

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
DALAM WILAYAH PERSEKUTUAN, MALAYSIA

(BAHAGIAN DAGANG)

**GUAMAN NO: D2-22-447-2005**

**ANTARA**

**ACHIEVA TECHNOLOGY SDN. BHD.  
(No. Syarikat: 389722-A)**

**... PLAINTIF**

**DAN**

1. **LAM YEN LING  
(NO. K/P: 690126-02-5264)**
2. **DING LIAN HAO  
(NO. K/P: 690915-02-5275)**
3. **HOO HAI SEOANG @ LAWRENCE HOO  
(NO. K/P: 690412-02-5265)**
4. **CHOO MAY LING  
(NO. K/P: 670522-02-5460)**
5. **CHANG LING HWA  
(NO. K/P: 660913-03-5608)**
6. **LIEW KIM KUANG  
(NO. K/P: 620806-05-5594)**
7. **LIANG MON LOI  
(NO. K/P: 740715-05-5149)**
8. **LEE CHAN YOONG  
(NO. K/P: 770801-14-5869)**
9. **CHIA MENG MENG  
(NO. K/P: 720629-08-5554)  
[t/a 'HORIZON HARDWARE MARKETING']**
10. **SIN FEE SHANN  
(NO. K/P: 740621-05-5199)  
[t/a 'PC THREE TECHNOLOGY']**
11. **PANG KEE LEONG  
(NO. K/P: 710102-12-5039)**

12. **YIN VUI KEONG**  
(NO. K/P: 721125-12-5457)
13. **BARRY SIA BOON THAIN**  
(NO. K/P: 740925-13-5219)
14. **INTELLIGENT TECHNOLOGY RESOURCES (M) SDN. BHD.**  
(No Syarikat: 367608-P)
15. **INTERACTIVE SYSTEM TECHNOLOGY SDN. BHD.**  
(No Syarikat: 525272-T)
16. **INTERACTIVE SYSTEM DISTRIBUTION SDN. BHD.**  
(No Syarikat: 527482-V)
17. **BUILD TECHNOLOGY SUPPLY SDN. BHD** ... **DEFENDAN-**  
(No Syarikat: 617045-T) **DEFENDAN**

### **GROUND OF JUDGMENT**

1. **Enclosure 134** is a Motion filed by the Plaintiff pursuant to Order 52 Rules of the High Court 1980 [RHC 1980] following leave being granted on 25.1.2008. This Motion seeks an order of committal against the 1<sup>st</sup> and 7<sup>th</sup> Defendants and one Siau Suen Miin [prospective contemnors] by reason of these persons having –

- a. committed contempt of court on or about 19.12.2005; or
- b. intentionally or effectively interfered with the administration of justice by issuing a letter dated 19.12.2005 to one Yeong Sin Pui [Yeong] with the intention of intimidating this witness.

2. As required by Order 52 rule 2(2) RHC 1980 a Statement setting out the name and description of the applicant and the person sought to be committed as well as the grounds upon which the motion is sought together with an affidavit verifying the facts relied on were filed – **Encls 134B & 134A** respectively. The 1<sup>st</sup> Defendant filed an Affidavit Jawapan on behalf of herself and the 7<sup>th</sup> Defendant [**Encl 137**] while Siau Suen

Miin [Siau] filed another [**Encl 138**]. The Plaintiff and Siau then filed several affidavits in response to each other's affidavits [**Encls 139, 140, 141, 142, 144 & 146**]. All the affidavits of the Plaintiff were affirmed by its Managing Director, Tan Phuan Lam. In her submissions learned counsel for the Plaintiff/Applicant took the position that this Motion was necessary and of utmost importance to the protection of witnesses generally including Yeong. Otherwise the 'streams of justice' would be polluted by such conduct. It is imperative that the relevant background facts be viewed chronologically in order that this Motion may be properly considered.

