

Case Note

CONTEMPT OF COURT AND THE LIABILITY OF LAWYERS

Pertamina Energy Trading Ltd v Karaha Bodas Co LLC
[2007] SGCA 10

The doctrine of contempt of court exists primarily to safeguard the integrity of legal proceedings for the benefit of litigants and the general public. This case is of significance to practitioners because it helpfully sets out the requirements that must be established before parties and non-parties can be found liable for contempt in respect of the breach of a court order. The Court of Appeal also sets out what it thinks lawyers should do when they are uncertain as to whether a proposed course of action would be in breach of a Singapore court order.

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I. Introduction

1 The recent decision of the Court of Appeal in *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC*¹ raises important issues in relation to the doctrine of contempt of court.

2 The contempt proceedings arose out of an unusual factual matrix – the party in whose favour the injunction had been granted was being accused by the party against whom the injunction had been granted of having thwarted or frustrated the operation of the injunction as well as breaching an implied undertaking to the court.

3 On 22 December 2004, Karaha Bodas Co LLC (“KBC”) obtained a domestic Mareva injunction (“the Singapore injunction”) against Pertamina Energy Trading Ltd (“Petral”) and Pertamina Energy Services Pte Ltd (“PES”) one day after they had obtained, in Hong Kong, a worldwide Mareva injunction against Petral.

* I would like to thank Yew Zhong Ming for her assistance in the preparation of this note. I am also grateful to Oommen Mathew for his comments.

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4 The portions of the Singapore injunction that were relevant to the contempt proceedings are set out below:

Disposal of assets

1. (1) The 1st Defendant [Petral] must not remove from Singapore in any way dispose of or deal with or diminish the value of any of his assets which are in Singapore whether in his own name or not and whether solely or jointly owned up to the value US\$36,236,581.65.

...

EXCEPTION TO THIS ORDER

(1) *This order does not prohibit the Defendants from spending \$50,000 on legal advice and representation. But before spending any money the Defendants must tell the Plaintiffs' solicitors where the money is to come from.*

(2) *This order does not prohibit the Defendants from dealing with or disposing of any of their assets in the ordinary and proper course of business. The Defendants shall account to the Plaintiffs weekly for the amount of money spent in this regard.*

(3) *The Defendants may agree with the Plaintiffs' solicitors that the above spending limits should be increased or that this order should be varied in any other respect but any such agreement must be in writing.*

...

THIRD PARTIES

(1) *Effect of this order*

It is contempt of Court for any person notified of this order knowingly to assist in or permit a breach of the order. Any person doing so may be sent to prison or fined.

5 On 17 and 18 January 2005, PES and Petral, applied for, *inter alia*, a discharge of the Singapore injunction. They were in fact successful and the Singapore injunction was subsequently discharged on 14 March 2005.²

6 On 26 January 2005, while the Singapore injunction was still in force, Petral, through their lawyers, sent a letter to KBC's Singapore lawyers informing KBC that Petral would be transferring some funds from Bank Mandiri in Singapore to Dah Sing Bank in Hong Kong.

² See *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2005] 2 SLR 568, affirmed in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112.

7 Petral's position was that (a) this transfer and intended payments constituted "a dealing with or disposing of any of their assets in the ordinary and proper course of business", pursuant to Exception 2 of the Singapore injunction; and (b) the letter was furnished pursuant to Exception 2 of the Singapore injunction.

8 KBC's Singapore lawyers received Petral's letter on 27 January 2005 and relayed it to A in Hong Kong. A was a solicitor and partner at the Hong Kong office of a UK law firm who had conduct of KBC's enforcement proceedings in Hong Kong. KBC then proceeded to apply to the High Court in Hong Kong and was granted a garnishee order *nisi* against Dah Sing Bank, despite making full and frank disclosure of the Singapore proceedings. Through this Hong Kong garnishee order *nisi*, KBC was able to garnish the moneys transferred by Petral to Dah Sing Bank.

9 Petral brought an application against KBC and A for contempt of court. B, the entire Hong Kong office of the UK law firm, was also made a defendant to the application for contempt of court. Petral's case was that KBC had frustrated the operation of the exception to the Singapore injunction which permitted the dealing with or disposal of Petral's assets in the ordinary and proper course of business. The case for contempt against both A and B was that they had aided and abetted KBC in frustrating the operation of the order.

10 In the High Court, Petral's application was dismissed. On appeal by Petral, the issues before the Court of Appeal were as follows:

- (a) Whether KBC had breached the implied "*Riddick*" undertaking not to use the information furnished in the letter of 26 January 2005 from Petral's lawyers for a collateral purpose.
- (b) Whether KBC had thwarted the operation of Exception 2 to the Singapore injunction by directly preventing Petral from dealing with its assets in the ordinary and proper course of business.
- (c) Assuming that contempt of court by KBC was established, whether A and B should be liable for contempt of court for aiding and abetting KBC in its contempt of court.

