Kraze Entertainment (S) Pte Ltd *v* Marina Bay Sands Pte Ltd
[2013] SGHC 207

Case Number : Suit No 401 of 2013 (Summons No 2671 of 2013)

Decision Date : 08 October 2013

Tribunal/Court : High Court

Coram : George Wei JC

Counsel Name(s) : Tito Shane Isaac / Justin Chan / Ho Seng Giap (Tito Isaac & Co LLP) for the plaintiff; Davinder Singh SC / Pardeep Singh Khosa / Manbeer Singh Mangat (Drew & Napier LLC) for the defendant.

Parties : Kraze Entertainment (S) Pte Ltd — Marina Bay Sands Pte Ltd

Civil Procedure – Pleadings – Striking Out

Civil Procedure – Costs – Security

8 October 2013 Judgment reserved.

George Wei JC:

1 This case concerns an application to strike out the plaintiff's writ of summons and statement of claim in Suit No 401 of 2013 ("the Second Action") filed on 2 May 2013, under O 18 r 19(1) of the Rules of Court (Cap 332, Rev Ed 2006) ("ROC") and/or the court's inherent jurisdiction.

Background facts

2 The plaintiff is a company incorporated in Singapore and is part of a Korean-based group known as the Kraze Group of companies whose businesses are centred primarily on entertainment, food and beverage, information technology and investment. The statement of claim filed in the Second Action asserts that the plaintiff has a paid up share capital of approximately S$10,711,788.00.

3 The substantive dispute between the plaintiff and the defendant arises out of a lease agreement for certain premises situated at #B2-05, South Crystal Pavilion at the Marina Bay Sands Shoppes, Singapore. Under the terms of the lease (signed 18 November 2009), the defendant leased the premises to an associated company of the plaintiff called Krazetech (incorporated in the Republic of Korea) for a term of ten years on certain terms and conditions. One condition was that the premises were only to be used for "a premium nightclub, bar and restaurant under an international nightclub brand name first approved in writing by the Landlord". In early December 2009, it was agreed by way of a letter of amendment that the premises would only be used for a premium nightclub, bar and restaurant under the brand names "Avalon" and "Pangaea".

4 On 6 January 2010, an assignment agreement was entered between the plaintiff, the defendant and Krazetech, whereby Krazetech assigned its entire interest in the lease to the plaintiff. The plaintiff agreed to comply with all of the tenant's obligations under the lease with effect from 31 December 2009 and during the residue of the term of the lease. Under the lease, the plaintiff was allowed a certain period of time for fitting out the premises. According to the pleadings, the possession date under the lease was 25 January 2011 and the fitting period would expire some 26 weeks later with the result that the term of the lease would begin on 26 July 2011. Subsequently in or

about April 2011, the plaintiff ran into difficulties with Pan AV Asia Partners Pte Ltd ("Pan AV"). The latter had granted a licence to the plaintiff to use the trademarks "Pangaea" and "Avalon". Pan AV had also entered into a management contract with the plaintiff to provide technical, operating, management and advisory services relating to the management and operation of a nightclub. The long and short of the story is that the dispute with Pan AV and the apparent breakdown in relationship placed the plaintiff in a difficult position under the lease agreement. According to the pleadings (paragraphs 20 and 22 of the statement of claim and paragraphs 27, 28 and 29 of the defence), negotiations or discussions took place between the plaintiff and defendant on 12 April 2011 over the possibility of launching under a different recognised international nightclub brand. By letter dated 21 April 2011, the defendant terminated the lease on the ground that the plaintiff was in repudiatory breach of its obligations. The plaintiff has denied that it was in repudiatory breach and asserts that the defendant's purported termination was wrongful and invalid.

5 As a result of the aforementioned, the plaintiff commenced Suit No 410 of 2011 against the defendant on 7 June 2011 ("the First Action") for declarations that the plaintiff was *inter alia* not in breach and that the defendant was not entitled to terminate the lease and that the lease remains valid and legally binding. The plaintiff also sought an order for specific performance and, in the alternative, damages for breach of the lease.

6 The First Action was subsequently struck out on 7 February 2013 for the plaintiff's failure to comply with a peremptory order dated 15 January 2013. Since the claim was not time barred, the plaintiff decided to bring the Second Action on 2 May 2013 based on the same cause of action as set out in the First Action and against the same defendant. Consequently, on 23 May 2013, the defendant filed the application to have the Second Action struck out as an abuse of process of the court.

Procedural History leading to the striking out of the First Action

7 The Writ and Statement of Claim for the First Action was filed on 7 June 2011. This was followed by the Defence on 30 June 2011 and the Reply on 14 July 2011. Thereafter a number of interlocutory applications were made in respect of which costs were awarded to the defendant. These include the costs for Summons No 3850 of 2011 and Summons No 5860 of 2011. These costs were paid one and a half months and two weeks after the date of award respectively. Thereafter the plaintiff failed to pay four cost orders in relation to other interlocutory applications. In consequence the defendant sent a statutory demand to the plaintiff. These outstanding costs were finally paid on the last date for payment under the statutory demand.

The Security Summons

8 On 29 October 2012, the defendant applied by Summons No 5528 of 2012 for an order of security for costs of the First Action in the sum S$100,000 ("the Security Summons"). The Security Summons was heard by Assistant Registrar Shaun Leong ("AR Leong") on 15 January 2013 and a peremptory order was granted. The plaintiff was required to furnish security in the requested sum by means of a first class banker's guarantee failing which the plaintiff's claims would be struck out. The final date for compliance was 5 February 2013, 4 pm. The plaintiff was also ordered to pay the costs of the security summons in the sum of S$4000 inclusive of disbursements. The peremptory order was granted in the Security Summons because AR Leong took the view that the plaintiff was unable to pay the costs of the defendant if the defence was successful and because the plaintiff had shown by its conduct to be dilatory in making payment of costs orders. It is to be noted that no appeal was made against the peremptory security for costs order.

9 On 17 January 2013, the defendant's solicitors provided the plaintiff's solicitors with a form of banker's guarantee that was acceptable to them. The defendant received no response from the plaintiff. This was followed by two written requests for payment of the costs of the Security Summons on 17 January 2013 and 1 February 2013.

