IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 713 OF 2000

CANDLEX LIMITED.....PLAINTIFF

VERSUS

MARK KATSONGA PHIRI.....DEFENDANT

CORAM: D F Mwaungulu

Ndau, Legal Practitioner, for the Plaintiff

Kalua, Legal Practitioner, for the Defendant

Matekenya, an official interpreter

Mwaungulu, J

ORDER

the application

The plaintiff, Candlex Limited applies, for an interim injunction. On 13th March 2000 the motion judge granted the plaintiff, Candlex Limited, an ex parte injunction. On 15th March 2000 the Court corrected the order. The ex parte injunction restrained the defendant, Mr. Katsonga Phiri, his servants or agents from remaining in or upon the plaintiff's plot No. CC96. Further it enjoined the defendant preventing the plaintiff occupying the premises. The order was up to this application.

One looks at the effect not the form of the order made. The final order and the ex parte order are negative and mandatory. The injunction prohibits the defendant doing certain things. In that sense the order is negative. The defendant occupied the premises from 1982. The order requires the plaintiff to vacate and surrender possession. The defendant has to do something positive. That order is mandatory. Courts, on different principles, grant interim injunctions of either type or in combination. The question is whether this court should do so here.

There is little difficulty if all there is is who owns the premises and hence can get the defendant off premises clearly the plaintiff's. The defendant claims he is lawfully on the premises. He queries the plaintiff's managing director's or the majority shareholder's authority to remove him. The plaintiff company's history supports the defendant's position. It is necessary therefore to look at the evidence.

the facts

Candlex Limited started in 1982. The defendant, its founder, was a majority shareholder (96%). Initially a success, problems began in 1993. In 1996 the financial controller, Mr. Abbey, proposed shareholders' cash injection. The defendant's cash injection was inadequate. The defendant sold half his shares to Mr. Abbey (5%) and Mr. Hubbe (50%). The company's fortunes never improved, at least immediately. The defendant's share holding is now 5%.

The defendant held various company positions. He was a director in 1982. He became managing director in 1984. The board of directors extraordinary meeting's minutes of 6th May 1993 is important. First, minute 3 C-D shows, contrary to what the plaintiff avers, several companies related or associated to Candlex Limited existed:

"The Managing Directors positions be upgraded to Group Chairman/Managing Director to over see Group operations. His salary to remain K20, 000.00 per month plus benefits commensurate to his position subject to review annually.

Mr. Phiri to negotiate for his remuneration from associate companies on his own since that is not the responsibility of Candlex."

Minute 2 states the meeting's purpose:

"The meeting was called to review the functions of the Managing Director and Key Managers, considering that the company is growing and that it is providing services to associate companies created by the Managing Director which has increased work load."

Secondly, minute 3 E raises a distinction, denied by the plaintiff, between the group chairman and chairmanship and directorship of Candlex Limited's board:

"Candlex board to be separate and independent from those of associate companies and Mr. Phiri to be free to sit on any or all the boards as Chairman or ordinary member because his Group Chairmanship is not necessarily board chairmanship."

Minute 3 F underscores reporting procedures:

"Managers will report to the Group Chairman/Managing Director on operational issues. Policy issues to be referred to the board."

Minute 3 F is unclear whether it refers to Candlex Limited's or other associate companies' managers. That is unimportant. Minutes of 13th August 1996 underscore the Group Chairman's important role in Candlex Limited's affairs:

"It was agreed that the involvement of the Group Chairman in the running of the company was necessary and vital. Accordingly, his remuneration was set at K500000 for the year."

The defendant's position, it appears, changed as his share holding dwindled. Mr. Hubbe

has the majority share holding. The defendant's share holding is 5%. Mr. Hubbe's management, at least in the defendant's eyes, is far from helpful. Consequently, the defendant on 8th June 1999 wrote to the Chairperson of Candlex Limited resigning from the Board of Directors with immediate effect. The letter should be reproduced. First, the plaintiff uses it to show that the defendant should not be on the premises because, if this was ever the basis of the occupation of the premises, the defendant is no longer director. Secondly, the letter should be understood in the circumstances obtaining. The defendant contends the resignation was conditional. It is important therefore to consider another defendant's letter of that day and surrounding correspondence. The resignation letter is as follows:

"I tender herewith my resignation from the Candlex Limited Board of Directors with immediate effect. I have enjoyed my time on the Board and of course my time in the Company. I wish your Board every success. Good luck."

