BARBADOS:

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 3 of 2000

BETWEEN:

Dino Trading And Services Pte Ltd

Dora Song Choo Kam (Also Known

As Dora Prochilo Also Known As

Dora Soong

Merlion Investments Limited

Appellants

AND

Steven Steel Supply

Respondent

Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice Errol Chase and The Honourable Mr. Justice Colin Williams, Justices of Appeal.

2000: February 28th & April, 19th.

Dr. R.L. Cheltenham Q.C. and Mr. A. Scott for Appellant.

Mr. A. Shepherd Q.C., and Mr. M.A. King for Respondent.

DECISION

On June 26, 1998 the plaintiff Steven Steel Supply, a corporation incorporated in Columbus, Ohio, United States of America (herein referred to as "Steven") issued a writ against the first defendant Dino Trading and Services Pte Limited, a limited exempt private company incorporated in Singapore and registered under the Companies Ordinance of Trinidad and Tobago (herein referred to as "Dino"), the second defendant Dora Song Choo Kam (also known as Dora Prochilo), of Fairview Place, Fairfield, St. Peter in this Island (herein referred to as "Dora Kam") and the third defendant Merlion Investments Ltd, a limited liability company incorporated and registered under the Companies Act Cap.308 of this Island (herein referred to as "Merlion") claiming as against Dino $3,394,872.00 United States dollars with interest due under a judgment given on June 16, 1996 in the High Court of the Republic of Singapore in favour of Steven and remaining unsatisfied, and as against Dora Kam and Merlion 1) an account of all money belonging to Dino that came into their hands 2) payment of the sum of $3,394,872.00 United States dollars 3) a declaration that all funds up to a limit of $3,394,872.00 United States dollars standing to the credit of Dino, Dora Kam and/or Merlion at any commercial bank is now held on trust for Steven absolutely 4) payment of the said sums and 5) interest and costs,

It is pleaded in the Statement of Claim that

"10. The defendants have met planned and unlawfully conspired and agreed with each other to place monies to which the plaintiff is entitled out of the reach of the plaintiff and thereby to cheat and defraud the plaintiff of the sums due under the judgment.

11. In furtherance of the said plan the defendants did the following acts:

(a) The second defendant as the principal officer and controller of the first defendant caused the first defendant to be registered under the provisions of the laws of Trinidad and Tobago so that the first defendant could remove funds from the jurisdiction of Singapore into the jurisdiction of Trinidad and Tobago where the judgment was not known or immediately enforceable.

(b) The second defendant then transferred "to her into personal capacity" funds belonging to the first defendant. The said transfer was done with the intention that it should make the first defendant judgment proof and so that the first and second defendants could avoid and evade the plaintiff's judgment and any and all of their legal obligations.

(c) The second defendant has caused to be incorporated the third defendant in this Island for the purpose of hiding funds from the plaintiff and avoiding and evading any legal obligations to satisfy the plaintiff's judgment.

(d) The second and/or third defendant then transferred to the third defendant funds belonging to the first defendant and/or second defendant. The said transfer was done with the intention that it should make the first defendant judgment proof and so that the first and second defendants could avoid and evade the plaintiff's judgment and any or all of their legal obligations and make it difficult if not impossible for the plaintiff to trace any funds and/or assets of the first defendant.

(e) The third defendant has failed to and does not conduct any legitimate business and was incorporated solely for the purpose of diverting and hiding funds which the plaintiff was entitled to at the time of its judgment so that the said funds could be placed beyond the reach of the plaintiff.

(f) The first, second and/or third defendant caused funds to be transferred into the jurisdiction of this Court into the names of the second and third defendants with the intention of fraudulently defeating the plaintiff's attempts to enforce judgment.

12. In the alternative the third defendant is no more than the alter ego of the second defendant who is the principal and controller of the first defendant and which company was created for the purpose of enabling the first and/or second defendant to hide funds belonging to the first defendant and which funds were properly to satisfy the plaintiff's judgment".

On June 25, 1998 the day previous to the issue of the writ, Steven had obtained a Mareva injunction against the defendants on terms which included an undertaking forthwith to issue a writ of summons endorsed with a Statement of Claim in the form of the draft produced to the Court and to serve the same on the intended defendants as soon as was reasonably practicable; and forthwith to give notice of the terms of the Order granting the injunction to the intended defendants "by service and of the telephone number" of a representative of the intended plaintiff's attorneys-at-law to whom any notice of an application to set aside or vary the order might be given out of office hours.

