BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0209

(1) ETON CONSULTANTS HOLDINGS LTD
(2) JAMES SPENCER GREENE

Applicants/Claimants

-and-

(1) DOROT PROPERTIES AND HOLDINGS LTD
(2) DOROT MALTA LIMITED
(3) DR. ZVI DINSTEIN
(4) MR MATIS COHEN
(5) ENGLISH & CONTINENTAL HOLDINGS LTD
(6) ENGLISH AND CONTINENTAL PROPERTIES LTD
(7) RAMON GREENE

Respondents/Defendants

Appearances:

Mr Richard Morgan of Maitland, London with Mr Philip Kite and Ms Emma Sparshott of Harney Westwood & Riegels for the Applicants
Ms Jo Cunningham and Ms Arabella di Iorio of Maples & Calder for the First to Fourth Respondents
Mr Paul Dennis of O'Neal Webster for the Seventh Respondent

2007: October 02, 03
2007: October 09,
2008: January 07

JUDGMENT

[1] **HARIPRASHAD-CHARLES J:** On 17 September 2007, I granted an interim injunction restraining the First to Fifth Respondents from causing or procuring the Fifth Respondent, English & Continental Holdings Ltd ("ECH") by its board of directors, from passing or implementing any resolution, save in accordance with a unanimous vote of its Directors in favour of a resolution passed at a lawfully convened meeting.

[2] This is the first return date and the Applicants seek to continue the Order until trial or further order. The First to Fourth Respondents (conveniently referred to as "the Respondents") tenaciously opposed the application. They say firstly, the Applicants are unable to demonstrate that there is a serious issue to be tried, and secondly, their failure to make full and frank disclosure of all material facts and to present fairly to the Court at the ex parte hearing, matters which the Respondents might rely upon by way of defence is sufficient ground to discharge the injunction.

The parties

[3] The First Applicant, Eton Consultants Holdings Limited ("Eton") owns 30% and the Second Applicant, James Spencer Greene ("James Greene") owns 20% of the issued and paid up share capital of ECH, a company incorporated in the British Virgin Islands ("BVI"). Eton is beneficially owned by Mr Julian (Jack) Reilly.

[4] The First Respondent, Dorot Properties and Holdings Limited ("DPH") owns the Second Respondent, Dorot (Malta) Limited ("Dorot Malta") (collectively called the "Dorot parties") which owns the remaining 50% of the issued and paid up share capital of ECH.

[5] The Third Respondent, Dr Zvi Dinstein and the Fourth Respondent, Mr Matis Cohen are directors of ECH appointed by or on behalf of DPH or Dorot Malta. The other two directors are Clermont Corporate Services Limited (a Company incorporated in Monaco), appointed as a director of ECH at the request of Eton and James Greene. The business of ECH is in real estate development.

[6] The Sixth Respondent, English & Continental Propertied Ltd ("ECP") and the Seventh Respondent, Mr Ramon Greene ("Ramon Greene") are joined in a formal capacity as being parties to the agreements dated 30 June 2005 and 27 March 2006 respectively. The latter agreement is at the core of the dispute in this action. Ramon Greene is James Greene's father.

Factual Matrix

[7] ECH was originally incorporated on 5 September 2001 as a company limited by shares under the International Business Companies Act, Cap. 291 with all of the issued share capital being held by James Greene. From 2001 onwards, the Dorot parties became involved in a number of business opportunities and joint ventures with Ramon Greene. One of those joint ventures was related to a group of companies held by ECP. In turn, the shares of ECP were held equally by Dorot Malta and ECH. Between 2001 and 2005, ECP was short of funds and the Dorot parties provided several substantial loans and securities to ECP and the joint venture companies held by ECP. It is alleged that by June 2005, significant debts were due and owing to the Dorot parties and as security for those debts, Ramon Greene granted a charge over ECH's shares in ECP in favour of DPH. Additionally, by mid-June 2005, the Dorot parties had a claim against Dock Lane Properties Limited, a company whose original sole shareholder was Ramon Greene, for approximately £2.65 million in damages arising out of alleged misappropriation of funds.

[8] Designed to take account of the significant debts and also a way forward, the parties decided to draw a line and entered into a new joint venture agreement on 30 June 2005 ("the 2005 Agreement") whereby the shares in ECH were allocated amongst three parties such that Dorot Malta holds 50%, James Greene holds 20% and Eton 30%. The Agreement also contained provisions for repayment of significant debts due to the Dorot parties.[1] It was signed by Mr Jehuda Maimon on behalf of the Dorot parties and Ramon Greene and James Greene ("the Greenes") on behalf of ECP and ECH. Following that Agreement, Mr Reilly was appointed as Manager and Eton became the legal owner of the 30% shareholding referred to in the 2005 Agreement.

