## CEYLON COLD STORES LTD. v. WHITTALL BOUSTEAD LTD.

COURT OF APPEAL
SOZA, J. & ATUKORALE, J.
C.A. (S.C.) APPLICATION NO. LA 35/80
APRIL 10 1980

*Interim injunction – Section 54(1) (b), Judicature Act – Considerations applicable – Serious matter to be tried at the hearing – Whether prima facie case of violation of rights tending to render judgment ineffectual – Balance of convenience.*

The respondent company acquired a large number of shares in the petitioner company (upon transfers, as well as allotments on bonus and rights issues) while being its Managing Agents and Secretaries. Regulations under the Imports and Exports (Control) Act imposed restrictions on the issue of licences to non-citizens; the petitioner's Articles of Association entitled its Board to decline to register transfers to non-citizens. The petitioner alleged that the respondent could not be deemed to be a "citizen", and had obtained the aforesaid transfers and allotments by misrepresentation, and instituted action for their cancellation. Similar actions were filed against three associate companies of the respondent. The petitioner unsuccessfully also sought interim injunctions restraining the respondent and its associates from exercising their voting rights; the applications for leave to appeal were refused by the Court of Appeal.

Thereafter another shareholder requisitioned an Extraordinary General Meeting of the petitioner for the removal of two of its directors. The petitioner again sought an interim injunction to restrain the respondent and its associates from exercising their voting rights at the requisitioned meeting. The District Court order having refused such interim injunctions, the petitioner applied for leave to appeal and revision.

**Held:**

That the petitioner was seeking to get, with special reference to the Extraordinary General Meeting, what it failed to get initially. It was bound by the earlier order of the Court of Appeal and was therefore not entitled to be heard again on what was substantially the same matter.

**Held further,** that "a party seeking an interim injunction under section 54(1)(b) of the Judicature Act No. 2 of 1978 must satisfy the Court that there is a serious question to be tried at the hearing. He must make out a *prima facie* case that during the pendency of the action the opposing party is doing or committing . . . . an act or nuisance in violation of his rights . . . . in the subject-matter and also tending to render the ultimate judgment ineffectual. As this is an equitable remedy and purely discretionary, if a *prima facie* case has been found to have been made out, the Court must go on and consider where the balance of convenience lies". Interim injunctions were refused because:–

(i) the registration of the impugned shares and the exercise of the voting rights attached thereto had not been shown to affect the petitioner in its trade or business nor its rights in the action;

(ii) a *prima facie* case that the exercise of the impugned voting rights at the Extraordinary General Meeting would violate the rights of the petitioner in the subject-matter of the action had not been made out; nor that it would tend to render the judgment ineffectual.

**Cases referred to:**

(1) *Jinadasa* v. *Weerasinghe* (1929) 31 NLR 33.
(2) *Preston* v. *Luck* (1884) 27 Ch.D. 497, 506 (C.A.).
(3) *Richard Perera* v. *Albert Perera* (1963) 67 NLR 445.
(4) *Gamage* v. *Minister of Agriculture and Lands* (1973) 76 NLR 25.
(5) *Dissanayake* v. *Agricultural and Industrial Credit Corporation* (1962) 64 NLR 283.
(6) *Smith* v. *Grigg Ltd.* (1924) 1 K.B. 655.
(7) *D. C. Thomson and Co. Ltd.* v. *Deaking* (1952) 2 All E.R. 361.
(8) *J. T. Stratford and Son Ltd.* v. *Lindley* (1964) 3 All E.R. 102.
(9) *Cavendish House (Cheltenham) Ltd.* v. *Cavendish Woodhouse Ltd.* (1970) R.P.C. 234.
(10) *American Cynamid Co.* v. *Ethicon Ltd.* (1975) 1 All E.R. 504.
(11) *Follows* v. *Fisher* (1975) 2 All E.R. 829.
(12) *Law Quarterly Review* (1975) 91 LQR 168.
(13) *Hubbard* v. *Vesper* (1972) 1 All E.R. 1023.
(14) *Yakkaduwe Sri Pragnarama Thero* v. *Minister of Education* (1969) 71 NLR 506.
(15) *Ceylon Hotels Corporation* v. *Jayatunge* (1969) 74 NLR 442.

