

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 24

Suit No 753 of 2015 (Summons No 4665 of 2016)

Between

Toyota Tsusho (Malaysia) Sdn Bhd

... Plaintiff

And

- (1) Foo Tseh Wan
- (2) Wah Sin Industrial Pte. Ltd.
- (3) Vintech Engrg Pte. Ltd.
- (4) TKA Amusement (S) Pte. Ltd.

... Defendants

GROUND S OF DECISION

[Contempt of Court] — [Civil Contempt]

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Toyota Tsusho (Malaysia) Sdn Bhd

v

Foo Tseh Wan and others

[2017] SGHC 24

High Court — Suit No 753 of 2015 (Summons No 4665 of 2016)

Lai Siu Chiu SJ

21 November 2016

10 February 2017

Lai Siu Chiu SJ:

Introduction

1 This action concerned a conspiracy which Toyota Tsusho (Malaysia) Sdn Bhd (“the plaintiff”) alleged was committed by its former employee and senior manager Foo Tseh Wan also known as Henry Foo (“the first defendant”) with the help and connivance of Wah Sin Industrial Pte Ltd (“Wah Sin”), Vintech Engrg Pte Ltd (“Vintech”) and TKA Amusement (S) Pte Ltd (“TKA”) who are the second, third and fourth defendants respectively. The second, third and fourth defendants will henceforth be referred to collectively as “the defendants”. All four defendants will be referred to collectively as “the four defendants”.

2 The plaintiff is a Malaysian company and is a subsidiary of Toyota Tsusho Corporation, a company listed on the Tokyo and Nagoya Stock

Exchanges. It is an international trading house and carries out the business of *inter alia* import, export and domestic businesses involving products such as automotives, plastics, chemicals, machinery, and metals. The plaintiff's Malaysian head office is in Kuala Lumpur and it has several offices around Malaysia, including an office in Johor Bahru, state of Johor ("the JB office").

3 The first defendant was the most senior employee in the JB office until his abrupt resignation on 23 June 2015. He had assisted the plaintiff in the setting up of the JB office's operations in 2008. While in the plaintiff's employment, the first defendant was in sole charge of the buying and selling of plastics and the day-to-day operations of the JB office.

4 The second to fourth defendants are Singapore private companies which purportedly supplied and delivered superior engineering plastics to the plaintiff.

5 In the writ of summons filed on 24 July 2015, the plaintiff claimed the following reliefs against all four defendants:

- (a) Damages for fraud and/or conspiracy and/or deceit and/or misrepresentation and/or breach of contract; and/or
- (b) Monies had and received; and/or
- (c) An account of profits and the payment of such sums found to be due to the plaintiff on the taking of such an account; and/or

(d) A declaration that the defendants are constructive trustees of the plaintiff or alternatively that the defendants be liable to account to the plaintiff as if they were constructive trustees; and/or

(e) Exemplary and/or punitive damages; arising out or in relating to the defendants' involvement in a scheme to defraud the plaintiff and/or to the benefit the defendants at the expense of and/or cause wrongful loss to the plaintiff.

6 In its statement of claim filed on 19 August 2015, the plaintiff alleged that the defendants had acted in concert with the first defendant to defraud the plaintiff through a series of fictitious transactions involving the purported sale and purchase of superior engineering plastics. The scale of the fraud perpetrated against the plaintiff is reflected in the fact that the plaintiff's claim against the defendants jointly and severally is for RM82,261,271.50. As against Vintech only, the claim is for RM27,597,585.51.

7 As these grounds of decision only involve Vintech, the court will not elaborate on the roles of the first, second and fourth defendants in the conspiracy. Vintech's founder and one of its directors is Gan Teck Beng also known as Vincent Gan ("Gan").

8 I should point out that by an order of court dated 23 September 2015 made in Summons No 4034 of 2015, the plaintiff consented to a stay of proceedings in this suit against Vintech on condition that Vintech did not challenge parallel proceedings taken out against the company in the Malaysian High Court in Kuala Lumpur by the plaintiff ("the Malaysian proceedings").

Similar stay orders were granted to the other three defendants as they too were defendants in the Malaysian proceedings.

9 In the course of these proceedings, the plaintiff secured innumerable orders against some or all the defendants the chief of which were: (i) a worldwide *Mareva* Injunction in Summons No 3622 of 2015 (“the *Mareva* Injunction”) against the four defendants and (ii) an *Anton Piller* order against the defendants (“the *Anton Piller* Order”) in Summons No 3624 of 2015. Both orders were obtained on 27 July 2015.

