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Sanctions: Where Law and Justice Collide: Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd [2013] SGHC 39

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Introduction

This is a cautionary tale for litigation practitioners and their claimant clients. The decision emanates from the High Court of Singapore, but is equally applicable to any jurisdiction in which security for costs can be sought against the claimant in an action.[1] In Singapore, the Rules of Court[2] set out the procedural rules governing all civil proceedings in the High Court and Subordinate Courts. Unlike the Civil Procedure Rules (CPR), the Singapore Rules of Court do not expressly articulate an overriding objective of timely and proportionate justice.[3] However, the courts have consistently prioritised robust case management and "an uncompromising but fair approach towards procedural non-compliance".[4] As such, both jurisdictions are closely aligned in their common goal to administrate justice in a speedy and cost-effective manner. How far, though, should the courts go in pursuing these lofty ideals? To what extent is it now acceptable to enforce sanctions imposed for procedural non-compliance, regardless of the merits of the case? This note looks at the decision of *Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd* [2013] SGHC 39 against the backdrop of trends in England and Wales, and Singapore in respect of enforcing unless orders, and asks if the pendulum has swung too far.

Facts

An order was made on January 15, 2013 requiring that the claimant, Kraze Entertainment (S) Pte Ltd ("Kraze"), furnish 100,000 Singapore dollars as security for costs in an action. Payment was to be made within 21 days from the date of the order, failing which the action would be struck out. The order stated that the deadline for payment was February 5, 2013 at 4pm (the "security for costs order").

On February 1, 2013, Kraze took out an application for an extension of time of 14 days to comply with the security for costs order. This application for extension was fixed for hearing on February 5, 2013, which was the deadline to comply with

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[1] See, for example, Pt 25 of the Civil Procedure Rules 1998.

[2] Cap 322, r .5, 2006 Rev. Ed.

[3] CPR r.1.1. See, generally, *Zuckerman on Civil Procedure: Principles of Practice*, 2nd edn (London: Sweet & Maxwell, 2006), at [1.9].

[4] L. Leo, "Case management: drawing from the Singapore experience" (2011) 30 C.J.Q. 143.

the security for costs order. No grounds were stated in support of the application for extension. When queried during the hearing, Kraze's counsel explained that the only ground for the application was that his client was not able to comply with the order.

The assistant registrar hearing the matter at first instance dismissed the application for the extension of time. On appeal, the High Court Judge upheld this decision. In so holding, the Judge acknowledged that it was harsh for an action to be struck out without trial, especially for failing to comply with an interlocutory order.[5] However, the Judge took the view that the harshness stemmed from the original security for costs order, and Kraze had not appealed this decision.[6] It is clear from the judgment that the Judge was also persuaded by the fact that Kraze had not contacted the defendant when it found itself unable to comply with the security for costs order, and that even when taking out an application for the extension of time, a supporting affidavit had not been filed. The Judge noted that Kraze was committed to furnishing the security for costs and complying with the order, but simply needed more time to obtain the monies. However, this fact only emerged when Kraze filed what the court termed a "summons in desperation", which was an application to stay the execution of the assistant registrar's decision.[7] The Judge's dim view of Kraze's conduct was perhaps summed up by his pithy statement that "before justice is the law".[8]

Analysis

No lawyer can quarrel with the general principle that the court has the discretion not to allow an extension of time and in effect strike out the action in an appropriate case. The security for costs order in this case was framed as an unless order, and the position in Singapore is that in the absence of good reasons, disobedience of an unless order is generally considered as contumelious conduct.[9] It is also settled law across various jurisdictions that the court can have regard to a variety of factors in deciding whether to grant an extension of time in this type of circumstance, including the reason for delay, whether the defaulting party's conduct was contumelious or contumacious, prejudice to the parties, the costs that have already been incurred and larger considerations of the administration of justice.[10] The court in the present case did take cognisance of such factors, as is evident from paras [5] to [7], where the Judge touched on the conduct of Kraze and the issue of prejudice to the parties.

