*Privy Council Appeal No. 23 of 1985*

**Datuk Hong Kim Sui** *Appellant*

*v.*

**Tiu Shi Kian and Chan Jin Hong** *Respondents*

FROM

# THE FEDERAL COURT OF MALAYSIA

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER 1986

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*Present at the Hearing:*

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
SIR IVOR RICHARDSON

*[Delivered by **Sir Ivor Richardson**]*

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On 19th July 1983 the present appellant, Datuk Hong Kim Sui, was found guilty in the High Court in Borneo at Kota Kinabalu of contempt of court and was fined the sum of $6,000 or in default of payment three months imprisonment. On 24th August 1984 the Federal Court of Malaysia dismissed the appellant's appeal but increased the fine to $10,000 or in default five months imprisonment. The appellant now appeals.

The essential facts may be stated quite shortly. The present respondents, Tiu Shi Kian and Chan Jin Hong, were proprietors of a night club at Kota Kinabalu called the Golden Million Cabaret and Nightclub, carried on in premises owned by the Hotel Berjaya Sdn. Bhd. ("the hotel company") and leased to Red Rose Restaurant Sdn. Bhd. ("the restaurant company") which at the material times was a wholly owned subsidiary of the hotel company. The appellant was managing director of both companies. The respondents' four year lease from the restaurant company expired on 23rd January 1982 but they claimed to be entitled to an option to renew the original agreement for a further period of two years and that they had exercised that option. On 3rd November 1982 they commenced proceedings in the High Court at Kota
[61] Kinabalu claiming specific performance of the option

and an associated injunction. An interlocutory injunction restraining the restaurant company from disturbing the respondents' quiet enjoyment of the night club premises and restraining the restaurant company from removing equipment, furniture and fixtures therein was granted *ex parte* on 24th November 1982 but following an *inter partes* hearing it was discharged on 3rd March 1983. The respondents immediately appealed against that order and that same day (3rd March 1983) the restaurant company's solicitors by letter recorded that they had advised their clients not to take any untoward steps until the outcome of the appeal was known. However, on the direction of the appellant the premises were locked against the respondents on 6th March 1983. Following an *inter partes* hearing on 14th March 1983 Mr. Justice Wan Mohamed made an order the relevant part of which reads:-

> "It is ordered that the Defendants their servants or agents be restrained from disturbing the Plaintiffs' quiet use and enjoyment of the Golden Million Cabaret and Night Club at Hotel Shangri-la and the equipment furniture and fixtures therein; And it is further ordered that the Defendants their servants or agents be restrained from removing the equipment furniture and fixtures therein pending the hearing of the Notice of Appeal dated 3rd March 1983."

The solicitors for the restaurant company wrote to the respondents' solicitors the same day advising that the restaurant company would be leaving the premises and would abide by the injunction. The respondents then operated the night club on the next two nights. However the premises were again locked against them on 16th March 1983 and the same day a notice was published in local papers to the effect that the hotel company as owner of the building had closed the restaurant and the night club.

The respondents instituted committal proceedings and on 19th July 1983 Mr. Justice Wan Mohamed found the appellant, and also Albert Teo Chin Kion, an executive director of the hotel company and of the restaurant company, and David U Kwok Fai, general manager of the hotel company, who had himself closed the night club premises and arranged the publication of the newspaper notices, each guilty of contempt. The appellant had been absent from Kota Kinabalu when the injunction proceedings were heard on 14th March 1983 and did not return until 23rd March 1983. The next day he was served with a copy of the order made on 14th March which contained an endorsement to the effect that if the restaurant company disobeyed the order he, the appellant, a director of the company would be liable to process of execution for the purpose of compelling him to obey the order. The

trial judge found that on 24th March the appellant knew that the premises were locked, that the respondents were precluded from operating the night club and that the closure was advertised in the local papers. He also found that the appellant had admitted that he could have complied with the order of the court but had allowed the breach to be continued until the hearing of the committal proceedings.

On the hearing of the appeal the Federal Court rejected various submissions advanced on behalf of the appellant against the making of the committal order. The court then turned to consideration of the penalty imposed in the High Court and, taking the view that the present appellant should bear a greater responsibility for the contempt than Mr. Teo who had been fined $10,000 in the High Court, the Federal Court reversed the orders and increased the appellant's fine to $10,000.

