IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[CIVIL SUIT NO: WA-22NCC-433-09/2020]

BETWEEN

AERODUA METAL (M) SDN BHD
[Company No.: 701266-H] **... PLAINTIFF**

AND

IBARAT HIJAU SDN BHD
[Company No.: 1205574-X] **... DEFENDANT**

GROUNDS OF JUDGMENT

INTRODUCTION

[1] Enclosure 6 ("Enc. 6) is an *ex parte* application for injunctive relief by the Plaintiff which was directed by the Court to be heard *inter partes*.

[2] On 13 November 2020, after considering the written submissions filed by the parties and hearing the oral arguments, I allowed Enc. 6 but on varied terms. This judgment contains the full reasons for my decision.

BACKGROUND

[3] The Defendant through an Assets Sale Agreement dated 3.10.2017 ("ASA") with Carotech Berhad (Receiver and Manager Appointed) (In Liquidation) agreed to purchase the plant and machinery which was

located at Plot C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan ("the plant and machinery") for a sum of RM4,400,000.00 ("the purchase price").

[4] The Defendant paid a sum of RM440,000 towards the purchase price on 28.11.2017.

[5] It was inter alia a term of the ASA that the full balance purchase price is to be paid within 30 days of the ASA. Arising from disputes between the Defendant and the Receiver and Manager, a Consent Judgment was recorded in Kuala Lumpur High Court Civil Suit No: WA-22NCC-55- 02/2018 on 31.01.2019 ("the Consent Judgment") where the Receiver and Manager agreed to grant two (2) months from the date of the Consent Judgment to the Defendant to settle the balance Purchase Price under the ASA.

[6] Pursuant to discussions between the representatives of the Plaintiff and the Defendant, both parties agreed to co-partner with each other in "an unincorporated joint venture" to undertake the purchase of the plant and machinery pursuant to the Consent Judgment and entered into a written Agreement dated 27.03.2019 ("the JV agreement") governing their rights, the salient terms of which were:

(i) the Plaintiff agreed to pay the balance Purchase Price of RM3,960,000.00 directly to the Receiver and Manager on behalf of the Defendant on or before 31.03.2019 –clause 2.2;

(ii) the Defendant having already paid the RM RM440,000 towards the purchase price is to pay a refundable security deposit of RM300,000 to the Receiver and Manager towards removing the plant and machinery and render the payment receipt to the Plaintiff – clause 2.3 and 2.4;

(iii) profits from the sale the plant and machinery will be shared 50:50 after reimbursement to the parties of their contributions and expenses above – clause 3.1;

(iv) the sale price is to be mutually agreed upon - clause 4.1;

(v) the plant and machinery ought to be removed within (6) months from 31.03.2019 in accordance with clause 5.4 under the ASA- clause 4.2;

(vi) the Defendant is to act as a Trustee for the joint venture with the Plaintiff in respect of the plant and machinery (as detailed in Appendix A of the Agreement) – clause 6.1;

(vii) the Defendant is not entitled to any component part of the plant and machinery to be vested in the joint venture to be sold and Defendant's sole interests are in the profits as defined - clause 6.2.

[7] Pursuant to the JV agreement, the balance purchase price in the sum of RM3,960,000.00 was paid by the Plaintiff.

[8] Bearing in mind that the plant and machinery had to be removed within 6 months of 31.03.2019, the parties tried to sell the plant and machinery before the dateline but all 3 attempts to sell the plant and machinery did not bear fruition. At one point the Defendant's Solicitors through their letter at Exhibit AD-17, page 91 of the Affidavit in Support informed the Plaintiff's solicitors the following:

(i) that the Purchaser wishes to "remain its anonymity" (sic), hence the Defendant shall not reveal the identity of the same; and

(ii) that as a security for the Plaintiff, in the event that the Purchaser fails to settle the balance purchase price in the

sum of RM 4,000,000.00 on/before 20.10.2019, the Defendant undertakes to pay the Plaintiff the balance purchase price within two (2) days from 20.10.2019.