**APPLICATION** for Leave to Appeal.

*H. L. de Silva* with *Faiz Mustapha, W. D. D. Weerasinghe* and *Mark Fernando* for petitioner.

*H. W. Jayawardene, Q.C.* with *C. Ranganathan, Q.C., K. N. Choksy* and *K. Kanag-Isvaran* for respondent.

*Cur adv vult.*

22nd April, 1980.
**SOZA, J.**

The plaintiff-petitioner (hereafter referred as the petitioner or the petitioner company) is the Ceylon Cold Stores Limited, a public company incorporated in Sri Lanka and carrying on the business of importing food and allied products, selling and distributing such

imports as well as food, soft drinks, ice-cream and other beverages manufactured from imported and local raw materials, processing and selling frozen meat products and also exporting seafood and passion fruit cordial.

The defendant-respondent (hereafter referred to as the respondent or the respondent company) is Messrs. Whittall Boustead Limited, a private company incorporated in Sri Lanka and belongs to the group of companies known as the Whittalls Group of Companies in which the other associate companies are Mortlake Ltd., Cobo Estates (Ceylon) Ltd., Bosanquet and Skrine Ltd., and Ceylon Financial Investments Ltd. Principal business of the respondent company are Managing Agents and Secretaries of Companies, Insurance Agents, Travel Agents, Importers and Exporters.

About 1975 the petitioner was beset with a number of problems which culminated in the filing of case No. 1017/Spl. in the District Court of Colombo. On 27th November 1975 judgment was entered in that case whereby 50,000 shares of the petitioner were directed to be sold to the highest bidder subject to certain conditions. In the Directorate of the petitioner at that time there were J. A. Naidoo a senior partner of Messrs. Julius & Creasy, who were and are the petitioner's lawyers and Mallory E. Wijesinghe. At the invitation of these two Directors and on the appropriate resolutions being passed, the respondent took over the post of Managing Agents of the petitioner with effect from 1st December, 1975 and Managing Agents and Secretaries of the petitioner with effect from 29th January, 1976. The 50,000 shares ordered to be sold as well as other shares were bought by the group of companies to which the respondent belonged. About the same time Sanmugam Cumaraswamy who was the Managing Director of the respondent Company and G. B. Paranagama who was one of its Directors were appointed to the Board of Directors of the petitioner Company. On 23rd June 1978 the authorised capital of the petitioner was increased from Rs. 5,800,000/- to Rs. 50,000,000/- divided into 6,225,000 ordinary shares of Rs. 8/- each and 25,000 7% cumulative preference shares of Rs. 8/- each. Of the authorised share capital 2,100,000 ordinary shares of Rs. 8/- each and 25,000 7% cumulative preference shares of Rs. 8/- each have been issued. The issued share capital is therefore Rs. 17,000,000/-. The Chairman of the Board of Directors of the petitioner Company is Mallory E. Wijesinghe and the other Directors are A. S. Goonetilleke, M. C. B. de Silva, C. P. de Silva, S. C. O. de Livera, Sanmugam Cumaraswamy, G. B. Paranagama and L. de Silva.

On 23rd June 1978 when the authorised share capital was increased, a bonus issue was granted of three new ordinary shares of Rs. 8/- each for every existing two ordinary shares of Rs. 8/- by capitalization of reserve on a re-valuation of the immovable assets. Subsequently on 18th August 1978 there was a rights issue of one new ordinary share for every five ordinary shares held as at 31st July 1978 in respect of a new allotment of 350,000 ordinary shares of Rs. 8/- each. The respondent entered into an underwriting agreement in relation to these 350,000 ordinary shares with the petitioner. Beginning from 29th December 1976 the respondent Company whilst acting as Managing Agents and Secretaries acquired shares from time to time (in its own name) in the petitioner Company and by 12th September 1979 held 238,666 shares of which 207,471 shares were taken in pursuance of the underwriting agreement in respect of the rights issue.

