Paillart Philippe Marcel Etienne and Another v Eban Stuart Ashley and Another [2006] SGHC 187

Case Number : Suit 491/2005

Decision Date : 30 October 2006

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Mahmood Gaznavi (Mahmood Gazvani & Partners) for the plaintiffs; Jonathan Yuen and Shahiran Ibrahim (Asia Law Corporation) for the defendants

Parties : Paillart Philippe Marcel Etienne; Sin Rong Investments Pte Ltd — Eban Stuart Ashley; Earth Science Industries Pte Ltd

Companies – Directors – Removal – First plaintiff and defendant directors of company – Defendant purporting to remove first plaintiff as director on ground of gross misconduct – First plaintiff applying for declaratory order that defendant be restrained from purporting to remove first plaintiff as director of company – Whether plaintiff guilty of alleged gross misconduct

Companies – Directors – Resolutions – First plaintiff and defendant directors of company – Defendant purporting to remove first plaintiff as director through circular resolution calling for extraordinary general meeting – Proposed resolution not circulated to first plaintiff – Whether resolution valid

Courts and Jurisdiction – Court judgments – Declaratory – Conditions for granting declaratory order – Whether fact that default judgment entered against one of two defendants making declaratory order against other defendant unnecessary

30 October 2006

Andrew Ang J:

1 The first plaintiff, Philippe Marcel Etienne Paillart, is the managing director of the second plaintiff, Sin Rong Investments Pte Ltd, an investment company incorporated in Singapore. The first defendant, Stuart Ashley Eban, is a director of the second defendant, Earth Science Industries Pte Ltd ("ESI"), a company incorporated in Singapore.

2 Prior to 28 April 2005, the second defendant was wholly owned by Century Trading Group ("CTG"), a company incorporated in the Territory of the British Virgin Islands. The board of directors of the second defendant comprised the first plaintiff, the first defendant and one Michael John Geraghty ("Geraghty"). The second defendant was the sole beneficial owner of the intellectual property rights relating to a machine for converting what would otherwise be waste products from oil or date palm plantations into organic fibrous material ("Palm Biomass"). However, to move the machine from the drawing board to reality, the defendants needed the help of the plaintiffs. Evidence was adduced by the plaintiffs which showed that before the plaintiffs became involved in the affairs of the second defendant, the second defendant only had a sum of $25.75 in its favour in its bank account in October 2004.

3 On 28 April 2005, the first and second plaintiffs, the first and second defendants, Geraghty and CTG entered into a written agreement ("the Agreement") to enable the second plaintiff to financially invest and participate in the business development of the second defendant.

4 In accordance with cl 2 of the Agreement, the second plaintiff became a shareholder of 22.22% of the shares of the second defendant. On the same day, the first plaintiff was also duly voted onto the board of directors of the second defendant in accordance with cl 2(f) of the

Agreement. The machine capable of performing the function described at [2] above was fabricated in April 2005 after the plaintiffs contributed nearly $800,000; the first defendant and Geraghty contributed about $4,500 each. The intellectual property rights in that machine were estimated by parties to be worth about $5m to $7m. It is undisputed that the machine was the second defendant's only and most valuable asset.

5 The present proceedings started as a result of the first defendant attempting to remove the first plaintiff as a director of the second defendant.

6 On 27 June 2005, the first defendant purported, by a notice of that date, to call for an extraordinary general meeting ("EGM") of the second defendant to be held on 14 July 2005 with the purpose of removing the first plaintiff from the board of the second defendant.

7 The first plaintiff protested on several grounds against the first defendant's attempt to remove him from the board of the second defendant.

8 First, he contended that the attempt was a violation of the Agreement entered into between the first and second plaintiffs, the first and second defendants, Geraghty and CTG.

9 In cl 5(b) of the Agreement, it was provided that as long as the second plaintiff held no less than 10% of the shares in the second defendant, the first plaintiff would be entitled to be appointed a director of the second defendant.

10 Besides, the first plaintiff took the position that the calling of the EGM was procedurally irregular in that the first defendant was not entitled, of his own accord, to call for an EGM.

