IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1992] SGCA 44

CA 129/1990

Between

Nikkomann Co Pte Ltd

… *Appellant*

And

Yulean Trading Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Injunctions

Version No 1: 11 Sep 2026 (01:05 hrs)

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Nikkomann Co Pte Ltd and Others v Yulean Trading Pte Ltd

[1992] SGCA 44

CA 129/1990
Karthigesu J; Warren Khoo L H J; Yong Pung How CJ
30 June 1992

1 Cur Adv Vult

2 On 11 April 1990, the respondents, Yulean Trading Pte Ltd, issued a generally indorsed writ against the appellants. In summary, Yulean claimed:

> (1) a declaration that the appellants were jointly and/or severally constructive trustees of three lots of timber comprised in three bills of lading identified in the indorsement;
>
> (2) an order that the appellants deliver up to Yulean the originals of the bills of lading;
>
> (3) further or alternatively, in the event that the goods comprised in the bills of lading had been sold, a declaration that the appellants were jointly and/or severally constructive trustees of the proceeds of sale to the extent of $171,547.05; and
>
> (4) an injunction restraining the appellants from disposing of or otherwise dealing with the bills of lading and the goods comprised therein, and any assets of the appellants within or outside Singapore, including credit balances in any accounts, subject in all cases to the limit of $171,547.15 (sic).

3 On the same day, Yulean applied, ex parte, for certain interim orders before Sinnathuray J. These were granted, and they may be summarized as follows (following the paragraph numbers of the order of court):

> (1) an order that the appellants, within 24 hours, deliver up the original bills of lading;
>
> (2) an order restraining the appellants from disposing of or otherwise dealing with the bills of lading and the goods comprised therein, and, subject to the limit of $171.547.05, any assets of the appellants and credit balances in any accounts held by the appellants;
>
> (3) an order that each of the appellants, within 24 hours, make and serve on Yulean`s solicitors an affidavit setting forth:
>
> (a) whether the goods comprised in the bills of lading have been sold and, if so, particulars of the sale;

4 (b)

5 if the goods have been sold, the whereabouts of the proceeds;

6 (c)

7 the whereabouts of the goods;

> (4) an order that the appellants, within 24 hours, give discovery of all documents relating to all transactions `comprised in and contemplated by the bills of lading` and any sale or purported sale of the goods referred to or comprised in the bills of lading;
>
> (5) an order giving Yulean and their solicitors liberty, upon giving three hours` notice, to inspect and take copies of all such documents at addresses indicated;
>
> (6) an order giving Yulean and their solicitors liberty, upon giving three hours` notice, to inspect and take copies of all entries in the books of the Singapore branch of the Bank of America relating to accounts held in the name of any of the appellants.

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8 Yulean filed a notice of motion inter partes to continue the interim orders and the appellants filed a notice of motion to discharge them. Both motions were heard by Tan Teow Yeow JC [as he then was]. On 29 November 1990, the learned judicial commissioner decided that the interim injunction issued on 11 April 1990 should continue and he dismissed the appellants` application for discharge. From these decisions, the appellants appealed to this court.

9 Tan Teow Yeow JC also granted leave for Yulean to apply for committal on the ground that the appellants had wilfully failed to comply with the terms of the interim orders. At the outset of the hearing of the appeal, however, we were told that this matter was not before us and we need not be concerned with it. So the only question before us is whether the interim orders should have been continued or whether they should have been discharged.

10 **The facts**

11 In the ex parte application, the material before Sinnathuray J consisted of the generally indorsed writ of summons and the affidavit of Lean Peng Khoon, the administrative officer of Yulean and a sales executive of Lumber and Plywood Pte Ltd, an associate company of Yulean. By the time the matter went before Tan Teow Yeow JC, there were at least a dozen more affidavits filed. An amended statement of claim and a defence had also been filed. The issues and the remedies sought were thereby more clearly defined.