The Court order which granted the injunction included the following terms:-

"2. The intended defendants be restrained and an injunction be granted restraining them until after the 7th day of July 1998 or further order in the meantime whether in the case of the first and third intended defendants by its directors or by its servants or agents or subsidiary or associated companies or any of them or otherwise howsoever and as regards the second intended defendant whether by herself, her servants or agents or otherwise howsoever, from:

a. Removing from the jurisdiction of this Court, disposing of, mortgaging, assigning, charging or otherwise dealing with any of their (respective or joint) assets within the jurisdiction, including, but not limited to the property situate at Fairfield in the parish of Saint Lucy and any bank accounts held at the CIBC Bank or any of its subsidiaries and/or wheresoever held.

b. Disposing of, transferring, charging, assigning, diminishing or dealing in any way whatsoever with any such assets or others within the jurisdiction of this Court.

c. Attempting to transfer, charge, assign, diminish, remove, dispose of, mortgage, encumber or in any other way deal whatsoever with any such assets within the jurisdiction of this Court.

Save in so far as the total unencumbered value of these assets in Barbados exceeds $4,000,000.00 in the currency of the United States of America.

3. The intended defendants must inform the intended plaintiff in writing at once of all their assets in the Island of Barbados and/or elsewhere, whether directly or indirectly held, whether in their own name or not and/or whether solely or jointly owned, by giving the value, location and details of all such assets. The information must be confirmed in affidavits which must be filed in respect of each intended defendant and served on the intended plaintiff's attorney-at-law within 7 days after this order had been served on each intended defendant .....

6. The intended defendants and each of them do forthwith disclose the full value of their respective and joint assets within and without the jurisdiction of this Court identifying with full particularity the nature of all such assets and their whereabouts and whether the same be held in their own names or by nominees or otherwise on their behalf and the sums standing in such accounts such disclosures to be verified by affidavits to be made by the intended defendants and in the case of the first and third intended defendants by their proper officer and served on the intended plaintiff's attorney-at-law within 7 days of service of this order or notice thereof being given .....

9. The intended defendants are to be at liberty to apply to vary or discharge this order upon giving to the plaintiff's attorney-at-law 72 hours notice of their intention to do so".

An interlocutory summons to continue the order made on June 25, 1998 was filed on June 26, 1998, and on July 9, 1998 an order was made continuing the order granted on July 25, 1998 until further order.

On July 27, 1998 the second defendant Dora Kam filed a summons for an order giving her further time to file a summons and affidavit under Order 12 rule 7 and her defence to the Statement of Claim notwithstanding that the time limited by the rules for her doing so had expired and for her to be at liberty to apply. This summons for an extension of time was set for hearing on October 8, 1998.

On January 16, 1999 the said defendant Dora Kam was served with a sealed and certified copy of the order of Court made on June 25, 1998 which had been continued by the order of Court made on June 26, 1998.

On June 28, 1999 the plaintiff Steven filed a summons for an order pursuant to (inter alia) the Rules Order 19 rule 7 and /or Order 43 rule 1 for an order that, no defence having been filed by any of the defendants, judgment be entered for the plaintiff for and/or an order made that

(1) An account be taken of all money coming into the hands of the defendants and that all necessary enquiries and directions be taken.

(2) A declaration that all sums of money and/or funds up to a limit of US $3,394,872.00 standing to the credit of the first, second and/or the third defendant at any commercial bank, is now held in trust for the plaintiff absolutely.

(3) Payment of the said sums.

(4) Interest and costs.

This summons was fixed for hearing on November 4, 1999.

On November 1, 1999 Dr. Cheltenham for the defendants took out a summons for an adjournment of the hearing scheduled for November 4, 1999. In an affidavit in support of the summons Dr. Cheltenham deposed that he had been advised by his physician to take a rest and avoid strenuous activities such as appearing in court cases for at least 3 weeks.

Hearing of the summons was adjourned and took place on January 18, 2000. In the meantime on January 6, 2000 the defendants applied for an order that the plaintiff Steven give security for the defendants' costs in the action on the ground that the plaintiff is resident out of the jurisdiction and

had no known assets within the jurisdiction and that in the meantime all proceedings in the action be stayed. The application was supported by the affidavit of Dora Kam.

