

DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO. P-02-10-1996

ANTARA

- 1. SOO BOON KOOI @ SAW BOON KOOY**
- 2. SOO CHEW TRADING SDN BHD**
- 3. DOCTOR BABY (M) SDN BHD**
- 4. LAGUTA SDN BHD**
- 5. CORSAME (MALAYSIA) SDN BHD ... PERAYU-PERAYU**

DAN

SOON BOON SIONG @ SAW BOON SIONG ... RESPONDEN

[Dalam Perkara Mengenai Saman Dalam Kamar
Bertarikh 11.7.1995 Dalam Guaman No. 22-159-1995
Dalam Mahkamah Tinggi Malaya Di Pulau Pinang

Antara

Soon Boon Siong @ Saw Boon Siong ... Plaintiff

Dan

Soon Boon Kooi @ Saw Boon Kooy & 4 Lagi ... Defendan]

Coram:

Mokhtar Sidin, J.C.A.
Low Hop Bing, J.C.A.
Suriyadi Halim Omar, J.C.A.

JUDGMENT OF THE COURT

The appellants' appeal arises from an Order of Injunction dated 21.12.1995 obtained by the respondent restraining the appellants from, amongst other things, determining his authority, powers, rights, entitlements, interests, benefits and privileges whether as governing director, director or shareholder of the appellant companies and from transferring and/or disposing of the assets and funds of the appellants.

The background to the appeal is as more particularly set out in my grounds of judgment in the matter under Court of Appeal Civil Appeal No. P-02-434-2005 between the respondent herein as appellant and the appellants herein as respondents arising from the decision of the High Court after a full trial.

For completeness and with a view to understanding the issues, I reproduce the text of the Order of Injunction granted on 21.12.1995 restraining the appellants as follows, namely:

- “(a) convening or attempting to convene any directors' meetings and/or any ordinary or extra-ordinary general meetings to determine the authority, powers, rights, entitlements, interests, benefits and privileges of the Plaintiff whether as governing director, director, shareholder or otherwise;

- (b) acting or continuing to act on any of the resolutions which may have been passed at any directors' meetings and/or any ordinary or extra-ordinary general meetings having the effect of terminating or curtailing the authority, powers, rights, entitlements, interests, benefits and privileges of the Plaintiff whether as governing director, director, shareholder or otherwise;
- (c) acting or continuing to act on the resolutions passed at any of the directors' meetings of the Defendants rescinding the resolutions pertaining to the mandate of the Plaintiff as a signatory of the Defendants' bank accounts and substituting and/or appointing in place of the Plaintiff any name or names as signatory or signatories of the Defendants' bank accounts;
- (d) terminating or attempting to terminate, withholding, withdrawing, suspending and/or curtailing in any way the monthly salary, fee, expenses, entitlements and benefits enjoyed by or due to the Plaintiff as governing director, director and/or as shareholder as the case may be;
- (e) removing or evicting the Plaintiff from and/or disturbing, threatening or harassing in any way the Plaintiff's enjoyment and/or occupation of his office at the 2nd Defendant's place of business at No. 2465, Tingkat Perusahaan 6, Kawasan Perusahaan Prai, 13600 Prai, Province Wellesley and/or other facilities incidental thereto;

- (f) transferring and/or disposing of any of the assets of the Defendants and/or transferring or disposing of any of the funds or monies of the Defendants whether for the purposes of fixed deposits with banks of financial institutions or for the purposes of the directors' and/or shareholders' current accounts with or in the Defendants save that the order herein shall not prohibit, restrain or restrict the Defendants from effecting payments in the ordinary course of business;
- (g) appointing any further directors and/or creating any new shareholders and granting, conferring and declaring any dividends, rights, interests, privileges and benefits other than to the Plaintiff and the 1st Defendant as the governing directors and as shareholders of the Defendants; and
- (h) taking, continuing, directing or suffering to be taken or continued any steps or actions with a view to passing, effecting or enforcing any resolutions for the purposes of and/or which may have the effect of terminating or curtaining the authority, powers, rights, entitlements, interests, benefits and privileges of the Plaintiff whether as governing director, director, shareholder or otherwise.”

