

**SURESH EMMANUEL ABISHEGAM & ANOR v. NAUTILUS
PERAK MARINE SERVICES SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J

[ORIGINATING SUMMONS NO: WA-24NCC-264-06-2016]

2 JUNE 2017

[2017] CLJ JT(5)

CIVIL PROCEDURE: Contempt of court – Committal proceedings – Application for leave – Proceedings against directors of company – Whether company must first be charged and convicted of contempt – Company not named in committal proceedings – Whether company could be guilty of contempt when no proceedings against it – Whether application flawed – Rules of Court 2012, O. 52, rr. 3(2), 6A

CIVIL PROCEDURE: Contempt of court – Committal proceedings – Service of order – Proceedings against directors of company – Plaintiffs sought to enforce *ex parte* leave order to commence committal proceedings – Whether copy of order must be served personally on proposed contemnors – Whether fundamental requirement warranting strict compliance – Whether service on solicitors could be regarded as service on proposed contemnors – Whether personal service could be waived – Rules of Court 2012, O. 45 r. 5(1)(a)(B)

CIVIL PROCEDURE: Contempt of court – Committal proceedings – Standard of proof – Whether contempt must be proven beyond reasonable doubt – Whether alleged act of contempt adequately described and particularised in statement – Deficiency in statement – Whether could be cured by subsequent filing of further affidavits – Whether proposed contemnors made genuine efforts to obey order of court – Whether contempt proven beyond reasonable doubt

The application herein ('encl. 44') was by the directors of the defendant ('the proposed contemnors') to set aside the *ex parte* leave order granted by the court to commence committal proceedings against them. On 24 November 2016, the court ordered, *inter alia*: (i) that the accounting and other records ('accounting records') of the defendant be opened to the plaintiffs' auditors; and (ii) that the defendant, within 14 days, supply to the plaintiffs, a copy of the accounting records from 2012 until the date of the order ('inspection order'). The sealed inspection order was served on the defendant for the defendant to forward a copy of the accounting records to the plaintiffs' auditors. However, the inspection order had never been served personally on each of the proposed contemnors. On 19 December 2016, the defendant served the accounting records on the auditors *vide* a letter. The auditors replied, accepting the accounting records and reserved their rights to request for further documents. In a subsequent letter, the auditors informed the

A

B

C

D

E

F

G

H

I

A plaintiffs that the accounting records that were forwarded was incomplete
and requested for additional accounting records, which the plaintiffs
conveyed to the defendant. Even after several letters were exchanged from
both parties where the defendant gave some additional accounting records,
they were still considered incomplete by the auditors. The plaintiffs thus
B filed the *ex parte* applications for leave to commence committal proceedings
against the proposed contemnors and hence, the application in encl. 44 by
the proposed contemnors. In seeking the order to set aside the leave order,
the proposed contemnors contended, *inter alia*: (i) that the inspection order
was never served personally on the proposed contemnors; (ii) there had been
C no full and frank disclosure by the plaintiffs; and (iii) there had been
compliance of the inspection order by the defendant.

Held (allowing encl. 44 with costs):

- D (1) The defendant had not been named in the present committal
proceedings. The plaintiffs had only named the proposed contemnors in
the plaintiffs' statement filed pursuant to O. 52 r. 3(2) of the Rules of
Court 2012 ('ROC') and the *ex parte* leave application. Only in the first
plaintiff's affidavits were averments made to state that the defendant was
guilty. Therefore, the leave order only provided for leave to commence
committal proceedings against the proposed contemnors. (para 21)
- E (2) Order 52 r. 6A of the ROC clearly provides that the first ingredient that
must be established before the proposed contemnors can be punished for
contempt is that the defendant as a company/corporation must first be
charged and convicted of contempt. Since the defendant had not been
named as the proposed contemnors, the *ex parte* leave order and the
F committal application were flawed. The defendant therefore could not
be guilty of contempt when there was no committal proceeding launched
against it. (paras 22, 23, 25 & 28)
- G (3) Pursuant to O. 45 r. 5(1)(a)(B) of the ROC, a party seeking to enforce
an order made against a body corporate to do an act within a specified
time may initiate committal proceedings against 'any director or other
officer of the body'. It is therefore fundamental that such order shall not
be enforced against the director or officer unless a copy of the order has
been served personally on the director and/or officer against whom an
order of committal is sought. Strict compliance to the rules must be
H adhered to and the inspection order must be personally served on the
proposed contemnors. The inspection order had not been personally
served on the proposed contemnors. Service of the order on the
defendant's solicitors could not be regarded as service on the proposed
contemnors. The mandatory requirement of personal service of the
I inspection order could not be waived even if the proposed contemnors
had knowledge of such an order and had acted upon it. (paras 29 & 32)

- (4) The standard of proof required to be proven by the plaintiffs is that contempt had been committed by each of the proposed contemnors beyond reasonable doubt. Hence, the alleged act of contempt must be adequately described and particularised in detail in the statement. The plaintiffs herein had failed to state what were the incomplete accounting records that they claimed the defendant/proposed contemnors failed to supply the auditors with. Before the hearing of the application, the plaintiffs came with an affidavit of the auditors listing out the documents that the defendant/proposed contemnors failed to give. However, the deficiency in the statement could not be supplemented or cured by any further affidavit at a later time. (paras 37 & 39) A B C
- (5) It is trite for an applicant in an *ex parte* application to make full and frank disclosure. Failure to do so may result in the *ex parte* order being set aside. It could not be gainsaid that the defendant had failed to comply with the inspection order by the plaintiffs' failure to show to the court the documents which had been supplied to the auditors by the defendant. There were genuine efforts done by the proposed contemnors to obey the order of the court. The plaintiffs also did not bring to the court's attention the fact that, in the leave application, the plaintiffs managed to get an order for damages. Had the court's attention been drawn to the prayer for costs on a full indemnity basis and damages, it would not have been awarded. Hence, this was an oppressive conduct and an abuse of the legal process by the plaintiffs. (paras 40-43) D E
- (6) The inspection order was an order pursuant to s. 167(1) of the Companies Act 1965 ('CA') and hence, it does not impose an obligation on the defendant as a company to comply. All that was required was for the defendant to supply the accounting and other records kept and in its possession. As far as the defendant and the proposed contemnors were concerned, they had supplied all the documents in its/their possession 'as will sufficiently explain the transaction and financial position of the company and enable true and fair profit and loss accounts and balance sheets' in accordance with the duties of the defendant as a company under s. 167(1) of the CA. What the plaintiffs were asking seemed to be beyond what the proposed contemnors could produce. The court was satisfied that the defendant had supplied all the documents in its possession and in the circumstances, there could be no contempt. (paras 55-57) F G H
- (7) There was no wilful or deliberate disobedience of the inspection order if at all there was any non-compliance on the part of the defendant and/or the proposed contemnors. In the absence of malicious intent on the part of the proposed contemnors and evidence of any intent to dishonour the terms of the inspection order, the plaintiffs had failed to prove their charges beyond reasonable doubt. (paras 58 & 65) I

