Lee Shieh-Peen Clement and another *v* Ho Chin Nguang and others [2010] SGCA 34

Case Number	: Civil Appeal No 17 of 2010
Decision Date	: 09 September 2010
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Luo Ling Ling and Rasanathan s/o Sothynathan (Colin Ng & Partners LLP) for the appellants; Julia Yeo Heem Lain and Richard Kalona (Robert Wang & Woo LLC) for the respondents.
Parties	: Lee Shieh-Peen Clement and another — Ho Chin Nguang and others

Civil Procedure

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 12.]

9 September 2010

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the Judge ("the Judge") in *Lee Shieh-Peen Clement and another v Ho Chin Nguang and others* [2010] SGHC 12 which held that the Respondents were not in breach of, or in contempt of, a Mareva injunction issued against them. At the conclusion of the hearing we allowed the appeal and held that the Respondents were in breach of the Mareva injunction. We now give our reasons.

Background

2 Lee Shieh-Peen Clement and Kong Yew Seng, the plaintiffs in the main action and the first and second appellants in the appeal ("the Appellants"), are both businessmen. Ho Chin Nguang ("Ho"), the first defendant in the main action, is a friend of the Appellants and is also a businessman. Ng Sow Moi ("Ng"), the second defendant in the main action, is Ho's wife, while Ho May Ing ("May Ing"), the third defendant in the main action, is Ho's sister. For the purposes of the appeal, only Ho and Ng were the respondents and they will hereinafter be referred to collectively as "the Respondents".

3 Sometime in May or June 2007, the Appellants entered into a joint venture ("the Agreement") with Ho to incorporate a Chinese company ("the Company") for the purposes of taking over a Gold Mining Project in Myanmar ("the first project"). While the exact oral terms of the Agreement on the first project were disputed, what was not in dispute was that in pursuance of the Agreement the Appellants in July/August 2007 issued two cheques for the total sum of S$4 million to Ho for the purposes of the first project. These cheques were deposited into a bank account in the name of the Respondents.

4 In March 2008, the second appellant, Kong Yew Seng, transferred another sum of S$4 million to Ho's bank account for a potential joint investment in an iron ore mine in China. The Appellants averred that this sum of money was initially intended to be a bridging loan which could be converted into an

investment in the purchase of the mine should the due diligence checks prove worthwhile. This bridging loan was also granted on the condition that it would be repaid in full to the Appellants in three months from the date of receipt of the said sum by Ho. However, with regard to this sum, the Respondents denied that it was intended to be a bridging loan. Instead, they asserted that the said sum was to all intents and purposes meant as a joint investment by the Appellants for subsequent investments ("the second project") through the Company.

5 Later the Appellants discovered that some of the representations made by Ho in inducing the Appellants to be involved in the first project and the bridging loan were false. In September 2008, Ho returned a total of S$1.61 million to the Appellants. The Appellants also took away three cars which were registered in Ho's name, Ho's UOB bank passbook, identity card, passport and three of his watches. The Appellants alleged that all the payments and chattels were handed over to the Appellants by the Respondents on their own free will. These constituted part repayment of the monies due and owing by the Respondents to the Appellants with respect to the bridging loan. On the other hand, the Respondents contended that the Appellants wanted to back out of the first project and unreasonably demanded for the refund of S$4 million for the second project. Resorting to threats and harassments, the Respondents alleged that the Appellants compelled the Respondents to return the sum of S$1.61 million to them and also took away the abovementioned items.

6 On 31 March 2009, the Appellants commenced Suit 285 of 2009, which is the main action against Ho, Ng and May Ing to recover the sum of S$5.07 million to S$5.1 million. At the same time, the Appellants also took out an *ex parte* application for a Mareva injunction against all three defendants. On 7 April 2009, the Appellants successfully obtained an *ex parte* interim Mareva injunction against them. Under this order, the defendants were allowed to spend only S$500 a week for ordinary living expenses and S$500 a week or a reasonable sum on legal advice.

7 The Appellants later withdrew their claim against May Ing, and the *ex parte* interim Mareva injunction granted on 7 April 2009 was replaced by a final Mareva injunction on 31 July 2009 ("the Order") against Ho and Ng, the Respondents in this appeal. Under the Order, the Respondents were allowed to spend S$1,500 a week towards their ordinary living expenses and S$1,500 a week or a reasonable sum on legal advice and representation. The relevant terms of the Order were:

Disposal of assets

1. (1) The 1st and 2nd Defendants must not:

(a) remove from Singapore, in any way dispose of or deal with or diminish the value of their assets which are in Singapore whether in their own name(s) or not and whether solely or jointly owned up to the value of SGD$5,100,000; or

(b) in any way dispose of or deal with or diminish the value of any of their assets whether they are in or outside Singapore whether in their own name(s) or not and whether solely or jointly owned up to the same value.

