Datuk Johari Abdul Ghani & Ors v QSR Brands Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–02–1070 OF 2005 AND W–02–1095 OF 2005
GOPAL SRI RAM, MOHD GHAZALI AND TENGKU BAHARUDDIN SHAH JJCA
4 MAY 2006

Civil Procedure — Injunction — Interim injunction — Where grant or refusal would terminate litigation — Whether a higher threshold to satisfy

Companies and Corporations — Meetings — Adjournment of — Whether decision by chairman to adjourn meeting valid Validity of adjourned EGM — Chairman had interest in one of the resolutions which sought his removal

The first plaintiff/appellant QSR Brands Bhd ('QSR') is a public listed company. On 22 August 2005 a special notice of a resolution moved pursuant to s 145 of the Companies Act 1965 was given by requisitionists. The resolutions sought an EGM to remove nine of its directors. At the scheduled meeting on 20 September 2005, the first defendant (one of the directors sought to be removed) was appointed chairman of that meeting. After votes had been cast one of the scrutineers approached the chairman to resolve and rule on the validity of two polling forms, both signed by the chairman at the request of Epsilon ('the disputed polling forms') as they were signed by a person (the chairman) whose name did not appear on the attendance sheet. The meeting was adjourned to 11 October 2005 by the chairman exercising his power under article 74 of the first plaintiff's articles of association to obtain proper legal advice. The meeting then proceeded, conducted by those remaining behind. Results were announced and the resolutions for the removal of all the directors were carried. Both sides of the dispute filed proceedings. The first was an originating summons filed by the plaintiffs/appellants seeking to restrain the defendants/respondents from acting or holding himself out as chairman and/or directors of the plaintiffs (QSR), and from otherwise intermeddling or interfering in the plaintiffs' company's business or management's affairs. The High Court refused this application. The High Court granted an injunction sought by the respondents until the declaration of the result of the poll pursuant to article 74 of the articles of association of the first plaintiff. The issue common to both appeals is whether the decision by the chairman to adjourn the meeting was valid.

Held, allowing the appeal:

(1) Looking at the affidavit evidence it is an inference warranted by the facts — that the chairman did not adjourn the meeting for the purpose of declaring the result of the poll that had been conducted. As may be gathered from the

affidavit evidence, the quarrel or uncertainty about the defective proxies was de minimis. The votes relating to the disputed proxies, and it is common ground, would not have affected the final result. That being the case, the chairman's assertion that he acted under art 74 cannot hold water. Therefore he was exercising his common law power of adjournment which he of course had as chairman of the meeting (see para 11–12).

(2) The correct approach to determine whether the common law power of adjournment has been properly exercised in a given case is that set out in *Byng v London Life Association* [1989] BCLC 400. It is quite apparent that the chairman failed to take into account relevant considerations. In particular, he should have but did not ask himself the question whether the two defective forms would have made a difference on the vote upon the resolutions before the meeting. There is one further point. The chairman had an interest in at least one of the resolutions, namely that which sought his removal. In these circumstances, the decision to adjourn was unreasonable in the sense explained in *Byng*. The chairman's decision to adjourn being invalid, it follows that the continuation of the meeting by the requisitionists was competent and that the business transacted thereat was valid (see para 13–14, 17).

(3) In the ordinary case of an application for an interim injunction, whether mandatory or prohibitory, the test is whether there is a serious question to be tried. If there is, and no injustice would be occasioned by the grant of the injunction then the balance of convenience would ordinarily lie in favour of the grant of the injunction. However, cases, though rare, may arise where the grant or refusal of an injunction would terminate the litigation one way or the other. In such cases, the *American Cyanamid* test of 'serious question to be tried' does not apply. The plaintiff seeking an injunction in those circumstances must satisfy a higher threshold (see para 19).