12 The facts, as they presented themselves before the learned judicial commissioner, were as follows. Yulean was a company dealing in the import and export of timber. The first appellants, Nikkomann Co Pte Ltd, were a company dealing in the manufacture of plywood and veneer. Tay, the second appellant, was a director of Nikkomann. Ong, the third appellant, was,

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according to him, a marketing director in the employ of Nikkomann. Tay and Ong were sued in their personal as well as representative capacity.

13 Tay had, for some years, had dealings with Lumber and Plywood Pte Ltd, an associate company of Yulean under the charge of Kwok Keng Fatt. These dealings ceased in early 1988 when Tay`s company, Arcadia Wood Pte Ltd, ceased trading. In late 1989, Tay made approaches to Kwok to get Lumber and Plywood to enter into a joint venture with Nikkomann for trading in timber.

14 On 29 December 1989, Tay sent a draft set of terms for the joint venture to Kwok. Under the proposal, Nikkomann was to be responsible for marketing and locating supplies of timber and related products, for resale, and Yulean was to provide financial assistance. Nikkomann was to be the contracting party in all transactions. For transactions by means of letters of credit from buyers, the letter of credit would be in favour of Nikkomann and Nikkomann would assign it to Lumber and Plywood. In return for the financial assistance of Yulean, Yulean would receive 30% of the profit on transactions using letters of credit. There was another form of transactions, described as `documentary proofs` transactions, in which Yulean would receive 35% of the profit.

15 It was decided on Lumber and Plywood`s side that Yulean, instead of Lumber and Plywood, should deal with Nikkomann in relation to the proposed joint venture, and that Kwok and Lean would be Yulean`s representatives. On 8 January 1990, a meeting was held between Tay and Ong for Nikkomann, and Kwok and Lean for Yulean. There appears to be little or no dispute that they reached an agreement substantially in terms of the draft proposal of 29 December. The only or only substantial dispute is whether the parties agreed, as Yulean alleges and as Nikkomann denies, that there were additional terms agreed, including one whereby the title to and beneficial ownership of all bills

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of lading and the goods comprised in them should be `in the name of Yulean`. These alleged additional terms are not embodied in any document.

16 On 12 January 1990, Ong informed Kwok that Nikkomann had entered into a contract with a purchaser by the name of Philippe Desmoulin & Co for the sale of 400cu m of Sabah dark red seraya sawn timber. He also told Kwok that he had obtained the supply from a company in Sabah, Seratim Sdn Bhd. He asked Kwok to open a letter of credit in favour of Seratim. Kwok requested Ong to fax a copy of Philippe Desmoulin`s letter of credit to him, but Ong was unable to do so and said it would be opened soon. Ong faxed what purported to be contracts entered into between Nikkomann and Philippe Desmoulin and between Nikkomann and Seratim.

17 On 15 January 1990, Yulean arranged for a letter of credit to be opened by Bangkok Bank in favour of Seratim for the sum of about M$144,500.

18 On 2 February 1990, in circumstances in regard to which the parties have given different accounts, Yulean arranged with Bangkok Bank for another letter of credit for the sum of M$81,250, to be opened in favour of another supplier, Quickways Sdn Bhd, for another lot of sawn timber, about 130 tons of dark red seraya, for on-sale to Philippe Desmoulin. Tay told Kwok that a letter of credit would be established by Philippe Desmoulin soon.

19 Thereafter, Yulean repeatedly asked Nikkomann for a copy of the letter of credit opened by Philippe Desmoulin, but to no avail. In his affidavit in reply to these allegations, Tay says that Nikkomann repeatedly asked Philippe Desmoulin`s agents in Singapore to press Philippe Desmoulin for the letter of credit, but Philippe Desmoulin failed to do so.

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20 On 15 March 1990, Tay told Kwok that the timber market had become depressed and that Philippe Desmoulin had pulled out of the purchase. He suggested flying to France with Ong to seek alternative purchasers. As a result of discussions of which different accounts have been given by the parties, the bills of lading relating to the goods were altered to show Nikkomann as the party to be notified instead of Yulean.

21 At this time, Nikkomann gave a cheque for $170,000 to Yulean. It was drawn on Citibank and post-dated 31 March 1990. According to Yulean, this was as security in exchange for Yulean agreeing to the change in the bills of lading. According to Nikkomann, it had nothing to do with that. Nikkomann, however, did not say what then it was for.

