

Background

[2] The present proceeding arose out of an agreement by a company, King David Investments Ltd (King David), to sell a property to the respondent, Zie Zhang, which did not settle. Hsiang-Fen Ying, one of the two applicants, was the sole shareholder and director of King David.³

[3] Ms Zhang sought specific performance. The proceeding was settled and the terms of settlement recorded in consent orders made in the High Court. Subsequently, the present applicants tried to appeal the consent orders including an unsuccessful attempt to appeal to the Court of Appeal. On 30 August 2016, the day after the Court of Appeal said it had no jurisdiction to hear the appeal, an agreement was entered into to sell the disputed property to a third party for value. Settlement of that agreement occurred on 12 September 2016.

[4] In response, Ms Zhang issued the present proceeding in the High Court. The respondent sought writs of arrest, a finding of contempt and a freezing order over another property owned by the Ying and Young Trust (the Trust's property).

[5] By the time Palmer J heard the matter, it was accepted specific performance was no longer possible. Palmer J rejected all of the grounds which the present applicants relied on for setting aside the consent order, for example, their ill-health and exhaustion. Essentially, he found their evidence lacked credibility. The consent order was varied to remove the obligation to transfer the property and associated orders were made as to payment to Ms Zhang.

[6] Palmer J found that the elements of civil contempt were met. In particular, the Judge said that there was a clear order of which Ms Ying had notice and which she deliberately breached. Palmer J declared that Ms Ying was in contempt and she was ordered to pay a fine of \$10,000 or risk imprisonment if payment was late.

³ The other applicant, Mr Young, is Ms Ying's husband. (Palmer J made reference to Mr Young's legal background: HC judgment, above n 2, at [4].)

[7] The applicants appealed. The Court of Appeal took the view it was “not tenable” to suggest the terms of the settlement agreement were misunderstood.⁴ The appeal against the decision not to set aside the consent orders was accordingly dismissed.

[8] The Court of Appeal said Palmer J was wrong to treat the contempt as a civil contempt. Ms Ying was not a party to the proceeding when the consent order was made (at that point only King David and Mr Young were named defendants). But, because Ms Ying’s actions caused King David’s breach of the consent orders, the Court said she could still have committed a criminal contempt. The Criminal Procedure Act 2011 accordingly applied.

[9] In upholding the finding of contempt, albeit a criminal contempt, the Court of Appeal said Ms Ying should have been warned of the risk of self-incrimination (as required by s 62(1) of the Evidence Act 2006). But the Court found there was no miscarriage of justice. That was because a finding of contempt was “inevitable even if Ms Ying had exercised her right to say nothing”.⁵ The facts led to “the inescapable conclusion that Ms Ying deliberately sold the property to [the third party] to prevent [King David] from complying with the consent order.”⁶

[10] The level of fine was reduced for consistency with fines imposed in other comparable cases.

The proposed appeal

[11] On the proposed appeal to this Court, the applicants essentially raise the same grounds as were raised in the Court of Appeal. Accordingly, they would reiterate the challenge to the refusal to set aside the consent order and say the mens rea element for contempt was not met. A number of other matters of detail (for example, as to the retention of the freezing order on the Trust’s property) are also raised.

⁴ The CA judgment, above n 1, at [35].

⁵ The CA judgment, above n 1, at [58].

⁶ At [58].

[12] The challenge to the refusal to set aside the consent order raises only factual questions. No question of general or public importance arises. The Court of Appeal considered the matters that would arise on the proposed appeal in relation to the consent order. Nothing has been raised with us to suggest an appearance of a miscarriage of justice in relation to that analysis.

[13] The approach taken to contempt in this case may have given rise to a general question of law.⁷ However, the challenges the applicants wish to pursue are limited to factual questions, such as whether or not Ms Ying acted in good faith because of advice she says she received from a solicitor. In those circumstances, where there is no appearance of a miscarriage given Ms Ying's conduct,⁸ the criteria for leave to appeal are not met.⁹

[14] The other matters the applicant would raise are matters of factual detail. These matters do not meet the leave criteria.

[15] The application for leave to appeal is dismissed. As no submissions were filed on behalf of the respondent, we make no order as to costs.

⁷ We are not to be taken as making any comment on the issues relating to contempt that might arise in other cases.

⁸ See *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [188], [191] and [234] per McGrath and William Young JJ (for McGrath, William Young and Glazebrook JJ).

⁹ Senior Courts Act 2016, s 74; Supreme Court Act 2003, s 13.