[Bahasa Malaysia summary

Plaintiff pertama/perayu adalah QSR Brands Bhd ('QSR') sebuah syarikat awam yang disenaraikan. Pada 22 Ogos 2005 satu resolusi khas telah diberikan mengikut s 145 Akta Syarikat 1965 oleh pihak yang merekuisisi. Resolusi-resolusi tersebut menuntut satu EGM untuk menyingkirkan sembilan daripada pengarah-pengarahnya. Pada mesyuarat yang ditetapkan tersebut pada 20 September 2005, defendan pertama (salah satu pengarah yang dituntut untuk disingkirkan) telah dilantik sebagai pengerusi mesyuarat tersebut. Selepas undi telah dibuang salah seorang pengurus pilihan raya telah bertemu dengan pengerusi tersebut untuk menyelesaikan dan menentukan kesahihan dua borang-borang undian, kedua-duanya ditandatangani oleh pengerusi di atas permintaan Epsilon (borang-borang undian yang dipertikaikan') oleh kerana mereka ditandatangani oleh seseorang (pengerusi tersebut) di mana nama seseorang tersebut tidak kelihatan di kertas kehadiran. Mesyuarat tersebut ditangguhkan ke 11 Oktober 2005 oleh pengerusi tersebut dalam menggunakan kuasanya di bawah perkara 74 artikel penubuhan syarikat plaintif pertama untuk mendapatkan nasihat guaman. Mesyuarat kemudiannya diteruskan oleh mereka yang masih berada di situ. Keputusan diumumkan dan resolusi-resolusi untuk menyingkirkan kesemua

pengarah-pengarah dijalankan. Kedua-dua pihak pertikaian ini memfailkan prosiding-prosiding. Prosiding pertama adalah saman pemula yang difailkan oleh plaintif-plaintif/perayu-perayu mendapat perintah untuk menahan defendan-defendan/responden-responden dari bertindak atau mengemukakan dirinya sebagai pengerusi dan/atau pengarah-pengarah plaintif (QSR), dan daripada campur tangan atau mengganggu syarikat perniagaan plaintif ataupun pengurusannya. Mahkamah tinggi tidak membenarkan permohonan tersebut. Mahkamah Tinggi membenarkan satu injunksi oleh responden-responden sehingga pengisytiharan keputusan undi menurut perkara 74 artikel penubuhan syarikat plaintif pertama tersebut. Isu yang sama di kedua-dua rayuan ialah sama ada keputusan pengerusi untuk menangguhkan mesyuarat tersebut adalah sah.

Diputuskan, membenarkan rayuan tersebut:

(1) Perkataan-perkataan yang kritikal di perkara 74 adalah 'adjourn the meeting to some place and time fixed for the purpose of declaring the result of the poll'. Dengan melihat bukti-bukti afidavit ia adalah satu inferens yang disokong oleh fakta-fakta — bahawa pengerusi tersebut tidak menangguhkan mesyuarat tersebut atas alasan untuk mengisytiharkan keputusan undi yang telah dijalankan. Seperti yang dapat disimpulkan daripada bukti-bukti afidavit, pertikaian ataupun ketidakpastian berhubungan dengan kecacatan proksi-proksi adalah de minimis. Undian-undian berhubungan dengan proksi-proksi yang dipertikaikan, adalah dipersetujui tidak akan menjejaskan keputusan tersebut. Dalam keadaan sedemikian, kenyataan pengerusi bahawa beliau bertindak di bawah perkara 74 adalah tidak munasabah. Dengan itu beliau telah menggunakan kuasanya yang sedia ada dalam common law dalam menangguhkan mesyuarat tersebut (lihat perenggan 11–12).

(2) Pendekatan yang betul untuk memastikan sama ada kuasa common law untuk menangguhkan mesyuarat tersebut telah digunakan dengan betul dalam sesuatu kes adalah seperti yang dinyatakan dalam kes *Byng v London Life Association* [1989] BCLC 400. Ia adalah jelas bahawa pengerusi tersebut telah gagal untuk mengambilkira pertimbangan yang relevan. Terutamanya, beliau sepatutnya tanya dirinya soalan sama ada kedua-dua borang yang cacat akan menjejaskan undian terhadap resolusi-resolusi di mesyuarat tersebut. Terdapat satu lagi perkara. Pengerusi tersebut mempunyai kepentingan di dalam sekurang-kurangnya salah satu resolusi-resolusi tersebut, iaitu yang menuntut penyingkirannya. Dalam keadaan-keadaan ini, keputusan untuk menangguhkan adalah tidak munasabah seperti yang diterangkan di dalam kes *Byng*. Oleh kerana keputusan pengerusi untuk menangguhkan mesyuarat tersebut adalah tidak sah, maka penerusan mesyuarat oleh pihak yang merekuisisi adalah kompeten dan perkara yang dijalankan di situ adalah sah (lihat perenggan 13–14, 17).