[9] The Applicants alleged that in or about March 2006, Messrs Ernst & Young, the auditors of DPH were finalising the preparation of the consolidated accounts for 2004 and 2005 for DPH in Israel and needed to see documentary evidence for audit and accounting purposes. They alleged that it was in these circumstances DPH, its lawyers or accountants drafted up the 2006 Agreement which was executed by all the parties thereto on 27 March

[1] See Bundle 2, page 79 et seq

2006 ("the 2006 Agreement"). The Dorot parties dispute this allegation and say that they were unaware of such agreement which if it were presented to their board of directors, would not have been approved since it was contrary to the interest of the Dorot parties or ECH. As already stated, this Agreement is at the heart of the dispute in this action.

[10] On or about 25 October 2006, the Memorandum and Articles of Association of ECH were amended and restated. Despite the express provision in Clause 2 of the 2006 Agreement, neither the minutes nor the amendments in the Articles of Association reflect the provision that all resolutions adopted by the board of directors should be adopted unanimously. In fact, article 68 of the restated Articles of Association expressly provides that "questions arising at any meeting shall be decided by a majority of votes; in case of an equality of votes the Chairman shall have a second or casting vote."

[11] In about late 2006/early 2007, it became palpably clear that the relations between the various parties were declining which resulted in a falling out between Dr Dinstein and Mr Maimon[2]. Following the schism, relations between the Applicants and the Respondents worsened. As a consequence, the parties entered into negotiations which led to the execution of an Agreement on 9 March 2007 ("the 2007 Agreement"). The Applicants agreed, amongst other things, to sell and transfer their shares in ECH to Dorot or its nominee and forgive all debts owed to them in consideration of the payment of £400,000 along with a full and final settlement of all claims against them by Dorot or any of its subsidiaries and by ECH and any of its subsidiaries and vice versa. It was an express term of the Agreement that the parties would use their best endeavours in relation to the performance of the Agreement which to date, has not been performed but which, for present purposes, I need not be troubled with.

The ex parte application

[12] The application for the ex parte injunction came before me at 4.38 p.m. on 17 September 2007 on very short notice and as a matter of urgency; the scurry being that a board

[2] See Transcript of Minutes of Meeting held on 9 February 2007 at page 61 of Exhibit "MC1", Tab. 17, Bundle 2.

meeting was scheduled to take place at 9.00 a.m. GMT on 18 September 2007. Fully cognizant of the fact that I did not have much time to sufficiently acquaint myself with the application, Learned Counsel for the Applicants, Mr Kite took me through the affidavit of Richard James Bamforth("Mr Bamforth") which supported the application as well as some of the exhibits.

[13] The Applicants alleged that a board meeting of ECH is scheduled to take place in less than 12 hours and one of the items listed on the Agenda to be considered was the composition of the board of directors of the Company and its subsidiaries. They feared that Dr Dinstein and Mr Cohen proposed to vote to remove the Applicants' appointed directors from the board of ECH, by using the casting vote of Dr Dinstein.

[14] It was further alleged that no papers had been provided to the directors in advance of the meeting but it was apparent that the intention of the Dorot parties was to continue with their strategy of removing James Greene and Clermont from the board by (i) convening a board meeting again giving the minimum possible notice; (ii) ensuring that the board meeting is scheduled to take place at a time least convenient for James Greene and (iii) using the Chairman's casting vote in order to remove the Directors nominated by Eton/ James Greene from the board, thereby enabling them to take control of ECH, wholly in breach of the 2006 Agreement and more specifically, Clause 2[3] which expressly provides:

> "Eton, JG and Dorot Malta agree that any and all decisions brought before any shareholders or class meeting of ECH and any resolution proposed to be adopted by ECH's board of directors (or any committee thereof), may only be adopted unanimously. The parties shall take all necessary actions in order to implement the same in ECH's organizational documents."

[15] The Applicants' case is that the Dorot parties and ECH expressly agreed that unanimity was going to be required in decisions not only at shareholder level but at board level when they executed the 2006 Agreement. They also say that even though the 2006 Agreement does not show the signatures of James Greene or his father, the Greenes did sign the Agreement and that no issue had previously been raised as to its validity.

[3] See paragraph 24 of Richard James Bamforth's affidavit filed on 17 September 2007.

[16] The Applicants alleged that at a board meeting of ECH on 28 March 2007, the board unanimously resolved that "the appointment of Dr Dinstein as Chairman of the board until further notice shall be accepted." It was also alleged that although consent was given for the appointment of Dr Dinstein as Chairman, this was in the context of the 2006 Agreement by which all decisions have to be unanimous and therefore neither party had control of ECH. It was further alleged that the intention was for the Chairman to have a role as a figurehead befitting his age and position and certainly not to allow the Dorot parties to circumvent the contractual arrangements in place. This meeting took place following the signing of the 2007 Agreement.