22 Ong and Tay went to Europe on 16 March 1990. On 23 March, Ong sent a message from a hotel in Utrecht to Kwok and Lean, purportedly reporting that the market situation in France was very bad, the importers were heavily over-stocked and unable to buy. He also said that he and Tay were trying their utmost to sell the timber. On 26 March 1990, Tay and Ong sent a message that they were still visiting customers. On 27 March, they sent a message that they had found prospective buyers. Then on 28 March, Ong sent a message that a firm bid had been received, but no details of the buyer or the price were mentioned. All these messages turned out to be bogus, as we shall see in a moment.

23 On 2 April 1990, when Tay and Ong returned from their trip, a meeting was held at Nikkomann`s offices. Again, there are differences, none material for present purposes, in the parties` accounts of what was said. According to Lean, Tay told Kwok and Lean that the goods had been sold but the purchasers had wrongly transferred the purchase moneys into Nikkomann`s account with the Bank of America instead of Citibank and that the Bank of America had

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refused to release the money. According to Lean, Tay also requested Kwok and Lean not to pay in the $170,000 Citibank cheque which had been handed over on 16 March 1990 as there were not sufficient funds in Nikkomann`s account to meet the cheque.

24 Again, according to Lean, he and Kwok pressed Tay and Ong to give them the identity of the purchasers and documentary proof of the sale, but Tay and Ong could not do so.

25 In Tay`s affidavit filed on 24 April 1990, he denied that Kwok and Lean had been told that the sale proceeds would be deposited in Nikkomann`s account with Citibank and that the sale proceeds had been wrongly transferred to Nikkomann`s Bank of America account.

26 As for the allegation by Lean that he and Kwok pressed Tay and Ong for details of the sale, all that Tay said in his affidavit was this: `... the plaintiffs merely asked for verbal information regarding the eventual sale which was supplied by the first defendants but did not at any time press for documentary proof of the sale transaction.`

27 Putting these differences aside, what remains is the fact that Tay and Ong did not give to Yulean`s representatives any detailed information or documents about the sale.

28 On 11 April 1990, the $170,000 Citibank cheque which had been given to Yulean was dishonoured on presentation. On the same day, Yulean, suspecting fraud, commenced an action and obtained the interim orders mentioned above.

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29 In the course of inspecting documents disclosed by Nikkomann in compliance with the interim orders, Yulean`s solicitors discovered that, contrary to the messages which Tay and Ong had sent from Europe, the entire lot of timber had in fact been sold to a Belgian firm, Vandecasteele Houtimport, by 20 March 1990. This was evidenced by a copy of a letter from Nikkomann to Vandecasteele of that date, which letter also acknowledged receipt of a bank draft for the sum of M$339,952.56 from Vandecasteele. The three amended bills of lading also appear to have been handed over to Vandecasteele on that date.

30 Yulean`s solicitors also discovered that Nikkomann`s account at the Bank of America had, on 23 March 1990, been credited with a sum of $233,717.39, the Singapore dollar equivalent of the sum of M$339,952.56 received from Vande. The relevant credit advice from the Bank of America was also found.

31 The position therefore is that at no time before the issue of the interim orders did the appellants inform Yulean of the fact that the timber had been sold to Vandecasteele and for how much, and what had become of the proceeds. At no time did the appellants take steps to account to Yulean for the proceeds. It was as a result of disclosures compelled by the interim orders themselves, that these facts were discovered.

