DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. 02(i)-67-09/2012 (W)

ANTARA

AV ASIA SDN BHD **… Perayu**

DAN

MEASAT BROADCAST NETWORK SYSTEMS SDN BHD **… Responden**

(Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
Rayuan Sivil No. W-02-((IM)(NCC)-1585-2011

Antara

AV Asia Sdn Bhd é Perayu

Dan

MEASAT Broadcase Network Systems Sdn Bhd é Responden

Coram: Zulkefli bin Ahmad Makinudin, CJ (Malaya)
Hashim bin DatoôHj. Yusoff, FCJ
Abdull Hamid bin Embong, FCJ
Hasan bin Lah, FCJ
Zaleha binti Zahari, FCJ

JUDGMENT OF THE COURT

Introduction

1. This is an appeal by the appellant against the decision of the Court of Appeal in affirming the decision of the High Court in dismissing the appellantôs application for an injunction in aid of arbitration pursuant to section 11 of the Arbitration Act 2005 [ñthe Actò]. We heard this appeal on 29-8-2013 wherein we dismissed this appeal with costs. We now give the reasons in arriving at our decision.

2. Leave has been granted to appeal to the Federal Court in respect of the following question of law:

> *ñWhether an agreement between parties to a litigation that damages are not an adequate remedy in respect of any injuries caused by breaches of an agreement between them and that injunctive relief would be an appropriate remedy:*
>
> *(a) disentitles either one of them from asserting that damages are an adequate remedy; and/or*
>
> *(b) disentitles the High Court from concluding that damages are an adequate remedy for the purposes of an application for interim injunctive relief.*ò

Background Facts

3. The relevant background facts leading to the present appeal are these. The appellant is in the business of providing television support equipment. The respondent sought the appellantôs expertise to reduce interruptions in its satellite transmission during inclement weather, a phenomenon called rain fade which was a defect inherent in the respondentôs satellite dishes. Towards this end the appellant and the respondent entered into an agreement dated 1st August 2008 which they referred to as a Mutual Non-Disclosure Agreement [ñthe MNDAò]. Under clause 4 of the MNDA the respondent is prohibited from disclosing confidential information disclosed to it by the appellant in the course of the dealings between the parties. Clause 4 of the MNDA is reproduced in full as follows:

> *ñThe Receiving Party and its employees, officers, agents, subcontractors, bankers, professional advisors, potential investors and affiliates shall hold Confidential Information in confidence and take all reasonable steps to preserve the confidential and proprietary nature of Confidential Information, including, without limitation:*
>
> *(a) Preventing disclosure of Confidential Information to persons within its organization not having a need to know in order to accomplish the Specific Purpose, and persons outside its organization regardless of the reason except as necessary to carry out the Specific Purpose or to exercise the rights granted herein, and only to the extent that such persons are*

bound by confidentiality obligations substantially similar to those set forth in this MNDA:

(b) Advising all of its employees, officers, agents, subcontractors, bankers, professional advisors, potential investors and affiliates who gain access to Confidential Information of its confidential and proprietary nature; and

(c) Developing reasonable procedures and policies to ensure that all of its employees, officers, agents, subcontractors, bankers, professional advisors, potential investors and affiliates who gain access to Confidential Information observe the confidentiality and nondisclosure requirements hereof. In the case of Contractor, each of its subcontractors shall execute an agreement substantially in the form of this MNDA with respect to Confidential Information of MBNS.

*The obligations of this paragraph also apply to the fact of the existence of Confidential Information, of this MNDA and the occurrence of all meetings and communications of the Parties which involve Confidential Information, and shall survive the termination of this MNDA subject to clause 14.*ò

4. It is the appellantôs case that the parties considered the possibility of the MNDA being breached, and for that reason had included clause 15 of the MNDA which provided:

ñ*The Receiving Party understands and agrees that monetary damages will not be sufficient to avoid or compensate for the unauthorized use or disclosure of Confidential Information and that injunctive relief would be appropriate to prevent any actual or threatened use of disclosure of such Confidential Information.*ò

5. The appellant subsequently contended that the respondent had breached the confidentiality provision and had divulged the confidential information disclosed to it by the appellant for its own commercial gain. The respondent denied this, resulting in the appellant instituting proceedings against the respondent in the High Court. The appellant sought an interim injunction to restrain the respondent from relying or using the confidential information forming the subject matter of the dispute. Although the matter in dispute between the parties is in arbitration, the High Court action having been stayed, section 11 of the Act entitles the appellant to seek injunctive relief pending the determination of the arbitration.