The defendant's letter of the same day to all shareholders gives the circumstances of the resignation. By this time the relationship between shareholders was acrimonious. The defendant opted to leave. He offered his shares to the company in return for plot No. CC 936. He was not, once given the plot, to charge the company for rent for three years. It could be, hoping shareholders would accept this arrangement, the defendant, having no shares in the company, decided to resign from the directorship of Candlex Limited. When Candlex Limited rejected the offer, on September 9th the defendant wrote Mr. Hubbe copy to the interim chairman of Candlex Limited. He states that in view of the refusal of his offer he remains a member and entitled to be on the board of directors of Candlex Limited. The action seeks a permanent injunction to remove the defendant from premises occupied for a long time, premises from which all the businesses, including the plaintiff company, mushroomed. The question is whether on the facts I should grant the injunction in the interim.

principles for granting interim relief

There is difficulty to do justice in this matter. The difficulty is peculiar to injunctions and indeed other interim orders. Our legal system does not envisage security for judgement. Rights are fully determined by trial. Our system of procedure, all cards on the table, means that trial does not take place, at least in the near future. Meanwhile a party's course of action may cause injustice or undermine the outcome at the trial. The consequences may leave the court's decision useless and ineffective. Interim injunctions avoid such injustice. Avoiding injustice is the fulcrum of interim injunction relief.

status quo is not the solo aim of interim injunction relief

The purpose of interlocutory injunctions, it is often said, is to maintain the status quo. There are situations where retaining the status quo may be the unjust thing to do. I want a tree in my yard adjacent to a neighbour cut down. It is ruining my house's foundation. It is also a nuisance. The problem is scarcely solved, on the principle of retaining the status quo, by retaining the tree there because my neighbour wants it there because he disputes my title to the yard. The matter should be understood from the perspective of competing

rights which justice wants to uphold in relation to time. If the tree is cut down and my neighbour wins the case her right to the tree cannot be replaced. Equally, if I win and the tree is not cut down, my time and right to do what I can with my property would have been seriously compromised sometimes at a loss that cannot be compensated in monetary terms. When granting interim injunctions courts, realising rights can only be determined at the end of the trial, have in the interim to do what is just without compromising substantive rights. In determining where justice lies, retaining the status quo ante is one consideration but not the solo basis of the relief. In Francome v. Mirror Group Newspapers Ltd., [1984] 1 WLR 892, Sir John Donaldson MR, when criticising the expression 'balance of convenience', an expression brought to ascendency in the House of Lords decision in American Cynamid v. Ethicon, [1975] AC 396, said this about the purpose of interim injunctions:

"Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience."

In R. v. Secretary of State for Transport, ex parte Factortame Ltd. (No 2), [1991] AC 603, the House of Lords reaffirming the American Cynamid v. Ethicon principle, Lord Bridge said:

"Questions as to adequacy of an alternative remedy in damages to the party claiming injunctive relief and a cross-undertaking in damages to the party against whom the relief is sought play a primary role in assisting the court to determine which course offers the best prospect that injustice may be avoided or minimised."

The American Cynamid v. Ethicon principle has been dutifully followed in this Court and the Supreme Court. The case has been followed in the United States. The principles do not apply in certain situations. Two concern us here.

prospect of granting a permanent injunction

An interim injunction is a stop gap mechanism. The court must bear in mind the likelihood of the Court granting a permanent injunction at the end of the trial. If the court cannot grant an injunction at the end of the trial, as, for example, where the action can only be met in damages, the court may not grant an interim injunction. When considering granting this interim relief, the court regards alternative remedies in damages. If an interim injunction can be granted, the House of Lords in American Cynamid v. Ethicon laid the following approaches, approaches confirmed by several decisions thereafter. There must be a triable issue and the court must decide where justice lies in refusing or granting the injunction.

principles to follow when granting ex parte injunction

The court must consider these aspects even when it is granting the injunction ex parte. The ex parte order is limited to the time up to the order inter partes. The Court normally decides on the papers and the affidavit of the applicant. The court in an appropriate case

grants the order without the other party. It should in certain cases, like the present, decline to grant the order ex parte. The application for injunction could fail at the hearing inter partes. The other party could have it set aside on other grounds. The defendant should not at this stage substantially alter her position. It would be unjust for her to revert to the original position if the application fails at the inter partes hearing. Where until the dispute a state of things exists, the ex parte order should retain and maintain that state of things and minimise or ameliorate further damage. It should be very rare indeed that an ex parte injunction should be given the effect of which is to give the final remedy that the applicant seeks. There the court must decline the application ex parte and order a hearing inter partes. It must be difficult to lay down the principles to guide the court. Justice demands such a course.

