Sembcorp Marine Ltd *v* Aurol Anthony Sabastian
[2012] SGHC 195

Case Number	: Originating Summons No 465 of 2011/E (Summons No 1622 of 2012/M)
Decision Date	: 28 September 2012
Tribunal/Court	: High Court
Coram	: Quentin Loh J
Counsel Name(s)	: Davinder Singh SC, Pardeep Singh Khosa, and Vishal Harnal (Drew & Napier LLC) for the applicant; George Lim SC and Foo Say Tun (Wee, Tay & Lim LLP) for the respondent.
Parties	: Sembcorp Marine Ltd — Aurol Anthony Sabastian

Civil Procedure – Supreme Court of Judicature Act – Further Argument

Contempt of Court – Criminal Contempt Criminal Procedure and Sentencing – Sentencing – Committal for Sentence

28 September 2012

Quentin Loh J:

1 This judgment follows upon my earlier judgment, *Sembcorp Marine Ltd v Anthony Sabastian Aurol* [2012] 2 SLR 645 where, upon an application for committal for contempt of court by the applicant Sembcorp Marine Ltd ("SCM"), I found the respondent, Mr Anthony Sabastian Aurol ("Mr Aurol") guilty of and duly convicted him for contempt of court on 19 March 2012. I found that Mr Aurol had knowingly and cynically breached an order of court ("the Sealing Order") to keep the Summons for sealing ("the Summons") and the supporting affidavit ("Wong's 5th Affidavit") sealed in the interim until the Court could finally decide whether to seal another affidavit ("Wong's 4th Affidavit") filed in Suit No. 315 of 2010 ("the Main Suit").

2 After I gave judgment, but before I heard the parties on sentence, Mr Aurol applied for (i) leave to adduce further evidence and (ii) leave to make further argument on a point of law, *viz*, that the interim sealing order was different from and was not a non-disclosure order.

3 I heard the applications in chambers on 24 April 2012 and reserved judgment. I gave my decision on 11 May 2012, disallowing the application for leave to adduce further evidence but allowing the application to make further arguments under s 28B, Supreme Court of Judicature Act (Cap 322, 2005 Rev Ed). I heard the parties in open court on 23 May 2012 and after hearing the further arguments, I was not persuaded to change my mind. I confirmed the conviction and proceeded to hear counsel on sentence and Mr Aurol's mitigation. I then reserved judgment on sentence.

4 Mr Aurol has appealed against my decision finding him guilty of contempt of court in Civil Appeal No 66 of 2012. Mr Aurol has also appealed against my dismissal of his application to adduce further evidence in Civil Appeal No 71 of 2012.

5 On 28 September 2012, I sentenced Mr Aurol to 5 days in prison for his contempt of court but

in view of the pending appeals, stayed my order until the Court of Appeal dealt with the same.

6 This judgment sets out:

(a) my reasons for disallowing Mr Aurol's application to adduce further evidence;

(b) why I was not persuaded by the further arguments on the question of law; and

(c) my reasons on sentence pursuant to the conviction of Mr Aurol for contempt of court

in an endeavour to allow all matters to be dealt with by the Court of Appeal.

The application to admit further evidence

The application

7 Mr Aurol's application was for leave to call Mr Conrad Jayaraj ("Mr Raj"), the journalist from the TODAY Newspaper ("TODAY"), to take the stand, give evidence and be offered for cross-examination. In Mr Aurol's Affidavit filed on 2 April 2012 ("the Affidavit") in support of his application, Mr Aurol deposes that Mr Raj will give evidence that:

(a) Mr Aurol never asked Mr Raj to keep his identity confidential when they spoke on the telephone on 9 or 10 December 2010;

(b) It was Mr Raj who telephoned Mr Aurol on 9 or 10 December 2010 and not the other way around; and

(c) Mr Aurol never asked Mr Raj to write the article that Mr Raj did on 14 December 2010 entitled "SembMarine Boss Rushes To Stop Affidavit Leak" ("the Article").

8 The Affidavit also exhibited an email from Mr Aurol to Mr Raj dated 30 March 2012 at 10.01 am, a reply from Mr Raj to Mr Aurol on 30 March 2012 at 11.02 am, and a draft affidavit by Mr Raj which was neither signed nor affirmed. During oral argument, counsel for Mr Aurol, Mr George Lim SC, urged upon me that Mr Raj would be able to give evidence that the email forwarding the Summons and Wong's 5th Affidavit was innocuous, notwithstanding that Mr Raj no longer had this email in his possession.

The applicable test to allow further evidence

9 The conditions for admitting further evidence after a matter has been concluded is set out in the well known case of *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*"), *viz*:

(a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

(c) the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible.

10 Mr Lim SC submits that the conditions in *Ladd v Marshall* does not apply to criminal or quasi-criminal cases where a different standard applies. He submits that even in civil cases, before the order is extracted, it can be amended and in this case, the sentence, which signals finality in the proceedings, has not been passed. The court has the power and broad discretion to allow further evidence if it is in the interests of justice. There is more flexibility in criminal cases.

11 The position in Singapore is clear. The Court of Appeal in *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327 ("*Juma'at bin Samad*") applied the *Ladd v Marshall* conditions in deciding whether to admit additional evidence in the criminal context. In so doing, the court *rejected* the UK approach laid out in s 23(1) of the UK Criminal Appeal Act 1968, which does *not* apply the *Ladd v Marshall* conditions in the criminal context. Instead, it found (*Juma'at bin Samad* at [14]) that the broad question of what evidence would be "necessary" in the interests of justice could be answered by reference to the three conditions of non-availability, relevance and reliability, *ie*, the *Ladd v Marshall* conditions. The court gave some scope (*Juma'at bin Samad* at [37]) for allowing further arguments where the conditions may not be satisfied, but limited these situations to:

> …*isolated* instances… in an effort to correct glaring injustice… warranted only by the *most extenuating circumstances*, which may include the fact that the offence is a serious one attracting grave consequences and the fact that the additional evidence sought to be adduced was highly cogent and pertinent and the strength of which rendered the conviction unsafe.
>
> [emphasis added]

12 I accept that this is a quasi-criminal case. However, it is clear that any departure from the *Ladd v Marshall* conditions can only take place once they have been applied, and where exceptional circumstances arise which excuse some, but not all, of these conditions. *Juma'at bin Samad* is not authority, as Mr Lim SC contends, for applying a general test of what is necessary in the interests of justice in deciding whether further evidence should be admitted. Mr Lim SC did not argue that this is such an exceptional case. Neither is there any support for that proposition. Having said that, as this is a contempt of court case, I was prepared to approach the application of the *Ladd v Marshall* conditions with some flexibility; I bore in mind that I was dealing with a serious matter where confidence in the administration of justice needs to be maintained, and which may attract the serious sanction of deprivation of liberty.

Non-availability of evidence

13 It is clear from the Affidavit that no attempt was made to obtain Mr Raj's evidence prior to the hearing on 13 March 2012. The only explanation given by Mr Aurol was that he had lost his trust in Mr Raj and could not be sure he would tell the truth. In paragraph 5 of the Affidavit, Mr Aurol deposes that when 'SCM' went to court for an order that TODAY divulges its source for the article, Mr Aurol was upset with Mr Raj for affirming an affidavit stating that Mr Aurol had told Mr Raj to keep his identity confidential when Mr Aurol did no such thing.

14 I find this difficult to accept. If Mr Aurol was upset, why did he not come forward and say openly that he was the source and that he never asked Mr Raj to keep his identity confidential? I find it inconsistent for him to be upset over that statement, yet take advantage of that statement in Mr Raj's affidavit whilst TODAY fought not to divulge its source, and only owning up after Judith Prakash J affirmed the order in Originating Summons No 74 of 2011 ordering TODAY to disclose its source. Although I place little or no weight on the unaffirmed draft affidavit of Mr Raj, paragraph 4 of that draft does say that Mr Raj and Mr Aurol still talked to each other after Prakash J's order: "[a]lthough we still talked over the phone, the conversations were not as friendly or candid as in the past..." If

this is true, then there is even less of an excuse for not having contacted Mr Raj earlier.

