RIH SERVICES (M) SDN BHD v. TANJUNG TUAN HOTEL SDN BHD
COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD, JCA; MOHD SAARI YUSOFF, JCA; MOHD NOOR AHMAD, JCA
CIVIL APPEAL NO: W-02-24-2002
13 MAY 2002
[2002] 3 CLJ 83

***CIVIL PROCEDURE**: Injunction - Ex parte injunction - Order of - Life span - Computation of 21 days - Whether includes the day order is made - Whether life span can be extended beyond 21 days - Rules of the High Court 1980, O. 3 r. 2(2), O. 29 r. 1(2B) - Interpretation Acts 1948 & 1967, s. 54(1)(a)*

***CIVIL PROCEDURE**: Injunction - Ex parte injunction - Order of - Whether order automatically lapses after life span of 21 days - Whether application for injunction still subsists upon lapse of order - Whether court has jurisdiction to grant ad interim injunction pending inter partes hearing of application*

***CIVIL PROCEDURE**: Injunction - Ex parte injunction - Damages - Entitlement of - Upon lapse of order*

The issue before the court was whether the learned judge was right in setting aside an *ex parte* injunction order on the basis that it fell outside the 21-day period pursuant to O. 29 r. 1(2B) Rules of the High Court 1980 ('RHC'). The learned judge had included the day the *ex parte* injunction order was made in computing the 21 days.

Held:

Per Abdul Hamid Mohamad JCA

[1] The day the injunction order was made should be excluded in computing the 21 days *(Sam Peng Thong & Ors v. Tetap Meriah Sdn Bhd)*. Order 29 r. 1(2B) RHC states "at the end of 21 days from the date on which it is granted". Both O. 3 r. 2(2) RHC and s. 54(1)(a) of the Interpretation Acts 1948 and 1967 require that the day the order is made to be excluded in reckoning the 21 days. Therefore, the *ex parte* injunction granted on 6 December 2001 expired on 27 December 2001. (p 90 d-f)

[2] The case of *Cheah Cheng Lan v. Heng Yea Lee* which decided that an *ex parte* injunction cannot be extended beyond the 21 days, was correctly decided. The *ex parte* order automatically lapses after 21 days. However, it is the *ex parte* order that lapses and **not** the application. The application upon service is converted to an *inter partes* application. The application now *inter partes* still subsists. (p 90 g)

[3] Even though the *ex parte* injunction order expired on 27 December 2001, the application was still in existence. In fact, it was still in existence on the day this appeal was heard. That being the case, the problem faced by the learned judge who for good reasons, could not hear the application *inter partes* on 26 December 2001 did not arise. (p 91 d-e)

[4] The learned judge clearly had the jurisdiction to consider whether to grant an *ad* interim injunction pending the *inter partes* hearing of the application. In *Jakob Renner v. Scott King*, an *ad* interim injunction was granted pending the hearing of an application for an interim injunction which was to be heard *inter partes.* (p 92 b-e)

[5] The *ad* interim injunction is not an extension of the *ex parte* order which expires after 21 days. It is a fresh order made on the converted *inter partes* application now before the court. When the court finally hears the application *inter partes,* the court will then decide whether to grant an injunction, *inter partes*. That will be a fresh order again. (p 92 f)

[6] If the defendant wants to set aside the *ex parte* order, the defendant is at liberty to file an application for that purpose. It is at the hearing of that application that the court should decide whether to set it aside, if it has not lapsed. If in the meantime, the *ex parte* order has lapsed, the court should nevertheless hear the application, not for the purpose of determining whether to set it aside because it has lapsed, but for the purpose of determining whether it should have been made in the first place. This is necessary in order to determine whether damages should be awarded. (pp 92 h-i & 93 a)

[7] It was wrong for the learned judge to set aside the *ex parte* order. The fact that the *ex parte* order automatically expired after 21 days did not mean that it was wrongly granted in the first place. Also, the fact that the application could not be heard *inter partes* within 21 days did not mean that it was wrongly given. Further, there was no application before the court to set aside the *ex parte* order. (p 93 b-d)

