Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and Another
[2006] SGHC 105

Case Number : OS 1646/2004, NM 115/2005

Decision Date : 19 June 2006

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Oommen Mathew and Raj Mohan (Haq & Selvam) for the applicant/first defendant; Alvin Yeo SC, Tan Kay Kheng and Tan Hsiang Yue (Wong Partnership) for the respondents

Parties : Karaha Bodas Co LLC — Pertamina Energy Trading Ltd; Pertamina Energy Services Pte Ltd

Injunctions – Mareva injunction – Contempt proceedings for alleged breach of terms of order for Mareva injunction – Whether implied undertaking existing that information disclosed according to terms of Mareva injuction not to be used for collateral purpose – Whether breach of such undertaking amounting to frustration of operation of injunction and contempt of court by parties in breach

Legal Profession – Contempt of court – Contempt proceedings for alleged breach of terms of order for Mareva injunction – Whether solicitor may be held liable for contempt of court for breach of implied undertaking by company solicitor representing – Liability of law firm for contempt of court by one solicitor from such law firm – Order 45 r 5(1)(ii) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

19 June 2006

Tay Yong Kwang J:

The application

1 Pursuant to leave granted by the High Court on 17 November 2005, the first defendant ("the applicant") applied by way of motion for the following orders:

> (a) that a fine be imposed as a penalty each on the plaintiff; its lawyer in Hong Kong, Michael Joseph Pilkington of Clyde & Co, Hong Kong; and Clyde & Co, Hong Kong (collectively, "the respondents") for such amount as the court may deem just and proper for their contempt of court;
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> (b) that the respondents pay to the applicant the costs of and incidental to the application; and
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> (c) for such further or other orders as the court may deem just.

The statement of facts

2 The Statement of Facts prepared pursuant to O 52 r 2(2) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) sets out the following grounds for the application:

> 1. The Application is made by the 1st Defendant, Pertamina Energy Trading Limited ("Petral"). Petral is a company incorporated in Hong Kong. Petral has an office with staff members at Room 703, Far East Finance Centre, 16 Harcourt Road, Hong Kong, China.
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> 2. Karaha Bodas Company LLC ("KBC") is a company incorporated in the Cayman Islands

and is a special project vehicle formed for the purposes of producing and developing energy resources in Indonesia. It is not carrying on any business. The only address as provided by KBC in the proceedings is that of KPMG's trust office in the Cayman Islands, which is KPMG Genesis Trust Company Ltd, P.O. Box 448 GT, Century Yard, Grand Cayman, Cayman Islands.

3. Michael Joseph Pilkington is a solicitor in Hong Kong and a partner of Clyde & Co, Hong Kong, the law firm having conduct of the legal proceedings in Hong Kong for KBC as against Petral. Michael Joseph Pilkington and Clyde & Co have been the Plaintiffs' solicitors in Hong Kong. Their address is Clyde & Co, 18th Floor, CITIC Tower, 1 Tim Mei Avenue, Central, Hong Kong.

4. The relief sought is that a fine be imposed on KBC, Michael Joseph Pilkington and Clyde & Co, Hong Kong for such amount as the Honourable Court deems just and proper for the contempt of the Court and that KBC, Michael Joseph Pilkington and Clyde & Co, Hong Kong do pay the Applicants the costs of and occasioned by these proceedings.

5. The grounds for the relief sought against the abovementioned KBC, Michael Joseph Pilkington and Clyde & Co, Hong Kong are as follows:

(a) On 22 December 2004, Honourable Justice Choo Han Teck ordered a Mareva Injunction ("Mareva Injunction") in favour of the Plaintiffs. As required by the Mareva Injunction, the Applicants, through their solicitors in Singapore, Messrs Haq & Selvam, wrote to KBC's solicitors in Singapore, Messrs Wong Partnership informing them of Petral's remittance of HK$890,022.34 (approximately US$115,000.00) from Petral's account in Bank Mandiri, Singapore to its own account with their bank in Hong Kong for payment of staff salary and other debts. Petral provided the information as ordered by the Mareva Injunction and under fear of penalty for contempt of court. The payment for which the money was remitted is pursuant to and as permitted by the exceptions to the Mareva Injunction. Messrs Wong Partnership relayed this information to their clients, KBC and KBC's Hong Kong lawyers, Clyde & Co. Wong Partnership are the solicitors on record for KBC and they acted on the instructions of Michael Joseph Pilkington and Clyde & Co, Hong Kong.

