Monex Group (Singapore) Pte Ltd *v* E-Clearing (Singapore) Pte Ltd [2012] SGHC 189

Case Number : Suit No 54 of 2008 (Summons No 2989 of 2011)

Decision Date : 14 September 2012

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Suchitra Ragupathy (Rodyk & Davidson LLP) for the plaintiff; Bernice Tan Huilin (Harry Elias Partnership LLP) for the defendant.

Parties : Monex Group (Singapore) Pte Ltd — E-Clearing (Singapore) Pte Ltd

Contempt of Court

14 September 2012 Judgment reserved.

Judith Prakash J:

Background

1 The application before me is for a committal order and arises out of a judgment and subsequent court order obtained by the plaintiff in the main proceedings against the defendant. This action, Suit 54 of 2008 ("Suit 54"), was brought by the plaintiff, Monex Group (Singapore) Pte Ltd, to recover sums due to it from the defendant, E-Clearing (Singapore) Pte Ltd, pursuant to a contract under which the plaintiff had provided the defendant with the use of the plaintiff's Monex System in relation to the multi-currency credit card clearing services business carried on by the defendant. At all material times, one Mr Wong Wei Ming, the respondent in this application, was a director and shareholder of the defendant.

2 The defendant resisted the plaintiff's claim and the trial of the action took place in November 2009. The respondent was present in court during the trial though he did not give evidence. On 26 February 2010, judgment was given in favour of the plaintiff and it was adjudged and ordered, *inter alia*, that:

(a) The defendant was to account to the plaintiff for the revenue earned from the utilization of the Monex System from January 2007 to March 2009.

(b) The amount due to the plaintiff would be assessed by the Registrar.

The defendant's counterclaim was dismissed and the defendant was also ordered to pay the plaintiff the costs of the claim and counterclaim (see *Monex Group (Singapore) Pte Ltd v E-Clearing (Singapore) Pte Ltd* [2010] SGHC 63 at [51]-[53]).

3 The plaintiff then turned its attention to obtaining a proper account from the defendant in relation to the revenue earned by the defendant through the use of the Monex System. Discovery orders were made in June and July 2010 and some information was obtained as a result. The defendant did not comply fully with the same, however. Subsequently, one Agnes Chua Guek Meng ("Ms Chua"), the former general manager of the defendant, filed an affidavit on behalf of the defendant on 4 August 2010 for use in the assessment hearing. In this affidavit, Ms Chua stated that

the Agreed Net Turnover earned by the defendant from the Monex System for the period from February 2007 to March 2009 was $2,331,781.16 and admitted that half of the same was payable to the plaintiff. When the assessment proceedings came on for hearing, however, no representative from the defendant turned up to participate in the assessment.

4 On 25 May 2011, the Assistant Registrar ("the AR") who had presided over the assessment assessed the amount payable by the defendant to the plaintiff as being $2,403,920.60 together with interest on the same at 5.33% per annum from the date of the writ to 26 February 2010 and costs and disbursements of the assessment fixed at $15,000.

5 In the meantime, on 2 December 2010, the plaintiff had obtained a Mareva injunction against the defendant. This injunction prevented the defendant from, *inter alia*, removing from Singapore or dissipating its assets up to the value of $1,306,934.93 (being half of the amount admittedly due to the plaintiff and interest thereon). As part of the injunction order, the defendant was ordered to make disclosure of certain information to the plaintiff ("disclosure order"). I will set out the terms of the disclosure order in more detail below (at [12]) because this committal application arose from the alleged failure of the respondent to comply with the disclosure order. As at the date the application for committal was made, the defendant had not paid the plaintiff any part of the amount assessed by the AR or any costs awarded to the plaintiff.

6 The plaintiff served the disclosure order on the defendant's registered office on 20 December 2010. Subsequently, on 7 February 2011, at about 8.20pm, a copy of the disclosure order was left at the respondent's residence together with a cover letter from the plaintiff's solicitors M/s Rodyk & Davidson LLP. The next day, the plaintiff attempted to serve a copy of the disclosure order personally on the respondent at his office but the respondent was not in. However, that same evening, the respondent acknowledged receiving a copy of the disclosure order which had been sent to him by way of email to his email account.

