# PT Makindo (formerly known as PT Makindo TBK) *v* Aperchance Co Ltd and others [2010] SGHC 221

**Case Number** : Originating Summons No 190 of 2010 (Summons No 1001 of 2010/F)

**Decision Date** : 05 August 2010

**Tribunal/Court** : High Court

**Coram** : Tan Lee Meng J

**Counsel Name(s)** : Chandra Mohan / Mabelle Tay (Rajah & Tann LLP) for the applicant; Davinder Singh SC / Cheryl Tay / Alecia Quah (Drew & Napier LLC) for the respondents.

**Parties** : PT Makindo (formerly known as PT Makindo TBK) — Aperchance Co Ltd and others

*Courts and Jurisdiction*

*Contempt of Court – Civil Contempt*

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 137 of 2010 was dismissed by the Court of Appeal on 10 February 2011. See [2011] SGCA 19.]

5 August 2010 Judgment reserved.

**Tan Lee Meng J:**

1 The present dispute between the parties arose as a result of misleading advertisements placed by both parties in Indonesian newspapers with respect to orders made by the Singapore High Court more than six years ago in February 2004. The applicant, PT Makindo, an Indonesian investment bank, applied for an order that the 1st respondent, Aperchance Co Ltd, a Hong Kong company, be fined for contempt of court. It also sought an order that the 2nd respondent, Mr Otto Rodusek, and the 3rd respondent, Mr Toh Keng Siong, who are the 1st respondent's only directors be fined or committed to prison for aiding the said contempt.

**Background**

2 On 22 November 2003, the 1st respondent commenced Suit No 1149 of 2003/H ("Suit 1149") against the applicant and three other defendants for, *inter alia*, the repayment of approximately US$126m. The three other defendants in that action were the applicant's officers, Rachmiwaty Jusuf, Gunawan Jusuf and Claudine Jusuf (collectively referred to as the "Jusuf defendants").

3 On 24 November 2003, pursuant to an *ex parte* application, the 1st respondent obtained a worldwide Mareva injunction against the applicant and the Jusuf defendants (the "Mareva injunction").

4 On 23 December 2003, the Jusuf defendants filed two applications. The first application, Summons No 7795 of 2003/Q, was to set aside the Mareva injunction. In the second application, Summons No 7802 of 2003/K, the Jusuf defendants sought the following:

(i) a declaration that the Writ of Summons had not been duly served on the applicant and the

Jusuf defendants or, if it had been purportedly served, an order that the purported service be set aside;

(ii) an order that paragraph 7 of the Order of Court dated 24 November 2003 granting leave to the 1st respondent to serve the Writ of Summons on the applicant and the 2nd and 3rd defendants in Suit 1149 out of jurisdiction be discharged and/or set aside; and

(iii) a declaration that in the circumstances of the case, the Singapore Courts had no jurisdiction over the applicant and the 2nd and 3rd defendants in respect of the subject matter of the claim.

5 The two Summons filed by the Jusuf defendants were heard by Lai Kew Chai J ("Lai J") in February 2004. On 27 February 2004, the Mareva injunction and the order for service of the Writ were set aside by Lai J on the ground that the Court had no jurisdiction over the defendants. Lai J, who did not consider the merits of the case, ordered the 1st respondent to pay costs to the defendants.

6 The 1st respondent did not appeal against Lai J's decision. On 3 September 2004, the costs were taxed and the 1st respondent was ordered to pay costs of $122,557.48 to the Jusuf defendants.

7 Advised by its Singapore counsel that Lai J's orders did not affect its right to pursue its claim in Indonesia, the 1st respondent instructed its Indonesian lawyers, M/s Lucas SH & Partners, to make representations to various Indonesian government agencies with respect to the said claim. The 3rd respondent said that on 11 April 2008, he was informed that the applicant's representatives had been called for an interview by the authorities. Hence, the respondents asserted that the applicant and the Jusuf defendants were clearly aware that the 1st respondent intended to pursue its claim for the recovery from them of its monies in Indonesia.

