Aurol Anthony Sabastian *v* Sembcorp Marine Ltd
[2013] SGCA 5

Case Number	: Civil Appeal No 71 of 2012
Decision Date	: 17 January 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; V K Rajah JA
Counsel Name(s)	: George Lim SC and Foo Say Tun (Wee, Tay & Lim LLP) for the appellant; Davinder Singh SC, Pardeep Singh Khosa and Vishal Harnal (Drew & Napier LLC) for the respondent.
Parties	: Aurol Anthony Sabastian — Sembcorp Marine Ltd

Contempt of Court – Criminal Contempt

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 2 SLR 645.]

17 January 2013 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This appeal concerns an alleged breach by the appellant, Mr Anthony Sabastian Aurol ("Aurol"), of an interim sealing order made by an Assistant Registrar ("the AR"). Upon the application of the respondent, Sembcorp Marine Ltd ("SCM"), in Originating Summons No 465 of 2011 ("OS 465 of 2011") for an order of committal against Aurol for contempt of court, Aurol was found guilty by the High Court and sentenced to five days' imprisonment. The decision of the High Court Judge ("the Judge") finding Aurol guilty of contempt is reported in *Sembcorp Marine Ltd v Aurol Anthony Sabastian* [2012] 2 SLR 645.

2 The present appeal is brought by Aurol against his conviction and sentence. It was heard together with Civil Appeal No 66 of 2012 ("CA 66 of 2012"), which was Aurol's appeal against the refusal of the High Court to grant him leave to adduce further evidence at a very late stage in the proceedings below. Following brief oral arguments before us, we dismissed CA 66 of 2012.

The factual background

3 The background to the present appeal revolves around a related action in Suit 351 of 2010 ("Suit 351") which was brought by SCM and PPL Shipyard Pte Ltd ("PPLS") against PPL Holdings Pte Ltd ("PPLH") and E-Interface Holdings Limited. SCM had entered into a joint venture with PPLH pursuant to which each party was to and did come to own shares in PPLS. Under the joint venture agreement, each party was granted pre-emption rights in the event the other party wished to sell its shares. However, the parent company of PPLH, Baker Technology Ltd ("Baker"), which was not a party to the joint venture agreement, sold its shares in PPLH to a competitor of SCM, ostensibly by-passing the restrictions imposed by the pre-emption rights. This subsequently led to the filing of Suit 351 by SCM.

4 Aurol was a director of Baker, PPLH and PPLS at the material time. He also had indirect

interests in Baker and had played a central role in arranging the sale of Baker's shareholding in PPLH to SCM's competitor.

Wong's 4th affidavit

5 Mr Wong Weng Sun ("Wong") is the President and Chief Executive Officer of SCM. He filed various affidavits in Suit 351 in that capacity. In his 4th affidavit ("Wong's 4th affidavit") filed on 26 November 2010, Wong set out fairly detailed information about the SCM Group's foreign exchange hedging policies. It subsequently occurred to SCM that this was confidential information and if the release of that information into the public domain was not restrained, it could be exploited by non-parties to the detriment of the SCM Group. [note: 1] On 3 December 2010, SCM filed Summons 5659 of 2010 ("SUM 5659") seeking a sealing order in relation to various documents including Wong's 4th affidavit.

SUM 5659

6 Specifically, the following reliefs were sought in SUM 5659: [note: 2]

(a) That SUM 5659 itself and all its contents including the supporting affidavit be sealed;

(b) That Wong's 4th affidavit be sealed from non-parties to Suit 351; and

(c) That any further affidavit in Suit 351 containing references to, or quotations or extracts from exhibit WWS-47 to Wong's 4th affidavit, be sealed from non-parties to Suit 351.

The affidavit filed in support of SUM 5659 and referred to in [6(a)] above was Wong's 5th affidavit. SUM 5659 and Wong's 5th affidavit were filed together on 3 December 2010.

Interim Sealing Order of 6 December 2010

7 On 6 December 2010, counsel for SCM appeared *ex parte* before the AR on duty, seeking an urgent hearing date for SUM 5659 to be heard by a High Court Judge. The minutes of the hearing before the AR were recorded on the backing sheet of the summons and read as follows:

> Bernette Meyer and Mr Issac Lum for Pf
>
> PC: Application is for the sealing of an affidavit that my client has filed a week before, on 26 Nov 2010. And also any further affidavits filed in this Suit which refers to a exhibit WWS-47 in that affidavit. Other side expected to file an affidavit this Friday. Seeking an urgent hearing date for this sealing application. And also to ask that in the interim, before that hearing, for this affidavit to be sealed such that non-parties to the suit cannot inspect the affidavit. We asked for consent to the sealing last week but did not receive.
>
> Ct: Application fixed for Friday 10 December 2010 on the usual OS SUMS list at 9am. In the interim (till the hearing of the application), Mr Wong Weng Sun's 5th supporting affidavit dated 26 November 2010, together with the summons, are to be sealed as against non-parties to the Suit. To serve on all parties.

8 As it turned out, the AR had made a mistake: Wong's 5th affidavit was dated 3 December 2010,

not 26 November 2010; it was Wong's 4th affidavit that was dated 26 November 2010. The AR's order was not extracted in the usual way. As a result, this notation on the backing sheet of the summons is the only record of the order that was made by the AR on 6 December 2010.

6 December 2010 letter

9 On the same day, after the AR had made the interim sealing order, SCM's lawyers, Drew & Napier LLC ("Drew"), wrote to the lawyers acting for the defendants in Suit 351, Straits Law Practice LLC ("Straits Law"), informing them of the hearing date for SUM 5659. The letter also stated the following: [note: 3]

> ... Please be informed that the Court has granted an interim order that until the hearing of the Summons, the Summons itself and the 5th Affidavit of Mr Wong Weng Sun filed in support of the Summons be sealed as against non-parties to the Suit.

10 On 7 December 2010, Drew served a copy of SUM 5659, the interim sealing order (as recorded on the backing sheet of the summons) as well as Wong's 5th affidavit on Straits Law. It is undisputed that copies of SUM 5659, the interim order, Wong's 5th affidavit and Drew's letter of 6 December 2010 were sent to Aurol on or prior to 9 December 2010. [note: 4] It is also undisputed that Aurol had received and read all of these documents on or before that date. [note: 5]

Aurol's conversation with Conrad Raj on 10 December 2010

11 Mr Conrad Raj ("Raj") is a senior journalist with the Today Newspaper ("Today") and an old friend of Aurol's. Raj had previously published an article on 2 July 2010 in Today, commenting on the fall-out between SCM and Baker. Raj and Aurol had a telephone conversation on 10 December 2010. [note: 6] There is some dispute as to whether it was Raj who called Aurol or the other way around; there is also some dispute as to what exactly transpired in the course of that conversation.

Aurol emails Raj SUM 5659 and Wong's 5th affidavit

12 On the same day (10 December 2010) following from their conversation, Aurol emailed a copy of SUM 5659 and Wong's 5th affidavit to Raj.

The 13 December 2010 Today article

13 On 13 December 2010, an article written by Raj was published in Today detailing the fact that SUM 5659 had been filed and setting out the reasons for the application.

14 This prompted an immediate reaction from SCM. Its lawyers wrote to Mediacorp Pte Ltd ("Mediacorp") which owned and published Today, drawing attention to the alleged breach of the interim sealing order and asking Mediacorp to name the source of the information which Raj had published in his article. Upon Mediacorp's refusal to reveal its source, SCM commenced Originating Summons No 74 of 2011 ("OS 74 of 2011") against Mediacorp.

Mediacorp ordered to reveal its source

15 On 7 March 2011, the AR who heard OS 74 of 2011 at first instance ordered Mediacorp to reveal its source. Mediacorp appealed this decision but the order was upheld by the High Court on

31 March 2011.

The apology

16 On 5 April 2011, Aurol wrote to the High Court and SCM. The letter was written on a PPLH letterhead but was signed by Aurol as a director. Aurol appeared to have identified himself as the source of the leak. He also stated as follows in the letter: [note: 7]

> We humbly and sincerely apologise to this Honourable Court for breaching the interim order dated 6 December 2010. We have the greatest respect for this Honourable Court, and the orders that it makes. We did not intentionally set out to breach the interim order.

SCM commences OS 465 of 2011

17 On 10 June 2011, by way of OS 465 of 2011 and pursuant to O 52 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"), SCM commenced committal proceedings against Aurol. Leave was granted by the Court on 30 June 2011. On 1 July 2011, SCM filed Summons 2861 of 2011 to apply for an order that Aurol be committed to prison for contempt.

