

1 **Ting Chuen Peng (mendakwa sebagai wakil bagi ahli**
negeri untuk negeri Negeri Sembilan untuk United
Chinese School Committees' Association of Malaysia
5 (Dong Zong)) & 5 Ors

v

10 **Yap Kiam @ Yap Sin Tian (didakwa secara peribadi dan**
sebagai bekas pengerusi yang dikatakan untuk United
Chinese School Committees' Association of Malaysia
(Dong Zong))

15

High Court, Kuala Lumpur – Originating Summons No.

24NCvC-1315-08/2015

Mohd Firuz Jaffril JC

20

October 16, 2017

25 *Civil procedure – Contempt of court – Application for committal – Breach of order of*
court – Whether application for leave for order of committal must be served on alleged
contemnor – Whether application for leave flawed as plaintiff did not file affidavit
verifying facts but instead filed affidavit in support of application for leave – Whether
circumstantial evidence can be used for purposes of proving contempt – Whether
defendant committed contempt – Rules of Court 2012, Order 52 r 3

30

The defendant and one Khoo Gim Seng ("Khoo") are the chairman and vice
chairman respectively of the Selangor/Wilayah Persekutuan State Member of
the Dong Zong society. As a result of unresolved leadership crisis, the first to the
35 fifth plaintiffs called for an EGM and filed an application for a quia timet
injunction to prevent the defendant from filing an action/injunction to prevent
the said EGM from transpiring. The injunction was duly granted. The sixth
plaintiff was elected as the Chairman of Dong Zong at the end of the EGM. An
40 ex parte injunction order ("KLHC injunction order") was issued to that effect.
However, five days after the sealed KLHC injunction order was served on the
defendant, Khoo filed a suit at the Shah Alam High Court against the first and the
sixth plaintiffs ("the Shah Alam suit"). The prayers therein were in direct breach
of the quia timet interim injunction order. Hence the instant application for
contempt against the defendant.

Issue

Whether the defendant has committed contempt.

Held, defendant found guilty of contempt and sentenced to 30 days' imprisonment 1

1. As regards the defendant's complaint that he was not served with the application for leave of the committal, there is no provision under the Rules of Court 2012 ("the RC 2012") which requires the application for leave for an order of committal be served on the alleged contemnor. Furthermore, such application for leave must be made *ex parte*. [see p 92 para 23(i)] 5
2. The plaintiff's mistake in stating the title "Affidavit Support" instead of "Affidavit Verifying Statement of Facts" as required under Order 52 r 3 of the RC 2012 is not a defect which goes to the root or substance of the plaintiffs' application. In any event, this court has the power at any stage to correct any defects or errors to any proceedings for purposes of determining the real question in controversy between parties to any proceedings. Furthermore, the defendant did not file any application to set aside the leave granted by this court. [see p 92 para 23(ii)] 10
15
20
3. Although the plaintiffs' allegations are mere conjecture and/or speculation and wholly unsubstantiated by any evidence whatsoever, not all cases that are prosecuted in court whether by way of criminal prosecution or civil proceedings requires direct evidence to be mandatory. Finding based on circumstantial evidence is a part of the law on evidence. Based on the decision in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* [1995] 2 AMR 1776, circumstantial evidence can be used for purposes of proving contempt. [see p 92 para 23(iv)] 25
30
4. Khoo was the agent of defendant and the action taken by Khoo in commencing the Shah Alam suit was at the request, directions and/or instructions of the defendant. The circumstantial evidence present, being the timing of the Shah Alam suit and reference to the explicit terms of the *ex-parte* order, led to an irresistible inference it was filed to frustrate the EGM resolutions. [see p 94 para 23(vii)-(viii)] 35
40

Cases referred to by the court

Gleeson v J-Wippel [1977] 1 WLR 510, Ch D (foll)

Houng Hai Hong v MBf Holdings Bhd and Anor (and Another Appeal) [1995] 3 AMR 3079; [1995] 4 CLJ 427, SC (ref)

Loot Ting Yee v Tan Sri Sheikh Hussain Sheik Mohamed [1982] CLJ (Rep) 203, FC (ref)

MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun [1995] 2 AMR 1776; [1995] 2 MLJ 493, CA (foll)

TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151, FC (ref)

Ting Chuen Peng (suing as representative of State Member for the State Negeri Sembilan of the United Chinese School Committees' Association of Malaysia (Dong Zong) &