I have not read the judgement in Re First Express Ltd., (1991) The Times, 10 October. The case is cited by the authors of Civil Litigation, J O'Hare and R N Hill, Sweet & Maxwell, 8th ed. 1997, 290. That judgement is not binding on this Court. It is persuasive. It is however good law. Generally the court should grant an ex parte injunction where giving notice to the opponent would cause injustice to the applicant because of the urgency of the matter or because a provisional order is necessary for surprise. Further it should not be given unless it is clear to the Court that the risk in damage to the defendant can be compensated in money or is outweighed by the risk of injustice to the applicant.

The defendant has had to be removed and prevented from using the premises he has been using for the past decades or two only for purposes of this application. In my judgement there was little harm in allowing the defendant to use the premises until the hearing of the application inter partes. On the facts of this case this was the right thing to do. The ex parte order could only have been to maintain a state of things before the dispute till the hearing of the inter partes summons. That position, in my judgement, was to allow the defendant on the premises, not to remove him, till there was a hearing inter partes. There was no damage that the ex parte order was trying to ameliorate. The plaintiff's concern was that the defendant was interfering with management of Candlex Limited. There is an injunction for that. There would not have been loss of rent. The premises were not going to be rented any way. The defendant had not been paying rent at all. There was no urgency or need for surprise in the injunction sought to justify an ex parte order. The ex parte order should not have been made. The ex parte application should have been ordered to be heard inter partes.

should an interim injunction be granted in this matter?

The question now however is whether the plaintiff should be granted the interim injunction. The plaintiff's claim, no doubt, is not frivolous and vexatious and has a prospect of succeeding. Mr Ndau and Kalua, legal practitioners for the plaintiff and the defendant respectively, raised pertinent law and factual issues that confirm there are triable issues. The court has not to resolve these at this stage. In American Cynamid v. Ethicon Lord Diplock said:

"It is no part of the Court's function at this stage to try to resolve conflicts of evidence on

affidavits as to fact on which the claims of either party may ultimately depend nor to decide difficult question of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

The matters counsel have raised will become handy later when considering the other principle in American Cynamid v. Ethicon.

are damages an adequate remedy for the plaintiff, can the defendant pay them

Where the plaintiff's claim is not frivolous nor vexatious and has prospect of success the court must seek a balance of justice. According to American Cynamid v. Ethicon this involves the following considerations. First, the court must consider whether damages are an adequate remedy for the plaintiff and the defendant can pay them. The Court will refuse the injunction if the answer is yes. The plaintiff contends that the damages here cannot be measured. He urges therefore that, following Woodford v. Smith, [1970] 1 All E R 1091, the court ought to grant the injunction.

The plaintiff however talks of losses that the company would suffer from the defendant interfering with the company's operations. As we have seen, there is an injunction, remotely connected to the defendant's occupation of the premises, for that. The defendant has been on the premises for close to two decades. The affidavits show that the company's ills have very little, if anything, to do with the defendant's occupation of the premises. The defendant's further occupation of premises, occupied for so long cannot, in my judgement, result in immeasurable loss if the defendant abides by the order not to interfere with the company's operations. The defendant's continued occupation does no risk, as in Merchant Adventurers and Birmingham City Council v. In Shops, [1972] N P C 71, to the reputation of the plaintiff. Again, I have not read the report. The judgement is referred to in The Supreme Court Practice, 1995 ed Sweet & Maxwell, 515.The only loss would be rental. These, as Mr Kalua submits, can be measured. A valuation of the premises can result in a measurable loss. The loss is academic because the defendant for some reason never paid rent. The defendant, who owns 5% shares in Candlex Limited, can pay the rentals, if there be any. It is in evidence that the defendant owns several associate companies. The plaintiff can pay the damages for occupation of the premises.