### **Background Facts**

3. On 31.5.2005 the Plaintiff sued the 17 Defendants some of whom were its ex-employees for loss and damage occasioned by reason of alleged fraud and/or breaches of trust, fiduciary duties and/or terms of contract. On 4.10.2005 the Plaintiff applied for an *ex parte mareva* injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 14<sup>th</sup> and 17<sup>th</sup> Defendants. This application was then ordered to be heard *inter partes*. On 14.11.2005, Siau appeared together with another as counsel for the 1<sup>st</sup>, 14<sup>th</sup> and 17<sup>th</sup> Defendants. The hearing was however adjourned to 27.2.2006.

4. Meanwhile, the Plaintiff filed another affidavit, affirmed by Yeong on 28.11.2005. In this affidavit Yeong *inter alia* deposed the contents of a telephone conversation between the 1<sup>st</sup> and the 7<sup>th</sup> Defendants that he purportedly overheard on the morning of 4.6.2003. A copy of the affidavit was served on the solicitors acting for all the Defendants except

the 9<sup>th</sup> Defendant. Yeong's affidavit can be seen at **exhibit "TPL-2"** in **Encl 134A**. Paragraph 6 in his affidavit subsequently became the basis of much action and it states:

"6. Pada pagi 4.6.2003 saya mendapat tahu daripada rakan-rakan sekerja saya bahawa terdapat kekecohan di dalam syarikat Plaintiff di mana Encik Phillip Tan iaitu Pengarah Urusan baru Plaintiff telah tidak dibenarkan memasuki pejabat Plaintiff oleh Defendan Ke-3 dan Ke-4. Saya masih ingat apa yang berlaku pada hari tersebut. Pada hari tersebut lebih kurang pukul 10.30 pagi saya terdengar Defendan Ke-7 bercakap dengan Defendan Pertama melalui talipon. Pada masa itu saya berada di tepi Defendan Ke-7. Di dalam percakapan talipon tersebut, Defendan Ke-7 menanyakan Defendan Pertama mengenai 1,400 unit Intel Pentium CPU yang dia suruh untuk keluarkan dari stor Plaintiff. Saya terdengar Defendan Pertama memberitahu Defendan Ke-7 di dalam bahasa Kantonis "Jangan hirau. Ada dokumen pesanan keluarkan stok". Selepas itu Defendan Ke-7 selesai bercakap dengan Defendan Pertama, Defendan Ke-7 komen pada saya dalam bahasa Kantonis "Mudah sahaja bagi Miss Lam cakap. Saya yang keluarkan stok. Apa-apa yang berlaku saya yang tanggung beban."

5. On 19.12.2005, acting on the instructions of Liang Mon Loi and Lam Yen Ling [7<sup>th</sup> and 1<sup>st</sup> Defendants] Siau issued a notice to Yeong demanding an apology for alleged defamatory/libelous statement made

in his affidavit against his clients [**the said letter**]. In the said letter it was claimed that the allegations in the affidavit were “*in fact, malicious, bitter and unjustifiable attack upon our clients’ reputation by irresponsibly imputing them to be thieves, criminals or ruthless, lawless, irresponsible, unethical, mischievous, or deceitful persons*”. The said letter further claimed that the “*facts are inaccurate and your statement is highly defamatory and has tarnished our clients’ reputation*”. A complete withdrawal and apologies in the manner set out in the letter together with various other instructions and the sum of RM40,000/= as damages were amongst the remedies sought. Legal action was then threatened in the event the reparation sought was not forthcoming. A copy of the said letter is exhibited as “**TPL-4**” in **Encl 134A**.

6. By letter dated 27.12.2005 the Plaintiff’s solicitors wrote to the solicitors for the defendants informing them that their “*clients have, through Messrs. Siau Suen Miin & Tan, issued a notice date 19.12.2005 to Yeong Sin Pui in respect of Yeong Sin Pui’s affidavit dated 28.11.2005 inter alia demanding him not to make the statements he made in his said affidavit.*” The letter then goes on to inform that that letter is viewed “*as an interference with and/or intimidation of witnesses in the proceedings*” as well as to notify that unless a written undertaking “*not to interfere with and/or intimidate witnesses in the proceedings including but not limited to those persons who have given sworn statements in the proceedings and/or any of our clients’ ex-staff or current staff and/or our client’s dealers, distributors, suppliers, customers, principals or otherwise*” an injunction would be sought to restrain the defendants. A copy of this letter is exhibited as “**TPL-5**” in **Encl 134A**.