At an Emergency Board Meting of the Petitioner Company held on 9th October 1979 several important resolutions were passed. One was to remove the respondent from its position of Managing Agents and Secretaries and a second was to withdraw consent to the registration of the aforesaid 238,666 shares and to cancel such registration and also to cancel the bonus shares and shares allotted on the rights issue and underwriting agreement. The first resolution led to the filing of case No. 1827/Spl. of the District Court of Colombo by the respondent against the petitioner challenging the validity of the removal and that case is still pending. In pursuance of the second resolution the instant case was filed. The chief ground on which the petitioner company seeks relief in the instant case may be stated shortly as follows: It is the declared policy of the Government that the import trade should be restricted to Sri Lankan traders. Under regulations operative by virtue of the provisions of the Imports and Exports (Control) Act No. 1 of 1969 which now govern this subject, restrictions were clamped down on the issue of import and export licences to non-Sri Lankan traders. Earlier on 16th December 1972 in order to achieve Ceylonisation of its share capital Article 40 of the Articles of Association of the petitioner Company was amended giving the Directors the right in their absolute discretion to decline to register any transfer of shares without assigning any reason for it. The Board was also given the discretion to decline to register transfers of shares unless they were in favour of citizens of Sri Lanka or in favour of Companies which are deemed to be citizens of Sri Lanka. For a private company to be deemed to be a citizen of Sri Lanka within the meaning of Article 40 one hundred percent of its effective share capital had to be held *bona fide* by citizens of Sri Lanka and all the Directors had to be citizens of Sri Lanka. The respondent Company had only two Directors who were citizens of

Sri Lanka and not all of its effective share capital was held by citizens of Sri Lanka. The respondent Company cannot therefore be deemed to be a citizen of Sri Lanka. As the registration of the shares of the respondent had been procured by misrepresentation the petitioner in the present suit seeks a declaration that the petitioner is entitled to withdraw its consent to the registration of the transfers of its shares and to cancel such registration and also to cancel the allotment of bonus shares and the allotment of shares on the rights issue and underwriting agreement. In its plaint the petitioner prayed for an interim injunction restraining the respondent until final adjudication of the matter in dispute from taking any steps towards exercising the voting rights attached to the 238,666 shares now registered in the name of the respondent Company.

At the dates material to the present action Sanmugam Cumaraswamy who was the Managing Director of the respondent held a majority of shares in a private company called Mortlake Limited, incorporated in Sri Lanka but according to the allegation of the petitioner not deemed to be a citizen of the Republic of Sri Lanka within the meaning of that phrase as used in Article 40(2) of the Articles of Association of the petitioner Company. Mortlake Limited held the controlling and predominant interests in the respondent Company. It also held the controlling and predominant interest in another company called Cobo Estates (Ceylon) Limited, a company incorporated in Sri Lanka but according to the allegation of the petitioner not deemed to be a citizen of the Republic of Sri Lanka, within the meaning of that phrase as used in Article 40(2) aforesaid. The Directors of Cobo Estates (Ceylon) Limited were the said Sanmugam Cumaraswamy and G. B. Paranagama. This company has acquired 35,502 shares in the petitioner Company. Mortlake Limited also held the controlling and predominant interest in a private company called Bosanquet & Skrine Ltd., incorporated in Sri Lanka, but according to the allegation of the petitioner not deemed to be a citizen of the Republic of Sri Lanka within the meaning of those words as used in Article 40(2) aforesaid. Sanmugam Cumaraswamy was the Chairman of Bosanquet & Skrine Ltd. and he and G. B. Paranagama held 500 shares each of the share capital. Bosanquet & Skrine Ltd., have acquired 61,263 shares in the petitioner Company. The respondent in the present case holds the controlling and predominant interest in another private company called Ceylon Financial Investments Limited, incorporated in Sri Lanka, but according to the allegation of the petitioner not deemed to be a citizen of the Republic of Sri Lanka within the meaning of those words as used in Article 40(2) aforesaid. G. B. Paranagama is a shareholder of that company. Ceylon Financial Investments Limited have acquired 11,875 shares in the petitioner company.

The petitioner at the same time that it filed the instant case instituted actions bearing numbers 1821/Spl., 1822/Spl. and 1823 Spl. in the District Court of Colombo against Bosanquet & Skrine Ltd., Cobo Estates (Ceylon) Limited and Ceylon Financial Investments Ltd., respectively, claiming identical declarations as in the instant case in respect of the shareholdings of these companies in the petitioner company. In all these three cases 1821/Spl., 1822/Spl. and 1823/Spl. the present respondent was joined as the 2nd defendant.