10 Besides a freezing of their bank accounts and other assets, the terms of the *Mareva* Injunction required the four defendants to inform the plaintiff in writing of all their assets whether in or outside Singapore and whether in their own name or not and whether solely or jointly owned, giving the value, location and details of all such assets (“the Disclosure Order”). The requisite information was to be confirmed in an affidavit which had to be served on the plaintiff’s solicitors within 14 days after the order of court for the *Mareva* Injunction had been served on the four defendants.

11 The *Mareva* Injunction relating to Vintech was for the sum of RM28,180,781.00. A separate *Mareva* Injunction and Disclosure Order was obtained against Gan personally by the plaintiff on 19 August 2015 in Suit No 834 of 2015 (“Suit 834”) in which one Lee Haw Ling (“Lee”) and Gan are the first and second defendants respectively. Lee is the managing director of Wah Sin and a director of TKA. In compliance with the Disclosure Order made in Suit 834, Gan filed an affidavit of his personal assets and means on 7 September 2015 (“Gan’s affidavit of means”).

12 In compliance with the Disclosure Order, Gan filed an affidavit of assets and means on behalf of Vintech on 14 August 2015 (“Vintech’s affidavit of means”). The plaintiff was dissatisfied with Vintech’s affidavit of means, asserting that Gan had failed to account for cash withdrawals totalling US\$10,136,400 (“the US\$ sum”) from Vintech’s United Overseas Bank Limited account no. XXX-XXX-XXX-X (“Vintech’s Account”) over the course of 2014 and 2015.

13 As for Gan’s affidavit of means filed on 7 September 2015, he had there disclosed his personal assets as (i) a bank account with a balance of S\$6,302.06; (ii) a joint bank account with his wife with a balance of S\$10,860.45; (iii) a public housing flat (“HDB flat”) jointly owned with his wife; (iv) shares in a private company; (v) shares in Vintech; (vi) sole proprietorship of Vintech Engineering; (vii) a joint bank account with his mother with a balance of S\$8,839.13; (viii) a motor vehicle bought with hire-purchase financing worth about S\$49,804 as of 24 August 2015; (ix) a private apartment in Johor Bahru; (v) a Changi Golf Club membership and (xi) a bank account in Malaysia to service the mortgage instalments on the private apartment in Johor Bahru. Gan’s cash assets (jointly and individually owned) according to his affidavit of means did not exceed S\$27,000.00 leaving aside the HDB flat and his motor vehicle which is a depreciating/wasting asset.

14 The plaintiff subsequently applied to court in Summons No 972 of 2016 to cross-examine Gan on Vintech’s affidavit of means and in Summons No 1000 of 2016 to cross-examine him on Gan’s affidavit of means (“the cross-examination applications”). The cross-examination applications were granted and cross-examination of Gan took place on 31 May 2016 (“the first

examination hearing”) and on 21 June 2016 (“the second examination hearing” and collectively “the examination hearings”).

15 In the light of the evidence adduced from Gan in the examination hearings as well as from Gan’s and Vintech’s affidavits of means, the plaintiff took the view that Gan had failed to comply with the Disclosure Order in this action and in Suit 834.

16 The plaintiff applied to court under s 175(1) of the *Evidence Act* (Cap 97, 1997 Rev Ed) in Originating Summons No 872 of 2015 (“the Discovery Application”) against United Overseas Bank (“the Bank”) for copies of:-

- (a) All cheques drawn on Vintech’s Account from 1 January 2014 to date;
- (b) All bank statements in respect of Vintech’s Account from 1 January 2014 to date; and
- (c) All debit vouchers, transfer applications and orders in respect of Vintech’s Account from 1 January 2014 to date.

17 On 19 November 2015, the plaintiff was granted an order in terms of the Discovery Application. The Bank duly furnished the requested documents to the plaintiff on 3 February 2016. Having looked at the Bank’s documents, the plaintiff formed the view that Gan’s and Vintech’s affidavit of means had failed to comply with the Disclosure Order in [10].

18 Consequently, the plaintiff applied for and was granted leave to apply for Gan’s committal for contempt of court. The plaintiff then filed Summons

No 4665 of 2016 for a committal order against Gan for contempt of court (“the Committal Application”) supported by the 6th affidavit of Toshihiro Sadowara (“Sadowara’s 6th affidavit”).

