Tan Beow Hiong *v* Tan Boon Aik
[2010] SGHC 218

Case Number : Divorce Petition No 601644 of 2002 (Registrar's Appeal No 720002 of 2010)
Decision Date : 04 August 2010
Tribunal/Court : High Court
Coram : Steven Chong J
Counsel Name(s) : The Appellant in person; Michael Eu and Josephine Kang (United Legal Alliance) for the Petitioner/Respondent; Kristy Tan (Allen & Gledhill LLP) as amicus curiae.
Parties : Tan Beow Hiong — Tan Boon Aik

Contempt of Court

4 August 2010 Judgment reserved.

Steven Chong J:

Introduction

1 This appeal, which arises from a lamentable series of events, raises a number of novel and difficult issues, and underscores the need (highlighted by Chan Sek Keong CJ at para 21 of His Honour's speech at the Opening of the Legal Year 2010) for greater clarity with regard to the law of contempt.

Background Facts

The Decree Nisi and the order of court granting the Respondent sole custody of the sale of the matrimonial flat

2 On 11 June 2002, a Decree Nisi dissolving the marriage of Mr Tan Boon Aik ("the Respondent") and Mdm Tan Beow Hiong ("the Appellant") was granted by District Judge ("DJ") Emily Wilfred. The Decree Nisi contained a consent order that the parties:

> [S]hall within 12 months from the date of the Decree Nisi Absolute sell the matrimonial flat at Blk 712, Pasir Ris St 72, #10-47, Singapore 510712, in the open market. Subject to refunding the parties' CPF accounts for monies used towards the purchase of the said flat together with the accrued interest, payment of the outstanding mortgage over the said flat and payment of all necessary costs and expenses in connection with the sale, the net sale proceeds shall be divided equally between the [Respondent] and the [Appellant]…

3 The Decree Nisi was made absolute on 18 September 2002, and by the terms of the consent order, the matrimonial flat ought to have been sold by 18 September 2003.

4 However, this was not done. The Respondent in his affidavit dated 28 June 2006 alleged that this was due to inaction and/or obstruction by the Appellant. Consequently, the Respondent applied for, and on 20 July 2006 was granted, an Order of Court (the "20 July Order of Court") that:

1. The [Respondent] to have sole conduct of the sale of the matrimonial flat at Blk 712 Paris

Ris Street 72 #10-47, Singapore 510712.

2. The Registrar of the Subordinate Courts be authorised to execute, sign, seal and deliver the Option to Purchase, Transfer, or any deeds, instruments, and documents as required by the Housing and Development Board on behalf of the [Appellant] as joint tenant in connection with the sale of the said matrimonial flat.

…

The order of court dated 5 March 2009 ordering the Appellant to move out of the matrimonial flat within 5 months

5 Despite the 20 July Order of Court granting the Respondent sole conduct of the sale of the matrimonial flat and empowering the Registrar to execute the necessary documents on the Appellant's behalf, the matrimonial flat remained unsold and occupied by the Appellant. The Respondent therefore applied on 23 September 2008 (in SUM No 650368 of 2008) for an order that the Appellant be compelled to move out of the matrimonial flat within eight weeks thereof. In his affidavit of even date in support of his application, the Respondent alleged that this was again due to the Appellant's irrational refusal to cooperate with his conveyancing solicitors and/or property agents. In her affidavit dated 11 December 2008, the Appellant did not satisfactorily explain her continued failure to comply with the Decree Nisi and/or the 20 July Order of Court. In the circumstances, it was unsurprising that, on hearing the Respondent's application, DJ Low Wee Ping made an order on 5 March 2009 (the "5 March Order of Court") that:

The [Appellant] move out of the matrimonial flat at Blk 712 Pasir Ris Street 72 #10-47, Singapore 510712, within 5 months from the date of this Order.

6 The Appellant was therefore obliged to move out of the matrimonial flat by 5 August 2009. It should be noted that in para 27 of her affidavit dated 11 December 2008, the Appellant had requested for a period of "six months" in which to vacate the matrimonial flat, and that the deadline of 5 August 2009 was therefore either generous (since the Appellant was herself only asking for a deadline of six months from the date of her affidavit, *ie* 11 May 2009) or reasonable (since the Appellant was given five months to move out of the matrimonial flat when she had requested for six months).

Events from 5 March 2009 to 4 January 2010

7 Despite the lapse of the deadline of 5 August 2009, the Appellant remained in occupation of the matrimonial flat. On 16 August 2009, however, and notwithstanding that sole custody of the sale of the matrimonial flat had been granted to the Respondent, the Appellant (represented by one Ms Winnie Tan (aka Mah Hwee Khoon)) negotiated for the sale of the matrimonial flat to a pair of buyers represented by one Mr Fabian Leong ("Mr Leong") (Ms Winnie Tan and Mr Leong are collectively referred to as "the agents"). Mr Leong, in his affidavit dated 6 January 2010, alleged that the Appellant had verbally assured him that she would be willing to move out of the matrimonial flat 30 days prior to completion of the sale, which, according to Mr Leong's affidavit, was originally estimated to be sometime in mid-December 2009. According to paras 9 and 13 of Mr Leong's affidavit, the Appellant had repeatedly assured him that she would move out of the matrimonial flat by 31 December 2009.

8 It seems that the Respondent did not object to the Appellant having conduct of the sale, notwithstanding the 20 July Order of Court granting him sole custody, as well as the 5 March Order of Court requiring the Appellant to move out by 5 August 2009, because it appeared to him that the

Appellant was finally cooperating, and so as to avoid further acrimony between the parties which might otherwise have jeopardised the sale process. The Respondent's conduct in this respect cannot be criticised though it was possible that the Appellant may have been led to believe, through the Respondent's repeated indulgences that deadlines for compliance with court orders would not be strictly enforced.

9 Inexplicably, however, in October 2009, the Appellant refused to execute the option to purchase, but instead demanded that the Respondent's solicitors apply to court to have the Registrar execute all conveyancing documents on her behalf in accordance with the 20 July Order of Court. Although this was done in November 2009, the Appellant informed Mr Leong (on 11 December 2009) that she would only move out of the matrimonial flat after completion of the sale.

10 This was unacceptable to both the Respondent and the buyers, but efforts to persuade the Appellant to leave the matrimonial flat by Ms Winnie Tan proved futile. On 30 December 2009, the Respondent's solicitors wrote to the Appellant informing her that they would be taking possession of the matrimonial flat on 4 January 2010.

11 On 4 January 2010, the Respondent's solicitors, together with Mr Leong, attempted to take possession of the matrimonial flat, but were met with strident resistance from the Appellant, who allegedly said that she would not leave unless an order of committal had been issued against her (para 25 of the affidavit of Eu Hai Meng dated 6 January 2010).

The order for committal

12 Perhaps understandably, on 6 January 2010, the Respondent made an *ex parte* application (SUM No 650001 of 2010) for leave to apply for an order of committal of the Appellant for contempt of the 5 March Order of Court. Leave having been granted the same day by the Deputy Registrar, the necessary documents were served on the Appellant on 7 January 2010, and after two rounds of pre-trial conferences, the application for the committal order was eventually heard by DJ Sowaran Singh on 1 March 2010.

13 At the hearing, the Appellant gave evidence that she did not move out within the five months as directed by the 5 March Order of Court because she understood that since the completion for the sale of the matrimonial flat was only to take place on 1April 2010, she need not move out prior to that date. She further added that based on the completion date of 1 April 2010, she had secured a rental flat commencing on 1 April 2010 and that she would move out by then. Under cross-examination, Respondent's counsel informed her that the buyers were not agreeable to give her more time beyond 8 or 9 March 2010 (*ie* a week from the hearing). As legal completion was scheduled to take place on 1 April 2010, it was not entirely clear to me on what basis could the buyers have required the sellers, including the Appellant, to provide vacant possession any time prior to 1 April 2010. It later emerged from her cross-examination that, although the buyers were originally not prepared to let the Appellant move out later than 8 or 9 March 2010, the Appellant was eventually able to persuade them to allow her to move out by noon on 14 March 2010. It should be noted that this date was, therefore, not imposed on the Appellant by DJ Sowaran Singh; rather, it was a date which was mutually agreed, as the transcript revealed:

> Q: The buyer has told us that he is not prepared to give you more than a week to move out. Can you move out in a week's time?
>
> A: *Can I request for two weeks?*

Q: The buyer cannot do so because he is staying with his in-laws. So can you move out by 8 or 9 March 2010.