[8] The learned judge should not have made an order that the appellant make good its undertaking as to damages. The fact that an *ex parte* order automatically lapses after 21 days does not mean that the defendant is automatically entitled to damages. The question should have been whether the *ex parte* should have been made at all? Only if it should not have been made, should the order for assessment of damages be made. That had not been decided. There was not even an application for that purpose. (p 93 e)

[9] It was unfair of the learned judge to penalise the appellant with costs as the *ex parte* order had lapsed and was not set aside. Neither was it found to have not been made in the first place. Therefore, costs should be in the cause. (p 93 g)

*[**Bahasa Malaysia** Translation Of Headnotes]*

Isu dihadapan mahkamah ini adalah sama ada keputusan Hakim Mahkamah Tinggi

mengenepikan perintah injunksi *ex parte* adalah betul atas dasar perintah itu adalah di luar tempoh 21 hari menurut A. 29 k. 1(2B) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KKMT'). Hakim tersebut telah mengambil kira hari perintah injunksi *ex parte* itu dibuat dalam pengiraan tempoh 21 hari itu.

Diputuskan:

Oleh Abdul Hamid Mohamad HMR

[1] Hari perintah injunksi itu dibuat tidak harus diambilkira dalam pengiraan tempoh 21 hari itu *(Sam Peng Thong & Ors v. Tetap Meriah Sdn Bhd)*. Aturan 29 k. 1(2B) KKMT menyatakan "at the end of 21 days from the date on which it is granted". Aturan 3 k. 2(2) KKMT dan s. 54(1)(a) Akta Tafsiran 1948 dan 1967 mengkehendaki hari perintah itu dibuat dikecualikan dalam pengiraan 21 hari. Oleh itu, perintah injunksi *ex parte* itu yang dibuat pada 6 Disember luput pada 27 Disember 2001.

[2] Keputusan kes *Cheah Cheng Lan v. Heng Yea Lee* bahawa injunksi *ex parte* tidak boleh dilanjutkan melebihi 21 hari adalah betul. Perintah *ex parte* itu secara automatiknya luput selepas 21 hari. Walaubagaimanapun, hanya perintah *ex parte* itu yang luput selepas tempoh itu dan bukan permohonannya. Permohonan selepas penyampaian bertukar menjadi permohonan *inter partes*. Permohonan yang sekarang menjadi permohonan *inter partes* itu masih sah.

[3] Walaupun perintah permohonan injunksi *ex parte* itu luput pada 27 Disember 2001, permohonannya masih sah. Malah, permohonan itu masih sah pada tarikh rayuan ini didengar. Atas sebab ini, masaalah yang dihadapi oleh Hakim Mahkamah Tinggi yang tidak dapat mendengar permohonan *inter partes* itu pada 26 Disember 2001 atas alasan yang wajar tidak timbul.

[4] Hakim Mahkamah Tinggi jelas mempunyai bidangkuasa sama ada untuk membenarkan injunksi *ad* interim sementara menunggu pendengaran permohonan *inter partes* itu. Dalam kes *Jakob Renner v. Scott King*, injunksi *ad* interim diberikan sementara menunggu pendengaran permohonan injunksi interim *inter partes*.

[5] Injunksi *ad* interim bukanlah tambahan kepada perintah *ex parte* yang luput selepas 21 hari. Ia adalah satu perintah baru yang dibuat pada masa ini di hadapan mahkamah ke atas permohonan *inter partes* itu. Apabila permohonan *inter partes* itu didengar kelak, Mahkamah akan pada masa itu memutuskan sama ada untuk membenarkan perintah injunksi *inter partes*. Perintah ini akan menjadi satu perintah yang baru.

[6] Sekiranya defendan ingin mengenepikan perintah *ex parte* itu, defendan bebas memfailkan satu permohonan untuk tujuan tersebut. Pada masa pendengaran permohonan itu, mahkamah akan memutuskan sama ada untuk mengenepikan perintah *ex parte* itu sekiranya ia tidak luput. Sekiranya dalam masa itu, perintah *ex parte* itu sudah luput, mahkamah sepatutnya mendengar juga permohonan itu, bukan untuk tujuan memutuskan sama ada untuk mengenepikannya memandangkan perintah itu telah luput tetapi untuk

memutuskan sama ada permohonan perintah *ex parte* itu patut dibuat pada kali pertamanya. Ini adalah perlu dalam memastikan sama ada gantirugi harus diberikan.

