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HCA2002/2001

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 2002 OF 2001**

BETWEEN

FONFAIR COMPANY LIMITED Plaintiff

and

UDL MANAGEMENT LIMITED Defendant

IN THE MATTER OF AN APPLICATION ON Applicant
BEHALF OF FONFAIR COMPANY LIMITED

and

CHAN KIM LEUNG Respondent
FOR AN ORDER OF COMMITTAL

AND

IN THE MATTER OF AN APPLICATION ON Applicant
BEHALF OF FONFAIR COMPANY LIMITED

and

LEUNG YU OI LING IRENE Respondent
FOR AN ORDER OF COMMITTAL

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Before : Deputy High Court Judge Poon in Court
 Dates of Hearing : 6-10 February 2006 and 8 June 2006
 Date of Judgment : 24 November 2006

 J U D G M E N T

1. This is an application by Fonfair Company Limited (“Fonfair”) for an order of committal against Mr Bobby Chan Kim Leung (“Mr Chan”) and Mrs Irene Leung Yu Oi Ling (“Mrs Leung”), directors of UDL Management Limited (“UDLM”), pursuant to Order 52, Rules of the High Court. The background leading to this application may be summarized as follows.

1. HCA2002/2001

2. On 7 May 2001, Fonfair commenced HCA2002/2001 against UDLM for delivery up of its books of account and all other accounting records and its minute book, share register and other company records (“the Account Records” and “the Company Records” respectively and “the Records” collectively). Fonfair alleged that on a date unknown before 24 March 2001, UDLM came into possession of the Records but had failed to deliver up the same despite requests. UDLM alleged that by a service agreement evidenced by a letter dated 1 December 2000, Fonfair had appointed the defendant to provide accounting services since 1 April 1999. Pursuant to this service agreement, Fonfair had periodically caused the Accounting Records and the Company Records to be delivered to UDLM to enable UDML to provide the aforesaid services. Upon completion of each review of the same, UDLM had duly returned to Fonfair the Account Records and the Company Records. Thus they were not retained by or in

A the possession custody or control of UDLM. UDLM also disputed
B Fonfair's authority to commence the action.

C
D 3. HCA2002/2001 was in fact a spin-off of HCA1886/2001.
E There, Fonfair sued Universal Dockyard Limited ("UDL") for rental and
F mesne profit under a tenancy agreement dated 10 September 1999 in
G respect of the premises at No.44 Ko Fai Road, Yau Tong Bay, Kowloon
H ("the Yau Tong Office"). (Fonfair commenced HCA2002/2001 for return
I of the Records for the purposes of, *inter alia*, ascertaining the full amount
J of UDL's liability to Fonfair under the said tenancy.¹) On 5 November
K 2001, Master Wong granted UDL conditional leave to defend the action
L and ordered that unless UDL paid into court the outstanding rent of
M HK\$3,616,000 and mesne profit at the monthly rate of HK\$226,000 within
N 14 days from 5 November 2001, Fonfair may enter final judgment against
O UDL. Upon UDL's default, final judgment was entered on 11 December
P 2001. UDL's appeal against Master Wong's order was dismissed by
Q Deputy Judge To on 25 January 2002.

R 4. On 11 December 2001, Master Wong entered summary
S judgment in HCA2002/2001 against UDLM, ordering it to deliver the
T Account Records to Fonfair's auditors, Messrs Lau & Au Yeung CPA Ltd
U ("LAYCPA") and the Company Records to Fonfair's former solicitors,
V Messrs K.F. Wong & Co. ("KFW") ("the 1st Order").

5. UDLM did not appeal against the 1st Order. But it did not
comply with it either. Responding to the request to deliver up the

¹ See the affirmation of Leung Yuet Keung, Fonfair's director, filed in its Order 14 application on 30 June 2001, at para.3.