- 1 *Ors v Yap Kiam @ Yap Sin Tian (sued in his personal capacity and as Chairman of*
United Chinese School Committees' Association of Malaysia (Dong Zong) & Anor
[2016] 7 MLJ 445, HC (ref)
- 5 *Yap Kiam @ Yap Sin Tian (mendakwa sebagai Pengerusi United Chinese School*
Committees' Association Malaysia (Dong Zong) dan juga ahli-ahli jawatan kuasa
pusat yang lain, selain daripada defendan-defendan yang dinamakan) v Poh Chin
Chuan (didakwa dalam kapasiti sebagai Setiausaha Agung United Chinese School
Committees' Association Malaysia (Dong Zong)) & 17 Ors [2015] 4 AMR 311;
10 *[2016] 7 MLJ 505, HC (ref)*

Legislation referred to by the court

Malaysia

- 15 Rules of Court 2012, Order 20 r 8, Order 52 r 3, 3(2)
Societies Act 1996

Justin Voon, KF Wong and HS Lim (KF Wong & Lee) for plaintiffs

- 20 *Zainur Zakaria and Frida Krishnan (The Chambers of Frida) for defendant*
Surendra Ananth (Ding Partnership) for Khoo Gim Seng

Judgment received: January 18, 2018

25

Mohd Firuz Jaffril JC

- [1] The following is the court's decision on encl 48 being the plaintiffs'
30 application for contempt against the defendant and one Khoo Gim Seng
("Khoo").

- [2] Leave to commence contempt proceedings was granted by this court on
January 6, 2016 pursuant to the plaintiffs' application dated January 6, 2016
35 (encl 47).

Background of the above applications

- 40 [3] The following brief/salient background facts are pertinent:

- (i) "United Chinese School Committees' Association of Malaysia" (also known as "Dong Zong") is a society registered under the Societies Act 1996 and is a vital/important society for Chinese Education in Malaysia. Amongst others, Dong Zong co-hosts the "UEC" examination taken by about 25,000 students nationwide annually;
- (ii) Dong Zong consist of 13 state members (one for each state of Malaysia) which are the core members under its Constitution;
- (iii) At all the material times, Yap and Khoo are the *Chairman* and *Vice Chairman* respectively of the Selangor/Wilayah Persekutuan State

Member known as "United Chinese School Committees' Association of Selangor and Wilayah Persekutuan" (hereinafter referred to as "Selangor/WP State Member");

- (iv) Yap was embroiled in a leadership crisis where the members of Dong Zong as a whole lost confidence in him. This was decided by YA Vazeer Alam Mydin Meera J in *Yap Kian @ Yap Sin Tian (mendakwa sebagai Pengerusi United Chinese School Committees' Association Malaysia (Dong Zong) dan juga ahli-ahli jawatan kuasa pusat yang lain, selain daripada defendan-defendan yang dinamakan) v Poh Chin Chuan (didakwa dalam kapasiti sebagai Setiausaha Agung United Chinese School Committees' Association Malaysia (Dong Zong)) & 17 Ors* [2015] 4 AMR 311 at 324; [2016] 7 MLJ 505 at 521-522 (Tab No. 1 of PBOA);

[44] It is evident that the plaintiff has lost the confidence of a majority of the members of the central committee and the central executive committee. As a result of the lack of confidence, meetings of both these committees called by the plaintiff could not be held for lack of quorum. Now, in the circumstance, if the court were to accept the plaintiff's contrary contention, then it would lead to a complete paralysis of the organisation. This cannot be the intention of the framers of the constitution, nor the intended purpose of its members.

- (v) However, Yap wished to "hang on" in his position and this resulted in deadlock and paralysis of Dong Zong. No EGM/AGM could be held as YAP and/or Poh's faction (who wanted to remove him) filed various suits and injunctions against each other to curtail the holding of each meeting by the other side respectively before it could be held. There were even "two chairmans" claiming to be the rightful Chairman of Dong Zong; and
- (vi) Finally, the Registrar of Societies ("ROS") issued notices to de-register Dong Zong (deadline on September 6, 2015 and will be deregistered thereafter) if the leadership crisis is not solved. The first to fifth plaintiffs (being the five other state members apart from Selangor/WP State Member and they are *not* Poh's faction) decided to save Dong Zong from de-registration by calling an EGM on August 23, 2015 but this time, apply for a quia timet injunction (anti-suit injunction) to prevent Yap from filing an action/injunction to prevent the said EGM from transpiring. The said quia timet injunction was granted by YA Nantha Balan J and reported in *Ting Chuen Peng (suing as representative of State Member for the State Negeri Sembilan of the United Chinese School Committees' Association of Malaysia (Dong Zong) & Ors v Yap Kian @ Yap Sin Tian (sued in his personal capacity and as Chairman of United Chinese School Committees' Association of Malaysia (Dong Zong) & Anor* [2016] 7 MLJ 445 at 488-489 (Tab No. 2 of PBOA);