32 **Issues before the court**

33 The grounds on which the appellants relied before the learned judicial commissioner and which were pursued before us to have the interim orders set aside were the following:

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> (A) in relation to both the Mareva injunction and the Anton Piller orders, the appellants said that Yulean had failed to make full and frank disclosure and had made material misrepresentations in the ex parte proceedings before Sinnathuray J;
>
> (B) in relation to the Mareva injunction, the appellants said that Yulean had not satisfied the requirements (1) that there should be a good arguable case, and (2) grounds for believing that the appellants` assets might be removed from the jurisdiction;
>
> (C) in relation to the Anton Piller orders, the appellants said:
>
> (i) that compliance by the appellants with the Anton Piller orders would infringe the appellants` privilege against self-incrimination;

34 (ii)

35 that there was no evidence that the appellants might destroy any incriminating documents before an inter partes application could be made;

36 (iii)

37 that Yulean failed to comply with their undertaking to inform the appellants that the information given to them in response to the orders would not expose them to the risk of prosecution and that such information would not be used in any criminal proceedings against them except a prosecution for perjury.

38 The Mareva injunction referred to may be taken as referring to order (2) set out earlier in this judgment. The Anton Piller orders referred to were variously identified as orders (3) and (4) before the learned judicial commissioner and as (3), (4), (5) and (6) before us. So far as the self-incrimination point is concerned, however, the complaint before us at any rate appears to be confined to order (3).

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39 **Views of court below**

40 The learned judicial commissioner, after analysing the facts, was of the view that there was very little doubt that Yulean had a good arguable case. He said that the conduct of the appellants raised many questions touching on their honesty in relation to the transactions. He rejected the appellants` argument that Yulean had failed to make full and frank disclosure in their ex parte application. He was also satisfied, on the evidence, that unless the appellants were restrained, there was a real risk of dissipation of their assets. He also rejected the appellants` argument that the Anton Piller order made infringed the appellants` privilege against self-incrimination. The learned judicial commissioner therefore ordered that the interim orders issued on 11 April 1990 continue, and dismissed the appellants` application to discharge them.

41 **Material non-disclosure argument**

42 The appellants` counsel raised the point that in the ex parte application before Sinnathuray J, Yulean had failed to make a full and frank disclosure of material facts. The facts which he said should have been disclosed were: firstly, that Yulean had not paid for the whole of the purchase price of the timber, and that the total amount of the two letters of credit which Yulean had opened amounted to only less than half of the purchase price of the timber. If these facts had been disclosed, it might, he said, have influenced the judge`s view whether Yulean were beneficial owners of all the timber as alleged by them. Secondly, counsel said that Yulean had made a misleading statement to the effect that Arcadia Wood had been wound up when this was not so.

43 We shall deal with the second matter first. Lean, in his affidavit of 11 April 1990 filed in support of the ex parte application, stated that Tay

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> *... had for the past ten years been maintaining business relationship with Kwok, Bobby Lean and Lumber & Plywood. However, all business activity between them came to a stop in early 1988 when Tay`s company, Arcadia Wood Pte Ltd, was wound up.*

44 The appellants said that this statement was not correct. They produced a copy of a Registry of Companies search to show that Arcadia Wood had not been wound up. They said that Arcadia Wood had merely ceased operations, but the business relationship between Kwok and Tay still continued. Tay, they said, was still active in the timber trade, operating under Nikkomann.

45 Lean explained that Tay had told Kwok in early 1988 that he was in the process of giving up his business in Arcadia Wood, and this gave Kwok the impression that he was winding up the company. Lean also said that all business activities between Kwok and Tay came to a stop in early 1988 until the end of 1989.

46 The appellants said that Yulean had thus misled the court in their ex parte application. This was material, they said, because the statement gave the impression that the appellants were of poor and dubious financial standing and would dissipate their assets. The judicial commissioner did not specifically deal with this point. Presumably, he did not think much of it.

47 For our part, we do not see how this inaccuracy in the description of the status of Arcadia Wood could have been of any significance. The statement appeared among the introductory paragraphs of Lean`s affidavit, and nothing at all was made of it. Lean did not suggest that because of this there was a likelihood of the appellants dissipating their assets. His allegation of the fear of this happening was based entirely on the conduct of the appellants after the

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agreement to go into the joint venture. We would regard this inaccuracy in Lean`s supporting affidavit as not material at all.

