IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2018] SGHCF 22

HCF/Registrar's Appeal No 14 of 2018

Between

URU

… *Appellant*

And

URV

… *Respondent*

In the matter of Divorce No 5605/2014

Between

URU

… *Plaintiff*

And

URV

… *Defendant*

JUDGMENT

[Family Law] — [Family Court] — [Family Justice Rules]

URU
v
URV

[2018] SGHCF 22

High Court (Family Division) — HCF/Registrar's Appeal No 14 of 2018
Tan Puay Boon JC
14 June, 3 September 2018

28 December 2018 Judgment reserved.

Tan Puay Boon JC:

Introduction

1 Rules 690(1)(*d*) and 694 of the Family Justice Rules (S 813/2014) provide for certain judgments and orders of the Family Justice Courts to be enforced through orders of committal. However, under rr 696(2) and (3), a judgment or order may not be enforced in this manner unless a copy of the order has been served on the person sought to be committed. Rule 696(4) goes on to provide that the copy of the court order must be endorsed with a notice in Form 136 (as set out in Appendix A to the Family Justice Courts Practice Directions) informing the person on whom the copy is served that he (or the body corporate in question, as the case may be) is liable to process of execution if he (or the body corporate) does not comply with the order – that is to say, the copy of the court order must be endorsed with a penal notice. The sole issue in the present appeal is whether a party requires leave of court to endorse such a

penal notice on the copy of the court order which is served on the person sought to be committed.

2 At the time the appeal was heard, this was a question on which there was a dearth of local authority, particularly at the High Court level. The appeal was also heard on an *ex parte* basis, with submissions from only one of the parties. Given the relative novelty of the issue, and also being conscious that my decision could have an impact on the interpretation of O 45 r 7 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which is *in pari materia* with r 696 of the Family Justice Rules, I felt that the court would benefit from an additional perspective. I thus appointed a young *amicus curiae*. I am grateful to Mr Tan Kia Hua ("Mr Tan") for accepting the appointment, and for his thoughtful and well-researched submissions.

Background facts

3 The facts giving rise to the appeal may be stated briefly. The appellant and the respondent are the plaintiff wife and the defendant husband, respectively, in divorce proceedings in the Family Courts. On 10 November 2017, the appellant and the respondent entered into an agreement which was encapsulated in a consent order ("the Consent Order") to resolve all outstanding issues in the ancillary matters proceedings.[1] Clause (o) of the Consent Order ("Clause (o)") required each party to transfer a sum of $7,700 as maintenance to the sole account of [W], a child of the marriage, by 2 January 2018. A copy of the Consent Order, endorsed by the appellant's solicitors with a penal notice, was served on the respondent on 14 January 2018.

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[1] Appellant's case, para 5.

4 As the respondent had not complied with Clause (o) as at 23 March 2018, the appellant took the view that he was in contempt of court, and sought to enforce the Consent Order by means of committal proceedings. As with applications for committal in the context of civil proceedings (see O 52 rr 2 and 3 of the Rules of Court and *Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1 ("*Mok Kah Hong*") at [56]), there are two stages to the committal of a non-complying party under the Family Justice Rules. At the first stage, the applicant applies for leave of court to commence committal proceedings against the respondent (r 759 of the Family Justice Rules). If leave is granted, the applicant may then make the actual application for the order of committal (r 760 of the Family Justice Rules).

5 The appellant initiated the first stage by applying for leave of court to commence committal proceedings against the respondent on 23 March 2018. The application was heard by the learned District Judge ("the District Judge") on 24 April 2018 on an *ex parte* basis. The District Judge took the view that the penal notice ought to have been endorsed by the court, and not by the appellant's lawyers, or that the appellant required leave of court to endorse the copy of the Consent Order with the penal notice.[2] As the appellant had not obtained such leave, the District Judge dismissed the application for leave to commence committal proceedings. The appellant appeals against that decision.