The decision below

18 On 19 March 2012, the Judge issued his judgment finding Aurol guilty of contempt, and directing that the parties' submissions on sentence be heard on 23 May 2012. On 28 September 2012, the Judge sentenced Aurol to five days' imprisonment.

19 In coming to his decision, the Judge first noted that whatever Aurol might say about the confusion engendered by the mismatch between the reference to the affidavit as Wong's 5th affidavit and the date ascribed to it, the interim sealing order was clear and ambiguous at least in relation to the summons itself. [note: 8] The Judge thought that given Aurol's background, he must have known the difference between a summons and an affidavit. Yet, Aurol had failed to offer any satisfactory explanation as to how he could possibly have misread the order in relation to the summons itself. [note: 9]

20 In relation to the reference to the affidavit, the Judge found that while there might have been some ambiguity arising from the misdescription referred to above, given that it was also described in the interim sealing order as a "supporting affidavit", and further given Drew's letter of 6 December 2010, no ambiguity or doubt could have persisted. In short, the Judge thought that these matters, taken together would have been sufficient to dispel any ambiguity. [note: 10] The Judge concluded that he was permitted to consider all the surrounding facts and circumstances, including Drew's letter of 6 December 2010 to ascertain the real meaning and purport of the interim sealing order. [note: 11] The Judge then considered the purpose of the order and determined that there was a real risk of interference with the administration of justice as a consequence of its being deliberately disobeyed.

21 The Judge also found that Aurol had the specific intent to breach the order and found Aurol's explanation that he had not read Drew's letter of 6 December 2010 in detail unconvincing, as it was bald and evasive. [note: 12] In the Judge's view, Aurol's failure to produce his phone records to show who had initiated the conversation with Raj, his failure to produce the email he sent to Raj or to give any explanation for this failure, as well as Raj's affidavit which appeared to contradict Aurol's evidence, all pointed to the fact that Aurol had deliberately piqued Raj's interest before sending him

the email with SUM 5659 and Wong's 5th affidavit attached while asking Raj to keep his identity strictly confidential. [note: 13] In addition, the Judge considered it significant that Aurol had failed to own up immediately after SCM instituted OS 74 of 2011 and instead waited until after the High Court had affirmed the AR's order to compel Mediacorp to reveal its source. The Judge was also troubled by the terms of the letter sent by Straits Law on behalf of Aurol on 5 April 2011 to convey his apology, observing that the letter had been carefully and deliberately crafted. As a result of all this, the Judge concluded that Aurol's actions were neither innocent nor unintentional. [note: 14]

22 Finally, the Judge held that there was a real risk of interference with the administration of justice because the breach by Aurol was not merely technical, but had the effect of destroying or nullifying the purpose of the order. This was thought to be so especially in the light of the fact that the situation was (and would have been known to be) irreversible once Aurol had successfully used Raj to make public what the AR had ordered to be sealed. [note: 15]

The parties' submissions

Aurol's case

23 In the appeal, Aurol's first argument was that the interim sealing order is to be distinguished from injunctive relief which takes the form of an express non-disclosure order. [note: 16] Mr George Lim SC ("Mr Lim"), who appeared for Aurol, argued that his client should not be held in contempt for disclosing SUM 5659 and Wong's 5th affidavit to Raj even assuming those documents were clearly covered by the terms of the interim sealing order because at its highest the order that had been made by the AR was just that: an interim sealing order the effect of which was only to seal the court file but not to prevent disclosure of materials from the file where this did not require any inspection of the court file. According to Mr Lim, the order would only have proscribed such disclosure if it had been an express non-disclosure order.

24 Mr Lim then submitted that the terms of the interim sealing order were ambiguous and it was impermissible for the Judge to have considered the extraneous circumstances that he did in his effort to infer the intended scope and purpose of the order. Specifically, it was contended that the Judge had made a number of errors in interpreting the interim sealing order. First, Mr Lim argued that the Judge had erred because in fact, SCM's lawyers had applied only for Wong's 4th affidavit to be sealed. Second, it was submitted that the Judge erred because he should not have relied on Drew's letter of 6 December 2010 to determine the meaning or interpretation of the interim sealing order. Finally, Mr Lim submitted that the Judge erred in placing undue reliance on the words "supporting affidavit" to dispel the ambiguity which was inherent in the order.

25 Mr Lim also submitted that criminal contempt proceedings fall within the supervision and jurisdiction of the Attorney-General ("the AG") in his role as the Public Prosecutor and guardian of the public interest. Thus, SCM's application ought at least to have been sanctioned by the Attorney-General's Chambers, which it was not. Mr Lim contended that the proceedings were also doomed to fail on account of this.

SCM's case

26 In response, Mr Davinder Singh SC ("Mr Singh") who appeared for SCM, argued that Aurol had failed to demonstrate that the Judge had erred in his central finding that the real and central purpose of making the interim sealing order was to preserve the *status quo* and specifically to prevent the

disclosure and publication of the protected information before SUM 5659 had been substantively disposed of by the Court. Mr Singh submitted that Aurol's arguments conflated the terms of the interim sealing order with its purpose. According to Mr Singh, the purpose of the interim order, when construed in the circumstances of the case, was clear and unambiguous, and indeed was known to Aurol. This was to preserve the *status quo* pending the substantive disposal of SCM's application. Yet, Aurol had deliberately disclosed the sealed documents to Raj as part of a deliberate plan to stimulate Raj's interest in the matter and to induce him to write an article that would embarrass SCM. In doing so, Aurol's actions posed a real risk of interfering with the administration of justice as the purposes underlying the interim sealing order had been compromised if not destroyed.

27 On Aurol's contention that the criminal contempt proceedings ought first to have been sanctioned by the AG, Mr Singh argued that unlike the position in England, there are no specific statutory provisions in Singapore that limit the power to initiate certain types of contempt proceedings to the AG. Indeed, Mr Singh submitted that the law in Singapore is that any interested party may, with the leave of the court, bring proceedings for criminal contempt.

Issues raised

28 The following principal issues arise for our consideration in the appeal:

(a) As a preliminary matter, whether a party is obliged to consult or to obtain the sanction of the AG before commencing proceedings for criminal contempt;

(b) Whether the terms of the interim sealing order were ambiguous and, if so, whether the High Court erred in relying on Drew's letter of 6 December 2010 to dispel the ambiguity; and

(c) Whether the offence of criminal contempt could be made out in the circumstances even though the order was a sealing order and not an express non-disclosure order.

Our decision

Whether there is an obligation to consult or to obtain the sanction of the AG before commencing proceedings for criminal contempt

29 As a preliminary point, it may be noted that the present action is one for criminal contempt and not for civil contempt. An action for civil contempt is directed at a party who is bound by an order of court but is alleged to have breached the terms of that order. Such an action is directed at securing compliance with the order in question. An action for criminal contempt on the other hand need not be confined to parties who are directly bound by the order. Any person, even one not directly bound by the order, can act so as to deliberately frustrate or undermine its purpose but if he does that, then he commits criminal contempt. There was no question here of an action for civil contempt being taken to secure Aurol's compliance with the interim sealing order. First, Aurol was not personally a party to that order. Second, the order had already been breached in circumstances where the breach could not be reversed. Rather, this was an action taken to punish Aurol for the asserted criminal contempt founded on his allegedly deliberate actions calculated to frustrate the purposes of the interim sealing order. In short, this was a prosecution for a crime that Aurol was alleged to have committed.

Constitutional Role of the AG

30 By virtue of s 11(1) of the Criminal Procedure Code 2010 (Act No 15 of 2010) ("CPC 2010") the AG is the Public Prosecutor and in him, in general, is vested the control and direction of criminal

prosecutions and proceedings. Section 11(1) of the CPC 2010 states:

> The Attorney-General shall be the Public Prosecutor and shall have the control and direction of criminal prosecutions and proceedings *under this Code or any other written law.* [emphasis added]

31 But, s 11 of the CPC 2010 does not provide an immediate answer to the question of the role of the AG in relation to the present proceedings. Singapore's contempt of court law "is based on common law and is an anomaly in our criminal justice system, as all our criminal laws are statute-based" (see Chan Sek Keong, Chief Justice, "Opening of Legal Year 2010" Response Speech (2 January 2010) at para 21). What then is the position in relation to a prosecution, anomalous though it be, that is brought under the common law?

32 At first blush, the position is apparently made somewhat clearer by Art 35(8) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"), which constitutionally enshrines the integral role played by the AG in the institution and conduct of *all* criminal proceedings. Art 35(8) of the Constitution reads:

> The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.

