Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and Others
[2007] SGCA 10

Case Number : CA 41/2006

Decision Date : 01 March 2007

Tribunal/Court : Court of Appeal

Coram : Kan Ting Chiu J; Andrew Phang Boon Leong JA; Tan Lee Meng J

Counsel Name(s) : Oommen Mathew and Rajmohan (Haq & Selvam) for the appellant; Alvin Yeo SC, Tan Kay Kheng, Tan Hsiang Yue, Aw Wen Ni (Wong Partnership) for the respondents

Parties : Pertamina Energy Trading Ltd — Karaha Bodas Co LLC; Michael Joseph Pilkington; Clyde & Co, Hong Kong

Contempt of Court – Civil contempt – Mareva injunction ordered by Singapore court in regard of foreign arbitral award – Condition of order of court that certain information to be furnished by appellant to first respondent for specific purpose only – Condition of order of court imposing on respondent implied undertaking not to use information for collateral purpose – Whether breach of such undertaking amounting to breach of court order and contempt of court

Contempt of Court – Civil contempt – Mareva injunction ordered by Singapore court in regard of foreign arbitral award – Order of court expressing that purpose of injunction not to prevent appellant from disposing of assets in ordinary course of business – Whether initiation of garnishee proceedings by first respondent thwarting operation of injunction amounts to contempt of court

Contempt of Court – Civil contempt – Whether third parties may be liable for aiding and abetting contempt of court – Applicable principles

1 March 2007 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The present proceedings raised the issue of whether or not a contempt of court had been committed in the context of a Mareva injunction. However, they arose in somewhat unusual circumstances. There was no alleged contravention of the Mareva injunction by the injunctee as such. There was, instead, an alleged thwarting or frustration of the injunction concerned as well as an alleged breach of an implied undertaking by *the injunctor*. In other words, the party in whose *favour* the injunction had been granted was now being accused by the party against whom the injunction had been granted of having committed acts in contempt of court. This was therefore an unusual fact situation. However, in the oft-cited words of an oft-cited article (see Joseph Moskovitz, "Contempt of Injunctions, Civil and Criminal" (1943) 43 Colum L Rev 780 at 780):

> Contempt of court is the Proteus of the legal world, assuming an almost infinite diversity of forms.

Indeed, in the English Court of Appeal decision of *Attorney-General v Newspaper Publishing Plc* [1988] Ch 333 ("*Newspaper Publishing*"), Sir John Donaldson MR referred to the "protean nature" of contempt (a point noted by Lord Oliver of Aylmerton in *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191 at 216 ("*Times Newspapers 2*")) and, in the (also) English decision of *Attorney-General v Sport Newspapers Ltd* [1991] 1 WLR 1194 ("*Sport Newspapers*"), Hodgson J referred (at 1230) to contempt as constituting "the Proteus of the common law".

2 Turning to the factual matrix proper, the appellant, Pertamina Energy Trading Ltd ("Petral"), is a company incorporated and carrying on business in Hong Kong. It is the first defendant of the originating summons that was accompanied by the grant of the Mareva injunction, which forms the centrepiece in the present proceedings (see [9] below). Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, now known as PT Pertamina ("Pertamina"), owns 99.83% of the shareholding in Petral. The second defendant in the aforementioned originating summons is Pertamina Energy Services Pte Ltd ("PES"). PES is incorporated in Singapore and is a wholly-owned subsidiary of Petral. Pertamina and PES were not parties to the contempt proceedings in the court below. Neither was involved in this appeal either.

3 The first respondent, Karaha Bodas Co LLC ("KBC"), is a company incorporated in the Cayman Islands. KBC is a special project vehicle that was formed for the purposes of developing geothermal energy resources in Indonesia with Pertamina. Currently, it is not carrying on any business because the project with Pertamina was cancelled by Presidential Decrees issued by the Indonesian government in 1997/1998. The cancellation of this project led to arbitration proceedings in Switzerland and resulted in an award against Pertamina on 18 December 2001.

4 In March 2002, KBC commenced parallel enforcement proceedings in Hong Kong and Singapore, in relation to the arbitral award which set in motion a string of events that have led to this contempt application.

5 The second respondent is a solicitor and partner at the Hong Kong office of a UK law firm. The second respondent is in charge of the conduct of KBC's enforcement proceedings in Hong Kong. The third respondent is made up of the entire Hong Kong office of the UK law firm just referred to, and is a partnership of 11 persons including the second respondent.

The facts leading up to the present proceedings

6 The Singapore High Court granted KBC leave to enforce its arbitral award on 14 March 2002, with judgment entered in the terms of the award. On 29 May 2002, KBC obtained garnishee orders *nisi* against PES and on 6 June 2002 Pertamina applied for an order to set aside the enforcement proceedings on the ground of invalid service.

7 Meanwhile, in concurrent Hong Kong proceedings, KBC's execution proceedings were stayed pending Pertamina's application to set aside the service of court documents. Between mid-July 2002 and early August 2002, KBC's charging order *nisi* was made absolute and Pertamina's application to set aside the service of court documents was dismissed.

8 In Singapore, on 20 August 2002, a consent order was made in the terms that the service of documents on Pertamina was valid, that Pertamina be given 21 days to apply to set aside the order of 14 March 2002, that the garnishee orders *nisi* were to remain in force and lastly, that further proceedings be held in abeyance until the lapse of the 21-day period or until the determination of Pertamina's setting-aside application or until a further order was made. On 10 September 2002, Pertamina applied to set aside the order of 14 March 2002 and the garnishee orders *nisi*.

9 More than two years later, on 22 December 2004, KBC obtained a domestic Mareva injunction ("the Singapore injunction") against Petral and PES one day after they had obtained, in Hong Kong, a worldwide Mareva injunction against Petral. After the Singapore injunction was obtained, KBC was given leave to serve court documents on Petral, out of jurisdiction. On 17 and 18 January 2005, PES and Petral, respectively, applied for, *inter alia*, a discharge of the Singapore injunction. They were in fact successful and the Singapore injunction was discharged on 14 March 2005 (see *Karaha Bodas Co*

LLC v Pertamina Energy Trading Ltd [2005] 2 SLR 568, affirmed in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112).

10 Crucially, though, on 26 January 2005, Petral, through their lawyers sent a letter to KBC's Singapore lawyers informing KBC of a transfer of funds from Bank Mandiri in Singapore to Dah Sing Bank in Hong Kong. Petral claimed in its letter that the transfer was to effect payments as itemised in the letter. The text of the letter is as follows:

> 1. The 1st Defendants hereby advise that the [*sic*] they will be making payments as set out in the attachment to this letter. The payments will be made this week.
>
> 2. The source of these funds is the 1st Defendants' account with Bank Mandiri (Singapore). Moneys have been transferred to the 1st Defendants' bank account in Hong Kong for the above purpose.

11 Petral asserts that this transfer and intended payments constituted "*a dealing with or disposing of any of their assets in the ordinary and proper course of business*", pursuant to Exception 2 of the Singapore injunction (set out at [17] below). Petral's case is that the letter was furnished pursuant to Exception 2 of the Singapore injunction.

12 KBC's Singapore lawyers who were in conduct of its Singapore proceedings received Petral's letter on 27 January 2005. KBC's Singapore lawyers relayed the said letter to the second respondent in Hong Kong. Having had receipt, KBC proceeded to apply to the High Court in Hong Kong and was granted a garnishee order *nisi* against Dah Sing Bank, despite making full and frank disclosure of the Singapore proceedings. Through this order, KBC was able to garnish the moneys transferred by Petral to Dah Sing Bank.

13 The present contempt proceedings have come about through events that occurred between 26 and 27 January 2005, starting with the letter sent out by Petral and culminating with the point at which the moneys transferred to Dah Sing Bank were garnished by KBC.

The issues

14 This appeal is brought by the appellant, Petral, against the decision of the trial judge ("the Judge") dismissing the appellant's committal application against the respondents for contempt of court (see *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 3 SLR 721 (hereafter, "GD")).

15 The issues raised by the appellant in the present proceedings are set out as follows:

> (a) Whether the first respondent had thwarted the operation of Exception 2 of the Singapore injunction by directly preventing the appellant from dealing with its assets in the ordinary and proper course of business.
>
> (b) Whether the first respondent had breached the implied undertaking not to use the information furnished in the letter of 26 January 2005 for a collateral purpose.
>
> (c) Assuming that contempt of court by the first respondent is established, whether the second respondent and the third respondent should be liable for contempt of court for aiding and abetting the first respondent in its contempt of court.