[9] That letter appears to set the stage for storm clouds to gather over the JV relationship, leading to accusations and counter accusations by the parties. The subsequent letters to each other added to the clouds with the JV relationship and purpose starting to go off the rails and until today, the plant and machinery have not been sold, both parties lost out and were left disappointed with each other.

[10] Meanwhile, the Defendant has admitted that it had started the removal of the plant and machinery from its location in Setiawan.

[11] It emerged from affidavits filed during the injunction application that the Receiver and Manager had terminated the ASA on 1.10.20 as the plant and machinery were not removed by the final dateline of 30.9.20 and pursuant to clause 5.4 (b) of the ASA:

(a) the Purchase Price will be forfeited by the Receiver and Manager as agreed liquidated damages;

(b) the Receiver and Manager will be given back the legal possession of the plant and machinery; and

(c) the Receiver and Manager will also be given the right to resell or dispose of or to remove the remaining plant and machinery as deemed fit.

[12] The Defendant in its affidavit in reply at paragraph 6.47 said it is in the process of filing an application to Court to challenge the termination of the ASA.

[13] The Plaintiff's substantive claims in this suit are for:

(i) a declaration that the plant and machinery detailed specifically in Appendix A located in Plots C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan, are held on a trust based on an "unincorporated joint venture" of the Plaintiff with the Defendant;

(ii) a declaration that based on paragraph (i) above that the Defendant has no rights, title, interest and/or benefits to any component plant and machinery specifically set out in Appendix A and located in Plots C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan pursuant to the terms of the Agreement dated 27.03.2019;

(iii) a declaration that the Defendant has breached the terms of the Agreement dated 27.03.2019;

(iv) an injunction order to restrain the Defendant and/or its representatives and/or servants and/or agents from selling and/or trading and/or to dispose off the plant and machinery detailed in Appendix A;

(v) an Order that the Defendant disclose the secret profits made; and

(vi) payment of losses and damage based on allegations that the Defendant:

(a) has failed in its implied and express contractual and fiduciary obligations entrusted by the Plaintiff to use its best endeavours to find a purchaser for the plant and machinery;

(b) owed a duty to act in the best interest of the Plaintiff to ensure that the plant and machinery is sold as soon as possible without loss to the Plaintiff;

(c) failed in its duty to do so;

(d) further failed to act honestly and in good faith;

(e) had at all material times, acted independently in handling the sale of the plant and machinery without involving and consulting the Plaintiff for any sales transaction that were entered into by the Defendant with the purchaser when the plant and machinery are in fact held under on trust for the joint venture with the Plaintiff;

(f) given that every sale and purchase transaction of the plant and machinery failed without any reason being given to the Plaintiff, the Defendant failed to give exclusive rights to the Plaintiff to sell the plant and machinery even though it had agreed to do so, it is clear that there is an intention to defraud the Plaintiff;

(g) has defrauded and/or concealed the actual price of the sale of the plant and machinery from the Plaintiff;

(h) had failed in the performance of his duties as a Trustee ("Trustee").

[14] To preserve the status quo pending the final disposal of the Plaintiff's claim, vide enc. 6, the Plaintiff sought:

(i) an Interim injunction order to prohibit the Defendant and/or its representatives and/or servants and/or agents from authorising any party to sell, deal with or dispose off the plant and machinery detailed in Appendix A and located at Plots C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan in any way unless with the express consent of the Plaintiff and based on terms agreed upon by the Plaintiff;

(ii) an Order that the Defendant forthwith from the date of service of this Order whether represented by agents and/or Defendant's employees, in any case, send and submit to Plaintiff and/or Plaintiff's Counsel a list of plant and machinery as contained in Appendix A and those previously located at Plot C1& C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan and which are currently sold and/or transacted and/or has been disposed of by the Defendant and/or its representatives and/or servants and/or agents and/or employees;

