DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN, MALAYSIA

GUAMAN SIVIL NO. S-22-1290-2007

ANTARA

BUMITECH MARKETING SDN. BHD.
(No. Syarikat: 348661-X)

... PLAINTIF/RESPONDEN

DAN

SUASA EFEKTIF (M) SDN. BHD.
(No. Syarikat: 253661-H)

... DEFENDAN/PEMOHON

DI DALAM MAHKAMAH TERBUKA

DI HADAPAN Y.A. DATO' HUE SIEW KHENG

HAKIM

DECISION
(Enclosure 66)

1. Enclosure 66 is the defendant's Inter parte Notice of Motion to commit the directors of the plaintiff company for contempt.

2. The 2 cited directors / alleged contemnors (ACs) are:

   i) Abdul Rahman Bin Baba; and

ii) Rosnan Bin Mohd Roslin

3. Learned counsel for the defendant has raised a preliminary issue that since the ACs have failed to purge their contempt, their right to be heard in this proceeding is forfeited. It is contended that the ACs have failed to purge their contempt to date by, inter alia, failing to ensure that all the P&D machines are fully functional pursuant to clause 7.1 of the Agreement dated 15.12.2005. Consequently the defendant prays for an order in terms of Enclosure 66.

4. Reliance for this submission was placed on the Federal Court decision of *Wee Choo Keong v Mbf Holdings Bhd. & Anor* [1993] 3 CLJ 210, particularly the finding of the court (at page 213) that:

> "Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has purged his contempt."

5. With respect, I am unable to agree with the contention that this case is authority for the proposition of law that in a contempt proceeding, the AC's right to be heard is forfeited if he has not purged his contempt. The reason is obvious: for an alleged contemnor to purge his contempt, he must be found guilty of contempt in the first place. The whole basis of this substantive Motion is for this court to determine if the ACs are guilty of contempt.

6. Furthermore, if one were to read the judgment of *Wee Choo Keong* carefully, it is clear that the court was making a finding in respect of whether the AC in that case had a right to be heard in respect of other pending applications.

7. The facts there show that on 2 March 1993, 2 applications were before the learned High Court judge: Enclosure 21 and Enclosure 27. Enclosure 21 was the application by the appellant / AC to set aside the injunction which was alleged to have been breached. Enclosure 27 was the substantive Notice of Motion for committal.

8. Learned counsel for the respondent objected to the hearing of Enclosure 21 and argued that the appellants ought not to be heard on Enclosure 21 until Enclosure 27 had been disposed of. The learned High Court judge agreed and proceeded to hear only Enclosure 27 whereupon the appellants, being dissatisfied with the ruling, appealed against the ruling.

9. It was in that context that the apex court ruled that the contempt must first be purged before the appellant can be heard *on the other application* although not specifically spelt out in the judgment.

10. *Wee Choo Keong* was an appeal against a "mere procedural ruling" (page 212) and not the substantive motion which had yet to be heard. That fact situation does not exist here as this proceeding is the substantive motion for committal.

11. I accordingly rule that the preliminary issue raised is untenable and cannot be allowed.

12. In respect of the substantive motion, I find that the defendant has proved beyond reasonable doubt that the ACs have breached the consent order in that clauses 7.1 and 11.2 of the 2005 Agreement have not been complied with.

13. The P&D machines have been removed without notice to the defendant and of the machines reinstalled, some are not functional.

14. I cannot accept the excuse that the ACs were under the mistaken belief that the machines belonged to them as their conduct in this

matter is inconsistent with that belief. They have, without protest, reinstalled the P&D machines and have endeavored to rectify the defects of some of the machines, as evidenced by the correspondence exchanged between the parties' solicitors.

15. The issue raised with regard to the consent judgment not being agreed to by them and that it did not reflect their intention and that their previous solicitor had not acted in accordance with their instructions cannot be sustained as it is trite that a party is entitled to rely on the apparent authority of counsel of the opposing party to compromise. This is clearly an afterthought.

16. The ACs have failed to raise any reasonable doubt. I find that they had willfully disobeyed the consent judgment entered into. In the circumstances, I find the ACs guilty of contempt of court.

Sentence

17. Both the contemnors have informed the court that they had no intention of committing contempt and asked for leniency. Learned counsel for the contemnors asked for a fine to be imposed.