A: *I am more confident in finding a place in two weeks by 14 March 2010*.

…

P/C: The buyer is agreeable provided she moves out by noon on 14 March 2010.

Q: Will you move out by noon on 14 March 2010?

A: *Yes. Thank you*.

[Emphasis added]

14 At the conclusion of the hearing, DJ Sowaran Singh held that the Appellant was guilty of contempt for disobeying the 5 March Order of Court by failing to move out of the matrimonial flat within five months of the date of the court order, and committed her to 30 days imprisonment for her contempt ("the Committal Order"). However, DJ Sowaran Singh ordered that her sentence was not to be executed if the Appellant moved out of the matrimonial flat by noon on 14 March 2010. Service of the Committal Order was dispensed with since the Appellant was present and had full notice of the contents of the order, and the Appellant was ordered to pay the Respondent's costs.

15 During the further hearing before me on 26 July 2010, I sought clarification from the parties as regards this apparent "right" of the buyers to vacant possession prior to the completion date of 1 April 2010. The Appellant informed me that when she entered into the agreement to sell the matrimonial flat to the buyers on or about 16 August 2009, she had also agreed out of goodwill, at the request of the buyers, to hand over the matrimonial flat 30 days prior to the completion date. However, on or about 11 December 2009, the Appellant withdrew the goodwill offer because the buyers did not release the balance option fee of $1,500 to her within the stipulated date. The Appellant informed the buyers through the agents of this withdrawal and that vacant possession would instead be handed over on the completion date. The buyers did not respond to the Appellant's withdrawal. Although the balance option fee was eventually released to the Appellant, there was no subsequent agreement by the Appellant to restore her goodwill offer for early possession. Counsel for the Respondent did not dispute the Appellant's explanation and in fact accepted that the buyers had no contractual right *vis-a-vis* the Appellant to vacant possession prior to 1 April 2010. This is a finding of some significance because if DJ Sowaran Singh had been informed that the buyers had no such right to early possession, he might have been minded to accede to the Appellant's request to vacate closer to the completion date.

The appeal

16 According to the Appellant's affidavit dated 14 June 2010, she undertook several steps to appeal against the Committal Order from 3 March 2010 onwards, and an appeal was eventually filed by her on 12 March 2010, essentially seeking that DJ Sowaran Singh's Committal Order be set aside.

17 Unfortunately, the Appellant was apparently under the mistaken impression that an appeal operated automatically as a stay of execution, and therefore did not move out of the matrimonial flat by 14 March 2010 (although in her affidavit of 14 June 2010 she alleged that she was making efforts to move out expeditiously).

18 Consequently, on 15 March 2010, the Appellant was committed to prison for 30 days. Although the Appellant has served her term of imprisonment (commuted to 18 days from 15 March to 3 April 2010) for her contempt, she nonetheless pressed ahead with her appeal, a course of action which has raised a number of interesting issues.

The issues

19 During the hearing before me on 26 May 2010, I informed the parties that given the important issues which this appeal has raised and the fact that the Appellant was not represented by counsel, I decided, in the interest of the fair administration of justice, to appoint an *amicus curiae* to assist the court. Ms Kristy Tan ("Ms Tan") was thereafter appointed as *amicus curiae* by letter dated 7 June 2010 and was invited to address the following issues:

(a) In contempt proceedings, whether the Court has the power to quash an order for committal and its sentence when the contemnor has already served the sentence;

(b) If the Court has such powers in (a), what factors would affect the Court's decision in the exercise of its power to quash the order for committal and sentence; and

(c) On the facts of the present appeal, assuming that the Appellant genuinely believed that the filing of the appeal operated as a stay of the Committal Order, whether that would be a sufficient ground to quash the Committal Order and sentence, and whether, given the quasi-criminal nature of committal proceedings, ignorance of the law would displace the *mens rea* element required for contempt of court.

As a corollary to issue (b) above, it is relevant to consider whether, on the facts of the present appeal, any of the factors identified in (b) are present to justify quashing the conviction and sentence.

20 In essence, I was asking Ms Tan to elucidate the court's power to quash an order for committal and/or the resulting warrant for committal. After carefully considering the above issues, I have decided to quash the warrant for committal issued pursuant to the Committal Order as well as set aside the 30-day sentence that had been activated by the warrant for committal. For the avoidance of doubt, in this judgment, I use the terms "quash" or "set aside" to mean annul and void *ab initio*

21 It is appropriate, however, to preface the reasons for my decision, and the examination of the above issues, with some preliminary observations on the law in respect of contempt of court in general.

Preliminary Observations

22 According to Hale LJ in *Griffin v Griffin* [2000] 2 FLR 44 (at 48) (see also para 21 of Chan CJ's speech at the Opening of the Legal Year 2010):

> The power to commit to prison for contempt of court is a common-law power which has never been fully regulated by statute or even by rules of court.

As such, although the jurisdiction of the courts in Singapore to punish for contempt of court is statutorily embodied (see s 8 of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) ("SCA") and s 7 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA")) and regulated (see O 45 and O 52 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court")), the solutions to most

of the novel issues in this appeal are to be found in the common law.

23 There is, at common law, a distinction conventionally drawn between criminal and civil contempt of court: see Sir David Eady and Professor A T H Smith, *Arlidge, Eady & Smith on Contempt* (London: Sweet & Maxwell, 3rd Ed, 2005) ("*Arlidge, Eady & Smith*"), Chapter 3, as well as Nigel Lowe and Brenda Sufrin, *Borrie & Lowe: The Law of Contempt* (London: Butterworths, 3rd Ed, 1996) ("*The Law of Contempt*"), at pp 655–664. Although the distinction is sometimes criticised (*Arlidge, Eady & Smith* at paras 3-47 – 3-54 and *The Law of Contempt*, *supra*), it is fairly clear that breach of a coercive (*ie* prohibitory or mandatory) court order or judgment is a civil contempt (see the speech of Lord Oliver in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 at 217), and does not amount to a criminal offence. As Lord Atkinson noted in *Scott v Scott* [1913] AC 417 (at 456):

> ... if a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court.

24 Notwithstanding this, however, perhaps because of the penal sanctions which may follow a finding of contempt, civil contempt has occasionally been described as a "common law misdemeanour": see *eg* per Lawton LJ in *Linnett v Coles* [1987] 1 QB 555 at 561 and Cumming-Bruce LJ in *Lee v Walker* [1985] 1 QB 1191 at 1201. However, this usage has been criticised (see *Arlidge, Eady & Smith* at paras 3-82 – 3-84), and the better view is that, as *The Law of Contempt* states at p 662:

> [C]riminal contempt is, for all its peculiarities, a crime, whereas a civil contempt despite its criminal characteristics is not.

25 Nonetheless, it is still correct to observe that civil contempt has criminal overtones, not least because a contemnor is liable to be imprisoned, and it is therefore often said that civil contempt "partakes of a criminal nature" (per Lord Denning MR in *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67 ("*Comet Products*") at 73 (see also *Re Bramblevale Ltd* [1969] 3 WLR 699 at 704)) or is "quasi-criminal" (per Cross LJ in *Comet Products* at 77 and Oliver LJ in *Lamb v Lamb* [1984] FLR 278 at 281). As a result, a number of safeguards must be observed before a litigant is visited with the drastic and punitive consequences attendant on a finding of contempt (see generally *Arlidge, Eady & Smith* at paras 12-15 – 12-65):

> (a) Committal proceedings are a measure of last resort (*P J Holdings Inc v Ariel Singapore Pte Ltd* [2009] 3 SLR(R) 582 at [5]), especially in family and matrimonial matters (*Danchevsky v Danchevsky* [1975] Fam 17 at 22 ("*Danchevsky*") (per Lord Denning MR) and *Ansah v Ansah* [1977] Fam 138 at 144 (per Ormrod LJ)) (see further [57] to [64] below);
>
> (b) Contempt must be proved on the criminal standard, *ie* beyond a reasonable doubt: *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and others* [2007] 2 SLR(R) 518 ("*Pertamina Energy*") at [31] to [35];
>
> (c) The alleged contemnor must be given the right to be properly heard, which normally entails a strict adherence to the procedural rules, *eg* the prescriptions as to the form of an order for committal set out in O 52, rr 2 and 3 of the Rules of Court (see generally Chapter 15 of *Arlidge, Eady & Smith*), although the approach of the English courts in this respect has changed somewhat (see [80] below).

