IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 31

Civil Appeal No 66 of 2016

Between

Tay Kar Oon

… *Appellant*

And

Tahir

… *Respondent*

GROUNDS OF DECISION

[Contempt of court] – [Civil Contempt]

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v
Tahir

[2017] SGCA 31

Court of Appeal — Civil Appeal No 66 of 2016 (Summons No 3 and 6 of 2017)
Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
19 January 2017

26 April 2017

Tay Yong Kwang JA (delivering the grounds of decision of the court):

Introduction

1 Civil Appeal No 66 of 2016 was an appeal against the decision of the Judicial Commissioner ("the Judge") in *Tahir v Tay Kar Oon* [2016] 3 SLR 296 where he committed the female Appellant, Tay Kar Oon (or Jasmine Tay), to eight weeks' imprisonment for contempt of court. The Appellant appealed against the term of imprisonment. We allowed her appeal to the extent that we set aside the imprisonment and substituted a fine. We now give our reasons.

2 The Respondent, Tahir, had applied to the High Court for leave to commence committal proceedings against the Appellant on the basis that the Appellant had breached various court orders by:

(a) failing to attend court to be examined as a judgment debtor on 23 October 2015 ("the first breach");

(b) failing to file and serve an affidavit giving disclosure of her assets by 5 November 2015, as required under a Mareva injunction, the main terms of which appear at [10] below ("the second breach");

(c) failing to provide answers to an examination of judgment debtor ("EJD") questionnaire on 6 November 2015 as directed by the Assistant Registrar on 23 October 2015 ("the third breach"); and

(d) failing to attend court for an EJD hearing on 13 November 2015 ("the fourth breach").

3 These matters were set out in a statement filed pursuant to O 52 r 5(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the O 52 Statement"). Leave to commence committal proceedings was granted to the Respondent on this basis and the committal proceedings went before the Judge. There were four hearings before the Judge. At the third hearing, further breaches of the Mareva injunction, consisting of three withdrawals of S$1,000 each from her bank account (totalling S$3,000) ("the fifth breach"), were discovered. At the final hearing, the Respondent's counsel sought leave to withdraw the committal proceedings. While acknowledging that the fifth breach was an outstanding issue, the Respondent's counsel also acknowledged that details of that breach had not been included in the O 52 Statement and he was willing to withdraw the proceedings on that basis.

4 After considering these matters, the Judge committed the Appellant to eight weeks' imprisonment. He held that the Respondent's wish to withdraw the proceedings did not affect the public interest in the protection of the

administration of justice and the maintenance of the court's authority. In sentencing the Appellant for her contempt, the Judge took into account the four breaches set out in the O 52 Statement as well as the fifth breach, a matter which was not raised in the O 52 Statement.

5 Before the Judge, the Appellant was represented by another firm of solicitors. On appeal before us, the Appellant was represented by Salem Ibrahim ("Mr Ibrahim") of Salem Ibrahim LLC. Before the Judge and before us, the Respondent was represented by the same solicitors from Morgan Lewis Stamford LLC. The Respondent's solicitors had earlier sought and obtained leave not to file a Respondent's Case. At the hearing of the appeal, counsel for the Respondent, Daniel Chia ("Mr Chia"), requested and was granted permission to be excused from the hearing. The hearing of the appeal thus proceeded with the Appellant being the only party before us.

6 After hearing counsel for the Appellant, we allowed the appeal by setting aside the sentence of imprisonment imposed by the Judge and substituting a fine of S$10,000, in default, ten days' imprisonment. As the Appellant had been made a bankrupt prior to the commencement of the committal proceedings, we further ordered that the S$3,000 withdrawn in breach of the Mareva injunction be paid to the Official Assignee. Both payments were to be made within seven days of the date of our judgment.

Background

7 The Appellant was an art dealer trading as a sole proprietor under the name of Jasmine Fine Art. In or around March 2014, the Respondent entered into an agreement to purchase from the Appellant a sculpture known as "Couple Dancing" by Fernando Botero[1]. Subsequently, the Respondent paid

the Appellant a sum of US$1,638,100 for the sculpture and further amounts for the associated shipping costs. However, the Appellant failed to procure the sculpture.

8 On 25 July 2014, the Respondent commenced an action against the Appellant for the recovery of the sums paid.[2] About a year later, on 15 July 2015, the parties entered into a settlement agreement on terms that the Appellant pay the Respondent the sum of US$1,638,100 and legal costs of S$14,400.[3] However, the Appellant failed to comply with the settlement agreement. The Respondent therefore commenced a second action, Suit No 922 of 2015 ("S 922/2015"), on 8 September 2015 against the Appellant for breach of the settlement agreement. On 18 September 2015, judgment in S 922/2015 was entered against the Appellant as she failed to enter an appearance.

9 To aid the enforcement of the judgment, the Respondent filed an EJD application in Summons No 4946 of 2015 ("SUM 4946/2015"). On 9 October 2015, the Appellant was directed to attend before the Registrar on 23 October 2015 at 9.00 am to be orally examined on her assets, which would include questions listed in a questionnaire ("the EJD Questionnaire").[4] However, on 23 October 2015, the Appellant and her solicitors failed to attend the EJD hearing. The Appellant was thus in breach of the Order of Court dated 9 October 2015 (*ie*, the first breach). At the same hearing, the Assistant

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1 Statement of claim in Suit No 798 of 2014, para 3 and 4.