11 Owing to the first defendant's refusal to call off the EGM, the first plaintiff brought this action and meanwhile was granted an interim injunction by Choo Han Teck J on 12 July 2005 pending the outcome of the plaintiffs' application in this action for a permanent injunction, *inter alia*. As against the second defendant, by reason of its failure to file a defence, default judgment in this action was entered against it on 11 November 2005.

12 In this present application, the plaintiffs seek:

(a) a declaration that for as long as the second plaintiff holds at least 10% of the shares in the second defendant, the first plaintiff is entitled to be appointed a director of the second defendant;

(b) an order that the first and second defendants, whether by themselves, their officers, servants, agents, employees or any of them or otherwise, be restrained, by a permanent injunction granted, from convening, holding or otherwise allowing to be held any EGM, directors' meeting or any meeting whatsoever or doing any acts or things whatsoever that purport to or have the effect of:

(i) removing the first plaintiff as a director of the second defendant or curtailing or diminishing his powers, rights or privileges as such director; and

(ii) appointing any person or persons as director(s) in addition to or in substitution of the first plaintiff as director of the second defendant;

(c) damages;

(d) interest; and

(e) costs.

13 In his closing submissions, the first defendant argued that given the default judgment obtained by the plaintiffs against the second defendant, the plaintiffs' action was misconceived as they had already achieved the remedy sought. This argument ought to be rejected for the following reasons.

14 The seminal case on the necessary preconditions to the issue of a declaratory order is the Singapore Court of Appeal case of *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR 201 ("*Salijah*'s case"). The preconditions for granting declaratory relief are set out in Jeffrey Pinsler, *Singapore Court Practice 2006* (LexisNexis, 2006) at para 15/16/4 as follows:

(i) the court must have the jurisdiction and power to award the remedy;

(ii) the power to make a declaratory judgment is confined to matters which are justiciable in the High Court;

(iii) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case and, the court may take into account any relevant matter in determining whether it would be just to grant a declaration;

(iv) the plaintiff must have *locus standi* to bring the suit and, the court will not entertain a suit for a declaration unless there is a 'real controversy' for the court to resolve; and

(v) the court is concerned that any person whose interest might be affected by the declaration should be before the court.

(vi) Further, when a declaration is prayed for, there must be some ambiguity or uncertainty about the issue so that the court's determination would have the effect of laying such doubts to rest.

15 The first defendant argued that there was no longer a subsisting dispute or "real controversy" for the court to resolve and the plaintiffs were hence not entitled to the declaration sought. Whether the first plaintiff is entitled to remain as a director had been settled conclusively in the first plaintiff's favour as a result of the default judgment obtained against the second defendant on 11 November 2005.

16 In support of this argument, the first defendant relied on *Salijah*'s case where the court said at 213, [65] as follows:

> What amounts to a contest of rights is that there must be a subsisting dispute between the parties which has not been resolved by any judgment of court. For once there has been such a judgment, or pronouncement, the controversy ends subject only to the right of an appeal.

17 I am of the view that *Salijah*'s case can be distinguished from the present case. In *Salijah*'s case, the wife had obtained a Syariah Court order for the transfer of her husband's interest in the matrimonial property upon payment of the husband's contributions from his Central Provident Fund on their divorce. Having failed to obtain such a transfer, however, the wife sought a declaration from the High Court that she was entitled to sole ownership of the property.

18 The trial judge dismissed her application on the basis that the matter fell outside the jurisdiction of the High Court and was covered by s 35(2)(*d*) of the Administration of Muslim Law Act (Cap 3, 1985 Rev Ed). This was the basis upon which the Court of Appeal affirmed the trial judge's decision and dismissed the wife's application for a declaration.

19 While the Court of Appeal observed *obiter* that even if the court had jurisdiction, no declaration could be granted as the substantive issue had already been determined by the Syariah Court and no rights remained in dispute, this was not the situation in the present case.

20 Lord Dunedin's observations in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Limited* [1921] 2 AC 438 as to the factors which may be considered by the court in determining whether the discretion of the court ought to be exercised in favour of the granting of a declaration are particularly apt here. The learned judge said, at 448, as follows:

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

21 The first defendant chose to contest the plaintiffs' action and it was not inconceivable that if the court found merit in the defendants' defence, it could have given judgment in the defendants' favour. Having chosen to defend the plaintiffs' action, the first defendant is not entitled to now mount the argument that the plaintiffs are not entitled to the orders sought on the basis that the orders obtained would serve no purpose.

