IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

IN THE FEDERAL TERRITORY OF KUALA LUMPUR, MALAYSIA

CIVIL SUIT NO: 22IP-53-10/2015

BETWEEN

1. JURIS TECHNOLOGIES SDN. BHD.
(Co. No.: 618486-X)

2. NATSOFT (M) SDN. BHD.
(Co. No.: 369362-H) **… PLAINTIFFS**

AND

1. FOO TIANG SIN
(NRIC No.: 820814-05-5275)

2. CHONG HAU YIP
(NRIC No.: 890806-05-5375)

3. ENG SHI PING
(NRIC No.: 850228-10-5441)

4. YOW YIK SHUEN
(NRIC No.: 881015-56-6289)

5. FONG HING YEH
(NRIC No.: 841212-06-5671)

6. PHI ORION SDN. BHD.
(Co. No.: 1019555-V) **… DEFENDANTS**

JUDGMENT

[Court enclosure no. 41 (committal proceedings)]

A. Introduction

1. The plaintiffs (**Applicants**) obtained leave of this court to file this application (**Enc. 41**) to commit the first defendant (**Respondent**) for

contempt of court regarding the Respondent's breach of an *ex parte* court order (***Ex Parte* Order**). The *Ex Parte* Order, among others, compelled the Respondent to deliver to the Applicants' supervising solicitors any laptop, notebook, iPad, digital and optical storage devices (**Electronic Devices**) in the Respondent's possession and/or control.

2. Enc. 41 concerns the following issues:

(1) whether the Applicants are required under O 45 r 7(2)(a) of the Rules of Court 2012 (**RC**) to serve personally an original copy of the sealed *Ex Parte* Order on the Respondent when a copy of the sealed *Ex Parte* Order has been attached to an email sent by the Applicants' solicitors to the Respondent. This question concerns the construction of O 45 r 7(2)(a), 7(6)(b) and O 62 r 3 RC;

(2) did the Respondent breach the *Ex Parte* Order? In this regard, whether the Respondent can rely on a defence that he has not been legally advised at the material time; and

(3) what is the appropriate sentence in the public interest for a contravention of the *Ex Parte* Order?

B. <u>Background</u>

3. Azizah Nawawi J granted the *Ex Parte* Order as follows, among others:

(1) an order to compel, among others, the Respondent, "*to immediately deliver up to the [Applicants'] supervising solicitors*" Electronic Devices

in the possession and/or control of the Respondent, "*without turning on or off, accessing, altering, destroying, removing, transferring or otherwise tampering with*" the Electronic Devices; and

(2) the Electronic Devices delivered to the Applicants' supervising solicitors are to be kept in the custody of the Applicants' supervising solicitors for the purpose of preserving the integrity of evidence until further direction from the court and/or to be tendered as evidence at the trial of this action.

4. The Applicants' solicitors sent a letter dated 2.11.2015 to the Respondent (**Applicants' Letter dated 2.11.2015**) which informed the Respondent of the following matters, among others -

(1) the Applicants had obtained the *Ex Parte* Order. A copy of the sealed *Ex Parte* Order was enclosed with the Applicants' Letter dated 2.11.2015;

(2) the contents of the *Ex Parte* Order had been stated in the Applicants' Letter dated 2.11.2015; and

(3) the Respondent was given notice that failure to comply with the *Ex Parte* Order, "*including any attempts to turn off or on, accessing, altering, destroying, removing, transferring or otherwise tampering with*" the Electronic Devices "*constitutes a contempt of court and committal proceedings will be initiated against*" the Respondent.

5. The Applicants' solicitor sent an email at 1.17 pm, 3.11.2015 to the Respondent (**Applicants' Email dated 3.11.2015**) which, among others -

   (1) informed the Respondent of the contents of the *Ex Parte* Order. A copy of the sealed *Ex Parte* Order and the Applicants' Letter dated 2.11.2015 were attached to the Applicants' Email dated 3.11.2015; and

   (2) gave notice to the Respondent that failure to comply with the *Ex Parte* Order, "*including any immediate attempts to turn off or on, alter, destroy, delete, remove, transfer, install or otherwise tampering with*" the Electronic Devices "*constitutes a contempt of court and committal proceedings will be initiated against*" the Respondent.

6. In reply to the Applicants' Email dated 3.11.2015, the Respondent sent two emails at 2.03 pm (**Respondent's 1st Email**) and 3.14 pm (**Respondent's 2nd Email**) on the same day 3.11.2015.

