SHOW CAUSE NOTICE UNDER THE PAIN OF PENAL SANCTIONS – THE PARADOX OF ORDER 52 RULE 2B FINALLY RESOLVED

CASE HIGHLIGHT

Civil Litigation

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The uncertainty of whether a formal notice to show cause is a *sine qua non* to an application for leave to issue committal proceedings against a putative contemnor has recently been put to rest by the Federal Court Tan Poh Lee v Tan Boon Thien [2022] 2 CLJ 719.

The requirement to show cause, in the language used in Order 52 rule 2B of the Rules of Court 2012 (ROC 2012), had swayed the courts to treat the *formal* show cause notice as a mandatory pre-condition to the filing of the application for leave to institute committal proceedings against a proposed contemnor.

In the past, the Court of Appeal in Uttayakumar Ponnusamy v Abdul Wahab bin Kassim & Ors [2020] 2 MLJ 259 and Dato' Sri Andrew Kam Tai Yeow v Tan Sri Dato' Kam Woon Wah & Ors [2021] 7 MLJ 874 have held that a prior formal notice is mandatory before an application for leave to commit is filed. The Federal Court in Peguam Negara v Mkini Dotcom Sdn Bhd & Anor [2020] 7 CLJ 173 held that the lack of formal notice is not fatal. In the latter case, rule 2B was not a focal issue given that the proposed contemnor was aware of the Attorney General's application.

The requirement of the formal notice to show cause was a core issue that arose for determination for the Federal Court in Tan Poh Lee.

Relevant Facts

The Respondents in this case had filed applications at the Court of Appeal to stay the decision of the High Court appointing an administrator *pendente lite* after the High Court had dismissed their stay applications at the High Court.

An order for stay in the form of interim preservation of assets was allowed by the Court of Appeal pending the disposal of the appeal. The Respondents, after the interim preservation order was made, instituted proceedings in Singapore seeking reliefs that contravened the interim preservation order.

The Appellants applied *ex-parte* for leave to issue committal proceedings against the Respondent under Order 52 of the ROC 2012 whereby leave was granted by the Court of Appeal. The Appellant then applied to set aside the leave order.

The central issue argued before the Court of Appeal was whether the leave order was invalid for failure to serve on the Respondent a formal notice to show cause as required under Order 52 rule 2B of the ROC 2012.

The Court of Appeal ruled that by reason of the use of the words *shall* in rule 2B, it was *mandatory* for an applicant to issue a formal notice to show cause to the proposed contemnor, giving him sufficient time and opportunity to answer the show cause before an application for leave to commence committal proceedings can be made. The Court of Appeal therefore set aside the leave order. The Appellant moved the Federal Court to determine a point of law on the interpretation and effect of rule 2B.

Decision of the Federal Court

The two questions of law posed for the Federal Court's determination were as follows:

(a) *Whether on a true construction of Order 52 rule 2B ROC 2012, prior notice to show cause is to be given to a proposed contemnor before the filing of an ex-parte leave application under Order 52 rule 3 ROC 2012; and*

(b) *Whether on a true construction of Order 52 rule 2B ROC 2012, the notice to show cause referred to in Order 52 Rule 2B, means the documents referred to in Order 52 rule 4(3) ROC 2012.*

The Federal Court debunked the common assumption held by the lower courts that Order 52 rule 2B mandated the issuance of a prior notice to show cause on the proposed contemnor *before* leave is sought failing which the application for leave would be invalid.

The said provision of Order 52 rule 2B reads as follows:

> *"In all other cases of contempt of court, a formal notice to show cause why he should not be committed to the prison or fined shall be served personally"*

The Federal Court held that the *formal* notice to show cause referred in rule 2B is a notice to be issued at the command of the Court, whose order has been alleged to have been breached by the proposed contemnor. This notice is envisaged under Order 52 rule 4(3) where the application, statement and affidavit in support are to be served personally on the proposed contemnor. A purposive approach in construing the provisions led the court to hold that the notice requirement cannot be viewed to apply sequentially in that the applicant is required to give a pre-application notice to show cause and a further notice after leave is granted. The proposed contemnor is fully aware of the order that he has to comply with.

The Federal Court, through Nallini Pathmanathan FCJ, held as follows:

"[9] The notice referred to in O 52 r 2B is to be issued at the behest of the court, and not the parties. Private parties do not issue notices to show cause to each other. It is what the court does. It is after all, the order of court which has been breached. And it is therefore the court that ensures compliance and redresses any contravention. And that is therefore what O 52 r 2B is concerned with – ensuring compliance and redressing non-compliance.

[10] It then follows that such a notice can only come into being after the initiation of contempt proceedings by making the requisite application to court. And that is why the notice in O 52 r 2B ties in with the documents referred to in O 52 r 4(3)."

The reasoning of the Federal Court is further buttressed by the fact that the language used in rule 2B clearly presupposes the finding of a prima facie case of contempt in which the penal consequences of fine and imprisonment may be visited upon the proposed contemnor. This can only happen after leave to institute committal proceedings is granted.

Whilst the Federal Court acknowledged and accepted that contempt proceedings entail penal consequences and hence the safeguards to liberty of the proposed contemnor must be borne in mind, Order 52 rule 3 and rule 4 provide these safeguards by the requirements to first find a *prima facie* case before contempt proceedings are initiated and the personal service of all the ex-parte committal papers on the proposed contemnor to enable him to answer the charge.

The Federal Court further added as follows:

"*[16] Moreover, the Rules of Court 2012 ensures that the potential contemnor is fully safeguarded. This takes the form of O 52 rr.3 and 4. As such, there is no basis on which to construe O 52 r 2B as imposing a further mandatory requirement for a pre-notice prior to even initiating contempt proceedings against a contemnor who has been party to, and therefore is fully conversant with an order of court made against him or involving him. Such a construction would defeat the need for prompt and full compliance with orders of court which carry the force of the law.*"

Contempt proceedings are viewed to be quasi-criminal in nature and hence the strict compliance of procedural requirements in committal proceedings cannot be relaxed particularly when the liberty of the proposed contemnor is at stake. In the same breath, the requirement that parties shall comply with the court orders cannot be subordinated. The safeguards include the provisions for service of orders and judgments where the successful party is required to personally serve the order or judgment on the other party before the prosecution of the enforcement process. The law also provides for a further notification of the consequences of non-compliance of an order of court by the endorsement of a *penal notice* under Order 45 rule 7, a

requirement that is nearly inflexible when committal proceedings is intended to be instituted against the non-compliant party.

It was most appropriate when the Federal Court reiterated that *the law does not believe in surplusage* and that the procedures laid down under the rules must be construed logically and meaningfully in its context. This decision may be an impetus for the reform of contempt laws, given the recent spate of contempt cases that had caught the eye and attention of the public and the legal fraternity.

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