IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 68

Suit No 727 of 2013
(Summons No 4071 of 2016)

Between

(1) Technigroup Far East Pte Ltd
(2) Technigroup International Pvt Ltd

… *Plaintiffs*

And

(1) Jaswinderpal Singh s/o Bachint Singh
(2) Tan Weng Kong
(3) Sukhminder Kaur d/o Guljar Singh
(4) Chaw Kooi Lin
(5) Office Furniture Specialty Pte Ltd

… *Defendants*

JUDGMENT

[Contempt of court] — [Civil contempt]
[Contempt of court] — [Sentencing]

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v
Jaswinderpal Singh s/o Bachint Singh and others

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Steven Chong J
22 September 2016; 31 January 2017

18 April 2017 Judgment reserved.

Steven Chong JA:

Introduction

1 When a party seeks to deny a well-founded claim on a false premise, it typically leads to intractable difficulties. In order to maintain the false case theory, lies and more lies would have to be spun. At some stage, when it becomes clear and obvious, usually following discovery and other interlocutory orders, that the false premise is no longer tenable or simply unbelievable, some litigants advisedly decide to cut their losses and resolve the dispute either through a settlement or just throwing in the towel. However, on some occasions, litigants can be quite incorrigible and elect to maintain the falsehood in the face of clear evidence to the contrary. Experience shows that it usually serves to compound the problem.

2 Regrettably, this is one such case. The first defendant was somewhat of a protégé of the ultimate owner of the plaintiffs. With the plaintiffs' funding and support, the first defendant, who started his employment with an "O" level education, eventually obtained a Bachelor of Commerce and a Masters of Business Administration. The plaintiffs' business was in the designing, manufacturing and distribution of office furniture. The first defendant worked his way up the organisation and eventually became a director and minority shareholder of the first plaintiff ("TFE") and the CEO of the plaintiffs' Indian operations carried out through the second plaintiff ("TI"), a wholly-owned subsidiary of TFE. However, his ambitions caused him to start a competitor business while he was still TFE's director. He started a rival business, the fifth defendant ("OFS Singapore"), together with his trusted lieutenant, the second defendant, who was at the material time the Senior Project Manager of TFE. However, the shareholdings and directorships of OFS Singapore were held by their respective wives, the third and fourth defendants, who never had any prior experience in the office furniture business.

3 Eventually, the plaintiffs discovered the breaches by the first and second defendants, terminated their employment, and on 14 August 2013 sued them and their respective wives for damages and/or an account of profits in Suit No 727 of 2013 ("Suit 727"). These claims were premised upon alleged breaches by the first and second defendants of their employment contracts and fiduciary duties as well as conspiracy by the third to fifth defendants. In essence, the plaintiffs claimed that in establishing and running OFS Singapore, the first and second defendants had placed themselves in a position of conflict and had, *inter alia*, misappropriated the plaintiffs' confidential information and property, solicited their clients, and diverted and/or usurped their business opportunities. It was specifically pleaded in the statement of claim that the

first and second defendants had "set up or assisted to set up, worked for and/or otherwise advanced the interests of OFS [Singapore]", were "involved in the management and running of OFS [Singapore]", and were its "controlling minds, and/or… shadow directors". [1] Thus, the plaintiffs averred that their wives had held their interests in OFS Singapore on their behalf and managed OFS Singapore on their direction.

4 Besides Suit 727, the defendants' involvement in OFS Singapore also gave rise to two related suits, which were directed to be heard together, with all interlocutory applications to be filed in Suit 727. Suit No 379 of 2013 ("Suit 379") was commenced by the first defendant on 24 April 2013 to claim minority shareholder relief in respect of TFE and damages against TFE for wrongfully terminating his employment. Soon after, on 2 July 2013, the majority shareholder of TFE commenced Suit No 581 of 2013 ("Suit 581") seeking *inter alia* to enforce a right to repurchase the first defendant's shares in TFE.

5 The proceedings were dominated by numerous discovery orders and repeated corresponding breaches by the defendants. The discovery orders largely concerned documents to expose the full extent of the defendants' breaches, the businesses which they had diverted away from the plaintiffs and the consequent profits made by them. In particular, the focus of one of the discovery orders concerned documents of related entities – at least in China – which appear to have been controlled and/or owned by the first and second defendants. Peremptory orders were made against them and eventually, their defences were struck off for contumelious breaches of an Unless Order which I had imposed arising from a Registrar's Appeal.

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[1] Statement of Claim (Amendment No 1), paras 29(a), 33(f) and 35.

6 Interlocutory judgment was thereafter entered against the defendants in Suit 727. Thus, there can be no dispute that the first and second defendants owned and/or controlled OFS Singapore, as was specifically pleaded. Despite these negative developments, the defendants continued to deny the existence of the related entities. Their denial inevitably has an adverse impact on the plaintiffs' assessment of damages and their claim for an account of profits. The defendants' persistent denial led to a further discovery order issued on 6 May 2016 for the purposes of the plaintiffs' assessment ("the 6 May Discovery Order"). Again, the ambit of this discovery order included the documents of related entities which were already covered under an existing discovery order made on 29 May 2014, which I shall refer to as the 2nd Discovery Order. The defendants elected to maintain the same position that the related entities do not exist in spite of the weight of the objective evidence and all the adverse findings against them in the earlier interlocutory orders.

7 At every stage of the proceedings, the defendants' contumelious non-compliance cost them. It led to the imposition of an Unless Order, the striking out of their defences and the entering of interlocutory judgment. On this occasion, their election to repeat the same false position carries a heavier price. The plaintiffs commenced committal proceedings against the first, second and fourth defendants for breaches of the 6 May Discovery Order (the proceedings were not pursued against the third defendant because of her medical condition). The defendants appear to have adopted a "catch me if you can" strategy. If convicted for contempt of court, they are liable to face a term of imprisonment.

Committal proceedings

The 6 May Discovery Order

8 This committal application finds its root in the 6 May Discovery Order issued by Assistant Registrar Una Khng ("AR Khng") for the purposes of the assessment of damages and the taking of accounts in Suit 727 following the entry of interlocutory judgment. The material terms of the 6 May Discovery Order are as follows:[2]

> …
>
> 3. the Defendants do, by 27 May 2016, provide to the Plaintiffs by letter, a list of all the documents within Schedule 1 that are in the possession, custody or power of the Defendants, together with copies of the said documents…
>
> 4. the Defendants do, by 10 June 2016, file and serve on the Plaintiffs a list of all documents within Schedule 1 that are in the possession, custody or power of the Defendants, duly verified by an affidavit stating whether the documents set out in Schedule 1 are, or have at any time been, in their possession, custody or power… and if the said documents or any of them are not in the Defendants' possession, custody or power, to provide an explanation as to why the said documents are not in their possession, custody or power;
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> …

9 The documents falling within Schedule 1 (referred to at paragraphs 3 and 4 of the 6 May Discovery Order) were as follows:[3]

> (a) the first to fourth defendants' bank account statements between September 2011 and February 2013;

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2 Order 52 Statement (Amendment No 1) (Plaintiffs' Bundle of Cause Papers and Notes of Evidence ("PBCP") Tab 17), p 46.

3 Order 52 Statement (Amendment No 1) (PCBP Tab 17), p 45.

(b) the "Related Party Documents", being all documents evidencing the transactions of OFS Singapore's "related entities, and/or entities owned and/or controlled by the [d]efendants (including but not limited to OFEI Furniture Products Enterprise / OFEI China / China OFS and OFS affiliates in Kenya and India)" (collectively, the "Related Entities") between September 2011 and February 2013; and

(c) the "Project Documents", being documents evidencing the value of contracts that OFS Singapore and/or the Related Entities entered into with the plaintiffs' customers and/or potential customers between September 2011 and August 2013.

10 It is worth noting that OFS Singapore's related entity in China has been variously referred to in the documentary evidence as "OFEI Furniture Products Enterprise", "OFEI China" and/or "China OFS". For clarity, I shall simply refer to the related entities in China and India as "OFS China" and "OFS India" respectively, regardless of their names of incorporation. The OFS affiliate in Kenya (if any) was largely left out of the picture in the committal proceedings, so I shall make no further mention of it.

11 For present purposes, it is relevant to briefly state the grounds for granting the 6 May Discovery Order. The most contentious category of documents was the Related Party Documents. The defendants had resisted discovery of these documents on the basis that apart from OFS Singapore, the first to fourth defendants did not own or control any other corporate entities, directly or indirectly, during the relevant period. Their position was that OFS China did not exist. Considering the evidence placed before her, AR Khng noted in relation to OFS China that the defendants' position "lacks credibility

and does not sit well with the available documentary evidence", was "undermine[d]" by the results of the plaintiffs' searches of corporate registers in China, and appeared at one point to be "a desperate attempt to explain away a highly incriminating piece of evidence".[4] In her oral grounds, she expressed her conclusions as such:[5]

> I am satisfied from the evidence that notwithstanding the Defendants' confirmation that no such entities exist, *there is very likely to be at least a Chinese entity, known as OFEI Furniture Products Enterprise that is owned and/or controlled by the 1st and/or 2nd Defendants during the relevant period.*
>
> …
>
> [This] is quite clear to me from a survey of the evidence before me and after having considered both parties' submissions…
>
> …
>
> Although the evidence in relation to these entities [in India and Kenya] is not as clear as the evidence in relation to OFEI Furniture Products Enterprise, *I am of the view that there is some prima facie evidence that there may have been an entity in India which was owned and/or controlled by the Defendants during the relevant period. …*
>
> [emphasis added]

12 In relation to the Project Documents, AR Khng ordered discovery on the condition that the plaintiffs provide a list of their customers and/or potential customers so as to clarify the scope of this category of documents. This list was duly provided by the plaintiffs on 13 May 2016.[6]

13 In line with the procedural preconditions for a committal order (see O 45 r 7(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of

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4 Order 52 Statement (Amendment No 1) (PBCP Tab 17), pp 590–594.

5 Order 52 Statement (Amendment No 1) (PBCP Tab 17), pp 589, 594–595.

6 Joint Reply Affidavit of Jaswinderpal Singh and Tan Weng Kong dated 18 August 2016 (PBCP Tab 12), p 149.

Court")), the 6 May Discovery Order was endorsed with penal notices that if the defendants neglected to obey the order by the time therein limited, they would be liable to process of execution for the purpose of compelling them to obey the same. A sealed copy of the 6 May Discovery Order was served on the defendants' then solicitors, Kertar Law LLC, on 20 May 2016.[7]

14 Purporting to comply with paragraph 3 of the 6 May Discovery Order, the defendants' solicitors wrote to the plaintiffs' solicitors on 27 May 2016 ("the 27 May letter").[8] This letter enclosed a list of bank statements along with corresponding copies, and stated that the defendants did not have possession, custody or power of any other documents under Schedule 1. Notably, no Related Party Documents or Project Documents were enumerated in that list. The plaintiffs were not satisfied as they found evidence that the defendants had failed to provide complete discovery of the bank statements. Further, it transpired that by 10 June 2016, the defendants had not filed a list of documents and a verifying affidavit as required under paragraph 4 of the 6 May Discovery Order.

Application to commence committal proceedings

15 Thus, on 15 June 2016, the plaintiffs applied in Summons No 2933 of 2016 for leave to apply for an order of committal against the first to fourth defendants for their alleged non-compliance with paragraphs 3 and 4 of the 6 May Discovery Order.[9] This application was accompanied by a supporting affidavit and a statement pursuant to O 52 r 2(2) of the Rules of Court ("the O 52 Statement"). In its original form, the O 52 Statement charged the first to

7 Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 51.