Yet, the court's analysis and ultimate decision is cause for concern. Procedural rules are meant to be applied to achieve the overriding objective of fair and effective administration of justice. These rules are the means to an end, and that end is the delicate balance between substantive justice on the merits and procedural justice,

[5] *Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd* [2013] SGHC 39 at [3].
[6] *Kraze* [2013] SGHC 39 at [7].
[7] *Kraze* [2013] SGHC 39 at [5].
[8] *Kraze* [2013] SGHC 39 at [7].
[9] *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 at [101]; citing Lord Diplock in *Tolley v Morris* [1979] 1 W.L.R. 592 HL at 603.
[10] For the pre-CPR position, see *Birkett v James* [1978] A.C. 297 HL; *Samuels v Linzi Dresses Ltd* [1981] Q.B. 115 CA (Civ Div); for the position in Singapore, see *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361; for the position in Hong Kong, see *Multi Sky Ltd v Dragages Et Travaux Publics* [1994] HKCA 329; for the position in New South Wales, see *Idoport Pty Ltd v National Australia Bank Ltd* [2002] NSWCA 271.

understood in terms of expediency and the proportionate use of resources. At the same time, the rules can also be understood as being concerned with procedural fairness in and of itself as an end goal. Bearing these in mind, it is suggested that the court's decision was problematic at two levels. First, the decision failed to achieve procedural fairness in its application of the rules within the existing procedural framework of the Rules of Court in Singapore. Secondly, the decision represents an excessive emphasis on procedural compliance at the expense of substantive justice. In particular, it was a disproportionate response to the claimant's breach, and this error arose because of the court's failure to draw a distinction between two very different types of unless orders.

The procedural gap

Although the court did acknowledge that the original security for costs order was too harsh,[11] it emphasised that no appeal was filed against this order. The decision not to appeal the original security for costs order is, however, entirely understandable, and it is not at all clear that such an appeal would have succeeded. In the first place, Kraze was not quibbling with the fact that security was awarded against it. An award of security for costs is made when considerations of justice require that the claimant's right to pursue his or her claim is qualified in situations where there is a risk that the claimant intends to evade future liability as to costs or where the claimant would otherwise be immune from costs orders against him or her.[12] The Singapore Court of Appeal has held that one of the rationales for the court's jurisdiction to award security for costs is to create a fund for ease of enforcement of any cost orders in the defendant's favour.[13] Kraze did not dispute that the court's jurisdiction to make this award was appropriately exercised.

More crucially, the question was whether Kraze should have appealed against the part of the original security for costs order that prescribed that the action was to be struck out in the event of default. The difficulty with mounting such an appeal is that an unless order is an accepted and effective case management tool to pre-determine the consequences of non-compliance and have such consequences operate automatically, without further order. These are particularly common in security for costs applications, [14] and are in the nature of standard orders that seek the automatic and efficacious closure of a case when security is not put up (although the necessity for such unless orders will be questioned below). As such, there was no allegation that the terms of the original security for costs order were oppressive.[15] Kraze's main problem was simply that it needed more time to obtain funds to comply with that order. In such circumstances, the extension of time application was surely the appropriate one to make and not an appeal against the original order.

[11] *Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd* [2013] SGHC 39 at [7].
[12] *Zuckerman on Civil Procedure: Principles of Practice* (2006), at [9.183].
[13] *Tjong Very Sumito v Chan Sing En* [2011] 4 SLR 580.
[14] See Form 177 of *Atkin's Court Forms on the Order for Security for Costs*. See also *Singapore Civil Procedure 2013* (Singapore: Sweet & Maxwell, 2013), Volume 1, para 23/3/37.
[15] A position that needs to be reconsidered in Singapore. In England and Wales, it is incumbent on a party who considers that a sanction is too onerous to appeal against the sanction. For this purpose an unless order is a sanction (*Sports Network Ltd v Calzaghe* [2008] EWHC 2566 (QB)). If no appeal is made against the sanction, the court is not entitled to decide an application for relief from sanctions on the basis that the sanction was too harsh: *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza)* [2012] EWCA Civ 224; [2012] F.S.R. 28; *Blackstone's Civil Practice 2014*, edited by Kay L.J., S. Sime and D. French (Oxford: OUP, 2013), at [48.22].

