Barakah Offshore Petroleum Berhad & Anor
v
Mersing Construction & Engineering Sdn Bhd & 3 Ors

High Court, Kuala Lumpur – Originating Summons No. WA-24NCC-545-10/2018
Darryl Goon Siew Chye J

May 3, 2019

Company law *– Arrangements and reconstructions – Stay of proceedings – Interveners seeking to set aside ex parte order which included restraining order obtained by applicants pursuant to s 368 of the Companies Act 2016 ("the Act") – Whether there was non-disclosure of material facts by applicants – Whether non-compliance by applicants with conditions set out under s 368(2)(c) and (d) of the Act when applying for restraining order – Companies Act 2016, ss 368, 368(2)(a), (b), (c), (d)*

The applicants had by way of ex parte originating summons ("the ex parte OS") and pursuant to s 368 of the Companies Act 2016 ("the Act") obtained an ex parte order dated October 16, 2018 ("the ex parte order") inter alia restraining their creditors from taking out any further proceedings in any action against them ("the restraining order") for a period of 90 days. Upon the expiry of the said 90 days, the applicants on January 10, 2019 by way of ex parte notice of application applied for and obtained an extension of time of the restraining order to enable them to secure a nominee director by their creditors. Having subsequently secured such a nominee director, the applicants then on February 4, 2019 filed another application, seeking inter alia a fresh restraining order or in the alternative an extension of the said restraining order for another 90 days.

Prior to the restraining order being extended, the interveners had applied to intervene and be added as parties to the proceedings. The interveners further also sought the setting aside of the said restraining order on the basis that there was non-disclosure of material facts by the applicants when applying for the said ex parte order. In this regard the first intervener contended that the applicants had failed to disclose the adjudication decision that was made in its favour in the sum of RM13,275,867 and that the applications had failed to disclose the actual or true value of their assets. The interveners further also contended that the applicants had failed to meet certain mandatory statutory requirements under the Act when obtaining the said restraining order. The applicants did not object to the interveners being added as parties to the proceedings but objected to the other orders sought by the interveners. On April 8, 2019, the applicants yet again filed another application ("encl 91") seeking inter alia a further extension of 90 days of the restraining order.

Issues

1. Whether there was non-disclosure of material facts by the applicants.

2. Whether the applicants had failed to comply with the conditions set out under s 368(2)(c) and (d) of the Act when applying for the restraining order.

Held, setting aside the restraining order and allowing the first, second and third interveners' application in encls 13, 27, 45, respectively; fourth intervener's application in encl 29 dismissed with costs; prayers 1 and 2 of encl 91 allowed with no order as to costs

1. Not every non-disclosure would necessarily result in the setting aside of an ex parte order. The non-disclosure must be of facts which are material or which could or would be taken into account by the court in considering whether to exercise the power or discretion sought. The value of the applicants' assets given as at June 30, 2018, was sufficiently close in time to the ex parte OS which was filed on October 12, 2018. No evidence was adduced to suggest that there was any material change in the value of their assets. As regards the non-disclosure of the adjudication decision that was made in favour of the first intervener, in the circumstances of the case, the non-disclosure was not a material non-disclosure. *[see p 681 para 30; p 683 paras 45 - p 683 para 46]*

2. (a) It cannot be the legislative intent that only s 368(2)(a) and (d) of the Act need be complied with when applying for a restraining order. The conditions under s 368(2)(a) to (d) need all be complied with. To hold otherwise would do violence to the manner in which s 368(2)(a) to (d) was drafted and would call, unjustifiably, for ignoring the fact that the conditions set out in s 368(2)(a) to (d) are cumulative, having regard to the semicolon after each subsection and the use of the conjunction "and" placed between s 368(2)(c) and (d). *[see p 688 para 68]*

   (b) Upon its proper construction, the conditions set out in s 368(2)(a) to (d) of the Act need to be complied with when an application is made for a restraining order under s 368(1) of the Act. Such a result is consonant with the plain language used and the legislative intent and purpose for the conditions in s 368(2)(a) to (d) of the Act. In this regard, the applicants, having conceded that the conditions in s 368(2)(c) and (d) of the Act were not complied with when making and securing the ex parte order, the restraining order thus cannot stand. *[see p 689 paras 71-72]*

Cases referred to by the court

Gula Perak Bhd v Datuk Lim Sue Beng (and 5 Other Appeals) [2018] 8 AMR 1; [2019] 1 CLJ 153, FC *(ref)*