Records by KFW, Mr Chan by letter dated 11 January 2002 repeated the allegation that all the Account Records and Company Records had been returned to Fonfair's responsible officer. He went on to say that "Unless [Fonfair] could prove that specific documents are in possession by [UDLM] (with evidence), [UDLM] could not be in a position to accede to your request."

6. On 30 January 2002, Fonfair obtained from Master Chan an order pursuant to Order 45 rule 6, RHC to comply with the 1st Order by 4 p.m. on 6 February 2002 ("the 2nd Order"). On 1 February 2002, the 2nd Order was served on Mr Chan (receiving the same on behalf of UDLM and in his personal capacity) with a penal notice. Mr Chan then provided the following documents to LAYCPA :

- (1) letter dated 16 January 2002 enclosing unpaid profits tax demand dated 13 December 2001;
- (2) letter dated 22 January 2002 enclosing;
 - (a) unpaid business registration certificate for the period between 3 July 2001 and 2 July 2002;
 - (b) penalty notice from Inland Revenue Department ("IRD") dated 23 August 2001;
 - (c) further notice from IRD dated 7 November 2001 re overdue business registration fee, levy and penalty;
 - (d) two summonses issued by Kwun Tong Magistrate's Court to Fonfair dated 6 December 2001 and 11 January 2002 respectively.

II. Commencing the contempt proceedings

7. On 28 February 2002, Fonfair applied for leave to commence committal proceedings against Mr Chan pursuant to Order 52 rule 2 of the Rules of the High Court, supported by a statement dated 27 February 2002 (“the 1st Statement”). The grounds for the application were set out in paragraph 3 of the 1st Statement. Paragraphs 3(a) to (f) dealt with the obtaining and service of the 1st and 2nd Order. Paragraph 3(g) went on to alleged that despite service of the 2nd Order, Mr Chan had failed to cause UDLM to comply with the 2nd Order and that Fonfair had only received the documents referred to in paragraph 6 above. Thus Mr Chan had by his failure to cause UDLM to comply with the 2nd Order been guilty of contempt : paragraph 3(h).

8. Leave to commence committal proceedings was granted on 7 March 2002. The notice of motion was then issued on 18 March 2002 (“the 1st Notice of Motion”). The only ground relied on by Fonfair to commit Mr Chan is that he, as UDLM’s director, had failed to cause UDLM to comply with the 2nd Order. The 1st Notice of Motion further gave notice that Fonfair intended to read and use the 1st Statement in support of its application for committal against Mr Chan.

9. On 17 April 2002, the 1st Notice of Motion came before me. Mr Chan was then acting in person. I queried why the application for committal was only made against Mr Chan when it appeared that the other director of UDLM, Mrs Leung had control of the management and beneficial interest in UDLM’s parent company, UDL Holdings Limited. I was then informed by Mr Simon Ho, counsel for Fonfair, that there was no particular reason other than the fact that it was Mr Chan who

A represented the defendant throughout the proceedings. The matter was
B then adjourned with directions given.

C
D 10. In the meantime, Fonfair decided to compel Mrs Leung to
E cause UDLM to comply with the 1st Order. On 27 May 2002, Fonfair
F obtained from Master Yuen an order, ordering the defendant to comply
G with the 1st Order within 7 days of the order (“the 3rd Order”). On
H 31 May 2002, the 3rd Order with a penal notice was served on Mrs Leung
I and Mr Chan.

J 11. On 5 March 2002, Mrs Leung in the name of Harbour Front
K Limited commenced HCCW246/2002 to seek the winding-up of Fonfair.
L On 2 February 2004, Kwan J dismissed the petition. While the
M winding-up petition was pending, Fonfair did not proceed with these
N contempt proceedings.

O 12. In the course of HCCW246/2002, Mrs Leung produced
P certain documents in connection with Fonfair. It is Fonfair’s case that
Q they were produced belatedly and did not cover all the documents that
R ought to have been disclosed under the 3rd Order.

