

Teeni Enterprise Pte Ltd v Singco Pte Ltd
[2008] SGHC 115

Case Number : Suit No 663/2008, RA 200/2008
Decision Date : 16 July 2008
Tribunal/Court : High Court
Coram : Chan Seng Onn J
Counsel Name(s) : Michael Khoo SC/Andy Chiok (Counsel)/Daniel Atticus Xu (MyintSoe & Selvaraj) for the appellant/plaintiff; Goh Hui Nee (C M Hoe Partnership) for the respondent/defendant
Parties : Teeni Enterprise Pte Ltd — Singco Pte Ltd

Civil Procedure

16 July 2008

Chan Seng Onn J:

Background facts

1 On 23 April 2008, the defendant filed Summons No 1855/2008/J seeking, *inter alia*:

(1) that judgment be entered against the plaintiff on the defendant's counterclaim and for the plaintiff's claim against the defendant to be dismissed due to the plaintiff's failure to serve all documents contained in the plaintiff's Supplementary List of Documents ("supplementary list") within the timeline stipulated by the court pursuant to an "unless order" dated 18 October 2007 ("the unless order") and pursuant to Order 24 Rule 16 and Order 92 Rule 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed);

(2) in the alternative, for the plaintiff to amend the supplementary list filed by deleting references to duplicate items which the plaintiff had listed and/or errors made in relation to the dates of those items reflected in the plaintiff's supplementary list and to identify those items that were without enclosures.

2 On 9 May 2008, the Assistant Registrar Tan Wen Hsien ("the AR"), heard the summons and dismissed the plaintiff's claim of \$1,069,909.55 (being the price of goods sold and delivered by the plaintiff to the defendant) and entered judgment against the plaintiff on the defendant's counterclaim for \$1,267,477.30 with interest amounting to \$98,967.40 on the ground that the plaintiff had breached the unless order.

3 The plaintiff appealed against the decision of the AR. I allowed the appeal. Dissatisfied, the defendant has appealed against my decision. I now state the reasons for my decision.

Non-compliance with the unless order

4 The unless order required the plaintiff to furnish the documents sought by 29 October 2007, failing which the plaintiff's action would be dismissed and judgment be entered for the defendant's counterclaim.

5 At the appeal, counsel for the plaintiff accepted that the plaintiff had not produced the following items in the supplementary list by 29 October 2007 ("the six documents"):

- (1) Items Nos 117, 218 and 223 of Part 1;
- (2) the enclosures to items Nos 194 and 199; and
- (3) Item No 25 of Part 1 B.

6 From the notes of evidence at the hearing below, counsel for the plaintiff Mr Daniel Atticus Xu ("Mr Xu") submitted before the AR that the disobedience must be intentional and contumelious. He explained to the AR that during that period, he was called up by the Law Society to attend before the Inquiry Committee. He was also admitted to Singapore General Hospital for chest pains. He said that he was affected by the Law Society investigations and his health was bad. He said that he furnished all the documents he could find and he had furnished more than 200 documents to the defendant on 29 October 2007. He had tried his best to comply with the order of court. He insisted that any failure to comply with the order of court was unintentional. Mr Xu submitted that the law would not expect the impossible. He said that he did not have the documents with him. Neither did the plaintiff. There was no prejudice to the defendant as the documents in question originated from the defendant. The defendant would have copies of them. He orally applied to the AR to consider an extension of time for him to file a separate list of documents stating the documents which the plaintiff had but were not now in its possession. Mr Xu said that the court must take into account all the circumstances of the case, including the occurrence of prejudice, the nature of the relief sought, and whether the penalty imposed was proportionate to the default.

7 Counsel for the defendant, Ms Goh Hui Nee ("Ms Goh") argued that the documents furnished after 29 October 2007 showed that the plaintiff did have the documents. Allowing an unless order to be further extended when no formal application had been taken out for extension of time would make a mockery of the system.