19 The Committal Application came up for hearing before this court. After hearing arguments from counsel, the court granted the Committal Application and sentenced Gan to three months’ imprisonment for contempt of court but suspended the sentence for ten days to afford Gan an opportunity to comply with the *Mareva* Injunction (“the Committal Order”). Failing his compliance with the terms of the *Mareva* Injunction by 1 December 2016, Gan would be imprisoned to purge his contempt.

20 Gan filed his 9th affidavit on 1 December 2016 in purported compliance of the Committal Order. I use the words “purported compliance” because Gan’s 9th affidavit was essentially a rehash of Vintech’s affidavit of means filed on 14 August 2015 which Gan asserted complied with the Disclosure Order; he repeated his arguments therein in his 9th affidavit.

21 Gan is dissatisfied with the Committal Order made on 21 November 2016 and has filed a notice of appeal (in Civil Appeal No 159 of 2016) against the court’s decision. Consequently, I now set out the reasons for making the order.

The arguments

The plaintiff’s arguments

22 It was the plaintiff’s case that Gan had failed in Vintech’s affidavit of means to make full and proper disclosure of all assets beneficially owned by

Vintech. As stated earlier at [12], the US\$ sum was unaccounted for while payments totalling RM79,301,748.30 that the plaintiff was induced to make to Vintech for inferior goods falsely described as superior engineering plastics had been transferred out from Vintech’s account to third parties whose identities Gan did not disclose. Vintech’s account showed a balance of only US\$21,168.72 after the transfer out of the US\$ sum.

23 The plaintiff did not believe/accept Gan’s explanation that Vintech paid the US\$ sum to its supplier, a Malaysian company called Advance System Polymer Sdn Bhd (“ASP”). The plaintiff pointed out that Gan produced no credible evidence to support this claim. Gan’s explanation was even more improbable as he claimed he made cash payments of the US\$ sum periodically to ASP without having any acknowledgments or receipts from ASP. Gan further claimed the requests for cash payments came from ASP and that a staff member of ASP called Calvin Tham would usually pick up the cash near UOB Plaza after he had withdrawn it from Vintech’s account but he provided no details as to the dates and times of such pick-ups.

24 The plaintiff referred to certain extracts of Gan’s testimony during the first examination hearing, pointing out that Gan could offer no explanation for the risks involved in not getting receipts for the alleged cash payments since (i) Calvin Tham could have absconded with the cash or (ii) ASP could have denied receiving the payments, risks which Gan acknowledged were possible.

25 Apart from his bare assertion that it was ASP’s request to be paid in cash, Gan could not explain why remittance by way of telegraphic transfers was not done for such a common commercial transaction.

26 It was telling that the Bank's documents compared with the documents disclosed by Gan showed that Gan paid ASP substantial sums months before the relevant purchase orders and invoices were issued for the alleged sales. The invoices and delivery orders showed that the payment terms were cash on delivery ("COD") even though the purchase orders provided for credit terms of 21 days.

27 In addition, it was Gan's testimony at the first examination hearing that there was no correlation between the cash payments and ASP's invoices. Apparently (according to Gan), the quantum of payments in US dollars were made at ASP's whim and fancy as and when the latter requested. At one stage of his cross-examination, Gan admitted that the invoices, purchase orders and delivery orders produced by him were "wrong" and did not accurately reflect any transactions between Vintech and ASP.

The submissions of Gan/Vintech

28 In his 8th affidavit filed on 14 November 2016 to resist the Committal Application, Gan had deposed in the following paragraphs:

59. We/I submit that we/I have already explained in our/my earlier affidavits as well as during the cross-examination on 31 May 2016, the purpose and method of making all the alleged cash payments to ASP.

60. We/I further wish to submit in respect of my responses "yes" during my cross examination is the acknowledgment of what I am hearing to the questions put up before me.

".....

Q Are you saying that all the invoices are inaccurate? "Yes" or "No" ?

A I don't say it is inaccurate. This is what they stated, its COD. It is their term.

Q Does it accurately reflect the actual transaction or not?

A For this case, yes. I would say no.

Q Your answer is "no"?

A Yes.

Q What about the rest of the invoices?

A I would say all no.

(pages 51 to 53 of the Transcripts)

61. The question above was referring to the payment terms of COD where we used to pay in advance to the suppliers. For the question "*Does it accurately reflect the actual transaction or not*", I first replied 'Yes' which was for the acknowledgment of the question and then I said 'No' in response to the payment terms stated COD and where we pay in advance.