2 Suit No 798 of 2014.

3 Statement of Claim in Suit No 922 of 2015, para 10.

4 Record of Appeal ("ROA") Vol V, p 256.

Registrar ordered the Appellant to provide answers to the EJD Questionnaire by 6 November 2015 and to attend court on 13 November 2015.

10 In the meantime, on 17 September 2015, the Respondent filed Summons No 4591 of 2015 ("SUM 4591/2015") for a Mareva injunction against the Appellant prohibiting the disposal of assets up to the total value of US$1,638,100 and S$14,400. On 27 October 2015, Kan Ting Chiu SJ granted the Respondent's application ("the Injunction Order"). Under the Injunction Order, the Appellant was to furnish an affidavit by 5 November 2015 disclosing all her assets in Singapore ("the Disclosure Affidavit"). In breach of the Injunction Order, the Appellant failed to file the Disclosure Affidavit by 5 November 2015. She was thus in breach of the Injunction Order (*ie*, the second breach).

11 The Appellant also breached the court directions given by the Assistant Registrar on 23 October 2015 on two counts. First, she failed to provide answers to the EJD Questionnaire by 6 November 2015. Second, she failed to attend the EJD hearing on 13 November 2015. This constituted the third breach and the fourth breach, respectively.

12 On 17 December 2015, Chua Lee Ming JC (as he then was) granted the Respondent leave to commence committal proceedings in respect of the four breaches detailed above. Although the Respondent also sought to bring committal proceedings in connection with the Appellant's alleged attempt to sell a certain property, Chua JC did not grant leave in connection with those allegations.[5]

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[5] Minute Sheet in Summons No 5872 of 2015 dated 17 December 2015 (Chua Lee Ming JC).

13 As mentioned earlier, there were four hearings in total before the Judge. At the first hearing on 15 January 2016, the Appellant admitted liability for her acts of contempt for which leave had been granted. The Judge found her guilty of contempt on the matters raised in the O 52 Statement and adjourned the matter for two weeks to give the Appellant an opportunity to purge her contempt by complying with the orders, and for both sides to prepare their submissions on sentencing.[6]

14 Prior to the second hearing on 11 February 2016, the Appellant completed the EJD Questionnaire and Disclosure Affidavit. The Judge, however, took the view that several parts of the EJD Questionnaire were incomplete and that full disclosure of the Appellant's assets had not been made. This included missing bank statements from the Appellant's accounts in Overseas Chinese Banking Corporation Ltd ("OCBC Bank") and United Overseas Bank Ltd ("UOB Bank") that covered the period when the Injunction Order was in force.[7] The Judge granted a final adjournment of the matter for the Appellant to purge her contempt.[8]

15 At the third hearing on 26 February 2016, the Appellant disclosed the missing bank statements from her OCBC Bank account. These statements showed that the Appellant was in breach of the Injunction Order as she had made three withdrawals of S$1,000 each (totalling S$3,000) on 28 October 2015, one day after the grant of the Injunction Order (*ie*, the fifth breach). As the Appellant was not able to procure the missing statements from her UOB Bank account by the third hearing, a short adjournment was granted for her to

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6 ROA, Vol III, p 178.

7 See the Judgment at [23] and [25].

8 See the Judgment at [26].

do so.[9] It should be noted that there was no record of the Appellant or the Appellant's counsel being questioned by either the Judge or the Respondent's counsel on the fifth breach or any explanation by her concerning the same during the third hearing.[10]

16 On 1 March 2016, the Appellant returned for the fourth and final hearing. At this hearing, the Respondent's counsel informed the Judge that the Appellant had disclosed her UOB Bank statements as well as correspondence between the freight forwarder and agent in connection with the sculpture.[11] Based on this and the Appellant's undertaking to co-operate with the Respondent, the Respondent's counsel informed the Judge that he was prepared to withdraw the committal proceedings with the Judge's leave. However, if the Judge was not minded to grant leave, the Respondent's counsel indicated that he was no longer seeking a custodial sentence. The Respondent's counsel acknowledged the Appellant's breaches of the Injunction Order but noted that "these were not covered by our original statement".[12] Following this, the Appellant's counsel made submissions in mitigation. The Judge concluded the proceedings, stating:[13]

> There is a public interest in making sure that people follow orders. Having said that, she is not on trial for defrauding the [Respondent], that is not what this case is about. This case is on contempt of court, I have heard the submissions, and I will consider them, in the light of these significant developments.

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9 ROA, Vol III, p 262.

10 Appellant's Case, para 27. Further, the transcript of the hearing on 26 February 2016 only indicates the JC's directions, and neither does the JC mention in the Judgment that the Appellant had been cross-examined on these breaches.

