

Metro Giant Group Sdn Bhd v Gala Sari Resources Sdn Bhd & Ors

A

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–125 5 OF 2004
KANG HWEE GEE J
17 AUGUST 2007

B

Civil Procedure — Contempt of court — Contempt proceedings — Subject matter were three letters written — Respondents admitted letters were antedated — Explanation that they were used to evidence record of payments — Whether antedating of three letters constitute a contempt

C

D

An application was made under O 52 r 2(2) of the Rules of the High Court 1980 (RHC) for an order of committal against: (i) Wisecap Ventures Sdn Bhd; (ii) Kung Teong Eng (director); (iii) Rosnita Binti Abdul Aziz (director); iv) Dato' Abdul Ghani bin Yusof (third party); (v) Cheng Poh Heng (solicitor). The suit arose from an agreement whereby the plaintiff sold the shares in the third defendant to the first defendant. Part payment of the purchase price had been made to the plaintiff by the first defendant and leaving a balance of RM7.5m outstanding. Before the full purchase was paid, the first defendant transferred the shares to the fourth defendant by a variation agreement and a loan agreement. The plaintiff contended that the transfer to the fourth defendant was mala fide and was transacted merely to prevent the plaintiff from recovering the shares from the defendants by restitution. There were three letters which were the subject matter of the contempt proceedings (as verified by the affidavit of Kung Teong Eng, a director of the fourth defendant dated 18 October 2006) purporting to show that payments were in fact made to Cheng Poh Heng (solicitor for the purchaser) and hence proved one way or another that the fourth defendant was entitled to the shares. The writer of the first two letters dated 10 July 2003 and 13 October 2003 respectively were written by Dato' Abdul Ghani bin Yusof (the fourth contemnor — a director of the second and third defendants). The third letter was written by a woman Rosnita binti Abdul Aziz — the third contemnor who was a director of the fourth defendant company. All the respondents had admitted that the letters were not written on the day they were signed. Essentially the explanation of the respondents in answer to the contempt charges was that the letters were antedated only because they did not have any letter evidence to record the payments by Dato' Ghani to the fifth contemnor Cheng Poh Heng and to record the payment by the fourth defendant to Cheng Poh Heng, the solicitor for the first defendant. The letters were not meant to deceive the court. The three payments to Cheng Poh Heng were in fact made on the respective dates of the letters and these could be verified by the issuance of the two telegraphic transfers and the banking slip showing exactly when the payments were made which corresponded to the dates of the letters.

E

F

G

H

I

A Held:

(1) It was pertinent to note that the affidavit of Kung Teong Eng a director of the fourth defendant was meant to verify the list of documents which the fourth defendant had in its possession in due compliance with O 24 r 3 of the RHC.

B It was not meant at this stage to verify the truth of their contents. It was opened to the defendants, the fifth contemnor and persons who wrote the letters to say at the trial of this suit that in truth the letters were antedated (see para 44).

C (2) The mere antedating of the three letters would not under the circumstances constitute a contempt of this court which required an intention on the part of the perpetrators to use them to mislead the court. Until and unless the alleged contemnors use the letters as evidence to show that they were in fact written on the dates as stated on the letters and not on the latter dates when they were signed, no contempt could be committed (see para 44).

D [Bahasa Malaysia summary]