The EOT Summons and the Stay of Consequences Summons

10 On 1 February 2013 (some five days before the deadline under the peremptory order expired), the plaintiff took out Summons No 621 of 2013 requesting a 14-day extension of time for compliance with the peremptory order ("the EOT Summons"). No affidavit was filed in support and the EOT Summons was only served on the defendant on 4 February 2013, the day before the expiry of the deadline under the peremptory order. The hearing of the EOT Summons took place on 5 February 2013 before AR Leong. Even at this stage, no affidavit in support had been filed. The result was that the EOT Summons was dismissed.

11 On the same day, the plaintiff filed a notice of appeal, Registrar's Appeal No 39 of 2013 ("RA 39"), against the decision of AR Leong not to grant the application for an extension of time. No affidavit was filed in support of the appeal. At the same time, the plaintiff took out a separate summons to stay the consequences of the decision of the EOT Summons ("the Stay of Consequences Summons") pending RA 39. No affidavit was filed in support. An interim stay was granted by Assistant Registrar Justin Yeo and the summons was fixed for urgent hearing on 6February 2013. On the evening of 5 February 2013, the plaintiff filed the 13th Affidavit of Lee Jun Hoe ("LJH") in support of the Stay of Consequences summons. On the next day, the Stay of Consequences Summons came before Assistant Registrar Eunice Chua who granted a stay but directed the plaintiff to fix an urgent date for the hearing of RA 39.

RA 39

12 RA 39 was heard by Justice Choo Han Teck ("Choo J") on 7 February 2013. The appeal was dismissed and, as a result, the First Action was struck out with costs awarded to the defendant (See *Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd* [2013] SGHC 39 ("*Kraze 1*")). By letter dated 20 February 2013, the plaintiff requested leave to make further arguments to Choo J in respect of RA 39. The learned judge certified on 21 February 2013 that he did not wish to hear further arguments.

13 On 20 February 2013, the plaintiff had also filed for leave to appeal to the Court of Appeal against the decision of Choo J in RA 39. The application for leave to appeal was supported by the filing of the 14th affidavit of LJH. This application for leave was set down to be heard by Choo J on 14 March 2013. However, on 13 March 2013, the plaintiff withdrew the application for leave to appeal. In a letter of the same date to the defendant's solicitors, the plaintiff's solicitors stated that they had received instructions to withdraw the application for leave and to issue fresh proceedings in respect of the subject matter of the action.

The Second Action

14 On 2 May 2013, the plaintiff commenced the Second Action. Given the procedural history, it is of no surprise that the substantive disputes in the First Action and Second Action are essentially the same. The defendant entered an appearance but without prejudice to their right to strike out the proceedings as being an abuse of the process of court.

15 The current application, Summons No 2671 of 2013, was filed for an order that the Second Action be struck out (along with its supporting affidavit). On 4 June 2013, the plaintiff filed notice of change of solicitors. On 11 June 2013, the assistant registrar indicated that the plaintiff was to file a reply affidavit by 21 June 2013 followed by the defendant's final affidavit in response by 5 July 2013.

16 On 18 June 2013, the plaintiff's solicitors by letter proposed payment of S$100,000 by way of security of costs for the Second Action in return for a withdrawal of Summons No 2671 of 2013. This was rejected by the defendant on 20 June 2013.

17 In total, three affidavits were filed on behalf of the plaintiff in respect of the Second Action:

(a) The 1st affidavit of Changwoo Son ("Mr Son") (Co-Managing Director of the plaintiff and Senior Associate of SBI Global Investment Co Ltd ("SBI"));

(b) The 1st affidavit of LJH (Managing Director of the plaintiff) and 2nd affidavit of LJH.

18 For the defendant, two affidavits were filed, both from Pereira Calvin Raymond, Associate General Counsel of the defendant.

19 The court was also referred to a number of affidavits filed in respect of the First Action including the 12th, 13th and 14th affidavits of LJH. In general, these affidavits were explanations by the plaintiff as to why they failed to comply with the peremptory order in the First Action.

The failure to comply with the peremptory security for costs order in the First Action

20 Before turning to the applicable legal principles, it will be useful to set out the reasons that were proffered in the First Action for the failure to comply with the order to provide security for costs.

21 From 17 January 2013 when the defendant provided a draft form of banker's guarantee for security of costs up to and including the hearing of the summons before AR Leong on 5 February 2013, no affidavit was filed by the plaintiff setting out reasons for its delay or apparent inability to provide the security. At the hearing, all that was said was "the grounds are basic which is that our clients are unable to comply with the existing order" (see *Kraze 1* at [2]).

22 It is also noted that even when the plaintiff applied on 5 February 2013 for an order staying the consequences of the decision of AR Leong pending the appeal, no affidavit was filed in support.

23 Then in the evening of 5February 2013, the 13th Affidavit of LJH was filed in support of the Stay of Consequences Summons which sets out the following reasons for the plaintiff's difficulty:

(a) The plaintiff's board comprised four directors. Three of the directors are based in Korea and whilst LJH was a Singapore Permanent Resident he was frequently travelling out of Singapore;

(b) The plaintiff had engaged the services of a reputable Singapore law firm and was committed to providing security for costs in the sum of S$100,000;

(c) The difficulty for a large group of companies such as the Kraze Group was that time is required for transfer and approval of funds. The remittance had to be approved by Kraze

Entertainment Co Ltd as well as Korea's central bank; and

(d) The plaintiff was in the process of getting funds from its majority shareholder, Kraze Entertainment Co Ltd in Korea.

