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Caught in the Crossfire: What Should Telcos Do if They Are Brought in as a Party to Litigation to Secure Evidence or Damages?

The advent of 5G technology and rapid growth within the Technology, Media & Telecommunications (TMT) industry have led to a spike in the number of business dealings involving telecommunications companies (telcos). Due to this, these telcos may occasionally become inadvertently entangled in legal proceedings between other parties, despite being mere bystanders to the actual dispute.

For instance, in a recent matter handled by G Vijay Kumar and Chan Mun Yew (dispute resolution lawyers in LHAG's TMT Practice), two corporate plaintiffs filed a multimillion-ringgit civil suit against a Network Facilities Provider (NFP) and its various directors for breach of contract and fraudulent trading. In an attempt to substantiate their claim for damages, the plaintiffs also filed a civil suit against eight telcos in Malaysia that were engaged in business dealings with the defendants, seeking, among others:

- (a) Discovery (*i.e. disclosure and production*) of documents which were relevant to the dispute between the plaintiffs and the NFP;
- (b) An injunction to restrain the telcos from making any payments to the NFP pursuant to their contractual relationship, pending conclusion of the suit between the plaintiffs and the NFP.

Vijay and Mun Yew successfully represented four major telcos in striking out the plaintiffs' claim against them. The relevant legal principles relating to discovery and injunctions involved in the case are set out below:

Discovery

It is settled law that an action for discovery of documents cannot be brought against a person whom the plaintiff has no cause of action. In simple terms, discovery cannot be obtained against

someone who is in the position of a mere witness or observer to the dispute between the actual parties.¹

The exception to the above is where the plaintiff seeks a *Norwich Pharmacal* order.² A plaintiff would be able to seek an order for discovery against a third party, only in a situation where the third party, through no fault of their own, became “mixed up” in the tortious actions of the wrongdoer and in doing so, facilitated the wrongdoing. In such circumstances, the third party would be under a legal duty to assist the plaintiff by way of disclosing relevant information and documents. However, the *Norwich Pharmacal* order is only applicable where:

- (a) The identity of the tortfeasors (i.e. the wrongdoer against whom the plaintiff has a cause of action based on the law of tort), is unknown to the plaintiff — making discovery a necessary measure to ascertain the identity of said tortfeasors; and
- (b) The third party had facilitated the wrongdoing perpetrated by the tortfeasors.

Therefore, in cases where the plaintiff is aware of the identity of the wrongdoer(s) in question, or where the plaintiff’s cause of action against the wrongdoer is based on contractual principles, as opposed to based on tort, discovery under the *Norwich Pharmacal* principles will be refused.

Injunction

Likewise, it is trite law that the plaintiff must establish a valid cause of action against a wrongdoer, before any injunction can be granted against the wrongdoer. In the absence of a valid cause of action, a claim for an injunction is liable to be struck out.³

There have been cases where an injunction was allowed against a party whom the plaintiff had no valid cause of action, but these are confined to situations where it can be demonstrated that: (a) the injunction sought was ancillary and incidental to the plaintiff’s cause of action against the main wrongdoer; and (b) any injunction obtained by the plaintiff against the wrongdoer would be inadequate to protect the plaintiff.⁴

Summary

A party cannot be unnecessarily dragged into a dispute between litigants solely for the purpose of fishing for evidence to support

¹ *First Malaysia Finance Bhd v Dato' Mohd Fathi* [1993] 2 MLJ 497 (SC) (“*First Malaysia Finance*”); *Norwich Pharmacal Co and others v Commissioner of Customs and Excise* [1973] 2 All ER 943 (UKHL) (“*Norwich Pharmacal*”); *Alcatel-Lucent (Malaysia) Sdn Bhd v Solid Investment Ltd & another appeal* [2013] 2 CLJ 734 (CA)

² *Norwich Pharmacal*, *supra* n 1; *First Malaysia Finance*, *supra* n 1; *Ricci v Chow* [1987] 3 All ER 534 (CA, UK)

³ *Nishimatsu Construction Co Ltd v Kecom Sdn Bhd* [2009] 2 MLJ 404 (CA); *Woolley Development Sdn Bhd v Stadco Sdn Bhd* [2011] 6 MLJ 121 (CA)

⁴ *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 (HC,UK)

their case unless they can satisfy the requirements for a *Norwich Pharmacal* order to be granted. In the same vein, an injunction cannot be arbitrarily sought against a party who is not involved in the dispute, unless it can be shown that it is incidental/ancillary to the plaintiff's cause of action against the defendant, and that the grant of injunction against the third party is imperative to protect the plaintiff's rights in the matter.

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