7. A separate letter dated 6.1.2006 was issued to Siau – exhibit “**TPL-6**” in **Encl 134A**. In this letter the essence of which was the same as exhibit “**TPL-5**”, Siau was asked to withdraw the said letter failing which a police report and a complaint with the Bar Council would be lodged.

8. On 9.1.2006 the Plaintiff initiated an application to restrain all the Defendants except the 9<sup>th</sup> Defendant from taking any action which may have the effect of interfering with the administration of justice including intimidating or frightening potential witnesses [**Encl 87**]. The basis for the application was the notice dated 19.12.2005.

9. From exhibit “**SSM-1**” in **Encl 138** it appears that the Plaintiff through one Phillip Tan had indeed lodged a written complaint with the Disciplinary Board on 13.1.2006 against Siau. In response to the Board’s letter, Siau by letter dated 23.2.2006 informed the Board the reasons for sending the said letter of 19.12.2005. It appears that his reasons had already been set out in an affidavit filed in reply to an application by the Plaintiff to disqualify Siau from representing the Defendants. That application was dismissed by the court on 25.1.2006. His reasons were that Yeong’s statement comprised hearsay evidence, and evidence that was scandalous, libelous and irrelevant in an application for a *mareva* injunction. Siau indicated his preparedness in retracting the letter if the court was of the view that the letter amounted to an intimidation or interference of a witness.

10. On 17.5.2006 the Disciplinary Board dismissed the complaint on the basis of no merit. An appeal was lodged. On 2.6.2006 the application for a *mareva* injunction was dismissed. The Plaintiff then lodged an appeal. On 5.7.2007 [Encl 87] was allowed with modifications and the Defendants were generally restrained from taking any action which may have the effect of interfering with the administration of justice including intimidating or frightening potential witnesses. The Defendants appealed. On 20.1.2009 the appeal against the Disciplinary Board's decision was dismissed with costs. An appeal has since lodged at the Court of Appeal. On 27.4.2009 the Court of Appeal dismissed the appeal against the refusal for grant of a *mareva* injunction.

### **The Issue**

11. The issue before me is whether the 3 prospective contemnors committed contempt of court. Such contempt is occasioned by the issue of the said letter with the intention of intimidating Yeong and thereby intentionally or effectively interfering with the administration of justice.

12. From paragraph 3.5 of the Statement [Encl 134A] the said letter written by Siau upon the instructions of the 1<sup>st</sup> and 7<sup>th</sup> Defendants clearly lies at the heart of this motion for committal. This same letter was also the basis of the restraining order granted on 5.7.2007. The committal order is sought against Siau because he was the solicitor who sent the letter and, against the 1<sup>st</sup> and 7<sup>th</sup> Defendants, because they instructed Siau.

13. At paragraphs 3.6, 3.7 and 3.8 the Plaintiff sets out the grounds upon which the assertion of interference with the administration of justice, perversion and obstruction of justice is made:

“3.6 Notis Defendan tersebut bertujuan atau diniatkan atau mempunyai kesan untuk menakut-nakutkan atau mengintimidasikan atau mengganggu saksi iaitu Yeong Sin Pui yang telah memberi keterangan atas sumpah/ikrar di dalam kes ini melalui Afidavit Yeong Sin Pui tersebut supaya Yeong Sin Pui tersebut akan berasa takut untuk memberi apa-apa keterangan selanjutnya di dalam tindakan ini.

3.7 Selanjutnya Notis Defendan tersebut bertujuan atau mempunyai kesan mengganggu pentadbiran keadilan Mahkamah Yang Mulia ini antara lainya untuk menyekat atau cuba menyekat keterangan yang boleh dan patut diberikan di dalam perjalanan adil tindakan ini.