7. The Respondent's 1st Email stated as follows:

   "***Your demand is duly noted. My partners and I are currently in Brunei and to see you tomorrow is a bit short notice [sic]. I seek your understanding first to allow me to appoint a lawyer and give time for my appointed lawyer and I to review the cover letter before proceeding***."

   (emphasis added).

8. According to the Respondent's 2nd Email -

"***We are having User Acceptance Testing (UAT) next week 9/11/205 [sic] in Brunei. The whole team including those individually named as defendants are in Brunei to standby [sic]. Can the submission date be negotiated?***"

(emphasis added).

9. On 4.11.2015 in Kuala Lumpur International Airport 2 (**KLIA 2**) -

(1) the Applicants' solicitors served personally, among others, a copy of the sealed *Ex Parte* Order on the Respondent; and

(2) the Respondent handed his mobile phone, laptop and a thumb drive (**Respondent's Devices**) to the Applicants' supervising solicitors.

10. On 5.11.2015 -

(1) the Respondent's Devices, among others, were handed by the Applicants' supervising solicitors to Siaga Informatics Sdn. Bhd. (**Siaga**) in the office of the Applicants' supervising solicitors and in the presence of the Respondent, the Respondent's solicitors and Applicants' solicitors. Siaga is the computer forensic expert appointed by the Applicants in this case; and

(2) Siaga conducted an imaging process of, among others, the Respondent's Devices to extract all information from the Respondent's Devices (for the purpose of Siaga's forensic examination). This process was carried out in the presence of the Applicants' solicitors,

Applicants' supervising solicitors, Respondent and Respondent's solicitors.

11. Siaga's "*Preliminary Forensic Report*" stated, among others, as follows:

    (1) a search of the Respondent's laptop using a keyword "*JURIS*" [part of the name of the first applicant company (**1st Applicant**)] showed one folder (named "*Client*") which contained most of the 1st Applicant's clients (**Folder**);

    (2) the entire Folder (which contained files) had been deleted (**Deleted Files**). Siaga could only recover the names and details of the Deleted Files but not their contents; and

    (3) the Folder was deleted within a time range of 8:27:27 pm to 8:28:25 pm, 3.11.2015.

12. The Respondent did not apply to court to set aside the *Ex Parte* Order. Nor did the Respondent appeal to the Court of Appeal against the *Ex Parte* Order. In fact, all the parties in this action, including the Respondent, entered into a consent order dated 30.11.2015 (**Consent Order**) which provided, among others, that all Electronic Devices delivered up to the Applicants' supervising solicitors, shall continue to be kept in the custody of the Applicants' supervising solicitors for the purpose of preserving the integrity of evidence until the conclusion of the trial of this suit.

C. Enc. 41

13. The Applicants obtained *ex parte* leave of this court under O 52 r 3(1) RC to cite the Respondent for contempt of court in respect of the Respondent's breach of the *Ex Parte* Order (***Ex Parte* Leave**). Enc. 41 has been filed pursuant to the *Ex Parte* Leave.

14. The Respondent filed two affidavits to oppose Enc. 41 on the following grounds:

    (1) the Respondent had not been served with the sealed *Ex Parte* Order when he entered appearance in this suit;

    (2) the Respondent had agreed to the Consent Order and had filed an affidavit to confirm that he had complied with the Consent Order (**Respondent's Compliance Affidavit**);

    (3) when the Respondent received a copy of the sealed *Ex Parte* Order, the Applicants' Letter dated 2.11.2015 and the Applicants' Email dated 3.11.2015, the Respondent had not obtained legal advice;

    (4) on 9.11.2015, the Respondent's solicitors had discussed with the Applicants' solicitors regarding the execution of the *Ex Parte* Order (**Discussion**). At the Discussion, the Respondent's solicitors had informed the Applicants' solicitors that the Respondent had not concealed anything and would co-operate fully with the Applicants regarding the enforcement of the *Ex Parte* Order;

    (5) the Respondent claimed that he had not breached the *Ex Parte* Order because the Deleted Files contained documents and information

which had been downloaded from his "*Personal Cloud*". The Deleted Files did not contain confidential information owned by the Applicants (**Confidential Information**); and

(6) when the Respondent was asked about the deletion of the Folder (**Deletion**) during Siaga's forensic examination of the Respondent's Devices, he immediately admitted the Deletion and "*volunteered*" to provide the contents of the Deleted Files by downloading from his Personal Cloud. The Respondent then downloaded the contents of the Deleted Files from his Personal Cloud into a thumb drive (**Thumb Drive**) and handed the Thumb Drive to Siaga. A copy of the contents of the Thumb Drive has been exhibited in Exhibit "*FTS-3*" in the Respondent's first affidavit affirmed on 6.10.2017.