8 According to the respondents, the applicant and the Jusuf defendants embarked on a scheme to discredit, embarrass, intimidate and pressure the 1st respondent into dropping its claim against them and that this plan involved the starting of a media war against the 1st respondent to prejudice it in the eyes of the relevant Indonesian authorities. Whether or not this accusation is true, the applicant published a number of misleading advertisements in Bahasa Indonesia in several Indonesian newspapers including *Bisnis Indonesia, Kompas* and *Kontan* in December 2009 and January 2010. The English translation of part of the applicant's advertisements is as follows:

> That on 21 November 2003, Aperchance Company Limited has filed a lawsuit to PT Makindo, Gunawan Jusuf, Rachmiwaty and Claudine in the Singapore High Court where as if Aperchance Company Limited has savings deposits in PT Makindo and based on the lawsuit from Aperchance Company Limited, *proved after the trial in the Singapore High Court, then on February 27 2004 the Singapore High Court has dismissed the claim filed by Aperchance Company Limited to the entire party and on August 11 2004, the Singapore High Court ordered Aperchance Company Limited to pay compensation costs to PT Makindo, Gunawan Jusuf and Rachmiwaty* in the amount of SGD 122,557.48 …. And it turned out that Aperchance Company Limited did not file any legal appeal to the Singapore High Court Verdict. *So the Singapore High Court verdict becomes binding and has permanent legal force……*..
>
> Based on the above mentioned facts, then it is proven that Pt Makindo does not have obligation in any form to Aperchance Company Limited and on the contrary, Aperchance Company Limited has acknowledged its obligation to PT Makindo, Gunawan Jusuf and

Rachmiwaty by paying the compensation costs.

[emphasis added]

9 The applicant's claim in its advertisements that the 1st respondent's claim in Suit 1149 had been dismissed by the Singapore courts following a trial in 2004 was clearly untrue as Lai J had only considered the issue of jurisdiction and not the merits of the case. As for the applicant's claim that it no longer owed any obligation to repay the monies claimed in that suit to the 1st respondent, this was regarded as untrue by the respondents.

10 The 1st respondent retaliated by placing Bahasa Indonesia advertisements, mostly in the same Indonesian newspapers that carried the applicant's earlier advertisements, between 7 and 11 January 2010. The English translation of part of the 1st respondent's advertisements is as follows:

> IMPEDING AND BLOCKAGE. THE ENTIRE ASSETS/CAPITAL OF PT MAKINDO TBK, RACHMIWATY JUSUF, GUNAWAN JUSUF AND CLAUDINE JUSUF ALL OVER THE WORLD PURSUANT TO THE JUDGMENT OF THE SINGAPORE HIGH COURT NO S 1149/2003/H DATED 24th NOVEMBER 2003. IN THE CASE BETWEEN APERCHANCE COMPANY LIMITED (the "PLAINTIFF") AGAINST PT MAKINDO TBK, RACHMIWATY JUSUF, GUNAWAN JUSUF AND CLAUDINE JUSUF (the "DEFENDANTS").

11 Like the applicant's advertisements, the 1st respondent's advertisements were also misleading as the Mareva injunction in question had been discharged by Lai J on 27 February 2004.

12 The applicant, who had fired the first salvo in what the respondents termed as "the media war", claimed that it was "shocked" by the 1st respondent's advertisements. On 20 January 2010, the applicant's lawyers, Rajah & Tann wrote to the 2nd respondent to state that the 1st respondent's advertisements were calculated to cause serious harm and damage to their client, who would be seeking to "recover substantial damages and reliefs … against [the 1st respondent] and its directors."

13 Subsequently, on 18 February 2010, the applicant filed Originating Summons No 190 of 2010/D ("OS 190") on an *ex parte* basis for leave to make an application for an order of committal for contempt of court against the respondents. The applicant did not disclose its own earlier misleading advertisements to the court. The requisite leave was granted to the applicants on 2 March 2010 and the application was heard on 24 May 2010.

**Whether the Respondents are liable for Contempt of Court**

14 Section 7(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and O 52 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) give the High Court power to punish for contempt of court. The rationale for punishing such contempt has been explained on numerous occasions. In Attorney-General v Times Newspapers Ltd *[1974] 1 AC 273*, Lord Morris of Borth-y-Gest stated at 302:

> In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the

land are so flouted and their authority wanes and is supplanted.