(3) Dalam keadaan biasa sesuatu permohonan untuk injunksi interim, sama ada mandatori ataupun larangan, ujian ialah sama ada terdapat satu persoalan yang serius yang perlu dibicarakan. Sekiranya terdapat, dan tiada ketidakadilan yang akan berlaku dengan pemberian injunksi maka imbangan kemudahan akan memihak kepada pemberian injunksi. Akan tetapi, kes-kes, walaupun jarang,

mungkin wujud di mana pemberian atau atau keengganan memberikan injunksi akan menamatkan litigasi. Dalam kes sedemikian, ujian *American Cyanamid* 'serious question to be tried' tidak terpakai. Plaintif yang memohon injunksi dalam keadaan tersebut harus memenuhi nilai ambang yang lebih tinggi (lihat perenggan 19).]

Notes

For cases on adjournment of meetings, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 382–383.

For cases on interim injunction, see 2(1) *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2769–2830.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504 (refd)
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680; [1948] 1 KB 223 (refd)
Bryanston Finance Ltd v De Vries (No 2) [1976] 1 Ch 63 (refd)
Byng v London Life Association [1989] BCLC 400 (refd)
Cayne & Anor v Global Natural Resources plc [1984] 1 All ER 225 (refd)
Collings Hui Sdn Bhd v United Estate Projects Bhd & Anor [1988] 3 MLJ 234 (refd)
Fellowes & Son v Fisher [1975] 2 All ER 829; [1976] QB 122 (refd)
Garden Cottage Foods Limited v Milk Marketing Board [1984] AC 130 (refd)
Gibb & Co v Malaysia Building Society Bhd [1982] 1 MLJ 271 (refd)
Gopal Narayan Kulkarni v Sanmukhappa Ningappa Angapi [1927] 29 Bom LR 1235 (refd)
Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors [1982] 2 MLJ 162 (refd)
Manchester Corporation v Connolly [1970] 1 Ch 420 (refd)
NWL Ltd v Woods [1979] 3 All ER 614; [1979] 1 WLR 1294 (refd)
Second Consolidated Trust Ltd v Ceylon Amalgamated Tea and Rubber Estates Ltd [1943] 2 All ER 567 (refd)
Shepherd Homes Ltd v Sandham [1971] Ch 340 (refd)
Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 (refd)
Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok [1975] 2 MLJ 109 (refd)
Wakefield v Duke of Buccleugh [1865] LT 628 (refd)
Woodford v Smith [1970] 1 WLR 806 (refd)

Legislation referred to

Companies Act 1965 s 145

Appeal from: Suit No D7–22–1386 of 2005 (High Court, Kuala Lumpur)

Logan Sabapathy (Rizal Zulkeply & PY Liew with him) (Rizal & Co) for the appellants in Civil Appeal W–02–1070 of 2005.

Malik Imtiaz Sarwar (Mathew Thomas Philip & Ang Hean Leng with him) (Thomas Philip) for the respondents in Civil Appeal W–02–1070 of 2005.

Logan Sabapathy (Rizal Zulkeply, PY Liew & Maidzuara Mohammed with him) (Rizal & Co) for the appellants in Civil Appeal W–02–1095–2005.

Azhar Azizan Harun (Abdullah Abdul Rahman with him) (Cheang & Ariff) for the first, fifth, sixth and seventh respondents in Civil Appeal W–02–1095–2005.
S Suhendran (Kadir, Andri & Partners) for the second, third and fourth respondents in Civil Appeal W–02–1095–2005.
Tay Hong Huat (Tay & Helen Wong) for the eighth respondent in Civil Appeal W–02–1095–2005.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] There are two appeals before us. They are civil appeals W–02–1070–05 and W–02–1095–05. Civil Appeal W–02–1070–05 is directed against the decision of the High Court granting an injunction for the respondents in the following terms:

> that until the declaration of the result of the poll pursuant to article 74 of the Articles of Association of the first plaintiff (QSR Brands Berhad):
>
> (i) that the first to fifth defendants (the appellants in Civil Appeal 1070-05), jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, be restrained and an injunction do hereby issue restraining the first to fifth defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, from giving effect to and/or implementing and/or acting and/or causing to give effect to and/or causing to be implemented and/or causing to act upon any and all purported resolutions passed, including without limitation the resolutions pertaining to the removal of the 9 directors, at the purported Extraordinary General Meeting ('the Purported EGM') of QSR Brands Berhad ('QSR') held on 20 September 2005 as purportedly chaired by the first defendant.
>
> (ii) that the first to fifth defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, be restrained and an injunction do hereby issue restraining the first to fifth defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, from acting and/or representing and/or holding out themselves out and/or causing to act and/or causing to be represented and/or causing to hold themselves out as the only directors of QSR.
>
> (iii) that the first to fifth defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, be restrained and an injunction do hereby issue restraining the first to fifth defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, from giving effect to and/or implementing and/or acting and/or causing to give effect to and/or causing to be implemented and/or causing to act upon any and all further resolutions passed and/or decision made subsequent to the Purported EGM.