16 Whilst we will deal with the *substance* of these issues, we will not deal with them in the

precise manner in which they have been raised in the preceding paragraph. In particular, although issues (a) and (b) are closely related, they are conceptually distinct. More importantly, it would be preferable to consider issue (b) first, which constitutes – in and of itself – a separate ground upon which contempt of court might have been established. Further, in so far as the second and third respondents are concerned, additional legal issues arise as they are third parties inasmuch as they are not parties against whom the court order was issued. And, if a contempt of court is indeed established, the further issue arises as to the sanction to be imposed on the party or parties concerned. To this end, after setting out the relevant parts of the Singapore injunction in the next part of this judgment, we proceed to consider, first, the relevant legal principles before applying these principles to the facts in the present proceedings.

The material portions of the Singapore injunction

17 For ease of reference, the portions of the Singapore injunction that are relevant to the present proceedings are set out below:

> Disposal of assets
>
> 1. (1) The 1st Defendant [the appellant] *must not remove from Singapore* in any way *dispose of or deal with or diminish the value of any of his assets which are in Singapore* whether in his own name or not and whether solely or jointly owned up to the value US$36,236,581.65. This prohibition includes but is not limited to the following assets in particular:-
>
> …
>
> **EXCEPTION TO THIS ORDER**
>
> (1) This order does not prohibit the Defendants from spending $50,000 on legal advice and representation. But before spending any money the Defendants must tell the Plaintiffs' solicitors where the money is to come from.
>
> *(2) This order does not prohibit the Defendants from dealing with or disposing of any of their assets in the ordinary and proper course of business. The Defendants shall account to the Plaintiffs weekly for the amount of money spent in this regard.*
>
> (3) The Defendants may agree with the Plaintiffs' solicitors that the above spending limits should be increased or that this order should be varied in any other respect but any such agreement must be in writing.
>
> …
>
> **THIRD PARTIES**
>
> (1) *Effect of this order*
>
> *It is contempt of Court for any person notified of this order knowingly to assist in or permit a breach of the order. Any person doing so may be sent to prison or fined.*
>
> [emphasis added]

18 We pause at this point to make some observations on Exception 2 of the Singapore injunction

(reproduced above at [17]), as it will furnish us with the appropriate context in which to analyse the respondents' conduct in relation to the relevant legal principles.

19 Exception 2 is a standard exception to Mareva injunctions generally. Exceptions such as these are necessary and fair, given the fact that the Mareva injunction has been described as "one of the law's two "nuclear" weapons": see *per* Donaldson LJ (as he then was) in the English Court of Appeal decision of *Bank Mellat v Nikpour* [1985] FSR 87 at 92. Indeed, the Mareva injunction was never intended to financially cripple the party against whom it is made. As was aptly put in a leading text, "the court should discourage any attempt by the claimant to make the relief more onerous for the defendant than is necessary to achieve its legitimate objective of preventing unjustified dissipation of assets": see Steven Gee, *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) ("*Gee*") at para 3.001. Indeed, in the case which gave its name to this particular procedure itself, *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, Lord Denning MR observed thus (at 510):

> If it appears that the debt is due and owing — and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment — the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.

The basic requirements for the grant of a Mareva injunction have since been elaborated upon in greater detail, but the core rationale which birthed this particular jurisdiction is succinctly captured in the above quotation, and should always be borne in mind.

20 The decision of the English High Court in *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1981] QB 65 should also be noted. In that case, Robert Goff J (as he then was) observed thus (at 71):

> [T]he point of the *Mareva* jurisdiction is to proceed by stealth, to pre-empt any action by the defendant to remove his assets from the jurisdiction. To achieve that result the injunction must be in a wide form because, for example, a transfer by the defendant to a collaborator in the jurisdiction could lead to the transfer of the assets abroad by that collaborator. ***But it does not follow that, having established the injunction, the court should not thereafter permit a qualification to it to allow a transfer of assets by the defendant if the defendant satisfies the court that he requires the money for a purpose which does not conflict with the policy underlying the*** *Mareva* ***jurisdiction***. [emphasis added in bold italics]

The learned judge also observed as follows (at 72–73):

> It does not make commercial sense that a party claiming unliquidated damages should, without himself proceeding to judgment, prevent the defendant from using his assets to satisfy his debts as they fall due and so put him in the position of having to allow his creditors to proceed to judgment with consequent loss of credit and of commercial standing. … All the interveners [the defendant's creditors who had lent money to the defendant for the purpose of purchasing ships, including the ship in the case at hand] are asking [in their application to vary the injunction so that they could, as equitable mortgagees of the defendant's ship as well as assignees of the insurance policies of the said ship, be paid the proceeds of these policies as repayment of the debt due under the loan] is that the defendants should be free to repay such a loan if they think fit to do so, not that the loan transaction should be enforced. ***For a defendant to be free to repay a loan in such circumstances is not inconsistent with the policy underlying the*** *Mareva* ***jurisdiction. He is not in such circumstances seeking to avoid his responsibilities to the plaintiff if the latter should ultimately obtain a judgment; on the contrary, he is***

> ***seeking in good faith to make payments which he considers he should make in the ordinary course of business. I cannot see that the*** *Mareva* ***jurisdiction should be allowed to prevent such a payment. To allow it to do so would be to stretch it beyond its original purpose so that instead of preventing abuse it would rather prevent businessmen conducting their businesses as they are entitled to do***. [emphasis added in bold italics]

21 Indeed, as Lloyd LJ put it in the English Court of Appeal decision of *Normid Housing Association Ltd v Ralphs and Mansell and Assicurazioni Generali SpA (No 2)* [1989] 1 Lloyd's Rep 274 (at 275–276):

> ***The Courts have never allowed the Mareva jurisdiction, beneficial though it be, to inhibit the ordinary course of business or to interfere with a defendant's ordinary transactions, especially where third parties are involved.*** … [T]he principle extends beyond the payment of debts, or the incurring of ordinary living expenses. It applies also to all ordinary transactions in the course of business or, I would add, in the course of life. [emphasis added in bold italics]

And, in the (also) English Court of Appeal decision of *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 ("*Polly Peck (No 2)*"), Lord Donaldson of Lymington MR observed, in a similar vein, thus (at 785):

> So far as it lies in their power, the courts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may thereafter obtain. … It is not the purpose of a Mareva injunction to prevent a defendant acting as he would have acted in the absence of a claim against him. *Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertaken with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be given in the future. Equally no defendant, whether a natural or juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or from meeting his debts or other obligations as they come due prior to judgment being given in the action*. [emphasis added]

Reference may also be made to the observations of Scott LJ (*id* at 782).

The relevant legal principles

Introduction

22 It is imperative to note, at the outset, that the doctrine of contempt of court is not intended, in any manner or fashion whatsoever, to protect the dignity of the judges as such; its purpose is more objective and is (more importantly) rooted in the public interest. As Lord Morris of Borth-y-Gest put it in the House of Lords decision of *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (at 302) ("*Times Newspapers*"):

> In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed *it is not because those charged with the responsibilities of administering justice are concerned for their own dignity : it is because the very structure of ordered life is at risk if the recognised courts of the*

land are so flouted and their authority wanes and is supplanted. [emphasis added]

In the same case, Lord Cross of Chelsea observed thus (at 322):

> "Contempt of court" means an interference with the administration of justice and *it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court*. [emphasis added]

23 And, in the English decision of *Sport Newspapers* ([1] *supra*), Bingham LJ acknowledged (at 1206) that the law of contempt "exists to vindicate and protect the rights of litigants, not the rights of courts or judges save in so far as their task is to vindicate and protect the rights of litigants". Indeed, counsel for the applicant in this particular case had also observed (correctly, in our view) that "[t]he courts' power to punish for contempt exists *not to vindicate the dignity of the court or the self-esteem of judges but to safeguard the integrity of legal proceedings for the benefit of those using the courts and so indirectly for the benefit of the public* whose interest it is that legal proceedings, civil or criminal, should be fairly tried and justly determined" (see at 1200; emphasis added).