Appellant's submissions

6 The appellant's position is that it is unnecessary to obtain court sanction for the endorsement of a penal notice as a prerequisite to the commencement of committal proceedings. In the appellant's submission, whether court sanction is

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[2] Record of Appeal ("ROA") Vol 1, pp 2–3.

required for such endorsement should be approached "purely as a matter of statutory interpretation".[3] For the court to read a requirement of court sanction into r 696 of the Family Justice Rules would exceed the proper remit of the court, and would amount to the court "arrogating to itself the legislative function".[4] Relying on the text of the Family Justice Rules, the appellant makes the following points:

(a) There is nothing in the Family Justice Rules to suggest that the endorsement of a penal notice should originate from the court,[5] nor anything to suggest that the court's sanction is required for such endorsement of a penal notice.[6]

(b) On the "plain and ordinary meaning" of the term "endorse", the penal notice is simply to be attached to the back of the copy of the court order. There are multiple provisions in the Family Justice Rules which use the term "endorse" in stipulating that a solicitor or applicant or party is to "endorse" a document. This shows that "an endorsement is an act which any party can do", rather than something which requires the court's sanction.[7]

7 The appellant also cites the authorities of *Deery v Deery and another* [2016] NICh 11 ("*Deery*"), a decision of the High Court of Northern Ireland, *Anglo-Eastern Trust Pte Ltd v Kermanshahchi* [2002] All ER (D) 296 ("*Anglo-Eastern Trust*"), a decision of the English High Court and *LA v TWK* [2016]

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3 Appellant's reply submissions, para 4.

4 Appellant's reply submissions, paras 3–13.

5 Appellant's case, para 23.

6 Appellant's case, para 27.

7 Appellant's case, paras 28– 29.

HKCU 2135 ("*TWK*"), a decision of the District Court of Hong Kong in support of the position that leave of court is not required for the endorsement of a penal notice on a court order.[8]

8 While the appellant's primary position is that the issue in this appeal is one of pure statutory interpretation, and that public policy considerations are thus "extraneous",[9] she nevertheless argues that policy considerations weigh in favour of the conclusion that leave of court is not required for the endorsement of a penal notice. In this regard, the appellant contends that there are already sufficient procedural safeguards contained in the Family Justice Rules which address unmeritorious applications for committal, and guard against the risk of abuse. These include the requirement for personal service of the court order on the alleged contemnor, the requirement of obtaining leave of court for commencement of the committal proceedings, and the requirement for a statement and supporting affidavit accompanying the application for such leave.[10] The appellant submits that these requirements already create significant "obstacles" for those who seek to enforce court orders through committal proceedings, and that "it would be a step backwards for the due administration of justice if the remedy of committal…is further curtailed".[11]

Amicus curiae's submissions

9 Mr Tan submits that leave of court *is* required for the endorsement of a penal notice on an order of court, and that this position is supported, on balance, by the relevant legal authorities.[12] In particular, Mr Tan cites *Mok Kah Hong* at

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8 Appellant's case, paras 33–43.

9 Appellant's reply submissions, para 3.

10 Appellant's reply submissions, para 48–55.

11 Appellant's reply submissions, para 59.

[43] and submits that there the Court of Appeal impliedly accepted that a formal application to insert a penal notice into a court order was a "necessary precursor" to an application for committal. Mr Tan also cites the District Court decisions of *GM v GN* [2004] SGDC 284 and *Woo Keng Sheng v Gan Geok Kheng* [2005] SGDC 191, as well as the decision of the Malaysian Court of Appeal in *Loh Eng Leong and another v Lo Mu Sen & Sons Sdn Bhd and another* [2003] 4 MLJ 284, in support of his position.

10 As a matter of policy, Mr Tan submits that it should be the court which endorses the penal notice because this allows the court to ensure that only orders which are intended to be enforceable by committal proceedings may be so enforced. In this regard, Mr Tan highlights that there have been instances where the English courts have dismissed applications for the insertion of penal notices. This, in Mr Tan's view, reflects "a judicial recognition that not every order made by the court is intended to be enforced on pain of committal".[13] That being the case, Mr Tan contends that the court should properly fulfil a "gatekeeping function" by exercising oversight over which orders should be accompanied by a penal notice. Mr Tan also submits that the court should lean in favour of affording maximum procedural safeguards to the individual, given the harsh consequences of committal.[14]

11 Mr Tan further submits that in the context of adversarial litigation, where parties frequently make claims or threats against each other which may be unfounded, a litigant (particularly an unrepresented litigant) may not appreciate the significance of a penal notice that is simply inserted or endorsed

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12 *Amicus Curiae's* submissions, paras 3 and 5–17.

13 *Amicus Curiae's* submissions, para 33.