II. General observations on Mareva injunctions and the doctrine of contempt of court

11 Andrew Phang JA delivered the judgment of the Court of Appeal. The learned judge set the context for the Court of Appeal's ruling by making the following general observations:

On Mareva injunctions

(a) That Exception 2 to the Singapore injunction is a standard exception to Mareva injunctions; and

(b) That such exceptions are both necessary and fair as a Mareva injunction is never intended either to financially cripple the party against whom it is made or to inhibit or interfere with a defendant's ordinary conduct of business.³

On the doctrine of contempt of court generally

(a) That “*the doctrine of contempt of court is not intended, in any manner or fashion whatsoever, to protect the dignity of the judges as such; its purpose is more objective and is (more importantly) rooted in the public interest*”;⁴

(b) That the punitive jurisdiction in contempt proceedings is “*to safeguard the integrity of legal proceedings for the benefit of those using the courts and so indirectly for the benefit of the public whose interests it is that legal proceedings, civil or criminal, should be fairly tried and justly determined*”⁵ and this is underscored by the fact that the courts in other jurisdictions have all taken an uniform approach;⁶ and

(c) That the criminal standard of proof beyond a reasonable doubt applies in all contempt proceedings in Singapore.⁷

III. Applicable principles for contempt of court committed by a party and a non-party

12 As regards a party to the proceedings, the learned judge noted that one of the ways in which a party can commit a contempt of court is when the party breaches an implied undertaking that he would only make use of documents disclosed under compulsion of court process,

3 *Supra*, n 1 at [18]–[21].

4 *Supra*, n 1 at [22].

5 *Supra*, n 1 at [23], quoting from the judgment of Bingham LJ in *Attorney-General v Sports Newspapers Ltd* [1991] 1 WLR 1194 at 1200.

6 *Supra*, n 1 at [22]–[27] for the discussion on case law from England, Australia and Canada.

7 *Supra*, n 1 at [35].

whether by virtue of the discovery process or by a specific court order, for the purposes of that action and no other ulterior or alien purpose (this is popularly referred to as the “*Riddick*” undertaking⁸). Andrew Phang JA further noted that this implied undertaking is owed by the party to the court and the court has the power to relieve or modify this obligation or impose sanctions for its breach.

13 In contempt proceedings, it is not necessary to prove that a party to the court order appreciated that it was breaching the order. The court quoted with approval the observations made by Yong Pung How CJ in the High Court decision of *Summit Holdings Ltd v Business Software Alliance*,⁹ that “[f]or civil contempt, it was sufficient that the alleged contemnor be proved to have deliberately done the relevant act”, “[the] motive of disobedience was clearly irrelevant in deciding a case of contempt” and “the *bona fides* of the persons who were in contempt and their reasons, motives and understandings in doing the acts which constituted the contempt of court might be relevant in mitigation of the contempt”.¹⁰

14 To establish contempt by a party, one need only prove that the relevant conduct of the party alleged to be in breach of the court order was intentional and that the party knew of all the facts, including the existence of the order and its material terms, which made such conduct a breach of the order. *Bona fide* reliance on legal advice is not a defence to an allegation of contempt and can only be a mitigating factor.

15 As regards a non-party, the Court of Appeal noted that there are two possible ways in which the non-party could be liable for contempt: (a) by aiding and abetting a party to the order in his commission of an act in contempt of court; or (b) by conducting himself in such a way where there is a real risk that the due administration of justice will be either impeded or prejudiced by frustrating the purpose of the order.¹¹

16 Unlike a party to the court order, a non-party can only be liable for contempt if he had the *specific intent* to either impede or prejudice the due administration of justice or frustrate the court order. Whether or not the requisite *mens rea* has been established depends on the facts of each case - this may be either expressly admitted, or inferred from the circumstances of the case.

8 *Supra*, n 1 at [36]–[40]. See also *Riddick v Thames Board Mills Ltd* [1977] QB 881.

9 [1999] 3 SLR 197.

10 *Supra*, n 1 at [62].

11 *Supra*, n 1 at [41]–[43].