7 On 27 April 2011, the plaintiff obtained a supplemental order from the High Court which specified that the defendant had to disclose the information required under the disclosure order within eight days of the service of the supplemental order. The respondent was subsequently notified of the supplemental order. A copy of the same was left at his residence on 29 April 2011 and on the same day a copy of the same was sent by email to his email account.

8 On 8 July 2011, the plaintiff filed the present application asking for an order that the respondent be committed to prison for his contempt of court by reason of his failure to comply with the disclosure order and the supplemental order. On 19 July 2011, the respondent filed an affidavit, his first, in which he apologised for his delay in complying with the order and disclosed certain information in purported compliance with the same.

9 At the first hearing of this application on 22 July 2011, the respondent turned up in person. He stated that he had given the plaintiff the information and documents required under paras 2 and 3 of the disclosure order and that the plaintiff had now asked him to supply information under para 4 of the order. The respondent declared that he had resigned as an executive director of the defendant in 2004 but had had to remain on the board as a non-executive director because the law required one Singapore resident to hold a directorship in the company. He then asked for more time in order to procure the documents that the plaintiff wanted. The matter was accordingly adjourned.

10 On 9 September 2011, the respondent filed a second affidavit in which he stated that the defendant's records and documents were in a warehouse which was under the control of the liquidator of the defendant who had been appointed when the defendant was wound up on 18 August

2011. The plaintiff was not satisfied with the respondent's disclosure and on 9 November 2011, one Mr David Bryne affirmed an affidavit on behalf of the plaintiff explaining the alleged inadequacies of the disclosure. In response, the respondent filed his third affidavit on 24 November 2011.

11 The plaintiff was not satisfied with the respondent's disclosure and explanations and applied for cross-examination of the respondent. This took place in January this year and thereafter the parties filed submissions.

The disclosure order

12 The relevant portions of the Order of Court made by Belinda Ang J on 2 December 2010 are as follows:

> Disclosure of information
>
> 2. The Defendants must inform the Plaintiffs' Solicitors in writing at once of all their assets whether in or outside Singapore and whether in their own names or not or whether held by others on behalf of and/or on trust for them and whether solely or jointly owned by any other party, giving the nature, value, precise location and sufficient details of all such assets, including but without prejudice to the generality of the foregoing:
>
> i the identity and details of all bank or other accounts in which the Defendants are interested whether legally, beneficially or otherwise, and whether in the Defendants' own name or not or solely or jointly held or held by nominee(s) or otherwise howsoever on his behalf or not, identifying the branch or other entity(s) with which the account(s) are held and its location(s), the account number(s), the state of the account(s) and the existing balance in each such account; and the Defendants shall give their respective consent(s) in writing within SEVEN (7) days of the service of the Order to be made hereon to all of their bankers providing to the Plaintiffs' solicitors any information relating to his bank account or accounts and copies of his bank statements;
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> ii. ...
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> iii. real property ...;
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> iv. any other property, identifying the nature, sums and stating its value, whether it is pledged or charged and if so, to whom and in what amount;
>
> v. monies, balances, debts, property (real or personal) held on behalf of or in trust for the Defendants ...
>
> 3. ...
>
> 4. The Plaintiffs by themselves, their servants or agents, including the Solicitor or any of them or otherwise howsoever be at liberty upon giving FIVE (5) days' notice to inspect and take copies of all entries in any bankers' books, cheques, cheque stubs, cheque deposit slips, withdrawal slips, credit and debit vouchers, banks instructions, remittance and transfer applications and advice, accounts, receipts, bank statements, instruments of transfer or other documents relating to the following bank accounts:-
>
> any monies held by DBS Bank, UOB, OCBC or any other Bank in the following account or

accounts:-

i. Account(s) in the name of the Defendants;

ii. Account(s) in the name of the Defendants jointly with any other party.