26 With these preliminary matters settled, I will now deal with the issues pertinent to this appeal.

Whether the Court has the Power to Quash an Order for Committal and its Sentence when the Contemnor has Already Served the Sentence

27 One of the Appellant's reasons for appealing against the Committal Order is that the imprisonment term, if not expunged, would leave her with a criminal record and affect her future employability.

28 Given that civil contempt is not a crime, it follows that the Appellant is not a criminal, and she therefore cannot be entered on the Register of Criminals under the Registration of Criminals Act (Cap 268, 1985 Rev Ed) ("ROCA"). Section 4 of the ROCA mandates that the Registrar of Criminals shall keep a register of, *inter alia*, persons convicted of any crime in Singapore, and s 2 of the ROCA states that a "crime" is "any offence included for the time being in the First or Second Schedule". In neither Schedule, however, is there a reference to s 8 of the SCA or s 7 of the SCJA, or to contempt more generally.

29 It would seem, therefore, that even if the Appellant's appeal is successful, there is no criminal record to expunge. In the circumstances, it might appropriately be asked whether the court has the power to hear and adjudicate an appeal which appears to be moot, *ie* where the sentence has already been served or judgment already executed.

30 In principle, an order for committal is an order of court, and is in that respect similar to any other judgment or order of court. An order for committal can therefore be stayed, appealed, varied or set aside like any other order of court (except those which legislation has decreed to be non-appealable), and there is no principle on which it can be said that an appellate court either lacks jurisdiction, or should decline the jurisdiction it otherwise has, to hear and adjudicate an appeal from a judgment or order which has already been executed. It is true that, when an appellant applies to stay execution of a judgment pending the hearing of an appeal, the court hearing the application will often ask itself whether, if a stay is not granted, the appeal would be rendered nugatory: *Lee Sian Hee (trading as Lee Sian Hee Pork Trader) v Oh Kheng Soon (trading as Ban Hon Trading Enterprise)* [1991] 2 SLR(R) 869 at [5]. This does not mean, however, that if a stay is not granted, with the consequence that the lower court's judgment is executed and an appeal is therefore nugatory, an appellate court will refuse to hear the appellant or refuse to overturn the lower court's judgment (if there are grounds on which to do so). The question of the effectiveness of an appeal is an inquiry relevant to determine whether a stay should be granted pending appeal, and not whether the appeal should be allowed to proceed. A disappointed litigant is entitled to have an appellate court hear his appeal, and to have his rights vindicated on appeal, even if it may only result in a "paper" judgment.

31 If this is the case in ordinary civil proceedings, there is no real basis for adopting a different approach in contempt proceedings, where, due to the fact that a person's liberty and reputation are at stake, it should be even more imperative that an appellate court hear, and rule on, an appeal, even if the alleged contemnor has already served the sentence imposed.

32 I am fortified in my conclusion by the fact that this was also the view arrived at by Ms Tan. Although her research did not reveal any local decision on point, she helpfully referred me to various provisions of the SCJA as well as a number of English authorities to support her view that the court does have the jurisdiction to quash an order for committal and a sentence thereunder notwithstanding service of the sentence by the contemnor.

33 First, Ms Tan relied on ss 20, 22 and 37 of the SCJA which read, *inter alia*, as follows:

Appellate civil hearing

20. The appellate civil jurisdiction of the High Court shall consist of —

(a) the hearing of appeals from District Courts;

(b) the hearing of appeals from District Courts and Magistrates' Courts when exercising jurisdiction of a quasi-criminal or civil nature; and

(c) the hearing of appeals from other tribunals as may from time to time be prescribed by any written law.

Powers of rehearing

22. —(1) All appeals to the High Court in the exercise of its appellate civil jurisdiction shall be by way of rehearing.

(2) The High Court shall have the like powers and jurisdiction on the hearing of such appeals as the Court of Appeal has on the hearing of appeals from the High Court.

Hearing of appeals

37. —(1) Appeals to the Court of Appeal shall be by way of rehearing.

....

(5) The Court of Appeal may draw inferences of facts, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

From these provisions, it is clear that the High Court, when hearing an appeal from the District Court, can "*make any order which ought to have been given or made, and make such further or other orders as the case requires*" [emphasis added].

34 Next, Ms Tan referred to several English cases which throw some light on the matter.

35 In *Lamb v Lamb* (see [25] above), the respondent wife was granted, *inter alia*, an order ousting the appellant husband from the matrimonial home and restraining him from removing or destroying its contents. The husband removed some items from the matrimonial home and damaged others before he left. The wife applied for an order for committal for breach of the order, and the court hearing the application decided to dispense with notice to the husband and dealt with the matter *ex parte*, ordering the husband to be committed to prison for 14 days ("the first order"). The husband appealed, *inter alia*, against the first order, and by the time of the hearing of the appeal, the 14 days had expired.

36 Oliver LJ commented (at 280–281) that:

As regards the first order, [counsel for the husband] takes three points. I should say straightaway that, as regards the first order, these points are to a large extent academic because, in fact, the [husband] remains to this day in prison and the period of 14 days has in fact expired.

Nonetheless, the English Court of Appeal went on to hear, consider and adjudicate upon the appeal (albeit the husband's appeal against the first order was dismissed).

37 In *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & others* [2008] EWCA Civ 389 ("*Symphony Gems*"), the English Court of Appeal was dealing with a suspended order for committal for 28 days made by Bean J on 31 January 2008 against a judgment debtor ("Mr Mehta") who had failed to attend an examination of judgment debtor ("EJD") ordered on 16 January 2007 and scheduled for 31 January 2008. Bean J's order was suspended on condition that Mr Mehta attend a re-scheduled hearing for the EJD on 11 March 2008, in which case the suspended committal order would be automatically discharged. Although it was not disputed that Mr Mehta had been in contempt of court for failing to attend the 31 January 2008 EJD, Mr Mehta appealed to set aside the suspended committal order, on the basis that, the evidence before the court could not have been satisfied beyond a reasonable doubt that Mr Mehta had been in such contumacious contempt as to justify an order for committal, suspended or otherwise. As it turned out, Mr Mehta did attend the EJD on 11 March 2008, and the suspended committal order would therefore have been discharged, rendering Mr Mehta's appeal somewhat unnecessary. Nonetheless, after noting that Mr Mehta had complied with the suspended order for committal by being present for the rescheduled EJD on 11 March 2008, Rix LJ commented at [18]:

> So, automatically, under the terms of the order, the suspended order for committal falls to be discharged, and that is common ground – so much so that, on behalf of the respondents, Mr Anthony Trace QC submits that this appeal (Mr Mehta's appeal from the order of Bean J) is entirely academic and unnecessary. He nevertheless was inclined, at the beginning of this hearing, to accept the suggestion from my Lord, Tuckey LJ, that it was not as academic as all that, because *if, as Mr Mehta submits, the (albeit suspended) order for committal should never have been made in the first place then Mr Mehta is entitled to have this court say that*.
>
> [Emphasis added]

38 By analogy, on the facts of the present appeal, if, as submitted by the Appellant, the order for committal should never have been made in the first place then the Appellant is entitled to have this court say that, notwithstanding that she has already served the sentence imposed.

39 Indeed, the English Court of Appeal went on to hold that the evidence before Bean J did not establish, to the criminal standard of proof, that Mr Mehta's conduct had been so contumacious as to justify an order for committal, and Rix LJ concluded (at [32]):

> In these circumstances it seems to me that it is not simply a matter of Bean J's order being discharged – that, as I say, is common ground – but I think it follows that, [for] the reasons which I have stated in this judgment, … this appeal should be allowed, so that the order should be set aside.

40 Another example is to be found in *Linnett v Coles* (see [24] above), where the defendant had on numerous occasions failed to obey orders made by the High Court to produce certain documents. For his contempt, the defendant was committed to prison "until further order". After serving eight days in prison, the defendant was released on bail, and thereafter complied with the order to produce the documents, and apologised to the court. At the same time, he lodged an appeal contending that the committal order was unlawful, as it purported to imprison him for an indefinite period, contrary to the maximum two-year period set by s 14(1) of the Contempt of Court Act 1981 (c 49) (UK).