(iii) an Order that the Plaintiff and/or his agents within two (2) days from the date of service of this Order be given permission to enter the factory located at Plot C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan to make an inspection of the plant and machinery detailed machines in Appendix A and located at Plots C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan which were previously located at that address and for that purpose, the Plaintiffs and/or servants and/or representatives and/or its agents be given reasonable authority to obtain access to the address for inspection

purposes and if necessary, the Plaintiff is entitled to bring the police with it during the inspection; and

(iv) the Plaintiff be given liberty to apply.

[15] The Plaintiff claimed that as the Defendant is already removing the plant and machinery, the plant and machinery will be dissipated.

Defendant's objections to injunction

[16] The Defendant's contentions in summary are that enc. 6 should be dismissed:

(i) *in limine* on the basis that it is procedurally defective:

(a) the Plaintiff failed and/or neglected to provide full and frank disclosure in the Affidavit in Support, which is the bedrock of any interim injunction - *Order 29 rule 1 (2A) of the Rules of Court 2012*;

(b) the Plaintiff omitted to disclose most of the discussions and/or the negotiations between the Plaintiff and the Defendant;

(c) the Plaintiff also failed and/or neglected to serve the Interim Injunction Order (Ex-Parte) dated 30.09.2020 to the Defendant until the hearing for the immediate compliance of the Defendant;

(d) the non-service of the Interim Injunction Order (Ex-Parte) dated 30.09.2020 by the Plaintiff demonstrates that the matter is NOT one of urgency;

(ii) the Plaintiff's claim against the Defendant does not disclose a bona fide serious issue to be tried and in

determining whether there is a bona fide issue to be tried, the ASA and the JV agreement ought to be read together;

(iii) any attempt by this Court to determine whether or not the Plaintiff's claim against the Defendant discloses a bona fide serious issue to be tried would be utterly futile until and unless the Receiver and Manager and the Defendant decide on how to deal with the Termination under the ASA;

(iv) the Plaintiff failed and/or neglected to demonstrate that:

(a) the Plaintiff has suffered an irreparable loss and/or damage;

(b) the remedies available at law are inadequate to compensate the loss and/or damage;

(c) in view of the balance of hardships between the Plaintiff and the Defendant, a remedy in equity is warranted (sic); and

(d) the public interest would not be disserved by an injunction.

(v) the only complaint and/or grievance of the Plaintiff under the Agreement is that the Plaintiff has yet to receive from the Defendant the Balance Sale Price in the sum of RM4,000,000.00, which can be adequately compensated;

(vi) damages would constitute an adequate remedy;

(vii) the balance of convenience in the present case do not favour the Plaintiff nor the Defendant:

(a) since 01.10.2020, the Receiver and Manager has reclaimed the legal possession of the plant and machinery through the Termination under the ASA;

(b) both the Defendant and the Receiver and Manager are still in the midst of deciding on how to deal with the Termination under the ASA;

(c) consequently, neither the Defendant nor the Plaintiff has any claim at all in respect of the plant and machinery at this juncture;

(d) therefore, both the grant and the refusal of an interim injunction order, as a matter of fact, would not produce any harm and/or injustice to both the Defendant and the Plaintiff until it is decided that the Termination under the ASA is unlawful and void;

(e) "the Defendant is in NO locus" to dispose of the plant and machinery at any time soon contrary to the interests of the Plaintiff until and unless the Termination under the ASA is held to be unlawful and void for good, the status quo should be strictly maintained by this Honourable Court at this interlocutory stage.

The Law

[17] As for this Court's jurisdiction to entertain a claim for declarations, Section 41 of the Specific Relief Act 1950 (Act 137) makes provisions for a declaratory decree. It stipulates that any person entitled to any "legal character", or to any "right as to any property", may institute a suit against any person denying, or interested to deny, his title to the "character" or "right". Raja Azlan

Shah, Acting Lord President (as His Royal Highness then was) in *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, 31, explained that the remedy of declaration can be used in a "wide range of circumstances" and in a "wide variety of cases in terms of subject matter".

