

Typo "thoo"

not "foo"

IN THE HIGH COURT OF MALAYA AT PENANG  
ORIGINATING SUMMONS NO. PA-24NCC-16-07/2019

In the matter of Sections 346 of  
the Companies Act 2016

In the matter of Million March  
Sdn Bhd (Company No: 238948-  
H)

And

In the matter of Order 88 rule 2  
Rules of Court 2012

And

In the matter of Oceantrax  
Engineering Sdn Bhd (Company  
No: 541733-X)

Between

Ng Boon Teik  
(NRIC No: 690411-07-5041)

...Plaintiff

And

1. Chang Tong Lee  
(NRIC No: 671101-08-6593)
2. Oceantrax Engineering Sdn Bhd  
(Company No: 541733-X)

...Defendants

## JUDGMENT

### Introduction

[1] The matter before the Court is the *inter partes* hearing of an application dated 14.8.2019 for an interim injunction [Enclosure 17] pending the hearing of the plaintiff's originating summons dated 4.7.2019 ("the present OS").

[2] The present OS is an oppressive action under section 346 of the Companies Act 2016 where the plaintiff principally seeks an order for the 1<sup>st</sup> defendant to purchase the plaintiff's shares or alternatively to wind up the 2<sup>nd</sup> respondent.

[3] The issue before this Court is whether the interim injunction ought to be granted pending the disposal of the present OS.

## Background

- [4] The following material facts provide the context within which the application for the interim injunction is being made.
- [5] The 2<sup>nd</sup> defendant has only two directors. The present shareholding of the 2<sup>nd</sup> defendant since 25.3.2016 is as follows: 1<sup>st</sup> defendant 50%, Shanxi Weixin Construction Engineering Co Ltd 40% ("Shanxi Weixin") and the plaintiff 10%. Prior to this distribution of shareholding, the plaintiff owned 50% of the shares. Through his efforts, Shanxi Weixin was brought in as shareholder in consideration of his shares to secure Chinese contracts, namely from a company named Jinko Solar Holding Co Ltd ("Jinko Solar").
- [6] The plaintiff's states that the 2<sup>nd</sup> defendant's Construction Industry Development Board ("CIDB") licence had expired when it entered into a contract with Advance Energy Industries (M) Sdn Bhd ("Advance Energy") on 10.5.2019. Since then the 1<sup>st</sup> defendant has made unauthorised

payments to Infinity Ideal Engineering & Connection Sdn Bhd ("Infinity Ideal") amounting to RM1 million on 31.7.2019, Elitepro Builders Sdn Bhd ("Elitepro Builders") amounting to RM500,000.00 on 31.7.2019 and to both Infinity Ideal and Advance Energy Industries (M) Sdn Bhd ("Advance Energy") amounting to approximately RM1 million between 9.7.2019 and 24.7.2019. It is further stated that the plaintiff and the 1<sup>st</sup> defendant had previously agreed on 21.2.2018 to cease the operation of the 2<sup>nd</sup> defendant by 30.4.2019. Subsequent to this agreement the 1<sup>st</sup> defendant had in March and April 2018 issued retrenchment notices to three employees, namely Kay Lean Hun, Low Wei How and Wong Lay Kean ("the three retrenched workers"). It is also alleged that since then the plaintiff has been excluded from the management of the 2<sup>nd</sup> defendant.

**[7]** The plaintiff lists the 1<sup>st</sup> defendant's oppressive actions in the grounds in support of the application as follows:

- (i) Payments were made between March and April 2019 by the 2<sup>nd</sup> defendant to the three retrenched workers without

the plaintiff's approval for purposes that are not allowed. The plaintiff alleges that the payments to two of the retrenched workers are suspicious as they are shareholders of Infinity Ideal which is a company set up by the 1<sup>st</sup> defendant on 8.2.2018.

- (ii) Payments were made from the 2<sup>nd</sup> defendant's bank accounts to the 1<sup>st</sup> defendant without the plaintiff's approval.
- (iii) The 1<sup>st</sup> defendant changed the keys and padlocks to the offices of 2<sup>nd</sup> defendant without the plaintiff's approval thus denying the plaintiff entry to the said offices.
- (iv) The 1<sup>st</sup> defendant had refused to sign a resolution for the consideration of the board of directors which would require the 2<sup>nd</sup> defendant's banks to act on instructions of two signatories, which would include the plaintiff, instead of the present one and only signatory which is the 1<sup>st</sup> defendant.
- (v) The 1<sup>st</sup> defendant filed an action against the plaintiff and other parties premised on a conspiracy to injure the 2<sup>nd</sup>

defendant and against the plaintiff for breach of fiduciary duty *vide* High Court at Penang Civil Action No PA-22NCC-26-08/2019 dated 20.9.2018 ("Civil Action No 26");

