AMERASEKERE
v.
MITSUI AND COMPANY LTD., AND OTHERS

SUPREME COURT.
G.P.S. DE SILVA, J., AMERASINGHE, J., AND KULATUNGA, J.,
S.C. APPEAL NO. 33/92.
S.C. APPEAL NO. 34/92.
S.C. SPECIAL LEAVE TO APPEAL APPLICATIONS NOS. 18 & 19.
C.A. LEAVE TO APPEAL APPLICATIONS NO. 206 AND 208/91.
D.C. COLOMBO CASE NO. 3155/SPL.
NOVEMBER 18 AND 19, 1992.

Company Law – Right of shareholder not qualified under 210 and 211 to bring derivative action as representative of the Company and injunctive relief – Locus standi.

If in the circumstances it is impossible to get the company itself to bring an action to protect its own interests because the directors are unwilling or helpless to intervene, a shareholder can sue in his own name, but in truth on behalf of the company, to enforce rights derived from it.

Where there is a *prima facie* case and a reasonable prospect of success and the plaintiff has actual and legally recognizable rights and the balance of convenience in his favour, an interim injunction should be granted.

Per Amerasinghe J: "However I am unable to accept Mr. Amerasinghe's submission that the plaintiff had no standing at all and his suggestion that the plaintiff's case was, therefore utterly hopeless. If in the circumstances alleged by the plaintiff, he was unable to induce the fourth defendant company to take effective steps to protect its own interests, and if as he alleges what he complains of cannot be validly effected or ratified by ordinary resolution, then it appears that he had every right as a representative of the company to obtain an injunction".

Cases referred to :

01. *Wallersteiner v. Moir* (No. 2) (1975) 1 All ER 849, 855, 856, 858.
02. *American Cyanamid v. Ethicon Ltd.*, (1975) AC 396, 407.
03. *Yakkaduwe Sri Pragnarama v. Minister of Education* (1969) 71 NLR 506, 511.
04. *Bandaranaike v. State Film Corporation* [1981] 2 Sri LR 287, 294-299, 302-303.
05. *Dissanayake v. Agricultural and Industrial Credit Corporation* (1962) 64 NLR 283, 285.
06. *Jinadasa v. Weerasinghe* (1929) 31 NLR 33, 34.
07. *Ceylon Cold Stores v. Whittal Boustead Ltd., C.A.L.A. 35/80 D.C. Colombo* 1820 Spl. C.A. Minutes of 22.4.80.
08. *Ratnayake v. Wijesinghe and others* [1989] 1 Sri LR 406.
09. *Preston v. Luck* (1884) 27 Ch. D. 497, 505-506, 508.
10. *Hubbard v. Vosper* [1972] 2 QB 84, 96.
11. *Evans Marshall & Co., v. Bertola S.A.* [1973] 1 WLR 349, 365, 378, 379.
12. *Fellowes v. Fisher* [1975] 3 WLR 225.
13. *Hubbard v. Pitt* (1975) 3 WLR 201.
14. *Richard Perera v. Albert Perera* (1963) 67 NLR 445, 447, 448, 449.
15. *Gamage v. The Minister of Agriculture and Lands* (1973) 76 NLR 25, 43-44.
16. *Montgomery v. Montgomery* [1964] 2 All ER 22.
17. *Gouriet v. Union of Post Office Workers* [1978] AC 435.
18. *Gray v. Lewis* (1873) 8 LR Ch. App. 1035.
19. *Menier v. Hoopers Telegraph Works* (1874) LR 9 Ch. 350, 353.
20. *MacDougall v. Gardiner* [1875] 1 Ch. D. 13, 24.
21. *Mason v. Harris* (1879) LR 11 Ch. 97, 104-105, 107-108.
22. *Cook v. Deeks and others* (1916) 1 AC 554.
23. *Daniels and Others v. Daniels and Others* [1978] 2 All ER 89, 96.