Under CPR r.3.8(1), where a party has failed to comply with a court order, any sanction that has been imposed by the court order takes effect unless the party in default applies for and obtains relief from the sanction. If an application for relief from the sanction is taken out, the court decides on the application by taking into account the considerations set out in CPR r.3.9. In the post-CPR era, it is during the application for relief from sanctions that the court should consider whether it is appropriate for the sanction to apply.[16] There is no equivalent to the application for relief from sanctions under the Singapore Rules of Court. As such, the application for extension of time is akin to the relief from sanctions process and is the most appropriate forum for the court to take into account all the circumstances of the case. The court ought to have noted this gap in the Singapore procedural framework in considering Kraze's application. While strict enforcement of rules should generally be encouraged, this must be carried out with a critical appreciation of the procedural framework in place, and a proper understanding of the available procedural options for the defaulting party. Failure to do so compromises procedural fairness.

Moreover, in the present case, Kraze's extension of time application was filed and heard even before the deadline for the furnishing of security had passed. As such, there was technically no breach to speak of at the time the application was made, which is the point in time that the court should have addressed the application. The court's case management powers would not have been undermined by granting the extension, since such an extension could not have been seen as sanctioning a breach of a court order or being overly forgiving of dilatory behaviour. Indeed, it could be argued that Kraze was effectively doing what was its only available and feasible option under the framework of rules in place in Singapore, which was to seek an extension of time before the breach took place, on the grounds that it was not able to obtain the necessary funds to furnish the security for costs in time.

Striking the balance between procedural and substantive justice

It is noteworthy that although the court acknowledged that no prejudice would accrue to the defendant if the extension of time was granted, the Judge still took the view that to allow the action to proceed would be an injustice to the defendant.[17] The Judge also felt that a message had to be sent to would-be claimants that it is not the case that "if they have a big claim they can choose which orders of court they will obey and how they would do so".[18]

One can certainly applaud the court's robust approach as taking a tough stand against dilatory behaviour and ensuring that cases are dealt with expeditiously. In England and Wales, the pre-CPR position was mired in an overly lax approach towards the enforcement of timelines and case management orders, which led to costly and time-consuming satellite litigation and the erosion of the normative force of unless orders.[19] The leading case of *Marcan Shipping (London) Ltd v*

[16] *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864, but see the cases cited in fn.15.
[17] *Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd* [2013] SGHC 39 at [7].
[18] *Kraze* [2013] SGHC 39 at [7].
[19] A. Zuckerman, "How seriously should unless orders be taken?" (2008) 27 C.J.Q. 1.

Kefalas[20] and cases that have followed[21] demonstrated a more vigorous attitude towards the enforcement of procedural orders, even if it entailed making decisions that run counter or are unrelated to the merits of the case, which was lauded as a welcome change.[22] An even stricter approach is intended with the replacement of CPR r.3.9 with effect from April 1, 2013 as part of the Jackson reforms in England and Wales.[23] Likewise, the Singapore courts have taken a firm stand against lackadaisical behaviour, as evidenced by the position taken by the Singapore Court of Appeal that:

> "The power of the court to extend the time for complying with an unless order should be exercised cautiously for a very good reason."[24]

Yet, one wonders whether the present case is an example of the case management paradigm being taken one step too far. Could not a more generous attitude have been taken towards the claimant, who had not acted in a contumelious or contumacious manner? Bearing in mind the rationale for awarding security for costs, Kraze would have been able to provide the pool of funds in order to ensure that the defendant's costs would be paid. Kraze just needed more time to obtain these funds, but the court seemed to disregard the evidence of this genuine difficulty.