[17] On 24 May 2007, a further board meeting was held at which several changes to the board of ECH were approved with Mr Cohen being appointed as a member of the board of ECH nominated by Dorot, to replace Mr Maimon.

[18] Since the execution of the 2007 Agreement, relations between the parties have again deteriorated. The alleged failures under the 2007 Agreement have been the subject of correspondence between James Greene, Mr Reilly and Fladgate Fielder, solicitors to the Dorot parties and are indicative of the breakdown of the relationship between the parties.

[19] At a board meeting held on 7 September 2007, a number of resolutions were tabled. Dr Dinstein and Mr Cohen voted in favour of resolutions of ECH and the Applicants' appointed directors namely Mr Reilly and Mr Blakey (as the alternate directors for Clermont and James Greene respectively) voted against.[4] Dr Dinstein then used his 'casting' vote to pass two resolutions. The Applicants claimed that the Minutes do not reflect that in each case, Mr Blakey and Mr Reilly objected to the exercise by the Chairman of his casting vote because of the "unanimity" provision in the 2006 Agreement. They also claimed that the requirements of section 114 of the Business Companies Act, 2004 ("the BCA") was completely disregarded. However, the resolution to remove the two directors was eventually adjourned "pending further discussions between the shareholders".

[4] See page 105 of Exhibit "RJB1".

[20] On Friday, 14 September 2007, the Applicants received an email from Mr Cohen notifying them of a further board meeting to take place at 9.00 a.m. GMT on Tuesday, 18 September 2007. One of the items listed on the Agenda to be considered was the composition of the board of directors of the Company and its subsidiaries. The Applicants were worried that Dr Dinstein and Mr Cohen proposed to vote to remove the Applicants' appointed directors from the board of ECH, by using the casting vote of Dr Dinstein which they say is a breach of the 2006 Agreement. Against that background, the Applicants sought and were granted the narrowest interim injunction to restrain the First to Fifth Respondents from causing or procuring ECH, by its board of directors, from passing or implementing any resolution, save in accordance with a unanimous vote of its Directors.

Applicable legal principles

[21] The procedure to be adopted by the Court in hearing applications for interlocutory injunctions and the tests to be applied, were laid down by Lord Diplock in the seminal case of **American Cyanamid Co. v Ethicon Limited**.[5] At page 407, Lord Diplock had this to say:

> "*The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried* [emphasis added]. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are questions to be dealt with at the trial…So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction relief that is sought."

[22] According to the **American Cyanamid**, when an application is made for an interlocutory injunction, in the exercise of the Court's discretion, an initial question falls for consideration, i.e. whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction? If there is

[5] [1975] AC 396, H.L.

doubt as to whether damages would not be adequate, the Court then has to determine where does the balance of convenience lie?

[23] Some of the key principles derived from the speech of Lord Diplock in the **American Cyanamid** (at pages 406-409) may be listed as follows:

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.

2. There are no fixed rules as to when an interlocutory injunction should or should not be granted. The relief must be kept flexible.

3. The evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

4. It is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed and mature considerations. These are matters to be dealt with at the trial.

5. The object of the interlocutory injunction is to protect the claimant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial; but the claimant's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

6. Some additional factors that the Court needs to bear in mind are: (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other to pay; (b) the balance of convenience; (c) maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases.

7. Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

8. The Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious issue to be tried.

[24] That question is the threshold requirement. Lord Diplock in the **American Cyanamid** said it is sufficient if the Court asks itself: is the applicant's action "not frivolous or vexatious"?, is there "a serious question to be tried"?, is there "a real prospect that he will succeed in his claim for a permanent injunction at the trial"? These may appear to be three subtly different questions but they are intended to state the same test [6].

Is there a serious issue to be tried?

[25] The Applicants contended that there is plainly a serious issue to be tried on whether decisions of the Board actually require unanimity.

[26] Learned Counsel for the Applicants, Mr Morgan contended that the 2006 Agreement was drawn up by Dorot's lawyers or accountants for audit and accounting purposes and it was subsequently executed by all the parties thereto or alternatively, was signed by representatives of all the parties thereto. He asserted that the Agreement was validly executed and as such, legally binding upon the Respondents. Mr Morgan contended that further support for the proposition that it was the Dorot parties that proposed the 2006 Agreement is found in Martin Chesler's [7] email to Mr Cohen.[8]

[27] Ms Cunningham appearing for the Respondents submitted that there is no issue to be tried, moreover a serious one. She argued that the Applicants' case is fundamentally flawed and she challenged the validity of the 2006 Agreement. Ms Cunningham submitted, inter alia, that if a party wishes ECH to be bound, it should have identified ECH as a party and expressly state so. She also referred to Mr Yoshpe' affidavit where he stated that Mr Maimon was never a director of DPH and that the Applicants were aware of this[9]. The Dorot parties asserted that the other director was Dr Dinstein and he did not sign. Nor did Clermont; it being Eton's director. Learned Counsel self-assuredly submitted that at the very centre of all this, the Applicants cannot produce a signed document. She adeptly