33 Notably, Art 35(8) of the Constitution does not circumscribe the power of the AG only to criminal proceedings initiated under any written law: it is thus intended to govern *all* criminal proceedings, whether initiated pursuant to a statute or under the common law. Art 35(8) of the Constitution has been judicially interpreted in many cases, and most notably in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*") at [145] to mean the following:

> In relation to public prosecutions, Art 35(8) makes it clear that the *institution, conduct or discontinuance* of ***any*** criminal proceedings is a matter for only the Attorney-General to decide. This means that except for unconstitutionality, the Attorney-General has an unfettered discretion as to when and how he exercises his prosecutorial powers. … [emphasis in original in italics; emphasis added in bold italics]

34 Insofar as it is a matter of the AG's power and discretion, the position is clear. There is no doubt that the AG has the power to institute and conduct prosecutions and proceedings for criminal contempt and this is reflected in the many cases where the AG has done so before our courts. But, it has also been held that Art 35(8) of the Constitution does not prevent other persons from commencing private prosecutions in the permitted circumstances. In *Public Prosecutor v Norzian bin Bintat* [1995] 3 SLR(R) 105 at [19], the High Court held:

> It is not disputed that in certain circumstances an aggrieved person may commence a private prosecution for certain offences without the consent of the Attorney-General. Thus, it is uncontroversial that the Attorney-General does not have the sole discretion to institute or conduct criminal proceedings ...

35 Similarly, in *Attorney-General v Tee Kok Boon* [2008] 2 SLR(R) 412 at [68], the High Court held that:

> Article 35 deals with the office of the Attorney-General and matters incidental thereto such as the appointment of the Attorney-General, his duties and powers. I am of the view that while Art 35(8) states his power to institute proceedings for any offence, it does not preclude others from

instituting criminal proceedings as may be prescribed by written law. The Attorney-General has overall control over criminal proceedings. As mentioned, the Attorney-General may intervene even in private prosecutions.

36 Insofar as the prosecution of statutory offences is concerned, the rights of private individuals to initiate prosecutions are set out in the CPC 2010 and in broad terms, these may be summarised thus:

(a) Pursuant to s 10 of the CPC 2010, the prosecution of the offences that are listed in that section may not be initiated without the consent of the Public Prosecutor;

(b) Subject to this, a private prosecution may be initiated pursuant to s 11(10) of the CPC 2010 if it is:

(i) for a summary case before a Magistrate's Court; and

(ii) the offence carries a maximum term of imprisonment provided by law that does not exceed 3 years or is punishable with a fine only.

(c) In respect of offences falling outside the scope of s 11(10) of the CPC 2010, a private prosecution may only be conducted upon obtaining a fiat from the Public Prosecutor under s 12 of the CPC 2010 (see Jennifer Marie and Mohammed Faizal, *The Criminal Procedure Code of Singapore* (Singapore Academy Publishing 2012) at para 03.22).

37 But even in instances where an aggrieved person may commence a private prosecution without the need for the AG's consent, the AG may intervene and decide whether to continue or discontinue the prosecution. This is provided for in s 13 of the CPC 2010:

Public Prosecutor's power to take over conduct of prosecution, etc.

13. Where a prosecution is conducted by a person other than the Public Prosecutor, the Solicitor-General, a Deputy Public Prosecutor or an Assistant Public Prosecutor, the Public Prosecutor may, if he thinks fit, take over the conduct of the prosecution at any stage of the proceedings and continue or discontinue the prosecution.

38 The rationale for this was explained in *Cheng William v Loo Ngee Long Edmund* [2001] 2 SLR(R) 626 as follows at [16]:

... It would seem that these provisions squarely contemplate *the risks particular to private prosecutions, where the complainant may allow his "private passions and prejudices to creep into the conduct" of a criminal appeal (Ponniah v Lim* [1960] MLJ 152). A private prosecution is a prosecution by a private individual which, if successful, relies on the state machinery to mete out the sentence imposed. In addition, a criminal offence is based on the notion of a wrong committed against society or social values. It follows that *a private prosecution should not defeat the interests of state and society* (such interests in this context being determined by the Public Prosecutor). [emphasis added]

39 But what is the position in relation to the prosecution of an offence founded in the common law? The present proceedings had to be brought in the High Court. Moreover, it was for an offence against the administration of justice and bears some resemblance to some of the offences identified in s 10 of the CPC 2010 as requiring the prior consent of the Public Prosecutor – see for instance s 228

of the Penal Code (Cap 224, 2008 Rev Ed). The proposition that such a prosecution for criminal contempt could be initiated in the High Court without *any* involvement of the Public Prosecutor would seem somewhat out of step with the statutory framework, though we recognise that this may well be the position ultimately since the offence concerned is a unique and anomalous one rooted in the common law.

40 In England, the issue was specifically considered by the *Report of the Committee on Contempt of Court* (Cmnd 5794, 1974) ("the Phillimore Committee report"). Mr Singh relied on the Phillimore Committee report at para 184 to argue that any interested person can bring proceedings for criminal contempt. [note: 17] The paragraph reads:

> 184. In general, contempt proceedings, like most other proceedings, civil or criminal, may be instituted by a private individual. ...

41 The English position is not entirely equivalent to ours because of the greater prevalence of criminal law founded in the common law there. But even so, the Phillimore Committee report goes on to state at para 187:

> **We are sure that the Attorney General must retain his right to act in the public interest where he thinks fit to do so.** Experience shows that such occasions are relatively rare, especially in connection with civil proceedings. But we are also sure that his should not be an exclusive jurisdiction. Although contempt is a public offence in the sense of being an interference with the course of justice, it is usually private individuals who are affected by it, and *if for one reason or another the Attorney General decides not to act*, the individual should have the right to test the matter in the courts. There are special reasons for such exceptions as exist to the general principle that prosecutions may be privately brought. We do not consider that the reasons here suffice to make contempt a further exception; and the present position has not resulted in many private proceedings for contempt in recent years. If any general restriction upon private prosecutions were to be imposed in the future, then no doubt the position in the law of contempt should be considered. **We believe, however, that the normal practice should be, especially where the alleged contempt is in relation to criminal proceedings, that the attention of the Attorney General should be drawn to the matter before any private proceedings are begun.** ... [emphasis in original in bold; emphasis added in italics]

42 Thus the Phillimore Committee concluded in 1974 that the right of the AG to act was not exclusive, but it also suggested that the institution of an action by a private individual ought only to take place "*if for one reason or another the AG decides not to act*" (emphasis added). This contemplates that there is a need to first consult the AG but reserving the possibility of proceeding with a private prosecution for criminal contempt in the event that the AG decides not to act.

43 It may be noted that the position in England was modified by s 7 of the Contempt of Court Act 1981 (c 49) (UK) ("UK Contempt of Court Act 1981") which provides that:

> Proceedings for a contempt of court under the strict liability rule (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney-General or on the motion of a court having jurisdiction to deal with it.

44 Under s 2(1) of the UK Contempt of Court Act 1981, proceedings under the strict liability rule refer to those brought in relation to publications which are addressed to the public at large. Thus, in England, in relation to contempt by publication at least, the position has been that proceedings may only be instituted either by, or with the consent of, the AG or on the motion of the court.

45 Outside the realm of the UK Contempt of Court Act 1981, while the position under the English common law remains that the consent of the AG is not strictly required, it has been noted in many instances that it is desirable that the aggrieved party should place the facts before the AG prior to instituting proceedings himself (see for instance David Eady & A.T.H. Smith, *Arlidge, Eady & Smith on Contempt* (London: Sweet & Maxwell, 4th Ed, 2011) ("*Arlidge, Eady & Smith on Contempt*") at para 3-181). This view also finds support in a number of judicial pronouncements. Lord Cross of Chelsea in *Attorney General v Times Newspapers Ltd* [1974] AC 273 ("*Times Newspapers*") observed thus at 326–327:

> … It is, I think, most desirable that in civil as well as in criminal cases anyone who thinks that a criminal contempt of court has been or is about to be committed should, if possible, place the facts before the Attorney-General for him to consider whether or not those facts appear to disclose a contempt of court of sufficient gravity to warrant his bringing the matter to the notice of the court. Of course, in some cases it may be essential if an application is to be made at all for it to be made promptly and there may be no time for the person affected by the "contempt" to put the facts before the Attorney before moving himself. Again the fact that the Attorney declines to take up the case will not prevent the complainant from seeking to persuade the court that notwithstanding the refusal of the Attorney to act the matter complained of does in fact constitute a contempt of which the court should take notice. Yet again, of course, there may be cases where a serious contempt appears to have been committed but for one reason or another none of the parties affected by it wishes any action to be taken in respect of it. In such cases if the facts come to the knowledge of the Attorney from some other source he will naturally himself bring the matter to the attention of the court.