14 *Amicus Curiae's* submissions, para 28.

by lawyers, as this may be viewed as an empty threat. In light of this, it should be the court which endorses an order with a penal notice, as this makes it more likely that a litigant will take the penal notice seriously.[15]

Decision

12 I structure my decision and analysis along the following lines: First, I shall discuss the appellant's contention that whether leave of court is required for the endorsement of a penal notice is purely a matter of statutory interpretation. Secondly, I shall discuss the distinction between the *insertion* of a penal notice as part of a court order, and the *endorsement* of a penal notice on a copy of the court order. Thirdly, I shall analyse whether the relevant precedents support the position that leave of court either is or is not required for the endorsement of a penal notice. Fourthly, I shall turn to policy considerations.

Purely a matter of statutory interpretation?

13 As mentioned, the appellant contends that whether leave of court is required for a party to endorse a copy of a court order with a penal notice is strictly a matter of statutory interpretation, and that for this court to find that leave of court is required would be to arrogate to itself the functions of the Family Justice Rules Committee which is responsible for the formation of any Family Justice Rules. In my judgment, while there is some merit to the appellant's position, it would not be entirely right to say that this issue should be approached purely as a matter of statutory interpretation. Before I elaborate further, I set out the full text of rr 696(1)–(4) of the Family Justice Rules for ease of reference:

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15 *Amicus Curiae's* submissions, para 27.

Service of copy of judgment, etc., prerequisite to enforcement under rule 694

696.—(1) In this rule, references to an order is (*sic*) to be construed as including references to a judgment.

(2) Subject to rules 477(4) and 492(3) and paragraphs (6) and (7) of this rule, an order must not be enforced under rule 694 unless —

(*a*) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and

(*b*) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act must not be enforced as mentioned in rule 694(2)(*b*) unless —

(*a*) a copy of the order has been served personally on the officer against whom an order of committal is sought; and

(*b*) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body corporate was required to do the act.

(4) The copy of an order served under this rule must be endorsed with a notice in Form 136 informing the person on whom the copy is served —

(*a*) in the case of service under paragraph (2), that he is liable to process of execution to compel him to obey the order —

(i) if he neglects to obey the order within the time specified in it; or

(ii) where the order is to abstain from doing an act, if he disobeys the order; and

(*b*) in the case of service under paragraph (3), that the body corporate is liable to process of execution to compel it to obey the order —

(i) if the body corporate neglects to obey the order within the time so specified; and

> (ii) where the order is to abstain from doing an act, if the body corporate disobeys the order.

14 At the risk of stating the obvious, the appellant is undeniably correct in saying that on the face of r 696(4), there are no words suggesting that the endorsement of the penal notice must be done at the instance of the court, nor any words suggesting that such endorsement should only be done with leave of court. Rule 696(4) merely states that the copy of the order "must be endorsed with [a penal notice]", without stating who should perform such endorsement and whether the court's sanction must first be sought. I agree with the appellant that these points are significant and weigh in favour of her position. The Family Justice Rules expressly specify the procedures and actions which require leave of court, such as, for instance, r 759, which provides that no application for an order of committal may be made unless leave to make such an application has been granted by the court in accordance with that rule. Seen in that context, I would agree with the appellant that the fact that r 696 mentions no requirement of leave for the endorsement of a penal notice is indicative that the Family Justice Rules Committee probably did not intend that leave should be necessary for such endorsement.

15 As for who should perform the endorsement, the fact that r 696(4) does not state who exactly is to endorse the penal notice is, arguably, equivocal since this could *either* mean that it is the party seeking to enforce the order through committal (hereinafter, "the enforcing party") who should perform the endorsement *or*, *equally*, some other party, such as the court. However, it is worth noting that r 696(4) is sandwiched by rr 696(2)–(3) and r 696(5), which provide that as a prerequisite for enforcement, certain orders must be served on the person sought to be committed. Like r 696(4), those provisions are silent as to who is to perform such service, but it seems clear that such service must be

performed at the instance of the enforcing party, rather than the court or any other party, given that it is the enforcing party who initiates the committal proceedings. Since r 696(4) appears alongside other sub-rules which stipulate requirements clearly intended to be fulfilled by, or at the initiative of, the enforcing party, the surrounding context would suggest that r 696(4) is also to be performed at the instance of the enforcing party. These factors weigh in favour of the appellant's view that leave of court is not required, and that there is no requirement that the endorsement must originate from the court.

16 On the other hand, I do not accept the appellant's submission that this question is to be approached purely as a matter of statutory interpretation. Hypothetically, had I accepted that submission, it would have disposed of this appeal entirely. There would be no question of statutory *interpretation* to discuss further because interpretation is the exercise of ascribing meaning to *expression* and there cannot be any interpretation of a *non-existent expression* (see the remarks of the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [28], albeit in the context of contractual interpretation). Since the Family Justice Rules do not contain any words to the effect that leave of court is required, or that the court must endorse the copy of the order with a penal notice, there would be nothing to interpret. The conclusion would simply be that the requirement is not in the rules, and therefore, must not exist.