[6] Smith v Inner London Education Authority [1978] 1 All E.R. 411 at 419, CA *per Browne L.J* See also Seaconsar v Bank Markazi [1994] A.C. 438, H.L., Canada Trust v Stolzenberg (No. 2) [1998] 1 WLR 547.
[7] It is to be noted that Martin Chesler of Clermont Corporate Services Limited was the representative and alternate director of Eton Consultancy and Holdings Limited.
[8] See Tab 16, Bundle 2 at Exhibit "MC1", page 60.
[9] See also paragraph 24 of Mr Yoshpe' affidavit at Tab 11.

probed the date of the audit and the 2006 Agreement. According to her, ECH's lawyers knew nothing of this "highly suspect, unorthodox and dubious" Agreement until September 2007[10].

[28] According to Ms Cunningham, the Applicants' case is misconceived and fatally flawed in that:

a) the evidence strongly supports a finding that the 2006 Agreement was never concluded or considered to be binding between the named parties:

   i. the Applicants are still unable to produce an agreement signed by Ramon and James Greene.

   ii. the parties' conduct post 2006 is not consistent with a binding agreement of the nature contended for by the Applicants.

And, in any event:

b) even on the face of the 2006 Agreement, neither Dorot Malta nor ECH was ever a party to it.

c) even if Dorot Malta was a party to the 2006 Agreement, as contended for by the Applicants (but which is denied by the Respondents), it is only an agreement to agree and as a consequence, it has no legal effect.

d) the 2006 Agreement itself states that it was intended only as an amendment to the provisions of the 2005 Agreement. It is beyond dispute that the 2005 Agreement has been superseded and it is unclear how the 2006 Agreement can now have a continued and independent existence.

[10] See Tab 15, page 118.

e) the Articles of Association expressly provide that the board of directors can vote by majority and that the Chairman has a casting vote. No amendment has been filed with the Registry and the Articles of Association must prevail pursuant to section 13 of the BCA.

The Articles of Association must prevail

[29] Quintessentially, Ms Cunningham argued that the Articles of Association must prevail for the following reasons: (i) Article 69 of the Articles of Association of ECH expressly provide that the board of directors can vote by majority and the Chairman has a casting vote;[11] (ii) no amendment has been filed with the Registrar as mandated by section 13 of the BCA; (iii) there is no evidence that a members' or directors' resolution amending Article 68 has been passed, as required by Articles 12 and 13 of the BCA and (iv) the restated Articles of Association filed in October 2006, over 6 months after the execution of the alleged 2006 Agreement, make no amendment to Article 69 which continues explicitly to provide that Directors' resolutions can be passed by a majority vote with the Chairman to have a casting vote.

[30] Mr Morgan contended that the Respondents' arguments are unfounded for a number of reasons. Firstly, the fact that the Articles have not been filed does not, as a matter of analysis, mean that ECH is not bound by the terms of the 2006 Agreement; or that its shareholders and their nominees are not bound *inter se* by what is a free-standing contract in its own right. As a corollary, Learned Counsel argued that since ECH agreed to take all necessary actions in order to implement the same in its organisational documents, ECH is not obliged to rely on its own breach to suggest that it is not bound by the agreement.

[31] Mr Morgan further prayed in aid of equity. He argued that equity will not allow a party to escape from an obligation because of its own non-performance.

[32] Learned Counsel attractively argued that the Respondents having represented to the Applicants that such an agreement was necessary and appropriate so that there could be

[11] See Exhibit "RJB1", page 14.

definitive confirmation of the notion of equal ownership and no overall control[12] and having obtained their signatures, thereby enabling the Dorot parties to make representations to their shareholders and the Israeli tax authorities, the Respondents are estopped now from contending that the Agreement is not binding. In support of this contention, Mr Morgan relied on the case of **Audubon Holdings Limited & anor v The Treasure Island Company & Ors**[13]

> "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his detriment, A is not permitted to affirm against B that a different state existed at the time."[14]

[33] There is no doubt that the arguments presented by both Counsel involve factual as well as legal issues. However, both parties are fully cognizant that in an interlocutory application such as this one, the Court is unable to resolve conflicts of evidence. The all-encompassing issue of whether or not the 2006 Agreement is a legally binding document will be resolved at trial. As it stands, the evidence on this issue is diametrically opposed and it would be premature for this Court to come to any conclusions in the absence of oral cross-examination.

[34] However, there are some legal issues which can be dealt with summarily. I turn firstly to some relevant sections of the BCA. Section 2 defines a "member, in relation to a company" as, amongst other things, a shareholder [15].