48 **Contract price non-disclosure**

49 The appellants said that the prices payable to Seratim and Quickways, the timber suppliers, were M$297,500 and M$227,500 respectively, making a total of M$525,000, whereas the letters of credit that Yulean opened were for M$144,500 and M$81,250, making a total of M$225,750, only about half the total price of the timber. The appellants claimed that they paid the difference to the suppliers.

50 Yulean admitted that copies of the two alleged contract notes had been faxed to them. In Lean`s affidavit in support of the application before Sinnathuray J, however, he exhibited only a copy of the purported contract with Seratim showing a contract price of M$297,500. No mention of the price was made in the body of the affidavit itself. The purported contract with Quickways was not exhibited at all, nor was there any mention in the affidavit as to the amount of this contract.

51 In Lean`s affidavit, he claimed that it was agreed at the meeting of 9 January 1990 that `the title to and beneficial ownership of all bills of lading and the goods referred to or comprised therein be in the name of the plaintiffs`. In the indorsement on the writ, as stated above, Yulean claimed a declaration that the appellants were constructive trustees of the three lots of timber comprised in the bills of lading. There was no mention that Yulean`s beneficial interest was limited to the $171,547.05 claimed by Yulean.

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52 For these reasons, the appellants said that if the total price had been disclosed, it might have `influenced the judge`s view whether the plaintiffs were beneficial owners of all the timber as alleged by them`.

53 The learned judicial commissioner dealt with the matter briefly as follows:

> *The defendants argued that the Mareva injunction ought to be discharged as the plaintiffs had failed to make full and frank disclosure in their ex parte application. I disagreed. The plaintiffs had made all necessary disclosures to the judge based on the information available to them then.*

54 We should make two points regarding the way the learned judicial commissioner approached this question as set out in the passage quoted above. Firstly, contrary to what the learned judicial commissioner said, it was not only in relation to the Mareva injunction that the appellants made the criticism of non-disclosure. Their criticism extended to the Anton Piller orders as well. The requirement of full and frank disclosure indeed applies to all ex parte applications.

55 Secondly, if in saying that Yulean had made all the necessary disclosures based on the information available, the judicial commissioner meant, as he seems to have done, to include the disclosure of the total price of the two lots of timber, he was clearly wrong. Yulean admitted that the purported purchase contracts with Seratim and Quickways had been faxed to them before Yulean opened the letters of credit. Yulean therefore did have the information on the total price. Yulean, however, did not disclose this to the learned judge in the ex parte application. They exhibited the Seratim contract, and not the Quickways contract, and they did not say anything about it in the affidavit itself.

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56 The manner in which the learned judicial commissioner put the position therefore leaves some doubt whether he appreciated the evidence and the submission made to him, and whether he properly dealt with the matter. In such circumstances, we in the appellate court are entitled or obliged to consider the question afresh.

57 The question that we have to consider is whether the price that is said to be payable to the suppliers is of such materiality as to justify or require the immediate discharge of the interim orders without examination of the merits. This depends on the importance of the fact to the issue which was to be decided by the judge hearing the ex parte application.

58 Unfortunately, so far as can be seen from the record of proceedings, Yulean`s counsel did not deal with the point at all, even though it had been specifically raised. Neither did he deal with it in his written case or in oral argument before us, even though, again, this point was specifically raised.

59 We see the position as follows. In their application before Sinnathuray J, Yulean claimed without qualification that the appellants were constructive trustees of the bills of lading and the goods comprised therein. On the other hand, however, as can be seen from the indorsement of the writ and the orders granted, Yulean took care to restrict their claims to the proceeds of sale to $171,547.05. Lean, in his supporting affidavit, made it clear that this was made up of Yulean`s claims of: (a) $163,752.39, the Singapore dollar equivalent of the value of the two letters of credit that Yulean had established; (b) two weeks` bank interest (any excess beyond two weeks being borne by Nikkomann) of $3,275.05; and (c) Yulean`s profit of $4,519.61. Yulean also took care to confine the monetary limit of the Mareva injunction which they asked for to the sum of $171,547.05.