S 13. Fonfair then applied for leave to commence committal
T proceedings against Mrs Leung. The application was supported by a
U statement dated 7 October 2004 (“the 2nd Statement”). The grounds in
V support of the application were set out in paragraph 3. Paragraph 3(a)
to (r) referred to the circumstances leading to the 1st, 2nd and 3rd Orders,
service thereof, the alleged failure by Mr Chan and Mrs Leung to comply
with the 3rd Order, HCCW246/2002 and the documents disclosed by

A Mrs Leung in HCCW246/2002. Mrs Leung had thus failed to caused
B UDLM to comply with the 3rd Order was is guilty of contempt :
C paragraph 3(s).
D

D 14. Leave was granted on 11 October 2004. The notice of
E motion was then issued on 13 October 2004 (“the 2nd Notice of Motion”).
F In the 2nd Notice of Motion, the only ground that Fonfair relied on for
G committing Mrs Leung is that she, as a director of UDLM, had failed to
H cause UDLM to comply with the 3rd Order. The 2nd Notice of Motion
I further gave notice that Fonfair intended to use and read the 2nd Statement
J in support of its application for committal against Mrs Leung.

J *III. The hearings*

K 15. The two Notices of Motion came before me on 4 February
L 2005. Mr Chan and Mrs Leung were acting in person. I gave directions
M and adjourned the matter for substantive hearing.

M 16. The substantive hearing took place on 15 June 2005.
N Mr Chan and Mrs Leung were again acting in person. At the outset of the
O hearing, Mr Isamil, appearing with Mr Simon Ho for Fonfair, made a
P preliminary application, to which I will return in a moment. Mr Chan and
Q Mrs Leung then applied for an adjournment to enable them to engage
R lawyers to represent them. I allowed the application and adjourned the
S hearing.

S 17. The adjourned hearing resumed on 6 February 2006. Fonfair
T was represented by Mr Nigel Kat appearing with Mr Simon Ho. Mr Chan
U and Mrs Leung were represented by Ms Catrina Lam. As noted,
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Mr Ismail sought a preliminary ruling at the hearing on 15 June 2005. He argued that Mr Chan and Mrs Leung are not entitled to raise as their defence on liability the allegation that UDLM is no longer in possession of the Fonfair's Records that UDLM is ordered to deliver up and that the Records had already been returned to Fonfair. Mr Kat had effectively abandoned this point. The hearing then proceeded. The affidavit evidence included the affirmations filed in Fonfair's summary judgment application against UDLM before Master Wong, the four affirmations filed by Mr Leung Yuet Keung ("Mr YK Leung") on various dates, the 3 affirmations filed by Mr Chan on various dates and the affirmation filed by Mrs Leung on 26 January 2005. Mr YK Leung, Mr Chan and Mrs Leung all gave oral evidence, which was completed on 9 February 2006. Mr Kat then made his closing submissions on 10 February 2006. The hearing was then adjourned for part-heard.

18. At the resumed hearing on 8 June 2006, Mr Daniel Fung, SC leading Ms Lam appeared for Mr Chan and Mrs Leung and made closing submissions on their behalf.

IV. An overview of counsel's submissions

19. Mr Kat submitted that UDLM was in contempt of the various orders for delivery up of the Records. Both Mr Chan and Mrs Leung, as directors of Fonfair, are liable under Order 45 rule 5(1)(ii) of the Rules of the High Court for contempt. Their evidence on how they had attempted to comply with the orders should not be accepted. Even if their evidence were to be accepted, no defence is available to them.

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20. Mr Fung took a number of points. First, the Notices of Motion were incurably bad for lack of particulars, rendering the application a nullity which should be dismissed with costs. Second, even if the application is a mere irregularity, the court should confine its determination on the complaints canvassed in the 1st and 2nd Statements. Thus even if the court were to conclude that the Records were in UDLM's custody or possession at the time when the orders were made and hence UDLM was in breach thereof, no finding of contempt can be made against Mr Chan and Mrs Leung *qua* directors of Fonfair. Third, the present application is an abuse of process brought by Mr YK Leung against Mr Chan and Mrs Leung, the wife of his brother Mr YT Leung. Mr YK Leung and Mr YT Leung had been engaged in a longstanding intra-family feud, resulting in an avalanche of litigation in recent years. Mr YK Leung brought this application for contempt in order to bring maximize embarrassment to his brother. Finally, Fonfair has in any event failed to prove the contempt against Mr Chan and Mrs Leung beyond a reasonable doubt.

