

Tiong Cheng Peng & Anor

v

Ker Min Choo & 6 Ors

High Court, Johor Bahru – Originating Petition No. 26-4-2008
Gunalan Muniandy JC

December 17, 2014

Civil procedure – Contempt of court – Breach of order of court – Application for an order of committal against court appointed liquidator pursuant to Order 52 r 4 of the Rules of Court 2012 – Whether applicants had locus standi to institute contempt action – Whether proposed contemnor had refused or neglected to perform act ordered within time specified in court order – Companies Act 1965, s 228 – Rules of Court 2012, Order 52 r 4

The applicants were the directors and shareholders/contributories of one Syarikat Jotang Wires & Cables Sdn Bhd that was subsequently wound up. One Teo Cheng Hua was then appointed as liquidator. Later, Teo Cheng Hua was removed as liquidator via a court order ("the order") under s 232(1) of the Companies Act 1965 ("the Act") on cause shown and was replaced by an Official Receiver. The applicants had filed the instant encl 162 in a winding-up petition, for an order of committal against Teo Cheng Hua pursuant to Order 52 r 4 of the Rules of Court 2012. It was contended that Teo Cheng Hua had committed contempt of court by deliberately breaching the express terms of the order namely paragraph (d) which expressly required Teo Cheng Hua to surrender to the Official Receiver all documents, papers, accounts etc. of the company in his possession not more than eight days after the order.

Issues

1. Whether the applicants had the locus standi to institute the instant contempt action.
2. Whether Teo Cheng Hua had refused or neglected to do the act ordered within the time specified in the order.

Held, allowing encl 162

1. Any party having sufficient interest in the outcome of the case can in law initiate an action for committal. The applicants were the first and second respondents in the winding-up petition and shareholders/contributories of the company. The contempt action is premised upon breach of the order obtained by the applicants for removal of Teo Cheng Hua as liquidator. As such, on the facts and in law, the applicants had sufficient interest in the matter and the capacity to bring this action. [see p 672 para 24]

2. (a) On the facts, Teo Cheng Hua had blatantly not complied with and disregarded the time frame stipulated in the order to do the said act. He had also attempted to initiate alteration or variation of the stipulated time frame and made allegations that the order had been unlawfully and wrongfully obtained. His conduct was manifestly in contempt of the order and clearly obstructed the process of proper liquidation by the Official Receiver that was prejudicial to the legitimate interests of the contributories. [see p 672 para 26] 1
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- (b) The only reason proffered by Teo Cheng Hua for non-compliance with paragraph (d) of the order is that the applicants had failed to pay the prescribed fees to the Official Receiver for the purpose of opening a file in order to accept the relevant documentation. There is no requirement under the law for the applicants to pay any prescribed fees to enable the Official Receiver to open any winding-up file. Section 228 of the Act requires only a liquidator other than the Official Receiver to provide security before acting as liquidator. [see p 673 paras 29-30] 10
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Cases referred to by the court 20

- B (JA) (An Infant), Re* [1965] 1 Ch 1112, Ch D (ref)
Bramblevale Ltd, Re [1970] Ch 128, CA (ref)
Hong Kwi Seong v Ganad Media Sdn Bhd (and Another Appeal) [2012] 6 AMR 221; [2013] 2 MLJ 251, CA (ref) 25
Loot Ting Yee v Tan Sri Sheikh Hussain b Sheikh Mohamed & Ors [1982] 1 MLJ 182, FC (ref)
Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd [2002] 4 AMR 4341; [2002] 4 MLJ 241, FC (ref)
Rozali Ismail, Tan Sri Dato (Dr) & 2 Ors v Lim Pang Cheong @ George Lim & 4 Ors [2012] 2 AMR 429; [2012] 3 MLJ 458, FC (ref) 30

Legislation referred to by the court

Malaysia

- Companies Act 1965, ss 228, 232(1) 35
 Courts of Judicature Act 1964, s 13
 Federal Constitution, Article 126
 Rules of Court 2012, Order 52 rr 3(2), 4

Other reference 40

Oswald's Contempt of Court, 3rd edn, p 6

Justin Voon and HV Yoong (Moi, NK Koh & Chee) for first and second respondents
NG Vinod and Mohd Sofian (Tam Cheng Yau & Co) for liquidator