22 Although the first defendant was permitted by the court to amend his defence on the second day of trial, the first defendant did not raise in his amended defence the issue that the relief sought by the plaintiffs was no longer sustainable in the light of the default judgment obtained by the plaintiffs against the second defendant. The first defendant raised the argument that the matter before the court had ceased to have any practical effect and was *res judicata* when closing submissions were made.

23 If the first defendant was genuinely of the view that the relief sought by the plaintiffs was unsustainable, in the light of the default judgment obtained against the second defendant, it was open to the first defendant to adopt such a position at the beginning of the trial. However, having had the opportunity to raise and ventilate in court the numerous allegations of wrongdoing on the part of the first plaintiff, the first defendant cannot in the next breath argue that the plaintiffs were not entitled to the relief sought.

24 Indeed, there is also the added issue of who should be made to bear the plaintiffs' cost. Without the first defendant consenting to judgment, there was no way I could have made an order for costs without hearing the parties' evidence and arguments. In the event, the first defendant's argument that the plaintiffs were not entitled to the relief sought on the basis that the matter is *res judicata* appears to be a strategic ploy to avoid paying costs after putting the plaintiffs to much cost and expense in defending the unsubstantiated allegations of wrongdoing made by the first defendant.

25 In *Grant v Knaresborough Urban District Council* [1928] Ch 310, the claimant sought a declaration that a notice served on him by the local rating authority, requiring him to make certain returns, was unauthorised and *ultra vires*. The defendants thereupon withdrew their notice but later filed their defence denying that the notices were invalid. The action was set down for trial but, shortly after, the defendants admitted the invalidity of the notice and by leave withdrew their defence stating that they did not propose to contest the action any further.

26 Although the claimant could have obtained a judgment in default of defence and an order for costs, the claimant proceeded to trial and called three experts to prove the subject matter of the declaration. Astbury J held that the claimant was entitled to proceed with the action, and after hearing evidence made the declaration asked for.

27 On the question of costs, the defendants submitted that the claimant should be given his costs up to the time the defence was withdrawn and such further costs as he would have incurred on his filing for judgment in default of defence. Astbury J ordered the defendants to pay full costs. The learned judge said at 317:

> [The defendants submit that] the plaintiff ought to have set down the action on motion for judgment in default of defence and that although on such a motion he would not without proof have been entitled to his declaration, it would have been sufficient for him if an order had been made that the defendants should pay the costs, they not disputing the plaintiff's right as claimed.
>
> I do not take that view. … *At the date of the writ the plaintiff was entitled to make out that case.* The form was then withdrawn, but afterwards a defence insisting upon its validity was put in. Later on that defence was withdrawn, and the plaintiff had to consider what step to take. *He was not bound in the circumstances to move for judgment in default of defence if, on such a motion, he could not obtain the relief he was clearly entitled to*.
>
> [emphasis added]

28 In *Zamir & Woolf: The Declaratory Judgment* (Sweet & Maxwell, 3rd Ed, 2002) the authors opined at para 4.087 that:

> This decision illustrates that *where a dispute exists which justifies the institution of declaratory proceedings, the subsequent withdrawal of the defence and admission of the claimant's right will not necessarily retrospectively deprive the claimant of his right to a declaration on the grounds that the issue is now theoretical*. If a declaration will still serve some purpose, then the court will be favourably disposed to granting declaratory relief. … Two facts peculiar to the present case could well explain why the court was prepared to grant the declaration. First, the contention that the claimant was not entitled to the declaration was raised by the defendants only to escape liability for the costs of the action; they did not argue that, since there was no longer any dispute between the parties, the case was not a proper case in which to grant a declaration; and the court, consequently, did not openly deal with this question. And the second point, which was not expressly made by the court, was that the notice, being "gravely oppressive," was in a form settled by the Minister of Health, and was probably sent, or intended to be sent, to many other persons, thus making a declaration as to its invalidity a matter of public interest. [emphasis added]

29 The authors at para 4.117 again made the point that:

> It sometimes happens that after the proceedings are commenced but before judgment, the dispute between the parties comes to an end. *This will not necessarily prevent the grant of declaratory relief, if the action raised substantial issues when the proceedings were commenced.* Thus where a committee of a union had purported to suspend the claimant from office in the union but by the time the proceedings challenging the validity of the decision came on for hearing the suspension had almost expired, the court rejected a preliminary point raised by the defendants based on the argument that no useful purpose would now be served by trying the

action because the only primary relief which was being sought was declaratory and no practical results would follow from the declaration that the suspension was invalid. [emphasis added]

30 Furthermore, there is no reason why the plaintiffs should be denied the remedy of a declaration as to the rights and obligations *vis-à-vis* the first defendant simply because the second defendant chose not to defend the plaintiffs' claim.

