

**A** **Excapt Services Sdn Bhd v  
New Heritage Limousine Services Sdn Bhd & Ors**

**B** HIGH COURT (KUALA LUMPUR) — SUIT NO D8-22-1673 OF 2007  
KANG HWEE GEE J  
9 JANUARY 2008

**C** *Civil Procedure — Injunction — Ex parte injunction — Ex-parte injunctive order — Plaintiff seized office before it even served the court order — Whether an abuse of process — Whether injunction ought to be set aside*

**D** *Civil Procedure — Injunction — Ex parte injunction — Setting aside — Non-disclosure of material facts by plaintiff — Discrepancy with respect to the actual amount of loan — Whether injunction ought to be set aside*

**E** The defendants applied inter alia for the first defendant to set aside the ex parte injunction (encl 11) and the second and third defendants to set aside the ex parte injunction (encl 12). The defendants alleged that there was a very serious non-disclosure of material fact with respect to the actual loan agreement between the parties. The inter-pleader proceeding summons before Court No 4 the loan that was granted to the defendants was for a sum of RM600,000 whereas in the current suit the plaintiff had alleged that the loan was for a sum of RM1m. The defendants also alleged that the plaintiff had abused the process of the court. The plaintiff had obtained the ex parte order on 13 December 2007. On 15 December 2007 after 8pm at night the plaintiff purportedly using the said ex parte order seized the office premises of the first defendant by putting a lock on the front door of the premises before it even served the court order. It had also taken over the business operation of the first defendant using the said ex parte order before service on the third defendant where the plaintiffs director, wrote a letter dated 14 December 2007 addressed to all the limousine drivers of the first defendant stating that all payments due to the first defendant shall be given to Mohd Pirdaus and his wife Nuraini Bahoo Abdullah. This was not within the ambit of the court order but the alleged letter dated 14 December 2007 inter alia referred to the court order and also annexed the court order to the letter.

**I**

**Held:**

(1) It was clear that the plaintiff had failed to disclose a material fact.

There was a clear discrepancy with respect to the actual amount of loan that the plaintiff had lent to the first defendant and should there be any legal reason for the difference this must be disclosed in the ex parte injunction sought for and obtained by the plaintiff (see para 11).

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- (2) The plaintiff had also abused the process of this court by acting on a frolic of its own after having obtained the ex parte injunctive order from the court. It was clear that even before the order was served on the defendants the plaintiff had proceeded to lock up the office of the first defendant and had issued notices to the limousine drivers of the first defendant in order that they pay their rental direct to Encik Mohd Pirdaus as a director of the plaintiff (see para 12).

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- (3) On these grounds alone the ex parte order should be withdrawn and be set aside with immediate effect. The defendants should be entitled to damages based on the undertaking to pay such damages upon being granted the ex parte order. The plaintiff should be forfeited of its right to make any application for an interim injunction of a similar nature. This should not however prejudiced whatever right it might have in its claim on the shares of the first defendant company (see para 13).

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**[Bahasa Malaysia summary]**

Defendan-defendan memohon antara yang lain untuk defendan pertama mengenyepikan injunksi ex parte (kandungan 11) dan defendan kedua dan ketiga untuk mengenyepikan injunksi ex parte (kandungan 12). Defendan-defendan menyatakan bahawa terdapat fakta-fakta material yang serius yang tidak didedahkan berhubung dengan perjanjian pinjaman yang sebenarnya di antara pihak-pihak. Di prosiding inter-pleader sebelum Mahkamah No 4 pinjaman yang diberikan kepada defendan-defendan adalah untuk jumlah RM600,000 sementara dalam tindakan ini plaintiff menyatakan bahawa pinjaman adalah untuk jumlah RM1j. Defendan-defendan juga menyatakan bahawa plaintiff telah menyalahgunakan proses mahkamah. Plaintiff telah memperolehi perintah ex parte pada 13 Disember 2007. Pada 15 Disember 2007 selepas 8 malam plaintiff kononnya telah menggunakan perintah ex parte tersebut untuk menyita premis pejabat defendan pertama dengan meletakkan kunci di pintu depan premis tersebut sebelum menyampaikan perintah mahkamah tersebut. Ia juga telah mengambil alih operasi perniagaan defendan pertama dengan menggunakan perintah ex parte yang belum lagi disampaikan kepada defendan ketiga di mana pengarah plaintiff melalui satu surat bertarikh 14 Disember 2007 kepada kesemua pemandu-pemandu limousine defendan pertama menyatakan bahawa segala bayaran yang perlu dibayar kepada defendan pertama dibayar kepada Mohd Pirdaus dan isterinya Nuraini Bahoa Abdullah. Ini bukannya dalam ruang lingkup perintah mahkamah tersebut

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A tetapi surat bertarikh 14 Disember 2007 tersebut antara yang lain merujuk kepada perintah mahkamah dan juga melampirkan perintah mahkamah kepada surat tersebut.

