NIP Global Logistics (M) Sdn Bhd v ARL Homecomm Sdn Bhd [2022] MLJU 2356

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

HAYATUL AKMAL ABDUL AZIZ J

SUIT NO WA-22NCVC-415-06 OF 2021

19 July 2022

Dinesh Nandrajog (with Henna Nandrajog) (Nandrajog) for the plaintiff.
David Gurupatham (with Leena Ang bt Basil Ang) (David Gurupatham & Koay) for the defendant.

Hayatul Akmal Abdul Aziz J:

JUDGMENT

(Enclosure 33)
INTRODUCTION

[1] The plaintiff applied (enclosure 33) under O.29 r.2 and O.92 r.4 Rules of Court 2012 ("RC 2012") against the defendant, praying for orders that:

"

(a) *An injunction to restrain the Defendant and/or the Defendant's agents and/or employees and/or servants and/or representatives from replacing the Plaintiff in the execution of the Joint Venture Agreement and Supplementary Agreement for a Project known as 'Tawaran Penggantian Tiang-tiang Lampu Sedia Ada Milik DBKL Kepada Tiang Lampu Berintegrasi Sistem Pemancar Telekomunikasi ("the said Project"), carry out works for the project without the involvement and consent of the plaintiff and/or enter into any agreement with any third party in relation to the project, pending the disposal of the dispute between the plaintiff and the Defendant under the present suit;*

(b) *An order directing the Defendant to disclose to the plaintiff the details of all agreements entered into by the Defendant with any third party in relation to the project and/or the financing of the project;*

(c) *An order for preservation of the status quo of the Malayan Banking Berhad Escrow Account No. 564342617181 ("the Escrow Account") whereby the plaintiff continues to manage the Escrow Account under the supervision of the Defendant;*

(d) *As an alternative to paragraph (c) above, an order that the Escrow Account is managed and supervised by an accountant and/or auditor and/or any independent party appointed by this Honorable Court; and*

(e) *Any further order or relief deemed just and appropriate by this Honorable Court."*

[2] The cause papers and written submissions are as follows:

(i) Writ of Summons dated 08.06.2021 (enclosure 1);

() Amended Statement of Claim dated 07.07.2021 (enclosure 4);

(c) Amended Statement of Defence and Counterclaim dated 09.12.2021 (enclosure 20);

(d) Amended Reply to Defence and Defence to Counterclaim dated 23.12.2021 (enclosure 25);

(e) Amended Reply to Defence to Counterclaim dated 21.01.2022 (enclosure 27);

(f) Plaintiff's Notice of Application dated 08.03.2022 (enclosure 33);

(g) Plaintiff's Affidavit-in-Support affirmed by Zaini Bin Md Dewa on 08.03.2022 (enclosure 34);

(h) Defendant's Affidavit-in-Reply affirmed by Abdul Munaf Bin Sultan Abd Kadir on 01.04.2022 (enclosures 44 & 45); and

(i) Plaintiff's Affidavit-in-Reply affirmed by Zaini Bin Md Dewa on 11.04.2022

(enclosure 46).

The parties' respective written and oral submissions/replies.

[3] On 19.05.2022, after considering all-cause papers, and written and oral submissions of the respective counsels, I allowed enclosure 33 (prayer a, b, d, and e) with costs in the cause. Aggrieved, the defendant filed this appeal, and my reasons are as follows:

BRIEF FACTS

[4] The brief facts gathered from the cause papers, in a nutshell are:

(a) In September 2017, the plaintiff and defendant entered into a Joint Venture Agreement dated 21.09.2017 (JVA) to erect and replace 350 existing lamp posts belonging to Dewan Bandaraya Kuala Lumpur (DBKL) with lamp posts integrated with a transmission telecommunications system (ILP) under a project known as *'Tawaran Penggantian Tiang-tiang Lampu Sedia Ada Milik DBKL Kepada Tiang Lampu Berintegrasi Sistem Pemancar Telekomunikasi'* (the project).

(b) The salient terms of the JVA are:

(i) RECITAL F - The parties intend that in the course of the project, the plaintiff shall replace the defendant as the party to the contract with DBKL to continue to carry out the work under the project where the parties shall combine their efforts to achieve this objective;

(ii) Clause 5.2.2- Ownership of the ILP shall vest and remain with the plaintiff at all times, and this is made known to the defendant, who acknowledges and agrees not to claim ownership of the ILP in any form whatsoever;

(iii) Clause 5.3.2 - Any payments received in relation to this contract shall be remitted into the project escrow account to be maintained and operated by the plaintiff as it deems fit; and

(iv) Clause 5.4.4- The plaintiff is entitled to payment of 80% of the net profit of the project while the defendant is entitled to payment of 20% of the net profit of the project.

(c) Under Clause 5.3.2, the defendant passed an irrevocable resolution appointing the plaintiff's representatives as the authorized persons to manage the project escrow account: p.30-31, enclosure 46.

(d) The parties subsequently entered into a Supplemental Agreement dated 18.04.2018 (SA) to erect 20 landed towers for telecommunication infrastructure network facilities and management of the project: p. 54-57, enclosure 34, Supplemental Agreement.

(e) From 2020 onwards, the plaintiff discovered that the defendant had breached various terms of the JVA and the SA:

(i) A Judgment for the sum of RM100,000.00 together with interest and costs were obtained by Malaysian Multimedia Corporation (MMC) against the defendant at the Kuala Lumpur Magistrates Court under Suit No. WA-A72NCVC-2087-04/2019;

(ii) The defendant failed and/or refused to make any payment against the Judgment which resulted in MMC filling a Winding-up Petition against the defendant at the Kual Lumpur High Court under Petition No.WA-28NCC-220-02/2020;

(iii) The defendant failed and/or refused to repay the plaintiff the sum of RM105,198.26 advanced by the plaintiff on behalf of the defendant to MMC;

(iv) The defendant is indebted to numerous creditors and failed to make payments towards the same;

(v) The defendant failed to make payments towards the annual fee for its license under the Communications and Multimedia Act 1998 for the years 2019, 2020, and 2021;

(vi) The defendant did not conduct its business properly and following sound financial, commercial, and industrial standards and practices whereby:

(a) The defendant's place of business and/or registered office has been closed since the middle of 2019; and

(b) The defendant failed to file and/or submit its Audited Financial Statements to the Companies Commission of Malaysia since 2009.

(f) As a consequence, on 04.03.2021, the plaintiff sent a notice for the defendant to rectify its defaults under the JVA within twenty-one (21) days from the date of the notice: p. 59- 63, enclosure 34. The defendant, however, did not respond.

(g) This was followed by a second notice dated 29.03.2021, giving another opportunity for the defendant to remedy the situation within thirty (30) days from the date of the said notice, failing which the plaintiff would terminate the JVA and the SA, and claimed for any damages suffered: p.65-66, enclosure 34. Similarly, as with the first notice, the defendant did not respond.