(2) This prohibition includes the following assets, in particular:

(a) the property known as 57 Hume Avenue, #07-08 Parc Palais Singapore 598753 or the net sale proceeds if it has been sold;

(b) any money in any sole or joint bank account(s) situated in Singapore, or elsewhere, as per Schedule 2:

(c) the 1ST Defendant's Seletar Country Club membership;

(d) the following Vehicles owed (sic) by the 1st and 2nd Defendants:

(i) BMW with Vehicle Registration No. SFF 80 R; and

(ii) Toyota MPV with Vehicle Registration No. SBJ 80 S.

(e) the following watches owed (sic) by the 1st Defendant:

(i) Roger Dubui diamond studded watch; and

(ii) Cartier rose gold watch.

(3) If the total unencumbered value of the 1st and 2nd Defendants' assets in Singapore exceed SGD $5,100,000.00, the 1st and 2nd Defendants may remove any of those assets from Singapore or may dispose of or deal with them so long as the total unencumbered value of the assets still in Singapore remains not less than SGD $5,100,000.00.

(4) If the total unencumbered value of the 1st and 2nd Defendants' assets in Singapore does not exceed SGD $5,100,000.00, the 1st and 2nd Defendants must not remove any of those assets from Singapore and must not dispose of or deal with any of them, but if they have other assets outside Singapore, the 1st and 2nd Defendants may dispose of or deal with those assets as long as the total unencumbered value of all his assets whether in or outside Singapore remains not less than SGD $5,100,000.00.

Disclosure of information

2. The 1st and 2nd Defendants must inform the Plaintiffs in writing at once all their assets whether in or outside Singapore whether in their own name(s) or not and whether solely or jointly owned, giving the value, location and details of all such assets. *The information must be confirmed in an affidavit which must be served on the Plaintiffs' solicitors within seven (7) days after this order has been served on the 1st and 2nd Defendants*. [emphasis added]

EXCEPTIONS TO THIS ORDER

3. This order does not prohibit the 1st and 2nd Defendants from spending $1,500.00 a week towards their ordinary living expenses and also $1,500.00 a week *or* a reasonable sum on legal advice and representation. ***But before spending any money the 1st and 2nd Defendants concerned must tell the Plaintiffs' solicitors where the money is to come from*** . **[emphasis in original in bold; emphasis added in italics]**

4. This order does not prohibit the 1st and 2nd Defendants from dealing with or disposing of any of their assets in the ordinary and proper course of business. The 1st and 2nd Defendants shall account to the Plaintiffs within three (3) weeks for the amount of money spent in this regard.

8 On 17 November 2009, the Appellants obtained leave to apply for an order of committal against the Respondents for their contempt of the orders of court of 7 April 2009 and 31 July 2009 by failing

to inform the Appellants' solicitors in writing within the requisite time limit or at all of:

(a) the value and details of all their assets whether in or outside Singapore by way of an affidavit which was to have been served on the Appellants' solicitors within seven (7) days after the orders dated 7 April 2009 and 31 July 2009 had been served on the Respondents; and

(b) the source of the money to be used before spending the same in the amount specifically limited by the High Court for the Respondents' expenditure on ordinary living and legal expenses.

The decision of the Judge

9 On 11 December 2009 the committal application came before the Judge who held that the Respondents had not breached cl 2 of the Order ("clause 2" or "cl 2") with respect to the disclosure of the Respondents' assets. In his view, cl 2 by its express terms only required a one-off disclosure by an affidavit listing out the assets of the Respondents and that had been done. Clause 2 did not require the Respondents to file further affidavits to set out assets which the Respondents might subsequently have acquired. On that basis, Ho's subsequent receipt of a monthly cash allowance of IDR 134,819,900 ("the monthly allowance") from the Indonesian company PT Mega Fortune ("PT Mega") for his role as its advisor and Vice Chairman, after the due submission by the Respondents of the affidavit of assets as required by cl 2, was not an asset that was required to be disclosed by the Respondents pursuant to the terms of the Order, in particular cl 2.

10 The Judge also held that cl 1(4) of the Order by its terms only restricted the disposal or dealing of disclosed assets. It was concerned with the diminution of the disclosed assets. In his opinion, the monthly allowance was not by its nature an asset within the contemplation of the Order, and this was so even if we assumed that there was a continuing obligation on the part of the Respondents to update and disclose after-acquired assets. Accordingly, there was no breach arising from Ho's receipt of the monthly allowance.

11 Moreover, the Judge was of the view that there was no breach of the Order by the Respondents' failure to provide an estimate of the values of their shares in various companies. In light of the fact that the shares were of private companies in multiple jurisdictions, the Judge thought that no additional commercial purposes could be served by requiring the Respondents to provide an estimate of the shares when the Appellants had been given the relevant financial statements and were able to arrive at their own conclusion as to the valuation of those assets. The Judge was of the opinion that to require the Respondents to take the further step of procuring independent valuations of unlisted companies would be unduly onerous considering the interlocutory nature and the purpose of a Mareva injunction.