62. It is a common practice to use the same template as long as we receive goods and make the payment. I did not hear the word "*actual transaction*" clearly, so I said 'No' which I was actually referring to the payment terms and the difference of the dates as the date of the documents and the date of delivery are sometimes different.

This court did not believe Gan's illogical explanations or excuses for the answers he gave during cross-examination.

29 The *gravamen* of Gan's objection to the Committal Application was he had complied with the Disclosure Order and the US\$ sum had been dispersed from Vintech's Account between 14 January 2014 and 5 May 2015, well before the *Mareva* Injunction was granted on 27 July 2015. He argued that the wording of the Disclosure Order (set out in [30] below) only required Vintech to account for his and the existing assets of Vintech. However, the US\$ sum was no longer an asset of Vintech as of 27 July 2015. If the court accepts Gan's argument, it meant that so long as sums of money that were previously

held in the bank account of a defendant had been withdrawn and spirited elsewhere before an injunction/freezing order was imposed, it meant there was no obligation on the defendant to account for the whereabouts of the sums that had been disposed of. That cannot be right and would defeat the very purpose of a tracing remedy. Moreover the court was of the view that Vintech had to account for assets that it owned beneficially but not legally (see [52] below).

The decision

30 It would be appropriate at this juncture to set out the extract from the *Mareva* Injunction pertaining to the Disclosure Order; it reads:

The Defendants must inform the Plaintiff in writing within 14 days of all their assets whether in or outside Singapore and whether in their own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. The information must be confirmed in an affidavit which must be served on the Plaintiff's solicitors within 14 days after this order has been served on the Defendants.

31 The breakdown for the US\$ sum withdrawn from Vintech's Account is as follows:

No.	Date of cheque	Cheque No.	Payee	Amount	Cash received by
1.	14 Jan 2014	099988	CASH	US\$218,400	Gan
2.	11 Mar 2014	099993	CASH	US\$150,000	Gan
3.	18 Mar 2014	099994	CASH	US\$500,000	Gan

4.	11 Apr 2014	099998	CASH	US\$500,000	Gan
5.	11 Apr 2014	099999	CASH	US\$70,000	Gan
6.	28 Apr 2014	104001	CASH	US\$330,000	Gan
7.	2 May 2014	104005	CASH	US\$100,000	Gan
8.	8 May 2014	104006	CASH	US\$235,000	Gan
9.	10 Jun 2014	104011	CASH	US\$250,000	Gan
10.	9 Jul 2014	104012	CASH	US\$600,000	Lau Kum Foon
11.	16 Jul 2014	104013	CASH	US\$450,000	Gan
12.	24 Jul 2014	104014	CASH	US\$50,000	Gan
13.	11 Aug 2014	104016	CASH	US\$500,000	Lau Kum Foon
14.	19 Aug 2014	104017	CASH	US\$350,000	Gan
15.	9 Sep 2014	104018	CASH	US\$350,000	Lau Kum Foon
16.	26 Sep 2014	104019	CASH	US\$200,000	Gan
17.	7 Oct 2014	104020	CASH	US\$125,000	Gan

18.	15 Oct 2014	104021	CASH	US\$500,000	Gan
19.	7 Nov 2014	104024	CASH	US\$500,000	Gan
20.	24 Nov 2014	104025	CASH	US\$260,000	Gan
21.	5 Dec 2014	104026	CASH	US\$275,000	Lau Kum Foon
22.	5 Dec 2014	104027	CASH	US\$100,000	Lau Kum Foon
23.	12 Dec 2014	104028	CASH	US\$210,000	Lau Kum Foon
24.	6 Jan 2015	104029	CASH	US\$300,000	Gan
25.	20 Jan 2015	104030	CASH	US\$189,000	Gan
26.	11 Feb 2015	104031	CASH	US\$120,000	Gan
27.	22 Apr 2015	104032	CASH	US\$450,000	Gan
28.	1 May 2015	104033	CASH	US\$700,000	Gan
29.	30 Apr 2015	104034	CASH	US\$1,104,000	Gan
30.	5 May 2015	104035	CASH	US\$450,000	Gan
			TOTAL	US\$10,136,400	

32 It is noteworthy that save for six, the remaining 24 withdrawals (some of which were very substantial), were made by Gan. Apart from his bald assertion, there was no evidence to support Gan’s assertion that he had handed the cash to Calvin Tham or to anyone else let alone to ASP.