21. Counsel had developed their submissions in length. Without any disrespect to counsel, I shall not deal with every point taken by them below. Suffice it to say that I have already considered their submissions in full when coming to my determination.

V. *Main issues*

22. The following main issues arose out of counsel's submissions :

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- (1) whether the Notices of Motions, as they now stand, are defective because of lack of particulars;
- (2) whether on the Notices of Motions, as they now stand, Mr Chan and Mrs Leung are liable *qua* director of Fonfair, even if Fonfair were to be found in contempt of the orders for delivery up;
- (3) whether the present application is an abuse of process; and
- (4) whether the contempt against Mr Chan and Mrs Leung is proved beyond a reasonable doubt.

I will first look at Issue (1).

VI. *Issue (1) – Whether the Notices of Motion are defective?*

23. It is, I believe, convenient to begin with a brief summary of the relevant provisions in Order 52, Rules of the High Court, under which contempt proceedings are brought. An applicant must first apply *ex parte* for leave to commence contempt proceedings. The *ex parte* application must be supported by a statement (“Order 52 Statement”) setting out, *inter alia*, the grounds on which committal is sought and by an affidavit verifying the facts relied on : Order 52 rule 2. When leave is obtained, the applicant then issues the notice of motion which shall state the grounds in respect of which leave for making the *ex parte* application has been granted : Order 52 rule 3(1A). In practice, the notice of motion should repeat the grounds in the Order 52 Statement, subject to the terms of the order granting leave affecting such grounds : see *Hong Kong Civil Procedure 2006*, Vol.1, paragraph 52/3/1 at p.793. A copy of the Order 52 Statement and affidavit in support of the *ex parte* application for leave must accompany the notice of motion served on the alleged

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contemnor : Order 52 rule 3. Except with the leave of the court hearing
the application for the committal order, the applicant cannot rely on any
grounds other than those as stated in the notice of motion : Order 52
rule 6(3).

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24. It can be readily seen that within the statutory framework of
the rules, the Order 52 Statement is an important document. It is to be
treated in a similar manner as an indictment in criminal proceedings
having regard to the penal nature of the sanctions for contempt : *Grand
Union Insurance Co. Ltd v. Clyde & Co.* [1988] HKC 464, *per* Mayo J (as
he then was) at p.469D-E; *Aqua-Leisure Industries Inc v. Aqua Splash Ltd*,
HCA18928/1998, unreported, 18 April 2001. Like an indictment, the
Order 52 Statement must provide the alleged contemnor with enough
information to enable him to meet the charge : *Chiltern D.C. v. Keane*
[1985] 1 WLR 619, *per* Sir John Donaldson MR at p.622C, speaking in
terms of the notice of motion but applied to the Order 52 Statement by
Yam J in *Incorporated Owners of United Building v. Ng Yuk Ming*
[1994] 3 HKC 637 and Yeung JA in *Secretary for Justice v. Choy Bing
Wing*, CACV11/2004, unreported, 3 December 2004, at paragraph 65.
The Order 52 Statement must accordingly give all the necessary particulars
on how and in what manner is it alleged the order or undertaking has been
breached to enable the alleged contemnor to defend himself, by telling him
exactly what is it that he has done or failed to do which constitutes the
contempt : see *Hong Kong Civil Procedure 2006*, Vol.1, paragraph 52/2/6,
commentary in (f) at p.790.²

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² In *Incorporated Owners of United Building v. Ng Yuk Ming*, Yam J said at p.639B-C
that the statement should state all the facts and the affidavit was just to confirm
those facts.