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60 Although Yulean might be criticized for wording their constructive trustee claim somewhat too broadly, it must have been clear that their beneficial interest in the goods could not exceed their monetary claim. The essence of their claim, not yet then particularized in a statement of claim but sufficiently apparent from the indorsement on the writ and from Lean`s supporting affidavit, was that the appellants had practised frauds on them and they sought to recover their losses. The object of the orders sought was to protect the status quo and to prevent the further perpetration of the frauds alleged. We do not think that it could possibly have mattered to the learned judge whether Yulean had only a partial or an entire interest in the bills of lading or the goods comprised in them. So far as restraining dealings with the appellants` assets is concerned, Yulean were scrupulous in limiting it to the amount of their claim. In the circumstances, we are unable to agree with the appellants` counsel`s submission that this omission on the part of Yulean was material.

61 **Arguable case issue**

62 Counsel said that the judicial commissioner`s view that Yulean had an arguable case was based on certain findings of fact which he had made on the basis of the conflicting affidavit evidence before him.

63 We agree that it is no part of the court`s function at this interlocutory stage to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend. It is unfortunate that the learned judicial commissioner in his judgment did seem to come to certain conclusions of fact where the evidence was conflicting. As an example, he stated as a fact that the parties had agreed at the meeting of 8 January 1990 that title to and ownership of the timber purchased from Seratim and Quickways was to vest in Yulean, when this point was disputed by Nikkomann.

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64 However, we are of the view that the learned judicial commissioner was fully justified in coming to the view that Yulean had an arguable case. He had before him the amended statement of claim of Yulean and the defence of the three defendants. He had also before him the numerous affidavits filed on behalf of the parties. He was entitled to take into account all the evidence disclosed as well as the pleadings.

65 At this point, we ought to say that the learned judicial commissioner was also entitled to take into account facts and documents disclosed or discovered in compliance or in pursuance of the interim orders, particularly the clandestine sale to Vandecasteele and the disposal of the proceeds of the sale, even though the question whether the order should have been made in the first place was being raised before him. In this respect, we respectfully follow the approach of the English Court of Appeal in ***WEA Ltd v Visions Channel 4 Ltd*** .1

66 The statement of claim set out the facts which we have set out above, but, as to be expected, in a more controversial manner. In their defence, the appellants agreed that there was a profit-sharing joint venture, but they said that the arrangement was for Yulean to provide only part of the financing required, and they thus denied that Yulean had the sole beneficial ownership of the timber. They said that Nikkomann had paid the balance of the purchase price to Seratim and Quickways. As for the dishonour of the Citibank cheque for $170,000, the appellants said that there was an understanding that Yulean would not present it for payment until they were advised that Nikkomann`s account was in funds. The appellants did not deny the sale of the timber to Vandecasteele, but said that part of the proceeds had to be used and had been used to pay off Seratim and Quickways. It is fair to say that the rest of the defence consisted largely of mere denials of the specific allegations of fact in the statement of claim, and contained the appellants` account of the events

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leading to Yulean`s claims varying only in details from Yulean`s account of these events.

67 In these circumstances, it is our view that the learned judicial commissioner was quite entitled to come to the view that the appellants` conduct raised questions touching on their honesty. The extraordinary and clandestine manner in which the appellants had gone about disposing of the timber, and the length to which they had gone in concealing the transaction from Yulean, gave ample ground for such a comment. There was also ample ground on the facts, taking into account the appellants` defence, for the learned judicial commissioner to find that Yulean had an arguable case, inter alia, of conspiracy to defraud and breach of contract, which they had set up against the appellants.

68 **Risk of dissipation**

69 Counsel submitted that Yulean had failed to show a real risk of dissipation of assets on the part of the appellants. He referred to the case of ***Art Trend Ltd v Blue Dolphine Pte Lt*** **d** [1983] 1 MLJ 25 in which Lai Kew Chai J, in discharging a Mareva injunction, referred to the fact that throughout the subsistence of the relationship between the parties in that case there had been no hint of any intention on the part of the defendants to dispose of their properties. Counsel argued that, in the instant case, Yulean`s directors and officers and Yulean`s associated company, Lumber and Plywood, had had business dealings with Tay for the last ten years, but there was no complaint that Tay had previously been dishonest or that he was uncreditworthy.