8 Ms Goh's affidavit filed on 23 April 2008 set out the following alleged defaults by the plaintiff:

(a) Plaintiff's failure to abide by the 1st direction

Pursuant to SIC No. 2376/2007/Y, which was heard on 4 June 2007, the plaintiff was directed to file and serve the plaintiff's affidavit verifying the supplementary list and the supplementary list of documents by 18 June 2007 and to produce copies of the documents by 25 June 2007. The plaintiff then served its supplementary list of documents on 18 June 2007 but failed to produce copies of the documents on 25 June 2007.

(b) Plaintiff's failure to abide by the 2nd direction

On 13 September 2007, the court at the pre-trial conference ("PTC") made further directions for the plaintiff to furnish its documents contained in its supplementary list by 20 September 2007.

The plaintiff still failed to furnish its documents contained in the supplementary list despite receipt of 3 faxes from the defendant dated 25 September 2007, 28 September 2007 and 16 October 2007 reminding them to do so.

(c) Plaintiff's failure to abide by the 3rd direction

On 16 October 2007, the defendant filed SUM4638/2007/V and the court on hearing the said summons on 18 October 2007 directed the plaintiff to furnish all documents contained in the supplementary list dated 18 June 2007 by 29 October 2007, failing which the plaintiff's action would be dismissed with costs to the defendant and judgment be entered for the defendant's counterclaim with costs (*i.e.* the unless order was made).

In view of the unless order, the plaintiff effected service of the documents contained in the plaintiff's supplementary list upon the defendant's solicitors on 29 October 2007.

On examination of the documents served, the defendant discovered that the plaintiff failed to abide by the 3rd direction by serving on the defendant an "incomplete" set of documents. The defendant then wrote to the plaintiff on 21 November 2007 notifying them (*inter alia* in paragraph 8 of that letter) that the 6 documents (see [5] above) were not furnished despite the unless order.

(d) Plaintiff's failure to abide by the 4th direction

At the PTC hearing on 29 November 2007, the defendant informed the court of the plaintiff's breach of the unless order of 18 October 2007. The court then directed the parties to bring all the documents in the supplementary list that the plaintiff had furnished at the next PTC hearing on 6 December 2007 and the court would then decide if the unless order should be enforced. This hearing was adjourned to 13 December 2007.

By 13 December 2007, the plaintiff was still unable to produce all the documents in its supplementary list. At the PTC on 13 December 2007, the court directed the plaintiff to file and serve an affidavit explaining compliance with the unless order by 18 December 2007 and the defendant was to file a reply, if any, by 27 December 2007. The court would then make a final determination on the issue of whether the unless order had been complied with at the next PTC hearing scheduled on the 3 January 2008.

However, the plaintiff failed to file the affidavit explaining compliance by 18 December 2007 despite receipt of the defendant's fax dated 19 December 2007 reminding them to do so.

(e) Plaintiff's failure to abide by the 5th direction

As the plaintiff failed to file its affidavit explaining compliance at the PTC hearing on 3 January 2008, the court gave a further extension for the plaintiff to file its affidavit explaining compliance by 31 January 2008. The next PTC hearing was scheduled on 14 February 2008.

However, the plaintiff again failed to comply with the court's directions given on the 3 January 2008. At the PTC hearing on 14 February 2008, the issue of compliance with the unless order given on 18 October 2007 was not dealt with. The matter was adjourned to the 28 February 2008.

(f) Plaintiff's failure to abide by the 6th direction

On 28 February 2008, the court gave another unless order for the affidavit explaining

compliance to be served on the defendant by 4 March 2008 failing which the plaintiff's action would be dismissed and judgment entered for the defendant's counterclaim. The court further directed the defendant to take up a summons in chambers application for the matter regarding compliance with the unless order dated 18 October 2007.

On 4 March 2008, the plaintiff filed its affidavit explaining compliance with the unless order dated 18 October 2007. However, the plaintiff again failed to furnish all the missing documents listed in the supplementary list.

The defendant wrote to the plaintiff on 23 April 2008 stating that the plaintiff's inclusion of the missing documents in its affidavit of 4 March 2008 should not be construed as any acceptance by the defendant of the plaintiff's documents. The defendant emphasised that it did not accept service of these documents out of time and if any, these documents attached to the plaintiff's affidavit of 4 March 2008 should and ought to have been served on the defendant within the time prescribed by the court i.e. by 29 October 2007. The plaintiff's exhibits were merely for the court's determination of whether the unless order of 18 October 2007 had been breached.