A **Obiter:**

(1) The plaintiffs had not exhausted all the available reliefs before commencing the proceedings herein. The plaintiffs' complaint in the committal proceedings was essentially that the accounting records which had been supplied to the auditors were incomplete causing the auditors' purported 'investigative audit' to be incomplete. In this regard, the complaint should have been directed to the Companies Commission of Malaysia instead of resorting to committal proceedings. The court was not here to take the function of a body corporate to decide whether the documents would be sufficient to explain the transaction and financial position of the defendant. (para 63)

Case(s) referred to:

Arthur Anderson & Co v. Interfood Sdn Bhd [2005] 2 CLJ 889 CA (*refd*)

B Krishna Reddy v. Pushpa Subrahmanyam [2011] 3 ALD 10 (DB) (*refd*)

Bakmawar Sdn Bhd v. Malayan Banking Bhd [1991] 3 CLJ 1759; [1991] 2 CLJ (Rep) 323 HC (*refd*)

Ban Lian Hardware Sdn Bhd v. Usaco Manufacturing (M) Sdn Bhd [2001] 7 CLJ 161 HC (*refd*)

Capital Insurance Bhd v. BS Sidhu [1996] 3 CLJ 477 CA (*refd*)

Goo Sing Kar v. Dato' Lim Ah Chap & Ors And Other Applications [2002] 2 CLJ 250 HC (*refd*)

E *Gordon v. Gordon* [1946] 1 All ER 247 (*refd*)

Helen Yeap Poh Sim & Yang Lain lwn. Universal Trustee (Malaysia) Bhd [2001] 7 CLJ 414 HC (*refd*)

Iberian Trust Ltd v. Founders' Trust and Investment Co Ltd [1932] 2 KB 87 (*refd*)

J&M Power Sdn Bhd v. J&M Power Resources Sdn Bhd [2012] 5 AMR 638 (*refd*)

Microsoft Corporation And Others v. Marks and Anor [1995] 33 IPR 15 (*refd*)

F *Regina v. Sunner and Sihota* [1977] BCJ No 1339 (*refd*)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC (*refd*)

Tay Seng Keng v. Tay Ek Seng Co Sdn Bhd [1977] 1 LNS 133 HC (*refd*)

TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 LNS 126 FC (*refd*)

G **Legislation referred to:**

Companies Act 1965, s. 167(1)

Rules of Court 2012, O. 45 rr. 5(1)(a)(B), 7(3)(a), (7), O. 52 rr. 3(2), 6A

Companies Act 1973 [S. Africa], s. 25(4)

For the plaintiffs - Jennifer Chandran & Amalina Suhainy; M/s Vaasan Chan & Chandran

H *For the alleged contemnors - Su Tiang Joo, Teh Eng Lay & Chok Zhin Theng; M/s Cheah Teh & Su*

Reported by S Barathi

I

JUDGMENT

A

Noorin Badaruddin J:

[1] Enclosure 44 is the application by the directors ('proposed contemnors') of the defendant to set aside the *ex parte* leave order ('the leave order') granted by this court to commence committal proceeding against them.

B

[2] The proposed contemnors are Dato' Seri Timor Shah Rafiq, Dato' Wan Mohamed Yaacob bin Dato' Wan Salaidin and Dato' Azlan Zulkifli Alymann.

Background Facts

C

Inspection Order

[3] On 24 November 2016, this court ordered *inter alia* as follows:

(i) that the accounting and other records ("accounting records") of the defendant, be open to the plaintiffs' auditors, Messrs Shaistri & Co ('the auditors') for inspection; and

D

(ii) that the defendant within 14 days, supply to the plaintiffs a copy of the accounting records from 2012 until the date of the order (inspection order')

E

[4] On 6 December 2016, the plaintiffs' solicitors served on the defendant's solicitors the sealed inspection order and requested that the defendant forward a copy of the accounting records to the plaintiffs' auditor.

[5] At all material times from 24 November 2016 until to date, the inspection order has not been served personally on each of the proposed contemnors.

F

[6] On 19 December 2016, the defendant *vide* their solicitors' letter served accounting records on the auditors and on 20 December 2016, the auditors replied accepting the accounting records and reserved their rights to request for further documents if necessary.

G

[7] On 11 January 2017, the auditors wrote to the plaintiffs' solicitors *inter alia* informing that the accounting records forwarded was incomplete and requested for the additional accounting records.

[8] On 19 January 2017, the plaintiffs' solicitors wrote to the defendant's solicitors requesting for the said additional documents.

H

[9] There were several exchanges of letters from both solicitors on this matter where the defendant gave some additional accounting records but were still considered as incomplete according to the auditors.

I

A [10] On 26 January 2017, the plaintiffs' solicitors filed the *ex parte* applications for leave to commence committal proceedings (encl. 34) against the proposed contemnors ('leave application'). On 31 January 2017, this court granted the leave order.

B [11] On 22 February 2017, the proposed contemnors filed this application to set aside the leave order (encl. 44).

[12] On 27 February 2017 the said application was served on the plaintiffs' solicitors and was also fixed for hearing on the same day. This court ordered *inter alia* for this application to be heard *inter partes*.