Findings of the High Court

6. The learned High Court Judge having been directed to clause 15 of the MNDA, found that although there was a serious question to be tried, damages were an adequate remedy in the circumstances of the case. The learned Judge dismissed the appellantôs application for the injunctive relief and in her judgment inter alia stated as follows:

> ï*6. Based on the facts presented by the parties, I am of the view that there are serious issues to be tried in relation to whether the defendant breached the terms of the MNDA in that:*
>
> *(i) Did the first defendant disclose part of the plaintiff's confidential information to the tender bidders including the second defendant in the tender exercise; and*
>
> *(ii) Did the first defendant divulge to the second defendant some or all of the confidential information as referred to in the NCA*

Suit relating to the plaintiff's satellite dish that was disclosed to the defendant by the plaintiff?

(iii) Did the second defendant use such confidential information to design and test for the first defendant and/or the first defendant's customer's satellite dishes which are almost identical that of the plaintiff's satellite dish?

…

59. In this case the defendants submitted that it will suffer great prejudice and substantial damages if the injunction is granted. According to the first defendant it will suffer a total loss of thereof RM202,360,000.00.

60. Based on the facts submitted by the parties, it appear to me that if the plaintiff were to succeed with its claim, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the continuing sale of the satellite dishes by the first defendant.

61. In the present case, the plaintiff's claim is essentially a monetary claim which is quantifiable. The plaintiff in its statement of claim in the IP Suit had quantified special damages of RM4,410,000.00 and loss of profit in the sum of RM1,342,032.00

*62. Thus, it is clear that damages is an adequate remedy for the plaintiff.*Ò

Findings of the Court of Appeal

7. The Court of Appeal affirmed the decision of the High Court and *inter alia* made the following conclusion on the effect of clause 15 of the MNDA:

> ñ*In the light of clause 15 it was contended that the Court was precluded from making any decision contrary to the terms set out therein which the Court must enforce because it was not for the Court to rewrite what the parties had contractually agreed. This argument was patently fallacious in that the genesis of the application was not clause 15 of the MNDA. While we accept that it was not wrong to consider what the parties had agreed as one of the factors in determining where the justice of the case lay, we would find no justification for the proposition that the Court must ipso facto enforce clause 15 of the MNDA*.ò

Submission of the Appellant

8. Learned Counsel for the appellant submitted before us that clause 15 of the MNDA is of material significance. It represents an agreement between the parties that having regard to the circumstances of the case as they stood at the time of the MNDA was entered into, the parties appreciated that the nature of the relationship envisaged under the MNDA and that the breach of clause 4 would result in irreparable harm. It was further submitted for the appellant that it could be inferred that clause 15 served to reassure both parties that any risk they were exposed to by the relationship was ameliorated by the acceptance of the other party that equitable remedy, which necessarily included injunctive relief, would be sought. On this point learned Counsel for the appellant referred to us the decision of the High Court of Australia in **Toll (FGCT) Pty. Limited v. Alphapharm Pty. Limited & Ors. [2004] HCA 52** wherein it was held as follows:

> ñ*It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents, as* ***Latham CJ*** *put it, whatever they might be*.ò

9. It is the appellantôs case that the respondent bound itself by clause 15 of the MNDA. The respondent was not entitled to question the adequacy of damages as it had put that question beyond doubt by its agreement. This clause 15 had to be read with clause 4 of the MNDA, the negative covenant by the respondent prohibiting it from disclosing confidential information imparted to it by the appellant. Without the respondent being entitled to raise the issue, the adequacy of damages could not have been a live issue before the learned High Court Judge.