3.8 Perbuatan Lam Yen Ling, Liang Mon Loi dan Siau Suen Miin di dalam mengeluarkan atau memberi arahan supaya dikeluarkan Notis Defendan tersebut terjumlah kepada penghinaan Mahkamah Yang Mulia ini.”

14. Further at paragraphs 3.16 and 3.17 the Plaintiff states that committal orders ought to be granted against the proposed contemnors because they issued or instructed to be issued the critical letter. It is the Plaintiff's case that the letter and persons involved in its issuance have interfered with the administration of justice and/or perverted or obstructed the course of justice:

“3.16 Bahawa Lam Yen Ling, Liang Mon Loi and Siau Suen Miin tersebut iaitu orang-orang yang diminta dikomitkan adalah orang-orang yang mengeluarkan atau atas arahnya dikeluarkan Notis Defendan tersebut.

3.17 Bahawa Lam Yen Ling, Liang Mon Loi and Siau Suen Miin tersebut telah pada atau sekitar 19.12.2005 dalam mengeluarkan atau mengarahkan atau memberi arahan supaya dikeluarkan Notis Defendan tersebut kepada Yeong Sin Pui seorang yang telah atau bakal memberi keterangan di dalam tindakan ini atau prosiding di dalam tindakan ini atau prosiding di dalamnya dengan itu telah melakukan kesalahan menghina Mahkamah dan/atau mengganggu pentadbiran keadilan (interfered with the administration of justice) dan/atau memesong atau menghalang perjalanan keadilan (perverted or obstructed the course of justice).”

15. The Defendants' response to these serious charges as found in the affidavits filed can be summed up as follows:

- a. denial of the alleged acts or intention
- b. delay on the part of the Plaintiff in initiating this application
- c. injunction already granted in respect of the same complaint and there has been due compliance of the injunction
- d. failure of full and frank disclosure that –
  - i. Plaintiff had filed a complaint against Siau
  - ii. this complaint had been dismissed by the Disciplinary Board on the basis that the claim had no merit
  - iii. appeal against the Disciplinary Board's decision heard by the High Court on 17.1.2009
  - iv. appeal was pending against the decision granting injunction made on 5.7.2007.
- e. multiplicity of proceedings and double jeopardy caused on Siau.

### **Applicable Law**

16. While Article 126 of the Federal Constitution and section 13 of the Courts of Judicature Act 1964 [Act 91] provide the Federal Court, Court of Appeal and the High Court with the power to punish any contempt of itself, there is as yet no specific legislation on contempt in this country. Order 52 of the RHC 1980 serves as the procedural law on contempt. Most of the earlier decisions on contempt concerned instances of disobedience of court orders or contempt in the face of the court.

Nevertheless it is obvious from these decisions that the common law principles on contempt apply.

17. The purpose and justification for this jurisdiction is to enable the courts to deal with contempt and more importantly to punish where contempt is found. This has been succinctly stated by Lord Denning in ***Attorney-General v Butterworth & Ors [1963] 1 QB 696 @ 709***:

*“The origin, purpose and justification of the jurisdiction of the courts to punish contempt is the prevention of the interference with the administration of justice. Any act done which is calculated to lower the authority of the court is a contempt: see Reg. v Gray and Ambard v Attorney-General for Trinidad and Tobago. Conduct which amounts to contempt may take a wide variety of forms, but once it is established that it does interfere with the administration of justice, there is jurisdiction to deal with it. The authority of the court is lowered by the acts which are calculated to deter witnesses from giving evidence before it. That is a statement of the obvious for which no authority should be required, but there is in fact authority for it in the dicta of Lord Langdale M.R. in Littler v Thomson and Kay J. in Rowden v Universities Co-operative Association Ltd.”*

18. In ***Manotech (M) Sdn Bhd v Jasa Keramat Sdn Bhd [2002] 4 AMR 4341 @ 4351*** the Federal Court quoted with approval the definition of ‘contempt of court’ by Nicholls LJ in *Attorney General v Hislop & Anor*