15. In the Federal Court case of **Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong & Ors** [2012] 3 MLJ 458, at paragraphs 36 and 37, Arifin Zakaria CJ has decided that the Statement filed by an applicant in committal proceedings under O 52 r 3(2) RC constitutes the "*charge*" against an alleged contemnor.

16. In this case, the Statement filed by the Applicants had alleged that the Respondent had breached the *Ex Parte* Order by way of the Deletion and the contents of the Deleted Files were "*important evidence to establish*" the Applicants' causes of action in this suit.

D. <u>Whether Applicants had to serve personally the sealed *Ex Parte* Order on Respondent before Deletion</u>

17. I reproduce below the relevant parts of O 45 rr 5(1), 7(2), (6), O 62 r 1(1) and 3 RC:

> "*O 45 r 5(1)* ***Where*** *-*
>
> *(a) …; or*
>
> *(b)* ***a person disobeys*** *a judgment or* ***order requiring him to abstain from doing an act****,*
>
> ***then, subject to these Rules, the judgment or order may be enforced by one or more of the following means****:*
>
> *(A)* ***with the leave of the Court, an order of committal****;*
>
> *…*
>
> ***Service of copy of*** *judgment or* ***order prerequisite to enforcement under rule 5***
>
> *O 45 r 7(1) …*
>
> *(2)* ***Subject to*** *Order 26, rule 7(3), and* ***paragraphs (6)*** *and (7)* ***of this rule, an order shall not be enforced under rule 5 unless*** *–*
>
> *(a)* ***a copy of the order had been served personally on the person required to do or abstain from doing the act in question****; and*
>
> *(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.*
>
> *…*
>
> *(6)* ***An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is***

satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either *-*

(a) by being present when the order was made; or

(b) ***by being notified of the terms of the order, whether by telephone, telegram or otherwise****.*

…

When personal service required

O 62 r 1(1) ***Any document which by virtue of these Rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these Rules*** *or by order of the Court* ***is required to be so served****.*

Personal service: How effected

O 62 r 3 ***Personal service of a document is effected by leaving a copy of the document with the person to be served*** *and, if so requested by him at the time when it is left, showing him -*

(a) in the case where the document is a writ or other originating process, the sealed copy; and

(b) in any other case, an office copy."

(emphasis added).

18. Firstly, the *Ex Parte* Order requires, among others, the Respondent -

(1) to abstain from "*turning on or off, accessing, altering, destroying, removing, transferring or otherwise tampering with*" the Respondent's Devices (***Ex Parte* Restraining Order**); and

(2) to deliver immediately the Respondent's Devices to the Applicants' supervising solicitors (***Ex Parte* Mandatory Order**).

19. I am of the following view:

(1) for the purpose of enforcing a **restraining injunction**, *ex parte* and *inter partes*, in an order or judgment (**order/judgment**) by way of committal proceedings against a party, there is no requirement to serve personally a copy of the sealed restraining order/judgment on the party if the party has already been notified of the terms of the restraining order/judgment. This because the requirement to serve personally a copy of the sealed restraining order/judgment under O 45 r 7(2)(a) RC is "*subject to*" O 45 r 7(6) RC. This is clear from the words "*subject to*" in O 45 r 7(2) RC itself. This interpretation is supported by the following three High Court judgments -

(a) in **Class One Video Distributors Sdn Bhd & Anor v Chanan Singh a/l Sher Singh & Anor** [1997] 5 MLJ 209, at 213-214 and 215-216, Haidar J (as he then was) decided as follows:

> *"It is not disputed that there was non-compliance of the statutory Form 87 by the second plaintiff and the question was whether the failure to indorse the penal notice therein was fatal to the second plaintiff's application. Counsel for the second defendant relied*

on Leow Seng Huat v Low Mui Yein [1996] 5 MLJ 381, where the learned judge held that failure to insert the penal indorsement in the order was fatal to the application, citing the cases of Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor [1988] 2 MLJ 239 and Iberian Trust Ltd v Founders Trust & Investment Co Ltd [1932] 2 KB 87 in support thereof.