8 Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 53.

9 PBCP Tab 7.

fourth defendants with failing to give complete discovery of their bank statements in the 27 May letter and failing to file a list of documents by 10 June 2016.[10]

16 The next day – that is, six days after the time limited for filing a list of documents – the defendants, who had instructed new solicitors in the intervening period, applied for an extension of time to comply with the 6 May Discovery Order.[11] They subsequently withdrew this application at the hearing on 1 July 2016 as they felt they had sufficiently complied through a supplementary list of documents belatedly filed on 24 June 2016 ("the 24 June LOD"). The 24 June LOD enumerated the same list as the 27 May letter. Again, no Related Party Documents or Project Documents were disclosed. Instead, the joint verifying affidavit filed by the first and second defendants stated that the defendants "do not have any related entities or do not own and/or control entities between September 2011 and February 2013".[12] As will be demonstrated below, this was not the first time that the first and second defendants were making this factual assertion, and the question of whether the defendants are in contumelious breach of their discovery obligations turns on the court's finding as regards the corporate existence of these Related Entities.

17 To take account of these developments and address the perceived inadequacies of the 24 June LOD, the plaintiffs applied to amend their summons for leave and the accompanying O 52 Statement. The leave application was heard before me on 18 August 2016. I granted the plaintiffs

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10 PBCP Tab 8.

11 Order 52 Statement (Amendment No 1) (PBCP Tab 17), pp 520–521.

12 Order 52 Statement (Amendment No 1) (PBCP Tab 17), pp 271–274.

leave to commence committal proceedings and to amend their summons and O 52 Statement.

18 On 22 August 2016, the plaintiffs filed the present Summons No 4071 of 2016 ("the committal summons") for the first, second and fourth defendants to be committed to prison for contempt of court. As it was established by that time that the third defendant lacked mental capacity due to a brain injury, committal proceedings were no longer being pursued against her.[13] The committal summons and the O 52 Statement were served personally on the fourth defendant on 23 August 2016 and on the first and second defendants on 25 August 2016.[14]

Order 52 Statement

19 As amended, the O 52 Statement charged the first, second and fourth defendants with the following breaches:[15]

> (a) In breach of paragraph 3 of the 6 May Discovery Order, the 27 May letter failed to give complete discovery of the bank statements. In particular, the following statements were missing ("the Missing Statements"):
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> > (i) bank statements of the second defendant's POSB current account and any other account into which a Cheque No 956652 was paid by OFS Singapore on 27 October 2011; and

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13 PBCP Tab 11; Plaintiffs' Submissions, para 40(b).

14 Affidavit of Henry Lee Koon Tong dated 6 September 2016 (PBCP Tab 18).

15 Order 52 Statement (Amendment No 1) (PBCP Tab 17) pp 5–32.

(ii) missing pages of bank statements that were disclosed (duly itemised and categorised as the "POSB Savings Account Missing Pages", "POSB Current Account Missing Pages" and "OCBC Account Missing Pages").

(b) In breach of paragraph 4 of the 6 May Discovery Order, they failed to file the list of documents and verifying affidavit by 10 June 2016.

(c) In breach of paragraph 4 of the 6 May Discovery Order, they failed to disclose documents falling within paragraph 4 and/or provide the requisite explanations as to why those documents were not in their possession, custody or power. I should make clear that this allegation pertained to the non-disclosures that remained outstanding even *after* the 24 June LOD was filed. In particular, it was alleged that they failed to disclose, without adequate explanation:

(i) the Missing Statements (except for the POSB Savings Account Missing Pages and the POSB Current Account Missing Pages which had by then been furnished);

(ii) the Related Party Documents; and

(iii) the Project Documents.

20 In their submissions, the defendants contended that the O 52 Statement was defective in that it failed to sufficiently particularise how OFS Singapore and the second defendant could have possession, custody or power over the Related Party Documents and Project Documents of OFS China. It should be noted that no such objection had been taken in the joint reply affidavit filed by the first and second defendants on the very day of the leave hearing ("the

1st Joint Reply Affidavit"). I shall address this procedural objection here as a preliminary matter, bearing in mind that leave to commence committal proceedings had already been granted by the time this objection was raised.

21 The legal requirements for an O 52 statement are clear. As recently affirmed by the Court of Appeal in *Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1 ("*Mok Kah Hong*") at [61], the O 52 statement serves the crucial function of enabling the alleged contemnors to know the case that has been put forth against them, so as to grant them ample opportunity to refute the allegations. A corollary to this is that the plaintiffs are allowed to rely only on the grounds set out in the O 52 statement (*Summit Holdings Ltd and another v Business Software Alliance* [1999] 2 SLR(R) 592 at [23]). To determine if the O 52 statement passes muster, the test is whether it is of sufficient particularity such that it provides the alleged contemnor with adequate information to enable him to meet the charges against him. This test is to be applied with reference to and from the perspective of a reasonable person in the position of the alleged contemnor reading the O 52 statement in a fair and sensible manner (*Mok Kah Hong* at [62]). This test is an important procedural safeguard which must be strictly complied with (*Mok Kah Hong* at [69]). Ordinarily, the test of sufficient particularity is to be enforced at the leave stage and the matter would not be allowed to proceed further if the O 52 statement were defective (*BMP v BMQ and another appeal* [2014] 1 SLR 1140 at [27]).

22 Having reviewed the O 52 Statement, I am of the view that the defendants' objection has no merit. The O 52 Statement not only asserted but also particularised in detail the documentary evidence relied upon by the plaintiffs to assert that the defendants had such control over OFS China as to

be in possession, custody or power over its transactional documents including the Related Party Documents and Project Documents. There can be no question that the defendants were sufficiently apprised of the allegations against them *and* of the evidence they needed to rebut in order to avoid liability for contempt.

Purged acts of contempt and outstanding breaches

23 Before turning to the parties' arguments, it would be useful to scope out the outstanding breaches that formed the focus of the parties' arguments. Various steps were taken by the defendants to purge their acts of contempt after the filing of the leave application but prior to the committal application. They first belatedly filed the 24 June LOD and subsequently disclosed some of the Missing Statements. Of the Missing Statements, the plaintiffs accept that the following had been satisfactorily disclosed prior to the filing of the committal summons:

(a) the POSB Savings Account Missing Pages and the POSB Current Account Missing Pages, which were furnished on 30 June 2016 pursuant to the 24 June LOD; and

(b) the OCBC Account Missing Pages and the second defendant's POSB current account bank statements, which were furnished in the 1st Joint Reply Affidavit.

24 At the first hearing of the committal summons on 22 September 2016, the plaintiffs informed me that they were no longer pursuing the second defendant's failure to account for the deposit of Cheque No 956652 into any of the accounts disclosed. They also informed me at the second hearing on 31 January 2017 that the remaining five months' missing

statements for the second defendant's POSB current account were disclosed in the second defendant's affidavit dated 21 October 2016.[16]

25 Nonetheless, in their written submissions, the plaintiffs urged that the initial non-compliance was strictly a breach of the 6 May Discovery Order and a finding of contempt can and should still be made. As a matter of law, I accept that failure to comply with a court order by the specified time can constitute contempt and may be punished even if compliance is effected at a later time (see *STX Corp v Jason Surjana Tanuwidjaja and others* [2014] 2 SLR 1261 ("*STX Corp*") at [84]–[87]). However, most of the Missing Statements were provided prior to the filing of the committal summons and the defendants' excuses for their tardiness turned on various unverified allegations made against their former solicitors. Therefore, I am according little weight to the breaches which had been remedied prior to the commencement of the committal proceedings. In any event, consideration of these purged acts of contempt was largely overshadowed by the alleged continuing breaches.

26 As such, the outstanding breaches concerned the defendants' refusal to provide discovery of the Related Party Documents and the Project Documents.

The parties' arguments

27 The plaintiffs' case is that the defendants have breached the 6 May Discovery Order by failing to disclose any Related Party Documents and Project Documents in the 24 June LOD. They argue that the defendants' categorical assertion that they do not have any Related Entities is false in the light of the overwhelming evidence from email correspondence, company

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16 11th affidavit of Tan Weng Kong dated 21 October 2016 (Plaintiffs' Supplementary Bundle of Documents, Tab 5), exhibit "TWK-2".

searches, OFS Singapore's accounting records and general ledgers that all point to the existence of OFS China and OFS India, owned and/or controlled by the first and second defendants. On this basis, transactional documents of the Related Entities exist, are within the first and second defendants' possession, custody and power, and remain undisclosed. It appears that their arguments on the Project Documents rest on the same premises; they are pursuing the Project Documents evidencing the value of contracts entered into by the Related Entities.[17] Thus, my treatment of the arguments and evidence concerning the Related Party Documents will apply to the Project Documents as well.

28 In response, the defendants argue that they have complied with the 6 May Discovery Order through their filing of the 24 June LOD, which has adequately explained that they are not in a position to disclose any Related Party Documents or Project Documents because they do not own or control any related entities of OFS Singapore outside Singapore. They assert that the 6 May Discovery Order did not establish anything more than a *prima facie* finding. Thus, the affidavit verifying the 24 June LOD should be taken as conclusive evidence of the non-existence of the Related Entities. Significantly, it must be underscored that the defendants' case is a categorical one that does not admit of any fall-back position. Their case is that they do not have *any* Related Party Documents because these Related Entities *do not exist*. It is not that the Related Entities did not generate any transactional documents or that they no longer have possession, custody or power over these documents.

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17 Plaintiffs' Submissions, paras 137–139.

Cross-examination of the alleged contemnors

29 In order to give the first, second and fourth defendants an opportunity to explain the evidence pertaining to the Related Entities, I invited them to offer themselves for cross-examination at the hearing on 22 September 2016. This was to grant them an opportunity to adequately explain why they are not in contumelious breach notwithstanding the compelling evidence presented by the plaintiffs as to the existence of, and their ownership or control over, the Related Entities. It is important for me to emphasise that the plaintiff did not apply to cross-examine them. The plaintiffs were of the view that the evidence which they have placed before the court is sufficient to discharge their burden of proof. At the next hearing on 31 January 2017, the first, second and fourth defendants accepted the invitation, and the plaintiffs agreed to their cross-examination.

30 I should mention that this was not the first occasion on which cross-examination was utilised in the course of committal proceedings for contempt of court. It appears that cross-examination of the alleged contemnors in *STX Corp* (at [74] and [84]–[85]) was likewise an aid in assessing the merits of the defendants' reasons for failing to disclose certain assets and their relative culpability. Legally, it is clear that leave can be given to cross-examine an alleged contemnor if he elects to put his affidavit in evidence: *Comet Products UK Ltd v Hawkex Plastics Ltd and Another* [1971] 2 WLR 361 at 366; O 38 r 2(2) of the Rules of Court.

Procedural history

31 As I alluded to earlier, the defence that the Related Entities do not exist and hence the Related Party Documents are not within the defendants'

possession, custody or power is not new. It was repeatedly but unsuccessfully raised by the defendants to oppose several earlier interlocutory applications. At this juncture, I wish to summarise the relevant procedural history so as to assess the impact of these earlier court findings on the inquiry at hand.

