Lagenda Erajuta Sdn Bhd
v
Acre Square Sdn Bhd & 51 Other Proposed Interveners

High Court, Shah Alam – Originating Summons No. 24NCC-169-12/2018
Gunalan Muniandy J

February 20, 2020

Civil procedure *– Parties – Intervention – Application to intervene and to set aside ex parte order granting leave of court in relation to proposed scheme of arrangement and restraining order – Whether delay if any in applying to set aside ex parte order would defeat application – Whether proposed interveners may intervene in sanction proceedings even after filing of application for order to sanction scheme of arrangement – Whether proposed interveners' rights and interests directly and seriously affected by proposed scheme – Whether proposed scheme of arrangement not bona fide and bound to fail – Whether proposed interveners required to file proof of debt – Whether against public policy to sanction proposed scheme as applicant insolvent – Whether there was non-disclosure of material facts by applicant when applying for ex parte order and restraining order – Whether there was non-compliance by applicant with requirements of s 368(2)(a), (b), (c), (d) of the Companies Act 2016 – Whether in the circumstances, grant of leave to intervene warranted – Companies Act 2016, s 368(2)(a), (b), (c), (d)*

The applicant is the developer of the mixed development project known as "1 Gateway" ("the project") on the lands owned by the Port Klang Authority ("the PKA"). The proposed interveners are purchasers of shop lots and shop offices (collectively "the units") of the project and had respectively entered into sale and purchase agreements with the applicant for the purchase of the said units. After having abandoned the project, the applicant subsequently sought to revive the project and with the assistance and support of a white knight, intended to deliver completed units to the respective purchasers, subject to a variety of conditions. The applicant accordingly filed the instant originating summons ("the OS") and obtained an ex parte order to sanction its proposed scheme of arrangement. The applicant also applied for and obtained a restraining order pursuant to s 368(2) of the Companies Act 2016 ("the CA 2016").

The proposed interveners applied to intervene in the OS and to set aside the ex parte order on the grounds that the application for the restraining order and the proposed scheme are not bona fide and are bound to fail; that there was non-disclosure of material facts by the applicant at the hearing of

the application for the ex parte order as well as non-compliance by the applicant of the statutory requirements of s 368(2) of the CA 2016 when applying for the restraining order.

In support of their application the proposed interveners contended inter alia that under the proposed scheme neither they nor any of the other purchasers would have any rights or claims arising from their respective sale and purchase agreements and that they would be prejudiced by a delay of up to 12 years or more in the completion and delivery of the units after the date of site possession of the land by the white knight without any liability on the part of the applicant to pay liquidated ascertained damages for the delay and the interest to be paid on loans taken from the financiers. It was further also contended that the proposed scheme is premature, bound to fail and cannot be implemented as the PKA had terminated the settlement agreement upon which the proposed scheme is conditional and that it would be against public policy to sanction the scheme in view of the fact that the applicant is insolvent.

The applicant in response contended inter alia that there are no merits to the proposed interveners' application and that the same is not bona fide as no proof of debt had been filed and as some of the proposed interveners had voted at the court convened creditors' meeting ("CCM"). It was further contended that given the fact the restraining order was obtained on December 18, 2018 followed by an extension on April 1, 2019, there was therefore inordinate delay on the part of the proposed interveners in filing the application on August 21, 2019.

Issues

1. Whether there was inordinate delay in the filing of the application to intervene which would defeat the application.

2. Whether presence of all persons so affected at the meeting to decide on the proposed arrangement, is crucial to meet the requirements of s 368 of the CA 2016.

3. Whether the proposed interveners who are recognised as a class of creditors are required to file a proof of debt being allowed to vote in the CCM.

