SING LIAN SDN BHD & 6 ORS v. LIM JIT TENG @ LIM TIN TENG & 9 ORS
[2006] 1 LNS 172
HIGH COURT [MELAKA]
LOW HOP BING, J
GUAMAN SIVIL NO: MT1-22-47-2005
30 JUNE 2006

DALAM MAHKAMAH TINGGI MALAYA DI MELAKA

GUAMAN SIVIL NO: MT1-22-47-2005

ANTARA

1. SING LIAN SDN BHD (No Syarikat 1667-T)
2. DATIN ENG SING KUAN @ GOH SIEW KOON
   [No K/P: 3336673]
3. TEY LIONG SENG [No K/P: A1408868]
4. TEY SUI KIAT [No K/P: A0034600]
5. TEY SWEE KIM [No K/P: A1788284]
6. TEY TSZE PHENG [No K/P: 730207-71-5199]
7. ENG KAH NGIN [No K/P: 0864957] ... PLAINTIF-PLAINTIF

DAN

1. LIM JIT TENG @ LIM TIN TENG
   [No K/P: 0056304]
2. LIM JET PENG @ THIN PENG
   [No K/P: 0059268]
3. KO MUN WAH [No K/P: 2281335]
4. LIM FUNG HSIEN [No K/P: A0875096]
5. LIM AI JEE [No K/P: 0056376]
6. ONG JUAT KIM [No K/P: 7781281]
7. LIM JIT KIM @ LIM TIAN JEE
   [No K/P: 370501-01-5197]
8. KOH BAN TONG [No K/P: 431229-04-5181]
9. TAN SENG SUN [No K/P: 531230-04-5195]
10. LEE KIN HONG
    [No Pasport Singapura: S0027131-D] ... DEFENDAN-DEFENDAN

JUDGMENT

I. APPLICATIONS

There are two applications before me.

The first application is encl (3) filed by the plaintiffs under O. 29 of the Rules of the High Court

1980 for, inter alia, an interlocutory injunction:-

(1) that the 7th defendant, Lim Jit Kim @ Lim Tian Jee ("D7"), the 8th defendant, Koh Ban Tong ("D8"), the 9th defendant, Tan Seng Sun ("D9") and the 10th defendant, Lee Kin Hong ("D10"), jointly and/or severally, be restrained until the final disposal of this suit from acting and/or representing themselves to be, or exercising any of the functions or performing any duties of, directors or officers of Sing Lian Sdn Bhd, the first plaintiff ("the company") or in any capacity whatsoever including from holding themselves out whether directly or indirectly as directors or officers or in any other capacity whatsoever of the company;

(2) from interfering or attempting to interfere with the management of the affairs and business of the company including the exercise and performance by the 2nd to 7th plaintiffs of their functions and duties as directors of the company ("the directors"); and

(3) that the 1st defendant, Lim Jit Teng @ Lim Tin Teng ("D1"), the 2nd defendant, Lim Jet Peng @ Thin Peng ("D2"), the 3rd defendant, Koh Mun Wah ("D3"), the 4th defendant, Lim Fung Hsien ("D4"), the 5th defendant, Lim Ai Jee ("D5"), the 6th defendant, Ong Juat Kim ("D6"), and DD7 to 10 jointly and/or severally be restrained until the final disposal of this suit from convening and/or requisitioning any general meeting of the company to discuss and/or vote on the same and/or similar grounds in the purported meeting of the company held on 9 April 2005 ("the purported meeting").

Unless otherwise stated or the context otherwise requires, a reference hereinafter to an order and rule is a reference to that order and rule in the Rules of the High Court 1980.

Upon the plaintiff's undertaking as to damages, an ex parte injunction was granted by me on 10 May 2005. On 31 May 2005, I granted an ad interim injunction until further order of the court. Before me now is the inter partes hearing.

The second application is encl (22) filed by all the defendants under O. 18 r. 19(1)(d) for an order:-

a) to set aside, dismiss or stay the company's action; and

b) to order Messrs Lim Kian Leong & Co, the plaintiffs' solicitors, to pay forthwith to all the defendants costs of this action, including encl (3) for interlocutory injunction.

II. FACTUAL BACKGROUND

The disputes between the multiple parties herein are demonstrated by the numerous volumes of pleadings, applications, affidavits and submissions, which have now attained a height of some three feet, filed by the respective learned counsel who have done their Herculean best to make my duty less onerous.