On the application of the petitioner Company enjoining orders were issued on 10.10.1979 along with notice of the application for interim injunctions in all four cases 1820/Spl., 1821/Spl., 1822/Spl. and 1823/Spl., restraining the respective defendants in those cases from exercising the voting rights attached to their respective shareholdings pending the disposal of the application for interim injunction. Thereafter on application of the defendants in the respective actions the enjoining orders were discharged and the applications for interim injunctions too were refused. This was on 28.11.1979. Applications for leave to appeal from the orders refusing the applications for interim injunctions in the four cases were lodged in the Court of Appeal. The Court of Appeal on 21.2.1980 dismissed the applications for leave to appeal and directed that the trial should be held before another District Judge as the Judge who heard the applications for interim injunctions had already made a decision on the substantive question which awaited determination at the trial.

In the meantime on 29.10.1979 the respondent in the present action instituted proceedings No. 1830/Spl. in the District Court of Colombo under section 360B of the Companies Ordinance claiming reliefs by way of injunctions against the petitioner and against its Directors excluding Sanmugam Cumaraswamy, G. B. Paranagama and L. de Silva, restraining them *inter alia* from issuing shares without offering a proportionate part of them to the respondent Company and its associate companies and from calling a General Meeting so long as cases 1820/Spl. to 1823/Spl. were pending. This action was dismissed on 26.3.1980 with costs.

Thereafter Colombo Life Assurance Ltd., acting under Section 112 of the Companies Ordinance by letter dated 12th March 1980 addressed to the Directors of the petitioner company a requisition for an Extraordinary General Meeting of the company for the purpose of considering and passing the following resolutions:

"(a) That Mallory Evan Wijesinghe, a Director of the Company, be removed from the office of Director under the provisions of Article 94 of the Articles of Association of the company;

(b) That the shareholders do appoint another person as Director in place of the aforesaid Mallory Evan Wijesinghe under the provisions of Article 95, such Director being proposed under Article 93 of the Articles of Association of the company;

(c) That Solomon Christoffel Obeysekera De Livera, a Director of the company, be removed from the office of Director under the provisions of Article 94 of the Articles of Association of the company;

(d) That the shareholders do appoint another person as Director in place of the said Solomon Christoffel Obeysekera De Livera, under the provisions of Article 95, such Director being proposed under Article 93 of the Articles of Association of the Company".

At this stage it should be mentioned that Mallory Evan Wijesinghe holds 18,723 shares in the petitioner company while S. C. O. de Livera holds 170 shares. Other Directors allegedly supporting these two Directors are A. S. Gunatilleke holding 150 shares, M. C. B. de Silva holding 6,300 shares and C. P. de Silva holding 1,452 shares. Hence the two Directors Mallory Wijesinghe and S. C. O. de Livera along with their supporters hold 26,795 shares representing 1.2760% of the total issued share capital of the petitioner company. Colombo Life Assurance Limited holds 305,910 shares representing 14.5671% of the total issued share capital of the petitioner company. Bosanquet & Skrine Ltd. purchased 8,963 shares of Rs. 10/- each in the Colombo Life Assurance Limited in the name of the aforesaid A. S. Gunatilleke. Thereafter the said shares were registered in the name of Bosanquet & Skrine Limited which now holds 8,963 shares in the Colombo Life Assurance Limited representing 44.815% of the issued share capital. These shares give Bosanquet & Skrine Ltd. in effect a controlling interest in Colombo Life Assurance Ltd. The petitioner Company submits that the Colombo Life Assurance Ltd. is requisitioning the Extraordinary General Meeting of the petitioner Company at the instigation and on the directions of Sanmugam Cumaraswamy who is its Chairman and holds and exercises a dominating interest and influence over the affairs of that Company. This requisition has been made in order to alter the composition of the present Board of Directors of the petitioner by using the voting power attached to the very shares held by the respondent and its associate companies which the petitioner is seeking to have cancelled in the present action and actions No. 1821/Spl., 1822/Spl. and 1823/Spl. Therefore the petitioner company is seeking an interim injunction restraining the respondent and its associate companies

who are defendants in the actions 1821/Spl., 1822/Spl. and 1823/Spl. from exercising the voting power attached to the impugned shares at the Extraordinary General Meeting which will be summoned in response to the requisition of Colombo Life Assurance Ltd. and until the final adjudication of the dispute. The petitioner fears that by the wrongful use of the voting power of the shares whose registration is sought to be cancelled in actions 1820/Spl., 1821/Spl., 1822/Spl. and 1823/Spl. the Directorate of the petitioner company will be varied and the actions themselves withdrawn while action No. 1827/Spl. will be compromised to the advantage of the respondent.