24 Although the doctrine of contempt of court is traditionally divided into the criminal and the civil spheres, the line between them is not often clear (and see the criticisms and consequent suggestion that this distinction be abolished in John Laws, "Current Problems in the Law of Contempt" (1990) 43 CLP 99 at 100–105). Suffice it to state that, in so far as the latter is concerned, there will always be an element of the public interest as well. As Salmon LJ put it in the oft-cited English Court of Appeal decision of *Jennison v Baker* [1972] 2 QB 52 (at 64):

> Of course an injunction is granted and enforced for the protection of the plaintiff. The defendant who breaches it is sent to prison for contempt with the object of vindicating (a) the rights of plaintiffs (especially the plaintiff in the action) and (b) the authority of the court. *The two objects are, in my view, inextricably intermixed.* [emphasis added]

Turning to other jurisdictions, we find a similar approach.

25 In the Australian High Court decision of *Witham v Holloway* (1995) 69 ALJR 847, Brennan, Deane, Toohey and Gaudron JJ observed, in a joint judgment, thus (at 851):

> One problem is that there is not a true dichotomy between proceedings in the public interest and proceedings in the interest of the individual. Even when proceedings are taken by the individual to secure the benefit of an order or undertaking that has not been complied with, *there is also a public interest aspect in the sense that the proceedings also vindicate the court's authority*. Moreover, the public interest in the administration of justice requires compliance with all orders and undertakings, whether or not compliance also serves individual or private interests.
>
> Nor can the dichotomy between proceedings in the public interest and proceedings in the interest of the individual be maintained on the basis that some cases involve an interference with the administration of justice and others merely involve an interference with individual rights. *All orders*, whether they be Mareva injunctions, injunctions relating to the subject matter of the suit, or, simply, procedural orders, *are made in the interests of justice. Non-compliance necessarily constitutes an interference with the administration of justice even if the position can be remedied as between the parties*.
>
> [emphasis added]

And, in the same decision, McHugh J observed thus (at 855):

> However, it is difficult to accept the claim that the disobedience of a court order is a matter that concerns only the parties to the action. An order by way of fine, committal or sequestration of property for disobeying a court order cannot be regarded as a matter that concerns only the parties to the action. The fine, committal or sequestration vindicates the authority of the court and deters other suitors from disobeying the orders of the courts. Whether the object of particular civil proceedings is coercive, remedial or purely punitive, an order fining or imprisoning the contemnor or sequestrating the property of that person *serves the public interest in maintaining the authority of the courts of justice*. Indeed, courts and commentators recognise that the objectives of proceedings for civil and criminal contempt overlap. [emphasis added]

26 In the English Court of Appeal decision of *Seaward v Paterson* [1897] 1 Ch 545, Rigby LJ stated (at 558):

> That there is a jurisdiction to punish for contempt of Court is undoubted. It has been exercised for a very long time — for longer than any of us can remember — and it is *a punitive jurisdiction* founded upon this, that it is *for the good*, not of the plaintiff or of any party to the action, but *of the public, that the orders of Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court*. [emphasis added]

27 Turning to Canada in general and the Canadian Supreme Court decision of *Vidéotron Ltée v Industries Microlec Produits Électroniques Inc* (1992) 96 DLR (4th) 376 in particular, the following observations of Gonthier J (at 398) might be usefully noted (though *contra per* L'Heureux-Dubé J, who dissented in this particular case, at 398):

> The penalty for contempt of court, even when it is used to enforce a purely private order, still involves an element of "public law", in a sense, because respect for the role and authority of the courts, one of the foundations of the rule of law, is always at issue.

28 It should also be borne in mind that a court will not make a finding of contempt of court lightly. As Lord Diplock aptly put it in *Times Newspapers* ([22] *supra* at 311–312):

> The remedy for contempt of court after it has been committed is punitive; it may involve imprisonment yet it is summary; it is generally obtained on affidavit evidence and it is not accompanied by those special safeguards in favour of the accused that are a feature of the trial of an ordinary criminal offence. Furthermore, it is a procedure which if instituted by one of the parties to litigation is open to abuse, particularly in relation to so-called "gagging" writs issued for the purpose of preventing repetition of statements that are defamatory but true. The courts have therefore been vigilant to see that the procedure for committal is not lightly invoked in cases where, although a contempt has been committed, there is no serious likelihood that it has caused any harm to the interests of any of the parties to the litigation or to the public interest.

29 Reference may also be made to the following observations of Eady J in the English High Court decision of *Lakah Group v Al Jazeera Satellite Channel* [2002] EWHC 2500 (at [27]):

> The court's jurisdiction in contempt is a valuable one but its essential purpose must always be borne in mind. Litigants, and indeed for that matter the court itself, should always be mindful that resort should be had to its salutary but Draconian powers only where necessary; that is to say, where there is no other effective means of achieving the desired objective. The underlying

rationale of the jurisdiction is to uphold the rule of law by protecting or enforcing the authority of the court. It is most emphatically never appropriate to use it as a tool of oppression or even as a tactical weapon.

3 0 This leads us to a closely related (and extremely important) issue – the standard of proof that must be satisfied before a contempt of court can be established. Indeed, as we shall see, the standard of proof required furnishes another safeguard, given the nature of contempt proceedings as just noted above.

The standard of proof

31 The law with respect to this particular issue is now well-established: the standard of proof is the *criminal* standard of proof beyond a reasonable doubt (and see generally David Eady & A T H Smith, *Arlidge, Eady & Smith on Contempt* (Sweet & Maxwell, 3rd Ed, 2005) ("*Arlidge, Eady & Smith*") at paras 3-43, 3-241–3-246 and 12-43–12-47; *Gee* ([19] *supra* at para 19.059 as well as C J Miller, *Contempt of Court* (Oxford University Press, 3rd Ed, 2000) at para 2.08).

32 An oft-cited decision is that of the English Court of Appeal in *In re Bramblevale Ltd* [1970] Ch 128 ("*Bramblevale*"). In that case, Lord Denning MR made the following very pertinent observations (at 137):

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.

33 The criminal standard of proof required to establish contempt is, in fact, now firmly engrained in the English legal landscape (see, for example, the English Court of Appeal decisions of *Newspaper Publishing* ([1] *supra* at 362) and *Dean v Dean* [1987] 1 FLR 517, especially at 520–523; as well as the English High Court decision of *Adrian Thomas Parker v Lincoln Rasalingham (Trading as Microtec)* (17 April 2000, unreported) ("*Microtec*") at [77]).

34 The decision in *Bramblevale* has, in fact, been applied in other jurisdictions as well: see, for example, the Australian High Court decision of *Witham v Holloway* ([25] *supra*). In this decision, Brennan, Deane, Toohey and Gaudron JJ observed, in a joint judgment, thus (at 852):

> The differences upon which the distinction between civil and criminal contempt is based are, in significant respects, illusory [see also above at [25]]. They certainly do not justify the allocation of different standards of proof for civil and criminal contempt. Rather, the illusory nature of those differences and the fact that the usual outcome of successful proceedings is punishment, no matter whether primarily for the vindication of judicial authority or primarily for the purpose of coercing obedience in the interest of the individual, make it clear as Deane J said in *Hinch*, that all proceedings for contempt "must realistically be seen as criminal in nature". The consequence is that all charges of contempt must be proved beyond reasonable doubt.

Reference may also be made, in the same case, to the judgment of McHugh J (especially at 857–858).

35 Most importantly, perhaps, the criminal standard of proof has in fact been clearly endorsed in the Singapore context in the Singapore High Court decision of *Summit Holdings Ltd v Business Software Alliance* [1999] 3 SLR 197 ("*Summit Holdings*") at [25]. We take the present opportunity to confirm that the criminal standard of proof applies in all contempt proceedings.

The implied undertaking under the principles established in Riddick

36 The general propositions in this particular regard are straightforward. The leading decision is that of the English Court of Appeal in *Riddick v Thames Board Mills Ltd* [1977] QB 881 ("*Riddick*"). It has been applied in Singapore in a number of cases (see, for example, the Singapore Court of Appeal decisions of *Microsoft Corporation v SM Summit Holdings Ltd* [1999] 4 SLR 529 ("*Microsoft Corporation*"); *Stansfield Business International Pte Ltd v VCS Vardan* [1998] 1 SLR 641; and *Hong Lam Marine Pte Ltd v Koh Chye Heng* [1998] 3 SLR 833 ("*Hong Lam Marine*"); as well as the Singapore High Court decision of *Sim Leng Chua v Manghardt* [1987] SLR 205).