11 ROA, Vol III, p 263.

12 ACB, Vol II, p 89.

13 ACB, Vol II, p 90.

17 On 12 April 2016, the Judge handed down his decision, committing the Appellant to eight weeks' imprisonment.

The decision below

18 In his judgment, the Judge noted that the standard of proof in an action for civil contempt is the criminal standard of proof beyond a reasonable doubt, but that all that had to be shown was that the contemnor intended the acts that were in breach of the court order. In his opinion, the reasons for disobedience were irrelevant in establishing liability. The Judge was satisfied that the Appellant was guilty of contempt on all the breaches of orders and court directions for which leave to commence committal proceedings had been granted.

19 The Judge then considered if it was open to him to find the Appellant guilty of contempt on grounds not included in the O 52 Statement. This related to the fifth breach which concerned the withdrawal of S$3,000 which was only discovered at the third hearing. The Judge was of the view that the court could grant an order of committal in relation to the fifth breach on the court's own volition, even though particulars of this breach were not included in the O 52 Statement. He held that the Appellant suffered no prejudice from the fact that the fifth breach had not been included in the O 52 Statement as the Appellant "clearly knew the case that *would* have been put forth against her had she not concealed these breaches" [emphasis in original] (at [37] of the Judgment). Given the public interest element in contempt proceedings, the Judge held that the court "certainly had the power to grant the order of committal in relation to breaches of court orders deliberately concealed such that they could not be included in the O 52 r 2(2) statement at the application for leave stage" (at [41] of the Judgment).

20 On the issue of sentence, the Judge considered that the Appellant's contempt had caused the Respondent to suffer real prejudice – the denial of any prospect of recovering the monies that he was otherwise entitled to – that was irreversible and incapable of remedy. He also found that the Appellant (a) had not made any genuine attempt to co-operate and comply with the court orders, (b) was not genuinely remorseful, (c) breached the court orders deliberately, and (d) raised mental issues as a ruse to delay the court proceedings. Given that the underlying concerns of the law of contempt were the protection of the administration of justice and maintenance of the court's authority, the Judge also gave the Respondent's wish to withdraw the committal proceedings limited weight.

21 Taking into account the parties' submissions and the Respondent's change of position, the Judge came to the conclusion that the custodial threshold had been crossed, especially with the revelation of the fifth breach. On a consideration of the various facts, the Judge held that an appropriate sentence, as deterrence and to protect the administration of justice and maintain the court's authority, would be eight weeks' imprisonment. The sentence was stayed pending appeal. The Judge made no order as to costs as the parties did not ask for such an order.

Appellant's case

22 The Appellant accepted that the court may try a contemnor on its own motion. However, she submitted that she had not been given an adequate opportunity of meeting the allegations in relation to the fifth breach as the entirety of her cross-examination was in relation to her answers to the EJD Questionnaire. The Appellant pointed out that the *bona fides* of contemnors and their reasons, motives and state of mind are pertinent issues to be

considered during sentencing and the Judge erred in failing to give her an adequate opportunity to meet the allegations in relation to the fifth breach prior to sentencing.

23 In relation to the issue of the appropriate sentence, the Appellant submitted that the sentence of eight weeks' imprisonment was manifestly harsh and disproportionate to the Appellant's actual breach, given that there was no real prejudice to the Respondent. The Appellant argued that the Judge erred in failing to (a) give proper weight to the fact that the Respondent had elected to withdraw the proceedings, (b) factor in the small amount of the withdrawal (*ie*, S$3,000) compared to the amount that the Appellant was allowed to use as living expenses under the Injunction Order (*ie*, S$2,000 a week), and (c) consider that the Respondent suffered no real deprivation since the Injunction Order did not cause the Respondent to become a secured creditor. The Appellant submitted the fifth breach was not part of a malicious, sustained enterprise targeted at dissipating assets but rather demonstrated a confused attempt by an unintelligent lady at navigating the Injunction Order and its exceptions. She also submitted that she was genuinely remorseful and had made genuine attempts to purge her contempt.

24 On these facts, the Appellant submitted that the sentence imposed by the Judge was disproportionate to the sentences imposed by the courts in previous cases and urged this court to impose a fine or order that she restore S$3,000 to her account with OCBC Bank.

The applications to adduce fresh evidence

25 The Appellant also filed two summonses to adduce fresh evidence on appeal. By Summons No 3 of 2017 ("SUM 3/2017"), the Appellant sought

leave to adduce a medical report dated 3 January 2017 from her psychiatrist, Dr Thomas Lee of The Resilienz Clinic Pte Ltd ("Dr Lee"). Dr Lee first saw the Appellant on 5 October 2016 and reviewed the Appellant over five subsequent sessions.[14] In his report, Dr Lee diagnosed the Appellant as suffering from "Major Depressive Disorder (MDD) with anxious distress".[15] He assessed that this condition developed sometime in 2014 and impaired the Appellant's ability to attend to important matters including court proceedings.[16] Aside from Dr Lee's report, the Appellant also filed an affidavit stating that she did not seek medical treatment earlier as she did not realise the severity of her condition.[17] The medical report substantiated the Appellant's claim before the Judge that she was suffering from mental health issues and required medical attention. Based on this, the Appellant stated that her claim before the Judge that she had mental issues was not "plainly frivolous" as the Judge had found (see the Judgment at [24]) although she accepted that the Judge may have got the wrong impression as she was unable to explain herself coherently at that time due to her mental condition.