12 As regards cl 3 of the Order ("cl 3"), the Judge found that the Respondents were not in breach of that clause when they failed to declare the sources of the funds from which they had utilised to spend on their ordinary living and legal expenses. The Judge noted Ho's explanation in his affidavit that the funds in question were the monthly cash allowances received by him subsequent to the filing of his affidavit of assets on account of his role as advisor and Vice Chairman of PT Mega. Moreover, given that Ho's interest in PT Mega had been duly disclosed in his affidavit of assets, and he had not drawn on or dissipated the bank accounts and assets disclosed in his affidavit of assets, the Judge said it would be a stretch to conclude that Ho was to be subject to committal proceedings by virtue of having received subsequent advances or gifts which had already been determined (see [10] above) not to constitute assets for the purposes of the Order.

13 In the premises, the Judge found that there was no breach of the Order on the part of the

Respondents. Therefore, the Appellants' application to commit the Respondents was denied.

Issues arising in this appeal

14 On the submissions of the parties, there were five main issues which arose in the appeal, namely:

(a) Whether the monthly allowance received by Ho constituted an asset for the purposes of the Order;

(b) Whether the Order operates only to restrict the disposal or dealing of disclosed assets;

(c) Whether the Respondents disclosed sufficient details of their assets with respect to cl 2;

(d) Whether the Respondents breached cll 3 and 4 in not informing the Appellants about the monthly allowance from PT Mega before using it on their monthly expenditure; and

(e) Whether an order of committal was an appropriate sanction for the breach or breaches of the Order.

We will now address each of these issues in turn.

General approach

15 Before addressing these arguments, we must emphasize the paramount importance of respecting and obeying orders of court. The proper administration of justice proceeds on the basis that orders of court would and should be observed. At the core of this principle of obeying court orders is the public interest in the administration of justice, including the dispatch of litigation as expeditiously as justice in the case requires. No party should be allowed to disregard orders of court. As Yong Pung How CJ put it in *Re Tan Khee Eng John* [1997] 1 SLR(R) 870 at [14]:

> *We are inviting anarchy in our legal system if we allow lawyers or litigants to pick and choose which orders of court they will comply with*, or to dictate to the court how and when proceedings should be conducted.
>
> [emphasis added]

16 It is within the purview of the courts to ensure that its orders are not contravened or thwarted (see *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and others* [2007] 2 SLR(R) 518). Accordingly, a court will not hesitate to punish any lawyer or litigant who fails to obey its orders or who seeks to undermine the effectiveness of its orders. The courts will jealously guard against any interference by any party which would disturb the proper administration of justice *(see Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 MLJ 577 at 592C-G).

17 The Order which this appeal was concerned with was a Mareva injunction. The object of such an interlocutory order is to prevent a defendant from dissipating his assets and thus rendering nugatory a judgment which might eventually be obtained by the plaintiff against him, when the assets would otherwise have been available to satisfy the judgment. Therefore, the Mareva injunction is an important weapon in the arsenal of the court in dealing with such a situation. In this regard, we must stress that the party against whom a Mareva injunction is issued must obey *both* the letter and the spirit of the order (see *Pan-United Marine Ltd v Chief Assessor* [2008] 3 SLR(R) 569 at [42] where the Court of Appeal emphasized the importance of looking at both the letter and the spirit of the law in a

different context). If there is any real uncertainty as to the scope of an order the proper thing for a party to do is to seek the assistance of the court or, at the very least, inform the other party of the act that is intended to be carried out. Deliberate concealment or what seems like clever manoeuvres to get round a Mareva injunction will be dealt with accordingly.

Was the monthly allowance received by Ho from PT Mega an asset within the scope of the Order?

18 The Appellants argued that the Judge erred in holding that Ho's subsequent receipt of the monthly allowance after the due submission of the affidavit of assets did not by its nature constitute an asset for the purposes of the Order. In support of this argument, the Appellants cited the case of *OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others* [2004] 4 SLR(R) 74 ("*OCM Opportunities Fund*"), where Belinda Ang Saw Ean J opined at [57] that:

> The Mareva jurisdiction extends to all assets, whether tangible assets or mere choses in action, provided that the defendant is the legal or beneficial owner of them: see *The Practice and Procedure of the Commercial Court* (5th Ed, 2000) at 138. *Salary, like fees and commission, is a chose in action and is capable of being caught by an injunction*. A monthly salary that is paid into a bank account is caught by an injunction as and when it is paid into the account.
>
> [emphasis added]

19 In contrast, the Respondents argued that the monthly allowance was not an asset for the purposes of the Order. Counsel for the Respondents highlighted the fact that he did not hold the legal title to his shareholding in PT Mega. Legal title was held by a proxy. Thus, it was a relationship of trust and his receipt of the monthly allowance was dependent upon him keeping his business counterparts happy. Moreover, Ho also claimed that a substantial part of the monthly allowance was spent on paying for the expenses of Ho's business counterparts, their families and relations each time they visited Singapore from Indonesia and China.