4. Whether the proposed scheme is not bona fide.

5. Whether there was non-disclosure of material facts by the applicant when applying for the ex parte order.

6. Whether there was non-compliance by the application with the requirements of s 368(2)(a) to (d) of the CA 2016.

Held, allowing the application with costs of RM10,000 subject to allocatur

1. (a) On the authorities and bearing in mind inter alia that the explanatory statement setting out the proposed scheme was only served on the proposed interveners about two months before the filing of the instant application, the delay if any in filing the said application, is not inordinate and does not defeat the said application or prevent the proposed interveners from intervening in the sanction proceedings even at the stage when the applicant had already applied for an order to sanction the scheme of arrangement. [*see p 621 para 7*]

   (b) The grant of the leave to intervene as prayed for and the setting aside of the ex parte order, is warranted in view of the fact that the implementation of proposed scheme would without doubt, directly and seriously affect the rights and interests of the proposed interveners. [*see p 623 para 9*]

2. The presence of all persons so affected at the meeting to decide on the proposed arrangement is crucial to meet the requirements under s 368 of the CA 2016 for a restraining order to be granted. In this regard, the CCM which was held outside the 90 days' period stipulated in the ex parte order without any leave to extend time, was in breach of the said order. Additionally, notice from the applicant on the filing of the proof of debt was given to some of the proposed interveners only whilst some of the others received it late and most importantly, the proposed interveners were deprived of their statutory rights and opportunity to vote at the meeting even though they were recognised as purchasers and creditors under the proposed scheme. [*see p 623 para 10 - p 624 para 13*]

3. There is no specific term or condition in the ex parte order, the proposed rules of meeting or s 366 of the CA 2016 requiring the filing of a proof of debt before the proposed interveners who are recognised as a class of creditors are allowed to vote in the CCM. The requirement for the filing of a proof of debt was self-imposed. Section 366 of the CA 2016 clearly permits creditors to vote in a CCM without any requirement for them to file any proof of debt. [*see p 624 para 14*]

4. On the evidence, the proposed scheme is being used by the applicant to avoid its contractual obligations toward its creditors and the proposed

interveners. In this regard, the applicant's application to sanction the same, is an abuse of process bearing in mind that the settlement agreement upon which the proposed scheme is conditional, had been terminated by the PKA and given the fact that the applicant is hopelessly insolvent, it would be against public policy to sanction any such scheme. In the premises the proposed scheme is not bona fide and is bound to fail. [*see p 624 para 15 - p 625 para 17*]

5. (a) On the evidence, the white knight is not in a financial position to implement the proposed scheme due to the lack of substantial assets and cash to rehabilitate and revive the project and the fact that they were incorporated less than three years prior to the filing of the instant action, had not carried out any development projects and more importantly, as they would be wholly dependent on third party funding to revive the project. [*see p 625 para 18 - p 626 para 18*]

(b) The non-disclosure of material facts by the applicant namely, the inability and incapacity of the white knight to rehabilitate the project, the latest statements of assets and liabilities and the actual facts, had misled the court into believing it necessary to grant the restraining order. [*see p 626 paras 20-21*]

6. It is trite law that all four requirements of s 368(2)(a) to (d) of the CA 2016 must be met even for the initial restraining order. In this regard and on the facts, there had been non-compliance with the said provisions. [*see p 627 para 22 - p 628 para 25*]

Cases referred to by the court

Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & 6 Ors (and 3 Other Appeals) [2013] 6 AMR 305; [2014] 6 MLJ 56, FC *(ref)*

Korakyat Plantations Sdn Bhd (dalam likuidasi) v Tan Siew Ee & 8 Ors [2005] 3 AMR 637; [2006] 1 MLJ 274, CA *(ref)*

PB Securities Sdn Bhd v Autoways Holdings Bhd [2000] 4 AMR 4075; [2000] 4 MLJ 417, CA *(foll)*

PECD Bhd & Anor v AmTrustee Bhd (and 2 Other Appeals) [2010] 3 AMR 334; [2010] 1 CLJ 940, CA *(ref)*

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC *(ref)*

Pelangi Airways Sdn Bhd (dahulunya dikenali sebagai Pelangi Air Sdn Bhd) v Mayban Trustees Bhd [2001] AMEJ 0197; (2001) MSCLC 92322; [2001] 2 MLJ 237, HC *(ref)*

Pilecon Engineering Bhd v Malayan Banking Bhd & Ors [2012] MLJU 1119 *(ref)*

Re Sateras Resources (Malaysia) Bhd [2005] 4 AMR 246; [2005] 6 CLJ 194, HC *(ref)*
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1990] 2 MLJ 31, HC *(ref)*
Transmile Group Bhd & Anor v Malaysian Trustee Bhd & 13 Ors [2012] 3 AMR 159; [2012] 9 CLJ 1071, HC *(ref)*