In the case of Messrs Hisham, Sobri & Kadir, the learned judge did not have the benefit of considering the cases of Allport Alfred James v Wong Soon Lam [1989] 1 MLJ 338 and Sofroniou v Szetti [1991] FCR 332 which were reported later. However, in respect of Leow Seng Huat's case, the two cases referred to by me were not brought to the attention and consideration of the learned judge. No doubt the two cases are not Malaysian cases but the wording in our O 45 r 7(4) of the RHC is similar to Singapore's O 45 r 7(4) and the English O 45 r 7(4)(a). In that event, if the two cases were brought to the attention of Hishamuddin J and argued, I have no doubt that the learned judge would have exercised his discretion accordingly. In fact, the Singapore Court of Appeal in the case of Allport Alfred James - quoting with approval the English case of Sofroniou v Szetti [1991] FCR 332 in allowing the appeal …

The issue before the Singapore Court of Appeal in Allport Alfred James turned on the construction of O 45 r 7(6), which is in pari materia with our O 45 r 7(6). In construing O 45 r 7(6), it is necessary to look at the relevant parts of r 7. The circumstances for the court to invoke its discretionary power under O 45 r 7(6) are well set out in the judgment of Allport

Alfred James and in my view it is appropriate therefore for me to set them out in extenso *(at pp 387–389):*

> *The issue in this appeal turned on the construction of O 45 but it is necessary to look at other relevant parts of r 7. First, under r 7(2)(a), an order, and, in this case, the injunction, should not be enforced unless 'a copy of the order has been served personally on the person required to do or abstain from doing the act in question'.*
>
> *…*
>
> *The important point to note in this provision is that the penal notice must be indorsed on the copy of the order 'served under this rule' and service under this rule means the personal service under r 7(2)(a). Once these two requirements are complied with, the order may be enforced by an order of committal under O 45 r 5.* ***However, in the case of an order requiring a person to abstain from doing an act, the court, under O 45 r 7(6), is empowered in certain circumstances to enforce the order, notwithstanding that the service of a copy of the order has not been effected in accordance with this rule****. …*
>
> *…*
>
> *The question is what is meant by the words 'service of a copy of the order has not been effected in accordance with this rule'. The words 'this rule' clearly mean r 7, and service effected in accordance with r 7 means in accordance with r 7(2)(a) and (4), ie service of a copy of the order with the penal notice indorsed on it.* ***It therefore follows that if a copy of the order has not***

been served personally, eg by registered post, or if it has been served personally but the copy served does not contain the penal notice, then the service of the copy of the order has not been effected 'in accordance with this rule', ie r 7. In such a case, the court has a discretion under r 7(6) to enforce the order if the following condition is satisfied, namely, the person against whom the order sought to be enforced has had notice thereof either*:*

(a) by being present when the order was made, or

(b) ***by being notified of the terms of the order, whether by telephone, telegram or otherwise****.*

…

In this case, though the order was not personally served on the second defendant, I am satisfied that the second defendant - having had the benefits of counsel's advice is deemed to know of the terms of the order. In any event, the second defendant did not deny that he had knowledge of the terms of the order. The word 'otherwise' in r 7(6) would be wide enough to cover this situation. In the circumstances, the conditions under r 7(6) would have been satisfied though the order did not contain the penal notice required under r 7(4). Though the service of the copy of the order had not been 'effected in accordance' with r 7 - as I said earlier - the second defendant had full knowledge of the terms of the order and the order was for the second defendant to abstain from doing certain acts. In other words, the court has a discretion to enforce the order if the court was satisfied that the second

defendant had notice of the order in one of the ways specified in sub-paras (a) and (b) of para 6 of O 45 r 7 of the RHC. I am so satisfied."

(emphasis added);

(b) **Ipmuda Trading Sdn Bhd v Khoo Kiat Piau & Anor** [1997] 1 CLJ Supp 158 concerned the then applicable O 30 r 7(6) of the Subordinate Court Rules 1980 [which is identical to O 45 r 7(6) RC]. Augustine Paul JC (as he then was) held as follows in **Ipmuda Trading**, at p. 164 -

"*Although a person cannot be held guilty of contempt in infringing an order of the Court of which he knows nothing Lyell J said in Husson v. Husson [1962] 3 All ER 1956 that* ***a distinction is to be drawn between mandatory and prohibitory orders*** *and added:*

> ***An order requiring a person to do an act must be served on him. If it is not served, committal proceedings for breach of the order do not lie. If, however, the order is to restrain the doing of an act, the person restrained may be committed for breach of it if he in fact has notice of it, either by his presence in Court when it is made, or by being served with it, or notified of it by telegram or in any other way****.*

***Where** a judgment or order has been served on a person or **he has had notice of it as provided by the rules then a breach of it may be enforced by an order of committal**.*"

(emphasis added); and

(c) **Class One Video Distributors** has been followed by Azahar Mohamed J (as he then was) in **Visiber Sdn Bhd v Tan Meng Them & Ors** [2010] 7 MLJ 537, at paragraphs 9-11;