20 The Respondents also pointed out that an asset was defined as a resource owned by a person which has a present or future economic value that can be realised. Implicit in that definition was the element of certainty that the economic value is owned and could be realised or enforced. The resource in question should not be gratuitous or dependent upon the goodwill of others. Following from this argument, the Respondents further argued that *OCM Opportunities Fund* was clearly distinguishable from the present case because the monthly allowance received by Ho was not a chose in action as it did not possess the element of contractual certainty like that of a salary, fee, commission or a debt owed by PT Mega to Ho. Instead, his entitlement to the monthly allowance was dependent on trust and the continual maintenance of good relationships between Ho and his Indonesian counterparts.

21 We were unable to accept this argument of the Respondent which had no basis in reality. Although Ho held his title to his shareholding in PT Mega by proxy, that shareholding was no less his. Ho had declared in his affidavit that the shareholding in PT Mega was an asset of his. It was disingenuous of him to assert that just because the legal title to the shareholding was held by a proxy that the shareholding did not belong to him. Through his proxy Ho was holding 90% of the shares in PT Mega which appeared to own assets of approximately US$13 million. [note: 1] Ho was the beneficial owner of that portion of the shareholding in PT Mega. To all intents and purposes, Ho was in complete control of PT Mega. Equally important, we also noted that there was no evidence that his proxy had not been acting in the affairs of the company in accordance with his instructions. Indeed, the fact that Ho was holding the important positions of company advisor and Vice Chairman was indeed telling.

As his beneficial interest in the 90% shareholding in PT Mega had been declared to be an asset of his, it must necessarily follow that whatever payments made by PT Mega to him, under whatever guise or label, must also be caught by the Order. If this were not to be the case, there would be such a wide gaping hole which would render completely ineffective a Mareva injunction. In the circumstances, it was entirely lame for Ho to assert that his receipt of the monthly allowance was dependent purely on trust and the continual maintenance of good relationships between him and his Indonesian counterparts.

22 As regards the Respondents' contention that a substantial part of the monthly allowance received by Ho was spent on paying for the expenses of Ho's business counterparts, their families and relations each time they visited Singapore, this was nothing more than a bare *ex-post facto* assertion without any shred of objective evidence in support. There was nothing to indicate how much of the monthly allowance was in fact (if at all) utilised for such expenses. Indeed, Ho had admitted that he could not produce any acknowledgment, invoice or payment voucher to support those expenditures, notwithstanding his claims that his Indonesian business counterparts and their family members visited Singapore very frequently either to shop or to seek medical treatment, while his Chinese business counterparts dropped by once or twice a year and spent more on meals and entertainment. [note: 2]

23 Accordingly, we found that the monthly allowance received by Ho was not a gift or an advance, but a payment he was entitled to on account of his being the *de facto* owner of 90% of PT Mega. It was therefore an asset which came within the scope of the Order.

Whether the Order applied to the disposal or dealing of after-acquired assets

24 It was not disputed that the Respondents' disclosed assets were not sufficient to meet the amount injuncted by the Order, and the monthly allowance was an asset which was acquired by Ho after the making of the affidavit of assets. The Appellants' case was that the Order operated to restrict the Respondents' disposal of all assets up to the value of S$5.1 million, regardless of whether the assets up to this value were disclosed by the Respondents or otherwise. Given that the Respondents' disclosed assets were insufficient to meet the amount injuncted under the Order, the monthly allowance received by Ho, though received after he had filed his affidavit of assets must likewise be caught by the Order.

25 The Appellants further argued that it defied logic and the very purpose of a Mareva injunction to limit its scope to only disclosed assets. To take the view that a Mareva injunction is limited in its scope to only disclosed assets would seriously undermine the object of a Mareva injunction as it would mean that the defendant could freely use his newly acquired assets as he pleases when he has yet to meet the amount injuncted in the Order. Furthermore, such a narrow view of the Order would not only encourage stealth and subterfuge, but also substantially emasculate the Order.

26 To address this issue it would be necessary to start from first principles. The undoubted object of the Mareva injunction is to prevent the course of justice from being frustrated by a defendant's actions which would have the effect of rendering nugatory or less effective any judgment or order which the plaintiff may thereafter obtain against the defendant. In *Commissioners of Customs and Excise v Barclays Bank* [2006] 3 WLR 1, Lord Bingham said at [10]:

> It is very well established that the purpose of a freezing injunction is to restrain a defendant or prospective defendant from disposing of or dealing with assets so as to defeat, wholly or in part, a likely judgment against it. The purpose is not to give a claimant security for his claim or give him any proprietary interest in the assets restrained: Gangway Ltd v Caledonian Park Investments (Jersey) Ltd [2001] 2 Lloyd's Rep 715 , para 14, per Colman J. The ownership of the assets does

not change. All that changes is the right to deal with them.