[35] Section 12 provides that "the members of the company may, by resolution amend the memorandum or articles of the company" and section 13 speaks to the mandatory filing of notice of amendment of memorandum or articles. It seems to me that what section 13 is saying is if the amendment to the memorandum or articles of a company is validly done but not registered, it would be ineffective. In other words, for the amendment to be effective, it must be registered. A company that contravenes subsection 13 (1) commits an offence and is liable on summary conviction to a fine of $1,000. However, pursuant to

[12] See paragraph 57 of Mr Riley's affidavit, Bundle 1, Tab 12.
[13] BVIHCV2002/0227 – Judgment delivered on 31 March 2006 per Hariprashad-Charles J.
[14] These were the words of Lord Birkenhead in **Maclaine v Gattey** [1912] A.C. 376 at 386.
[15] See section 2 –Interpretation section.

subsection 13 (5), the Court does have the power to extend time to file such restated memorandum or articles. However, it remains ineffective until filing and upon registration.

[36] Article 69 of the Articles of Association of ECH filed on its incorporation states:

PROCEEDING OF DIRECTORS

"69. Questions arising at any meeting **shall be decided by a majority of votes;** (emphasis added) in case of any equality of votes, the Chairman shall have a second or casting vote."

[37] Article 68 of the restated Articles of Association filed on 25 October 2006 made absolutely no amendment to Article 69. It fact, it is verbatim with Article 69 of the "old" articles. The only change is that the "old" 69 is now the "new" 68. Consequently, the position as regards the Articles of Association of ECH is that Directors' resolutions can be passed by a majority vote with the Chairman to have a second or casting vote.

[38] Mr Morgan has also correctly expounded the state of the law with regards to shareholders' agreements. There is no doubt that the courts have shown their enthusiasm to enforce agreements between shareholders which arise and take effect outside of the articles. The main decisions relate to voting agreements and establish the lucid principle that shareholders may validly agree to exercise their voting rights in a certain way so as to regulate the affairs of the company in accordance with their wishes. Shareholders' agreements are governed by the normal principles of contract law. Thus, shareholders cannot agree to an illegal act nor can they vary the agreement without the consent of all the parties (unless it otherwise so provides).

[39] In the instant case, there is no evidence of any shareholders' or directors' resolution having been passed, as required by section 12 and 13 of the BCA amending the "old" Article 69 or the "new" Article 68. Furthermore, the restated Articles of Association filed in October 2006, over 6 months after the execution of the alleged 2006 Agreement, make no amendment to Article 69 which continues explicitly to provide that Directors' resolutions can be passed by a majority vote with the Chairman to have a casting vote.

[40] In any event, Clause 2 of the 2006 Agreement constitutes an amendment to ECH's Articles of Association and has no legal effect where:

i. The agreement does not specifically provide that, in the event of an inconsistency between the Articles of Association and the Agreement, the terms of the Agreement are to prevail and in any event,

ii. Neither a notice of amendment nor the restated Articles of Association incorporating such amendment have been filed with the Registrar of Companies in accordance with section 13 of the BCA.

[41] It is for all of these reasons that I am of the provisional view that the Articles of Association must prevail.

Parties to the agreement

[42] It is the Applicants' case that the 2006 Agreement is a legally binding and effective agreement. Leaving aside the signatures of James Greene and Ramon Greene[16], Mr Morgan contended that the other signatories are those of Eton by its directors and the Dorot parties. Mr Maimon signed as Chief Executive Officer of DPH and as director of Dorot Malta.

[43] The Respondents have indefatigably challenged the validity of this Agreement. They say that its execution is suspect. More particularly:

a. ECH is not privy to the 2006 Agreement which is expressly stated, on its face, to be an agreement only between the Applicants and DPH.

b. If, which is not admitted, James Greene is a party to the 2006 Agreement (no executed copy has been produced to that effect) it is still denied that ECH and/or Dorot Malta are party to the same, where

[16] There is affidavit evidence by Ramon Greene and Mr Bamforth that both Greenes did sign.

(1) neither ECH nor Dorot Malta purported to execute the agreement through an authorized officer of the respective companies;

(2) the shareholders of ECH had neither actual nor ostensible authority to enter into agreements and/or to execute contractual documentation for and on behalf of ECH;

(3) DPH, as a shareholder of Dorot Malta, had neither actual nor ostensible authority to enter into agreements and/or to execute contractual documentation for and on behalf of Dorot Malta.

(4) Mr Maimon had neither actual nor ostensible authority to enter into agreements and/or execute contractual documentation for and on behalf of DPH.

[44] In his comprehensive written submissions, Mr Morgan dealt with the issues raised by the Respondents[17]. Learned Counsel referred to **Bowstead and Reynolds on Agency** (17th edn). Chapter 3 deals with Authority of Agents: actual and apparent. At page 307, the issue of apparent (or ostensible) authority is set out in Article 74.

> "Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."