17 It seems to me, however, that the appellant's position is undergirded by a doubtful assumption that all matters relating to the procedure of the Family Justice Courts must be exhaustively contained in the Family Justice Rules. I disagree with this assumption for several reasons.

18 First, it has been recognised that in matters of procedure, the court has "a general or residuary source of power beyond the confines of procedural rules to ensure that it has the appropriate authority to deal effectively with the abuse of its process" (see Goh Yihan, "The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise" [2011] SJLS 178 at 207, Re *Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 ("*Nalpon*") at [36]–[40] and *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [80]). Thus r 958 of the Family Justice Rules states that nothing in them "shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court". The issue in the present appeal deals with the attachment of penal notices to orders of the court, and more generally to a matter of procedure relating to the enforcement of court orders by process of committal. These are undoubtedly areas which directly concern the court's processes and may therefore also be areas which engage the court's inherent powers to control its own processes.

19 This last mentioned point is closely related to my second reason for doubting that all matters relating to the procedure of the Family Justice Courts are exhaustively contained in the Family Justice Rules: the existence of practice directions. It should be noted that r 7 of the Family Justice Rules provides that "Practice directions may make additional provisions in relation to the requirements for any application in the Family Justice Courts which is specified in those practice directions". Such directions do not have the force of law, but have effect as directions from the court (*Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [88]). Significantly, several of the Family Justice Courts Practice Directions *do* specify that certain actions require leave of court, notwithstanding that such requirements are not found in the Family Justice Rules (see, *eg,* paragraph 94(2) which requires that where a

party is represented by more than one counsel and counsel have divided their work such that submissions on different issues, or certain portions of the examination, cross-examination or re-examination are to be conducted by different counsel, an application must be made to seek the court's leave at the commencement of the trial or hearing; for further examples see paragraphs 67(6) and 126(3)). In my view, such practice directions are reflective of the principle I have just alluded to concerning the court's power to control its own processes. They also demonstrate that it is factually inaccurate to say that all procedural matters are comprehensively contained in the Family Justice Rules.

20 Of course, with regard to the court's inherent powers (discussed at [18] above), I recognise that such residual powers are only to be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands (see *Nalpon* at [42] citing *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR(R) 353 at [17]). To be clear, I do not say that requiring a party to seek leave of court for the endorsement of a penal notice *would be* a proper exercise of the court's inherent powers to control its processes. Equally, I am not suggesting that the requirement to seek the court's leave for the endorsement of a penal notice is found anywhere in the current Family Justice Courts Practice Directions. The point I make is that it is incorrect to say that the question at issue in this appeal may be approached strictly as a matter of statutory interpretation of the Family Justice Rules. The fact that the Family Justice Rules do not contain any requirement for a party to obtain leave of court to endorse a copy of a court order with a penal notice is a significant factor which should be afforded the appropriate weight (see [14]–[15] above), but it is not conclusive. It should further be noted that practice directions may formalise or embody principles which courts have *first* established in a line of precedents (see *Tunas (Pte) Ltd v Mayer Investments Pte Ltd and others* [1989] 1 SLR(R) 161 at [9]–[10]), and

thus the mere fact that a requirement to seek the court's leave for the endorsement of a penal notice is not found in the Family Justice Courts Practice Directions presently does not obviate the need for the court to consider whether such a requirement exists or should exist.

21 The authorities referred to at [16]–[20] above were not cited by the appellant and Mr Tan, as the parties did not address the topic of the court's inherent powers in detail in their submissions. However, these cases stand for uncontroversial propositions and, in any event, it will be seen that they have not had a decisive impact on the outcome of this appeal.

22 The final point which I make on the topic of statutory interpretation relates to the appellant's argument that the various uses of the term "endorse" in the Family Justice Rules shows that "an endorsement is an act which any party can do".[16] I find this argument unpersuasive. In many of the examples referred to by the appellant in support of her argument, the rules in question specify the party who is to perform the endorsement. For instance, r 48(4) is a deeming provision which stipulates that a document is deemed to be duly served on a defendant or co-defendant if his *solicitor* "endorses on [the] document served … that he accepts service of the document on the defendant's or co-defendant's behalf". Similarly, r 208(3)(*b*) provides that for the party applying for a grant of probate, his solicitors must endorse a certificate stating whether there are any caveats or pending probate applications in respect of the deceased's estate. These can hardly give rise to any general conclusion that "endorsement" can be performed by any party or without leave of court. The other examples referred to by the appellant which do not specify the party which is to perform the endorsement are marked by the same ambiguity found in r

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[16] Appellant's case, para 29.