(b) The Mareva Injunction placed no limits on the ordinary expenses payable by Petral.

(c) KBC, Michael Joseph Pilkington and Clyde & Co, Hong Kong misused the information and frustrated the operation of the Mareva Injunction and application of the remittance by using it to intercept the monies by garnishing the monies rightfully remitted by Petral from its account in Bank Mandiri, Singapore to its account with their bank in Hong Kong for uses permitted by the exceptions to the Mareva Injunction and without reference to the Defendants or this Honourable Court.

(d) KBC's and Clyde & Co's conduct in using the letter and the information contained therein, which was provided by the Applicants in compliance with the Mareva Injunction and where the monies remitted were for uses permitted under the exceptions to the Mareva Injunction, without the consent of Petral or the approval of this Honourable Court was intended or calculated to impede, frustrate, obstruct or prejudice the administration of justice. KBC and their Hong Kong Solicitors, Clyde & Co in garnishing the sums remitted from Singapore to Hong Kong was a misuse by KBC, Michael Joseph Pilkington and Clyde & Co of the letter and information provided by the Applicants under compulsion of the Mareva Injunction, is in contempt of the Mareva Injunction issued by the Singapore Courts and frustrated the operation of the exceptions under the Mareva Injunction. The entire interception proceedings were conducted under the directions of Michael Joseph Pilkington.

No affidavit was filed by any officer of the Plaintiffs and no evidence of their authority has been produced.

6. The Hong Kong Court permitted the improper interception of the remittance *sub silentio* in relation to the meaning and effect of the exceptions to the Mareva Injunction notwithstanding objections raised on behalf of the Applicants. The order is under appeal to be heard in April 2006. The action and the Mareva Injunction in the Originating Summons were set aside by Honourable Justice Choo Han Teck and an order for damages against the Plaintiffs was made on 14 March 2005. The setting aside order made by Honourable Justice Choo Han Teck was affirmed by the Court of Appeal on 24 August 2005. The Grounds of Judgment of the Court of Appeal were delivered on 12 October 2005.

In the premises, the Applicants seek leave to apply for an order granting the relief sought.

The factual background

3 The first defendant is a company registered and carrying on business in Hong Kong. It is almost entirely owned by Pertamina, an Indonesian oil and gas corporation. The second defendant is a company incorporated in Singapore. It is wholly owned by the first defendant. Pertamina has no part in this contempt of court application.

4 Karaha Bodas Company LLC ("KBC"), the plaintiff in this action and one of the respondents in this application, does not currently carry on any business because the basis for its creation, namely, to engage with Pertamina in a geothermal resources project in 1994, ended when the project was cancelled by presidential decrees issued by the government of Indonesia in 1997/1998. The cancellation of the said project led to arbitration proceedings and the making of a US$261m Swiss arbitral award ("the arbitral award") in favour of KBC against Pertamina (and another entity known as PT.PLN (Persero)). KBC began enforcement proceedings of the arbitral award in Singapore pursuant to the New York Convention in March 2002 by way of Originating Summons No 342 of 2002. Enforcement proceedings by KBC against Pertamina are also going on in the United States.