This summons for security and the summons that had been fixed for hearing on November 4, 1999 were heard by Payne J on January 18, 2000 and an order was entered on January 20, 2000 in the following terms:-

"Upon the plaintiff's summons for judgment in default of the defendants filing their defence this day coming on for hearing

And upon the defendants' summons for security for costs this day coming on for hearing

And upon hearing Alair Shepherd, Q.C., attorney-at-law for the plaintiff and John Forde holding papers for Dr. Cheltenham, Q.C., attorney-at-law for the defendants It is hereby ordered that the plaintiff be at liberty to enter judgment in default of defence unless the defendants file their defence within 14 days from the date hereof and that the summons for security for costs be adjourned to the 22nd day of February 2000, the plaintiff to be paid the costs thrown away by today in any event".

On February 1, 2000 the defendants took out a notice of motion for leave to appeal against the order of Payne J. and for the application for leave to appeal to be treated as the hearing of the appeal. The relief sought by the defendants is that the order of the High Court be reversed and/or varied and that an order providing for the giving of security for costs by the plaintiff be granted with a further order that no judgment may be entered until and unless security is provided and a still further order granting time for the defendants to file their defence after security is provided; alternatively, an order reversing the order in the Court below and a further order that the matter be remitted to the High Court to be dealt with in accordance with such directions as the Court of Appeal may give.

When the matter came on for hearing before this Court Mr. Shepherd stated that the plaintiff was objecting to the grant of leave to the defendants to appeal. He filed an affidavit in opposition to the grant of leave and a perusal of his affidavit discloses that it merely amplifies the record of appeal prepared by the defendants and we can see no reason why it cannot be referred to on the application for leave to appeal. In any case the record of appeal prepared by the defendants does contain in the closing pages a copy of Mr. Shepherd's affidavit.

The point of contention relates to Mr. Shepherd's objection to the grant of leave to appeal on the ground that the defendants are in contempt of court in not having given the information or made the disclosure required by paragraphs 3 and 6 of the order of the court made on June 25, 1998 (and entered on June 26, 1998) and continued by the order of Court of June 26, 1998. The submission is

that the defendants are in contempt of court and should not be granted leave to appeal until they have purged their contempt.

Mr. Shepherd relies on Hadkinson v Hadkinson [1952] 2 All E.R. 567 and Midland Bank Trust Co Ltd and another v Green and others (No.3) [1979] 2 All E.R. 193.

In the former case Romer L.J. said at p.569:-

It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham L.C. said in Chuck v Cremer 46 E.R. 884 at 885

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed." Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating mainly to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt".

Later on (at p.570) he dealt with the exceptions to the rule and said:

"One of the exceptions is that a person can apply for the purpose of purging his contempt, and another is that he can appeal with a view to setting aside the order upon which his alleged contempt is founded. Neither of those exceptions is relevant to the present case. A person against whom contempt is alleged will also, of course, he heard in support of a submission that, having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it, or that, having regard to all the circumstances he ought not to be treated as being in contempt. The only other exception which could in any way be regarded as material is the qualified exception which, in some cases, entitles a person who is in contempt to defend himself when some application is made against him".

The rule as stated by Denning L.J. is more qualified (at pp.574, 575):

‘It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance.

In this regard I would like to refer to what Sir George Jessel, M.R. said in a similar connection in Re Clements and Costa Rica Republic v Erlanger (1877) 46 L.J. ch. 375 at 383: “I have myself had on many occasions to consider this jurisdiction, and I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s rights, that is, if no other pertinent remedy can be found. Probably this will be discovered after consideration to be the true measure of the exercise of the jurisdiction.” Applying this principle, I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.”

In the Hadkinson case there was a petition by a wife for the dissolution of her marriage, a decree nisi was granted, and it was directed that the child of the marriage should remain in the custody of his mother, but that he should not be removed out of the jurisdiction without the sanction of the court. On the decree being made absolute, the mother re-married, and without the sanction of the court she removed the child to Australia. On a summons by the father an order was made directing the mother to return the child within the jurisdiction. On an appeal by the mother against the order the father objected that, as she was in contempt, she was not entitled to be heard. The Court of Appeal in England held that the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction.

Romer L.J. said (at p.572):-

“Although, therefore, there are circumstances in which the court would hear a parent who was in contempt (and I do not suggest that the examples which I have given are exhaustive) no such circumstances exist in the present case. Undoubtedly, the mother should be heard before a final decision is reached on a matter so vital to the infant as his future domicile. Let her be heard, however, when the boy’s return within the jurisdiction will have produced the dual effect of partially purging the mother’s contempt and of enabling the court to enforce such order with regard to the child as it may then think proper to make.”