33 In Sadowara’s 6th affidavit, he had referred to an email from Gan to the first defendant dated 29 December 2014 wherein Gan had used the words *dummy invoices* to describe the invoices, purchase orders and delivery orders that Gan had produced in Vintech’s affidavit of means. Gan’s lame explanation was that his reference to *dummy invoices* was merely a request for copies of the original invoices that he had somehow misplaced. In an earlier email dated 27 August 2014 from Gan to the first defendant, Gan had again asked the latter for *dummy invoices*.

34 At the first examination hearing, Gan was unable to explain why he would ask the first defendant whose employer was a customer of Vintech not ASP, to provide him with *dummy invoices* from Vintech’s supplier ASP; that email was not even copied to ASP. Indeed, when he was first questioned, Gan said he was not aware of any link between the first defendant and ASP.¹ At a later stage of his cross-examination, Gan sought to change his earlier testimony by saying he did not know what was the relationship between ASP and the first defendant.²

35 Even more telling was another email thread dated 24 June 2014 that showed Vintech had arranged for certain “Statkon” products (“the Statkon

¹ Notes of Evidence, 31 May 2016, p 24 lines 22-25.

² Notes of Evidence, 31 May 2016, p 112 lines 2-8.

contract”) to be delivered to ASP rather than the latter supplying the product to Vintech. When he was confronted with this email, Gan could only repeat his unconvincing explanation on *dummy invoices*. When he was pressed to produce the purchase orders for the Statkon contract, Gan claimed he could not retrieve all the old records as Vintech had supposedly changed its service provider for its corporate domain/email management and suggested that the plaintiff get the document instead from ASP. However when pressed, Gan could not even remember the name of Vintech’s service provider.

36 To recapitulate [33], the words *dummy invoices* had been used in an email dated 29 December 2014 from Gan to the first defendant and Elizabeth Kang (of ASP) where he asked for *ASP dummy documents*. However, as of 27 August 2014, Gan’s evidence was he had not received the original invoices from ASP. So how could he have asked for copies as he claimed? Moreover, the documents relating to the Statkon contract had been issued by or to ASP at around 6 and 8 August 2014. It is highly unlikely that Gan would have misplaced those documents in a span of three weeks or less.

37 Many more instances were cited in Sadowara’s 6th affidavit on why the plaintiff could not accept/believe the contents of Vintech and/or Gan’s affidavit of means. During the first examination hearing, Gan even said under cross-examination that he did not know what business ASP was in, despite the latter being supposedly Vintech’s supplier.³

38 Apart from the instances in [33] to [35] and the unexplained whereabouts of the US\$ sum, Sadowara’s 6th affidavit cited other instances

³ Notes of Evidence, 31 May 2016, p 22 lines 19-25.

from Gan's testimony at the examination hearings which clearly showed that Vintech's affidavit of means as well as Gan's affidavit of means could not be accepted at face value.

39 It bears noting that the plaintiff's application to examine Gan on his two affidavits of means were granted by consent on 18 April 2016. The cross-examination applications for this action (see [14] above) and Suit No 834 of 2015 respectively ("the Consent Orders") were in identical terms (save for the different dates of filing of the affidavits of means and the different summons numbers) and read as follows:

1 By consent, the Plaintiff be at liberty to cross-examine Mr. Gan Teck Beng (Singapore NRIC No. S1672450E) in relation to the affidavit affirmed by him and filed on 14 August 2015 by the 3rd Defendant purporting to disclose the 3rd Defendant's assets pursuant to the Order of Court dated 27 July 2015 granted in HC/SUM 3622/2015;

2 By consent, Mr. Gan Teck Beng to attend to be cross-examined at such time and place as the Court shall appoint.

3 Before the cross-examination takes place, the deponent for the 3rd Defendant in HC/S 753/2015 (i.e., Mr. Gan Teck Beng) shall first file an affidavit to depose to the following matters:

- (i) The reason for the cash withdrawals in excess of USD 10 million from UOB bank account no. XXX-XXX-XXX-X for the years 2014 and 2015;
- (ii) The reason for those cash withdrawals;
- (iii) The purpose of those cash withdrawals;
- (iv) If the withdrawals were deposited into other bank account(s), to provide particulars of the bank account(s) and account holder(s) that received the deposits;

(v) If the cash withdrawals were handed to other parties, to identify those parties; and

(vi) In the event paragraphs (iv) and (v) above do not apply, to furnish particulars of the current whereabouts of the cash withdrawn.

4 Costs of the application be fixed at \$1,000 exclusive of disbursements on a reimbursement basis to be paid by the 3rd Defendant the Plaintiff.