15 Although I have some sympathy for Mr Lim SC's submission that it would have been unwise to subpoena Mr Raj at the 13th February hearing because his evidence might be inimical to Mr Aurol's case, I note that neither Mr Aurol nor his advisers even tried to contact Mr Raj to at least put their factual points across to him to see what he would say or if he would come forward to confirm those facts or give some other form of limited confirmation. The potential hostility of a witness is not an acceptable excuse for non-fulfilment of the first condition (*viz*, that the evidence could not have been obtained with reasonable diligence for use at trial) when *no effort at all* was made to contact the witness, Mr Raj. If Mr Aurol appreciated the importance of Mr Raj's evidence, and it was available to him before the committal hearing, but chose not to do so for tactical reasons, then I see little ground for showing flexibility in applying the first condition. That would set an undesirable precedent. I should also mention that the Main Suit had already started when the hearing of SCM's application in this Originating Summons first came up in July 2011. That hearing was adjourned by consent to a date after the trial and submissions had been made. As noted above, the application for committal for contempt only came on for hearing on 13 February 2012. There was more than ample time to contact Mr Raj during those intervening months.

Relevance and important influence on the result of the case

16 I was also unable to accept that the evidence would probably have an important influence on the result of the case. Mr Raj's purported evidence, even if I take it as true, does not answer some other very relevant facts that led me to find Mr Aurol in contempt of court. This "new" evidence does not answer the following:

(a) Mr Aurol's breach of the Sealing Order (which was clear and unambiguous and endorsed on the Summons itself) and his failure to offer any explanation for that breach, other than saying that he "did not realise that it had been sealed";

(b) Mr Aurol's inability to explain away Drew & Napier LLC's letter of 6 December 2010 which he had admitted to reading before he sent the Summons and Wong's 5th Affidavit to Mr Raj;

(c) My findings at [57] and [58] of my earlier judgment on Mr Aurol's ability to understand legal matters of this nature;

(d) Mr Aurol's failure to explain, or his inadequate "explanation", of how he could have misunderstood that it was Wong's 4th, and not Wong's 5th, Affidavit, which was sealed;

(e) Mr Aurol's non-production of his SingTel records, despite the fact that they would have proved that he had called Mr Raj, and from which I drew an adverse inference;

(f) Mr Aurol's deletion of his email to Mr Raj, despite the fact that this was an important part of his defence, and from which I also drew an adverse inference;

(g) Mr Aurol's informing Mr Raj of the contents of paragraph 21 of Wong's 5th Affidavit, (see [18] below).

(h) Mr Aurol's lying low whilst SCM was trying to obtain the identity of the "source" of the TODAY article, and only coming forward when he could no longer conceal his identity; and

(i) The very carefully crafted letter by Mr Aurol's lawyer, which was calculated to avoid answering the adverse facts and circumstances, and his insincere apology (see [71] – [74] of my earlier judgment).

17 Even if I were to ignore (e) and (f) above, the remaining factors will be sufficient to prove the *mens rea* required for my finding Mr Aurol in contempt of court.

18 Mr Lim SC submits that it is very important that Mr Aurol never asked Mr Raj to write an article when he passed Mr Raj a copy of the Summons and Wong's 5th Affidavit. This misses the point I made at [66] and [67] of my earlier judgment. I found that Mr Aurol had attempted "to pique Mr Raj's interest in the affidavit" by deliberately referring Mr Raj to paragraph 21 of Wong's 5th Affidavit, knowing that Mr Raj had written articles about SCM in not too flattering terms in the past, and intending to entice Mr Raj to write a similarly unflattering article. I thus made the point that Mr Aurol had embarked on this line of action with the intention that Mr Raj would write the article, notwithstanding that this intention was never expressly articulated to Mr Raj. As I said in [67] of my earlier judgment, one does not wave a red cloth in front of a bull and expect it to ignore that instigation. Even if Mr Raj had not told Mr Aurol that he would publish the article, Mr Raj has no knowledge of Mr Aurol's subjective state of mind and is unable to testify as to Mr Aurol's intention behind drawing his attention to the relevant paragraph in the sealed affidavit in those circumstances. That finding would stand whether or not Mr Aurol had asked Mr Raj to write an article.

19 Mr Aurol asserts that he "really had no intention to interfere in the administration of justice". [note: 1] Mr Lim SC also submitted that Mr Raj's evidence goes to intention. [note: 2] But the fact remains that Mr Raj cannot testify as to Mr Aurol's state of mind. These are things which are peculiarly within the knowledge of Mr Aurol, and Mr Aurol could and should have raised these points at the hearing.

20 This can clearly be seen from the following. I have already noted above that Mr Aurol never explained his breach of the Sealing Order. Mr Aurol now belatedly attempts to slip in an excuse, not raised before, through the unaffirmed draft affidavit of Mr Raj at paragraph 7, where Mr Raj purportedly tells a hesitant Mr Aurol that, in Mr Raj's personal experience, the application to seal, *ie*, the Summons, was not normally sealed. However it is noteworthy that nowhere in his Affidavit does Mr Aurol attempt to say, for example, that he now remembers this fact after Mr Raj brought this up or that was why he thought the Summons was not sealed when he sent it to Mr Raj.

21 Even if I accept that draft statement as true (and I have my doubts, as noted at [14] and [26] of this judgment), the relevant question is whether Mr Aurol relied on this statement and therefore thought that the Sealing Order had not also been sealed. This is not something that Mr Raj can give evidence on. I also find it implausible that Mr Aurol would not have raised this as part of his defence in these proceedings if he had thought that the Summons was not sealed because of certain statements Mr Raj had made.

The reliability and apparent credibility of the new evidence

22 On the one hand, I have to balance the fact that there does not seem to be much reason for Mr Raj to lie, particularly given the risks that he would have to take to be cross-examined. This is a fairly weighty element. Yet on the other, I note three things.

23 First, Mr Raj does not say in his 30 March 2012 email in reply to Mr Aurol's long accusatory email, that he could offer himself for cross-examination notwithstanding his employer's lawyer's advice

not to affirm the draft affidavit. Mr Raj's email appears to have a tone of finality and apology.

24 Secondly, Mr Aurol's email of 30 March 2012 is a long narrative, accusatory at parts and setting out a lot of "facts". Mr Raj's response email does not comment upon or confirm any of these "facts" or accusations other than that he called Mr Aurol on:

> …that fateful day in Dec (10th i think) when I called you on the update on the Sembmarine affair with your company.

25 This *prima facie* goes towards establishing that it was Mr Raj who called Mr Aurol. However, as noted above, that does not change the relevant findings and the decision that I made.

26 Thirdly and very importantly, the unaffirmed draft affidavit is not evidence I can rely on. I cannot ignore the fact that Mr Raj has consciously chosen not to affirm that draft. It cannot be assumed that if Mr Raj is called to the stand, he will give evidence as to what is stated in the draft. Whilst not pivotal on its own, taken in the context of my observations and reasons above, this becomes a very relevant factor against allowing the application.

27 Mr Aurol feels it is very important to establish, *inter alia*, that he never asked Mr Raj to keep his identity confidential. Yet, as I have pointed out above and in my earlier judgment, his behaviour whilst TODAY fought two rounds to prevent disclosure speaks for itself. Moreover, this would contradict paragraphs 26 and 27 of Mr Raj's clear affidavit evidence, which was affirmed and filed on 23 February 2011 in OS 74 of 2011/E, where he deposes in no uncertain terms as to the following:

> 26 Further, as a journalist, I am under a professional obligation of confidentiality towards the identities of all my information sources, *including the source* which provided me with the Application to Seal and Mr Wong's 5th Affidavit. ...
>
> 27 The Application to Seal and Mr Wong's 5th Affidavit were no exception. They were provided to me *by my source on the basis that* I would keep his/her identity strictly confidential. [note: 3]
>
> [emphasis added]

28 Mr Raj is an experienced journalist and language is a tool of his vocation. I find it difficult to accept that he would have misunderstood the meaning of or misused the phrase "on the basis that" when explaining why he refused to disclose Mr Aurol's identity. The statements set out above are unambiguous and I find that their meaning could not have been lost on Mr Raj.