[1991] 1 All ER 911 @ 923 as an “interference with the due administration of justice”. However, because of the generality of the phrase “administration of justice” itself the Federal Court was “of the view that the categories of contempt are never closed”. Whether an act amounts to interference with or perverts the administration or course of justice must be determined on the facts and circumstances of each case. In its decision, the Federal Court also took the opportunity to endorse a similar view expressed by Low Hop Bing J [as his lordship then was] in **Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240**. At p 270 his lordship said:

*“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 judice matters, civil or criminal, for the time being pending in any court.*

*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.”*

19. Further, as contempt proceedings are quasi-criminal in nature it is vital that the elements of contempt are satisfied on a standard of proof which is beyond reasonable doubt. In ***Manotech (M) Sdn Bhd v Jasa Keramat Sdn Bhd @ 4359*** the Federal Court stated:

*“In the absence of a specific legislation on the contempt of court as stated earlier by us, the contempt of court in our country is guided by the common law principles. We agree with what was stated by Sir John Donaldson MR in A-G v Newspapers Publishing Plc (CA), supra, that the standard of proof is the criminal standard be it classified as “civil contempt” or “criminal contempt” though such classification may tend to mislead rather than assist. Be that as it may, we are here concerned with the conduct involving an interference with the due administration of justice or the course of justice and not conduct involving the breach or assisting in the breach of a court order. In this case the standard of proof required is proof beyond reasonable doubt. This standard of proof had been approved by our Supreme Court in Houg Hai Hong & Anor v MBf Holdings Bhd & Anor (and 3 Other Appeals) [1995] 3 AMR 3079”.*

20. I, for my part, am reminded that in any contempt proceedings, the gravity and implications of the orders sought must not be forgotten. In ***T.O. Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151*** the Federal Court remarked at **page 153** in particular of contempt committed by counsel or solicitors:

*“This is a matter which fortunately rarely arises in court. It concerns the question of an advocate accused of contempt of court by aiding and abetting a client to disobey a court order. I would like to refer to what Lord Goddard said when he delivered the judgment of the Judicial Committee of the Privy Council *Parashuram Detaram Shamdasani v King Emperor [1945] AC 264, 270* in respect of insulting statements made by a litigant or person with reference to the Bar and, in particular to counsel appearing against him. This is what Lord Goddard said:-*

*“Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of suppress methods of advocacy which are merely necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to offensive is to use it for a purpose for which it was never intended.”*

21. This view was again echoed by the Federal Court in ***Jaginder Singh v Attorney General [1983] 1 MLJ 71***. After agreeing with the

lower court's observations and expressions of caution and self-direction, the Federal Court reminded: "*As a finding of contempt of court is a conviction of an offence (see Izuora v R [1953] AC 327, 334-4; Shamdasani v King Emperor [1945] AC 264, 270), the jurisdiction must be exercised sparingly, and where it is absolutely necessary.*" These observations to me apply whether the prospective contemnor is counsel or lay person.

22. It is not to say that there can never be contempt where counsel is involved or when a person is exercising his legal rights. What these guiding principles indicate is that the facts and surrounding circumstances must be carefully scrutinized. Therefore, the first order must be to carefully examine the said letter and the circumstances surrounding its issue. It is the Plaintiff's case that the language and content of the said letter is intimidating and threatening of a witness. The fact that the said letter was issued by solicitors is seen as a relevant and aggravating factor. It is trite that the protection of witness is integral to the due and proper administration of justice in any country.

### **Findings**

23. Undoubtedly, the said letter is a letter of demand generally sent as a preliminary step in any intended defamation action. However, the alleged defamatory words are contained in an affidavit filed in court. This affidavit forms evidence before the court. Learned counsel for the Plaintiff submitted that since such evidence is privileged and protected that letter of demand ought never to have been issued by Siau, an

advocate and solicitor “who could not have known that the said Defendants have no right to sue the witnesses for defamation on the witness’s statement on account of privilege”. On that score, the said letter and more particularly its content becomes an intimidation or a threat to a witness if one of the purposes of the said letter was to persuade the witness to change or withhold his evidence or deter him from giving it. The fact that the said letter was issued by or through an advocate and solicitor is submitted by the Plaintiff to exacerbate the seriousness or gravity of the threat or intimidation. This is especially so where there is a real risk of interference with the due administration of justice. According to learned counsel, Siau ought not to have used his office as the means to advance the threat in circumstances where the chances of persuading or influencing the witness one way or another are much higher than if the threat came from a layman.