[emphasis added]

The views of Lord Morris were endorsed by the Singapore Court of Appeal in *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and others* [2007] 2 SLR(R) 518 ("*Pertamina*") at [22].

15 Contempt of court must be proven beyond reasonable doubt: see *Pertamina* at [35]. Lord Denning MR explained why this is so in In re Bramblevale Ltd *[1970] 1 Ch 128 at 137 as follows*:

A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.

16 As the court's jurisdiction to punish for contempt is draconian in nature, it must be exercised sparingly. In *Parashuram Detaram Shamdasani v King- Emperor* [1945] 1 AC 264, Lord Goddard observed at 270:

Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended.

17 In attempting to prove contempt of court on the part of the respondents, the applicant must confine its case for an order of committal to the grounds raised in its Statement filed under O 52 r 2(2) of the Rules of Court ("Statement") because O 52 r 5(3) provides:

Except with the leave of the Court hearing an application for an order of committal, no grounds shall be relied upon at the hearing except the grounds set out in the statement under Rule 2.

18 In its Statement filed pursuant to O 52 r 2(2), the applicant alleged at paras 18 and 19 as follows:

18 However, nowhere in the advertisements was it mentioned that the worldwide Mareva Injunction has been set aside on 27 February 2004 or that the service of the Writ of Summons and Statement of Claim in Suit 1149 of 2003/H by the 1st Respondent on the Plaintiffs in Suit 1149 has been similarly set aside.

19 This is a blatant disregard for and willful disobedience of the Order of Court dated 27 February 2004. The advertisements are utterly untrue and amount to a contempt of court. They wholly fail to mention that the worldwide Mareva Injunction has been set aside and is no longer in force. Additionally, the advertisements are in breach of the Order of Court dated 27 February 2004 requiring the 1st Respondent to serve copies of Orders of Court dated 27 February 2004 on parties who were notified of the worldwide Mareva Injunction.

19 According to the applicant's Statement, the 1st respondent had, by placing the said advertisements, failed and/or refused to comply with the 27 February 2004 Order and had thwarted and frustrated the very purpose of the said Order.

20 The relevant part of the 27 February 2004 Order is as follows:

2 [T]he Order of Court dated 24th November 2003 … (the "Mareva Order") and the Injunction Prohibiting Disposal of Assets Worldwide granted therein be set aside.

….

4 [T]he Plaintiff serves copies of the present Order of Court dated 27 February 2004 together with the Order of Court in respect of Summons-in-Chambers No 7802/2003/K dated 27th February 2003, on all parties *in Singapore who were notified* of the Mareva Order and/on whom the Mareva Order was served.

[emphasis added]

21 Mr Davinder Singh SC, the 1st respondent's counsel, pointed out that his client did not breach the above-mentioned terms of the Order. He explained in his written submission at para 16(b):

In order for the Applicant to succeed, the order will have to be interpreted in a way which flies against its clear and express wording. The order expressly required the 1st Respondent to serve copies of it *"on all parties in Singapore who were notified of the Mareva Order and/or on which the Mareva Order was served"*. Not only was the Order of Court dated 27th February couched in the past tense (therefore only referring to parties who had already been notified and/or served as of 27 February 2004), it was also limited to parties who were in Singapore. The undisputed evidence is that this was done. In any event, even if (which is denied) there is any ambiguity in the terms of the Order of Court dated 27 February 2004, it will be resolved in favour of the Respondents, thereby precluding any finding that there has been a breach of the order amounting to civil contempt.

[emphasis in original]

22 Mr Singh is correct because the 1st respondent's then solicitors, M/s Yeo Wee Kiong Law Corporation ("YWK"), had delivered copies of the said Order to Credit Suisse/Credit Suisse First Boston, UBS AG and HSBC Singapore on 5 March 2004. These were the parties in Singapore on whom the Mareva injunction had been served.