24 On 20 February 2013, the 14th affidavit of LJH was filed in support of the plaintiff's application for leave to appeal against Choo J's dismissal of RA 39. In this 14th affidavit, a range of reasons was offered to explain the non-compliance:

(a) That despite having been informed by the plaintiff's solicitors of the consequences of non-compliance and the receipt of several reminders from the plaintiff's solicitors of the importance of complying with the order lest the action be struck out, LJH did not "properly appreciate what was at stake" and thought that "there was sufficient time for the plaintiff to obtain a banker's guarantee";

(b) LJH was substantially preoccupied for the whole month of January 2013 preparing for an audit of the Kraze Group of companies in South Korea which was scheduled to commence on 12 February 2013;

(c) That LJH is a Korean citizen familiar with the Korean legal system but is not familiar with Singapore legal system. The point was also made that LJH did not fully appreciate the gravity of the Singapore order because the Korean system was different on security for costs midway through proceedings; and

(d) LJH started making arrangements on 29 January 2013 for funds to be remitted by Kraze Entertainment Co Ltd but that the process took time for approval by the Board and Korea Central Bank.

It is also noted that, in the 14th affidavit, LJH unreservedly apologised to the court for not appreciating the gravity of the order.

25 Thereafter, the plaintiff made the decision to withdraw its application for leave to appeal to the Court of Appeal and instead it decided to commence fresh proceedings against the defendant. In the first affidavit filed by LJH on 18 June 2013 in the Second Action to resist the strike out application, the failure to comply with the peremptory security for costs order in the First Action was explained as follows:

(a) At the material time, LJH was preoccupied with the audit being performed on the entire Kraze Group in Korea.

(b) The audit was a substantial undertaking due to the various businesses and different companies within the Group

(c) It was necessary for LJH to be in Korea to brief, inform and assist the accounting firms involved in the audit which was envisaged to involve financial reports up to March 2013.

26 Apart from the above explanation for the failure to provide the security for costs, LJH's 1st affidavit in the Second Action also asserts that the plaintiff is now ready able and willing to provide security for costs (for the Second Action) in the sum of S$100,000. Indeed, LJH asked the court to note that by a letter dated 18 February 2013, the plaintiff's former solicitors had informed the

defendant's solicitors that the security of S$100,000 had been placed with the plaintiff's former solicitors who were, therefore, in a position to provide a suitable undertaking by way of security of costs. Other points drawn to the court's attention to resist the application for striking out the Second Action included the fact that the plaintiff had paid up all costs owing under the First Action including the sum of S$35,855.21 due to the defendant in respect of the successful striking out of the First Action. That sum, however, it is to be noted, was only paid on 18 June 2013 – the same date as the swearing of the 1st affidavit by LJH in the Second Action. Finally, the plaintiff again apologised to the court for the failure to comply with AR Leong's "unless order" in the First Action and added that a shareholder of the company, SBI, has now given their full support to the plaintiff and that the support extends as far as causing a transfer of a sum in excess of $200,000, thereby enabling the plaintiff to make the offer to the defendant to provide security for costs in the Second Action. For good measure, the plaintiff also notes that two new directors from SBI had been designated to sit on the plaintiff's board of directors.

The issues in this application

27 The issue before the court is whether the Second Action should be struck out as an abuse of process given that the cause of action is the same as the First Action and is brought against the same parties. This is not a case concerning issues of *res judicata* or the limitation period. The issue is one of abuse of process under O 18 r 19(6) of the ROC and the court's inherent jurisdiction.

Preliminary issue – The relevance of the decision to withdraw the application for leave to appeal and time bar

28 Before discussing the relevant legal principles pertaining to the striking out, I discuss a preliminary point that arose in this application to strike out the Second Action. This concerns the reason why the plaintiff chose to withdraw the application for leave to appeal against Choo J's decision to dismiss RA 39 in the First Action. The consequence of that decision was that any hope of reviving the First Action was gone for good.

29 In the plaintiff's written submissions to resist the current striking out application, it is stated under the heading "Possible Concession by the defendant" that "concessions as to the plaintiff's ability to institute fresh proceedings appear to be on the face of the record". This record referred to the decision of Choo J in RA 39. In *Kraze 1* at [5], Choo J stated that:

> Mr Davinder [counsel for the defendant] first objected to the use of this affidavit to support the application for an extension of time when it was filed in support of a separate application for a stay of execution even though there was no execution in this case to be stayed at all – the failure to comply with unless order, Mr Davinder submitted, merely meant that the plaintiff's case was struck out. It was contended that the action was not time-barred; the plaintiff could file another suit or apply to restore the action.

30 In the present proceedings to strike out the Second Action, the court has been invited by the plaintiff to bear this point in mind when "adjudicating upon the substantive issues of this application". The point has been borne in mind and I find little merit (if any) in the suggestion that counsel for the defendant had indicated that the defendant would not object to fresh proceedings. After perusal of the submissions of the plaintiff, the defendant and the bundles of affidavits, it is clear that Mr Davinder Singh was merely confirming that the claim was not yet time-barred and that neither the defendant nor Choo J had made any comment on the substantive merits of starting a fresh action. Indeed, in the circumstances, it would be most surprising if after striking out the First Action, the defendant would encourage the issuance of fresh proceedings. The decision to withdraw the

application for leave to appeal against the decision of Choo J in RA 39 was a matter for the plaintiff alone. Even taking the plaintiff's case at its highest, the only possible legal argument the plaintiff could mount was an issue of estoppel (as against the defendant). This argument was, however, not canvassed by counsel, and perhaps rightly so as likewise I found little merit in it. Therefore, I found this point irrelevant in coming to my decision.

The Law

31 The leading case in Singapore is the decision of the Court of Appeal in *Changhe International Investments Pte Ltd (formerly known as Druidstone Pte Ltd) v Dexia BIL Asia Singapore Ltd (formerly known as Banque Internationale A Luxembourg BIL (Asia) Ltd*) [2005] 3 SLR(R) 344 ("*Changhe CA*"). This was a case where the plaintiff's suit was dismissed for breach of an "unless order" made with respect to the filing of a list of documents. No appeal was made against the decision to dismiss the suit nor was there any appeal for an extension of time for compliance. Instead, some three years later, Changhe, the plaintiff, commenced the second suit raising the same causes of action. Dexia, the defendant, applied to strike out the statement of claim on the grounds that it was an abuse of process of the court and/or was scandalous, frivolous or vexatious and/or disclosed no reasonable cause of action. The application was dismissed at first instance, and Dexia appealed.