(2) an applicant in committal proceedings must prove beyond all reasonable doubt that the alleged contemnor has been notified of the terms of the restraining order/judgment - please see VT Singham J's decision in the High Court case of **Foo Khoon Long v Foo Khoon Wong** [2009] 9 MLJ 441, at paragraph 8;

(3) a person can be notified of the terms of a restraining order/judgment within the meaning of the words "*or otherwise*" in O 45 r 7(6)(b) RC by way of an email, facsimile or any electronic means. In this case, the Respondent had been notified of the terms of the *Ex Parte* Restraining Order by way of the Applicants' Email dated 3.11.2015. Such a fact is confirmed by the Respondent's 1st and 2nd Emails. Accordingly, by reason of O 45 r 7(6)(b) RC, there is no requirement under O 45 r 7(2)(a) RC to serve personally a copy of the sealed *Ex Parte* Restraining Order on the Respondent before the Deletion; and

(4) in any event, in accordance with O 45 r 7(2)(a) RC, a "*copy*" of the sealed *Ex Parte* Order has been "*served personally*" on the Respondent by way of the Applicants' Email dated 3.11.2015. This decision is premised on the following reasons -

(a) the word "*copy*" in O 45 r 7(2)(a) RC has been widely defined in O 1 r 4(1) RC to mean "*anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly*". A copy of the sealed *Ex Parte* Order attached to the Applicants' Email dated 3.11.2015 comes within the meaning of the word "*copy*" [as interpreted in O 1 r 4(1) RC] in O 45 r 7(2)(a) RC; and

(b) the manner of personal service of an order/judgment in O 45 r 7(2)(a) RC is provided in O 62 r 3 RC. According to O 62 r 3 RC, an order/judgment is served personally on a person by leaving a copy of the sealed order/judgment with the person to be served. A copy of the sealed *Ex Parte* Order attached to the Applicants' Email dated 3.11.2015 had been left with the Respondent within the meaning of O 62 r 3 RC as admitted in the Respondent's 1st and 2nd Emails. The Respondent's 1st and 2nd Emails did not request for an original copy or an office copy of the sealed *Ex Parte* Order.

20. Based on the evidence and reasons stated in the above paragraph 19, I have no hesitation to reject the Respondent's contention that he had not

been served personally with a copy of the sealed *Ex Parte* Order before the Deletion.

E. Whether Respondent had breached *Ex Parte* Restraining Order

21. It is not disputed that the Applicants have the legal burden to prove beyond all reasonable doubt that the Respondent has breached the *Ex Parte* Restraining Order by way of the Deletion - please see Wan Adnan FCJ's (as he then was) judgment in the majority decision of the Federal Court in **Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal** [1995] 3 MLJ 549, at 574.

22. Firstly, Enc. 41 does not concern the Consent Order. Hence, the fact that the Respondent had complied with the Consent Order by affirming the Respondent's Compliance Affidavit, is not relevant in the determination of Enc. 41.

23. Secondly, I am of the view that a party in a proceedings is legally bound to obey -

    (1) a mandatory and/or restraining order/judgment once the party has been served personally with the mandatory and/or restraining order/judgment under O 45 r 7(2)(a) RC; and

    (2) a restraining order/judgment when the party has been notified of the terms of the restraining order/judgment within the meaning of O 45 r 7(6)(b) RC.

Once the circumstances explained in the above sub-paragraph (1) and/or (2) have happened, a party cannot disobey the order/judgment by claiming that the party has not been legally advised. As explained in the above paragraph 19, the Respondent had already been notified of the terms of the *Ex Parte* Restraining Order and/or had been served personally with a copy of the sealed *Ex Parte* Order. Accordingly, the Respondent is legally bound to obey the *Ex Parte* Order even if he does not have the benefit of legal counsel. If I have acceded to the above contention of the Respondent, this will confer on parties in legal proceedings a *carte blanche* to breach any order/judgment by deliberately not seeking legal advice. Such an outcome is clearly inimical to due administration of justice.

24. There is proof beyond all reasonable doubt that the Respondent had intentionally breached the *Ex Parte* Restraining Order by deleting the Folder in the Respondent's laptop. This decision is based on the following evidence and reasons:

    (1) the Respondent's 1st and 2nd Emails clearly showed that he was aware of the *Ex Parte* Order. In fact, the Respondent's 2nd Email requested for an extension of time for him to comply with the *Ex Parte* Order;

    (2) the Deletion is intentional because -

        (a) in view of the Respondent's 1st and 2nd Emails, he had established communication with the Applicants' solicitors. In a borderless "*digital world*" where messages and/or emails can be easily sent through any electronic device (eg. "*smart*" mobile

phone, laptop or iPad), the Respondent could have easily asked the Applicants' solicitors on whether there would be a breach of the *Ex Parte* Restraining Order if he had deleted a file or folder in his laptop. However, this was not done by the Respondent;