[3] Civil Appeal W–02–1095–05 is directed against the refusal of the High Court to grant an injunction prayed for in the following terms:

> (a) that the defendants [the respondents in Civil Appeal 1095–05] be restrained, whether by himself or by his servant or agents or otherwise howsoever, from acting or holding himself out as chairman and/or directors of the first plaintiff [QSR], and from otherwise intermeddling or interfering in QSR's business or management's affairs until the final disposal of this originating summons;

(b) that the poll forms of the Extraordinary General Meeting on 20 September 2005 ('EGM'), which are sealed in a box and in the custody of an official of the EGM, Ms Seow Fei San, be brought to the court and be opened by the Deputy Registrar and be photocopied for the purpose of all proceedings in this originating summons;

(c) such further order or other relief as this honourable court deems fit.

[4] Arguments on both appeals were heard on 2–3 May 2006 and at the conclusion of submissions by learned counsel, we reserved judgment to this afternoon. These appeals have not only been argued exhaustively; they have been argued to the point of exhaustion: our exhaustion. But there is really only one point which is common to these appeals. We will discuss that point later in this judgment for we must first narrate the facts. Here they are.

[5] QSR Brands Berhad ('QSR') is a public listed company. On 22 August 2005 a special notice of a resolution moved pursuant to s 145 of the Companies Act 1965 was given by requisitionists. The resolutions sought to be moved at the meeting which was scheduled to be held on 20 September 2005 were as follows:

Ordinary Resolution No 1 — Removal of Director

That Tan Sri Dato' Nik Ibrahim Kamil bin Tan Sri Ahmad Kamil be and is hereby removed as director of the company with immediate effect.

Ordinary Resolution No 2 — Removal of Director

That Sarbjit Singh a/l Sarban Singh be and is hereby removed as director of the company with immediate effect.

Ordinary Resolution No 3 — Removal of Director

That Yoong Nim Chor be and is hereby removed as director of the company with immediate effect.

Ordinary Resolution No 4 — Removal of Director

That Choong Show Tong be and is hereby removed as director of the company with immediate effect.

Ordinary Resolution No 5 — Removal of Director

That Mohd. Harris bin Pardi be and is hereby removed as director of the company with immediate effect.

Ordinary Resolution No 6 — Removal of Director

That Nurolamin bin Abas be and is hereby removed as director of the company with immediate effect.

Ordinary Resolution No 7 — Removal of Director

That Umar bin Abdul Hamid be and is hereby removed as director of the company with immediate effect.

Ordinary Resolution No 8 — Removal of Director

That Y Bhg Datuk Haji Izhar bin Sulaiman be and is hereby removed as director of the company with immediate effect.

Ordinary Resolution No 9 — Removal of Director

That YAM Dato' Seri DiRaja Syed Razlan ibni Almarhum Tuanku Syed Putra Jamalullail be and is hereby removed as director of the company with immediate effect.

Ordinary Resolution No 10 — Removal of Director

That any such persons as might have been appointed as directors of the company at any time or times between 29th July 2005 and the conclusion of ordinary resolution 9 above be and are hereby removed as directors of the company with immediate effect.

[6] A meeting was held as per the notice on the date aforesaid. The third respondent in Civil Appeal W–02–1070–05 was appointed Chairman of that meeting. It is a fair inference that all present knew the terms of the resolutions that were being moved. In particular the third respondent in Civil Appeal W–02–1070–05 must have known about the proposed resolution seeking his removal as a director of QSR. At the meeting a poll was demanded and granted. Counting of the votes took place. According to the evidence of the third respondent in Civil Appeal W–02–1070–05 who is also the first respondent in Civil Appeal W–02–1095–05, this is what happened at that meeting. And we quote from his affidavit, which is as follows:

40. Well before any voting on resolutions took place during the Wisdom EGM, four persons from the floor were unanimously appointed 4 scrutineers for the purpose of the conducting, counting and tallying up of votes for the polls to be taken.

41. The share registrar and staff involved in the polling were from Epsilon Share Registration Sdn Bhd ('Epsilon').

42. After votes had been cast, at around 11.30am, Ronald Menon, one of the scrutineers, approached me, as Chairman of the meeting, and the second defendant, as the Company Secretary, to resolve and to ask me to rule on the validity of two polling forms, both signed by me at the request of Epsilon ('the Disputed Polling Forms').