C **The Application (encl. 44)**

Contentions Of The Proposed Contemnors

[13] Summarily, in seeking for the leave order to be set aside, the proposed contemnors contended the following grounds:

D (a) that the inspection order was never served personally on the proposed contemnors;

(b) there has been no full and frank disclosure by the plaintiffs;

(c) there has been compliance of the inspection order by the defendant;

E (d) there is insufficient particularisation; and

(e) there is bad faith on the part of the plaintiffs against them.

F [14] It is the proposed contemnors' argument that they have made and taken all the efforts to supply all the accounting documents that they have to the auditors. They have even give full explanation what the documents are and had also supplied documents to the plaintiffs' solicitors. But despite all that and having received all those documents, the plaintiffs came before this court and applied for the present application.

Responses Of The Plaintiffs

G [15] The plaintiffs concede that it is not disputed that the inspection order was not served personally on the proposed contemnors. Nevertheless, according to the plaintiffs, the inspection order was served on the defendant. The plaintiffs argue that as the proposed contemnors are the directors of the defendant and they are in control in the management of the defendant, they are fully aware of everything that happens in the defendant as well as having knowledge of their obligations in respect of the accounting records. Being represented by solicitors to contest the originating summons and affirming affidavits, the plaintiffs submitted that the proposed contemnors have full knowledge of the said application and the inspection order. In fact, according to the plaintiffs, the proposed contemnors' solicitors requested additional

H

I

time to comply with the inspection order when it was granted and in good faith the plaintiffs thought by the extension of time given, the defendant *via* the proposed contemnors as the directors would comply with the inspection order.

A

[16] In addition, the plaintiffs submitted that Legislature in their wisdom has not made service mandatory as they have given the court the power to dispense off with service of the said order. Order 45 r. 7(7) of the Rules of Court 2012 ('ROC') is cited by the plaintiffs, which reads:

B

(7) Without prejudice to its power under Order 62, rule 5, the Court may dispense with the service of a copy of an order under this rule if it thinks it just to do so.

C

[17] As to the non-full and frank disclosure, it is the plaintiffs' submission that that contention is not true based on the fact that the plaintiffs have disclosed that the auditors confirmed receipt of the defendant's letter dated 19 December 2016. According to the plaintiffs, even if the letters from both parties and their representatives and e-mails pertaining to a Maybank statement are excluded, the proposed contemnors are still guilty of contempt as there are other accounting records that were not given. As to the letter dated 27 January 2017, the plaintiffs have admitted that there is no denial that the proposed contemnors had subsequently forwarded additional accounting records as requested under the inspection order and the letter enclosing the documents have been exhibited.

D

E

[18] The plaintiffs submitted that the purported compliance of the inspection order claimed by the proposed contemnors is actually an issue between the proposed contemnors and the auditors. The plaintiffs laid down an analysis of the documents forwarded by the defendant *via* the proposed contemnors to the auditors which according to the plaintiffs shows that there are still some accounting records that are outstanding. It is the plaintiffs' contention that as long as the defendant fails to forward all accounting records as defined by the Companies Act 1965 and/or Companies Act 2016, there is non-compliance of the inspection order.

F

G

[19] In relation to the insufficient particularisation, the plaintiffs submitted that this is a simple case of the proposed contemnors forwarding the accounting records to the auditors as the inspection order is very clear and precise. It is the plaintiffs' case that the auditors have detailed what are accounting records that are still outstanding.

H

[20] The plaintiffs further replied that the bad faith is on the part of the defendant *via* the proposed contemnors as they have failed to comply with such a straightforward inspection order.

I

A *Evaluation And Findings*

[21] Foremost, it is to be noted that the defendant, Nautilus Perak Marine Services Sdn Bhd has not been named in the present committal proceedings. The plaintiffs had only named the proposed contemnors in the plaintiffs' statement filed pursuant to O. 52 r. 3(2) of the ROC and the *ex parte* leave application. Only in the first plaintiff's affidavits, averments were made to state that the defendant is guilty. Therefore, the leave order only provides for leave to commence committal proceedings against the proposed contemnors.

[22] Order 52 r. 6A of the ROC provides:

C If a corporation is guilty of contempt of Court, the Court may fine the corporation or punish any officer of the corporation who caused or willfully permitted or contributed to the contempt of Court or fine the corporation and punish the officer.

D [23] Reading the above provision of the ROC, it is clear that the first ingredient that must to be established before the proposed contemnors can be punished for contempt is that the defendant as a company/corporation must first be charged and convicted of contempt. In *Regina v. Sunner and Sihota* [1977] BCJ No. 1339; 4 BCLR 272 Barnett Prov. J discussed the provision of s. 25(4) of the Companies Act 1973 which states as follows:

E (4) Where a corporation is guilty of an offence under subsection (1) or (2),

(a) every director or officers; and

(b) every other person

F who authorised, permitted, or acquiesced in the offence, is guilty of the offence personally.

[24] The learned judge went on to state as follows:

G 15. Mr. Vanderburgh submits that even if this is so the accused individuals cannot be found guilty because Laketown has not been convicted of any offence. He relies upon s. 59 of The Summary Convictions Act, R.S.B.C 1960, c. 373

...

...

H 17. In my opinion Mr. Vanderburgh's submission is unanswerable. The court cannot deem that Laketown was guilty of any offence and therefore cannot say that there is a basis for finding personal guilt on the part of Sunner, as a director or officer of the Corporation, or Sihota, as a person who authorised the corporation's offences (assuming, for the present reasons, that the wording of the information would permit such a result in the case of Sihota).

I

[25] The defendant therefore cannot be guilty of contempt when there is no committal proceeding launched against it. It is only when the first prerequisite of “if a corporation is guilty of contempt of court” has been met, the court will then determine whether the proposed contemnors have ‘caused or wilfully permitted or contributed to the contempt of court.’

A

[26] In *Microsoft Corporation And Others v. Marks and Anor* [1995] 33 IPR 15, the Federal Court of Australia stated at p. 26 of the report that an individual who is a director of the company would not be guilty of contempt merely by virtue of his position within the company.