The first and second discovery orders

32 I have already mentioned that interlocutory judgment was entered into for Suit 727. The trail of breaches leading up to the entry of interlocutory judgment can be traced back to Summons No 174 of 2014. This was the plaintiffs' application for discovery of documents relating to, *inter alia*, the accounts, transactions, customer lists and internal correspondence of OFS Singapore. On 7 February 2014, Assistant Registrar Yap Han Ming Jonathan ("AR Yap") granted an order for discovery of most of the documents sought ("the 1st Discovery Order").[18]

33 The defendants purported to comply with the 1st Discovery Order through two supplementary lists of documents. Upon reviewing the documents in the first of these two lists, the plaintiffs noticed that OFS Singapore's general ledger and customer list seemed to indicate that OFS Singapore had procured payments from, and entered into purchases on behalf of, the plaintiffs.[19] These transactions appeared to have been carried out through certain related entities which I am now referring to as OFS China.

34 On suspicion that the defendants had illicitly channelled assets from the plaintiffs to these related entities, the plaintiffs initiated Summons No 1505

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18 Order 52 Statement (Amendment No 1) (PBCP Tab 17), Annex N.

19 Affidavit of Lindy Lin Chian Yung dated 25 March 2014 (PBCP Tab 21, p 213) ("Lindy Lin's 25 March 2014 Affidavit"), paras 48–50.

of 2014 ("the 2nd Discovery Application") to seek discovery of all documents evidencing the transactions *between* OFS Singapore, "OFEI China", "China OFS" and "OFS' suppliers/purchasing agents" *and* "TGI", "Technigroup India" and/or "Technigroup",[20] including all related internal documents between OFS Singapore and OFS China.[21] This was the first occasion on which the plaintiffs asserted the existence of foreign related entities of OFS Singapore. Broadly speaking, the scope of the 2nd Discovery Application overlapped with the scope of the Related Party Documents under the 6 May Discovery Order.

35 The 2nd Discovery Application was resisted by the defendants, *inter alia*, on the ground that OFS China is not an existing company but a "terminology referr[ing] to OFS suppliers/purchasing agents".[22] On this basis, the defendants denied the existence of any of the transactions for which documents were being sought. AR Yap disagreed with the defendants and on 29 May 2014 ordered them to file a further list of documents verified by an affidavit in respect of the documents sought ("the 2nd Discovery Order").[23] It was considered a "plausible inference drawn from the general ledgers disclosed" that there has been a "possible siphoning of funds from Technigroup to OFS [Singapore] and onwards to OFEI China or China OFS". It bears highlighting that *no appeal* was filed by the defendants against the 2nd Discovery Order.

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20 Lindy Lin's 25 March 2014 Affidavit, paras 49–54.

21 Order 52 Statement (Amendment No 1) (PBCP Tab 17), Annex O.

22 Affidavit of Tan Weng Kong dated 5 May 2014 (PBCP Tab 21, p 257), para 3.

23 Notes of Evidence for 29 May 2014 (PBCP Tab 21, p 313), pp 15–16.

The Unless Order

36 Alongside the 2nd Discovery Application, the plaintiffs also applied in Summons No 1516 of 2014 for a peremptory order to enforce the defendants' obligations under the 1st Discovery Order, which had not been fully complied with.[24] The specific instances of non-disclosure related to, *inter alia*, documents evidencing projects undertaken by OFS Singapore. It should be noted that these "Project Documents" are also the subject of the 6 May Discovery Order.

37 At the hearing on 15 July 2014, AR Yap found "gaps" in the defendants' disclosures and ordered their compliance within 14 days, failing which they were to make payment of the plaintiffs' claim or part thereof into court ("the Unless Order"). The defendants appealed and the plaintiffs cross-appealed against the sanction ordered for breach of the Unless Order.[25]

38 The appeals were heard before me and on 30 October 2014, I upheld the Unless Order and substituted it with a more severe sanction: that the writ and statement of claim in Suit 379 and the defences in Suit 581 and Suit 727 be struck out in the event of further non-compliance. In reaching this decision, I found that the defendants had deliberately failed to comply with the 1st Discovery Order and had provided no credible explanations for their breaches. In fact, it was stated in no uncertain terms that I considered their various explanations for non-disclosure to be "self-serving", "incredible", "plainly unbelievable" and "contrived".[26] Further, based on the defendants' approach towards their discovery obligations until that point, I made the

[24] Order 52 Statement (Amendment No 1) (PBCP Tab 17), Annex P.

[25] Order 52 Statement (Amendment No 1) (PBCP Tab 17), Annex Q.

[26] Order 52 Statement (Amendment No 1) (PBCP Tab 17), pp 859–874.

unflattering observation that "the defendants have had no qualms in redacting, doctoring and destroying documentary evidence without providing any credible explanation for why they had embarked on such a course". Thus, I was of the view that their breaches were contumelious in nature and deserved a severe sanction.

The striking out

39 The defendants purported to comply with the Unless Order through a further supplementary list of documents and further affidavits. However, as it appeared that the disclosures remained incomplete, the plaintiffs thereafter applied in Summons No 774 of 2015 to strike out the action in Suit 379 and the defences in Suit 581 and Suit 727.[27] AR Yap agreed that the defendants had failed to substantially comply with the Unless Order. Significantly, he took the view that the defendants' explanations for their non-disclosures or belated disclosures were highly unsatisfactory. This was because these explanations had already been discredited by the court in previous applications, had since been contradicted by third party discovery, or were too transparently convenient or contrived to be accepted. Accordingly, on 19 May 2015, AR Yap allowed the application and granted leave to the plaintiffs to enter interlocutory judgment for Suit 727 ("the Striking Out Order").

40 While the Unless Order was primarily premised on the defendants' breaches of the 1st Discovery Order, their breaches of the 2nd Discovery Order had become apparent by this stage and were taken into account by AR Yap in assessing the propriety of the Striking Out Order. In this regard, the defendants unsurprisingly relied on the second defendant's affidavit for the

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27 Order 52 Statement (Amendment No 1) (PBCP Tab 17), Annexes I and R.

2nd Discovery Application,[28] in which he claimed that OFS China does not exist. This same position was adopted in a fresh affidavit filed by the first defendant on 20 March 2015, which interestingly added that the plaintiffs "have not produced any company profile searches or any other registration documents to show that such entities do exist".[29] He also repeated the same argument that all correspondence in relation to OFS China "were adopted by Sandhurst for ease of reference and accounting purposes of all export/expenses through trading agents in China". "Sandhurst" was a reference to Sandhurst Consultancy Pte Ltd ("Sandhurst"), which acted as the corporate secretary for OFS Singapore. AR Yap was not persuaded that the defendants had complied with the 2nd Discovery Order. Pertinently, he observed in his oral grounds that "the Defendants have taken up *untenable* positions in respect of OFS China and OFEI China, since at least one identifiable entity, "OFEI Furniture Products Enterprise", has been revealed" [emphasis added].[30] I also hasten to add that the first defendant's challenge to the plaintiffs to produce a company profile search of OFS China has in fact been met and satisfied (see [88] below).

41 Although the defendants initially appealed against the Striking Out Order by way of Registrar's Appeal No 160 of 2015, they subsequently withdrew the appeal at the hearing before me on 3 July 2015. Thus, interlocutory judgment was entered in respect of Suit 727, with the defendants liable to pay damages to be assessed and/or an account of profits to be taken

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28 Affidavit of Tan Weng Kong dated 5 May 2014 (PBCP Tab 21, p 257).

29 Affidavit of Jaswinderpal Singh s/o Bachint Singh dated 20 March 2015, paras 169–170.

30 Order 52 Statement (Amendment No 1) (PBCP Tab 17), Annex I, p 11.

("the Interlocutory Judgment").[31] As mentioned, the 6 May Discovery Order was made in preparation for the hearing for the assessment of damages.

Relevant legal principles

42 The legal principles governing applications for committal are clear and well-established. An action for civil contempt can be brought against a party for disobedience of a court order requiring an act to be done within a specified time (see O 45 r 5 of the Rules of Court). A party would be in contempt of court if it is shown that the relevant conduct comprising the breach was intentional and it knew of all the facts which made such conduct a breach of the order. In practice, this means that the party must at least know of the existence of the order and all its material terms (*Mok Kah Hong* at [86]). It is however not necessary to establish that the party had appreciated that it was breaching the order by such conduct. His motive is irrelevant to his liability for contempt, though it may be taken into account at the sentencing stage.

43 It is settled law that in both criminal and civil contempt, the court applies the criminal standard of proof beyond reasonable doubt (*Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and others* [2007] 2 SLR(R) 518 ("*Pertamina Energy Trading Ltd*") at [31]). However, the parties' cases raised interesting questions pertaining to issue estoppel and the evidential burden of proof where the alleged contempt consists of a breach of a discovery order.

Issue estoppel

44 Beginning with issue estoppel, there appeared to be a possibility that issue estoppel could arise as I noticed, in the course of examining the

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[31] See Interlocutory Judgement *vide* HC/JUD 199/2016.

procedural history, that the defences to the present committal proceedings traverse the same ground as in the prior interlocutory proceedings. Conscious that no submissions had been made on this point, I invited the parties to tender further submissions on whether the 2nd Discovery Order, the Striking Out Order and/or the 6 May Discovery Order precluded the defendants from denying in their defence: (a) the existence of Related Entities of OFS Singapore; (b) that the defendants own and/or are in control of the Related Entities; and (c) that the documents which formed the subject of the 6 May Discovery Order are in the possession, custody or power of the defendants. I shall refer to these three aspects of the defence collectively as the "Disputed Facts".

The parties' further submissions

45 The plaintiffs predictably argued that the 2nd Discovery Order had made an implicit finding as to the existence of OFS China while the observations made by AR Yap in the Striking Out Order were predicated on implicit findings against the defendants on all the Disputed Facts. Likewise, the 6 May Discovery Order was final and conclusive in respect of all the Disputed Facts, which formed the basis for AR Khng to order the disclosure of the Related Party Documents and Project Documents. Since the arguments and evidence presented before AR Yap and AR Khng were substantially similar to those being canvassed in the committal proceedings, it was said that the defendants have had every opportunity to substantiate their denials, and yet have failed.

46 The first defendant made a number of interesting submissions, objecting to the operation of issue estoppel in committal proceedings as a matter of legal principle. His counsel, Mr Jordan Tan, argued that in the light

of the quasi-criminal nature of committal proceedings, the position in criminal proceedings (as set out in *Public Prosecutor v Nur Ellesha Shahidah Bte Abdul Rahman @ Sasha Binte Abdul Rahman* [2016] SGDC 11) should be adopted, *ie*, that issue estoppel either did not apply at all in committal proceedings, or only applied defensively to protect the defendant from having to face allegations previously determined in his favour. Alternatively, even if issue estoppel could apply offensively to inculpate a defendant in committal proceedings, it was argued that prior judgments reached on a lower standard of proof cannot be dispositive of an issue raised in committal proceedings where contempt must be proved beyond a reasonable doubt. Lastly, the first defendant contended that the assistant registrars' findings could not be binding in committal proceedings because they lacked the competence to determine questions of criminal or quasi-criminal liability.