[7] Hakim Mahkamah Tinggi tersalah dalam mengenepikan perintah *ex parte* itu. Oleh kerana perintah *ex parte* itu secara automatik luput selepas 21 hari bukanlah bermakna ianya telah salah diberikan. Begitu juga, kerana permohonan *inter partes* itu tidak dapat didengar dalam tempoh 21 hari bukanlah bermakna perintah itu salah diberikan. Lagi, tiada sebarang permohonan dibuat di hadapan mahkamah untuk mengenepikan perintah *ex parte* itu.

[8] Hakim Mahkamah Tinggi tidak sepatutnya memerintahkan perayu menepati akujanji gantiruginya. Oleh kerana perintah *ex parte* itu secara automatik luput selepas 21 hari bukanlah bermakna defendan secara automatiknya berhak ke atas gantirugi. Persoalannya adalah sama ada permohonan perintah *ex parte* itu sepatutnya dibuat. Sekiranya tidak, barulah perintah taksiran itu sepatutnya dibuat. Ini tidak diputuskan, malah tiada sebarang permohonan dibuat untuk tujuan itu.

[9] Adalah tidak adil untuk Hakim Mahkamah Tinggi mengenakan kos ke atas perayu memandangkan perintah *ex parte* itu telah luput dan bukan diketepikan. Perintah *ex parte* itu juga bukan tidak sepatutnya dibuat. Oleh itu, kos sepatutnya menjadi dalam kausa.

[Kedua-dua pihak dikehendaki menghadirkan diri di hadapan hakim yang arif untuk mendapatkan tarikh pendengaran permohonan inter partes; injunksi ad interim diberikan sehingga selesai pendengaran permohonan oleh hakim yang arif; deposit dipulangkan kepada perayu.]

Reported by Usha Thiagarajah

Case(s) referred to:

Beese & Ors (Managers of Kimpton Church of England Primary School) & Ors v. Woodhouse & Ors [1970] 1 All ER 769 ***(refd)***

Cheah Cheng Lan v. Heng Yea Lee [2001] 1 CLJ 727 ***(refd)***

Jagjit Singh Khanna v. Dr Rakhul Das Mullick & Anor AIR [1988] Cal 9 ***(refd)***

Jakob Renner v. Scott King [2000] 3 CLJ 569 ***(refd)***

Sam Peng Thong & Ors v. Tetap Meriah Sdn Bhd [2002] 1 CLJ 105 ***(foll)***

Legislation referred to:

Interpretation Acts 1948 & 1967, O. 54(1)(a)

Rules of the High Court 1980, O. 3 r. 2(2), O. 29 r. 1(2B)

Counsel:

For the appellant - CV Das (K Mohan & K Prakash); M/s Shook Lin & Bok

For the respondent - Yougesswary Singam; M/s Zainal Abidin & Co

JUDGMENT

Abdul Hamid Mohamad JCA:

The appellant (the plaintiff in the High Court) is the company that manages the Regency Hotel and Resort at Port Dickson, belonging to the respondent (the defendant in the High Court). A management agreement was entered by the parties on 15 September 1991. It was to last for ten years. The appellant would be paid 5% of the total annual revenue. Under the agreement the appellant was to have uninterrupted control and operation of the hotel and the respondent agreed not to interfere with the day to day running of the hotel.

On 5 December 2001, the appellant filed a suit (S5-22-1254 of 2001) from which this appeal arises. In the suit, the appellant alleges that the respondent had failed and/or neglected to pay the appellant its management fees from October 1995 amounting to RM348,582.43 as at 31 December 1996. The appellant also alleges that the respondent had wrongfully and unlawfully terminated the management agreement. There is also another suit filed in Kuala Lumpur High Court No. D2-22-67-96 between the parties which is still pending.

