2 SLR 117 at [4]. The discretionary power to enforce the unless order according to its strict terms must therefore be exercised judiciously and cautiously after carefully weighing everything in the balance.

40 We were inclined to agree with these observations and noted that they were in line with the guidance of Auld LJ in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 ("*Hytec*") at 1677, which was also cited in *Syed Mohd* at [14]:

> [T]here is no need to confine the test to that of an intentional disregard of a court's peremptory order, whether or not it is characterised as flouting, contumelious, contumacious, perverse, obstinate or otherwise. Such an intent may be the most usual circumstances giving rise to the exercise of this jurisdiction. But failure to comply with one or a number of orders through negligence, incompetence or sheer indolence could equally qualify for its exercise. It all depends on the individual circumstances and the existence and the degree of fault found by the court after hearing representations to the contrary by the party whose pleading it is sought to strike out.

41 In the present case, there was a need to balance the Appellant's repeated non-compliance up to 31 August 2011 – which militated against any exercise of judicial leniency – and the plain fact that all the documents for which discovery had been sought, and which were within the Appellant's possession, power or control, had subsequently been disclosed. It appears that the Judge below had thought that the balance should have been struck in the Appellant's favour until the amended submissions tipped the scales. We also noted that the Respondent did not suffer from any irremediable prejudice due to the delay in the disclosure of documents. Its counterclaim remains intact and as the documents sought did not have a clear connection to the Respondent's defence in the main suit, we did not think that the Respondent's legal position would have been compromised should both matters proceed to trial. This had to be balanced together with the fact that the Appellant, as the assignee of the debt, was hamstrung by extraneous circumstances due to Mr Takeshi's initial resistance to disclosing the documents, and that this obstacle appeared to have been removed by the time of the appeal before us. All things considered, we did not think that it was proportionate for the Appellant's Statement of Claim to be struck out owing to its earlier breaches of 'unless orders'.

The juridical function of 'unless orders'

42 We pause here to note that 'unless orders' remain a potent tool for the efficient and prompt administration of justice. It is axiomatic that this is indispensable to the practical realisation of the rule of law. As Auld LJ observed in *Hytec* at 1674–1675:

> Because it is his last chance, a failure to comply will ordinarily result in the sanction being imposed. ... This sanction is *a necessary forensic weapon which the broader interests of the administration of justice require to be deployed* unless the most compelling reason is advanced to exempt his failure. ... The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two. [emphasis added]

43 The English Court of Appeal has also reiterated the same point more recently in *Marcan Shipping (London) Ltd v Kefalas* [2007] 1 WLR 1864 ("*Marcan Shipping*"). At [36] of Moore-Bick LJ's judgment, there is a succinct summation of the practical approach to be taken by the courts which also acknowledges that the effectiveness of 'unless orders' cuts both ways:

> [B]efore making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge *should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case*. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the ***most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified*** . I find it difficult to imagine circumstances in which such an order could properly be made for what were described in *Keen Phillips v Field* as "good housekeeping purposes". [emphasis added in bold italics]

44 It is precisely because of the potency of "unless orders" that they must be used with due care. As much as the coercive powers of the court are needed to deter recalcitrant breaches of process, routine use of "unless orders" would be the forensic equivalent of using a sledgehammer to crack a walnut. Further, the efficient *administration* of the law does not constitute an end unto itself and ought not to compromise the very tenets of justice and fairness which it is meant to serve. In this regard the guidance of Collins MR in *In re Coles and Ravenshear* [1907] 1 KB 1 at 4 remains as relevant as ever:

> Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.

