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UPDATE

How not to deal with court orders requiring information

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This legal update analyses the unusual case of PT Ventures v Vidatel, which involved a contempt application brought for non-compliance with a freezing order and related disclosure orders. It provides a helpful reminder of the principals underpinning contempt applications, as well as demonstrating how not to deal with disclosure orders.

Background

PT Ventures v Vidatel is an unusual case. It involves a contempt application brought for non-compliance with a freezing order and related disclosure orders.

The unusual history of this case centres around the initial application for a freezing order. Such applications are normally confidential, and made *ex parte*, but this application was accidentally disclosed prior to its hearing, such that Vidatel Ltd (the **Respondent**) became aware of the application before any freezing order had been made.

The accidental disclosure took place on 4 October 2015. The application hearing took place on 9 October 2015, and a freezing order was made on that day. In addition, the Court made various ancillary orders, including that the Respondent file and serve an affidavit setting out in detail any sale, disposition or transfer of its assets, since 4 October 2015.

Following the initial order, there was a regrettable period of insufficient compliance with the Court's orders. Information was only produced slowly, in a piecemeal fashion, over the course of six affidavits filed by the Respondent, in response to the initial orders and later in response to a contempt application brought by the Applicants. As a result of this conduct, this matter required five separate hearings before the Court.

At the conclusion of those hearings, Leon J characterised the Respondent's conduct as follows:

'The manner in which [the Respondent] dealt with the information provision requirements of this Court's Orders provides "a text book lesson" in how not to deal with court orders requiring information.'

Contempt application

The Respondent initially filed two affidavits. The first, filed on 12 October 2015, did not deal with the period of 4-9 October 2016 at all. The second, filed on 15 October (in breach of a Court deadline) provided scant (and potentially misleading) information about two payments made on 9 October, but did not include details such as (a) the amounts transferred; (b) where they were transferred from; and (c) where they were transferred to.

Following the second affidavit, PT Ventures SGPS SA (**PT**) applied for orders finding the Respondent in contempt of court for breaching orders made by the BVI Court restraining disposition of the Respondent's assets and directing disclosure of information regarding such assets and any dispositions thereof (the **Orders**). The complaints related to: (a) the payments made on 9 October, allegedly in breach of the Court's freezing order; and (b) various examples of non-compliance or insufficient compliance with the Court's orders regarding disclosure.

Various additional evidence was served in relation to that application and Justice Barry Leon heard PT's application and produced a written judgment dated 24 June 2016 (a link to which can be found here).

Threshold Test for Civil Contempt

As the Court observed, the criteria required to establish civil contempt in the BVI are set out in *Liao Hwang Hsaing v Liao Chen Toh* and *Liao Wen Toh* (BVIHCV 2011/0222). In that decision, Ellis J relied upon *Masri v Consolidated Contractors Intl SARL* [2011] EWHC 1024 (Comm) (which is an English decision emanating from the High Court of Justice, Queen's Bench Division, Commercial Court) in which Justice Christopher Clarke held that it is necessary to show that the party to be held in contempt:

- knew the terms of the order;
- acted (or failed to act) in a manner which involved a breach of the order; and
- knew the facts which made his conduct a breach of the order.

Having reviewed the authorities, the Court noted that it was not necessary to demonstrate that the offending party intended to breach the order or appreciated that his act (or omission) would amount to breach. Rather, it was sufficient to show that the offending party intended to commit the prohibited act (or to refrain from doing the required act).

The Court also observed that, following *Liao Hwang Hsaing*:

'If after considering all of the evidence [the Court] concludes that there is more than one inference to be drawn from the facts and at least one of [sic] such inference is inconsistent with a finding of contempt then the application must fail.'

The decision on the contempt application

Payments

In relation to the transfers made in alleged breach of the Court's order, the Court found that the transfers had actually been completed seven hours before the order was made. It therefore concluded that the order had not been breached.

The Court also found that the transfers in question had been requested well before 4 October 2015, and that therefore there had not been any deliberate attempt to pre-empt the freezing application.

No steps taken to prevent the payments

The Court went on to consider whether, theoretically, if the order had been in place at the time of the payments, liability might arise by virtue of the fact that the Respondents knew the payment instruction was outstanding, but took no steps to prevent the transfers from taking place.