Decision on application to adduce further evidence

29 For the reasons set out above, even though I was prepared to exercise some small measure of flexibility on the application of the *Ladd v Marshall* conditions for the introduction of new evidence, I dismissed the application by Mr Aurol for leave to call Mr Raj to give further evidence.

The application for further argument

The application

30 Mr Lim SC also applied for leave to submit further arguments. When I heard counsel in chambers, Mr Lim SC informed me that the legal argument was that a sealing order was very different

from a non-disclosure order; the former was not a "gag" order and a disclosure of the sealed documents did not breach the interim sealing order. Counsel for SCM, Mr Davinder Singh SC objected and pointed out that Mr Aurol's letter making the application did not identify this as a further argument. The Supreme Court Practice Directions, paragraphs 71(e) and (f), clearly require a party to set out the proposed further arguments briefly, citing the authorities and including copies of the authorities. Mr Lim SC also did not have any authorities with him and stated he would produce them at a later date if I allowed further argument as he thought that a later date would be fixed for full argument. Although Mr Singh SC argued convincingly that there was no explanation why this could not be made before, and that the breach of the Practice Directions should militate against my considering Mr Lim SC's arguments, as this was a quasi-criminal case, I decided to allow further argument on the premise that this non-compliance could be cured without causing prejudice to SCM. I directed Mr Lim SC to file his written submissions with authorities by 15 May 2012 so that SCM would know the argument they had to meet when the matter next came up for hearing.

The further argument: sealing orders and "gag" orders

31 I heard further argument on this issue on 23 May 2012 and, after hearing counsel, was not persuaded to change my decision. I now give my reasons.

32 Mr Lim SC submits that a sealing order is very different from a non-disclosure or "gag" order. The former is an administrative order, which merely prevents non-parties (or such other parties as ordered by the court) from having access to the Court file. The "gag" order prohibits the disclosure of information. Mr Lim SC cited various authorities, including *Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother & Ors* [2008] 1 WLR 2327, which explains what sealing means, and *The Report of the Committee of Super Injunctions: Super Injunctions, Annonymised Injunctions and Open Justice* and *A-G v Guardian Newspapers Ltd & Ors* [1987] 1 WLR 1248, which gives an example of a non-disclosure order. The order sought by SCM was a sealing order and it was limited in nature and effect. It did not prohibit disclosure of the documents. There was no "gag" order prohibiting the parties to the main action or anyone else from disclosing or publicising the Summons and Wong's 5th Affidavit. There was therefore no breach by Mr Aurol of the Sealing Order.

33 Mr Lim SC raised the analogy of s 12(6) of the Adoption of Children Act (Cap 4, 2012 Rev Ed). He argued that while this provision automatically sealed an adopted child's identity, a relative or friend who knew and told the child that he had been adopted would not be guilty of contempt. With respect, I do not see how this supports Mr Aurol's case at all. There can be no contempt as such information originated from another source, not the sealed register. As Lord Nicholls said in *Attorney-General v Punch Ltd and anor* [2003] 1 AC 1046 ("*A-G v Punch*") at 1059:

> Disclosure of information which is already fully and clearly in the public domain will not normally constitute contempt of court in the type of case now under discussion. Contempt lies in knowingly subverting the court's purpose in making its interlocutory order by doing acts having some significant and adverse effect on the administration of justice in the action in which the order is made. If the third party publishes information which is already fully and clearly in the public domain by reason of the acts of others, then the third party's act of publication does not have this effect.

34 Mr Lim SC's submission is that the interim sealing order, not worded as a "gag" order, had a limited purpose in preventing non-parties from inspecting the Summons and Wong's 5th Affidavit. It therefore did not prohibit the disclosure or publication of the Summons and Wong's 5th Affidavit; consequently, its disclosure to Mr Raj could not have undermined the limited purpose of the Sealing

Order.

35 This is a submission which completely ignores the circumstances under which the Sealing Order was made and confuses the terms of the order with the purpose of the order. If Mr Aurol's position was that the Sealing Order had a limited effect and Mr Aurol was not prevented thereby from sending the Summons and Wong's 5th Affidavit to Mr Raj, one wonders why Mr Aurol lay low whilst Mediacorp fought to prevent naming their source, and why Mr Aurol only apologised to the court indirectly through his solicitors when he could no longer stay anonymous. That apology must have been made under advice. One wonders what Mr Aurol was apologising for if he did not frustrate the purpose for which the Sealing Order was made.

36 As set out in [84] of my earlier judgment, the purpose of the Sealing Order was clearly threefold:

(a) First, to avoid non-parties to the Main Suit, from becoming aware of the fact that SCM had sought to seal Wong's 4th Affidavit.

(b) Secondly, to avoid non-parties to the Main Suit from becoming aware of the sensitive matters contained in Wong's 5th Affidavit, including:

(i) the fact that the confidential policies of SCM were set out in Wong's 4th Affidavit which had already been filed in court; and

(ii) the manner in which the confidential policies could be deployed to the detriment of SCM and its subsidiaries.

(c) Thirdly, and more importantly, the court's interim order kept the Summons and Wong's 5th Affidavit sealed so that it could, upon hearing both parties, decide whether or not it should seal Wong's 5th Affidavit.

37 As I said in my earlier judgment, each one of these three purposes was thwarted once Mr Raj published the Article in TODAY. Mr Aurol would not have had knowledge of the existence or contents of Wong's 5th Affidavit and the application but for his involvement in the Main Suit. This is not knowledge in the public domain but was knowledge derived entirely from the sealed documents. When Mr Aurol disclosed the Summons and Wong's 5th Affidavit to Mr Raj, he was certainly making them available to a non-party. Mr Raj was only able to publish the Article because Mr Aurol sent him the Summons and Wong's 5th Affidavit. The public became immediately aware that SCM had sought to seal Wong's 4th Affidavit and that SCM's confidential policies were contained in Wong's 4th Affidavit.

38 It is unarguable that the Sealing Order, the terms of which do not explicitly prohibit disclosure, has the same broad aim as a non-disclosure order: to maintain the confidentiality of information adduced as evidence in proceedings and to maintain the status quo until a court is able to decide the issue. The documents were clearly "sealed as against non-parties", indicating that it was targeted at preventing non-parties from having access to these documents, howsoever this access was obtained.

39 It should not be forgotten that these are criminal, not civil, contempt proceedings which concern the breach of an order of court by a party bound by that order. Mr Aurol is not a party to the Main Suit. And, as argued before and noted in my earlier judgment, 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 can be held liable for criminal contempt if he deliberately frustrates the purpose of that order: see *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC* [2007] 2 SLR(R) 518 ("*Pertamina*") at [43]. The subversion of an order of court constitutes a direct threat to the due administration of justice because it has the effect of destroying or nullifying either the purpose of the trial, pursuant to which the order is made, or the order itself: see *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191 ("*A-G v Times Newspapers*") at 215.