E Satu permohonan dibuat di bawah A 52 k 2(2) Kaedah-Kaedah Mahkamah tinggi 1980 ('KMT') untuk satu perintah komital terhadap: (i) Wisecap Ventures Sdn Bhd; (ii) Kung Teong Eng (pengarah); (iii) Rosnita binti Abdul Aziz (pengarah); (iv) Dato' Abdul Ghani bin Yusof (pihak ketiga); (v) Cheng Poh Heng (peguamcara). Tindakan ini berbangkit daripada satu perjanjian di mana plaintif menjual saham-sahamnya di defendan ketiga kepada defendan pertama. Pembayaran sebahagian harga belian telah dibuat kepada plaintif oleh defendan pertama dan meninggalkan baki sebanyak RM7.5j yang masih belum dibayar. Sebelum bayaran sepenuhnya dibayar, defendan pertama memindahkan saham-sahamnya kepada defendan keempat melalui satu perjanjian variasi dan satu perjanjian pinjaman. Plaintif mendakwa bahawa pindahtamlik saham-saham tersebut kepada defendan keempat adalah mala fide dan dilakukan semata-mata untuk menghalang plaintif daripada mengambil balik saham-saham tersebut daripada defendan-defendan melalui restitusi. Terdapat tiga surat-surat yang menjadi perkara pokok prosiding penghinaan (seperti yang dinyatakan dalam affidavit Kung Teong Eng, seorang pengarah defendan keempat bertarikh 18 Oktober 2006) yang kononnya menunjukkan bayaran-bayaran sebenarnya telah dibuat kepada Cheng Poh Heng (peguamcara pembeli) dan dengan itu telah membuktikan walau apa cara pun bahawa defendan keempat adalah berhak kepada saham-saham tersebut. Penulis surat pertama dan kedua bertarikh 10 Julai 2003 dan 13 Oktober 2003 masing-masing ditulis oleh Dato' Abdul Ghani bin Yusof (penghina keempat — seorang pengarah defendan-defendan kedua dan ketiga). Surat ketiga ditulis oleh seorang wanita Rosnita binti Abdul Aziz — penghina ketiga yang merupakan pengarah syarikat defendan keempat. Kesemua responden-responden telah mengakui bahawa surat-surat tersebut tidak ditulis pada tarikh ia ditandatangani. Pada dasarnya, alasan responden-responden menjawab caj penghinaan adalah surat tersebut diberikan tarikh yang lebih awal hanya kerana mereka tidak mempunyai sebarang surat membuktikan rekod bayaran oleh Dato' Ghani kepada penghina kelima Cheng Poh Heng dan untuk merekodkan bayaran defendan keempat kepada Cheng Poh Heng, peguamcara untuk defendan pertama. Surat-surat tersebut dikatakan bukan bermaksud untuk menipu mahkamah.

Ketiga-tiga bayaran kepada Cheng Poh Heng sebenarnya telah dibuat pada tarikh-tarikh yang masing-masing pada surat-surat tersebut dan ini dapat ditentusahkan dengan pengeluaran dua pindahan telegrafik dan slip pembankan yang menunjukkan bila bayaran tersebut dibuat yang secocok dengan tarikh surat-surat tersebut.

A

B

Diputuskan:

- (1) Adalah penting untuk diambil perhatian bahawa affidavit Kung Teong Eng seorang pengarah defendan keempat adalah untuk menentusahkan senarai dokumen-dokumen di dalam milikan defendan keempat dalam mematuhi A 24 k 3 KMT. Ia bukannya pada peringkat ini untuk menentusah kebenaran kandungannya. Ia adalah terbuka kepada defendan-defendan, penghina kelima dan orang-orang yang menulis surat-surat tersebut untuk menyatakan pada perbicaraan tindakan ini bahawa sebenarnya surat-surat tersebut diberikan tarikh yang lebih awal (lihat perenggan 44).
- (2) Hanya dengan memberi ketiga-tiga surat tersebut satu tarikh yang lebih awal tidak akan dalam keadaan ini membentuk satu penghinaan terhadap mahkamah yang memerlukan satu niat di pihak pelaku-pelaku untuk menggunakannya untuk memperdayakan mahkamah. Sehingga dan kecuali penghina-penghina yang dikatakan itu menggunakan surat-surat tersebut sebagai bukti untuk menunjukkan bahawa mereka sebenarnya ditulis pada tarikh-tarikh seperti yang dinyatakan di surat-surat tersebut dan bukannya pada tarikh-tarikh kemudiannya apabila ditandatangani, tiada penghinaan dilakukan (lihat perenggan 44).]

C

D

E

Notes

F

For cases on contempt of court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1794–1795.

Cases referred to

G

Emperor v Govind Singh AIR 1926 Patna 535 (refd)
Jl Moses v A Ramanatha Iyer [1941] Mad Cr C 84 (refd)
Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd [2002] 4 MLJ 241 (refd)
Murray Hiebert v Chandra Sri Ram [1999] 4 MLJ 321 (refd)
PP v Straits Times (Malaya) Bhd [1971] 1 MLJ 69 (refd)
R v Selva & Anor [1982] 1 All ER 96 (refd)
Upendra Nath Chatterjee v Emperor [1935–1936] Vol XL 40 CWN 313 (refd)
William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1994] 3 MLJ 40;; [1994] 3 CLJ 125 (refd)

H

Legislation referred to

I

Penal Code ss 192, 464
 Rules of the High Court 1980 O 24 rr 3, 5, O 52 r 2(2)

Yusof Khan (Mathew Thomas Philip, Balan Nair Thamodaran and Md Yunus bin Sharif with him) (Thomas Philip) for the plaintiff/applicant.