47 The second and fourth defendants tendered a rather puzzling set of submissions, which I may dispose of here and now. In essence, they submitted that the Interlocutory Judgment contained no determination on any of the Disputed Facts because the statement of claim had not yet been amended to include claims about the Related Entities. This submission was misguided because the Interlocutory Judgment was not in issue; it seems that they may have confused the Interlocutory Judgment with the interlocutory orders in question (namely the 2nd Discovery Order, the Striking Out Order and the 6 May Discovery Order). They also asserted, without explanation, that neither the Striking Out Order nor the 6 May Discovery Order reached a determination on the existence of the Related Entities and the defendants' control over them. While I will comment further on the conclusiveness of the assistant registrars' findings, I think it is plainly contradictory to the record to say that no finding was reached on them, even on a preliminary basis, because

the oral grounds specifically addressed at least OFS China. More bewilderingly, the second and fourth defendants went on to submit, seemingly based on an extended doctrine of *res judicata*, that the *plaintiffs* ought to be estopped from re-litigating the Disputed Facts because no findings had been made on these issues despite the plaintiffs having previously raised them on five to six occasions. Quite apart from the fact that this was not the question they were invited to address, this submission should be rejected outright. Findings on the Disputed Facts had been made *against* the defendants; hence, if any party is to be estopped from taking up the same position, it would clearly be the defendants.

Does issue estoppel operate in the present case?

48 Having considered the parties' arguments and all the circumstances, I have come to the conclusion that issue estoppel does not arise in this case to preclude the defendants from denying the Disputed Facts for the purposes of the committal application. A useful starting point is the Court of Appeal's decision in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 which established the following requirements for issue estoppel (at [14]):

(a) there must be a final and conclusive judgment on the merits of the issue which is said to be the subject of an issue estoppel;

(b) the judgment has to be by a court of competent jurisdiction;

(c) there must be identity between the parties to the two actions that are being compared; and

(d) there must be an identity of the subject matter in the two proceedings.

49 To my mind, the crux of the matter lies in the first requirement. In this regard, it is clear that interlocutory orders can constitute a "final and conclusive judgment on the merits" of an issue. In *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [28], Sundaresh Menon JC (as he then was) observed thus:

> It is important not to equate finality for the purposes of *res judicata* with the vexed issue of finality for the purposes of an appeal. The distinction between "final" and "interlocutory" decisions is not relevant to the doctrine of finality in respect of *res judicata*... Finality for the purposes of *res judicata* simply refers to a declaration or determination of a party's liability and/or his rights or obligations leaving nothing else to be judicially determined...

I also recently held in *Cost Engineers (SEA) Pte Ltd and another v Chan Siew Lun* [2016] 1 SLR 137 at [56] that a consent judgment can be *final* and capable of forming the basis of an issue estoppel as parties should be prevented from re-litigating the same issues raised and argued in previous proceedings after being recorded in a consent judgment.

50 Thus, at first blush, a discovery order may qualify as a basis for issue estoppel. However, the question of issue estoppel must be examined in the light of the *nature of the order* and the particular *issues* which are said to be the subject of issue estoppel. Where a defendant argues that he is not in contempt because he has no further documents in his possession, custody and power, I do not think that the underlying discovery order(s) can, by the operation of issue estoppel, preclude him from denying possession, custody and power of the said documents. For the purposes of this analysis, I shall focus on the 6 May Discovery Order since the evidence and arguments concerning the Disputed Facts were most extensively ventilated at that forum and it forms the strongest basis for any argument in favour of issue estoppel.

51 While the 6 May Discovery Order is final in the sense that it has not been appealed, in its very nature it leaves open the question of the defendants' possession, custody and power of the target documents for further assessment in the light of the defendants' response on affidavit. It is important to crystallise what exactly is entailed in the making of an order for specific discovery. Before a court will order specific disclosure under O 24 r 5 of the Rules of Court, it will first need to be satisfied that there is a *prima facie* case that the documents are (or have been) in the possession, custody or power of the party in question and the documents sought are relevant and necessary (see *The Management Corporation Strata Title Plan No 689 v DTZ Debenham Tie Leung (SEA) Pte Ltd and Another* [2008] SGHC 98 at [30]–[32]; *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) "*Singapore Civil Procedure*" at para 24/5/1).

52 Hence, in making the 6 May Discovery Order, the court made *prima facie* findings that the Related Entities exist, that they are within the defendants' ownership and/or control and that the defendants have possession, custody or power over the transactional documents of the Related Entities. I must stress that these findings were made on a *prima facie* basis, not because the evidence before AR Khng was insufficient to meet a higher standard of proof, but because a *prima facie* finding was all that was required to trigger the court's jurisdiction to make a discovery order.

53 Consistent with this position, a party bound by a discovery order may provide an explanation to displace the *prima facie* findings that prompted the order. Therefore, a discovery order is in its nature not final and conclusive in respect of the existence of the documents sought to be disclosed and the

defendant's possession, custody and power over them. As stated in *Singapore Civil Procedure* at para 24/5/1:

> The making of the order requiring a party to state by affidavit whether any particular document or class of document is or has been in his possession does not prevent the respondent from deposing, in the affidavit that he subsequently makes after the order is made, that he in fact has had no such documents…

54 In a similar vein, Matthews and Malek, *Disclosure* (Sweet & Maxwell, 4th Ed, 2012) state at para 6.57 that "once an order has been made for specific disclosure, that does not preclude the respondent stating in his specific disclosure that he has no such documents". In other words, a discovery order is *capable* of compliance in a manner which ultimately persuades the court to draw a *different* conclusion about the existence and custody of those documents from its preliminary impressions. This may indeed happen if cogent evidence and explanations to this effect are tendered by the party ordered to provide discovery to the court.

55 Applying these principles to the present case, when the 6 May Discovery Order was made, the defendants were afforded an opportunity to explain on oath why the documents sought to be disclosed are not in fact within their possession, custody or power. This must include the possibility of explaining that the Related Entities (whose documents are being sought) do not exist or are not controlled by them. Therefore, I accept that issue estoppel does not operate here and the defendants are strictly not precluded from denying possession, custody and power of the documents and adducing evidence to substantiate this defence.

56 Nonetheless, this does not mean that all allegations of breach fall away once the defendants file an affidavit asserting such a denial. Whether the

defendants have complied with their discovery obligations must still be determined with reference to the adequacy and completeness of their responses on affidavit, in the light of all the evidence. In *Soh Lup Chee and others v Seow Boon Cheng and another* [2002] 1 SLR(R) 604, when assessing if a discovery order had been complied with, Choo Han Teck JC (as he then was) observed that "where the court is satisfied from the documents produced that other documents must exist, the party concerned must either produce them or explain on oath what has become of them" (at [10]). A breach was found on the facts because the plaintiffs succeeded in demonstrating numerous obvious omissions of documents that must surely exist and the defendants had failed to provide a reasonable explanation why the documents were no longer in their possession. In this regard, I am mindful that in both their 24 June LOD and their defences to the contempt proceedings, the defendants have repeated *ad nauseam* the same assertions as before. If at the stage of committal proceedings, they choose to repeat the same factual defences without any further amplification, they undoubtedly run the risk that the court will not give any weight to their contentions and may reject the same explanation again. However, that is a separate matter from whether they are estopped from running the same arguments once more.

57 Bearing in mind the reasoning set out above, I shall make some comments on the parties' submissions. The plaintiffs had cited two cases as examples that discovery and inspection orders could form the basis of an issue estoppel. In my view, both cases can be distinguished from the case before me. The first was *Wee Soon Kim Anthony v UBS AG* [2003] 2 SLR(R) 91 where issue estoppel arose from a discovery order in respect of the question of relevancy. In an earlier discovery application, the court had decided that the appellant's bank records were relevant and necessary and hence ought to be

disclosed. There was no appeal against this decision. As the appellant failed to disclose the documents, the respondent sought inspection directly from the banks under s 175 of the Evidence Act (Cap 97, 1997 Rev Ed). In those later proceedings, the court held that the appellant was estopped from re-litigating the question of *relevancy*, which had been determined conclusively by an earlier court (at [14]). Clearly, the material difference from the present case lies in the *issue* in respect of which issue estoppel is said to operate. While a discovery order may be final and conclusive as regards the question of relevancy, it inherently defers a conclusive determination of the question of possession, custody and power until after a list of documents and a verifying affidavit are filed.

58 The second case cited by the plaintiffs was *Alliance Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1, which at first sight may seem to be on all fours with the facts of the present case. The defendants were ordered to produce a hard disk for inspection. In making the order, Belinda Ang Saw Ean J had clearly stated that a *legal prerequisite* to the court's power to order inspection was a finding that the defendants had possession, custody or power of the hard disk. The Court of Appeal affirmed the inspection order. However, the defendants still failed to produce the hard disk, and in a later application to strike out their defence, they continued to assert that they did not have the hard disk in their possession, custody or power. In striking out the defence, Ang J held that the defendants were estopped from re-arguing the merits of the production order and advancing exactly the same argument that had been rejected by both the High Court and the Court of Appeal (at [23] and [25]). The case before me is different because of the nature of the order that has allegedly been breached. While an order for inspection only permits compliance by producing the documents covered by

the order, a discovery order is capable of compliance in a manner that rebuts the court's preliminary findings about possession, custody and power. Hence, these authorities cited by the plaintiff do not assist in determining whether issue estoppel is operative in the present case in respect of the Disputed Facts.

59 Having found that issue estoppel does not operate here, it is no longer necessary to deal with the first defendant's submissions as a matter of legal principle. Nonetheless, I shall deal with them briefly. Leaving aside the position in criminal law, his principal argument does not address the situation where issue estoppel is directed at preventing parties from re-opening the very subject matter of the civil order that has allegedly been breached. In such a situation, where issue estoppel is not directed at proving the elements of contempt, I do not see why the rationale for precluding issue estoppel in criminal proceedings should bite. It would also be of no import that the prior decision was reached on a lower standard of proof; that is not in itself cause for the court to re-open the merits of the underlying order. I will say more on this below (see [66]–[69]). In any event, it seemed to me that the authority cited by the first defendant does not in fact support the proposition being advanced. In *McIlkenny v Chief Constable of the West Midlands and another* [1980] 1 QB 283, the prosecution had succeeded in a criminal trial in proving beyond reasonable doubt that the plaintiffs were not assaulted by the police and their statements were admissible. Hence, the plaintiffs were estopped from subsequently alleging in a civil action that they had been assaulted by police officers. Although the earlier binding decision in this case was indeed made on a higher standard of proof, the case does not contain any *dicta* preventing issue estoppel from operating in the converse situation where the earlier decision was made on a lower standard of proof. I should add that the lower burden of

proof adopted in the interlocutory orders was certainly *not* the reason why I found that issue estoppel was inapplicable in the present case.

Burden of proof

60 The foregoing analysis paves the way for a lucid statement of the evidential burden of proof where the act of contempt consists of a breach of a discovery order. Relying on *Tan Beow Hiong v Tan Boon Aik* [2010] 4 SLR 870 ("*Tan Beow Hiong*") at [75], the plaintiffs had submitted that it was only necessary for them to prove a *prima facie* breach of the 6 May Discovery Order, following which the burden would shift to the defendants to prove their defence that the Related Entities do not exist and hence the Related Party Documents do not exist either. I do not think that the proposition in *Tan Beow Hiong* has any application here. In that case, the burden of proof was allocated as such in the context of a breach of a *suspended* committal order. Where the court has already determined beyond reasonable doubt that the defendant is liable for contempt and the plaintiff is applying to activate the suspended committal order, the onus rightfully lies on the defendant to satisfy the court that he has cured his proven breaches. In contrast, where contempt is being determined proper at an earlier stage, as in this case, it would be inappropriate to allocate the burden in a similar fashion. To do so would abrogate the procedural safeguards granted to a defendant in quasi-criminal proceedings.