[18] Under section 41 of the Specific Relief Act 1950 (Act 137), a declaration can be sought by the applicant in order to protect the applicant's entitlement to a legal character or status or right to property.

[19] In *Dato Raja Ideris bin Raja Ahmad & Ors v. Teng Chang Khim (Chairman of the select Committee on Competence, Accountability and Transparency and the Chairman of the Committee of Rights and Privileges State Legislative Assembly of Selangor) & Ors* [2012] 5 MLJ 490, the Court of Appeal in a judgment delivered by Low Hop Bing JCA pronounced as follows:

> "[28] A declaratory judgment merely states the rights or legal position of the parties as they stand without altering them in any way: see *Gan Hwa Kian & Anor v. Shencourt Sdn Bhd* [2007] 4 MLJ 554. A declaration can be used to ascertain and determine the legal rights of parties or to determine a point of law: *Brett Andrew Macnamara v. Kam Lee Kuan* [2008] 2 MLJ 450 at p 459 per Balia Yusof J (now JCA). By virtue of s. 41 and O. 15 r. 16, the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. The court has power to grant a declaration irrespective of whether an application has a cause of action or not and even if a cause of action does not exist at the time of the filing of an application: see eg *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener)* [1995] 2 MLJ 421; *BSN Commercial Bank (M) Bhd v. Pentadbir Tanah Daerah, Mersing*

[1997] 5 MLJ 288; *and Cekal Berjasa Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 MLJ 284 at p 294, per Abdul Malik Ishak J (now JCA).

[29] The jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action: *Guaranty Trust Co of New York v. Hannay* [1915] 2 KB 536 (CA) (Eng); *Dewan Singh v. M Thynappa Ltd & Yeo Teck Chiang* [1939] MLJ 278; *Haji Hussin bin Haji Ali & Ors v. Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 (FC); *Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64; and *Tengku Mariam binte Tengku Sri Wa Raja & Anor v. Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110…"

[20] As the subject matter of enc. 6 is for interlocutory injunctive relief, this court need only apply the guidelines of the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 in order to decide whether discretion may be exercised to grant the orders sought.

[21] In *Keet Gerald Francis*, the Court of Appeal has set out the principles for a judge to follow when hearing an application for an interlocutory injunction at pages 206 to 207:

"To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

1. he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he

must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

2. having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge

would be entitled to dispense with the usual undertaking as to damages (*see Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

3. the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1983] 3 AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in Cheng Hang Guan. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion."

[22] I will consider now the issues raised by both counsel.

Is There a *Bona Fide* Serious Issue To Be Tried?

[23] In my assessment of the parties' affidavits, I have considered the approach of the Federal Court in *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81, [1999] 2 CLJ 997 at 1005-1006 per Edgar Joseph Jr FCJ:

> "The Law on the approach of the Court of first instance in evaluating and resolving a conflict of evidence on affidavit was well captured by the Privy Council in *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 and in *Tay Bok Choon v. Tahansan Bhd.* [1987] 1 MLJ 433. In the first of these cases - Eng Mee Yong - Lord Diplock delivering the advice of their Lordships of the Board said this (at p. 381 D):
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflict of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit *however equivocal, lacking in precision, inconsistent with undisputed contemporary document or other statements by the same deponent, or inherently improbable itself may be*. (emphasis added)
>
> In the second of these cases - Tahansan - Lord Templeman put the point more shortly and generally, thus:
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> > If allegations are made in affidavits by the petitioner and those allegations are *credibly denied* by the respondent's affidavits, then in the absence of oral evidence or cross

examination, the judge must ignore the disputed allegation. (emphasis added)