32 In granting the application (see *Changhe International Investments Pte Ltd (formerly known as Druidstone Pte Ltd) v Dexia BIL Asia Singapore Ltd (formerly known as Banque Internationale A Luxembourg BIL (Asia) Ltd* [2005] 1 SLR(R) 598), Tan Lee Meng J, whilst accepting that the decision as to whether to order a strike out of the second suit was "at the discretion of the court", noted that caution should be taken in exercising this discretion, especially in those cases where the first suit had been struck out because of a breach of a peremptory order. After all, peremptory orders are made to be complied with and should not be ignored. The learned judge was right to make the point that when deciding whether the discretion should be exercised in favour of permitting the second action to proceed, the court should consider whether any satisfactory explanation had been given for the failure to comply with the peremptory order in the first suit. Tan J noted that the plaintiff had failed to give any satisfactory explanation in both the first and second suits for the failure to comply. Indeed, in the second suit, the plaintiff again failed to file an affidavit (in time) so as to explain the reasons for the earlier non-compliance forcing counsel to rely on an earlier affidavit filed 3 years ago in respect of the first suit. That affidavit was filed for the earlier action and in any case offered no satisfactory explanation. This led Tan J to make the point that the lack of diligence of the plaintiff in the first suit was equally evident in the second suit.

33 Changhe then appealed to the Court of Appeal. Delivering judgment for the Court of Appeal, Judith Prakash J noted in *Changhe CA* at [6] that judicial attitudes regarding the exercise of the discretion to strike out for abuse of process (when a second suit is brought within the limitation period for the same cause of action) had changed over the years. At one time, the general view (at least as expressed in dicta in *Birkett v James* [1978] AC 297 and *Tolley v Morris* [1979] 1 WLR 592) was to doubt that "a person who started an action within the limitation period was liable to have it struck out as constituting an abuse of process of the court for the sole reason that a previous suit instituted by him in respect of the same cause of action was struck out on the ground that his disobedience to court's orders amounted to contumelious default" (see *Changhe CA* at [6] per Prakash J). However, it was also noted that there was a shift of judicial approach in England said to have originated from the English Court of Appeal decisions in *Samuels v Linzi Dresses Ltd* [1981] QB 115 ("*Samuels*") and *Janov v Morris* [1981] 1 WLR 1389 ("*Janov*").

3 4 *Janov* was a similar case where a peremptory order had been made and not complied with, leading to the action being struck out. A second action was then started. Dunn LJ at p 1395 stated

that he preferred the view that "the court should be cautious in allowing the Second Action to continue and should have due regard to the necessity of maintaining the principle that orders are made to be complied with and not to be ignored."

35 The Singapore Court of Appeal noted that *Samuels* and *Janov* had stood as good law for many years and had been cited and followed in several Singapore cases including *Syed Mohamed Abdul Muthaliff v Arjan Bhishan Chotrani* [1999] 1 SLR(R) 361. As a result, the Court of Appeal at [11] was minded to observe that:

> Thus, it is established law that where a litigant, whose First Action has been struck out for failure to comply with a peremptory order, brings a second suit based on the same cause of action, that the second suit may be struck out as being an abuse of process of the court unless the litigant can give a proper explanation to establish that his failure to comply with the peremptory order was not contumelious.

36 In this regard, Prakash J noted the general principle that disobedience to a peremptory order would generally amount to contumelious conduct. In order to discharge the burden, Prakash J held that the litigant would have to show that its disobedience to the "unless order" was not contumelious "in that it was not intentional and arose from an extraneous circumstance over which the litigant had no control." Indeed, the Court of Appeal went so far as to say that the cases had established that the mere fact that the contumelious conduct was that of the litigant's solicitor is not necessarily a sufficient explanation since ordinarily the court should not distinguish between the litigant and his advisers.

37 On the actual facts in *Changhe CA*, the Court of Appeal found that the litigant had not discharged the burden of adequately explaining what happened and why it was not the litigant's own fault. It is instructive to examine briefly the reasons for this finding.

38 First, the litigant did not file a fresh affidavit in the second action from any individual who had full knowledge of the first action and the interaction between the litigant and its first set of solicitors in that action. This was despite the fact that the litigant had asked for and obtained extension of time to file an affidavit to resist the striking out of the Second Action. Instead, the litigant chose to rely on an "old" affidavit sworn in the first suit from one Victor Boey. The problem, however, was that whilst the latter was a director of the litigant, he did not have any personal knowledge of the transactions that gave rise to the claim. Furthermore, the Court of Appeal observed that Mr Boey did not have any personal involvement in the conduct of the first suit and that there was no evidence of the advice given to the litigant by its legal advisers with regard to the conduct of the proceedings. The first suit appeared to have been driven by Chinese officers – but there was no explanation as to why with "modern communications" the "unless order" to provide further and better particulars could not have been complied with. Prakash J held (at [29]) that "it was not enough to blame solicitors. Changhe had to explain why it did not have someone on the ground to follow up on the progress of the action."

39 Prakash J also noted that there was no hint in the old affidavit filed in the first suit that the litigant intended to obey the order in the future or that it had made any positive attempt to comply with the "unless order". Neither was there any explanation in the second suit as to why so much time (*viz*, three years) had elapsed between the striking out of the first action and the launch of the fresh proceedings. This was thought to be important as the litigant had to show that no further disobedience of court orders would occur. The litigant's failure to explain what had happened had an impact on the sincerity in pursuing the second action and "did not inspire confidence" that if the second action was allowed to proceed, the orders of the court would be promptly complied with.

4 0 *Changhe CA*, therefore, stands as authority for the proposition set out in the headnote that where a litigant, whose first action has been struck out for failure to comply with a peremptory order, brings a second action based on the same cause of action, that second action may be struck out as an abuse of process unless the litigant:

(a) could give a proper explanation to establish that his failure to comply was not contumelious (disobedience to a peremptory order would generally amount to contumelious conduct); and

(b) could show that no further disobedience of court orders would take place.