24. *Burland v. Earle* [1902] AC 81.
25. *Prudential v. Newman Industries No. 2* [1982] 1 All ER 354, 357, 366.
26. *Murugesu v. Northern Divisional Agricultural Producers Co-operative Union Ltd.*, (1952) 54 NLR 517.
27. *Gnanapragasam v. Swaminathan* [1983] 2 Sri LR 140.
28. *Kumarasena v. Data Management Systems Ltd.*, [1987] 2 Sri LR 190.
29. *Manchester Corporation v. Conolly* [1970] 1 Ch. 420.
30. *Woodward v. Smith* (1970) 1 All ER 109.
31. *Estmanco Co. (Kilmer House) Ltd., v. Greater London Council* [1982] 1 All ER–437.
32. *London and Blackwell Railway v. Cross* (1885) 31 Ch. D. 354, 369.

APPEAL against order of Court of Appeal granting leave to appeal against the interim injunction granted by the District Court. (Order of Court of Appeal is reported in (1992) 1 Sri L.R.)

H.L. de Silva P.C. with *K. Kanang-Isvaran P.C.*, with *C.V. Vivekanandan, Anil Tittewela* and *Harsha Cabral* for petitioner.

Eric Amerasinghe, P.C. with *L.A. Wickramasinghe, H. Soza* and *Anil Silva* for 1st and 2nd Defendants-petitioners-appellants-respondents.

L.C. Seneviratne P.C. with *T.C. Boange* and *S.D. Yogendra* for 2nd defendant-respondent.

Cur. adv. vult.

December 02, 1992.

AMERASINGHE, J.

Work on the construction of the Colombo Hilton Hotel commenced in or about March 1984 and the hotel was opened for operations on 1st July, 1987. Mitsui & Co Ltd of Tokyo, the first defendant, and Taisei Corporation of Tokyo, the second defendant, were promoters, contractors, suppliers, financiers and shareholders who have representation on the Board of Directors. The third defendant, Kano Kikkau Sekkeisha Yzo Shibata & Associates, were the architects responsible for the design and supervision of the project. The fourth defendant was formerly known as Lanka Japan Hotels Ltd. On 20th October 1983 it came to be known as Hotel Developers (Lanka) Ltd. This company owns the Hilton Hotel. Cornel Lionel Perera, the fifth defendant, is the Chairman and Managing Director of Hotel Developers (Lanka) Ltd. The others named in the plaint as defendants are Directors of the Board of Hotel Developers (Lanka) Ltd.

Nihal Sri Ameresekere, the plaintiff, was also connected with the Hilton project. He was one of the subscribers of the Memorandum and Articles of Association of the company that owns Hilton Hotel ; he is decribed as a Director in the Prospectus of the Company issued on 11th March 1983 (P 5) ; he continued as a Director until his removal from that position on 22nd December 1990. He holds 70,000 shares in the Company.

It seems that, for supposed or actual reasons, Ameresekere, was unhappy or uncertain with regard to certain aspects of the execution of the project and from time to time sought clarification and information, and being dissatisfied with certain aspects of the conduct of the company's affairs eventually on 17th September 1990 filed an action in the District Court of Colombo against the defendants. The plaintiff prayed as follows :

(a) for a declaration that the 1st and 2nd Defendants are not entitled to any payments, whatsoever under and in terms of and according to the tenor of the said Construction Agreement referred to herein.

(b) for a declaration that the said Mitsui, the 1st Defendant is not entitled to any payment, whatsoever under and in terms of and according to the tenor of the said Supplies Contract referred to herein.

(c) for a declaration that the 3rd Defendant is not entitled to have received any payments whatsoever, under and in terms of and according to the tenor of the Design & Supervision Contract referred to herein.

(d) for a declaration that the said Mitsui Taisei Consortium, the 1st and 2nd Defendants abovenamed are not entitled to make any claim, whatsoever under the said Loan Agreement referred to herein and therefore precluded from claiming under or enforcing the said Guarantees referred to herein.

(e) for a declaration that the said Hotel Developers, the 4th Defendant Company is not under any obligation to make any further payment, whatsoever to the 1st and/or 2nd and/or 3rd Defendants abovenamed under the said contracts and agreements, namely; the Construction

Agreement, Supplies Contract, Design & Supervision Contract and the said Loan Agreement.

(f) for a declaration that the said Hotel Developers, the 4th Defendant is entitled to the reimbursement of all monies paid and received by the 1st and/or 2nd and/or the 3rd Defendants abovenamed, to date.