31 As the plaintiffs rightly pointed out, it was open to the first defendant to set aside the default judgment against the second defendant. Additionally, the first defendant could have carried on the second defendant's defence, especially when the matter concerned the same set of facts.

32 To my mind, the first defendant's argument, that the plaintiffs are not entitled to the relief sought on the basis that the plaintiffs have already obtained default judgment against the second defendant, ought to fail. If the first defendants genuinely believed that the matter was *res judicata* by virtue of the default judgment, they could have asked the court to grant the same order in terms against them. They did not do so but chose to defend the action. Throughout the proceedings, the first defendant alleged various instances of gross misconduct on the part of the first plaintiff. It must be reiterated that it is not implausible that this court could have, after hearing the evidence and arguments made by both parties, found in the first defendant's favour.

33 The first defendant also made the argument that given the clearly acrimonious relationship between the first plaintiff and the first defendant, there would never be a proper quorum sufficient to constitute a proper EGM of the second defendant. However, this is a circular argument for the factual impossibility of constituting a proper quorum did not stop the first defendant from attempting to remove the first plaintiff as a director of the second defendant, which then gave rise to this action. I am therefore not convinced of the first defendant's argument. The first plaintiff is entitled to invoke whatever remedies the law avails him to protect his interests in the light of the first defendant's attempt to remove him as a director of the second defendant.

34 I will now proceed to consider the first defendant's defence. In his defence, the first defendant alleged that the first plaintiff committed various wrongs and that the first defendant was therefore entitled to remove him. The allegations of wrongdoing had earlier been mentioned in a letter dated 24 June 2005 ("the Letter") which had been sent out by solicitors for the defendants calling for the first plaintiff's resignation.

35 In the Letter, the defendants alleged that the first plaintiff had acted without the second defendant's or the directors' approval, in passing a directors' resolution dated 6 May 2005 ("the Resolution"), to register a company in the Free Zone Establishment ("FZE") in the Sharjah Airport International Free Zone ("SAIF Zone") in the United Arab Emirates ("UAE").

36 The defendants also alleged that the first plaintiff acted fraudulently in signing a power of attorney ("the Power of Attorney") in favour of the first plaintiff's son, Nicholas Paillart, as neither the second defendant nor the directors had at any point in time consented or authorised the execution of the Power of Attorney. Both those documents, which were issued under the second defendant's name, bore the sole signature of the first plaintiff with the title of "President", a position which did not exist.

37 The defendants alleged that the first plaintiff was in breach of his director's duties to the company and demanded that the first plaintiff resign as a director of the second defendant.

38 The first plaintiff's response to the Letter was that the allegations were false. He therefore

refused to resign and thereafter launched separate defamation proceedings in the Subordinate Courts.

The defence

39 The first defendant made five main points in his defence. First, he alleged that the first plaintiff had breached the Agreement in that he failed to secure a promised investment from an entity known as "Green SA" ("Green"). Second, he maintained that the defendants were entitled to remove the first plaintiff from the directorship of the second defendant because of "gross misconduct", particularised in the Letter. Third, the first defendant contended that the first plaintiff's acts of misconduct were a breach of s 157 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") – again warranting immediate dismissal. Fourth, the convening of the EGM was proper. Finally, the first defendant contended that the plaintiffs were not entitled to the equitable remedies sought as by his misconduct the first plaintiff had unclean hands and it would be inequitable to grant the remedies in those circumstances.