The discretion of the court

41 A question remains as to whether the court retains any discretion not to strike out a second action in those cases where the litigant is able to demonstrate that future breaches will not arise in the second action, but has been unable to provide a proper or full explanation as to why it was unable to comply with the peremptory order in the first action. In *Changhe CA*, the Court of Appeal referred to the "discretion to strike out" at [6]. Then, at [13], the Court of Appeal asked the question:

> has the appellant discharged the burden of establishing that it has not treated the court with *intolerable* contumely? [emphasis added]

Further, the Court of Appeal [at (32)] accepted that on occasions, the "circumstances leading to the making of the 'unless' order can be relevant" if only to "a certain extent".

42 The above suggests that while the main consideration is whether the litigant has been able to give a satisfactory explanation as to why the peremptory order was not complied with, there may be subsidiary considerations to be taken into account of as well. Notably, *Changhe CA* was a case where the litigant did not even bother to file a fresh affidavit in the second suit from a person with direct knowledge of what had transpired in the First Action. The litigant in *Changhe CA* was described as having a short but "instructive history of procedural default on its part" (in the first action) and the Court of Appeal was not even confident that if the second action was allowed to proceed, that the orders of the court would be promptly complied with.

43 There is little doubt that disobedience of any peremptory court order is a serious matter which will rightly attract a stern response from the court both at the stage of determining the appropriate sanction (stay, costs, strike out etc) for non-compliance and at the point when the court is deciding the issue as to whether fresh proceedings for the same cause of action can be allowed to proceed. Nevertheless, it seems implicit in *Changhe CA* that the courts will recognise that there are degrees of contumelious behaviour. It stands to reason that the more serious the breach, the more careful the court in the second action will be in deciding whether (i) a satisfactory explanation has been given for the non-compliance (breach); and (ii) whether it should exercise its discretion to strike out the second action (including whether to exercise the residual discretion in favour of the plaintiff).

The decision of the Court of Appeal in Mitora Pte Ltd v Agritrade International (Pte) Ltd [2013] 3 SLR 1179 ("Mitora")

44 In deciding whether the court retains any residual discretion not to strike out the action (despite the fact that contumelious behaviour is found on the part of the plaintiff in the first action), reference may also be made to the very recent decision of the Court of Appeal in *Mitora*. The action

concerned a claim for monies said to be owed under a consultant agreement. In that case, on 15 June 2011, the AR granted an "unless order" which required the plaintiff to comply with an order for discovery of certain classes of documents made earlier on 26 May 2011. On 20 June 2011, the plaintiff filed the first supplementary list of documents. A summons was also taken out seeking an extension of time and a variation of the discovery order so that certain documents did not have to be disclosed. This resulted in a "final extension of time" to 4 July 2011 (but with no variation). This was the second "unless order". On the same day that the second "unless order" was obtained, the plaintiff filed a second supplementary list of documents but failed to disclose any more documents until after the final deadline of 4 July 2011 had elapsed. Subsequently, the plaintiff filed a third and fourth supplementary lists of documents (out of time) and also took out a summons seeking an extension of time for compliance with the "unless orders".

45 The request for time extension was refused by the AR and as a consequence the statement of claim was struck out. The third and fourth supplementary lists were struck out as being an abuse of process. The plaintiff appealed against the AR's decision. At the first hearing before the judge on 4 April 2012, two categories of documents remained ostensibly undisclosed: Senamas's income tax statements and financial statements. The plaintiff was given time by the judge to provide these documents as a final opportunity to redeem itself. In fact, those income tax statements and financial statements had already been included in the bundle of documents submitted for the 4 April 2012 hearing before the judge. Thereafter, the plaintiff filed an affidavit setting out the income tax statements together with letters certifying translation from Japanese to English. At the subsequent hearing before the judge, it was clarified that the financial statements had already been provided but could not be filed as a supplementary list of documents when the plaintiff's new solicitors had taken over. As a result, the judge granted a second adjournment to 23 May 2012 for the plaintiff to file all the documents. This was done by 18 May 2012. However, at the third hearing before the judge, the defendant raised two "new arguments" to the effect that the plaintiff had not complied in full because it had only disclosed Senamas bank passbooks (without monthly bank statements) and because the passbook only covered the period from March 2007 to October 2008 as opposed to April 2005 to April 2010 as ordered. The result was that on 25 June 2012, the judge dismissed the appeals against the AR's decision to strike out the statement of claim. The judge took the view that the plaintiff's excuses of inadvertence and misunderstanding were simply too "feeble" to justify the repeated failure to comply. The plaintiff then appealed.

46 On appeal, V K Rajah JA in *Mitora* underscored the fact that the plaintiff did substantively comply with all its discovery obligations by 18 May 2012 and that the new solicitors had taken great pains to confirm with solicitors for the defendant that the discovery obligations had been complied with. The Court of Appeal also took note of the fact (amongst other points) that it was only "late in the day" at the third hearing before the judge that the defendant introduced the new contention that the passbooks did not suffice as monthly bank statements. In the view of the Court of Appeal, the late employment of the inadequate disclosure objection functioned "intentionally or otherwise as an ambush" on the plaintiff. In deciding the consequences of a breach of an "unless order", the Court of Appeal first stressed that whilst a breach will trigger the specified adverse consequences, the defaulting party might be able to avoid those consequences if it could demonstrate that the breach had not been intentional and contumelious. After all, it was established law that an important factor (sometimes described as the crux of the issue) was whether the defaulting party had made positive efforts to comply but was prevented from doing so by extraneous circumstances (see *Syed Mohamed Abdul Muthaliff and anor v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 at [14]).

47 However, in addition, the Court of Appeal was quick to add that even if the default was intentional and contumelious, this was not the end of the judicial inquiry. The court still had to "determine what sanction should be imposed as a result." This is significant because it suggested that

just because there had been an intentional and contumelious breach of an "unless order", it did not necessarily follow that the only sanction must be a striking out. As was said by Parker LJ in *Re Jokai Tea Holdings* [1992] 1 WLR 1196, there must be appropriate degrees of consequences. Some intentional breaches are more serious than others. The question in that case was essentially whether the breach (failure to comply with a request for further and better particulars) of the defendant was "so heinous" as to support the striking out of the defence. This led the Court of Appeal to confirm that the "judicial philosophy espoused in these cases clearly reveals a tendency to be guided by considerations of proportionality in assessing breach of unless orders." On the facts, the Court of Appeal found that it was not proportionate for the plaintiff's statement of claim in *Mitora* to be struck out owing to the earlier breaches of the "unless orders".