26 By Summons No 6 of 2017 ("SUM 6/2017"), the Appellant sought leave to admit a further affidavit and an affidavit filed by her former solicitor, Mr L. Devadason. In her affidavit, the Appellant exhibited three text messages sent by OCBC Bank relating to the three withdrawals of S$1,000 made on 28 October 2015. These text messages were received in the early morning of 28 October 2015, between 12.59 am and 1.01 am. Mr L. Devadason stated in his affidavit that he only explained the import of the Injunction Order to the

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14 Appellant's affidavit in CA/SUM 3/2017 at p 20, paras 2 and 17.

15 Appellant's affidavit in CA/SUM 3/2017 at p 20, para 14.

16 Appellant's affidavit in CA/SUM 3/2017 at p 20, para 16.

17 Appellant's affidavit in CA/SUM 3/2017 at para 7.

Appellant on 28 October 2015 at 4.30 pm, which was after the Appellant had withdrawn the funds from her OCBC Bank account. By this evidence, the Appellant sought to demonstrate that she did not know on 28 October 2015 at the time the withdrawals were made that they were in breach of the Injunction Order.

27 Due to the different nature of the evidence sought to be adduced in SUM 3/2017 and SUM 6/2017, the test to be applied in respect of each application differed. The evidence in SUM 3/2017 related to Dr Lee's report, which was evidence which arose after the date of the Judge's decision. The test to be applied in relation to the report was whether the further evidence would have "a perceptible impact on the decision such that it is in the interests of justice that it should be admitted" (see *Yeo Chong Lin v Tay Ang Choo Nancy and another appeal* [2011] 2 SLR 1157 at [13]). In our view, Dr Lee's report had a bearing on the determination of the appeal as it was relevant to the Judge's observation that the Appellant had raised her medical issues as a "ruse" to delay the proceedings (at [58] of the Judgment) and it would also help mitigate the contempt of court. We therefore granted leave for the evidence in SUM 3/2017 to be admitted.

28 The evidence in SUM 6/2017 concerned evidence which related to matters that occurred before the date of the hearings before the Judge. Under s 37(4) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and O 57 r 13(2) of the Rules of Court, the applicant would have to demonstrate "special grounds" in order for such evidence to be admitted. It has been accepted that the test for determining "special grounds" comprises the three requirements which were laid down in the decision of *Ladd v Marshall* [1954] 1 WLR 1489. The three requirements are: first, the evidence could not have been obtained with reasonable diligence for use at the trial; second, the

evidence must have an important influence on the result of the case; and third, the evidence must be credible on the face of it. However, where contempt proceedings are concerned, it has been held that the standard to be applied to ascertain if fresh evidence ought to be admitted on appeal would, by analogy, be the rules applicable in criminal cases as the liberty of the subject is in issue (see *Singapore Civil Procedure 2017, Vol 1* (Sweet & Maxwell, 2017) (Foo Chee Hock JC gen ed) at para 57/13/15). In the decision of *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299, Chao Hick Tin JA clarified that in the context of criminal cases, the court should generally admit fresh evidence on appeal where the evidence is relevant and reliable and would go towards exonerating a convicted person or reducing his sentence (at [14]–[16]).

29 We accept that the *Ladd v Marshall* requirements do not apply with full rigour in the context of contempt proceedings which are quasi-criminal in nature (see *Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1 ("*Mok Kah Hong*") at [57] and [66]). The summons was uncontested and, in our view, the evidence which the Appellant sought to adduce in SUM 6/2017 appeared credible and would be relevant to show the Appellant's motive and intention in the fifth breach.

30 Separately, it has also been held that where a judge took up a point in his decision which was not raised by the parties and did not give notice of this new point to the parties, the *Ladd v Marshall* test ought not to be applied rigidly and the parties should be allowed to adduce evidence in the appeal to deal with the new point (see the decision of the Court of Appeal in *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR(R) 637 at [45]). In our view, this principle applied in the present case as well. As will be discussed below, we considered that the Judge took the fifth breach into account without giving proper notice to the parties. In the circumstances, the

Appellant did not have an opportunity to present her case in relation to the fifth breach. The Appellant should therefore be allowed to adduce the evidence relating to the fifth breach on appeal even if the first *Ladd v Marshall* condition could not be satisfied. We therefore granted leave for the evidence in SUM 6/2017 to be admitted.

The present appeal

31 In the substantive appeal, the preliminary legal issue that was raised was whether the Judge was permitted to rely on matters outside the O 52 Statement in convicting and sentencing the Appellant where the Respondent was seeking to withdraw the committal proceedings. This entailed two separate questions. First, did the Judge have the jurisdiction or power to proceed in connection with the allegations of contempt given that the Respondent wished to withdraw the proceedings? Second, if proceedings were unaffected by the Respondent's attempt to withdraw them, could the Judge rely on matters outside the O 52 Statement in arriving at his decision on liability and sentence?

32 The Judge answered both questions in the affirmative. He held that there was a punitive objective to the order of committal in cases of civil contempt and that the public interest in protecting the administration of justice was unaffected by the Respondent's withdrawal of the committal proceedings. As for the second question, the Judge held that the court certainly had the power to grant an order of committal in relation to breaches of court orders deliberately concealed such that they could not be included in the O 52 Statement at the application for leave stage (at [41] of the Judgment). The Appellant did not appear to dispute that the court has the jurisdiction and power to act against a contemnor on its own motion.