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**Diputuskan:**

- C (1) Ia adalah jelas bahawa plaintif gagal mendedahkan satu fakta material. Terdapat perbezaan yang jelas berhubung dengan jumlah sebenarnya pinjaman yang telah dipinjam oleh plaintif kepada defendan pertama dan sekiranya terdapat sebarang alasan undang-undang untuk perbezaan tersebut, ia mesti didedahkan di injunksi ex parte yang dipohon dan diperolehi oleh plaintif (lihat perenggan 11).
- D (2) Plaintif juga telah menyalahgunakan proses mahkamah dengan bertindak secara sesuka hati mereka selepas memperolehi perintah injunksi ex parte tersebut daripada mahkamah. Ia adalah jelas bahawa walaupun sebelum perintah tersebut disampaikan kepada defendan-defendan, plaintif telah bertindak dengan menguncikan pejabat defendan pertama dan telah mengeluarkan notis-notis kepada pemandu-pemandu limousine defendan pertama untuk membayar sewa mereka terus kepada Encik Mohd Pirdaus sebagai pengarah plaintif (lihat perenggan 12).
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- F (3) Atas alasan-alasan ini sahaja, perintah ex parte patut ditarik balik dan diketepikan dengan segera. Defendan-defendan berhak kepada gantirugi berdasarkan akujanji untuk membayar gantirugi sebegini sekiranya diberikan perintah ex parte tersebut. Hak plaintif untuk memohon injunksi interim yang bersifat serupa patut dirampas.
- G Akan tetapi ini tidak sepatutnya memprejudiskan sebarang hak yang dimilikinya untuk menuntut bahagiannya disyariatkan defendan pertama (lihat perenggan 13).]

**Notes**

- H For cases on ex parte injunction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2948–2999.

**Legislation referred to**

- I Rules of the High Court 1980 O 29 r 1(2BA)

*Mohd Rizal Bahari (Paramalingam & Norafizah bte Ismail with him) (Bahari & Bahari) for the plaintiff.*

*Justin TY Voon (Alvin KW Lai with him) (Sidek Teoh Wong & Denni) for the defendants.*

**Kang Hwee Gee J:**

[1] There are three applications in today's proceeding as follows:

- (1) Inter-partes hearing of the application granted ex parte on 13 December 2007 (encl 4);
- (2) Application by first defendant to set aside the ex parte injunction (encl 11);
- (3) Application by the second and third defendants to set aside the ex parte injunction (encl 12)

[2] It would be appropriate that the court proceeds to hear encls 11 and 12 first as there would be no necessity to hear encl 4 should the defendants succeed in their application to set aside the ex parte order. Both the applications encls 11 and 12 are based on similar grounds as follows:

[3] There is a very serious non-disclosure of material fact before this court with respect to the actual loan agreement between the parties. The same plaintiff had earlier filed an affidavit in the inter-pleader proceeding commenced by the solicitor holding the document as a stakeholder of the parties' document in relation to a loan granted by the plaintiff to the first defendant now the subject matter of this action. In the said affidavit (exh 'A-9' of encl 9 of the defendants' affidavit in reply) filed by the plaintiff in the inter-pleader suit the plaintiff has categorically represented to the court that the loan was for RM600,000 by which a copy of the purported loan agreement was exh'd in exh 'A-8' in encl 9 before this court. However in this current suit the same deponent of the plaintiff Encik Mohd. Pirdaus Bin Idris has filed an affidavit in support of ex parte for an interim injunction which can be found in encl 3 and in this affidavit the plaintiff now categorically alleged that the loan is for the sum of RM1m with reference to a different purported loan agreement which can be found in exh 'A-6' of encl 9. There is no explanation whatsoever of this serious discrepancy. The plaintiff has omitted to exh in its affidavit in support the actual agreement exhibited in that suit. We submit that there is a serious inconsistency as well as non-disclosure of material fact by the plaintiff in obtaining the ex parte order and the order therefore should be set aside by this court.

[4] The plaintiff has abused the process of the court. The plaintiff obtained the ex parte order on 13 December 2007. However, it only begin to attend to serve the same on the 18 December 2007. This can be seen in exh 'A-1' of encl 9 in respect of its cover letter to serve the cause paper and the ex parte order which is stated 18 December 2007. On 15 December 2007 after 8pm

- A** at night the plaintiff purportedly using the said ex parte order seized the office premises of the first defendant by putting a lock on the front door of the premises before it even served the court order. It even broke the alarm and also pasted a police report lodged by the plaintiffs director Encik Mohd. Pirdaus. The said police report can be seen in exh 'A-15' of encl 17.
- B** The content of this police report inter alia states that:

Saya telah menyita pejabat di alamat... atas arahan mahkamah.

- C** [5] The ex parte order did not say that it can seize the office premises of the first defendant. More so where the defendants had not been served with the court order. It is a known law that until the order is served the plaintiff does not have any right to act on the order.