46 In *Dobson and another v Hastings and others* [1992] Ch 394 at 411, the Court found that the issue was a "far reaching" one which called for extensive treatment, especially in light of the cases. The following observations of the Court at 411 are noteworthy:

> Thirdly, at the close of the submissions Mr Gray presented an argument that Mr Dobson and Mr Woodward were not competent as applicants on the present committal motion. Only the Attorney-General can initiate contempt proceedings where the contempt alleged is not that of breaching or assisting in the breach of a court order. Where a breach of a court order is asserted the party to the litigation in which the order was made can himself launch contempt proceedings. But when the contempt is not based on a breach of a court order, the Attorney General alone has locus standi. Mr Gray presented his submission crisply and succinctly, basing himself largely on observations of the House of Lords in *Gouriet v. Union of Post Office Workers* [1978] AC 435 to the effect that it is the exclusive right of the Attorney-General to represent the public interest.
>
> This is a far reaching argument. I am not persuaded that the matter is as cut and dried as Mr Gray would have it. I am fortified in this view by noting that, when addressing this category of contempt in *Attorney General v Newspaper Publishing Plc.* [1988] Ch 333, 362, Sir John Donaldson MR stated guardedly that "in general" this form of contempt was a matter for the Attorney General to raise. Further, in *P v. Liverpool Daily Post and Echo Newspapers Plc.* [1991] 2 AC 370, 425, Lord Bridge of Harwich regarded this as a difficult point, on which the Attorney-General should be heard. In my view this important point calls for more extended treatment than it was accorded before me. It is a point I ought not to decide unless that is necessary ...

47 In *Pelling v Hammond* (C/00/2363), September 22, 2000 (cited in *Arlidge, Eady & Smith on Contempt* at para 3-181), on an application for permission to appeal the refusal of the Divisional Court to grant leave to bring proceedings for contempt, Laws LJ opined that as the allegation was one of

criminal contempt, he had considerable doubts as to the applicant's standing and said that it was "certainly desirable and perhaps necessary for the Attorney-General to be approached to see whether he should bring contempt proceedings".

48 To similar effect is the decision of the Supreme Court of the United States in *Young v United States ex rel Vuitton et Fils, SA* (1987) 481 US 787 ("*Young*") where it was held that a person charged with contempt *has* a right to a disinterested prosecutor. In *Young*, the petitioners had violated injunctions that were the result of a settlement of a lawsuit with Louis Vuitton SA, the French luxury goods manufacturer. Two of Louis Vuitton's legal representatives had requested the District Court to appoint them as private prosecutors to represent the United States in the investigation and prosecution of the petitioners infringing activity. The District Court acceded to that request. On appeal to the Supreme Court, the petitioners argued that the appointment of Louis Vuitton's legal counsel as special prosecutors violated their right to be prosecuted only by an impartial prosecutor.

49 Justice Brennan, who delivered the majority decision of the Court, observed at 814 that:

> ... A prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated cannot provide such assurance, for such an attorney is required by the very standards of the profession to serve two masters. The appointment of counsel for Vuitton to conduct the contempt prosecution in these cases therefore was improper.

50 The facts in *Young* are slightly different from those in the case at hand because the appointment of Louis Vuitton's legal representatives as private prosecutors entailed also conferring certain investigatory powers upon them, over and above the power to bring proceedings. But given that the end result of a private prosecution for criminal contempt is the imposition of penal sanctions on the contemnor for acting to the detriment of the public interest, the observations of Justice Brennan in *Young* about the desirability of a disinterested prosecutor are apposite here.

51 Indeed, in our view given the *sui generis* nature of criminal contempt, there is a compelling interest in the AG being consulted before proceedings are commenced by a private party. We note that an action for criminal contempt may even arise out of civil proceedings either through a contumelious breach of a court order or the intentional subversion of its purpose. It is commenced by an application for committal brought pursuant to O 52 r 2 of the Rules of Court and may then be decided solely on affidavit evidence – even though guilt has to be proven beyond a reasonable doubt. As Lord Diplock observed in *Times Newspapers* at 311–312:

> ... The remedy for contempt of court after it has been committed is punitive; it may involve imprisonment, yet it is summary; *it is generally obtained on affidavit evidence* and *it is not accompanied by those special safeguards in favour of the accused that are a feature of the trial of an ordinary criminal offence*. Furthermore, it is a procedure which if instituted by one of the parties to litigation is open to abuse ... [emphasis added]

52 In our judgment, this particular facet of proceedings brought for criminal contempt more than anything else, clearly distinguishes it from other criminal offences where an aggrieved person may commence a private prosecution without first obtaining the AG's consent.

53 SCM's contention that any interested party may, with leave of court, bring proceedings for criminal contempt because of the absence of specific statutory provisions in Singapore that confine the power to initiate certain types of contempt proceedings to the AG, in our view misses the point. In Singapore, as reflected in Art 35(8) of the Constitution, the AG plays a unique and integral role as

guardian of the public interest *vis-à-vis* the institution and conduct of *all* criminal proceedings. This includes proceedings for criminal contempt. While we acknowledge that a private individual is entitled to institute proceedings for criminal contempt, in our judgment, such an individual is obliged, at least in the absence of any particular concerns of urgency, to first consult the AG, as the disinterested prosecutor and guardian of the public interest, before commencing the action.

54 Thus, prior to commencing committal proceedings against Aurol under O 52 r 2 of the Rules of Court for criminal contempt, SCM ought to have first consulted the AG. Had the AG then decided to take up the matter, he would have been doing so pursuant to his constitutional power to take conduct of the prosecution; had he declined to prosecute the matter, SCM could then have commenced proceedings of its own accord but in doing so it would have been obliged to join the AG as a party and lay all the facts before the court including any expressed views of the AG. This would enable the court to have the benefit of the AG's views in coming to a decision as to whether the matter should be pursued.

55 In our view, this strikes an appropriate balance between allowing private individuals to retain the right to initiate proceedings for criminal contempt, while ensuring that there is adequate oversight by the AG, in his special position as disinterested prosecutor and guardian of the public interest. We are especially alive to the danger noted in *Young*, that a prosecutor of a contempt action who represents the private beneficiary of the order that has allegedly been violated does not provide a meaningful or sufficient assurance of an impartial prosecution. By mandating that such a party first consult the AG before commencing action, there is the added advantage that any contumelious conduct which may lead to an interference with the administration of justice is brought to the attention of the AG, who might otherwise not even be aware of such conduct.

56 The AG's disinclination to commence proceedings for criminal contempt will not necessarily be determinative of the court's decision in relation to either the granting of leave under O 52 r 2(1) of the Rules of Court, or the eventual making of an order for committal. The court will determine each case on its merits, although it will also take the AG's views into consideration. As the Court held in *Phyllis Tan* at [146]:

> … The prosecutorial power cannot circumscribe the judicial power. On the contrary, it is the judicial power that may circumscribe the prosecutorial power in two ways: First, the court may declare the wrongful exercise of the prosecutorial power as unconstitutional. … Secondly, it is an established principle that when an accused is brought before a court, the proceedings thereafter are subject to the control of the court: see *Goh Cheng Chuan v PP* [1990] 1 SLR(R) 660, *Ridgeway* at 32-33 and *Looseley* at [16]-[17]. Within the limits of its judicial and statutory powers, the court may deal with the case as it thinks fit in accordance with the law.

Inherent jurisdiction of the court to punish for contempt

57 The source of the judicial power mentioned above is, of course, enshrined in Art 93 of the Constitution, which reads:

> The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.

58 In relation to the power to punish for contempt of court, s 7(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") specifically provides that:

> The High Court and the Court of Appeal shall have the power to punish for contempt of court.