B

[27] In *Iberian Trust Ltd v. Founders’ Trust and Investment Co. Ltd* [1932] 2 KB 87, the court at p. 98 of the report held as follows:

C

... the remedy against the directors of the company under Order XLII., r. 31, is an alternative one, and I do not see how it can be applicable unless the plaintiffs be in a position to pursue the original remedy against the defendant company. In my judgment, on this ground also, the plaintiff company is not in a position to ask for leave to issue writs of attachment against Holt and Shuttleworth.

D

[28] On the above said issue, this court finds that since the defendant has not been named as a proposed contemnor, the *ex parte* leave order and the committal application are flawed.

E

[29] It cannot be disputed that the inspection order has not been personally served on the proposed contemnors. No affidavit of service has been filed by the plaintiffs. O. 45 r. 5(1)(a)(B) of the ROC states that a party seeking to enforce an order made against a body corporate to do an act within a specified time may initiate committal proceedings against “any director or other officer of the body.” It is therefore fundamental that such order shall not be enforced against the director or officer unless a copy of the order has been served personally on the director and/or officer against whom an order of committal is sought. Order 45 r. 7(3)(a) of the ROC states:

F

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(B) or (C) unless:

G

(a) a copy of the order has also been served personally on the officer against whom an order of committal is sought;

[30] In *Capital Insurance Bhd v. BS Sidhu* [1996] 3 CLJ 477; [1996] 3 MLJ 1, the Court of Appeal in dismissing the appeal held:

H

(1) Although the plaintiff’s counsel was present and heard the order directing him to refund the money deposited, nonetheless, he was required by O. 45 r. 7 of the RHC to be served with the order personally before he could be said to have wilfully disobeyed the order.

I

- A [31] The Court of Appeal in that case stated that it was fortified in its view by the case of *Gordon v. Gordon* [1946] 1 All ER 247 where the court held:
- (i) since orders of committal and attachment affected the liberty of the subject, proceedings for contempt by disobedience of an order to do something outside the court could only be enforced if the rules relating to the process of committal or attachment had been strictly complied with;
- B
- (ii) On the facts, the service of the order in due time was necessary for the purpose of founding proceedings in contempt, the court having no power to dispense with the formal requirements of the rule.
- C [32] This court finds merit in the proposed contemnors' argument that before contempt proceedings, which affect the liberty of subject(s) can be enforced, strict compliance to the rules must be adhered to and that the inspection order must be served personally on the proposed contemnors. Service of the order on the defendant's solicitors cannot be regarded as
- D service on the proposed contemnors. As stated in *Gordon v. Gordon (supra)* the personal service on the proposed contemnors is necessary as it is the founding proceedings in contempt and the court has no power to dispense with the formal requirement of the rules. The mandatory requirement of personal service of the inspection order cannot be waived even if the proposed
- E contemnors had knowledge of such order and have acted upon it.
- [33] This court is fortified with the above finding by the Federal Court's judgment in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458 where Arifin Zakaria CJ (as he then was) held as follows:
- F It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards in committal proceeding which requires strict compliance.
- G [34] In *Ban Lian Hardware Sdn Bhd v. Usaco Manufacturing (M) Sdn Bhd* [2001] 7 CLJ 161, Abdul Wahab Patail J (as he then was) held:
- [1] The plain and literal meaning of the words "shall not be enforced ... unless" found in O. 45 r. 7(3) RHC was that enforcement could not be made until the conditions were met, which in the context of the order for leave against the director, Sim Hsio Chor, meant that the consent order must be served personally upon him.
- H
- [2] The copy of the order was served only upon the solicitors for the plaintiff company. Service upon the plaintiff's solicitor was not personal service upon Sim Hsio Chor who was a director, unless there was evidence that the solicitor was also the solicitor for the said director at the relevant time and had been authorised to accept service on behalf of
- I the director. Because a company and a director are separate legal entities

whose interests are not necessarily congruent, it cannot be assumed that the solicitor for the company was necessarily the solicitor for the director also, or that if the company had authorised the solicitor to accept service, it does not necessarily mean that the director had also given such authority in respect of himself. A

[35] The fact that para. 2 of the inspection order is a mandatory order as opposed to prohibitory order, the failure to personally serve the inspection order on each of the proposed contemnors is fatal as the leave order obtained by the plaintiffs were made *ex parte*. B

[36] Moving on, it is the finding of this court that what the plaintiffs did was to submit an analysis of the documents forwarded by the defendant *via* the proposed contemnors to the auditors to argue that even though the defendant has submitted some accounting records, there are still some accounting records that are outstanding. In other words, the plaintiffs do not deny the fact that the defendant/proposed contemnors have given what was necessary to the auditors for the accounting purposes except for the fact that those documents are still incomplete. However, in the plaintiffs' statement pursuant to O. 52 r. 3(2) of the ROC, the plaintiffs did not provide the particulars of how each of the proposed contemnors had caused, wilfully permitted or contributed to the alleged contempt of court. C D

[37] Bearing in mind that the standard of proof required of the plaintiffs to prove that contempt has been committed by each of the proposed contemnors is beyond reasonable doubt, the alleged act of contempt must be adequately described and particularised in detail in the statement itself. Order 52 r. 6A of the ROC provides: E

If a corporation is guilty of contempt of Court, the Court may fine the corporation or punish any officer of the corporation **who caused or wilfully permitted or contributed** to the contempt of Court or fine the corporation and punish the officer. (emphasis added). F

[38] In *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong @ George Lim & Ors (supra)*, the Federal Court restated as follows: G

[37] We wish to state in clear terms that the alleged act of contempt must be adequately described and particularised in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. H

[39] In this present case, the plaintiffs failed to state what are the incomplete accounting records that they claimed the defendant/proposed contemnors failed to supply the auditors with. This court finds that all the I

A plaintiffs did in the statement was only a sweeping allegation that the defendant did not provide the complete accounting record. Simply put, there are no particulars before this court to establish how the proposed contemnors have committed contempt. What happened is, just before the hearing of the present application, only then, the plaintiffs came with an affidavit of the
B auditors listing out the documents that the defendant/proposed contemnors failed to give. As stated by the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong @ George Lim & Ors (supra)*, any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time.