696(4). On the whole, there is nothing in the examples cited by the appellant which can be extrapolated into a general proposition that each time the word "endorsement" is used in the Family Justice Rules, it must refer to "an act which any party can do" without any need for court sanction.

Endorsement of a penal notice distinguished from the insertion of a penal notice on a court order

23 Many of the relevant authorities have addressed the question of whether leave of court is necessary for the endorsement of a penal notice by considering whether a penal notice forms *part of* the court order. Thus, for instance, in *TDQ v TDR* [2015] SGFC 72 ("*TDQ*") at [98], District Judge Yarni Loi remarked as follows:

> Even though I granted leave to the Plaintiff to endorse the Penal Notice on the court orders, I should mention that a penal notice is not part of a court order, but may be added to a copy of the order to be served. **In fact, there is legal commentary and case authority that a judge's sanction is not required for such endorsement:** see [*Anglo-Eastern Trust*]; *Blackstone's Civil Practice 2013* at page 1328 para 78.6 where the writers state: 'This notice is not part of the court's order and does not require the judge's sanction: it may be added by the person who makes the copy which is to be served.' [emphasis added in bold]

24 In my view, it is not strictly accurate to speak in terms of whether penal notices categorically are or are not parts of court orders. A penal notice may form part of a court order, but it also may not (see *UNE v UNF* [2018] SGHCF 15 ("*UNE v UNF*") at [11] and [16]). In this regard, it is helpful to draw a distinction between the *insertion* of a penal notice in a court order by a court, and the *endorsement* of a penal notice on a copy of a court order by some other party. Both actions are possible. It is clear that the courts sometimes do specifically insert penal notices in their judgments and orders: see *Mok Kah Hong* at [19]–[22] which records how the High Court Judge in that case had

specifically determined that a penal notice should be included in the orders of the court. Quite apart from whether the court takes the view that its sanction is required for the inclusion of a penal notice, it may choose to insert a penal notice as part of its orders on the application of a party, if it considers this "just in the circumstances of the case" (*UNE v UNF*, at [16]). The penal notice then becomes a part of the court order. In other situations, however, the penal notice is "endorsed" by being attached on a separate page to the copy of the court order which is served on the person sought to be committed. This was, in fact, what happened in the present case.[17] In such circumstances, the penal notice does not form part of the order of court.

25 In my judgment, the fact that a penal notice may be attached on a separate page to a copy of a court order without forming part of the order is not, in itself, determinative of the question as to whether the endorsement of a penal notice under r 696(4) requires court sanction. In other words, it does not follow from the proposition that a penal notice "endorsed" on a separate page does not form part of the court order that leave of court is, therefore, not required for such endorsement. It is nevertheless worthwhile to draw this distinction for two reasons:

(a) First, it is useful to hold this distinction in mind when considering why a divergence in practice has developed in which some counsel routinely apply to court for the inclusion of penal notices on court orders, while other counsel simply attach penal notices of their own accord to copies of court orders. In this regard, I note that one of the points which appears to have influenced the District Judge's conclusion that leave of court is required was the fact that many lawyers

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17 ROA Vol 3, p 16.

do seek the court's assistance or approval to include penal notices along with their orders, since, at the hearing of the application below, the District Judge queried counsel for the appellant on why there was such a practice of applying to the court for leave if it were not necessary for the endorsement to be performed or approved by the court.[18] The practice may well have arisen from the fact that counsel have not always distinguished between inserting a penal notice which then forms part of the orders of court (such an amendment to a court order does, of course, require leave of court), and simply attaching a penal notice on a separate page to a copy of the order of court.

(b) Secondly, I highlight this distinction to clarify that nothing in this judgment should be taken as approving or sanctioning the *insertion or inclusion* of a penal notice by a party or his or her solicitors in a manner that misleadingly suggests that it is part of the court order.