IV. The decision

17 With regard to whether KBC had breached the implied undertaking not to use the information furnished in Petral's letter for a collateral purpose, the Court of Appeal found that an implied undertaking did arise in this case. The court was of the view that Petral would not have offered the information as set out in the letter to KBC *but for* the Singapore injunction.¹² Therefore, the "*Riddick*" principle applied and KBC was obliged to not use the letter for any purpose, which included applying for a garnishee order in Hong Kong.¹³

18 The Court of Appeal concluded that there had been a clear contempt of court by KBC in breaching the implied undertaking. In commencing garnishee proceedings in Hong Kong, KBC had "utilised the information contained in the letter for a *wholly collateral purpose* that was *wholly unrelated* to the *raison d'être* of the Singapore injunction in general and Exception 2 in particular".¹⁴

19 With regard to whether KBC had thwarted the operation of the exception to the Singapore injunction, the Court of Appeal found that KBC was also liable for contempt because it was fully aware of the existence of the Singapore injunction and its terms and it had forwarded the letter to A, KBC's solicitor in Hong Kong, for the commencement of garnishee proceedings. While noting that it was not necessary to prove *mens rea* on the part of KBC, the Court of Appeal nonetheless opined that KBC knew precisely what it was doing and that it is "quite likely that [KBC] in fact appreciated that it was breaching the order".¹⁵

20 With regard to whether A was liable for contempt of court, the Court of Appeal found that he was liable on two fronts: (a) for aiding and abetting KBC's thwarting or frustration of the exception to the Singapore injunction; and (b) for having simultaneously impeded or prejudiced the due administration of justice.¹⁶ The court described A as having acted with "Nelsonian blindness". Although he might well have intended to vindicate KBC's legal rights via the garnishee proceedings in Hong Kong

12 *Supra*, n 1 at [69].

13 *Supra*, n 1 at [71].

14 *Supra*, n 1 at [73]–[74].

15 *Supra*, n 1 at [78].

16 *Supra*, n 1 at [84]–[85].

and advance his client's interests, it did not justify the disregard of a Singapore court order.¹⁷

21 It is crucial to note the Court of Appeal's comments in reaching its conclusion. The court said:

[W]e find it rather surprising that [the second respondent] did not at least realise that by engaging in such conduct, he (and the first respondent) would simultaneously be acting in direct opposition to the terms of the Singapore injunction in general and Exception 2 therein in particular. Any reasonable lawyer in the position of the second respondent ought to have realised that there was at least a potential legal difficulty in respect of his actions that might even constitute an act in contempt of court... What, therefore, the second respondent ought to have done was to have advised the first respondent that it ought to apply to the Singapore court to clarify the position and thereby receive the necessary permission to do what it did (even if they both subjectively believed that initiating the abovementioned proceedings in Hong Kong was justified).¹⁸

22 The impetus for the Court of Appeal's rigorous view on how a reasonable lawyer in A's position should act can be gleaned from its concluding observations at the end of the judgment. The court said:

Before concluding, it is eminently appropriate to note that what is most alarming, in our view, is that what transpired in the present proceedings might, if left unchecked, well be replicated not only in Singapore but in other jurisdictions as well – with the precedent in these proceedings being cited and used in the process. Such a possibility is to be assiduously avoided. The Mareva injunction is an important remedy, whose terms cannot – and ought not to – be thwarted. It would be easily set at naught if conduct such as that which occurred in the present proceedings were permitted. More importantly, such conduct would, as alluded to above, also herald the commencement of possible legal anarchy across jurisdictions. Respect for court orders in any and every jurisdiction is a given. Any contravention of such orders cannot be excused on the ground that it was effected in aid of possibly legitimate legal proceedings elsewhere. Indeed, such contravention could not, in our view, be excused even on the ground that it was effected in clearly legitimate legal proceedings elsewhere. How the courts in other jurisdictions decide on legal proceedings as well as issues brought before them is wholly within their purview. What is within this court's purview, however, is the need to ensure that its orders are not contravened or thwarted. We cannot overemphasise the importance of this fundamental proposition, and trust that nothing akin to the

17 *Supra*, n 1 at [93].

18 *Supra*, n 1 at [81].

conduct in the present proceedings will ever come before this court again. If, in the unfortunate event it does, more stringent sanctions will be meted out accordingly.¹⁹

23 With regard to whether B was liable for contempt of court, the Court of Appeal found that it was not liable because it had not been proven that all the other lawyers in B possessed the requisite knowledge of the Singapore injunction.²⁰

V. Conclusion

24 The significance of this decision for practitioners lies primarily in the observations made by the Court of Appeal as to what lawyers should do in such situations. The court has made it abundantly clear that, where there is uncertainty as to whether a proposed course of action is likely to be in breach of a Singapore court order, lawyers (whether practising in Singapore or elsewhere) should advise their clients to apply for a clarification or variation of the court order and not proceed with the contemplated act until such clarification or variation is obtained. If not, the lawyer proceeds at his own peril.

19 *Supra*, n 1 at [97].

20 *Supra*, n 1 at [86].