The second point to note regarding this part of the case is that, it is an elementary proposition sometimes overlooked with resulting confusion and possible injustice that where statements are made by a deponent, based on information and belief these ought not to be looked at all, unless the court can ascertain not only the source of the information and belief but also unless the deponent's statement is corroborated by someone who speaks from his own knowledge. (See, *In re J.L Young Manufacturing Ltd. Co.* [1900] 2 Ch. 753 754 per Lord Alverstone CJ, applied by the old Federal Court in *Cantrans Services (1965) Ltd. v. Clifford* [1974] 1 LNS 14)."

[24] This court has also borne in mind that at this stage of the proceedings, it is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case. This is settled law as pronounced by Lord Diplock in *American Cyanamid*'s case ([1975] AC 396 at p 407; [1975] 1 All ER 504 at p 510; [1975] 2 WLR 316 at p 323):

"… It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations."

[25] Based on the materials available before the court, the Plaintiff and Defendant "co-partnered" for a single adventure and for profit that the plant and machinery purchased in the name of the Defendant is to be a joint venture asset. The JV agreement made this clear and pursuant thereto, the Plaintiff did pay the balance purchase price in the sum of RM3,960,000.00 to the Receiver and Manager.

[26] The understanding and arrangements between the Plaintiff and Defendant constituted a joint venture; but whether such joint venture was a partnership under the provisions of the Partnership Act 1961 ('Act 135') is another matter to be established at trial. A joint venture may or may not be a partnership and in deciding whether or not a partnership existed, the court ought to have regard to the provisions in s. 4 of Act 135 as well as the intention of the parties as appearing from the whole facts of the case and the contract the joint venturers had made: *Chooi Siew Cheong & Anor v. Lucky Height Development Sdn Bhd & Anor* [1995] 1 MLJ 513 (FC) at pp 521 D-F, 522 A-D. *Chooi Siew Cheong* was a case where there was a joint venture agreement in writing and one of the questions for the court's decision was whether the joint venture project was a partnership under Act 135.

[27] In the ordinary sense, a 'partnership' or a 'joint venture' gives rise to fiduciary duties to act with the utmost good faith.

[28] In the case of *James Birtchnell & Anor v. The Equity Trustees, Executors and Agency Co Ltd & Anor* (1928–30) 42 CLR 384, a case often cited in our Courts, Dixon J at p 407 explains the fiduciary relationship between partners and how the relationship is to be determined:

> "The relationship between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the lifeblood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon *VC in Helmore v. Smith* [1890] 15 App Cas 223 at p 225 (1886) 35 Ch D 436 at p 444). The relation is based, in some degree, upon a

> mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (*Cassels v. Stewart* [1881] 6 App Cas at p 79). The subject matter over which the fiduciary obligations extend is determined by the character of the venture of undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm. Once the subject matter of the mutual confidence is so determined, it ought not be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties."

[29] The duty that arises from a joint venture was extensively reviewed by the Court of Appeal in *Kuan Pek Seng v. Robert Doran* [2013] 2 MLJ 174. Jeffrey Tan FCJ (after referring to *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 MLJ 474 held at para 51-52:

> **"**[51] Subsequent to Newacres (1991), in *Chooi Siew Cheng v. Lucky Height Development Sdn Bhd & anor* [1995] 1 MLJ 513, Cheong Siew Fai FCJ, as he then was, affirmed that joint venturers may owe certain fiduciary duties to one another, but that the existence of such duties does not necessarily make them partners under the Act (for difference between joint venture and partnership, see Australian Business Law 19th Edition by Paul Latimer paragraph 9-150), and in *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & anor* [1999] 2 MLJ 481, Gopal Sri Ram

JCA, as he then was, too affirmed that participants to a joint venture stand in a fiduciary position to each other:

> It is settled that parties to a joint venture stand in a fiduciary position to each other. The scope or extent of the duties that joint venturers owe each other depends upon varied considerations. These would encompass (but are not limited to) the nature of the particular joint venture, its subject matter, the relevant documents passing between the parties, including any agreement upon which the particular venture is founded and the attendant circumstances. Here, as in other areas of equity jurisprudence, there is no substitute for a meticulous examination of the facts. If authority is required for these propositions it may be found in the decision of the Supreme Court in *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 MLJ 474.
>
> It is axiomatic that mutual trust and confidence between joint venturers is essential for the proper working of the relationship. And where, as in the present instance, there is reliance by one joint venturer upon the skill or expertise professed by the other in the subject matter of the enterprise, there is, in my judgment, a duty upon that other to use his best endeavours to ensure the success of the venture. Equity will, in my view, imply such an obligation in the absence of an express term in the particular joint venture agreement.

[52] 2 subsequent authorities (Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 MLJ 353 and Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd [2006] 6 MLJ 544) reaffirmed that the relationship between joint venturers is fiduciary. That the relationship is fiduciary is therefore settled." (emphasis added)

[30] It must be categorically emphasized and it is of significant importance to note the fact that there is a joint venture between the Plaintiff and Defendant is not disputed by the parties herein, and as such the duties of utmost good faith and fiduciary duties owed by one party to the other in this case as joint venturers will apply. Such a relationship is based upon a mutual confidence that each will engage in some particular kind of activity or transaction pertaining to the joint venture for their joint advantage only. And owing to fiduciary obligations, each joint venturer cannot insulate itself from scrutiny and is accountable to the other.

[31] The Plaintiff states that the dispute with the Defendant relates to the implementation of the JV agreement by the Defendant to have the plant and machinery sold, and by dint of the JV agreement and by reason of all the circumstances of the case, the Defendant is, at all material times, under a fiduciary duty to act honestly, reasonably and in good faith and in all its dealings with the Plaintiff. The Plaintiff alleged that at all material times, the Defendant had acted in breach of its contractual and fiduciary duties, acted fraudulently and was dishonest, together with various other claims and gave particulars thereof in the statement of claim, and therefore sought various declarations as summarised by me at paragraph 13 above and injunctive relief.

[32] In my respectful view, whether there is a breach of fiduciary duty by the Defendant, whether it has acted fraudulently and was dishonest, the Plaintiff's litany of denunciations of the Defendant by their very nature, require proof by extrinsic and viva voce evidence and are questions of law and fact which can only be decided after trial. Suffice, at this juncture, for me to hold that the first test of showing bona fide serious issues as laid down by in *Keet Gerald Francis* has been met.

Damages An Inadequate Remedy?

[33] The Defendant has urged upon this Court that as the Plaintiff's complaint is that it has yet to receive from the Defendant the balance sale price in the sum of RM4,000,000.00, damages would constitute an adequate remedy.

[34] On the other hand, the Plaintiff prevailed on this court the case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, a decision of the Supreme Court. He argued that damages is not an adequate remedy as the plant and machinery is held on trust for the joint venture.

[35] In *Alor Janggus*, the appellants/plaintiffs there sought, inter alia, damages. The injunction was allowed on appeal. In the said case, on the application of *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316, His Lordship Jemuri Serjan CJ (Borneo) remarked as follows (p 253 of the report):

> "However, as is stated in *Hubbard v. Vosper* [1972] 2 QB 84; [1972] 1 All ER 1023; [1972] 2 WLR 389 and approved by Lord Diplock in *American Cyanamid* 's case [1975] AC 396 at p 407D; [1975] 1 All ER 504 at p 510; [1975] 2 WLR 316 at p 322 the discretion of the court to grant or refuse an interlocutory injunction should not be fettered by laying down any rules which would have the effect of limiting the flexibility of the remedy." (emphasis added)

[36] *Alor Janggus* to me is still good law in holding 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. His Lordship Jemuri Serjan CJ (Borneo) pithily said in that "*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" (pg 270).