59 In our view, s 7(1) of the SCJA preserves the court's inherent jurisdiction to protect its own process and authority by proceeding on its own motion in cases where its authority is threatened or undermined. In *Churchman v Joint Shop Stewards' Committee of the Workers of the Port of London* [1972] 1 WLR 1094, Lord Denning MR made the following observations at 1100–1101:

> I would like to add this: Mr. Churchman and Mr. Cartwright themselves did not seek to commit the three dockers to prison. All that they did — or, rather, was done on their behalf — was that they reported to the Industrial Court, as that court had directed them to do, any breaches of the order. It was in pursuance of that direction that Mr. Churchman and Mr. Cartwright, or those acting on their behalf, brought this matter to the attention of the court. I do not say that the court was not entitled to act as it did. *It may be that in some circumstances the court may be entitled, on sufficient information being brought before it, to act on its own initiative in sending a contemnor to prison.* But, if it does so think fit to act, it seems to me that *all the safeguards required by the High Court must still be satisfied.* The notice which is given to the accused must give with it the charges against him with all the particularity which this court or the High Court here ordinarily requires before depriving a person of his liberty. The accused must be given notice of any new charge and the opportunity of meeting it. Even if he does not appear to answer it, it must be proved with all the sufficiency which we habitually require before depriving a man of his liberty. ... [emphasis added]

60 In *Seaward v Paterson* [1897] 1 Ch 545 ("*Seaward*"), in punishing a stranger to the litigation who had aided and abetted a breach of an injunction, the Court made clear that it was acting on the basis of its inherent right to punish conduct which obstructs the course of justice. As Rigby LJ observed at 559–560:

> ... I entirely dissent from the suggestion that when once the court is seised of the matter any party to the action can exercise any influence whatever. *The court acts upon its own jurisdiction and upon its own authority, though doubtless it would have due regard to the wishes and feelings of the person who has brought the matter before it. ...* [emphasis added]

61 Rigby LJ's observations were cited with approval by Sir John Donaldson in the case of *Con-Mech (Engineers) Ltd v Amalgamated Union of Engineering Works (Engineering Section)* [1973] ICR 620, who concluded at 626 that:

> Once it is accepted that the High Court is concerned to exercise its power of punishment for contempt in the public interest, as distinct from the interests of the parties, *it seems to us that that court must have inherent jurisdiction so to regulate its own procedure as best to achieve this object*. The fact that the RSC do not so provide is without significance for, in general, those rules are intended for the guidance of litigants and their advisers and not for that of the court itself. It would be otherwise if those rules in terms curbed the court's freedom of action, but they do not in fact do so. [emphasis added]

62 In 1974, in considering the question of whether the waiver by an aggrieved party of a contempt signified the end of the matter, the Phillimore Committee noted at para 171 that this did not reflect the practice of the courts and strongly recommended that the position be clarified that:

> ... the court should have the power of its own motion to act against a person who disobeys its order whenever it thinks fit to do so ...

63 Indeed, s 7 of the UK Contempt of Court Act 1981 expressly preserves the court's inherent jurisdiction even though it provides that proceedings for contempt of court under the strict liability

rule should not be instituted other than with the consent of the AG (see *Arlidge, Eady & Smith on Contempt* at para 3-180).

64 In our judgment, on this issue, the position is largely similar in Singapore. While we recognise that both the AG, in his role as the Public Prosecutor and guardian of the public interest, and the party aggrieved by the breach, have an interest in bringing proceedings for contempt, in exercising its powers to punish for contempt, the court, in the final analysis, acts within its inherent jurisdiction and on its own authority in the administration of justice. This is a necessary corollary of the judicial power that is vested in the court pursuant to Art 93 of the Constitution.

65 In exercising such powers, the court is not seeking to vindicate its own dignity or the self-esteem of judges but to safeguard the integrity of legal proceedings for the benefit of those seeking recourse before the courts; and so, ultimately, for the benefit of the public in whose interest it is that legal proceedings, civil or criminal, should be fairly tried and justly determined (see *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and others* [2007] 2 SLR(R) 518 ("*Karaha Bodas*") at [23]). In the words of Lord Morris of Borth-y-Gest in *Times Newspapers* at 302:

> In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. *When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted and their authority wanes and is supplanted*. [emphasis added]

66 Thus, the court may not only allow a private prosecution for criminal contempt to proceed despite the AG's refusal to prosecute, but it may even institute proceedings for criminal contempt on its own motion, so long as the requisite procedural safeguards are satisfied.

67 In this case, SCM had not sought the views of the AG before commencing committal proceedings against Aurol for criminal contempt. It follows that the present proceedings are procedurally defective. Of course, the court may exercise its discretion within its inherent jurisdiction to cure such a procedural irregularity. For the reasons stated at [51] to [55] above, where a party has failed to consult the AG before commencing criminal contempt proceedings on its own accord, such discretion to regularise the proceedings ought, as a general rule, only to be exercised sparingly, and only for compelling reasons. An example of a compelling reason would be exceptional urgency (see *Arlidge, Eady & Smith on Contempt* at para 3-181).

68 No such exceptional circumstances exist in the present case. Indeed the article in question was published almost two years ago on 13 December 2010. However, we are also mindful of the fact that this point has not previously been laid down by the Singapore courts and SCM's attention would not have been drawn to these considerations. We therefore proceed to consider the appeal on the merits.

Whether the terms of the interim sealing order were ambiguous

69 We turn to the issue of whether the terms of the interim sealing order were ambiguous and, if so, whether the Judge erred in relying on extraneous circumstances including Drew's letter of 6 December 2010 to dispel the ambiguity.

70 The Judge found that the purpose of the interim sealing order was clear based on the surrounding facts and circumstances. In particular, he found that "what is sought to be protected by

the interim order is the eventual ability of the court to decide whether parties should be prevented from disclosing the information contained in Wong's 4th and 5th Affidavits, and the summons" (see [54] and [55] of the judgment below).

71 Building on the Judge's findings, SCM argued that the Court's purpose in granting the interim sealing order was to preserve the *status quo*, *ie* to ensure that the public remained unaware of:

(i) the fact that SCM had sought to seal Wong's 4th affidavit;

(ii) the fact that confidential information was contained in Wong's 4th affidavit; and

(iii) the manner in which such information could be deployed to the detriment of SCM. [note: 18]

72 There is no doubt that since the essence of criminal contempt is interference with the administration of justice, a party who is not directly bound by an order of court may nonetheless be held liable for criminal contempt if he acts to deliberately frustrate the purpose of that order (see *Karaha Bodas* at [43]). However, as this Court held in *Karaha Bodas* at [46]:

> ... the purpose of the court order concerned depends, in the main, on the precise terms of that order itself.

73 That the terms of the order form the essential starting point makes eminently good sense. This is especially so in relation to cases concerning a third party who is not directly bound by that order because such a party would have no other point of reference from which to ascertain the court's purpose in having granted the order. As Lord Nicholls of Birkenhead observed in *Attorney General v Punch Ltd and Another* [2003] 1 AC 1046 at [43]–[46]:

> 43 ... It is for the court to decide whether the plaintiff's asserted right needs and should have any, and if so what, interim protection. If the court orders that pending the trial the defendant shall not do certain acts the court thereby determines the manner in which, in this respect, the proceedings shall be conducted. This is the court's determination on what interim protection is needed and is appropriate. Third parties are required to respect this determination, as expressed in the court's order. The reason why the court grants interim protection is to protect the plaintiff's asserted right. ***But the manner in which this protection is afforded depends upon the terms of the interlocutory injunction.*** The purpose the court seeks to achieve by granting the interlocutory injunction is that, pending a decision by the court on the claims in the proceedings, the restrained acts shall not be done. Third parties are in contempt of court if they wilfully interfere with the administration of justice by thwarting the achievement of *this* purpose in *those* proceedings.
>
> 44 This is so, even if in the particular case, the injunction is drawn in seemingly over-wide terms. The remedy of the third party whose conduct is affected by the order is to apply to the court for the order to be varied. Furthermore, there will be no contempt unless the act done has some significant and adverse effect on the administration of justice in the proceedings. This tempers the rigour of the principle.
>
> 45 Departure from this straightforward approach runs into serious practical difficulties. ***If, in this context, the purpose of the court in granting an interlocutory injunction means something other than the effect its terms show it was intended to have between the parties, how is a third party to know what it is? How is a third party to know what is the***

purpose, which he must respect, if it is something other than the purpose evident on the face of the order? Uncertainty is bound to follow, with consequential difficulties in proving that a third party knowingly impeded or prejudiced the purpose the court sought to achieve when granting the injunction. I see no justification or need to go down this route, which is not supported by authority.

46 This discussion does, of course, underline how important it is for courts to seek to ensure that injunctions are not drawn in wider terms than necessary. This is of particular importance when the terms of the injunction may, in practice, affect the conduct of third parties.