9 The AR stated in her brief reasons that the plaintiff had been warned time and time again of the consequence of its breaches. It still failed to comply with the orders of the court again and again, despite several warnings from the pre-trial conference registrars. No application for extension of time was sought nor was any adequate explanation forthcoming. Under the circumstances, the AR granted prayer (1) of the defendant's summons (see [1] above).

At the hearing of the appeal

10 At the hearing of the appeal, I focussed on the six documents (i.e. Items 25, 117, 194, 199, 218 and 223), which the defendant alleged were not produced in breach of the unless order.

11 I carefully examined the six documents and all the relevant circumstances to see, *inter alia*, why the unless order was not complied with, whether the failure to produce had prejudiced the defendant in any way in the conduct of its case, whether there was any reason or incentive for the plaintiff to conceal the documents if the documents were indeed in their possession, whether the plaintiff could have been insincere in stating that the documents could not be found and whether there was a reasonable suspicion that the documents were deliberately destroyed to make the evidence disappear and thus no longer available for discovery and the trial of the action. I also scrutinised the reasons offered by the plaintiff to explain its non-compliance with the unless order to see whether or not the reasons were valid, reasonable and could be relied upon. Was the conduct of the plaintiff one of deliberate and persistent non-compliance in total disregard of the unless order of the court? Was the conduct of the plaintiff so contumacious or contumelious that it called for such a severe penalty by way of a summary dismissal of the plaintiff's claim and entering of full judgment on the defendant's counterclaim without hearing any evidence on the merits of the dispute, which in this case involved millions of dollars? Basically, I had to determine whether it would be just in all the circumstances of the case to exercise my discretion to excuse the plaintiff for its non-compliance with the unless order. The history of procedural defaults and non-compliance with other orders would be relevant evidence to show whether or not the present default was likely to be intentional, contumelious or contumacious, and if so, then the same history would also be a relevant consideration for the kind of penalty that the court should impose. Nevertheless, it must be borne in mind that the unless order enforced on 9 May 2008 related principally to the failure to provide the six documents and not to breaches of other orders.

12 The Court of Appeal in *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR 750 ("*Arjan*") referred to the following passage in the judgment of Sir Nicolas Browne-Wilkinson V-C in *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630, 636–637:

In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an unless order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

13 The Court of Appeal then held at [13], [14] and [15] that:

13 The onus is on the defaulting party to show why his failure to obey the order does not warrant the striking out of the claim. The defaulter must establish that there was no intention to ignore the peremptory order and that the failure to obey was due to extraneous circumstances.

14 Whether or not the default was 'intentional and contumelious' is not the sole criterion upon which the discretion of the court in deciding whether or not to strike out is exercised. . In *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630, 641; [1992] 1 WLR 1196, 1206–1207, Sir John Megaw drew a distinction between the noun 'contumely', which he understood to mean 'insolent reproach or abuse', and 'contumacy', which means 'perverse and obstinate resistance to authority'. His Lordship said that it was perverse and obstinate resistance to authority and not insolent reproach or abuse which is a frequent hallmark of a litigant's failure to comply with a peremptory order. There is some support for the view that the test for striking out need not depend on whether or not the conduct of the party in breach was intentional and contumelious. In *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666, 1677, Auld LJ, who expressed his preference for a wider test, said:

[T]here is no need to confine the test to that of an intentional disregard of a court's peremptory order, whether or not it is characterised as flouting, contumelious, contumacious, perverse, obstinate or otherwise. Such an intent may be the most usual circumstance giving rise to the exercise of this jurisdiction. But failure to comply with one or a number of orders through negligence, incompetence or sheer indolence could equally qualify for its exercise. It all depends on the individual circumstances and the existence and the degree of fault found by the court after hearing representations to the contrary by the party whose pleading it is sought to strike out.

The crux of the matter is that the party seeking to escape the consequences of his default must show that he had made positive efforts to comply but was prevented from doing so by extraneous circumstances.