(h) In the circumstances, the plaintiff filed this instant suit against the

defendant seeking, among other things:

"

(i) *A declaration that the JVA and the SA was terminated on 28.04.2021;*

(ii) *A declaration that the plaintiff has replaced the defendant as the party to the contract with DBKL to continue to carry out the work under the project;*

(iii) *A declaration that the plaintiff is the owner of all ILPs built and erected under the said project;*

(iv) *Payment of special damages amounting RM1,573,162.55".*

The defendant responded with a counterclaim asserting:

"

(i) *The plaintiff failed to pay its share of profits in the project;*

(ii) *The plaintiff had managed and controlled the escrow account without the involvement of the defendant; and*

(iii) *The plaintiff had committed fraud in falsifying the Novation Agreements entered into by the defendant with telecommunication companies".*

Seeking:

"(iv)A declaration that the Joint Venture Agreement and Supplemental Agreement was terminated on 29.10.2021;

(v) A declaration that the JVA and the SA were terminated on 29.10.2021;

(vi) An order that the defendant takes over all ILPs built and erected by the plaintiff under the project to set off towards the counterclaim; and

(vii) A declaration that the defendant has the right to manage the ILPs encroaching on the defendant's concession site".

(i) Presently, the project is still ongoing pending the determination of this suit:

(i) *The ILPs erected under the project are still existing to date;*

(ii) *Rental of various sites for the ILPs is still ongoing to date; and*

(iii) *The telecommunication companies are still using the ILPs to date.*

(j) In September 2021, the plaintiff's access to the project escrow account was denied by the defendant, which attributed to the plaintiff's inability to monitor all payments due from third parties, and the telecommunication companies, for the use of the ILPs while waiting for the determination of this suit by the Court. Consequently, the plaintiff cannot meet its monthly financial commitments to meet ongoing expenses incurred in the project. This had caused a demand letter being issued against the plaintiff from the landlord of Lot 22377, Jalan Puah, Kg. Puah, Mukim Setapak, Kuala Lumpur District, Federal Territory of Kuala Lumpur, claiming arrears of rental of the said site: p.68, enclosure 34.

(k) In January 2022, the plaintiff discovered that 5G technology equipment was installed by EdgePoint Infrastructure Sdn Bhd / Edgepoint Towers Sdn Bhd on one of the ILPs erected in the project at the LP ARL Menara TM site. The defendant had approved EdgePoint infrastructure Sdn Bhd/ Edgepoint Towers Sdn Bhd installation of the said 5G equipment on the ILP:

(i) *The defendant unilaterally approved the installation of the said 5G technology equipment by EdgePoint Infrastructure Sdn Bhd/Edgepoint Towers Sdn Bhd without the knowledge, consent, and/or approval of the plaintiff;*

(ii) *There was already a prior existing 4G technology equipment installed by Webe Digital Sdn Bhd on the ILP at the LP ARL Menara TM site;*

(iii) *The said ILP can only support the loading weight of one type of technology, and therefore the safety of the said ILP is jeopardized; and*

(iv) *The installation of the said 5G technology equipment is unlawful, and the ILP is now considered an illegal structure that is susceptible to order for demolishment by the local council.*

In the circumstances, the plaintiff issued a notice to the defendant:

(i) *Immediately restore the plaintiff's access to the escrow account;*

(ii) *Restrain from carrying out any further conduct which would endanger the safety of the ILPs erected in the project: p. 70-73, enclosure 34.*

The defendant responded:

(i) *Access had been denied to the project escrow account since there is a current ongoing suit between them, and in any event, the JVA and the SA are deemed terminated;*

(ii) *The rental owing to the Landlord of Lot 22377, Jalan Puah, Kg. Puah, Mukim Setapak, Kuala Lumpur District, Federal Territory of Kuala Lumpur has been duly settled by the defendant;*

(iii) *The tenancy between the plaintiff and the landlord has been terminated, and a new tenancy has been entered into between the defendant and the landlord for the rental of Lot 22377;*

(iv) *All ongoing monthly expenses incurred in the project will subsequently be undertaken by the defendant; and*

(v) *The 5G technology equipment was installed with the prior consent and approval of Digital Nasional Berhad and DBKL by Edgepoint Towers Sdn Bhd, however, it has now been taken down temporarily to obtain the relevant consent and approval from Digital Nasional Berhad and DBKL under the defendant's name.*

Finding the response inappropriate, the plaintiff responded that:

(i) *It is unacceptable for the defendant to unilaterally decide that the plaintiff no longer has any rights for access to the project escrow account, especially since there is an ongoing suit between parties dealing with the very issue of termination of the JVA and the SA;*

(ii) *The plaintiff had been managing the project escrow account all the while. The defendant has no authority to decide otherwise. This matter is to be adjudicated and decided upon by the Court and not prematurely determined by the defendant;*

(iii) *The defendant had abused its position and acted in bad faith by deciding on matters relating to the rental of Lot 22377 prematurely without the Court's determination; and*

(iv) *DBKL never approved the 5G Technology Equipment and issued a Notice of Offence for the said 5G Technology Equipment.*

The defendant responded:

(i) *The JVA and the SA are deemed terminated, and therefore the plaintiff has no rights to the project escrow account;*

(ii) *The defendant has the right to mitigate its losses pending the ongoing litigation;*

(iii) *The Tenancy Agreement between the landlord and the plaintiff was terminated as a result of the plaintiff's failure to make payment of rent for Lot 22377;*

(iv) *The ILPs erected in the project no longer belong to the plaintiff as DBKL has revoked the plaintiff's ownership; and*

(v) *Digital Nasional Berhad obtained DBKL's approval to install the 5G Technology Equipment.*

[5] In the circumstances, the plaintiff filed enclosure 33 to seek injunctive reliefs against the defendant.

THE PLAINTIFF'S SUBMISSIONS

[6] In support of enclosure 33, the plaintiff argued that, it has met the requirements of the Keet Gerald Francis test *(Keet Gerald Francis Noel John v Mohd Noor & Ors* [1995] 1 CLJ 293**, CA)** in its application for injunctive relief:

(i) Serious issues to be tried:

There are evidently several serious issues between the parties that must be tried.