parties do not want damages as remedy

This however scarcely settles the matter. The American Cynamid v. Ethicon principles do not apply where, like here, the parties do not want damages as remedies. The case on the point is Cambridge Nutrition Limited v. British Broadcasting Corporation, [1990] 3 All ER 523. Lord Justice Kerr said at page 535:

"The American Cynamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interlocutory injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial. In my view, for reasons which require no elaboration, the present case is not in that category. Neither side is interested in monetary compensation, and once the interlocutory decision has been given, little, if anything, will remain in practice."

are damages an adequate compensation for the defendant, is the undertaking sufficient to cover them

There is a sense in which, as the plaintiff contends, the damage is immeasurable. I give doubt a benefit. I must consider the next aspect which is whether the plaintiff's undertaking as to damages is adequate protection for the defendant and the plaintiff can honour it. The court must, to determine where the balances of justice lies, consider the situation where the defendant succeeds. Interim injunctions are in the interest of fairness made on the undertaking that the plaintiff will compensate the defendant for losses caused by the interim relief. The court should not grant an interim injunction if the plaintiff's undertaking cannot adequately cover the defendant's loss from the interim relief sought. The injunction sought removes the defendant from premises he has used for two decades. Several satellite companies have grown around the idea of Candlex Limited. The defendant has suddenly to look for new accommodation for all these companies. It is difficult to assess the impact of such movement of premises on the business' good will. It is not easy for business to change premises from the ones with which a business is associated with. The loss is not only in financial terms. No doubt, the plaintiff's action affects the defendant's other businesses' reputation. The plaintiff's undertaking as to damages may not adequately compensate the defendant should the defendant succeed against the injunction. The company has liquidity problems. It has sufficient assets to compensate the defendant only if, however, the plaintiff's undertaking could adequately compensate the defendant.

should the status quo be maintained?

This leads to the third consideration in American Cynamid v. Ethicon. Here the matters are evenly balanced. While the plaintiff's undertaking as to damages is inadequate to compensate the defendant's losses, the plaintiff can compensate the defendant if only the undertaking could properly compensate the defendant's loss. The loss to the defendant's reputation is immeasurable. Where the factors are evenly balanced, it is preferable to maintain the status quo. The status quo refers to the situation prevailing before the last change. Lord Diplock in Garden Cottage foods Ltd. v. Milk Marketing Board, [1984] AC 130, 140, said:

"The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in American Cyanamid is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there is unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo."

This must be obvious. For if the factors are evenly balanced justice would demand that there should be no alteration to the things as they were till the court has finally determined the matter. In the present case justice would demand that the defendant

continue using the premises until the matter is finally determined.

practical realities of granting the injunction

In deciding where justice lies, the court may have to consider social and economic factors. In American Cynamid v. Ethicon the court considered that “no factories would be closed and no work place would be closed and no work people would be thrown out of work” because of the injunction. In Parnass/Pelly v. Hodge, [1982] FSR 329, in a passing-off action, the interlocutory injunction was refused. It necessitated a change in the defendant’s market strategy. The report is not available to the Court. The case is cited by the authors of Civil Litigation, J O’Hare and R N Hill, Sweet & Maxwell, 8th ed. 1997, 288. Here the effect of the injunction is closure of the defendant’s offices and immediate stoppage of operations of the other companies on the premises. This may affect the defendant’s employees and factories. The defendant, has while the matter is being resolved in court to change all positions and strategies for the associate companies that have mushroomed around the premises on which Candlex owes its origin and station. The plaintiff’s operations, as demonstrated, are, if at all, scarcely affected by the presence of the defendant who has been on the premises since the early 1980s. The wisdom of Lord Diplock in N.W.L. Ltd v. Woods, [1979] 1 WLR 1294, 1306 is handy:

“My lords, when properly understood, there is in my view nothing in the decision of this House in American Cynamid Co. v. Ethicon Ltd [1975] A C 396 to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply.”

the relative strength of the cases

Finally the Court, only as a last resort, has to consider the relative strength of the parties’ cases. Here the effect of the injunction would be to preempt or obviate the need for a trial. The defendant would be removed from the premises. In such a case the court has to consider the relative strength of the plaintiff’s case. This entails a prediction about which party will win. That is why the matter is considered only as a last resort. If the plaintiff’s chances are good, the court should grant the injunction. Conversely, if it is likely a defense will be established an interim injunction should not be made (NWL Ltd. v. Woods, [1979]1 WLR 1294; and Hadmore Productions Ltd. v. Hamilton, [1983] AC 191).