15 Whether or not there has been prejudice to the other party is also a factor to be taken into account. The nature of the relief sought by the party in default and whether or not the penalty imposed is proportionate to the default in question are also relevant. In short, all the circumstances of the case must be taken into account.

14 Of the six documents, Mr Michael Khoo ("Mr Khoo") who was counsel for the plaintiff at the appeal said that all efforts were made to comply but none of the documents could be found except

for Item 218 which was furnished on 4 March 2008. I shall deal first with Item 218, and later with the rest of the five "missing" documents (*i.e.* Items 25, 117, 194, 199 and 223), which according to Mr Khoo, were not furnished to date because they are unavailable.

Item 218

15 Item 218 in Schedule 1, Part 1 of the supplementary list was a "Memo from Singco with drawings" dated "17.06.2006". Since Item 218 was a document that originated from the defendant, it would not be unreasonable to assume that even though it was not furnished by the plaintiff before the deadline of 29 October 2007 set by the unless order, the defendant would have disclosed the same document in the defendant's own list of documents. I could see no incentive for the plaintiff to suppress the document or deliberately delay its production as the defendant would have a copy of this document in any case. Nothing could be gained by the plaintiff from refusing to produce the document on time as ordered. On the contrary, by deliberately flouting the unless order, the plaintiff would be putting itself at risk and would have much to lose should the unless order be enforced.

16 Where there are voluminous documents, it will not be difficult to "lose" a document in the numerous large paper files in the office, especially if care has not been taken to systematically organise, index and file all the documents. I do understand the difficulties of a small firm, which Mr Xu is in, where the resources in terms of legal and administrative manpower may well be stretched and the lawyers may have to handle a case almost singlehandedly and without much paralegal assistance. But having said this, it does not mean that lawyers from small firms should be using this as an excuse for non-timely compliance with court orders.

17 In the affidavit of Mr Xu filed on 4 March 2008 to explain the plaintiff's compliance in respect of Item 218, Mr Xu merely said, "Based on the Plaintiffs' files given, I now find said memo." He ought to have given some details in his affidavit of the personal situation he was in at that time, which he had orally explained to the AR (see [6] above) and the amount of time and effort he spent looking for the document since the unless order was made on 18 October 2007.

18 I noted however that Item 218 was produced some four months after the date stipulated in the unless order by which the document should have been furnished. Considering the numerous documents involved in the supplementary list and having regard to his unfortunate personal circumstances at that time, I was prepared to excuse Mr Xu for the late production of this document. I did not have the sense that there was any contumelious conduct or deliberate suppression of the document on the part of Mr Xu or the plaintiff. Furthermore, no prejudice could have been caused by the four months' delay as I believed that the defendant would have a copy of Item 218 in any event since it was a document that originated from the defendant.

19 Ms Goh attempted initially to argue that the document produced was not the document described in Item 218. I was satisfied that the document as described in Item 218 had been furnished. There were some hand drawings at the bottom left corner of the document and it bore a machine-printed trace at the bottom of the document which showed that the document was faxed from the defendant's office on 17 June 2005. The date and the existence of the hand drawings matched the document's description.

20 I could also understand why Mr Xu took so long to locate this document because the document did not look like a normal memo with a clear date "17.6.2005" printed or written at the top of the document. It could easily have been missed during the search.

21 In any event, the document was produced prior to the defendant's filing of its Summons No

1855/2008/J on 23 April 2008 and prior to the hearing of that summons on 9 May 2008 by the AR. This was more a technical breach of the unless order which had been remedied prior to the application by the defendant to enforce the unless order.

Item 117

22 The document listed as Item 117 in Schedule 1, Part 1 of the supplementary list was described as a "Memo from Singco to Teeni for Edelweiss Park Condominium P/O No. A3845, A3847, A3907, A3906 & A4027".

23 Ms Goh insisted that there was a failure in compliance because the memo/fax furnished for Item 117 bore a different date. The document produced was dated "14.11.2005" whereas the document in Item 117 was supposed to be dated "21.1.2005". Ms Goh further pointed out that the document furnished was identical to the document furnished for Item 113, which was stated in the supplementary list as a document dated "14.11.2005" and described as "Singco's Fax to Teeni on Edelweiss Park Condominium". Hence, Ms Goh argued that the plaintiff had failed to produce the document described in Item 117.