[45] When one scrutinizes the affidavit evidence which was adduced at this hearing, one readily sees conflicting evidence as to the role of Mr Maimon in DPH, Dorot Malta and ECH. These are matters which cannot be determined at this interlocutory stage of the proceedings. Some other issues which will arise at the trial include: (i) whether Mr Maimon had authority to bind DPH and/or Dorot Malta; (ii) whether Dorot Malta and ECH were

[17] See pages 18 – 25.

parties to the 2006 Agreement and (iii) whether Mr Maimon was a director of ECH at the date of the execution of the 2006 Agreement.

An agreement to agree

[46] The 2006 Agreement provides that the parties "*shall take all necessary actions in order to implement the same in ECH's organisational documents"* and *"endeavour to reach a detailed agreement stipulating the above."*

[47] The Respondents say that the argument advanced by the Applicants that the 2006 Agreement constitutes a binding and enforceable agreement is legally misconceived in that to the best of the Respondents' knowledge, no such detailed agreement was ever reached and the Applicants have not alleged that it was reached.

[48] I accept the Respondents' argument that as a consequence, the 2006 Agreement constitutes no more than an agreement to agree and/or the condition precedents to reach a detailed agreement and/or implement the same in ECH's organisational documents have not been satisfied and therefore, the agreement has no legal effect and/or is not binding upon the parties to it.[18]

2006 Agreement superseded

[49] The Respondents alleged that even if, which is expressly denied, the 2006 Agreement was binding and effective as of 27 March 2006, the Agreement has been superseded and/or is no longer binding and effective between the parties, where:

a) ECH's Articles of Association were subsequently amended and restated on 25 October 2006 and filed with the Registrar of Companies. The Amended and Restated Articles of Association, prepared by the representative director of Eton, provide at Article 69 that:

> "The directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit. Questions arising at any

[18] See Chitty on Contracts (29th edn) volume 1 at para 2-114, 134.

meeting shall be decided by a majority of votes; in case of any equality of votes the chairman shall have a second or casting vote…."

b) The purported agreement expressly provides that its purpose was "*to supplement certain provisions of the [2005] Agreement."* In the event, the 2005 Agreement has been superseded by the 2007 Agreement and it is denied that the purported agreement has any residual effect independent of the 2005 Agreement.

[50] In my opinion, it cannot be disputed that the 2005 Agreement has been superseded by the 2007 Agreement although the Applicants unconvincingly argued that the 2007 Agreement did not purport to, nor cancel the prior agreements.

[51] Although the 2007 Agreement has not been performed, it effectively revokes and replaces the 2005 Agreement- seeking to put into place a new regime for settlement of debts between the parties. The corollary is true: if the 2007 Agreement had been performed, all previous agreements would have fallen away.

[52] In any event, had the 2006 Agreement been binding upon the shareholders, it was expressly stated to constitute an amendment to the 2005 Agreement which had itself been superseded by the 2007 Agreement.

Applicants' case inconsistent with contemporaneous evidence

[53] In summary, the case for the Applicants is that the 2006 Agreement was drawn up at the behest of the Dorot parties and it was done for audit and accounting purposes by Dorot lawyers or accountants. They say that the Agreement was signed by Mr Maimon on behalf of the Dorot parties and on behalf of ECH.[19] Eton also signed by its directors and there is affidavit evidence that the Agreement was signed by James Greene. Although there is no copy of a signed version before the Court, Ramon Greene gave sworn evidence that it was signed by both him and his son.[20] The Applicants alleged that there is no evidence to contradict it.

[19] See Exhibit RJB1 to the affidavit of Richard Bamforth, pages 85 – 87.
[20] See Bundle 1, Tab 13, paragraph 4 of Affidavit of Ramon Greene sworn to on 1 October 2007.

[54] Mr Morgan submitted that the 2006 Agreement is a validly executed document signed by all the parties thereto or by representatives of all the parties thereto. Learned Counsel argued that it is preposterous for the Respondents to turn around and now say that Mr Maimon does not have the authority to bind the Dorot parties when it was the same Mr Maimon who signed the 2005 Agreement to which the Dorot parties received significant benefits.

[55] The Applicants say that the Respondents have breached Clause 2 of the 2006 Agreement which provides for unanimity.

[56] The Respondents argued that given the serious legal hurdles which lie in the way of enforcing the 2006 Agreement and whether or not it was ever concluded or considered to be binding between the parties is moot. Ms Cunningham submitted that the contemporaneous evidence weighs heavily in favour of the Respondents' case that the 2006 Agreement was never in fact concluded nor was it considered to be binding between the parties. She quizzically enquired why would Ernst & Young who were auditing the accounts for 2004 and 2005 respectively be looking at a 2006 Agreement and in any event, if they had sight of it, why would they not mention it in their report?