Kempadang Bersatu Sdn Bhd v Perkayuan OKS No. 2 Sdn Bhd [2019] 4 CLJ 131 *(ref)*
Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 3 AMR 340; [2017] 4 CLJ 265, FC *(ref)*
Kosma Palm Oil Mill Sdn Bhd & 2 Ors v Koperasi Serbausaha Makmur Bhd Bhd [2004] 1 AMR 417; [2004] 1 CLJ 239, CA *(ref)*
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd (and Another Appeal) [2017] 6 AMR 509; [2018] 2 CLJ 163, CA *(ref)*
PECD Bhd & Anor v AmTrustee Bhd (and 2 Other Appeals) [2010] 3 AMR 334; [2010] 1 CLJ 940, CA *(ref)*
Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & 2 Ors v Badrul Zaman b PS MD Zakariah [2018] 5 AMR 733; [2018] 8 CLJ 273, FC *(ref)*
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 AMR 635; [2016] 9 CLJ 1, FC *(ref)*
R v Special Commissioners of Income Tax District of Kensingon; Ex p Princess Edmond De Polignac [1917] 1 KB 486 *(ref)*
Re PECD Bhd & Anor (No. 2) [2008] AMEJ 0057; [2008] 10 CLJ 486, HC *(ref)*
Re Sanda Industries Bhd & 2 Ors [1999] 1 AMR 892; [1999] 1 CLJ 459, HC *(ref)*
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat (and Another Reference) [2017] 4 AMR 123; [2017] 5 CLJ 526, FC *(ref)*
Shanmugam Ramalingam v PP (and Other Appeals) [2018] 5 CLJ 326 *(ref)*
Westminster City Council v National Asylum Support Service [2002] 4 All ER 654 *(ref)*

Legislation referred to by the court

Malaysia
Companies Act 1965, ss 176, 176(10A), (10A)(a), (b), (c), (d), 181
Companies Act 2016, ss 366, 366(1), 368, 368(1), (2), (2)(a), (b), (c), (d), (3)
Companies (Amendment) (No. 2) Act 1998, s 14
Construction Industry Payment and Adjudication Act 2012
Courts of Judicature Act 1964

Ramesh Kanapathy and *Eldarius Yong Zhen Jie* (Chellam Wong) for applicants
Alvin Lai Kok Wing and *Lin Pei Sin* (Justin Voon Chooi & Wing) for first intervener
Foong Chee Keen (Nik & Foong) for second intervener
Lee Shih and *Nathalie Ker Si Min* (Skrine) for third intervener
Rodney Gan (Zul Rafique & Partners) for fourth intervener

Judgment received: May 9, 2019

Darryl Goon Siew Chye J

Introduction

[1] This judgment concerns several applications by interveners in respect of an ex parte order granted to the applicants in this originating summons and the applicants' application to further extend that order.

[2] This originating summons was commenced ex parte invoking the court's powers to order a compromise or arrangement with the applicants' creditors and, towards that end, to restrain further proceedings in any action or proceeding against the applicants, pursuant to ss 366 and 368 of the Companies Act 2016, respectively.

[3] The first applicant is a public company listed on the Main Board of Bursa Malaysia with a total issued and paid up capital of RM165,319,234.44. The first applicant is in the business of investment holdings and providing upstream services for the oil and gas industry.

[4] The second applicant is a private limited company and a wholly owned subsidiary of the first applicant with a total issued and paid up capital of RM25,000,000.00. The second applicant is in the business of providing and carrying out onshore and offshore contracting works, also in the oil and gas industry.

[5] From around 2014 to 2015, the applicants' financial performance began to decline and they started to face financial difficulties. Sometime in 2018, the second applicant managed to secure a contract described as the Pan Malaysia Maintenance, Construction and Modification contract. This contract was said to be worth approximately RM1.2 billion over a period of five years. At the same time, it was claimed that the second applicant had submitted tenders for several projects and these were still in their early stages.

[6] Being confident that they would be able to improve their financial situation, the applicants sought to ameliorate their current financial problems by restructuring their debts. Towards this end, the applicants proposed a scheme of arrangement with a view to securing a compromise with their creditors.

[7] At the same time, in order to facilitate the process of securing the approvals for the proposed scheme, the applicants also sought an order from the court to restrain further proceedings in any action or proceeding against them.

[8] Hence, the ex parte originating summons herein invoking ss 366 and 368 of the Companies Act 2016.

Background

[9] The ex parte originating summons herein was issued on October 12, 2018. It was heard and an ex parte order in the terms sought by the applicants was granted on October 16, 2018 ("ex parte order").