- A** *Justin Voon (Elvin Lai with him) (Sidek Teoh Wong & Denis) for the first and third contemnors.*
Richard Wee Thian Seng (YH Teh & Quek) for the second contemnors.
Cyrus Das (Saranjit Singh with him) (Vasdev Bakshani & Associates) for the fourth contemnors.
- B** *KT Wong (KT Wong & Co) for the fifth contemnors.*

Kang Hwee Gee J:

- C** [1] This is my oral judgment: (ex tempore).
- [2] Parties are agreed that the two sets of encls 214, 223, 225, 231 and 246 (applications to set aside) and encl 202 for committal proper to be heard together in order to save time.
- D** This application under O 52 r 2(2) of the Rules of the High Court 1980 is for an order of committal against:
- (i) Wisecap Ventures Sdn Bhd;
 - (ii) Kung Teong Eng (director);
 - (iii) Rosnita Binti Abdul Aziz (director);
 - (iv) Dato' Abdul Ghani bin Yusof (third party);
 - (v) Cheng Poh Heng (solicitor).
- E**
- F** [3] The Suit D8-22-1255-04 came up for the case management before the late Justice Abdul Wahab Said Ahmad on 3 April 2006 and he ordered all the parties including the fourth defendant *to file an affidavit verifying the list of documents which they had in their possession within 1 month from 3 April 2006* presumably under O 24 r 3 of the Rules of the High Court 1980.
- G**
- [4] The fourth defendant failed to do so within the one month period and the case management was postponed to 4 July 2006, then to 5 September 2006 and subsequently to 6 October 2006 on account of the fourth defendant's failure to file and serve the affidavit verifying the list of documents.
- H**
- [5] On 20 October 2006 the fourth defendant finally filed the affidavit verifying the list of documents it had in its possession. The said affidavit refers to the following documents amongst others for purposes of the trial of the main action:
- I**
- (i) Letter dated 10 July 2003 written by Dato' Ghani to M/S Cheng Poh Heng;
 - (ii) Letter dated 13 October 2003 written by Dato' Ghani to M/S Cheng Poh Heng;
 - (iii) Letter dated 31 December 2003 written by Wisecap Ventures Sdn Bhd (the fourth defendant in the main action) to M/S Cheng Poh Heng.

[6] The letters are exhibited as exh 'ARO-4' in encl 203.

A

SUBMISSION OF COUNSEL FOR THE PLAINTIFF

[7] The letters in question were fabricated to convey the fact that they were in existence on 10.7.2003, 13.10.2003, 31.12.2003 respectively when in fact they did not exist on those dates.

B

This fabrication is apparent from the letters themselves which:

- (i) contain the address of Cheng Poh Heng stated to be at No 148-3A, Jalan Tun Sambathan 50470 Kuala Lumpur as the address to which the letters were sent to and the address at which the letters were received;
- (ii) at all material times ie the dates on which the letters were purportedly issued, sent and received (10 July 2003, 13 October 2003 and 31 December 2003) Cheng Poh Heng was not practising at No 148-3A, Jalan Tun Sambathan 50470 Kuala Lumpur.

C

D

This fact is confirmed by the Malaysian Bar Council which confirmed that Cheng Poh Heng's practice as an advocate and solicitor was not at the material time at 148-3A but at 146-2A Jalan Tun Sambathan and that the address of his practice at 148-3A was only with effect from 2 January 2004, that means six months later.

E

See exh 'ARO-7' encl 203 and confirmed at exh 'ARO-5' encl 203.

- (iii) At all material times that is on the dates when the letters were purportedly sent and delivered viz 10 July 2003, 13 October 2003 and 31 December 2003 Cheng Poh Heng was not even at the said address stated in those letters.

F

[8] The letters in question it is submitted were not even in existence on the dates stated and could not have acknowledged receipt by Cheng Poh Heng on the said dates as expressly endorsed by him on those respective letters.

G

Dato' Abdul Ghani at para s 18 and 22 of his first affidavit affirmed on 12 February 2007 alleges that the letters dated 10 July 2003 and 13 October 2003 were not prepared on the dates stated on the letters and were only prepared on 28 January 2004. He also admits that Cheng Poh Heng did not acknowledge receipt on the dates stated in the letters. This is apparent at p 11 of Dato' Ghani's affidavit affirmed on 12 February 2007.

H

[9] Dato' Ghani also confirmed that the letters were antedated with reference to the dates of issuance and acknowledgement of receipts and these letters are to be used at the pending hearing of the action. Refer to para 18 of the affidavit.