C [40] The plaintiffs on the other hand failed to show to this court the documents which have been supplied to the auditors by the defendant. In other words, the defendant could not be gainsaid to have failed to comply with the inspection order. Indeed, the plaintiffs exhibited the documents in their affidavits in the *ex parte* application but those documents cannot be
D dumped before this court and expecting the court to do its own identification of the incompleteness of those documents. In *Bakmawar Sdn Bhd v. Malayan Banking Bhd* [1991] 3 CLJ 1759; [1991] 2 CLJ (Rep) 323; [1992] 1 MLJ 67, Siti Norma Yaakob J (as she then was) had stated:

E It is true that the defendant's letter was exhibited to the plaintiff's *ex parte* application but it is incumbent upon the plaintiff on an *ex parte* application of this nature not only to make full disclosures but also to draw attention to all relevant factors so as not to mislead the court into making an order that it would not have necessarily made.

F [41] In this present case, the inspection order was never served on the proposed contemnors personally. The duty of counsel when they approached the court on an *ex parte* basis is onerous. It is an *uberrimae fide* duty. They must bring all possible counter argument so that at the end of the day, they should not embarrass the court. This court's attention was not brought to the fact that in the leave application, the plaintiffs managed to get the court to
G order damages. Indeed, this court admits that it is also an oversight on its part. No pleadings were forwarded as to why this court must allow the damages sought. No answer was given either by the plaintiffs. Had the court's attention been drawn to this prayer for costs on a full indemnity basis and damages, it would not have been awarded. That itself is an oppressive conduct and an abuse of the legal process on the part of the plaintiffs.

H [42] Enclosure 45 is the affidavit affirmed by Dato' Seri Timor Shah Rafiq, one of the proposed contemnors. It is a voluminous document as it contains all the correspondence between the defendant *via* its solicitors, the auditors and the plaintiffs' solicitors. This court finds that from encl. 45 alone, there were genuine efforts done by the proposed contemnors to obey the order of
I this court. The documents exhibited in encl. 45 alone revealed that the

plaintiffs have failed to make full and frank disclosure of all the relevant facts and documents when obtaining the *ex parte* leave order. Paragraph 19 of encl. 45 states as follows:

[19] We are advised by our solicitors and verily believe that the averments in Suresh's 1st, 2nd, 3rd and 4th Affidavits are lacking in material particulars and the Plaintiffs had obtained the Leave Order dated 31.1.2017 on an *ex parte* basis without making any mention of and/or disclosing the following material documents and facts:

19.1 the Defendant's solicitors' letter dated 19.12.2016 to Messrs. Shaistri & Co. in Exhibit B whereby the Defendant had supplied to Messrs. Shaistri & Co. all the accounting records from 2011 until the date of the Inspection Order that was in the Defendant's possession in compliance with paragraph 2 of the Inspection Order;

19.2 the Defendant's solicitors' letter dated 14.12.2016 to the Plaintiffs' solicitors in Exhibit C;

19.3 the Letter of Request to MBB in Exhibit D;

19.4 the Plaintiffs' solicitors' letter dated 14.12.2016 in Exhibit E to the Defendant's solicitors refusing to provide any assistance;

19.5 the Defendant's solicitors' letter dated 14.12.2016 in Exhibit F;

19.6 the Defendant's solicitors' letter dated 15.12.2016 to the 1st Plaintiff in Exhibit G;

19.7 the email dated 19.12.2016 from the 2nd Deponent to the 1st Plaintiff in Exhibit H;

19.8 the Defendant's solicitors' letter dated 20.12.2016 to Messrs. Shaistri & Co. in Exhibit I;

19.9 the letter dated 23.12.2016 from Defendant's solicitors to Messrs. Shaistri & Co. in Exhibit J;

19.10 the 2nd Deponent's email dated 9.1.2017 to each of the 1st Plaintiff and the 2nd Plaintiff in Exhibit K;

19.11 the 2nd Deponent's email dated 18.1.2017 to each of the 1st Plaintiff and the 2nd Plaintiff in Exhibit L;

19.12 the fact that the Defendant had sought the Plaintiffs' assistance to sign the aforesaid Letter of Request to MBB and the Plaintiffs' solicitors had refused to provide any assistance and the Plaintiffs had not responded to the Defendant's requests;

19.13 the fact that the Defendant had through the Defendant's solicitors' letter dated 26.1.2017 in Exhibit S provided explanation to each and every of the Plaintiffs' complaints which allegedly formed the basis of the committal proceedings herein;

A

B

C

D

E

F

G

H

I

- A 19.14 the Plaintiffs' solicitors' letter dated 27.1.2017 to the Defendant's solicitors in Exhibit T;
- 19.15 the fact that the Plaintiffs have through their solicitors' letter dated 27.1.2017 (in Exhibit T) given a blanket bare denial to the Defendant's explanations in the Defendant's solicitors' letter dated 26.1.2017 in Exhibit S;
- B 19.16 the fact that the inspection Order dated 24.11.2016 has not been served personally on each of us; and
- 19.17 the fact that the Plaintiffs and/or their auditors, Messrs. Shaistri & Co. had not inspected nor made any copy or extraction to the accounting records of the Defendant which were made available in accordance with paragraph 1 of the Inspection Order dated 24.11.2017.
- C

[43] This court agrees with the defendant/proposed contemnors' submission that the plaintiffs have refused to come clean and explain themselves. Plethora of authorities state that it is trite for an applicant in an *ex parte* application to make full and frank disclosure and failure to do so may result in the *ex parte* order being set aside. In *Arthur Anderson & Co v. Interfood Sdn Bhd* [2005] 2 CLJ 889; [2005] 6 MLJ 239, the Court of Appeal through the judgment of Richard Malanjum JCA (as His Lordship then was) at pp. 906-907 (CLJ); p. 255 (MLJ) states:

D

E

[38] Another assertion of the appellant was that the respondent failed to make a full and frank disclosure of all material facts known to it at the *ex parte* stage. Specific reference was made to the failure by the respondent to inform the learned High Court judge of the existence of a discovery order in relation to Lau's suit. It was contended that although the parties were different the subject matter and dispute were related or connected to the present case and thus should have been disclosed.