The affidavits filed herein reveal the following:-

The directors of the company are also its majority shareholders while DD1 to 8 are the minority

shareholders.

The company, formerly known as Sing Lian Express Sdn Bhd, was incorporated under the Companies Act 1965. As at 26 May 2005, the paid-up capital was RM4,395,948.

D9 was the proxy of Tan Soon Hin Holdings Sdn Bhd ("Tan Soon Hin Holdings") in the purported meeting.

D10 was purportedly the corporate representative of Singapore Johore Express Ltd ("Singapore Johore Express").

Before the commencement of this suit, the company, the directors and some of the defendants were engaged in at least three separate pending actions viz:-

(1) Kuala Lumpur High Court Civil Suit No. S3-22-95-2001 where leave to show cause was granted upon the company's ex parte application against some of the defendants, inter alia, for presenting a winding-up petition against the company three days before the inter partes hearing of the application for interim injunction to restrain the defendants from presenting the winding-up petition. The company's inter partes application for committal was dismissed and the same is pending appeal;

(2) Melaka High Court Winding-up Petition No. 28-39-2001 presented by DD1 to 8, Tan Soon Hin Holdings, Singapore Johore Express and 13 others, against inter alia the first plaintiff. In 2004, after filing a new winding-up petition against inter alia the first plaintiff company, the petitioners applied to withdraw this petition. I had on 20 September 2005 allowed the withdrawal subject to terms; and

(3) Melaka High Court Winding-up Petition No. 28-23-2004 presented by DD1 to 8, Tan Soon Hin Holdings, Singapore Johore Express and 12 others against inter alia the first plaintiff. On the first plaintiff's application inter alia to strike out, I had on 7 December 2004 stayed the proceedings therein on grounds of multiplicity of proceedings. The first plaintiff, inter alia, had appealed against my decision and the appeal is pending.

On 3 May 2005, the plaintiffs in this action sought declarations, inter alia, that the purported meeting is void for illegality and to restrain DD7 to 10 from interfering with the directors' day to day management of the company. DD1 to 6 had on 18 March 2005 issued a notice under s. 145 of the Companies Act 1965 to call for the purported meeting.

A reference hereinafter to a section is a reference to that section in the Companies Act 1965, unless otherwise stated or the context otherwise requires.

On 23 March 2005, all the parties to the aforesaid actions as well as three other actions involving another company, Sing Hai Estates Bhd, agreed to meet on 7 April 2005 on a without prejudice basis to explore the prospect of a global settlement ("the settlement meeting").

However, on 24 March 2005, the plaintiffs received a notice from DD1 to 6 calling for the purported meeting.

On 28 April 2005, the plaintiffs received another notice from DD1 to 6 asking for the company's audited accounts for the years 2001 to 2004.

The settlement meeting proceeded between PP2 to 4 and five representatives of the opposing parties in all the aforesaid legal actions, and it was agreed that the parties would meet again to agree on the professional valuer to prepare reports on the company and Sing Hai Estates Bhd, for purposes of settlement. PP2 to 4 were under the impression that the purported meeting was to be adjourned as the company's audited accounts were not ready.

On 9 April 2005, PP2, 3, 5 to 7 (P3 attending on his own behalf, and also as proxy for P4 as well as the corporate representatives of three other corporate shareholders of the company) attended the purported meeting which they expected would be adjourned so as to enable the settlement meeting to proceed amicably. Miss SF Pang was also present as the minority shareholders' solicitor ("the defendants' solicitor").

PP2 and 3 were prevented from taking their seats in their capacity as the company's directors. Further P2 was not allowed to chair the purported meeting.

Despite protest by the directors, the purported meeting proceeded to appoint D1 to chair it, wherein inter alia DD1 and 7 unilaterally:-

(1) on the advice of the defendants' solicitor, refused to recognise PP2 to 7 as the company's directors and declared that PP2 to 7 were no longer directors;

(2) proceeded with and refused to adjourn the purported meeting;

(3) referred to and acted upon an alleged syndicated agreement which was not an item on the agenda;

(4) rejected and refused to act on the plaintiffs' demand for polls on the relevant resolutions;

(5) ignored the directors' consent to stand for re-election as directors;

(6) declared DD7 to 10 as the company's directors without any election process or voting; and

(7) reappointed an auditor without any nomination or vote.