(b) a file or folder in any computer, including a laptop, cannot be "*easily*" deleted by way of a mistake. I rely on the following judgment of Lai Siu Chiu J in the Singapore High Court case of **BP Singapore Pte Ltd v Quek Chin Thean & Ors** [2011] 2 SLR 541, at paragraph 53 -

> "*[53]* ***Foo admitted to deleting the two documents but claimed that this was done inadvertently. I did not believe him. I had pointed out to his counsel that it was impossible for anyone to inadvertently delete specific files from a computer because the person would have had to select the file in question and give the command for it to be deleted. Even after such a command had been given, there would be a prompt by the computer asking the person to confirm his decision. The more likely story was that Foo had panicked after the execution of the search order and had attempted to dispose of the remaining files in his possession which might incriminate him. I took a very dim view of his actions****. …*"
>
> (emphasis added); and

(c) if the Respondent had inadvertently deleted the Folder -

(i) the Respondent could have easily downloaded the contents of the Deleted Files from his Personal Cloud and re-saved those contents in his laptop before he handed the laptop to the Applicants' supervising solicitors in KLIA 2;

(ii) the Respondent could have informed the Applicants' solicitors by way of email regarding the Deletion;

(iii) when the Respondent handed the Respondent's Devices to the Applicants' supervising solicitors in KLIA 2, the Respondent could have informed the Applicants' solicitors and the Applicants' supervising solicitors regarding the Deletion;

(iv) when the Applicants' supervising solicitors handed the Respondent's Devices to SIAGA (**Handing-Over**), the Respondent could have informed SIAGA, the Applicants' solicitors and/or the Applicant's supervising solicitors regarding the Deletion. It is to be noted that three of the Respondent's solicitors were present during the Handing-Over and the Respondent could have easily informed his solicitors regarding the Deletion and his solicitors could then inform the same to SIAGA, the Applicant's solicitors and/or the Applicant's supervising solicitors; and

(v) at any time before the Applicants obtained the *Ex Parte* Leave, the Respondent could have informed his solicitors

regarding the Deletion and in such an event, the Respondent's solicitors could in turn inform the Applicants' solicitors of the Deletion; and

(3) the *Ex Parte* Restraining Order enjoined the Respondent from, among others, deleting anything in his laptop. The *Ex Parte* Restraining Order did not concern the Confidential Information. Consequently, even if it is assumed that the Deleted Files did not contain the Confidential Information, the Respondent would still have breached the *Ex Parte* Restraining Order by deleting the Folder. In any event, a perusal of the Retrieved Information shows the name of the 1st Applicant. There is no reason why the Respondent should keep information with the 1st Applicant's name in his Personal Cloud and laptop.

F. <u>What is appropriate sentence for Respondent?</u>

25. When the court finds a person guilty of contempt of court, the court has a discretion to impose the following sentence on the contemnor:

(1) under O 52 r 7(1) RC, the court may suspend the execution of the order of committal -

(a) for any period of time; and/or

(b) based on any term or condition

- as may be specified by the court.

When the court suspends the execution of a committal order according to O 52 r 7(1) RC, the court may admonish, caution or reprimand the contemnor;

(2) the court may discharge a contemnor pursuant to O 52 r 8(1) or (2) RC;

(3) the court may order a contemnor to give security for his or her good behavior (**Security for Good Behaviour**). The court's power to order Security for Good Behaviour has been preserved by O 52 r 9 RC;

(4) the court may impose a fine to be paid by a contemnor. This power has been retained by O 52 r 9 RC. When the court orders a fine to be paid by a contemnor, the court may specify -

(a) a time period for the contemnor to pay the fine;

(b) the fine to be paid in instalments; and/or

(c) a period of imprisonment of the contemnor in the event the contemnor fails to pay the fine - please see Noorin Badaruddin JC's (as she then was) judgment in the High Court case of **BYD Auto Industry Company Ltd v AMDAC (M) Sdn Bhd** [2017] 5 CLJ 371, at paragraph 59.

A daily fine may be imposed for a "*continuing*" contempt of court which has not yet to be purged by the contemnor - **BYD Auto Industry**, at paragraph 59;

(5) a custodial sentence may be ordered for a contemnor. Neither the RC nor any written law in Malaysia provides for a maximum imprisonment sentence for contempt of court.