41 The English Court of Appeal held that the committal order was indeed unlawful, and concluded

that s 13(3) of the Administration of Justice Act 1960 (c 65) (UK) ("the AJA 1960"), on its proper construction, gave the English Court of Appeal jurisdiction to remedy an irregularity in the making or form of a committal order which had been executed (such as by substituting a new sentence), if justice so required. More will be said on this aspect of the case later (see [80] to [82] below), but for present purposes the important point was that the English Court of Appeal allowed the appeal and quashed the defendant's sentence (without substituting another sentence). Lawton LJ held (at 562):

> Anyone accused of contempt of court is on trial for that misdemeanour and is entitled to a fair trial. *If he does not get a fair trial because of the way the judge has behaved or because of material irregularities in the proceedings themselves, then there has been a mistrial, which is no trial at all. In such cases*, in my judgment, *an unlawful sentence cannot stand and must be quashed*. It will depend on the facts of each case whether justice requires a new one to be substituted. If there has been no unfairness or no material irregularity in the proceedings and nothing more than an irregularity in drawing up the committal order has occurred, I can see no reason why the irregularity should not be put right and the sentence varied, if necessary, so as to make it a just one.
>
> [Emphasis added]

4 2 *Linnett v Coles* does not provide a complete parallel to the present appeal, as the defendant had only partially served his (indefinite) sentence, whereas here the Appellant has fully served her sentence. Nonetheless, there is no indication (especially not in the speech of Lawton LJ quoted above) that the English Court of Appeal in *Linnett v Coles* would have felt itself constrained in quashing an unlawful sentence, simply because that sentence had been fully served. Ms Tan highlighted to my attention that the statutory provision (*viz* s 13 of the AJA 1960) which was relied on in *Linnett v Coles* is in very similar terms to s 37(5) of the SCJA (see [33] above).

43 In light of the provisions of the SCJA and the English cases referred to above, I am satisfied that I have the power to hear and adjudicate the Appellant's appeal, and, if necessary, quash the Committal Order and the Appellant's sentence, notwithstanding that she has already served it. Counsel for the Respondent fairly submitted, after considering Ms Tan's submissions, that the High Court is indeed vested with such a power.

What Factors Would Affect the Court's Decision to Quash the Committal Order and Sentence

44 Contempt has to be proven beyond a reasonable doubt on established legal principles, and once contempt is proved, the court has a discretion as to sentence – whether an order for committal should be made (instead of a fine or a reprimand), and if so, how long the committal period should be.

45 The grounds for appellate intervention where the lower court has erred in applying legal rules to the facts before it (*ie* where it has no discretion, such as making a finding of contempt) are well-known: an appellate court will intervene where the lower court has misdirected itself as to the law, or where the lower court has made findings of fact which are plainly wrong or against the weight of the evidence (see generally Jeffrey Pinsler, *Singapore Court Practice 2009* (Singapore: LexisNexis, 2009) ("*Singapore Court Practice 2009*"), at paras 57/1/12–57/1/14). Where a lower court has made a decision in the exercise of judicial discretion, *eg* the sentence to be imposed in respect of a proven contempt, an appellate court will not intervene unless (*Singapore Court Practice 2009* at para 57/1/15):

> … it is clearly wrong, as when the judge was mistaken in law or disregarded or misapplied a significant principle or failed to appreciate the true facts or took into account irrelevant

considerations or exceeded the discretion vested in him or failed to exercise any discretion at all.

46 These traditional grounds for appellate intervention have also been applied to reverse findings of contempt (see *Re Bramblevale Ltd* ([25] above), where a finding of contempt was overturned because contempt could not be proved beyond a reasonable doubt), as well as to set aside or vary committal orders (see *Banton v Banton* [1990] 2 FLR 465, where a committal order was set aside as the lower court had not appreciated that it had a discretion as to sentence).

Whether a Genuine Belief that the Filing of an Appeal Operated as a Stay of Execution Would be a Sufficient Ground to Quash the Committal Order and Sentence

47 It is well-settled that the *mens rea* necessary to establish a finding of civil contempt is set at a low threshold: the contemnor need only intend to do acts which put him in breach of a coercive court order; it need not be shown that he had the specific intention of disobeying the court order. The contemnor's motive in doing the acts which breached the court order is irrelevant to the question of liability, and is only relevant to the question of mitigation. This was confirmed beyond doubt by the Singapore Court of Appeal in *Pertamina Energy* (see [25] above) at [51] to [62], where it endorsed the voluminous case law supporting such an approach, and commented (at [51]) that:

> [I]t is only necessary to prove that the relevant conduct of the party alleged to be in breach of the court order was intentional and that it knew of all the facts which made such conduct a breach of the order (including, of course, knowledge of the existence of the order and of all of its material terms (see the English High Court decision of Re L (A Ward) [1988] 1 FLR 255 at 259)). However, *it is unnecessary to prove that that party appreciated that it was breaching the order*. As Sachs LJ put it in the English Court of Appeal decision of Knight v Clifton *[1971] Ch 700 at 721, "[t]he* prohibition is absolute and is not to be related to intent unless otherwise stated on the face of the order."
>
> [Emphasis added]

48 On the facts of this appeal, therefore, it is irrelevant that the Appellant did not appreciate that an appeal did not operate as a stay of execution of the Committal Order: her conduct in intentionally remaining in the matrimonial flat after 14 March 2010 was, to paraphrase the Court of Appeal's judgment in *Pertamina Energy* quoted above, in breach of the Committal Order, and she knew of all the facts which made such conduct a breach (including knowledge of the existence of the Committal Order and of all of its material terms). In this respect, it was common ground between Ms Tan and the Respondent's counsel that the Appellant's belief that the appeal operated as a stay of the Committal Order was irrelevant to the issue of *mens rea* and in any event cannot displace the *mens rea* element required for contempt of court.

49 However, I agree with Ms Tan that the Appellant's belief that the appeal operated as a stay of the Committal Order could be relevant to the question of mitigation for the purpose of determining the appropriate sentence/punishment. In my view, it is equally relevant to the exercise of discretion to grant additional time for compliance with a court order (a point addressed in further detail at [87] below). At its highest, however, the Appellant's mistaken belief could only justify varying or quashing the *sentence* of 30 days' imprisonment, and not the Committal Order itself. Setting aside the *Committal Order* (which would also mean setting aside the sentence) would require something more, *ie* an inquiry as to whether there were any other factors which would justify an appellate court's intervention, which may be sub-divided into a number of questions:

(a) Whether DJ Sowaran Singh had correctly found that the Appellant's civil contempt had

been proved beyond a reasonable doubt;

(b) Whether, having so found, DJ Sowaran Singh was correct in granting the Committal Order (suspended or otherwise); and

(c) Whether the (suspended) Committal Order ought to be quashed for any other reasons.

Whether Any Other Factors Justify Quashing the Committal Order and Sentence

Whether contempt had been proved beyond a reasonable doubt

50 There can be no doubt that the Appellant was clearly in contempt of the 5 March Order of Court , which was, as DJ Sowaran Singh observed at [11] of his Grounds of Decision ("GD"), clear and unambiguous in requiring the Appellant to move out of the matrimonial flat by 5 August 2009.

51 The Appellant had ample time to move out, but, for reasons best known to her, considered that the 5 March Order of Court was simply a means by which she could embarrass the Respondent. In her own words (at para 17 of her affidavit dated 26 January 2010):

> I did not mean to defy the Court Order of 5 March 2009 that I move out within five months. It is just that *I wanted to prove the [Respondent] wrong by marketing and selling the flat just eleven days later (16 August 2009) and at a reasonable price*.
>
> [Emphasis added]

52 However, the deadline of 5 August 2009 was not something which the Appellant could, at her option, disregard. A breach of the 5 March Order of Court had plainly been committed when the Appellant chose, quite freely and deliberately, not to vacate the matrimonial flat by 5 August 2009. There is no such thing as "one free breach" of an order of court (see *Jordan v Jordan* [1993] 1 FLR 169 at 172 (per Lord Donaldson MR)), and given that the Appellant's motive in failing to obey the order to move out was irrelevant to the question of her liability in contempt, DJ Sowaran Singh was amply justified in finding the Appellant's contempt was proved beyond a reasonable doubt. This was also the view arrived at by Ms Tan which, unsurprisingly, was accepted by the Respondent's counsel. However, Ms Tan rightly pointed out that different considerations need to be examined (see [87] below) in determining whether the Appellant was in breach of the Committal Order for her failure to vacate the matrimonial flat by noon on 14 March 2010.