40 I will now consider each of the defences.

Breach of the Agreement

41 In his defence, the first defendant averred that the first plaintiff was in breach of cl 3 of the Agreement in that he failed to secure a promised investment from Green. I find that the first plaintiff did not breach the Agreement in allegedly failing to secure the promised investment by Green. Clause 3 of the Agreement states as follows:

> Investor: Once this agreement has been executed and all of the activities described in [cl 2] above have been completed, it is all parties intention to invite a company called Green SA, incorporated in Samoa, identified by Philippe as a willing and capable investor, to invest US$1.00 million in ESI. The terms and conditions of this investment shall be subject to a separate agreement between ESI and Green SA.

42 Upon a proper construction of cl 3 of the Agreement, it is clear that the parties merely contemplated inviting Green to invest in the second defendant. The clause merely stipulated the parties' intention to invite Green to invest in the second defendant. Nowhere did it require the first plaintiff to ensure or procure Green's investment. The terms of such investment were also left open subject to agreement.

43 It follows from the above that the defendants were not entitled to rely upon a breach of cl 3 of the Agreement to argue that the first plaintiff had repudiated the Agreement. Indeed, not every breach of a term of a contract entitles the innocent party to treat a contract as repudiated.

44 *Halsbury's Laws of England* vol 9 (Butterworths, 4th Ed, 1974) at para 547 states as follows:

> Not every refusal to perform a part of the contract amounts to a repudiation which entitles the other party to treat the contract as at an end; there must be a refusal to perform something which goes to the root or essence of the contract.

45 I should add that, even if the first plaintiff was bound to secure Green's investment and that this breach of the Agreement amounted to a repudiation of the Agreement, the defendants did not accept such repudiation. *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) vol 2 at para 37-213 states:

The innocent party faced with a repudiatory breach can do one of two things: (i) affirm the contract in a clear way; or (ii) accept the repudiation by making it plain that by reason of the repudiatory act of the defaulting party, he considers that the contract is at an end.

46 At trial, counsel for the first defendant conceded that the defendants had not accepted the purported repudiation by the first plaintiff of the Agreement. Accordingly, even if the first plaintiff was in breach, the defendants could not treat the Agreement as at an end. Clause 5(b) therefore continued to have effect and the first plaintiff could not be removed on the ground that he had breached the Agreement.

47 On the basis of the contract alone, the plaintiffs would be entitled to the declaration and injunction sought, barring any reason making it inequitable to do so. Although the declaration is not an equitable remedy, it is discretionary in nature and equitable principles apply: see *Zamir & Woolf* ([28] *supra*) at paras 4.028 and 4.029. The same can be said of an injunction, being an equitable remedy. Nevertheless, let me go on to the other defences.

The first plaintiff's alleged gross misconduct

48 The first defendant alleged that the documents, the Resolution and the Power of Attorney executed in favour of Nicholas Paillart, the first plaintiff's son, were fraudulent for the following reasons:

(a) Although the first plaintiff claimed that the Resolution comprised official minutes of a meeting of the board of directors of ESI, no ESI directors' meeting had been convened or held on 6 May 2005 or at any other time adopting the resolutions contained therein.

(b) The first plaintiff admitted in writing that no such minutes ever existed.

(c) No ESI directors' meeting had been held on 6 May 2005 or at any other time authorising the issue of a power of attorney to the first plaintiff's son as "Manager/Negotiator of the company".

(d) There was no documentary evidence corroborating the first plaintiff's claim that the majority directors consented to these documents.

(e) ESI's corporate secretary, David Yeung, was unaware of the existence of both documents as written and signed by the first plaintiff, and had never seen such documents or filed any such documents with the Accounting and Corporate Regulatory Authority.

(f) No other ESI directors signed the Resolution or Power of Attorney, nor was any signature line provided in either document for the first defendant or Geraghty's signatures.

(g) The first plaintiff had both documents notarised and certified and then had his son, Nicholas Paillart, attempt to submit the Resolution to meet a banking requirement that required a *bona fide* directors' resolution of ESI.

49 I am of the view that the evidence does not support the first defendant's case that the first plaintiff was guilty of the alleged gross misconduct. The first plaintiff's testimony was that Geraghty was involved in the setting up of the FZE company in the UAE and the first plaintiff's task was to sign the three documents, namely, the letter appointing Pannell Kerr Foster as ESI's consultants to register ESI as a FZE company, the consent to the Resolution, and the Power of Attorney, and return

them for the incorporation of the FZE company.