See also *Polly Peck International plc v Nadir and others* (*No 2*) [1992] 4 All ER 769 at 785.

27 The position is restated by Mark S W Hoyle, *Freezing and Search Orders* (London: Informa, 4th Ed, 2006) as follows at para 1.18:

> The single most effective reason for granting a Mareva injunction was, in practical terms, encompassed within the need to prevent a defendant snapping his fingers at a judgment of the court with financial impunity, because he had arranged his affairs so as to leave no worthwhile assets within the reach of the plaintiff judgment creditor [per Lord Denning MR in *Pertamina* [1978] 1QB 644 at p. 661, referring to the words of Kerr J].

The material provisions on the financial limit of the Order were set out in cll 1(1) and 1(4) (see [7] above).

28 The combined effect of these two provisions was to injunct the amount of S$5.1 million. They did not say that the Order would only apply to assets declared by the Respondent in his affidavit. The all important thing which the Order sought to achieve was to secure for the Appellants the sum of up to S$5.1 million. To read the Order as having been "frozen" as at the date of the making of the affidavit would very seriously emasculate it. As the Appellant so rightly pointed out, to construe the Order so narrowly would encourage stealth and subterfuge and in turn engender controversies as to the origin of particular assets. We would illustrate the problems a narrow interpretation of such an Order would cause as follows. Let's say that shortly after the making of the affidavit of assets the defendants have by a stroke of luck acquired new assets. On this view, the defendants would be free to spend their new funds and the only way for the plaintiff to stop this would be for him to apply for a fresh order. To require the plaintiff to re-apply for a fresh order, he must have some basis to allege that he suspects that the defendants have acquired new assets. If the defendants do not disclose that they have new funds, and certainly on this narrow view of such an Order Ho is not obliged to do so, the plaintiff will remain in the dark and he would not have any basis to apply for a fresh order. In any event to require the plaintiff to make a fresh application whenever he suspects the defendants to be in possession of new funds would be too cumbersome and would seriously undermine the utility of the Mareva injunction.

29 In our opinion, contrary to the view of the Judge, there was nothing in cl 1(4) which suggested that the Order only applied to disclosed assets. Suppose a defendant deliberately refuses to disclose an asset, what then is the position of that asset? Would it then become an undisclosed asset and not be subject to the Order? This would be ridiculous. It was clear on a plain reading of cl 1(4) that the Respondents could dispose of or deal with their assets outside Singapore even when they have inadequate assets in Singapore to meet the Appellants' claim as long as the total unencumbered value of their assets *in and outside of Singapore* were above the stipulated sum of S$5.1 million. The purpose of cl 1(4) was to underscore the fact that the Order was only to attach up to the sum of S$5.1 million and nothing more and it in no way sought to derogate from cl 1(1).

30 The approach taken by the Judge is untenable from another angle. It cannot be doubted that cl 1(4) operated from the moment the Order was granted (see *Z Ltd v A-Z and AA-LL* [1982] 1 QB 558 at 572) and the Respondents had to comply with it upon being served. The Judge's interpretation of cl 1(4) that it applies only to restrict the disposal or dealing of disclosed assets would lead to the illogical conclusion that the Order did not freeze any assets at all until the Respondents disclosed their assets in an affidavit. Such an interpretation would again render the Order nugatory. Moreover, it would be contrary to the very purpose of a Mareva injunction to limit the scope of such an

injunction to disclosed assets which did not exceed the amount provided for in the injunction, as it would make it meaningless for the quantum of such an injunction to be specified since the injunction would allow for the Respondents to diminish their total assets by using after-acquired assets or monies without due regard to their liabilities under the injunction.

31 Finally we would add that we are fortified in our view by the decision in *TDK Tape Distributor (UK) Ltd v Videochoice Ltd and Others* [1986] 1 WLR 141 ("*TDK Tape*"), where it was held that a Mareva injunction would encompass assets acquired after the date the injunction was granted. In *TDK Tape*, the defendants' solicitors applied the proceeds of an insurance policy which had matured upon the death of the defendant's wife towards the settlement of their outstanding fees, after the grant of the Mareva injunction. Skinner J held that the policy was in existence at the time the defendant disclosed his assets by affidavit, and it was not an after-acquired asset. Equally significant is that Skinner J opined that even if the policy had been an after-acquired asset, it would still have been caught by the injunction (at 145):

> It seems to me that it would be a negation of the purpose of that injunction if, every time the defendant acquired some new asset or property, it was up to the plaintiffs to discover that and make an application to the court that the existing injunction be extended to deal with it. It seems to me that *a Mareva injunction is looking to the future and is dealing with the situation between the obtaining of the judgment and its eventual execution, and it will cover any assets which are acquired between the granting of the order and the eventual execution of any judgment obtained in the action in question*.
>
> [emphasis added]