The appellants' appeal is only against para i(d) of the said Order of Injunction, ie, restraining the appellants from ‘terminating or attempting to

terminate, withholding, withdrawing, suspending and/or curtailing in any way the monthly salary, fee, expenses, entitlements, benefits enjoyed by or due to the respondent, as governing director, director, shareholder or otherwise, as the case may be’.

The appellants have at the outset taken the point that the appeal is academic as the High Court had on 18.3.2005 dismissed the respondent’s claims completely and had dissolved the said Order of Injunction. With respect, I do not think that the appeal is academic, merely because the High Court had dismissed the respondent’s claims completely and had, in the course of doing so, dissolved the said Order of Injunction. As the appeal had not been withdrawn, I am therefore constrained to hear the appeal.

For the purposes of the appeal, I hold that the validity or propriety of the said Order of Injunction must be determined in the context of the circumstances and issues raised at the time of the inter-parte hearing of the respondent’s Summons in Chambers (Encl. 3) for an Order of Injunction against the appellants pending trial of the matter. The essential issue to be determined is whether the respondent had made out and established his case for an Order of Injunction pending trial following the criteria as laid down in the case of *American Cyanamid Co v Ethicon* [1975] A ALL ER 504.

Although the appeal record does not contain nor have I been referred to any grounds of judgment in respect of the said Order of Injunction, I am satisfied, having perused the record of appeal, that the High Court Judge, in granting the said Order of Injunction, was similarly satisfied that the respondent had met the criteria as laid down in the case of *American Cyanamid Co v Ethicon* [1975] 1 ALL ER 504. I am satisfied in particular that there is a real apprehension on the part of the respondent that he would suffer irreparable damage, if steps had not been taken to preserve the status quo, having regard to the following, in particular:

- (i) the directors' resolution of the 2nd appellant dated 17.10.1994 requiring the respondent and the 1st appellant to execute several deeds of trust in respect of the trade marks registered in the names of the 1st appellant and the respondent in favour of the 2nd appellant;
- (ii) the letter of 30.11.1994 from the 2nd appellant terminating summarily the employment of Soo Li Lih, the daughter of the respondent, as executive officer, 'due to certain unforeseen circumstances';
- (iii) the directors' resolutions of the appellant companies passed on 27.5.1995 rescinding, in effect, the respondent's mandate as a signatory of the companies' bank accounts; and

- (iv) the letter dated 3.7.1995 from the 2nd appellant informing the respondent that payments of salary and all other expenses shall cease with effect from 1.7.1995.

It is the appellants' contention that para i(d) of the said Order of Injunction is akin to a monetary order compelling the appellants to pay the respondent his monthly salary pending the outcome of the respondent's case and that, therefore, damages would have been the sole and adequate remedy for the respondent.

I have considered the arguments raised and am of the view that the respondent's monthly salary, fees, expenses, entitlements and benefits would appeal to extend beyond salaries or wages payable in a strictly employer-employee relationship having regard to the respondent's assertions on affidavits affirmed on 10.7.1995 and 4.10.1995 in support of his Summons in Chambers for an interlocutory injunction as follows:

- (i) that the companies were in fact incorporated for purposes of tax-savings and to complement or take over, if need be, the business of the partnership of Soo Chew Trading set up between the 1st appellant and the respondent as partners;
- (ii) that though the partnership had in 1989 ceased business and that since then, the 2nd appellant had assumed the goodwill and business of the said partnership, the

companies had at all times been funded essentially from the income and profits of the partnership;

- (iii) that the respondent as chairman and director is entitled to a monthly salary and to various other benefits, both personal and household, from the 2nd appellant in lieu of dividends in respect of the respondent's shares in the companies; and
- (iv) that the respondent is a governing director of the companies, with all powers and privileges as provided for under the Articles of Association of the companies, including the right to give any directions in relation to the companies' businesses and the right to hold office until death or resignation.