26 I turn now to discuss the relevant precedents.

Precedents

27 I begin by discussing the decision of the Court of Appeal in *Mok Kah Hong* which, of the various authorities cited by the appellant and Mr Tan, is the only one which is strictly binding on me. If it did address the point in issue, it would have disposed of this appeal entirely. I am of the view, however, that *Mok Kah Hong* does not deal with the question of whether leave is required for the endorsement of a penal notice on a copy of a court order as a prerequisite to the commencement of committal proceedings.

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[18] ROA Vol 1, page 2.

28 In *Mok Kah Hong*, the alleged contemnor was a plaintiff husband who, in anticipation of an incumbent divorce, began to divest himself of his assets. The defendant wife obtained an injunction against the husband to prevent him from dissipating, disposing and/or dealing with one of his properties ("the Stevens Court Property") and his shareholdings in various companies. When the ancillary matters came before the High Court Judge ("the Judge"), the Judge ordered the husband to transfer the Stevens Court property to the wife free of encumbrances within four months from the date of the order. The husband was also ordered to pay the wife lump sum maintenance in two tranches. Both parties appealed against the Judge's decision. On appeal, the Court of Appeal made some adjustments to the Judge's orders on the division of matrimonial assets and held that the wife was entitled to receive a sum of about $7.048m from the husband.

29 A dispute between the parties subsequently arose with regard to the extraction of the order of court. The wife took the position that a penal notice should be inserted into the order of court, while the husband objected to this. The wife thus took out an application seeking orders that the timeframe within which the husband was to pay the wife the sum of $7.048m was to be specified as "4 months from the date of the CA Judgment", and that a penal notice be inserted in the judgment of the Court of Appeal (see *Mok Kah Hong* at [28]).

30 The Court of Appeal allowed the wife's application. In explaining its reasons, the court rejected the husband's argument that a judgment for the payment of a monetary sum (as opposed to a judgment requiring a party to perform some other positive act) could not be enforced through the mode of committal proceedings (at [48]). The requirement in O 45 r 1(1) of the Rules of Court was simply that the order sought to be enforced through committal

proceedings had to specify a timeframe for compliance (at [45] and [48]–[49]). This was the context in which the court made the following remarks at [43]:

> …[G]iven that the issue concerning the insertion of the penal notice was not specifically dealt with in the course of the substantive appeal, coupled with the fact that the order only required the husband to pay the specified sums of money without specifying any timeframe within which the payment had to be effected, the wife's application…was a necessary precursor to any commencement of committal proceedings against the husband.

31 I consider that the decision in *Mok Kah Hong* does not stand for the proposition that leave of court is required for the endorsement of a penal notice on a copy of an order of court under r 696(4) of the Family Rules. While the above quote does implicitly suggest that the court's sanction is necessary for the inclusion of a penal notice, it should be noted that the wife in that case had applied for the *insertion* of the penal notice in the orders of court. In other words, she had sought for the *court* to include the penal notice as part of its own orders. It would appear that no arguments were made concerning whether it would have been permissible for the wife to have endorsed a copy of the court order with a penal notice of her own accord. Further, the court's focus appears to have been directed towards the wider question of whether the orders in that case were enforceable by means of committal. Thus, when the court said that the wife's application for the inclusion of a penal notice was a necessary precursor to the commencement of committal proceedings "given that the issue concerning the insertion of a penal notice was not specifically dealt with in the course of the substantive appeal", it would appear that the emphasis was on the point that the question of whether the orders were of the type which could be enforced through committal proceedings had not hitherto been resolved, and that *to resolve that issue* was a precursor to the commencement of committal proceedings.

32 Most of the other authorities relied on by the appellant and Mr Tan have dealt with the question of whether leave of court is necessary for the inclusion of a penal notice in a relatively brief manner. Both *TDQ v TDR* (at [98]) and *Deery* (at [28]), which were cited by the appellant, simply noted that the penal notice did not form part of the orders of the court, drawing support from the decision of Park J in *Anglo-Eastern Trust*. That decision concerned O 45 r 7(4) of the Rules of the Supreme Court 1965 (SI 1965 No 1776) (UK) ("the UK Rules") which is substantially similar to r 696(4) of the Family Justice Rules. According to the report of the decision, Park J noted that the wording of O 45 r 7(4) of the UK Rules seemed to suggest that the penal notice was not part of the order itself, but might be added onto a copy of the order. O 45 r 7(4) "assumed that a 'copy' of the order…had to be personally served on (the alleged contemnors)", and "[i]n those circumstances, it was for the person who had created a copy of the order for service to put the penal notice on it, if r 7(4) was to be complied with in order to make enforcement of the order possible by [means of committal]".