On 24 May 2005, defendants obtained leave and filed conditional appearance.

On 27 May 2005, defendants filed encl (22) to, inter alia, set aside, dismiss or stay the first plaintiff's action.

III. PRELIMINARY ISSUE

Defendants' learned counsel Mr. SP Chandra assisted by Mr. K Mogan raised a preliminary issue of law under s. 156 contending that the minutes of the purported meeting having been signed and entered in the company's minutes book would deem DD7 to 10 as the validly appointed directors of the company, until the contrary is proved by the plaintiff, and that encl (3) is misconceived and unsubstantiated in law, relying on inter alia:-

(1) Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1; [1994] 1 MLJ 413 SC;

(2) Re LY Swee Co Sdn Bhd [1970] 1 LNS 136; [1970] 2 MLJ 107 HC; and

(3) KJ Aiyer's Judicial Dictionary 13th Edn. [2001] at p. 767.

Plaintiffs' learned counsel Mr. Lim Kian Leong assisted by Miss Tan Shin Shin contended that the presumption under s. 156 is rebuttable.

Although the above submissions are based on the common ground of the rebuttable presumptions under s. 156, the defendants have additionally submitted that encl (3) is misconceived and unsubstantiated. Hence, it is necessary for me to embark upon a careful analysis of the authorities cited for the parties respectively.

First, s. 156 where relevant merits reproduction as follows:-

"156. Minutes of proceedings

(1) Every company shall cause:-

(a) minutes of all proceedings of general meetings and of meetings of its directors and of its managers (if any) to be entered in books kept for that purpose within fourteen days of the date upon which the relevant meeting was held; and

(b) those minutes to be signed by the chairman of the meeting at which the proceedings were had or by the chairman of the next succeeding meeting.

(2) Any minute so entered that purports to be signed as provided in subsection (1) shall be evidence of the proceedings to which it relates.

(3) Where minutes have been so entered and signed, then, until the contrary is proved:-

(a) the meeting shall be deemed to have been duly held and convened;

(b) all proceedings had thereat shall be deemed to have been duly had; and

(c) all appointments of officers or liquidators made thereat shall be deemed to be valid."

In my view, s. 156(1) makes it mandatory for a company to cause minutes of all proceedings of general meetings, board meetings and managers' meetings to be entered in the minutes books within 14 days of the relevant meeting and such minutes shall be signed by the chairman of the same meeting or the chairman of the next succeeding meeting.

Under s. 156(2), the minutes shall be evidence of the proceedings to which they relate. This evidence is merely prima facie evidence raising presumptions that the meeting had been duly held and convened, that proceedings had been duly had and that all appointments of officers or liquidators are valid. These presumptions are rebuttable by any party who is able to prove to the contrary: s. 156(3).

As the minutes are merely prima facie evidence, contrary evidence may be adduced by the challenger(s) to contradict or supplement them: In re Indian Zoedone Company [1884] 26 Ch 170 CA England; Re Fireproof Doors Ltd [1916] 2 Ch. 142 High Court England; Walton Woon "Company Law" 2nd Edn. pp. 204 & 205); Loh Siew Cheang "Corporate Powers Controls, Remedies and Decision-making" at p. 566 para 8.4; and Dr. Wong Kim Fatt "Company resolutions" p 41 para 3.6.

Amanah Merchant Banker, supra, cited for the defendants, concerns the interpretation of a letter of guarantee wherein the material words in encl 17 were "a notice so sent shall be deemed to be served on the day following that on which it is posted". The Supreme Court speaking through Mohamed Dzaiddin SCJ (later CJ Malaysia) held that the expression "shall be deemed" means "shall be regarded". As encl 17 did not contain the words "until the contrary is proved" as found in s. 156(3), I am of the view that the Supreme Court judgment is unhelpful to the defendants.

The presumption of law as expounded in KJ Aiyer's Judicial Dictionary, supra, and relied on by the defendants is equally unsupportive, as the learned author there had added that such a presumption means that the court is bound to presume the fact is proved "until evidence is given by the party interested to rebut or disprove it".

In my judgment, as the parties are at liberty to prove the contrary to rebut the presumption under s. 156(3), the minutes relating to the purported meeting remain arguable or triable issues at the trial of the action herein. I am therefore unable to accept the defendants' contention that encl (3) is misconceived and unsubstantiated.