24. Relying on ***R v Kellett [1975] 3 ALL ER 468*** learned counsel for the Plaintiff submitted that it does not matter that the proposed contemnor had no intention to interfere with the proper administration of justice. It is enough if the action complained of is inherently likely to so interfere. It also does not matter whether the witness is actually deterred or influenced. In ***R v Kellett*** Stephenson LJ said @ 475:

*“Perversion of the course of justice is per se an offence against the public weal.’ An attempt (or incitement) to pervert (or defeat) the (due) course of justice is an offence against the common law and no less than a conspiracy to pervert it was a punishable misdemeanor: R v Grimes, per Kilner*

*Brown J; ... Those cases show also that tampering with evidence, inducing a person to give false evidence, or not to give evidence, for reward are instances of this common law offence whether the evidence is to be given in criminal or in civil proceedings and whether the inducement is effective or, as in this case, not.”*

25. Thus, what we have before us is a situation where parties are supposedly exercising their legal rights and in the course of it is alleged to have committed contempt. In **Kellett**, the Court of Appeal upheld the conviction of a contemnor though the threat was to exercise a legal right as that did not excuse the interference with the administration of justice. The contemnor in that case had sent a letter to 2 neighbours who were potential witnesses for his wife in divorce proceedings informing them of his proposal to sue for slander. The contemnor did not get on with his wife or his neighbours. The letter was to afford these witnesses the opportunity to withdraw their evidence given in the form of statements to an enquiry agent. The intent of the letter was clearly to cause a change of evidence and thereby to interfere with the due administration of justice.

26. Although Stephenson LJ decided that the exercise of a legal right may still amount to an interference with the administration of justice, at **p 475** he nevertheless felt that “*It would seem repugnant to justice and to common sense if in every one of these cases the ‘offender’ could be said to be attempting to pervert or defeat the course or the ends of justice*”. Each case must be determined on the facts and there is a need to prove

intent or a guilty mind: see **Attorney-General v Butterworth & Ors @ 722:**

*“I think the short answer to this contention is that contempt of court is a criminal offence, punishable summarily by the court itself, and like all criminal offences, it requires a guilty mind... At any rate, the law requires a guilty mind in these cases of intimidation or victimization of witnesses... It seems to me that the intimidation of a witness is only a contempt of court if it is done with the purpose of deterring him from giving evidence or influencing him to give it in a sense different from that in which he would otherwise have given it, and the victimization of a witness is only a contempt of court if it is done with the purpose of punishing him for having given evidence in the sense he did.”*

27. In the facts of this case, the said letter demanded that Yeong fully and completely withdrew his statement not from the court files but by publication in a local English newspaper in terms to be approved by the Defendants. There is no real difference here as the effect is the same - to require a withdrawal of a statement filed in court. This is a requirement under the law of defamation, that such a notice be first issued.

28. In **Re Run Run Shaw and Runme Shaw; Ex parte Republic Pictures International Corporation [1949] Supp MLJ 16** in the early days of anti-suit injunctions the Singapore Court dismissed an

application for contempt. The court held that there was nothing to bar the proposed contemnor from instituting the suit and making the application to the New York Court for an injunction to restrain the applicants from proceeding with their action in Singapore for damages for breach of contract. The proposed contemnor was merely pursuing their legal rights. The court cited the decision in ***Webster v Bakewell Rural District Council [1916] Ch 300*** where a motion to commit a solicitor for contempt of court was dismissed on the basis that the solicitor was merely acting on instructions of the client, proposing or threatening to exercise a legal right.