32 *TDK Tape* was cited with approval in *Soinco SACI and Another v Novokuznetsk Aluminium Plant and Others* [1998] 2 WLR 334, where Coleman J stated at 348-349:

> *If the assets of a trading company caught by the order were to be confined to those in existence at the date of the order, but subject always to dissipation in the ordinary course of business, much of the value of the Mareva jurisdiction would be destroyed*. Every time further funds were received by a trading company in such a case it would be necessary to apply for another injunction. The view on this matter expressed obiter by Skinner J in T.D.K. Tape Distributor (U.K.) Ltd. v Videochoice Ltd. [1986] 1 W.L.R. 141 at 145B-D reflects the assumption which has consistently been adopted in this court.

Skinner J's reasoning in *TDK Tape* has also been adopted in other jurisdictions (see the Malaysian case of *Yukilon Manufacturing Sdn Bhd & Anor v Dato ' Wong Gek Ming & Ors* (No 4) [1998] 7 MLJ 551 and the Hong Kong case of *Save Power Limited v Arthur Tse Lup Kee* [1995] HKEC 353).

Did the Respondents breach cll 3 and 4 of the Order in not informing the Appellants about the monthly allowance before using it on their monthly expenditure?

33 The Appellants argued that the Judge erred in finding that the Respondents did not breach the Order when the Respondents failed to declare the source of their funds before spending the same on their monthly expenses. It seemed to us clear that the Judge had come to this view primarily because he thought that the monthly allowance was not an asset within the scope of the Order and that in spending the monthly allowance the Respondents were therefore not required to make any declaration as to its source pursuant to cl 3 of the Order. To repeat, what cl 3 demanded was that the Respondents should not spend beyond the prescribed limits in respect of their ordinary living expenses and legal fees and should further, before spending any money on the aforesaid purposes inform the

Appellants' solicitors where the money was to come from (see cl 3 set out above at [7]).

34 It was not disputed that Ho spent about S$16,115.27 to S$19,615.27 per month between June and November 2009 and that these sums exceeded the spending limits imposed on the Respondents by cl 3. In addition, Ho had failed to inform the Appellants' solicitors as to the source of the fund from which the expenditures would be taken. *Prima facie*, the Respondents had breached both aspects of the obligation under cl 3. However, the Judge agreed with the Respondents, holding that there was no breach of the Order because Ho's interest in PT Mega had been duly disclosed in his affidavit of assets, and he had not drawn on or dissipated the bank accounts and assets that he had disclosed. It was clear that the Judge had arrived at this decision based on his perception that the monthly allowance was a subsequent advance or gift which did not constitute an asset for the purposes of the Order. However, if this were to be the correct view of the monthly allowance, then even if Ho had started to receive it before the grant of the *ex parte* Mareva injunction, the Respondents could argue that every payment so received was a gift, and thus was not caught by the Order. The fact that the monthly allowance was received by Ho after the grant of the Mareva injunction would not have made a difference.

35 As we have ruled in [23] above that the monthly allowance constituted an asset for the purposes of the Order even though it was a payment received after the Respondents had filed their affidavit of assets, we therefore held that the Judge was in error in holding that the Respondents had not breached cl 3. In fact the Respondents had admitted that they had breached cl 3 in not accounting for their weekly expenditures. They said: [note: 3]

> ...[w]e [the Respondents] had inadvertently failed to account to the Plaintiffs [the Appellants] under the 2nd Injunction Order dated 31st July 2009 and I wish to apologise for our failure.

36 Indeed, we would further hold that the Respondents, in spending the sums in excess of what was permitted under cl 3 had also committed a breach of that part of the Order. In passing, we would mention that the Respondents made the argument that they should not be compelled to reduce their ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be given in the future. This argument is wholly without merit. Once a Mareva injunction is made against a defendant and the assets which he discloses do not satisfy the sum to be injuncted, the defendant would no longer have the liberty to spend his money as he pleases. He is subject to the restrictions placed by the court.

37 Lastly, before we move to the next issue we wish to add that we did not think that the Respondents had breached cl 4.This was because that clause concerned the Respondents' dealing or disposing of their assets in the ordinary course of business. We were here concerned only with the expenditures incurred by the Respondents on living expenses and legal fees, and not how they dealt with their assets in the course of business. Thus there could not have been a breach of cl 4 because it was inapplicable.

Have the Respondents disclosed sufficient details of their assets pursuant to cl 2 of the Order?