- D** [6] The plaintiff has not been forthright to this court. The plaintiff in para 16 of the said affidavit encl 16 alleged on oath that it never uses the order to seize the office of the first defendant. This is blatantly untrue because its own police report lodged by the same deponent who affirmed the affidavit in encl 16 categorically stated in the police report:

- E** Saya telah menyita pejabat dialamat... atas arahan mahkamah.

- F** [7] It has also taken over the business operation of the first defendant using the said ex parte order again before it even served the said order, having only served the order of the court on the third defendant only on 18 December 2007. The irrefutable proof that the plaintiff has taken over the business operation of the first defendant can be found in exh 'A-5' of encl 9 where Mohd Pirdaus, plaintiffs director, wrote a letter dated 14 December 2007 which can be found in exh 'A-5' of encl 9 addressed to all the limousine drivers of the first defendant stating that ail payments due to the first defendant shall be given to Mohd Pirdaus and his wife Nuraini Baha Abdullah. This is not within the ambit of the court order but the alleged letter dated 14 December 2007 inter alia referred to the court order and also annexed the court order to the letter.

- H** [8] The plaintiff has breached the very court order that they obtained. Although Mohd Pirdaus is not a director of the first defendant he should not have acted purportedly as the agent of the first defendant in dealing with the assets of the first defendant This is because the ex parte order itself expressly states that the first defendant or its agent is prevented from touching the assets. A fortiori where the plaintiff itself touches the assets of the first defendant company as in this case.
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[9] The defendants are seriously prejudiced because the defendants as the directors and shareholders of the company cannot even operate their own business. The plaintiff itself has pleaded in para 6 of the statement of claim that at all material times the second, third and fourth defendants are the directors of the company.

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[10] This application to set aside the ex parte order is opposed on the following grounds:

(1) We deny the allegation by the defendants that there is a serious non disclosure. The agreement in exh 'PI-3' for RM1m was witnessed and initialed by the solicitors of the first defendant at that time. The agreement for RM600,000 that was used in the inter-pleader proceeding in Court No 4 was not witnessed nor initialed by the solicitors of first defendant at that time;

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(2) We did not delay the service of the ex parte order to the defendants. However, we received the order from this court on 14 December 2007 at 4pm. Any ex parte order can be served within one week of the date of the order granting the interim injunction (O 29 r 1 (2BA)). We did not delay and the service of the ex parte order was made within the time period;

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(3) With respect to the allegation of having locked the office of the premises on the night of the 15 December 2007 before the service of the ex parte order on the defendants, we deny we misuse the order. The plaintiff had harboured the fear that if the office of the first defendant was not locked up then the second, third and fourth defendants might transfer all the relevant documents regarding the first defendant business to other place which cannot be found by the plaintiff and this will prejudice the right of the plaintiff to take over the first defendant company by virtue of the fact that Court No 4 had already decided on the inter-pleader summons that all the shares belonged to the plaintiff. Even though the plaintiff had locked the office premises of the first defendant however the plaintiff never occupied the premises or take over the business of the first defendant. It was all done with the good intention of protecting the plaintiff's own right and the dissipation of the assets of the company upon being adjudicated the proprietor of the one million shares of the first defendant company by the inter-pleader summons at the Court No 4;

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(4) We deny that we have taken over the business or management of the company. We had merely locked the office up and issued the notices to the limousine drivers merely as a notice to inform the drivers that the plaintiff had a court order and in order to secure the future rights of the plaintiff for in the event that if the drivers paid their dues to the second,

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- A third and fourth defendants the plaintiff would not be able to recover without going through the tedious process of judicial recovery process.

#### FINDINGS AND DECISION

- B [11] Having heard the submissions of the parties with reference to the respective affidavits it is clear that the plaintiff had failed to disclose a material fact that in the inter-pleader proceeding summons before Court No 4 the loan that was granted to the defendants was for a sum of RM600,000 whereas
- C in the current suit in this court the plaintiff had alleged that the loan was for a sum of RM1m. There is a clear discrepancy with respect to the actual amount of loan that the plaintiff had lent to the first defendant and should there be any legal reason for the difference this must be disclosed in the ex parte injunction sought for and obtained by the plaintiff.
- D [12] The plaintiff had also abused the process of this court by acting on a frolic of its own after having obtained the ex parte injunctive order from the court. It is clear that even before the order was served on the defendants the plaintiff had proceeded to lock up the office of the first defendant and had
- E issued notices to the limousine drivers of the first defendant in order that they pay their rental direct to Encik Mohd Pirdaus as a director of the plaintiff.
- F [13] On these grounds alone the ex parte order must be withdrawn and be set aside with immediate effect. The defendants shall be entitled to damages based on the undertaking to pay such damages upon been granted the ex parte order. The plaintiff shall be forfeited of its right to make any application for an interim injunction of a similar nature. This should not however prejudiced whatever right it may have in its claim on the shares of the first defendant company.
- G [14] The plaintiff shall pay the costs of this application.

*Order accordingly.*

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Reported by Sally Kee

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