According to s 14(1) of United Kingdom's Contempt of Court Act 1981 [**CCA (UK)**], a court in England and Wales can commit a person to prison for contempt of court for a term not exceeding 2 years for committal by a superior court and a term not exceeding 1 month in the case of committal by an inferior court. Section 12(1) of India's Contempt of Courts Act 1971 [**CCA (India)**] provides that Indian courts can only impose an imprisonment sentence up to 6 months and/or a fine not exceeding 2,000 Indian rupees. It is hoped that our legislature may provide for a maximum imprisonment and fine sentence for contempt of court along the lines of CCA (UK) and CCA (India); and

(6) the court may order a contemnor to pay costs of the committal proceedings to the applicant under O 59 rr 3(1) and/or (2) RC. Costs may be awarded on a standard basis [please see O 59 r 16(2)(a) and (3) RC] or an indemnity basis [please refer to O 59 r 16(2) and (4) RC]. In the English High Court case of **EMI Records Ltd v Ian Cameron Wallace Ltd & Anor** [1982] 2 All ER 980, at 984, Robert Megarry VC (sitting with the Chief Taxing Master and Mr. Harvey Crush as assessors) explained that the court may award costs on an indemnity basis in cases of contempt of court.

O 59 r 24 RC provides the court's discretionary power to grant interest on costs from the date of award of costs until the date of full payment of costs.

26. Learned counsel for the Applicants and Respondent have cited many cases regarding the appropriate sentence to be meted by the court to the Respondent for a breach of the *Ex Parte* Restraining Order. Sentences are imposed for contempt of court in the exercise of the courts' discretion. The exercise of such a discretion is dependent on the particular facts of the case in question. As such, cases regarding sentences meted for contempt of court provide mere guidelines and cannot constitute binding legal precedents from the view point of the *stare decisis* doctrine.

27. The Respondent's learned counsel has advanced the following mitigation in support of a Security for Good Behaviour or in the alternative, a fine not exceeding RM10,000 (**Respondent's Plea in Mitigation**):

    (1) the Deletion was not a deliberate act by the Respondent. At worst, the Respondent had acted recklessly by deleting the Folder from his laptop;

    (2) the Deletion did not interfere with the administration of justice in this case;

    (3) the Respondent is remorseful;

    (4) the Respondent had subsequently done the "*right thing*" by -

(a) agreeing to the Consent Order and by affirming the Respondent's Compliance Affidavit; and

(b) providing the Thumb Drive to Siaga;

(5) Enc. 41 concerns a "*civil contempt*" and does not involve the commission of an offence;

(6) this is the first time the Respondent has breached a civil court's order;

(7) if the court imprisons the Respondent, this will cause irreparable harm to the Respondent's bright future. The Respondent is a university graduate who has a good extra-curricular record. He is presently 36 years old and has an exemplary work record. Four testimonials regarding the Respondent's good character have been tendered to this court;

(8) the Respondent is the eldest in his family and is the main income earner for his younger sister, younger brother and retired parents; and

(9) the Respondent tenders his apology to court regarding his breach of the *Ex Parte* Order.

28. I have considered the Respondent's Plea in Mitigation. Regrettably, I am unable to -

(1) suspend the execution of a committal order against the Respondent;

(2) discharge the Respondent;

(3) order the Respondent to furnish a Security for Good Behaviour; and

(4) fine the Respondent.

On the facts of Enc. 41, the just and appropriate sentence for the Respondent is a 7 days' imprisonment sentence (**Imprisonment Sentence**). The Imprisonment Sentence is based on the following evidence and reasons:

(a) to preserve relevant evidence for the just determination of a case, a plaintiff may apply to court for an *ex parte* order to compel a defendant to deliver documents and real evidence to the plaintiff for the purpose of the trial of the case (***Ex Parte* Delivery Order**). In the English High Court case of **Lock International plc v Beswick & Ors** [1989] 1 WLR 1268, at 1281, Hoffmann J (as he then was) has explained that in many cases, it will be "*sufficient*" for the court to grant an *Ex Parte* Delivery Order, rather than an *ex parte* Anton Pillar order (which is draconian in effect). The efficacy of an *Ex Parte* Delivery Order is wholly dependent on an *Ex Parte* Restraining Order which restrains a defendant from removing, destroying, dissipating or concealing relevant evidence (which the defendant is compelled by the *Ex Parte* Delivery Order to deliver to the plaintiff). It is to be noted that evidence obtained by the execution of an *Ex Parte* Delivery Order may not necessarily assist a plaintiff but may also be of use to the defendant or co-defendant at the trial in question.

The effectiveness of *Ex Parte* Delivery Orders is accentuated by the wide use of Electronic Devices in this digital age. Concomitantly, there is the high risk and "*danger*" of deletion of evidence (which may be relevant to the trial of a case) from Electronic Devices.

