P J Holdings Inc v Ariel Singapore Pte Ltd
[2009] SGHC 72

Case Number : OS 202/2008, SUM 5070/2008

Decision Date : 26 March 2009

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : John Thomas (David Nayar and Vardan) for the plaintiff; Jeffrey Ong (JLC Advisors LLP) for the defendant

Parties : P J Holdings Inc — Ariel Singapore Pte Ltd

Contempt of Court – Civil contempt – Whether committal proceeding measure of last resort – Whether impecunious judgment debtor could be committed for contempt – Order 45 r 5 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

26 March 2009

Choo Han Teck J:

Background

1 On 15 August 2008, the plaintiff P J Holdings Inc obtained an order of court ("the Order"), which was endorsed with a penal notice, against the defendant Ariel Singapore Pte Ltd ("Ariel Singapore"). The Order provided, *inter alia*, that:

> Specific Performance of the Deed dated 12th July 2007 ("the Deed") to take place within one (1) month from 15th August 2008 in that the Defendants complete the sale and purchase of 40,000 ordinary shares owned by the Plaintiffs in P.J. Services Pte Ltd and to pay the Plaintiff the sum of S$3,000,000.00 as per the Deed; …

On 4 September 2008, the plaintiff's solicitors wrote to the defendant's solicitors informing them that completion was to take place in their office before 14 September 2008 and that the plaintiff will require payment for the sum of $3m for the 40,000 ordinary shares in P J Services Pte Ltd. The defendant did not reply. By a facsimile dated 16 September 2008, the plaintiff's solicitors informed the defendant's solicitors that in view of the defendant's non-compliance with the Order, "[the plaintiff] shall now proceed as they deem fit without further reference to [the defendant]". On 13 October 2008, the plaintiff applied to the High Court for liberty to commence committal proceedings against Mr Low Shiong Jin, a director of the defendant, in respect of the latter's failure to comply with Order. Leave was granted on 7 November 2008. A week and a half later, the plaintiff filed the present application to commit Mr Low to prison "for the contempt of Court by the Defendants for its failure to comply with the Order of Court dated 15th August 2008".

2 At the first hearing on 16 January 2009, the matter was adjourned as the parties were in negotiations to settle the matter out-of-court. Prior to the second hearing on 30 January 2009, the defendant filed an affidavit stating that at no time during the material period did Ariel Singapore have the financial means to pay the plaintiff. The matter was then further adjourned. At the third hearing on 24 March 2009, counsel for the plaintiff informed the court that a settlement had been reached on the following terms:

1. Leave to withdraw with liberty to restore.

2. Low Shiong Jin will make best his endeavours to make payment of $3m to the plaintiff.

3. Each party to bear his own costs.

3 Counsel for the plaintiff then requested for leave to withdraw with liberty to restore. I refused to grant leave to withdraw with liberty to restore, and instead granted leave to withdraw with no liberty to restore. My reasons for so doing are as follows.

The Statutory Provisions

4 Sections 7 and 13 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") provide as follow:

> **Contempt**
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> **7**. —(1) The High Court and the Court of Appeal shall have power to punish for contempt of court.
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> 2) Wilful disposal by a garnishee, otherwise than in accordance with law or by leave of the court, of any property attached in his hands or under his control by a notice of court, shall be deemed to be contempt.
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> (3) Wilful disobedience by a corporation to any order punishable by attachment may be punished by attachment of the directors or other officers of the corporation who are responsible for, or are knowingly a party to, such wilful disobedience.
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> **Writs of execution**
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> **13**. A judgment of the High Court for the payment of money to any person or into court may be enforced by a writ, to be called a writ of seizure and sale, under which all the property, movable or immovable, of whatever description, of a judgment debtor may be seized, except —
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> (a) the wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of his trade, when the value of such apparel, bedding, tools and implements does not exceed $1,000;
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> (b) tools of artisans, and, where the judgment debtor is an agriculturist, his implements of husbandry and such animals and seed-grain or produce as may in the opinion of the court be necessary to enable him to earn his livelihood as such;
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> (c) the wages or salary of the judgment debtor;
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> (d) any pension, gratuity or allowance granted by the Government; and
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> (e) the share of the judgment debtor in a partnership, as to which the judgment creditor is entitled to proceed to obtain a charge under any provision of any written law relating to partnership.