40 A court therefore has to look at the purpose of the order, to determine whether the contemnor had the requisite intention to interfere with the administration of justice and therefore whether he intended, by his act, to frustrate or thwart the purpose of the order: *A-G v Times Newspapers* at 223, and then to determine whether the contemnor's act carried a real risk that the administration of justice would be interfered with. The court also has to consider whether the act or acts in question had the effect of destroying or nullifying either the purpose of trial, pursuant to which the order of court was made, or the order itself: *A-G v Times Newspapers* at 206H – 207F. It is clear that the purpose of the court which granted the order, and not only the purpose of the parties applying for the order, is what is relevant: *A-G v Punch* at [39]:

> ...*Fundamental to the concept of contempt in this context is the intentional impedance or prejudice of the purpose of the court.* The underlying purpose of the Attorney General, as the plaintiff in the proceedings against Mr Whayler, in seeking the order against Mr Shayler is nothing to the point. Lord Oliver of Aylmerton adverted to this distinction in Attorney General v Times Newspapers [1992] 1 AC 191, 223:
>
> > *"'Purpose', in this context, refers, or course, not to the litigant's purpose in obtaining the order or in fighting the action but to the purpose which, in seeking to administer justice between the parties in the particular litigation of which it has become seised, the court was intending to fulfil."*
>
> [emphasis added]

41 The court is not strictly confined to the express terms of the order when determining the purpose of the court in granting the order in criminal contempt proceedings. The court is also entitled to consider the circumstances surrounding the grant of the order and its purpose: see *A-G v Times Newspapers* at 224D-224E; *Arlidge, Eady & Smith on Contempt* (Sweet & Maxwell, 3rd Ed, 2005) at paras 11-43 and 12-51. There may be times when there is room for genuine doubt about the court's purpose in granting the order. In such a case, the contemnor could escape liability as it would be difficult to establish an intention or frustrate the purpose of the court if the purpose itself was not known or obvious: see *A-G v Times Newspapers* at 223D-223F; see also *Pertamina* at [42]–[44]. However, this is not at all the case here. The purpose is readily ascertainable and clear.

42 Importantly, the Sealing Order was an interlocutory order. The point of this order was the preservation of confidentiality pending the eventual decision of the court. This is exactly the situation in *A-G v Punch*, where Lord Hope opined (at [122]):

> Above all, full weight must be given to the purpose of these injunctions. They were interlocutory injunctions. It was not the intention when they were granted that they should be permanent. Their purpose was to serve the interests of the administration of justice by preserving the confidentiality of the information until trial.

43 Lord Hope recognised that, while an injunction chose the method of restraining publication, its purpose was maintaining confidentiality until the court could make a permanent order. If granted, the

eventual and permanent sealing order would have prevented any non-party from inspecting the sealed documents and it would never have been known that SCM had ever tried to seal any documents. Wong's 4th Affidavit was only sealed subsequently. The real risk of harm to the administration of justice came not only from the fact that the Summons and Wong's 5th Affidavit was meant to be kept confidential, but also from the fact that the article alerted the public to the existence of Wong's 4th Affidavit and it could have been inspected *before* the court had a chance to pronounce on it. This would have usurped the court's ability and function to decide whether it should be sealed. That this was eventually sealed by agreement between the parties and not by court order does not change the fact that the contemptuous act had the real risk of affecting the administration of justice.

4 4 *Attorney-General v Newspaper Publishing Plc* [1997] 1 WLR 926 ("the *Spycatcher* litigation") does not help Mr Aurol's case. There, the UK Court of Appeal found that the breaches were very minor as the newspaper had only reproduced two additional sentences which added very little to information already in the public domain, one sentence of which had "in all probability… been read in open court during the proceedings" (at 936) and was thus already publically available. The *Spycatcher* litigation does not stand for the proposition that inconsistency with the eventual aim of the order is not enough to constitute the *actus reus* of contempt. In the present case, *none* of the information provided in the Article was already in the public domain, nor was it a negligible addition to publically available information. The information disclosed was new and its disclosure took away the power of the court to make an eventual decision on the sealing of the documents.

45 The other authorities relied upon by Mr Lim SC do not take Mr Aurol's case any further. In *Potash Corporation of Saskatchewan and Potash Corporation of Saskatchewan Sales v Keith Barton*, 2001 SKCA 56, the facts were quite different and distinguishable. A sealing order had been made of the Queen's Bench files below and as the parties were about to file their 'Appeal Book and factums' for the appeal, Potash Corporation of Saskatchewan, fearing their position on appeal would be irretrievably compromised should the contents of the Appeal Book and factums be open to public inspection before the appeal was to be heard, applied to seal them. The Saskatchewan Court of Appeal ruled that it would be offensive to the strong tradition of public access to seal court files and instead imposed a ban on publication until the hearing of the appeal. There was no issue on the terms of the order and the purpose of the court order was not in issue. In fact it was counsel who took up Cameron JA's suggestion of a ban on publication instead of a sealing order. In *Grand Union Insurance Co Ltd v Clyde & Co & Ors* [1988] HKC 464 ("*Grand Union*"), the order made there was a most unusual and vague order, *viz*, that the proceedings were to be marked "confidential" in the registry of the Hong Kong Supreme Court, and the court held that those terms were not clear enough to mean that no one could publish any information relating to the proceedings. The court expressly held that what was written by the respondent law firm did not render the administration of justice impracticable or to frustrate such attainment of justice or in any way prejudiced or impeded the course of justice. The interim sealing order here certainly does not suffer from those same defects in *Grand Union.* The other authorities relate to 'super injunctions' which are another class of injunctions altogether and based on European Union Human Rights legislation.

46 For the foregoing reasons, I was not persuaded, despite the valiant efforts of Mr Lim SC, to change my decision.

Sentence

The relevant sentencing precedents and principles

47 There is no minimum or maximum sentence for contempt of court proceedings. However, it is

trite law that a custodial sentence is not the starting point. As stated in *Lee Shieh-Peen Clement v Ho Chin Hguang* [2010] 4 SLR 801 ("*Clement Lee*") at [45], "committal to prison is normally a measure of last resort". This has been recently re-emphasized by Prakash J in *Monex Group (Singapore) Pte Ltd v E-Clearing (Singapore) Pte Ltd* [2012] SGHC 189 at [40].

Precedents where a fine was appropriate

48 A fine of $5,000 was awarded in *Summit Holdings Ltd v Business Software Alliance* [1999] 2 SLR(R) 592 ("*Summit Holdings*"). This was a case of contempt by disobeying an order to return items seized under a quashed warrant. The contemnors had acted reasonably, in good faith and in reliance on legal advice which was not in itself a breach. It was held that (*Summit Holdings* at [53]):

> …the bona fides of the persons who were in contempt and their *reasons, motives and understandings* in doing the acts which constituted the contempt of court might be relevant in mitigation of the contempt. Bona fide reliance on legal advice, even though the advice turned out to be wrong, might be relevant and important as mitigation, depending on the circumstances. In this case, there was nothing to show that BSA had acted otherwise than in *good faith* and on legal advice which turned out to be wrong. It was *reasonable* for BSA to rely on its solicitors for the conduct of the litigation.
>
> [emphasis added]

49 The court also gave due consideration to the fact that these were technical breaches which caused no "substantial prejudice to the applicants or the due administration of justice". It proceeded to find that it was not appropriate to impose a high financial penalty.

50 A heavy fine of $200,000 with costs was imposed in *Clement Lee*. The contemnors in that case had breached a money order. They argued that they had not appreciated the scope of the order and that their breach was thus not serious. The Court of Appeal rejected this contention, detecting in their behaviour a general bent towards hiding their interests in the applicant company which belied their claim. This is not unlike the present case, where I have found that there was a deliberate and cynical breach. This was not enough to commit the respondents to prison. Instead, the question the Court of Appeal asked was: what was the advantage that the contemnors were trying to get? The court found that (*Clement Lee* at [49]):

> The advantage which the Respondents had obtained in breaching the Order was to have more money to spend. In this instance, we felt that a financial sanction would be sufficient. In our opinion, an appropriate order to make was to require the Respondents to restore S$200,000 into their Singapore account within seven days, with proof of such restoration to be furnished to the Appellants' solicitors… Furthermore, in order to impress upon the Respondents the utmost importance of complying with an injunction, and that they should not resort to unilateral interpretations favouring themselves, we ordered that the costs for this appeal be awarded to the Appellants on an indemnity basis. That should suffice to register the court's disapproval of their conduct.