On 6 December 2001, the appellant filed an *ex parte* summons in chambers praying for the following orders:

> 1. The Defendant whether by its agents, servants, officers or howsoever, be restrained from interfering with or obstructing or hampering the Plaintiffs continued management and operation of The Regency Hotel and Resort, Port Dickson ("the Hotel").
>
> 2. The Defendant within 2 days of service of this order, whether by its agents, servants, officers or howsoever, including by way of signing cheques or issuing instructions, do all things as may be necessary to pay, authorise, or ensure payment of wages, allowances or contractual dues owing to or arising in respect of all persons working at the Hotel for the period November 2001 as specified in SCHEDULE A herein out of the funds generated by the operations of the Hotel including funds in Bumiputra Commerce Bank Account No. 05080007490051 and The Standard Chartered Bank Account No.

> 836144611102 ("the accounts"), and for subsequent months to pay, authorise or ensure payment from the funds as aforesaid in accordance with such lists of staff or employees as may be submitted by the Plaintiff to the Defendant within 7 days of receipt of such submission;
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> 3. The Defendant within 2 days of service of this order, whether by agents, servants, officers or howsoever, do all things as may be necessary to pay, authorise or ensure payment of outstanding amounts due to suppliers and creditors as specified in SCHEDULE B herein, out of the funds generated by the operations of the Hotel including funds in the accounts and to hereafter pay, authorise or ensure payment from the funds as aforesaid in accordance with such lists of creditors and suppliers as may be periodically submitted to the Defendant by the Plaintiff within 7 days of receipt of such submission;
>
> 4. The parties be at liberty to apply;
>
> 5. A date to be fixed for the *inter partes* hearing of this application;
>
> 6. That provision may be made for the costs of this application; and
>
> 7. Such further or other relief which this Honourable Court deems fit.

The learned judge heard the application (encl. 4) on 6 December 2001 and granted prayers (1), (2), (3) and (4). The learned judge also fixed the *inter partes* hearing on 24 December 2001.

On 24 December 2001, the *inter partes* hearing of encl. 4 was adjourned to 26 December 2001.

On 26 December 2001, learned counsel for the appellant, sought an adjournment because he had only been served with an affidavit by the respondent that very same morning and suggested that the *inter partes* hearing be fixed in the first week of January 2002. The learned counsel also prayed that in the interim period the *ex parte* injunction that was granted on 6 December 2001 be extended. There was an argument whether the *ex parte* order would expire on 26 December 2001 or 27 December 2001. That depends on when the computation of the 21 days is to begin, that is, whether the day the order was made is to be included or not. The learned judge held that the day the order was made must be counted and that the 21 days expires on 26 December 2001.

On the power to extend the *ex parte* order, the learned judge held that he was "constrained to follow" *Cheah Cheng Lan v. Heng Yea Lee* [2001] 1 CLJ 727 CA. This is what the learned judge says:

> With a heavy heart, I was constrained to follow *Cheah Cheng Lan* even though that decision was decided *per incurium* and even though that decision greatly eroded the inherent powers of the court "to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court" as set out in Order 92, rule 4 of the RHC. The doctrine of *stare decisis* compelled me to follow *Cheah Cheng Lan* blindly.

Consequently, the learned judge made the following orders:

> (1) set aside the *ex parte* interim injunction that was granted on 6 December 2001;
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> (2) order that the plaintiff make good its undertaking as to damages to the defendant and here the defendant has to file a formal application to support its application for that prayer;
>
> (3) refuse to extend the *ex parte* interim injunction that has automatically lapsed by today (26 December 2001) which the plaintiff orally requested to be extended until the hearing of the *inter partes*; and
>
> (4) costs to the defendant.

Before us, even though it is not essential for the determination of the appeal, we were asked to decide on the issue whether, in the computation of the 21 days life span of an *ex parte* injunction under O. 29 r. 1(2B) of the Rules of the High Court 1980 (RHC 1980), the day the order is made should be counted or not.

Order 29 r. 1(2B) reads:

> (2B) Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of 21 days from the date on which it is granted.

Order 3 r. 2(2) RHC 1980 provides:

> (2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

Order 54 of the Interpretation Acts 1948 and 1967 (Act 388) provides:

> 54(1). In computing time for the purpose of any written law:
>
> > (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing done;

The learned judge in this case had counted 6 December 2001, the day the injunction order was made in computing the 21 days. Our attention was drawn to the judgment of Syed Ahmad Helmy JC in *Sam Peng Thong & Ors. v. Tetap Meriah Sdn. Bhd.* [2002] 1 CLJ 105 in which the learned Judicial Commissioner excluded the day the order was made in computing the 21 days.