1 (vii) The said EGM was successfully concluded of August 23, 2015
2 (hereinafter referred to as "the said EGM") (Yap refused to participate
3 although he was invited). The EGM is the *Supreme Authority* of Dong
4 Zong under its Constitution. Ten out of 13 state members attended and
5 voted in favour of a new line-up of leaders of Dong Zong which was
6 elected to resolve the leadership crisis, where Lau Lee Ming ("the sixth
7 plaintiff" herein) was elected as the Chairman of Dong Zong. *The ROS*
8 *withdrew its notice of de-registration and the ROS accepted/knowledged the new*
9 *line-up of Dong Zong leaders.*
10

[4] On September 2, 2015, an ex parte injunction order ("the KLHC injunction order") was issued in the following terms:

15 Suatu Injunksi Interim diberikan sehingga pelupusan Saman Pemula di sini
16 supaya pihak *Defendan dan/atau agen-agen dan/atau nomini-nomininya*
17 *dan/atau pihak-pihak yang diarahkan dan/atau digaji olehnya adalah dihalang*
18 *dari memulakan dan/atau memfailkan dan/atau meneruskan apa-apa tindakan*
19 *Mahkamah dan/atau prosiding Mahkamah termasuk tetapi tidak terhad kepada*
20 *permohonan untuk apa-apa Injunksi dan/atau Injunksi Interim dan/atau*
21 *Injunksi Ad Interim dan/atau permohonan-permohonan lain dan/atau dari*
22 *melakukan apa-apa tindakan yang lain dalam apa jua cara untuk *menjejaskan,**
23 *menggugat, menghentikan, menahan, mengacau dan/atau mengecewakan*
24 *Resolusi-Resolusi yang telahpun diluluskan dan/atau keputusan-keputusan*
25 *Mesyuarat Extraordinary General Meeting* untuk Pertubunan yang dikenail
26 sebagai United Chinese School Committees' Association of Malaysia (selepas ini
27 dirujuk sebagai "Dong Zong") yang telahpun diadakan pada 23.8.2015 (selepas ini
28 dirujuk sebagai "Mesyuarat EGM tersebut" melalui Rekuisisi yang bertarikh
29 28.7.2015 dan Notis untuk Mesyuarat EGM tersebut yang bertarikh 29.7.2015.
30

[5] Service of the draft KLHC injunction order was duly served on the
35 defendant. In fact, the defendant's solicitors admitted to this fact by way of a
36 letter dated September 7, 2015. The sealed KLHC injunction order was
37 subsequently served on both the defendant and his solicitors on September 10,
38 2015 respectively.

40 [6] On September 21, 2015, the injunction order was extended by way of an ad
interim order pending disposal of the inter partes injunction application.

[7] On September 15, 2015, a suit was filed in the Shah Alam High Court by Khoo
who was the Vice Chairman of Selangor/WP State Member of Dong Zong and
several other co-plaintiffs via Shah Alam High Court Originating Summons
No. 24-1155-09/2015 ("the Shah Alam suit") against the first and the sixth
plaintiffs in the current proceedings before me. Khoo was named as the first
plaintiff.

[8] On September 21, 2015, the defendant's application to set aside vide encl 19
was dismissed by this court.

[9] On December 29, 2015, Khoo filed an injunction application in the Shah Alam suit which was supported by his affidavit affirmed on September 15, 2015. 1

[10] The Shah Alam suit was finally struck out on December 29, 2015.