The effect of the Respondent's withdrawal of the committal proceedings

33 We begin the discussion of the effect of the Respondent's withdrawal of the committal proceedings by briefly noting the distinction between civil and criminal contempt. *Arlidge, Eady and Smith on Contempt* (Sweet & Maxwell, 4th Ed, 2011) explains (at para 3–1):

> … [T]he general approach has been that a criminal contempt is an act which threatens the administration of justice that it requires punishment from the public point of view; whereas, by contrast, a civil contempt involves disobedience of a court order or undertaking by a person involved in litigation. In these cases, the purpose of the imposition of the contempt sanction has been seen as primarily coercive or "remedial".

34 A similar categorisation was employed by V K Rajah JA in *You Xin v Public Prosecutor and another appeal* [2007] 4 SLR(R) 17, where he noted that contempt of court could be broadly divided into two categories: contempt by interference (*ie*, criminal contempt) and contempt by disobedience (*ie*, civil contempt). Rajah JA explained (at [16]):

> The former category comprises a wide range of matters such as disrupting the court process itself (contempt in the face of the court), publications or other acts which risk prejudicing or interfering with particular legal proceedings, and publications or other acts which interfere with the course of justice as a continuing process (for example, publications which "scandalise" the court and retaliation against witnesses for having given evidence in proceedings which are concluded). The second category comprises disobeying court orders and breaching undertakings given to the court.

35 The five alleged acts of contempt in the present case involved the breach of court orders and directions and thus fell within the category of civil contempt, a point which the Judge identified. While it is clear that cases of criminal contempt cannot be waived or settled (see, for example, *Seaward v Paterson* [1897] 1 Ch 545 at 560), the situation in respect of civil contempt is

not as clear. Some authorities have taken the position that it is open to the aggrieved party to waive the breach in cases of civil contempt. Lord Diplock stated as follows in *Attorney-General v Times Newspapers Ltd* [1974] 1 AC 273 ("*Times Newspapers*") at 307–8:

> … There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity; but no sufficient public interest is served by punishing the offender if the only person for whose benefit the order was made chooses not to insist on its enforcement.

36 However, as the Judge identified in the Judgment, contrary views have been expressed. For example, Sir John Donaldson P stated in *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union (Interim Proceedings)* [1972] ICR 285 (at 298) that:

> … once proceedings for contempt of court have been set in motion it is not open to the parties to settle the matter of the contempt. They can certainly settle the dispute which they may have with each other … But as far as the contempt of court is concerned, that is a different matter and one with which we are deeply concerned. …

37 In the United Kingdom, the Committee on Contempt of Court, chaired by Phillimore LJ, considered in its *Report* (Cmnd 5794) (HMSO, 1974) at para 171 that there would be three cases in which the court should have the power to take action against the contemnor irrespective of whether the aggrieved party chose not to move to commit the contemnor or to withdraw the application. These three cases were (a) cases where an order had been made in respect of a child or for a child's benefit; (b) situations where the person in whose favour the order was made was nervous about enforcing it; and (c) particularly flagrant cases where it was necessary that the court should have the power to vindicate its authority and the rule of law. The committee concluded by recommending that the court should have power of its own

motion to act against a person who disobeyed its order whenever the court thought fit to do so.

38 In our view, the Respondent's withdrawal of the committal proceedings was not a bar to the Judge's exercise of his jurisdiction over the matter or to his power to make an order of committal. As has been often observed, the law of civil contempt, like criminal contempt, exists also to vindicate the court's authority and protect the administration of justice. In *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and others* [2007] 2 SLR(R) 518 ("*Pertamina*"), we emphasised that there will always be an element of public interest in the context of civil contempt (at [24]). Therefore, the court should have the power in both criminal and civil contempt to act against the contemnor irrespective of any withdrawal or settlement of the proceedings. In this connection, O 52 r 4 of the Rules of Court expressly provides that the High Court and the Court of Appeal have the power to make an order of committal on its own motion.

39 We therefore held that the Judge was correct in deciding that he could proceed to sanction the Appellant for contempt notwithstanding the Respondent's wish to withdraw the committal proceedings. The question which remained was the weight the Judge ought to have given to the Respondent's wish to withdraw the proceedings in sentencing the Appellant. We discuss this question below in connection with the appropriate sentence to be imposed on the Appellant.

Whether the Judge could convict and sentence the Appellant on matters outside the O 52 Statement

40 The next issue was whether the Judge was permitted to convict and punish the Appellant on the fifth breach, which was a matter outside the O 52

Statement. The Appellant accepted as a matter of principle that a Judge would be entitled to take into account matters outside the O 52 Statement in convicting and sentencing an alleged contemnor[18] but submitted that such a situation would be rare. The Appellant further submitted that the facts of her case did not give rise to such a situation and cited the observations of Yong CJ in *Summit Holdings Ltd and another v Business Software Alliance* [1999] 2 SLR(R) 592 ("*Summit Holdings*") on the importance of the O 52 r 2(2) statement in notifying the alleged contemnor of the allegations made against him.[19] In the present case, the Appellant submitted that she ought not to have been convicted and sentenced on the fifth breach as she did not have an opportunity of answering the allegations.