the situation is more than a tenancy at will

The plaintiff’s case is premised on that the defendant was a tenant at will. Occupation of premises without payment of rent, as Mr. Ndau submits, and correctly in my view, creates a tenancy at will. This is clear as far back as 1823 when R.v. Collett, (1823) Russ & Ry 498, was decided. The decision was followed in Spurgin v. White, 1860 3 LT 609. The plaintiff contends that such a tenancy can be determined without notice. He relies, again correctly in my view, on the English decision of Martinaly v. Ramuz, [1953] 1 WLR 196 and decisions in this court of Kingflower Ltd v.Lingadzi Farm, Civ. Cause No. 951 of 1996, unreported, and the earlier case of Mussa Mahomed v. Ahmed Lambat, (1923-61) 1 ALR (Mal.) 181. The plaintiff contends that he was entitled therefore to reenter the

premises. He has a good and arguable case entitling him to the injunction.

Mr Ndau's argument, although ingenuous, is a simplistic mesmerisation of facts. There was, in my judgement, a situation more than, if not different from, a tenancy at will. The defendant contends that occupation of the premises was as of right as managing director and group chairman of Candlex Limited and other associate companies. There could be a dispute about that now. The matter has to be settled at the trial. As director or chairman the defendant is entitled to the privileges and rights the company accords him on the arrangements the director

entered with the company. Article 55 (3) of Appenix C provides:

"A director may hold any other office or place of profit under the company (other than the office of auditor) in conjunction with his office of director for such period and on such terms (as to remuneration and otherwise) as the directors may determine ..."

has the defendant resigned as director as group chairman?

Mr Ndau then submits that the position is untenable because the defendant resigned as managing director. The defendant contends that he only resigned from the position of director in Candlex. He never resigned as group chairman of Candlex Limited and associate companies. Mr Ndau, relying on Morsely v. Koffyfontein Mine, [1910] 2 Ch 38 2 argues that the effect of resigning as director of a company applies to all directorships, permanent or honourary. He relies on the same decision. This was a decision of the Court of Appeal. It was tacitly approved by the House of Lords([1911] AC 409). The case is only persuasive in my court. It is also good law.

The case however can be distinguished from the one present here. The reasoning in the Court of Appeal does not appear in the report. There are two insertions in the report that are far from helpful on the legal conclusion. The first is at page 392:

"[His Lordship then dealt with the subsidiary question and held that Mr Mosely had undoubtedly resigned his office of director and had no continuing right of control over the exercise by the directors of the power validly vested in them.]"

The reasoning of Eve, J is not in the judgement. An earlier note however suggests that the reasoning turned on the wording of the articles. At page 385 the note says:

"A subsidiary question was also raised whether, having regard to the fact that the plaintiff as a permanent director had not sanctioned the increase of capital by assenting to the resolution of 1903, that resolution could be acted upon, but this point does not call for detailed notice, as the Judge held that the plaintiff had in fact vacated his office of permanent director in 1897, in accordance with provisions of the articles."

The point was not considered in the House of Lords.

As we have seen, the position of group chairman is very distinct. It emanates from the fact that the defendant was founding and a majority shareholder in all the companies including Candlex Limited and that he had an illustrious directorship on Candlex Limited. As we have seen, the minutes clearly demonstrate that, as group chairman, he was free to sit on any of the boards as group chairman. His group chairmanship was not

undermined at any rate by his declining to sit on the boards of any of the companies. The minutes clearly delineate the position of director of a company and group chairman. They reiterate the importance of the position of group chairman to Candle x Limited. The letter of resignation is clear as to the position the defendant wants to relinquish. He resigns as director for Candlex Limited, not as group chairman. Where the directorship is multifaceted and cannot be confined to the activities of one company resignation of one directorship does not necessarily imply resignation of other directorships. In Morsely v. Koffyfontein Mine the director was permanent and ordinary director in one company. The Morsely v. Koffyfontein Mine decision can be distinguished on that score.