[10] The orders sought and granted in the ex parte order included approvals to call a creditors' meeting and a members' meeting, directions for the meetings and the appointment of one En Sulaiman bin Ibrahim, or in his absence his nominee, to chair the meetings.

[11] Among the orders granted as part of the ex parte order was a restraining order made pursuant to s 368 of the Companies Act 2016 ("restraining order"). The restraining order states as follows:

> 5. Pursuant to Section 368(1) of the Act, all proceedings in any action and/or any proceedings against all the abovenamed Applicants including but not limited to enforcement of any security, the commencement of winding up proceedings against all the above named Applicants and/or any appointment of receiver and/or manager over all the abovenamed Applicant's assets be restrained for a period of ninety (90) days from the date of this order hereof except with leave of Court and subject to any terms as this Court may impose.

Thus, the restraining order granted pursuant to s 368 was for a period of 90 days.

[12] On January 10, 2019, the applicants filed an ex parte notice of application (encl 46) to extend the orders granted in the ex parte order. The extensions of time sought were allowed save for the extension of time in respect of the restraining order, which was not. This was because the applicants were not able to comply with the requirement under s 368(2)(d) in providing a person nominated by a majority of the creditors to act as a director.

[13] However, having secured a nominee director by the creditors, on February 4, 2019, the applicants filed an ex parte notice of application (encl 60) for inter alia a fresh restraining order or, alternatively, to extend the restraining order.

[14] The applicants' application in encl 60 was heard on March 6, 2019 and was granted. Among the orders granted was an order extending the restraining order for 90 days from January 15, 2019.

The interveners' applications

[15] Prior to the restraining order being extended, four companies had filed applications seeking to intervene and be added as parties to the proceedings. Also sought were various orders affecting the ex parte order of October 16, 2018.

[16] The first application to intervene was made by a company known as Mersing Construction & Engineering Sdn Bhd ("Mersing") in encl 13. Mersing's application to intervene was filed on November 13, 2018. Mersing was a creditor of the second applicant by reason of an adjudication decision in its favour under the Construction Industry Payment and Adjudication Act 2012, and which decision was ordered by the High Court in Shah Alam to be enforced as a judgment of the High Court, on October 16, 2018. The adjudication decision in favour of Mersing was for a sum of RM13,275,867.96 plus interest and costs. Apart from seeking to be added as a party to the proceedings, Mersing also sought to set aside the ex parte order and such further or other order as the court may deem fit.

[17] The second application to intervene was made by a company known as ENI Integrated Works Sdn Bhd ("ENI") in encl 27. ENI's application to intervene was filed on December 16, 2018. ENI claims to be a creditor of the second applicant with a pending civil suit against the latter in Kuala Lumpur Sessions Court Civil Suit No. WA-B52C-23-07/2018 for a sum of RM597,575.00. In addition to being added as a party, ENI sought to set aside the restraining order. This was so that its suit in the Sessions Court may proceed.

[18] The third application to intervene was made by a company known as CPM Construction Sdn Bhd ("CPM") in encl 29. CPM's application to intervene was filed on December 26, 2018. CPM also claimed to be a creditor of the second applicant with a pending action against the second applicant for a sum of some RM42 million in Shah Alam High Court Suit No. BA-22C-44-10/2018. In addition to being included as a party, CPM sought an order for leave to proceed with its suit against the second applicant.

[19] The fourth application to intervene was made by a company known as Bintang Subsea Ventures (M) Sdn Bhd ("Bintang") in encl 45. Bintang's application to intervene was filed on January 9, 2019. Bintang was a creditor named in the applicants' proposed scheme of arrangement with a claim of RM13,275,867.00. In addition to being included as a party, Bintang also sought to set aside the ex parte order and such further or other order as the court may deem fit.

[20] Mersing, ENI, CPM and Bintang are hereinafter collectively referred to as the "interveners".

[21] On February 18, 2019, the applicants consented to the interveners being added as parties to the proceedings. The other orders sought by the interveners were, however, not consented to and they were fixed for hearing on April 18, 2019.

[22] No objections were taken by the applicants as to the timing of the interveners' applications to set aside the orders.