23 Although contempt of court has been described as the Proteus of the legal world and assumes an almost infinite diversity of forms (see the oft-cited article by Joseph Moskovitz, "*Contempt of Injunctions, Civil and Criminal*" (1943) 43 Colum L Rev 780 at p 780), acts of contempt are generally classified as acts that scandalise the courts or interfere with the course of justice.

24 In the present case, the 1st respondent did not scandalise the court as it did not impugn the impartiality, integrity or independence of the judiciary. Neither did it interfere with the administration of justice. The misreporting of *continuing* proceedings may, depending on circumstances, be a contempt of court if further proceedings are likely to be prejudiced or if this effect was intended by the misreporting but different considerations arise when the proceedings in question have already ended. If a judgment is misrepresented in a way that injures the reputation of one of the parties to the action, the remedy open to the injured party is, without more, to sue for defamation. In *Dunn v Bevan; Brodie v Bevan* [1922] 1 Ch 276, Sargant J explained at 285:

It seems to me that applications for alleged contempt ought to be very carefully scrutinised, and that the Court ought not in any way to enlarge the jurisdiction or apply it to matters which are

outside the well established lines. It is suggested … that there is a third form of contempt, not consisting either in scandalising the Court or in interfering with the course of justice; and that that form of contempt consists in a misrepresentation of the judgment of the Court and of the proceedings in Court for the purpose of injuring one of the parties. In my judgment there is not such a third class of contempt …. *It seems to me that if the proceedings in a Court are ended, then, unless there is an attack on the Court itself, the mere making of statements as to the proceedings must be dealt with by the ordinary law of libel or slander if they are misrepresentations and go beyond what is legally permissible*.

[emphasis added]

25 The facts in *Dunn v Bevan* bear some resemblance to the present proceedings before this court. In that case, the plaintiffs, who were members of a trade union, instituted proceedings against the defendants, the Executive Council of the union, to prevent them from proceeding on the result of certain ballots which had been improperly conducted. Sargant J, who restrained the defendants from acting on the result of the ballots, absolved the defendants from the charges of fraud brought against them. The Executive Council sent to its members a circular letter which was not in every respect accurate. It was erroneously stated that the charges brought by the plaintiffs had been withdrawn when there had been no such withdrawal. There were other inaccuracies. In response to this circular, the plaintiffs issued their own circular and suggested in it that the defendants had not been cleared of fraud. The defendants sought an injunction to restrain the issuance of the circular on the basis that it was a contempt of court. In making it clear that the issue of contempt of court did not arise, Sargant J pointed out (at 287) that if the court was "to be burdened with examining statements of this kind between rival parties as to what exactly took place in proceedings in *an action which has come to an end and has been terminated by a formal judgment*, *the Court might* for many a long day be occupied with such applications, and *have its burdens very considerably increased without any good result"* (emphasis added). Sargant J added (at 284) that as he had already given judgment in the action, the Court ought not to trouble itself with the matter unless it was absolutely compelled to do so, as would be the case if the report scandalised the court by making attacks on the judge who presided at the trial.

26 In the present case, the proceedings in Suit 1149 ended more than six years ago on 27 February 2004. As such, the court should not trouble itself with the misleading advertisements of both parties, and especially so when the applicant can sue the respondents for defamation. After all, an order of committal is regarded as a measure of last resort and such an order should not be sought when there are other reasonable alternatives: see *Danchevsky v Danchevsky* [1975] Fam 17. This is also set out in *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) at para 52/1/6:

**Remedy of last resort/other remedies**

The general principle is that if a reasonable alternative to committal proceedings exist, that should be used first. The courts commit a person to prison for contempt only after other options have been exhausted.