24 Mr Xu in his 4 March 2008 affidavit explained that he had found a duplicate copy of the covering page of the memo and its enclosures which he annexed to his affidavit as "DAX-1" (hereinafter referred to as the "duplicate copy"). This appeared to me to be the document described in Item 113 as there was only one document in the plaintiff's supplementary list with the date "14.11.2005". In this duplicate copy, both the dates at the top right hand corner and at the bottom right hand corner beneath the signature tallied with the date of the document listed as Item 113.

25 I then compared the two documents, viz Item 117 and the duplicate copy produced by Mr Xu in his affidavit (now established to be Item 113). I noticed that the two documents were identical in every respect except for the following:

(a) The document the plaintiff had furnished for Item 117 stated "Pages: 1/5 including this page". "1/5" was handwritten.

The duplicate copy (item 113) stated "Pages: 1/6 including this page". "1/6" apparently was a handwritten amendment changing "1/5" to "1/6". I did not think this was material for the present purpose.

(b) The handwritten date below the signature at the bottom left corner of the document in Item 117 was amended by hand to "21/11/05" from "14/11/05" by cancelling "14" and inserting "21". The duplicate copy (Item 113) did not have any amendment to the date "14/11/05" below the signature.

(c) The bottom of the page of the document in Item 117 showed a machine-printed trace "21/11/2005 17:25 FAX 62684083 SINGCO PTE LTD". The duplicate copy (Item 113) had no such trace.

26 From the amendments to the date in (b) above to "21.11.05" and from the machine-printed trace in (c) above indicating that the document was faxed on 21 November 2005 by the defendant to the plaintiff, I concluded that the plaintiff had in fact furnished the document dated "21.11.05", which matched the date for the document described in Item 117. After all, the memo/fax document supplied by the plaintiff under Item 117, though having the date "14.11.05" at the top right hand corner, did have at the bottom right corner both the handwritten date "21.11.05" and a machine-printed date

"21.11.05" showing the date on which it was faxed by the defendant to the plaintiff. It was therefore not wrong of the plaintiff to have described the document under the circumstances as being dated "21.11.05".

27 From its contents, I could also see that it was a memo/fax from Singco (Private) Limited to Teeni Enterprise P/L on the subject of "EDELWEISS PARK CONDOMINIUM" and the memo/fax concerned PO's A3845, A3847, A3907, A3906 and A 4027, which fitted the description given for Item 117. This fortified my view that the document for Item 117 had been produced and there was in fact compliance with the unless order.

28 I further noted that the supplementary list contained only two documents bearing the same date "21.11.2005" (i.e. Items 117 and 118). While the contents of the disclosed document fitted the description for Item 117 very well, it did not quite fit the description given for Item 118. This was further evidence corroborating the fact that the document furnished by the plaintiff was the document described in Item 117.

29 To be doubly sure that the handwritten amendment to the date on the document at the bottom right hand corner from "14.11.2005" to "21.11.2005" was genuine and that it was in fact faxed on 21 November 2005 by the plaintiff to the defendant (and that it was not something engineered or doctored by the plaintiff to claim compliance), I requested Ms Goh to verify with her client the authenticity of the amendment and the machine-printed fax details since her client was the originator and the sender of the document. She subsequently confirmed that her client had indeed amended the date from "14" to "21" of November 2005 by hand and faxed the document across to the plaintiff on 21 November 2005, which the plaintiff had subsequently itemised as Item 117.

30 With the verification concluded, I had little doubt that the plaintiff had furnished the document in Item 117.

31 The error of Ms Goh was simply to assume that the date "14.11.2005" appearing at the top right corner of the document conclusively identified the date of the document, which was not the case here since different dates appeared on the face of the document. It was wrong of Ms Goh to have complained that Item 117 in the supplementary list was not produced in contravention of the unless order.