The applicability of Mitora

48 Admittedly, the *Mitora* decision did not deal directly with a case where an application is made to strike out a Second Action on the grounds that it is the same as an earlier action which had been struck out for breach of an "unless order". It was concerned with the question: what is the appropriate sanction for breach of an "unless order" in the very first action itself? The question that therefore arises in the present case can be put as follows: To what extent does the proportionality principle referred to in *Mitora* apply in an action to strike out a statement of claim as being an abuse of process on the ground that it is based on the same cause of action struck out in earlier proceedings for breach of a peremptory order?

49 Applying the earlier decision of the Court of Appeal in *Changhe CA*, the second action would not be struck out if the plaintiff was able to provide a proper explanation so as to establish that the failure to comply with the peremptory order was not intentional and contumelious. In addition, the plaintiff would be required to show that further disobedience of court orders would not occur. However, returning to the question above, what if the plaintiff was able to demonstrate that no further disobedience of court orders was likely in the fresh suit without being able to demonstrate that the failure to comply with the order in the first action was because he was prevented from so doing because of extraneous reasons? Does the court in the second action enjoy any discretion to allow the second action to continue notwithstanding the failure of the plaintiff to demonstrate that the breach in the first action was rooted in external circumstances beyond its control? The defendant in the present case has urged the court to take a stricter view of *Changhe CA* in that the plaintiff must demonstrate that the failure to comply in the First Action was not contumelious because the plaintiff was unable to comply because of extraneous circumstances. In contrast, the plaintiff urged the court to take the view that *Mitora* has mitigated the full rigor of *Changhe CA* by its underscoring of the principle of proportionality.

50 In my view, the decisions in *Changhe CA* and *Mitora* are not as far apart as they first appear, and that the principle of proportionality may apply in both cases. After all, in *Changhe CA* it is instructive to note that Prakash J stated at [13] that:

> To decide whether there has been an abuse of process and whether the appellant has discharged the burden of establishing that it has not treated the court with *intolerable* contumely, it is necessary to examine in some detail *the history of both sets of proceedings*. [emphasis added]

51 Two points arise. First, *Changhe CA* recognises that there are degrees of contumelious behaviour (as does *Mitora*). Second, the courts must examine with care the plaintiff's conduct in both sets of proceedings.

52 Reading the two cases together, it follows that even if the plaintiff fails to demonstrate that it

was prevented from complying in the First Action because of extraneous circumstances (over which he had no control) it does not mean that the court must inevitably strike the Second Action out as being an abuse of process. In *Changhe CA*, the plaintiff was unable to give a proper explanation for the non-compliance in the first action and had not even filed a fresh affidavit in the second action to explain what had occurred in the first action. It was no wonder that the Court of Appeal stated at [29] that the failure of Changhe to explain matters had a bearing on its sincerity in pursuing the second action – it did not inspire confidence that if the second action was allowed to proceed, that the orders of the court would be promptly complied with.

53 Undoubtedly, the Court of Appeal did at [34] state that the "court's main concern is why such an order had not been complied with" and that "whether the second action should be struck out depends entirely on the explanation for Changhe's conduct in [the earlier suit] and its assurance to the court that its conduct in that suit would not be repeated in the present suit". Any breach of an "unless order" is serious. Nevertheless, there may still be cases where it will not be appropriate to strike out a second action even though the plaintiff was unable to demonstrate that an external circumsta nce prevented compliance in the first action. No doubt the court in the second action will be very careful before coming to such a view and exercising its discretion, but as a matter of principle there seems to be no good reason why such a residual discretion, in the name of fairness and proportionality, should not exist.

54 Therefore, to answer the question posed above directly, I find that as a matter of law, the court retains the discretion not to strike out the second action even if the plaintiff has been unable to provide a proper explanation for the failure to comply in the earlier action.

Summary of the applicable law

55 Applying both *Changhe CA* and *Mitora*, the following summarises briefly the propositions of law which have guided me in coming to my decision:

(a) Where a litigant, whose first action has been struck out for failure to comply with a peremptory order, brings a second action based on the same cause of action, that the second action may be struck out as being an abuse of process of the court unless the litigant can give a proper explanation to establish that his failure to comply with the peremptory order was not contumelious. What amounts to a proper explanation depends on each case, but in general, this will involve showing that some extraneous circumstance prevented or at least hindered compliance.

(b) If the litigant can give a proper explanation, the litigant must further show that no further disobedience of court orders will take place before the court will exercise any discretion not to strike out the second action.

(c) Without any proper explanation, disobedience to a peremptory order would generally amount to contumelious conduct.

(d) Even without a proper explanation, the court retains the residual discretion not to strike out the Second Action for an abuse of process. *Mitora* suggests that just because there had been an intentional and contumelious breach of an "unless order", it did not necessarily follow that the only sanction must be a striking out because there are degrees of contumelious behaviour. Similarly, *Changhe CA* recognises that there are degrees of contumelious conduct and that the court retains a discretion as to whether to strike out.

(e) An evaluation as to how serious the contumelious behaviour was will depend on all relevant considerations including the procedural history of the suit. In cases where the contumelious conduct of the litigant lies at the bottom of the scale (such as where the plaintiff is able to demonstrate that whilst he was not prevented by extraneous circumstances from complying, there were substantial problems which made it objectively hard for him to promptly comply) the court may in its discretion, taking into account other relevant factors such as the apparent strength of the litigant's case and the degree of confidence it has that breaches will not occur in the fresh suit, decide to allow the Second Action to continue.

Application of the law

Has the plaintiff been able to provide a satisfactory explanation for the non-compliance in the First Action?

