

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)**

MAHKAMAH RAYUAN SIVIL NO. W-02-563-2003

ANTARA

SEE TEOW GUAN & 12 ORS

**...PEMOHON/
PERAYU**

DAN

**LIQUIDATORS OF KIAN JOO HOLDINGS SDN BHD
(IN LIQUIDATION) & 3 ORS**

**...RESPONDEN-
RESPONDEN**

[Dalam Perkara Penggulungan Syarikat No.D4-28-294-1994
dalam Mahkamah Tinggi Malaya di Kuala Lumpur]

Antara

See Teow Guan & 12 Ors

...Pempetisyen-
Pempetisyen

Dan

Likuidator-Likudator Kian Joo Holdings
Sdn Bhd & 3 Ors

... Responden –
Responden

Corum: Tengku Baharudin Shah, JCA
Suriyadi Halim Omar, JCA
Hasan Lah, JCA

JUDGMENT OF THE COURT

The applicants had filed Enclosure 7 (a), hereinafter referred to as the motion, and had prayed for the following reliefs:

- “(1) an order that the liquidators of the Kian Joo Holdings Sdn Bhd (in Liquidation) be restrained, whether by themselves or by their servants otherwise from disposing 45% of the 153,868,617 Kian Joo Can Factory Berhad shares totaling 69,240,877 ordinary shares of RM0.25 each; and
- (2) such other or further order that this Honourable Court deems just and necessary.”

The grounds of this application are that unless an injunction is granted pending the hearing and disposal of this appeal, the liquidators of the Kian Joo Holdings Sdn Bhd (in Liquidation) will proceed to sell all the 69,240,877 shares forming the subject matter of this appeal making this appeal if successful, nugatory and therefore academic

as causing irreparable harm to the appellants, more fully explained in the affidavit of Dato' See Teow Guan affirmed on 02 July 2007 in support of this application.”

We had unanimously dismissed the motion with costs. We now state our reasons.

But first of all how did this motion come about? To answer that question there is a need first to peruse its antecedents. Kian Joo Holdings Sdn Bhd (hereinafter referred to as the company) was incorporated on 27.3.82 having 27 shareholders who were all members of the **See** family. On 10 September 1994 a petition was filed, as per Kuala Lumpur High Court Companies (Winding-up) No D4-28-294-94, to wind up the company. Subsequently by consent of the parties, the High Court on 30.1.96 had ordered that the company be wound up, and liquidators appointed.

On 12.7.96, the liquidators convened a meeting of the contributories of the company pursuant to Section 237(2) of the Companies Act 1965, to ascertain their wishes regarding the disposal of the shares and warrants in its possession. In that meeting 2 groups emerged viz. the See Teow Chuan contributories (STC group) and the See Teow Guan contributories (STG group or the applicants). Basically they were siblings. At that meeting and confirmed in another, it was resolved that 55% in value and 52% in number of the contributories (that is the STC group) preferred a sale of the shares and warrants, whilst the remaining holders of 45% in value and 48% in number of the shares (the STG group) preferred distribution of the shares and warrants in specie.

Thereafter the liquidators, after coming into possession of the properties and after the said meetings, had wanted to implement the majority decision. Being aggrieved the STG group had filed in court an application (Enclosure 191) to modify the said decision. Enclosure 191 reads as follows:

“1. That the Court modify the decision of the Liquidators to sell the entire controlling block of 42,741,276 Kian Joo Can Factory Berhad shares and 5,698, 835 warrants by excluding from the sale 19,233,039 Kian Joo Can Factory Berhad shares and 2,564,404 warrants representing 45% proportionate shares entitlement of the Petitioners, Doris See Slew Lian and See Siew Hua.

2. That the Court direct the Liquidators to distribute in specie to the Petitioners, Doris See Siew Lian and See Siew Hua proportionate number of Kian Joo Can Factory Berhad shares and warrants according to the Schedule annexed.

3. That the costs of this application be taxed and paid to the Petitioners by the Liquidators out of the Company’s accumulated funds.