40 The cross-examination applications were a corollary to the Disclosure Order and Gan willingly undertook to be cross-examined. Having agreed to be cross-examined wherein his answers were found to be less than satisfactory and/or did not answer items 3(i) to (vi) at [39], it cannot now lie in Gan's mouth to assert that he had complied with the Disclosure Order.

41 Even if there had been no Consent Orders, the court would have relied on *OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others* [2004] 4 SLR (R) 74 ("*OCM Opportunities*") to grant the examination applications. There, Belinda Ang Saw Ean J had followed the UK decision in *House of Spring Gardens Ltd v Waite* [1985] FSR 173) and granted the examination applications (at [34]-[35]).

42 Counsel for Gan/Vintech had (at the first examination hearing before the Assistant Registrar) relied on *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia* [1996] TLR 584 (also cited by Belinda Ang J in *OCM Opportunities*) to argue that the court should not allow the cross-examination process to be used to extract material to build the plaintiff's case. The court in *OCM Opportunities* was mindful to guard against such abuse (at [35]). In this case, there was no possibility of such an abuse taking

place as Gan's and Vintech's affidavit of means cried out for particulars and/or explanations on the whereabouts of the US\$ sum.

43 The court noted from the transcripts of the second examination hearing that Gan had been ordered by the court at the first examination hearing to file an affidavit⁴ and to furnish further documents requested by the plaintiff. The documents required were listed in the plaintiff's solicitors' letter to Vintech's counsel dated 1 June 2016. They comprised of:

- (a) All emails sent by Elizabeth Kang and/or any other representative(s) of ASP chasing for payment from Vintech for ASP's invoice dated 21 November 2013;
- (b) All emails sent by Elizabeth Kang and/or any other representative(s) of ASP chasing for payment from Vintech for ASP's invoice dated 20 September 2013;
- (c) All emails sent by Elizabeth Kang and/or any other representative(s) of ASP attaching one or more of the invoices exhibited in the 6th affidavit of Gan dated 6 May 2016, and
- (d) All documents showing that for the invoice dated 20 September 2013 exhibited to Gan's 6th affidavit US\$1,497,557 of the invoice sum of US\$2,599,757 was paid by "offsetting" amounts owed by ASP to Vintech for purchases of goods.

⁴ Notes of Evidence, 31 May 2016, p 116 line 18 to p 118 line 25.

44 In his 6th affidavit filed on 6 May 2016 (“Gan’s 6th affidavit”) in response to the second affidavit of Sadowara in support of the examination applications, Gan repeated his unconvincing testimony given at the examination hearings as can be seen from the following paragraphs:-

8 The “cash withdrawals” being referred to in the Order of Court [at [39]] relate to the cash withdrawals amounting to USD10,136,400.00 which is specifically referred to and set out at Paragraph 21 Page 9 of Sadowara’s 2nd affidavit affirmed on 1 March 2016

9 We reiterate that the cash withdrawals were made to our supplier, Advance System Polymer Sdn Bhd (hereinafter as “**ASP**”) towards payment of their invoices to us. The purpose of the cash withdrawals was to pay for the purchase of goods from ASP as further explained below.

Reasons for Cash Withdrawals in excess of US\$10 Million

10 The cash withdrawals in question relate specifically to invoices raised by ASP to Vintech towards purchases of goods.

11 We have prepared a compilation of relevant Invoices raised by ASP to Vintech by way of the cash withdrawals towards those invoices. Annexed hereto and collectively marked as exhibit “**VT-1**” is a copy of the Table with the relevant supporting invoices from ASP.

...

14 For the cash payment arrangements, our usual contact point with ASP was one Ms. Elizabeth Kang.

15 Specifically for the cash withdrawal payments, ASP/Elizabeth had assigned one Mr. Calvin Tham (hereinafter “**Kalvin**”) to pick up ASP’s payment from us. Once we withdrew the cash from UOB Plaza, I will proceed to pass him the money.

...

20 I confirm that all of the cash withdrawn was passed on to ASP through Calvin as set out above. It was not deposited into any external bank account(s) and was not retained by Vintech or myself, either directly or indirectly or in any other form.