Denning L.J. said (at p.575):-

“The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia, it is impossible for this court to enforce its orders in respect of him. No good reason is shown why he should not be returned to this country so as to be within the jurisdiction of this court. He should be returned before counsel is heard on the merits of this case, so that, whatever order is made, this court will be able to enforce it. I am prepared to accept the view that in the first instance the mother acted in ignorance of the order, but nevertheless, once she came to know of it, she ought to have put the matter right by bringing this boy back. Until the boy is returned, we must decline to hear her appeal.”

Midland Bank Trust Co. Ltd v Green, cited earlier, was a case in which the court heard an applicant who was in contempt in not having complied with an order for discovery where her application was to set aside a judgment which was insupportable in law and which therefore the court had had no jurisdiction to enter, since not to exercise the jurisdiction would have been an injustice. Oliver J stated the general rule (at p.201):-

“There is no doubt that the general rule is that the Court will not entertain any application by a party in contempt for an exercise of the court’s discretion in his favour, although he remains entitled to attend the trial for the purpose of defending himself or seeking to set aside as irregular an order made against him after his contempt.”

After considering Hadkinson v Hadkinson, earlier cited, and Gordon v Gordon [1904-7] All E.R. Rep. 702 he concluded:-

“In my judgment, the fact that in the instant case the applicant is in contempt ought not to prevent the hearing of the substance of the application, although I think that it may well be that, if the applicant were to succeed in establishing that the order was, as she claim, insupportable in law, it should be set aside only on terms that, however belatedly, the order for discovery should be complied with. In view of the pending appeal of the plaintiffs that might not be altogether an academic exercise.”

In the earlier case of Gordon v Gordon an order was made in divorce proceedings against a wife at the instance of her husband to hand over to him the child of the marriage and she was ordered to pay the costs of the application out of her separate property notwithstanding that such property was subject to a restraint on anticipation. When the husband attempted to serve the order it was discovered that the wife had gone away with the child in spite of an undertaking which she had given not to do so. Thereupon a further order was made for the attachment of the wife for contempt and another order for her committal. These orders could not be put into effect because the wife was abroad. She subsequently, while still in contempt, appealed against so much of the order first mentioned as directed her to pay costs out of property of hers which was subject to a restraint on anticipation. The court entertained the appeal on the ground that the order was made without jurisdiction. Vaughn-Williams LJ said (at p.705):

“....taking it generally, it has not been disputed in the discussion before us that this rule that a person who is in contempt cannot be heard, prima facie applies to voluntary applications on his part - when he comes and asks for something, and not to cases in which all that he is seeking is to be heard in respect of matters of defence. I do not for one moment suggest that every matter of defence entitles a person in contempt to be heard: for instance, if an order has been made in the discretion of the Court, and someone who is oppressed, or thinks himself oppressed by that order, appeals, saying that the court has exercised its discretion wrongly, that person, if he is in contempt cannot be heard to say anything of the kind until he has purged his contempt ... But when you come to the case of an order which it is suggested may have been made without jurisdiction, if upon looking at the order one can see that that really is the ground of the appeal, it seems to me that such a case has always been treated as one in which the Court will entertain the objection to the order, though the person making the objection is in contempt. It was admitted, and could not be otherwise than admitted, that if the objection was to the very order which had created the contempt, and the objection was one of the character which I have described, the fact that the objector was in contempt would not deprive him of the right to be heard.’

He went on to say:

‘Here is an order the objection to which is obviously of a character which does not depend upon an exercise of the discretion of the Court. It is said that it is unlawful to make such an order in respect of the separate property of a woman who is subject to a restraint on anticipation - that is to say, unlawful for the Court by which the order was made and on the occasion on which is was made, and it is said that we ought not to look at the order because this lady, this divorced wife, is in contempt. In my judgment that is not so. Having regard to the nature of the objection, in my opinion the present appellant is merely coming here to say, “This order which has been made against me is an illegal order, and it appears to be so upon the face of the order itself.” That being so, no rule has been brought to our notice which, in my opinion, should prevent her from being heard.’

Stirling J said (at p.707):

“And here the question is not merely one of irregularity in the order, but it is one of want of jurisdiction in the Court.”

And Cozens-Hardy L.J said (at p.706):-

“... I entirely agree with my learned brethren that the preliminary objection ought to be disallowed. But I desire expressly to limit my judgment to a case in which the respondent is saying that the order complained of is outside the jurisdiction of the Court, as distinguished from the case of an order which, although it is within the jurisdiction of the Court, ought not, it is said, to have been made.”

