Energy & Commodity Pte Ltd and others *v* BTS Tankers Pte Ltd

[2021] SGCA 76

Case Number	: Civil Appeal No 187 of 2020
Decision Date	: 05 August 2021
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JCA; Tay Yong Kwang JCA
Counsel Name(s)	: Lim Chee San (TanLim Partnership) for the appellants; Yap Yin Soon and Dorcas Seah Yi Hui (Allen & Gledhill LLP) for the respondent.
Parties	: Energy & Commodity Pte Ltd — Vu Xuan Thu — D&N Trading & Consultancy Limited — Dinh Thi Hoang Uyen — BTS Tankers Pte Ltd

Contempt Of Court – Civil contempt

Civil Procedure – Striking out

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2021] SGHC 58.]

5 August 2021

Andrew Phang Boon Leong JCA (delivering the grounds of decision of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *BTS Tankers Pte Ltd v Energy & Commodity Pte Ltd and others* [2021] SGHC 58 ("the GD").

2 The respondent's case below was that the second appellant and the companies he controlled – the first appellant ("ECPL") and the third appellant ("D&N") – acted in concert with persons in Vietnam to charter the respondent's vessel "BTS CHRISTINA" ("the Vessel") and smuggle oil into Vietnam. The Vietnamese authorities caught the relevant persons in Vietnam and sentenced them to imprisonment. The Vietnamese authorities also detained the Vessel for three years, which, according to the respondent, caused it substantial loss. Thus, in 2017, the respondent commenced HC/S 844/2017 ("Suit 844") against the appellants, to which the third appellant never entered an appearance. As against the fourth appellant, the respondent's case was that she, being the second appellant's wife, held certain assets that in fact belonged to the first and third appellants, including a condominium at Leonie Hill worth approximately S$900,000 ("the Leonie Property").

3 Throughout the proceedings below, the appellants failed to comply with numerous court orders directing them to make certain disclosures. In consequence, the Judge made two orders dated 27 October 2020. First, she ordered that the second and the fourth appellants be committed to prison for seven months and five months respectively, both for civil contempt ("the Committal Order"). Second, the Judge ordered that, failing compliance with their outstanding disclosure obligations, the appellants' defences were to be struck out and judgment was to be entered against them ("the Unless Order"). The latter order was breached, and judgment was entered in favour of the respondent on 17 November 2020. Before us, the appellants appealed against both orders. The Committal Order had been stayed pending the determination of this appeal. We dismissed the appeal and now set out the detailed grounds for our decision.

Facts

4 The Judge set out a detailed account of the facts concerning the appellants' conduct in the proceedings below. This is adequate for present purposes and we see no need for us to repeat the facts here, save to highlight the key events that underscore the egregious nature of the appellants' conduct.

5 Initially, only the second appellant entered an appearance in Suit 844 and filed what can reasonably be said to be a bare defence. ECPL subsequently entered an appearance two years later, while, as stated before, D&N never entered an appearance. Pursuant to a first discovery order, the second appellant only disclosed five items in his list of documents filed on 14 December 2017. As this was plainly insufficient, the respondent requested for 58 categories of documents focusing on exchanges between the second appellant, ECPL, D&N and the Vietnamese company known as "DDHP". The second appellant resisted and only drip-fed documents when pressed to disclose them. He did eventually file a supplemental list of documents on 26 January 2018 disclosing 27 items and a second supplemental list of documents on 30 April 2018 disclosing another five items. However, 19 of the documents disclosed in his first supplemental list of documents were repetitions from the respondent's own list of documents.

6 More importantly, what arose from the disclosures was that the dealings between the first three appellants and DDHP appeared not to be *bona fide*. The payment terms in ECPL's and D&N's sales contracts with DDHP did not correspond with the sums deposited into, for example, ECPL's bank account. The second appellant's cursory response was that he would "reserve the explanation … to a later stage". Moreover, the second appellant only disclosed 14 emails between ECPL, D&N and DDHP which he said represented the entirety of his written exchange with DDHP for the sale and purchase of millions of dollars' worth of cargo. His explanation was that he dealt with DDHP mainly via "oral communication" and that he did not need to give particulars about the said communication.