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25. As required by Order 52 rule 3(1A), the notice of motion must set out the grounds upon which leave to commence committal proceedings are given. It is good practice to repeat in the notice of motion all the particulars in support of the grounds as set out in the Order 52 Statement. But the absence of particulars in the notice of motion is not necessarily fatal. If the notice of motion expressly refers to the Order 52 Statement and clearly states that particulars of the grounds contained there will be relied on in the application, it will be sufficient. For the alleged contemnor will, by reading the notice of motion together with the Order 52 Statement, know what exactly the charge is that he has to meet with the supporting particulars.

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26. In this connection, the English practice under Order 52 of the old Supreme Court Rules is worth noting. There, where the court concerned was a Divisional Court, an applicant had to apply for leave to commence committal proceedings. The application must make an application for leave supported by a statement. Upon leave being granted, the applicant should then issue a notice of motion. A standard form for the notice of motion can be found in *Chitty & Jacob's Queen's Bench Forms*, Form 1089 at p.833. The material part read :

“... for an order that – be committed to prison for his contempt of Court [specify the contempt alleged with as much precision as possible] upon the grounds set forth in the copy statement served herewith used on the application for leave to issue this notice of motion.”

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The English practice of referring to the statement in the notice of motion in the aforesaid manner lends support to my view in paragraph 25 above.

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27. Here, the 1st and 2nd Statements have set out the particulars that Fonfair sought to rely on in support of the ground for contempt that Mr Chan and Mrs Leung had failed to cause UDLM to comply with the 2nd and 3rd Orders respectively. Although the 1st and 2nd Notices of Motion do not repeat those particulars, they can be found in the 1st and 2nd Statement. It would be most desirable if the 1st and 2nd Notices of Motion explicitly stated that the particulars as set out in the Statements would be relied on. But I think the present wording is clear enough to indicate Fonfair's intention to rely on those particulars. I have no doubt that Mr Chan and Mrs Leung knew the case with particularity that they have to meet. So I do not think the so-called lack of particulars in the 1st and 2nd Notice of Motion constitutes any procedural defect as contended by Mr Fung.

28. I will accordingly rule against Mr Fung on Issue (1).

VII. *Issue (2) – Any liability qua director on the Notices of Motion?*

29. I next turn to Issue (2). I will begin with a brief summary of the applicable law.

30. A director of a company can be liable for contempt committed by the company in two ways : (a) under Order 45 rule (1)(iii) or (b) as a person aiding and abetting the contempt : see *Cartier International BV v. Kaybeen International Ltd* [1985] HKLR 127, *per* Huggins VP at p.130-131, *Nicolas Pappadis v. Chan Shing Sheung Barry* [1989] 2 HKLR 511, *per* Hunter JA at pp.518-519; *Excel Noble Development Ltd v. Wah Nam Group Ltd* [2001] 4 HKC 148, *per* Rogers VP at pp.155-156.

Here, Fonfair purports to rely on basis (a) only. The following discussion on law therefore concerns basis (a) only.

31. The director's obligation is to use his position to secure compliance with the order. His liability is however not absolute. In the *Cartier* case, Huggins VP, rejecting the argument that a director was absolutely liable, said at p.132C-F :

“It is one thing to punish a director for the company's failure to do something where it lies within the power of the director to ascertain whether the order has been obeyed and to ensure compliance if it has not: it is another to punish him if he had no reasonable opportunity to ensure compliance.”

See also the *Excel Nobel* case, per Rogers VP at p.157B-E.

32. As the liability of a director for his company's breach is dependent upon his carrying out his own responsibilities as a director of the company, the law, as can be seen under the relevant provisions in Order 45, requires certain procedures to be followed :

- (1) the director must be fully aware of the terms of the order with which the company must comply;
- (2) the director must have that knowledge at a time when he can use his position as director to secure compliance;
- (3) the director should be aware that, if he does not so use his position, steps may be taken against him personally to enforce compliance.