51 Given that the contemnors were motivated throughout by financial concerns, the Court of Appeal found that a punishment that would hit where it hurt the most was a high financial penalty with indemnity costs. By this reasoning, a fine would not, but a custodial sentence would be more effective, where the advantages the contemnor hoped to gain from the contemptuous act were *non-financial* or the contemnor had already internalised the cost of breach into his cost-benefit analysis of the act (see [65] below).

52 A fine was also given in *A-G v Punch* which concerned the publication of information in breach of an injunction. The contemnor editor published an article which included information restrained by the injunctions but which the editor did not believe was harmful to the national interest. Upon finding that this was an act in contempt of court, the House of Lords restored the trial judge's findings and the fine of £5,000 for the editor and £20,000 for the publisher of the offending article. The reason for a fine was not found in the transcript of the trial below.

53 In *Pertamina*, the Court of Appeal found that a fine was sufficient to vindicate and preserve the authority of the court. This concerned a breach of a Mareva injunction. The court observed (at [97]) the seriousness of such an offence, stating that

> The Mareva injunction is an important remedy, whose terms cannot – and ought not to – be thwarted. It would be easily set at naught if conduct such as that which occurred in the present proceedings were permitted. More importantly, such conduct would, as alluded to above, also herald the commencement of possible legal anarchy across jurisdictions.

54 The seriousness of the offence and the threat of "legal anarchy across jurisdictions" were not enough, however, to ground a custodial sentence. The Court considered that while the first respondent had initiated the entire train of contemptuous acts, he may have been acting on the advice of the second respondent, a lawyer, and this was a mitigating factor justifying a fine of $5,000 (*Pertamina* at [90]-[92]). The second respondent had aided and abetted the first respondent, but as he was not a direct party to the substantive proceedings in which the order was made, he too was fined only $5,000. This did not, however, stand for the proposition that a fine would always be the most appropriate sanction for interlocutory injunctions. The Court of Appeal clearly decided on a fine as a result of mitigating factors and *not* because the breach of an interlocutory injunction was not serious. Moreover, it warned (*Pertamina* at [97]):

> What is within *this* court's purview, however, is the need to ensure that *its* orders are *not* contravened or thwarted. We cannot overemphasise the importance of this fundamental proposition, and trust that nothing akin to the conduct in the present proceedings will ever come before this court again. If, in the unfortunate event it does, more stringent sanctions will be meted out accordingly.
>
> [emphasis added]

55 The Court adopted a hybrid-like approach in *Allport Alfred James v Wong Soon Lan* [1992] 2 SLR(R) 100 ("*Wong Soon Lan*"). This concerned the breach of an ex parte order pursuant to ancillary proceedings. The wife had disposed of the matrimonial home in contravention of this order in deliberate disregard of the order, even though she had understood the terms and purpose of the order. Because the purpose of the order was to preserve the matrimonial assets, or the value thereof, for ancillary proceedings, the court gave the wife 21 days to pay the court the sum that she had dissipated, or to be committed to prison for 21 days in lieu.

56 All the cases except *A-G v Punch* (where there were no reasons for the sanction given) concerned reversible or money orders. The main motive for the breach in *Clement Lee* and *Pertamina* had been to maintain a financial advantage. It is now settled law that while motive is not relevant in determining *mens rea*, it may be relevant as part of the inquiry to determine if there were any mitigating circumstances for the purposes of sentencing; see [48] above and *OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others (No 2)* [2005] 3 SLR(R) 60 ("*OCM Opportunities*") at [27]. Where the motive for committing the contemptuous act is financial gain, a financial penalty would be most appropriate as it would be sufficient to nullify the profits hoped to be

gained from the act. It would also be proportionate to the offence, as the preservation of the court's authority in relation to interlocutory money orders is to ensure that its money judgments can be properly enforced. In cases such as *Wong Soon Lan*, the return of dissipated assets would be most proportional as the damage to the administration of justice in that case was the inability to enforce the ancillary judgment and the paying back of the value of the assets would restore the enforcement authority of the court.

Precedents grounding a custodial sentence

57 Steven Chong J succinctly summarised the law's position on custodial sentences for contempt in the family context in *Tan Beow Hiong v Tan Boon Aik* [2010] 4 SLR 870 ("*Tan Beow Hiong*") at [63]-[64]. He found that a custodial sentence would only be appropriate where there was a continuing, deliberate and persistent course of conduct and where all other efforts to resolve the situation had been unsuccessful. It would thus seem that a custodial sentence relates to contumacious breaches where the contempt has yet to be purged. However, as I have observed in the preceding section, breaches of money and other orders which had yet to restored to their status quo did not automatically result in a custodial sentence. I find that it is necessary to review the cases where a breach of a court order has resulted in a custodial sentence.

58 The wife in *Tan Beow Hiong*, for example, was motivated not by the welfare of her children or by any other financial reason, but because she wanted to prove the husband wrong. Contemptuous acts in the family context are often emotionally driven, out of spite or a desire to be proven right. I find that Mr Aurol was clearly not motivated by financial rewards; there could be no financial reward from the leaking of the Summons and Wong's 5th Affidavit. Neither was he motivated by a desire to advance the public interest by serving as public watchdog for SCM's conduct of its business affairs. He has never claimed this, and I have found that that Mr Aurol was motivated by spite and had wanted to inflict the maximum embarrassment on SCM, a listed company.

59 Egregious behaviour and motive has been an important part of decisions for a custodial sentence to be imposed. In *Precious Wishes Ltd v Sinoble Metalloy International (Pte) Ltd* [2000] SGHC 5 ("*Precious Wishes*") (at [34]), the seriousness of the contemptuous act was measured by the contemnor's deliberate disregard of a Mareva injunction for his personal benefit, and his inability to recover the dissipated monies despite having known of the contempt proceedings for a year preceding the trial and judgment and having been given a further month to raise the money after conviction. He could not restore the position that the company and its creditors were in for the purposes of judgment in the main suit, and the only solution left in that case was a sanction of three months imprisonment.

60 The position of the contemnor is also important. A custodial sentence was imposed in *Re Tan Khee Eng John* [1997] SGHC 115 ("*John Tan*"). The contemnor had failed to obey a court order for appearance and failed to notify the court of his absence or reasons for absence. He was committed to 7 days of imprisonment. Yong Pung How CJ (as he then was), found (*John Tan* at [14]) that the failure to appear was "calculated to lower the authority of the court" and was unmitigated. Yong CJ was influenced by the fact that this was a breach committed by a lawyer, who was an officer of the court and should have known better, who engaged in a carefully calculated act to defy the authority of the court.

61 Another case involving lawyers where there was a custodial sentence is *Lim Meng Chai v Heng Chok Keng* [2001] SGHC 33 ("*Lim Meng Chai*"). The contemnor in that case had evaded the production of trial documents and stakeholding monies entrusted to him and persistently refused to obey the court order even after contempt proceedings were instituted. This grounded a 3.5 month

custodial sentence. Chan Seng Onn JC (as he then was) found that this involved an officer of the court and was therefore very grave. More importantly, the entire suit was part of the contemnor's continuing breach; the contemnor showed no real remorse and tried deceptively to postpone the hearing of the motion with defences designed to further delay compliance with the order. Leniency would have amounted to court assistance for the contemnor to continue to disregard the order. Chan JC opined that (*Lim Meng Chai* at [105]-[106]):

> [The contemnor] never intended to hand over the stakeholding monies entrusted to him, and he never did. His conduct was on the whole deplorable, dishonest and deceptive. It was in my view wholly inappropriate to adjourn the matter and stay execution to *enable him to delay further*.
>
> … Being an advocate and solicitor and an officer of the court, he ought to know better. On the contrary, he acted in *blatant defiance* of the two orders. He should know the seriousness and gravity of his disobedience of the two court orders. He *relied on lame excuses to ignore and flout the court orders*. The fact that the contemnor had sought ways and means to evade or circumvent the order of court would be relevant: *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1994] 3 MLJ 40 . *I had to take a grave view of such utterly contemptuous and disgraceful conduct by an advocate and solicitor and an officer of the court*. Furthermore, I *could not detect any real remorse or regret* throughout the proceedings. The deceptive means he used to postpone the hearing of the motion was shameful. He raised absolutely unmeritorious defences involving legal niceties and technicalities in the hope of further delaying his compliance… Anything other than imprisonment would be too lenient in the circumstances of this case, and would certainly bring court orders into disrepute and encourage others to disregard them with gay abandon. The *need for deterrence* must be taken into consideration. The *image of advocates and solicitors that they, as officers of the court, would always dutifully and respectfully obey the orders of court must not be tarnished*. Honesty and integrity should be the hallmark of the legal profession. It would be a very sad day if lawyers are no longer respected and regarded as members of an honourable profession.
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> [emphasis added]