Judgment received: February 2, 2015

Gunalan Muniandy JC

[1] This is an application ("encl 162") by the first and second respondents ("R1" and "R2") in a winding-up petition for an order of committal against the court appointed liquidator, one Teo Cheng Hua ("TCH") pursuant to Order 52 r 4 of the Rules of Court 2012 ("the ROC"). The applicants prayed for these orders:

- i) That a committal order be given against TCH for contempt of court.
- ii) That TCH be committed to prison for committing contempt of court.
- iii) That TCH be ordered to pay a fine in the sum deemed fit by this court for the above contempt.
- iv) That the cost of these proceedings be borne by TCH.
- v) Further and/or other reliefs to the applicants deemed fit and just by the court.

Background of case

[2] R1 and R2 were directors and shareholders/contributories of Syarikat Jotang Wires & Cables Sdn Bhd ("Jotang company"), a limited company incorporated under the Companies Act 1965 ("the CA"). Jotang company was wound-up by an order of Johor Bahru High Court ("JBHC") on March 24, 2011. TCH was appointed as liquidator of the Jotang company vide the said winding-up order. Thereafter, until he was removed, TCH had full access to all books, documents, accounts, records and data of the company in his capacity as liquidator. Subsequently, TCH was removed as liquidator vide order of this court dated September 26, 2013 ("the order"), under s 232(1) of the CA on cause shown and replaced by the Official Receiver ("OR").

[3] At all material times, TCH's correspondence address was his office address at 2C & 2C-1, Jalan Giam, Taman Majidee, 80250 Johor Bahru and also at No. 9, Jalan Mohd Amin 7, 80100 Johor Bahru, Johor.

Grounds for committal

[4] According to paragraph (d) of the order, TCH was directed to do the following act:

Teo Cheng Hua [No. Kelulusan: 517/04/12 (J/PH)] atau [No. K/P: 460810-01-5093] secara serta merta dan tidak lewat dari lapan (8) hari dari tarikh Perintah ini menyerahkan kepada Pegawai Penerima sebagai Pelikuidasi baru segala buku-buku, dokumen-dokumen, kertas-kertas, akaun-akaun, surat-menyurat dan segala dokumen-dokumen lain yang relevan dalam milikannya berkenaan dengan jawatannya sebagai Pelikuidasi.

[5] TCH had failed to comply with and breached paragraph (d) of the order that clearly and specifically required him to hand over all relevant books, document, accounts, etc. in his custody as liquidator of the Jotang company to the OR within eight days from September 26, 2013 or on/before *October 4, 2013*.

[6] Without receipt of the complete liquidation documents in accordance with the terms of the order the OR was prevented from discharging his duties promptly and properly and thus, liquidation of the Jotang company could not proceed effectively at the material time.

[7] TCH was clearly personally aware of the order, particularly paragraph (d), for inter alia these reasons:

- i) He was served with the application for his removal dated April 17, 2013 ("encl 116") together with the supporting affidavit;
- ii) He had filed an affidavit in reply dated May 29, 2013;
- iii) TCH was, thus aware that if encl 116 is allowed he would be required to serve the complete liquidation documents on the newly appointed liquidator within eight days from the date of the order;
- iv) TCH had attended court on May 22, 2013 during the contempt hearing in chambers and was present in the vicinity of the court on September 26, 2013 when the order was made at the proceedings where he was represented by his counsel; and
- v) He was at all material times represented by solicitors who were clearly informed vide letter dated October 2, 2013 by the applicants' solicitors regarding paragraph (d) of the order and specifically of the requirement for complete liquidation documents to be served on the OR on or before October 4, 2013.

[8] At all material times, TCH and his solicitors did not intend to reply to correspondence from the applicants' solicitors as to whether paragraph (d) of the order had been complied with and till to date there was non-compliance.

[9] Vide the applicants' solicitors' letter dated *November 28, 2013* to TCH, a copy of the sealed order that had just been extracted was served on TCH.

[10] Thereafter, on enquiry from the OR by the applicants' solicitors, it was found that as at October 17, 2013 complete liquidation documents had yet to be served on the OR and TCH continued to breach and disobey the order.

[11] Even after a lapse of more than two months, TCH still did not comply with the order and this clearly constituted serious breach and total disrespect for the order.