Legislation referred to by the court

Malaysia
Companies Act 1965, s 176
Companies Act 2016, ss 366, 366(3), (4), 368(1), (2), (2)(a), (b), (c), (d)
Rules of Court 2012, Order 15 r 6(2), (3)

Melanie Ho Mei Yee (Melanie) for applicant
Justin Voon Tiam Yu and *Alvin Lai Kok Wing* (Justin Voon Chooi & Wing) for proposed interveners
Ooi Chih-Jen and *Khaw Eng Khoon* (Chih-Jen & Assoc) for liquidators

Judgment received: May 28, 2020

Gunalan Muniandy J

(Enclosure 36)

[1] This is a notice of application filed by the proposed interveners ("PIs") in an originating summons ("OS") commenced by the applicant who was the developer of a major development project in Klang, Selangor. Enclosure 36 is the PIs' application which seeks, inter alia:

(i) For leave to be granted to the PIs to intervene in the proceedings and become a party to the proceedings and the intitulement be amended to include the PIs as respondents herein;

(ii) For an order that the ex parte order dated January 3, 2019 be set aside forthwith.

Factual background

[2] A summary of the material facts from the PIs' submission is as follows:

(i) Through prayer (1) in encl 36, the PIs are seeking leave of this honourable court for the PIs to intervene in the proceeding herein.

(ii) The applicant is the developer of a huge mixed development project ("project") known as "1 Gateway" in Klang, Selangor on the project

lands owned by Port Klang Authority ("PKA"). Four phases in the project were launched but subsequently abandoned by the applicant.

(iii) The 14 pieces of project lands measuring approximately 17.27 acres were not owned by the applicant but PKA. This is a huge development project worth about RM500 million as at 2012.

(iv) The PIs are purchasers of single/duplex shoplex or three and four storey shopoffices (hereinafter referred to as "the units") of the "1 Gateway" project developed by the applicant.

Grounds in support of encl 36

[3] Reliance was principally placed on the settled law principle that the court will allow an interested party to intervene if his legal rights and interest in relation to the subject matter of the action would be directly affected by any order which may be made in the action. Reference is made to:

(i) *Pegang Mining Company Ltd v Choong Sam & Ors* [1969] 2 MLJ 52.

(ii) Order 15 r 6(2) and (3) of the Rules of Court 2012.

(iii) *Pilecon Engineering Bhd v Malayan Banking Berhad & Ors* [2012] MLJU 1119.

[4] The PIs also submitted that they have fulfilled the test for intervention on these grounds:

(i) Pursuant to the respective sale and purchase agreements entered into between the PIs, the applicant and Lembaga Pelabuhan Klang as listed in paragraph 6 of the PIs' affidavit in encl 37, the PIs are the purchasers of the units in the "1 Gateway" project (hereinafter referred to as "the project");

(ii) The PIs are bona fide purchasers and have entered into valid sale and purchase agreements with the applicant for the purchase of the units (exh 1 of encl 37);

(iii) The applicant had neither disputed the sale and purchase agreements entered into nor raised any fact to cast doubt over its validity;

(iv) In fact, the PIs are named/listed as "the scheme creditors" in the applicant's affidavit in support of the initial application in encl 1, details of which are set out in paragraph 9 of encl 3 and the lists of scheme creditors of the applicant (senarai nama pembeli) which can be seen at exh "A3" of encl 3;

(v) In view that the objectives of the proposed scheme are to revive the project including the units purchased by the PIs as alleged by the applicant (see p 503 of encl 38), the PIs have a direct interest in the proposed scheme;

(vi) Clearly, when the PIs herein come within the definition of scheme creditors, the PIs have the requisite legal right or interest to be joined as parties in the proceeding herein. The PIs would be bound by the proposed scheme if it is approved and sanctioned by the court. PIs' rights and interest pursuant to the respective sale and purchase agreements would be compromised and affected in the event that this honourable court sanctions the applicant's proposed scheme.