56 The first point to consider is whether a satisfactory explanation has been provided for non-compliance of the peremptory order in the First Action. In the present case, the "unless order" was imposed by the AR on 15 January 2013. That order was to furnish security for costs in the sum of S$100,000 within a period of 21 days failing which plaintiff's claim was to be struck out. It was non-compliance with this order that eventually led to the action being struck out. In fact in *Kraze 1*, Choo J (in dismissing an appeal for time extension largely because no explanation had been provided for the non-compliance) commented that he was mindful that the "unless order" was made in respect of an order for security for costs and that there was no record of intentional breaches other than non-compliance with the order for security. Nevertheless, the learned judge quite rightly added that since the plaintiff did not appeal, the order was one which had to be complied with. The failure to provide a proper explanation for the non-compliance led to a rejection of the attempt to obtain an extension of time.

57 There is no doubt that the plaintiff in the present case was fully aware of the "unless order" and that its then solicitors had reminded them several times of the approaching deadline and the importance of compliance. This is not a case where there had been some miscommunication as a result of which the plaintiff was unaware that security had not been provided.

58 It will be recalled that the first attempt made by the plaintiff to explain the failure to comply was set out in the 13th affidavit of LJH filed on 5 February 2013. The second attempt was made on 20 February 2013 by means of the 14th affidavit of LJH filed in support of the plaintiff's application for leave to appeal against Choo J's dismissal of RA 39. The third attempt to explain was by means of the 1st affidavit filed by LJH on 18 June 2013 by way of resisting the present proceedings to strike out the Second Action for abuse of process.

59 Thereafter, the plaintiff made the decision to withdraw its application for leave to appeal to the Court of Appeal and instead commenced fresh proceedings against the defendant. In the 1st affidavit filed by LJH on 18 June 2013 in the Second Action to resist the strike out application, the failure to comply with the peremptory security for costs order in the First Action was explained as follows:

(a) at the material time, LJH was preoccupied with the audit being performed on the entire Kraze Group in Korea;

(b) the audit was a substantial undertaking due to the various businesses and different companies within the group; and

(c) it was necessary for LJH to be in Korea to brief, inform and assist the accounting firms involved in the audit which was envisaged to involve financial reports up to March 2013.

60 As I had observed at [26] above, LJH's first affidavit in the Second Action also asserted that the plaintiff is now ready able and willing to provide security for costs (for the Second Action) in the sum of S$100,000. Indeed, LJH had asked the court to note that by letter dated 18 February 2013, the plaintiff's former solicitors had informed the defendant's solicitors that the security of S$100,000 had been placed with the plaintiff's former solicitors who were, therefore, in a position to provide a suitable undertaking by way of security of costs. Other points drawn to the court's attention to resist the application for strike out (the Second Action) include the fact that the plaintiff has paid up all costs owing under the First Action including the sum of S$35,855.21 due to the defendant in respect of the successful striking out of the First Action. That sum however, it is to be noted, was only paid on 18 June 2013 – the date of the swearing of the first affidavit by LJH in the Second Action. Finally, the plaintiff has again apologised to the court for the failure to comply with AR Leong's "unless order" in the First Action and adds that a shareholder of the company, SBI, has given their full support to the plaintiff. That support extends as far as causing a transfer of a sum in excess of $200,000 thereby enabling the plaintiff to make an offer to the defendant to provide security for costs in the Second Action. For good measure, the plaintiff also notes that two new directors from SBI had been designated to sit on the plaintiff's Board.

61 On the other hand, it is noted that LJH in the 1st affidavit filed in the Second Action refers to a successful business in Singapore called Kraze Burger. The latter is part of the Kraze Group of companies and it is stated that the burger outlet (which is at Marina Bay Sands) in Singapore enjoys an annual revenue of approximately S$3 million. While Kraze Burger is a different business within the Kraze Group and that Kraze Burger is not under a duty as such to assist the plaintiff in the present case with funds, it is nevertheless hard to understand why in all the circumstances the plaintiff was unable to provide security in the sum of S$100,000. No details have been provided as to whether the audit in Korea was especially onerous. Accepting that LJH had to be in Korea to assist in the audit does not explain why he could not have appointed personnel to oversee the Singapore proceedings with greater care and attention. After all, as LJH states in the 1st affidavit in the Second Action, the plaintiff had already "invested some S$10 million" towards commencing nightclub operations at Marina Bay Sands at the time when the alleged wrongful termination by the defendant took place. Given the substantial nature of the claim, it is rather surprising that such little care and attention was paid to compliance with the security for costs order. The conclusion that the court is compelled to arrive at is that the plaintiff has not been able to provide a proper or satisfactory explanation for the non-compliance with the peremptory security for costs order. Indeed, the evidence establishes that the plaintiff fully knew of the order and was well aware that the deadline was fast approaching. If LJH chose to spend all his time attending to the audit, that is his decision and one which he must have consciously made knowing full well of the existence of the Singapore security for costs order. At the very least, the plaintiff acted with gross and reckless disregard to the consequences of non-compliance. For this reason, I was not convinced that the plaintiff has proved that it was prevented by extraneous circumstances from complying with the peremptory security for costs order. Nor has he demonstrated that there were substantial problems that were making it difficult for him to comply.

Were there any other considerations to suggest that the plaintiff's breach of the peremptory order was not so serious such that the discretion should be exercised in its favour?

62 Apart from the reasons proffered above, there are other considerations the plaintiff raised in trying to persuade the court that the action should not be struck out.

Whether the peremptory security for costs order in the First Action was justified

Whether the peremptory security for costs order in the First Action was justified

63 In the First Action, the peremptory security for costs order was made by the AR on 15 January 2013. There was no appeal against the making of the order. Instead, an application was heard on the very day when time for compliance was to expire, for an extension of time for providing security. This was refused by the AR. An appeal against the refusal before Choo J was dismissed (see [12] above). In dismissing the appeal, the learned judge observed at [3] that "it is indeed harsh for an action to be struck out without trial, especially when it is struck out for failing to comply with an interlocutory order." The learned judge at [7] was mindful that the "unless order" "was made in respect of an order for security of costs" and that "there was no record of intentional breaches (other than not paying costs) so it seemed to me that to have the action struck out for non-compliance with the order was probably too harsh in the first place." Nonetheless, the learned judge commented that the plaintiff did not appeal and so had to obey the order. No reasons were offered for the failure to comply and there was "virtually no basis for the AR to grant it the indulgence that it sought."