(g) for an Interim injunction restraining the said Mitsui/Taisei Consortium and the said Architects, the 1st, 2nd and 3rd Defendants respectively, by themselves, their representatives, servants and agents or otherwise howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever in any manner howsoever, under the said Contracts and Agreements, namely ; the Construction Agreements, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two Guarantees and referred to in the plaint, until the final determination of this action.

(h) for an Interim Injunction restraining the 4th Defendant Company by itself, its Directors, Servants and Agents or otherwise, howsoever, from entertaining any demand and/or claim from the 1st and/or the 2nd and/or the 3rd Defendants abovenamed in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever, in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Loan Agreement referred to in the plaint until the final determination of this action.

(i) for a Permanent Injunction restraining the said Mitsui/Taisei Consortium and the said Architects, the 1st, 2nd and 3rd Defendants respectively, by themselves, their representatives, servants and agents or otherwise, howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever, in any manner howsoever, under the said Contracts and Agreements, namely ; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two Guarantees referred to in the plaint.

(j) for a Permanent Injunction restraining the said Hotel Developers, the 4th Defendant Company by itself, its Directors, servants and agents or otherwise howsoever, from entertaining any demand and/or claims, whatsoever, from the 1st and/or 2nd and/or 3rd Defendants abovenamed in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendant and/or paying any monies, whatsoever in any manner howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Agreement referred to in the plaint.

(k) for costs ; and

(l) for such further or other reliefs as to the Court shall seem meet.

The learned District Judge issued enjoining orders in terms of prayer "g" restraining the first, second and third defendants from making claims and recoveries in respect of the specified agreements relating to the Hilton Project and in terms of prayer "h" restraining Hotel Developers (Lanka) Ltd., the fourth defendant, entertaining any demands and making any payments with regard to the Hilton project. Upon notice being issued, and after considering the pleadings, objections and other documents filed, and submissions of learned counsel, the learned District Judge by his Order dated 9th September 1991 issued the interim injunctions prayed for by the plaintiff.

The learned District Judge was of the view that the questions raised by the plaintiff with regard to the appropriateness and nature of payments to the first, second and third defendants ; and whether there was fraudulent collusion to "deviously siphon out foreign exchange" from the company and the country, ought to be considered at a "full trial" and upon a consideration of the evidence adduced at such trial. However, he said, if what the plaintiff alleged was true, then injunctions should be issued to prevent such "siphoning out" because otherwise, the learned District Judge held, the "extensive loss" that would be caused would be "irremediable", for the possibility of recovery once the money had gone abroad would be remote. A person seeking justice, he said, should not be prevented from doing so. On the other hand, as far as the first, second and third defendants were concerned, any loss caused to them by delay

in the making of any payments due could be offset by the payment of interest.

The first and second defendants, and the third defendant separately, sought leave to appeal to the Court of Appeal. On 31st January 1992, the Court of Appeal granted leave to appeal.

The plaintiff sought special leave to appeal to the Supreme Court from the order of the Court of Appeal granting leave to appeal in respect of both applications 206 & 208 of 1991. This Court granted leave to appeal on the question "whether granting of leave by the Court of Appeal against the interim injunction by the District Court on 09.09.91 is sustainable in law". By consent of the parties it was agreed that the appeals relating to the first and second as well as the third defendants would be heard together.

I am of the view that the granting of leave by the Court of Appeal against the interim injunction granted by the District Court on 09.09.91 is not sustainable in law for several reasons.

To begin with, the Court of Appeal granted leave to appeal in a matter that was not before it. The Court erroneously assumed that the matter before it was concerned with an injunction granted against the fourth defendant, *viz.* Hotel Developers (Lanka) Ltd. The Court of Appeal said: "The plaintiff in paragraph 61(h) of his plaint prayed for an injunction against the fourth defendant".

However, the fourth defendant did not file any objections or make any submissions to the District Court on the matter. Nor did the fourth defendant seek leave to appeal from the Order of the District Court.

Nevertheless the Court of Appeal permitted the participation of Counsel for the fourth defendant at the hearing of the leave to appeal proceedings relating to the application of the first, second and third defendants on the basis that the fourth defendant was a "necessary party". The fourth defendant was a necessary party to the proceedings in the District Court, in relation to the granting of an injunction against the fourth defendant in terms of paragraph 61(h) of the plaint, but not in relation to an appeal concerning an injunction granted against the 1, 2 & 3 defendants in terms of paragraph 61(g) of the plaint. In fact, when learned Counsel for the 4th defendant attempted to make submissions at the hearing of the special leave to appeal

application before the Supreme Court on 21.05.92, the Court refused to let him do so. The Court of Appeal granted leave to appeal against an order that was not before it and so, obviously, the grant of leave in these cases is not "sustainable in law."