1 [12] The applicants' solicitors had met with OR and were taken aback to be told
that TCH had tried to negotiate and arrange ("mengurus") with the OR for the
deadline to surrender the complete liquidation documentation to the OR to be
extended.

5 [13] The order did not provide for any extension of time and no party could
extend the time stipulated except the court.

10 [14] At no instance had any reasonable explanation been given for
non-compliance with the order nor did he have any valid ground for the failure
at any material time.

15 [15] Vide letter dated November 29, 2013, the applicants' solicitors had notified
the OR that TCH could not arbitrarily alter the terms of the order as regards the
time frame for surrender of the company documentation to the OR via the same
letter the solicitors confirmed with the OR that up to November 29, 2013 the
documentation had yet to be served on the OR.

20 [16] AS at *December 6, 2012*, which was some two months and one week
subsequent to the order, the complete documentation had still not been released
to the OR by TCH. It was only on *December 10, 2013* that TCH served several
documents on *December 10, 2013* on the OR who confirmed that the documents
were incomplete.

25 [17] On the foregoing grounds, it was contended that this was a straightforward
case where TCH had clearly committed contempt of court by deliberately
breaching the express terms of the order. It was further alleged as follows:

(i) The breach of the order by TCH was serious and prejudicial to the
applicants.

(ii) Apart from that, TCH had attempted to abuse the court process and law
by resorting to alter or vary the terms of the order to obtain an extension
without a court order.

(iii) TCH had attempted to unnecessarily and wrongfully delay handing over
of the liquidation document to the OR.

(iv) As a consequence, there was serious interference in the administration of
justice.

40 The law on contempt of court

[18] The Federal Court in *Loot Ting Yee v Tan Sri Sheikh Hussain b Sheikh Mohamed
& Ors* [1982] 1 MLJ 182 dealt, inter alia, with the real question for the court's
determination in a case of contempt. Raja Azlan Shah Ag LP (as His Highness
then was) laid down the test in these terms:

We feel that the real question for the court in this case to decide whether there is contempt, is whether the risk of prejudice to a fair and proper trial of the pending legal proceedings is serious or real or substantial. That is an application of the ordinary *de minimis non curat lex* principle – the law does not concern itself with trifles. Intent alone is insufficient to establish contempt (see *R v Ingrams & Ors; Ex parte Goldsmith*.

[19] In *Tan Sri Dato (Dr) Rozali Ismail & 2 Ors v Lim Pang Cheong @ George Lim & 4 Ors* [2012] 2 AMR 429; [2012] 3 MLJ 458, the Federal Court adopted the general definition of contempt of court given by *Oswald's Contempt of Court*, 3rd edn, at p 6 as follows:

To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, or their witnesses during the litigation.

[20] His Lordship Arifin Zakaria CJ explained that Article 126 of the Federal Constitution, together with s 13 of the Courts of Judicature Act 1964 empowered the Federal Court, the Court of Appeal and the High Courts to punish any contempt of itself. Having traced the traditional classification of contempt of court in England as being either civil or criminal wherein the general approach had been that a criminal contempt meant an act that so threatens the administration of justice that it requires punishment whereas by contrast civil contempt involved disobedience of a court order, His Lordship observed:

Contempt has been reclassified either as (1) a specific conduct of contempt for breach of a particular court order; or (2) a more general conduct for interfering with the due administration of justice. This classification is better explained in the words of Sir Donaldson MR in *Attorney-General v Newspaper Publishing Plc* (supra) at p 362:

"Of greater assistance is the reclassification as (a) conduct which involves a breach, or assisting in the breach, of a court order; and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or, more generally, as a continuing process, the first category being a special form of the latter, such inference being a characteristic common to all contempts per Lord Diplock in *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at p 449."

This reclassification was adopted by the Court of Appeal in *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 AMR 4241; [2001] 4 MLJ 577, CA.

[21] In another leading Federal Court case, *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 AMR 4341; [2002] 4 MLJ 241 the court adopted the general definition of contempt of court provided by *Oswald's Contempt of Court*, 3rd edn, as a good guide. The court went on to hold:

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1 What therefore is contempt of court, "is interference with the due administration of justice" – per Nicholls LJ at p 923 of *Attorney-General v Hislop & Anor* [1991] 1 All ER 911, CA.