The court's decision is particularly disconcerting since the defendant in the present case would have suffered no prejudice if the action had continued. In any case, an award of costs could easily have compensated any prejudice that the defendant did suffer. Kraze, in contrast, would have had to incur significant delay and expense in re-filing the entire action.[25] The fact that the limitation period had not expired in this case must have weighed on the Judge's mind, even if he did not expressly state as such. Even in this climate of rigorous enforcement of unless orders, it is perhaps hard to imagine that the court would have been willing to strike out the claim had it been impossible for Kraze to file a fresh action. If that were the case, it would certainly mean that the preoccupation with procedural compliance would have ridden roughshod over the importance of the substantive merits of the case. We must not lose sight that rules of procedure should ultimately be the hand-maiden and not the master of the law. While the emergence of case management considerations to the forefront as key objectives of administration of justice must surely be welcomed,[26] it cannot be overstated that "[t]he quest for justice … entails a continuous need to balance the procedural with the substantive",[27] and this tension must always be carefully resolved, having regard to the nature and specific facts and circumstances of each particular case.

[20] *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864.

[21] See, for example, *Tarn Insurance Services Ltd v Kirby* [2009] EWCA Civ 19; [2009] C.P. Rep. 22; *Phaestos Ltd v Ho* [2012] EWHC 1996 (TCC); [2012] C.I.L.L. 3225.

[22] Zuckerman, "How seriously should unless orders be taken?" (2008) 27 C.J.Q. 1.

[23] S. Sime and D. French, *Blackstone's Guide to the Civil Justice Reforms 2013* (Oxford: OUP, 2013), at [5.86] to [5.91].

[24] *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 at [10].

[25] Which might well be struck out as an abuse of process: *Janov v Morris* [1981] 1 W.L.R. 1389 CA (Civ Div); S. Sime, *A Practical Approach to Civil Procedure*, 3rd edn (London: Blackstone's Press Ltd, 1997), p.370. This indeed came to pass as the Singapore High Court subsequently struck out the second action filed by Kraze on the grounds of abuse of process of the court: see *Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd* [2013] SGHC 207.

[26] In the United Kingdom, the regime under the CPR envisages three key objectives: enabling the court to (a) do substantive justice, (b) by the use of no more than proportionate resources, and (c) within a reasonable time.

[27] *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [8].

Distinction between different types of unless orders

A fairer result that strikes a better balance between procedural and substantive justice may have been reached if the court had in the first place distinguished between peremptory orders that are made as a result of persistent default and dilatory behaviour, and peremptory orders that have a "housekeeping" nature.[28] The former type of unless order, particularly one stipulating striking out or dismissal as a consequence, is commonly imposed when the court seeks to send a signal to the defaulting party that it will grant no further indulgence.[29] The latter type of unless order is routinely made to ensure that cases that cannot be actively pursued do not languish in the court system. These "housekeeping" unless orders are in the nature of process requirements, of which non-compliance is meant to lead to an automatic consequence without the need for further court involvement. It is arguable that the portion of the security for costs order in the present case that sought striking out in default of payment could have been characterised as being in the nature of a "housekeeping" order. It was simply a standard provision that was included to ensure that the case would be automatically closed should the claimant have been unable to put up the security. Other examples of such "housekeeping" unless orders include conditional orders for case management purposes, such as an order for permission to serve particulars of claim out of time conditional on payment into court,[30] and where failure to file the requisite appeal papers by a certain date would lead to the automatic withdrawal of the appeal.[31]

Once such a distinction is recognised, it should then become clear that the exercise of the court's discretion should be influenced by the fact that the breaches were committed in respect of a "housekeeping" unless order. At a general level, the court should take a more relaxed attitude and be more willing to resolve any doubts in favour of the defaulting party. The court should also be more willing to take into account the difficulties faced by the defaulting party as well as to take a closer look at the merits and substantive justice of the case.[32] In contrast, more stringent standards should be applied when the court is addressing breaches of unless orders that were made precisely to respond to persistent defaulting conduct, as in such cases it is important to send a message to the parties that timely compliance with case management orders is a fundamental precept of the civil justice system.