I

[10] The explanation that the letters were made on or around 24 January 2004 is not only inherently improbable and contradictory but it also confirms the contempt in that Dato' Ghani's claim that the letter was prepared on 24 January 2004 cannot be true. At para 15 of his affidavit dated 12 February 2007 he averred as follows:

- A** I respectfully state that the first two payments I had made to CPH were not under the cover of any letter for the purpose of recording the purpose of the payment to CPH or any acknowledgement of receipt of the same. I also understand that no cover letter was issued by the fourth defendant in respect of its payment on 31 December 2003.
- B** [11] By fabricating these letters it is obvious that the letters were meant to show that there could not be a restitution of the shares (the relief which we are seeking) as loans had been obtained from Wisecap and the shares were used as security for the loan.
- C** [12] The alleged contemnor Dato' Ghani's explanation at para 16 of his affidavit is that:
- I further state that on the third occasion when I made the payment to Cheng Poh Heng, the said payment was made accompanied by a cover letter stipulating the particulars of the payment and a request for CPH's written acknowledgement of the said payments. I also prepared similar letters of the type I had used as the cover letter for the third occasion and dated it on the same day on which I had made payments to CPH. My purpose was to regularize the earlier omission to use the cover letter when making the payment and to place on record that each of these payments was for the same objective under the financial arrangement with the fourth defendant. I also advised the fourth defendant to similarly regularize their payment to CPH with a cover letter.
- D**
- E** In para 17 of his affidavit Dato' Ghani states as follows:
- The said letters were then prepared and sent to CPH for his acknowledgement. I had discussed the purpose and necessity of these letters with CPH as I needed CPH's agreement in this regard. CPH acknowledged the rationale of keeping proper records particularly when large sums were involved and immediately obliged as the payments were made and the contents of the letters though antedated, were not untrue as it recorded events that had transpired.
- F**
- G** [13] Cheng Poh Heng as a solicitor is obliged under the Legal Profession Act 1976 to keep a proper record of client's money in accordance with the Solicitors Accounts Rules 1990. A receipt by Cheng Poh Heng would have sufficed if indeed Dato' Ghani needed to "regularize" the payments made to Cheng Poh Heng. Therefore, Dato' Ghani's explanation that he needed to regularize the matter by making cover letters on 24.1.2004 is an inherently incredible and improbable afterthought.
- H** [14] There are inconsistencies and contradictions and unexplained issues with regard to the preparation of the letters in question:
- (i) Rosnita. In para 15 of her affidavit dated 12 February 2007 states that the fourth defendant only received the letters in late 2006. She further states that in late January 2004 she was given the letter dated 31 December 2003 for her to sign but that she did not prepare the letters. Who prepared the letter was however not disclosed.
- I**
- (ii) Kung Teong Eng in his affidavit dated 8 March 2007 states that he did not prepare or sign the said letters.

(iii) However, Kung Teong Eng in para 16(iii) of the affidavit states:

A

Surat Wisecap Ventures Sdn Bhd yang ditulis oleh Rosnita kepada Tetuan Cheng Poh Heng yang bertarikh 31 Disember 2003.

(iv) Dato' Ghani in his affidavit dated 12 February 2007 at para 16 says as follows:

B

... Saya juga telah menasihati defendan keempat untuk melakukan regulirasi yang serupa berkenaan pembayaran mereka kepada CPH dengan menyertakan sekali surat pembuka.

However, in his affidavit (Dato' Abdul Ghani's) dated 19 March 2007, he contradicts himself at para 11(a) that:

C

... saya telah dinasihati oleh Defendant Keempat untuk mendapatkan pengakuan bertulis untuk pembayaran RM1.0 juta kepada CPH.

(iv) The letters dated 10 July 2003, 13 October 2003 are stated to have been carbon copied to the fourth defendant but no explanation has been offered as to why the fourth defendant did not possess these letters until late 2006 if they were in fact carbon copied to the fourth defendant.

D

(iv) No explanation has been offered as to why it took the fourth defendant seven months since the date of the court order to produce these documents.

E

[15] In view of these inconsistencies and contradiction I submit that this is a fit and proper case for cross-examination of the alleged contemnors on their affidavits with regard the letters in question for the court to determine.

[16] By producing the three letters in the fourth defendant's affidavit verifying their list of documents the alleged contemnors had resorted to deceitful conduct meant to interfere with, obstruct, pervert and/or undermine the due administration and course of justice in that the three letters were intended and meant to be used as evidence at the trial of the action and thereby to induce this Honourable Court to accept and believe that the letters were issued, sent and received at the address stated on the dates stated on the said letters when this is actually untrue and to use these letters to build up a case for the defendants in the main action.