[emphasis in original in italics; emphasis added in bold italics]

74 In other words, while the court will not go so far as to demand absolute precision in the drafting of the terms of an order before criminal contempt can be found, yet those terms must be sufficiently certain such that a third party whose conduct is under scrutiny, would reasonably be taken to be in a position to ascertain its purpose upon perusing it. As Lord Oliver of Aylmerton noted in *Attorney General v Times Newspapers Ltd and Another* [1992] 1 AC 191 ("the *Spycatcher* case") at 223F:

... Where there is room for genuine doubt about what the court's purpose is, then the party charged with contempt is likely to escape liability, not because of failure to prove the actus reus but for want of the necessary mens rea, for an intention to frustrate the purpose of the court would be difficult to establish if the purpose itself was not either known or obvious. ...

75 It follows that the starting point for the inquiry in the present case would be the terms of the interim sealing order in order to ascertain whether that gives a clear indication as to what the AR's purpose was in granting the order.

76 As previously noted, the order was issued by the AR on the backing page of SUM 5659; it was never extracted by either party in accordance with the usual procedure. Accordingly, the annotations made by the AR on the backing page constitute the only reference point for determining what the terms of the order are. For ease of reference, we set out the AR's annotations again:

Bernette Meyer and Mr Issac Lum for Pf

PC: Application is for the sealing of an affidavit that my client has filed a week before, on 26 Nov 2010. And also any further affidavits filed in this Suit which refers to a exhibit WWS-47 in that affidavit. Other side expected to file an affidavit this Friday. Seeking an urgent hearing date for this sealing application. *And also to ask that in the interim, before that hearing, for this affidavit to be sealed such that non-parties to the suit cannot inspect the affidavit.* We asked for consent to the sealing last week but did not receive.

Ct: Application fixed for Friday 10 December 2010 on the usual OS SUMS list at 9am. *In the interim (till the hearing of the application), Mr Wong Weng Sun's 5th supporting affidavit dated 26 November 2010, together with the summons*, are to be sealed as against non-parties to the Suit. To serve on all parties.

[emphasis added]

77 It is undisputed that the AR was mistaken when she referred to Wong's 5th affidavit dated 26 November 2010: Wong's 5th affidavit was dated 3 December 2010 and it was Wong's 4th affidavit that was dated 26 November 2010. *Prima facie*, this gives rise to some ambiguity as to whether the

AR intended to seal Wong's 4th affidavit or his 5th affidavit. The question then is whether by looking at the AR's annotations as a whole it is possible to resolve this ambiguity.

78 According to the AR's annotations of what transpired during the hearing, Ms Meyer had first described the nature of her application under SUM 5659 as being "for the sealing of an affidavit that my client has filed *before*, on 26 Nov 2010", *ie* Wong's 4th affidavit, as well as any other affidavits filed in the suit which refers to exhibit WWS-47 in Wong's 4th affidavit. At no point does it appear that Ms Meyer mentioned Wong's 5th affidavit. It was then further noted by the AR that Ms Meyer had asked that "in the interim, before that hearing, for *this* affidavit to be sealed such that non-parties to the suit cannot inspect the affidavit." On a plain reading, the reference to *this* affidavit appears to be a reference to the affidavit that had been referred to in the first sentence, *ie* Wong's 4th affidavit.

79 Against this, however, it was contended by SCM that the AR's subsequent use of the words "*supporting* affidavit" (emphasis added) suggests that she intended to seal Wong's 5th affidavit. Reference was made by SCM to Prayer 1 of SUM 5659 which reads as follows:

> that the file relating to this Summons and all its contents including the supporting affidavit be sealed.

80 According to SCM, since "supporting affidavit" in Prayer 1 of SUM 5659 referred to the 5th affidavit, the AR must similarly have been referring to the 5th affidavit in her order. However, we note that in the very same sentence, the AR had referenced 26 November 2010 as the date of the affidavit she evidently intended to seal and this is the date on which the 4th affidavit was filed. This suggests that the AR might have been looking at the 4th affidavit while drafting her order (which seems to be the only or at least most plausible explanation for how and why she referenced the date).

81 In our view, the most that can be said about the terms of the interim sealing order, on its face, is that it was and remains ambiguous as to which affidavit the AR was referring to. Indeed, the Judge below acknowledged as much at [44] and [55] of the judgment. However, the Judge relied on the surrounding facts and circumstances, and in particular, Drew's letter of 6 December 2010 and on this basis went on to conclude that the ambiguity had been sufficiently dispelled.

82 As noted above at [9], SCM's solicitors had written to Straits Law, the solicitors for the defendants in Suit 351 on 6 December 2010, informing them that:

> ... the Court has granted an interim order that until the hearing of the Summons, the Summons itself and the 5th Affidavit of Mr Wong Weng Sun ... be sealed ...

83 The Judge found that this letter, to which Aurol's attention had been drawn, was sufficient to dispel any ambiguity in the order itself.

84 With respect, we consider that in making this finding the Judge fell into error. Drew's letter of 6 December 2010 could not possibly have clarified any ambiguity that was inherent in the AR's order. At its highest, the letter could only have set out Drew's understanding of the order, though even then it is noteworthy that neither Ms Meyer nor Mr Lum, who were the attending lawyers before the AR filed an affidavit deposing to their understanding of the terms of the interim sealing order. But the key

point is that Drew's subjective interpretation of the meaning of the interim sealing order could not and should not have had any bearing in determining what the AR's decision and her purpose in making the order had been. Indeed, given that the terms of the interim sealing order were ambiguous, it is not unlikely that the lawyers concerned could themselves have misinterpreted the order. Put simply, Drew's letter of 6 December 2010 might reveal what the lawyers from Drew believed; and also what they conveyed to Straits Law; even what was conveyed to Aurol by Straits Law; and even what Aurol believed. But it can shed no light on what the AR intended or what her purpose had been in making the order and unless that is clear beyond any reasonable doubt the conviction cannot stand.

85 The note of Ms Meyer's appearance suggests that during the hearing, mention was made of sealing one affidavit only. According to SCM, Ms Meyer had asked for an interim sealing order *vis-à-vis* the summons and Wong's 5th affidavit, but not Wong's 4th affidavit. This does not seem entirely logical to us because it was the latter, and only the latter, which contained the confidential information about the SCM Group's foreign exchange hedging policies. We asked Mr Singh during oral arguments what interest SCM would have had in sealing Wong's 5th affidavit. Mr Singh replied that Wong's 5th affidavit explained in detail how information in Wong's 4th affidavit could be used to SCM's detriment. According to him, without Wong's 5th affidavit, no one would have known of the significance of Wong's 4th affidavit.

86 This may be so, but, Mr Singh did not go as far as to say that the 5th affidavit itself contains confidential information. Moreover, if we accept his response at face value, then it would seem the sealing application was superfluous since until Wong's 5th affidavit had been filed, the information contained in Wong's 4th affidavit would have remained in the file without attracting any attention. In our view, this seems unlikely if not untenable. Ultimately, Wong's 5th affidavit is *descriptive* in nature in that it merely *describes* in a general sense what type of confidential information is contained in the 4th affidavit and how it could be used to SCM's detriment; it does not itself contain the confidential information that SCM really wanted to protect. On balance, our view is that if SCM was seeking protection at that stage for only one affidavit, it was more likely than not to have been Wong's 4th affidavit.

87 In addition, according to Aurol's affidavit filed on 18 July 2011 [note: 19] ("Aurol's 18th July 2010 affidavit") at para 22, in the course of a telephone conversation on 1 December 2010 between Ms Valerie Ang of Straits Law, who was one of the solicitors for the defendants in Suit 351, and Ms Meyer, Ms Meyer had asked Ms Ang for PPLH's consent to seal Wong's 4th affidavit. Ms Ang was unable to obtain instructions to consent. As a result, SCM then filed SUM 5659 on 6 December 2010. This is further corroborated by the AR's annotations, where the AR recorded Ms Meyer as saying "We asked for consent to the sealing last week but did not receive".

88 It is also corroborated by a letter sent by Straits Law to Drew on 16 December 2010. [note: 20] This was a letter from Straits Law stating that while they were happy to agree to a sealing order, the sealing order ought to be limited in scope to the confidential portions of Wong's 4th affidavit. For present purposes, the following statements by Straits Law in the letter bear highlighting:

> Our clients note that your client's position on sealing has been modified and clarified since your initial request made over the telephone on 1 December 2010.
>
> During that telephone conversation, your Bernette Meyer had explained that *your client wanted*

your reply affidavit and any response from our clients to the reply affidavit referring to any documents in the reply affidavit to be sealed on the ground that it contained confidential information or information not publicly available, such as PPL Shipyard's minutes of meetings.