7 The respondent then obtained a first discovery order directing the first three appellants to disclose email databases, computer hard drives and handphones. This order also required disclosure of an OCBC account held by D&N ("the D&N OCBC Account"). The second appellant did not comply. He claimed that: (a) DDHP had not paid any monies to D&N and therefore the D&N OCBC Account did not need to be disclosed; (b) he lost the passwords to three of his five email addresses; (c) he did not use a computer or hard drive for his business as printing and typing was outsourced; and (d) he had discarded his phone. In the circumstances, the respondent obtained a second discovery order as regards the outsourcing of the second appellant's printing and typing. To this, the second appellant claimed that the outsourced documents were "not returned" to him or had been "discarded", and that the individual who he allegedly engaged to do his printing and typing had "left Singapore".

8 Fearing a potential dissipation of assets, the respondent obtained a first *Mareva* order which required the appellants to disclose all their assets. An application to set aside the first *Mareva* order was dismissed. The second appellant claimed that the first three appellants did not have assets and therefore did not make any disclosures. It was later revealed that the second appellant had sold his 1% share in the Leonie Property and all his shares in one TUTP Pte Ltd ("TUTP") (an asset listed in the first *Mareva* order) to his wife, the fourth appellant, during the course of Suit 844. This arrangement was complex and involved a power of attorney and declarations of trust, with the effect that the second appellant held the assets on trust for his wife. Once this came to light, the respondent obtained a second *Mareva* order against the fourth appellant on the basis that the purported asset transfers were void as fraudulent conveyances and that she held assets that belonged to the first three appellants. Her application to set aside the second *Mareva* order, in which she claimed to be a woman of substance, was dismissed.

9 The respondent then discovered that, throughout Suit 844, the second and fourth appellants in

truth were spending more than S$25,000 a month in support of their lifestyles. In response, the couple now claimed to be impecunious, asserting that it was the fourth appellant's mother, one "Ms Hoang", who had been financially supporting the family. However, Ms Hoang's bank balance would not have been sufficient to maintain the couple's standard of living for more than five months, and the couple's IRAS statements showed that they had claimed "Parent Relief" in respect of Ms Hoang. Given the foregoing, the respondent obtained a third discovery order in aid of the *Mareva* orders to uncover the true extent of the couple's wealth. Again, this proved to be futile.

10 When the respondent did eventually obtain the appellants' bank statements (including those of the D&N OCBC Account) directly from the banks, the statements showed that the second appellant was not impecunious. On the face of the evidence, up to US$250m had been flowing through the three bank accounts of ECPL, D&N and TUTP from 2016 to 2019. The D&N OCBC Account also received US$1.2m in deposits from what were claimed to be unknown and unrecorded sources. In the circumstances, the respondent applied for the Committal Order and the Unless Order.

11 In relation to the Committal Order, the Judge held that the respondent had discharged its burden of proving that the second and fourth appellants were in contempt of court (see the GD at [60]). The Judge found that, in this case, the couple's conduct could not be said to be the result of honest and reasonable failure to understand their discovery obligations (see the GD at [65]). This was not done once or twice but on multiple occasions. They had also maintained lies repeatedly (see the GD at [68]). Taking into account the circumstances, the second appellant was committed to seven months' imprisonment while the fourth appellant was committed to five months' imprisonment. In relation to the Unless Order, the Judge noted that it had been granted to give the appellants one last chance before their defences were to be struck out (see the GD at [82]–[83]). The guiding principle was proportionality, and the appellants – on whom the burden of proof lay – could not show that their breaches were not intentional and contumelious (see the GD at [84]).

Our decision

12 Before us, the appellants appealed against both orders on the basis that the orders had not been breached, that the sentences imposed were excessive, and that the Unless Order was a disproportionate sanction. We deal with these in turn.

13 On the issue of liability for civil contempt, we agree with the Judge that the respondent had established beyond reasonable doubt that the second and fourth appellants breached the Committal Order and the Unless Order. The Judge ensured that each and every alleged breach of a court order had been proven, and we therefore agree that every court order mentioned in the Committal Order had been breached. The appellants' bald assertions were insufficient to excuse them from their breaches of court orders (see the decision of this court in *Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1 ("*Mok Kah Hong*") at [112] and the GD at [75]). It should also be noted that D&N had no standing to appeal as it had failed to enter an appearance in Suit 844.

14 Before us, counsel for the appellants, Mr Lim Chee San ("Mr Lim"), sought to respond to the respondent's written submissions as well as skeletal arguments virtually paragraph by paragraph. However, even a moment's reflection would have revealed that the sum of Mr Lim's arguments amounted, in substance, to no more than the bare and bald assertions referred to in the preceding paragraph. Mr Lim sought to proffer, in particular, three arguments:

(a) The first was an allegation that the Judge had given the impression that she had pre-judged the matter.