The Court of Appeal seems to have been of the view that leave to appeal should have been granted because the learned District Judge had failed to satisfy himself that, in terms of section 54 of the Judicature Act No. 2 of 1978 sufficient grounds existed for the granting of an injunction.

The Court of Appeal in its Order said as follows :

> According to the provisions of section 54 of the Judicature Act, the Court must satisfy itself, "that sufficient grounds exist" before injunctive relief is granted. It does not appear from the Order of the learned District Judge that he has addressed his judicial mind to the question whether the plaintiff-respondent has adduced sufficient evidence to make out a *prima facie* case, although reference to some documents by name has been made, in passing.

The Counsel for the 1st and 2nd defendant-respondents submitted that the plaintiff-respondent has no *locus standi* to bring this action. He contended that the facts urged by the plaintiff-respondent does not disclose a cause of action. He also submitted that plainiff-respondent does not have a right to bring a derivative action. The Counsel for the 7th defendant-respondent submitted that right to bring a derivative action does not exist under the Sri Lankan law. He submitted that the Companies Act of Sri Lanka is comprehensive on the rights of the shareholders. He further argued that the only rights available to a shareholder are those specified in section 210 and 211 of the Companies Act, in this regard. Those rights he pointed out could only be exercised by a shareholder having a minimum of five percent of shares of the Company. The learned Counsel for the plaintiff-respondent cited section 3 of the Civil Law Ordinance, and contended that the law applicable in regard to the matter is the English Law. He pointed out that in the case of *Wallersteiner v. Moir (no. 2)* [1] this right has been recognised in England. Therefore he argued that a right to bring a derivative action exists in Sri Lanka. In our view these are fit questions of law to be decided in appeal and we accordingly grant leave to appeal.

Mr. H. L. de Silva, P.C., referred to various averments set out in the plaint and argued that the learned District Judge had properly exercised his discretion in granting the interlocutory injunctions prayed for. Mr. de Silva, P.C., maintained that the learned District Judge had duly considered and evaluated the abundant information in the pleadings, objections, documents filed and submissions made and satisfied himself that there was a serious question to be tried at the hearing and that a *prima facie* case had been made out, both with regard to the reliefs sought and the existence of legally enforceable rights. The learned District Judge had then, having weighed the needs of the plaintiff and defendants, correctly determined that the balance of convenience lay on the side of the plaintiff. Mr. de Silva referred to the provisions in the contracts, prospectus and other documents and said that the plaintiff's case was that the first, second and third defendants had not carried out their work in accordance with the contracts and arrangements entered into although they had been paid certain sums already and might be paid other sums in future. Although ordinarily it should have been the fourth defendant that should have sought the reliefs prayed for, yet, in the circumstances of this case, because it was impossible to get the company itself to bring this action, the plaintiff, as a shareholder had done so in his own name, but in truth on behalf of the company to enforce rights derived from it. If the plaintiff eventually succeeds, a declaration that the fourth defendant company, in terms of prayer (f) of paragraph 61 of the plaint, was entitled to reimbursement, would be rendered nugatory and ineffectual by what the learned District Judge had called "siphoning out" of funds from the company and the country under the pretext of making payments supposed to be due under the contracts and agreements relating to this case. Whether the plaintiff would succeed in obtaining such a declaration, based as it is on contested facts and disputed questions of law *ex hypothesi* is uncertain and will remain uncertain until final judgment is given in the action. However, until such time, it was necessary by injunctions to restrain the defendants from disturbing the *status quo* in order to ensure that if he succeeds, the declarations would be meaningful and that the plaintiff and the company would not be left with a pyrrhic victory. The refusal to grant the injunctions would deprive the fourth defendant of actual redress and result in eventual injustice. In the circumstances leave to appeal should have been refused.