18. Learned counsel for defendant urged the court to impose a custodial sentence as he contended the contemnors had full knowledge of the implication of their actions as they had tried to remove the machines, valued at almost RM1 million, surreptitiously at dusk by unknown persons.

19. The Supreme Court in *Wee Choo Keong (supra)* had, in no uncertain terms, said as follows: (at pages 220-221)

Obedience to court order

It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not

> *open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience*. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequence.

20. This was endorsed by the Court of Appeal in *Lee Lim Huat v Yusof Khan bin Ghows Khan* [1997] 3 AMR 2401. The appellate court there affirmed the sentence of one month imprisonment imposed by the High Court in respect of the contempt committed by the advocate and solicitor for breaching an injunction.

21. In *Arab-Malaysian Prima Realty Sdn. Bhd. v Sri Kelangkota Rakan Engineering JV Sdn. Bhd. & Ors* [2000] 2 CLJ 612, the High Court at Shah Alam censured the contemnor's acts of contempt as follows:

> In my view, it is high time that our judiciary shows its abhorrence to the two acts of contemptuous conduct, as illustrated by the facts and circumstances of this case. Therefore, the court must fulfill its responsibilities by passing an appropriate sentence on each count to reflect the extreme seriousness. Our courts would not be doing their duties and indeed would be acting against public interest, especially having regard to the fact and circumstances of the instant case, by imposing a mere fine especially in respect of the 2nd conviction. Public policy and public interest call for the existence of the law of contempt in order to ensure eg, that order of the court are not breached or contravened and that due administration of justice is not put in jeopardy.

22. The contemnor therein, one Khalijah bt. Hasnan @ Mazura Abdullah, was fined RM30,000.00 for the first act of contempt and sentenced to three (3) months imprisonment for the second act of contempt.

23. In the present case, I concur with learned counsel for the defendant that the contemnors were aware they were breaching the consent

order as firstly, they tried to remove the machines by employing unknowns persons to do the job and using a lorry that could not be linked to it, all done under the cover of darkness. Upon discovery, they had readily acquiesced in returning and replacing the machines and had sought for time to repair the damaged machines. These actions, as stated earlier, are inconsistent with their "honest" belief that the machines belonged to them.

24. I do not find the contemnors to be remorseful or repentant for breaching the consent order. It is trite that a genuine remorse in the form of apologies, which should be unambiguous unqualified and tendered at the earliest opportunity, is a highly significant mitigating factor. (*See Chung Onn v Wee Tian Peng* [1996] 5 MLJ 21; *Attorney General v Arthur Lee Meng Kuang* [1987] 1 MLJ 206; *Chandra Sri Ram v Murray Hieber* [1997] 3 CLJ Supp. 518). As aptly expressed in *Brig. E. T. Sen (Retd) v E. Narayanan & Others* (Air) [1969] Delhi 201:

> Apology has to be offered clearly at the earliest opportunity indicative of remorse and contrition which is the essence of the purging of a contempt and it should not be offered in the hope and with the object of avoiding punishment. Apology and justification go together. It is therefore wrong on the part of a lawyer to contend that if the court finds his client's conduct as amounting to contempt of court, then he is willing to tender an unconditional apology.

25. The contemnors have informed the court that they had no intention of committing contempt. Intention or *mens rea* is not an essential ingredient for the purpose of finding a person guilty of contempt (see *Arab-Malaysian Prima Realty* (supra)). Nevertheless, from the conduct of the contemnors as set out above, I am unable to agree with the contemnors that they did not have the intention of committing contempt.

26. In the circumstances, I do not find any genuine mitigating factors here and it is my considered view that the willful disobedience and lack of respect of the order of this court should be met with a fitting deterrent sentence.

27. I accordingly sentence the contemnors to two (2) weeks imprisonment.

(DATO' HUE SIEW KHENG)
Judge
High Court Malaya
Kuala Lumpur

Date: 10 May 2012

KAUNSEL

En. Hasnan bin Hamzah (Tetuan Hasnan Hamzah) – bp kontemnor-kontemnor, En. Abd. Rahman Bin Baba dan En. Rosnan bin Mohd Roslin.

En. Alex Chang bersama Cik S.P. Tan (Tetuan Alex Chang & Co.) – bp defendan.

SALINAN DIAKUI SAH

18/6/2012
AIDA BINTI ABU BAKAR
Pegawai Tinggi Kuala Lumpur