Whether an order for committal should have been granted

Rules of Court

53 Order 45 r 5(1) of the Rules of Court prescribes:

> **Enforcement of judgment to do or abstain from doing an act (O. 45, r. 5)**
>
> **5**. – (1) Where –
>
> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, Rule 4; or
>
> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:

(i) with the leave of the Court, an order of committal;

…

54 It is clear that in the present case, the Appellant was "required by a judgment or order to do an act within a time specified in the judgment or order", *viz* to move out of the matrimonial flat by 5 August 2009, and that she had "refuse[d] or neglect[ed] to do it within that time".

Committal is not the natural consequence of a finding of contempt

55 Nonetheless, as *Arlidge, Eady & Smith* points out at para 12-30:

Even where a contempt is proved, it should never be assumed that committal is the natural consequence.

56 In *Smith v Smith* [1988] 1 FLR 179, the plaintiff obtained a non-molestation order against the defendant when their relationship ended. Subsequently, the plaintiff applied to commit the defendant for breach of the order, alleging that the defendant had come to her residence, drunkenly looked through the window and waved some papers at her. At the hearing of the application, the defendant admitted being in breach of the order but explained that he was only delivering a letter addressed to the plaintiff. The recorder hearing the application considered the defendant's reason a "transparent excuse", and ruled that "the normal punishment will be committal", before committing the defendant to prison for 28 days. On appeal, Sir John Donaldson MR said (at 181):

It is quite clear to my mind that if somebody is accused of a contempt of court by breach of an order that must be proved. That was proved in this case. However, the recorder was in error, if this is what he meant, when he seemed to assume that a breach of an order or of an undertaking automatically or normally leads to imprisonment. It is quite correct that the orders of the court must and will be maintained. But there is nothing automatic about committal to prison. It depends upon all the circumstances.

In the same case, Balcombe LJ said (at 182):

The recorder said that it must be clearly understood that the normal punishment for a contempt of court will be committal. The court's powers to deal with breaches of orders or undertakings given to the court are much wider than that. In the lowest degree it can merely adjourn the application for committal to see what happens. It can make a suspended committal order. It can, in appropriate cases, impose a financial penalty. Further, of course, the length of the sentence, if it is considered appropriate to commit the contemnor to prison, must, as Sir John Donaldson MR says, vary according to the facts of the case.

Committal as the last resort in family proceedings

57 It has also been said (per Ormrod LJ in *Ansah v Ansah* (see [25] above) at 144) that "[c]ommittal orders are remedies of last resort; in family cases they should be the very last resort". In *Danchevsky* (see [25] above), resort to committal proceedings was deprecated by the English Court of Appeal on facts which were similar to this case: a county court made an order for the sale of a

house (the former matrimonial home of the parties) in which the husband had continued to live after the dissolution of the marriage. The wife had left the house, but the husband would neither leave the house nor let it be sold. On 15 May 1974, the county court ordered the husband to give up possession of the house to the wife or her solicitors by noon on 12 June 1974 and to cooperate in its sale, but the husband disobeyed the order. On the wife's application to commit the husband to prison, he refused to give an undertaking to the court to vacate the house within three days, on the grounds that the house could be divided into two separate households (which would give greater security for the couple's two adolescent children), and on 21 June 1974 the county court ordered the husband committed to prison for three months for contempt.

58 On appeal, Lord Denning MR commented (at 21–22) that:

> The object was to see that the order of the court was obeyed – that the house was sold for the benefit of both parties. To achieve this, it was not necessary to send the man to prison. Whenever there is a reasonable alternative available instead of committal to prison, that alternative must be taken. In this case there was a reasonable alternative available. It was this: to enforce the order for possession by a warrant for possession, to sell the house, and to make the conveyance of the property by means of an instrument to be signed and executed by a third person on the direction of the court…
>
> [Counsel for the wife] submitted that the committal for three months was done to punish the husband – to punish him for his disobedience in the past in not giving up possession. I do not think this was an appropriate case for punishment, certainly not for imprisonment. The husband was obstinate and misguided. But he was sincere. The right way of dealing with the matter was to take steps to enforce the order of the court, but not to imprison him.

Buckley LJ added (at 22) that:

> … it is quite clear, I think, from what we have read in the judge's judgment, that Mr Danchevsky was in fact in contempt – and one might say in gross contempt – of the order of the court, for he made it manifest that he had no intention of carrying out that order if he could possibly avoid doing so. But the fact remains that the objective could have been obtained by other relief which would not have involved committing Mr Danchevsky to prison for contempt of court. As Lord Denning MR has said, it was open to Mrs Danchevsky to apply for a writ of possession and to execute that writ and thereby recover possession of the house from her former husband, and to carry out that sale with the assistance, if necessary, of an order of the court directing some third party to execute the conveyance in Mr Danchevsky's place…

Concurring, Scarman LJ remarked (at 24) that committal:

> … was a singularly blunt and ineffectual weapon for securing the wife's rights – that is to say, the right to a sale of this house and the division of the proceeds between herself and the defendant. There are, as Lord Denning MR and Buckley LJ have pointed out, other more efficient, more direct ways of achieving the sale of a house than flinging the husband into jail for three months.

5 9 *Danchevsky v Danchevsky* was cited with approval by Choo Han Teck J in *P J Holdings Inc v Ariel Singapore Pte Ltd* (see [25] above) at [5].

60 In this case Ms Tan submitted that as an order for possession (and a consequent writ of possession) had not been applied for, a reasonable alternative had not been explored, and therefore it may not have been appropriate for DJ Sowaran Singh to have issued the Committal Order: *P J Holdings*

Inc v Ariel Singapore Pte Ltd at [6]. However, unlike *Danchevsky*, a number of features in the present appeal are apparent:

(a) Other alternatives were in fact attempted, *viz* the 20 July Order of Court giving the Respondent sole custody of the sale of the matrimonial flat and empowering the Registrar to execute the necessary conveyancing documents in the Appellant's place (which was the very alternative contemplated in *Danchevsky* itself), as well as the 5 March Order of Court requiring the Appellant to vacate the matrimonial flat by 5 August 2009.

(b) The Appellant displayed none of the *bona fides* and sincerity of the defendant in *Danchevsky* (a factor which clearly influenced Lord Denning MR). She failed to comply with the 5 March Order of Court not because she was concerned about the welfare of adolescent children, but because she wanted to prove the Respondent wrong.

(c) An order for possession and writ of possession may well have been futile given the Appellant's refusal to vacate the matrimonial flat on 4 January 2010 unless an order for her committal was obtained. Ms Tan sought to persuade me that a writ of possession would have been equally effective to make the Appellant move out by 14 March 2010. Ms Tan submitted that enforcement of a writ of possession, as with enforcement of an order for committal, would be by the court's bailiff. On 15 March 2010, when the bailiff enforced the Committal Order, the Appellant did indeed vacate the matrimonial flat. Accordingly, Ms Tan reasoned that the Appellant would likewise have vacated the matrimonial flat if the bailiff had been enforcing a writ of possession instead of the Committal Order. However, the difficulty with Ms Tan's submission is that the court would, in effect, be examining the appropriateness of the Committal Order with the benefit of hindsight, a course which Ms Tan submitted I should not adopt in determining the correct order(s) to make.

(d) Further, in *Danchevsky*, at the time the order for committal was made, the sale of the matrimonial home had not been concluded. It was perhaps appropriate to first enforce the order for possession by a writ of possession as a precursor to the sale. Viewed in that context, it was understandable for the English Court of Appeal to have found that the county court had failed to consider a reasonable available alternative. However, in the present appeal, the parties had already concluded a binding agreement to sell the matrimonial flat. I agree with the Respondent's counsel that it was reasonable for the Respondent to expect that the Appellant would not have abided by an order for possession even if that alternative had been explored. After all, it was not disputed that the Appellant did inform the Respondent's solicitors on 4 January 2010 that she would only vacate the matrimonial flat if an order for her committal was obtained, though during the hearing before me on 26 July 2010, she explained that she did not fully understand the legal implications arising from such an order.

(e) In any event, I consider that a reasonable alternative was in reality explored by way of the suspended nature of the Committal Order. Inasmuch as a writ of possession would have provided the Appellant with a final chance to comply with the 5 March Order of Court to vacate the matrimonial flat prior to the issuance of an order for committal, the same effect was achieved through the suspended nature of the Committal Order. In truth, DJ Sowaran Singh granted her a further 14 days to comply with the 5 March Order of Court.