Item 194

32 Item 194 in Schedule 1, Part 1 of the supplementary list referred to a document dated "04.05.2006" and described as "Memo from Singco to Teeni on Edelweiss Project". The defendant complained that the plaintiff had failed to produce the enclosure to this document. The only basis for stating that the document contained an enclosure was the word "Encl" appearing at the end of the letter as follows:-

Yours sincerely

Singco Pte Ltd

(Signature)

S M See

Encl:

Cc: Mr. BT Lee – K LW

Mr. Low - K LW

33 The letter was silent as to what was enclosed. Mr Xu averred in his affidavit that he could not find the enclosure mentioned at the foot of memo in the plaintiff's files. Mr Xu stated that on closer reading of the contents of the same memo, it appeared to him that there might not have been any enclosure.

34 Since this was a document that originated from the defendant, I took the view that the defendant should have a copy of the enclosure and should have disclosed it in the defendant's list if it existed.

35 I then asked Ms Goh to check whether there was in fact any enclosure to this item which the defendant had sent to the plaintiff. She confirmed that the defendant did have the enclosure and this had been disclosed in the defendant's list.

36 I did not think it was necessary to spend more time at the hearing to determine whether or not there was any prejudice occasioned to the defendant arising from the non-production of the enclosure which the defendant itself had disclosed in its list of documents. Obviously there would not be any.

37 From the circumstances, I did not think that Mr Xu had not been forthright when he said that he could not find the enclosure. It was only his surmise that the enclosure did not exist. I therefore accepted Mr Xu's explanation in his affidavit that the plaintiff could not produce the enclosure because the plaintiff did not have it in its "possession, custody or power." There would have been no reason for the plaintiff or Mr Xu to hide it since the enclosure came from the defendant. I would definitely be more concerned if the document in the plaintiff's supplementary list was not one that originated from the defendant or was not one that was already in the defendant's possession.

38 In any case, after considering all the circumstances, I did not think that the non-production of the enclosure to this item which I was satisfied could not be found by the plaintiff merited the draconian measure of dismissing the entire claim of the plaintiff and entering judgment on the defendant's counterclaim without a hearing by the court on the evidence and the merits of the dispute.

Item 199

39 Item 199 in Schedule 1, Part 1 referred to a letter dated "19.04.2006", which was described as "Singco's Letter to Teeni on Payment and Delivery Goods". The defendant's complaint was in relation to the plaintiff's failure to produce the defendant's cheque that was enclosed under the cover of this letter. Again this was a document sent by the defendant enclosing the defendant's own cheque for \$45,000 as its advance payment to the plaintiff.

40 Mr Xu explained in his affidavit, and I accepted his explanation, that the plaintiff had presented the cheque and that the plaintiff did not have a practice of keeping a photocopy of the cheques received before presentation for clearance. Hence, this cheque would not be in the plaintiff's "possession, custody and power" and the plaintiff could not in my view be faulted for not producing the cheque itself or a copy of it.

41 Further, Ms Goh confirmed that the defendant was not disputing that the cheque was issued by

the defendant. There could be no prejudice as there was no dispute that the defendant had made a payment of \$45,000 to the plaintiff via a cheque enclosed in the defendant's letter itemised as No 199 in the supplementary list and the plaintiff had admitted receiving the monies.

42 Again I did not think there was any contumelious conduct on the part of the plaintiff for its failure to produce the cheque or a copy of it, even if it could be construed that Item 199 included the cheque, the production of which was governed by the unless order.

Item 223

43 Item 223 in Schedule 1, Part 1 referred to a document dated "27.06.2006" with the description "Teeni's Fax note to Aminah on Replacement for EP Recon-Oak Wrap Frame". This was a handwritten cover note from the plaintiff to Aminah, who is a staff working for the plaintiff's supplier in Malaysia according to Mr Xu. Based on the plaintiff's files, Mr Xu averred in his affidavit that he could only find the covering fax note. He had searched for the attachment to the cover note in the plaintiff's office and his office. Requests had also been made to K LW Wood Products (M) Sdn Bhd's staff to search for the same. The plaintiff, K LW staff and Mr Xu could not find the attachment.

44 It appeared to me that they had made reasonably serious positive efforts to look for the missing attachment and I had no reason to disbelieve the averments by Mr Xu in his affidavit of the various steps taken to locate it.