50 I accept the first plaintiff's evidence that he honestly held the view that the first defendant's and Geraghty's signatures were needed before the Resolution could become valid. The Resolution merely stated that the first plaintiff had consented to the adoption of various resolutions. It is material that the first paragraph of the Resolution states that "*[t]he undersigned being the director* of Earth Science Industries Pte Ltd … hereby consent to the adoption of the following resolutions" [emphasis added]. For the Resolution to be valid, the consent of the rest of the directors of ESI to the Resolution was required.

51 Although it is odd that the first plaintiff signed off as "President" in the Resolution, I accept the plaintiffs' argument that if the first plaintiff had intended to hoodwink anyone, the first plaintiff would never have used the non-existent title of "President". Indeed, whether he had used the title "President" or "Chairman" (which position he actually occupied) would have made no difference to the document. Had the first plaintiff drafted the Resolution, he would not have used a non-existent title since the use of his legitimate title as Chairman would not have affected the document in any manner whatsoever.

52 The resolutions which the first plaintiff consented to included, first, the registration of a FZE company in the SAIF Zone in the UAE; second, the provision of full financial commitment by ESI to the establishment of the FZE company; third, the appointment of the first plaintiff's son, Nicholas Paillart, as the manager/negotiator of the company; and finally, the execution of the Power of Attorney in Nicholas Paillart's favour.

53 The fact that the first plaintiff's son was involved required that this court carefully scrutinise the transactions. The first defendant contended that the first plaintiff's son, by virtue of the Power of Attorney, would then be able to control ESI's bank account with Standard Chartered Bank in Dubai. The evidence, however, was that the bank account with Standard Chartered Bank in Dubai was never opened. Furthermore, neither the first plaintiff nor the first plaintiff's son stood to gain from the transactions as the FZE company was to be wholly owned by the second defendant. This was not disputed by the second defendant.

54 The plaintiffs' evidence was that Geraghty had previously identified the first plaintiff's son as a possible source of help. This corresponded with the documentary evidence. As can be seen from the application form dated 4 May 2005, submitted by Geraghty, for a SAIF-Zone licence, it was Geraghty who had inserted the name of "Nicholas Philippe" as the manager of the proposed FZE company. In yet another application form submitted by ESI, this time for registration in the SAIF Zone as a FZE company, Geraghty had again inserted the name "Nicholas Philippe" in the column for the manager of the FZE company. The plaintiffs contend that if they were the ones who had inserted the names, they would have inserted "Nicholas Paillart" instead of "Nicholas Philippe".

55 In my view, it is material that the opening paragraph of the Power of Attorney states as follows:

> BY THIS POWER OF ATTORNEY given this 6 day of May 2005, *we the Directors* of Earth Science Industries Pte Ltd, HEREBY APPOINT Mr. Nicholas Paillart ... [emphasis added]

The words "we the Directors" clearly indicate that the Power of Attorney was intended to be signed by more than one signatory. That being the case it was illogical to suggest that the first plaintiff attempted to pass off the document as valid when it carried only his signature.

56 The first defendant also alleged that the plaintiffs were guilty of trying to "steal" the intellectual property rights belonging to the second defendant because the second plaintiff had tried to pay the second defendant's patent lawyers, M/s Lawrence YD Ho & Associates Pte Ltd ("M/s Lawrence Ho"), the fees for extending the patent to countries beyond Singapore. The second plaintiff's cheque was rejected by M/s Lawrence Ho as they took the view that they were "unable to accept a cheque from Sin Rong Investment Pte Ltd for an ESI patent unless there is a Director's [*sic*] Resolution from ESI to authorize it". The first defendant argues that this was another example of the first plaintiff attempting to issue instructions unilaterally on behalf of the second defendant without a legitimate directors' resolution.

57 The onus of proving the allegations of wrongdoing lies with the first defendant. The standard of proof when fraud is alleged was discussed by the Singapore Court of Appeal most recently in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263. Without going any further, it would suffice for the present purposes to say that the more serious the allegations, the more the party on whom the burden of proof fell had to do in order to establish his case on a balance of probabilities. Having considered the evidence and the submissions of counsel for the first defendant, I find on a balance of probabilities that the first defendant has not made out his case that the first plaintiff was guilty of the alleged gross misconduct.