In our judgment, the view taken by Syed Ahmad Helmy JC is the correct view. It should be noted that O. 29 r. 1(2B) RHC 1980 talks about "at the end of 21 days from the date on which it is granted." Both O. 3 r. 2(2) RHC 1980 and s. 54(1)(a) of the Interpretation Acts 1948 and 1967 require that the day the order is made to be excluded in reckoning the 21 days. So, the

ex parte injunction granted on 6 December 2001 expired on 27 December 2001.

The next question to be answered is whether an *ex parte* injunction can be extended beyond the 21 days. The answer has clearly been given by this court in *Cheah Cheng Lan*. We have no reason to disagree with it, even if we can. We are of the view that that case was correctly decided, and all that it decided is that an *ex parte* injunction cannot be extended beyond the 21 days. The order automatically lapses after 21 days. It is the *ex parte* order that lapses, not the application, which upon service, is, by law, converted to an *inter partes* application. The application, now *inter partes*, subsists.

Previously, there was no provision as the present r. 1(2BA) of O. 29. So, upon the order being made on the *ex parte* application, the application can logically be said to have been exhausted. Now the rule provides that the same *ex parte* application be served on the relevant party within one week and the court is required to fix a date for *inter partes* hearing to be held before the expiry of the 21 days. What it means is that, upon it being served, its character changes to one of *inter partes*. True that a date of hearing *inter partes* must be fixed before the expiry of the 21 days. The purpose is to require the parties (now the parties, not just the applicant) to appear before the judge before the *ex parte* injunction expires. Of course, if the parties are ready, the court may hear and may decide whether to grant a fresh *inter partes* injunction or not. The court is not extending the *ex parte* injunction because it cannot by law be extended. Of course, it may be, for one reason or other, as in this case, that the court is unable to hear the application *inter partes*. What happens then? The *ex parte* order expires? Yes. The application, now converted into an *inter partes* application, also expires? No. The application does not expire, only the *ex parte* order expires. By analogy, an *ex parte* application, which for some reasons cannot be heard or heard but no decision is given within 21 days from its filing, does not expire after 21 days from its filing. It is still there until it is heard and decided upon, even well after 21 days of its filing.

So, even though in this case, the *ex parte* injunction expires on 27 December 2001, the application, on 26 December 2001 when the parties appeared before the learned judge, was still in existence, indeed it was still in existence even on the day we heard this appeal.

That being the case the "problem" faced by the learned judge who, for good reasons, could not hear the application *inter partes* on 26 December 2001 actually did not arise. The "problem" was thought to have arisen because the learned judge thought that not only the *ex parte* order expired after 21 days, but the application, now *inter partes*, had also expired. With respect, we think that is not the case.

So, faced with the situation that the learned judge did, ie, he could not hear the application *inter partes* before the expiry of 21 days and the *ex parte* injunction was expiring, what could he do?

Bear in mind, that the application was still before him, alive and pending. He clearly had the jurisdiction to consider whether or not to grant an ad interim injunction pending the hearing *inter parties* of the application. From my own experience, quite often parties would agree to such an order or the defendant would give an undertaking to maintain the *status quo* pending the hearing of the application *inter partes*. But even if they do not agree, the court has the jurisdiction to make such an order.

Such a practice has been adopted in England. In *Beese and Others (managers of Kimpton*

Church of England Primary School) and Others v. Woodhouse and Others [1970] 1 All ER 769 (CA) the plaintiff having filed a writ and the statement of claim, took out a summons for an interim injunction. However, pending the hearing of the application *inter partes*, the judge granted an injunction, *ex part* e. The Court of Appeal held that the court below had the jurisdiction to do so. The headnote summarises the judgment thus:

> Where an application for an injunction cannot be heard by the court through no fault of the plaintiff or defendant, and the judge comes to the conclusion on a *prima facie* view that irreparable damage may be done to the plaintiff by not preventing the continuance of the alleged nuisance or whatever other wrongdoing it may be by the defendant, he has jurisdiction to grant an *ex parte* injunction (see p. 771 g, p. 772 g, and p. 773 j, post).