13 During the respondent's first appearance in court, he asked for some direction as to what documents exactly the plaintiff wanted him to produce. On 26 July 2011, the plaintiff's solicitors wrote to him informing him of what they were looking for. The relevant portion of this letter ("the 26 July letter") reads:

> 2. At the hearing on the 22nd July 2011, before the Honourable Justice Prakash, you have asked for a four (4) weeks adjournment to produce the documents in listed paragraph 4 of the 2nd December 2010 order ...
>
> 3. In order to facilitate the production of the documents, may we suggest that you forward all bank statements/audited accounts/management accounts for the period 2009 to date. And, in order to expedite the matter, we suggest that you produce all documents which would show where exactly our client's share in the relevant/Net Turnover in the utilization of the Monex System has been transferred to. You would appreciate that this is pertinent to our client.

The plaintiff's submissions

14 The plaintiff's position was that the essence of the disclosure order and in particular para 4 of the same was that the defendant had to disclose all bankers' books, cheques, cheque stubs, cheque deposit slips, withdrawal slips, credit and debit vouchers, bank instructions, remittance and transfer applications and advice, accounts, receipts, bank statements and instruments of transfer which would assist the plaintiff in ascertaining exactly where its share in the defendant's revenue had been parked or siphoned off to. It was also to assist in the execution of the judgment that would be entered in the plaintiff's favour once the amount payable had been finally assessed. The respondent knew that this was the essence of the order and the 26 July letter had made it absolutely clear to the respondent that he was to produce all bank statements for the period from 2009 until 26 July 2011.

15 The respondent had produced the following statements/documents:

(a) Statements for DBS current account number [xxx] (from 1 January 2009 to 30 June 2011) ("CA-901");

(b) Statements for DBS Fixed Deposit account [xxx] (from 28 December 2008 to 30 June 2011) ("FD-005");

(c) The cheque stubs for CA-901 (from 15 December 2008 to 21 June 2011); and

(d) Selective payment vouchers, remittance statements, invoice, bills in respect of the withdrawals from CA-901 (from January 2009 to November 2009).

16 The plaintiff submitted that the disclosure as described above was inadequate and that there were several categories of documents that the respondent had deliberately failed to produce.

17 Firstly, the defendant had disclosed other accounts which it had with DBS apart from those

listed above. These additional accounts were:

(a) DBS Foreign Currency Current Account (USD) No. [xxx] ("USD-current account");

(b) DBS Foreign Currency Current Account (EUR) No. [xxx] ("Euro-current account"); and

(c) DBS Current Account No. [xxx] ("CA*018").

The respondent had not produced any statements for these three accounts. This was particularly egregious in respect of CA*018 because DBS had been depositing money into that account on various dates right up to February 2009.

18 Secondly, DBS had deposited the defendant's share of the revenue earned from the Monex System into DBS account no. [xxx] ("CA-902"). No statements for this account had been produced. The defendant had not even disclosed CA-902 in the course of the proceedings.

19 Thirdly, whilst the respondent had alleged that there was no money standing to the credit of FD-005 at the time he affirmed his affidavit, he should have, but had not, produced the statements from January 2009 to the date of the affidavit to show the credit balance in the account during that period.

20 Fourthly, the documents produced by the respondent were not complete as many of the withdrawals made by way of remittance of funds from the various accounts had not been accounted for. Substantial amounts were transferred from CA-901 between March 2009 and January 2010 and the respondent had failed to produce the documents relating to those transfers or to explain the reasons for the transfers. Apart from these specifically identified transfers, there were many more withdrawals that the respondent had not accounted for. In fact, the statement showed that on many days there were multiple withdrawals from the defendant's accounts. Not a single withdrawal had been accounted for by the respondent.