This distinction is especially crucial as true unless orders that are made as a consequence of persistent defaults must be taken seriously; and they will only be taken seriously if they can be effectively enforced. As Professor Zuckerman has argued,[33] an unless order that is fair, reasonable and proportionate in the first place would have to be enforced with no exceptions once the stipulated default occurs,

[28] This phrase was used in the case of *Keen Philips (A Firm) v Field* [2006] EWCA Civ 1524; [2007] 1 W.L.R. 686.

[29] Zuckerman, "How seriously should unless orders be taken?" (2008) 27 C.J.Q. 1.

[30] *Zuckerman on Civil Procedure: Principles of Practice* (2006), at [10.130]. In *Keen Philips (A Firm) v Field* [2006] EWCA Civ 1524; [2007] 1 W.L.R. 686, the "housekeeping" order was a standard form order that unless transcripts were furnished by a certain time, permission to appeal would be refused.

[31] For example, in Singapore under O.57 r.9(4) of the Rules of Court, an appeal to the Court of Appeal is deemed to be withdrawn if the Appellant's Case and Record of Appeal, and the Core Bundle, are not filed within the stipulated time frame.

[32] Such an argument was made in *Giorgio Ferrari Pte Ltd v Lifebrandz Ltd* [2013] 1 SLR 358, but Justice Andrew Ang sitting in the High Court of Singapore did not address it directly.

[33] *Zuckerman on Civil Procedure: Principles of Practice* (2006), at [10.144].

unless there are changes in circumstances and events since the making of the order. Otherwise, these true unless orders would not achieve their objective of securing timely compliance through dealing robustly with repeated and contumelious procedural defaults. In contrast, "housekeeping" unless orders are merely meant to facilitate and ensure that court proceedings move along in the system without the need for further judicial hearings. As such, where there is default in complying with such "housekeeping" orders, the court should adopt a more generous attitude when considering if relief (whether by way of a relief from sanction or an extension of time) should be granted.

In fact, it may be queried whether such "housekeeping" unless orders are even necessary at all, since bare court orders (without the consequences of breach attached to them) are equally binding and should equally be observed. Indeed, in *Marcan Shipping (London) Ltd v Kefalas*, the English Court of Appeal was of the opinion that:

> "[A] conditional order striking out a statement of case or dismissing a claim … is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified."[34]

The court further said that it could not "imagine circumstances in which such an order could properly be made for … 'good housekeeping purposes'".[35] If such "housekeeping" orders are placed on equal footing with unless orders imposed after numerous defaults, hugely disproportionate and unjust outcomes could result, whereby even the most trivial of procedural breaches could lead to the dismissal of an action, and claimants such as Kraze pay the price. This tilts the balance too far in favour of rigid procedural adherence at the expense of substantive justice. Unless the distinction is made clear between true unless orders and "housekeeping" orders, we may be better off without the latter.

Conclusion

It would seem that these days, unless orders do mean what they say, and practitioners would do well to advise their clients to take such court orders seriously. Yet, even while this robust adherence to procedural justice is to be welcomed, judges dealing with breaches of such orders should bear in mind that there is a wide variety of circumstances leading to the making of such orders, and an even wider variety of circumstances leading to the breach of such orders. In this connection, this note has, through a description of the disproportionately harsh and exacting decision of the Singapore High Court, suggested that the court should draw a distinction between true unless orders, and peremptory orders of a "housekeeping" nature. More broadly, and in every case, a careful balance must be struck between furthering the case management objective on one hand, while at the same time ensuring that a deserving claimant is able to utilise the civil justice process to ventilate his or her claim. A failure to do so could mean that meritorious claims may never see the light of day, and that is a curious form of justice indeed.

[34] *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864 at [36].
[35] *Marcan Shipping* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864 at [36].