70 It seems to us that, in the light of the evidence, this submission on behalf of the appellants is somewhat naive. It overlooks the thrust of the justifiable complaint by Yulean that the appellants had not been honest in their dealings

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with Yulean in regard to this joint venture. The learned judicial commissioner said that the risk of dissipation was amply demonstrated by the fact that although funds were available on 23 March 1990, the post-dated cheque issued to Yulean was nevertheless dishonoured. We see no ground for disturbing his conclusions.

71 **Privilege against self-incrimination**

72 Counsel for the appellants submitted that para 3 of the order made by Sinnathuray J infringed their privilege against self-incrimination. He cited ***Riedel-de Haen AG v Liew Keng Pang*** 3 and **Rank Film Distributors v Video Information Centre** [1982] AC 380[1981] 2 All ER 76

73 Paragraph 3 of the order reads as follows:

> *Further or alternatively, the first, second and third defendants do within 24 hours each make and serve on the plaintiffs` solicitors an affidavit setting forth and disclosing to the plaintiffs:*
>
> (a) whether the goods referred to and/or comprised in the bills of lading, or any part thereof have been sold and if so, the name, address and other relevant particulars of the purchaser/s, the consideration for such purchase, and the quantity of the goods thereunder;
>
> (b) in the event the goods referred to and/or comprised in the bills of lading or any part thereof have been sold, the whereabouts of the proceeds of sale of the said goods or any part thereof including but not limited to the reference number/s of the bank account/s into which the said proceeds of sale have been deposited, the name of the bank/s and the branch/es in which the account/s is or are kept, the name of the person/s in which the account/s is or are held and the capacity in which such person or persons hold/s the account/s;
>
> (c) the whereabouts of the goods referred to and/or comprised in the bills of lading ... .

74 The complaint of the appellants is that the information which they were compelled by the court to disclose tended to incriminate them and expose them

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to a charge of conspiracy under s 120A (criminal conspiracy) of the Penal Code (Cap 224) (`the Code`).

75 This part of the order was in fact complied with by Tay without objection. He stated in his affidavit of 17 April 1990 that the goods had been sold to Vandecasteele for the net price of M$377,725.07 and that M$339,952.56 (being 90% of the net price) had been paid into Nikkomann`s account (identified) with the Bank of America.

76 It should be noted that the appellants raised the question of privilege only in relation to para 3 of the order, but not to paras 4, 5 or 6 relating to the discovery and inspection of documents. The information about the sale to Vandecasteele and the proceeds of the sale was contained in the documents subject to discovery and inspection pursuant to paras 4, 5 and 6 of the order. As the privilege against self-incrimination is available in regard to documents subject of discovery as well as in information to be supplied, it seems odd that the appellants should have raised the question of privilege only in relation to the information they were required to supply under para 3.

77 Can a point be taken against the appellants that they had complied with the order without objection, and that it was too late for them now to object? This involves the question whether it was open to them, when the order of court was served, to object to providing the information on the ground of privilege.

78 In ***Wardle Fabrics Ltd v G Myristis Lt d*** 5 Goulding J said that if the court makes an order within its jurisdiction, a party is bound to obey it at the risk of contempt proceedings if he does not, and that the subsequent discharge of the order as having been irregularly obtained would not in logic and principle affect the disobedient party`s liability to penalties for contempt.

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79 In ***Columbia Picture Inc v Robinson*** 6Scott J agreed with this statement. In ***Hallmark Cards Inc v Image Arts Ltd*** ,7 however, Buckley LJ said:

> *While the order stands, the party who refuses access to his premises is in default of the order. But if the party against whom the order is made were to succeed in getting the order discharged, I cannot conceive that that party would be liable to any penalties for any breach of the order of which he may have been guilty while it subsisted, for if the order is discharged upon the footing that it ought not to have been made, then the contempt is in truth no contempt, although technically no doubt there is contempt.*