Second extension of the ex parte order

[23] On April 8, 2019, the applicants filed another application (encl 91) for several orders including an application to further extend the restraining order for a period of 90 days. This was because the order of October 16, 2018, which was extended by 90 days on March 6, 2019, was due to expire on April 14, 2019. The orders sought by the applicants in encl 91 were the following:

1. The period to convene the respective Applicants' Creditors' Meetings pursuant to Section 366(1) Companies Act 2016 ('the Act') for the purpose of taking into account and if thought fit, approve with or without modification a Scheme of Arrangement and compromise between the applicants and the

Applicants creditors be extend for a period of 90 days from the date of 14.4.2019 to convene the said meeting.

2. The period for the 1st Applicant to have the Members Meeting pursuant to Section 366(1) of the Act for the purpose of taking in to account and if thought fit, approve with or without modification a Scheme of Arrangement and Compromise between the 1st Applicant and its Members be extended for a period of 90 days from the date of 14.4.2019 to convene the said meeting.

3. Pursuant to Section 368(2) of the Act, the restraining order dated 16.10.2018 and extended pursuant to Order dated 6.3.2019 to restrain all proceedings in any action and/or any proceedings against all the abovenamed Applicants including but not limited to enforcement of any security, the commencement of winding up proceedings against all the abovenamed Applicant and/or any appointment of receiver and/or manager over all the abovenamed Applicants' assets, except with leave of Court and subject to any terms as this Court may impose be extended for a period of (90) days from the date of 14.4.2019 herein.

4. Encik Sulaiman bin Ibrahim (NRIC No.: 600119-06-5119) to continue acting as a Director of the Applicants for the purpose of Section 368(2)(d) of the Act.

5. The Applicants are required within seven (7) days from the date of this Order herein,

   (a) Lodge an office copy of the Order with the Registrar;

   (b) Publish a notice of the order in one 'The Star' newspaper or as an alternative, "The New Straits Times" newspaper; and

   The lodgement of the office copy and the advertisement to constitute valid service of the Order on all parties related hereto.

6. Cost of this Application be borne by the applicants;

7. The Applicants be given liberty to apply; and

8. Any and all other further order and reliefs this Honourable Court deems fit and just.

[24] This application in encl 91 was also fixed for hearing on April 18, 2019.

Interveners' contentions

[25] The interveners' applications, taken together, raised three issues namely:

(i) whether the ex parte order ought to be set aside,

(ii) whether that part of the ex parte order consisting of the restraining order, ought to be set aside; and

(iii) whether CPM should be granted leave to continue with its suit against the second applicant in Shah Alam High Court Suit No. BA-22C-44-10/2018 if the ex parte order or the restraining order is not set aside.

[26] The interveners' contentions were two-fold. The first was that there was non-disclosure of material facts by the applicants in their application for the ex parte order. The second was that when obtaining the restraining order, the applicants did not meet certain mandatory statutory requirements under the Companies Act 2016. Accordingly, the interveners maintained that the resultant effect was that the ex parte order, including the restraining order, must be set aside.

Alleged non-disclosure

[27] It is a well-established principle in respect of ex parte applications that the applicant must make full and frank disclosure of facts that may be material for the court to consider when the court is required to exercise a discretion in favour of the applicant.

[28] A statement of this principle can be found, over a hundred years ago, in *Reg v Special Commissioners of Income Tax District of Kensingon; Ex parte Princess Edmond De Polignac* [1917] 1 KB 486 at 509, where Warrington LJ expressed it in the following manner:

> It is perfectly well settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make *the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order* which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.
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> (Emphasis added.)

Even then, the requirement of full and frank disclosure in an ex parte application was regarded as settled principle.

[29] The passage by Warrington LJ was cited with approval by Kang Hwee Gee J sitting in the Court of Appeal in *PECD Bhd & Anor v Amtrustee Bhd (and 2 Other Appeals)* [2010] 3 AMR 334; [2010] 1 CLJ 940, a case involving a proposed scheme under s 176 of the Companies Act 1965, where his Lordship stated:

[67] The requirement that an affidavit supporting an ex parte application for a relief must make a full and frank disclosure in order to enable the court to properly decide whether there are grounds to grant the order on an *ex parte* basis is so well established. The passage from the judgment of Warrington CJ in *Reg v Special Commissioners of Income Tax District of Kensingon; Ex parte Princess Edmond De Polignac* [1917] 1 KB 486 at 509, cited by the learned judge correctly states the law.