42.1 The Disputed Forms were called into question as they were signed by a person (me) whose name did not appear on the attendance sheet for the Wisdom EGM ('the Attendance Sheet').

42.2 This issue was of concern as I was informed by the scrutineers who met me that, earlier, 2 of the scrutineers had insisted that the Disputed Polling Forms be rejected (ie, disqualified) because the signatories of those forms had not signed the Attendance Sheet.

43. After consulting the Company Secretary, I then mentioned to the scrutineers who met me that I would require the benefit of proper legal advice since I felt that the results could be affected and there is the significant risk of litigation, whichever way I ruled. Accordingly, the (sic) I mentioned to the scrutineers who met me that in order to afford me the benefit of such legal advice, I was inclined to adjourn the Wisdom EGM pursuant to article 74 of the first plaintiff's Articles of Association ('article 74'). The scrutineers accepted this.

...

46. Therefore, I took the view that unlike an adjournment under article 72, under article 74 I could adjourn the Wisdom EGM for the purpose of declaring the result of the poll and this did not require a direction by the meeting.

47. At this juncture, an informal discussion was held with En Zainal Abidin, who represented Kulim (Malaysia) Berhad (who holds the single largest block of shares in the first

plaintiff of about 30%). En Zainal Abidin, on studying article 74, felt that it was the call of the Chairman of the Wisdom EGM whether or not to adjourn the meeting.

48. The second defendant then ordered Miss Seow Fei San of Epsilon to place all the polling forms in boxes and to seal the boxes (except for the Disputed Polling Forms, which were kept outside the boxes for the purpose of me obtaining a legal opinion subsequently). The boxes were sealed in the presence of all the scrutineers. They were then handed into the custody of Miss Seow Fei San of Epsilon, on terms that they were to be properly and safely kept sealed, and opened only on instruction of the Chairman of the reconvened Wisdom EGM.

49. At around 12 noon, I explained to the Wisdom EGM the situation and that therefore I exercised my powers under article 74 of the first plaintiff's Articles to adjourn the meeting to 11 October 2005, 10am at 3rd Floor, Wisma KFC. During the time that I was speaking, one of the scrutineers (whom I am told was one Ms Lee Noushi) tried repeatedly but unsuccessfully to interrupt me by shouting into a floor microphone what she considered to be the 'results' of the poll. I stood my ground, adjourned the Wisdom EGM and left.

[7] The upshot was that the meeting was adjourned by the third respondent in Civil Appeal W–02–1070–05. The undisputed evidence shows that the meeting then proceeded, conducted by those remaining behind. Results were announced and the resolutions were carried. In effect all the respondents in Civil Appeal W–02–1095–05 were removed as directors. The next thing that happened was that proceedings were filed by both sides of the dispute that are now before us. The first proceedings was an originating summons filed by the appellants in both appeals seeking the following relief:

(a) that the defendants (the respondents in Civil Appeal 1095-05) be restrained, whether by himself or by his servant or agents or otherwise howsoever, from acting or holding himself out as chairman and/or directors of the plaintiffs (QSR), and from otherwise intermeddling or interfering in the plaintiffs' company's business or management's affairs;

(b) costs to be borne by the defendants;

(c) such further order or other relief as this honourable court deems fit; and for the damages to be assessed by this honourable court;

(d) such further order or other relief as this honourable court deems fit.

[8] A day later, QSR and two other plaintiffs, including the third respondent in Civil Appeal W–02–1070–05 caused a writ to be issued praying for a declaration that the adjournment was valid and for consequential relief. On 21 September 2005 the appellants in both appeals moved for an injunction in the terms mentioned earlier. Simultaneously, the respondents in Civil Appeal W–02–1070–05 also moved for an injunction in the terms we have set out. Both applications came before the learned judge who on 5 October 2005 granted the orders sought by the respondents in W–02–1070–05 and dismissed the orders sought by the appellants in Civil Appeal W–02–1095–05.

[9] The issue common to both appeals before us is whether the decision by the third respondent in Civil Appeal W–02–1070–05 to adjourn the meeting was valid. If it was, then it follows that the meeting that continued was unlawful and the

A resolutions thereat were improperly carried. It also follows that the learned judge was correct in granting the injunction aforesaid. Before we deal with the sole issue in this case, we must mention for completeness that a meeting of QSR was held on 11 October 2005, claimed by the respondents in Civil Appeal W–02–1070–05 to be a continuance of the adjourned meeting.