21 The plaintiff submitted that the respondent's failure to disclose numerous withdrawals and to explain such withdrawals despite having been asked for such explanations was a deliberate failure aimed at frustrating the purpose and spirit of the disclosure order. The respondent knew the purpose of the order and as such his conduct was clearly contumacious. In order to evade being held liable for contempt, he had disclosed selected documents to support the argument that he was not in breach of the disclosure order.

The respondent's submissions

22 Whilst the respondent represented himself in all the open court hearings before me, subsequently written submissions were furnished on his behalf by M/s Harry Elias Partnership LLP.

23 The respondent's position was that he had complied fully with the disclosure order. He submitted that by virtue of the same, he had to disclose, *inter alia*, the "identity and details of all bank or other accounts in which the Defendants are interested whether legally, beneficially or otherwise". In the respondent's submission, the words "the identity and details of ... bank ... accounts in which the Defendants are interested ..." could only be interpreted as meaning those bank accounts in which the defendant had an existing interest as at the time of the disclosure order.

24 In support of his submission of full compliance, the respondent dealt first with his compliance with para 2 of the disclosure order. He noted that para 2 also required the defendant to inform the

plaintiff of all its assets and submitted that assets would include bank accounts. The respondent's view was that this paragraph required him to give the details of all the bank accounts of the defendant in which the defendant was interested, and he had therefore disclosed, in his first and second affidavits, three bank accounts *viz* CA-901, FD-005 and DBS Singapore Dollar Fixed Deposit no. [xxx] ("FD-248"). These were the only bank accounts in which the defendant had an interest. There were no other active bank accounts in which the defendant was interested whether legally, beneficially or otherwise.

25 The plaintiff's complaint that the respondent had failed to disclose the three accounts mentioned in [17] above and the account mentioned in [18] above was unjustified. The respondent did not disclose those accounts because they no longer existed on the date of the order.

26 As for the statements in respect of FD-248, the respondent had stated at para 13.3 of his third affidavit that that account was inactive and had no credit balance as at the date of filing of his first affidavit. The bank did not issue any bank statements as the account was inactive. He submitted that the intention and purport of the disclosure order was to make the defendant inform the plaintiff of all its assets which were in existence at the date of the order and therefore available to satisfy the judgment. Any bank account which had been closed as at the date of the order could not be regarded as an "asset" in which the defendant was interested at that date.

27 As regards para 4 of the order, that allowed the plaintiff and its agents to inspect and take copies of various documents mentioned in the paragraph including bankers' books, cheques, bank instructions, remittance and transfer applications and advices and other documents relating to the bank accounts. The respondent pointed out that the liquidator of the defendant had taken control of all the defendant's records and documents which were stored in a particular warehouse.

28 The respondent had had access to the warehouse and on 18 August 2011 and 9 September 2011, he had served on the plaintiff's solicitors all documents that he had found there which met the description in para 4. He had given full details of these documents in his second affidavit. The location of the warehouse had been disclosed to the plaintiff and the plaintiff was at liberty to require the liquidator of the defendant to give it access to the documents.

29 The respondent had taken steps to provide the information required by the disclosure order. He himself had visited the warehouse several times, the last visit being on 26 February 2012, with the consent of the liquidator, to look through the contents of the boxes. He had provided the plaintiff with an index of the contents of these boxes and having found certain errors in this index, had submitted an amended index in his fourth affidavit. As such the respondent had complied with the order by disclosing all the required information and giving copies of all the required documents which he could find from the defendant's records.

The law

30 There are no novel questions of law in this case. It is therefore sufficient if I briefly repeat the established principles. In an application to determine whether an individual has committed a contempt of court, the court applies the criminal standard of proof beyond reasonable doubt (see *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and others* [2007] 2 SLR(R) 518). As the aforesaid case noted at [30], the courts have recognised that the criminal burden of proof acts as a safeguard, given that the remedy for contempt of court after it has been committed is punitive. In order to establish contempt of court, the complainant must show that the putative contemnor in committing the act complained of or omitting to comply with an order, has the necessary *mens rea*. This means that it must be established that the conduct complained of was intentional and was carried out with

knowledge of all the facts which made such conduct a breach of an order. Further, the order must be wilfully or deliberately disobeyed rather than not complied with accidentally or unintentionally.