The relevant provisions in the Rules of Court (Cap 322, R5), in relation to contempt *vis-à-vis* a

judgment or order for the payment of money or to do an act, are as follows:

> **Enforcement of judgment, etc., for payment of money (O. 45, r. 1)**
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> **1**. —(1) Subject to these Rules and section 43 of the Subordinate Courts Act (Chapter 321) where applicable, a judgment or order for the payment of money, not being a judgment or order for the payment of money into Court, may be enforced by one or more of the following means:
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> (a) writ of seizure and sale;
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> (b) garnishee proceedings;
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> (c) the appointment of a receiver;
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> (d) in a case in which Rule 5 applies, an order of committal.
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> **Enforcement of judgment to do or abstain from doing an act (O. 45, r. 5)**
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> **5**. —(1) Where —
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> (a) 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 within that time or, as the case may be, within that time as extended or abridged under Order 3, Rule 4; or
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> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,
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> then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:
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> (i) with the leave of the Court, an order of committal;
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> (ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;
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> (iii) subject to the provisions of the Debtors Act (Chapter 73), an order of committal against that person or, where that person is a body corporate, against any such officer.

Measure of Last Resort

5 Committal proceeding is a measure of the last resort. This well-settled principle is set out at para 52/1/6 of the Singapore Civil Procedure 2007, which states:

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

An illustration of the above can be seen in *Danchevsky v Danchevsky* [1974] 3 WLR 709 ("*Danchevsky*"). In that case, a county court registrar made an order for the sale of the former matrimonial home of the divorced parties. The husband would neither leave the house, nor would he let it be sold. As a result, a county court judge ordered the husband to give up possession of the

house and to cooperate in its sale. The husband refused to comply with the order. The wife then applied to commit the husband for contempt. At the committal hearing, the judge offered the husband three days to vacate the house. The husband again refused to give any undertaking to do so. The judge then made an order committing him to prison.

On appeal, the English Court of Appeal unanimously allowed the appeal. Lord Denning MR said, at p 712:

> The object was to see that the order of the court was obeyed – that the house was sold for the benefit for both parties. To achieve this, it was not necessary to send the man to prison. Whenever there is a reasonable alternative available instead of committal to prison, that alternative must be taken. In this case there was a reasonable alternative available. It was this: to enforce the order for possession by a warrant for possession, to sell the house, and to make the conveyance of the property by means of an instrument to be signed and executed by a third person on the direction of the court.

Buckley LJ and Scarman LJ agreed with Lord Denning MR. In particular, Scarman LJ said, at p 714:

> Was this term of imprisonment appropriate as an aid to the execution of civil process? Here I agree with both Lord Denning MR and Buckley LJ, that it was a singularly blunt and ineffectual weapon for securing the wife's rights – that is to say, the right to a sale of this house and the division of the proceeds between herself and the defendant. There are, as Lord Denning MR and Buckley LJ have pointed out, other more efficient, more direct ways of achieving the sale of a house than fling the husband into jail for three months. …

6 In the present case, there were, in effect, two orders for specific performance: (a) the defendant is to complete the sale and purchase of the 40,000 shares in P J Services Pte Ltd; and (b) the defendant is to pay $3m to the plaintiff. As with regards to (a), in the face of an uncooperative counterparty, as in *Danchevsky*, the plaintiff could either rescind the agreement and sue for breach of contract, or invoke the court's powers to complete the transaction *viz*. s 14(1) of the SCJA:

> If a judgment or order is for the execution of a deed, or signing of a document, or for the indorsement of a negotiable instrument, and the party ordered to execute, sign or indorse such instrument is absent, or neglects or refuses to do so, any party interested in having the same executed, signed or indorsed, may prepare a deed, or document, or indorsement of the instrument in accordance with the terms of the judgment or order, and tender the same to the court for execution upon the proper stamp, if any is required by law, and the signature thereof by the Registrar, by order of the court, shall have the same effect as the execution, signing or indorsement thereof by the party ordered to execute.