(Emphasis in original)

45 In purported compliance with the plaintiff's request in [43], Gan then filed his 7th affidavit on 13 June 2016 ("Gan's 7th affidavit") in which he was equally vague and/or short on details. Gan merely rehashed his testimony at the two examination hearings and what was deposed to in his 6th affidavit, as can be seen from the following paragraphs:-

12 As to their [plaintiff's] current request, I have been unable to retrieve all the old records. We wish to inform this Honourable Court that during the end of 2014, we changed the service provider for Vintech's corporate domain/email management. Consequently, information pertaining to Vintech's email account underwent changes that caused a loss of data.

13 As such, whatever information documents which we had was what would have been available and captured as per [the *Anton Piller* Order] raid of 27 July 2015. The sum effect of this would be that the Plaintiffs would already have a record of whatever which was in our records at that time.

14 On the part of Advanced System Polymer Sdn Bhd ("ASP"), who are the 18th Defendants in the on-going Malaysian Suit No. 22NCC-216-07/2015, ASP may have the corresponding records in their systems. The Plaintiffs are at liberty to get whatever relevant records from ASP in the Malaysian Suit. A copy of the proposed amendment to the Writ of Summons for the Malaysian Suit is annexed hereto at Pages 20-28 of exhibit "**VT-1**" in this Affidavit.

...

16 In light of the Search Order, the absence of Vintech's information-carrying assets, the change in our service provider and after an extensive search in our premises, I regret to inform this Court that I could not find any email sent by Miss Elizabeth Kang and/or any other representative(s) of Advance System Polymer Sdn Bhd ("**ASP**") chasing for payment from Vintech for ASP's invoices dated 20 September 2013 and 21 November 2013. I also cannot recall when exactly the email may have been sent or even if it was sent by email or handed over by hand to me at one of our many meetings in their offices.

Email Correspondence with attached ASP's invoices

17 I could not find any email sent by ASP attaching one or more of the invoices exhibited in the Vintech Affidavit. [Gan's 6th affidavit].

(Emphasis in original)

The documents exhibited in Gan's 7th affidavit were either totally irrelevant and/or nothing new. Gan failed to produce even one of the documents requested in the plaintiff's solicitors' letter dated 1 June 2016 set out in [43] above.

46 The above paragraphs from Gan's 7th affidavit missed the point altogether – either he was being deliberately obtuse or Gan failed to understand the essence of the plaintiff's request. The plaintiff wanted to trace the whereabouts of the US\$ sum and it served no purpose for Gan to refer to invoices and/or purchase orders which had already been discredited by the plaintiff at the examination hearings as fabricated/false. It bears remembering that the plaintiff's claim against the defendants was also based on constructive trust (see [5] above).

47 There was no obligation on the plaintiff to take up Gan's suggestion to obtain documentation from ASP; the duty was on Vintech/Gan to comply with the court's order to produce documents. If indeed, ASP was to be approached, Gan should be the party to do so. I should add that it was the plaintiff's case that Elizabeth Kang was a known associate and accomplice of the first defendant in the fraud perpetrated on the plaintiff and ASP was a company controlled by Elizabeth Kang.

48 Gan's repeated responses of "I'm not sure" and/or "I can't remember" in answer to numerous questions from plaintiff's counsel did not improve his credibility. His responses were no answer to why Vintech would pay ASP in

advance in cash when the latter's invoices all stated COD as the payment terms. His submission that the COD term did not accurately reflect the transactions only served to reinforce the court's view that the alleged sales and purchases of plastic materials between ASP and Vintech were non-existent and the documents relating thereto were fabricated. My view is reinforced by Gan's own use of the words *dummy invoices* alluded to earlier at [36].

49 The court found Gan's affidavit of means as well as Vintech's affidavit of means not only unconvincing but also lacking credibility. Gan expected the court to believe that in an ordinary buyer-seller relationship the buyer would pay the seller in advance before orders were even confirmed and where orders were confirmed, that the quantum of payment to the seller would be at the whim and fancy of the seller, without regard to the terms of the contracts or worse, that there were no proper contracts documenting the sales.

50 It beggars belief that Gan as a businessman with at least five years' experience and Vintech as a buyer, would pay huge sums in cash to ASP without obtaining receipts or acknowledgments and without any assurance that goods the company had purportedly ordered from the latter would be delivered.

The standard of proof

51 The standard of proof required for civil contempt cases is the criminal standard of beyond reasonable doubt (see *Summit Holdings Ltd and another v Business Software Alliance* [1999] 2 SLR(R) 592 at [25], reaffirmed by the Court of Appeal in *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and others* [2007] 2 SLR(R) 518 at [35]; *Monex Group (Singapore) Pte Ltd v*

E-Clearing (Singapore) Pte Ltd [2012] 4 SLR 1169 (“*Monex Group*”) at [30] and more recently in *Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1 at [85] (“*Mok’s case*”).