(f) Any further delay in vacating the matrimonial flat might have jeopardised the sale and could possibly have exposed the Respondent as joint tenant with the Appellant to liability to the buyers, a consideration which did not arise in *Danchevsky*.

61 In addition, there must be limits to a court's patience when faced with a recalcitrant and obstructive litigant who is in continuous breach of a mandatory court order. In *Kavanagh v Kavanagh* ([1978] CA Transcript 166, unreported, but cited by *The Law of Contempt*, at p 584–585, and N V Lowe, "Evicting the Recalcitrant Spouse", (1979) 43 Conv 337 at 341), Ormrod LJ commented that the wife's attempts to obtain possession by seeking an order for possession by a writ of possession followed by a writ of restitution and finally by an order for committal was ill-advised, being a highly complex and old-fashioned property approach. Instead, Ormrod LJ recommended a different procedure (which was endorsed by Lord Denning MR) in cases where an ex-wife is attempting to sell the matrimonial home which her former husband refuses to give up possession of, as follows:

> (a) Obtain a personal order together with the proper penal message against the husband that he vacate the premises by a particular date and that he be restrained from returning thereafter. However, at this stage no move should be made to commit the husband.
>
> (b) Arrange for the contract of sale of the house to be made with vacant possession.
>
> (c) When the sale is imminent (*ie* when the contract is about to be signed), if the husband is still in breach of the order, apply to the court to enforce the personal order. Ormrod LJ envisaged that in such cases the court would make an indefinite committal order pending the sale or until the spouse gives an undertaking not to interfere with the sale.
>
> (d) As soon as the husband is in prison, sign the contract and let the purchaser into possession.

Indefinite committal orders cannot be made by the Subordinate Courts on account of s 8(2) of the SCA (in England, indefinite committal orders can no longer be made as a result of s 14 of the Contempt of Court Act 1981), but the point is that, on the facts of the present appeal, steps (a) and (b) were observed, and the Appellant was still in breach of the 5 March Order of Court despite the imminence of the completion of the sale of the matrimonial flat.

62 Further, the sentiments expressed in *Danchevsky* and *Ansah v Ansah* do not mean that a court should hesitate to deploy committal orders if the court's authority is continually defied and thwarted. In *Jones v Jones* [1993] 2 FLR 377, Russell LJ, in response to counsel's reliance on Ormrod LJ's dictum in *Ansah v Ansah* that "[c]ommittal orders are remedies of last resort; in family cases they should be the very last resort" (see [25] above), pointedly commented (at 381):

> For my part I see little, if any, general principle emerging from the observations of Ormrod LJ. Time and again in this court it has been said that in matrimonial disputes the order that has to be made upon a breach of an undertaking, or a breach of an injunction, must vary and be dependent upon the individual circumstances of the individual case and I certainly am not prepared to hold that Ormrod LJ was contending that in all cases, irrespective of circumstance, an immediate custodial sanction should not be imposed.

63 In my judgment, the more appropriate test is that suggested by Butler-Sloss LJ in *Re M (Minors) (Access: Contempt: Committal)* [1991] 1 FLR 355, which is summarised in the headnote thus:

> Committal orders in family cases were remedies of very last resort and should only be considered where there was a continuing course of conduct and where all other efforts to resolve the situation had been unsuccessful. The court would take that measure where it was clear that a person was deliberately and persistently refusing to obey a court order.

64 On the facts of the present appeal, there clearly was a continuing course of conduct by the Appellant, who was deliberately and persistently refusing to obey the 5 March Order of Court, in circumstances where all other efforts to resolve the situation had been unsuccessful. As such, an order for committal was indeed appropriate, and DJ Sowaran Singh was correct to have suspended the Committal Order on the terms that he did (which he was of course entitled to do under O 52 r 6 of the Rules of Court), as it gave the Appellant a final opportunity to comply with the court's directions, and underscored the dangerous path the Appellant was treading by unilaterally deciding when and how she would eventually vacate the matrimonial property. A suspended order for committal was, in the circumstances, the most ideal solution, for it tempered justice with mercy.

The significance of suspending the Committal Order

65 Thus far, the approach of DJ Sowaran Singh had much to commend it, and the Committal Order *per se* was unassailable. The problem, however, lies in the fact that the Committal Order had been suspended, and the events that transpired after the Appellant's non-compliance with the Committal Order.

The court's discretion in dealing with breaches of a suspended order for committal

66 In her submissions, Ms Tan raised the critical point that where a suspended order for committal has been made, and the contemnor breaches the terms and conditions on which the order was suspended, the court is not obliged to impose the suspended sentence, but has a discretion to do what is just in the circumstances: *re W (B) (An Infant)* [1969] 2 WLR 99 at 103–104; *Banton v Banton* (see [46] above) at 466–467; *Villiers v Villiers* [1994] 1 WLR 493 at 498; *Griffin v Griffin* (see [22] above) at 49 and *Phillips and others v Symes (No 3)* [2005] 1 WLR 2986 at [51]. The discretion is unfettered – the court may impose the suspended sentence in whole or in part, or substitute a fine, or indeed impose no penalty at all.

67 This was first decided in *re W (B) (An Infant)*, where the contemnor had given an undertaking to the court that he would not associate or communicate with an underaged girl who had been made a ward of the court. The contemnor broke that undertaking, and was sentenced to six months' imprisonment for contempt of court, but the sentence was suspended provided he complied with injunctions restraining him from associating or communicating with the girl during her minority. The contemnor breached the injunction, and Megarry J held that he had no discretion but to activate the suspended sentence. The English Court of Appeal unanimously allowed the contemnor's appeal, with Lord Denning MR stating (at 103) that:

> We are all of the opinion that Megarry J. had a discretion in the matter. The sentence of six months did not come into operation at once and automatically upon a breach being proved. The court has a discretion analogous to a suspended sentence in the criminal courts. Imprisonment is not the inevitable consequence of a breach. The court has a discretion to do what is just in all the circumstances. It can reduce the length of the sentence or can impose a fine instead. It may indeed not punish at all. It all depends on how serious is the beach, how long has the man behaved himself, and so forth.

68 It will be seen that Lord Denning MR founded the court's discretion in such cases by drawing an analogy to the treatment of suspended sentences in the English criminal courts. Our courts, however, have no power to suspend criminal sentences: *Aw Hoon v Public Prosecutor* [1996] 2 SLR(R) 886. Nonetheless, as a matter of principle, it is clearly justifiable that a court has a broad discretion in sentencing a contemnor who has breached the terms of a suspended order for committal. When an order for committal is suspended on certain terms and conditions, a breach of those terms and

conditions by the contemnor is, in principle, disobedience of an order of court, and therefore a further contempt. Since the court has a complete discretion in sentencing contemnors (see [56] above), it must obviously have the same discretion in sentencing repeat contemnors.

Procedure to be adopted

69 In order for this discretion to be properly exercised, the court must be properly appraised of the relevant facts and circumstances surrounding the breach of the suspended order for committal. For this to be possible there must be a *renewed* application to lift the suspension and activate the sentence, which calls upon the contemnor to show cause as to why the suspended sentence ought not to be imposed. There must be another hearing *inter partes*, at which the court can then decide, after considering all the relevant facts, what the consequence of the breach should be. If this is not done, and the court is merely told *ex parte* that the contemnor has breached the terms of the suspended order for committal, and a warrant for committal issued forthwith, not only would the contemnor be deprived of the opportunity to be adequately heard (which would be, to all intents and purposes, a breach of natural justice), the court would also be fettering its discretion unjustifiably.

70 It is not entirely clear if the English rules on civil procedure prior to 1999 provided for this. For instance, Nigel Fricker and David Bean, *Enforcement of Injunctions and Undertakings* (Jordans, 1991) at para 31.2 states:

> It is submitted that when there has been a breach of the terms of suspension of an order of committal, an application for the lifting of the suspension and implementation of the committal should be made by way of an adapted notice of application to commit. On principle, the contemnor ought to be given precise details of his alleged further contempt. The judgment in *Lakin v Lakin* [1984] CAT No 488 lends support to this proposition.