(a) *Whether the defendant has breached the terms of the JVA and the SA;*

(b) *Whether the plaintiff's termination of the J VA and the SA 28-04-2021 is valid and lawful;*

(c) *Whether the defendant has wrongfully replaced the plaintiff in the contracts entered into by the plaintiff with third parties in the project;*

(d) *Whether the defendant had trespassed onto the plaintiff's property, that is, the ILPs erected in the project;*

(e) *Whether the plaintiff is the rightful owner of the ILPs post termination of the JVA and the SA;*

(f) *Whether the defendant misrepresented facts to DBKL, causing DBKL to withdraw the plaintiff's ownership of the ILPs erected in the project;*

(g) *Whether the defendant had acted with mala fide in managing the project's affairs unilaterally despite the ongoing litigation between the parties; etc.*

This is in contrast to the position taken by the defendant that asserted that there are no serious issues to be tried:

(a) *The plaintiff is no longer the owner of the ILPs as DBKL has revoked the plaintiff's ownership of the ILPs through its letter dated 10.12.2021;*

(b) *The defendant did not act with mala fide in unilaterally managing the affairs of the project as the JVA and the SA were terminated;*

(c) *The plaintiff's allegations on the defendant replacing the plaintiff in the contracts entered into by the plaintiff with third parties in the project is a non-issue;*

(d) *The plaintiff's allegations of the unjust enrichment of the defendant is a non-issue;*

(e) *The current status quo of the project is that the plaintiff no longer owns the ILPs, and therefore this Court cannot reverse the decision of DBKL in revoking the plaintiff's ownership of the ILPs;*

(f) *The project escrow account involves the interests of the third parties in the project, and as such, the said third parties' interests would be affected in the event the Court allows the plaintiff's application.*

The plaintiff argued that before the purported revocation of the ILPs by DBKL, it is undisputed that the plaintiff was the owner of the ILPs erected in the project as at the date of termination of the JVA and the SA, i.e., 28.04.2021 and/or the date of filing of the present suit, i.e., 08.06.2021. The status quo referred to in the present application is the status quo of the project as of the date of filing the present suit. This Court has the power to grant an injunction to preserve the status quo of the project. The termination of the JVA and the SA does not render enclosure 33 academic as the subject matter on the termination of the said agreements is in dispute. The controversy affecting the parties' rights is still in existence for determination. The interests of third parties are not affected by this injunction. They are further fortified if the said escrow account is managed and supervised by a qualified accountant and/or auditor and/or any independent party appointed by this Court until the disposal of the present suit. In support, the plaintiff cited:

- *Expro Marine Sdn Bhd v Amalgamated Plant Engineering Sdn Bhd* [2022] 1 CLJ 61**, CA** held:

  (i) *The termination of an agreement does not render an application for injunction academic as the said subject matter is disputed by parties and to be adjudicated upon;*

  (ii) *The rights and interests of the plaintiff would be greatly affected if the plaintiff's injunction application was dismissed pending the disposal of the arbitral proceedings as the plaintiff would be replaced by another contractor by the defendant as the master agreement was terminated;*

  (iii) *It would only be just to have the status quo of the parties preserved.*

- *Maple87 Builders Sdn Bhd v Bina Terbit Sdn Bhd & Anor* [2019] 1 LNS 642**, HC:**

  "(i) Are there bona fide serious issues to be tried?

  [26] The plaintiff contends that there are serious issues to be tried at the trial of this suit. These issues are (a) whether D1 's termination of the SubContracting Agreement with the plaintiff was lawful; (b) what was the value of the works done by the plaintiff up to the purported termination of the Sub-Contracting Agreement; (c) what are the sums of monies that should be paid by D2 and/or 01 to the plaintiff for works done; and (d) whether D2 and/or D1 had breached their trust obligations to the plaintiff.

  [27] I find that all these issues are questions of facts which have to be proven at trial through documentary evidence and testimony of witnesses. Whether or not D2 and/or D1 are express and/or constructive trustees of the monies paid by D2 to D1 for works done by the plaintiff under the project is a question of fact and law that has to be determined by this Court after considering all the documentary and oral evidence at trial. These questions cannot be decided by this Court summarily. Accordingly, this Court finds that there is bona fide serious issue to be tried in this case."

(ii) Damages are not an adequate remedy

The plaintiff submits that if the application for injunctive relief is not granted, the plaintiff will continue to suffer hardships and losses which cannot be compensated by way of damages, contrary to the defendant's assertion that the plaintiff's claim is merely monetary:

(a) *The plaintiff's property, i.e., the ILPs erected in the project, will continue to be violated, endangered, and trespassed upon by the defendant and third parties;*

(b) *The plaintiff has and will continue to lose all its rights in the contracts entered into by the plaintiff with third parties in the project, such as DBKL, the telecommunication companies, and the landlords of the ILPs sites;*

(c) *The landlords for sites other than Lot 22377 may similarly terminate their contracts with the plaintiff as a result of the defendant's interference;*

(d) *The plaintiff has and will continue to lose ownership of the ILPs due to the wrongful advice and misrepresentation by the defendant to DBKL;*

(e) *The plaintiff has and will continue to suffer injury to its reputation and credibility in the eyes of the third parties involved in the project;*

(f) *The plaintiff has and will continue to lose all its rights to managing the project* and the escrow account.

The plaintiff cited **Expro Marine Sdn Bhd, CA** (supra), where the Court of Appeal observed that in cases of termination of contracts causing adverse consequences involving multiple parties, damages are not an adequate remedy:

> *"[76] Regarding this point, the High Court in paras. 23 and 24 of its grounds of judgment held:*
>
> *[23] Upon taking into consideration all the circumstances of the case and authorities cited by counsels on this issue, it is my considered view that the award of damages itself is not adequate to compensate the plaintiff if the injunctive reliefs are not allowed as the plaintiff's entitlement to the damages flowing from the breach of contract committed by the defendant is only one aspect of the consequences.*
>
> *[24] I accept the plaintiffs' submission that there are other possible/potential adverse consequences that are likely to incur if the injunctive reliefs are not allowed. It is noted that it is a possibility that Petronas Carigali Sdn Bhd may terminate the award for the project due to delay in executing the works, thereby causing both plaintiff and defendant losing the contract forever, and in such a situation, damages cannot be an adequate remedy to the plaintiff. [77] We agree with the learned High Court Judge that damages are not adequate to compensate the plaintiff if the injunctive relief is not allowed. Based on the background factual matrix and the issues raised, the matter at hand is more than just a breach of the master agreement or its termination. It involves multiple parties and issues unraveled from the arrangement and discussion of the multiple parties. It would be absurd to decide that the award of damages is adequate the compensate the plaintiff while there could be other adverse consequences affecting both parties, such as injury to reputation and goodwill."*

In further support, the plaintiff also cited the Court of Appeal in *Tenaga Nasional Berhad v Teobros Development Sdn Bhd* [2008] 4 MLJ 143**, CA,** that it is a good law to hold that the justice of the case should take precedence and where there is any doubt as to the adequacy of the remedy of damages, it is incumbent upon the Court to regard damages as an inadequate remedy and then move on to consider the question of the balance of convenience.