Analysis

31 There are two steps I must take in this analysis. The first is to decide exactly what the disclosure order requires the respondent to do. The second is to determine whether he has fulfilled such requirements. In deciding what the disclosure order required, I have to interpret the plain meaning of the language used and any ambiguity should be resolved in favour of the person who has to comply with the order because it was drafted by the plaintiff who had a duty to make the requirements of the order crystal clear so that the respondent would not have any doubt about what compliance with the order entailed.

32 There are two parts of the disclosure order which are in issue here. The first is para 2 sub para (i). This requires the defendant to inform the plaintiff's solicitors in writing of *all* their assets including the identity and details of all bank accounts in which the defendants *are* interested. The plaintiff's interpretation of this part of the order is that the defendant has to disclose all bank accounts which it had at any time whether before or at the time of the order. The respondent's interpretation of the order is that it refers to all bank accounts which the defendant had at the time that the order was made and does not include bank accounts which the defendant once had but which had been closed by the date of the disclosure order. In view of the language of the order, *ie*, the words "bank or other accounts in which the Defendants *are interested*" I agree with the respondent's submission that the order applied only to those bank and other accounts which were currently held by the defendant on 2 December 2010 being the date of the disclosure order. Any bank account which had been closed before the date of the order would not be a bank account in which the defendant would have had a current interest on the date of the order. The language of the 26 July letter was wider than that of the order. Insofar as documents referred to in the letter were documents connected to accounts that were not covered by the disclosure order, the respondent was not obliged to produce such documents.

33 The second part of the order, para 4, permitted the plaintiff to inspect and take copies of all entries in banker's books and other documents relating to moneys held by the named banks in accounts in the name of the defendant and accounts in the name of the defendant jointly with any other party. This part of the order imposes on the defendant the obligation to give the plaintiff inspection of such documents and to allow the plaintiff to take copies of the same. Because para 4 provides for a right of inspection upon five days' notice it must apply to documents that are in the defendant's possession, or custody, or control. The order does not require the defendant to produce the documents to the plaintiff at any particular place. The defendant has to allow the plaintiff to inspect the documents and this means that such inspection can take place at the usual location of the documents. In this case, the respondent did produce some documents to the plaintiff but at the same time he also told the plaintiff where all the documents currently in the possession of the defendant could be found and said that it could inspect the documents at that location. The plaintiff did not at any time ask the respondent to make arrangements for it to inspect the documents at that location. On the facts, there has not been any non-compliance with para 4.

34 I must, however, deal in more detail with para 2. As noted above, the plaintiff has alleged that the respondent had failed to comply with that part of the order because he had not produced certain documents. I will take them in turn.

35 First, there is the allegation that the respondent failed to disclose *all* statements for CA-901. Instead, he had selectively disclosed only certain bank transfers relating to this account. The plaintiff

pointed out that the respondent had failed to produce documents to account for withdrawals from that bank account including at least 18 sums withdrawn between 28 January 2009 and 15 July 2010 totalling more than $350,000. The plaintiff said that in the 26 July letter it had directed the respondent to produce "all documents which would show where exactly [the plaintiff's] share in the revenue/net turnover in the utilisation of the Monex System has been transferred to" and that the respondent had failed in this requirement.

36 The disclosure order was not as wide as the 26 July letter. It did not require the respondent to produce all documents showing exactly where the plaintiff's share of income went to. What it required was for the respondent to produce all documents arising out of bank accounts that were subsisting on 2 December 2010 including any documents issued in relation to such bank accounts which would show where the defendant's revenue had been sent. There was no evidence from the respondent that established that account CA-901 was already closed at the time of the disclosure order. Accordingly, the respondent was obliged in respect of account CA-901 to disclose "all entries in any bankers' books, cheques, cheque stubs, cheque deposit slips, withdrawal slips, credit and debit vouchers, banks instructions, remittance and transfer applications and advice, accounts, receipts, bank statements, instruments of transfer or other documents". This meant all such documents that existed prior to the date of the order had to be supplied. The withdrawals that the plaintiff highlighted were all made prior to the date of the disclosure order and the defendant must have had documents relating to those withdrawals. The disclosure order required the respondent to produce those documents. Yet, the respondent did not do so and did not explain exactly why he had not done so.