The legal principles

41 In *Summit Holdings*, the applicants made certain allegations against the respondent that went beyond the O 52 r 2(2) statement but urged the court to invoke its inherent jurisdiction to grant leave for these allegations to be included. Yong Pung How CJ held that it was not an appropriate case to grant the applicants leave to rely on grounds not set out in the statement because it was important, in an application for committal which is of a criminal character, for the procedural rules to be complied with strictly. Yong CJ highlighted that the purpose of the O 52 r 2(2) statement was to "set out distinctly the grounds which the applicants are proceeding upon and to allow the respondents to have the opportunity of answering them, and, in this respect, its rationale is similar to that of a criminal charge, which is required to be sufficiently particularised so that the accused knows the case that he is

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18 Appellant's Skeletal Arguments, para 8.

19 Appellant's Skeletal Arguments, para 12.

meeting and has the opportunity of refuting the allegations" (at [17]). Yong CJ then went on to state (at [19]–[20]):

> 19 In effect, what [counsel for the applicants] was advocating was that the court exercise its summary power to find that the respondent was in contempt even on grounds that were not in the statement. The summary power to punish for contempt should only be exercised sparingly and the decision to deal with matters summarily should not be likely *(sic)* taken. The power to punish for contempt summarily was intended to enable the courts to deal with conduct which would adversely affect the administration of justice. It was necessary to maintain the dignity and authority of the judge and to ensure a fair trial …
>
> 20 This case was not one of contempt in the face of the court nor was it a matter in which it was necessary and imperative for the court to act immediately and summarily. The applicants did not show that it was a case in which it was necessary for immediate action to be taken by the court in dealing with the contempt. These allegations could only be dealt with if affidavits of evidence were adduced by the respondents detailing the circumstances and explanations as to why they had embarked on a certain course of conduct. The respondent's rights were seriously prejudiced if summary proceedings were used. … These allegations could only be made if the respondent knew in advance the exact ground on which the applicants were relying.

42 It is clear from the decision in *Summit Holdings* that procedural fairness in committal proceedings entails ensuring that the alleged contemnor understands the nature of the allegations against him and is given an opportunity to respond to them. Similarly, *Arlidge, Eady and Smith on Contempt* states (at para 15-36) that procedural safeguards are critical in contempt proceedings and that on the hearing of an application for committal, the person sought to be committed has the right to be heard both as to liability and to punishment. The authors also state (at para 15-38) that the court is "not entitled to take into account any matter which has not been put to the respondent and which the respondent has not had an opportunity of answering".

43 The above principles relate to natural justice. They are also in line with the procedure for contempt proceedings set out in O 52 of the Rules of Court. By the O 52 r 2(2) statement, the alleged contemnor is first notified of the allegations made by the applicant against him. The contemnor is then given an opportunity to respond to these allegations by giving oral evidence during the hearing pursuant to O 52 r 5(4). Order 52 r 5(3) also provides that except with the leave of court, no ground shall be relied upon at the hearing except the grounds set out in the O 52 r 2(2) statement but without prejudice to the power of the court to allow an amendment pursuant to O 20 r 8 to correct any defect or error in the proceedings or if it would assist to determine the real issue in controversy between the parties. Given these statutory safeguards, it would be exceptional for an applicant to be allowed to pursue a point not contained in the O 52 Statement. Thus, in the ordinary case, an applicant who wishes to proceed on what are essentially additional charges would be required to seek leave of court to do so.

44 The considerations as to procedure are different where it is the court that wishes to pursue an allegation of contempt not contained in an O 52 r (2) statement. It follows from the principle that the court has the power to order committal on its own motion that the court must also have the power to grant an order for committal on matters not within an O 52 r 2(2) statement (or indeed, when there is no O 52 r 2(2) statement). However, the rules of natural justice must still be upheld. The power of the court to commit an alleged contemnor on its own motion must be exercised judiciously and due process must be accorded to the alleged contemnor. This requires that the alleged contemnor be given notice of the charge which the court wishes to act on and an opportunity to meet that charge in relation to both liability and punishment. In this connection, the relevant information which an alleged contemnor may

wish to put forth could well include evidence relating to his state of mind, motives or understanding concerning the breach in question which could be relevant to issues of conviction and/or sentence.

45 We now examine the facts of the present case in the light of the principles set out above.

Application of the law to the facts

46 The fifth breach first came to light at the third hearing on 26 February 2016 when the Appellant produced her OCBC Bank account statements for October 2015. At [37] of the Judgment, the Judge stated that the Appellant's then counsel, Mr L. Devadason, "had no explanation for the Mareva Injunction breaches [*ie*, the fifth breach] when I called upon him to respond. The silence was deafening; this was tacit admission of the [Appellant's] breaches of the Mareva Injunction".