[30] However, not every non-disclosure would necessarily result in the setting aside of an ex parte order. The non-disclosure must be of facts which are material or which could or would be taken into account by the court in considering whether to exercise the power or discretion sought. In *Kosma Palm Oil Mill Sdn Bhd & 2 Ors v Koperasi Serbausaha Makmur Bhd Bhd* [2004] 1 AMR 417; [2004] 1 CLJ 239, Richard Malanjum JCA as his Lordship then was, stated:

> *It is trite law that in any* ex parte *application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant.* In *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 his Lordship Bingham J (as he then was) said this at p 437:
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> *"Failure to make full and fair disclosure*
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> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. *He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.* Most of these principles are established by authorities such as *Rex v Kensington Income Tax Commissioners* [1917] 1 KB 486; *rmax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289; *Wardle Fabrics Ltd v G Myristis Ltd* [1984] FSR 263; *BankMellat v Nikpour* [1985] FSR 87. Other principles have not been the subject of detailed challenge".
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> (See also *Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd* (1994) 4 MSCLC 91,078; [1994] 1 CLJ 264).
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> (Emphasis added.)

[31] On the issue of non-disclosure, it was first contended by Mersing that the applicants failed to fully disclose the adjudication decision in its favour of RM13,275,867.00.

[32] What was disclosed by the applicants was merely the fact of a pending decision in the High Court in Shah Alam in respect of a claim by Mersing. What the applicants did not disclose was the fact that the pending decision was in respect of Mersing's application to enforce the adjudication decision as a judgment of the High Court.

[33] The disclosure by the applicants in page 1 of the proposed debt restructuring scheme exhibited to the affidavit in support of the applicants' ex parte originating summons, was merely the following:

> On 28 August 2018, Mersing Construction & Engineering Sdn Bhd filed in a claim against the Company for a sum of RM13,275,867.00 wherein the Shah Alam High Court has fixed a date to deliver its decision on the matter on 16 October 2018.

There was thus no indication that an adjudication decision had in fact been made in Mersing's favour.

[34] The second allegation of non-disclosure was the applicants' failure to disclose the actual or the true value of their assets. Mersing contended that there were discrepancies between the applicants' financial statements and their interim financial statements, both stated to be as at June 30, 2018, pertaining to the value of certain assets they owned.

[35] In the first applicant's statement of assets and liabilities given as at June 30, 2018, it was stated that its unencumbered non-current assets consisting of "Plant and Equipment" was RM3,748.00, its total current assets were worth RM129,042,507.00 and its total assets were worth RM221,027,452.00.

[36] Whereas in the first applicant's interim financial statement given also as at June 30, 2018, which Mersing had downloaded from the first applicant's website, it was stated that its "Property, Plant and Equipment" were worth a total of RM282,631,000.00, its current assets were worth RM218,193,000.00 and its total assets were worth RM500,824,000.00.

[37] At the same, time the second applicant's statement of assets and liabilities as at June 30, 2018 states that its unencumbered non-current assets consisting of "Property, Plant and Equipment" were worth RM25,838,056.00.

[38] Mersing pointed out that even if it was maintained by the first applicant that the majority of its unencumbered non-current assets referred to were owned or had been transferred to the second applicant, this cannot account for the vast difference between the "Property, Plant and Equipment" said to be worth RM282,631,000.00 in its interim financial statement as at June 30, 2018 when

compared to the value of the same assets owned by both applicants as per their respective statement of assets and liabilities, also as at June 30, 2018.

[39] Mersing contended that the massive difference between the worth of the first applicant's stated total assets of RM500,824,000.00 in its interim financial statement from its website and its stated total assets of RM221,027,452.00 in its statement of asset and liabilities, rendered the applicants' proposed scheme of arrangement dubious and, if not warranted, prejudicial to the applicants' unsecured creditors.

[40] In addition, Mersing contended that the applicants should have disclosed evidence of their latest statement of asset and liabilities for the period after June 30, 2018 up to before its application for the ex parte order, but failed to do so.

[41] The applicants' response to the allegation of non-disclosure of the adjudication decision in Mersing's favour was that even if disclosed or admitted, the debt merely represented 15% of the scheme creditors. In addition, the second applicant maintained that it has a claim against Mersing in Shah Alam High Court Suit No. BA-22C-35-08/2018 for a sum of RM41,759,001.69 which, if successful, would be more than the RM13,275,867.96 owed to Mersing.

[42] As for the inconsistencies in the value of their assets, the applicants pointed out that the interim financial statement referred to by Mersing was in fact the unaudited condensed consolidated statement of the first applicant's group of companies. It was not the interim financial statement of the first applicant as alleged. The applicants in their affidavit in reply went on to explain at some length the nature of the assets.

[43] The court was of the view that the allegation of non-disclosure of material facts was not made out.