(b) The second argument by Mr Lim was to the effect that the respondent had not called the second and fourth appellants in order to cross-examine them with regard to their respective accounts, thus denying them an opportunity to explain their positions.

(c) Finally, Mr Lim argued that the respondent had proceeded outside the scope of the statements made pursuant to O 52 r 2(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the O 52 Statements"). Specifically, Mr Lim argued that the O 52 Statements did not disclose certain breaches in relation to the third discovery order and the two *Mareva* orders.

15 We begin with the allegation that the Judge had "pre-judged or appeared to have pre-judged" arising from comments that were critical of the appellants. Although Mr Lim strenuously denied doing so, he was in effect arguing that the Judge's decision was tainted with apparent bias. This was a serious allegation (see the decision of this court in *BOI v BOJ* [2018] 2 SLR 1156 ("*BOI v BOJ*") at [141]), even if Mr Lim did not realise or agree, and we cautioned him against making such an argument lightly. Yet, he maintained what was an untenable distinction between an allegation of pre-judging and an allegation of apparent bias, and it was evident to us that he had not devoted adequate attention to the jurisprudence in this area of law. In any event, there was no basis for this argument to have been made, given that the Judge's comments came at the conclusion of the hearing, a point that Mr Lim had conveniently omitted. In fact, Mr Lim had in his bundle of documents reproduced the Judge's comments in isolation and devoid of context as it appeared on the final page of an eight-page minute sheet. This was an entirely unsatisfactory state of affairs as it had the tendency to mislead the court. Whilst it was the case that this was an *ex parte* application, it must nevertheless be reiterated that the Judge's observations were made at the conclusion of the hearing after receiving (and considering) detailed particulars in relation to the application (which she ultimately granted). It is questionable whether Mr Lim took seriously our word of caution in *BOI v BOJ* at [141], that "[s]hould such proceedings arise before the court in the future and be found to be unmeritorious, there may be serious consequences".

16 Secondly, Mr Lim pointed out that the second and fourth appellants had not been cross-examined on the veracity of the claims made in their affidavits. However, as counsel for the respondent, Mr Yap Yin Soon ("Mr Yap"), observed during oral submissions before us, cross-examination or interrogatories of the appellants would have been an exercise in futility. The appellants had already filed numerous affidavits in response to various queries raised by the respondent. It was clear quite early on that the couple lacked credibility, having already failed to address the contradictions in their case raised by the respondent. In cross-examination, the appellants would simply have regurgitated the version of events that they had set out in their affidavits or perhaps worse, possibly spin an even greater web of untruths. Either scenario would have been a manifest waste of time and resources, and the Judge eventually rejected the appellants' account as being baseless. Mr Yap noted that the Committal Order was indeed a measure of last resort and the decision to make the relevant application had been arrived at only after a meticulous and prolonged investigation into the matter, all of which had arisen because of the appellants' lies and lack of candour.

17 We now address the alleged deficiencies in the O 52 Statements. It is clear that the purpose of an O 52 statement is to give the person against whom committal proceedings are brought notice of the charges they are faced with (see the decision of this court in *Lee Shieh-Peen Clement and another v Ho Chin Nguang and others* [2010] 4 SLR 801 at [45], citing the Malaysian High Court decision of *Syarikat M Mohamed v Mahindapal Singh* [1991] 2 MLJ 112 at 114). On the other hand, "the purpose of the accompanying affidavit is for the applicant to verify the truth of the contents of the statement, and [it] is *not* meant to supplement the O 52 r 2(2) statement" [emphasis in original] (see *Mok Kah Hong* at [66]). In our view, however, the O 52 Statements were not defective and had

not been "supplemented" by the accompanying affidavit. The breaches alleged in the O 52 Statements were simply framed at a higher level of generality that did not detract from their clarity in the least; even then, a close perusal of these Statements will demonstrate that the particulars in these Statements were indeed both manifold as well as precise. For example, where the second appellant's O 52 statement charged that the second appellant had "[d]issipated assets subject to the 1st Mareva Order", the accompanying affidavit particularised the specific acts of dissipation, including, among other things, that "VXT had also diverted … a sum of SGD 16,251.68 … into VXT's personal UOB account instead of into ECPL's account". While the appellants argued that a specific charge of wrongfully diverting the said sum of S$16,251.68 had not been set out in the second appellant's O 52 Statement, in our judgment, the breaches in the O 52 Statements were framed at a sufficient degree of specificity, especially given the number of breaches. In the final analysis, sufficient notice had been provided. Indeed, the object of the O 52 Statements – of giving notice of the relevant charges – had been achieved, since the appellants responded by refuting each and every breach with particularity. They were well (indeed, more than well) aware of the specific charges that had been proffered against them.