(iii) Balance of convenience

The plaintiff argued that if the interlocutory injunction is refused and they succeed at the pending trial, the harm, inconvenience, and loss suffered cannot be adequately compensated by damages because of its rights and interests in the project and with various third parties currently in jeopardy. Meanwhile, the defendant unjustly enriches itself by unilaterally controlling the project, the escrow account and replacing the plaintiff in contracts with third parties in the project. Citing **Maple87 Builders Sdn Bhd, HC** (supra), that found the balance of convenience lies in ordering that parties jointly control the project account:

> *"[31] In deciding whether or not to grant the interim injunction, I have to weigh the harm that the injunction would produce to D1 against the harm that would result to the plaintiff from refusing to grant the injunction. As D2 had deposited all the monies payable pursuant to interim payment certificates No. 5 and No.6 into D1 's RHB account instead of the Project Account, I find that the balance of convenience lies in asking D1 to deposit all the monies received from D2 into the Project Account pending disposal of this suit. The Project Account is jointly controlled by D1 and the Plaintiff. Therefore, neither of them can withdraw the monies without the consent of the other prior to the disposal of this suit. This way, the status quo is preserved prior to the full and final disposal of the trial."*

Therefore, the balance of convenience is in favor of preserving the status quo of the project whereby the plaintiff continues to manage the escrow account with the supervision of the defendant, or the escrow account be managed and supervised by an accountant and/or auditor and/or any independent party appointed by Court to ensure fairness and justice to both parties, pending the determination of the instant suit. The various baseless allegation on the purported mismanagement of the said escrow account, failure to pay shared profits, inflated construction costs, and theft of money paid by the telcos have been strenuously denied by the plaintiff and are matters to be canvassed, ventilated, and determined at trial.

(iv) Undertaking on damages

The plaintiff has given its undertaking as to damages in paragraphs 38 and 39 of its Affidavit in Support: p. 16, enclosure 34. The defendant had argued that the plaintiff's undertaking on damages is a bare undertaking without any evidence to support its financial position citing *Zaidin Abd Ghani v Raja Raman Nair & Co* [2001] 6 CLJ 558**.** In distinguishing the facts of that case, the plaintiff argued that the defendant had never challenged its financial position. It is a bare averment of the defendant. In any event, based on the justice of the case, the Court is empowered to dispense with the undertaking on damages, citing *Dato' Tan Toh Hua & 2 Ors v Tan Toh Hong & 2 Ors [2001] 1 MLJ 369***.**

[7] Full and frank disclosure

Contrary to the assertion of the defendant that the plaintiff had failed to make full and frank disclosure on the allegation of fraud in the novation agreements, the plaintiff asserts that it was a misleading accusation since it had been disclosed in paragraph 14 of the Plaintiff's Affidavit in Support (p.5-6, enclosure 34). All relevant facts and evidence have been revealed and addressed in the affidavits filed by parties herein. Citing **Expro Marine Sdn Bhd, CA** (supra), it was observed that as the injunction application was made on an inter parte basis, full and frank disclosure of all relevant facts was made through the exchange of affidavits, as follows:

> *"[69] In this regard, the High Court Judge, upon evaluation of the evidence, held as follows:*
>
> *[19] On this issue, it must be noted that the hearing of the Originating Summons was made inter parte, whereby through the process of exchange of affidavits, the plaintiff had, in fact, made full and frank disclosure of all relevant facts related to the disputes between the parties. There is, therefore, no prejudice caused to the defendant as all the necessary information and documents were made available by the plaintiff to the defendant through the process of exchange of affidavits, and therefore such argument raised defendant is without any merits (see Damayanti Kantilal Doshi & Anor v. Jigarlal Kantilal Doshi* [2004] 1 CLJ 437; *[2004] 1 MLJ 456* and *Dato' Sri Andrew Kam Tai Yeow v. Tan Sri Date' Kam Woon Wah & Ors* [2018] 1 LNS 952; *[2018] MLJU 1883**).***
>
> *[70] Thus, we are not persuaded by the defendant's submission that the plaintiff had suppressed any material facts from the High Court. Moreover, the defendant has not highlighted any pertinent facts suppressed by the plaintiff. On the contrary, the learned High Court Judge found that all documents and correspondences had been exchanged through the affidavits.*
>
> *[71] In the premises, we are satisfied that the plaintiff has met this requirement of making full and frank disclosure to the court".*

[8] In reply to the defendant's submission, the plaintiff argued that:

(a) The plaintiff is not a party to the agreement between the defendant and DBKL:

(i) *Clause 23 of the agreement between DBKL and the defendant allows the said agreement to be assigned to third parties if agreed between the Defendant and DBKL: p.95, enclosure 44;*

(ii) *The covenant to assign is evident in Recital F of the JVA, which provides that the plaintiff shall replace the defendant as the party to the contract with DBKL to continue to carry out the work under the project: p.21, enclosure 34; and*

(iii) *The defendant and DBKL's agreement to assign the project to the plaintiff is evident in the parties' conduct in leaving the project management to the plaintiff.*

(b) The escrow account and alleged failure to remit the defendant's profit entitlement:

(i) *The defendant knew about the financing of the project at all times;*

(ii) *The escrow account was accessible and supervised by the defendant at all times;*

(iii) *The plaintiff always submitted all relevant information regarding the financing of the project to the defendant's staff; and*

(iv) *The defendant never issued any notice to the plaintiff demanding information regarding the project's finance before filing this suit.*

(c) Allegation of fraud in the novation agreements with the telcos:

(i) *The plaintiff, Dato Zaini Bin Md Dewa, and/or Nabil Bin Nahar were never involved in the alleged forging of the novation agreements;*

(ii) *This issue has been vehemently denied and addressed by the plaintiff in paragraphs 85-119 of its Amended Reply to Defence and Defence to Counterclaim dated 23.12.2021: p.3-42, enclosure 25; and*

(iii) *This matter is also being investigated by the police with no conclusion.*

(d) Default in paying rental for ILP sites:

(i) *Any late payment of rental to DBKL was due to the financial constraints of the project, whereby DBKL took no action on the said outstanding rentals based on the agreement between parties;*

(ii) *All payments made from the escrow account to the plaintiff's account were for ongoing expenses of the project, including rental due to the landlords of the ILP sites, rental due to the plaintiff for the usage of the ILPs, etc.; and*

(iii) *All payments from the escrow account to the plaintiff's account were with the defendant's knowledge as invoices for the said payments were issued by the plaintiff to the defendant at all material times: p. 33-205, enclosure 46.*

(e) Failure to obtain MPAJ's approval for certain ILPs erected in the project in breach of clause 5.1 JVA:

Clause 4.1.2 JVA placed that obligation on the defendant: p. 27, enclosure 34.