27 At this juncture, two cases relied on by the applicant will be considered. To begin with, the applicant relied on *Pertamina* for its assertion that the 1st respondent thwarted and frustrated the purpose of the Mareva injunction in February 2004. In that case, X obtained a Mareva injunction in Singapore against Y. Exception 2 of this injunction did "not prohibit [Y] from dealing with or disposing of any of [its] assets in the ordinary and proper course of business" but Y was required to "account to [X] weekly for the amount of money spent in that regard". X's Singapore lawyers were informed on

26 January 2005 that funds intended for Y's course of business in Hong Kong would be transferred from a Singapore bank to Dah Sing Bank in Hong Kong. Y made it clear that the disclosure was pursuant to Exception 2 of the Singapore injunction and itemised the payments that will be made out of the funds transferred to Hong Kong. X's Singapore lawyers forwarded the information to X's Hong Kong solicitor, who quickly applied for and was granted an order to garnish the money transferred by Y to Dah Sing Bank. Y applied for an order of committal against X and its Hong Kong solicitors for contempt of court on, *inter alia*, the ground that X had thwarted and frustrated the operation of Exception 2 of the Singapore injunction by directly preventing X from dealing with its assets in the ordinary and proper course of business. The Court of Appeal held that X was in contempt of court and that its Hong Kong solicitor had aided and abetted in that contempt.

28 The facts in *Pertamina* are quite different from those in the present case. In *Pertamina*, the Mareva injunction was still in force when X tried to undermine it by garnishing money that Y had forwarded to Hong Kong in accordance with Exception 2 of the injunction. This thwarted and frustrated Exception 2 of the injunction. In the present case, the Mareva injunction was lifted six years ago and the applicant's money has not been siphoned to the 1st respondent in breach of the court order that lifted the Mareva injunction. As such, *Pertamina* is not relevant to the present proceedings.

29 Another case relied on by the applicant is *Re Bineet Kumar Singh* [2003] 3 LRI 375. In that case, an Indian sports college's petition to the court to allow its students to sit for an examination conducted by the appropriate authority was dismissed. The college forged a court order directing the State Government of Maharashtra to conduct the examination for its students. In holding that those college officers responsible for transmitting the fabricated court order to the State Government had acted in contempt of court, the Court held at [6]:

> Nothing is more incumbent upon the courts of justice than to preserve their proceedings from being misrepresented…. When a person is found to have utilised an order of a court which he or she knows to be incorrect for conferring benefit on persons who are not entitled to the same, the very utilisation of the fabricated order by the person concerned would be sufficient to hold him/her guilty of contempt, irrespective of the fact whether he or she himself or herself is the author of fabrication.

30 The facts in *Bineet* are very different from those in the present case. The 1st respondent did not fabricate a Mareva Injunction and he did not cause banks holding the applicant's money to freeze the latter's accounts. As such, *Bineet* is irrelevant to the present case.

31 Thus far, I have found that the 1st respondent had complied with the 27 February 2004 Order and that if the applicant believed that its reputation has been injured as a result of the 1st respondent's advertisements, it should sue the latter for defamation.

32 The respondents relied on yet another ground for dismissing the present application. This concerns the failure of the applicant to serve a copy of the Order of Court dated 27 February 2004 or an order endorsed with the requisite penal notice personally on the 2nd and 3rd respondents. The requirement for a penal notice to be personally served is provided for by O 45 r 7 of the Rules of Court. The position is explained in *Singapore Court Practice 2009* (Jeffrey Pinsler SC gen ed) Lexis Nexis at para 45/7/2:

> **Penal notice**. The copy of the order must be endorsed with a notice (in form 81) informing the person on whom the copy is served that if he neglects to obey the order within the time specified

therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it.

33 The significance of a penal notice was elucidated in *Allport Alfred James v Wong Soon Lan* [1988] 2 SLR(R) 520 by Chao Hick Tin JC, who stated at [8]:

> The court's powers to punish any person for civil contempt are quasi-criminal in nature. *Where there is prescribed any procedural step in the exercise of that jurisdiction, that rule should be scrupulously observed and strictly complied with…* [T]he rationale for a penal notice is to ensure that the person against whom the order is made fully appreciates the consequences of any non-compliance.
>
> [emphasis added]

34 As the applicant had failed to effect personal service of the 27 February 2004 Order and the requisite penal notice on the 2nd and 3rd respondents, its application against them cannot succeed.

35 Finally, it ought to be noted that the respondents also pointed out that the application should be dismissed because the 27 February 2004 Order did not specify a time frame for compliance. As I have held that the 1st respondent did not breach the 27 February 2004 Order, this point need not be considered further.

36 For the reasons stated, the applicant's application is dismissed with costs.