As I consider LY Swee & Co Sdn Bhd, supra, to be more relevant to the defendants' application in encl (22), I shall analyse it at the hearing and determination of that enclosure later in this judgment.

IV. INTERLOCUTORY INJUNCTION:

FUNCTIONS OF JUDGE

It was stressed for the defendants that the principles laid down in American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396 HC and Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors [1995] 1 CLJ 293; [1995] 1 MLJ 193 CA are not applicable to encl (3), and that the defendants should not be restrained from exercising their powers and duties, unless the plaintiffs have an

extremely strong case on the merits, citing:-

(1) Smith and others v. Inner London Education Authority [1978] 1 All ER 412 CA;

(2) Malli Dei and another v. Kanchan Prava Dei AIR [1973] Orissa 83; and

(3) Bank Bumiputra Malaysia Berhad v. Australia Furniture (M) Sdn Bhd [1995] 3 CLJ 57; [1995] 2 AMR 1710 HC.

It was argued for the plaintiffs that the principles in American Cyanamid, supra, and Keet Gerald Francis, supra, are applicable to encl (3) and that the defendants may be restrained by an interlocutory injunction.

In my view, in so far as the grant or refusal of an interlocutory injunction is concerned, an analogy can hardly be drawn between an education authority in Smith & Others, supra, and the individual defendants herein.

The facts in Malli Dei, supra, cited for the defendant, revolve around a nominee's entitlement to receive the insurance amount and have nothing to do with the heated disputes in company matters before me. I am unable to find any usefulness of this authority to the defendants' contention.

Australia Furniture (M) Sdn Bhd, supra, cited for the defendants, concerns the execution of a writ of distress against which an injunction was sought to restrain further steps to be taken in execution thereof. I refused to grant the injunction as the appropriate procedure should have been by way of an application under s. 10 of the Distress Act 1951. I am of the view that this authority is not of any assistance to the defendants.

In the circumstances, I am unable to uphold the defendants' contention herein.

At this juncture, it is necessary for me to consider the functions of a judge hearing an application for interlocutory injunction, as enunciated by the House of Lords in American Cyanamid Co, supra, and restated by our Court of Appeal in Keet Gerald Francis, supra, at pp. 390-391, as follows:-

"(a) He should ask himself whether the totality of the facts presented before him disclosed a bona fide serious issue to be tried. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;

(b) Having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by the grant, against the harm that would result from its refusal; and

(c) The judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result between the date of the application and the trial

proper and to maintain the status quo."

(See also Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor [1999] 5 CLJ 376, 380 HC; See Teow Chuan & Anor v. Yam Tunku Nadzaruddin Ibni Tuanku Jaafar and 4 Ors [1999] 7 CLJ 195 HC; and Dato' Jaffar Mohd Ali & Anor v. Jastera Bhd & Ors [2000] 8 CLJ 106 HC).

V. SERIOUS QUESTION(S) TO BE TRIED

The plaintiffs have set out nine serious questions to be tried while the defendants conceded there were at least four such questions viz:-

(1) whether the purported meeting was lawful and regular?

(2) whether the appointment of D1 as chairman of the purported meeting was lawful and valid?

(3) whether the appointment of DD7 to 10 as directors at the purported meeting was lawful and valid? and

(4) whether the reference to and discussion of the syndicated agreement ought to have been put on the agenda of the notice calling for the purported meeting?

My function herein has been made easier as it is common ground that there is a plenitude of serious questions to be tried.

I shall therefore move on to the next step of my inquiry.

VI. JUSTICE OF THE CASE

It was submitted for the plaintiffs that justice of the case is in favour of the grant of the injunction pending the trial of this action.

The defendants contended that granting the plaintiffs the injunction would be a travesty of justice as the defendants could manage the affairs of the company in a competent and responsible manner until the final disposal of this case.

The answer to the above submissions is to be ascertained by examining the facts and circumstances of the case before me.

As I have set out the factual background in considerable detail, I do not propose to embark on a repetition here, except to say that especially in the light of what had transpired at the purported meeting, including the alleged invalidity of the proceedings thereat, I hold that justice of the case is in favour of the plaintiffs.

I shall revert to this principle later in my judgment, when I consider this injunctive relief as a

discretionary remedy and the status quo.