10. It is also contended for the appellant that an exercise of discretion by the High Court ignoring clause 15 of the MNDA would tantamount to the High Court effectively rewriting the agreement between the parties to exclude the said clause. The High Court is obliged to give effect to the commercial intent of the MNDA. It is not open to the respondent at this point in time, to argue that an injunction ought not be granted. The appellant chose to strike the bargain it did with the respondent with full knowledge of what the implications of that bargain were. It could not seek to resile from that

bargain. On this point learned Counsel for the appellant referred to us the case of **Richard Wheeler Doherty v. James Clagston Allman [1878] 3 App Cas 709** wherein **Lord Cairns** at pages 719 and 720 had this to say:

> ñ*My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such a case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not a question of the balance of convenience or inconvenience, or of the amount of damage or injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves*.ò

Decision of This Court

11. With respect we could not agree with the contention of learned Counsel for the appellant on the application of clause 15 of the MNDA to the contracting parties in the granting of injunctive relief. We are of the considered view that the learned trial Judge of the High Court had not misapprehended the nature of the clause 15 of the MNDA and the role that the Court is to interpret it in the context of the application for interim preservation. The learned trial Judge had rightly considered the principles and guidelines in the granting of an

interim injunction as laid down in the case of **American Cyanamid Co. v. Ethicon Ltd [1975] AC 396** and followed in our local case of **Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Others [1995] 1 CLJ 293** in arriving at her decision.

12. We are of the view the mere existence of clause 15 of the MNDA to the effect that damages may not be an adequate remedy does not *ipso facto* entitle the appellant to an interim injunctive relief. We agree with the contention of the respondent that the test as enunciated in the **American Cyanamid** regarding the grant of an injunction case must still be satisfied. The existence of such a clause as in clause 15 of the MNDA does not as a matter of law fetter the jurisdiction and the discretion of a court of law to decide whether to grant an interim injunctive relief. The justice of the case must be considered in determining whether an interim injunctive relief ought to be granted. With respect, we cannot agree with the position taken by the appellant that a negative covenant existing in a contract would obviate the need for the court to consider the balance of convenience test as enunciated in **American Cyanamid**.

13. We also noted that the said clause 15 of the MNDA does not provide that the parties have agreed or consented to the fact that the granting of an injunction is automatic and as of right. We further find that the alleged breach of the confidential information as contended by the appellant had not yet been established. This is an issue to be tried by the learned Judge of the High Court as the respondent had disputed receiving the confidential information. The discretion,

whether to grant the injunctive relief, is therefore still vested with the Court. It is the inalienable duty and power of the Court to exercise such a discretion and it will not be exercised lightly. There are a number of decided cases from foreign jurisdiction to support such a proposition as follows:

14. We would firstly refer to the Canadian case of **Jet Print Inc. v. Cohen [1999] OJ No. 2864** and at paragraphs 25 to 29 of the judgment wherein the issues similar to the present case were raised by the parties and the Court *inter alia* held:

> *"25. The only other basis offered by the plaintiffs for a finding of irreparable harm was the term in the employment contracts quoted earlier which says that any breach or threatened breach of the restrictions:*
>
> > *'will cause irreparable injury to the Employer and that money damages will not provide an adequate remedy in the Employer.'*
>
> *26. The plaintiff says that this term in the employment agreement is sufficient to establish irreparable harm and there is no need to produce evidence to support such a finding. In other words the contractual term provides all that is necessary for the finding of irreparable harm. In support of this assertion, the plaintiffs rely on the decision in* ***London Life Insurance Co. v. Heaps et al. [1993], 50 CPR (3d) 438 (Ont. Gen. Div.)*** *in which* ***Mr. Justice Weekes*** *said at page 444:*
>
> > *'At present, I am satisfied that the actions of Heaps in soliciting the business of his former London Life clients is a violation of clause 8 of the employment agreement. The agreement stipulates that any such violation will cause*

> *irreparable harm and that an injunction is an appropriate remedy. That alone would be enough to lead to the conclusion that **London Life** will suffer irreparable harm.'*