5 In view of the generality of the phrase "interference with the due administration of justice", we are of the view that the categories of contempt are never closed. To that extent we respectfully endorse the statement made by Low Hop Bing J in *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240 at 270:

10 "The circumstances and categories of facts which may arise and which may constitute contempt of court, in a particular case, are never closed. This is the same position as in the case of negligence in which the scope for development is limitless. Contempt of court may arise from any act or form whatsoever, ranging from libel or slander emanating from any contemptuous utterance, news item, report or article, to an act of disobedience to a court order or a failure to comply with a procedural requirement established by law. Any of these acts, in varying degrees, affects the administration of justice or may impede the fair trial of sub judice matters, civil or criminal, for the time being pending in any court.

20 The particular matrix of the individual case is of paramount importance in determining whether a particular circumstance attracts the application of the law of contempt. Hence, a positive perception of the facts is a prerequisite in deciding whether or not there is any contravention necessitating the invocation of the law of contempt."

25 [22] As regards the burden of proof of contempt of court, the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors* (supra) adopted the settled principle as reaffirmed by Lord Denning MR in *Re Bramblevale Ltd* [1970] Ch 128 in these words:

30 A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt (see Lord Denning MR at p 137).

35 [23] An act of disobedience to a court order, as alleged in this case to be wilful and deliberate, is recognised as conduct amounting to contempt of court. To be punishable, it must pose a serious, real or substantial risk of prejudice to a fair and proper trial of pending legal proceedings. It is also trite law that strict adherence to all procedural safeguards prescribed by law is vital in committal proceedings for contempt which are penal in nature. This must necessarily be so as committal is indeed a very serious matter as it involves deprivation of a person's liberty on being found guilty of and convicted for contempt. The courts are required to proceed very carefully before making an order to commit the contemnor to prison. (Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112.)

Finding

[24] First and foremost is the issue raised by the proposed contemnor ("PC") as to the locus standi of the applicants to institute this contempt action. Any party having sufficient interest in the outcome of the case can, in law, initiate an action for committal. The applicants were the first and second respondents in the winding-up petition and directors/contributories of the company. The contempt action is premised upon breach of the order obtained by the applicants for removal of the PC as liquidator. Hence, in the court's view, on the facts and in law, the applicants had sufficient interest in the matter and the capacity to bring this action. In the result, the issue of locus standi as argued was a non-issue and without any basis.

[25] This contempt action is grounded on breach and non-compliance by the PC of the court order dated September 26, 2013 which vide paragraph (d) clearly and expressly required the PC to not more than eight days after the order surrender to the OR all documents, papers, accounts, etc. of the company in his possession as the then liquidator appointed by the court.

[26] It was beyond dispute that the PC had blatantly not complied with and disregarded the time frame stipulated in the order to do the said act. Not only that, he had attempted to initiate alteration or variation of the stipulated time frame by communication with the OR. He had further made allegations to the effect that the order had been unlawfully and wrongfully obtained which was tantamount to challenging the validity of the order itself. His conduct was manifestly in contempt of the order dated *September 26, 2013* that required strict compliance by him in regard to the said documents to facilitate liquidation of the company being taken over by the OR in compliance with the order and clearly obstructed the process of proper liquidation by the OR that was prejudicial to the legitimate interests of the contributories.

[27] In the determination of whether the PC had refused or neglected to do the act ordered within the time specified in the order, the specified terms of the order are of paramount importance. In *Hong Kwi Seong v Ganad Media Sdn Bhd (and Another Appeal)* [2012] 6 AMR 221; [2013] 2 MLJ 251 the Court of Appeal held:

The specific terms of the judgment or order are of overriding importance, as they are to be construed by the court in order to determine the legal effect as to whether the defendant is required to do an act within a time specified therein and whether the defendant has refused or neglected to do so within the prescribed time in the context of Order 45 r 1(a). The court will then decide whether or not to grant leave to the plaintiff to pursue an order of committal under Order 45 r 1(a)(i).

[28] An important point that is relevant and noteworthy is that this is not the first committal proceedings instituted against TCH in the present action. In previous proceedings for committal initiated by the same applicants, TCH was found guilty of contempt of court for interference or obstruction in the course of justice for which on February 19, 2014 he was sentenced to a fine of RM50,000