45 The handwritten cover note from the plaintiff to Aminah was as follows:

To: Aminah/Eric/Annan

From: Chua

Date: 27/6/06

RE: Replacement for EP Recon-Oak Wrap Frame

Dear all,

Please find attached the balance requirement for EP Recon-Oak veneer wrap frames.

Thanks & regards

(Signature)

Chua

46 Based on the nature of the claim, this cover note appeared to me to be a document which might adversely affect the plaintiff's case. It suggested that there could be defects to some of the EP Recon-Oak Wrap Frames supplied by the plaintiff to the defendant, which therefore required the replacements to be made.

47 If the plaintiff wanted to hide the existence of the attachment, then it did not make much sense to me that the plaintiff even made discovery of the cover note which indicated that the plaintiff had to do some rework. If indeed the plaintiff had intentionally wanted to suppress the document, it was more likely than not that the plaintiff would also not have disclosed the cover note. But the plaintiff did so.

48 I was therefore inclined to believe that there was no ulterior motive in the plaintiff's failure to make discovery or production of the attachment to this cover note. The person (or the paralegal staff) preparing a very long list of documents would probably find it quite tedious and time consuming to scrutinise the contents of every document to check whether or not each document in the list contained attachments. It would not surprise me if he were to take the easy way out and mechanically prepare the list of documents based simply on the date and the subject matter header appearing in each document, without actually reading the contents to determine if any enclosures had been referred to.

49 I noted however in this case that it was only a short one-page cover note and arguably, the person preparing the list ought to have noticed that it contained an attachment and he ought to have looked for it immediately, and if it was not there, then he should make clear by spelling it out in the list of documents that that particular document in the list did not include the attachment. On the other hand, I also could not rule out the possibility that he might not have noticed that there was supposed to be an attachment when he prepared the very long list of documents.

50 In any case, I was satisfied with the explanation provided by Mr Xu that he had subsequently caused a fairly extensive search to be made for the attachment, which even extended to the recipient of the document *i.e.* its supplier, who was also unable to locate the attachment.

51 In the circumstances, I accepted that the enclosure to Item 223 could not be found and hence, could not be produced in compliance with the unless order.

52 I did not think that prejudice would be suffered by the defendant because of the unavailability of the enclosure to Item 223. Whatever balance requirement there was could be tabulated from the defendant's purchase orders, the plaintiff's delivery orders and the plaintiff's invoices and all these documents should be available to both parties, unless they have both lost or misplaced these documents, which would not be a likely scenario. In my view, these documents flowing between the plaintiff and the defendant should be the primary documents to establish whatever should be the balance requirement of the "EP Recon-Oak veneer wrap frames" due from the plaintiff to the defendant. Relying on an internal document such as Item 223 from the plaintiff to its own suppliers might not necessarily be reliable and accurate. What if the plaintiff had also consolidated materials from other parties/projects and sent them together with those from the defendant to the same supplier, K LW Wood Products (M) Sdn Bhd?

Item 25

53 Item 25 in Schedule 1, Part 1 B concerned a "Delivery Order No. A7354 Singco (Private) Ltd" dated "13.06.2006".

54 Mr Xu attributed it to a wrong description because of a typographical error. It should have read as "Delivery Order No. A7254 Singco (Private) Ltd". Delivery Order No A7254 dated "13.06.2006" had been disclosed at Item 20 of Part 1 B of the plaintiff's supplementary list.

55 Since Ms Goh was complaining of the non-disclosure of Item 25 in breach of the unless order, I again asked Ms Goh to verify if Delivery Order No A7354 existed at all since this was again another document that originated from the defendant and I believed that the defendant would likely have a complete set of the copies of its own delivery orders.

56 After checking with the defendant, Ms Goh confirmed that there was no such Delivery Order

bearing the number A7354 but there was a Delivery Order bearing the number A7254. Ms Goh now agreed that it was likely to be a typographical error as the defendant was not likely to have issued Delivery Order No A7354.

57 As such, the explanation given by Mr Xu in his affidavit that there was a typographical error was not merely a lame excuse for non-compliance with the unless order but was a genuine error on the part of the plaintiff in preparing the supplementary list. I am not for the moment condoning slips and errors due to carelessness, which could result in wasted costs and time for everyone including the court hearing the matter, but clearly, it would be impossible for the plaintiff to produce a non-existent Delivery Order bearing the number A7354.