[11] The facts leading to the plaintiffs' application for contempt against the defendant and Khoo are as follows: 5

(i) The originating summons in the said Shah Alam suit contains prayers which are in direct breach of the said injunction order in this suit i.e. the quia timet interim injunction order herein. We refer to inter alia prayers 1 and 4 of the said originating summons as follows: 10

1. Satu deklarası bahawa resolusi-resolusi yang diluluskan pada msyuarat EGM United Chinese School Committees' Association Malaysia ("Dong Zong") yang diadakan pada 23 haribulan Ogos 2015 untuk pemilihan semula *keseluruhan Ahli-Ahli Negeri Dong Zong, Ahli Jawatankuasa (JP) dan Ahli Jawatankuasa Eksekutif (JEP) Dong Zong dan/atau adalah bercanggah dengan Perlembagaan Dong Zong dan perubahan dalam komposisi pemegang-pemegang jawatan Dong Zong adalah ultra vires Perlembagaan Dong Zong dan adalah batal dan tidak sah;* 15 20

...

4. Bahawa Defendan-Defendan sama ada secara individu atau secara kolektif, dan/atau melalui ejen-ejen mereka, pembantu, penama atau bagaimana jua pun selainnya *dihalang daripada melaksanakan perkara-perkara yang diputuskan pada "Extra General Meeting" ("EGM") United Chinese School Committees' Association Malaysia (dirujuk sebagai "Dong Zong") bertarikh 23 haribulan Ogos 2015.* 25 30

(Emphasis added.)

(See p 145 at exh 11 of Ting's first affidavit.) 35

(ii) *Similarly, the injunction application filed by Khoo in the said Shah Alam suit prays for injunction order which directly injuncts the resolutions passed on the EGM on August 23, 2015 and this can be seen from prayer 3 of the said injunction application as follows:* 40

Bahawa Defendan-Defendan sama ada secara individu atau secara kolektif, dan/atau melalui ejen-ejen mereka, pembantu, penama atau bagaimana jua pun selainnya *dihalang daripada melaksanakan perkara-perkara yang diputuskan pada "Extraordinary General Meeting" ("EGM") United Chinese School Committees' Association Malaysia (dirujuk sebagai ("Dong Zong") bertarikh 23haribulan Ogos 2015.* (Emphasis added.)

(iii) Khoo then applied to amend the origination summons in the Shah Alam suit to add a prayer to specifically challenge that the said injunction order in the

1 *suit herein do not prevent Khoo from commencing the action in the said Shah
Alam suit as follows:*

5 [2] Satu deklarası bahawa perintah Mahkamah Tinggi yang bertarikh
2.9.2015 seperti yang diperolehi oleh pihak Defendan-Defendan tidak
boleh melarang tindakan Plaintiff-Plaintif di sini terhadap
Defendan-Defendan bagi menghalang hak undang-undang Plaintiff untuk
memulakan tindakan terhadap Defendan-Defendan berdasarkan hak
undang-undang yang membenarkan satu tindakan dibawa mengikut kes
10 *Ashby v White* [1702] 2 Ld Raym 938 and *Woodford and another v Smith and
another* [1970] 1 All ER 1091 yang dirujuk oleh Mahkamah Di dalam bidang
kuasa ini.

15 [3] Satu deklarası bahawa, adalah hak yang termaktub di dalam
perlembagaan bagi Plaintiff-Plaintif memulakan dan membawa tindakan
ini untuk melindungi hak-hak mereka di bawah perlembagaan Dong
Zong, dan di bawah undang-undang umum.

20 [4] Satu deklarası bahawa Resolusi yang diluluskan semasa Mesyuarat
Agung Luar Biasa Dong Zong pada 23.8.2015, adalah melanggar
Peraturan 5.2.3, 5.3 dan 5A9 Perlembagaan Dong Zong.

(See pp 279-280 in exh T12 of Ting's first affidavit.)

25 (iv) The plaintiffs contended that since both Yap and Khoo are "chairman"
and "vice chairman" of the same society i.e. the Selangor/WP State
Member of Dong Zong, clearly they acted together to try to circumvent
and/or frustrate the said injunction order herein.

30 (v) According to the plaintiffs, both Yap and Khoo now attempt to feign their
participation and/or to avoid any responsibility in this matter and the
clear cut interference with the said injunction order herein.

35 (vi) The contempt proceedings against the defendant and Khoo were heard
together on August 24, 2017.

40 **Summary of plaintiffs' submissions**

[12] In their written submissions dated August 7, 2017, the plaintiffs submitted
as follows:

(a) As the both the defendant and Khoo have made no attempt to set aside
the leave order for committal obtained against them, a prima facie case of
contempt has been established.