There was no dispute that there was a "serious question" in the sense of a matter to be tried that was "not frivolous or vexatious", as Lord Diplock put it in *American Cyanamid v Ethicon Ltd* [2] Nor

was it in dispute that the learned District Judge had, as he ought to have, made an assessment of the balance of convenience in accordance with the applicable principles in that regard. (Cf. *Yakkaduwe Sri Pragnarama v Minister of Education* [3] ; *Bandaranaike v. State Film Corporation and Another* [4] at 302-303).

Mr. Eric Amerasinghe, P.C., however maintained that much more than that was required to have justified the learned District Judge's order granting the injunctions prayed for: The order in respect of an interim injunction, he said, was a "final order" on which no further determination would be made and, therefore, he said it was "unlike any other interlocutory determination". The granting of the interim injunctions would create an estoppel and give rise to defences based on *res judicata.* The questions before the court could not be finally decided on a *prima facie* basis. The plaintiff is a mere shareholder who had no *locus standi.* If, as suggested by the plaintiff, the fourth defendant company was defrauded or its rights had been otherwise violated, it was for the fourth defendant to complain. If, as he now suggests, the plaintiff came into court claiming derivative rights, that was not evident from the form of the proceedings. There was, he said, "no hint or any suggestion in the plaint that this action was being instituted as a derivative action". It was referred to for the first time in the oral submissions of Counsel to the learned District Judge. In any event, learned President's Counsel for the first and second defendants said that even "with some strained effort, by wading through the rambling averments contained in the plaint" he could discover nothing to show that the fourth defendant was entitled to the reliefs claimed. Learned Counsel referred to various plans and documents including, what he said were duly amended and authorized plans, especially (P 54), and submitted that the work had been carried out by the first and second defendants in accordance with the relevant contracts and agreements and that the fourth defendant had no cause of action against them. Therefore the plaintiff could not derive any rights which the fourth defendant itself did not possess. Paragraphs 31, 32, 40C, 57, 58 and 59 of the plaint, indicated that, in the alleged circumstances of the case, a cause of action, if any was "rooted in contract". The rest of the plaintiff's averments, Mr Amerasinghe submitted were concerned with the creation of a certain "atmosphere". They were introduced to suggest fraudulent conduct for the purpose of establishing that the defendants were "wrong-doers" and thereby enabling the plaintiff to suppose that he could bring the action. The remedy for a breach of contract, if any, was confined to damages.

The learned District Judge, Mr. Amerasinghe, P.C. said, had been misled by the irrelevant consideration of the remittance of money abroad. That was a matter for the authorities concerned with exchange control and not a matter to be taken into account in granting an injunction.

Although some decisions suggest that, apart from questions relating to the balance of convenience and equities, all that needs to be established is a "serious question" to be tried, (e.g. see per H.N.G. Fernando, J in *Dissanayake v Agricultural and Industrial Credit Corporation* [5] per Lord Diplock in *American Cyanamid v Ethicon Ltd (supra),* I agree that somewhat more was necessary before the injunctions were granted. It is this : The learned District Judge should have been satisfied that the plaintiff had a *prima facie* claim and a reasonable prospect of success even in the light of the defences raised in the pleadings, objections and submissions of the defendants. (*See Jinadasa v Weerasinghe* [6] per Dalton, J ; *Ceylon Cold Stores v Whittal Boustead Ltd.* [7] *Bandaranayake v State Film Corporation* [4] per Soza, J ; *Ratnayake v Wijesinghe and others* [8] per Goonewardene, J ; *Preston v Luck* [9] per Cotton, LJ ; *Hubbard v Vosper* [10] *Evans Marshall & Co v Bertola S.A.*[11] per Kerr, J. See also *Fellowes v Fisher* [12] ; *Hubbard v Pitt.*[13]