58 In fact, I am of the view that the first defendant was the one who had acted dishonestly.

59 The first plaintiff's stance is that the whereabouts of the machine, the second defendant's only and most valuable asset, are unknown. As the parties who had financially supported the development of the machine from drawing board to reality, the plaintiffs have a legitimate interest in the whereabouts of the machine. During cross-examination, it emerged from the first defendant's evidence that:

(a) some day in between 14 November and 21 November 2005, he had appointed Geraghty to be the guardian of the machine;

(b) this was despite the fact that Geraghty had resigned as a director of ESI on 12 September 2005;

(c) Geraghty had removed the machine from the warehouse (where it had been kept) on 13 September 2005;

(d) the machine had been sold to Oceanic Shiphandlers ("OS"), an entity which the first defendant admitted was "friendly", for 41,210.50 dirhams on 11 September 2005 as part of "a deal … made between [Geraghty] and [OS]";[note: 1]

(e) Geraghty was the first defendant's ally "in ensuring that the machine would somehow return to [the first defendant] or to [Geraghty]";[note: 2] and

(f) the first defendant had attempted to purchase the machine from OS by asking OS for a quote for the machine on 27 December 2005 on behalf of his own company, Kaitiaki Pte Ltd, a company of which he and his wife were the only shareholders and directors.

60 In the event, I am persuaded by the plaintiffs' submission that the first defendant's conduct was dishonest. Given my finding, it hardly lay in the first defendant's mouth to complain about the first plaintiff's misconduct. Even assuming that the first plaintiff did have improper or fraudulent motives (of which I find no evidence), proper steps had to be taken to remove him.

Contravention of the Companies Act

61 The third defence is that the first plaintiff's acts of gross misconduct were in contravention of s 157 of the Act and warranted immediate dismissal. It would follow from my finding that no misconduct had been made out as alleged and that therefore there was no breach of s 157 of the Act. But for the sake of argument, even if there was gross misconduct and a breach of s 157 of the Act, proper steps had to be taken to remove the first plaintiff. This leads us to the first defendant's next point which is that the EGM was properly called.

Notice of EGM

62 I accept that the purported director's circular resolution resolving to convene an EGM for the purpose of removing the first plaintiff from the directorship was not sent to the first plaintiff at the material time. Despite Art 105 of the memorandum and articles of association of the second defendant allowing a resolution to be passed by a majority vote, at the least the proposed resolution had to be circulated to the first plaintiff. This was not done. In my view, the purported resolution was ineffective: see *Polybuilding (S) Pte Ltd v Lim Heng Lee* [2001] 3 SLR 184 ("*Polybuilding*"). In *Polybuilding*, the court observed that although a majority decision of the board of directors prevails, a meeting of the majority without notice to the minority is ineffective. That being so, the notice of EGM was defective.

Plaintiffs not entitled to equitable relief

63 The final contention of the first defendant is that by reason of the first plaintiff's misconduct as alleged, the first plaintiff ought to be denied the equitable relief prayed for. Given my finding that the first defendant had not proved on a balance of probabilities that the first plaintiff had committed gross misconduct as alleged, this final contention of the first defendant is inapplicable. I might add that from the evidence that emerged as to the first defendant's conduct, it hardly lay in his mouth to complain about the first plaintiff's misconduct.

64 In the premises, I grant the plaintiffs the relief prayed for, *viz*:

(a) a declaration that for as long as the second plaintiff holds at least 10% shares of the second defendant, the first plaintiff is entitled to be appointed a director of the second defendant;

(b) an order that the first defendant be restrained and a permanent injunction be granted restraining him from convening, holding or otherwise allowing to be held any EGM, directors' meeting or any meeting whatsoever or doing any acts or things whatsoever that purport to or have the effect of removing the first plaintiff as a director of the second defendant or curtailing or diminishing his powers, rights or privileges as such director;

(c) damages to be assessed by the Registrar and interest thereon to be fixed by the Registrar;

(d) that there be liberty to apply in regard to prayer 12B(b); and

(e) costs to be taxed.

[note: 1] (In line 25 of p 217 of the Notes of Evidence).

[note: 2] (In lines 28–31 of p 217 of the Notes of Evidence).