37 In *Riddick* itself, Lord Denning MR set out the relevant principles as follows (at 896):

> The memorandum [the document in question] was obtained *by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party — or anyone else — to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice.* Very often a party may disclose documents, such as inter-departmental memoranda, containing criticisms of other people or suggestions of negligence or misconduct. If these were permitted to found actions of libel, you would find that an order for discovery would be counter-productive. The inter-departmental memoranda would be lost or destroyed or said never to have existed. *In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed.* They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J., *Bray on Discovery*, 1st ed. (1885), p. 238:
>
> > "A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit : ... nor to use them or copies of them for any collateral object ... If necessary an undertaking to that effect will be made a condition of granting an order ..."
>
> Since that time such an undertaking has always been implied, as Jenkins J. said in *Alterskye v. Scott* [1948] 1 All E.R. 469, 471. *A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose.*
>
> [emphasis added]

38 Such an implied undertaking is owed to *the court*, and a *breach* of such an undertaking is *a contempt of court*, and punishable accordingly. The following elaboration by Hobhouse J (as he then was) in the English High Court decision of *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 WLR 756 (at 764–765) is illuminating:

> *This undertaking is implied whether the court expressly requires it or not. The expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is now in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information. However treating it as having the character of an implied undertaking continues to serve a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation*

which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (viz. contempt of court) and can be relieved or modified by an order of the court. It is thus a formulation of the obligation which has merit and convenience and enables it to be treated flexibly having regard to the circumstances of any particular case. Treating the duty as one which is owed to the court and breach of which is contempt of court also involves the principle that such contempts of court can be restrained by injunction and that any person who knowingly aids a contempt or does acts which are inconsistent with the undertaking is himself in contempt and liable to sanctions: see *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd*. [1975] Q.B. 613.

The rational basis for the rule is that where one party compels another, either by the enforcement of a rule of court or a specific order of the court, to disclose documents or information whether that other wishes to or not, the party obtaining the disclosure is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties in the pending litigation between them; it follows from this that the results of such compulsion should likewise be limited to the purpose for which the order was made, namely, the purposes of that litigation then before the court between those parties and not for any other litigation or matter or any collateral purpose …

[emphasis added]

Reference may also be made to *Microsoft Corporation* ([36] *supra*, especially at [23]–[24] and [36]).

39 The *opposite* of compulsion is, of course, *voluntariness*. Hence, in *Hong Lam Marine* ([36] *supra*), it was held (at [21]) that:

[T]he *Riddick* principle applies to documents disclosed under compulsion of court process, whether by virtue of the enforcement of the rules of the court or by a specific court order. It has no application to documents voluntarily disclosed in legal proceedings; the implied undertaking does not apply to such documents.

40 The principles embodied in *Riddick* are straightforward enough, and its rationale equally clear (and for a comprehensive and relatively recent summary, see the English High Court decision of *Cobra Golf Inc v Rata* [1996] FSR 819 at 830–832). There are occasional difficulties surrounding the precise parameters of the principle (see, for example, the House of Lords decision of *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, although the statutory changes effected thereafter (in the UK context) appear to have generated separate difficulties (see *Gee* ([19] *supra*) at paras 24.002–24.003)). Fortunately, they do not arise on the facts of the present proceedings.

Contempt of court and third parties

41 In so far as *third parties* are concerned (in these proceedings, the second and third respondents), there are two possible ways in which they could commit a contempt of court.

42 The first relates to *aiding and abetting* a party to the order concerned in the latter's commission of an act in contempt of court. The leading decision in this particular regard is that of the English Court of Appeal in *Seaward v Paterson* ([26] *supra*). In that case, Lindley LJ held (at 554) that while a third party was, like any other member of the public, not bound by the court order concerned, he was:

> bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this — *not that he has technically infringed* the injunction [the court order concerned], which was not granted against him in any sense of the word, *but that he has been aiding and abetting others* in setting the Court at defiance, and deliberately treating the order of the Court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction, which has a technical meaning. … It has always been familiar doctrine to my brother Rigby and myself that the orders of the Court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the Court, or by assisting those who were bound by its orders. [emphasis added]

The learned lord justice then proceeded to observe thus (at 555–556):

> *A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked.* In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. [emphasis added]

Reference may also be made to the English Court of Appeal decision of *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 578–579 ("*Z Ltd*").

43 The second relates to conduct where there is a real risk that the due administration of justice will be either impeded or prejudiced inasmuch as the purpose of the court in making the order concerned would be defeated. As was succinctly put in a legal text, "a third party must not deliberately frustrate the purpose of the order" (see *Gee* ([19] *supra*) at para 3.006). It need not, of course, be shown that a certainty of prejudice would result; as just mentioned, a real risk would suffice (see, for example, *Sport Newspapers* ([1] *supra*) at 1208). In so far as the issue of *mens rea* on the part of the third parties is concerned, this is discussed below (at [63]–[65]).

44 Carnwath LJ, in the English Court of Appeal decision of *World Wide Fund for Nature v THQ/Jakks Pacific LLC* [2004] FSR 10, after citing a passage from the judgment of Lord Nicholls of Birkenhead in the recent House of Lords decision of *Attorney-General v Punch Ltd* [2003] 1 AC 1046 ("*Punch*") at [4] (reproduced, in fact, below at [50]), succinctly referred (at 175) to this particular category of contempt as being based on "deliberate frustration".

45 We pause at this juncture to make three specific observations.

46 The first is that the purpose of the court order concerned depends, in the main, on the precise terms of that order itself.

47 The second is that the relevant case law as well as secondary literature have hitherto been concerned with the conventional situation where the *main purpose*, so to speak, of the court order concerned is in issue. So, for example, the main purpose of a Mareva injunction is to prevent the unjustified dissipation of assets. Hence, any conduct by a third party which thwarts or undermines this particular purpose would constitute a contempt of court. However, the situation we are presently concerned with relates to Exception 2 of a Mareva injunction. Given that Exception 2 forms an

integral part of the overall injunction itself and serves an important purpose, it is *imperative* that it is *also observed*. To this end, therefore, *the purpose of* Exception 2 is important, and has in fact been dealt with above (see generally at [19]–[21]). In other words, one of the main issues in these proceedings is to ascertain whether or not Exception 2 has been thwarted, having regard to its *purpose*.

48 Thirdly, and turning now to the relationship between the two categories just mentioned, the second category of contempt might *overlap* with the first. However, they might also differ inasmuch as the third party might not have aided and abetted a party to the order concerned in the latter's contempt but might nevertheless, by its conduct, have impeded or prejudiced the due administration of justice. Everything depends, in the final analysis, on the precise factual matrix in question.

49 In this particular regard, the following observations by Lord Jauncey of Tullichettle in *Times Newspapers 2* ([1] *supra* at 229–230) are apposite:

> My Lords in none of these cases, nor in any other case cited by the appellants, is it stated that in relation to a court order a third party can only be liable for contempt of court if he aids and abets a person named therein to breach it. In all these cases, however, it is made clear that a third party's liability depends on the fact that he has interfered with the course of justice … Given that interference with the course of justice is the basis of a third party's liability for contempt … I can see no reason in principle for distinguishing the position of a third party who aids and abets a breach of the order and one who intends to and does achieve a similar interference with or frustration of the order by means which do not involve assisting the person named therein to breach it. If a third party by such independent act renders nugatory a court order of whose existence he is aware, why should he not be liable for contempt as he would be if he had actively assisted the named person to defeat the operation of the order? In both cases the third party has, with knowledge, interfered with the course of justice, and in both cases he should in my view be subject to the same liability.