(vi) The 1<sup>st</sup> defendant entered into a contract with Advance Energy on 21.5.2019 without a resolution of the board of directors or the shareholders of the 2<sup>nd</sup> defendant despite knowing that the 2<sup>nd</sup> defendant is incapable of performing the contract as the 2<sup>nd</sup> defendant's CIDB license has expired. The 1<sup>st</sup> defendant after the contract was secured caused to be made certain suspicious payments to be made to Infinity Ideal and Elitepro Builders in July 2019 as the 2<sup>nd</sup> defendant had no business dealings with these companies whose directors include two of the three retrenched workers.

(vii) The 2<sup>nd</sup> defendant's overdraft facility in Public Bank increased from RM207,341.56 as at 31.3.2018 to RM401,702.47 as at 30.4.2019. The plaintiff as a director of the 2<sup>nd</sup> defendant was unable to ascertain the accounts as he had been excluded by the 1<sup>st</sup> defendant from the management of the 2<sup>nd</sup> defendant.

[8] The 1<sup>st</sup> defendant on the other hand revealed that there were pending actions concerning and against the plaintiff before the present OS was filed. The cases are:

- (i) Originating Summons PA-24NCC-13-06/2018 ("OS 13") filed in June 2018. In that action Hadhariah J had on 27.6.2019 granted an *ex parte* injunction to restrain the plaintiff from meddling into the affairs of the 2<sup>nd</sup> defendant. It appears from the notes of proceedings on 17.7.2019 of that case that the learned Judge did not make an *ad interim* injunction pending the hearing of an application to intervene by the plaintiff [Enclosure 26] and the *inter partes* application for interim injunction [Enclosure 19] as she was under the impression that it was agreed that the plaintiff had given an undertaking to do nothing ie silence and inaction on his part pending the disposal of the said applications. This much is clear from the notes of proceedings which state as follows:

Yes, so I think Mr Gan we all agree no action, just sit still, the proposed intervener sits still, so there

is no need for me to make this order for further extension of the injunction. Pending disposal of Enclosure 19 and 26, I will not make any order for extension, so status quo to be maintained.

(ii) Civil Action No 26 was filed on 20.9.2018 by the 1<sup>st</sup> defendant pursuant to leave of court being granted on 5.7.2018 to initiate a derivative action pursuant to section 347 of the Companies Act 2016. In this action the plaintiff, MGI Construction Industries ("MGI Construction") and 3 other individuals are being sued for breach of fiduciary duties and/or conspiracy to injure the 2<sup>nd</sup> defendant. MGI Construction is a company set up by the plaintiff and is alleged to have siphoned off millions in contract works from the 2<sup>nd</sup> defendant. I find that the matters raised in the present OS, including the oppressive acts alleged by the plaintiff are all matters in issue and for determination in Civil Action 26.

[9] The plaintiff attempted to freeze the 2<sup>nd</sup> defendant's bank accounts with United Overseas Bank, Public Bank Berhad and Alliance Bank on 13.5.2019 following a successful

tender by the 2<sup>nd</sup> defendant for a project worth RM14 million with Advance Energy. The 1<sup>st</sup> defendant avers that that this project will keep the 2<sup>nd</sup> defendant afloat pending the trial of Civil Action 26 and if the contract is in any way compromised by the present action for interim injunction by the plaintiff, the 2<sup>nd</sup> defendant would be put at risk to suffer involuntary liquidation as it will be sued for liquidated damages of RM2,800.00 a day and damages for breach of various subcontracts it has entered into to fulfil its obligations under the contract with Advance Energy.

**[10]** The accounts of the 2<sup>nd</sup> defendant with the said banks, if frozen, would halt payments the 2<sup>nd</sup> defendant has to make to its suppliers and sub-contractors. Infinity Ideal, Elitepro Builders and ATS Engineering Sdn Bhd ("ATS Engineering") are the sub-contractors of the 2<sup>nd</sup> defendant for the purpose of carrying out the 2<sup>nd</sup> defendant's obligations under the contract with Advance Energy.