I also agree that the injunctions should not have been issued unless the learned District Judge was satisfied that the plaintiff had actual, legally recognizable rights and not merely rights claimed by him. (See *Richard Perera v Albert Perera* [14] *Gamage v The Minister of Agriculture and Lands* [15]; *Montgomery v Montgomery* [16]; *Gouriet v Union of Post Office Workers*[17]. The question the learned District Judge had to consider was what was proper to be done between the time for the matter relating to the injunctions and the hearing and final determination of the action. He did not have to decide the rights of the parties any further than was necessary in determining the question. In order to determine that question it was essential for the learned District Judge to see whether the plaintiff had any *locus standi.* (Cf. *Preston v Luck* [9] per Lindley, LJ). However I am unable to accept Mr. Amerasinghe's submission that the plaintiff had no standing at all and his suggestion that the plaintiff's case was, therefore, utterly hopeless. If in the circumstances alleged by the plaintiff, he was unable to induce the fourth defendant company to take effective steps to protect its own interests, and if as he alleges what he complains of cannot be validly effected or ratified by ordinary

resolution, then it appears that he had every right as a representative of the company to obtain an injunction. (E.g. see Row on Injunctions, 6th Ed. 1985 Vol 2 pp. 903 et seqq. Cf. also *Gray v Lewis* [18] ; *Menier v Hoopers Telegraph Works* [19] per James, LJ *MacDougall v Gardiner* [20] ; *Mason v Harris* [21] per Malins, VC and per Jessel, MR at pp. 107-108 ; *Cook v Deeks and others* [22] per Lord Buckmaster, LC; *Wallersteiner v Moir* [1] especially per Lord Denning, MR at pp. 855-856 ; *Daniels and others v Daniels and others* [23] especially at p. 96, per Templeman, J. Cf. also Gower's Principles of Modern Company Law, 1979, 4th Ed. esp. at pp. 644-656 ; Pennington's Company Law, 1985, 5th Ed esp. at pp. 727-742 ; Palmer's Company Law 24th Ed. 1987 Ch. 65 pp. 975-986). Whether the plaintiff will in fact establish the circumstances upon which he bases his derived rights to obtain the declarations of a permanent, as distinct from an interim nature is, of course, a matter that will depend on what the evidence will lead the learned District Judge to decide at the end of the trial.

I am unable to agree with Mr. Amerasinghe's submission that the fact that the plaintiff had not adopted a particular form in bringing the action was a sufficient ground for rejecting the plaint and the prayer for the injunction. The usual form of action is merely a matter of procedure in order to give a remedy for a wrong that would otherwise escape redress. (Per Lord Davey in *Burland v Earle* [24]; *Wallersteiner v Moir* (supra) per Lord Denning, MR, at p. 858). Indeed, the use of what was described in *Prudential v Newman Industries* [25] as the "time-honoured formula" for the purpose of bringing a derivative action, namely, "AB (a minority shareholder) on behalf of himself and all other shareholders of the Company vs. The wrongdoing Directors and the Company", might even be misleading, for as Gower (quoted with approval by Lord Denning in *Wallersteiner (ibid)* points out, what really occurs is that the plaintiff shareholder is not acting as a representative of the other shareholders but as a representative of the company. The basis of the plaintiff's claim is that he has been compelled to bring this action as a minority shareholder, albeit holding what the first and second defendants in their written submissions to this Court at paragraph 6.04 described as "only 0.15% of the issued share capital as at 31st March 1990", because in the circumstances of the case, the directors, including the Government's representatives on the Board, will not assist or are helpless to intervene, especially in view of the powers given by the

Articles of Association (P1 and P10 a) to the representatives on the Board of the first and second defendants, the "foreign collaborators", in protecting the fourth respondent company. Whether the evidence will establish the averments supporting the plaintiff's position in this regard will have to await the trial. However, at this stage, I am of the view that the plaintiff had sufficient standing, as established by the material placed before the learned District Judge, to conclude that the interim injunctions should be granted. I should like to refer to the following observations of Lord Denning, MR, in *Hubbard v Vosper* [10] quoted with approval by Sachs, LJ in *Evans Marshall & Co v Bertola S.A* (supra) at p. 378 :

> " In considering whether to grant an interlocutory injunction, the right course for the 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 the best to be done. Sometimes it is best to grant an injunction so as to maintain the *status quo* until the trial. At other times it is best not to impose a restraint upon the defendant but to leave him free to go ahead... The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules. "