5 On 15 March 2002, the Hong Kong High Court gave leave to KBC to enforce the arbitral award and ordered that judgment be entered in terms of the arbitral award. The Hong Kong judgment was served on Pertamina in Indonesia. KBC then commenced enforcement proceedings in respect of the Hong Kong judgment ("the Hong Kong proceedings"). Michael Joseph Pilkington ("Pilkington") of Clyde & Co, Hong Kong ("Clyde & Co"), one of the three respondents, had conduct of the Hong Kong proceedings. Pertamina applied unsuccessfully to set aside service of the Hong Kong judgment and the judgment itself. A garnishee order was taken out and made absolute subsequently. In the course of the Hong Kong proceedings, the first defendant's manager, who was orally examined before a master of the Hong Kong High Court, revealed that the first defendant paid Pertamina some US$5.5m in breach of a garnishee order *nisi* obtained against the first defendant. The said manager also admitted that some US$36m was transferred from the first defendant to the second defendant and that the said sum would be returned to the first defendant when the Hong Kong proceedings were over. Consequently, the master ordered the first defendant to pay KBC such sum representing the debt due from Pertamina to the first defendant as at the date of service of the garnishee order *nisi* ("the US$5.5m order"). The first defendant appealed against the making of the garnishee order absolute and the US$5.5m order. A judge of the Hong Kong High Court dismissed both appeals.

6 On 21 December 2004, KBC obtained a worldwide Mareva injunction in Hong Kong against the first defendant for up to US$36m ("the Hong Kong Mareva injunction"). On 22 December 2004, KBC commenced this originating summons seeking a declaration that the sum of US$36,236,581.65

transferred from the first defendant to the second defendant prior to 30 September 2004 was held by the second defendant on trust for or on behalf of or was controlled by the first defendant and also seeking an order that the said sum be repaid by the second defendant to the first defendant. On the same day, KBC obtained an *ex parte* domestic Mareva injunction ("the Singapore Mareva injunction") against the first and second defendants. The relevant terms of the Singapore Mareva injunction are:

IMPORTANT:-

NOTICE TO THE DEFENDANTS

(1) This order prohibits you from dealing with your assets up to the amount stated. The order is subject to the exceptions at the end of the order. You should read it all carefully. …

(2) If you disobey this order you will be guilty of contempt of Court and may be sent to prison or fined.

…

As a result of the application IT IS ORDERED by Justice Choo that:

Disposal of assets

1 (1) The 1st defendant must not remove from Singapore in any way dispose of or deal with or diminish the value of any of his assets which are in Singapore whether in his own name or not and whether solely or jointly owned up to the value of US$36,236,581.65. This prohibition includes but is not limited to the following assets in particular:-

…

Disclosure of information

2 The 1st Defendant must inform the Plaintiffs in writing at once of all his assets in Singapore whether in his own name or not and whether solely or jointly owned and of any transfers of monies from the 1st Defendant to the 2nd Defendant or other parties from 15 March 2002 to be held, as a nominee or otherwise, on trust for or on behalf of or which are controlled by the 1st Defendant, giving the value, location and details of all such assets. The information must be confirmed in an affidavit which must be served on the Plaintiffs' solicitors within 7 days after this order has been served on the 1st Defendant.

…

EXCEPTIONS TO THIS ORDER

(1) This order does not prohibit the Defendants from spending $50,000 on legal advice and representation. But before spending any money the Defendants must tell the Plaintiffs' solicitors where the money is to come from.

(2) This order does not prohibit the Defendants from dealing with or disposing of any of their assets in the ordinary and proper course of business. The Defendants shall account to the Plaintiffs weekly for the amount of money spent in this regard.

(3) The Defendants may agree with the Plaintiffs' solicitors that the above spending limits should be increased or that this order should be varied in any other respect but any such agreement must be in writing.

7 On 24 January 2005, the first defendant made disclosures about its assets and gave the particulars of its bankers in Singapore and in Hong Kong. Pursuant to the above exceptions in the Singapore Mareva injunction, the first defendant withdrew from PT Bank Mandiri (Persero), Singapore Branch, the equivalent of HK$890,022.34 (US$114,105.43) and caused the amount to be transferred to its account with Dah Sing Bank in Hong Kong. According to Hadamean Siregar ("Hadamean"), a manager in the Finance and Administration department of the first defendant, the purpose of the withdrawal and remittance was to apply the amounts in satisfaction of, in the ordinary and proper course of business, debts and monetary obligations incurred by the first defendant. On 26 January 2005, the first defendant, through its solicitors, wrote to KBC's Singapore solicitors as follows ("the 26 January 2005 letter"):

> 1 The 1st Defendants hereby advise that the [*sic*] they will be making payments as set out in the attachment to this letter. The payments will be made this week.
>
> 2 The source of these funds is the 1st Defendants' account with Bank Mandiri (Singapore). Moneys have been transferred to the 1st Defendants' bank account in Hong Kong for the above purpose.