[emphasis added]

89 The fact that all the surrounding references to sealing appear to have been to Wong's 4th affidavit was yet another factor suggesting that this was the affidavit that was the subject of the interim sealing order; but the position is not clear because of the other references to the "5th supporting affidavit" in the note of the order itself. On the whole, the interim sealing order was ambiguous in our view.

90 The Judge did also state at [41] of the judgment below as follows:

Whatever else Mr Aurol says about the mistaken reference to the number of the affidavit and the date ascribed to it, he cannot deny that the interim sealing order in relation to Summons 5659 was clear and unambiguous.

We agree.

91 At para 37 of Aurol's 18 July 2011 affidavit, Aurol offered this explanation in relation to the disclosure of SUM 5659:

I never had any intention of breaching the Interim Order or thwarting or frustrating its purpose. With regard to the summons, I did not realise it had been sealed.

92 It is evident that Aurol's explanation in relation to the summons itself is a bald statement that admits the breach but asserts an absence of deliberate intent. It cannot possibly exculpate him. However, we think that Lord Reid's admonition in *Times Newspapers* at 298–299 is apposite:

I think the true view is that expressed by Lord Parker C.J. in *Reg. v Duffy, Ex parte Nash* [1960] 2 Q.B. 188, 200, that there must be "a real risk, as opposed to a remote possibility."That is an application of the ordinary *de minimis* principle. There is no contempt if the possibility of influence is remote. If there is some but only a small likelihood, that may influence the court to refrain from inflicting any punishment. If there is a serious risk some action may be necessary. ...

93 The foregoing words of Lord Reid were cited with approval by this Court in *Shadrake Alan v Attorney-General* [2011] 3 SLR 778, where it was held at [30] that:

We would add that, *even if* the Judge had indeed held the view that "a small likelihood" of risk constituted a real risk (a view which we disagree with for the reason stated in [28] above), such a "small likelihood" of risk would merely be a "technical" contempt that may not even attract any sanction at all (see Lord Reid's view in *Times Newspapers* at 299, and also *Shadrake* 1 at [77]). Such a situation would be a highly borderline or marginal case of contempt and, viewed from the perspective of substance and even practical principle, might not even merit the initiation of contempt proceedings by the Respondent in the first place.

94 In both cases, it was made clear that if the nature of the contempt was such that there is no real likelihood that any risk to the public interest would materialise, the court will be slow to inflict punishment. In the present case, we think it not irrelevant as has been observed at [85]–[88] above, that it was only Wong's 4th affidavit, and not Wong's 5th affidavit nor the summons itself, which

contained the confidential information that SCM was seeking to protect. This, coupled with the ambiguity in the interim sealing order as to whether it was Wong's 4th affidavit or Wong's 5th affidavit that had been sealed, militates against the Court inflicting punishment for the breach constituted solely in relation to the disclosure of the summons.

95 The Judge also placed some emphasis on Aurol's background and commercial experience and his knowledge of the circumstances of the case in the light of which he concluded that Aurol would have known what the AR's order was directed at. With respect, we fail to see how Aurol's background as an experienced businessman, even one with a law degree, could have shed light on what the true purpose and intent of the AR in making the order had been.

96 In our judgment, the Judge focused on Aurol's actions which showed a disregard for and a reprehensible indifference to what the Court's purposes may have been. The Judge was also mindful of the fact that given the acrimonious circumstances prevailing in the context of the disputes between SCM and Aurol's principals as well as Aurol's personal involvement in those disputes, he had every motive to do what he could to undermine SCM's endeavour to rectify the situation after they had put themselves in the prejudicial position of potentially having released important confidential information into the public domain. We do not disagree with the Judge on those conclusions. But Aurol's dishonourable intentions and even his acting upon those intentions do not constitute a crime if there is a reasonable doubt as to what the real purpose of the order was. The fact of the matter is that on the face of the interim sealing order there remains some room for reasonable doubt as to what its precise purpose was. Given that we are dealing with proceedings for criminal contempt for which the standard of proof is the criminal standard of proof beyond a reasonable doubt, this ambiguity ought to be resolved in Aurol's favour. To use the words of Lord Denning MR in *In re Bramblevale Ltd* [1970] Ch 128 at 137:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. ...

97 In our judgment this is true in relation to each element of the offence. Here the offence lies in frustrating the purpose of the order in question and that purpose must specifically be proven. Accordingly, we find that in respect of his disclosure of Wong's 5th affidavit, Aurol ought not to have been found guilty of criminal contempt. As to his disclosure of the summons, this was technically a violation but we do not think this alone would carry a real risk of interference with the administration of justice. We therefore allow Aurol's appeal on this ground.

Whether the offence of criminal contempt could be made out in the circumstances even though the order was a sealing order and not an express non-disclosure order

98 The foregoing conclusion suffices for the purposes of allowing the appeal. However, it is important that we also address Aurol's argument that an interim sealing order merely prevents the inspection of sealed documents from the court file and has no relevance where a person who has possession of the sealed material discloses it to others. According to Aurol, an interim sealing order does not prevent such disclosure, even by publication of the sealed documents, because this would not entail the inspection of the court file. According to Aurol, this follows from the fact that a sealing order is distinct from a specific non-disclosure order.

99 In our view, this contention is flawed. In proceedings for criminal contempt, the court will not adopt a myopic and blinkered view of the scope of an order. It is ultimately the *purpose* for which the order was granted that will be the lodestar in guiding the court's determination as to the true *effect*

of the order. As Mr Singh submitted, it is precisely for this reason that in the *Spycatcher* case at 231B, the Court held that a third party, who was neither named in the injunction nor had assisted a named party to breach the order, could nevertheless be found guilty of contempt where he knowingly acted so as to frustrate the purpose of the order. Thus, while the injunctions granted by Millett J in the *Spycatcher* case appeared, on their face, to be only directed at the parties named in the order, the Court adopted a purposive approach and found that the *effect* of the order was also to prevent third parties such as the defendant from undermining the order by publishing the materials which were covered by the injunctions. In doing so, the Court (per Lord Oliver of Aylmerton) found at 223E to 224A that there was no doubt that the purpose of the injunction "was to preserve, until the trial of the action, the plaintiff's right to keep confidential and unpublished" the said materials.

100 In the same vein, in *Seaward* (referred to above at [60] and cited by this Court in *Karaha Bodas* at [42]), Lindley LJ observed at 555–556 that:

> ... A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person who got it. In the other case *the Court will not allow its process to be set at naught and treated with contempt*. ... [emphasis added]

101 This is the same distinction we have already alluded to at [29] above. While in a narrow sense, the effect of granting the interim sealing order was that it prevented an individual from inspecting the sealed documents, it was evident that the AR had intended that the public should not have access to the confidential information contained in the sealed documents through any other means. To find otherwise would mean that a party to the proceedings who might routinely have obtained copies of the sealed materials as well as a non-party who somehow obtained possession of them could, with impunity, have disclosed the confidential information to the public in spite of the interim sealing order. This would not only denude the interim sealing order of all meaning and effect, but would also allow one, in the words of Lindley LJ, to "set the court's process at naught". By any measure, it would be perverse if such conduct were not also caught within the ambit of the offence of criminal contempt provided each element had been satisfactorily proved.

102 In the present case, but for the fact that we have found some ambiguity as to whether the interim sealing order was directed at Wong's 4th affidavit or Wong's 5th affidavit, we would quite readily have found Aurol's actions to have undermined and subverted the AR's purpose in granting the order. Indeed Aurol had clearly undermined the purpose of the interim sealing order insofar as the summons itself was concerned, though we have found that this was a "technical" violation. Given that the gravamen of the offence is the intentional impedance of the Court's purpose, we would not have accepted the argument that there was no contempt here simply because the interim sealing order *prima facie* only prevented inspection of the sealed documents in the court's file. There is no doubt that the disclosure of confidential information contained in the sealed documents had it been done to thwart or frustrate the purpose of the order would have amounted to criminal contempt.

Costs

103 We have allowed the appeal and now turn to the question of costs. The power to award costs is fundamentally and essentially one that is discretionary. Even though the general principle is for costs to follow the event, the overriding concern of the court must be to exercise its discretion to

achieve the fairest allocation of costs (see *Singapore Court Practice 2009* (Jeffrey Pinsler SC gen ed) (LexisNexis, 2009) at para 59/3/2, *Soon Peng Yam and another (trustees of the Chinese Swimming Club) v Maimon bte Ahmad* [1995] 1 SLR(R) 279 and *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155).