*I note that, notwithstanding the above statement, Mr. Justice Weekes then went on to find that there was other evidence before him upon which he could conclude that irreparable harm would be suffered by **London Life**.*

27. With respect, I believe that the above statement by Mr. Justice Weekes goes too far. I note that no authority is cited for the proposition and I confess to having some considerable difficulty with it. The granting of an injunction is an equitable remedy. I do not believe that the parties to a contract can obviate or waive the usual requirements on which a court would need to be satisfied before exercising its equitable jurisdiction. While such a term in a contract might provide some evidence in favour of a finding of irreparable harm, I do not see that it can be a complete answer to that requirement and thereby preclude the court from inquiring into the issue, particularly in a case such as here where there is otherwise an absence of evidence that would lead in that conclusion.

*28. I find support for my view in **Mr. Justice Sharpe**'s text, "**Injunctions and Specific Performance**", **[2nd edition]** wherein he says at para 7.730:*

> *'This suggest that the agreement will be relevant, although perhaps not determinative in the assessment of the nature of the plaintiff's interest in obtaining actual performance rather than damages. The court, however, maintains an overriding discretion to refuse the remedy.'*

*In a footnote to that paragraph, Mr. Justice Sharpe notes the leading American case of **Stokes v. Moore, 77 So. 2d 331***

(Alabama SC, 1995) *in which the following statement appears at page 335:*

> *'We do not wish to express the view that an agreement for the issuance of an injunction, if and when a stipulated state of facts arises in the future, is binding on the court to that extent. Such an agreement would serve to oust the inherent jurisdiction of the court to determine whether an injunction is appropriate when applied for and to require its issuance even though to do so would be contrary to the opinion of the court.'*

29. I conclude therefore that the presence of the above quoted clause in the employment agreements does not obviate the need for the plaintiffs to satisfy the court that they will suffer irreparable harm if the injunction is not granted. For the reasons I have already given, I find that the plaintiffs have not satisfied that requirement." **[Emphasis Added]**

15. We would also refer to the case of **First Health Group Corp v. National Prescription Administrators, Inc. and David W. Norton 155 F. Supp. 2d 194** where the **United States District Court** in interpreting Section 10 of the Agreement between the parties declined to grant the injunction sought. Section 10 of the Agreement reads as follows:

> ñ*26. Section 10 of the Agreement, titled 'Remedies' states:*
>
> *'In the event [Norton] breaches or threatens to breach section 7, 8 or 9 of this Agreement, [First Health] shall be entitled to injunctive relief, enjoining or restraining such breach or threatened breach. [Norton]*

> *acknowledges that [First Health's] remedy at law is inadequate and that [First Health] will suffer irreparable injury if such conduct is not prohibited…"*

The relevant passages in the judgment are set out at pages 48 and 49 as follows:

> ñ***D. Irreparable Harm***
>
> *Having established that there is a reasonable probability of success on the merits as to some of its claims, First Health has cleared the first hurdle towards a preliminary injunction. The Court now turns to the issue of irreparable harm.*
>
> *[21] First Health claims that it has satisfied the requirement for demonstrating irreparable harm by virtue of Norton's Employment Agreement with First Health. The Agreement provides that, in the event that Norton breaches sections 7,8 or 9 of the Agreement, First Health shall be entitled to injunctive relief enjoining any actual or threatened breach, and that Norton 'acknowledges that [First Health's] remedy at law is inadequate and that [First Health] will suffer irreparable injury if such conduct is not prohibited.' Agreement section 10. First Health cites no authority, and this Court has found none, in support of the proposition that the parties may contractually bind themselves and the Court to injunctive relief before any breach has occurred. Because the nature of the alleged breach and its consequences are unknown when a contract is executed, a question exists as to whether the parties can effectively waive a judicial determination on this crucial element.*
>
> *'The grant of injunctive relief is an extraordinary remedy…which should be granted only in limited circumstance.' **Frank's GMC***

Truck Center, Inc. v. General Motors Corp., 847 F. 2d 100, 102 (3d Cir. 1988) (citing United States v. City of Philadelphia, 644 F.2d 187, 191 n.1 (3d Cir. 1980). *As* ***Justice Baldwin****, sitting on the Circuit Court for the District of New Jersey wrote 171 years ago, 'there is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction; it is the arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages.'* ***Bonaparte v. Camden & A.R. Co. 3F.Cas 821 (C.C.D.N.J. 1830) (No. 1,617)***.