The learned Additional District Judge of Colombo after inquiry by his order of 26.3.1980 refused to issue notice of the application for an interim injunction in all four cases. The present application and the applications bearing Nos. 36/80, 37/80, 38.80 for leave to appeal and the four applications for revision bearing numbers C.A. 408/80, C.A. 409/80, C.A. 410/80 and C. A. 411/80 have been filed in respect of these orders of 26.3.1980 made in the four cases 1820/Spl. to 1823/Spl. respectively.

It is contended that the present application or interim injunction filed by the petitioner company praying for an interim injunction is different from the earlier application in view of the new circumstances and new situation created by the requisition for an Extraordinary General Meeting making the use of the voting rights of the impugned 238,666 shares a very live possibility, indeed almost a reality to scuttle the present action itself. The earlier application prayed for in the plaint itself was for an interim injunction restraining the respondent from taking any steps towards exercising or exercising the voting rights attached to the impugned 238,666 shares. In paragraph 24 of the plaint, the petitioner averred that it has good reason to apprehend that the respondent is likely to take steps presently within its power to exercise the voting rights attached to the said 238,666 shares in order to hamper the petitioner in the prosecution of the action and deprive it of the relief sought. In any event the respondent will be acting in violation of the right of the petitioner to have the registration of the said shares cancelled and this will tend to render the ultimate judgment of the Court ineffectual. In the present application for an interim injunction the petitioner amplifies on the same fears and relates them to the Extraordinary General Meeting being summoned on the requisition presented by Colombo Life Assurance Ltd. In short, the petitioner is seeking to get with special reference to the Extraordinary General Meeting what it failed to get at its first essay. The petitioner is bound by the earlier order made on 21.2.1980 by this Court and therefore not entitled to be heard again on what is substantially the same matter. Hence this application must fail.

However, in view of the arguments adduced before us, I will proceed to consider the question before us on its merits also.

I will first consider the legal principles that are applicable when a Court is confronted with a question like the present one whether an interim injunction should issue or not. The legal provision applicable to the case before us is conceded to be section 54(1)(b) of the Judicature Act No. 2 of 1978 (which is identical with the now repealed section 42(1)(b) of the Administration of Justice Law No. 44 of 1973 and section 86(b) of the Courts Ordinance). Under this provision an injunction will be granted if it appears –

(1) that the defendant during the pendency of the action is doing or committing or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or committed, an act or nuisance,

(2) that such act or nuisance

(a) violates the plaintiff's rights in respect of the subject-matter and

(b) tends to render the judgment ineffectual.

The violation alleged in the instant case is of the petitioner's right to have its consent to the registration of 238,666 votes in the name of the respondent cancelled as the respondent is a private company one hundred percent of whose effective share capital is not held by citizens of Sri Lanka and not all of whose Directors are citizens of Sri Lanka and as these facts were misrepresented and suppressed in the declarations made by the respondent when it applied for the registration of the transfers of shares. Further, the respondent threatens by the use of its voting rights to change the Directorate of the petitioner at an Extraordinary General Meeting of the shareholders shortly to be held on a requisition made by the Colombo Life Assurance Limited by its letter of 12th March 1980 and cause this action and the other actions to be withdrawn and so thwart any judgment on the validity of the registration.

Our Courts have held that before an injunction is issued the Judge should be "satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief" – per Dalton, J. in *Jinadasa v. Weerasinghe.*[1] Dalton, J. was here adopting the rules as laid down by Cotton, L.J. in the case of *Preston v. Luck.*[2] In the same case

Lindley, L.J. regarded it as almost axiomatic that the plaintiffs must show that they had a *prima facie* right to have matters kept in *status quo* for an interlocutory injunction to issue.