B

[10] In order to resolve the issue at hand, it is necessary to hearken to two of the articles of association of QSR. They are arts 72 and 74. They read as follows:

C 72. The Chairman may, with the consent of the meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and place to place but no business shall be transacted at an adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for thirty (30) days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting. D The Exchange shall be duly informed of every adjournment and the reasons for each adjournment.

E 74. If a poll is duly demanded it shall be taken in such manner (including the use of ballot or voting papers or tickets) and either at once or after an interval or adjournment or otherwise as the Chairman directs, and the result of the poll shall be the resolution of the meeting at which the poll was demanded, but a poll demanded on the election of Chairman or on a question of adjournment shall be taken forthwith. The demand for a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which the poll has been demanded. The Chairman of the meeting may (and if so directed by the meeting shall) appoint scrutineers and may, in addition to the powers of F adjourning meetings contained in article 72, adjourn the meeting to some place and time fixed for the purpose of declaring the result of the poll.

[11] Article 72 does not apply to this case because the third respondent in Civil Appeal W–02–1070–05 (whom we shall refer hereto as the third respondent) did not G seek the consent of the meeting to adjourn it. That leaves us with art 74. In our judgment the critical words in that article are 'adjourn the meeting to some place and time fixed for the purpose of declaring the result of the poll'. Looking at the affidavit evidence presented to the learned judge and read to us at length by counsel on both sides, it is a fair inference — indeed we would say that it is an inference warranted H by the facts — that the third respondent did not adjourn the meeting for the purpose of declaring the result of the poll that had been conducted.

[12] As may be gathered from the affidavit evidence already quoted, the quarrel or I uncertainty about the defective proxies was de minimis. The votes relating to the disputed proxies, and it is common ground, would not have affected the final result. That being the case, the third respondent's assertion that he acted under art 74 cannot hold water. We therefore conclude, as we must, that he was exercising his common law power of adjournment which he of course had as chairman of the meeting.

[13] The correct approach to determine whether the common law power of adjournment has been properly exercised in a given case is that set out by the English Court of Appeal in *Byng v London Life Association* [1989] BCLC 400. In that case, Browne-Wilkinson V-C said this:

> The starting point is to consider the nature of the residual power to adjourn which in my judgment remains vested in the chairman. It was a residual power exercisable only when the machinery provided by the articles had broken down. This residual common law power is itself tightly circumscribed by reference to the objects for which it exists. I quote again from the passages which I have emphasised above in the quotations from *R v D'Oyly* ([1840] 113 ER 139) and Mr Rogers's book (*Rogers A Practical Arrangement of Ecclesiastical Law* [1840]). The power is to regulate proceedings 'so as to give all persons entitled a reasonable opportunity of voting'. The chairman must 'do the acts necessary for those purposes'. The power to adjourn is only validly exercised if 'no injurious effect were produced'. I would add that at a company meeting a member is entitled not only to vote but also to hear and be heard in the debate. Therefore it is the very purpose of the power to facilitate the presence of those entitled to debate and vote on a resolution at a meeting where such debate and voting is possible. To my mind, this is inconsistent with the view that the exercise of the power can only be impugned on the grounds of lack of good faith. In my judgment the chairman's decision must also be taken reasonably with a view to facilitating the purpose for which the power exists. Accordingly, the impact of the proposed adjournment on those seeking to attend the original meeting and the other members must be a central factor in considering the validity of the chairman's decision to adjourn.
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> The quotation from Rogers might suggest that if the chairman's decision proves in the event to have an adverse effect on the members, that will render the decision invalid. In my judgment that is not the correct test. The chairman's decision will not be declared invalid unless on the facts which he knew or ought to have known he failed to take into account all the relevant factors, took into account irrelevant factors or reached a conclusion which no reasonable chairman, properly directing himself as to his duties, could have reached, ie the test is the same as that applicable on judicial review in accordance with the principles of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223. This was the approach adopted by Uthwatt J in *Second Consolidated Trust Ltd v Ceylon Amalgamated Tea and Rubber Estates Ltd* [1943] 2 All ER 567, where he held a chairman's decision invalid on the grounds that he had failed to take into account a relevant factor.

[14] Turning now to the evidence once again, it is quite apparent that the third respondent failed to take into account relevant considerations. In particular, he should have but did not ask himself the question whether the two defective forms he was shown by the scrutineers would have made a difference on the vote upon the resolutions before the meeting. There is one further point. The third respondent had an interest in at least one of the resolutions, namely that which sought his removal. In these circumstances, we are unable to distance ourselves from the impression that the decision to adjourn was unreasonable in the sense explained in *Byng*.