The attachment to the above letter set out 19 items of payment totalling HK$890,022.34 (US$114,105.43). The largest amount, HK$408,480, was said to be for the January payroll for the first defendant's staff in Hong Kong, who were all Chinese, and Chinese New Year was in two weeks' time.

8 KBC's Singapore solicitors relayed the above information to KBC's Hong Kong solicitors, Clyde & Co. It was alleged by the first defendant that Clyde & Co, in the name of KBC, without any prior notice to the first defendant or to the Singapore High Court, intercepted the entire amount in Dah Sing Bank in Hong Kong by garnishing it on 27 January 2005. The application for the garnishee order was based on an affidavit by a lawyer in Clyde & Co, who has since left the law firm. However, the first defendant believed that it was Pilkington who was directing the litigation as the said affidavit, in its reference number, bore his initials "MJP".

9 On 24 March 2005, Choo Han Teck J set aside KBC's originating summons and the Singapore Mareva injunction and ordered an inquiry as to damages. The Court of Appeal dismissed KBC's appeal against Choo J's decision on 24 August 2005 and released its grounds of decision in October that year.

10 In the meantime, after the money in the first defendant's account in Dah Sing Bank in Hong Kong was garnished, the first defendant applied in Singapore for an order that KBC and its lawyers do all things necessary to permit the release of the said money. In the affidavits supporting that application, reference was also made to the alleged misuse of the 26 January 2005 letter and alleged contempt of court. The application was part-heard by Choo J who also gave directions to the parties regarding the filing of further affidavits. The application has not been restored for hearing by the first defendant. KBC alleged before me that the first defendant's present application for contempt of court was nothing more than an attempt to exert pressure on KBC and its solicitors.

11 Pilkington made an affidavit on behalf of KBC, Clyde & Co and himself. He stated in his affidavit that Clyde & Co comprised eleven partners, one of whom was himself. He claimed that all the

other partners were not aware of the material circumstances relating to the 26 January 2005 letter or the garnishee proceedings against Dah Sing Bank and that it was therefore inappropriate to bring the present application against the law firm. He maintained that all the steps in the Hong Kong proceedings and in the Singapore proceedings were taken with KBC's instructions and he denied that he was directing the litigation on his own accord. He also asserted KBC was already aware of the fact that the first defendant had two accounts with Dah Sing Bank by reason of the documents disclosed by the first defendant in advance of the oral examination of the first defendant's manager (see [5] above) and from the letter by the said bank to Clyde & Co on 14 January 2005 following the service of the Hong Kong Mareva injunction. He stated that the Hong Kong High Court, in making the garnishee order absolute against Dah Sing Bank, had rejected the suggestion that the liberty to dispose of assets and to spend money in the ordinary and proper course of business ring-fenced those assets from execution. As KBC remained a judgment creditor against the first defendant pursuant to the US$5.5m order, he was of the view that KBC was fully entitled to execute the US$5.5m order against the first defendant's assets in Hong Kong.

12 Pilkington stated that the Singapore Mareva injunction, although since set aside, had been obtained to facilitate the enforcement of the Hong Kong Mareva injunction and KBC's enforcement efforts in Hong Kong. In his view, the Hong Kong proceedings and the Singapore proceedings were therefore very closely related and integrated and there could be no collateral purpose in the use of the information contained in the 26 January 2005 letter. Everything in Hong Kong and in Singapore was done solely to further the enforcement proceedings in relation to the arbitral award. In any event, KBC made full and frank disclosure of all material circumstances, including the fact of the Singapore Mareva injunction, in its affidavit supporting its application for the garnishee order against Dah Sing Bank. According to Pilkington, the first defendant's recourse was clearly in Hong Kong which was the proper forum to determine whether or not the garnishee order absolute against Dah Sing Bank was appropriately granted in the circumstances. The first defendant has appealed against the Hong Kong High Court's decision making the garnishee order absolute.