18 We turn now to the sentences imposed on the second and fourth appellants – seven months' and five months' imprisonment, respectively. In our view, the sentences imposed were not excessive. This court in *Mok Kah Hong* at [104] provided the following guidance on the relevant factors to be taken into account when sentencing for contempt:

> 104 Prior to addressing the relevant facts in the present case, it is useful to first examine the factors that are typically relevant to sentencing in cases of contempt by disobedience. It appears that there are comparatively fewer cases dealing specifically with sentencing for contempt by disobedience, as opposed to contempt by interference. In David Eady & A T H Smith, *Arlidge, Eady & Smith on Contempt* (Sweet & Maxwell, 4th Ed, 2011), the learned authors (at para 14-11) referred to the English High Court decision of *Crystal Mews Ltd v Metterick* [2006] EWHC 3087 (Ch), where Lawrence Collins J had identified a number of relevant factors to be taken into account (at [13]):
>
> > The matters which I may take into account include these. First, whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy. Second, the extent to which the contemnor has acted under pressure. Third, whether the breach of the order was deliberate or unintentional. Fourth, the degree of culpability. Fifth, whether the contemnor has been placed in breach of the order by reason of the conduct of others. Sixth, whether the contemnor appreciates the seriousness of the deliberate breach. Seventh, whether the contemnor has co-operated.

19 All these factors operated against the second and fourth appellants here. The respondent had been prejudiced by the appellants' contempt as Suit 844 had dragged on for several years. There was no evidence that there were extraneous circumstances preventing the appellants from making the relevant disclosures, especially given the amount of time they had to act. They repeatedly acted in wanton disregard of their discovery obligations and lied to the court, as evinced by their ever-changing narratives. And while we accepted that the couple did in certain instances make disclosures, those were either made in disregard of the stipulated timelines or were paltry and against the spirit of the requested disclosures. The appellants did not cooperate and there was no indication that they appreciated the seriousness of these breaches. All things considered, the Judge's imposition of 7 months' imprisonment and 5 months' imprisonment respectively was warranted.

20 Finally, the appellants contended that the Unless Order had been granted in disregard of this court's decision in *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 ("*Mitora*") at

[35]–[41]. There, this court had set out criteria for when a court would exercise its power to strike out pleadings for breach of an "unless order":

> 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 Ltd* [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 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 overturning 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".

21 Contrary to the appellants' suggestion, we were of the view that the Judge's grant of the Unless Order was proportionate. As the Judge rightly pointed out, the "guiding principle was that of proportionality" (see the GD at [84]). The purpose of the Unless Order was to give the appellants a final opportunity to produce all relevant documents. Rather than to comply in full, the appellants chose to appeal. Given the appellants' intentional breaches of court orders, the prejudicial effect

these breaches had on the respondent, the appellants' constant lying, as well as the lack of any genuine attempt to comply, the Judge had in truth exhausted all other measures and there is every reason to think that the Unless Order was proportionate.

22 We note that in *Mitora*, this court held that it was not proportionate for the statement of claim there to be struck out owing to the appellant's earlier breaches of "unless orders" (see *Mitora* at [41]). However, we think that the facts of *Mitora* are distinguishable. In that case, the appellant there was hamstrung by extraneous circumstances which resulted in the delay. Those extraneous circumstances having been resolved by the time of the appeal, the appellant was able to subsequently comply. This being the case, there had been, in truth, no irremediable prejudice suffered by the respondent in *Mitora*. That is quite different from the present case, where Suit 844 had dragged on since 2017 and there was no credible explanation for the delays in disclosure. In the present context, the proportionality principle operated against the appellants.

23 For the reasons set out above, we dismissed the appeal and awarded costs of S$65,000 (all-in) to the respondent, with the usual consequential orders, this being a fair sum given the work that had been done by the respondent thus far. It should be noted that this sum was awarded on an indemnity basis. It bears repeating that the appellants' conduct in this case was egregious. By deliberately breaching court orders, maintaining lies, and wasting the court's time, the appellants could not seriously have expected any other outcome.