37 The plaintiff's second complaint related to CA*018 which is referred to in [17(c)] above. The plaintiff adduced evidence to show that substantial deposits were made into this account between January 2009 and February 2009. The respondent, however, did not adduce any bank statements relating to this account. The respondent attempted to justify this omission by stating that CA*018 was:

> [U]sed for merchant settlement purposes. A significant amount of the monies of S$495,184.19 and S$34,490.26 in fact do not belong to the Defendant but to the merchant themselves.

In my judgment, if that explanation was the only defence in respect of this account, it would not excuse the respondent's omission. This is because the terms of the disclosure order are wide and require the "identity and details of all bank or other accounts in which the defendants are interested" to be disclosed. It would not be relevant that the moneys in the account belonged to someone else as long this was an account in the defendant's name and was therefore, *prima facie*, an account in which it had an interest. The more important point was whether CA*018 was in existence on the date of the order. The respondent's position was that it had been closed by then. The order was made in December 2010 and therefore the evidence furnished by the plaintiff to show that deposits were made into the account as late as February 2009 did not disprove the respondent's assertion that the account had been closed before the relevant date. This account would therefore fall into the category of three other accounts which I deal with in [39] below.

38 Next, I deal with FD-248. The respondent did not produce any documents for this account. His explanation, as noted above, was that the account was inactive and the bank did not issue statements for an inactive account. That explanation is not adequate. The respondent did not maintain that the account was closed as at 2 December 2010. He was therefore obliged to produce all documents which the defendant possessed relating to the account and if he wanted to assert that there were no documents at all connected with the account, then he should have proved this assertion. As it stands, this is a bare assertion. The fact that there may have been no money in this account as at the date of the respondent's first affidavit (19 July 2011) does not excuse him from

producing the documents relating to the account and, if he could not find them, taking steps to get them from the bank.

39 The plaintiff is not in as strong a position in regards to its complaints that the respondent did not disclose the USD-current account, the Euro-current account and CA-902. The respondent's assertion was that all these accounts (together with CA*018) were closed before the date of the order. Technically therefore, he was not required to produce documents relating to them. The plaintiff was not able to adduce any evidence to establish that contrary to the respondent's contention, these bank accounts were subsisting at the date the order was made or that the respondent had wilfully disobeyed the order in relation to these accounts. The plaintiff did not provide details as to its complaint regarding these bank accounts and therefore it has not proved beyond reasonable doubt that in failing to produce documents relating to these three accounts, the respondent was in wilful breach of the disclosure order.

Conclusion

40 I have found that the respondent is in breach of the disclosure order in two respects. What course should be taken now? The plaintiff has submitted that the respondent should be committed to prison. However, I note that a committal proceeding is a measure of last resort and the order should only be made when the court is faced with a "recalcitrant and obstructive litigant who is in continuous breach of a mandatory court order" (see *Tan Beow Hiong v Tan Boon Aik* [2010] 4 SLR 870 at [61]). In this case, the respondent did make several attempts to comply with the disclosure order and has provided many of the documents it covers. Although he is in breach, therefore, I do not think he was in continuous breach.

41 I am therefore making a suspended committal order. I grant the respondent a further 30 days from the date of this judgment to purge his contempt by supplying the documents which I have found he is obliged to produce. If he does not do so, the plaintiff shall be entitled to apply for a further short hearing at which I will fix the sentence for contempt. The plaintiff's costs of this application shall be borne by the respondent and taxed if not agreed.