62 Repeated breaches of a court order evincing a flagrant disregard of the court's authority have also been factors in finding that a custodial sentence may be appropriate. In *Re: Ho Kok Cheong bankruptcy No 1235 of 1987* [1995] SGHC 121 ("*Ho Kok Cheong*"), the contemnor had travelled out of Singapore on more than 300 occasions (378 according to the official assignee and 319 according to the contemnor's counsel) in breach of s 38(1)(c) of the Bankruptcy Act (Cap 20, Rev Ed 2009) which prohibits bankrupts from travelling outside Singapore. The court took into account three other bankruptcy cases where there had been a custodial sentence instead of a fine: four weeks imprisonment for 132 breaches in 1980, 21 days imprisonment for 266 breaches in 1993, and 18 days for 152 breaches in 1994. Although by the time the bankrupts had appeared before court, their breaches were not contumacious in the sense that they were continuing breaches, the number of times they had travelled out of the country showed an attitude of flagrant disregard for which a fine would have been inadequate. MPH Rubin J in *Ho Kok Cheong* found (at [13]) that the contemnor "could well have deserved a sentence of imprisonment in the region of between six and 12 weeks". However, as the appeal concerned the addition of a new period of imprisonment on top of a completed prison term, only a fine was imposed to reflect the court's concern with the seriousness of the nature of the infractions. It is also worth noting that in that case, a financial penalty would have been wholly inappropriate as this would not have any deterrent effect on bankrupts who did not have any means to pay a financial penalty.

63 The English Court in *In Re Barrell Enterprises* [1973] 1 WLR 19 ("*Barrell Enterprises*") (at 27)

identified two main motivating factors for imprisonment: (1) punishment for disobedience of the order of the court and (2) that of seeking to enforce the order. The contemnor in *Barrell Enterprises* had refused to produce documents, the value of which ran into the thousands of pounds, in disobedience to the court order. The value of the documents withheld was taken into account as increasing the gravity of the offence for the purposes of punishment. In relation to the enforcement principle, this affected the length of the sentence rather than the question of whether a sentence should be imposed at all. The court considered that an extended term of imprisonment would be unlikely to cause the contemnor to disclose the true story behind her contemptuous acts and thus they discharged her from indefinite custody, finding instead that the six months imprisonment already served was appropriate as punishment.

64 The use of imprisonment as a final tool of enforcement was resorted to by the court in *OCM Opportunities.* The contemnors had failed to comply with clear and unambiguous orders to account under an interlocutory injunction. This breach persisted after a permanent injunction was obtained. The court found that they remained uncooperative, deliberate, and contumacious in breaching the terms of the orders, and that "imprisonment, as opposed to a fine, was appropriate as there was no other effective means to ensure compliance" (*OCM Opportunities* at [37]).

65 The interaction of the principles of enforcement and deterrence were elucidated in *Cartier International BV v Lee Hock Lee and another application* [1992] 3 SLR(R) 340 ("*Cartier*"). The contemnor had breached a court order prohibiting the sale of Cartier and Rolex watches in breach of copyright over an extended period of time. There had been three raids between March 1989 and October 1991, and the contemnor refused to comply with the court order by stopping the sale of the pirated watches. Instead, he hired a fall guy to take the rap for the breach of the court order. The court sentenced him to six months imprisonment, finding that the contemnor had internalised the cost of the fine into the cost of his act. Accordingly, a fine would not be enough as this would not deter him from continuing to breach the order as he stood to make more money than he would have to pay in fines. General and specific deterrence was a primary motivating factor, and this complemented the need to enforce the order strictly. G P Selvam JC (as he then was) opined that (*Cartier* at [43]):

> A fine would not be proper because it was clear to me that the defendant had done his calculations and had built fines into his cost. It has been said that the purpose of legal punishment is to persuade offenders that law-breaking is not the way to make a living.

66 Other factors in favour of a custodial sentence included the fact that the contemnor had procured others to break the law on his behalf by employing staff to sell these watches, had planned the breach, and continuously, knowingly and cynically breached the order over an extended period of time.

67 The various factors taken into account for a custodial sentence are different ways of answering one question: Is a fine adequate to punish and deter contemptuous behaviour? The nature of that behaviour, the motives for it, and the ameliorative and deterrent effect of a fine are all relevant factors.

Relevant sentencing principles

68 A review of the case law reveals the following principles:

(a) *The attitude behind the contemptuous behaviour*: did the contemnor act deliberately and cynically in flagrant disregard of the court order, or did he act in good faith? In this respect, personal objections to the order, however sincerely held would not suffice to lessen the gravity

of the offence; see *OCM Opportunities* at [37]. The kind of good faith that would justify a fine on the lower end of the scale is, *eg*, the conviction that what the contemnor was doing was right in law. Thus, in *Summit Holdings*, acting on legal advice, while not negating intention, was a mitigating factor justifying a fine. By contrast, in *OCM Opportunities*, the personal belief that they ought to be allowed to breach an order of court was an aggravating factor justifying the imposing of a custodial sentence. Similarly, in *Precious Wishes*, the deliberate and cynical placing of personal pecuniary interest over obedience to the law and the individuals the order was seeking to protect was an aggravating factor. In *John Tan*, the fact that the act was "*calculated* to lower the authority of the court" [emphasis added] was an aggravating factor justifying a custodial sentence.

(b) *The motive for committing the contemptuous act*: was the motive for the contemptuous behaviour pecuniary or non-pecuniary? In *Clement Lee*, the court found that the main advantage the contemnor was seeking was pecuniary. It would thus be wholly appropriate to impose a fine as this would remove the advantage and impose a further pecuniary disadvantage such that the punishment would be proportional to the expected gain, and would deter the contemnor and others like him. By contrast, in *Tan Beow Hiong*, the court seemed more willing to countenance a fine for contemptuous behaviour motivated by care for the contemnor's children (presumably also because the welfare of the children is a statutory consideration in the type of proceedings involved in *Tan Beow Hiong*), but set its face against behaviour motivated out of pure spite, for which there was really no fine which could be proportional to the act or which could deter such behaviour.

(c) Another way of looking at *Tan Beow Hiong* and *Clement Lee* is through the lens of whether a fine would have been an adequate deterrent. In the line of bankrupt cases cited in *Ho Kok Cheong*, a fine would also not be enough to deter contemptuous behaviour as this would make no difference to the status of existing bankrupts, and the contemnor would not have had the means to pay the fine, making punishment effectively moot. The deterrent effect of a fine would often be enough to assess the adequacy of a fine. Thus, in *Cartier*, the fact that even a hefty fine would not have been enough to deter the contemnor meant that a fine would be inadequate and that a custodial sentence should be imposed instead.

(d) *The reversibility of the breach*: can the harm caused to the other party be remedied by a fine and attendant costs, or is there substantial prejudice to the other party which cannot be remedied by costs? In this line of cases, which arose out of civil suits, the nature of the act must also be assessed in relation to its impact on the other party. In the injunction line of cases, the harm could easily be compensated by returning the dissipated assets. Thus, the court is more ready to impose a fine; see *Clement Lee*, *Pertamina*, *Wong Soon Lan*. By contrast, where the other party cannot be restored to its original position, this may be an aggravating factor; see *Precious Wishes*, *Barrell Enterprises*.