50 And, in the House of Lords decision of *Punch*, Lord Nicholls observed, in a similar vein, thus (in a passage which simultaneously furnishes a succinct overview of the various categories of contempt: see [44] *supra* at [2]–[4]):

> 2 Contempt of court is the established, if unfortunate, name given to the species of wrongful conduct which consists of interference with the administration of justice. It is an essential adjunct of the rule of law. Interference with the administration of justice can take many forms. In civil proceedings one obvious form is a wilful failure by a party to the proceedings to comply with a court order made against him. By such a breach a party may frustrate, to greater or lesser extent, the purpose the court sought to achieve in making the order against him. …
>
> 3 … Sometimes the purpose a court seeks to achieve in making an order against a party to proceedings may be deliberately impeded or prejudiced by the conduct of a third party. This may take more than one form. The third party may be assisting, that is, aiding and abetting, a breach of the order by the person against whom the order was made. Then he is an accessory to the breach of the order. …
>
> *4 Aiding and abetting a breach of the order by the person specifically restrained by the order is not always an essential ingredient of "third party" contempt. The purpose of a court in making an order may be deliberately frustrated by a third party even though he is acting independently of the party against whom the order was made.* …

[emphasis added]

The issue of mens rea

The party to the court order

51 In so far as the party to the court order is concerned, it would appear that it is only necessary to prove that the relevant conduct of the party alleged to be in breach of the court order was intentional and that it knew of all the facts which made such conduct a breach of the order (including, of course, knowledge of the existence of the order and of all of its material terms (see the English High Court decision of *Re L (A Ward)* [1988] 1 FLR 255 at 259)). However, it is unnecessary to prove that that party appreciated that it was breaching the order. As Sachs LJ put it in the English Court of Appeal decision of *Knight v Clifton* [1971] Ch 700 at 721, "[the] prohibition is absolute and is not to be related to intent unless otherwise stated on the face of the order".

52 The case law supporting such an approach is enormous (see, for example, the English Restrictive Practices Court decision of *In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137 ("*Mileage Conference Group*"); the English High Court decisions of *Spectravest Inc v Aperknit Ltd* [1988] FSR 161 at 173–174; *Z Bank v D1* [1994] 1 Lloyd's Rep 656 at 660; and *Microtec* ([33] *supra* at [80]); the English Court of Appeal decisions of *Knight v Clifton* ([51] *supra* at 713 and 721) and *P v P (Contempt of Court: Mental Capacity)* [1999] 2 FLR 897 at ("*P v P*") ; as well as the English House of Lords decisions of *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 109 ("*Heatons Transport*"); *In re M* [1994] 1 AC 377 at 427; *Times Newspapers 2* ([1] *supra* at 217); and *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456 at 481 ("*Pioneer Concrete*")).

53 More specifically, in an oft-cited decision, *Mileage Conference Group*, Megaw J (as he then was) observed thus ([52] *supra* at 1162–1163):

> We accept the view of the law expressed by Warrington J. in *Stancomb* v. *Trowbridge Urban Council* [[1910] 2 Ch 190 at 194]:
>
> > "… if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, *and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order*."
>
> …
>
> Questions as to the bona fides of the persons who are in contempt, and their reasons, motives and understandings in doing the acts which constitute the contempt of court, may be highly relevant in *mitigation* of the contempt. *Bona fide reliance on legal advice, even though the advice turns out to have been wrong, may be relevant, and sometimes very important, as mitigation*. The extent of such mitigation must, however, depend upon the circumstances of the particular case, and the evidence adduced.
>
> [emphasis added]

54 Indeed, citing *Mileage Conference Group* itself, Megarry J (as he then was), in the English High Court decision of *C H Giles & Co Ltd v Morris* [1972] 1 WLR 307, reiterated (at 319):

I bear in mind that there is authority for the proposition that it is no defence to proceedings for contempt that the acts or omissions which constituted the contempt were effected reasonably on legal advice …

55 And Lord Sterndale MR observed, in the English Court of Appeal decision of *The King v The Council of the Metropolitan Borough of Poplar* [1922] 1 KB 95, thus (at 103):

Unless and until the time comes when the law of this country is that a person may disobey an order of the Court or the laws as much as he likes if he does it conscientiously the question of motive is immaterial. That is not the law at present.

56 And, in *Times Newspapers 2* ([1] *supra*), Lord Oliver observed thus (at 217):

The intention with which the act was done will, of course, be of the highest relevance in the determination of the penalty (if any) to be imposed by the court, but the liability here is *a strict one in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound of that which is prohibited*. [emphasis added]

5 7 Indeed, the strictness of law with regard to the issue of *mens rea* in so far as a party to a court order is concerned is underscored by the decision of the English Court of Appeal in *P v P* ([52] *supra*). In that case, the alleged contemnor was a husband who suffered from a medical condition that rendered him deaf and dumb, and with deteriorating eyesight that resulted in little more than tunnel vision; he did, however, possess an average IQ (see at 898). He was held to have been in breach of an injunction forbidding his return to the matrimonial home. Butler-Sloss LJ observed thus (at 902):

[A] degree of understanding, which is not total, may in a case be sufficient. *It is not necessary for members of the public to have a clear understanding of the finer points of procedure of the law in the case in which they are parties*. It depends upon the facts. *It is however crucial that a litigant against whom an order is to be made understands what he must not do, that the order on a piece of paper tells him he must not do A or B or C and that he understands that if he disobeys the order he will be in trouble and he may go to prison.* [emphasis added]

In the same case, Judge LJ (as he then was) stated, in a similar vein, thus (at 903):

To amount to contempt the disobedience must be wilful or deliberate rather than accidental and unintentional, and so, consistently with that principle, contempt cannot be established, for example, against an individual who, unaware of the existence of the order, acts contrary to its terms. *What, however, is not required is proof that in committing the prohibited act he intended to be contumacious or that he was motivated by a desire to defy the court.* [emphasis added]

58 Finally, Sedley LJ, also in the same case, observed thus (at 904):

What it is necessary that a potential contemnor should understand is that an order has been made forbidding him to do certain things and that if he does them he may well be punished. This much, even in his sad condition, the judge was satisfied the appellant [in the present case] understood.

59 There is, however, at least one decision which suggests a different approach: see the English Court of Appeal decision of *Irtelli v Squatriti* [1993] QB 83 ("*Irtelli*"). Standing virtually alone in the midst of the many other authorities to the contrary (some of which have been cited above), this

particular case has in fact been characterised as "doubtful" in the leading textbook on the law of contempt (see *Arlidge, Eady & Smith* ([31] *supra* at p 922)). Indeed, this particular work pertinently points out that since *Irtelli* was decided, the House of Lords (in *Pioneer Concrete* ([52] *supra*)) had expressly endorsed the traditional view embodied in the vast majority of case law. In the circumstances, the learned authors of *Arlidge, Eady & Smith* are of the view (at para 12-92) that "[d]espite the strength of the court, it is respectfully submitted that the statements in *Irtelli* should be treated with caution, in so far as they might be thought to express any principle beyond the facts of that case" (see also *per* Neuberger J (as he then was) in the English High Court decision of *Bird v Hadkinson* [1999] BPIR 653 at 660, where the learned judge followed *Pioneer Concrete* instead of *Irtelli*; reference may also be made to the (also) English High Court decision of *In the Matter of John Katchis* [2001] ACD 70 at [38]–[39] ("*Katchis*")).

60 Despite Jacob J's (as he then was) apparent sympathy with *Irtelli* in the English High Court decision of *Adam Phones Ltd v Goldschmidt* [1999] 4 All ER 486 at 494, we are of the view that the traditional (and strict) approach should be adopted. This is not merely due to the overwhelming weight of authority (although that is a fact that ought not to be treated lightly); in the following words of Lord Wilberforce in *Heatons Transport* ([52] *supra* at 109), which we endorse:

> The view of Warrington J. [in *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch 190 (see also above at [53])] has … acquired high authority. *It is also the reasonable view, because the party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional.* [emphasis added]

6 1 Besides, if the contempt is a merely technical one, this will, as we have seen above (at [53]), be taken into account in *mitigation* of the contempt – thus ensuring that undue harshness or injustice does not result to the contemnor.

62 Indeed, it is important to note that the approach we have just endorsed was in fact adopted by the Singapore High Court in *Summit Holdings* ([35] *supra*). In that case, Yong Pung How CJ observed (at [51]) that "[f]or civil contempt, it was sufficient that the alleged contemnor be proved to have deliberately done the relevant act". The learned judge then proceeded to further observe thus (at [52], and, significantly, citing *Mileage Conference Group* ([52] *supra*)):

> In my view, motive of disobedience was clearly irrelevant in deciding a case of contempt. The breaches of the order of court amounted to contempt of court, even though they were committed on legal advice that they were not breaches …

However, Yong CJ did also agree (at [53]) that:

> [T]he bona fides of the persons who were in contempt and their reasons, motives and understandings in doing the acts which constituted the contempt of court might be relevant in mitigation of the contempt. Bona fide reliance on legal advice, even though the advice turned out to be wrong, might be relevant and important as mitigation, depending on the circumstances.