29. It is therefore critical to examine whether the said letter was issued by the proposed contemnors with no genuine intention of suing for defamation [see ***R v Kellett @ p 472***]. In other words the threat was merely an empty threat with no other purpose but to intimidate Yeong and to pervert the course of justice. There must therefore be present a guilty mind. To determine this vital element, the reasons for making the demand must be scrutinized. This will involve scrutinizing the affidavits filed.

30. Although a great number of affidavits were filed in relation to the numerous interlocutory applications filed, only the ones pertaining to the *mareva* injunction [**Encl 42** where Yeong's affidavit is filed in support of], the injunction sought against the Defendants [**Encl 87**] and the application to remove Siau as counsel [**Encl 60**] will be scrutinized. These applications have been referred to by the parties and it is

appropriate to view them only in the context of understanding and confirming actions taken and the reasons for such actions.

31. From these affidavits filed, the proposed contemnors, in particular Siau held the view that based on a Court of Appeal decision “kata-kata Yeong Sin Pui tersebut adalah palsu dan boleh diambil tindakan undang-undang”. It was consistently maintained that the pertinent part of the statement contained hearsay evidence, was scandalous, libelous or irrelevant to the application for a *mareva* injunction. This can be found not only in the said letter but in various affidavits filed, namely affidavits filed in response to the current motion; to challenges launched by the Plaintiff to remove Siau as counsel for the Defendants; in the application for an injunction [**Encl 87**]; as well as in the written response to the Disciplinary Board. From the court file there is also a specific affidavit-in-reply affirmed on 21.12.2005 filed by the 4<sup>th</sup> and 7<sup>th</sup> Defendants [**Encl 76**] in response to the affidavit by Yeong. In that affidavit, apart from maintaining the position as just set out there were specific denials of the allegations made by Yeong.

32. Now, it would appear that the appropriate method would be to apply to cross-examine Yeong on his affidavit with a view to discrediting him. However, the Defendants and their counsel chose instead to issue a letter of demand consistent with the exercise of a legal right of action in defamation. But this right does not exist in law as the testimony of the witness is protected in law except where there is perjury. Although there are indications in the affidavit of the 4<sup>th</sup> and 7<sup>th</sup> Defendants [**Encl 76**] that a cross-examination of Yeong and another deponent of another affidavit

may be undertaken, it is unclear why that did not materialize. Be that as it may the said letter and the consistent position taken by the proposed contemnors reflect the seriousness of the allegations of Yeong such that the 1<sup>st</sup> and 7<sup>th</sup> Defendants sought legal advice on it. Legal opinion and interpretation, though wrong were given by Siau and it was carried through with the issuance of the said letter. The chronology of events and the issue of the said letter reflect a genuine intention to sue for defamation. The said letter was not issued as a mere threat for the purpose of intimidating Yeong as alleged.

33. I therefore do not find the existence of the necessary element of a guilty mind as decided in ***Attorney-General v Butterworth & Ors*** and ***T.O. Thomas***. What I do find is human frailty. As humans and more as legal counsel and thereby as an officer of the court, there is bound to be the occasion when there is error in judgment and legal opinion. This is one such occasion where Siau erred in his legal apprehension and in so doing departed erroneous legal advice leading to the issue of the letter of demand. I do not find any mala fides at the material time or any guilty mind operating to defeat, obstruct or interfere with the administration of justice. At **p 154 -155** the Federal Court in ***T.O. Thomas*** pointed the significance of this element –

*“Another point raised is that in a contempt case it must be proved that appellant had a guilty mind – in the sense that he deliberately aided and abetted another to disobey a court order. ... In Debabrata Bandopadhyay & Ors v The State of*

*West Bengal AIR 1969 SC 189, Hidayatullah CJ at page 193 observed that:-*

*“A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished. It must be realized that our system of courts often results in delay of one kind or another. The remedy for it is reform and punishment departmentally. Punishment under the law of contempt is called for when the lapse is deliberate and in disregard of one’s duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged.”*