VII. DISCRETIONARY REMEDY AND STATUS QUO

It was submitted for the defendants that this discretionary remedy should not be granted as damages would be more than an adequate remedy to the plaintiffs. Support was sought in:-

(1) M.N. D'Cruz v. K. Sethu & Ors. [1982] CLJ (Rep) 542 HC;

(2) Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor, supra;

(3) Bank Bumiputra Malaysia Bhd v. Australia Furniture (M) Sdn Bhd, supra; and

(4) Natseven TV Sdn Bhd v. Television New Zealand Limited [2001] 4 CLJ 722; [2001] 4 AMR 4048 HC.

The plaintiffs' response is that the above authorities cited for the defendants do not deal with the fact situation in the instant case.

Upon considering the above submissions, I am of the view that the parties are sharing the common ground that the injunctive relief should not be granted if damages would be an adequate remedy to the plaintiffs.

Whether or not damages would provide an adequate remedy to the plaintiffs is a question of fact which can only be arrived at by considering and examining the surrounding circumstances in each particular case. For this purpose, the authorities cited for the defendants would require my prior consideration.

In M.N. D'Cruz, supra, the plaintiff's application for an ex parte injunction to restrain the defendants from continuing to act as committee members of a registered society was dismissed by VC George J (later JCA). The issue of whether damages would be an adequate remedy was not ventilated before the learned Judge.

Interkol, supra, concerns the plaintiff as the tenant of the defendants. The plaintiff had fallen into arrears in the payment of rentals, pursuant to which the defendants had obtained a writ of distress against the plaintiff. The plaintiff sought an interlocutory injunction against the defendants to allow the plaintiff to enter the premises, and to prevent the defendants from removing the plaintiff's goods from the premises, and also to prevent the execution of the writ of distress. After an empirical analysis of the facts and the law, I had no difficulty in dismissing the plaintiff's application for injunction.

Australia Furniture, supra, has been considered above. The factual background there is substantially similar to Interkol, supra.

The plaintiff in Natseven TV, supra, sought an injunction to restrain the defendant from proceeding

with a winding-up petition in the face of the plaintiff's three admissions of indebtedness to the defendant. On these admissions by the plaintiff together with the grounds stated in my judgment, the result was obvious ie, the dismissal of the plaintiff's application for injunction.

I am unable to see how the above authorities can support the defendants' contention herein.

Reverting to the factual background before me, it is to be observed that DD7 to 10's conduct had resulted in the letter given by OCBC Bank Melaka in which the company has maintained an account, stating to the effect that the bank would not honour any cheque of the company issued on or after 26 April 2005 until sufficient explanation has been given by the plaintiffs' directors. That letter was issued by the bank at the instance of D7 who sought to change the company's mandate. D7 was also present at the registered office of the company and demanded to inspect the company's accounts (see para 39 p 17 of the plaintiffs' affidavit in support of encl (3)). PP2 to 7 are the directors and majority shareholders of the company. The affairs of the company are largely ground to a halt. I am of the view that damages would therefore not be an adequate remedy to the plaintiffs and hence justice of the case is in favour of the plaintiffs.

The principle under this head would also require me to examine the status quo.

In considering the status quo, I find it instructive to refer to the judgment of the Court of Appeal delivered by Gopal Sri Ram JCA in Dato' Jaafar Mohd Ali & Anor v. Jasatera Bhd & Ors [2000] 2 CLJ 689 CA. There, the substance of the dispute related to the alleged removal of certain directors at the board meeting held on 31 December 1998. The issue before the Court of Appeal was whether the status quo should be the status quo as at 31 December 1998 or the much later date of the plaintiff's application for injunction. The Court of Appeal held that the status quo should be the status quo at the time of the impugned meeting of 31 December 1998 ie, as at the date of the passing of the impugned resolutions and the court should be concerned with the question whether the status quo prevailing immediately before the passing of the impugned resolutions should be maintained.

In the light of the above judgment of the Court of Appeal, I should in the instant case only be concerned with the question whether the status quo prevailing immediately before the purported meeting should be maintained. On the factual background as alluded to above, I am of the view that that status quo should be maintained.