Justice Of The Case Or The Balance Of Convenience

[37] In weighing the justice of the case, I have considered that the Plaintiff has paid a significant sum of RM3,960,000.00 as balance purchase price to the Receiver and Manager for the plant and machinery; the fact that the Defendant's financial contribution is a lot less and the fact that the Defendant has admitted that it had started to remove the Plant and machinery from its original location in Setiawan, the fact that the plant and machinery is held in trust for the joint venture and may be dissipated leading to the joint venture's proprietary rights being impinged, an injury will, if not restrained, take place and this is an important consideration to this Court in the context of the hardship or inconvenience to the Plaintiff if the interlocutory relief of an injunction is refused. In the circumstances and the factual matrix as obtained here, I am of the considered view that the risk of doing an injustice is greater if the injunction is not granted.

[38] I find that there was nothing at all produced by the Defendant on record to suggest that the Defendant would be prejudiced in any way by the grant of the injunctive relief.

[39] My additional reason for holding that the balance of convenience should tilt in favour of granting the interim injunction prayed for is that the Defendant has informed that the ASA has now been terminated, and thus no plant and machinery can be taken out pending the challenge as to the legality of the termination of the ASA. By the Defendant's own concession, I therefore see no prejudice at all to the Defendant for this Court to allow the Orders sought and for the

Plaintiff as a joint venturer who had expended a considerable sum to purchase the plant and machinery to be allowed to enter the premises where the plant and machinery are located to inspect the joint venture's property.

[40] It is my conclusion that the Plaintiff had succeeded in raising serious bona fide issues to be tried and that the balance of convenience is tilted in favour of the Plaintiff.

Other matters raised by Defendant

[41] I find the Defendant's counsel's vigorous assertions that enc. 6 is to be dismissed *in limine* for infringing *Order 29 rule 1 (2A) of the Rules of Court 2012 as* there was no full and frank disclosure and based on alleged failure to serve the Interim Injunction Order (Ex-Parte) dated 30.09.2020 to be misplaced and have no teeth at all. It appears to me that the Defendant's counsel has seriously misconceived the matter which a simple file search would have shed light on. To begin with, the fact is, enc. 6 was directed to be heard *inter partes* and was not heard *ex parte*.

[42] In any case to address the non-disclosure point, the Defendant's counsel ought to be aware that the Court of Appeal in *Damayanti Kantilal Doshi v. Jigarlal Kantilal Doshi* [2004] 1 MLJ 456 after referring to the case of *Salcon Engineering Sdn. Bhd. v. PRM Energy Systems (M) Sdn. Bhd.* [1994] 1 CLJ 295 and *Noor Jahan bte Abdul Wahab v. MD Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 ruled that the paramount consideration was whether the justice of the case required the granting of the interim injunction on the facts presented in an inter partes hearing and the Court should not take a narrow and strict interpretation of O. 29 r. 1(2A). At p. 464, 465, the Court of Appeal approvingly cited:

> "*The practicality of the Bennet and Broadbent approach is that the court will not at the inter parte hearing, be encumbered with a forensic study on the question of disclosure. In some cases, such as the present, this is an onerous task involving detailed study of voluminous documents. At the end of this exercise, much time is wasted. I prefer to approach the inter parte hearing on a more pragmatic level by considering the merits of continuing the injunction on the material disclosed by both parties.*"(emphasis added)

[43] This court has not considered any matter raised by the Defendant in its submissions that were not set out in its affidavit and/or pleading. It is not out of place to say that statements from the Bar are to be deprecated – see: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 MLJ 281.

CONCLUSION

[44] It is trite that the general purpose of an interlocutory injunction is to maintain/preserve the status quo by preserving a fair balance between the parties and to give them protection while awaiting the finality of trial.