34. It cannot be gainsaid that because of the nature of the proceedings, strict proof is required. Errors of judgment or misapprehension of the correct legal position do not fall within the meaning of criminal contempt as was expressed by Sarkaria J. in *S Abdul Karim v MK Prakash & Ors 1976 SC 859* and cited by the Federal Court @ **p. 155**:

*“Sarkaria J expressed his opinion in S Abdul Karim v MK Prakash & Ors 1976 SC 859 in these words at page 863:-*

*“The broad test to be applied in such cases is, where the act complained of was calculated to obstruct or had an intrinsic tendency to interfere with the course of justice and the due administration of law. The standard of proof required to establish a charge of ‘criminal contempt’ is the same as in any other criminal proceedings. It is all the more necessary to insist upon strict proof of such charge when the act or omission complained of is committed by the respondent under the colour of his office as a judicial officer. Wrong order or even an act of usurpation of jurisdiction committed by a judicial officer, owing to an error of judgment or to misapprehension of the correct legal position, does not fall within the mischief of ‘criminal contempt’. Human judgment is fallible and a judicial officer is no exception. Consequently, so long as a judicial officer in the discharge of his official duties, acts in good faith and without any motive to defeat, obstruct or interfere with the due course of justice, the courts will not, as a rule, punish him for a ‘criminal contempt’. Even if it could be argued that mens rea, as such, is not an indispensable ingredient of the offence of contempt, the courts are loath to punish a contemnor, if the act or omission complained of, was not willful.”*

35. Further, this being a quasi-criminal offence where the burden of proof is beyond reasonable doubt, I would have expected some evidence forthcoming from Yeong. After all, the said letter was issued to him. Though the “threat” need not be shown to have operated on him, but bearing in mind the far-reaching implications of this motion, there must, at the very least, be some evidence of a complaint by him. It cannot be presumed. There is none.

36. From the facts of this case I do not find it “*absolutely necessary*” nor do I find evidence beyond reasonable doubt that the said letter and the persons involved in its issue are guilty of contumacious conduct warranting an order of committal for contempt on the grounds and for reasons set out in the Statement and affidavit filed in support of this motion. The said letter was not issued with the intention of intimidating Yeong or interfering with the administration of justice or perverting the course of justice.

37. In the event that the above finding is wrong, I am nevertheless of the view that this Motion ought not to be granted for other reasons. Firstly, the complaint has already been dealt with and it would not be just to subject the proposed contemnors to this additional action. As threatened by the Plaintiff’s solicitors when there was no retraction from the Defendants and from Siau a complaint was lodged with the Disciplinary Board and an application for an injunction filed. Those complaints have been dealt with -by this court when on 5.7.2007 an order of injunction based on the same facts and against the same persons was granted. There are no complaints of non-compliance of that order. Although there is a pending appeal there is no stay of the effect of the injunction. The Disciplinary Board too has deliberated and determined the complaint lodged by the Plaintiff. The Board dismissed the complaint after finding no merit in the complaint. The appeal against this determination has also been dismissed by the High Court. Obviously there is multiplicity of action that must not be allowed. These actions are based not just on the same facts but in respect of the same issue – interference with the administration of justice.

38. Finally, there has been delay in moving this court for this motion. Whilst it is noble on the part of learned counsel to take up the present cause in the interest of preventing future instances of witnesses “being deterred from coming forward in the aid of legal proceedings” making it therefore impossible to administer justice, such causes must be done promptly. Otherwise interference, if it is interference in the first place is permitted to take its insidious effect. However, as explained, what we have here is an example of man, including lawyers being fallible and making errors of judgment with no malice or such similar intent. In such a case the greatest latitude must be shown having regard to the implications of the order sought.

39. In the circumstances the Motion [**Encl 134**] is dismissed with costs.

Date: 19<sup>th</sup> May 2009

**(DATO' MARY LIM THIAM SUAN)**  
JUDICIAL COMMISSIONER  
HIGH COURT KUALA LUMPUR  
(COMMERCIAL DIVISION)

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