F

[39] In *Siporex Trade SA v. Condel Commodities Ltd* [1986] 2 1LR 428 Bingham J said this at p 437:

G The scope of the duty of disclosure of a party applying *ex parte* for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit sworn before or immediately after the application.

H He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state.

I

If the duty of full and fair disclosure is not observed the court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.

A

[40] As expressed by the English courts it is also the law in this country that when applying for an *ex parte* order an applicant is duty-bound to make an honest, full and frank disclosure of all relevant material facts within his knowledge, which failure may be a ground to set aside any order granted. (See: *President Hotel Sdn Bhd v. Data Bandar Kuala Lumpur & Anor* (75) MD 1, *Bakmawar Sdn Bhd v. Malayan Banking Bhd* [1992] 1 MLJ 67, *Makonka Electronic Sdn Bhd v. Electrical Industry Workers' Union & Ors.*

B

C

[44] In *Goo Sing Kar v. Dato' Lim Ah Chap & Ors And Other Applications* [2002] 2 CLJ 250, Ramly Ali JC (as His Lordship then was) at p. 256 of the report held that:

A matter is regarded as material if it is a factor that the court will take into consideration in the exercise of its discretion.

D

[45] Before proceeding to the next discussion, an observation is made by this court of this fact; the plaintiffs contended that the proposed contemnors are directors of the defendant and that they are supposed to know and deemed to know of the accounting records as the defendant being a company functions under the Board of Directors. The fact is, the plaintiffs are also the directors of the defendant. By the same token whatever they say that the proposed contemnors should know the plaintiffs themselves ought to know of the defendant's accounting records as well. So if the auditors claim that there are incomplete documents, the plaintiffs themselves must be tasked to look and produce the documents if there are any for that matter.

E

F

[46] Exhibit B in encl. 45 is the defendant's solicitors' letter of 19 December 2016 to the auditors. This letter is crucial. This court finds that from this letter, all documents in the defendant's possession had been supplied to the auditors. The letter states:

G

We refer to above matter, the Order dated 24.11.2016 ("Order") and the letter from Messrs Vaasan Chan & Chandran to us dated 6.12.2016, a copy of which is enclosed herewith.

2. As per the Plaintiffs' solicitors' request, we enclose herewith a copy of the document referred to in paragraph 2 of the Order that are in our client's possession by way of service on the Plaintiffs

H

3. Kindly be informed that our client does not have a copy of its Malayan Banking Berhad bank statement for the month of October 2014 and is in the midst of requesting for a copy of it from the bank.

4. Upon receipt thereof, we shall forward a copy of the aforesaid bank statement to you.

I

A [47] The plaintiffs did not exhibit this letter in their *ex parte* application. The explanation offered by the plaintiffs is that they have referred to it in their affidavit. That cannot tantamount to a frank and full disclosure.

B [48] In reference to the letter of 19 December 2016 again, it addressed the missing bank statement. This has not been highlighted to the court. The inquiry on the ten correspondences exchanged between the defendant's solicitors and the plaintiffs' solicitors and/or the auditors and between the defendant (through the proposed contemnors) and the plaintiffs are therefore being avoided by the plaintiffs. It could be gleaned from one of the correspondences ie, exh. E (the plaintiffs' solicitors letter dated 14 December 2016 to the defendant's solicitors), the plaintiffs refused to give assistance to the request by the defendant's solicitors for the first plaintiff to give his signature for the purpose of obtaining the bank statement. This is what the plaintiffs' solicitors replied:

D 2. Kindly be informed that we do not want to be liaison between the respective parties in respect of management matters of your client. As such kindly refrain from forwarding us such matters hereafter.

E [49] This court is satisfied that what is glaring from the ten correspondences mentioned in the above is that genuine efforts were taken up by the proposed contemnors to obey the inspection order. As stated earlier, the proposed contemnors have given all the documents that they are in possession with and what is missing, they have attempted to obtain them, but of course obstacles are created by the plaintiffs themselves as reflected in the above paragraph. Even at the *ex parte* stage, this court would want to be satisfied as to whether the proposed contemnors have made effort to comply. They did but it was not disclosed by the plaintiffs. Those documents show the *bona fide* efforts expended by the defendant to obtain a copy of the missing bank statement both before and after the supply of documents on 19 December 2016. This fact ie, the *bona fide* efforts expended on the part of the defendant/proposed contemnors are very material as the efforts would exculpate the defendant of any charge of contempt.

F [50] Another letter which is of importance as well is the defendant's solicitors' letter of 26 January 2017. In this letter of 26 January 2017, the defendant's solicitors took all the trouble to explain to the plaintiffs' solicitors pertaining to the queries and allegations by the plaintiffs in their letter of 19 January 2017 and they are as follows:

G
H i. Management accounts for the year 2011 – explanation was given by the Defendant that these documents had been forwarded to the auditor and that in any event paragraph 2 of the Inspection Order does not include documents for the year 2011.