How a Court must approach this question was explained by H. N. G. Fernando, J. (later C.J.) in the case of *Richard Perera v. Albert Perera.*[3] Where the injunction is sought under section 86(b) of the Courts Ordinance (same as section 54(1)(b) of the Judicature Act No. 2 of 1978), it must appear that the defendant is doing or committing an act or nuisance in violation of the plaintiff's rights respecting the subject-matter and tending to render the judgment ineffectual. Hence there must be some apparent violation of rights to which the plaintiff appears to be entitled and not merely of rights which he claims. Where the plaintiff through his counsel or his evidence reveals information which justifies the *prima facie* view that he is not entitled to the substantive relief claimed in his plaint, it would be wrong for a Judge to ignore such information and issue the injunction. If the material actually placed before the Court reveals that there is probably no right of the plaintiff which can be violated, it would be unreasonable to issue an injunction. This approach to the question was approved by Pathirana, J. in the case of *Gamage v. The Minister of Agriculture & Lands.*[4] In an earlier case, that of *Dissanayake v. Agricultural and Industrial Credit Corporation*[5] H. N. G. Fernando, J. (as he then was) had put the legal requirement thus:

> "The proper question for decision upon an application for an interim injunction is 'whether there is a serious matter to be tried at the hearing' *(Jinadasa v. Weerasinghe).*[1] If it appears from pleadings already filed that such a matter does exist, the further question is whether the circumstances are such that a decree which may ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction is not issued".

The principle that a plaintiff who seeks an interlocutory injunction had to make out a *prima facie* case was followed even in England for nearly a hundred years. I have already referred to the case of *Preston v. Luck*[2] decided in 1884. In 1924 Atkin, L.J. in the case of *Smith v. Grigg Limited*[6] held that a plaintiff who applies for an interlocutory injunction to restrain further infringements of an alleged right must establish to the satisfaction of the Court a strong *prima facie* case that the right which he seeks to protect in fact exists. In 1952 in the case of *D. C. Thomson & Co., Ltd. v. Deaking*[7] it was conceded at the Bar and accepted by Lord Evershed, M. R. that the

plaintiffs must show that they had "a *prima facie* case, or, if you will, a strong *prima facie* case", that they are entitled to the remedy they seek. In 1964 there was the House of Lords decision in *J. T. Stratford & Son, Ltd. v. Lindley*[8] where Lord Upjohn after cautioning that any expression of opinion on the available evidence must not influence in any way the judgment of the trial judge when the matter comes up before him and he hears evidence not available on an interlocutory application and has also, what is perhaps more important, the benefit of hearing oral evidence and seeking the witnesses, stated the principles as follow at page 116:

> "An appellant seeking an interlocutory injunction must establish a *prima facie* case of some breach of duty by the respondent to him. He may even obtain a *quia timet* injunction in case of a threatened injury . . . . He must further establish that the respondents are threatening and intending to repeat that breach of duty . . . . This being so, an injunction may be granted if it is just and convenient so to do, the remedy being purely discretionary. The balance of convenience in these cases is always of great importance . . . ."

In 1970 in the case of *Cavendish House (Cheltenham) Ltd. v. Canvendish-Woodhouse Ltd.*[9] Harman, L.J. (Salmon, L.J. notably concurring) put the matter succinctly thus:

> "Therefore you start of with a *prima facie* case. That, of course, is the essential prelude to the granting of interlocutory relief".

This long-standing approach was however thrown overboard by the decision of the House of Lords in the case of *American Cynamid Co. v. Ethicon Ltd.*[10] where Lord Diplock (Lord Salmon was one of the Judges who concurred with him) said that there was no such rule that the plaintiff seeking an interlocutory injunction should make out a *prima facie* case. The new doctrine propounded by Lord Diplock may be set out in three sequential propositions:

(1) Discover whether the plaintiff's case is frivolous or vexatious; in other words, whether there is a serious question to be tried (p 510).

(2) Decide in whose favour the balance of convenience lies. As to that, consider the extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial. This is a significant factor in assessing where the balance of convenience lies (pp 510, 511).

(3) If the extent of the uncompensatable disadvantage to each party does not differ widely "it may not be improper to take it into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent on the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party" (p 511).