[57] It is an established principle of law that the onus is on the Applicants to show that there is a serious issue to be tried. Having analysed the factual and legal evidence, I am of the view that there is no serious issue to be tried which warrants the continuation of the interlocutory injunction. Prima facie, the Applicants' case for an injunction is fundamentally flawed. There appears to be substantial doubts with respect to the legal validity of the 2006 Agreement and no doubt, this would be resolved at trial when more evidence would be forthcoming. In any event, to date, the Applicants have not produced an agreement signed by James Greene and Ramon Greene and even if they can do so, the Applicants will have an insurmountable task of overcoming a litany of legal hurdles including but not limited to the following:

a. The restated and amended Articles of Association filed in October 2006 made no amendment to the provision that resolutions of the board of directors should be passed by majority vote with the Chairman to have a second or casting vote.

b. The allegation that neither ECH nor Dorot Malta signed the Agreement through their authorised signatories as per section 103 of the BCA and the Applicants are still unable to provide a fully executed copy.

c. The 2006 Agreement expressly provided that the parties would "take necessary action" and "reach a detailed agreement. It appears that nothing was done.

d. The 2007 Agreement effectively revokes and replaces the 2005 Agreement- seeking to put into place a new regime for settlement of debts between the parties. The 2006 Agreement cannot exist on its own.

e. The 2006 Agreement was never filed and registered as required by section 13 (2) of the BCA.

[58] Even if I were wrong to come to these prima facie findings, I would move on to consider whether damages would be an adequate remedy.

Damages as an adequate remedy

[59] In the **American Cyanamid,** Lord Diplock said at page 408:

> "If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

[60] In my judgment, damages would be an adequate remedy for the Applicants. It appears that the Applicants do not wish to be involved in the affairs of ECH. Their primary concern is how much they will receive for their shares. If ECH is permitted to continue its operation, it could only redound to the benefit of all parties including the Applicants and may serve to

facilitate the performance of the 2007 Agreement. Whatever the case may be, any conceivable loss is monetary and can be measured in damages by reference to the share value.

[61] ECH is an active company. If the business is deadlocked for any considerable period, it may never recover. It is in the interest of all parties that this company continues its operation. It is the "principal operating company for the group."

Balance of convenience

[62] If the status quo is to be maintained, the Court would have to give effect to the October 2006 Articles of Association and not to an Agreement which is muddled up with factual as well as legal hurdles.

Applicants' failure to give full and frank disclosure

[63] The Court has a discretion whether or not to grant an injunction and in doing so, it must bear in mind not only the legal test but other factors including the Applicants' motivation for the injunction and their duty to make full and frank disclosure.

[64] It is trite law that because the injunction was obtained ex parte, the Applicants had a duty to make full and frank disclosure to the Court of all material facts and to present fairly to the Court matters which the Respondents might rely upon by way of defence.[21]

[65] While the Applicants did identify some possible defences, the transcript reflects that the Court was not taken to (i) the amended and restated Articles of Association of ECH filed in October 2006 and (ii) the relevant provisions of the BCA which governed the dispute.[22]

[66] The Applicants failed to exhibit the 2006 Articles of Association at the ex parte hearing. They say that they were not aware that the Articles had been amended.[23] They further say that it appears that the Respondents themselves were not aware because Dr Dinstein

[21] Gee on Commercial Injunctions 5ed edition
[22] See Transcript of Proceedings dated Monday, 17 September 2007 from 4. 38 p.m. to 5.35 p.m.
[23] See Affidavit of Jack Reilly at Tab 12, Bundle 2, paragraph 85.

himself gave 3 days notice of the meeting of directors on 18 September 2007 as he was apparently relying on the provisions of Article 70 of ECH "old" articles[24] rather than Article 69 of ECH's "new" Articles[25].

[67] It is common ground that an injunction could be discharged if there is material non-disclosure. A consequence of applications for interim injunction being made without notice is that the applicant who seeks the injunction is under a duty to give full and frank disclosure of any defence or other fact going against the grant of the relief sought. The case of **Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac**[26] is supportive of the point that the applicant has a duty to make "a full and fair disclosure of all the material facts." The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries will be held to be proper and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application and (b) the order for which the application is made and the probable effect of the order on the defendant.

[68] The rule that an injunction without notice will be discharged if it was obtained without full and frank disclosure has a dual purpose. It will deprive wrongdoer of an advantage improperly obtained. It also serves as a deterrent to ensure that persons who make applications without notice realize that they have this duty of disclosure.

[69] The Learned Authors of Civil Procedure, Volume 1 Autumn 2001 (the White Book) outlined the principles at page 430:

> "It is well-established that an applicant who applies for an interim remedy without notice to the respondent is under a duty to investigate the facts and fairly to present the evidence on which he relies…. The applicant must disclose fully to the court all matters relevant to the application, including all matters, whether of fact or of law, which are, or may be, adverse to it…. In *Memory Corporation Plc v Sidhu [2000] 1 WLR 1443, CA*, Mummery L.J. said (at page 1459) it is a "high duty" and

[24] Page 34 of GY1-Bundle 2.
[25] Page 55 of GY1 –Bundle 2.
[26] [1917] 1 K.B. 486, 514, per Scrutton LJ.