64 The important point is that even though it may be thought that the making of the "unless order" in the First Action was harsh, the appeal heard by Choo J was not about the merits of the original order but on whether there was any basis on which a time extension could be granted when no reasons at all had been proffered to explain the delay. Whatever the merits of the original order, the order had been made and had not been appealed. For that reason, Choo J made the comment at [7] that:

> if the order of AR Leong dismissing the … application for an extension of time were to be set aside, litigants will be encouraged to believe that if they have a big claim they can choose which orders of court they will obey and how they would do so. If that were justice to the plaintiff, it must surely be an injustice to the defendant.

65 It is important to emphasise that it is not for this court to decide afresh whether the "unless order" (that was breached) was correctly imposed in the First Action. That would clearly be wrong: if the "unless order" was imposed and was not successfully appealed, the court in the Second Action cannot review the correctness of the decision to make the first order. The decision of the court in the Second Action on the question of abuse of process cannot take the form of a "back-door appeal" on the question as to whether the "unless order" was properly made in the First Action.

66 However, that does not mean that the court in the Second Action can never take account of the reason as to why the "unless order" was imposed in the First Action. The court may do so in order to indirectly engage in an assessment of the relative seriousness of the breach. The circumstances leading up to the making of the "unless order" may be helpful in assessing the conduct of the litigant and may be relevant for the purposes of evaluating how contumelious the litigant's behaviour was in the First Action and whether he is likely to comply promptly in the Second Action.

Has the plaintiff demonstrated that it will comply with court orders if allowed to continue with the Second Action?

67 Whilst the plaintiff has not been able to demonstrate that the disobedience with the court's order in the First Action was due to an extraneous circumstance, it has, as noted earlier, already proffered its apologies, paid up all outstanding costs (for the First Action) and offered reasons as to why it is now in a better position to provide security for costs should it be allowed to continue with the Second Action.

68 In the 1st Affidavit of LJH filed in the Second Action, it is stated that the plaintiff remains ready able and willing to furnish security of S$100,000. As noted already, LJH also explained that a

shareholder, SBI, has transferred a sum in excess of S$200,000 thereby making it possible for the plaintiff to provide security for costs. Indeed, the court notes in this regard the affidavit filed by Mr Son in support of the plaintiff in the Second Action. Mr Son who is now the "Co-Managing Director of the plaintiff and a Senior Associate of SBI", states that "SBI is now committed to this litigation and we feel that this fresh financial support will cure any future problems of default in relation to both timelines and cost orders." Further, unlike the plaintiff in *Changhe CA*, the plaintiff in the present case has not waited for many years before launching the fresh action.

69 Whilst these are helpful steps, this court is bound to observe that the actual costs of the action (if allowed to proceed) may well be far in excess of S$200,000. The relatively slow payment of the final cost orders in the First Action (18 June 2013) is also a cause for some concern as is the fact that in the First Action there was a history of slow payment of costs. Indeed, at one stage, the defendant even sent in a statutory demand (threatening winding-up) for payment. The failure of the plaintiff to file affidavits in support of their applications is also a matter of concern. Even if the plaintiff has made repeated assurances of its intention to comply in the future, the dilatory conduct of the plaintiff in the First Action and its inability to provide a satisfactory explanation for its non-compliance in the First Action remains a cause for concern. The main new factor is the involvement of SBI and the promise of injection of new or fresh funds and support. With this alone, I was not convinced that the plaintiff would comply promptly with future court orders.

Conclusion

70 This case has involved an evaluation of the law as set out in the decisions of the Court of Appeal in *Changhe CA* and *Mitora*. Pertaining to these two cases, the specific question of law before this court was whether the court retained a residual discretion to allow a Second Action to proceed even though no proper or satisfactory explanation has been provided for the earlier failure to comply with a peremptory order.

71 As discussed above, this court is of the view that the *Changhe CA* decision does support a residual discretion to allow a second action to proceed even though the plaintiff is unable to show that the non-compliance arose because of an extraneous circumstance over which he had no control. For example, where the plaintiff is able to show that his failure to comply was due to momentary carelessness and that the plaintiff has, without delay, taken all possible steps to rectify the error, the court may be persuaded to exercise the discretion in his favour if it is of the overall view that the plaintiff is unlikely to repeat the error and that the plaintiff will obey orders in the future. In such cases, the fact that there was no history of non-compliance or dilatory conduct in the first action may also shed important light on the seriousness of the breach in that action. On the other hand, where the facts show a pattern of late payment of cost orders leading to statutory demands and grant of security of costs coupled with a puzzling lack of affidavits to explain the delay (especially when seeking an extension of time), the plaintiff cannot expect the residual discretion to be easily exercised in his favour.

72 In the present case, whilst the court notes the assurance of interest and control by SBI, the fact remains that the breach in the First Action was serious bearing in mind the history of late payment of costs and the dilatory conduct in the response to the expiration of time and the failure to file affidavits in a timely manner explaining the cause of the delay. Indeed, the court is reminded that, in the 14th affidavit of LJH filed in the First Action, it was stated that the plaintiff had started making arrangements on 29 January 2013 for its "majority shareholder, Kraze Entertainment Co Ltd, to remit the necessary funds to Singapore" and that it was only able to do so on 14 February 2013. Whilst the plaintiff may well need some time to secure funding, the change of emphasis from one shareholder to another (SBI) does not inspire confidence although it does at least indicate that some steps have

been taken – albeit very late in the day. Whilst the exercise of the residual discretion remains one of balance and judgment, this court stresses that the discretion is only residual in nature. The court is not convinced that this is an appropriate case where the discretion should be exercised in favour of the plaintiff.

73 For these reasons, the application is granted with costs awarded to the defendant to be agreed or otherwise taxed.

Copyright © Government of Singapore.