33 As stated at [25] above, my view is that it does not follow from the fact that a penal notice "endorsed" on a separate page does not form part of the court order that leave of court is, therefore, not required for such endorsement. However, it would appear that Park J concluded that the defendant's solicitors in that case were entitled to include a penal notice on the copy of the order without leave of court for two slightly different reasons: not *only* because the penal notice was on a mere "copy" of the order and not the order itself, but *also* because the overall structure of O 45 r 7 suggested that the endorsement of the penal notice was part of a wider sequence of actions to be taken at the initiative of the person seeking to enforce the order by committal. It was the party seeking to enforce the order who had to serve a copy of the order on the person sought to be committed, and "in those circumstances, it was for the person who had

created a copy of the order…to put the penal notice on it". This is somewhat similar to the point I have made at [15] above, noting that r 696(4) comes amidst other sub-rules which stipulate requirements clearly intended to be fulfilled by, or at the initiative of, the enforcing party as prerequisites for the commencement of committal proceedings. Thus, I agree with, and draw support from, Park J's decision in *Anglo-Eastern Trust* in this regard.

34 The final precedent which I should mention is the *ex tempore* judgment of Debbie Ong J in *UNE v UNF* which I have referred to in [24] above. That decision was issued after the time of the hearing of this appeal. I have not sought the further submissions on that judgment because the matters and considerations covered in that judgment were also covered in the appellant's and Mr Tan's submissions, and my views are, in any event, aligned with those of Debbie Ong J's.

Policy

35 I turn finally to address the policy considerations which have a bearing on my decision. The main policy factors arising from the submissions of the appellant and Mr Tan which I take into account are as follows:

36 On one hand, I consider that parties who have obtained orders or decisions of the court in their favour should, where necessary, be able to seek enforcement through committal proceedings and should not have to face an excessive number of procedural hurdles. Parties who have obtained judgments in their favour are also entitled to expect that those who are required by such judgments to do, or refrain from doing certain acts, will comply with those orders and will understand that non-compliance carries consequences.

37 On the other hand, I consider that not all court orders are enforceable by means of committal, and there *is* a possibility that parties served with a penal notice may misunderstand the potential consequences of non-compliance. Even in relation to certain court orders which *are* enforceable by means of committal, the courts have sometimes found that it may be undesirable to include penal notices given the harshness of the orders in question. The example cited by Mr Tan is the English courts' approach to possession orders. It has been held that it is "generally undesirable" for penal notices to be attached to such orders (see *Robert Arnold Tuohy and others v Gary Bell (As Trustee in Bankruptcy of the Appellant* [2002] EWCA Civ 423 at [59]). In that case, Neuberger J (as he then was) observed as follows (at [38]):

> …It is upsetting enough for a person to receive a court order requiring him to leave his home; it would add to the pressure if he was warned that, if he did not leave on the date specified in the order, he would be liable to be put in prison.

38 Having weighed the policy considerations, I am of the view that, on balance, it is preferable that litigants should not have to obtain leave for the endorsement of a penal notice on a copy of an order of court. The starting point is that those who have obtained judgments and orders in their favour are entitled to see that such orders are complied with, and those who are subject of such orders ought to recognise the seriousness of such orders, and the possibility of facing adverse consequences if they do not obey them. Seen in this light, it must be asked why a party should have to obtain the court's prior approval before informing the person subject to the order that if he does not comply, he may be compelled to do so.

39 With regard to the risk of abuse, and the need for the court to play a gatekeeping function, I am of the view that there are already multiple and sufficient procedural safeguards built into the committal application process.

The court plays a gatekeeping function at the stage of considering whether leave should be granted to an applicant who seeks to commence such proceedings, and any issues in relation to the potential abuse or misuse of the threat of committal may be addressed at that stage. In addition, any potential abuses may also be addressed at the committal hearing proper which provides the alleged contemnor "ample opportunity to deny the allegations and provide an explanation for his non-compliance" (see *Mok Kah Hong* at [58]). Further, in considering the risk of abuse, or the risk that parties may wield empty threats of committal to compel each other into compliance, this is a risk which should not be overstated. In the first place, if a party believes he has legitimate reasons for non-compliance, "[t]he correct and only course…[is] to seek, through appropriate legal process, to have the orders discharged, set aside or stayed" (see *OCM Opportunities Fund II, LP and others v Burhan Uray alias Wong Ming Kiong) and others* [2005] 3 SLR(R) 60 ("*OCM Opportunities*") at [28]). The court is entitled to act on the basis that parties should either comply with orders, or avail themselves of the appropriate legal processes if they are not able to. The threat of committal should not, in the first place, be a major factor in a party's consideration as to whether or not to comply with a court order. Further, the risk that parties may "threaten" each other with the prospect of committal proceedings ought to be assessed in view of the *text* of Form 136 which, as mentioned, is found in Appendix A to the Family Court Practice Directions. Form 136 reads, in material part, as follows:

> NOTICE ON CERTAIN JUDGMENTS
>
> The endorsement should be in the following words or words to the following effect:
>
> (*a*) In the case of a judgment or order requiring a person or body corporate to do an act within a specified time:
>
> "If you, the within named ( ) neglect to obey this judgment (or order) by the time therein limited, you

> will be liable to process of execution for the purpose of compelling you to obey the same".
>
> (*b*) In the case of a judgment or order requiring a person to abstain from doing an act:
>
> "If you, the within named ( ) disobey this judgment (or order), you will be liable to process of execution for the purpose of compelling you to obey the same".

40 It will be seen that the wording of Form 136 does not actually mention committal, or imprisonment, or indeed any words implying a deprivation of liberty at all. The wording simply states that the non-complying party "will be liable to process of execution for the process of compelling [him or her] to obey" the order of court. In other words, the penal notice referred to in r 696(4) of the Family Justice Rules simply states what all parties should already know – which is that they must comply with court orders and if they fail to, they may be compelled to comply by some "process of execution".

41 As to the point that there are certain types of orders in relation to which the courts have found that the use of a penal notice is inappropriate in view of their *inherent harshness* (see [37] above), these would appear to be a fairly limited category of cases. To implement a general requirement for leave of court before a penal notice may be endorsed on a court order because of this limited category of cases would be to use the tail to wag the dog.

Summary and conclusion

42 To summarise my analysis, I am of the view that leave of court is not required for a party to endorse a copy of a court order with a penal notice under r 696(4) of the Family Justice Rules. The fact that no requirement of court sanction is mentioned in r 696(4), and that r 696(4) is located amidst other rules specifying what steps the enforcing party is required to take as prerequisites for

committal proceedings, strongly suggests that such leave is unnecessary. This view is supported by the decision of *Anglo-Eastern Trust* and the other cases which have cited that authority. In contrast, the Court of Appeal's decision in *Mok Kah Hong* did not directly address the issue of whether leave is required for endorsement of a penal notice. The court's comments implying that an application for the insertion of a penal notice was a "necessary precursor" to the commencement of committal proceedings do not stand as authority for the proposition that court sanction is required for the endorsement of a penal notice on a copy of a court order. Finally, the policy considerations do not weigh in favour of the view that such court sanction is required. This is because the risk that parties may wrongfully wield the threat of committal proceedings is adequately addressed by existing procedural safeguards, and in any event, the wording of Form 136 does not raise the spectre of committal or imprisonment, but simply informs the person on whom the order is served that he may face legal processes to compel his compliance if he neglects to obey it.

43 I therefore allow the appeal against the District Judge's decision. This leaves me to consider whether the appellant ought to be granted leave to commence committal proceedings. In this regard, I note that r 696(2)(*b*) of the Family Justice Rules provides that the copy of the order requiring a person to do an act must be served *before* the expiration of the time within which the person was required to do the act. This requirement was not complied with in the present case. The appellant's solicitors served the copy of the Consent Order endorsed with a penal notice on the respondent on 14 January 2018 (see [3] above), some 12 days after the 2 January 2018 deadline which was fixed for the parties to comply with Clause (o) of the Consent Order. Nevertheless, I also note that r 696(7) affords the court a discretion to "dispense with service of a copy of an order under this rule if it thinks it just to do so". In this case, I have no reason to doubt that the respondent received the copy of the Consent Order

and was fully apprised of what he was required to do under Clause (o) (see *OCM Opportunities* at [24]–[25]), not least because the order was recorded *with his consent*. He has, to date, failed to comply with that clause and in light of this, I consider it fair to dispense with strict compliance with O 696 r 2(*b*). I therefore grant the appellant leave to commence committal proceedings.

Tan Puay Boon
Judicial Commissioner

Carrie Kaur Gill and Clement Yap Ying Jie (Eversheds Harry Elias LLP) for the appellant;
The respondent absent and unrepresented;
Tan Kia Hua (WongPartnership LLP) as young *amicus curiae.*