[15] What then of the meeting that continued? The answer to that question was given as long ago as 1927. It was in the case of *Gopal Narayan Kulkarni v Sanmukhappa Ningappa Angapi* [1927] 29 BomLR 1235 where Marten CJ said this:

> The question seems to me, therefore, to be one entirely different from that in *The King v Gaborian*[1809] 11 East 77, where the presiding officer, viz, the mayor and also two

A aldermen and several burgesses left the meeting without any objection, and it was not until after that had been done that certain persons who remained in the room purported to make a new election. On the other hand in *National Dwellings Society v Sykes* [1894] 3 Ch. 159 Mr Justice Chitty held (p 162) that it is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it; but he has no power to stop or adjourn a meeting at
B his own will; and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for that object. Counsel for the appellants says that in that case the meeting had begun and that a particular resolution had been passed. Let that be so. To my mind it makes no essential difference whether the chairman illegally and at once declared the validly called meeting dissolved, or whether he waited till one or two or three resolutions had been passed, and
C then made an announcement before all the business for which the meeting has been called had been concluded.

[16] In *John v Rees* [1970] Ch 345 Megarry J said 'On the footing that there was no valid adjournment, it follows that, as the cases establish (see for example, *National*
D *Dwellings Society v Sykes* [1894] 3 Ch 159) and as counsel for the plaintiff concedes, the meeting remained in being and competent to transact business. The elections conducted after the departure of the plaintiff were accordingly valid'.

[17] So too here. The third respondent's decision to adjourn being invalid,
E it follows that the continuation of the meeting by the requisitionists was competent and that the business transacted thereat was valid.

[18] In meeting the appellants' case, it was argued by learned counsel for the second to fourth respondents in Civil Appeal W–02–1095–05 that it would be
F unjust for this court to set aside the injunction obtained by respondents in Civil Appeal W–02–1070–05 and to grant the injunction to the appellants in Civil Appeal W–02–1095–05. In support of his argument, Mr Suhendran of counsel referred us to a decision of the Court of Appeal in *Cayne & Anor v Global Natural Resources plc* [1984] 1 All ER 225 and to the speech of Lord Diplock in *NWL Ltd v Woods* [1979] 3 All ER 614. We were also referred to *Collings Hui Sdn Bhd v United Estate Projects*
G *Bhd & Anor* [1988] 3 MLJ 234 where at p 236, VC George J (as he then was) said:

> Certainly where the plaintiffs' case is so open and shut that any trial of the issues would simply be a formality, I agree that the court need not apply *American Cyanamid* [1975] 1 All ER 504 but can grant the injunction sought without further ado. In *Cayne & Anor v Global Natural Resources plc* [1984] 1 All ER 225, May LJ put it in this way at p 238f:
>
H > There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases would, in my judgment, be exceptional.

I **[19]** With respect it is our view that the learned judge in *Collings Hui Sdn Bhd* misunderstood the decision in *Cayne*. In our judgment the effect of *Cayne v Global Resources* and *NWL Ltd v Woods* is simply this. In the ordinary case of an application for an interim injunction, whether mandatory or prohibitory, the test is whether there is a serious question to be tried. If there is, and no injustice would be occasioned

by the grant of the injunction then the balance of convenience would ordinarily lie in favour of the grant of the injunction. This in reality is a paraphrase of Lord Diplock's seminal dictum in *American Cyanamid*. However, cases, though rare, may arise where the grant or refusal of an injunction would terminate the litigation one way or the other. In such cases, the *American Cyanamid* test of 'serious question to be tried' does not apply. The plaintiff seeking an injunction in those circumstances must satisfy a higher threshold. This is sometimes referred to as a prima facie case (see *Fellowes v Fisher* [1975] 2 All ER 829) or a strong 'prima facie case' (*Wakefield v Duke of Buccleugh* [1865] LT 628, p 629; *American Cyanamid Co v Ethicon Ltd* [1975] AC 396) or 'an unusually sharp and clear case' (*Shepherd Homes Ltd v Sandham* [1971] Ch 340; *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150). Whether a high degree of assurance is felt by a court in a case falling outside the *American Cyanamid* test depends on the facts and circumstances of each case. The stronger, the more credible, the evidence, the greater the assurance that will be felt. And that is indeed the position here on the instant facts. We are therefore unable to agree with Mr Suhendran of counsel that it would be unjust for us to reverse the learned judge in the two appeals before this court based on the facts of this case.