F

G

SUBMISSION BY COUNSEL FOR THE FIRST AND THIRD CONTEMNORS, ENCIK JUSTIN VOON

H

[17] It does not fulfil the criteria where it is proven beyond reasonable doubt. There are many uncertainties in the facts and circumstances and the plaintiff has not made up the case based on the statement pursuant to O 52 of the RHC that they were in fact firstly fabrication of false documents. Refer encl 193 p 5 para 4.1: 'membuat dokumen-dokumen palsu.' Paragraph 4.2: 'mereka-rekakan keterangan palsu yang terkandung di dalam dokumen-dokumen palsu tersebut.' See chart produced. The affidavit verifying list of documents which the fourth defendant has in its possession discloses various other documents apart from the three letters to show that the loan transpired.

I

- A** [18] The first letter 10 July 2003 from Dato' Ghani (fourth contemnor) to Cheng Poh Heng (fifth contemnor — solicitor). The contents of the letter are true in all respect. This is verified by the deposit slip dated 10 July 2003. Therefore the first paragraph is true. The second paragraph is supported by the loan documents at p 20 encl 205 as well as pp 23–28. (These are not disputed.)
- B** [19] These letters were not prepared by my client but by Dato' Ghani and were given to my client and my client received them in good faith.
- C** [20] Second letter 13 October 2003 p 31: same submission as first letter. There is also a banking slip to support the contents of the letter which had also been included in the list of documents.
- D** [21] Third letter 31 December 2003: my client's own letter. Contents of letter similar relating to payment of purchase price under the S&P. Payment can be verified by banking slip p 38 dated 31 December 2003. The person who signed this letter is Rosnita binti Abdul Aziz — third contemnor. She is a nominee director of an individual Dato' Abdul Halim bin Abdul Samad. This is disclosed in her affidavit para 9 of encl 209. She had acted on the instruction of the principal Dato' Halim. Dato' Ghani had prepared all three letters admitted by Ghani himself in his affidavit. My client signed it on the basis that it would serve as a record.
- E** [22] All three letters have banking slips to prove payment on the respective dates.
- [23] Dato' Ghani's affidavit explained why the three letters were written antedating — solely for purpose of record and documentation (para 22 of encl 213).
- F** [24] The documents did not tell a lie. So it cannot be a fabricated evidence. Only the dates were different.
- G** [25] The documents were produced by my client (first contemnor) in abeyance to the process of discovery because they were in my client's possession. They were not involved in preparing the letter nor acknowledgement of receipt of letter. When my client signed the last letter, acknowledgement did not exist.
- SUBMISSION BY COUNSEL FOR THE SECOND CONTEMNOR, ENCIK RICHARD WEE
- H**
- [26] I just took over the case yesterday. I am adopting the submission of Encik Justin Voon, counsel for the first and third contemnors. Further I wish to add more points:
- I** (i) The second contemnor is the director of fourth defendant as a nominee of Encik Shorbani.
- (ii) The second contemnor's position in this company is because he affirmed an affidavit verifying document of which in that this document he verified

includes the three letters which were earlier explained and referred to by counsel for the first and third contemnors.

A

- (iii) He is not verifying the three documents as 'benar' but merely verifying that the 'senarai dokumen' as 'benar'. See O 24 r 5 of the RHC read with Form 40. See also O 24 r 3 requiring deponent to file affidavit verifying such a list of documents.

B

SUBMISSION BY COUNSEL FOR THE ALLEGED CONTEMNOR, DATO' DR CYRUS DAS

[27] The gist of the complaint to support this application to cite the alleged contemnor for contempt is that they had:

C

- (i) fabricated documents; and
- (ii) fabricated document evidence in the falsified documents;

D

and thereby obstructed the administration of justice with the intention of misleading the honourable court.

[28] The three impugned letters were part of four letters relating to the same transaction. Of the three impugned letters, two of them were signed by Dato' Ghani and the other one by Rosnita. All three letters refer to the same transaction and they refer to certain payments made to the client's bank account of M/s Cheng Poh Heng and Co the solicitor for the purchaser Gala Sari Resources (first defendant). The fourth letter is dated 28 January 2004 also signed by Dato' Ghani and referred to the same transaction. It is not disputed by the applicant in their statement that the fourth letter dated 28 January 2004 was a contemporaneous letter that is to say it was written and dated on the same day. This letter was not antedated. All these letters refer to the payment with respect to the purchase of 14.4% of the stake in the third defendant company to the value of RM13m. All the payments in the four letters added up to RM5.5m being part of the purchase price and it is not disputed that they were paid over and received by the applicant plaintiff on the 4 February 2004. See encl 213 pp 38–39. These letters reflect that the total sum of RM5.5m was paid to the solicitor for Gala Sari, fifth contemnor (first defendant's previous solicitor) who in turn paid the sum of RM5.5m to the plaintiff's solicitor M/s Choy & Associates on 4 February 2004.