See the *Excel Nobel* case, per Rogers VP at p.157E to H.

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33. As to a director's liability in the context of Order 45,
Woolf LJ (as he then was) said in *AG for Tuvalu v. Philatelic Distribution Corp* [1990] 1 WLR 927 at p.937E-F :

D "In our view where a company is ordered not to do certain acts
E of give an undertaking to like effect and a director of that
F company is aware of the order or undertaking he is under a duty
G to take reasonable steps to ensure that the order or undertaking is
obeyed, and if he wilfully fails to take those steps and the order
or undertaking is breached he can be punished for contempt.
We use the word 'wilful' to distinguish the situation where the
director can reasonably believe some other director or officer is
taking those steps."

H The authorities cited by counsel detail this general duty of director to take
I reasonable steps to ensure compliance thus. He has a personal duty (a) to
J find out exactly what have to be done by the company to comply with the
K order; (b) to see that such things are done properly and in accordance with
L the time set out in the order, whether by delegating the task to other
M employees of the company or by themselves personally; and (c) in the case
N of delegation, to ensure that the employees understand the requirements of
the order and do the things properly within the time set out in the order;
and to supervise the staff to ensure that they did carry out their instructions
properly and timely.

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34. Here, the 1st and 2nd Notices of Motion alleged that Mr Chan
and Mrs Leung had failed to cause UDLM to comply with the 2nd and
3rd Orders respectively. As I understand him, Mr Fung essentially took
two points. First, given that no absolute liability can in law be imposed
on a director in respect of his company's contempt, a mere allegation that
Mr Chan and Mrs Leung had failed to cause UDLM to comply with the
Orders does not *ipso facto* render them liable to be committed under
Order 45 rule 5(1)(iii). The alleged failure to cause UDLM to comply

A with the Orders can only relate to an allegation that they were aiding and
B abetting UDLM in its breach of the Orders, which forms no part of the
C basis upon which the present application is made. Mr Fung relied on
D *Excel Nobel Development v. Wah Nam Group Ltd, CACV576/2000*,
E unreported, 18 October 2000. There, the company was under a Mareva
F injunction obliged to make discovery of its assets. The plaintiff
G complained that there was non-compliance of the discovery order by the
H company. The company applied to commit the company's director for
I contempt. The director raised objections to the notice of motion.
J Rogers VP said at paragraphs 7 and 8 :

I "7. The important thing, however, as far as the 2nd contemnor is
J concerned is the basis upon which the application is made. As
I have already stated the 2nd contemnor is a director of the 1st
alleged contemnor. Paragraph 8 of the statement reads :

K '8. The grounds upon which relief is sought are further that
L the 2nd Intended Contemnor, as an executive director of
M the 1st Intended Contemnor, with full knowledge of the
N terms of the Disclosure Order, and in contumelious
O disregard of the Disclosure Order, has wilfully refused
and/or failed to inform the Plaintiffs or caused or
procured the 1st Intended Contemnor to so inform the
Plaintiffs, when it was within his power to do so, in the
form required or at all, of the 1st Intended Contemnor's
assets, thereby rendering the Mareva Injunction, to
which the Disclosure Order was granted as an ancillary,
defeasible.'

P When the notice of motion is considered the conclusion of the
final paragraph reads :

Q '... the 1st and 2nd Contemnors did fail to so inform the
R Plaintiffs and further failed to serve such affidavit in the
S time afforded, that is on or before 25th February 2000,
and that the 2nd Contemnor, being at all material times
an executive director of the 1st Intended Contemnor and
the affirmant of an affirmation dated 11th March 2000
affirmed in purported compliance with the Disclosure
T Order, contumaciously indulged in the 1st Intended
U Contemnor's failure to obey the said Disclosure Order.'