In this case, the Applicants could have applied for an *ex parte* Anton Pillar order against the Respondent but the Applicants chose to apply for the *Ex Parte* Delivery Order. It is in the public interest for all defendants to comply strictly with *Ex Parte* Restraining Orders. If a defendant breaches an *Ex Parte* Restraining Order, such as in this case (by way of the Deletion), this may defeat the very purpose of the *Ex Parte* Delivery Order. Accordingly, it is in the public interest for this court to impose the Imprisonment Sentence so as to send a clear message that all parties in proceedings shall obey strictly *Ex Parte* Restraining Orders (so as to ensure that *Ex Parte* Delivery Orders are not frustrated). The public interest to ensure strict compliance with the *Ex Parte* Restraining Order in this case, clearly outweighs the Respondent's Plea in Mitigation;

(b) the Imprisonment Sentence is meted to deter all parties in other proceedings from breaching *Ex Parte* Restraining Orders in a manner which will defeat *Ex Parte* Delivery Orders (**Public Deterrence**). The need for Public Deterrence in this case, prevails over the Respondent's Plea in Mitigation;

(c) no expert evidence has been adduced by the Respondent to show that the contents of the Deleted Files are the same contents of the Thumb

Drive (given by the Respondent to Siaga). In other words, by the Deletion, the Applicants had been deprived of their right to adduce at the trial of this case the contents of the Deleted Files as evidence in support of the Applicants' suit. This constitutes an unjust interference with the administration of justice in this case;

(d) as explained in the above sub-paragraph 24(2), the Deletion is intentional. There is no mitigation that the Deletion had been done inadvertently or even recklessly; and

(e) the Respondent did not show genuine remorse because he did not admit that he had breached the *Ex Parte* Order at the first case management of Enc. 41. On the contrary, the Respondent raised various defences by filing two affidavits and a written submission to oppose Enc. 41 (please see the above paragraph 14). In other words, the Respondent had caused the Applicants to expend much time, expense and effort to prove Enc. 41 beyond all reasonable doubt. Needless to say, judicial resources have been expended in respect of Enc. 41. The Respondent only tendered his apology to court after the court has found him liable for contempt of court.

I must add that if not for the Respondent's Plea in Mitigation, this court would have ordered an imprisonment sentence in excess of 7 days for the Respondent.

29. In addition to the Imprisonment Sentence -

(1) subject to an allocatur fee, the Respondent shall pay RM20,000.00 to the Plaintiffs as costs for Enc. 41 (**Costs**); and

(2) the Respondent shall pay to the Applicants interest at the rate of 5% per annum on the Costs from the date of imposition of the Imprisonment Sentence until the date of full payment of the Costs.

G. Stay of execution of Imprisonment Sentence

30. Upon an oral application by the Respondent's learned counsel, I grant a stay of execution of the Imprisonment Sentence (**Stay**) pending the disposal of the Respondent's appeal to the Court of Appeal against the Imprisonment Sentence (**Respondent's Appeal**). The Stay is granted subject to the condition that a surety (who is not the Respondent) provides a bond sum to the court to ensure the Respondent's presence at the hearing and disposal of the Respondent's Appeal.

H. Summary of court's decision

31. In summary -

(1) by reason of O 45 r 7(6)(b) RC, the Applicants were not required under O 45 r 7(2)(a) RC to serve personally a copy of the sealed *Ex Parte* Restraining Order on the Respondent when the Respondent had been notified of the *Ex Parte* Restraining Order by the Applicants' Email dated 3.11.2015. Additionally or alternatively, the Applicants had served personally a copy of the sealed *Ex Parte* Order on the

Respondent by way of the Applicants' Email dated 3.11.2015 within the meaning of O 45 r 7(2)(a) read with O 62 r 3 RC;

(2) the Respondent cannot rely on a defence that he had not been legally advised at the time of the Deletion. On the facts of this case, there is proof beyond all reasonable doubt that the Respondent had intentionally breached the *Ex Parte* Restraining Order by deleting the Folder; and

(3) the Imprisonment Sentence is appropriate in the public interest and to ensure Public Deterrence.

WONG KIAN KHEONG
Judge
High Court (Commercial Division)
Kuala Lumpur

DATE: 25 JUNE 2018

Counsel for Applicants:	*Mr. Eddie Chuah Seong Eng &* *Mr. Derrick Leong Tjen Ming* *(Messrs Wong & Partners)*
Counsel for Respondent:	*Mr. Steven Cheok Hou Cher & Mr. Ng Kim Poh* *(Messrs Christopher & Lee Ong)*