I

- ii. General expenses in the sum of RM9,665.80 in the year 2012 – The supporting documents have been supplied to the auditor on 19.12.2012 **A**
- iii. Difference between the balance sheet, income statement, general ledger and audited financial statements for the year 2012 – The Inspection Order does not impose any obligation on the part of the Defendant company to explain the alleged differences and that the Plaintiffs request was for documents not in existence on 19.12.2016, when the Defendant company supplied the documents in accordance with the Inspection Order **B**
- iv. Legal fees to Messrs. Raja Eleena Siew Ang & Associates in the year 2013 – the invoices were not in the Defendant's possession on 19.12.2016 when the Defendant company supplied the documents in accordance with the Inspection Order **C**
- v. Administrative charges in the sum of RM7,884.99 in the year 2013 – the supporting documents have been supplied to the auditor **D**
- vi. Form C (Corporate Tax) for the year of assessment 2013 (1-1-2013 - 31-12-2013) – The Forms C were not in the Defendant company's possession on 19.12.2-16 when the Defendant company supplied the documents in accordance with the Inspection Order **D**
- vii. The financial statements filed with SSM on 28-8-2016 – This document has been exhibited in the affidavit of 7.9.2016 before the Inspection Order was made **E**
- viii. Discrepancy in respect of administrative charges for the year 2014 – the Inspection Order does not impose any obligation on the part of the Defendant company to explain the alleged discrepancy **F**
- ix. Administrative charges of RM1,000.00 (GJ00039 – dated 30-6-2014) – the documents were not in the Defendant company's possession on 19.12.2016 when the Defendant company supplied the documents in accordance with the Inspection Order **F**
- x. Maybank bank statement for the month of October 2014 – this document was not in the Defendant's company's possession on 19.12.2016 when the Defendant company supplied the documents in accordance with the Inspection Order. The Defendant company had highlighted this in their solicitors' letter dated 19.12.2016 **G**
- xi. Proper trial balance, balance sheet, income statement and general ledger for the year 2014 – these documents have been supplied to the auditor on 19.12.2016 **H**
- xii. Audited Financial Statements for the year ended 31-12-2015 – the Plaintiffs had been given this document in August 2016 **H**
- xiii. Management Accounts for the year ended 31-12-2016 – this document was not in the Defendant's company's possession on 19.12.2016 when the Defendant company supplied the documents in accordance with the Inspection Order. **I**

- A [51] The attention of this court is brought to the case of *Helen Yeap Poh Sim & Yang Lain Iwn. Universal Trustee (Malaysia) Bhd* [2001] 7 CLJ 414 where Raus Sharif J (as His Lordship then was) had dismissed a committal application for the reason that the audited accounts for certain years were not supplied because the accounts for those years have not been audited.
- B [52] In addition to the explanation in the above, the defendant through its solicitors have annexed hundred over pages of annexure. The plaintiffs failed to exhibit their solicitors' letter of 27 January 2017 where they failed to respond to the defendant's explanation in the letter of 26 January 2017. The plaintiffs stated in their letter of 27 January 2017 that without addressing the contents and all the enclosures in the defendant's letter of 26 January 2017, the defendant is put on notice that it shall not be construed as an admission and/or acceptance of the contents and that each and every statement contained therein shall be deemed denied until they expressly state otherwise and that the plaintiffs reserved their rights to reply as and when necessary.
- C
- D [53] Had the plaintiffs drawn this court's attention to the letters stated in the above during the hearing of the *ex parte* leave application, it would have been obvious that the defendant had supplied the documents in its possession on 19 December 2016 and that the defendant had further expended efforts to obtain documents from other parties and supplied more documents on 26 January 2017.
- E
- [54] One other important observation is the fact that from the explanation given by the defendant's solicitors' in its letter of 26 January 2017, significantly, the missing bank statements for each of the months in year 2014 including that of October 2014 were sent by Maybank to the first plaintiff's office in Wangsa Maju. Obviously, the plaintiffs have no answers to the defendant's letter of 26 January 2017 other than the bare denial in their solicitors' letter of 27 January 2017.
- F
- [55] Furthermore, it is to be noted that the order given by this court is an order to inspect. That is the nomenclature of the order dated 24 November 2016. Apparently, the plaintiffs never made use of the said inspection order as they themselves never showed any efforts to make the inspection. It is to be borne in mind that the inspection order is not an investigative order as the plaintiffs have named it. It is an order pursuant to s. 167(1) of the Companies Act 1965. Section 167(1) of the Companies Act 1965 does not impose an obligation on the defendant as a company to comply but instead all that is required is for the defendant to supply the accounting and other records it kept and in its possession.
- G
- H

I

[56] As far as the defendant and the proposed contemnors are concerned, they have supplied all the documents in its/their possession “as will sufficiently explain the transaction and financial position of the company and enable true and fair profit and loss accounts and balance sheets” in accordance with the duties of the defendant as a company under s. 167(1) of the Companies Act 1965. Indeed, that is all that is required under the said section. The plaintiffs on the other hand seem to take the stand that the defendant must give all the documents that the auditors required. But the plaintiffs and the auditors stop short of saying that with all the documents supplied by the defendant, the auditors are unable to sufficiently explain the transactions and financial position of the company. The plaintiffs seem to be asking beyond what the proposed contemnors could produce. Further and as stated earlier, the plaintiffs and the auditors did not avail themselves to what has been ordered in para. 1 of the inspection order ie, they did not carry out the inspection exercise.

[57] In any event, this court is satisfied that the defendant had supplied all the documents in its possession as at 19 December 2016. In such circumstances, there can be no contempt. The Federal Court had this to say in *Tay Seng Keng v. Tay Ek Seng Co Sdn Bhd* [1977] 1 LNS 133; [1978] 1 MLJ 126 at p. 127:

It was common ground that the order which was alleged to have been disobeyed by the appellant related to the account books etc. for the period July 1972 to June 1974. The numerous affidavits filed on behalf of the respondents tended to show that these books of account should have been in the possession of the appellant, although there were no positive statements by any of the deponents of those affidavits that the account books in question had been seen with the defendant at about the time that his services as manager were terminated. There was also no evidence in any of the affidavits that the appellant had been seen to remove any of the books of account. The appellant himself had categorically stated in his affidavits that those account books were not in his possession.

[58] This court is of the considered view that there was no wilful or deliberate disobedience of the inspection order granted by this court if at all there was any non-compliance on the part of the defendant and/or the proposed contemnors. This is not a clear case of a contumacious conduct on the part of the defendant and or the proposed contemnors to disregard the inspection order.