47 Unfortunately, however, there was no record of the Judge questioning Mr L. Devadason on the circumstances of the fifth breach during the third hearing. The minute sheet only recorded that the Appellant had sought an adjournment of the hearing to produce further UOB Bank account statements. Indeed, the fact that the OCBC Bank account statements for October 2015 were produced at the third hearing was also missing from the record. When questioned by us during the hearing of the appeal, counsel for the Appellant, Mr Ibrahim, accepted that the Judge had put certain questions about the fifth breach to Mr L. Devadason. However, he submitted that those questions were not of such a nature that put the Appellant or Mr L. Devadason on notice that the Appellant was being charged for the fifth breach.

48 It was unfortunate indeed that the Judge's questions to Mr L. Devadason regarding the fifth breach and the counsel's response could not be ascertained given the lack of a complete record of the events that transpired at the third hearing. Based on the record of proceedings, it would not be unreasonable for the parties to have formed the impression that the Judge would not be taking the fifth breach into account in convicting and sentencing the Appellant. It will be recalled that at the fourth hearing, the Respondent's counsel indicated that it would not be appropriate to pursue the fifth breach for the purposes of conviction and punishment. Additionally, Mr L. Devadason's submissions in mitigation at the fourth hearing centred on the Appellant's personal circumstances and her efforts to comply with the court orders. No mention was made of the fifth breach in either the written or oral mitigation plea. We doubted that the facts and the submissions relating to the fifth breach would have been omitted from the mitigation plea if the Judge had indicated that he was minded to take the fifth breach into account for the purposes of conviction and punishment.

49 In the premises, it appeared to us that the Appellant was neither given proper notice that she could be convicted and punished for the fifth breach nor an opportunity to present her case in relation to the fifth breach. There was no evidence on record before the Judge concerning the Appellant's reasons, motives or understanding in relation to the fifth breach. The Judge inferred that the Appellant "must have intended to avoid attending the EJD hearings and filing relevant disclosure documents, as she knew she had already breached the Mareva Injunction by withdrawing sums from her bank account. These breaches could have been inadvertently revealed if she had attended the EJD hearings" (at [58] of the Judgment). In the absence of a proper record showing that the Appellant was given the opportunity to explain her conduct

in connection with the fifth breach, we were unable, with respect, to uphold such an inference.

50 We therefore concluded that the Judge should not have taken the fifth breach into account where he (a) had not given proper notice to the parties that it was a breach that he intended to rely on and (b) had not given the Appellant an opportunity to present her case in relation to that breach.

The appropriate sentence to be imposed

51 The final issue concerned the appropriate sentence to be imposed on the Appellant. The Judge imposed a sentence of eight weeks' imprisonment. It appeared from the Judgment that the fifth breach had a strong influence on the Judge's view that a custodial sentence was warranted. He opined that "the concealed Mareva Injunction breaches turned out to be the most aggravating acts of contempt" (at [41]). He also found that "the custodial threshold had clearly been crossed especially with the revelation of the Mareva Injunction breaches" (at [64]).

52 On appeal, the Appellant adduced additional evidence in relation to the fifth breach which we have mentioned above at [25]–[26]. The Appellant relied on this further evidence to submit that she did not know at the time she made the withdrawals in the early hours of 28 October 2015 that her actions would amount to a breach of the Injunction Order granted by the Court the previous day. According to Mr L. Devadason's affidavit, the application for the Injunction Order was heard before Kan SJ at 10.00 am on 27 October 2015. His evidence was that he called the Appellant to inform her that the Injunction Order had been granted when he returned to his office after the hearing.[20] However, he did not elaborate on the terms and effects of the

Injunction Order during the call and instead scheduled a meeting with her in the afternoon on the next day in order to explain the Injunction Order to her. It was only the next day at approximately 3.40 pm when the Appellant attended at his office that she received an explanation of the terms of the Injunction Order.

53 We accepted that the evidence recited above indicated, on its face, that the Appellant may not have known in the early morning of 28 October 2015, when she withdrew the monies, that withdrawal of the S$3,000 would amount to a breach of the Injunction Order. Given the gravity of an order of committal and the fact that such proceedings are in essence criminal in nature, any reasonable doubt as to the Appellant's motive, intention and understanding when she acted in breach of the Injunction Order should be resolved in her favour. In the circumstances, we disregarded the fifth breach for the purposes of determining the appropriate sentence for the Appellant's contempt. Nevertheless, we were of the view that the Appellant (who has been made bankrupt) should return the S$3,000 to the Official Assignee.

54 We considered next the appropriate sentence to be imposed for the Appellant's other four breaches. These included the Appellant's failure to attend the EJD hearings, to comply with directions in connection with the EJD hearings and to comply with the Injunction Order.

55 In *Mok Kah Hong*, this court referred (at [104]) to the decision of Lawrence Collins J in *Crystal Mews Ltd v Metterick* [2006] EWHC 3087 (Ch), where Collins J identified (at [13]) a number of factors which would be relevant to the issue of sentencing. These factors included (a) whether the

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[20] Mr Devadason's affidavit in SUM 6/2017 at para 4-5.

applicant had been prejudiced by virtue of the contempt and whether the contempt was capable of remedy; (b) the extent to which the contemnor acted under pressure; (c) whether the breach of the order was deliberate or unintentional; (d) the degree of culpability; (e) whether the contemnor had been placed in breach of the order by reason of the conduct of others; (f) whether the contemnor appreciated the seriousness of the deliberate breach; and (g) whether the contemnor had co-operated. Although these factors are not exhaustive, they provide a useful framework for analysis.