(f) Enclosure 33 is frivolous, vexatious, and an abuse of the court process:

(i) *The defendant's arguments that since the JVA and the SA had been purportedly terminated, the parties are no longer bound to its covenants are misconceived. The Court must determine the validity of the purported termination, which will lead to legal consequences on the parties' legal position in the project;*

(ii) *Pending that determination, it is just and equitable to have the status quo of the project preserved; and*

(iii) *Reliance was placed on* ***Expro Marine Sdn Bhd, CA*** *supra that held that the termination of an agreement does not render an application for injunction academic as the subject matter is to be adjudicated upon, and it would only be just to have the status quo of parties preserved in the interim.*

(g) Mandatory effect of the injunction sought:

Contrary to the arguments by the defendant, the injunction sought is predominantly prohibitive and not mandatory, as it seeks to prohibit the defendant from carrying out acts that would further affect and jeopardize the plaintiff's rights and interests in the project:

(i) *Endangering and jeopardizing the safety of other ILPs erected under the project at the LP ARL Menara TM site;*

(ii) *Replacing the plaintiff in other Tenancy Agreements entered into between the plaintiff and the landlord for the ILP sites;*

(iii) *Causing DBKL to withdraw the plaintiff's ownership of the ILPs erected under the project, etc.*

In support, the plaintiff cited *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 1 CLJ 72**, FC:**

"[3] The grant of a mandatory injunction is entirely discretionary. It is a discretion to be exercised sparingly but in a proper case unhesitatingly. An appellate Court will not interfere with the exercise of the discretion by a lower Court unless the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice.

[4] The respondent is entitled to ask for mandatory relief under the Specific Relief Act 1950 against the appellant to do something which he is under obligation to do by way of an interlocutory application before trial. There is no limit to the practice of the Court concerning interlocutory applications so far as they are necessary and reasonable applications ancillary to the administration of justice at the hearing of the cause."

(h) Plaintiff seeking to alter the status quo instead of preserving it:

(i) *The defendant argued that to compel it to take steps to revert the current status quo of the escrow account (management by the defendant with no access by the plaintiff) to the status quo of the escrow account at the time of filing the present suit (management by the plaintiff with monitoring by the defendant) would be mandatory. This case is not an exceptional case to support such an order;*

(ii) *To allow the defendant to manage the escrow account unilaterally and the project would be a premature determination of the merits of the case, causing an irreparable injury and grave inconvenience to the plaintiff if it succeeds at the full trial of this action; and*

(iii) *The defendant would continue to replace the plaintiff in contracts with third parties for the project, etc. An injunction is, therefore, necessary.*

(i) Unclean hands and non-disclosure of material facts:

(i) *These are baseless and unproven allegations;*

(ii) *Enclosure 33 was filed as an inter parte application at the outset to enable parties to disclose all relevant facts to this Honourable Court; and*

(iii) *This indicates that the plaintiff never intended to conceal facts material to the present application.*

(j) The rights and interests of the third parties involved in the project will be affected:

(i) *The only reason DBKL issued its letter dated 10.12.2021 to revoke the plaintiff's ownership of the ILPs was due to the wrongful advice and misrepresentation by the defendant to DBKL. The defendant, therefore, ought to now correct its wrongful advice and misrepresentation to DBKL; and*

(ii) *Third parties will not be affected as the business and affairs of the project are ongoing to date, and the telcos are continuing to use the ILPs. They will continue to do so irrespectively of who the owner of the ILP is.*

(k) Project would be undermined, and public interest will be affected:

(i) *The defendant argued that there is a risk that DBKL may terminate the project with the Defendant if the injunction is granted. However, this was never raised in their affidavit in reply and is only now raised in their submission;*

(ii) *As such, this issue cannot be considered. Citing Time Online Dotcom Bhd v Bates (Malaysia) Sdn Bhd [2005] 4 MLJ 251*, **HC** *in support where it was observed that Such an argument cannot be considered by this Court and must be wholly disregarded because it was not raised in the affidavits. It was a submission from the bar. Likewise, it was held in CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor [2015] 8 MLJ 832*, **HC** *that the second defendant had never raised the issue of duress, coercion, and threats in his affidavits filed in opposition of the* O 14 *application despite five affidavits having been filed. Therefore, the second defendant's defense of duress, coercion, and threats was an afterthought to defeat the plaintiff's claim.*

In the circumstances, the plaintiff prays that enclosure 33 is allowed with costs.

THE DEFENDANT'S SUBMISSIONS

[9] In objecting to enclosure 33, the defendant argued:

(a) Since the plaintiff has complete control over the operation of the escrow account (it is an account registered in the name of the defendant with the plaintiff appointed as a signatory), the defendant is left in the dark in financial matters over the project, including the non-remittance of the defendants share of profits from the project on the basis that the said project did not yet yield any profits.

(b) The defendant argued that the plaintiff took this suit on the alleged breach of the JVA by the defendant, claiming:

(i) *That there was a judgment for RM100,000.00 together with interests and costs obtained by MCMC against the defendant under the Kuala Lumpur Magistrates Court Suit No. WA-A72NCVC-2087-04/2019;*

(ii) *That the defendant refused to make any payment towards the judgment above, which led MCMC to file a winding-up petition against the defendant;*

(iii) *The defendant refused to repay the RM105,198.26 that was advanced by the plaintiff to the defendant to pay MCMC;*

(iv) *That the defendant owes money to a lot of creditors and failed to make payments to those creditors till today;*

(v) *That the defendant did not pay the yearly fees for its license under the Communications and Multimedia Act 1998 for the years 2019, 2020, and 2021; and*

(vi) *The defendant did not conduct business according to commercial and industrial standards and practices.*

(c) Sometimes, on 23.9.2021, after the close of the pleadings, the defendants purportedly received an inquiry from U Mobile concerning a purported novation agreement between them dated 28.06.2021:

(i) *The defendant was surprised since no such agreement had been entered between them. Examining a copy of the said agreement, it showed that it had been signed by Dato' Zaini Bin Md Dewa dan Nabil bin Nahar, the plaintiff's representatives;*

(ii) *The defendant's signature (Puan Azlinda & En. Munaf) and the company stamp had been forged allegedly by the plaintiff;*

(iii) *Concerned, the defendant, sometimes on 24.09.2021, contacted other telcos [Maxis Broadband Sdn Bhd (Maxis), Celcom Networks Sdn Bhd (Celcom), Digi Telecommunication Sdn Bhd (Digi), and Webe Digital Sdn Bhd (Webe)] only to discover that similar fraudulent novation agreements had been put in place;*

(iv) *Several police reports were lodged on 24.09.2021 (DANG WANGI/021948/21 and DANG WANGI/021952/2) on the allegedly fraudulent novation agreements;*

(v) *The defendant's then alerted the telcos of the alleged fraudulent novation agreements and directed that all payments for the use of the ILPs must be directed to the defendant;*