VIII. NON-DISCLOSURE

It is the defendants' contention that as there were no annual general meetings and no accounts of the company for the years 2001 to 2004, the injunction should be refused, as the plaintiffs were allegedly "totally and absolutely guilty" of:-

(a) non-disclosure of important, relevant and material facts;

(b) concealment of cogent and vital information and documents;

(c) lies and deception perpetrated on the defendants; and

(d) misleading the court, relying on:-

(i) The Topps Co Inc v. Mally Jaya Sdn Bhd [1998] 2 CLJ SUPP 235; [1998] 5 MLJ 744 HC;

(ii) Natseven TV Sdn Bhd, supra, HC;

(iii) Lim Sung Huak & Ors v. Sykt Pemaju Tanah Tikam Batu Sdn Bhd [1994] 1 CLJ 264; [1993] 3 MLJ 527 HC;

(iv) Tunas (Pte) Ltd v. Mayer Investment Pte Ltd & Ors [1989] 1 LNS 13; [1989] 2 MLJ 132 HC Singapore;

(v) Creative Furnishing Sdn Bhd v. Wong Koi [1989] 1 CLJ 22 (Rep); [1989] 2 CLJ 93; [1989] 2 MLJ 153 SC;

(vi) Kepong Industrial Park Sdn Bhd & Ors v. Teoh Seng Aun & Ors [1999] 4 CLJ 726; [1999] 6 MLJ 342;

(vii) Zaidin Abd Ghani @ Zaidin Stothard v. Raja Raman Nair @ Mohd Yusof & 4 Ors [2001] 6 CLJ 558; [2001] 3 AMR 3032 HC;

(viii) Ali And Fahd Shobokshi Group Ltd. v. Moneim and Others [1989] 1 WLR 710 HC; and

(ix) P.M.K. Rajah v. Worldwide Commodities Sdn. Bhd. & Ors. [1985] 86 HC.

In response, it was stressed for the plaintiffs that encl (3) is entirely based on the allegedly illegal events that had taken place at the purported meeting and was not concerned with any annual general meeting or the company accounts, in which case they were not material to encl (3), and that all pending litigations between the parties have been disclosed by the plaintiffs, who relied on:-

(1) Damayanti Kantilal Doshi & Anor v. Jigarlal Kantilal Doshi [2004] 1 CLJ 437; [2004] 1 MLJ 456 CA; and

(2) Noor Jahan bte Abdul Wahab v. Md Yusoff bin Amanshah & Anor [1994] 2 CLJ 249; [1994] 1 MLJ 156 SC.

On my part, at this juncture, it is appropriate to analyse the authorities cited for the defendants.

In The Topps Co Inc, supra, the applicant had obtained an ex parte trade description order pursuant to the Trade Description Act 1972 on the basis of an affidavit affirmed by a deponent who described himself as a general manager when he was actually an undischarged bankrupt. The respondent then applied to set aside the ex parte order on the ground of the deponent's failure to make full and frank disclosure of all material facts. I allowed the respondent's application and set aside the ex parte order.

The plaintiff in Natseven TV Sdn Bhd, supra, had applied for an interim injunction to restrain the

defendant from proceeding with its winding-up petition against the plaintiff, but its affidavit in support had failed to disclose, inter alia, the plaintiff's admission of indebtedness of a certain sum of money for which a statutory notice under s. 218 had been issued by the defendant to the plaintiff. In view of the plaintiff's non-disclosure of, inter alia, this material fact, I dismissed the plaintiff's application for interim injunction.

In Lim Sung Huak, supra, the plaintiffs obtained an injunction restraining the defendant from, inter alia, selling two lots of land, one lot being registered in the name of the defendant company while the other, in the name of an individual as trustee. The plaintiffs based their application for the injunction on the sale and purchase agreements alleged to have been entered into between the defendant company and the plaintiffs or the original purchasers who have assigned their rights to the plaintiffs, when actually all the agreements, except for one, were entered into with a firm and not the defendant company. KC Vohrah J (later JCA) set aside the injunction, on the ground, inter alia, that the statement of claim and the affidavit of the plaintiff were misleading.

From the above authorities, it can be gleaned that an applicant for an ex parte injunction has a duty to make full and frank disclosure of all material facts (see also Tunas, supra, per Coomaraswamy J (Singapore); Creative Furnishing Sdn Bhd, supra, SC per Mohamed Azmi SCJ (as he then was); Kepong Industrial Park Sdn Bhd, supra, per Kamalanathan Ratnam J; Zaidin Abd Ghani @ Zaidin Stothard, supra, per Ramly bin Ali JC (now J); per Mervyn Davies J; and P.M.K. Rajah, supra, per Zakaria Yatim J. (later FCJ)).