**[11]** The freezing of the accounts would effectively prevent the down payment of RM4.2 million from Advanced Energy which has been paid into the 2<sup>nd</sup> defendant's account in

Public Bank from being utilised to carry out the 2<sup>nd</sup> defendant's obligations under the contract. This would put the contract with Advance Energy and the subcontracts with Infinity Ideal, Elitepro Builders and ATS Engineering in jeopardy and induce breaches of contract these entities had entered with the 2<sup>nd</sup> defendant. Any halt in the execution of the contract with Advance Energy would realise the danger of involuntary liquidation of the 2<sup>nd</sup> defendant. This very real event would in turn compromise Civil Action 26 and bring an end to the derivative action which is seeking a substantial amount of compensation and damages from the plaintiff and the other defendants to the action. The plaintiff, it is averred would escape the various accusations of breach of fiduciary duty and/or conspiracy to injure action of which a prima facie case has been established when leave was granted to initiate the said derivative action.

**[12]** The plaintiff's action of sending notices to 'freeze account' to the banks in which the 2<sup>nd</sup> defendant operated accounts had earlier caused a delay that incurred expenses by way of loans from third parties. It was for this reason that the

defendants had obtained the *ex parte* interim injunction against the plaintiff in OS 13 before Hadhariah J. The *ex parte* interim injunction had prevented the plaintiff from taking any action, legal or otherwise, or to collaterally attack and paralyse the 2<sup>nd</sup> defendant's operations and business. As shown above the *ad interim* injunction pending the decision was not made as Hadhariah J was made to understand that the plaintiff would do nothing in the meantime.

**[13]** The 1<sup>st</sup> defendant averred that that the *ex parte* injunction obtained on 20.8.2019 in the present OS has effectively put the 2<sup>nd</sup> defendant in a perilous situation similar to that of the plaintiff's attempts at freezing the 2<sup>nd</sup> defendant's accounts. The risk of suffering liquidated damages and damages for breach of contract at the instance of Advance Energy and from the 2<sup>nd</sup> defendant's suppliers and subcontractors is very real.

**[14]** The defendants further revealed that the plaintiff in Civil Action 26 had filed Enclosure 38 to amend his defence to include a counterclaim to wind up the 2<sup>nd</sup> defendant and

Enclosure 40 for an injunction against the 1<sup>st</sup> defendant from utilising, releasing and/or withdrawing monies from the 2<sup>nd</sup> defendant's bank accounts. The prayers in Enclosures 38 and 40 in Civil Action 26 has the same effect as the orders sought in the present OS and the orders that were granted in the *ex parte* interim injunction dated 20.8.2019.

[15] At the time the plaintiff filed the present OS and on a certificate of urgency obtained the *ex parte* interim injunction on 20.8.2019, Enclosures 38 and 40 had been heard and were pending decision before Rosilah J. Upon obtaining the *ex parte* interim injunction on 20.8.2019 the plaintiff caused his solicitors to withdraw Enclosures 38 and 40 in Civil Action 26 as the very purpose in those enclosures had been achieved.

#### **The interim injunctions sought in Enclosure 17**

[16] The orders sought in Enclosure 17 are prohibitory injunctions, mandatory injunctions and what the plaintiff

states are consequential orders. The prohibitory injunctions are prayers 1, 3 and 4 and can be summarised as follows:

- (a) the 1<sup>st</sup> defendant is restrained from causing the 2<sup>nd</sup> defendant from absolutely dealing with any party including Advance Energy, ATS Engineering, Infinity Ideal and Elitepro Builders;
- (b) the 1<sup>st</sup> defendant is restrained from altering the shareholding of the 2<sup>nd</sup> defendant; and
- (c) the 1<sup>st</sup> defendant is restrained from carrying out any business under the name of or through the 2<sup>nd</sup> defendant.

**[17]** The mandatory injunctions are prayers 2 and 7 and can be summarised as follows:

- (a) an order that the 1<sup>st</sup> defendant and the plaintiff approve and execute a resolution of the board of directors which requires the banks to act on the

instructions of two signatories pending the disposal of the present OS; and

- (b) an order that the 1<sup>st</sup> defendant provide an account of all payments from the bank accounts of the 2<sup>nd</sup> defendant since 1.5.2018 and that the 1<sup>st</sup> defendant immediately reimburse the said sums to the 2<sup>nd</sup> defendant.

[18] I am of the view that the consequential orders sought pursuant to prayers 5 and 6 are not relevant to an application for an interim injunction and therefore will not consider them for the purposes of this application.

**Keet Gerald Francis inquiry**

[19] In hearing an application for an interim injunction I am required to undertake a three-stage inquiry enunciated by the Court of Appeal in **Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors** [1995] 1 MLJ 193. I now append my conclusions in respect of each stage of the inquiry.