Admittedly the learned District Judge did not in his judgment discuss the material on the basis of which he came to the conclusion that the plaintiff had a real prospect of success. Having regard to the fact that at that stage questions involving serious allegations against some of the defendants had to be assessed on incomplete, conflicting and untested evidence, and having regard to the fact that such a discussion would also be necessarily embarrassing to the judge who will have eventually to try the case, I think the learned District Judge quite properly, in the circumstances of this case, desisted from expressly referring in detail to these matters in his judgment. The learned District Judge might well have said, as I now say on my own behalf, in the words of Kerr, J. in *Evans Marshall & Co v Bertola* : "It is undesirable that I should say more than necessary, and everything that I say is no more than by way of preliminary and *prima facie* impressions at this stage. "I want to make it as clear as I can that what I am saying in the matter before me should not in any way be construed at the trial as my concluded view on any matter of law or fact to be decided at the trial. That

is not to say that some consideration of the substantive questions at the stage of granting interim injunctions or in considering an appeal from the granting such an injunction is necessarily irrelevant. (Cf. per H. N. G. Fernando, J in *Richard Perera v Albert Perera* ; per Pathirana, J in *Hewawasam Gamage v Minister of Agriculture and Lands* [15]). Nor can it be said that the learned District Judge did not consider what he ought to have taken into account. However, it was not for him at the stage of considering whether to grant the interim injunction or for an appellate court considering the correctness of the granting of an interim injunction to determine the substantive questions. It can scarcely be gainsaid that there are cases in which it may be appropriate to dispose of the substantive issues once and for all. (E.g. see *Richard Perera v Albert Perera* (supra) at 449;. *Murugesu v Northern Divisional Agricultural Producers Co-operative Union Ltd* [26] *Gnanapragasam v Swaminathan* [27]; *Kumarasena v Data Management Systems Ltd* [28]. See also *Manchester Corporation v Conolly* [29]) Woodward *v Smith* [30]. However, this was not such a case. Therefore, what the learned District Judge was expected to do was to consider the material before him placed by all the parties and decide whether the plaintiff's prospect of success was real and not fanciful and that he had more than a merely arguable case. This he did, quite correctly, leaving the true and final position with regard to the complex questions of fact and difficult questions of law to be determined after what he referred to as a "full trial" after the action was fought to a finish. In deciding to grant the injunctions the learned District Judge was not deciding the substantive issues after a full-dress trial and making "final orders" on them bringing into operation the principles of estoppel and res judicata, as Mr. Amerasinghe, P.C., supposed. The "final orders", as Mr. Amerasinghe, P.C. described them related to the *interim reliefs prayed for* and not the *substantive questions relevant to the permanent reliefs claimed.* The *substantive questions* were not, as Mr. Amerasinghe complained, disposed of by the learned District Judge, as he said "in a *prima facie* way". The substantive questions were considered for the limited purpose of ascertaining whether the plaintiff had a reasonable prospect of success and, therefore, qualified to be granted the interim injunctions he had prayed for. What more could the learned District Judge have done except to consider the prospect of success on the basis of *preliminary and prima facie impressions*? He correctly left the concluded views on the substantive questions to be determined at the end of the trial. The Court of Appeal erred in assuming that substantive issues in the suit were appropriately triable at the

interim injunction stage and had been so tried ; and in deciding, therefore, that the matter before it was an appropriate case for granting leave to appeal upon which appeal if could express its views. Such a view is erroneous and therefore not sustainable in law.

I agree that if at the end of the trial there really is no relief which the fourth defendant can ask for and which the District Court could give the company, the plaintiff's action must fail. *(Cf. MacDougal v Gardiner* [20]. And I do appreciate the dilemma that emerges when a court is confronted with an application for an injunction by a plaintiff who brings the application in a derivative capacity. On the one hand, if the plaintiff can require the court to assume as a fact every allegation in the plaint as proved, the purpose of the rule in *Foss v Harbottle* would be easily outmanoeuvred by the mere allegation of fraud and control. If, on the other hand, the interim injunction is to be refused until the issue of fraud or control is decided, the injunction would serve very little or no purpose. The interests of justice, I think, are served in the circumstances by requiring the plaintiff to establish a *prima facie* case that (1) the company is entitled to the relief claimed, and (2) that the action falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle.* (Cf. *Prudential v Newman Industries No (2)* (supra) at p. 366). With regard to the first condition, where the facts alleged in the plaint are not disputed or clear, it has been suggested that the injunction might be granted if the plaintiff has an arguable case. (See *Estmanco Co. (Kilmer House) Ltd v Greater London Council* [31] cf. also Pennington 6th Ed. 655). The plaintiff points to articles 79, 127 and 129 of the Articles of Association of the fourth defendant which give the "foreign collaborators" special rights. However, the effect of these on the question of control is disputed, and therefore, the plaintiff had to have more than an arguable case. In my view, he succeeded in establishing a *prima facie* case with regard to both the conditions I have referred to.