In my judgment, the determination of the defendant's contention of non-disclosure is to be based on the subject matter of the suit herein and encl (3) both of which fall within a clearly defined compass pertaining to the purported meeting.

The question that has to be addressed is whether the annual general meetings and the audited accounts of the company for the years 2001 to 2004 were material to the plaintiffs' suit and consequently to the plaintiffs' application in encl (3) for the ex parte injunction.

In ordinary parlance, to the plaintiffs, a fact is material if it is relevant to their case, on the basis of their statement of claim and encl (3) by which the plaintiffs are bound.

A proper perusal of the plaintiffs' statement of claim reveals, inter alia, the capacities of the respective parties in the plaintiffs' suit which is wholly and exclusively based on the purported meeting, the numerous episodes that had transpired in the purported meeting, the illegality allegedly occasioned by the defendants and the prayers sought by the plaintiffs which in essence were for declarations that all the defendants' deeds and the episodes that had transpired at the purported meeting were illegal and void. The plaintiffs' suit and the plaintiffs' application in encl (3) for ex parte injunction and now inter partes hearing were not based on the annual general meetings and the audited accounts of the company for the years 2001 to 2004, which are therefore neither material nor relevant to the plaintiffs' case.

Quite apart from that, it is now trite law that the paramount consideration is justice of the case as has been alluded above. This proposition has been established in authoritative judgments.

By way of illustration, in Damayanti, supra, one of the issues before the Court of Appeal was whether the learned judicial commissioner was correct in setting aside an ex parte injunction on the ground that there was a material non-disclosure at the ex parte application stage. Richard Malanjum JCA (now FCJ) speaking for the Court of Appeal in para 23 held that the paramount consideration is whether the justice of the case requires the granting of the interim injunction on the facts presented in the inter partes hearing despite the making of an ex parte order earlier on. His Lordship followed Noor Jahan, supra, where Edgar Joseph Jr J (later SCJ) referred to the judgment of Sir Nicholas Browne-Wilkinson VC in Dormeuil Freres SA & Anor v. Nicolian International (Textiles) Ltd [1988] 3 AER 197 to the effect that if in the circumstances existing when the matter comes before the court inter partes, justice requires an order either continuing the ex parte injunction or the grant of fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure.

Applying the above principles to the factual background in which the plaintiffs had disclosed all the material facts on the basis of the plaintiff's statement of claim and their affidavits in support of encl (3), I am unable to find any merits in the defendants' contention grounded on non-disclosure. I am therefore of the view that justice of the case is in favour of the grant of the interlocutory injunction.

IX. AUTHORITY OF SOLICITORS

Defendants' application in encl (22) was made pursuant to O. 18 r. 19(1)(d) challenging the authority of solicitors Messrs Lim Kian Leong in commencing this action. It was submitted that the first plaintiff's action against the defendants should be set aside, dismissed or stayed, being a nullity as no valid authority had been given by the board of directors of the company or its majority shareholders in a general meeting to commence this action in the company's name and the solicitors who had commenced this action were never authorised to act for the company, citing:-

(1) s. 156;

(2) Re LY Swee & Co Sdn Bhd, supra;

(3) Sarawak Building Supplies Sdn Bhd v. Director of Forests & Ors [1991] 3 CLJ 706 (Rep); [1991] 1 CLJ 373; [1991] 1 MLJ 211 HC;

(4) Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd [1990] 3 CLJ 165 (Rep); [1990] 2 CLJ 297; [1990] 3 MLJ 239 HC; and

(5) Sundram Properties Sdn. Bhd. v. Cyril Wettasinghe & Ors. [1987] CLJ (Rep) 988 HC.

For the company, it was stressed that this is not a plain and obvious case to justify the order sought by the defendants, citing Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7; [1993] 3 MLJ 36 SC.

I shall first consider Re LY Swee & Co Sdn Bhd, supra, where the minutes of the directors' meeting in relation to the appointment of the company's solicitors had not been entered in the company's

minute book within 14 days of the meeting and that was held to be in contravention of s. 156, and so the validity of the appointment was successfully challenged on that ground: per Abdul Hamid J (later CJ Malaysia). However, it is significant to note that the issue of the abuse of the process of the court under O. 18 r. 19(1)(d) was not before his Lordship who also did not strike out the petition. Hence, that judgment must be seen in that light.