(b) The following evidence clearly shows that the plaintiffs has beyond
reasonable doubt proven contempt against both the defendant and Khoo:

- (i) in filing the Shah Alam suit, Khoo had acted in his capacity as "Vice Chairman of Selangor/WP State Member" (see the title and first paragraph of the Shah Alam suit); 1
- (ii) Khoo could not have acted in his official capacity to file the Shah Alam suit unless approved and/or agreed to by the defendant who was the Chairman of Selangor/WP State Member at the material time; 5
- (iii) the Shah Alam suit was filed about five days after the sealed injunction order was served on the defendant; 10
- (iv) when the defendant failed to set aside the KLHC injunction order on September 21, 2015, Khoo filed the application for injunction in the Shah Alam suit on September 29, 2015; 15
- (v) on October 2, 2015, Khoo applied to amend the prayers in the Shah Alam suit the terms of which directly impugned the KLHC injunction order; and 20
- (vi) based on the timing of the filing of the Shah Alam suit and the reliefs sought, there was an irresistible inference that both the defendant and Khoo were involved in the whole matter. 25
- (c) Based on the KLHC injunction order, Yap and his agents and/or nominees and/or parties under his direction and/or employ are enjoined. 30
- (d) The Shah Alam suit was a planned collateral attack on the resolutions reached during the EGM on August 23, 2015.

Khoo's position

[13] Khoo had opposed the contempt proceedings instituted against him. For this purpose Khoo filed his affidavits in reply dated April 20, 2017 and June 30, 2017. For purposes of the hearing written submissions dated August 7 and 21, 2017 were furnished. 40

[14] I had after hearing submissions, found that the plaintiffs had succeeded in proving beyond reasonable doubt that Khoo was guilty of contempt as against the injunction order. In mitigation, Khoo duly apologised to the court, showed remorse and promised not to take any further part in the dispute between the plaintiffs and the defendant. I accordingly sentenced Khoo by imposing a fine in the amount of RM10,000 payable within 30 days. In default of the payment of the RM10,000, I imposed an imprisonment sentence of two (2) weeks.

[15] Khoo did not appeal against my decision. In view thereof, this judgment relates purely to my grounds of judgment against the defendant alone.

1 **The defendant's reply**

[16] In the defendant's affidavits in reply to the plaintiffs' application (see the
defendant's affidavits in reply Nos. 1 and 2 affirmed on February 22, 2016 and
5 March 21, 2016) the defendant replied as follows:

- (i) he did not commit any act of contempt and pushed the plaintiffs to proof
such;
- 10 (ii) he denied that Khoo is his agent and/or person under his direction; and
- (iii) the defendant contended that he did not approve or gave approval for the
Shah Alam suit to be filed.

15 [17] In his written submission dated August 7, 2017, the defendant's solicitors in
summary submitted as follows:

- (i) the defendant has not been served with the application for leave;
- 20 (ii) the crux of the plaintiffs' case is premised on the fact that the defendant is
the Chairman of the Selangor/WP Member State Committee, whilst
Khoo is the deputy chairman. Because of this they have a close
25 relationship and is said to be "privy" and/or agent or nominee of each
other, to carry out the intention of members of the Selangor/WP Member
Committee and/or at the very least Khoo would act for the defendant
and/or under his instruction to challenge the resolution passed at the
30 EGM of August 23, 2016 in breach of the injunction order;
- (iii) the plaintiffs' application for leave is flawed as the plaintiffs did not file
an affidavit verifying the facts on as required under Order 52 r 3(2) but
instead filed an affidavit in support of the application for leave;
- 35 (iv) the plaintiffs' allegations are mere, conjecture and/or speculation,
wholly unsubstantiated by any evidence whatsoever;
- 40 (v) any member within the Dong Zong state members and/or the Selangor
WP state is in law entitled to exercise and pursue their legal rights to
uphold their rights under the Dong Zong Constitution. Being individual
and independent minded members of Dong Zong, they:
 - a. are not controlled by the defendant;
 - b. need not obtain the consent or approval of the defendant;
 - c. do not act under the direction of the defendant;
 - d. are not employed by the defendant; and