Grounds for setting aside the ex parte orders

[5] The grounds of the PIs' application to set aside the said ex parte order, are inter-alia as follows:

(a) The application for the restraining order and the proposed scheme is not bona fide and bound to fail;

(b) The applicant did not fully disclose the material facts and was not frank to this honourable court during the ex parte hearing of the application for the said ex parte order;

(c) The statutory requirements under s 368(2) of the Companies Act 2016 have not been complied by the applicant in the application for the restraining order.

Grounds in opposition

(1) Inordinate delay by the PIs in filing this application only on August 21, 2019 long after the OS was filed by the applicant and a restraining order had been obtained on December 18, 2018 followed by an extension on April 01, 2019.

(2) Enclosure 36 is not a bona fide application but a backdoor attempt because:

(a) No proof of debt was filed; and

(b) Certain PIs had voted at the court convened creditors' meeting.

(3) Enclosure 36 has no merits but is a futile afterthought attempt to seek reliefs that serve no purpose as can be seen from the fact that encls 20 and 23 have already been withdrawn whereas on the other hand,

encl 33 is the application for sanction for the scheme of arrangement in which the applicant submits that all the relevant requirements have already been satisfied. To intervene at this juncture would only be futile.

(4) The PIs have failed to show any reasons in their various affidavits that is the proposed scheme of arrangement (which has been approved by approximately 92% of the total value or creditors present and voting) was bound to fail.

Analysis and finding

[6] To begin with the issue of inordinate delay in the filing of encl 36, the PIs while denying that the delay was excessive, explained as follows:

(a) Enclosure 36 is filed by the PIs at this juncture after several discussions and meeting between the PIs who are purchasers in the project and taking legal advice from solicitors;

(b) In view that some of the PIs are from East Malaysia i.e. Sabah and Sarawak, additional time was needed to gather the purchasers who are interested to intervene in this proceeding and to arrange meeting in order to prepare the necessary and give instruction to the solicitors to file encl 36;

(c) Furthermore, the PIs were only served with the explanatory statement which set out the proposed scheme on or about June 2019, which is about two months before the filing of encl 36 on August 21, 2019.

[7] I upheld the PIs' contention on this issue that in light of what is stated above, the delay (if any, which is denied) is not inordinate and does not defeat encl 36 herein by reliance on the following authorities wherein the PIs in these cases were allowed to intervene in the sanction proceedings when the company applied for an order to sanction the scheme of arrangement:

(i) *Korakyat Plantations Sdn Bhd (dalam likuidasi) v Tan Siew Ee & 8 Ors* [2005] 3 AMR 637; [2006] 1 MLJ 274;

(ii) *PB Securities Sdn Bhd v Autoways Holdings Berhad* [2000] 4 AMR 4075; [2000] 4 MLJ 417 at 424;

(iii) *Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & 6 Ors (and 3 Other Appeals)* [2013] 6 AMR 305; [2014] 6 MLJ 56 (Federal Court).

[8] This application, apart from seeking to set aside the ex parte order dated January 3, 2019, also seeks for an order for the PIs to intervene to, inter-alia, oppose encl 33 filed by the applicant for a sanction order to be given to the proposed scheme on the premise that the PIs, being bona fide purchasers and creditors of the applicant, will be directly affected and/or aggrieved by the implementation of the proposed scheme by reason of the following:

(a) Based on the proposed scheme, all the purchasers including the PIs would have no rights or claims arising from the sale and purchase agreement (including their claim for 6% per annum liquidated damages for late delivery of vacant possession which was supposed to be delivered within 40 calendar months from the respective sale and purchase agreements i.e., since year 2016) or in relation to the project, the project lands and/or the proposed scheme against PKA and its related parties, the applicant and/or white knight;

(b) The white knight will first construct and develop new phases and sell the new units for profit before they would revive the construction of the units purchased by the PIs. The units would only be completed and delivered to the PIs for up to 12 years or more after the date of site possession of the project lands by the white knight, whereby such period may be extended by mutual agreement between only the applicant and the white knight;

(c) The PIs would be seriously prejudiced by such a long delay in the completion of the units without any liability on the part of the applicant to compensate the liquidated ascertained damages for such delay and the loan interest to be paid by the purchasers to the financiers;

(d) The white knight, while enjoying all the benefits of the proposed scheme, is passing all the risks and burden to the purchasers including the PIs, who would be required to pay progressive interest to the financiers for as long as 12 years or even longer;

(e) The success of the subsequent phases of the project is dependent upon the successful sale of the earlier phases to new prospective buyers for profit before they could construct the units bought by the PIs. This is completely unfair to the PIs and shows lack of financial ability of the white knight to undertake and revive the project;

(f) Any caveats on the project lands entered will be removed;

(g) The PIs will lose their contractual/other existing rights against the applicant if the scheme is sanctioned by the court.