13 Pilkington was also of the view that the Singapore Mareva injunction did not preclude the use of the information in the 26 January 2005 letter. The first defendant, he said, was only obliged to give an account of money that had already been spent in relation to its dealing with or disposal of assets in the ordinary and proper course of business, not intended or proposed expenditure in the future. The information pertaining to intended expenditure had therefore been given voluntarily by the first defendant.

The decision of the court

14 Steven Gee QC in *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) states (at para 24.005):

> The theory of the implied undertaking was that because the discovery was compelled by the court order for a limited purpose, the documents were subject to an implied undertaking not to use them for another purpose.
>
> …
>
> A party who obtained discovery in proceedings did so on condition that he would make use of the documents only for the purposes of that action.

For the last proposition, the learned author cited the well-known decision of *Riddick v Thomas Board Mills* [1977] QB 881, where it was held that a memorandum obtained on discovery in the first action

could not be used to institute libel proceedings.

15 Our Court of Appeal, while accepting the Riddick principle stated above, has held in *Hong Lam Marine Pte Ltd v Koh Chye Heng* [1998] 3 SLR 833 ("*Hong Lam Marine*") that where documents were voluntarily disclosed in legal proceedings, the privacy of the documents was destroyed by the party which chose to produce them and such documents were not subject to the implied undertaking to the court.

16 The respondents submitted that there were two main issues to be decided in this application:

(a) What was the precise scope of the first defendant's obligation under exception (2) in the Singapore Mareva injunction?

(b) Was the information in the 26 January 2005 letter given pursuant to the said exception (2) and therefore covered by the implied undertaking not to use it for a collateral purpose?

17 The respondents pointed out that there was no reference at all to the Singapore Mareva injunction in the 26 January 2005 letter, much less the said exception (2). They also claimed that the first defendant was merely informing KBC of future events as its obligation to account arose only after money had been spent and not before and that, for the purpose of the intended or proposed payments, money had already been transferred between the first defendant's account with Bank Mandiri in Singapore and its account with an unidentified bank in Hong Kong. This, they submitted, was a transfer of money between a person's bank accounts and did not constitute a "dealing with" his assets because the money continued to be held by him. Further, they said, payment of money into a person's bank account which was in credit could not be a disposal or dissipation of assets and that transfer of money between a person's accounts could not be said to be within the ordinary and proper course of business.

18 I think the respondents were being overly pedantic in saying that the first defendant was offering the information in the 26 January 2005 letter voluntarily because the information was furnished earlier than the time period ordered by the terms of the injunction. There could be no doubt that the first defendant would not have offered the information but for the Singapore Mareva injunction. This was even more so given the fact that the parties had already been involved in contentious legal proceedings in Hong Kong. A person does not need to expressly refer to a court order before he could be said to be complying with it. It is sufficient that there could be no doubt that he did certain acts which he would not have done if there was no legal compulsion. In my view, therefore, the 26 January 2005 letter was clearly to comply with the Singapore Mareva injunction even if it was furnished in advance of the time period stipulated by the court order. If the first defendant had been tardy in complying with the court order, its late notification would nevertheless have come within the ambit of compulsion. The respondents therefore fail in their contention that the 26 January 2005 letter fell within the principle enunciated in *Hong Lam Marine* in that it was voluntary information given outside the scope of the implied undertaking.

19 I would have little difficulty agreeing with the respondents about the transfer of money between accounts if the two bank accounts were both located within Singapore. However, in this case, the first defendant was transferring its money from one jurisdiction to another and I do not see how such a transaction would not fall afoul of the prohibition in the Singapore Mareva injunction (see [6] above) that:

> The 1st defendant must not remove from Singapore in any way dispose of or deal with or diminish the value of any of his assets which are in Singapore …

I doubt if the respondents would take the same position if the first defendant had transferred money from its Singapore account to its account in a jurisdiction other than Hong Kong. The transfer was necessitated by the payments stated in the annexure to the 26 January 2005 letter and therefore part of its ordinary and proper course of business.