61 Taking into consideration the nature of the 6 May Discovery Order, the definitive act which the defendants were ordered to perform was to file a list of documents verified by affidavit. If the defendants had failed to file an affidavit altogether, there would be no question that they would be in immediate breach of the discovery order. However, if an affidavit is filed, the fact that the defendants have attested to the completeness of their disclosures

or produced some documents is not the end of the matter. The plaintiffs may nonetheless prove a breach by satisfying the court that the disclosure is incomplete. The significance of this is that the evidential burden lies on the plaintiffs to prove beyond reasonable doubt that the defendants have documents within their possession, custody or power that have not been disclosed. In the present case, this means that the plaintiffs bear the burden of proving the Disputed Facts beyond reasonable doubt.

62 This position is consistent with the approach of local and foreign courts to contempt actions for breaches of discovery or disclosure orders. Dealing with alleged breaches of a disclosure order attached to a Mareva injunction, the court in *Monex Group (Singapore) Pte Ltd v E-Clearing (Singapore) Pte Ltd* [2012] 4 SLR 1169 required the plaintiff to prove beyond reasonable doubt that certain bank accounts belonged to the respondent and existed at the date of the order and thus documents in connection with those bank accounts had to be disclosed (see [39]). Similarly, in *STX Corp*, the burden lay on the plaintiff to prove beyond reasonable doubt that a defendant was a beneficial owner of a company and had failed to disclose this in his affidavit of assets (see [48]).

63 A recent decision by the Hong Kong Court of Appeal, *Ip Pui Lam Arthur and Another v Alan Chung Wah Tang and Another* [2017] HKCU 472 squarely affirmed this position. In the Court of First Instance, To J had opined that once the plaintiffs proved that the defendants had not produced the documents at issue, it fell to the defendants to prove *prima facie* that the documents do not exist or had never been or are no longer in their possession, custody or power. Rejecting To J's approach, the Hong Kong Court of Appeal stated this proposition at [4.2]:

> Because of the penal consequence of not complying with paragraph 3 of the March 2015 Order, in order to prove that the defendants are in contempt, the burden on the plaintiffs is to show, on the criminal standard of beyond reasonable doubt, that the documents are in existence and that they are within the custody or power of the defendants to produce them and the defendants intended not to produce them. …

64 In a similar vein, in *VIS Trading Co Ltd v Nazarov and ors* [2015] EWHC 3327 (QB) ("*VIS Trading Co*"), the claimant had applied for the first defendant to be committed to prison for contempt by failing to comply with an order for disclosure of documents recording details of all his assets so as to satisfy a judgment debt (the "21 May 2015 Order"). After the claimant commenced the contempt application, the defendant filed several affidavits of assets and claimed that he had thereby complied with the 21 May 2015 Order. Whipple J was of the view that the burden lay on the claimant to prove that the first defendant's disclosures remained incomplete (at [31] and [35]–[36]):

> [31] … The fact that the First Defendant has produced some documents, in purported compliance with the 21 May 2015 Order, does not determine the compliance issue in the First Defendant's favour... Rather, the First Defendant is on notice of the Claimant's case that the Defendants have failed to comply with the 21 May 2015 Order, and *the Claimant is entitled to continue to advance that case, even in the face of purported compliance by the First Defendant since the date of the application. The burden of proof remains on the Claimant throughout, to the criminal standard, and the Claimant can invite the Court to conclude, on the basis of all the evidence in the case, that the Defendants have not yet complied with the 21 May 2015 Order. …*
>
> …
>
> [35] *The Claimant does not seek to set out a comprehensive analysis of what is missing (how could it, given that the point of the 21 May 2015 Order was to establish what was there, and absent compliance, the Claimant cannot know what is missing). Rather, the Claimant points to a number of categories of documents where the Court can be satisfied to the requisite criminal standard that disclosure to date has been incomplete.* From that demonstrated default, the Claimant invites me to

> draw such inference as I consider to be appropriate – again, to the criminal standard – about the extent of the Defendants' compliance to date, more generally.
>
> [36] The First Defendant maintains that he has disclosed all that is available. I must consider, on all the evidence, whether I accept that. If I conclude that the First Defendant is or might be telling the truth, then I could not be satisfied to the criminal standard of the Claimant's case on continuing breach, and I would have to sentence on the basis of past breaches only.
>
> [emphasis added]

65 Hence, the burden lies on the plaintiff to prove all matters that go towards establishing a breach of the discovery order, which include the existence of the undisclosed documents and the defendant's possession, custody and power of them. To this, the defendants say that in issuing the 6 May Discovery Order, AR Khng merely found that "there is very likely to be at least a Chinese entity, known as [OFS China] that is owned and/or controlled by the [first and second] [d]efendants during the relevant period." This, they submit, falls short of the standard of proof. I cannot agree with this submission. The plaintiffs' case is premised on the evidence they have placed before the court, not on the assistant registrar's decision. Hence, it is no answer for the defendants to argue that the plaintiffs' case falls short of meeting the standard of proof because AR Khng had only made *prima facie* findings.[32] The court's assessment as to whether the standard of proof is satisfied is not limited or in any way constrained by AR Khng's findings which were evidently sufficient for the purposes of the 6 May Discovery Order. Instead, the court's task in this regard is to examine *all* the evidence before the court, including the oral testimony of the first, second and fourth defendants.

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32 Defendants' Further Submissions, paras 16–25.

66 It is imperative for me to clarify that in examining the Disputed Facts in this contempt action, the court is examining the question of *breach*; the court is not purporting to revisit the merits of the underlying discovery order. Ordinarily, where a breach can be established by the commission or omission of a definitive act (*eg*, the failure to turn up for cross-examination or to make payment), the contempt hearing need not traverse the same ground as the underlying order in order to establish a breach. Even though contempt must be proved to a higher standard of beyond reasonable doubt, it is the *breach* which must be proved to this standard, and not the legal and factual merits of the underlying order. Thus, a court hearing a contempt application does not typically re-evaluate the legal and factual premises of the underlying order, which must be complied with as long as it remains valid. Let me illustrate this by way of two examples.

67 In *OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others* [2005] 3 SLR(R) 60 ("*OCM Opportunities Fund II*"), the defendants were ordered under a worldwide Mareva injunction to disclose all of their assets to the plaintiffs. They were refused leave to suspend any disclosure of assets pending their application to set aside the Mareva injunction. Belinda Ang Saw Ean J dismissed the setting aside application and the defendants appealed. In the interim, they deposed to affidavits of assets that were wholly lacking in particulars and failed to turn up for cross-examination on those affidavits. Eventually, default judgment was entered against them for being in breach of a peremptory order for cross-examination and a permanent injunction was put in place until the judgment sum was satisfied. The Court of Appeal also refused to hear their appeal on account of their contumelious contempt of court.

68 The point of significance is that in subsequent committal proceedings for breaches of the disclosure order and cross-examination order, only the purported breaches – the inadequacy of the "holding affidavits" and the failure to turn up for cross-examination – had to be proved beyond reasonable doubt (at [30]). There was no suggestion that the merits of the underlying orders had to be proved afresh to the higher criminal standard of proof. Rather, the orders remained binding even if the defendants disagreed with them:

> [28] The starting point is this. The correct and only course, short of obedience to the orders in question, was to seek, through appropriate legal process, to have the orders discharged, set aside or stayed. That was what the majority defendants did initially. But once their stay applications failed or applications for expedited appeal were refused, the majority defendants continued to ignore and disregarded their legal duty under the various orders.
>
> [29] As long as the orders stood, the plaintiffs were entitled to have them respected and obeyed. It is not for the majority defendants to disregard the orders on the basis of a belief that the Order of 5 March 2004 was basically wrong in that the action should be set aside or stayed and the Mareva injunction discharged. The legal position on this is clear. …

69 *Mok Kah Hong* demonstrates the same point. In that case, the husband had been ordered to pay a lump sum maintenance to his ex-wife. In the substantive appeal, the Court of Appeal had quantified this lump sum based on the value of the husband's *known* assets, to which an uplift was applied to account for adverse inferences drawn from his conduct in divesting himself of his assets during the matrimonial proceedings. The husband failed to pay the maintenance sum and his ex-wife brought committal proceedings against him. In the committal action, the husband consistently adopted the position that he had no means to comply with the order of court. However, he produced no new evidence to suggest any material change in circumstances since the making of the order. The Court of Appeal thus rejected the husband's attempt

to launch a collateral attack on the specific findings already made in the substantive appeal about his financial means. Such an approach was directed at preventing "alleged contemnors from continuously seeking to reopen and relitigate findings that have already been made at an earlier substantive hearing" (at [91]). In other words, since the husband's financial means had been conclusively determined in the Court of Appeal's earlier order, it was not necessary for the Court of Appeal to be satisfied of his financial means on a higher standard of proof in order to establish his breach in the committal proceedings and it was not obliged to excuse him in the absence of any evidence of a change in circumstances.

70 Finally, I should clarify that nothing in the analysis above should call into question whether the 6 May Discovery Order is sufficiently clear and unambiguous as to form the basis of a committal order. Rather, it is in the *nature* of the 6 May Discovery Order that the defendants' compliance with those clear obligations is to be assessed with reference to the sufficiency of their responses and the plaintiffs' ability to show evidence of documents that should have been, but were not, disclosed.

Relevance of earlier court findings

71 If these earlier court orders do not give rise to issue estoppel, then what is their significance to this application? They have relevance at several fronts. First, though I must arrive at findings on the Disputed Facts based on the evidence, I need not ignore the fact the court has already considered and rejected the defendants' purported explanation in relation to OFS China on several occasions. The court's previous rejections would be relevant in considering whether the defendants have offered any *fresh* reasons in support of their purported explanation and if not, how that would in turn impact on the

plaintiff's burden of proof. In short, notwithstanding that issue estoppel is strictly inapplicable, I am entitled to inquire whether there is any reason for the court to revisit its previous rejections of the defendants' explanation. Second, the defendants' past conduct of their case, in the face of numerous criticisms by the court, has a bearing on whether committal is a proportionate response at this stage of the proceedings. This is thus an appropriate juncture for me to pause to note some common strands that emerge from the procedural history.

72 First, the defendants' repeated breaches all related to discovery aimed at uncovering the full extent of their involvement in rival ventures in breach of the duties owed to the plaintiffs by the first and second defendants. Second, the procedural history evinces a pattern of incomplete disclosures accompanied by inadequate, unsubstantiated and often self-contradicting explanations. Their behaviour until the imposition of the Unless Order led me to conclude on that occasion that "[a]ll of their actions appear deliberately designed to dilute [the first and second defendants'] involvement in OFS".[33] In arriving at the Striking Out Order, AR Yap also concluded thus:

> … [I]t is evident that the [d]efendants have been recalcitrant in seeking to avoid full compliance with its discovery obligations. At no point during the contest of the unless order, the Registrar's Appeals, or even these proceedings [have] the [d]efendants displayed any acknowledgement of their failings. Instead, the [d]efendants have attempted to stick to their guns and in so doing, have compounded their earlier errors.[34]

73 A critical fact that should be emphasised is that although the defences were struck off and judgment entered, the defendants' discovery obligations in fact remained substantially not complied with. The breaches that remained

[33] Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 870.