[9] There can be no doubt that the implementation of the proposed scheme would directly and seriously affect the rights and interests of the PIs. Hence, there is sufficient justification to grant leave for the PIs to intervene in this proceeding, including to oppose encl 33 and/or to set aside the ex parte order based on several grounds advanced by them.

[10] Inter alia, the court convened meeting was held outside the 90 day period stipulated in the order without any leave to extend time. It was, thus, held in breach of the order. Secondly, some of the PIs did not receive any notice from the applicant on the filing of the proof of debt while some others received it late. Thirdly, and most importantly, the PIs were deprived of their statutory rights and opportunity to vote in the meeting even though they have been recognised as the purchasers and creditors under the proposed scheme. Despite being lawful creditors, they have not been given the opportunity to be present and participate at the said meeting and/or exercise their statutory right to vote at the same which should, thus, be regarded as unrepresentative.

[11] The PIs aptly cited in support a case very well in point, *PB Securities Sdn Bhd v Autoways Holdings Berhad* [2000] 4 AMR 4075 at 4088 and 4090; [2000] 4 MLJ 417 at 421 where the Court of Appeal held inter alia:

> The learned judge also ignored the evidence that when the respondent applied for the restraining order, they listed the appellant as one of 24 scheme creditors, to be involved in the restructure exercise. This document was submitted to the court and formed part of the court order. Therefore in the light of what we have stated we agree with the submission of learned counsel for the appellant that, the learned judge was clearly wrong in his reasoning when he held that there ought to be a trial of the debt. ...
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> By their act to prevent the appellant from the unsecured creditors' meeting, the respondent had also abused the purport of s 176 of the Act. In the circumstances of the case, it is our view that to exclude the appellant and to prevent it from exercising its statutory right to vote were not mere procedural irregularities but illegalities so as to render null and void the votes taken at the adjourned unsecured creditors' meeting of November 10, 1999.

[12] In regard to the three stage process under the then s 176, Companies Act 1965, reference was made to another case directly in point, *Transmile Group Berhad & Anor v Malaysian Trustee Berhad & 13 Ors* [2012] 3 AMR 159; [2012] 9 CLJ 1071 where it was remarked inter alia:

> In *Re Hawk Insurance Co Ltd* [2002] BCC 300 Chadwick LJ had occasion to consider this issue when construing s 425 of the then English Companies Act 1985 which is similar to s 176 of the Companies Act 1965:
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> > "... First, there must be an application to the court under s 425(1) of the Act for an order that a meeting or meetings be summoned. It is at that stage that a

> decision needs to be taken as to whether or not to summon more than one meeting; and if so, who should be summoned to which meeting. Secondly the scheme proposals are put to the meeting or meetings held in accordance with the order that has been made; and are approved (or not) by the requisite majority in number and value of those present and voting in person or by proxy. Thirdly, if approved at the meeting or meetings, there must be a further application to the court under s 425(2) of the Act to obtain the court's sanction to the compromise or arrangement.
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> It can be seen that each of those stages serves a distinct purpose. At the first stage, the court directs how the meeting or meetings are to be summoned. It is concerned, at that stage, to ensure that those who are to be affected by the compromise or arrangement proposed have a proper opportunity of being present (in person or by proxy) at the meeting or meetings at which the proposals are to be considered and voted upon."

[13] Hence, it can be observed that, in principle, the presence of all persons so affected at the meeting to decide on the proposed arrangement is crucial to meet the requirements under s 368 of the Companies Act 2016 for a restraining order to be granted.