E

F

G

H

[29] The date of the banking transactions and the total payment of RM5.5m to the solicitor for the plaintiff/applicant on 4 February 2004 is important because it would verify the truth of the contents of the four letters including the three antedated letters. (Correction with respect to the payment of RM4m they were paid by telegraphic transfers on different dates and the proof of payment is by credit advice from the bank not by a paying slip.)

I

[30] The truth of the contents of the letters can be supported by agreements which had been legally drawn up namely the variation agreement exhibited at p 18 of encl 213, the loan agreement dated 10 July 2003 exhibited at p 25 of encl 213.

A [31] The loan agreement is material because it shows that there was a financing agreement between Wisecap (the fourth defendant) as financier and Gala Sari (the first defendant) as purchaser cum borrower. The variation agreement is material because it gave an option to the vendor ie the plaintiff to withdraw early any purchase money paid to M/s Cheng Poh Heng and Co as solicitor for the purchaser Gala Sari.

B The variation agreement expressly mentioned M/s Cheng Poh Heng & Co as receipt of the purchase money. In this respect the loan arrangement that Dato' Ghani had with the two individual Dato' Halim and Encik Shorbani is also documented in a letter dated 9 July 2003 addressed to Wisecap, the fourth defendant, by Dato' Ghani that he would finance Wisecap up to the limit of RM7.5m.

C [32] When one really looks at the real complaint in the statement under O 52 it boils down to the complaint of antedating and that this antedating was done with a view of misleading the court:

D (i) mere antedating a letter is not a fabrication or the creation of false document in law. See s 464 of the Penal Code which carries the definition of false document. Also see s 192 of the Penal Code. See *Emperor v Govind Singh* AIR 1926 Patna 535 at p 536: antedating document not necessarily forgery where there is no dishonest intention to deceive. Where contents can be proved to be true held no forgery — *Jl Moses v A Ramanatha Iyer* [1941] Mad Cr C 84.

E (ii) See *Public Prosecutor v Straits Times (Malaya) Bhd* [1971] 1 MLJ 69 and *R v Selva & Anor* [1982] 1 All ER 96. The documents impugned had been made pre-litigation and was therefore not made in contemplation of litigation which only began seven months later.

F (iii) Burden lies on the plaintiff to prove beyond reasonable doubt that the impugned documents were fabricated, that there was a falsification of the contents and it was done with the objective of obstructing justice and misleading the court.

G [33] Counsel for the fifth alleged contemnor adopts submission of the counsel for the fourth contemnor. Further when the fourth payment of RM2m was made to the fifth alleged contemnor on 28 January 2004 it was accompanied by three cover letters dated the same day that is 10 July 2003, 13 October 2003 and 31 December 2003 on which the payments were made to the fifth alleged contemnor for his acknowledgement. The dates corresponded to the days the letters were signed.

H It shows that there was no intention to fabricate or mislead this honourable court.

[34] The allegation of the fabrication of false evidence does not touch upon a point material to the proceeding in the D8 suit.

REPLY BY COUNSEL FOR THE PLAINTIFF

I [35] The contempt is confined to the three letters. Hence references by the contemnors to other letters and documents pertaining to the loan agreement between the first and fourth defendants are irrelevant not being the subject matter of this contempt proceeding. The letters are fabrication to convey the impression that they

existed on those dates stated thereon and that they were received by the fifth contemnor on those dates as endorsed by the advocate and solicitor (the fifth contemnor). The contemnors admit that these letters did not exist on those dates stated in the letters and that they were not received by the fifth contemnor on those dates stated. The truth of those parts in those letters which were referred to by the contemnors which they alleged to be true are irrelevant for purposes of these contempt proceedings but are matters for trial. The contention that these letters were prepared for internal record purposes is refuted by the fourth contemnor's affidavit vide encl 213 para 23. These letters were in fact used in the discovery process which is an integral step in the main action which had commenced in August 2004. See *Halsbury's* (4th Ed) Vol 13 p 2:

1. Meaning and function of discovery. The term 'discovery' in this title is used to describe the process by which the parties to a civil cause or matter are enabled to obtain, within certain defined limits, full information of the existence and the contents of all relevant documents relating to the matters in question between them. The process of the discovery of documents operates generally in three successive stages, namely (1) the disclosure in writing by one party to the other of all the documents which he has or has had in his possession, custody or power relating to matters in question in the proceedings; (2) the inspection of the documents disclosed, other than those for which privilege from or other objection to production is properly claimed or raised; and (3) the production of the documents disclosed either for inspection by the opposite party or to the court.

The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their respective cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to use before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to documentary evidence and to reduce the costs of the litigation.