*Bona fide serious issue to be tried*

**[20]** The first stage is to determine whether there is a *bona fide* question to be tried. At this stage I must not make a decision on the merits but merely to decide whether from the totality of the facts presented in the affidavits a *bona fide* serious issue to be tried is disclosed.

**[21]** The plaintiff submitted that the issue to be tried is whether the acts of the 1<sup>st</sup> defendant (as per paragraph [7] above) are oppressive or prejudicial to the plaintiff's rights as director, member and shareholder of the 2<sup>nd</sup> defendant.

**[22]** The plaintiff brings this action pursuant to subsection (1) of section 346 of the Companies Act 1965. Under that subsection only a member or a holder of a debenture of a company is entitled to seek the relief in the situation provided by paragraphs (a) or (b) of the subsection. The relevant paragraph for the purposes of this application is paragraph (a) which reads as follows:

that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company

**[23]** The plaintiff is a person holding shares in the 2<sup>nd</sup> defendant and therefore this makes him a member of the company. This proposition is amply made out in *Palmer's Company Law, Volume 1, 22<sup>nd</sup> Edition*, page 527 as follows:

In the case of a company limited by shares, a member is a person holding shares in the company; there can be no membership, ie, proprietary relationship to a company, otherwise than through the medium of shareholding. Consequently, the terms 'member' and 'shareholder' are synonymous, apart from the now exceptional case of the bearer of a share warrant who is a shareholder but is not a member

because he is not registered in the register of members.

**[24]** In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716, Gopal Sri Ram JCA (as he then was) speaking for the Federal Court said in respect of subsection (1) of section 181 of the Companies Act 1965 (in *pari materia* with subsection (1) of section 346 of the Companies Act 2016) said as follows:

A reading of s 181 reveals that in the latter part of para. (a) of sub-s (1) to that section the Legislature has used the expression "members, shareholders... of the company". However, it does not require much intellectual exercise to realise that the sub-section, read as a whole, when using the terms "member" and "shareholder", refers to the same category of persons within the company.

**[25]** The question is whether the issue to be tried advanced by the plaintiff is within the scope of paragraph (a) of the subsection. The paragraph is to provide a remedy where

the powers of directors are being exercised in a manner oppressive to a shareholder or in disregard to the shareholder's interest. It is very clear that the legislature has not included directors in the ambit of this remedy. There is therefore no issue to be tried if the act complained of is oppressive to or prejudicial against the interests of a director. Acts of directors that are oppressive against or in disregard to directors are not envisaged by subsection (1) of section 346 of the Companies Act 1965.

**[26]** This proposition was established by the Federal Court in **Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors & Another Appeal** [2013] 2 CLJ 277 by endorsing the following view of the Court of Appeal in **Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors** [2010] 4 CLJ 897 at 907 on the issue which is stated in the following terms:

If the petitioners relies on sub-s (1)9a) of s 181, there must be shown the element of 'oppression' or 'disregard'. It must involve, at least, an element of lack of probity or fair dealing to a

member against his right as member or shareholder. Oppression or disregard of interest of a director of a company clearly does not come under the ambit of s 181 ...

**[27]** The next question is whether from the complaints made there is a serious issue to be tried in relation to the question whether the affairs of the company are being conducted or the powers of directors are being exercised in a manner oppressive to shareholders or in disregard of the shareholders' interests. I have carefully examined the acts and the complaints that were advanced by the plaintiff and came to the following conclusions:

(i) The complaint in respect the payments made to the retrenched workers and to the 1<sup>st</sup> defendant without the plaintiff's approval are complaints against the plaintiff's rights and interests as a director and not against the plaintiff's rights and interests as a shareholder.

(ii) The complaint of being denied entry into the offices of the 2<sup>nd</sup> defendant was clearly a complaint against the plaintiff's rights and interests as a director.

(iii) The refusal of the 1<sup>st</sup> defendant to agree to put a resolution before the board of directors that required the inclusion of the plaintiff's signature for bank transactions is a complaint against the plaintiff's rights and interests as a director.

(iv) The filing of the derivative action, Civil Action 26, is a right granted by the legislature under section 347 of the Companies Act 2016. It is a legal right brought in the interest of the 2<sup>nd</sup> defendant. This action was filed after the court had found a *prima facie* case of breaches of fiduciary duty and/or conspiracy with others to injure the 2<sup>nd</sup> defendant against the plaintiff. It certainly does not fall within the acts envisaged in section 346 of the Companies Act 2016.