(vi) *It was later discovered that supposedly RM1,194,557.20 had been paid out under those novation agreements to the plaintiff comprising:*

(a) *Maxis RM974,200.00: exhibit AM-12;*

(b) *Webe RM220,357.20: exhibi AM-12; and*

(c) *Digi, Celcom, and U Mobile had not provided any details of payments.*

(vii) *The plaintiff had also falsified the defendant's letterhead to Digi and Maxis to facilitate the transfer of deposits paid from the escrow account to the plaintiff's account;*

(viii) *The defendant denies having executed an MoU on 01.10.2017 with the plaintiff, and upon examining a copy of the supposed MoU from the plaintiff, it was discovered that:*

(a) *It was a fraudulent MoU;*

(b) *The defendant's records do not show the existence of the purported MoU. (viii) The defendant lodged another police report (DANG WANGI/023147/21) on 07.10.2021 after summing up alleged fraudulent losses of approximately RM1,194,557.20, though the plaintiff contends this to be absurd; (ix) The escrow account for years (2018-2021) will show the transfer of funds to the plaintiff's account;*

(ix) *In addition, sometime in January 2022, the defendant discovered that the actual construction cost of an ILP is approximately RM45,000-RM65,000. However, the plaintiff bloated the construction cost to between RM140,000-RM150,000 per ILP via an intermediate company called Proven Stylish Sdn Bhd (sharing a common director with the plaintiff) to allegedly engineer a lower amount of profit sharing between the parties; and*

(x) *The plaintiff is also in breach of clause 5.1 of the JVA, where the MPAJ had compounded them for erecting five ILPs in the defendant's name without MPAJ's approval. MPAJ had demolished two ILPs, while three were compounded (RM75,000.00).*

[10] The ILPs erected in the said project belong to the plaintiff under the JVA. That status, however, had been withdrawn by DBKL's letter (10.12.202) to defendant. The defendant further argued that at the point of the filing of this suit by the plaintiff, the fraudulent conduct of the plaintiff was not yet discovered. But since then, the defendant has been compelled to take mitigative actions to contain the adverse impact. The JVA and the SA are already deemed terminated by the act of filing this action. Consequently, with the JVA and the SA no longer in place, there arises no necessity for access to the escrow account to be granted to the plaintiff that derived its rights under the JVA, where they have abused that position. The arguments given to support its application by the plaintiff that with no access to the said escrow account, they are unable to monitor, manage and operate the said account to meet the monthly financial commitments in the project is not tenable since when they had access, they also failed to see to those commitments (to DBKL, the landlords for the ILPs sites). They were, however, able to transfer money from the project revenue to their account.

[11] Though, on the face of it, the plaintiff is applying for a prohibitory injunction, in essence, it is mandatory. It is to compel the defendant to give effect to the JVA and the SA when it had already been terminated:

(a) *Plaintiff's termination letter dated 28.04.2021.*

(b) *The act of the plaintiff initiating this suit in Court; and*

(c) *Defendant's termination letter dated 29.10.2021.*

Even parties had sought a declaration in this suit that the said agreements

had been terminated. Therefore, seeking an injunction to restrain the defendant from further dealing with the project without the agreement is abusive, particularly in the administration of the escrow account. Citing *s.53 Specific Relief Act 1950* on the Court's injunctive powers and *Shepherd Homes Ltd. v. Sandham* *[1971] Ch. 340*, Megarry observed:

> *"The subject is not one in which it is possible to draw firm lines or impose any rigid classification. Nevertheless, it is plain that in most circumstances, a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the Court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known, and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the plaintiff's attempts to stop him, then upon the plaintiff promptly resorting to the Court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo, and the plaintiff's promptitude is a badge of the seriousness of his complaint. In the present case, the company knew of the erection of the fence by September 11, 1969, but did not launch its notice of motion until over five months later. In the absence of any explanation, I do not think it unfair to treat this tardiness as some measure of the company's need for the injunction. Furthermore, the status quo for any reasonable period prior to the service of the notice of motion is that of the defendant's fence being in situ so that the injunction sought will disturb rather than preserve anything that can fairly be called the status quo."*

The mandatory injunction must only be granted in exceptional and extremely rare cases: *Wah Loong (Jelapang) Tin Mine Sendirian Berhad v Chai Nyen Yiok* *[1975] 2 MLJ 109*; *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* *[1987] 2 MLJ 192*; *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* *[1979] 1 MLJ 150***.**

[12] The defendant argued that there are no serious questions to be tried since the parties sought several reliefs that the agreement had been terminated, and who is the rightful owner of the erected 125 ILPs in the project. In the circumstances, the defendant cannot be said to be acting mala fide or committed trespass in its mitigative actions. Since the DBKL had withdrawn the approval of transferring the ownership of the 125 ILPs to the plaintiff, it can no longer claim ownership rights. The injunction cannot compel DBKL to reverse the decision that it had made.

[13] The defendant also argued that damages to the plaintiff are an adequate remedy in the present case. It is trite that in such a position, specific relief is generally declined: *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor* *[2003] 3 MLJ 522***.** This attempt to secure an injunction is an abuse of process when the

plaintiff's action is grounded on monetary issues founded on a contract. The plaintiff has failed to show how damages are an inadequate remedy in this case. **Zaidin Abd Ghani v. Raja Raman Nair & Ors** (supra) was cited:

> *"The Plaintiff should but has failed to produce sufficient evidence to show what are the damages or losses that the plaintiff would suffer that render damages an inadequate remedy in the circumstance of this case. The plaintiff should but has failed to show the nature and extent of damages or losses he would suffer or would have suffered. In the absence of those evidence, the logical conclusion is that the plaintiff would be adequately compensated by damages."*

In addition, the undertaking to damages given by the plaintiff is merely a bare undertaking with no evidence to support their financial position: **Zaidin Abd Ghani,** supra. Since damages are an adequate remedy for the plaintiff, the Court must not consider the balance of convenience. However, if this Court finds otherwise, the defendant submits that the guiding principle on 'balance of convenience can be found on pp. 407-408,

American Cyanamid:

> "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 favor of granting or refusing the interlocutory relief that is sought. As to that, the governing principle is that the Court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be an 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. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the Court should then consider whether, ... if the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial..."*

- *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [*[1995] 1 MLJ 241*] further explained:

> *"Be that as it may, the grant or refusal of an interlocutory injunction must be decided on the fundamental principle that the Court should take whichever course that appears to carry the lower risk of injustice. We are engaged in weighing the respective risks that injustice may result from deciding one way rather than the other at the stage when the evidence is incomplete. On the one hand, there is the risk that if the interlocutory injunction is refused, but the plaintiffs succeed in establishing at the trial their legal rights to the protection for which the injunction has been sought, they may, in the meantime, have suffered harm and inconvenience or monetary loss for which an award of money can provide no adequate recompense. On the other hand, there is the risk that if the interlocutory injunction is granted, but the plaintiffs fail at the trial, the defendants may in the meantime have suffered harm and inconvenience which is similarly irrecompensable."*

The circumstances of this case and the adverse manner that the plaintiff had conducted itself in the project, in particular, the administration of the escrow account as set out in the preceding paragraphs, stack against them in securing the injunction. In contrast, the injunction would adversely affect the project and the defendant. In the circumstances, this Court should consider which course carries the lower risk of injustice. The balance lies in refusing the injunction.