[20] The other point taken is that if we allow these appeals it would mean granting the appellants the whole of the relief they have claimed. But that is not unusual. It has happened before. In *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271, Abdoolcader J when repelling a submission that it would be unjust to grant an order that would virtually give the plaintiff the full relief sought for at the interlocutory level said this:

> The short answer to the issue raised in this respect is that the court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefore on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience (*Woodford v Smith* [1970] 1 WLR 806, 817, 818 (at pp 817–818); *Wah Loong (Jelapang) Tin Mine* [1975] 2 MLJ 109, (at p 114); *Sivaperuman* [1979] 1 MLJ 150). If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should be issued even if it gives the applicant his whole remedy before the trial (*Manchester Corporation v Connolly* [1970] 1 Ch 420, 427 (at p 427). In *Bryanston Finance Ltd v De Vries (No 2)* [1976] 1 Ch 63, pp 76, 81, Buckley LJ, said (at p 76) that in relation to a petition for the winding-up of a company, the action (for an injunction to restrain the petitioner from petitioning for winding-up) as a whole is in the nature of an interlocutory proceeding. The court in that case held that the company was only entitled to interlocutory relief if on the available evidence it could be said that presentation of a petition would prima facie be an abuse of process, and Sir John Pennycuick said (at p 81):
>
> > The decision in the *American Cyanamid* Case [1975] AC 396 was, as I understand it, addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action... I do not think the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue in the action....
>
> This is in effect a judicial acknowledgement on the lines of the observation by Lord Denning MR, in *Fellowes & Son v Fisher* [1976] QB 122, p 129 (at p 129) that an interlocutory decision is often for all practical purposes final, and indeed Lord Diplock in

his judgment in the House of Lords in *NWL Ltd v Woods* [1979] 1 WLR 1294, 1306 (at p 1306) spoke to the same effect in discussing the decision of the House in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

These words apply with force to the facts of this case.

[21] In the course of argument we were reminded quite correctly by learned counsel for the respondents in both appeals that we were dealing with discretionary appeals before us. We are conscious of this. We are also conscious of the limited role we play in discretionary appeals, that is to say, appeals against discretionary orders. Our role has been summed up by Lord Diplock in *Garden Cottage Foods Limited v Milk Marketing Board* [1984] AC 130. This is how he put it:

> [O]n an appeal from the judge's grant or refusal of an interlocutory injunction, an appellate court including your Lordships' House, must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some misunderstanding of the law or of the evidence before him, or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.

[22] The same caution was administered by the Federal Court unto itself in *Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors* [1982] 2 MLJ 162 where Salleh Abas FJ said this (at p 164):

> Although the function of an appellate court with regard to the exercise of discretion by a judge in granting or refusing an interlocutory injunction is one of review only and we must defer to the judge's decision in the matter, we however feel justified in this case in overruling the decision of the court below because we are of the opinion that the learned judge's exercise of discretion in setting aside the interlocutory injunction and order previously made by Anuar J was based upon a misunderstanding of the law and the facts before him (see Lord Diplock in *Hadmor Productions Ltd & Ors v Hamilton & Anor* [1982] 2 WLR 322, 325). Such misunderstanding led him to take into consideration questions which ought not to be considered as they are not justified by the facts in this case.

[23] In the present case, there are no reasons at all given by the learned judge. There are not even 'sketchy grounds' referred to by Lord Diplock in *Garden Cottage*. So there is clearly a very wide ambit for us in point of discretion. What discretion

could be possibly interfered with when no reasons at all have been given for its exercise. Put in that way, we feel that we are more advantaged than the Federal Court in *Lian Keow*.

[24] We have very carefully considered the objective facts in this case. We have anxiously scrutinized the evidence. Having done so, we have come to the conclusion that this is a case in which no reasonable tribunal properly directing itself on the facts and applicable law would have made the orders that were made by the High Court in these appeals.

[25] For the reasons already given, the injunction granted on 5 October 2005 in Civil Appeal W–02–1070–05 is hereby dissolved forthwith. There shall be an inquiry into the damages suffered by the appellants in consequence of that injunction, pursuant to the undertaking upon which that injunction was granted. In Civil Appeal W–02–1095–05, there shall be an order in terms of prayer (a) of summons in chambers dated 21 September 2005 upon the usual undertaking as to damages. The appellants shall have the costs for both appeals as well as costs incurred in the court below. Insofar as costs in Civil Appeal W–02–1070–05 are concerned, these shall be taxed against the second and third respondents only and be paid by them. Deposit to be refunded to the appellants.

Appeal allowed.

Reported by Sally Kee