45 It repays reminding that the immediate purpose of an "unless order" is not to punish misconduct but to secure a fair trial in accordance with due process of law (see also *Disclosure* at para 17.05). Since it is axiomatic that "unless orders" must mean what they say, it is imperative that such orders are drafted with due care and consideration. This point is well-made in *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2nd Ed, 2003) at para 10.143:

> If unless orders are to be effective in securing timely compliance they must, first, be used sparingly, as has just been suggested. Second, unless orders will tend to be taken seriously only if the parties believe that they would be enforced. The wise counsel that one should not make threats that one cannot carry out, or mean to do so, applies to court orders with even greater poignancy. Idle threats would diminish the authority of the court and undermine the normative force of rules and court orders. It follows that *a court should not stipulate consequences that would infringe the right to fair trial or would be otherwise unjust*. *Put differently, an unless order should only stipulate consequences that it would be proper, on the basis of the information then available, to visit on the defaulter*. [emphasis added]

With all of the foregoing points in mind, we would suggest the following guidelines for the more scrupulous use of "unless orders":

> (a) "unless orders" stipulating the consequence of dismissal should not be given as a matter of course but as a last resort when the defaulter's conduct is inexcusable;
>
> (b) the conditions appended to 'unless orders' should as far as possible be tailored to the prejudice which would be suffered should there be non-compliance; and
>
> (c) other means of penalising contumelious or persistent breaches are available, including but

not limited to

(i) awarding costs on an indemnity basis;

(ii) ordering the payment of the plaintiff's claim or part thereof into court where the defaulting party is a defendant (see *Husband's of Marchwood Ltd v Drummond Walker Developments Ltd* [1975] 1 WLR 603 at 605);

(iii) striking out relevant portions of the defaulting party's Statement of Claim or Defence rather than the whole;

(iv) barring the defaulting party from adducing certain classes of evidence or calling related witnesses; and

(v) raising adverse inferences against the defaulting party at trial.

46 In this regard, the draconian sanction of striking out a litigant's claim or defence in its entirety should not be the default consequence of an "unless order" as it would effectively deprive the litigant of its *substantive* rights on account of a *procedural* fault. The public interest in the timely delivery of justice does not necessitate all "unless orders" to carry a nuclear payload. Indeed, the indiscriminate issuance of such heavy-handed orders will undermine their enforceability and thereby also their core function of deterrence. There is also a serious risk that the fair administration of justice will be frustrated if "unless orders" become a quotidian feature of civil litigation. Interlocutory procedure will begin to resemble a strategic game of brinksmanship when profligate use of peremptory orders is accompanied with ever shorter time-lines for compliance. In the instant appeal we were concerned that the time given for compliance with the first and second Unless Orders – five days including the weekend – was rather short given that the Appellant did not have direct access to the subject documents. The early availability of "unless orders" allowed the Respondent to rapidly compound the weaknesses in the Appellant's position and to push home its advantage with alacrity. While the Respondent was not entirely without fault, we thought that the precipitous foreclosure of its procedural options was startling.

47 Finally, we do not think that the more calibrated use of "unless orders" would be translated into a charter for delay, as litigants who commit process breaches will continue to be penalised and remain vulnerable to the ultimate sanction of a striking out order. It also remains the case that under O 24 r 16(1) of the Rules of Court, an action or defence can be struck out for failure to make discovery of documents even if the defaulting party rectifies his non-compliance. The court's power to strike out an action may be properly invoked in cases involving an inexcusable breach of a significant procedural obligation. It follows that the breach of an "unless order" which compels discovery will be susceptible to such an order. This was the case in *Manilal and Sons (Pte) Ltd v Bhupendra K J Shan (trading as JB International)* [1989] 2 SLR(R) 603 (at [61]–[63]) and in *Tan Kok Ing v Ang Boon Aik and Others* [2002] SGHC 215 (at [30]), where the documents which were deliberately withheld in breach of "unless orders" pertained materially to the pleadings. In the latter case, Woo Bih Li JC (as he then was) commented at [36] that a failure to disclose need not be continuing before it is capable of attracting a remedial response from the courts, as this would create a moral hazard wherein a defaulter can "quickly offer to make disclosure once his deception has been discovered". Such concerns are both legitimate and genuine, and we would add that litigants who have demonstrably conducted themselves in this fashion are likely to conspire to sabotage a fair trial as well. For example, in *Lee Chang-Rung and others v Standard Chartered Bank* [2011] 1 SLR 337 (at [34]– 35]), Tay Yong Kwang J upheld the striking out of the plaintiffs' action for failure to comply with an "unless order" because their conduct did not suggest that they would take their discovery obligations

seriously and pursue their claim honestly and fairly.