Consequentially, I do not think that damages would be an adequate remedy, more so, in view of the respondent's assertions on affidavit affirmed on 10.7.1995 as follows:

- (i) that the respondent had been instrumental in building, developing and promoting the business, goodwill and name of the 2nd appellant as traders and/or manufacturers of infant products;
- (ii) that the appellants' moves to force or induce a curtailment or termination of the respondent's authority, powers, rights, entitlements, interests, benefits and privileges, whether as governing director, director,

shareholder or otherwise, were motivated primarily to secure and entrench the position of the 1st appellant and his family members at the respondent's expense and to the detriment of the respondent's position in the companies; and

- (iii) that the 1st appellant had caused the companies to limit the salary and benefits due to the respondent as shareholder and had diverted or channeled the dividends and profits which would otherwise be payable to the respondent as shareholder to various directors and/or shareholders' current accounts with or in the companies for the benefit of the 1st appellant and his family members and with the intention of securing the positions of the 1st appellant and his family members as shareholders or otherwise.

The truth or veracity of the assertions on affidavits on the part of the respondent, including the assertions that the companies were incorporated for the purposes of tax savings, and to complement and/or take over, if needed be the business activities of the partnership and that the share equity in the companies as between the respondent and the 1st appellant shall be on an equal basis consistent with their shares in the partnership, are strictly issues to be addressed at the trial. Likewise, the denials or contentions of the appellants on affidavits, including the contentions that the respondent had

not been taking any part in the business of the companies or had breached his fiduciary duty as a director, are matters to be addressed at the trial.

The appellants' complaint that para i(d) of the said Order of Injunction is highly prejudicial to and onerous on the appellants and their compliance under threat of committal proceedings would appear to have been exaggerated, given the fact that the said Order of Injunction is intended to preserve the status quo. Besides, the appellant's complaint or concern had incidentally been addressed in para i(f) of the said Order of Injunction, ie, that 'the order shall not prohibit, restrain or restrict the defendants from effecting payments in the ordinary course of business'.

The issue of damages for any injury or inconvenience that may have been suffered by the appellants, may have to be addressed, if at the conclusion of the trial, the judge should find that the said Order of Injunction ought not to have been granted. It would then be up to the respondent to argue his contention that the appellants had by their Defence dated 3.8.1995 agreed in effect to resume payment of his salary without the need for a restraining order.

For purposes of the appeal, it is my finding that damages would not be an adequate remedy. If, at all, there is any doubt, the balance of convenience would nonetheless appear to favour the respondent, more so,

when no reason had been stated in the very letter dated 3.7.1995 from the 2nd appellant informing that payment of salary and all other expenses shall cease with effect from 1.7.1995.

In *Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689, the Supreme Court cited Lord Diplock's judgment in *American Cyanamid v Ethicon* appearing at page 510 as follows:

“It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...”

On what should be taken into account in determining the balance of convenience, Lord Diplock in *American Cyanamid v Ethicon* had this to say:

“It would be unwise even to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.”

In the circumstances, I am satisfied that the respondent had made out his case for an interim injunction in the terms of the said Order of Injunction dated 21.12.1995 pending trial of the matters in dispute.

The fact that the hearing of the appeal had come up after the conclusion of the trial proper and the dismissal of the respondent's case completely should not, in my view, affect at all the essential issue whether the respondent was indeed entitled to an injunction pending trial of the matters in dispute.

For the reasons as stated, it is my finding that there is no merit in the appeal. The appeal is hereby dismissed with costs and the deposit for the appeal to be paid to the respondent towards account of taxed costs.

My learned brothers, Datuk Wira Low Hop Bing J.C.A. and Datuk Suriyadi Halim Omar J.C.A., have read this judgment in draft and have expressed their agreement with it.

Dated: 19 September 2007

(Datuk Haji Mokhtar bin Haji Sidin)
Judge
Court of Appeal, Malaysia

Counsel:

Mr. Wong Chong Wah (together with Mr. Lim Koon Huan and Ms Elaine Ho) for the appellants.
(Messrs. Skrine)

Mr. J.A. Yeoh for the respondent.
(Messrs. Shearn Delamore & Co.)