[14] In opposing, the defendant also argues that:

(a) The Court should only consider the question of the "status quo" when other factors (particularly the balance of convenience) are evenly balanced. In the present case:

(i) *The plaintiff sought for the status quo of the escrow account to be preserved where the management remains with the plaintiff while the supervision of the Escrow Account maintains with the defendant as per prayer (c). However, the defendant was denied access to the account when this position was in place. By this injunction, it is not to preserve the status quo but to alter the status quo. More importantly, considering the alleged fraudulent actions of the plaintiff, it should not be allowed.*

(ii) *Garden Cottage Foods Ltd. v Milk Marketing Board* [*(1984) AC 130*] **,** *and* ***Zaidin Abd Ghani v. Raja Raman Nair & Ors*** *(supra) were cited*

(b) The plaintiff allegedly did not come to Court with clean hands. It is trite that the application of equitable principles requires that an applicant seeking an injunction must come with clean hands: *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 MLJ 1:

> *"Now, since injunctions are a discretionary remedy, the plaintiff must come to this Court with clean hands, for he who comes to equity must come with clean hands. This maxim seems to be related to the ex turpi causa non-oritur actio of the common law. This maxim looks to the past rather than to the future. The plaintiff must be prepared to do what is right and fair. The plaintiff must show that its past record in the transaction is clean because 'he who has committed Iniquity. .. shall not have Equity'* (*Jones v Lenthal* [1669] 1 Ch Gas 154). *But 'Equity does not demand that its suitors shall have led blameless lives' (per Brandeis J in Loughran v Loughran* [1934] 292 US 216 *at p 229). However, what actually bars the claim is not in relation to the general depravity but rather one which has 'an immediate and necessary relation to the equity sued for'* (*Dering v Earl of Winchelsea* [1787] 1 Cox Eq 318 *at p 319-320*; *Moody v Cox* [1917] 2 Ch 71 *at p 87; and Duchess of Argyll v Duke of Argyll* [1967] Ch 302 *at p 332)."*

Presently, there are ongoing criminal investigations on the plaintiff's alleged conduct, as alluded to in the preceding paragraphs. This ex-parte application by the plaintiff did not disclose all pertinent facts, though vehemently denied by the plaintiff. The Court considers this assertion incorrect since enclosure 33 was filed as an inter-parte application at the outset by the plaintiff and not as alleged.

(c) If the Injunction Application is allowed, it will affect third parties with legitimate rights and interests in the project (the telcos and DBKL). Though they are not parties in this proceeding, they should be considered, citing *London Passenger Transport Board v Mascrop* (1942) AC 332, Viscount Maugham:

> *"except in very special circumstances, all person interested should be made parties, whether by representation orders or otherwise before a declaration by its terms affecting their rights is made."*

The Court of Appeal in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* (1995) 3 MLJ 417 held that, though that position is spoken in the context of declaratory relief, it also applies in general application. The defendant argued that injunctive relief would bind the defendant, but it would not be possible for the defendant to compel DBKL to reverse its decision on the ownership of the ILPs. Since the telcos and DBKL are not parties to the ongoing suit, any order given by this Court will be incapable of binding the said third parties.

(d) **Keet Gerald Francis, CA,** had indicated that in determining the balance of justice in an application for an injunction, "any question going to the public interest may, in appropriate cases, should be taken into account": *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133**.** Where the public interest is a factor, public interest must outweigh private interest. In the circumstances, the plaintiff's application for an injunction does not meet the Keet Gerald Francis test, and the defendant prays that Enclosure 33 is dismissed with costs. This is not an exceptional and extremely rare case that warrants the grant of a mandatory injunction.

THE LAW

[15] An interim injunction may be granted if the requirements in *Keet Gerald Francis Noel John v Mohd Noor@Harun Bin Abdullah & 2 Ors* [1995] 1 MLJ 193**, CA** are met. The Federal Court in *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & 2 Ors* [2019] 5 MLJ 1; [2019] 7 CLJ 395**, FC,** held that the applicable test for the grant of interim injunctions is the ***"Keet Gerald Francis* test":**

(a) **There must be a serious question to be tried:** The applicant must satisfy the Court that there is a serious question to be tried. That is, the claim is not frivolous or vexatious. The Court is not required to decide on the merits of the claim. Instead, it will consider whether the issues are serious enough to warrant a trial;

(b) **Damages are not an adequate remedy:** If damages are an adequate remedy and the defendant is financially able to pay such damages, an interim injunction will not be granted regardless of how strong the plaintiff's claim appears to be. The onus is on the applicant to establish that damages are not an adequate remedy: *Gerak Indera Sdn Bhd v Farlim Properties Sdn Bhd* [1997] 4 AMR 4244; [1997] 3 MLJ 90 **at 99, CA.** If the Court is in doubt as to the adequacy of damages, it should proceed on the basis that damages are not an adequate remedy and move to consider the balance of convenience: **Tenaga Nasional Berhad v Teobros Development Sdn Bhd** (supra).;

(c) **The balance of convenience lies in favor of the injunction:** The test of balance of convenience is that the Court should take whichever course that appears to carry the lower risk of injustice: **Alor Janggus Soon Seng Trading Sdn Bhd & 6 Ors v Sey Hoe Sdn Bhd & 2 Ors** (supra).

(i) The risk that if the interlocutory injunction is refused and the plaintiff succeeds at trial, the harm, inconvenience, and monetary loss suffered by the plaintiff cannot be adequately compensated by damages; and

(ii) The risk that if the interlocutory injunction is granted and the plaintiff later fails at trial, the harm and inconvenience suffered by the Defendant is not compensable: **Tenaga Nasional Berhad v Teobros Development Sdn Bhd** (supra): Public interest has been a relevant consideration in weighing the balance of convenience between the parties.