The tone of this quotation suggests that no such procedure was in place, and unfortunately *Lakin v Lakin* is not a reported judgment. Although p 4 of the transcript in *Lakin v Lakin* does indicate that "a further application to commit" the respondent for breach of a suspended order for committal was made, it is not clear whether the application was made *inter partes*. In *Nicholls v Nicholls* [1997] 1 WLR 314, the appellant husband had given, in March 1995, a non-molestation undertaking and an undertaking not to dispose of specified items from the matrimonial home. In September 1995, he was committed to two months' imprisonment, suspended for one year on condition he did not harass the respondent wife. This was not complied with, and in March 1996, the wife (at 317)

> … *made an application for… the suspended committal order… to be activated* on the grounds that the husband had harassed the wife on five different occasions.
>
> [Emphasis added]

It is clear from the headnote that the wife's application was served on the husband, and that he was present at the subsequent hearing at which the suspended order for committal was activated. Most notably, in *Griffin v Griffin* (see [22] above), the issue on appeal was whether an order for committal for contempt of court, suspended for as long as the contemnor complied with another order of infinite duration, was valid. In ruling that it was, Hale LJ stated (at 50) that any injustice such an order gave rise to could be cured, *inter alia*, because:

> … these orders [*ie* suspended orders for committal] are not activated automatically *but only upon application to the court*. The court hearing such an application has a discretion...

[Emphasis added]

Although Hale LJ did not say so explicitly, it seems clear from the context that she had in mind an *inter partes* application.

71 It would appear, therefore, that at least by 1999, the practice in England regarding suspended orders for committal was that they could only be activated after an *inter partes* application to the court seeking such a course of action, and, naturally, only after the consequent hearing had been conducted, whereupon the court would decide, if the breach had been proved, how to exercise its discretion in sentencing.

72 After the introduction of the English Civil Procedure Rules 1998 (SI 1998/3132) (UK) ("CPR") in 1999, such a procedure appears to have been specifically provided for. Part 71 of the CPR deals with "Orders to Obtain Information from Judgment Debtors", and rr 71.2 and 71.8 provide:

Order to attend court

71.2

(1) A judgment creditor may apply for an order requiring –

(a) a judgment debtor; or

(b) if a judgment debtor is a company or other corporation, an officer of that body,

to attend court to provide information about –

(i) the judgment debtor's means; or

(ii) any other matter about which information is needed to enforce a judgment or order.

…

Failure to comply with order

71.8

(1) If a person against whom an order has been made under rule 71.2 –

(a) fails to attend court;

(b) refuses at the hearing to take the oath or to answer any question; or

(c) otherwise fails to comply with the order,

the court will refer the matter to a High Court judge or circuit judge.

(2) That judge may, subject to paragraphs (3) and (4), make a committal order against the person.

(3) …

(4) If a committal order is made, the judge will direct that –

(a) the order shall be suspended provided that the person –

(i) attends court at a time and place specified in the order; and

(ii) complies with all the terms of that order and the original order; and

(b) *if the person fails to comply with any term on which the committal order is suspended, he shall be brought before a judge to consider whether the committal order should be discharged*.

[Emphasis added]

73 As Rix LJ noted in *Symphony Gems* (see [37] above) at [15]:

… what the rule contemplates is that there may be a committal order; that that committal order, if made, will be suspended; that it will be discharged if the debtor complies with the order then made and any outstanding order, but *that if the order is not complied with there will not be automatic enforcement of the committal order but that the debtor should be brought before a judge to consider whether the committal order should be enforced* or whether it should, in the words of the rule, be discharged.

[Emphasis added]

74 It is of course true that Part 71 of the CPR deals with examinations of judgment debtors and not committal for contempt of court generally, and that our rules of civil procedure are not based on the CPR. However, in my view, there is no reason why the sort of procedure envisioned by r 71.8(4)(b) of the CPR should not also apply in Singapore when a suspended order for committal is made and then not complied with. Given the draconian nature of an order for committal, it is imperative that the contemnor be afforded the chance to be heard and to make representations as to the appropriate penalty to be imposed, if any, for breach of the terms of a suspended order for committal. The correct procedure to be adopted, therefore, where it is sought to activate a suspended order for committal, is for a fresh application to be made, by way of an amended application for an order for committal (under O 52 r 3 of the Rules of Court), and an *inter partes* hearing to be convened on an urgent basis, whereupon the court will be in possession of all the relevant information and can therefore properly exercise its discretion as to the correct consequence of the breach of the terms of the suspended order for committal.

75 It should be added that once an application has been made to activate the suspended order, and an *inter partes* hearing convened, if a *prima facie* breach of the suspended order has been proven beyond a reasonable doubt by the applicant (and therefore a *prima facie* case of contempt made out), then, as with an ordinary hearing of an application for an order for committal, the contemnor bears the burden of convincing the court of his defence: s 105 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"); *Lewis v Pontypridd, Caerphilly, and Newport Railway Company* (1895) 11 TLR 203. Given the relatively low threshold of *mens rea* for civil contempt (see [47] above), however, it is more likely that any exculpatory facts will only go to mitigation, which the contemnor also has the burden of proving: s 108 of the Evidence Act.

Procedure not followed in this case

76 On the facts of this appeal, however, this procedure was not adopted. What appears to have happened is that, on 15 March 2010, faced with the Appellant's continuing refusal to move out of the matrimonial flat, the Respondent's solicitors had simply applied *ex parte* to the Subordinate Courts for the execution of the committal order via the expedited issuance and enforcement of a warrant for committal.

77 It also appears that the warrant for committal was summarily issued by the Subordinate Courts, without any further hearing having been conducted. In such circumstances, the court had erred in unnecessarily depriving the Appellant the chance to be heard, denying itself the opportunity of being acquainted with all the relevant evidence, and fettering its undoubted discretion by, in effect, automatically activating the suspended 30-day sentence.

78 I should add that if, in this case, an *inter partes* application had been made, and at the hearing the Appellant had simply failed to appear, the court *might* have been entitled, in exceptional circumstances, to issue an order for her committal in her absence: see *Lamb v Lamb* ([25] above) and *Wright v Jess* [1987] 1 WLR 1076. It is not, however, necessary to consider this matter in detail as it does not arise for decision in this case.

Remedy

79 The conclusion reached thus far is that, while DJ Sowaran Singh was fully justified in imposing the suspended Committal Order, it was not correct for the Committal Order to be executed in the manner that it was, *ie* on an *ex parte* basis without any apparent exercise of judicial discretion. In other words, while the Committal Order was not flawed, the warrant for committal was.

80 In England, there has been a substantial body of case law dealing with the question of what an appellate court ought to do when confronted with procedural errors in the form or the making of an order for committal. Whereas it was previously held (see *Gordon v Gordon* (1946) 62 TLR 217 at 218) that, since the liberty of an individual is at stake, strict adherence to all procedural rules was required and any departure from them, no matter how technical and minor, would result in a committal being set aside regardless of the injustice of such a course of action, the present approach is authoritatively stated in *Nicholls v Nicholls* (see [70] above). Lord Woolf MR, after a comprehensive review of the authorities, laid down the following guidance (at 327) for future cases:

> (1) As committal orders involve the liberty of the subject it is particularly important that the relevant rules are duly complied with. It remains the responsibility of the judge when signing the committal order to ensure that it is properly drawn and that it adequately particularises the breaches which have been proved and for which the sentence has been imposed.
>
> (2) As long as the contemnor had a fair trial and the order has been made on valid grounds the existence of a defect either in the application to commit or in the committal order served will not result in the order being set aside except in so far as the interests of justice require this to be done.
>
> (3) Interests of justice will not require an order to be set aside where there is no prejudice caused as a result of errors in the application to commit or in the order to commit. When necessary the order can be amended.
>
> (4) When considering whether to set aside the order, the court should have regard to the interests of any other party and the need to uphold the reputation of the justice system.

(5) If there has been a procedural irregularity or some other defect in the conduct of the proceedings which has occasioned injustice, the court will consider exercising its power to order a new trial unless there are circumstances which indicate that it would not be just to do so.

81 Lord Woolf MR indicated (at 325–326) that the discretion given to an appellate court in England to rectify procedural defects both prior and subsequent to the making of an order for committal had two statutory sources: s 13(3) of the AJA 1960 (see [41] above) and Ord 59, r 10(3) of the Rules of the Supreme Court (SI 1965/1776) (UK) ("RSC") (now r 52.10 of the CPR). The discretion conferred by both statutory provisions is equally broad (see *Smith v Smith (Contempt: Committal)* [1992] 2 FLR 40 at 43). Section 13(3) of the AJA 1960 is broadly similar to s 37(5) of the SCJA (see [42] above), and Ord 59 r 10(3) of the RSC was in substantially the same terms as O 55 r 6(5) of the Rules of Court, which states:

> The Court may give any judgment or decision or make any order which ought to have been given or made by the Court, tribunal or person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it or him.