38 On this issue, the Appellants submitted that the Judge erred in finding that there was no breach of cl 2 despite the Respondents' failure to provide the value and details of the assets comprising their disclosed shareholdings in a number of private companies ("the Private Companies"). The Appellants accepted that the Respondents had provided some financial statements relating to the Private Companies, but argued that the veracity of these statements was doubtful. The Appellants also disputed the Judge's finding that they had conceded that the Respondents had provided them with the latest available financial statements of the Private Companies. They further argued that the

Judge was wrong to find that there was no additional commercial purpose in getting the Respondents to provide their estimate of the value of their shareholdings in the Private Companies because it was the Respondents' duty to do so under the Order and that case law required that the Respondents disclose at least the net asset value of their shares in the Private Companies.

39 We agreed with the Appellants that they had not conceded that the Respondents had provided them with the latest available financial statements relating to the Private Companies. Instead, the Appellants only acknowledged that they had received documents from the Respondents which were relevant to the Private Companies but that those documents did not provide an estimate of the market values of the shares of the Private Companies.

40 However, what was more problematic was the Appellants' assertion that the onus was on the Respondents to provide to the Appellants an estimate of the values of their shareholdings in the Private Companies. In support of this argument, the Appellants cited *OCM Opportunities Fund* at [41] which held that:

> ...To that extent, *in the case of shares in private companies, there is normally no difficulty disclosing the value on a simple net asset basis*, as this can be determined from the accounts of the company concerned. A disclosure of the par value of the shares, as some of the majority defendants had done, is not adequate.
>
> [emphasis added]

41 We would emphasise that these views expressed in *OCM Opportunities Fund* should be construed in their proper context. In that case, where the plaintiff was granted leave to cross-examine the defendants on their affidavits of assets on the ground that the information furnished was incomplete and lacking in particulars, the court in addressing the law, approved the general proposition that a defendant was not required to incur any expenses in order to obtain a valuation of his assets. Instead, the defendant was only obliged to disclose the value of his assets to the best of his ability. The court then stated that *merely disclosing the par value* of the shares in private companies was inadequate because there was usually no difficulty in disclosing the value of a share in a company on a simple net asset basis based on the accounts of the company.

42 In the present case, there was clear difficulty for the Respondents to disclose the value of the shares in each of the Private Companies. As the Judge rightly pointed out, these shares in question related to several private companies in multiple jurisdictions. While the parties were in dispute as to which documents the Respondents had furnished to the Appellants in relation to the Private Companies, the fact of the matter was that the Respondent did supply the Appellants with the relevant financial statements of the Private Companies.

43 We agreed with the Judge that based on the financial statements provided by the Respondents, the Appellants should and were in fact able to arrive at their own conclusion as to the valuation of the shares in question. To require the Respondents to take the further step of procuring independent valuations of unlisted private companies would be unduly onerous considering the interlocutory nature and the purposes of a Mareva injunction. Accordingly, we found that the Respondents had disclosed sufficient details of their assets pursuant to cl 2.

Whether an order of committal is appropriate for the breaches committed by the Respondents

44 The power to punish for contempt summarily is intended to enable the court to deal with conduct which would adversely affect the administration of justice. It is necessary to maintain the

dignity and authority of the court and to ensure a fair trial (see *Summit Holdings Ltd and another v Business Software Alliance* [1999] 2 SLR(R) 592 at [19]).

45 The relevant principles pertaining to an order of committal are stated in *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed)(LexisNexis, 2009) ("*Pinsler*") at para 52/1/2 as follows:

> ...
>
> As a general principle, the judgment creditor is expected to use alternative enforcement methods before contemplating committal. Even if those methods have been engaged without success, the court will not commit the judgment debtor unless there is credible evidence that the debtor's non-compliance was wilful in the sense that he refused or neglected to pay in spite of his ability to do so (Khoo Wai Leong, Ronnie v Andrew J Hanam [2003] SGMC 41, para 35; …
>
> The other purpose of the order is to punish the offender for his contempt (Re Barrell Enterprises [1973] 1 WLR 19). …
>
> Committal to prison is normally a measure of last resort. Other options are available to the court, and often the exercise of its discretion will be based on the attitude of the offender. If he is apologetic and promises to comply with the court order (or if he has already complied with it since the service on him of the notice of motion for committal), the court may merely reprimand him in strong terms. If he has yet to comply with the order, the court may warn him that unless he does so he will be imprisoned.

Further, para 52/2/1 of *Pinsler* reads:

> The importance of these requirements was recently emphasized by KC Vohrah J in Syarikat M Mohamed v Mahindapal Singh [1991] 2 MLJ 112, at 114: '… since committal proceedings are quasi-criminal proceedings and the liberty of the subject is involved, the procedural rules applicable must be strictly enforced.' The point is that the person against whom the committal proceedings are brought 'needs to know with particularity what charge or charges they are faced with, charges which can land them in prison' (at 115). The learned judge ruled that as it is the specific purpose of the statement to include these grounds, any omission to do so cannot be made good by setting them out in the affidavit, the purpose of which is to merely verify the statement. … (See Cartier International BV v Lee Hock Lee [1993] 1 SLR 616 in which the High Court reiterated these requirements.)