[14] As regards the purported requirement of submitting proof of debt it is merely self-imposed by the applicant without any specific court order or any written rule imposing such a condition before the PIs as the recognised creditors are allowed to vote in the court convened meeting. Inter alia, there is no specific term or condition mentioned in the ex parte orders, the "proposed rules of meeting" which can be seen at exh "A5" of the encl 3 or s 366 of the Companies Act 2016 that a proof of debt must be filed before the creditors who are recognised as a class of creditors are allowed to vote in the court convened meeting. More importantly, the PIs have been recognised by the applicant as their creditors in the category of purchasers. The question then arises whether the applicant should now be estopped from claiming that the PIs are not scheme creditors and should not be allowed to vote at the meeting. It is vital to note that s 366(3) of the Companies Act 2016 clearly permits the creditors to vote in the court convened meeting without any requirement imposed on the creditors to file any proof of debt. The role of the court to sanction the scheme pursuant to s 366(4) of the Companies Act 2016 only if approved by a majority of the creditors present must be seriously noted. In this context the court must have, as suggested, the opportunity to hear the objections by the PIs, inter-alia, that the proposed scheme of arrangement is not bona fide and tainted with concealment of facts and policy argument.

[15] On the important issue of bona fide, it is essential to note that, in this case, the objective of the proposed scheme is purportedly to revive the

abandoned project. As stated in the explanatory statement (at pp 507-508 of encl 38), the applicant intends to, with the assistance and support of the white knight, deliver completed units to the respective purchasers subject to a variety of conditions. Based on the evidence presented, the PIs were correct to contend that the proposed scheme is prima facie not bona fide and is bound to fail. The proposed scheme is only used by the applicant to avoid their contractual obligations towards the creditors including the PIs and that the applicant's application should be considered an abuse of the process of the court. The basis for this contention is premised primarily on the fact that:

(a) PKA has terminated the settlement agreement ("SA") on which the proposed scheme is conditional.

(b) The applicant is hopelessly insolvent and it is against public policy to sanction any scheme.

[16] It was shown from the applicant's evidence itself that as the SA has been terminated by PKA and the land cannot be transferred by PKA to the applicant pursuant to the terms of the SA, the proposed scheme is premature, bound to fail and cannot be implemented at all to revive the project. No evidence to the contrary was adduced by the applicant to prove that the issue of the land ownership and its related implications have been resolved between the applicant and PKA.

[17] As to the issue of the applicant's insolvency, firstly, the project lands do not belong to the applicant which means that they or the white knight would in all probability not be able to obtain any financing from any financial institution. Without any valuable assets at its disposal the applicant would have to bear properly the development costs of over RM36 million. Thus, the PIs were right in contending that public policy may militate against implementation of the scheme as the applicant will be carrying out business with more liability but with no realisable assets whatsoever as the lands would be charged to the financiers to secure credit facilities and loans. In *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31 at 34-35, the court held that:

> The other objection raised is that the applicant is hopelessly insolvent and that it is against public policy to sanction any scheme that it proposes to undertake.

[18] In regard to the white knight, the evidence clearly disclosed that they are not in a financial position to implement the proposed scheme. In gist, the PIs pointed out that the applicant did not disclose to the court during the initial application herein by way of ex parte that the white knight does not have any substantial assets and cash to rehabilitate and revive the project with a development cost of RM146,440,044.84 based on the white knight's

own financial statement as at April 30, 2018 which shows that they merely have total assets amounting to RM17,210.00. Since their incorporation less than three years before the filing of this action they were not shown to have carried out any development projects. More importantly, they would be wholly dependent on third party funding to revive the project which was unlikely to be forthcoming. In essence, the feasibility of the proposed restructuring scheme that was dependent on substantial outside funding was gravely in doubt. Likewise, the interests of the creditors do not appear to be safeguarded but in fact appear to be in jeopardy.

[19] With respect to the issue of non-disclosure of material facts, the law is settled that in applying for an order on an ex parte basis, the applicant has a duty to fully and frankly disclose all material facts to the court, failing which the ex parte order for leave to convene a creditors' meeting and to restrain all legal proceedings would be set aside – *PECD Berhad & Anor v AmTrustee Berhad (and 2 Other Appeals)* [2010] 3 AMR 334 at 344-345; [2010] 1 CLJ 940 at 958-959.