82 As such, the guidance provided by Lord Woolf MR in *Nicholls v Nicholls* is, in my judgment, applicable in Singapore. Order 55 r 6(5) of the Rules of Court gives the High Court the power to rectify procedural defects both in the procedure leading up to the making of an order for committal and/or after the order has been made. As Lord Woolf MR held earlier in the same judgment (at 326):

> Like any other discretion, the discretion provided by [O 55, r 6(5)], must be exercised in a way which in all the circumstances best reflects the requirements of justice. In determining this the court must not only take into account the interests of the contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general.

I should add that although *Nicholls v Nicholls* was concerned with when defective *orders for committal* can be set aside or amended, the guidance provided by Lord Woolf MR is also applicable to situations where, as in the present case, a *warrant for committal* (issued pursuant to an order for committal) is defective, and may have to be set aside or amended.

83 Applying the guidelines in *Nicholls v Nicholls*, the question remains of whether, notwithstanding the fact that the suspended Committal Order was sound, the interests of justice require the defective warrant for committal to be quashed, or whether the procedural irregularities (see [76] and [77] above) can now be remedied by way of amendment or retrial.

84 This requires consideration of whether such irregularities have caused prejudice to the Appellant (or to other parties), and whether there was a reasonable chance that the court would have acted differently if the proper procedure (see [69] and [74] above) had been followed. This is entirely in line with my ruling that the decision to be made following the *inter partes* hearing must ultimately be an exercise of judicial discretion.

85 In my judgment, the interests of justice clearly require the warrant for committal (as well as the sentence it activated) to be quashed, for the following reasons.

86 During the hearing on 26 May 2010, I directed the Appellant to file an affidavit to explain her conduct from 1 March 2010 (the date of the suspended Committal Order) to 14 March 2010 (the date when the Appellant was required to vacate the matrimonial flat). In her affidavit, the Appellant detailed the steps she took after the Committal Order was made by DJ Sowaran Singh:

(a) From 3 March to 11 March, she took preparatory steps to file her appeal against the Committal Order. She visited the Subordinate Court Registry on a number of occasions to seek assistance to prepare her appeal papers and to obtain the Notes of Evidence which were eventually collected on 10 March 2010. Finally on 12 March 2010, she filed the appeal.

(b) In the meantime, she was taking steps to rent a room so that she could move out and hand over the property to the buyers "as soon as possible". In a text message dated 14 March 2010, she told the buyers that they might be able to move in by the following week, *ie* the week commencing 22 March 2010, as she was going to sign a tenancy agreement by "Monday/Tuesday", *ie* 15 or 16 March 2010.

(c) In addition, the Appellant believed that since her appeal had been filed, the Committal Order was stayed and she would not be required to move out by 14 March 2010.

87 I have no doubt that had an *inter partes* hearing been convened, the Appellant would have informed the court of the developments subsequent to the Committal Order. In my view, if that had been done, there was at least a reasonable chance that the court would not have issued the warrant for committal for the following reasons:

(a) The Appellant in fact took steps to find alternative accommodation. In other words, she intended and was attempting to comply with the Committal Order. In this regard, the Appellant may be criticised for leaving it very late in the day to do so. However, it cannot be overlooked that she spent a great deal of time preparing her appeal (without assistance from counsel), a course which she was entitled to pursue as of right.

(b) While her belief, however genuine, that her appeal operated as a stay of the Committal Order does not prevent her from being in contempt of court, it nonetheless reveals that she did not adopt a course of action to intentionally or deliberately flout the Committal Order.

(c) It was common ground between the parties (and accepted by DJ Sowaran Singh at [10] of his GD) that legal completion for the sale of the matrimonial flat was on 1 April 2010. It follows that the buyers were only legally entitled to vacant possession on 1 April 2010 a fact that was not disputed by the Respondent. Given that the Appellant was taking active steps to move out by the week commencing 22 March 2010 (which would still be within time for legal completion to take place), the court hearing the matter on an *inter partes* basis would very likely have granted the Appellant additional time to move out and would not have issued the warrant for committal immediately.

88 As regards the issue of prejudice to the Appellant, that is a given. It is a matter of considerable regret that the Appellant has had to serve what might have been (had the correct procedure been followed) an unnecessary sentence of imprisonment, and it is unfortunate that, unlike in normal criminal cases, the quashing of her sentence will make no discernible difference as there is no criminal record to be erased, and no legal pronouncement will allow her to reclaim those 18 "lost" days. Nonetheless, quashing her sentence will ensure that there will be no *administrative* record that she has ever been in prison, which might otherwise blemish her employment profile or possibly inconvenience her visits to other countries (in the case of countries which require the visitor to declare any imprisonment sentence), and will in any event vindicate her reputation.

89 Given all the circumstances of this case, therefore, the interests of justice require that the warrant for committal (as well as the sentence it activated) be set aside.

The Sentence was in any case Manifestly Excessive

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90 Although DJ Sowaran Singh was amply justified in imposing the suspended Committal Order, the 30-day term of imprisonment was manifestly excessive in view of the Appellant's circumstances. She was merely seeking to maximise her use of the matrimonial flat prior to legal completion on 1 April 2010. The Committal Order was partly intended to ensure the Appellant's compliance to give up vacant possession of the matrimonial flat to enable the sale to be completed. That could have been achieved with a brief custodial sentence, which would also have registered the serious consequences arising from her contempt.

Costs

91 In her notice of appeal, the Appellant also appealed against DJ Sowaran Singh's order that she pay the Respondent's costs fixed at $2,000 to be deducted from her share of the sale proceeds. In addition to considering whether to interfere with the order as to costs below, I have to consider the issue of the costs of this appeal.

Costs below

92 In my view, there is no reason to disturb DJ Sowaran Singh's order as to costs: the suspended Committal Order was justified (see [65] above), and the Appellant was, after all, in clear contempt of court by disobeying the 5 March Order of Court. Costs, therefore, correctly followed the event.

Costs of the appeal

93 The question of the costs of the appeal, however, is somewhat more difficult. In *Phillips v Symes (No 3)* (see [66] above), the contemnor had successfully appealed a sentence of two years' imprisonment (the Court of Appeal substituted a term of one year, and the order for committal was modified in other respects in the contemnor's favour). Pill LJ said (at [4] of the costs judgment ([2005] EWCA Civ 663)) that there was:

> … little material as to whether the approach to costs on a successful appeal by the contemnor in contempt proceedings should be the same as that in any civil appeal or whether a different approach should apply on the ground that the decision as to sentence will often, as in this case, and as in the case of an appeal against sentence in a criminal case, primarily be an issue between the contemnor and the court.

94 Pill LJ considered (at [7]) that, while there was no difference in principle between proceedings for civil contempt and other *inter partes* proceedings:

> … factors may be present in contempt proceedings which are not normally present in civil proceedings. Amongst them, in a case such as the present, is the fact that the contemnor by his admitted contempts of court has brought the entire proceedings upon himself and is in a weaker position to claim costs as between the parties than most litigants.

95 In my opinion, Pill LJ's remarks apply here. The Appellant, by her initial contempt of court, has brought the entire proceedings upon herself, and it would be unfair to penalise the Respondent in costs for an error in procedure which was not of his doing. In the circumstances, it is fair that each party should bear their own costs for this appeal.

Conclusion

96 The law of contempt represents the court's inherent jurisdiction to safeguard the administration of justice and uphold the rule of law by punishing those who defy its authority: *Summit Holdings Ltd and another v Business Software Alliance* [1999] 2 SLR(R) 592 at [25]. At the same time, the contempt jurisdiction is open to charges of arbitrariness precisely because it is a creature of the common law which, when invoked, has potentially devastating consequences for the contemnor. To strike an adequate balance between these competing tensions, it is imperative that the proper safeguards are in place to ensure that contemnors are not unnecessarily, and irreparably, punished for their transgressions. Regrettably, this appeal has revealed that the procedure for the activation of suspended orders for committal has not been adequately regulated, and it is hoped that this ruling in setting aside the warrant for committal and the consequent sentence will remedy this.

97 On that note, I would like to record my deep appreciation to counsel for their concise and succinct submissions on this important but obscure area of the law. I especially thank Ms Tan for agreeing, in spite of her heavy commitments, to assist in this appeal as amicus curiae. *Her submissions were well-researched, clear and commendably fair*.