Third parties

63 In so far as conduct by a third party which results in a real risk of prejudice to the due administration of justice is concerned (see generally above at [43]–[44]), there must be *a specific intent* on the part of the third party concerned to impede or prejudice the due administration of

justice. As a third party is, *ex hypothesi*, not privy to the court order concerned, *mens rea* must (unlike the situation concerning a direct party to the court order, considered above) be proved. Indeed, this is reflected in the Singapore injunction itself (at [17] above).

64 In *Times Newspapers 2*, Lord Oliver observed as follows ([1] *supra* at 217–218):

> When … the prohibited act is done not by the party bound himself but by a third party, a stranger to the litigation, that person may also be liable for contempt. There is, however, this essential distinction that his liability is for criminal contempt and arises not because the contemnor is himself affected by the prohibition contained in the order but because his act constitutes a *wilful interference with the administration of justice* by the court in the proceedings in which the order was made. *Here the liability is not strict in the sense referred to* [see above at [56]]*, for there has to be shown not only knowledge of the order but an intention to interfere with or impede the administration of justice — an intention which can of course be inferred from the circumstances*. [emphasis added]

65 In a similar vein, in *Sport Newspapers*, Bingham LJ observed thus ([1] *supra* at 1208):

> The parties were agreed that the applicant must show that the respondent's publication *was specifically intended to impede or prejudice the due administration of justice. Such an intent need not be expressly avowed or admitted but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct, although the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent.* But this need *not* be the *sole* intention of the contemnor, *and intention is to be distinguished from motive or desire.* [emphasis added]

Reference may also be made to *Newspaper Publishing* ([1] *supra* at 374–375 and 383) and *Punch* ([44] *supra* at [87]). It bears repeating that whether or not the requisite *mens rea* has been established is, as confirmed in the case law just cited, dependent on the precise facts concerned.

Our decision

Whether there was an implied undertaking and, if so, whether it had been breached

66 The obvious legal starting-point is, of course, contained in the principles and rationale set out in *Riddick* ([36] *supra*). Indeed, this was virtually the only point of agreement between counsel for both parties.

67 Counsel for the respondents, Mr Alvin Yeo SC, argued that the letter of 26 January 2005 was given by the appellant to the respondents *voluntarily*, and not under legal compulsion pursuant to the Singapore injunction, as the said letter was given *before* the appellant was legally obliged to do so.

68 The Judge rejected this argument, finding it to be "pedantic" (see GD at [18]). In particular, he observed thus (see *id*):

> I think the respondents were being overly pedantic in saying that the first defendant was offering the information in the 26 January 2005 letter voluntarily because the information was furnished earlier than the time period ordered by the terms of the injunction. There could be no doubt that the first defendant would not have offered the information but for the Singapore Mareva injunction. This was even more so given the fact that the parties had already been involved in contentious legal proceedings in Hong Kong. A person does not need to expressly refer to a court

order before he could be said to be complying with it. It is sufficient that there could be no doubt that he did certain acts which he would not have done if there was no legal compulsion. In my view, therefore, the 26 January 2005 letter was clearly to comply with the Singapore Mareva injunction even if it was furnished in advance of the time period stipulated by the court order. If the first defendant had been tardy in complying with the court order, its late notification would nevertheless have come within the ambit of compulsion. The respondents therefore fail in their contention that the 26 January 2005 letter fell within the principle enunciated in *Hong Lam Marine* [[36] *supra*] in that it was voluntary information given outside the scope of the implied undertaking.

We agree for the following reasons.

69 In the first instance, the funds mentioned in the letter had *already been transferred* to the appellant's bank account in Hong Kong, although they had not been disbursed yet. In the circumstances, the *duty to account to the first respondent* had *already arisen or accrued*, although the appellant had not yet contravened the time limit stipulated under Exception 2 of the Singapore injunction yet as it had (as just observed) not actually disbursed the funds to the specific (and intended) payees yet. It would, presumably, have had to inform the first respondent once actual disbursements had been effected. This brings us to a second – and closely related – point. Before proceeding to consider this particular point, it bears repeating that once the funds had been transferred to the appellant's bank account in Hong Kong, *the appellant was under a duty, pursuant to the terms of the Singapore injunction itself, to account to the first respondent for the transfer of funds to its (the appellant's) bank account in Hong Kong. If it could not, it would have been in breach of the Singapore injunction and liable to contempt proceedings before the Singapore court.*

70 Secondly, and turning to the time frame under which the letter had been given from the appellant to the first respondent, even though the appellant had, as we have noted above, discharged its legal duty somewhat in *advance* of the stipulated deadline under, as well as pursuant to, the terms of the Singapore injunction in general and the duty to account to the first respondent under the terms of Exception 2 in particular, it was clear that the appellant had only issued the letter because it was *legally obliged or compelled to do so under the terms of the injunction*. It is true that the appellant had fulfilled its legal obligations under the Singapore injunction *in advance*. *However, the fact remains that it was fulfilling its legal obligations under this injunction all the same. How a law-abiding action such as this can be construed as being a voluntary act on the part of the appellant escapes us completely*. Indeed, why would any person – whether an individual or (as is the case here) a company – ever inform a third party (such as the first respondent) of its intention to transfer funds out of the jurisdiction in order to finance its legitimate business costs *without more*? The answer is clear. We have just mentioned it, but since the respondents made much of this particular argument, we state it once more: *The reason was because the appellant was legally compelled to do so under the relevant terms of the Singapore injunction.* There is – and can be – no other reason. The only "sin" the appellant committed was to perform its legal obligations *too efficiently and too dutifully*. As a result, the first respondent was able, through its Hong Kong solicitors, to *intercept* the funds concerned, *utilising information it would never have been privy to, but for* the *appellant's* need to fulfil its legal obligations under the relevant terms of the Singapore injunction. In other words, and putting it simply, if we accept the respondents' argument, it would entail (in effect) *penalising* the appellant for being *efficient and solicitous* in meeting its legal obligations under the Singapore injunction. A moment's reflection would reveal, with respect, not only the illogicality but also the injustice and unfairness inherent in the acceptance of such an argument. Indeed, the *further* consequence of accepting such an argument would be to allow the first respondent to reap the fruits of such injustice and unfairness. The Judge was, in our view, being too polite when he characterised the respondents' argument in this particular regard as being merely

"pedantic".

71 As the issuance of the letter from the appellant to the first respondent was *legally compelled* (and *not* voluntary), there therefore arose an implied undertaking that the first respondent would not utilise the information contained in the letter for a collateral purpose. We now turn to a consideration of that particular issue.

72 Mr Yeo naturally argued that the first respondent had not in fact utilised the information contained in the letter for a collateral purpose. Here, he relied heavily on the Judge's decision to the effect that there had been parallel proceedings in both Singapore and Hong Kong and that, as a result, the first respondent ought to be given the benefit of the doubt – bearing in mind that contempt proceedings entailed the criminal standard of proof beyond a reasonable doubt.

73 With respect, we do not see how the parallel proceedings in the Hong Kong context could be relevant. The focus in the present proceedings ought, by their very nature, to be on conduct in relation to the Singapore injunction – in particular, the conduct of the first respondent with respect to an injunction which had been granted by the Singapore court. In this regard, it was clear, in our view, that the first respondent could utilise the information contained in the letter *only* for the purposes of ensuring that the assets frozen pursuant to the Singapore injunction were not dissipated unlawfully by the appellant. To this end, the first respondent could, for example, have ensured that what was contained in the letter was true; or, if it were in doubt, the first respondent ought to have queried the *bona fides* of the purpose stated in the letter and/or brought the matter before the court for a ruling. Such conduct would have been directly related to the Singapore injunction and would not have involved a collateral purpose. *However*, what *in fact* happened in the present proceedings was *quite different*. The information contained in the letter was, instead, utilised by the first respondent in order to initiate garnishee proceedings in the Hong Kong court in relation to the very funds that were stated in the letter. The clear consequence of such conduct was the undermining – indeed, thwarting – of Exception 2 of the Singapore injunction. The first respondent had, in other words, utilised the information contained in the letter for a *wholly collateral purpose* that was *wholly unrelated* to the *raison d'être* of the Singapore injunction in general and Exception 2 in particular. Indeed, as we have just observed, the first respondent's conduct had, on the *contrary*, in fact *undermined* the entire basis underlying *Exception 2*.