4. An injunction restraining the Liquidators from disposal of Kian Joo Can Factory Berhad shares and warrants.”

At the end of the hearing of Enclosure 191, the High Court found that the STG group had failed to show how the liquidators had acted fraudulently or were mala fide in the exercise of their discretion, to warrant intervention by the court. In the result Enclosure 191 on 13.6.2003 was dismissed with costs. Being dissatisfied the applicants had filed an appeal. The appeal is now pending before the Court of Appeal.

On 12.6.2007 the liquidators placed an advertisement in The Star inviting expression of interest from eligible buyers for the shares of Kian Joo Can Factory Berhad held by the company on 3.7.2007. The motion and the supporting affidavit supplied the following grounds for the reasons why the restraining order was sought, in that unless the reliefs were granted:

1. the liquidators would proceed to sell the 69,240,877 shares forming the subject matter of the appeal;

2. unless restrained, a successful appeal would be rendered nugatory and academic, thus causing irreparable harm to the appellants;
3. it had always been the intention of their late father as well as the family that these shares be retained by the family; and
4. the price was too low and would result in multi million ringgit loss in value of the investment.

The motion was made pursuant to section 44 of the Courts of Judicature Act 1964 which provision reads as follows:

“Section 44

(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing

security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

(3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.”

As gleaned from the above, s. 44 of the Courts of Judicature Act 1964 , empowers the Court of Appeal to grant any order that can preserve the integrity of any appeal pending before it. Previously for like-issues, an appellant had to establish 'special circumstances' that warranted a stay of proceedings or of execution, in order to preserve the integrity of the appeal. Recent developments have shown that Malaysian courts have now shifted to more practical and less stringent approaches. In matters governing an application for a stay, or any other form of interim order, the approach is that no

successful appeal should be rendered nugatory at the end of the day. Despite this pragmatic approach, there is no blank cheque that demands automatic granting of a restraining order in order to avoid any appeal being rendered nugatory. Persuasive reasons must still be ventilated and established to ensure a successful motion.

The applicants' prayer here for a restraining order, of the liquidators whether by themselves or by their servants or otherwise, of disposing the shares was in effect and substance an interlocutory injunction. In fact the very motion had alluded to that terminology. Bearing in mind the prohibitive nature of this order, as said above unless persuasive reasons were supplied, the motion was doomed to fail. In *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 at page 150 the Federal Court had held that:

“The first is that it is couched in prohibitory terms restraining the appellant until the trial of the suit from remaining in the quarters but it is

in effect a mandatory injunction. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect (Shepherd Homes Ltd. v Sandham (at p. 359); Hounslow Local Borough Council v Twinckenham Garden Developments Ltd. (at p. 570-1) and as I said in my judgment in Wah Long (Jelapang) Tin Mine Sendirian Berhad v Chai Nyen Yiok, *an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases* (emphasis mine).”

It is quite established that an injunction for the preservation of property and other mandatory orders may only be granted in accordance with the principles applicable to the granting of interlocutory injunctions. It may be granted where the court is satisfied that there is a substantial question to be tried, and a case has been made out for the

preservation of that property (*Nicholas & Ors v Gan Realty Sdn Bhd & Ors* [1970] 2 MLJ 89). And as in the *American Cyanamid Case* [1975] AC 396, smack on the issue of injunctions, there is the requirement that before a court exercises its discretion in favour of granting an injunction:

- (1) there must be a serious question to be tried;
- (2) there must not be any delay by the appellants in making the application;
- (3) that if the appellants were to succeed at the appeal, damages would not be adequate compensation for its loss;
- (4) that the balance of convenience lies in its favour; and
- (5) the Appellants must demonstrate evidence that its financial undertaking given to Court is solid and worth powder and shot; and
- (6) there are special circumstances in its favour including the justice of the case.

At this interlocutory stage it is not the function of the Court to resolve the issues on conflicting affidavit evidence,

inclusive of difficult questions of law that require detailed argument or mature considerations.