[34] Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 576.

unsatisfied include the project documents evidencing transactions between OFS Singapore and identified customers covered by the 1st Discovery Order and all the documents covered by the 2nd Discovery Order. What is more, the plaintiffs had to resort to third party discovery against Sandhurst in order to obtain documents which the defendants had failed to disclose. The defendants only disclosed *two documents* from Sandhurst. This unsatisfactory disclosure led to a third party discovery application against Sandhurst which resulted in a disclosure of 555 more documents.[35] The production of this large trove of documents was a direct repudiation of the defendants' earlier assertions that their disclosures were complete, and served to demonstrate the extensive measure of their suppression.

74 These repeated failures by the defendants occurred despite sufficient notice of the importance of their discovery obligations and the severity of their breaches. Essentially, it appears that the defendants took the calculated decision to allow their defences to be struck off and judgment to be entered rather than fully comply with the discovery orders. Thus, if the defendants are found to be in breach of their discovery obligations once more on this occasion, it can hardly be said that contempt is a disproportionate measure.

Analysis

Did OFS China exist at the material time and if so, was it under the control of the first and second defendants?

75 Having established the applicable principles, I shall now examine the evidence of the defendants' outstanding breaches of the 6 May Discovery Order. Central to the defendants' case that they are not in contumelious breach

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[35] Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 571.

of the 6 May Discovery Order is that OFS China never existed as a corporate entity in China.[36] All references to OFS China in the contemporaneous documents were instead mistakenly used by Sandhurst to refer to a group of suppliers and agents in China with business dealings with OFS Singapore. It is vital to bear in mind that it is *no*t the defendants' case that OFS China never had any of the Related Party Documents or that the defendants *no longer* had possession, custody or power over those documents. It is also not their case that the Related Party Documents which they have disclosed are all that they have. Instead their case is that they do not have *any* Related Party Documents. As such their defence rests substantially on the court's finding as regards the corporate existence of OFS China and its relationship with the first and second defendants.

76 In deciding whether the defendants had deliberately breached the 6 May Discovery Order, it is first necessary to determine whether OFS China ever existed and if so, whether it was owned and/or controlled by the first and/or second defendants at the material time. These two inquiries will be dealt with together as they cover the same ground. If they are resolved against the defendants, it must follow that they have possession, custody and power of the transactional documents of OFS China (*ie*, the Related Party Documents and the Project Documents in relation to OFS China) by virtue of their ownership or control. Their continuing denial would thus be intentionally false and hence their non-compliance is both wilful and contumelious. With this in mind, I now turn to the evidence.

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36 Joint Reply Affidavit of Jaswinderpal Singh s/o Bachint Singh and Tan Weng Kong dated 16 September 2016 ("2nd Joint Reply Affidavit"), paras 71(e), (h) and (i).

Email Correspondence

77 This is always a good starting point for the inquiry. There is a preponderance of correspondence which referred to OFS China as a corporate entity. This emerged from the documents which were flushed out from Sandhurst pursuant to a third party discovery order (see [73] above).

78 In examining the contemporaneous correspondence, it is useful to keep in mind the defendants' purported explanation for the repeated references to OFS China – it was allegedly used by Sandhurst to describe a group of suppliers and agents in China. The defendants relied on an affidavit filed by Sukhbir Singh s/o Gernail Singh on behalf of Sandhurst in an earlier application in which Sandhurst confirms that OFS China is an abbreviation, adopted by it for accounting convenience, referring to OFS Singapore's suppliers in China.[37] It will be self-evident that this explanation simply does not make sense, as the defendants conceded under cross-examination.

79 First, in an email dated 3 February 2012, a revised invoice issued in the name of OFS China (specifically, "OFEI Furniture Products Enterprise") was sent by Sandhurst to the second defendant.[38] This revised invoice was prepared by Sandhurst in response to the second defendant's email instruction on 2 February 2012 to "increase the value by 39% for all the prices and so the total prices will be around $9255". The revised invoice stated the address of OFS China as "Shangen Gangtoucun, Xiqiao, Nahai / Foshan City, Guangdong". This email was also relied on by AR Khng as "an important email as it shows that the 2nd Defendant had some kind of control over an

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37 Affidavit of Sukhbir Singh s/o Gernail Singh dated 26 February 2016 filed in Summons No 5877 of 2015 ("Sandhurst Affidavit"), p 4.

38 Order 52 Statement (Amendment No 1) (PBCP Tab 17), pp 712–718.

invoice issued by [OFS China]".[39] This must be correct as the inference is irresistible in the face of the email exchange. Why would the second defendant be instructing Sandhurst to revise an invoice upwards for OFS China unless it was related to OFS Singapore?

80 Under cross-examination, the second defendant claimed that the 39% price increase was requested by the customer, T-Space Planning & Services Pvt Ltd, to facilitate custom clearance in India. He said that if the price was not increased, customs would require the container to be inspected. Why would a customer agree to pay a mark-up of 39% in order to be relieved of the inspection? The inherent flaw of this unbelievable explanation lies in that fact that it presupposes that the Indian customs officers would know what the market price of the contents is with reference to the invoice price in determining whether to inspect the container. Further, when the first defendant was cross-examined on this revised invoice by OFS China, he claimed that OFS China is *a supplier* run by one Kristopher (also known as Kristoph) in China. This contradicts his earlier position that OFS China is merely a loose reference used by Sandhurst to describe a *group of suppliers/agents*. In any event, the second defendant's explanation offers no sensible reason why he and Sandhurst were revising an invoice for OFS China, except that he exercised control over its transaction prices.

81 Second, on 2 March 2012, Sandhurst sent an email to one Gina Lu ("Gina"), copied to the second defendant and one Kristoph, requesting "the accounting records for the China company of OFS from the date of commencement in excel spreadsheet till the month of Feb 2012".[40] It is to be

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39 Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 592.

40 Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 637.

noted that the request is very specific to "the China company of OFS". The second defendant agreed under cross-examination that it would not be logical to ask for the accounting records of a non-existent company. Further, the email was addressed to Gina, whom the second defendant agreed was from OFS China at the material time.

82 More importantly, if OFS China was intended as a loose reference to a group of suppliers and agents in China, it is utter nonsense for Sandhurst to be requesting for the accounting records of such an alleged grouping of suppliers/agents especially since there is no evidence before the court as to the composition of this alleged grouping. This is a patently dishonest explanation. Mr Jordan Tan in fact confirmed at the hearing that there is "no such list" before the court and he was unaware of any "composite list". There is no conceivable reason why Sandhurst, acting as the corporate secretary of OFS Singapore, would be writing to OFS China to ask for its accounting records unless it is related and controlled by the first and second defendants through OFS Singapore. The sample excel spreadsheet sent by Sandhurst required information from OFS China such as "Invoice No", "Sold to", "Date Paid", "By cash" and "By cheque".[41] There is no sense asking for such detailed transactional information from a grouping of suppliers/agents. Instead, the reporting of the transaction records of OFS China to OFS Singapore is consistent with a clear corporate link between the two companies. By the same token, it would not make any sense for such suppliers to agree to provide such confidential information to OFS Singapore if it were merely a "customer" of this alleged grouping of suppliers. There is nothing in the sample spreadsheet to limit the disclosure of such confidential information to only transactions with OFS Singapore.

[41] Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 639.

83 Third, in an email dated 13 March 2012, the second defendant provided Sandhurst with a list of shipments from OFS China to OFS Singapore.[42] This list bore the letterhead and the corporate logo of OFS China. It is plainly inconceivable for OFS China to have a corporate logo if it was merely a loose reference to an alleged grouping of suppliers. Further, there would be no reason for the second defendant to be co-ordinating the transmission of this list of shipments to Sandhurst unless it was related to and controlled by the first and second defendants through OFS Singapore.

84 Fourth, the fact that OFS China is related to and controlled by the first and second defendants through OFS Singapore is also borne out by a further email dated 4 April 2012 from Sandhurst to Kristoph, copied to the second defendant.[43] The second defendant testified that Kristoph was a sourcing agent for OFS Singapore and supplied products to OFS Singapore under the name of OFS China.[44] Likewise, the first defendant testified that Kristoph ran OFS China. In this email, Sandhurst requested "for income and expenses for OFS China" to be reported in a template excel spreadsheet. The request contained specific instructions for "the cash/petty cash expenses" and to "ensure that the cheque[s] are in running order". Again, it is plainly illogical for Sandhurst to be asking for the "income and expenses for OFS China" and such specific details including "petty cash expenses" and for OFS China to agree to provide the same unless it is related to OFS Singapore. In fact, as OFS Singapore was paying for expenses of OFS China including meal expenses, the second

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42 Order 52 Statement (Amendment No 1) (PBCP Tab 17), pp 617-619.

43 Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 638.

44 2nd Joint Reply Affidavit, p 462–463 (*ie*, Affidavit of Tan Weng Kong dated 15 February 2016, exhibit "TWK-2").

defendant agreed that it is possible that OFS China was indeed owned by OFS Singapore.

85 In another email dated 8 November 2012, Sandhurst wrote to Kristoph, addressing him as "Boss" and requesting "the [C]hina shipment details and expenses".[45] Why would Sandhurst, as corporate secretary of OFS Singapore, be asking for such information and more importantly be addressing Kristoph of OFS China as "Boss" if there is no ownership relationship between OFS China and OFS Singapore? On 20 November 2012, Kristoph replied to Sandhurst by way of email, copied to the second defendant, attaching an excel spreadsheet setting out the profit and loss statement of OFS China.[46] There is no logical reason for Sandhurst to have any interest in the profit and loss accounts of OFS China unless it was indeed related to OFS Singapore. Sandhurst's contrived explanation is that it "assumed [Kristoph] wanted to stay transparent and fully accountable" and "over provided Sandhurst with… basically not relevant information" which Sandhurst ignored as it only accounted for expenses incurred by Kristoph for purchases on behalf of OFS Singapore.[47] This is a ludicrous explanation. It is inexplicable why a supplier would find it necessary to be accountable to the corporate secretary of its customer unless there was an ownership connection. Indeed, the first defendant agreed that the fact that OFS China has a profit and loss statement is consistent with its existence as a corporate entity. He also agreed that if OFS China were a supplier, there is no reason why it would offer its profit and loss statement to OFS Singapore. According to the first defendant, it does not make

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45 Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 648.

46 Order 52 Statement (Amendment No 1) (PBCP Tab 17), pp 650–652.

47 Sandhurst Affidavit, para 31.

any sense "but it is true". In my judgment, nothing can be further from the truth.

86 Finally, in an email chain ending 3 September 2012, Gina's initial email was signed off on behalf of OFS China with an email address and a physical address located at "Foshan ctiy [*sic*], Nanhai district, Xiqiao, San Gen, Jiang Tou Yong Dong, Er Xiang Qi Hao" which not surprisingly matches the address stated in OFS China's revised invoice mentioned earlier.[48] The second defendant acknowledged that it would not make sense for a loose grouping of suppliers to have a specific address.

87 I should add that the second defendant did state under cross-examination that although he was copied on the various email exchanges, he had "ignored" them because he did not deal with accounting matters. In my view, that misses the point. There would be no reason to have copied the second defendant on the email exchange on accounting matters relating to OFS China unless he and, correspondingly, the first defendant had a financial interest in OFS China.

Company Searches in China

88 There is no dispute that the plaintiffs conducted company searches in China to determine the corporate existence of OFS China.[49] It is a fact that the searches confirmed that OFS China was indeed incorporated in Foshan City, China with an address substantially similar to the address of OFS China as stated in Gina's email and the revised invoice: "Foshan City Nanhai District Xiqiaoshangen Administrative Region Gangtouyong Village East Second St.