74 In the circumstances, we cannot but arrive at the conclusion that there had been a clear contempt of court by the first respondent, which had been proved to have taken place beyond a reasonable doubt.

75 However, in so far as the second and third respondents are concerned, the legal principles are somewhat different (see generally [63]–[65] above). It would, in the circumstances, be apposite to deal with the situations *vis-à-vis* these respective parties separately.

76 Indeed, there was – plainly and simply – a clear thwarting or frustration, by the first respondent, of the Singapore injunction in general and Exception 2 thereof in particular, *without more*. Mr Yeo sought to link this particular issue (*viz*, that of an alleged breach of the implied undertaking) to the thwarting of the operation of the Singapore injunction in general and Exception 2 thereof in particular.

77 We do *not* think that, whilst *factually* related, both are *necessarily* related from a *legal* perspective. In particular, it is clear that, irrespective of whether or not there was an implied undertaking, there could still, in principle, be contempt of court if the party concerned was in breach of a court order (see, for example, *Summit Holdings* ([35] *supra* at [45]), as well as Mark S W Hoyle,

Freezing and Search Orders (Informa, 4th Ed, 2006) ("*Hoyle*") at paras 9.1 and 9.20). Everything depends on the particular factual matrix concerned. In the present circumstances, we have found that there has been a breach of the implied undertaking by the first respondent and we now turn to consider whether there has also been contempt in so far as Exception 2 of the Singapore injunction is concerned.

Whether the respondents had thwarted the operation of Exception 2 of the Singapore injunction

The position of the first respondent

78 It is clear, in our view, that the first respondent is liable for a contempt of court in this particular respect as well. We pause to observe that as the first respondent is a direct party to the Singapore injunction, it is unnecessary (in accordance with the relevant legal principles set out above at [51]–[62]) for the appellant to establish that the first respondent had in fact a direct intention to disobey the court order by thwarting the operation of Exception 2 of the Singapore injunction. Nor is the fact that the information concerned was given to the first respondent voluntarily relevant (although we have found that there had been no voluntariness on the facts in any event). In other words, it is only necessary to prove that the first respondent's conduct was intentional inasmuch as it knew all the facts which made its conduct a breach of the order and nevertheless proceeded with such conduct. However, it is unnecessary to prove that the first respondent appreciated that it was breaching the order. It seems to us, though, that, given the commercial acumen of the first respondent itself, it is quite likely that it in fact appreciated that it was breaching the order. However, it is also possible – although the point was only implicit at best – that the first respondent might have thought (in possible consultation with the second respondent) that it was lawfully entitled to act the way it did. This possibility does not, nevertheless, seem to us to be that persuasive in the light of the fact that the information in the letter of 26 January 2005 was in fact passed *by the first respondent* to the second respondent *via* its (the first respondent's) Singapore solicitors. Be that as it may, it is, in the light of the relevant legal principles just referred to, unnecessary for us to decide on the question as to whether or not the first respondent actually intended to breach the order concerned. It is clear, in our view, that the first respondent was fully aware not only of the existence of the order and its terms but also knew precisely what it was doing.

79 In any event, even if the first respondent thought that it was justified in proceeding with the Hong Kong proceedings (*via* the second respondent), this was impermissible – a point which we deal with in more detail below (at [81]–[83]).

The position of the second respondent

80 We turn next to consider the legal position with regard to the second respondent who, it will be recalled, was the Hong Kong solicitor in charge of the matter, and who in fact was responsible for initiating the garnishee proceedings in Hong Kong itself. He was in possession of all the relevant facts in general surrounding the grant as well as the terms of the Singapore injunction in general and the letter of 26 January 2005 in particular. Mr Yeo did not, correctly in our view, seek to argue otherwise, especially in the light of the second respondent's own affidavit.

81 The second respondent might well have thought that the utilisation of the information contained in the letter of 26 January 2005 to initiate the garnishee proceedings in Hong Kong was justified. However, if so, we find it rather surprising that he did not at least realise that by engaging in such conduct, he (and the first respondent) would simultaneously be acting in direct opposition to the terms of the Singapore injunction in general and Exception 2 therein in particular. Any reasonable

lawyer in the position of the second respondent ought to have realised that there was at least a potential legal difficulty in respect of his actions that might even constitute an act in contempt of court (*cf* also *Punch* ([44] *supra* at [52])). Besides, a Mareva injunction does *not* create a security right over the assets concerned (see, for example, the English High Court decision of *Boeing Capital Corporation v Wells Fargo Bank Northwest* [2003] EWHC 1364 (Comm) at [14] as well as *Polly Peck (No 2)* ([21] *supra* at 782 and 785)). What, therefore, the second respondent ought to have done was to have advised the first respondent that it ought to apply to the Singapore court to clarify the position and thereby receive the necessary permission to do what it did (even if they both subjectively believed that initiating the abovementioned proceedings in Hong Kong was justified). In this regard, the following observations by Richards J in *Katchis* ([59] *supra* at [36]) which, whilst delivered in a somewhat different fact situation, underscore the general spirit of the point which we have just made:

> The existence of an agreement, in principle, of that kind [which envisaged the variation of the order to permit the act that was done] plainly does not justify the doing of an act in breach of the existing order. It is incumbent on a person in the position of the Respondent [the alleged contemnor] to wait until the order has been varied rather than to flout the existing order in anticipation, even expectation, of the future variation.

82 The following observations in a leading textbook are also apposite (see *Hoyle* ([77] *supra* at para 9.17):

> It is no defence to contempt proceedings to allege that the order should not have been made, or has been discharged. An order of the court must be obeyed while it stands, and a breach is still contempt even if, at a later stage, the order is in fact discharged. *The same principle applies if the original order was wrongly made; the defendant's remedy is to apply for its immediate discharge while keeping to its terms.* [emphasis added]

Reference may also be made to the English Court of Appeal decision of *Hadkinson v Hadkinson* [1952] P 285, especially at 288, as well as the Privy Council decision (on appeal from the Court of Appeal of Saint Vincent and the Grenadines) of *Grafton Isaacs v Emery Robertson* [1985] AC 97.

83 Even more to the point, perhaps, are the following observations by Moore-Bick J (as he then was) in the English High Court decision of *Nokia France SA v Interstone Trading Limited* [2004] EWHC 272 (Comm) at [54]:

> The terms of the order in the present case follow the standard form for a worldwide freezing injunction to be found in Appendix 5 to the Admiralty & Commercial Courts Guide. Paragraph 5 prohibits the respondent from dealing with or disposing of his assets up to the stated value; the effect of the order is further clarified by paragraphs 6 and 8. Paragraph 11(2), however, states that the order does not prohibit the respondent from dealing with or disposing of his assets in the ordinary and proper course of business. Despite the fact that this comes under the heading "Exceptions to this Order", I do not think that the respondent bears the burden of proving that a payment which is said to have been made in contravention of the order was in fact made in the ordinary course of business. Paragraph 11(2) is worded in unqualified terms and makes it clear that payments in the ordinary course of business fall outside the terms of the order altogether. In my view a person should not be held in contempt of court unless the case against him is properly established. If the applicant alleges that the respondent is in breach of the order in a way that renders him liable to punishment by imprisonment, it is for him to establish that breach in every essential respect. It does not follow, however, that the respondent can sit back and do nothing. Once the applicant has put before the court credible evidence that a payment was not made in

> the ordinary course of business the court may well be willing to make a finding to that effect against the respondent if he has failed to put forward any justification supported, where appropriate, by appropriate evidence.

In other words, and as already mentioned above, the first and second respondents could – in accordance with the principles embodied in the above quotation – have challenged the appellant's proposed utilisation of the funds mentioned in its letter of 26 January 2005. They did not. It must therefore be assumed that these funds *were*, indeed, to be properly utilised pursuant to Exception 2 of the Singapore injunction.

84 In the circumstances, there can, in our view, be no doubt that the second respondent is also liable for the contempt of court inasmuch as he had aided and abetted the first respondent's thwarting or frustration of Exception 2 of the Singapore injunction. It is clear, from the circumstances set out above, that the respondent not only had knowledge of the court order but also had the requisite intention to aid and abet the first respondent in its thwarting or frustration of Exception 2. For the same reasons, we also find that the second respondent had, simultaneously, aided and abetted the first respondent's breach of the implied undertaking which was owed by the latter to the appellant.