20 I accept, however, that KBC and its solicitors knew that the first defendant had an account with Dah Sing Bank in Hong Kong as a result of the Hong Kong proceedings or through other sources. The knowledge did not come from the disclosures made by the first defendant as a result of the Singapore Mareva injunction. It certainly did not come from the 26 January 2005 letter as there was no mention of Dah Sing Bank at all in that letter.

21 The implied undertaking is owed to the Singapore court which granted the Singapore Mareva injunction, not to the Hong Kong court. The fact that KBC gave full and frank disclosure of all material matters to the Hong Kong court in applying for the garnishee order against Dah Sing Bank therefore has no bearing on the issue whether the respondents had misused the information in the 26 January 2005 letter. I have to decide only the question whether there was contempt of court in the alleged misuse of information, not whether the garnishee proceedings in Hong Kong should be upheld or set aside. For the same reason, I see no need to discuss the issue raised by the parties on whether KBC was a judgment creditor. There is no impediment to the first defendant's application here despite the appeal in Hong Kong against the garnishee order absolute.

22 The next issue that I have to consider is whether the information in the 26 January 2005 letter was used for a collateral purpose. This case is unusual in that there was an extremely close nexus between the Hong Kong proceedings and the Singapore proceedings. Everything that had been done by KBC and its solicitors was to facilitate the enforcement of the arbitral award. The proceedings in the two jurisdictions were running parallel to each other and one was effectively aiding the other, although the Singapore proceedings were subsequently set aside. The proceedings in both jurisdictions appear to me to be for the same purpose. The burden of proving contempt of court, which could result in imprisonment and a fine, is a heavy one and the standard of proof required is that which applies to criminal proceedings (see *Singapore Court Practice 2005* (Jeffrey Pinsler gen ed) (LexisNexis, 2005) at para 52/5/3 and the cases cited therein). In this case, there was, at the very least, a reasonable doubt whether the information was used for a collateral purpose. On this ground, I found that contempt of court had not been made out as the first defendant was not able to satisfy me that the information given was misused in that it was used for a collateral purpose.

23 The first defendant argued that the "payment order" made in the Hong Kong proceedings and the registration of the arbitral award in Hong Kong were being challenged there. It claimed that Pertamina had recently found that KBC had concealed material documents and had filed affidavits in Hong Kong giving full particulars of such fraudulent concealment on the part of KBC. The arbitral award against Pertamina, which had been registered in Singapore by way of Originating Summons No 342 of 2002, was also being challenged here on account of the alleged fraud. The first defendant further submitted that if Pertamina should succeed in Hong Kong, KBC would have to repay all the money that it had received so far and that KBC had virtually no assets in Hong Kong, Singapore or anywhere else. It was therefore anxious that no further assets of Pertamina or of the first defendant should fall into the hands of KBC.

24 In my view, the matters raised by the first defendant in the preceding paragraph were completely irrelevant to the issue before me. As I have emphasised earlier, this application is not concerned about setting aside the execution proceedings against the first defendant or even against Pertamina.

25 The first defendant's other ground for alleging contempt against the respondents was that they had thwarted the operation of exception (2) in the Singapore Mareva injunction, namely, the liberty to dispose or deal with or diminish the value of the first defendant's assets in the ordinary and proper course of business. In my opinion, whether the money transferred to Hong Kong for purposes allowed by the Singapore Mareva injunction is immune from execution there is a question best left to the Hong Kong courts to deal with. The Singapore court, in permitting certain expenditure to be paid out of assets here, does not thereby shield the money transferred out of its jurisdiction against execution elsewhere in the world. It only confers immunity on the party who makes such payment against charges of contempt of court in that the party has been expressly permitted to use the money for the stated purpose.