With regard to the argument that considerations relating to the remittance of money abroad were matters for the exchange control authorities alone, it might be pointed out that it could not entirely be a matter of indifference to the Government, especially in the alleged circumstances of this case. The Government of Sri Lanka, by entering into an investment agreement (P 9) dated 31st January 1984, became a major shareholder in the fourth defendant company.

Moreover, by issuing a letter of guarantee (P 17 (b) to induce Taisei Corporation, the second defendant, to enter into a loan agreement (at the request of the Government of Sri Lanka) concurrently with Mitsui & Co., the first defendant, pursuant to which Taisei Corporation would lend a certain sum of money to the owners of the hotel, Hotel Developers (Lanka) Ltd., the fourth defendant, the Government made itself eventually responsible for the repayment of the monies borrowed by the fourth defendant.

The question of remittances was more directly relevant to the decision of the learned District Judge in this way : Admittedly, if damages were an adequate remedy, then as a matter of law an injunction should not have been issued. (E.g. see per Lindley, LJ in *London and Blackwell Railway v Cross* [32]. However, in the opinion of the learned District Judge, if the interim injunctions had not been granted, the declaration prayed for relating to reimbursement, if eventually granted, would be rendered meaningless and hollow. The action would then have been an exercise in futility.

In connection with Mr. Amerasinghe's submissions on the questions of the adequacy of damages as a remedy as well as his observations on the supposed irrelevance of certain matters, I should like to refer to the following observations of Sachs, LJ. in *Evans Marshall & Co. v Bertola S.A* (supra) at p. 379 para. H–p. 380 para. H:

> The standard question in relation to the grant of an injunction, "Are damages an adequate remedy?", might perhaps, in the light of the authorities of recent years, be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"....The courts have repeatedly recognized that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach....So far the question of adequacy of damages has been discussed on the footing that if judgment was recovered *(sic.)* the sum awarded would be paid. But whenever the adequacy of damages falls to be considered in this class of case, there arises the further question – are the defendants good for the money? Also (if they are abroad), will their government's exchange control permit the payment? In other words, will the judgment be satisfied?

As far as the learned District Judge was concerned, unless the interim injunctions were granted to prevent what he described as the "siphoning out of money" from the company and the country, the chance of eventual satisfaction of the judgment was "remote". Assuming that the plaintiff will succeed, then, but for the interim injunctions, the fourth defendant company, like Pyrrhus after the battle of Asculum in Apulia, might well be constrained to say, "One more such victory and we are lost."

Mr. L. C. Seneviratne, P.C., submitted that since the third defendant had already been fully paid, injunctions restraining that party from demanding, claiming, drawing, receiving and/or collecting monies and restraining the fourth defendant from entertaining any demand or claim or paying monies to the third defendant was inappropriate. On the other hand Mr. Kanag-Iswaran, P.C., pointed out that, in terms of the published accounts of the fourth defendant company, certain sums of money were shown as yet due to the third defendant and that this was, therefore, yet another disputed question to be decided at the trial, and not a matter for determination at the stage of deciding whether an interim injunction should be granted. I agree with Mr. Kanag-Iswaran.

For the reasons set out in my judgment, I hold that the granting of leave by the Court of Appeal against the interim injunction granted by the District Court on 09.09.91 against the first, second and third defendants is not sustainable in law. I therefore set aside the order of the Court of Appeal granting leave to appeal in Applications Nos. 206 & 208 of 1991 and affirm the order of the learned District Judge of Colombo dated 09.09.91 and delivered on 28.10.91 and direct the action to proceed to trial which I further direct shall be held and concluded as soon as practicable. I order the first and second respondents in these proceedings to pay a sum of Rs. 10,500/- as costs. I order the third respondent to pay Rs. 5225/- as costs.

G. P. S. DE SILVA, C.J. – I agree.

KULATUNGA, J. – I agree.

Order of Court of
Appeal granting
leave to appeal set aside.