48 It is clear beyond peradventure that the court is entitled to look at all circumstances in its assessment of whether the striking out application should be granted. Indeed, in exceptional circumstances, an action may be struck out even where there might still be a reasonable prospect of a fair trial, as acknowledged in GP Selvam, *Singapore Civil Procedure, Volume 1* (Sweet & Maxwell, 2013) at para 24/16/1:

> Although the normal prerequisite for the striking out of an action under r.16 is the existence of a real or substantial or serious risk that fair trial will no longer be possible, in cases of contumacious conduct, the deliberate destruction or suppression of a document or the persistent disregard of an order of production would engage the court's jurisdiction and justify a striking out order even where a fair trial was still possible ...

49 We would add that this general position is also mirrored in Australia, as set out in Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 9th Ed, 2011) at para 10.759:

> While the court has a wide power over the plaintiff's default, it is discretionary in nature. It strikes out a proceeding only where the plaintiff wilfully disregards obligations under the rules or where the circumstances show that a drastic order is indicated. In *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 the High Court held that incomplete discovery is a ground for ordering a new trial.

50 In the present case, we were convinced that a fair trial was eminently possible and that the Respondent's initial failings did not suffice to justify the striking out of its Statement of Claim.

Conclusion

51 At the conclusion of the hearing we allowed both appeals with no order of costs. Cost orders below were not disturbed.

[note: 1] 8th affidavit of Andreas Thanos at [13], Core Bundle Vol 2 at p36

[note: 2] Defence and Counterclaim dated 23 August 2010; Core Bundle Vol 2 at p7

[note: 3] *Ibid* at [13]; Core Bundle Vol 2 at p54

[note: 4] 8th affidavit of Andreas Thanos at [14], Core Bundle Vol 2 at p37

[note: 5] 8th affidavit of Andreas Thanos; Respondent's Supplemental Core Bundle at pp 30–32

[note: 6] See n1 *supra*

[note: 7] *Ibid* at [4]; Core Bundle Vol 2 at p8

[note: 8] Statement of Claim dated 22 July 2010; Core Bundle Vol 2 at p4

[note: 9] Suit No 535/2010

[note: 10] 1st Affidavit of Walter Ferix at p25; Record of Appeal Vol 3B at p74

[note: 11] *Ibid* at [3]; Core Bundle Vol 2 at pp4-5

[note: 12] Defence and Counterclaim dated 23 August 2010; Core Bundle Vol 2 at p12

[note: 13] *Ibid*; Core Bundle Vol 2 at pp14-15; Record of Appeal Vol 3A at p180

[note: 14] Core Bundle Vol 2 at pp4-6

[note: 15] See Record of Appeal Vol 3A pp48-50 for categories of documents requested

[note: 16] Record of Appeal Vol 2 at pp98-101

[note: 17] Core Bundle Vol 2 at pp19-22

[note: 18] Record of Appeal Vol 3A at pp121-123

[note: 19] Record of Appeal Vol 3A at pp297-298

[note: 20] Respondent's Supplemental Core Bundle at p60

[note: 21] Record of Appeal Vol 3A at pp293-294

[note: 22] Core Bundle Vol 1 at p5

[note: 23] Record of Appeal Vol 3B at pp312-315

[note: 24] See Minute Sheet for 16 May 2012

[note: 25] Core Bundle Vol 2 at pp165-168

[note: 26] Core Bundle Vol 1 at p11, Grounds of Decision at [6]

[note: 27] Core Bundle Vol 2 at pp165-170

[note: 28] *Ibid* at p172

[note: 29] See Minute Sheet dated 23 May 2012

[note: 30] See n1

[note: 31] Core Bundle Vol 2 at pp176-177

[note: 32] Respondent's Supplemental Core Bundle at pp60-61

[note: 33] Core Bundle Vol 1 at p5

Copyright © Government of Singapore.