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8. The final words of the notice of motion and the reference in paragraph 8 to the contumelious disregard of the disclosure order and *willfully refusing and failing to inform the plaintiffs or causing or procuring the 1st contemnor to so inform the plaintiff* when it was in his power to do so, in my view can only relate to an allegation that the 2nd intended alleged contemnor was aiding and abetting a breach of an injunction. A charge of aiding and abetting a breach of an injunction is quite a different charge from a charge of being a director of a company which has failed to comply with a mandatory order. The difference between the two has been reflected in a number of cases in particular in *Cartier v Kaybee* [1985] HKLR 127.” (Emphasis applied)

In my view, what Rogers VP had said is equally applicable to the present case. So I accept Mr Fung’s submission.

35. Mr Fung next submitted that the allegation “failure to cause” amounts to the imposition of absolute liability upon a director in respect of a company’s contempt, a proposition expressly rejected by the Court of Appeal in the cases referred to in paragraph 31 above. I have already summarised the 1st and 2nd Statements in paragraphs 7 and 13 above respectively. Having carefully read the 1st and 2nd Statements again, I agree with Mr Fung.

36. Accordingly, I rule that as the 1st and 2nd Notices of Motion now stand, no liability can be imposed on Mr Chan and Mrs Leung *qua* directors of UDLM even if it were found to be in contempt of not complying with the 2nd and 3rd Orders.

37. Mr Kat submitted that if necessary he would apply to amend the Notices of Motion so that he could rely on matters arising from the evidence of Mr Chan and Mrs Leung to impose liability on them *qua* directors of UDLM. Such matters include the allegation that they had :

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- (1) refused or neglect to comply with the Orders;
- (2) refused or failed to take all possible or reasonable steps to comply with or secure compliance with the Orders;
- (3) refused or failed to take adequate and continuing steps to comply with or secure compliance with the Orders;
- (4) failed to supervise the searches conducted in UDLM’s office premises at the Property and 7/F Aitken Vanson Centre, Kwun Tong; or
- (5) failed to investigate or make inquiries into the location of the documents falling within the ambit of the Orders.

An application to amend is necessary because it is trite that an applicant is not entitled to rely on matters not stated in the notice of motion and the Order 52 statement : *Grand Union Insurance Co. Ltd v. Clyde & Co.*, per Mayo J p.469D and *Yee Sang Metal v. Yip Yeuk Ping*, HCMP2493/2002, unreported, 1 November 2002, per Burrell J at paragraph 17(b). But given Mr Kat’s stance, there is no formal application before me. In any event, an application to amend will be allowed only if it does not cause any prejudice to the alleged contemnor. I agree with Mr Fung that it is now too late and unfair to allow any amendment after the close of evidence. Mr Chan and Mrs Leung would definitely suffer irreparable prejudice if an amendment were to be allowed now. I am further of the view that the proposed amendment is objectional on principle. An applicant should not be entitled to use the evidence of the alleged contemnor, which only emerged in the course of the contempt proceeding, to perfect his charge of contempt. Accordingly even if an application to amend were formally made, I would reject it.

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VIII. Conclusion

38. For the above reasons, the application for committal against both Mr Chan and Mrs Leung must fail. I will dismiss it accordingly. That being my conclusion, it is not necessary for me to go further to consider Issues (3) and (4). In particular, in connection with Issue (4), I do not think it is appropriate to consider the evidence and make findings on a charge which has not been properly formulated. I note that the application is disposed of on technicality with no reference to merits. But as the liberty of two individuals is at risk. They are fully entitled to insist that the steps taken in the application fully comply with all the technical requirements. When there is non-compliance, the application, as is the case here, is liable to be dismissed without any reference to merits.

39. Finally, I will make an order *nisi* that Mr Chan and Mrs Leung do have the costs to be taxed if not agreed.

(J. Poon)
Deputy High Court Judge

Mr Nigel Kat and Mr Simon Ho, instructed by Messrs Ho & Ip, for the Applicant
Ms Catrina Lam (6 - 10 February 2006) and Mr Daniel Fung, SC leading
Ms Catrina Lam (8 June 2006), instructed by Messrs Tsang & Lee,
for the Respondents