48 Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 721.

49 Order 52 Statement (Amendment No 1) (PBCP Tab 17), pp 701, 726–731.

No. 7". It was incorporated on 19 October 2011 with a registration number and was de-registered on 16 August 2013. The searches were carried out on Chinese government websites. When confronted with the plaintiffs' company search of OFS China, the second defendant conceded that OFS China did exist as a corporate entity.

89 The defendants claimed to have carried out similar searches in China with nil returns.[50] When asked whether a specific search was carried out in Foshan City, China, the defendants' counsel confirmed that they do not have any information on the specific searches which were carried out by the defendants' Chinese lawyer. The defendants were only able to direct me to the search results exhibited in their Chinese lawyer's affidavits. Although these exhibited searches included the Guangdong area, of which Foshan City is a part, the search for OFS China was not carried out using Chinese characters. There was also no specific search of the Foshan City records.

90 In my view, the plaintiffs' search results merely confirmed a fact which is clearly borne out by the defendants' own contemporaneous correspondence. It is not clear how, where and when the searches were carried out by the defendants. I would have thought that given the body of objective correspondence, coupled with the positive search results by the plaintiffs listing the exact Chinese name OFS China was incorporated under, it was for the defendants to conduct a specific search in Foshan City if they wished to maintain their misguided denial of the corporate existence of OFS China. It may well be that the searches conducted by the defendants was restricted to companies which were still on record and therefore with the de-registration of

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[50] 2nd Joint Reply Affidavit, Tab 24, pp 565–821 (*ie*, Affidavit of Tan Weng Kong dated 15 February 2016, exhibit "TWK-2").

OFS China on 16 August 2013, the searches may have shown a false negative. This observation, however, in no way formed any part of my finding that OFS China did exist and was controlled and/or owned by the first and second defendants through OFS Singapore.

OFS Singapore's accounting records

91 Finally, the general ledger of OFS Singapore contained critical entries which undoubtedly established an ownership link between OFS China and OFS Singapore.

92 The general ledger as of 31 August 2012 referred to various payments by OFS Singapore to OFS China for "printing/stationery", "telephone expenses" and even "meals".[51] Such payments are entirely consistent with the plaintiffs' case that OFS China was controlled by OFS Singapore. The first defendant claims that the reimbursement of such expenses was pursuant to an agreement with OFS China. However, by the defendants' own case, OFS China is merely a term loosely used by Sandhurst to describe a group of suppliers/agents in China. It is incongruous for OFS Singapore to be reimbursing expenses for a group whose composition is not even disclosed. Further, such reimbursement is quite unusual to say the least. Yet there is no evidence before me of any agreement to support such an unusually generous reimbursement policy. Needless to say, it is quite difficult to imagine an agreement with a group of suppliers/agents whose composition is unknown.

93 When confronted with such irrefutable evidence, the first defendant concocted a new explanation under cross-examination that these expenses were paid in cash to Kristoph who would then pay the expenses to the

[51] Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 671.

suppliers and agents in China on behalf of OFS Singapore. If this were true, there would be no reason why the general ledger would not refer the payments to Kristoph instead. Further, there is no evidence of any proper accounting by Kristoph as to how, for what and when the payments to suppliers/agents were allegedly made.

94 The general ledger as of 31 August 2012 and 31 March 2013 also contained substantial advances to OFS China, the breakdown of which is set out below:[52]

Date	Quantum of advance (S$)
25/10/2011	100,000
19/03/2012	100,000
21/11/2012	100,000
21/11/2012	152,775.40
21/11/2012	16,500
21/11/2012	12,100
21/11/2012	70,400

95 When confronted with these advances, the first defendant again claimed that these advances were made to suppliers and that they were in fact paid to Kristoph. This is unconvincing because, first, if they were indeed advances to suppliers, surely they must eventually be reflected in the suppliers' invoices to OFS Singapore. Yet no corresponding invoices have been disclosed and neither were they reflected in the general ledger. Second,

52 Order 52 Statement (PBCP Tab 17), pp 660, 670 and 681.

there is also no evidence that the advances were in fact paid to Kristoph. Even if they were paid to Kristoph, it does not mean that these advances were not made to OFS China since, by the first and second defendants' own evidence, Kristoph is from OFS China.

Conclusion on OFS China

96 In the light of such compelling objective evidence, it is disingenuous for the first and second defendants to maintain the false position that OFS China was merely a reference used by Sandhurst to describe a group of suppliers/agents in China. I am satisfied beyond reasonable doubt that OFS China existed as a corporate entity during the relevant period and that the first and second defendants had control of OFS China through OFS Singapore. Considering the evidence of invoices, income, freight costs and expenses of OFS China, I am also convinced that documents evidencing the transactions carried out by OFS China (*ie*, the Related Party Documents and the Project Documents) must exist and remain undisclosed by the defendants in spite of their control over OFS China. Like the English court in *VIS Trading Co* (see [64] above), I do not think it is reasonable to expect the plaintiffs to itemise specific transactional documents that are missing. I should underscore that *none* of the Related Party Documents or the Project Documents has been disclosed. Given that the purpose of the 6 May Discovery Order was to establish what documents exist in these two categories, the plaintiffs cannot possibly know what specific items are missing if the defendants have wilfully withheld this information *altogether*. Hence, it is sufficient that I am satisfied beyond reasonable doubt that these two *categories* of documents are in existence and come within the first and second defendants' possession, custody or power.

Did OFS India exist at the material time and if so, was it under the control of the first and second defendants?

97 The plaintiffs' case in relation to OFS India is substantially weaker. As with OFS China, establishing the defendants' failure to disclose the Related Party Documents and/or the Project Documents for OFS India turns on the corporate existence of OFS India. This is because the defendants' case is that initial plans to set up an affiliate of OFS Singapore in India did not materialise, and hence no Related Party Documents or Project Documents exist.[53]

98 The plaintiffs rely principally on an email dated 2 March 2012 from Sandhurst to one Vibhavari Lad ("Vibha"), copied to the second defendant, in which Sandhurst requested for "the accounting records for the India company of OFS from the date of commencement in excel spreadsheet till the month of Feb 2012".[54] This request notably mirrors the request made of OFS China and discussed at [81]–[82] above. In the email, Sandhurst also suggests that the excel spreadsheet should be sent to them on a monthly basis. I agree with the plaintiffs that it makes no sense for Sandhurst to request for the accounting records of a non-existent company. The first defendant's testimony however was that Sandhurst was under the mistaken impression that OFS India had been incorporated by that time when it was not. To demonstrate this, the first defendant pointed to an email several months later on 17 August 2012 where Vibha reported on the "process of finalizing the set up of OFS Representative branch office in India".[55] The first and second defendants' evidence was that this entity was finally never incorporated, though I note there is no

53 2nd Joint Reply Affidavit, para 71(f).

54 Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 723.

55 Order 52 Statement (Amendment No 1) (PBCP Tab 17), p 654.

documentary evidence to prove that the initial plans were terminated. Nonetheless, on the face of the 17 August 2012 email, it does appear to contradict the existence of a corporate entity of OFS India in March 2012. The plaintiffs' counsel proffered the possibility that the email dated 17 August 2012 was referring to a different Indian entity, this being a representative office of OFS Singapore rather than the Indian-incorporated company mentioned in March 2012. While this may be so, the plaintiffs, unlike in the case of OFS China, do not have any other evidence establishing the existence of a related corporate entity actively trading in India and coming under the control of OFS Singapore or the first and second defendants. Since it is in doubt whether OFS India was active to begin with, in my view, there is insufficient evidence to discharge the plaintiffs' burden of proof that there exist Related Party Documents and/or the Project Documents in relation to OFS India that the defendants have failed to disclose.

Conviction

99 To summarise, based on the objective evidence and consistent with the findings in the earlier court orders, it is clear that OFS China did exist until it was de-registered on 16 August 2013 and transactional documents of OFS China do exist. Crucially, the first and second defendants were in control of OFS China through their control of OFS Singapore. I reiterate that their control of OFS Singapore cannot be disputed now since Interlocutory Judgment has already been entered; there is no room for the first defendant to distance himself from OFS Singapore under the pretext that his wife was a director, as he sought to do under cross-examination, and in any case this account runs contrary to the second defendant's evidence that the first defendant was the "boss" of OFS Singapore. It follows from their control over

OFS China that the first and second defendants had possession, custody or power over the Related Party Documents and the Project Documents of OFS China. Therefore, their failure and refusal to disclose the documents is contumelious and in wilful defiance.

100 In oral submissions, Mr Jordan Tan contended that the defendants lacked the *mens rea* to commit contempt. He submitted that even if the defendants' explanations on affidavits were false, they were not *deliberately* false but were asserted in reliance on explanations offered by Sandhurst and searches by their lawyers in China. He urged the court to take into account his client's efforts to ascertain the true position from Sandhurst. In my view, this escape route is simply not open to the first and second defendants. Having found from the contemporaneous documentary evidence that the first and second defendants exercised control over OFS China through OFS Singapore, I fail to see how it can be possible for the first and second defendants to be *innocently* mistaken about the existence of entities that they had actively incorporated and directed.

101 Mr Tan also raised the argument that the evidence presented by the plaintiffs shows that the first and second defendants could not have had possession, custody or power over the Related Party Documents and the Project Documents when the 6 May Discovery Order was issued. At that time, OFS China had already been de-registered some three years earlier in August 2013. This argument is misconceived and is, in my view, an opportunistic one. To proceed down this line, the first and second defendants must first accept that OFS China did exist. They must then go on to prove that since the de-registration of OFS China, they *no longer* have possession, custody or power over the Related Party Documents. This argument is contrary to their own case

theory which categorically denies the existence of OFS China. Further, there is no evidence to support the implicit contention that they *no longer* have possession, custody or power over the Related Party Documents and the Project Documents post the de-registration of OFS China.

102 In relation to the fourth defendant, her counsel, Mr Kirpal Singh, submitted that no order should be made against her because she had not acted deliberately in defiance of the 6 May Discovery Order. Although she was a director of OFS Singapore and had filed affidavits affirming that the defendants do not own or control any Related Entities (which I have found to be false), it emerged from the cross-examination that she may not have properly appreciated the contents of the affidavits and did not have detailed knowledge of the operations of OFS Singapore and its entities in China or India. It is also clear from the evidence and the Interlocutory Judgment that the wives of the first and second defendants were nominee directors acting under the instruction of the first and second defendants, who were in substance the bosses of OFS Singapore. Thus, while I find her in contempt of court for breaching the 6 May Discovery Order which was addressed to her as well, her lower culpability will nonetheless be taken into account in sentencing.

103 In sum, I am satisfied beyond reasonable doubt that the first, second and fourth defendants were in contemptuous breach of the 6 May Discovery Order by deliberately failing to disclose the Related Party Documents and Project Documents.

Sentencing

The legal principles

104 Having found that the first, second and fourth defendants were in contempt of court, I proceed now to determine the appropriate sanction. The starting point is that committal to prison is usually a measure of last resort, though this does not oblige the plaintiffs to exhaust all alternative remedies first: *STX Corp* at [81] and *Mok Kah Hong* at [96]. As the court noted in *STX Corp* at [82], a custodial sentence will not be imposed for a "casual or accidental" breach. Regard should also be had to the distinction drawn by the Court of Appeal in *Mok Kah Hong* between breaches which are one-off in nature and breaches which are either continuing or repeated in nature (at [103]). While the overriding principle for one-off breaches is punishment for past breaches, a sentence for the continuing breaches may be additionally motivated by the objective of coercing the contemnor to effect compliance with the order.