In determining whether a preliminary injunction should issue, a court must first look to whether the plaintiff is likely to experience irreparable harm without an injunction, and second, to whether the plaintiff is reasonably likely to succeed on the merits. ***Adams v. Freedom Forge Corp. 204 F. 3d 475, 484 (3d Cir. 2000)****. 'A court may not grant this kind of injunctive relief without satisfying these requirements, regardless of what the equities seem to require.' See also* ***In re Arthur Treacher's Franchisee Litig. 689 F. 2d 1137 1143 (3d Cir. 1982)***.

*It would represent an extraordinary variance from this basic principle for a court to recognize that the parties to a suit at equity have contracted around one of these fundamental elements. 'It is a basic doctrine of equity jurisprudence that courts of equity should not act…when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' …Therefore, this Court must not interpret section 10 of Norton's Employment Agreement with First Health to waive the required analysis of whether, in fact, plaintiff has established that it will suffer irreparable harm in the absence of a preliminary injunction.*ò [**Emphasis Added**]

16. Based on the above two cited case authorities we are of the view it is clear that a clause in a contract stipulating that injunctive relief ñ*may*ò or ñ*shall*ò be the appropriate remedy where damages may not be appropriate or where there is irreparable harm does not mean that such relief will be granted as of right. The party seeking to secure equitable relief of such a nature must still satisfy a Court of law that the pre-requisites for granting injunctive relief are prevalent. A Court is free to exercise its jurisdiction and ultimately the discretion whether to grant or to dismiss an application for injunctive relief notwithstanding the attempts by the parties to a contract to oust that jurisdiction and discretion.

17. In his submissions before us learned Counsel for the respondent, besides strenuously challenging the appellantôs reliance on the application of clause 15 of the MNDA, raised a number of other issues in opposing the appellantôs application for the injunctive relief. Amongst others, the respondent contended that the terms of the injunction are imprecise as the ñ*confidential information*ò sought by the appellant to be protected is not defined and there was no evidence proffered by the appellant to support its allegation of disclosure of the alleged confidential information by the respondent to third parties. We do not think it is necessary for us to determine one way or another as to the outcome of these issues. The learned trial Judge in this case has found that on the totality of facts presented it had disclosed *bona fide* issues to be tried. We therefore will not embark upon a judicial scrutiny of the merits of these issues raised by

the respondent at this interlocutory stage before the learned trial Judge.

Conclusion

18. For the reasons abovestated we would answer the question posed before us as follows:

1. The grant of an injunctive relief is an equitable remedy which is within the courtõs absolute discretion. In this regard the principles for the granting of such a remedy must be strictly adhered to at all times and cannot be curtailed by a contract entered into between the parties;
2. As a matter of law, the respondent is not disentitled from asserting that damages are an adequate remedy in opposing an application for an interim injunctive relief notwithstanding clause 15 of the MNDA.

19. The appellantõs appeal is therefore dismissed with costs. We make an order of costs of RM100,000/- to be paid by the appellant to the respondent. Deposit is to be refunded to the appellant.

(ZULKEFLI BIN AHMAD MAKINUDIN)
Chief Judge of Malaya

Dated: 20th January 2014

Counsel for the Appellant

En. Malik Imtiaz, Mr. R.S. Sodhi and Mr. Pavendeep Singh.

Solicitors for the Appellants

Messrs. Watson Peter & Mohd Fuad

Counsel for the Respondent

Tan Sri Cecil Abraham, Mr. N. Navaratnam, Mr. Sunil Abraham, Mr. Wong Wye Wah, Puan Idza Hajar Bt. Idzam and Mr. Wong Li Wei.

Solicitors for the Respondent

Messrs. Kadir Andri & Partners