[59] In *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126; [1977] 1 MLJ 151, Lee Hun Hoe CJ (Borneo) (as he then was) in delivering the judgment of the Federal Court held as follows:

A

B

C

D

E

F

G

H

I

- A 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. Cases cited in support are *Arthur Reginald Perera v. The King* [1951] AC 482 488; *Re Bramblevale Ltd* [1969] 3 All ER 1062 1063; *Worthington & Ors v. Ad Lib Club Ltd* [1965] 1 Ch 236; *Attorney-General v. Butterworth & Ors* [1963] 1 QB 696; *Comet Products UK Ltd v. Hawkes Plastics Ltd* [1971] 2 QB 67. Two Indian cases on the same point were also referred to as Indian law of contempt is substantially the same as English law which is also the basis of our law of contempt. In *Debabrata Bandopadhyay & Ors v. The State of West Bengal* AIR 1969 SC 189 Hidayatullah CJ at p. 193 observed that:
- B
- C 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.
- D It must be realised 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.
- E
- Sarkaria J expressed his opinion in *S Abdul Karim v. MK Prakash & Ors* AIR 1976 SC 859 in these words at page 863:
- F The broad test to be applied in such cases is, whether 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 proceeding. 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 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 a 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 urged 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 wilful.
- G
- H
- I

Perhaps, I should refer to the recent case of *Kent County Council & Anor v. Batchelor* 7th October 1976 reported in The Times of October 7, 1976 where the Court of Appeal allowed an appeal by defendant against Justice Caulfield's finding that he was guilty of contempt for breach of an injunction from cutting down tree. The learned judge had directed himself properly for he said that the court had to be satisfied beyond all reasonable doubt that the defendant had wilfully and intentionally disobeyed the order of the court. However, their Lordships did not consider the evidence sufficient to warrant conviction. Lord Denning M.R. reiterated what he had said in earlier cases that:

A

B

A contempt of court by disobedience of an injunction was equivalent to a criminal charge. For disobedience of an injunction a man could be sent to prison for an indefinite time. On such a charge and with such consequences the burden was upon those making the charge to prove it beyond reasonable doubt.

C

In the matter of contempt arising out of disobedience to an order of injunction of court the test is to ask whether defendant knows of it. It need not be necessary that he should be served. Thus in *United Telephone Co v. Dale* (1884) 25 Ch D 778 786 Pearson J. said:

D

In no case will the court enforce obedience to its injunction by means of a committal to prison, simply upon the ground that the order has not been served, when it appears beyond all doubt or dispute that the defendant is aware that the injunction has been granted, and that it is the intention of the plaintiff to enforce it.

E

Key J in *Avery v. Andrew* [1879] 13 ChD 110 119 expressed the same view but in stronger words:

What is the necessity for serving an order upon a defendant, if he knows perfectly well without that service what it is which he is bound to obey?

F

Wilfully, disobeying an order of the court constituted contempt, This commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required to do by the process, order or decree of the court: *Miller v. Knox* (1838) 4 Bing NC 574. The contempt must be wilful. An order of court must have been contumaciously disregarded. It is no good if it is casual, accidental and unintentional. *Fairclough & Sons v. Manchester Ship Canal Co (No 2)* [1897] WN 7.

G

[60] In *B.Krishna Reddy v. Pushpa Subrahmanyam* [2011] 3 ALD 10 (DB), the Andhra Pradesh High Court in India held as follows:

H

Wilful would exclude casual, accidental, *bona fide* or unintentional acts or genuine inability to comply with the terms of the order.

I

A [61] The High Court in *B.Krishna Reddy v. Pushpa Subrahmanyam (supra)* went further to state as follows:

B In contempt proceedings the court is both the accuser and the judge of the accusation. It should act with circumspection making allowances for errors of judgment and difficulties it is only when a clear case of contumacious conduct, not explainable otherwise, arises that the contemnor must be punished. 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 not to be encouraged. (Debabrata Bandhopadhyaya). The power of contempt is not intended to be exercised as a matter of course. Courts should not feel unduly touchy when they are told that their orders have not been implemented forthwith. If the court is told that the direction or the order of the court has been complied with subsequently, *albeit* after receipt of notice of contempt, Courts are expected to show judicial grace and magnanimity in dealing with the action for contempt. (Suresh Chandra Poddar; and Syed Maqdoom Mohiuddin).

D [62] Returning to the local authorities, Mary Lim J (as Her Ladyship then was) in *J&M Power Sdn Bhd v. J&M Power Resources Sdn Bhd* [2012] 5 AMR 638 took into account the proposed contemnors' attempt at compliance with the consent order and found that the applicant had failed to prove beyond reasonable doubt that the proposed contemnors' non-compliance with the consent order was deliberate. Her Ladyship held at pp. 651-652 as follows:

E Ultimately, it is a question of fact. Unless there is clear evidence of contumacious conduct, the court is not prepared to find present deliberate acts of contempt ...

F I believe in treading with great circumspection, particularly where I see a genuine and real attempt at compliance. Punishment ought to be meted out swiftly where 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" as was opined by Hidayatullah CJ in *Debabrata Banclpadhyay & Ors v. The State of West Bengal* AIR 1969 SC 189 at 193.

G [63] This court is of the considered view that the plaintiffs have not exhausted all the available reliefs before commencing the proceedings herein. The plaintiffs' complaint in the committal proceedings herein is essentially that the accounting records which have been supplied to the auditors are incomplete causing the auditors purported "investigative audit" to be incomplete. In this regard, the complaints should have been directed to the Companies Commission of Malaysia instead of resorting to committal proceedings. The court is not here to take the function of a body corporate to decide whether the documents would be sufficient to explain the transaction and financial position of the defendant.

I

[64] Before departing, the solicitors for the proposed contemnors have also prayed for encl. 41 to be dismissed with costs. Enclosure 41 is the plaintiffs' application for committal order against the proposed contemnors. This court has refused to make such order as it is of the view that since encl. 41 was not heard as yet due to the fact that this court directed for this present application (encl. 44) to be heard first on the basis of opposing the *ex parte* leave order granted by this court on 31 January 2017, and as the *ex parte* leave order is now set aside by this court, encl. 41 is redundant. Therefore, this court did not make any order as to encl. 41.

Conclusion

[65] Premised on the above evaluation and findings, this court finds that there is no evidence of any default in compliance of the consent order, wilful or otherwise. In addition, there is no evidence of any intent to dishonour the terms of the inspection order. The proposed contemnors have taken steps towards compliance which are reasonable and adequate. There is also no malicious intent on the part of the proposed contemnors and as such this court finds that the plaintiffs have failed to prove their charges beyond reasonable doubt.

[66] Enclosure 44 was allowed with costs of RM5,000 to each proposed contemnors. This court made no order as to encl. 41.

A

B

C

D

E

F

G

H

I