Let us now scrutinize the reasons for the motion. The first reason was that unless restrained the liquidators would proceed to sell the 69,240,877 shares forming the subject matter of the appeal. That was a reason that was quite unacceptable as these liquidators were appointed by the court, and hence officers of the court, who merely wanted to perform their duties (*Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233; *Che Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204). Their decision to sell the shares at the best possible price would have benefited every shareholder including the applicants. The court here was not about to interfere with the liquidators' decision simply because its opinion might differ from that of the liquidator. Here, not only was there not shown bad faith or perverse errors had been committed by the liquidators, but as per the supporting affidavit, the applicants had also not adduced any evidence that such

sale would have caused irreparable damage to them (*Evercrisp Snack Products (M) Sdn Bhd & Anor v sSweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297; *Shiraz Nominees (in liq) v Collinson & Anor* (1985) 10ACLR 7). In *Re Hans Place Ltd (in liquidation)* (1993) BCLC 768 the court there had stated, amongst others:

“.....The court would only interfere with the exercise of the liquidator’s discretion where he acted in bad faith or his decision was perverse and since there were no allegations of this nature the court would not interfere.”

Ground 3, i.e. the intention of their late father to have the shares retained by the family coupled with the fear of losing them, were inextricably intertwined to the fear of suffering a loss in value of the investment (ground 4). Regretfully these are not special circumstances (*Kosma Palm Oil Mill Sdn Bhd v. Koperasi Serbaguna Makmur Bhd* [2003] 4 CLJ

1). Mere fear and sentimentality certainly do not qualify as persuasive grounds construable as special circumstances.

Unexplained here too was the delay of 4 years by the applicants since 13-6-2003 to apply for this injunction order. They had filed the notice of appeal on 3-7-2003 and the appeal records were filed on 26-8-2003. Despite the conspicuous clarity of section 73 of the Court of Judicature Act 1964, legislating that an appeal shall not operate as a stay, the applicants took no steps whatsoever for 4 years to apply for this order. The unexplained delay of 4 years was inordinate and inexcusable and in the circumstances of the case quite fatal to the applicants' motion (*Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198; *Evercrisp Snack Products Sdn Bhd v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297; *Blue Town Investments Ltd v Higgs and Hill plc* (1990) 1 WLR 696). In the case of *Canton and United Breweries (NSW) Pty Ltd v Bond Brewing New South Wales Ltd and Others* [1988]

76 ALR 633 at page 633 the Federal Court of Australia had as per the head note stated:

“(iii) The applicant’s delay was a sufficient reason for refusing an interim injunction”

In the case of *R. v. Senate of the University of Aston, Ex parte Roffey and Another* [1969] 2 ALL ER 964 at Page 976 Donaldson, J had opined in the following manner:

“In this situation I regard the time factor as decisive. The prerogative remedies are exceptional in their nature and should not be made available to those who sleep on their rights. The applicant Pantridge’s complaint is that he was not allowed to re-sit the whole examination in June 1968 and, if successful, proceed to the pass degree course in the 1968-69 academic year, yet he did not even apply to move this court until July 1968. By such inaction, in my judgment he forfeited whatever claims he might otherwise have had to the courts intervention. I would therefore refuse the relief sought.”

It was of the court's view that there was total failure on the part of the applicants to establish that there were serious questions to be tried which warranted such an injunction. As stated above, the fear of losing control of the shares, and suffering certain economic losses, did not qualify as serious questions to be tried. To make matters worse there was inordinate and inexcusable delay in filing this motion, in the light of the appeal having been filed in August 2003 whilst this motion being filed in 2007. In fact there was also no evidence adduced in the applicants' affidavit:

- i. showing that damages would be inadequate compensation for their losses; and
- ii. no evidence adduced to show their capacity and capability of honouring their financial undertaking as to damages (*Brigid Foley Ltd v Elliot* [1982] RPC 433; *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; *Cheah Theam Swee & Anor V Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426).

It was for all the above reasons that we had dismissed the motion with costs.

Dated this 9th day of November 2007.

Suriyadi Halim Omar
Judge, Court Of Appeal
Malaysia

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