[44] In so far as the value of the applicants' assets are concerned, Mersing had been relying on a different set of financial statements – those reflecting the value of the assets of the first applicant group of companies and not those specifically of the first and second applicants.

[45] The value of the applicants' assets given as at June 30, 2018 was sufficiently close, in time, to the ex parte originating summons filed by the applicants on the of October 12, 2018. There was no evidence led to suggest that there was any material change in the value of the assets for either applicants. This would have been a valid criticism had the contention that there was a discrepancy in the value of the applicants' assets been grounded on more solid foundation.

[46] As for failing to disclose that an adjudication decision had actually been made in favour of Mersing for the sum of RM13,275,867, the court was of the view that in the circumstances of the case, this was not a material non-disclosure. That there was such a claim was disclosed. That there was a pending decision

was also disclosed. Sufficient facts had been disclosed to enable queries to be raised by the scheme creditors and a full explanation to be provided, if required, including the fact of the second applicant's pending claim against Mersing.

[47] The very purpose for a restraining order is to stay further proceedings in any action, whether it be pending a trial or pending an application for execution. Therefore, whether Mersing had a claim under an adjudication decision that was pending leave of court for execution or a claim pending the decision of the court, either situation would warrant consideration for the grant of a restraining order. In addition, in the factual circumstances of this case, the amount owed to Mersing, which was disclosed, would not per se frustrate the proposed scheme.

The restraining order

[48] It was the interveners' contention that the restraining order ought not to have been granted. It was maintained that when making the application for the restraining order, the applicants had failed to comply with the conditions set out under s 368(2)(c) and (d) of the Companies Act 2016.

[49] The applicants however maintained that they were not obliged to comply with those provisions. This, the applicants contended, was because the conditions under s 368(2)(a) to (d) were only applicable in relation to an application to *extend* a restraining order that had been granted. Those conditions are not applicable in the primary application for a restraining order under s 368(1) of the Companies Act 2016.

[50] Before the relevant provisions of the Companies Act 2016 are considered, it would be pertinent to consider the applicable principles of statutory interpretation.

[51] In *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 3 AMR 340; [2017] 4 CLJ 265, Balia Yusof Wahi JCA as his Lordship then was, sitting in the Federal Court and delivering the decision of the court, observed as follows:

> [52] The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is. And this is primarily done by reference to the words used in the provision. *Craiese on Legislation* (9th edn, 2008) at p 611 states:
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> > "The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the court is to interpret legislation 'naccording to the intent of them that made it' and that intent is to be deduced from the language used."

(See also *Gula Perak Bhd v Datuk Lim Sue Beng (and 5 Other Appeals)* [2018] 8 AMR 1; [2019] 1 CLJ 153.)

[52] In *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & 2 Ors v Badrul Zaman bin PS MD Zakariah* [2018] 5 AMR 733 at 745 paragraph [45]; [2018] 8 CLJ 273 at 286 paragraph 45, Ramli Ali FCJ delivering the judgment of the Federal Court, stated that "In interpreting the provisions of an Act of Parliament, the trend now is to adopt such a construction as will promote the legislative intent or purpose underlying the provisions."

[53] Very recently in *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No. 2 Sdn Bhd* [2019] 4 CLJ 131, the Federal Court speaking through Zainun Ali FCJ stated:

> [34] The courts have always been inclined to take a purposive and literal construction of a provision in a statute. In this regard, the literal meaning of an Act will be given where that meaning is in accordance with the legislative purpose (see the decisions in *Tan Kim Chuan & Anor v Chandu Nair Krishna Nair* [1991] 2 MLJ 42; [1991] 1 CLJ (Rep) 441, *United Hokkien Cemetries, Penang v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121; [1979] 1 LNS 122, *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; [1985] CLJ (Rep) 122, *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449; [1985] 1 LNS 46).

[54] Being central to the interveners' contention, s 368(1), (2) and (3) of the Companies Act 2016 are set out in full below:

> Power of Court to restrain proceedings
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> 368. (1) If no order has been made or resolution passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or any member or creditor of the company, restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to any terms as the Court may impose.
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> (2) The Court may grant a restraining order under subsection (1) to a company for a period of not more than three months and the Court may on the application of the company, extend this period for not more than nine months if –
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> (a) the Court is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;
>
> (b) the Court is satisfied that the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members under section 366;
>
> (c) a statement of particulars as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) the Court approves the person nominated by a majority of the creditors in the application by the company under subsection (1) to act as a director or if that person is not already a director, appoints that person to act as a director notwithstanding the provisions of this Act or the constitution of the company.