(v) The successful procuring of the tender and subsequent contract worth RM14 million with Advance

Energy without the plaintiff's approval is a complaint against the plaintiff's rights and interests as a director. The procurement of a contract of such magnitude is in the interest of shareholders and not otherwise.

(vi) The overdraft status with Public Bank is again a complaint in respect of the plaintiff's rights and interests as a director resulting from the fact that the plaintiff was unable to ascertain the true position since he has been excluded from the management of the 2<sup>nd</sup> defendant.

**[28]** In my judgment there is no issue to be tried let alone a *bona fide* serious issue to be tried. The complaints as framed in the application are all matters of oppression to the plaintiff as a director or in disregard of the plaintiff's interests as a director. The complaints are not framed in a manner that suggests that the plaintiff is oppressed as a shareholder or things are being done in disregard of his interests as a shareholder.

**[29]** Since I have found that there is no issue to be tried the matter ends here and the relief must be refused. I therefore refuse the application for interim injunction as sought in Enclosure 17.

*Justice of the case*

**[30]** Assuming that there is a bona fide issue to be tried as framed by the plaintiff, the next question is to consider is to whom the justice of the case favours. At this stage of the inquiry all the relevant matters should be taken into account including the practical realities of the case. I am then to weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. In this case the injunction if granted against the 1<sup>st</sup> defendant would seriously affect the 2<sup>nd</sup> defendant. It would bring the 2<sup>nd</sup> defendant's operations to a standstill. The contract with Advance Energy is in operation. To carry out the contract, the 2<sup>nd</sup> defendant has subcontracted certain works to Infinity Ideal, Elitepro Builders and ATS Engineering. Halting the operations at this stage would certainly cause colossal losses to the 2<sup>nd</sup> defendant and subject the company to law suits for breach of contract. The harm the

interim injunction would produce is more serious and damaging than that which would result from its refusal.

[31] I am of the view that in the circumstances of this case the justice favours the refusal of granting the injunction.

*Judicial discretion*

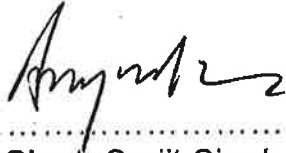
[32] The final stage of the inquiry requires the court to determine as to whether the judicial discretion ought to be exercised in favour of allowing or refusing the application for interim injunction. The remedy is discretionary and the court is entitled to take into account all discretionary considerations and any question going to the public interest may in appropriate cases be taken into account.

[33] If I had been adequately apprised of Civil Action 26 and Enclosures 38 and 40 therein and that both enclosures were similar to the orders sought in the present originating summons, I would have without any hesitation refused the *ex parte* injunction. In my judgment the filing of the *ex parte* injunction is an abuse of the process of the court and the court should

protect its process from being abused. In obtaining a favourable outcome and immediately applying to withdraw the enclosures of a pending decision is most telling. The actions of the plaintiff are against public interest. Chaos would reign if parties were to file separate proceedings for the same orders in different courts. I agree with counsel that this would amount to an act of judge shopping. (see **Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd** [1994] 4 MLJ 637 at 646 and **Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank (M) Bhd & Ors, Interveners)**[2000] 3 MLJ 201).

[34] I also take into account the fact the reason for Hadhariah J in not granting the *ad interim* injunction was that the plaintiff had agreed to do nothing. Yet, the plaintiff filed the present OS with the objective of obtaining orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Such an act of concealment before Hadhariah J of actions that could be taken if the *ad interim* injunction is not granted is a dishonest act which had misled the court. It is an abuse of the process of the court to then file the present OS and especially the *ex parte* application for interim injunction.

[35] For the above reasons the application for interim injunction is refused with costs. The plaintiff is to pay any damages incurred by the defendants as a result of the ex parte interim injunction and the ad interim injunction pending today's decision.



.....  
Amarjeet Singh Serjit Singh  
Judicial Commissioner  
High Court of Malaya at Penang

Dated: 13<sup>th</sup> September 2019

**Counsel for the Applicant:**

Gan Khang Aik, Kang Mei Yee & Lee Sze Ching  
[GAN PARTNERSHIP]

**Counsel for the Respondent:**

Nicholas Tan & Khoo May Yee  
[LIM HUCK AIK & CO.]

Cases referred to:

1. **Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193.**
2. **Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716.**
3. **Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors & Another Appeal [2013] 2 CLJ 277.**
4. **Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors [2010] 4 CLJ 897.**
5. **Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1994] 4 MLJ 637.**
6. **Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank (M) Bhd & Ors, Interveners)[2000] 3 MLJ 201.**