In the end, the Court did not determine this question, finding that the timing of the payment, before the Order had been made, made the question moot. It warned:

'A person in such a position will want to carefully consider the acceptability of not making at least reasonable enquiries, and if the transaction that transfers assets had not been completed, at least making reasonable efforts to countermand (that is, stop the completion of the transaction/transfer).'

No steps taken to prevent the payments, after learning of the application, but before the Order was made

The Applicant also submitted that the actions taken by the Respondent in the face of the pending injunction application, to frustrate the relief sought, could amount to contempt.

The Court considered this argument, noting that no authority for the Respondent's proposition could be found.

This is not particularly surprising, given that in most cases, freezing injunctions will be sought *ex parte* and the Respondents will have no notice of them until the relevant orders are made. Also, from a rule of law perspective, it would be surprising (and regrettable) if a freezing order had retroactive effect.

In the end, the Court declined to make an order on this issue, on the ground that 'as this Court had not found that the Respondent acted in breach of the asset transfer prohibition in its Orders, this is not the case in which further canvassing of the possibility of pre-order contempt is necessary or appropriate.'

Whilst the result appears sound, this rationale is questionable. If it is a good answer that the order itself was not breached, then one wonders in what circumstance a finding of contempt for actions taken *before* the order was made could ever be found. Fortunately, for the reasons set out above, this point is likely to be of academic interest only.

Failures relating to disclosure

Leon J then considered the alleged failures relating to disclosure, which included:

- not providing any information on a matter (ie transfers between 4 and 9 October 2015) by the deadline set by the Court;
- not providing affidavits by the deadline set by the Court;
- not providing information 'sufficiently clearly'; and
- not providing information 'in detail'.

After considering the evidence, Leon J concluded that:

'The Court is not satisfied beyond a reasonable doubt that the Respondent intended not to do the acts required by its orders – that is, that it intended not to provide the required affidavits or information by the deadlines set by the Court or not to provide information that it did provide sufficiently clearly and in the required detail ...

It is possible that the Respondent's serial non-compliance was due to insufficient attention, diligence, focus and organisation and exacerbated by distance, time differences and less familiarity with the legal system and legal culture of this jurisdiction.'

Leon J's view was therefore that PT had failed to meet the required burden of proof, proof beyond a reasonable doubt, and dismissed PT's application.

It should be noted that in coming to that conclusion Leon J did not have regard to the apology offered by Ms dos Santos of the Respondent nor of the Respondent's compliance with the Order after the contempt application was filed. It was not necessary to do so, it having been established that the inference discussed above could be drawn from the facts.

However, Leon J did point out that the Respondent's response to the Orders was a 'text book lesson' in how not to deal with court orders requiring information noting that if the Respondent had concerns about the volume of information which was to be disclosed to PT at an early stage in its dispute with the Respondent, the Respondent could have sought certain protections or a way in which to satisfy the Court whilst avoiding complete disclosure to PT.

Leon J therefore concluded that PT had not been 'unjustified or precipitous' in bringing the contempt application and invited submissions as to costs in light of the Respondent's obstructive behaviour.

Indeed, Leon J noted that the Respondent caused *a* 'disproportionate amount of this Court's resources to be expended on obtaining compliance with [the Orders] and [PT] undoubtedly incurred considerable expenses for no reason other than how [the Respondent] dealt with, or did not deal with, this Court's orders.'

Conclusion

Given the facts of the case, and the Court's view of the Respondent's behaviour when faced with successive Court orders, the Respondent might well consider itself fortunate to have escaped a finding of contempt on this occasion.

This case demonstrates that the burden of proof to establish contempt is a high one. Conversely, it will no doubt be relied upon in future cases of non-compliance with disclosure orders, as a 'text book lesson' in how not to deal with such orders. Indeed, it may be that in future cases, the Court expects litigants to have learned this lesson, such that similar conduct will amount to contempt.

In all cases, if presented with a freezing injunction and related orders, or even notice that such orders are being sought, litigants would be well-advised to seek legal advice immediately.

Mourant Ozannes is one of the leading offshore firms and deals with such issues on a regular basis. Should you have any queries regarding orders seeking disclosure of information (whether to obtain such orders or how to proceed should such orders be served on you (or your clients)), or litigation in the BVI more generally, please contact your usual Mourant contacts or one of the contacts below.

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