52 According to Judith Prakash J (as she then was) in *STX Corp v Jason Surjana Tanuwidjaja and others* [2014] 2 SLR 1261 (citing *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 1 WLR 1695), if the wording of the injunction was clear enough, the freezing order would cover assets not legally but beneficially owned by the enjoined party. In this case, the *Mareva* Injunction decreed that Vintech must not:-

- (i) remove from Singapore any of its assets which are in Singapore whether in its own name or not and whether solely or jointly owned up to the value of RM 28,180,781.00; or
- (ii) in any way dispose of or deal with or diminish the value of any of its assets whether they are in or outside Singapore whether in its own name or not and whether solely or jointly owned up to the same value.

I accept the plaintiff’s argument that the words “*whether in its own name or not*” are wide enough to include assets beneficially but not legally owned by Vintech.

53 The court entertained no doubts whatsoever that Gan as Vintech’s director was untruthful in his 6th and 7th affidavits when he deposed (repeatedly) that he/Vintech had paid the US\$ sum to ASP for the purchase of plastic materials, that the same was not retained by Vintech or himself and it was not deposited into any external bank account. Gan’s contradictory testimony and bare assertions could not be accepted at face value. He had wilfully and persistently refused to comply with the Disclosure Order contained in the *Mareva* Injunction even though it contained a penal notice

that disobedience of the order meant that the defendants were guilty of contempt of court and could be liable to imprisonment or fine.

The penalty

54 In regard to the penalty to be meted out to Gan for his contempt, counsel for the plaintiff had cited *Monex Group* and *Mok's* case (see [51] above). The appellate court in *Mok's* case had imposed a sentence of eight months' imprisonment on the recalcitrant husband which was suspended for four weeks to afford him a final opportunity to comply with the orders for which he had been found to be in contempt. Counsel submitted that an appropriate punishment in this case was a term of imprisonment of between six to eight months.

55 To quote from Prakash J's decision in *Monex Group*, a committal order was "a measure of last resort" when the court was "faced with a recalcitrant and obstructive litigant who [was] in continuous breach of a mandatory court order" (at [40]). Was this the case here? It appeared to be so.

56 Having found that Gan was in deliberate contempt of the Disclosure Order, the court then had to determine the appropriate sentence to be imposed. The sentence ranged from five days' imprisonment for criminal contempt imposed on the defendant in *Sembcorp Marine Ltd v Aurol Anthony Sebastian* [2013] 1 SLR 245 ("*Sembcorp*") for breaching an interim sealing order of documents to eight months' imprisonment in *Mok's* case (albeit suspended for four weeks to afford an opportunity for compliance). According to the guidelines laid down in *Sembcorp* at [68], the length of the sentence of imprisonment would depend on such factors as (i) whether the contemnor had

acted deliberately in flagrant disregard of the court order, (ii) whether his motive in breaching the court order was pecuniary or non-pecuniary, (iii) whether a fine would be a sufficient deterrent (iv) whether the breach caused substantial prejudice to the other party that cannot be remedied by costs and (v) whether the contemnor was remorseful.

57 There can be little doubt that Gan's egregious conduct in refusing to disclose to the plaintiff the whereabouts/fate of the US\$ sum was to frustrate any attempts the plaintiff would/could make to recover the sum by the proprietary remedy of tracing. He was motivated solely by pecuniary considerations.

58 Having taken into consideration the determining factors spelt out in *Sembcorp* and *Mok's* case at [110], the court was of the view that a fair and just punishment to be imposed on Gan would be to sentence him to three months' imprisonment for his contempt but suspend the sentence for ten days to afford him a final opportunity to comply with the Disclosure Order within the *Mareva* Injunction; the court so ordered. Unfortunately, Gan's 9th affidavit filed in purported compliance with the Disclosure Order on 1 December 2016 (see [20]) shows he still has no intention to remedy his previous default.

Lai Siu Chiu
Senior Judge

Toyota Tsusho (Malaysia) Sdn Bhd
v Foo Tseh Wan

[2017] SGHC 24

Han Guangyuan, Keith and Goh Rui Xian Elsa (Cavenagh Law LLP)
for the plaintiff;
Kirpal Singh s/o Hakam Singh and Oh Hsiu Leem Osborne (Hu
Shoulin) (Kirpal & Associates) for the 3rd defendant.