46 In *P J Holdings Inc v Ariel Singapore Pte Ltd* [2009] 3 SLR(R) 582 at [7], Choo Han Teck J stated:

> ...Order 45 r 5 (1)(*a*) applies only when "a person required by a judgment or order to do an act within a time specified in the judgment or order *refuses or neglects* to do it." [emphasis added] … In *Re Quintin Dick* [1926] Ch 992, Romer J held that the term "refuse or neglect" was not equivalent to "fail or omit", and that the former implied a conscious act of volition whereas the latter did not. In *Ng Tai Tuan v Chng Gim Huat Pte Ltd* [1990] 2 SLR(R) 231, Chao Hick Tin JC (as he then was) expressed the view that the word "neglect" necessarily implies some element of fault. He cited the case of *In re London and Paris Banking Corporation* (1874) LR 19 Eq 444 where Sir G Jessel MR said, at p 446:
>
> > … the word 'neglected' is not necessarily equivalent to the word 'omitted'. Negligence is a term which is well known in law. Negligence in paying a debt on demand, as I understand, is

> omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. ...
>
> The word "refuse" has also been similarly defined. In *DP Vijandran v Majlis Peguam* [1995] 2 MLJ 391 , the court noted that "[t]he ordinary meaning of the word refuse is to decline to give", and that "failure is not synonymous with refusal" Similar sentiments were also expressed by the tribunal in *Lowson v Percy Main & District Social Club & Institute Ltd* [1979] ICR 568. I agree with the foregoing cases. …

47 With respect to the question as to the proper sanction to be imposed by this court, we had borne in mind the following circumstances. First, the case of the Respondents was that the breaches which they had committed were due to their failure to appreciate that the monthly allowance constituted an asset under the Order. The Respondents had assumed that since they had already disclosed all their assets in their affidavit of assets, including Ho's shareholding in PT Mega, Ho's subsequent receipt of the monthly allowance after the filing of the affidavit of assets would not constitute an asset for the purposes of the Order. Hence the Respondents felt they were free to spend the monthly allowance on their monthly expenditures without informing the Appellants. Second, they claimed that this erroneous assumption in their minds was contributed by the fact that the Appellants, though aware that the Respondents had not written to them to account for their monthly expenditures since the first injunction Order was served on the Respondents on 7 April 2009, did not complain about this omission until some six months later on 11 September 2009. The Respondents explained their mental thoughts as follows [note: 4] :

> If the Defendants [Respondents] were aware that this cash allowance should be disclosed and accounted for, they would have done so. After all, the 1st Defendant's [Ho's] interest in PT Mega Fortune has been honestly disclosed. There is also nothing to hide as the Defendant's [Ho's] cash allowance is used for the Defendants' [Respondents'] monthly expenses of S$16,115.27 – S$19,615.27 which are all entirely proper and reasonable.

48 However, it was clear to us that the Respondents were less than candid about their interests in PT Mega, especially with regard to the details on the monthly allowance. Even though Ho holds an overwhelming 90% of the shareholding in PT Mega and therefore has complete control over the company which had assets totalling approximately US$13 million, the Respondents had not provided any relevant documents to show how the monthly allowance was arrived at. Moreover, no documents were adduced to confirm Ho's assertion that he only received the monthly allowance subsequent to the Respondents having filed the affidavit of assets or that this was the only payment he received from PT Mega. Accordingly, we were unable to accept the Respondents' claim that the breaches arose out of their non-appreciation of the scope of the Order.

49 However, we did not, in any event, feel that this was a case which we needed to commit the Respondents, particularly Ho, to prison. As mentioned in *Pinsler* (see [45] above) committal to prison should normally be a measure of last resort. The advantage which the Respondents had obtained in breaching the Order was to have more money to spend. In this instance, we felt that a financial sanction would be sufficient. In our opinion, an appropriate order to make was to require the Respondents to restore S$200,000 into their Singapore account within seven days, with proof of such restoration to be furnished to the Appellants' solicitors. This sum was computed based on the monthly amounts which the Respondents had spent in excess of the limit laid down in the two Mareva injunctions over the period of the breach. Furthermore, in order to impress upon the Respondents the utmost importance of complying with an injunction, and that they should not resort to unilateral interpretations favouring themselves, we ordered that the costs for this appeal be awarded to the Appellants on an indemnity basis. That should suffice to register the court's disapproval of their

conduct.

Conclusion

50 For the reasons above, we allowed the appeal with the usual consequential orders, and with the Appellants being entitled to costs on the indemnity basis here and costs on the standard basis below.

[note: 1] Core Bundle ("CB"), Vol II, Part 2, at pp 257-258.

[note: 2] CB, Vol II, Part 2, at p 207, paras 72-74.

[note: 3] CB, Vol II, Part 2, at p 200.

[note: 4] Respondents' Case, at p 48, para 98.