(e) *The standard of care expected of the individual*: This is closely related to motive. In *John Tan* and *Lim Meng Chai*, the court clearly found that a lawyer, being an officer of the court, should be held to a higher standard so as not to bring the legal profession into disrepute. I would venture to say that this is a matter of degree: it would obviously be a mitigating factor if the contemnor was unable to understand the full impact of his actions. The standard of care expected of such an individual would be less compared not only to a lawyer, but also to someone who was better able to understand the consequences of his actions and persisted in breaching a court order. It should be noted that the second respondent in *Pertamina* was also a lawyer, but that a fine was warranted in that case as he was guilty of the secondary offence of aiding and abetting contempt, instead of the primary offence and the case is hence distinguishable from

John Tan and *Lim Meng Chai*.

(f) *Nature of the contemptuous act*: how egregious was the contemptuous act? In assessing the gravity of the act, the purpose of the order breached and the impact of that breach on this purpose is important. In *Pertamina* and *Wong Soon Lan*, the purpose of the order was to prevent dissipation of assets. The breach could easily be ameliorated by paying back these sums or their value. By contrast, in *Precious Wishes*, the contemnor had been unwilling or unable to pay back these monies, and the contemptuous act thus took on a more pernicious complexion as it was irremediable. In *Barrell Enterprises*, the high value of the documents withheld made the breach more egregious as there would be fewer effective ways of compensating for the harm done by the contemptuous act. Planning (such as in *Cartier*) or persistent breach (such as in *Lim Meng Chai* and *OCM Opportunities*) may also render an act egregious. A contumacious breach would be more serious than a breach that had effectively ended and could not be repeated. A breach that had been planned, taking into account the cost of the fine, and which had been conducted over a period of time when there had been numerous opportunities to stop the contemptuous behaviour would be serious enough to ground a custodial sentence; see *Cartier*.

(g) *Whether the* contemnor *was remorseful*: in *Ho Kok Cheong*, the court found that the contemnor's remorse was a mitigating factor justifying a substantial fine instead of sending the contemnor back to prison to serve an additional term of imprisonment. By contrast, Chan J in *OCM Opportunities* found that there was no real remorse or regret from the contemnor during the proceedings. I pause to note that it would be an unusual case where there would be cause for looking behind the contemnor's words or actions to assess the sincerity of his apology. The apology alone is often enough to purge a contemptuous act in the context of contempt in the face of the court. I find that an apology is less important in the context of a breach of court order than in the context of contempt in the face of court because it does not purge the contempt. The breach of an order may be either continuing or past. The purging of contempt in the case of a Mareva injunction may be to restore the assets or value of the assets. Even the most remorseful of apologies could not purge the contempt if the monies have not been paid back. It was thus a contumacious breach in *Precious Wishes* as the contemnor could not restore the dissipated assets when he was called upon to do so, even though he averred that he was remorseful. The absence of remorse played a role in *OCM Opportunities* because it showed that there was no intention as well as no attempt to restore the other party to the position under the breached court order. I find that while remorse is mitigating factor, the lack of remorse cannot be an aggravating factor unless it points towards contumacious breach with no intention of remedy.

(h) Procuring others to commit the contemptuous act is an aggravating factor; see *Cartier*.

Application of relevant sentencing principles to the present facts

69 I now proceed to apply these principles to the present case.

Mr Aurol's attitude behind the contemptuous behaviour

70 I have already found (at [85] of my earlier judgment) that Mr Aurol had deliberately and cynically breached the interim sealing order. The chain of events leading to the disclosure of the documents showed that Mr Aurol had deliberately engineered the situation in a calculated attempt to subvert the Sealing Order. He had used the words of Wong's 5th Affidavit to pique Mr Raj's interest, and had then forwarded both sealed documents to Mr Raj, despite the fact that there was no ambiguity in the Sealing Order as to the Summons and that he had read the 6th December letter

clarifying that Wong's 5th Affidavit was also sealed. Mr Aurol's behaviour during the hearing of the Summons and proceedings leading up to this confirm this finding. He has not, until today, explained when he read the 6th December letter, how he read it, and what he understood by it. Instead, his first apology was deliberately obfuscating and left out these important details, and his argument that he had not known that the Summons and Wong's 5th Affidavit were sealed was disingenuous at best.

71 In Mr Aurol's application for further argument, an attempt was made to rely on an unaffirmed draft affidavit, purportedly by Mr Raj testifying to the contents of the email Mr Aurol had sent, but this again very disingenuously contradicted the clear and natural meaning of Mr Raj's affidavit produced for the Mediacorp suit. Even during submissions on sentence, when given an opportunity to apologise, Mr Aurol very carefully selected his words and apologised for the inconvenience he had caused this court, but not for the breach of the order itself:

> I have always had the highest regard for this court and our judicial system. I have never doubted its integrity. Although I must honestly say that the result of your decision has not made me happy, I respect your decision in this suit, and to disallow Conrad's evidence. Conrad was my really good friend and *this chain of events started when I emailed those documents to him. I am really sorry that it has taken up so much of your Honour's time and for all this, I would like to offer my sincere apologies. I'm sorry that this had to happen and I promise not to do anything to damage or harm the judicial system*. These proceedings have been quite difficult for me. I have come to the stage of retirement and have had a good reputation in the private sector. I know that I have to live with it now. It has affected me and my family and caused quite a bit of strain, and I ask that your Honour be merciful when meting out your punishment. The last thing I want to do is end my career with a sentence that sends me to jail. It is not something I want to add to my resume. [note: 4]
>
> [emphasis added]

72 I find that Mr Aurol has been less than forthright throughout the hearings; this confirms my inference that his contemporaneous attitude toward the breach was cavalier and cynical as it has not changed to this day. This is clearly a situation where Mr Aurol considered that he was above the law, and that the restrictions on disclosure of the sealed documents did not apply to him. This amounts to a flagrant disregard of the law not unlike the attitude evinced in *OCM Opportunities*.

Mr Aurol's motive for disclosing the sealed documents

73 As I have observed at [58] above, Mr Aurol was not motivated by pecuniary advantage or even by exercising his freedom of expression. His primary motivation was spite and to cause maximum embarrassment to SCM, a public listed company. This is neither a mitigating nor aggravating factor, but the lack of pecuniary motive may mean that a fine may not be sufficient or proportional as punishment or deterrence.

Whether a fine would be an adequate specific and general deterrent

74 Mr Aurol has already expressed that he would not breach a court order again as he had learned his lesson. On the surface, it would thus appear that in relation to specific deterrence, a fine would be sufficient. However, I find that in cases such as Mr Aurol's, where financial advantage plays little part in the motivation for breaching a court order, a fine would not be sufficient to deter. Something stronger would be required to register the seriousness of the breach for general deterrence purposes.

The reversibility of the breach and nature of the order breached

The reversibility of the breach and nature of the order breached

75 The nature of the interim sealing order was that any breach of the order would be an irreversible breach which took away the Court's ability to decide on a matter it was seized of. This is a particularly serious breach. Mr Lim SC has tried to impress upon me that there was really no harm done, as there was no rush to inspect the 4th Affidavit, which was sealed almost immediately after that breach by agreement between the parties, and there had been a subsequent permanent sealing order proving that there had been something for the court to decide. I am unfortunately not persuaded by these arguments.

76 It would not be accurate to say that merely because there was a permanent sealing order, the court maintained its substantive ability to decide on the matter. A permanent order would have been necessary whether or not the documents had been disclosed in the Article. The difference that Mr Aurol's breach made was that the permanent order was robbed of its practical effect and amounted to a toothless and *ex post facto* declaration. I find that the substantive decision-making power of the court had been removed unilaterally by one party and it is this that gives the right complexion to the contemptuous act. In any event, the order by Lai Siu Chiu J on 22 December 2012 to permanently seal the documents was by consent between the parties and included other items such as Wong's 4th Affidavit which had yet to be sealed. The revealing of the names and areas of confidential policies and the fact that SCM had sought to have these policies sealed did *prima facie* also cause harm to SCM, even if only by the loss of reputation caused by the Article. While there is no evidence of any financial loss occasioned by Mr Aurol's act, I note that the loss of reputation or embarrassment for an established and listed company like SCM may be significant and cannot always be compensated by costs. I have noted nonetheless that there was no evidence of any pecuniary loss occasioned to SCM.