And then there is the warning that the Court is not justified in embarking on anything resembling a trial on material that is necessarily incomplete, conflicting and untested by cross-examination – see pages 510, 511.

On this last mentioned matter it may not be inapposite to quote what H. N. G. Fernando, J. said in the case of *Richard Perera v. Albert Perera*[3] at page 447:

> "While adhering to the view that the trial Judge should not decide the substantive question in considering an application for an injunction, I do not agree that some consideration of the substantive question at this early stage is necessarily irrelevant."

With this view I am in respectful agreement.

The decision of Lord Diplock caused difficulties for the Court of Appeal when that Court was called upon to decide the case of *Follows v. Fisher.*[11] Pointed expression has been given to the uncertainties caused by Lord Diplock's new doctrine by Peter Prescott writing in the *Law Quarterly Review*[12] and by Alastair Wilson in an article entitled "Granting an Interlocutory Injunction" in the New Law Journal of 27th March 1975, p. 302.

We have not adopted the doctrine propounded by Lord Diplock. It is not likely that we will. Our law is that an interim injunction will issue only if there is a substantial question to be investigated and the plaintiff makes out a *prima facie* case. The Court must assess the relative strength of the cases of the parties on the material before it. In the words of Lord Denning, M. R. in *Hubbard v. Vesper,*[13]

> "in considering whether to grant an interlocutory injunction the right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done".

If the case is weak or is met by a strong defence the Court will refuse the injunction. If the plaintiff succeeds in showing he has a *prima facie* case, that is, a case which he has a good chance of winning, the Court will go on to consider whether on the balance of convenience, it would be better to grant an injunction or not – see the case of *Follows v. Fisher* [11] at page 834.

His Lordship H. N. G. Fernando, C.J. in the case of *Yakkaduwe Sri Pragnarama Thero v. The Minister of Education* [14] explained the balance of convenience rule citing with approval the following passage from Halsbury Vol. 21 3rd Ed. p. 366:

> "Where any doubt exists as to the plaintiff's right, of if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted lies on the plaintiff".

In evaluating the balance of convenience regard must be had, where appropriate, to the question of uncompensatable disadvantage or irreparable damage. Germane to the question of balance of convenience are also the conduct and dealings of the parties before the application to Court. The jurisdiction to interfere, being purely equitable, is governed by equitable principles.

As Sirimane, J. discussing this aspect of the question in the matter of granting an interim injunction, said in *Ceylon Hotels Corporation v. Jayatunge* [15]:

> "Such an injunction is granted on equitable grounds and the conduct and dealings of the parties before the application to Court should be taken into consideration."

To sum up, a party seeking an interim injunction under section 54(1) (b) of the Judicature Act No. 2 of 1978 must satisfy the Court that there is a serious question to be tried at the hearing. He must make out a *prima facie* case that during the pendency of the action the opposing party is doing or committing or procuring or suffering to

be done or committed or threatens or is about to do or procure or suffer to be done or committed an act or nuisance in violation of his rights (that is, rights to which he appears to be entitled) in the subject-matter and also tending to render the ultimate judgment ineffectual. As this is an equitable remedy and purely discretionary, if a *prime facie* case has been found to have been made out, the Court must go on and consider where the balance of convenience lies.

Turning to the facts of the case before us, I cannot see how the exercise of voting rights by the respondent can violate the petitioner's rights in the subject-matter. It cannot affect the petitioner's business. It has not for the last three years and probably will not in the future. It must be remembered that the petitioner is a public company and so long as 51% of its effective share capital is held *bona fide* by citizens of Sri Lanka and the majority of its directors are citizens of Sri Lanka, it will be eligible for registration as a Sri Lankan trader. The Whittall Group of Companies commands only 16.7670% of the voting rights (see document F) and even if all the companies in this Group cannot be deemed to be citizens of Sri Lanka, it will not adversely affect the petitioner's eligibility for registration as a Sri Lankan trader under the Import Control Notice No. 18/64 published in Government Gazette No. 14152 of 27th August 1964 (see E1). Hence the registration of the impugned shares and the exercise of the voting rights attached to them will not affect the petitioner in its trade or business. Nor will it affect the petitioner's rights in the action. The petitioner's rights in the action embraced not only the right to prosecute the suit but also to withdraw it. Subject to the rules of Court the petitioner is *dominus litis.* Whether the suit is prosecuted or withdrawn no question will arise of the judgment being rendered ineffectual. The rights in an action which a person has are one thing and the manner of their exercise is quite another and a different thing. The manner of the exercise of his rights in the action will depend, subject to the rules of Court, on his own will. In the instant case on the will of the majority of the Board of Directors. Even if the will of the petitioner is gong to be changed by changes in the Board of Directors for which the respondent is responsible, there is not involved any infringement or violation of its rights in the action. On the contrary changes in the Directorate are part of the democratic process which operates, or should operate, in companies.