(d) **The applicant can meet its undertaking in damages financially:**

The applicant is required to provide an undertaking as to damages to mitigate the obvious risk of unfairness to the party against whom an injunction is ordered at a time when the issues have not been entirely determined and when usually the merits have not been thoroughly ventilated. Failure to provide an undertaking or the inability to pay damages could be adverse to the applicant: *Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor (and Another Originating Summons)* [2019] 6 AMR 638; [2020] 1 CLJ 839 **at paras [42]-[45].** Some evidence of the ability to give effect to an undertaking as to damages should be included when the financial ability is challenged: *Asia General Equipment and Supplies Sdn Bhd & 6 Ors v Mohd Sari bin Datuk OKK Hj Nuar & 3 Ors* [1998] AMEJ 0027; *[1998] MLJU 423*; [1998] 1 LNS 5**, HC** *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No. 4) [1998] 7 MLJ 551*. The inability of the plaintiff to give a viable undertaking as to damages is not a determining factor in refusing an injunction. In a case where the injustice to the plaintiff is so manifest, the Court may dispense with the usual undertaking as to damages: *Dunggon Jaya Sdn Bhd v Aeropod Sdn Bhd & Anor (and Another Appeal)* [2019] 3 AMR 729; *[2019] 4 MLJ 466*; [2019] 9 CLJ 734 **at para [36], CA.**

FINDINGS

[16] The Federal Court in **Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & 2 Ors** (supra), ruled that the applicable test for the grant of interim injunctions is the **"Keet Gerald Francis test," (Keet Gerald Francis Noel John v Mohd Noor & Ors** (supra) which requires an applicant to satisfy the following requirements:

(i) There must be a serious question to be tried;

(ii) Damages are not an adequate remedy;

(iii) The balance of convenience lies in favor of the injunction;

(iv) The applicant can meet its undertaking in damages financially.

In determining the facts before the Court, a finding will be rendered according to the facts and the law where the justice of the case matters. The learned counsel asserted that the plaintiff had met the required threshold in canvassing for the said injunction. From the facts argued, I find there **are bona fide serious issues** between the parties that would require it to be canvassed and ventilated at the substantive hearing of this suit to determine the legal position and rights of parties appropriately and justly vis-a-vis the JVA and the SA that had regulated their contractual conduct in the said project. The contractual disputes between the parties are bona fide serious issues to be tried which, amongst others, are:

(a) The purported end to the JVA and the SA legally impacting the parties. Who had breached the said agreements in this instant suit;

(b) The unilateral act of the defendant in replacing the plaintiff in contract with third parties, grounded on the purported termination of the JVA and SA;

(c) The purported withdrawal of ownership over the ILPs;

(d) The purported act of DBKL in its arbitrary withdrawal of the ownership without any due process of inquiry into the facts that had impacted third parties' rights and position;

(e) Was the element of mala fide present in the conduct of the parties;

(f) Was there unjust enrichment as claimed;

(g) The purported impact on third parties interest in this suit; and

(h) The project escrow account, legitimacy of access, and denial.

I agree that the termination of the JVA and the SA does not render enclosure 33 academic as the subject matter on the termination of the said agreements is in dispute: **Expro Marine Sdn Bhd v Amalgamated Plant Engineering Sdn Bhd** (supra). These are bona fide issues for the trial proper with viva voce evidence and not by a contest of conflicting affidavit evidence. In my opinion, an injunction to preserve the parties' status quo is required, pending the proper determination of this suit.

[17] It is trite that on the question of the **adequacy of damages** as a remedy, the Court of Appeal in **Tenaga Nasional Berhad v Teobros Development Sdn Bhd** (supra), held that it is a good law to determine that the justice of the case should take precedence and where there is any doubt as to the adequacy of the remedy of damages, it is incumbent upon the Court to regard damages as an inadequate remedy and then move on to consider the question of the balance of convenience. I agree that if the parties' positions are not preserved, the defendant will continue to act upon the presumptuous position of replacing the plaintiff in contracts with third parties concerning the project pending the determination of this suit. In that regard, the plaintiff rightly argued that they would suffer continuous hardship and losses. As held by **Expro Marine Sdn Bhd, CA** supra, in cases of termination of contracts causing adverse consequences involving multiple parties, damages are regarded as an inadequate remedy. In the circumstances, I find that the **balance of convenience** lies in favor of granting enclosure 33. The said escrow account is to be managed and supervised by an independent accountant and/or auditor and/or any independent party appointed by the Court to ensure fairness and justice to both parties, pending the determination of the instant suit. The numerous issues on the alleged mismanagement of the said escrow account are matters to be canvassed, ventilated, and determined at trial. I accept the plaintiff's **undertaking for damages** for this injunction. At this juncture, there had never been an issue on the financial ability of the plaintiff, nor had it been challenged by the defendant. Though the inability of the plaintiff to give a viable undertaking as to damages in appropriate cases is not a determining factor in refusing an injunction, where the justice of the case demands, the Court may dispense with the usual undertaking as to damages: **Dunggon Jaya Sdn Bhd v Aeropod Sdn Bhd & Anor (and Another Appeal)** (supra).

[18] In my considered view:

(a) I find no failure on the part of the plaintiff to render a **full and frank disclosure** in enclosure 33, which from the outset was filed as an inter-parte application for injunction. All relevant facts and evidence have been addressed in the affidavits filed: **Expro Marine Sdn Bhd, CA** supra.

(b) I was alluded to by the defendant citing **TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd** (supra), on its suggestion of the purported mandatory impact of the injunction sought, albeit the plaintiff's assertion that it is predominantly prohibitive to restrain the defendant from carrying out acts that would adversely impact the plaintiff's interests in the project. It is trite that an interlocutory injunction, although prohibitory in the language of the prayers, but is mandatory in essence, and effect will only be sporadically granted before trial saves in exceptional and extremely rare cases. **Sivaperuman v Heah Seok Yeong Realty Sdn. Bhd.** (supra). This was followed by **Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd** (supra) and *Karuppannan s/o Chellapan v Balakrishnan s/o Subban* [1994] 4 CLJ 479, **FC.** Therefore, it would also be incumbent on the applicant to satisfy not only the Keet Gerald Francis test but also the Court's higher burden of the case being exceptional in its nature. It is trite that equity looks to the substance and intent and not the form. However, from the facts presented to me from the parties, I do not find any such restriction to inhibit the granting of enclosure 33 hereof.

(c) I am not at all convinced that granting enclosure 33 will undermine the ILP project by DBKL, where allegedly, the public interest will be affected. I find no cogent evidence adduced to support such a supposition and it is merely a bare assertion by the defendant. I recognized that this issue was never raised in the defendant's affidavit and is only now raised in their submission and should not be considered.

CONCLUSION

[19] Considering the facts, all-cause papers, and written and oral arguments of respective counsels, I find that enclosure 33 for an injunction by the plaintiff had satisfied the Keet Gerald Francis test. The assertion that granting the said injunction would occasion injustice to the defendant in the circumstances of the case is untenable. Consequently, I allowed enclosure 33 (prayer a, b, d and e) with costs in the cause.

End of Document