[20] The non-disclosure complained of in this instance was threefold:

(1) The clear inability and incapacity of the white knight to rehabilitate the project as alluded to;

(2) Non-disclosure of the latest statements of assets and liabilities, inter-alia, stating inaccurate or exaggerated figures as to the liabilities of scheme creditors for an ulterior purpose; and

(3) Non-disclosure of the actual facts, particularly by having misled the court by creating a wrong impression that a majority of the purchasers of the units have agreed to execute the deed of release and discharge to discharge the applicant from legal obligations and liabilities (which is one of the conditions precedent), when it is not the case here.

[21] Having scrutinised the facts and issues raised on this point, in my finding, the contention of the PIs that by not fully disclosing the true and fair state of affairs of the applicant, the court was misled into believing that it was necessary to grant the restraining order based on the figures presented by the applicant should be upheld. Without the disclosure of the actual figures of the applicant's assets and liabilities to the court, the proposition that the ex parte order ought not to have been granted in the first place (*Re Sateras Resources (Malaysia) Berhad* [2005] 4 AMR 246 at 256-258; [2005] 6 CLJ 194 at 205-207 referred to) merited careful consideration.

[22] Lastly, of significance is the issue of non-compliance with s 368(2) of the Companies Act 2016 which, for convenience is reproduced below:

> (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 –
>
> (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;
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> (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
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> (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.

[23] It is settled law as decided in a number of local cases that all the four requirements under subparagraphs (a) to (d) of s 368(2) of the Companies Act 2016 must be met even for the initial restraining order application.

[24] First and foremost, it would appear that the applicant has failed to adhere to s 368(2)(a) of the Companies Act 2016 as they had failed to prove that the scheme of arrangement and compromise was proposed by the applicant to their creditors or whichever class of creditors representing at least half of the value of all creditors when the application for the said order was filed.

[25] Secondly, it is plain too that the applicant has also failed to comply with s 368(2)(d) of the Companies Act 2016 as no director was nominated by a majority of the creditors to be approved by the court to act as a director of the company. It is the law that the court's power under this section is only to the extent of appointing a person nominated by the creditors by majority to act as a director. (See *Pelangi Airways Sdn Bhd (dahulunya dikenali sebagai Pelangi Air Sdn Bhd) v Mayban Trustees Berhad* [2001] AMEJ 0197; (2001) MSCLC 92322; [2001] 2 MLJ 237 at 243-244.) The documentary evidence produced by the

applicant did not disclose satisfactorily that this mandatory requirement had been met in compliance with s 368(2) of the Companies Act 2016.

[26] Premised on the aforesaid grounds, I would conclude as follows.

[27] Upon having considered the contentions of both parties, the background facts, the issues in dispute and the principles applicable to this area of the law, the court finds as follows on the PIs' application.

[28] Based on the grounds advanced and facts raised in support of encl 36, the court agrees with the PIs that they have satisfied the established test for intervention in accordance with principles enunciated in leading authorities and the provisions of Order 15 r 6(2) and (3) of the Rules of Court 2012. Inter alia, the PIs are bona fide purchasers of various units on the subject land and have entered into sale and purchase agreements with the applicant for the said purchase. They have, thus, shown that they are interested parties who have a right to intervene to protect their legal rights and interests in the subject matter of the action who would be directly and substantially affected by its outcome.

[29] Similarly, as regards the prayer to set aside the ex parte restraining order, the court upholds the PIs' contention that the applicants have failed to satisfy the court that:

(1) The restraining order and the proposed scheme are bona fide and not bound to fail;

(2) The applicant has made full and frank disclosure of all the important and material facts during the ex parte proceedings; and

(3) All the statutory requirements under s 368(1) and (2) of the Companies Act 2016 have been complied with for the restraining order to be granted.

[30] Hence, it is found that encl 36 is supported by valid and sufficient grounds in law and fact and ought to be granted.

[31] An OIT is accordingly granted for prayers 1) to 7).

[32] Costs of RM10,000.00 to the PIs subject to allocatur.

[33] No order on encl 33.