Further, it cannot be taken as certain that the Sanmugam Cumaraswamy group will get into the saddle at the forthcoming Extraordinary General Meeting for the voting strength available to them on their own is only 16.7670%. Even after the 14.5671% voting

strength of Colombo Life Assurance Ltd. is added, still other support would be needed. In any event the will of the majority must prevail.

It is significant that before the conflict between Mallory Wijesinghe and Sanmugam Cumaraswamy which spawned the present litigation there was no complaint of the Board being misled by misrepresentations or fraud, or of error induced by the respondent. They co-existed peacefully for nearly three years. In fact Mallory Wijesinghe and the Directors supporting him have a voting strength of only 1.2760%. To retain their positions with such a small voting strength they would have had to rely on alliances and bargains with other groups. The comment is therefore justified that the voting rights now being impugned would have stood Mallory Wijesinghe and the Directors supporting him in good stead during the past few years.

When the respondent sought registration of the transfers of the impugned shares beginning from December 1976 the Chairman of the Board of Directors of the petitioner Company was Mallory Wijesinghe and in the Directorate there were J. A. Naidoo a senior partner of the well-known legal firm of Messrs. Julius & Creasy, and M. T. L. Fernando a senior partner of Messrs Turquand Young & Co. who were the Auditors of the Whittall Group of Companies. These three directors, or at least one or more of them, should have known the composition of the Board of Directors of the companies in the Whittalls Group – see the copy of the plaint in case No. 1827/Spl. marked D. These allegations are not specifically traversed in the answer filed by the petitioner in that case but merely described as irrelevant and so not calling for a specific pleading – see document E. It should also be observed that two members of the Board of Directors of the time, J. A. Naidoo and M. T. L. Fernando are no longer there.

All these matters will have an important bearing at the trial. It must not be overlooked that in the matter of the registration of transfers of shares, Article 40 of the Articles of Association of the petitioner gives the Board of Directors an absolute discretion. The Board can refuse an application for registration of a transfer of shares for any reason or even for none. The Directors **may** also decline to register any transfer of shares (whether fully paid or partly paid) unless the transferee or transferees are, or, are deemed to be citizens of Sri Lanka in accordance with the laws and/or regulations for the time being applicable – see Article 40(2) of the Articles of Association. On the material presented to Court it cannot be said that there is a legal bar

to the registration of the transfer of shares to a company not deemed to be a citizen of Sri Lanka. Such registration seems perfectly legal. Accordingly unless it can be established that the Board of Directors that functioned at the time material to the question, was misled by the declarations of the respondent and its Associate Companies and for that reason induced to give its consent to the registration, the petitioner will fail. Even the question whether the respondent and its Associate Companies cannot be deemed to be citizens of Sri Lanka is not free from difficulty. Further the reasons for the late discovery (in September 1979) of the true character and composition of the respondent and its associate companies must be established. This would be an uphill task if the opportunities for knowing these facts existed as disclosed by the respondent. On the fact of it, the registration is legal and the complaint in regard to the declarations has come long after they were made. For nearly three years the Directors of the Mallory Wijesinghe group benefitted by the support of those in the Sanmugam Cumaraswamy group.

On the material before Court, a *prima facie* case that the exercise of the impugned voting rights at the Extraordinary General Meeting shortly to be held will violate the rights of the petitioner Company in the subject matter of the action, has not been made out; nor that it will tend to render the judgment ineffectual. It may affect the position of particular Directors but that is not a matter with which the Court need be concerned in these proceedings. The application for leave to appeal is accordingly refused with costs.

**ATUKORALE, J.** – I agree.

*Application refused.*