[36] Refer to *R v Selva & Anor* [1982] 1 All ER 96 where at Held:

An act could not have a tendency to pervert the course of justice unless proceedings of some kind were in being or imminent or an investigation was in progress which might bring about proceedings, so that a course of justice had been embarked on. Since there were no such proceedings or investigation in being, imminent or in progress and since no actual proceedings were within the contemplation of S or M it could not be said that a course of justice had been embarked on when Sand M acted as they did. Accordingly, the offences had not been made out and the judge ought to have directed the jury to acquit the defendants. The appeals would therefore be allowed and the convictions quashed (see p 99 c d, p 102 g h, p 103 b to d and f to h and p 105 b, post).

Dictum of Lord McDermott LCJ in *R v Bailey* [1956] N1 at 26 followed.

R v Vreones [1891] 1 QB 360 distinguished.

Per curiam. (1) Altering the record of endorsements on a driving licence in order to procure that in the event of the licence holder committing in the future another road traffic offence the court will sentence him in ignorance of his previous offences does not set in motion a course of justice for the purpose of constituting an attempt to pervert the course of justice (see p 103 j to p 104 b, post).

An intention to pervert the course of justice is an essential ingredient of the offence of perverting the course of justice and it is insufficient to establish merely that the accused's acts

A had a tendency to pervert the course of justice (see p 104 *ef* and *j* to p 105 *a*, post); dictum of Pollock B in *R v Vreones* [1891] 1 QB at 369 followed.

Refer to *Upendra Nath Chatterjee v Emperor* [1935–1936] Vol XL. 40 CWN 313.
See *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 MLJ 241 at p 248:

B In view of the generality of the phrase ‘interference with the due administration of justice’, we are of the view that the categories of contempt are never closed. To that extent we respectfully endorse the statement made by Low Hop Bing J, in *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240 at p 270:

C The circumstances and categories of facts which may arise and which may constitute contempt of court, in a particular case, are never closed. This is the same position as in the case of negligence in which the scope for development is limitless. Contempt of court may arise from any act or form whatsoever, ranging from libel or slander emanating from any contemptuous utterance, news item, report or article, to an act of disobedience to a court order or a failure to comply with a procedural requirement established by law. Any of these acts, in varying degrees, affects the administration of justice or may impede the fair trial of sub judge matters, civil or criminal, for the time being pending in any court.

D The particular matrix of the individual case is of paramount importance in determining whether a particular circumstance attracts the application of the law of contempt. Hence, a positive perception of the facts is a prerequisite in deciding whether or not there is any contravention necessitating the invocation of the law of contempt.

E [37] The fact that the letters are yet to be used at the trial proper is relevant because for the purposes of contempt with regard to interference for justice. It is not necessary to prove that there was actual interference with the administration of justice. It is enough if it is likely or tends in any way to interfere with the proper administration of justice. Refer *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321 at p 322 at Held (4):

G (per Ahmad Fairuz JCA) The correct test applicable in contempt proceedings had been applied by the trial judge. The term ‘real risk’ introduced in *Reg v Duffy & Ors; ex p Nash* [1960] 2 QB 188 was never intended to qualify the tests used in earlier cases. Therefore, the trial judge was correct when he held that in order to constitute contempt of court, it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice. It is enough if it is likely or it tends in any way to interfere with the proper administration of justice (see p 332D-G); *PP v The Straits Times Press Ltd* [1949] MLJ 81; *PP v SRN Palaniappan & Ors* [1949] MLJ 246 and *Re Sin Poh Amalgamated Ltd & Ors* [1954] MLJ 152 followed.

H [38] The exchange of documents in the discovery process is an important step as it may influence or affect the cause of a party’s conduct in litigation in question because based on what is discovered a party may even withdraw his whole claim or relinquish part of his claim. It is therefore humbly submitted that it is no answer in the case of contempt against a corporation for its directors to maintain that he or she is merely a nominee or sleeping director. Refer *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1994] 3 MLJ 40;; [1994] 3 CLJ 125 at p 126 held [2]:

I

Directors of a company who have been notified of an injunction are liable for the breach of the injunction by the company and it is no defence to claim that they were 'sleeping directors'.