[45] For the reasons given, the following orders are made in respect of enc. 6:

(i) Defendan dan/atau wakil-wakil Defendan dan/atau pekerja-pekerja Defendan dan/atau pengkhidmat-pengkhidmat Defendan dan/atau ejen-ejen Defendan dihalang dan/atau dilarang untuk mengeluarkan loji dan jentera yang diperincikan secara khusus dalam Lampiran A yang mana terletak di Plot C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan

dari tanah dan/atau kilang yang bertempat di Plot C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan bagi tempoh empat puluh lapan (48) jam dari tarikh perintah variasi bagi Penghakiman Persetujuan yang bertarikh 31.01.2019 di bawah Guaman Sivil No: WA-22NCC-55-02/2018 yang akan direkodkan oleh Defendan dan Penerima dan Pengurus bagi Peliquidasi Carotech Berhad tersebut;

(ii) Plaintif dan/atau wakil-wakil Plaintif dan/atau pekerja-pekerja Plaintif dan/atau pengkhidmat-pengkhidmat Plaintif dan/atau ejen-ejen Plaintif diberikan kebenaran untuk memasuki tanah dan/atau kilang yang bertempat di Plot C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan dalam tempoh empat puluh lapan (48) jam dari tarikh perintah variasi bagi Penghakiman Persetujuan yang bertarikh 31.01.2019 di bawah Guaman Sivil No: WA-22NCC-55-02/2018 oleh Defendan dan Penerima dan Pengurus bagi Peliquidasi Carotech Berhad tersebut untuk membuat suatu pemeriksaan bersama bagi loji dan jentera yang diperincikan secara khusus dalam Lampiran A perjanjian bertarikh 27.3.2019 yang mana terletak di Plot C1 & C2, Lumut Port Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak Darul Ridzuan;

(iii) Plaintiff diberi kebebasan untuk memohon; dan

(iv) kos dalam kausa.

[46] Last but not least, in the interest of justice the matter will be fixed for early trial.

Dated: 15 JANUARY 2021

(LIZA CHAN SOW KENG)
Judicial Commissioner
High Court of Malaya at
Kuala Lumpur

COUNSEL:

For the plaintiff - Muniandy Vestanathan & Fiona Aurella Culas; M/s Andy & Co

For the defendant - Kryadarshini Kanapathy Pillai, Aravind Raj Perianan & Lalitakumari Thillaidasan; M/s Kadir, Khoo & Aminah

Case(s) referred to:

Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, 31

Dato Raja Ideris bin Raja Ahmad & Ors v. Teng Chang Khim (Chairman of the select Committee on Competence, Accountability and Transparency and the Chairman of the Committee of Rights and Privileges State Legislative Assembly of Selangor) & Ors [2012] 5 MLJ 490

Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193

Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 3 MLJ 81, [1999] 2 CLJ 997 at 1005-1006

American Cyanamid's case ([1975] AC 396 at p 407; [1975] 1 All ER 504 at p 510; [1975] 2 WLR 316 at p 323

Chooi Siew Cheong & Anor v. Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513 (FC) at pp 521 D-F, 522 A-D.

James Birtchnell & Anor v. The Equity Trustees, Executors and Agency Co Ltd & Anor (1928–30) 42 CLR 384

Kuan Pek Seng v. Robert Doran [2013] 2 MLJ 174

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 MLJ 474 held at para 51-52

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241

Damayanti Kantilal Doshi v. Jigarlal Kantilal Doshi [2004] 1 MLJ 456

Salcon Engineering Sdn. Bhd. v. PRM Energy Systems (M) Sdn. Bhd. [1994] 1 CLJ 295

Noor Jahan bte Abdul Wahab v. MD Yusoff bin Amanshah & Anor [1994] 1 MLJ 156

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 MLJ 281

Legislation referred to:

Specific Relief Act 1950, s. 41

Partnership Act 1961, s. 4

Rules of Court 2012, O. 29 r. 1 (2A)