Standard of care expected in Mr Aurol's case

77 I found (at [43] of my earlier judgment) that Mr Aurol was an experienced businessman with sufficient facility in English and awareness of the law to have been quite certain what the purpose of the Sealing Order was. However, this is not the same as saying that he was an officer of the court. I do not find that the same level of care expected of a legal professional should be applied to Mr Aurol and I do not think that it would be appropriate to find that Mr Aurol's experience as a businessman counts as an aggravating factor. Nonetheless, I do find that there is little by way of mitigation for Mr Aurol in this area.

Nature of Mr Aurol's Act

78 I find that the contemptuous acts were egregious. Mr Aurol not only disclosed the documents to Mr Raj, he had deliberately selected a paragraph to pique Mr Raj's interest and then sent the documents on to Mr Raj. This was not an act committed on the spur of the moment; it was a calculated act.

79 By the time Mr Aurol talked to Mr Raj on 9 or 10 December 2009, he had already had the benefit of reading the 6th December letter, which clarified any latent ambiguity in the interim sealing order. He had obviously read Wong's 5th Affidavit in enough detail to know which paragraph would be of most interest to journalists and particularly to Mr Raj. He would have had time to consider his position in relation to the sealed documents, particularly as he was aware that the application to seal Wong's 4th and 5th Affidavits had been taken out, and had, through his lawyers, contested the sealing of the 4th Affidavit. If the application had been sent to him in hard copy, Mr Aurol would have had to scan the

sealed documents before sending them. If they had been sent to him in soft copy, Mr Aurol would have had to forward them after deleting text pertaining to legally privileged correspondence between his lawyers and himself in the main suit. In either case, this was not a situation where Mr Aurol could send the information on at a quick, unthinking click of the mouse.

80 I am unable to believe that Mr Aurol's act was an unconsidered act carried out on the spur of the moment. Even if Mr Aurol had only formed his intention to breach the order at the time when Mr Raj had called him, I find that Mr Aurol had ample opportunity to rectify the situation. The Article was published four days after the conversation between Mr Aurol and Mr Raj, and seven days after the 6th December letter was sent. Mr Aurol could have called Mr Raj at any time during those four days to ask Mr Raj not to publish an article based on the sealed documents. He chose not to do so.

81 I am not persuaded by Mr Lim SC's submissions that Mr Aurol had not known that Mr Raj would publish the article and thus could not have prevented its publication. Mr Aurol knew that Mr Raj was a journalist and had published unfavourable articles about SCM in the past; he deliberately piqued Mr Raj's interest. I find that Mr Aurol intended thereby for Mr Raj to publish the article, and gave him every means to do so by forwarding the relevant documents to him. He then proceeded to protect himself by telling Mr Raj not to disclose his identity, a point that Mr Raj testified to in his affidavit in the Mediacorp suit (see [27] above). If Mr Aurol had not intended for Mr Raj to publish an article based on the sealed documents, there would be no need for him to ask Mr Raj to keep his identity confidential. Even if I were to give Mr Aurol the benefit of the doubt and find that Mr Raj's affidavit in the Mediacorp suit had wrongly stated the facts, I find that this would still be a classic case of "Nelsonian blindness". Mr Aurol would have known that Mr Raj would be more likely than not to publish an article based on the sealed documents that he had forwarded. Yet he chose to do nothing about this, nor even caveat his email or telephone conversation by telling Mr Raj that it was a conversation between friends and that Mr Raj should not publish an article based on these documents. Instead, Mr Aurol chose not to reveal to Mr Raj that the documents were sealed, thus enticing Mr Raj to publish an article based on the documents.

82 The culmination of all these factors shows that Mr Aurol's acts constituted a deliberate and cynical breach of the Sealing Order and, to my mind, this is a strong aggravating factor.

Mr Aurol's apology

83 A sincere apology and remorse goes a long way in considering the appropriate sentence and in most cases removes the necessity for a custodial sentence. The fact that Mr Aurol apologised may be a mitigating factor. However, as I have already noted at various parts of my decision and at [16(i)] above, Mr Aurol's apology was deliberately obfuscating and incomplete. While the fact of an apology may be a mitigating factor, I find that the way in which Mr Aurol apologised and the fact that he chose not to apologise until the very last minute when Mediacorp had been ordered to reveal his identity are factors in favour of finding that this is not a particularly strong mitigating factor. Even when given an opportunity to apologise during mitigation, Mr Aurol proceeded to give a carefully worded apology, not for his wrong doing, but for taking up the Court's time (see [71] above).

The procurement of Mr Raj to aid his scheme

84 For the reasons set out at [78]–[82] above, and in the circumstances of this case, I find that Mr Aurol deliberately chose to pique Mr Raj's interest and bait him to publish some article on SCM, in order to inflict maximum embarrassment and damage to SCM. This amounted to a procurement of Mr Raj, unwittingly on the latter's part, to assist in the breach of the interim sealing order and is an aggravating factor.

85 In the final analysis, I find that there are very few mitigating factors in Mr Aurol's favour and many aggravating factors which indicate that a fine would be insufficient. I find that, for the reasons given at [70]–[84] above and, in particular, the egregious nature of the act and Mr Aurol's attitude towards and motivation for his actions, a custodial sentence would be appropriate.

86 However, I find that Mr Aurol's actions do not reach the level of seriousness as in *Cartier*, *Precious Wishes*, *Lim Meng Chai* and *OCM Opportunities*. These were breaches which had been planned over a number of months and even years, and were persistent and continuing. By contrast, the breach of an interim sealing order is a once and for all breach. While it may achieve the same amount of damage, I find that the few days of planning and calculation does not reach the same level of seriousness and planning over months and years, and deliberately calculating the cost of a fine into the cost of the act. Further, although not an overly strong factor given the nature of the breach and the purpose of the Sealing Order, I nonetheless take into account that no financial damage was caused to SCM and Wong's 4th Affidavit was subsequently sealed.

87 I also find that as Mr Aurol was not an officer of the court, the strong public policy reasons behind having a longer custodial sentence in *OCM Opportunities* and *John Tan* do not apply. Unlike *Barrell Enterprises*, there is no issue of enforcement as the breach was a once and for all breach and cannot be retrospectively enforced. There is thus no enforcement impetus to increase the custodial sentence to ensure compliance in the case. I thus find that it would be a wholly inappropriate and disproportionate punishment for Mr Aurol to be sentenced to a custodial sentence of the 3, 4 or 6 months meted out in those cases. Mr Aurol's case is closer to *John Tan*'s case and the 7 days meted out there.

88 I do not consider that a lengthy custodial sentence is necessary or desirable to achieve general deterrence for contemptuous acts of this nature. A short custodial sentence would be sufficient to register the seriousness of his breach and to specifically and generally deter such behaviour. The very mention of a custodial sentence is a powerful deterrent to others contemplating the same course of action as Mr Aurol. I find that a custodial sentence of 5 days in prison would be sufficient to preserve the authority of the court and as punishment for Mr Aurol's contemptuous acts.

Conclusion

89 Taking all the facts and circumstances of this case into account, I hereby sentence Mr Aurol to 5 days imprisonment for his contempt of court.

90 Having heard the parties on costs, I award costs to SCM, including the costs in Summons in Chambers 2861 of 2011.

[note: 1] Affidavit of Anthony Sabastian Aurol, 02/04/2012 at [16].

[note: 2] Notes of Evidence, 24/4/2012 at p 5.

[note: 3] Affidavit of Evidence-in-Chief of Conrad Jayaraj in OS 74/2011 at [27].

[note: 4] Notes of Evidence, 23/05/2012 at p 21.