- e. are not agent or nominee of the defendant especially so when the individual members feel that any order made is unconstitutional or ultra vires the constitution. 1
- (vi) the Shah Alam suit was not instituted by the Selangor/WP State Members only. There were also other state members such as Sabah, Penang and Johor who were the second, third and fourth plaintiffs were not under the control, direction and employment of the defendant or need consent or approval or are the agent and/or nominee of the defendant; 5
10
- (vii) the action taken by the plaintiffs is a personal attack on the defendant and is mala fide when he has not done anything, whether willfully, deliberately, intentionally or otherwise to breach the injunction order; 15
- (viii) the plaintiffs apart from making sweeping, have not provided any evidence and/or cogent evidence, beyond a reasonable doubt, to substantiate or justify their application for committal against the defendant; 20
- (ix) As contempt must be proven beyond reasonable doubt, any ambiguity must be resolved in favour of the alleged contemnor (see *Houng Hai Hong v MBf Holdings Bhd and Anor (and Another Appeal)* [1995] 3 AMR 3079; [1995] 4 CLJ 427); and 25
- (x) even without the participation of Khoo, the three other plaintiffs in the Shah Alam suit being state members of Sabah, Penang and Johor could still proceed with the Shah Alam suit. 30

Plaintiffs' response to the defendant's reply

- [18] In response to the defendant's reply, the plaintiffs submitted that: 35
- (i) it is inherently improbable for the Selangor/WP State Member to take action without the defendant's knowledge and/or consent as the defendant was the chairman of the association; 40
- (ii) if the defendant disapproves or did not agree to the filing and steps taken in the Shah Alam suit, there is nothing to show that he took action to stop the Shah Alam suit; and
- (iii) the Shah Alam suit was filed in the defendant's interest.

The plaintiffs' summing up

- [19] The plaintiffs therefore concluded that:

- 1 (i) the defence forwarded by both the defendant and Khoo consists of bare
denials devoid of logic and without independent support;
- 5 (ii) both the defendant and Khoo are guilty of conduct which interferes with
the due administration of justice by breaching the terms of the KLHC
injunction order; and
- 10 (iii) Khoo had assisted the defendant in breaching the KLHC injunction
order.

Principles applicable in a contempt proceedings

15 [20] In dealing with the plaintiffs' application for committal proceedings against
the defendant (as well as Khoo), I am reminded that the test to be applied in a
contempt application is whether the risk of prejudice to a fair and proper trial is
serious or real or substantial. In this regard, whether there is a clear and present
danger to the administration of justice (see *Loot Ting Yee v Tan Sri Sheikh Hussain
Sheik Mohamed* [1982] CLJ (Rep) 203).

20 [21] Based on my reading of the applicable authorities on the issue of contempt,
I am also reminded that there are four (4) key principles that the court must take
into account when examining the terms of court order contended to have been
25 impugned:

- (i) Contempt is criminal in nature as the liberty of the alleged contemnor is
involved;
- 30 (ii) Contempt must be proven beyond reasonable doubt;
- (iii) The language of the court order must be clear and unambiguous; and
- 35 (iv) Any ambiguity must be resolved in favor of the contemnor.

[22] Apart from the four (4) key principles mentioned above, the following
principles are also applicable:

- 40 (i) the contemnor need not be a party to the order concerned (see *TO Thomas
v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151);
- (ii) proof beyond reasonable doubt can be by way of circumstantial evidence
(see *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* [1995] 2 AMR 1776;
[1995] 2 MLJ 493); and
- (iii) mens rea is not a necessary ingredient that must be proven.

Court's findings

[23] Having reviewed the cause papers and submissions by both parties, my
findings are as follows:

- (i) With reference to the defendant's complaint that he has not been served with the application for leave of the committal, I take the view that there is no provision under the Rules of Court 2012 ("the RC 2012") which requires the application for leave for an order of committal be served on the alleged contemnor. Furthermore, such application for leave must be made ex parte (see Order 52 r 3 of the RC 2012). 1
5
- (ii) With reference to the defendant's complaint that application for leave is flawed as the plaintiffs did not file an affidavit verifying the facts as required under Order 52 r 3(2) but instead filed an affidavit in support of the application for leave, I take the view that the plaintiffs' mistake in putting the title "affidavit support" instead of "affidavit verifying statement of facts" as required under Order 52 r 3 is not a defect which goes to the root nor substance of the plaintiffs' application. In any event, this court has the power at any stage to correct any defects or errors to any proceedings for purposes of determining the real question in controversy between parties to any proceedings (see Order 20 r 8 of the RC 2012). In addition, the defendant did not file any application to set aside the leave granted by this court. 10
15
20
- (iii) In so far as the contempt proceedings herein is concerned, this court is only concerned with the issue whether the defendant and/or Khoo had interfered with the administration of justice in trying to circumvent the terms of the injunction order issued by Nantha Balan J. The involvement of other individual members of the Selangor/WP member or a Sabah, Penang or Johor state member is not an issue for this court to determine. In any event, even if the individual members of the Selangor/WP State Member or Sabah, Penang and Johor state members are justified in commencing the Shah Alam suit, that does not necessarily mean that the defendant and Khoo are absolved and admonished from the contempt charges brought by the plaintiffs against both of them. 25
30
35
- (iv) Whilst I do take note of the defendant's submissions that the plaintiffs' allegations are mere, conjecture and/or speculation, wholly unsubstantiated by any evidence whatsoever, I do realise that not all cases that are prosecuted in court whether by way of criminal prosecution or civil proceedings requires direct evidence to be mandatory. Findings based on circumstantial evidence is very much a part of the law on evidence. Based on the decision in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* [1995] 2 AMR 1776; [1995] 2 MLJ 493, I take the view that circumstantial evidence can be used for purposes of proving contempt. 40
- (v) In deciding whether the defendant has committed contempt, I am guided by the case of *Gleeson v J-Wippel* [1977] 1 WLR 510 at 515 and 516:

1 I propose first to consider the general head of res judicata. *It was common*
ground that the only relevant from of this was issue estoppel. Mr Skone James
referred to the three requirement set out by Lord Reid in *Carl Zeiss Stiftung*
5 *v Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853 at 909, 910; and see at p 935, per
Lord Guest. The first requirement that of a final judgement in the earlier
proceedings, is plainly satisfied. So is the second requirement that of identity of
subject matter, here the question whether or not the Wippell shirt is an indirect
copy of the plaintiff's drawing. It is the third requirement, that there should be
10 identity of parties in the two sets of proceedings, that's creates the difficulty. There
was identity of plaintiffs in the two proceedings; the presence of the plaintiff
company as co-plaintiff in the Denne action plainly makes no difference for this
purpose. But for the doctrine of issue estoppel to apply there must also be identity
of defendants (which there plainly is not) or else the existence of privity between
15 Denne, the defendant in the earlier action, and Wippell, the defendant in the
present action. Such privity, said Mr Skone James, does exist in the present
case, whereas Mr Jacob on behalf of the plaintiff said it did not. The
question, then is the meaning of "privity" in this context.

20 *The requisite is said to be a privity either of blood, of title, or of interest: see Zeiss*
No. 2, at p 910, per Lord Reid. ...

First, I do not think that in the phrase "privity of interest" the word "interest" can
be used in the sense of mere curiosity or concern. ...

25 *Second, it seems to me that the substratum of the doctrine is that a man*
ought not to be allowed to litigate a second time what has already been
decided between himself and the other party to the litigation. This is in the
interest both of the successful party and of the public. *But I cannot see that*
30 *this provides any basis for a successful defendant to say that the successful defence*
is a bar to the plaintiff suing some third party, or for that third party to say that the
successful defence prevents the plaintiff from suing him, unless there is a sufficient
degree of identify between the successful defendant and the third party. I do not say
that one must be alter ego of the other: but it does seem to me that, having due
35 *regard to the subject of the dispute, there must be a sufficient degree of*
identification between the two to make it just to hold that the decision to which one
was party should be binding in proceedings to which the other is party. It is in that
sense that I would regard the phrase "privity of interest".

40 *Third, in the present case, I think that the matter may be tested by a question*
that I put to Mr Skone James in opening. Suppose that in the Denne action
the plaintiff, Miss Gleeson, had succeeded, instead of failing. Would the
decision in that action that Wippell had indirectly copied the Gleeson
drawings be binding on Wippell, so that if sued by Miss Gleeson, Wippell
would be stopped by the Denne decision from denying liability? Mr Skone
James felt constrained to answer Yes to that question. *I say – constrained*
because it appears that for privity with a party to the proceedings to take effect, it
must take effect whether that party wins or loses. As was said by Buckley J in Zeiss
No. 3 [1970] Ch 506 at 541 (where the question was rather different) "the
relationship cannot be conditional upon the character of the decision".

(Emphasis added.)