In this country Low Hop Bing J has also granted an ad interim injunction pending the hearing of an application for an interim injunction which was to be heard *inter partes* in *Jakob Renner v. Scott King* [2000] 3 CLJ 569. The learned judge relied on a decision of the court in India in *Jagjit Singh Khanna v. Dr. Rakhul Das Mullick & Anor* AIR [1988] Cal. 9 and said:

> Applying the principle enunciated in the above case, I am of the view that it is within the jurisdiction of our superior courts to grant ad interim injunction pending the disposal of an application for interlocutory injunction, such as encl. 2 in the instant case. This view is in line with the powers of the High Court under s. 25 of the Courts of Judicature Act 1964 and the additional powers under para 6 of the schedule to the same Act which include the power to grant injunction in any manner whatsoever.

Indeed, as we understand it, it is quite a common practice amongst judges in this country.

That way, the *status quo* is preserved after the expiry of the *ex parte* order until the *inter partes* hearing of the application.

It must be pointed out that the ad interim injunction is not an extension of the *ex parte* order which expires after 21 days. It is a fresh order made on the converted *inter partes* application now before the court. And, when the court finally hears the application, *inter partes*, the court will then decide whether or not to grant an injunction, *inter partes*. That will be a fresh order again.

It should be added, that when the court hears the application, *inter partes*, the issue is whether the court should or should not grant a fresh injunction, *inter partes*. The court is not considering whether or not to extend the *ex parte* order, which cannot be extended beyond 21 days. Neither is the court concerned with the question whether the *ex parte* order should be set aside or not. Those are not the issues before the court.

However, if the defendant wants to set aside the *ex parte* order, the defendant is at liberty to file an application for that purpose. It is at the hearing of that application that the court should decide whether to set it aside or not, if it has not lapsed. If in the meantime the *ex parte* order has lapsed, the court should nevertheless hear the application, not for the purpose of setting it aside or not, because it has lapsed, but for the purpose of determining whether that *ex parte* order should or should not have been made in the first place. This is necessary in order to

determine whether damages should be awarded or not.

In this case, the learned judge, having found that the *ex parte* order would expire on 26 December 2001 and the application could not be heard, *inter partes,* before the expiry of the 21 days proceeded to set aside the *ex parte* order of 6 December 2001.

With respect, we are of the view that it is wrong for the learned judge to do so. First, the order would expire anyway after 21 days. Secondly, the fact that it automatically expires does not mean that it was wrongly granted in the first place that justifies it to be set aside. Thirdly, the fact that the application could not be heard *inter partes* within 21 days does not mean that the *ex parte* order was wrongly given. Fourthly, there was no application to set aside the *ex parte* order before the court.

The learned judge also made an order that the appellant makes good its undertaking as to damages. Again, with respect, for the same reasons given in the preceding paragraph, such an order should not have been made. The fact that an *ex parte* order lapses automatically after 21 days does not mean that the defendant is automatically entitled to damages. The question is should the *ex parte* order have been made at all? Only if it should not, then the order for assessment of damages should be made. That has not been decided. There was not even an application for that purpose.

Regarding the order of the learned Judge refusing to extend the *ex parte* interim injunction, we made no order as the question extending it does not arise at all because it cannot be extended anyway.

The learned judge also ordered that costs be paid to respondent. Here again, with respect, we are of the view that it is unfair to penalize the appellant (plaintiff) with costs as the *ex parte* order had lapsed and was not set aside, nor was it found that it should not have been made in the first place. We ordered that costs be in the cause.

Now, as has been said earlier, what had lapsed is the *ex parte* order, not the application, which has now become an *inter partes* application. There is no time limit for it to be heard. It still subsists. So, we directed that the parties appear before the learned judge on 15 April 2002 to get a date of hearing, *inter partes,* of the application which should be heard as a matter of urgency. In the meantime, we were told that there was an Erinford injunction granted by this court until the day we decide this appeal. In the interest of justice and in the circumstances of this case, we granted an ad interim injunction on the same terms as the Erinford injunction granted by this court on 28 January 2002 until the disposal of the application by the learned judge.

In the circumstances of this case we ordered that the costs of this appeal be costs in the cause and that the deposit to be refunded to the appellant.