104 The court has a very wide discretion in determining what the fairest allocation of costs is and in this regard it is not confined to considering the particular outcome of the litigation. In *Lee Seng Choon Ronnie v Singapore Island Country Club* [1993] 1 SLR(R) 557 ("*Ronnie Lee*"), the appellant succeeded in his appeal and was found to be entitled to a declaration that the decision to delete his name from the register of members of the club was null and void and that he remained at all times a member. Nonetheless, he was denied the costs of the appeal as well as the costs below. The Court in *Ronnie Lee* explained at [31] and [32] that, in doing so, it was reflecting its disapproval of the appellant's conduct in failing to pay relatively small amounts of his club's bills under the pretext of frequently travelling abroad or the unauthorised signing of chits by his son, which the Court said was inexcusable and revealed a cavalier attitude and disregard of the club's rules. The Court further observed at [31] that:

> His [the appellant's] denial of having received the notices sent to him by the club and yet being able to produce to the court the third and final reminder [effectively the second notice under r 47(e)] claiming it was a file copy obtained for him by an unnamed friend, when the club did not keep copies of the second and subsequent reminders, was deplorable.

105 It seems to us that Aurol's conduct in emailing SUM 5659 and Wong's 5th affidavit to Raj is equally deserving of this Court's opprobrium. Aurol revealed a reprehensible disregard for the Court and a manifest willingness to undermine a litigant's right to avail itself of the Court's processes. In the present case, it is undisputed that copies of SUM5659, the interim order, Wong's 5th affidavit and Drew's letter 6 December 2010 had been sent to Aurol on or before 9 December 2010. [note: 21] It is also undisputed that Aurol had read these documents before his conversation with Raj. At paras 25, 28 and 29 of Aurol's 18th July 2010 affidavit, he deposed as follows:

> 25 On 9 December 2010, I was reading the backing sheet of Summons No. 5659/2010M, which contained the interim order, when I received a telephone call from Mr Conrad Jayaraj ("Conrad").
>
> ...
>
> 28 In the course of our conversation, I mentioned the application by the Applicant in Summons No. 5659/2010M.
>
> 2 9 *I told Conrad about the application because there was a comment at Paragraph 21 of Wong Weng Sun's 5th Affidavit of 3 Dec 2010 about journalists which I thought would interest him.*
>
> [emphasis added]

106 Specifically, in relation to Drew's letter of 6 December 2010, at para 34 of Aurol's 18th July 2010 affidavit, [note: 22] he deposed to the following:

> Drew & Napier LLC has referred to the contents of their letter of 6 December 2010 to Straits Law Practice LLC, but this letter was not within my contemplation when I spoke to Conrad on 9 December 2010. *I received this letter, but had not read it in detail.* All along, I acted under the

belief that it was the 4th Affidavit of Wong Weng Sun which the Applicant had sought to seal. [emphasis added]

107 Thus, Aurol's position was that he received the letter but "had not read it in detail". However, as the Judge pointed out at [62] of the judgment below:

> ... Nowhere does he explain what he understood that letter to mean, or otherwise explains why, having read it, he thought it was irrelevant or forgot all about it. The letter was a short one-page, three-paragraph, straightforward letter; there was nothing complex about its contents and it involved an application which the Defendants [in Suit 351] had to decide whether to contest or agree to. Why the contents of that important letter were not in his contemplation when he spoke to Mr Raj is also not explained nor elaborated upon. I do not even categorise that as an explanation, because I read this as a bald and evasive statement.

108 Indeed, given that Aurol had read the summons, the interim order and Wong's 5th affidavit in enough detail for him to even be aware of what para 21 of Wong's 5th affidavit said about journalists, it is inconceivable that he would not also have read Drew's letter of 6 December 2010 with equal attention. That letter directly contradicted his supposed belief that it was Wong's 4th affidavit that had been sealed. Likewise, the use of the words "5th supporting affidavit" in the interim sealing order ought, at least, to have given him cause for pause. While these factors do not resolve the ambiguity that was inherent in the order and so do not establish just what the AR's intention had been, they do shed light on Aurol's attitude and his intentions and more specifically his wanton disregard for the due processes of the Court.

109 The only proper thing for Aurol to have done in these circumstances would have been to clarify the proper ambit of the order before emailing SUM 5659 and Wong's 5th affidavit to Raj on 10 December 2010. He did not do this and his actions, though not amounting to a crime, reveal a reprehensible disregard for the Court and for the order that had been made.

110 The circumstances before and after the publication of the Today article also reveal the lack of probity in Aurol's conduct.

111 Aurol claimed that he did not ask Raj to keep his identity confidential when he sent him the summons and Wong's 5th Affidavit. [note: 23] This was contradicted by Raj's affidavit filed on 23 February 2011 in OS 74 of 2011 (at para 27), in which Raj deposed to the contrary. The fact that Mediacorp resisted the disclosure of the source sought by SCM in OS 74 of 2011, both before the AR and the High Court, lends credence to Raj's version of the events.

112 In any event, the matter might have been clarified if Aurol had simply disclosed the email he sent to Raj. However, Aurol claimed he was unable to do so as he had supposedly deleted the email from his computer, and was unable to retrieve it from the internet service provider.

113 Aurol's disclosure of the information to Raj, who was not only a journalist but one who had earlier written an article in Today about the on-going dispute in Suit 351, adds to the dark cloud that hangs over Aurol's conduct. In particular, it may be noted that Aurol had specifically drawn Raj's attention to para 21 of Wong's 5th affidavit, which explicitly states that one of the reasons for the sealing order was the high possibility that journalists might seek to examine the affidavits to find material for news articles. The Judge had likened this to "waving a red cloth in front of a bull and expecting it to ignore the instigation".

114 Aurol's furtive conduct throughout the entire episode also belies his claim that his disclosure to Raj was entirely innocuous. By a letter dated 14 December 2010 from Drew to Mediacorp, Drew had requested Mediacorp to reveal the source of the leak of information to Raj. If Aurol's claim that he and Raj were old friends is to be believed, Raj must have told Aurol about Drew's request. However, Aurol chose not to come forward. It was only after SCM filed proceedings against Mediacorp seeking disclosure of the source and after the AR's decision on 7 March 2011 ordering Mediacorp to reveal the source had been upheld on appeal by the High Court on 31 March 2011 and another Today Article had been published on 2 April 2011 [note: 24], stating that Mediacorp had been ordered to disclose the identity of the source, that Aurol finally surfaced on 6 April 2011 to reveal himself as the source and apologise "for breaching the interim order" (see [16] above). If his apology is to be taken at face value as a sincere expression of his contrition, then it appears that Aurol evidently believed his actions had been in breach of the order.

115 For all these reasons, although we allow Aurol's appeal we register our disapproval of his conduct by not awarding him the costs of the appeal. Each party will bear its own costs of the appeal. We also do not disturb the order of costs that was made by the Judge in favour of SCM in the proceedings below.

[note: 1] See Wong's 5th Affidavit at para 7 (Found at Appellant's Core Bundle Vol 2, Tab 5).

[note: 2] Appellant's Core Bundle Vol 2, Tab 4.

[note: 3] Appellant's Core Bundle Vol 2, Tab 7.

[note: 4] See Respondent's Supplementary Core Bundle at 82–83, 86.

[note: 5] *Ibid*.

[note: 6] 1st Affidavit of Aurol filed for OS 465 of 2011 at para 25; but corrected by para 35 of Appellant's Case.

[note: 7] Appellant's Core Bundle Vol 2, Tab 9.

[note: 8] See [41] of the judgment below.

[note: 9] See [43] of the judgment below.

[note: 10] See [44] and [47] of the judgment below.

[note: 11] See [55] of the judgment below.

[note: 12] See [63] of the judgment below.

[note: 13] See [63]–[66] of the judgment below.

[note: 14] See [69]–[71] of the judgment below.

[note: 15] See [83] and [86] of the judgment below.

[note: 16] See paras 137 and 138 of the Appellant's Case.

[note: 17] See para 487 of the Respondent's Case.

[note: 18] See Respondent's Case at para 254.

[note: 19] See Respondent's Supplementary Core Bundle at 79.

[note: 20] See Appellant's Core Bundle Vol 2, Tab 11.

[note: 21] See Respondent's Supplementary Core Bundle at 82-83, 86.

[note: 22] See Respondent's Supplementary Core Bundle at 88.

[note: 23] See para 36 of Aurol's 18th July 2010 affidavit.

[note: 24] See Respondent's Supplementary Core Bundle at 17.