26 The first defendant based its application against Pilkington and Clyde & Co on two grounds. The first is O 45 r 5(1)(ii) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) under which enforcement of an order against a body corporate may, with leave of the court, be effected by "an order of committal against any director or other officer of the body". Under this provision, it argued, "a human agent of a limited company is personally liable for the contempt of the company" and it is unnecessary to determine whether the human agent aided or abetted the commission of the contempt. The second ground relied on (at para 32 of the first defendant's written submissions) is "the principle that anyone with the knowledge of the terms of the court and the prohibition against use of documents and information who knowingly assists the principal contemnor to set the process of court at naught is himself liable for contempt".

27 The first defendant submitted that Pilkington and Clyde & Co were the human agents of KBC as Pilkington, in his capacity as a partner of Clyde & Co, was the only person who had filed an affidavit on behalf of KBC in relation to KBC's application for the Singapore Mareva injunction against the first and the second defendants. Both the solicitor and the law firm also acted as the human agents of KBC in Hong Kong and both of them were therefore "the hands and minds of KBC in Hong Kong and Singapore".

28 Neither Pilkington nor any of the other ten partners of Clyde & Co was a "director or officer" of KBC. Order 45 r 5(1)(ii) does not apply to a solicitor or a firm of solicitors in its professional capacity. The cases cited by the first defendant do not appear to support its reliance on this rule. *Datuk Hong Kim Sui v Tiu Shi Kian* [1987] 1 MLJ 345, a decision of the Privy Council on appeal from the Federal Court of Malaysia, involved a contemnor who was a director of the restaurant company in question and who was found liable under O 45 r 5(1)(ii) in that capacity. As stated by the Privy Council (at 347), "the Rules recognise that directors and officers are the human agencies responsible for the conduct of the affairs of companies". In *Watkins v A J Wright (Electrical) Ltd* [1996] 3 All ER 31, a solicitor was found guilty of contempt of court in breaching the implied undertaking as to documents disclosed in the discovery process. However, liability was found because he was a solicitor and not because he was thereby a director or officer of the company, whose shareholder he was advising. It was also held by Blackburne J in that case that ignorance of the existence of the implied undertaking was no defence to committal proceedings based on a breach of the undertaking but that it was relevant to mitigation when the court had to consider the sanction to impose.

29 In my view, O 45 r 5(1)(ii) does apply, contrary to and with respect to the submissions of the respondents, to any case where committal is involved even if the applicant, like the first defendant here, expressly asks the court to impose only a fine instead of incarceration. This is a logical conclusion because while committal proceedings are generally commenced by a party to proceedings, the ultimate sanction is left to the court. The Privy Council in the case cited above certainly did not think that the said rule was inapplicable to a situation where a fine was imposed. The appellant there was fined $6,000, in default three months' imprisonment, by the High Court in Borneo. His appeal to

the Federal Court was dismissed but his fine was increased to $10,000, in default five months' imprisonment.

30 On the second ground relied on by the first defendant, Pilkington, as the solicitor in charge of this matter, had not denied knowledge of the implied undertaking. If I had found that there was a breach of the implied undertaking by misuse of the information for a collateral purpose, Pilkington would have been guilty of contempt of court. There was no justification to involve the rest of the partners of Clyde & Co in this application. There was no evidence that all were, or any of them was, aware of the 26 January 2005 letter and the garnishee proceedings that followed. Knowledge is essential to establish culpability on the part of third parties. The Singapore Mareva injunction provides expressly that third parties would be guilty of contempt of court if they "knowingly" assist in or permit a breach of the injunction.

31 In pronouncing my decision, I said:

> In any event, if contempt were established, it seems to me that only [Pilkington] ought to be liable and not the plaintiff nor [Clyde & Co].

The plaintiff was erroneously excluded from liability in the event that there was contempt. It should only have been Clyde & Co that would be exonerated. The plaintiff could only have been exonerated if Pilkington had acted on his own without authority but that was obviously not the case. The plaintiff would, of course, have been able to mitigate by pleading that it had relied on professional legal advice.

32 In the circumstances, I dismissed the application against all the respondents. In the light of my ruling on the issues canvassed, I was of the view that a fair order on costs was that each party should bear its own costs in this application because, although Clyde & Co was wrongly brought into these proceedings, the law firm's stand was effectively the same as Pilkington's anyway.

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