58 If only Ms Goh had checked before insisting on the production of a non-existing document, then Mr Xu would not have needed to embark on a wild goose chase looking through all the files for a non-existent document. Although it was not an easy task trying to sort out the voluminous documents for the purpose of drawing up the supplementary list, nevertheless Mr Xu must still bear responsibility for the typographical error which set the scene for the wild goose chase.

59 Since the plaintiff had already made discovery of Delivery Order No A 7254 in Item 20 of the supplementary list, there was no intentional refusal not to make discovery of Item 25 in the list.

Proportionality of the sanction

60 Accordingly, the only real default of any significance that I could see was the late production of Item 218 beyond the deadline set in the unless order. Even then, I did not think there was any prejudice or uncompensatable damage caused to the defendant by the four months' delay. I accepted that there could be wasted costs for various unnecessary letters, applications and attendances before the various Assistant Registrars, which in any event could be readily compensated in costs.

61 With regard to Items 25, 117 and 199, I did not consider that the alleged non-production constituted a non-compliance that was of any substance. For the missing enclosures to Items 194 and 223, which could not be found despite the efforts made to look for them, it meant that the enclosures were no longer in the plaintiff's "possession, custody and power", and hence, I did not regard the plaintiff's inability to produce the enclosures to be a substantive breach of the unless order.

62 What the Court of Appeal had stated at [24] in the case of *Arjan* was particularly apposite on the question of the proportionality of the sanction to be imposed on the defaulting defendant in this case:

24 As for the question of proportionality in respect of the sanction imposed on the defaulting party, in *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630, 640; [1992] 1 WLR 11 96, 1206, Parker LJ aptly pointed out that there must be degrees of appropriate consequences even where the conduct of a party who has failed to comply with a penal order can properly be described as contumelious or contumacious or in deliberate disregard of the order, just as there are degrees of appropriate punishments for contempt of court by breach of an undertaking or injunction. His Lordship added that the question in each case is whether the punishment fits the crime. In the present case, in the light of the appellants' past record, the very thin margin of default and the absence of uncompensatable damage or prejudice to the respondent, the appellants' default did not warrant the striking out of their counterclaim.

Conclusion

63 For the reasons given, enforcement of the unless order was clearly disproportionate, inappropriate and harsh in the light of all the facts and circumstances of this case and would not be in the interests of justice. Each case of a breach of a peremptory order must be decided on its own facts and on the facts, I found that the plaintiff and his counsel had made reasonable positive efforts to locate the missing documents and there was no evidence of any intentional and contumelious or contumacious non-compliance with the unless order, let alone of an extent that would justify the orders made by the AR. I agreed with the submission of plaintiff's counsel that the "draconian punishment" of allowing the "massive" counterclaim of over \$1.2 million (based apparently in part on an alleged loss of profit of 25% from potential contracts as a result of this litigation) and the dismissal of the whole of the plaintiff's claim was disproportionate, taking into account the relatively trivial breach by the plaintiff which did not occasion any real prejudice to the defendant.

64 Clearly, the court must balance the need to ensure compliance with court orders which are made to be adhered to and not ignored, and the need to ensure that a party would not be summarily deprived of its cause of action or have default judgment entered against it without any hearing of the merits especially when the non-compliance or breach, having regard to all the relevant circumstances, was not so serious or aggravating as to warrant such a severe consequence: see *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 at [4]. The discretionary power to enforce the unless order according to its strict terms must therefore be exercised judiciously and cautiously after carefully weighing everything in the balance.

65 The proper course of action in my view should be to allow the plaintiff to amend the supplementary list to remedy the discrepancies and errors instead of applying the draconian measures reserved for contumacious disobedience of court orders.

Orders made

66 In the result, I allowed the appeal and set aside the orders of the AR. I gave an order in terms of the alternative prayer (2) (see [1] above) of the defendant's summons with costs fixed at \$5,000 to be paid by Mr Xu personally to cover all the wasted costs incurred by the defendant arising from the supplementary list drawn up by the plaintiff.

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