[55] It should be stated at the outset that the applicants conceded as fact, that s 368(2)(c) and (d) were not complied with when the application for the restraining order was made and granted.

[56] Section 368(1) is the empowering provision in respect of restraining orders. Subject to the conditions therein set out, it is the provision that confers power on the court to restrain further proceedings in any action or proceeding against an applicant.

[57] Section 368(2), on the other hand, deals with the duration of restraining orders and their extension.

[58] Construing the provisions in s 368(2), without regard to subsections (2)(a) to (d), might lead to a conclusion that subsections (2)(a) to (d) are only applicable when an applicant is seeking to *extend* the duration of a restraining order that has been granted. This is because the conjunction "and" is placed between two separate applications namely, the application under s 368(1) for a restraining order and an application to extend the restraining order. It is to the second application, i.e. the application to extend, that the second conjunction "if" is employed and subsections (2)(a) to (d) attached thereto.

[59] However, any such conclusion quickly evaporates when regard is had, particularly, to s 368(2)(a) and (d).

[60] Section 368(2)(a) makes specific reference to the court being satisfied that, "... there is a proposal for a scheme of compromise or arrangement ...". Clearly, in order to be eligible for a restraining order under s 368(1), there must first be a compromise or arrangement proposed. Section 368(1) states so. Indeed, it is the very existence of a proposed compromise or arrangement that is the *raison d' etre* for the grant of a restraining order.

[61] Section 368(2)(a) merely provides the condition that the proposal must be between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors. This links it to s 368(1) with the effect that the proposal referred to therein must meet the condition stipulated in s 368(2)(a), before a restraining order may be granted.

[62] Section 368(2)(d) makes specific reference to "... the person nominated by a majority of the creditors in the application by the company under subsection (1) to act as director ...". This provision points directly to the fact that there must be such a person nominated when an application is made under s 368(1) i.e. an

application for a restraining order, and not when an application to *extend* a restraining order is made.

[63] Learned counsel for Bintang pointed out that the conditions set out in s 368(2)(a) to (d) had existed in the predecessor to s 368 i.e. s 176(10A) of the Companies Act 1965.

[64] Section 176(10A) of the Companies Act 1965 stated as follows:

> Power to compromise with creditors and members
>
> 176(1) ...
>
> ...
>
> Power of Court to restrain proceedings
>
> (10) Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.
>
> (10A) The Court may grant a restraining order under subsection (10) to a company for a period of not more than ninety days or such longer period as the Court may for good reason allow if and only if –
>
> (a) it is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one- half in value of all the creditors;
>
> (b) the restraining order is necessary to enable the company and its creditors to formalize the scheme of compromise or arrangement for the approval of the creditors or members pursuant to subsection (1);
>
> (c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and
>
> (d) it approves the person nominated by a majority of the creditors in the application by the company under subsection (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

[65] Subsection (10A) was added to s 176 of the Companies Act 1965 by s 14 of the Companies (Amendment) (No. 2) Act 1998 (Act A1043). In paragraph 13 of the

explanatory statement to the Companies (Amendment) (No. 2) Bill 1998 introducing the proposed amendment, it was stated as follows:

> 13. Clause 14 seeks to amend section 176 of Act 125 to ensure that creditors are aware of an application made under subsection (10) and to ascertain that restraining orders under that subsection are only granted under specific conditions to avoid any abuse.

[66] Consistent with this legislative intent, our courts have held that subsection (10A)(a) to (d) had to be complied with when applying for a restraining order (see *Re Sanda Industries Bhd & 2 Ors* [1999] 1 AMR 892; [1999] 1 CLJ 459 and *Re PECD Bhd & Anor (No. 2)* [2008] AMEJ 0057; [2008] 10 CLJ 486).

[67] Learned counsel for Bintang pointed out that the rationale for introducing subsection (10A) as indicated in the Bill would, logically, continue to apply to the very similar provisions that continue to appear under s 368(1) and (2) of the Companies Act of 2016. Thus, s 368(2)(a) to (d) too, were intended to continue to ensure that creditors are aware of an application made under s 368(1) and to avoid any abuse. It therefore follows that the conditions set out under s 368(2)(a) to (d) need to be complied with when applying for a restraining order under s 368(1) and not only when seeking to extend it under s 368(2). This argument is compelling and accords with the way s 368(2)(a) and (d) are worded. It also accords with and maintains the legislative intent and purpose.