> requires the applicant to make full, fair and accurate disclosure of material information to the court and to draw the court's attention 'to significant factual, legal and procedural aspects of the case' The duty has always been important. "

[70] More support for this principle is the case of **Enzo Addari v Edy Gay Addari.**[27] Rawlins J (as he then was) stated:

> "An applicant who seeks a freezing order, without notice, is under a duty to make full and frank disclose of all material facts that touch the case. The applicant must disclose all such facts that are within his or her knowledge, as well as facts that would have come to his or her attention with reasonable diligence or upon reasonable inquiries. The duty is a continuing one. The result is that an applicant must bring any material changes in circumstances that occur after the grant of the freezing order to the attention of the court. At this stage, a court should not attempt to resolve complex issues of disputed facts or law on an application to discharge or to vary a freezing order."

[71] The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries will be held to be proper and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application and (b) the order for which the application is made and the probable effect of the order on the defendant.

[72] In deciding in a case where there has undoubtedly been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of a fresh injunction, it is pertinent that the court assess the degree and extent of the culpability with regard to the non-disclosure, and the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. If the duty to disclose is not observed, the Court may discharge the injunction. It is no excuse for the Applicants to say, as they have done here, that they were unaware of the amended and restated Articles of Association. They should have been aware of the Memorandum and Articles of ECH and ought to be informed of the law which governs this dispute.

[27] BVIHCV2003/0209, Judgment delivered on 19 July 2004.

[73] A court must also take all the relevant circumstances into account when it is determining the consequences for the breach of the duty to make full and frank disclosure. The circumstances should include the gravity of the breach. It should also include the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant. This latter should involve the consideration whether the consequences of the breach were remediable and were in fact remedied. The court must also bear in mind the overriding objective and the need for proportionately in accordance with the overriding objective of CPR 2000.

[74] Be that as it may, the discharge of the order is not automatic on a finding of any material non-disclosure. The court has a discretion to discharge the order or not to discharge it. It may also decide to grant fresh injunctive relief if it determines that justice requires it to protect the applicant. The court should note that, by its very nature, an application without notice usually requires a lawyer to take instructions and prepare drafts and pleadings in some haste. The court should weigh this against the need to uphold and enforce the duty to disclose as a deterrent to those who withhold material facts. At the end of the day, an interlocutory injunction may be discharged for serious and culpable non-disclosure.

[75] In **Behbehani v Salem**[28], Woolf LJ stated that:

> It is preferable, in my view, for each case to be considered on its own merits, taking into account the public interest which exists in protecting the administration of justice from the harm that will be caused if the applicants for the draconian relief of Mareva and Anton Pillar orders do not, on an ex parte application, make disclosure of all the material facts, whether or not the non-disclosure is innocent. I recognize the strain placed on legal advisers and the pressure under which they have to work, especially in large commercial actions, where prompt steps sometimes have to be taken in order to protect their client's interests. However, if the court does not approach the question of the non-disclosure of material matters in the way that has been indicated in earlier decisions, there will be little hope of solicitors who are subjected to such pressures appreciating the importance of making full disclosure and, more important, bringing home to the clients the serious consequences of non-disclosure."

[28] [1989] 2 All ER 143

[76] As I have already indicated, the Court was not taken to (i) the amended and restated Articles of Association of ECH filed in October 2006 and (ii) the relevant provisions of the BCA which governed the dispute. I echo the judicious words of Lord Woolf that in large commercial actions, the pressure and strain placed upon legal practitioners are monstrous. But, in my judgment, the first thing that a lawyer ought to do in a case such as this one was to look at the Memorandum and Articles of Association of the company and to inform the Court properly with regards to the applicable legislation. These were not matters beyond the lawyer's reach.

[77] Had I been taken to the amended and restated Articles and the relevant sections of the BCA particularly section 13, I would have been in a better position to decide whether or not to grant the injunction. In my considered opinion, the Applicants, being under a duty to make full and frank disclosure to the Court, did not do so and the interlocutory injunction cannot continue in the light of their failure to present their case fairly to the Court.

Conclusion

[78] For all of the reasons stated, which owe much to Ms Cunningham's formidable arguments, the application to continue the interim injunction which was granted on 17 September 2007 and extended by further order on 2 October 2007 is dismissed and the injunction is hereby discharged. The Applicants will pay the First to Fourth Respondents' costs to be assessed if not agreed.

[79] Finally, it would be remiss of me if I do not acknowledge the sterling presentation made by Mr Morgan both in his oral and written submissions.

Indra Hariprashad-Charles
High Court Judge