56 This court also held in *Mok Kah Hong* that a distinction ought to be drawn between one-off and continuing breaches. As stated in *Mok Kah Hong* at [102]–[103], the rationale behind sentencing for both types of breaches would be different in that the overriding sentencing principle in one-off breaches was punishment as there was no coercive value to the sentence given that the contemnor was no longer in a position to remedy the breach. However, in cases of continuing breaches, there were both punitive and coercive elements. On the facts of that case, the contemnor had a history of acting in "flagrant disregard of judgments or orders made by various courts at all levels" (at [111]) and it was found that the contemnor's non-compliance was both deliberate and fraudulent (at [112]). However, despite the contemnor's "contumelious disregard of the judgments and orders of the court on *multiple* occasions" [emphasis in original] (at [115]), the court nevertheless imposed a suspended sentence, granting the contemnor a "final indulgence by suspending the sentence imposed for a period of four weeks from the date of the order" for the purpose of enabling the contemnor to take steps to effect compliance (at [116]). Thus, despite the gravity of the contemnor's conduct in that case, the court took a largely coercive approach, imposing a substantial

sentence of eight months' imprisonment but giving some time for the contemnor to purge his contempt.

57 In our view, the coercive rationale played a limited role in the present case since the Appellant appeared to have substantially purged her contempt by complying with the various orders and directions in question. Indeed, the Respondent appeared to have taken this view too and was willing, on this basis, to withdraw the committal proceedings. The overriding sentencing considerations in the present case were therefore essentially general and specific deterrence. The public interest was the upholding of the court's authority expressed in orders of court.

58 In our judgment, a fine was sufficient punishment for the Appellant. Her contempt, although sustained for a period of time, had been substantially purged. This court has stated that committal to prison would normally be a measure of last resort (see *Lee Shieh-Peen Clement and another v Ho Chin Nguang and others* [2010] 4 SLR 801 ("*Lee Shieh-Peen*") at [49]). The present case was not one where the Appellant's non-compliance with the court orders and directions had become a matter of public concern. The matter was essentially a private dispute between the Appellant and the Respondent and concerned the Respondent's efforts at getting back his money. Further, what the Appellant had to be punished for was her non-compliance with court orders and not her impecuniosity (see *Mok Kah Hong* at [92]) or her failure to effect payment under the settlement agreement. However, we emphasise here that court orders and directions, whether made by consent of the parties or not, are meant to be complied with irrespective of whether the person who has to comply is happy or willing to do so.

59 There were factors here that militated against a custodial sentence. First, the Respondent suffered little, if any, discernible prejudice from the Appellant's failure to comply with the directions. The Respondent's claim against the Appellant was for a sum of more than US$1.6m. At the time the Respondent sought to enforce the judgment against the Appellant in October 2015, there was little prospect of the Respondent recovering substantial sums given the state of the Appellant's finances even if the Appellant did comply with the orders and directions given. The Appellant went into bankruptcy in November 2015, very soon after the Injunction Order was granted on 27 October 2015. Further, any prejudice in so far as the withdrawn sum of S$3,000 was concerned was addressed by our order that the Appellant pay this amount to the Official Assignee.

60 Additionally, the Appellant's claim that she suffered from psychological issues at the time the various breaches were committed was corroborated by Dr Lee's report which assessed her to have been suffering from Major Depressive Disorder with anxious distress (see [25] above). Her psychological condition appeared to have hampered her ability to deal with the various legal proceedings she was facing. We accepted that the Appellant was under pressure and stressed at the time she breached the various court orders. Although she only saw a doctor sometime in October 2016 for these ailments, we found it plausible that the Appellant did not seek medical attention earlier because of her misplaced belief that she could cope with the medical issues on her own.

61 The above points suggested that, in relation to the first to fourth breaches, the Appellant did not breach court orders for her personal benefit. Moreover, the Appellant eventually co-operated with the Respondent to his apparent satisfaction. However, her breaches were intentional and sustained

for a period of time. Given the public interest in ensuring that court orders and directions are complied with, her breaches had to be punished nevertheless with a fairly high fine.

62 A fine was also in line with the trend of punishment in the authorities. As the Judge identified at [60] of the Judgment, breaches by omissions, such as non-attendance in court or the failure to file disclosure affidavits and/or questionnaires were generally punished by imposing fines. In the circumstances here, we decided that a fine of S$10,000 was sufficient punishment for the first to fourth breaches.

Conclusion

63 For the above reasons, we allowed the Appellant's appeal to the extent that we set aside the term of eight weeks' imprisonment that was imposed on the Appellant and also the warrant of arrest that was issued as a consequence. In its place, we imposed a fine of S$10,000, in default, ten days' imprisonment. We further ordered that the withdrawn S$3,000 be paid to the Official Assignee. These two payments were to be made within seven days from the date of our order.

64 As the appeal was not contested, no costs order was sought and none was made.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

Salem Ibrahim, Iman Ibrahim, and Kulvinder Kaur (Salem Ibrahim LLC) for the appellant

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