In the present case Dr. Cheltenham has put forward three arguments in response to Mr. Shepherd's submission, first, Husbands J dealt with a like submission in his decision of July 7, 1998, did not refuse to hear the second defendant and there was no appeal from the decision of Husbands J, to hear the second defendant, and the plaintiff cannot now raise the matter again; second, there is a particular procedure for citing a party for contempt and it has not been followed; and third, the question was not raised before Payne, J on the defendants' application for security for costs.

As to the first argument, the decision of Husbands J discloses that it was the plaintiff's application to which Mr. Murrell for the second defendant made a submission in limine that the Court was not in a position to hear the application since (1) under the provisions of the Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act Cap. 201 it had not been deposed by the plaintiff that the registration of the Singapore judgment in this jurisdiction had been effected nor had any undertaking been given by counsel for the plaintiff that registration of the foreign judgment would be effected prior to the ex parte application and (2) the first defendant Dino was not an entity recognised by the Companies Act Cap. 308. Mr. Shepherd for the plaintiff responded, inter alia, that the second defendant could not be heard because she was in contempt of court in that she had not complied with paragraphs 3 and 6 of the order of the Court. Husbands J dealt with this point by first quoting from the judgment in Hadkinson v Hadkinson and then continuing as follows:

"In X Ltd and another v Morgan Grampia (Publishers) Ltd and others [1920] 2 All E.R. 1 the Court held that it had a discretion whether to hear a contemnor who had not purged his contempt and in deciding whether to bar a litigant the Court should adopt a flexible approach. Accordingly where a contemnor not only failed to comply with an order of the Court, but, for example made it clear that he would continue to defy the Court's order whatever the outcome of the appeal, the Court was entitled to exercise its discretion to decline to entertain his appeal...

It therefore seems quite clear on the authorities that the Court has a discretion whether to hear someone who may be in contempt of court. The Court will hear the second defendant since, even though she may have failed to obey the order of the Court, technically the Court had not been moved in this regard".

He went on to hold that the submissions in limine on behalf of the second defendant failed and the order of the Court stood.

Why should the plaintiff have appealed when it obtained the result that it wanted? Moreover at the time when Husbands J heard the application, it was only a matter of days after the period for complying with paragraphs 3 and 6 of the order of the Court of June 25, 1998 had expired. It is now over 18 months since the expiration of that period.

As to the second argument, the authorities make it clear that two consequences will in general follow the wilful disobedience to an order of court. As was said by Romer L.J. in a passage from Hadkinson v Hadkinson earlier reproduced, the first is that he or she is in contempt and may be punished by committal or attachment or otherwise and the second is that no application to the Court by such a person will be entertained until he has purged himself of his contempt. No questions here as to the strict compliance with the rules where it is sought to commit or attach for contempt.

As to the third argument, the defendants were represented in their application for security by counsel who had no instructions that would have enabled the application to be heard and it was adjourned. Mr. Shepherd said that he had no opportunity to raise the contempt point.

So that there is no substance in the points raised by counsel for the defendants.

In this case the Court's leave to appeal against an order made by Payne J is sought. The second defendant is in contempt of court. No exception to the general rule is invoked. It is not suggested that the order of the court was made without jurisdiction or is in any way unsound in law or irregular. The question is whether in the circumstances of the case the discretion of the Court should be exercised in favour of a party who is in contempt and has been in contempt for very many months and who seems determined not to comply with the order of the Court.

Applying the strict test adumbrated by Denning LJ in Hadkinson v Hadkinson, the question is whether "the disobedience is such that so long as it continues, it impedes the course of justice in the cause by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make."

In this case fraud is alleged against the defendants, the allegations being that they removed funds from the Republic of Singapore in order to avoid the payment of a legitimate sum owing to the plaintiff. The plaintiff is attempting to trace the exact location of the funds that were removed and any other assets of the defendants which may be located in this jurisdiction. It follows that the neglect or refusal of the defendants and each of them to comply with the terms of the Mareva injunction constitutes a contempt of court which goes to the very root of this litigation and is calculated to impede the course of justice therein. It seems to this Court that a case has been made out by the plaintiff for disallowing the defendants from having the Court's discretion exercised in their favour until the contempt is purged.

Leave to appeal is accordingly refused with costs to plaintiff to be agreed or taxed.

Stay for 6 weeks.

Chief Justice.

Justice of Appeal Justice of Appeal.