The Morsely v. Koffyfontein Mine case can be distinguished on another aspect. The question here is whether the defendant had resigned in fact and law. This matter was not fully canvassed in argument. The defendant contends, although the letter of resignation from Candlex Limited does not bear this out, that his resignation was conditional on the company buying his 5% share holding in exchange for the plot the premises the bone of contention in this matter. That this could be the case, as we have seen, is confirmed by that the defendant wrote to the effect on the same day he wrote the resignation letter. The defendant contends that the revocation is ineffective because the condition precedent is unfulfilled as the plaintiff refused his offer. In my judgement, where a director's resignation turns out on the happening of certain conditions the director ceases to be director on the happening of the event. It is a question of fact whether the condition precedent has occurred or not. More on this can only be established by trial. The defendant could raise this defence successfully at the trial. The defence could succeed and grossly undermine the plaintiff's case.

has the withdrawal of the resignation been accepted?

Neither party produced the company's articles of association. The exact wording of the article, if there was one, on a director's resignation is not before this court. In Glossop v. Glossop, [1907] 2 Ch 370, there was a specific provision. It is clear from the judgment of Neville, J., that much depended on the construction of the relevant article. He said in relation to the particular article:

"Then the question that remains is whether the defendants were right in treating the plaintiff as having vacated his office as managing director in consequence of the written notice sent by him to the company requesting the acceptance of his resignation as managing director. That seems to me to depend entirely upon the proper construction to be put upon the articles of association of the company, and I think the most material articles are 84 and 85."

The statement after that is however of general application:

"I have no doubt that a director is entitled to relinquish his office at any time he pleases by proper notice to the company, and that his resignation depends upon his notice and is not dependent upon any acceptance by the company, because I do not think they are in a position to refuse acceptance consequently, it appears to me that a director, once having given in the proper quarter notice of his resignation of his office, is not entitled to withdraw that notice, but if it is withdrawn it must be by the consent of the company

properly exercised by the managers, who are the directors of the company."

What he said about the particular provision is important in understanding our section 145 of the Companies Act and article 42 (e) of table C of the first schedule. Both provisions speak of the director resigning his office "by notice in writing to the company." It follows that a director's resignation properly done does not need acceptance from the company. Counsel for the appellant contended that the words, much like those in our section 145 and article 42 (e), implied that there must be acceptance by the company. Rejecting the contention, Neville, J., said:

"...it seems to me that if the construction contended for by the plaintiff had been intended by the articles, the words that would have been used would have been of this nature: 'If by notice in writing to the company he resigns his office, and such resignation be accepted.'

Neville J did say that the withdrawal, if made, could be accepted by the company through its directors. It would appear to me that the composition of the directorship cannot be a matter for the directors themselves. It is a matter of the shareholders as well. The shareholders could accept the withdrawal of the resignation. The defendant states that the shareholders have decided to have him back. The plaintiff disputes this. That can only be resolved by trial. Trial will determine whether the withdrawal has been accepted. The case is not as simple, therefore.

Equally important however is the defendant's contention that the plaintiff's action is a fraud on the minority. The defendant contends that Mr Hubbe, as majority shareholder, is operating to the detriment of minority shareholders and hence against the company. It is significant that the shareholders agreed that the defendant gets involved again in the management of the company as the defendant's memo of 22nd January, 1999 suggests. The defendant's position in the plaintiff company is clearly understood. There are privileges enuring to him as founder of the company and shareholder as the minutes of 9th June 1998 show. There is a sense in which on the evidence, and it could be more pronounced at the trial, it can be said that the presence of the defendant on the premises was a decision of the shareholders when he was a majority shareholder. There is reasonable suspicion that Mr Hubbes decisions, including, the removal of the defendant on the premises, are taken in a context where other shareholders can react in a way that they are being undermined because of the size of share holding in the company. Any member would be entitled to complain. Section 203(1) of the Companies Act provides:

(1) Any member of a company may apply to the court for an order under this section on the ground-

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or in disregard of his or their proper interests as members of the company: or

(b) that some act of the company has been done or is threatened or that some resolution of the members or any class of them has been passed or is proposed which unfairly discriminates against, or is otherwise unfairly prejudicial to, one or more of the members.