The primary submission for the appellant on the present appeal was that he was not liable for contempt in the absence of *mens rea* and in that regard the Malaysian courts had erred in not taking into account the evidence of the appellant that, having regard to the state of the premises and to his legal advice that it was too late for him to comply with the order, he believed he was entitled to take no steps to obey the injunction. Their Lordships cannot accept this argument. The position of the appellant at the committal hearing fell squarely within Order 45 rule 5(1) and rule 7(3) and (4) of the Rules of the High Court 1980. The relevant provisions read:-

> "5(1) Where -
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> (a) ....
>
> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,
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> then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say -
>
> (i) ...
>
> (ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body; ...

7(1) ....

(2) ....

(3) Subject as aforesaid an order requiring a body corporate to do or abstain from doing an act shall not been enforced ... unless -

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

(b) ...

(4) There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served -

(a) ...

(b) in the case of service under paragraph (3) ... if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it."

Thus the Rules recognise that directors and officers are the human agencies responsible for the conduct of the affairs of companies. They fix a director with liability for the conduct of the company and so with liability for any breach by the company of an injunction where the director has appropriate notice that he is liable to process of execution if the company disobeys the order.

In terms of the order served on him on 24th March the appellant was responsible as a director of the restaurant company for ensuring that the prohibitory order was complied with from then on. In continuing to lock the premises against the respondents the company deliberately continued doing what the order prohibited namely, disturbing the respondents' quiet use and enjoyment of the night club and the equipment, furniture and fixtures. For his part the appellant knew that in failing to require - as he acknowledged in evidence he had power to do - that the respondents be allowed the use of the premises, he was not complying with the terms of the injunction. The only possible inference is that on and from 24th March the restaurant company through its responsible officer the appellant knew, and he knew, that its conduct in continuing to deny the respondents the use of the premises was in breach of the terms of the order of 14th March. His reasons for his inaction are not a defence. If, as was

submitted, he believed that the premises could not reasonably be used for a night club pending the hearing of the interlocutory appeal, the restaurant company should have sought to have the order of 14th March varied or discharged. While that order stood unvaried the restaurant company was bound to comply with its terms and it was his responsibility to see that it did so. And reliance on legal advice, while it may be relevant as mitigation, is not a defence where the conduct complained of is in breach of the order (Re *Agreement of the Mileage Conference Group of the Tyre Manufactures' Conference Ltd.* [1966] 2 All E.R. 849).

The appellant was accordingly subject to the committal process as a director in terms of Order 45 rule 5(1)(ii). In the result it is not necessary to consider whether he was also liable for aiding and abetting the disobedience by the restaurant company of the order (*Seaward v. Paterson* [1897] 1 Ch. 545 *Ronson Products Ltd. v. Ronson Furniture Ltd.* [1966] Ch. 603).

Mr. Newman also submitted that the committal failed on the ground that the order of 14th March was ambiguous and there was no *status quo* to be preserved by the order. His submission was that the restaurant company (and the appellant) were not in a position to comply with the order for two reasons: (1) because of the state of the premises following the commencement of renovation work on 6th March after the premises were first closed against the respondents; and (2) because there was some evidence that the tenancy of the restaurant company had been determined and so, it was submitted, it did not have possession of the premises.

Their Lordships are satisfied that there is no substance in these further submissions. The order is perfectly clear in protecting the respondents' quiet enjoyment of the night club premises. It was breached by the continuing exclusion of the respondents from the premises. Their Lordships add that if, contrary to their conclusion on this branch of the case, the state of the premises were a relevant subject for inquiry, the appellant would have had to overcome the findings of fact in the Malaysian courts that the respondents had used the premises as a night club on 14th and 15th March before they were again dispossessed and that the night club could have been carried on thereafter by the respondents if they had not been excluded. And the trial judge also found as a fact that at the material time the restaurant company was still the tenant of the premises - a matter which had never been in dispute until after the order of 14th March was made.

The remaining question relates to the sentence imposed on the appellant. The memorandum of appeal to the Federal Court did not challenge the quantum of the fine imposed in the High Court and the Federal Court itself increased the fine without notice to the appellant and so without giving him any opportunity to be heard. In these circumstances the increased fine cannot stand.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed except as to the amount of the penalty and in that regard the order made in the High Court should be restored. The appellant must pay the costs of the appeal to their Lordships' Board.