105 The Court of Appeal also identified several factors relevant to sentencing (at [104]), taking guidance from the decision of the English High Court in *Crystal Mews Limited v Metterick & Others* [2006] EWHC 3087 (Ch) at [13]:

(a) whether the plaintiff has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy;

(b) the extent to which the contemnor has acted under pressure;

(c) whether the breach of the order was deliberate or unintentional;

(d) the degree of culpability;

(e) whether the contemnor has been placed in breach of the order by reason of the conduct of others;

(f) whether the contemnor appreciates the seriousness of the deliberate breach; and

(g) whether the contemnor has cooperated.

106 It should be stressed that the factors listed above were not intended to form a rigid framework but were simply directed at guiding the court to consider all relevant facts. The Court of Appeal went further in *Mok Kah Hong* to discuss salient factors that commonly featured in the sentencing process for contempt cases in matrimonial contexts (see [105]–[110]). These were: (a) a degree of continuity in the contemptuous conduct, taking into account the past conduct of the contemnor; (b) the impact of the contemptuous conduct on the other party; (c) the nature of the non-compliance, in particular whether it was intentional or fraudulent on the part of the contemnor; and (d) any genuine attempts on the part of the alleged contemnor to comply with the judgment or order. In *Mok Kah Hong* itself, the Court of Appeal sentenced the husband to eight months' imprisonment (suspended for four weeks) in the light of his grave and contumelious disregard of the judgments and orders on multiple occasions.

107 In my view, these factors, though not exhaustive, are equally relevant and instructive in cases of contempt in commercial contexts. For example, in *OCM Opportunities Fund II*, the court considered the continuing and intentional nature of the defendants' breaches of their disclosure obligations pursuant to the Mareva injunction. It noted that the defendants remained uncooperative and had not purged their contempt by the time of the committal

hearing. Further, it was an aggravating factor that their refusal to disclose the true value of their assets was deliberate and inexcusable, and in clear defiance of the authority of the court. Thus, the defendants were committed to six months' imprisonment for breaching the disclosure orders and failing to attend court for cross-examination on their affidavits of assets. Similarly, in *Maruti Shipping Pte Ltd v Tay Sien Djim and others* [2014] SGHC 227 ("*Maruti Shipping*"), the court took into account the contemnor's past conduct, noting that he was a "repeat offender" who had previously breached a Mareva injunction (at [127]). The court also appeared to pay attention to the impact of his conduct on the opposing party; it was an aggravating factor that the defendant had dragged out the proceedings and could no longer make restitution of the sum that he had deliberately dissipated (at [125] and [128]). An imprisonment term of six months was imposed for a litany of breaches for preventing the execution of an Anton Piller order, withdrawing monies in breach of a Mareva injunction, failing to comply with disclosure obligations and failing to deliver up his passport.

108 The impact of the disobedience on the other party was even more clearly a consideration in *Lexi Holdings Plc (in administration) v Luqman and others* [2007] EWHC 1508 (Ch) ("*Lexi Holdings Plc v Shaid Luqman (2007)*"), where the defendant had concealed or failed to disclose information about his assets and funds in an attempt to prevent recovery of the proceeds of fraud. Arriving at the view that this was a very serious case, Henderson J commented that the defendant had "done his level best to hinder the administrators in their task, and such information as he has disclosed has been prised from him step by reluctant step" (at [184]). Thus, it is clearly relevant to consider how obstructive or cooperative the defendant has been and the impact of such behaviour or attitude on the other party.

109 In addition, where the contemptuous act consists of breaches of discovery or disclosure obligations, it will also be pertinent to bear in mind the extent of the non-disclosure and whether any positively misleading disclosure had been made (*eg*, a pretence that complete disclosure had been given). These facts would be germane to any assessment of the nature of the breach and its impact on, or prejudice to, the other party. For example, in *Lexi Holdings Plc v Shaid Luqman (2007)*, the defendant's breaches merited a higher sentence where he had made dishonest and untruthful attempts to positively disown assets beneficially held by him and to prevent the tracing of certain funds to their ultimate destination (see [189]–[190]). The court also considered that even at the time of the committal order, the information provided remained woefully incomplete and inadequate. In a later judgment, the defendant's provisional sentence was in fact revised upwards because he had "grossly aggravated his contempt" by having further affidavits filed on his behalf which were either fabricated or a product of duress, containing "convenient" explanations devoid of documentary evidence (see *Lexi Holdings Plc (In Administration) v Shaid Luqman & Ors* [2007] EWHC 2355 (Ch) at [56] and [60]).

110 In examining the authorities which dealt principally with breaches of disclosure obligations contained in freezing orders, I am mindful that such disclosure obligations are of a somewhat different flavour from an order for specific discovery, which is what I am concerned with in the present case. Deliberate and substantial breaches of the disclosure provisions of a freezing order tend to be treated as a serious matter because any subsisting non-disclosure increases the risk that assets may be dissipated without accountability, which in turn undermines the very purpose of a freezing order and the other party's ability to satisfy his claim. For this reason, such a breach

normally attracts an immediate custodial sentence (*JSC BTA Bank v Solodchenko and others (No 2)* [2012] 1 WLR 350 at [51]). Nonetheless, it may be considered equally an obstruction of the administration of justice when a defaulting party deliberately and substantially interferes with a litigant's ability to prove his case or to quantify the loss caused to him by refusing to adequately comply with a discovery order. In serious cases, it would appear that the defaulting party is attempting to evade a final determination of his obligations in accordance with law. Thus, I found it instructive to refer to the reasoning in these authorities.

Application to the present case

111 With the above guidance in mind, I shall move on to consider how the legal principles apply to the facts at hand. Relying on *OCM Opportunities Fund II*, *Maruti Shipping* and *Mok Kah Hong* (discussed above), the plaintiffs pressed for the first, second and fourth defendants to be committed to prison for six to eight months. They argued that the defendants' conduct is of a similar severity because the defendants have deliberately defied court orders with the motive of denying the plaintiffs redress and prolonging the search for evidence. Further, their breach in relation to the undisclosed documents is a continuing one, for which they have shown no remorse. I accept that the defendants' failure to disclose the Related Party Documents and the Project Documents is a continuing one, though it is a mitigating factor that they have purged their contempt in relation to the initial Missing Statements.

112 Counsel for the first and second defendants submitted that either a fine or a suspended custodial sentence should be imposed. This was to reflect that they were not in contumelious breach as they had believed in the non-existence of the Related Entities out of wilful blindness at best and may not

have understood the consequences of non-compliance. However, I have already explained (at [100] above) the flaw in any attempt to disavow the deliberate nature of the first and second defendants' actions. Moreover, in my view, their non-compliance is all the more egregious because the documents sought had been the subject matter of earlier court orders which the defendants had also liberally flouted. Further, the first and second defendants continue to maintain the same false position which had already been repeatedly rejected by the court without bolstering it with *any* credible evidence. In fact, when I gave the defendants an opportunity to explain the body of evidence to the court in cross-examination, their position was worsened.

113 The defendants also implored me to consider that committal should be ordered only as a last resort. To this, I would question: what else can the plaintiffs be expected to do? In my opinion, it would be futile to require the plaintiffs to seek another order for further discovery or another Unless Order, given the history of repeated breaches in respect of the *same* documents. Given their abysmal track record, the defendants are likely to repeat the same false explanation. In the four-month interval between the two hearings, I had invited the defendants to take steps to comply with the 6 May Discovery Order. Instead, they pursued discovery of without-prejudice communication which came to naught when it was dismissed by the assistant registrar and the judge on appeal.[56] Beyond supplying the Excluded Bank Statements in October 2016, the defendants stuck to their guns and blatantly refused to disclose *any* Related Party Documents or Project Documents.

114 In this regard, the impact of the defendants' breaches on the plaintiffs' case should be accorded substantial weight. The 6 May Discovery Order is

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[56] See Summons No 4825 of 2016 and Registrar's Appeal No 3 of 2017.

critical to the plaintiffs' assessment of damages. It is disingenuous for the defendants to submit that the plaintiffs have not been prevented from advancing their damages claim because they have found other means to quantify their damages by inviting expert opinions. This alternative course was only adopted by the plaintiffs because information crucial to their assessment was not forthcoming from the defendants. Surely there would have been no better basis for proving their losses than to have in hand the documents evidencing the very transactions that caused them loss; hence, it is undeniable that the plaintiffs have been handicapped by the non-disclosure. Furthermore, the record attests that the defendants made prior calculated decisions to allow the defence to be struck off and for judgment to be entered rather than to comply with the discovery orders. Now at the stage of enforcing the Interlocutory Judgment, all the efforts by the plaintiffs hitherto would be thwarted if the defendants were permitted without adequate sanction to maintain their false explanation.

115 Having considered all the factors discussed earlier, I am of the view that a substantial custodial sentence is merited because the first and second defendants have acted in contumelious disregard of their discovery obligations on multiple occasions and have maintained false assertions about OFS China despite having had numerous opportunities to come clean. Although the first and second defendants occupied different levels of seniority with respect to their involvement with OFS Singapore and consequently OFS China, I can see no reason to make any distinction in their respective sentences since they substantially adopted the same position as regards the 6 May Discovery Order. In any event, no submission was made that different custodial sentences should be meted out. As they have refused to disclose the Related Party Documents, it is unknown how much they stand to gain from their breaches

singly or collectively. Nevertheless, I consider that the present case is of lower gravity than *Mok Kah Hong*, where the husband had actively divested himself of assets and refused to hand over his ex-wife's entitlement to a share of the matrimonial assets even after final judgment by the Court of Appeal. As the present case concerns discovery of essentially two categories of documents, it is also slightly less serious than *Maruti Shipping* where the contempt consisted of multiple breaches of freezing and search orders. Further, in *Maruti Shipping*, it was the second time that the defendant was being sentenced for contempt by disposing of funds which were subject to a Mareva injunction. In the light of all the circumstances, the appropriate sentence for the first and second defendants is four months' imprisonment.

116 I am however suspending the sentence imposed for a period of four weeks from the date of the order, so as to grant the first and second defendants a final opportunity to fully comply with their discovery obligations. If they do not supply the documents within the stipulated time or their disclosure remains unsatisfactory, the plaintiffs are entitled to make a renewed application by way of an amended application for an order for committal (under O 52 r 3 of the Rules of Court). The purpose of this application is to lift the suspension and activate the sentence, and call upon the contemnor to show cause as to why the suspended sentence ought not to be imposed (*Tan Beow Hiong* at [69]). At this further *inter partes* hearing, if the breach is proved, "the court will be in possession of all the relevant information and can therefore properly exercise its discretion as to the correct consequence of the breach" of the suspended committal order (*Tan Beow Hiong* at [74]).

117 For the reasons explained at [102] above, the fourth defendant's culpability was substantially lower than that of the first and second defendants.

Hence, I am imposing a fine of $5,000 (or three days' imprisonment in default) on the fourth defendant.

118 Finally, I fix costs for the committal proceedings at $15,000 inclusive of disbursements, to be paid by the first, second and fourth defendants to the plaintiffs.

Steven Chong
Judge of Appeal

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