[68] For completeness, it should also be stated that it cannot be the legislative intent that only s 368(2)(a) and (d) need be complied with when applying for a restraining order. The conditions under s 368(2)(a) to (d) need all be complied with. To hold otherwise, would do violence to the manner in which s 368(2)(a) to (d) are drafted. It would call, unjustifiably, for ignoring the fact that the conditions set out in s 368(2)(a) to (d) are cumulative, having regard to the semicolon after each subsection and the use of the conjunction "and" placed between s 368(2)(c) and (d).

[69] That the court may have regard to the explanatory statements in a Bill is now quite settled. The explanatory statement to the Arbitration (Amendment) Bill 2010 was referred to by the Federal Court in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 AMR 635; [2016] 9 CLJ 1. The explanatory statement in the Bill for an amendment Act in respect of the Courts of Judicature Act 1964 was referred to by the Federal Court in *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No. 2 Sdn Bhd* [2019] 4 CLJ 131 (see also *Shanmugam Ramalingam v PP (and Other Appeals)* [2018] 5 CLJ 326 and *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd (and Another Appeal)* [2017] 6 AMR 509; [2018] 2 CLJ 163 and *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat (and Another Reference)* [2017] 4 AMR 123; [2017] 5 CLJ 526).

[70] In this context regard may also be had to the following observation of Lord Steyn in *Westminster City Council v. National Asylum Support Service* [2002] 4 All ER 654 at 657:

> In so far as the explanatory notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose explanatory notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, government Green or White Papers, and the like. After all, the connection of explanatory notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see *Cross Statutory Interpretation* (3rd edn, 1995) pp 160-161.

[71] Having regard to the foregoing, the court is of the view that upon its proper construction, the conditions set out in s 368(2)(a) to (d) need to be complied with when an application is made for a restraining order under s 368(1) of the Companies Act 2016. Such a result is consonant with the plain language used and the legislative intent and purpose for the conditions in s 368(2)(a) to (d).

[72] As the applicants have conceded that the conditions in s 368(2)(c) and (d) were not complied with when making and securing the ex parte order, the restraining order granted therefore cannot stand.

[73] In the course of arguments, learned counsel for the applicants pointed out that there are practical difficulties for some companies to meet the conditions set out in s 368(2)(a) to (d). The problems are more acute if there is an element of urgency due to a pending legal suit against the company.

[74] It is probably the case that companies in financial difficulties would be more likely to encounter legal suits with financial claims against them. However, such practical difficulties that a company invoking s 368 might face, have to be weighed against the somewhat drastic effect of a restraining order that creditors may be stopped in their tracks from enforcing their legal rights in a court of law.

[75] It behoves applicants invoking s 368 of the Companies Act 2016 to conscientiously prepare with care when making their applications and not to do so at the eleventh hour, after legal actions have been brought, judgments entered and enforcement proceedings commenced or about to be commenced.

Conclusion – The interveners' applications

[76] Mersing and Bintang's applications in encls 13 and 45 respectively, sought to set aside the ex parte order in its entirety. However, the court was of the view that setting aside part of the ex parte order, that is to say only the restraining order, would be within the further or other orders sought in their applications.

[77] For the reasons given above, the restraining order was set aside and Mersing's application in encl 13, Bintang's application in encl 45 and ENI's application in encl 27 were allowed with costs.

[78] In view of the foregoing orders, CPM's application in encl 29 for leave to proceed with its pending action in Shah Alam High Court Suit No. BA-22C-44-10/2018 against the second applicant was no longer necessary or maintainable. However, CPM's application was necessitated by the restraining order obtained by the applicants. Therefore, CPM's application in encl 29 was dismissed with costs to be borne by the applicants.

The applicants' application in encl 91 for further extensions

[79] The ex parte order was not set aside. Only the restraining order was set aside. The applicants maintained that they still wanted the other orders sought for in prayers 1 and 2 of encl 91.

[80] All the interveners, save for Mersing, had no objections. Mersing's objection was premised on a contention that the extensions of time sought in prayers 1 and 2 were not justified. This was because, the extensions were sought for the reason that an investor had been found by the applicants to participate in the proposed scheme.

[81] The court was however unable to agree with the objection raised by Mersing. The primary concern here was with the proposed scheme of arrangement and not who would provide the financial support for it. Indeed, no evidence was led or any reason given as to why this new investor was not acceptable or suitable.

[82] Accordingly, prayers 1 and 2 of encl 91 were allowed with no order as to costs.