Our section 203(1) is like section 459 of the Companies Act in the United Kingdom. The section has been construed in a way that does not restrict its scope to legal rights created by the articles of association but considering equitable principles as well. The statement of Hoffmann, J., in Re A Company, [1986] BCLC 376 is on point. The report is not accessible here. The statement is quoted in Palmer's Company Law, 25th ed.Sweet&Maxwell, 1992, 8198:

"Counsel for the company submitted that the section must be limited to conduct which is unfairly prejudicial to the interests of the members as members. It cannot extend to conduct which is prejudicial to other interests of persons who happen to be members. In principle I accept this proposition ... But its application must take into account that the interests of a member are not necessarily limited to his strict legal rights under the constitution of the company. The use of the word 'unfairly' in section 459 ... enables the court to have regard to wider equitable considerations ... Thus in the case of the managing director of a large public company who is also the owner of a smallholding in the company's shares, it is easy to see the distinction between his interests as a managing director employed under a service contract and his interests as a member. In the case of a small private company in which two or three members have invested their capital by subscribing for shares on the footing that dividends are likely but that each will earn his living by working for the company as a director, the distinction may be more elusive. The member's interests as a member who has ventured his capital in the company's business may include a legitimate expectation that he will continue to be employed as a director and his dismissal from that office and exclusion from the management of the company may therefore be unfairly prejudicial to his interests as a member."

The interests of the members of a company have always attracted protection from the Courts. It could very well be that the decision to remove the defendant should be one that the shareholders have to decide. It seems unusual to me that given all that there is here Mr. Hubbe decided, and there is little to suggest that the decision was the board's or the shareholders, to remove the defendant from the premises. In my judgement, the relative strength of the plaintiff's case is evenly balanced. In such a case justice is served by maintaining the status quo. This means that the defendant should continue on the premises until the matter is resolved.

What was not considered at the grant of the ex parte order was the fact that the effect of the order was in a way to finally dispose of the matter. Interlocutory orders are granted without full investigation of the merits of either side's case. Courts are reluctant therefore to grant an injunction the effect of which would be to finally dispose of the matter without giving the defendant the benefit of trial. To be granted interlocutory relief in such a case the plaintiff must show a more than arguable case or more than merely a serious issue to be tried(NWL Ltd v Woods, [1979] 1 WLR 1294; Parnass/ Pelly v Hodge, [1982] FSR 329; Cambridge Nutrition Ltd v BBC, [1990] 3 All ER 523; Lansing Linde Ltd v Kerr, [1991]1 WLR 251, Lawrence David Ltd v Ashton, [1989] ICR 123). I do not think

here the threshold has been reached. There are serious matters raised by the defendant that justify my reluctance in granting the order whose effect is a final remedy that the plaintiff wants. I would therefore refuse the injunction in its negative form.

the mandatory injunction cannot be granted either

I arrive at the same result in relation to the mandatory injunction. The

American Cynamid v. Ethicon principles do not apply to mandatory injunctions. In Mobil Oil (Malawi) Limited v. Sacranie, Civ. Cause No 106/20000 this Court approved this passage in The Supreme Court Practice. 1994 ed., Sweet & Maxwell, London, pp 516:

“The Cynamide guidelines are not relevant to mandatory injunctions. The case has to be unusually strong and clear before a mandatory injunction will be granted at the interlocutory stage even if it is sought to enforce a contractual obligation. However where it is necessary that some mandatory order has to be made ad interim the court will make the order whether or not the high standard of probability of success at trial is made out.”

The case cited for the principle is Leisure Data v. Bell [1988] F.S. R 367.I have not found the report to read the case. It is, in my judgement, a good principle that this Court must approve. I do not think, for reasons earlier stated, that this is a case where it is necessary to make an interlocutory injunction in the interim.

The principles applicable to mandatory injunctions were considered by the House of Lords in Redland Bricks Ltd v.Morris [1969] 2 All ER 576.On the principles there stated By Lord Justice Upjohn this is not the case where I would not grant an interim mandatory injunction. Mead v. Harringey London Borough Council, [1979] 2 All ER 576, was the decision of the Court of Appeal. It was held there that a mandatory injunction will not be granted on affidavit evidence where the issues of fact are strongly contested. There the facts in dispute related to industrial disputes. The facts could only be resolved by trial. Some facts in this matter can only be resolved by trial. There are some matters that are in real dispute between the parties. It would not be right to grant the interim mandatory injunction.

I would therefore dismiss the application for an interim injunction with costs.

Made in Chambers this 11th Day of May, 2000

D F Mwaungulu

JUDGE