85 We also find that the second respondent was liable in contempt under the *second* category discussed above (at [43]–[44]). By aiding and abetting the first respondent in its thwarting of Exception 2 of the Singapore injunction as well as in its breach of the implied undertaking owed to the court, the second respondent ought also to be considered as having simultaneously impeded or prejudiced the due administration of justice. As we have seen (at [48]–[50] above), there is, to this extent, an overlap between the first and second categories of possible contempt by third parties. However, the second category could also cover situations where the third party could not be said, on the facts, to have aided and abetted the third party but had, nevertheless, intended to (and in fact did) impede or prejudice the due administration of justice by the court. In our view, the strongest case that the second respondent can raise is that there were at least some legal doubts. However, as we have already emphasised above, this is no excuse for proceeding with what (on the part of the first respondent) was a probable breach of both the implied undertaking as well as the thwarting of Exception 2 of the Singapore injunction, when a simple application to the Singapore court would have served to clarify the situation and, consequently, prevented what in fact has turned out to be a contempt of court on both the aforementioned counts. Nevertheless, the factor just mentioned would be relevant when we come to the issue as to the appropriate sanction to be imposed on the second respondent.

The position of the third respondent

86 We turn, finally, to the legal position with regard to the third respondent, which is the firm of solicitors of whom the second respondent was partner. In our view, the third respondent is *not* in contempt of court. Mr Yeo sought to argue that it could not as there was no vicarious liability for the acts of the second respondent. With respect, the argument from vicarious liability is a legal red herring as we do not think that it is relevant. In the special context of contempt proceedings, the requisite *knowledge* on the part of the alleged contemnor needs to be established. In our view, *this* was the nub of the case in so far as the third respondent was concerned. Looked at in this light, it is our view that it could *not* be said that the third respondent did possess the requisite knowledge and we therefore do *not* find that it is in contempt of court.

The appropriate sanction

87 Having, with respect, differed from the Judge with regard to the issue as to whether or not the first and second respondents were in contempt of court, we come now to the appropriate sanction to be imposed upon the parties concerned (here, the first and second respondents).

88 We find no real mitigating circumstances with regard to the first respondent (with the exception of one factor, which we take into account below (at [92])). It was a direct party to the substantive proceedings and yet initiated as well as sanctioned a breach of an implied undertaking as well as a blatant thwarting of a Singapore court order. Indeed, as Edmund Davies LJ (as he then was) put it in *Jennison v Baker* ([24] *supra* at 66):

> If the orders of court can deliberately be set at nought by a litigant employing for her own personal advantage such means as were here resorted to, and if indeed it be the case that she has to go unpunished for her contumacy, justice vanishes over the horizon and the law is brought into disrepute.

89 The situation here is, in fact, not unlike that which obtained in the English Court of Appeal decision of *Mid Bedfordshire District Council v Brown* [2005] 1 WLR 1460 ("*Mid Bedfordshire District Council*"), where Mummery LJ, delivering the judgment of the court, stressed (at [25]):

> [T]he vital role of the court in upholding the important principle that the orders of the court are meant to be obeyed and not to be ignored with impunity. The order itself indicated to the defendants the correct way in which to challenge the injunction. It contained an express provision giving the defendants liberty to apply, on prior notice, to discharge or modify the order. The proper course for the defendants to take, if they wished to challenge the order, was to apply to the court to discharge or vary it. If that failed, the proper course was to seek to appeal. Instead of even attempting to follow the correct procedure, the defendants decided to press on as originally planned and as if no court order had ever been made. They cocked a snook at the court. They did so in order to steal a march on the council and to achieve the very state of affairs which the order was designed to prevent. No explanation or apology for the breaches of the court order was offered to the judge or to this court.

90 The first respondent was clearly attempting to (and, ultimately, did) utilise information obtained from the appellant pursuant to the latter's compliance with the terms of Exception 2 of the Singapore injunction in order to steal a march on the appellant by way of the garnishee proceedings in Hong Kong. It bears repeating that it was, in fact, the first respondent itself who had initiated the entire train of events in the first instance.

91 Indeed, and returning to *Mid Bedfordshire District Council*, we are of the view that the following observations in that decision ([89] *supra* at [26]–[27]) are especially apposite:

> This [suspending an injunction and thus allowing the defendants to continue to be in defiance of a court order properly served and explained to them] would send out the wrong signal, both to others tempted to do the same and to law-abiding members of the public. The message would be that the court is prepared to tolerate contempt of its orders and to permit those who break them to profit from their contempt.
>
> The effect of that message would be to diminish respect for court orders, to undermine the authority of the court and to subvert the rule of law. In our judgment, those overarching public interest considerations far outweigh the factors which favour a suspension of the injunction so as to allow the defendants to keep their caravans on the land and to continue to reside there in breach of planning control.

92 However, we do take into account the fact that the first respondent may also have been acting on the advice of the second respondent. In the circumstances, therefore, we impose a fine of $5,000 on the first respondent.

93 We reject Mr Yeo's argument to the effect that the second respondent did not intend to aid and abet the first respondent in thwarting Exception 2 of the Singapore injunction. We find it hard to believe that he could, as a trained as well as experienced legal professional, have been oblivious to the fact that, in initiating the garnishee proceedings on behalf of the first respondent in Hong Kong, he was aiding and abetting the thwarting of the clear terms of Exception 2 itself, as well as aiding and abetting a breach of the implied undertaking owed by the first respondent to the court under the principles in *Riddick* (set out at [36] above). Even if he did not subjectively know of these legal consequences at the material time, he ought, as a reasonable lawyer, to have checked. This is a classic instance of "Nelsonian blindness". It has been argued before us that the second respondent was merely seeking to vindicate the first respondent's legal rights *via* the garnishee proceedings in Hong Kong. That may well have been his intention. But this does not, as we have been at pains to emphasise, justify the *disregard* of a *Singapore* court order in the process. As Lord Woolf MR, delivering the judgment of the English Court of Appeal in *Nicholls v Nicholls* [1997] 1 WLR 314, observed (at 326):

> Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The court itself has a very substantial interest in seeing that its orders are upheld.

94 Nevertheless, as we have also been at pains to emphasise, this concern by the court is not rooted in any concern for the court's own dignity as such but, rather, it is to ensure that the administration of justice is not undermined (see generally at [22]–[23] above). It is imperative that the legitimacy of the law – especially in the eyes of the public – not be diminished and brought into disrepute.

95 Taking into account all the mitigating factors that we could possibly muster on behalf of the second respondent, we find it appropriate to impose a fine of $5,000 on him.

9 6 In the circumstances, we also order that the appellant be entitled to the costs of the proceedings against the first and second respondents both here and below. The third respondent is entitled to the costs of the appeal only as it did not appeal against the costs order made by the Judge in the proceedings below.

Concluding observations

97 Before concluding, it is eminently appropriate to note that what is most alarming, in our view, is that what transpired in the present proceedings might, if left unchecked, well be replicated not only in Singapore but in other jurisdictions as well – with the precedent in these proceedings being cited and used in the process. Such a possibility is to be assiduously avoided. The Mareva injunction is an important remedy, whose terms cannot – and ought not to – be thwarted. It would be easily set at naught if conduct such as that which occurred in the present proceedings were permitted. More importantly, such conduct would, as alluded to above, also herald the commencement of possible legal anarchy across jurisdictions. Respect for court orders in any and every jurisdiction is a given. Any contravention of such orders cannot be excused on the ground that it was effected in aid of possibly legitimate legal proceedings elsewhere. Indeed, such contravention could *not*, in our view, be excused even on the ground that it was effected in *clearly* legitimate legal proceedings elsewhere. How the courts in other jurisdictions decide on legal proceedings as well as issues brought before

them is wholly within their purview. What is within *this* court's purview, however, is the need to ensure that *its* orders are *not* contravened or thwarted. We cannot overemphasise the importance of this fundamental proposition, and trust that nothing akin to the conduct in the present proceedings will ever come before this court again. If, in the unfortunate event it does, more stringent sanctions will be meted out accordingly.

Copyright © Government of Singapore.