A

[39] No credible answer or explanation have been proffered by all the five contemnors against discharge of contempt of this honourable court and hence they have not shown cause as to why all five should not be committed to prison for contempt especially to this case which relates to interference to the due administration of justice. See 52.1.12 *Malaysian High Court Practice* 2006 Desk Edition Volume 1:

B

[52.1.12] The standard of proof

C

The standard of proof required in contempt of court proceedings is proof beyond reasonable doubt. Where there is doubt, such doubt ought to be resolved in favour of the alleged contemnor; see the Supreme Court decision in *Wee Choo Keong v MBf Holdings Bhd* [1995] 3 MLJ 549 and *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240. The evidence when considered in its totality has to establish beyond reasonable doubt the guilt of the contemnor: *Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor* [1997] 2 MLJ 472, (CA) per Gopal Sri Ram JCA. In sentencing, subject to questions of policy, each case must be dealt with according to its own facts. See also *City Aligarh Municipal Board & Ors v Ekka country-regionplaceTonga Madzoor Union & Ors* [1970] AIR SC 1707; *Re Bramblevale Ltd* [1970] 1 Ch 128 and *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126; *Dean v Dean* [1987] 1 FLR 517, CA; *Attorney-General v Newspaper Publishing Plc & Ors* [1988] Ch 333, CA at 362.

D

E

FINDINGS AND DECISION

F

[40] The suit arose from an agreement whereby the plaintiff sold the shares in the third defendant to the first defendant. Part payment of the purchase price had been made to the plaintiff by the first defendant and leaving a balance of RM7.5m outstanding. Before the full purchase was paid, the first defendant transferred the shares to the fourth defendant by a variation agreement and a loan agreement.

G

[41] The plaintiff contends that the transfer to the fourth defendant was mala fide and was transacted merely to prevent the plaintiff from recovering the shares from the defendants by restitution.

The three letters which are now the subject matter of the present contempt proceedings (as verified by the affidavit of Kung Teong Eng, a director of the 4th defendant dated 18 October 2006) purporting to show that payments were in fact made to Cheng Poh Heng (solicitor for the purchaser) and hence prove one way or another that the fourth defendant was entitled to the shares.

H

[42] The writer of the first two letters dated 10 July 2003 and 13 October 2003 respectively were written by Dato' Abdul Ghani bin Yusof (the fourth contemnor — a director of the second and third defendants). The third letter was written by a woman Rosnita binti Abdul Aziz — the third contemnor who was a director of the fourth defendant company.

I

- A [43] All the respondents had admitted that the letters were not written on the day they were signed. Essentially the explanation of the respondents in answer to the contempt charges is that the letters were antedated only because they did not have any letter evidence to record the payments by Dato' Ghani to the fifth contemnor Cheng Poh Heng and to record the payment by the fourth defendant to Cheng Poh Heng, the solicitor for the first defendant. The letters were not meant to deceive the court. The three payments to Cheng Poh Heng were in fact made on the respective dates of the letters and these can be verified by the issuance of the two telegraphic transfers and the banking slip showing exactly when the payments were made which corresponded to the dates of the letters.
- B
- C [44] It is pertinent to note that the affidavit of Kung Teong Eng a director of the fourth defendant is meant to verify the list of documents which the fourth defendant had in its possession in due compliance with O 24 r 3 of the RHC. It is not meant at this stage to *verify the truth of their contents*. It is open to the defendants, the fifth contemnor and persons who wrote the letters to say at the trial of this suit that in truth the letters were antedated. The mere antedating of the three letters would not under the circumstances constitute a contempt of this court which requires an intention on the part of the perpetrators *to use them to mislead the court*. Until and unless the alleged contemnors *use the letters* as evidence to show that they were in fact written on the *dates as stated* on the letters and not on the latter dates when they were signed, no contempt can be committed.
- D
- E [45] A contempt proceedings is quasi criminal in nature and the plaintiff is obliged to prove the charges beyond reasonable doubt. The plaintiff has failed to do so.
- F [46] Enclosure 202 is dismissed with costs.
- ENCLOSURES 214, 223, 225, 231 AND 246
- G [47] With respect to the respondents' applications encls 214, 223, 225, 231 and 246 to set aside the leave granted to the plaintiff to initiate this contempt proceedings there is clearly no reason why they should be allowed.
- H [48] The leave was granted on the basis that there is evidence before the court that the three letters were written at the time when the addressee M/s Cheng Poh Heng & Co had not yet set up shop at the said premises thereby providing ample justification for me to conclude that at that stage in all probability those letters had been fabricated. The court at that stage should not be concerned with the reasons and circumstances under which those letters were written but with the question of whether those letters were forged and therefore constitutes contempt which justifies a competent hearing.
- I

[49] The applications to set aside must therefore be dismissed with costs.

A

ENCLOSURES 216, 218, 221, 242 AND 244

[50] All applications by the respective parties to cross-examine the deponents of affidavits are now by reason of my findings rendered academic and are struck out with no order as to costs.

B

Order accordingly.

Reported by Sally Kee

C

D

E

F

G

H

I