On completion, part (b) of the Order effectively creates a judgment debt and a direction that the debt be paid within one month from 15 August 2008. Are there any reasonable alternatives available to the plaintiff that could assist in recovering the debt apart from the present application? In my view, the plaintiff ought to have first applied for an examination of the judgment debtor in order to establish the latter's assets and taking matters from there, if an execution could be issued to collect the debt, then that must first be employed. The plaintiff did not seek alternative remedies to enforce a judgment debt before applying to commit the defendant. This omission alone was sufficient ground to dismiss its application.

7 What happens then to an impecunious judgment debtor, as the defendant in the present case depicts itself as? In my view, under such circumstances, committal proceedings should still not issue.

My reasons are as follows. 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). The key words here are "refuse" and "neglect". In *Re Quintin Dick* [1926] 1 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] SLR 903, 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 *Re London & Paris Banking Corp* (1874) 19 Eq 444 where 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* [1979] ICR 568. I agree with the foregoing cases. In the premises, this means that an impecunious debtor would be outside of the scope of O 45 r 5 as such a person cannot be said to have "refused or neglected" to obey an order directing them to make payment. The combined effect of the fact that an impecunious debtor is outside the scope of committal proceedings and the principle that such proceedings are remedies of the last resort would mean that in the vast majority of cases, committal proceedings would not apply to an order or judgment for the payment of monies. In most instances, a person would ordinarily be regarded as impecunious if he is unable to satisfy the judgment debt upon the conclusion of the various execution proceedings. The logical ending point in such cases should be a winding-up order or a bankruptcy order, as the case may be. In the present case, the burden was on the plaintiff to prove beyond a reasonable doubt that Ariel Singapore had neglected to make payment. Having examined the documentary evidence, it was clear that Ariel Singapore, which is now in liquidation, was in no position to make payment during the material period.

8 As for the case of *Eric Lau Man Hing v Eramara Jaya Sdn Bhd* [2007] 2 MLJ 578 cited by counsel for the plaintiff at the last hearing, it could be easily distinguished. The relevant paragraphs of that decision are as follow:

> 16 The respondents claimed that they had no money or assets to purchase the petitioner's shares in the company to give effect to the order and swore various affidavits saying so. However, the petitioner was able to show in the affidavits filed that the respondents had bank accounts with monies in them, had monies placed on fixed deposits and were possessed of properties, thereby putting paid to the respondents' contentions claiming otherwise. The respondents claimed that they had no financial ability to pay for the shares, yet they were directors and shareholders in a number of companies.
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> 17 It was also the finding of this court during the hearing of the oppression petition (see Eric Lau Man Hing v Eramara Jaya Sdn Bhd & Ors) that large amounts of monies were easily transferred by the respondents between themselves, their family members and other related companies. They could not therefore subsequently argue that the monies belonged to other companies. Even if the respondents were unable to or had no means to pay for the shares in the company, which they were ordered to, the proper course for them to have adopted should have been to have instructed their solicitors or counsel to come back to this court to seek a variation of the order. That was never done

Lest it be forgotten, the law settled since *Salomon v Salomon* [1897] AC 22, in that the directors and shareholders of a company are not liable for the debts of the company save in instances where the corporate veil had been lifted, as was the case in *Eric Lau*. There is however no basis to do the same in the present case. The defendant's liability for contempt may therefore arise only if the conditions in O 45 r 5(1)(*a*) are met, in that the company had "refused or neglected" to do an act required under a judgment or order. Having found earlier that Ariel Singapore was in no position to make payment during the material period, it would follow that it did not refuse or neglect to comply with the Order. As such, the liability of the defendant *qua* director did not arise.

9 For the foregoing reasons, I was minded to dismiss the application given the lack of merits. However, as the parties had reached an amicable settlement prior to the rendering of judgment, I allowed the application to be withdrawn pursuant to O 21 r 6 of the Rules of Court, but I ordered that there be no liberty to restore although the parties had agreed to that as a condition of withdrawal.