Sarawak Building Supplies, supra, concerns an application by the defendant pursuant to O. 12 r. 7(1) for an order, inter alia, that the action filed in the name of the plaintiff-company be struck out, dismissed or stayed. The judgment of Haidar J (later CJ(M)) was based on O. 12 r. 7(1) which where relevant merits reproduction as follows:-

"7. Application to set aside writ etc

(1) A defendant to any action may ... ... if he has entered a conditional appearance apply to the court for an order setting aside the writ ... ..."

I would observe that O. 12 r. 7(1) is intended to enable a defendant to obtain an order to set aside the writ eg, where such defendant is claiming immunity from legal process and that the court had no jurisdiction to hear the plaintiff's claim : MBf Capital Bhd & Anor v. Dato' Param Cumaraswamy [1997] 3 CLJ 927; [1997] 3 MLJ 300; and Malaysian High Court Practice 1998 Desk Edn. p. 218.

It is significant to note that O. 12 r. 7(1) does not contain provisions corresponding to O. 18 r. 19(1)(d) and so under O. 12 r. 7(1) different considerations would apply.

O. 18 r. 19(1)(d) had never been ventilated before his Lordship in Sarawak Building Supplies, supra. Hence, I am of the view that the defendants are unable to derive any assistance from Sarawak Building Supplies, supra.

In Syawal Enterprise, supra, one Soo Seng Chuan had instructed a firm of solicitors to take out a writ on behalf of the first plaintiff, a registered company although he was entered in the books of the first plaintiff as a minority shareholder. VC George J (later JCA) allowed the defendant's application under O. 18 r. 19 to strike out the plaintiff's writ on the ground that the firm of solicitors had no proper authority to cause the writ to be issued on behalf of the first plaintiff.

It is to be noted that in relation to encl (22) before me, it has never been doubted that the directors are the majority shareholders of the company. Hence, the facts in Syawal Enterprise, supra, are readily distinguishable.

In Sundaram Properties, supra, the summons in chambers of the first and second defendants sought to strike out the writ on the ground that it was instituted by persons who were not even registered shareholders. Peh Swee Chin J (later FCJ) at p 992e-f arrived at the inescapable conclusion that it was filed without authority and was irregular, thereby allowing the application and struck out the writ.

In the case before me, the company itself has filed the action and the other plaintiffs are registered

majority shareholders and directors of the company. The factual matrix is therefore readily distinguishable. Further, it is unclear whether the defendants before his Lordship was relying on O. 18 r. 19(1)(d).

O. 18 r. 19(1)(d) where relevant provides as follows:-

"19. Striking out ...

(1) The court may at any stage of the proceedings order to be struck out ... ... any writ in the action ... ... on the ground that:-

(a) ... ...;

(b) ... ...;

(c) ... ...; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed ... ... as the case may be."

[Emphasis added]

The part of the prayer sought by the defendants to "set aside" the first plaintiff's action does not appear to come within the ambit and purview of O. 18 r. 19(1)(d) which provides for a striking out. However, as the other prayers viz "to stay or dismiss" the first plaintiff's action are within the final sentence under O. 18 r. 19(1), I shall proceed to consider encl (22) on that basis.

In my judgment, the final sentence under O. 18 r. 19(1)(d) must be construed in the context of whether there is any abuse of the process of the court.

The locus classicus of O. 18 r. 19 is to be found in Bandar Builder, supra, where the Supreme Court through the judgment of Mohamed Dzaiddin SCJ enunciated, inter alia, as follows:-

(1) The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.

(2) So long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out. It cannot be said that the pleadings were otherwise an abuse of the process of the court.

I would respectfully add that it is only in plain and obvious case that an action should be stayed or dismissed under O. 18 r. 19(1)(d).

As had been analysed above in relation to the hearing and determination of encl (3), the defendants have conceded that there were at least four serious questions to be tried. These questions as enumerated above relate to the episodes that had transpired at the purported meeting which is now the subject matter of the first plaintiff's action herein. The lack of proper authority on the part of the first plaintiff's solicitors herein cannot be said to be unarguable. In my view, the first plaintiff's action does not constitute an abuse of the process of the court, and so does not warrant a stay or dismissal thereof, but must proceed on trial on its merits.

X. CONCLUSION

On the foregoing grounds, I allow the plaintiffs' application in encl (3) and make an order in terms thereof, and dismiss the defendants' application in encl (22), with costs of both applications to the plaintiffs.