- (vi) Having referred to the above case following question comes to mind: 1
 If Yap had succeeded in the KL suit, would Khoo file the application in the Shah Alam High Court?
 The answer to this question, can easily be answered in negative. 5
- (vii) The above question is important to determine as to whether there was a privity of interest between the defendant and Khoo. Based on the undisputed facts, Khoo is the Deputy Chairman of UCS CAM Selangor/WP State Member and the fact that he is a member of the fraction of the UCS CAM supporting the defendant, I am constrained to hold that Khoo was the agent of defendant and the action taken by Khoo in commencing the Shah Alam suit was at the request, directions and/or instructions of the defendant. 10
 15
- (viii) The circumstantial evidence present, being the timing of the Shah Alam suit and reference to the explicit terms of the ex parte order, leads to an irresistible inference it was filed to frustrate the EGM resolutions. 20
- (ix) Based on the affidavit filed by the contemnors, I took note that the defendant apart from alleging that the plaintiffs' case is based on mere, conjecture and/or speculation, wholly unsubstantiated by any evidence whatsoever and mala fide, he denies all allegations made by the plaintiffs. The fact that the "media report" of the full terms of the injunction order was not put forward is apparent. 25
 30
- (x) In light of the above, I find that the defendant has failed to rebut the evidence adduced by the plaintiffs. I therefore concluded that the charges of contempt has been proven beyond reasonable doubt and found the defendant guilty of contempt. 35

Sentencing

[24] Despite delivering my finding that the defendant was guilty of contempt on September 28, 2017, sentencing was heard only on October 13, 2017. This was to enable counsels to prepare the necessary submissions for purposes of mitigation and sentencing. 40

[25] For this purpose, learned counsel for the defendant and Khoo furnished the court with a written submission dated October 13, 2017. The contents of the written submissions were later on reiterated in open court. Albeit brief, the contents of the submissions alluded to the following:

- 1 a. No evidence was adduced by the plaintiffs in support of their claim that
the defendant and Khoo had acted together to circumvent and/or
frustrate the injunction order.
- 5 b. All the allegations and imputations by the plaintiffs are mere conjecture
unsupported by evidence.
- 10 c. The defendant is of an advanced age and had health problems including
severe hypertension, diabetes etc.

10 [26] I then heard the aggravating submissions from the plaintiffs' counsel. Before
making any decision on the sentence, I informed the defendant's counsel that his
submission was not one of mitigation but more of a challenge to the court's
15 finding of guilt against the defendant. Furthermore, his submission was void of
any sense of remorse and apology from the defendant. I further indicated that I
was not prepared to sentence the defendant to prison. Thereafter, I requested for
counsel to advise the defendant accordingly and stood down the matter to allow
20 the defendant to take advice from counsel.

[27] When the case was called up about 20 minutes later, counsel for the
defendant informed that the defendant does not wish to apologise as he was of
the view that by doing so it would jeopardise his chances of succeeding at the
25 appeal. (Note: It was at this time that Khoo who was represented by his own
counsel apologised to the court and was sentenced as stated in paragraph 6
above.)

30 [28] Having seen the stand taken by the court towards Khoo, learned counsel for
the defendant requested for the matter to be stood down again to enable him to
counsel the defendant.

35 [29] When the case resumed, learned counsel for the defendant informed the
court that the defendant's stand of not wanting to apologise remains the same. I
then proceeded to ask the defendant to approach the bench and communicated
with him directly by asking whether he understands the events that transpired
before him. He replied that he understood. I then asked if it was true that he does
40 not want to apologise nor is he remorse over the events which had culminated
and he answered in the affirmative.

[30] That being the case, I informed him that I have no other choice but to send
him to prison for contempt in view of the fact that contempt tantamounts to a
perversion of the administration of justice by the court, to which he replied that
he understood the court's position. Having considered the facts of the case, the
mitigation forwarded by counsel that the defendant is under constant
medication and the chronology of events that, I sentenced the defendant for a
term of imprisonment for thirty (30) days.

[31] In doing so, I did acknowledge of the defendant's health condition but based on my own knowledge medical attention for illness such hypertension and diabetes is available in prison. I also took the view that the defendant did not show any remorse as to the events which have transpired. Despite his counsel advising that an apology to the court will not affect his chances on appeal against the finding of contempt made by the court against, the defendant was adamant not to offer any apology. This to my mind, showed that the defendant does not recognise the views of others and will continue to do as he pleases as long as the things that he does conforms with his own principles.

[32] Having pronounced sentence, I summarily dismissed the defendant's oral application for a stay and had directed his solicitors to file a formal stay application. Stay was duly granted on October 23, 2017.