80 In ***WEA Ltd v Visions Chanel 4 Ltd*** 1 Donaldson LJ expressed the opinion that the defendants, when served with an Anton Piller order, could, if they had wished, have refused immediate compliance and instead have made an urgent application to have the order set aside. He suggested that this was implicit in the paragraph of the order giving the defendants liberty to move to vary or discharge the order on 24 hours` notice to the plaintiffs` solicitors. Donaldson LJ, however, took care to point out the risk of the parties choosing this course being held in contempt. He referred to the ***Hallmark*** case.7

81 The point was not fully argued before us, but as at present advised, we tend to agree with the views of Buckley LJ and Donaldson LJ. It seems to us that if the appellants were true to their position that the information they were required to provide was privileged, they should have taken immediate objection and made an urgent application to court to have the order discharged on that ground.

82 Needless to say, a party in the appellants` position should contemplate such a course only on the clearest and firmest advice, as he would be visited with dire consequences in the event the objection taken turns out to have been

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misconceived. The time to take the objection is on being served with the order, and the objection should be by way of response to the order. If he does not object then, but instead provides the information required by the order, we are of the view that he is precluded thereafter from raising the point.

83 There is analogy in this respect in trial proceedings; a witness who wishes to object to answering a question on such a ground has to take the objection when the question is asked. If he does not do so, his answer is not protected by the privilege: see ***R v Sloggett*** .8

84 The appellants not only did not object; they provided the answers to para 3 of the order, and did not take out a motion for discharge of the court order until 31 May 1990 although the order must have been served on them soon after it was issued on 11 April.

85 **Risk of destruction of incriminating documents**

86 Appellants` counsel, citing Ormrod LJ`s judgment in ***Anton Piller KG v Manufacturing Processes Ltd & Ors*** ,9 submitted that there was no evidence that there was a possibility that the appellants might destroy incriminating documents before any application inter partes could be made.

87 We can dispose of this argument quite shortly. The appellants` conduct in relation to the execution of the joint venture, which we have referred to more than once, was sufficient to give rise to concern that they might try to cover their trails by putting incriminating documents out of Yulean`s reach. In such matters, it would be unreasonable to expect direct evidence. The court is justified in drawing inferences from the demonstrated propensity of a party.

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88 **Breach of undertaking**

89 One of the undertakings given to the court on behalf of Yulean against which the ex parte orders were made was that Yulean would inform the appellants that the information given by them in response to the orders would not subject them to the risk of prosecution and that the evidence would not be used in any criminal proceedings except a prosecution for giving false evidence by their answers. The appellants` counsel contended that if such an undertaking is not included in an Anton Piller order, its omission would render such an order invalid. By the same token, he said that if such an undertaking were included, but the plaintiff fails to carry out the undertaking, that would also make the order invalid.

90 The complaint was that Yulean breached the undertaking in not specifically informing the appellants in terms stated above. As the undertaking and its terms appear clearly in the introductory paragraphs of the order of court, the appellants were well aware of them. Although in strict compliance with their undertaking, one might say that Yulean should have formally told the appellants, but we really cannot see what harm has resulted from Yulean`s omission to do so; we do not see any point in insisting on Yulean telling the appellants what they could plainly see on the document served on them.

91 Furthermore, it should be noted that the offence of criminal conspiracy under s 120A of the Code, which the appellants` counsel mentioned in connection with his point about self-incrimination, is an offence of which cognizance could be taken only upon the complaint of the public prosecutor (see s 130 of the Criminal Procedure Code (Cap 68)). In the normal course, it is the public prosecutor or one of his deputies who might be expected to conduct such criminal proceedings. It is difficult to see how the undertaking given by Yulean

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could have any binding effect on the initiation and conduct of such criminal proceedings.

92 **Conclusion**

93 In the circumstances, we dismiss the appeal with costs. We order that the sum deposited as security for the costs of this appeal be paid to Yulean`s solicitors to account of the respondents` costs of this appeal.

94 **Outcome:**

Karthigesu J
Warren Khoo L H J
Yong Pung How CJ

Raymond Chan (Chan Tan & Partners) for the appellants
Andre Yeap (Allen & Gledhill) for the respondents

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