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COMMITTAL SANCTION APPLIED BY ENGLISH HIGH COURT

Bunge SA v Huaya Maritime Corporation of the Marshall Islands & Anor[2017] EWHC 90 (Comm) (27 January 2017)

Introduction

On 27 January 2017, the Commercial Court handed down its decision in *Bunge SA v Huaya Maritime Corporation of the Marshall Islands & Anor* [2017] EWHC 90, in which it ordered the defendant to be imprisoned for 18 months for failure to comply with disclosure orders despite the disclosure orders not having been personally served on the defendant, nor having contained the required penal notice.

Background

The applicant/claimant, Bunge S.A. entered into a charterparty with Huaya Maritime Corporation of the Marshall Islands, the first respondent. Although limited information was available, the Court was satisfied that on the evidence available, Mr Hua (the second respondent) was in actual control of Huaya, and was likely also to be or have been at the relevant time a director or officer of Huaya.

Following a dispute between Bunge and Huaya, arbitration proceedings between the two resulted in an arbitration award (obtained from a London LMAA Tribunal) in favour of Bunge and against Huaya in the sum of US$61,239.10 together with interest and legal costs. That award went unsatisfied.

On 19 April 2016 Flaux J heard Bunge's ex-parte application and made freezing injunction and ancillary disclosure order against Huaya, which were successful sent by email to Huaya. No response was received and no disclosure was given. On the return date of 3 May 2016, HHJ Waksman QC continued the freezing injunction and repeated the ancillary disclosure order (which were both, again, successfully emailed and couriered to Huaya). No response or disclosure was forthcoming from Huaya.

On the basis of Huaya's failure to comply with disclosure orders of Flaux J dated 19 April 2016 and HHJ Waksman QC dated 3 May 2016, Bunge made an application for an order against Huaya, declaring that it is in contempt of court, and an order for committal for contempt against Mr Hua, for his role in that contempt as a director, officer or individual in actual control of Huaya. The application as served on Mr Hua did not contain a penal notice, as required by the Civil Procedure Rules.

Decision

The Court (Cranston J) made the order sought by the applicant.

Key issues for the court included the failure to include a penal notice in the application as served upon the respondent; the requirement for personal service of disclosure orders; and requirements for contempt of court and appropriate penalty.

As to the failure to serve the penal notice:

- At a hearing on the application, Bunge submitted that the Court should waive this requirement on the basis that Mr Hua had been given every opportunity to respond to the application, and had also been informed of the potential consequences of the failure to comply (by way of email).

- The Judge, Cranston J, found at that hearing that it would not be right to waive immediately the failure of the application notice to contain the penal notice, and wanted to give Mr Hua a final opportunity to take steps to meet the requirements of the orders. Accordingly, the Court ordered that he be warned expressly along the lines of the penal notice.

- After that was done, and following another failure to respond by the respondent, the Court was prepared to order that the requirement would be waived as all that could be done had been done to warn Mr Hua of the serious consequences of non-compliance.

As to the requirement for personal service of disclosure orders:

- In the present case, the disclosure orders were not served on Mr Hua personally because he was not a party to the arbitration claim and because Bunge did not envisage that Huaya would ignore the court's orders. In the circumstances, Bunge applied for dispensation with personal service on Mr Hua of the disclosure orders.

- CPR 81.8 allowed the courts to dispense with service if satisfied that the person had notice of the order if the court thought it just to do so. In previous cases, the courts had taken the view that where a party knows, and persistently fails to respond, it is just to dispense with personal service, otherwise there would be an encouragement to persistent offenders to use a technicality to defeat the purpose of the order.

- In the present case, the Court was satisfied that Mr Hua was notified of the terms of the disclosure orders by email and courier, thus satisfying 81.8, and seemed to have acknowledged that in conversations with third parties.

Contempt of court and penalty

- The Court set out the principles applicable to an application for contempt under CPR 81.4. The burden of proving the contempt lies on the applicant; as regards the necessary elements of the offence the criminal standard of proof applies so that the applicant's case must be proved beyond reasonable doubt; and the court needs to exercise care when it is asked to draw inferences in order to prove contempt. Where conclusions of guilt are to be drawn on the basis of secondary evidence it must be possible to draw a single inference of guilt and only that inference.

- For a company, it is necessary to show that the order was served on the company and it was breached.

- For a third party, who cannot be proved to be a director or an officer, a stranger is liable for contempt if his act constitutes a willful interference with the administration of justice by the court in the proceedings in which the order was made. It has also to be shown there was an intention on his part to interfere with or impede the administration of justice – this does not need to be stated expressly or admitted by the defendant, but can be inferred from all the circumstances including the foreseeability of the consequences of the defendant's conduct.

- In the present case, Mr Hua's act constituted a willful interference with the administration of justice which could clearly be inferred from all the circumstances – there was no excuse, and no excuse had been offered.

- Accordingly, imprisonment of Mr Hua for contempt was the appropriate remedy, and a sentence of 18 months (out of the available maximum of 24 months) would be imposed. There was no mitigation in the present case