IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA

(COMMERCIAL DIVISION)

SUIT NO: D5-22-1924-1999

BETWEEN

TUCK SIN ENGINEERING & CONSTRUCTION SDN BHD

(No. Syarikat: 153842-K) ... PLAINTIFF

AND

YEE HENG MANUFACTURING (M) SDN BHD

(No. Syarikat: 173280-K) ... DEFENDANT

CORUM

DATUK RAMLY HAJI ALI
JUDGE
HIGH COURT KUALA LUMPUR
(COMMERCIAL DIVISION)

GROUNDS OF JUDGMENT

1. The Plaintiff's claim is for the balance of payment due for works done and completed by the Plaintiff at the request of the Defendant. The Plaintiff's claim is founded on and supported by the final Progress Claim No: 11.

Factual Background

2. The Defendant was looking for a contractor to build a factory for them in Bandar Sri Damansara. To assist them, the Defendant engaged a Project Manager (Design Group), and an Architect. They were asked to identify a suitable contractor to build the Defendant's two (2) storey factory. Design Group invited contractors to tender for the job. To those who were interested, Design Group sent them tender documents to be filled up and returned.

3. The Plaintiff was one of the interested contractors. It submitted a bid as well and *"fill up standard terms and conditions such as the price, the time frame, specifications"*.

4. The Architect recommended the bid submitted by the Plaintiff. The Defendant agreed with the Architect's recommendation. The Architect then prepared a Letter of Acceptance and sent it to the Plaintiff.

5. The Plaintiff counter signed the acceptance on 22.7.1992. They also agreed with the additional terms contained in the Letter of Acceptance. One of the important terms was clause 6 which read as follows:-

> "6. *Term of payment: all payment claims will be submitted every two (2) weeks by main contactor; and payment to our certificate will be the following week".*

6. Construction commenced. The process for payment by the Defendant to the Plaintiff was straight forward:-

(a) the Plaintiff would submit his progress claim to the Architect;

(b) the Architect would certify whether the work claimed was done, and confirm this by issuing a Payment Certificate against the claim made by the Plaintiff. This Payment Certificate would be handed to the Plaintiff; and

(c) the Plaintiff would then present this Payment Certificate to the Defendant, and the Defendant would pay the amount as certified by the Architect.

7. The Plaintiff allegedly submitted Progress Claim No. 10 to the Architect. But the Architect never issue Payment Certificate No. 10. The Plaintiff filed a Sessions Court Suit No. 3-52-3243-96 against the Defendant claiming the amount billed in Progress Claim No. 10. The Session Court Judge however dismissed the Plaintiff's claim with costs to-be taxed. She found that the Plaintiff had not proven in fact and in law that they had done the .work in claim No. 10. She found that the Architect had not certified payment on that Progress Claim No. 10.

8. The Plaintiff now claims for Progress Claim No. 11, alleging that money is due for work done in Progress Claim No. 11.

Court's Findings

9. The burden of proof is always on the party who desires the Court to give judgment as to any legal right or liability. Judgment in his favour is dependant on the existence of facts which he asserts. He must prove those facts exist. In the present case, the Plaintiff must prove that they have rendered services pursuant to Progress Claim 11.

(see: Section 11, of the Evidence Act 1950; and *Tenaga Nasional Bhd. v. Perwaja Steel Sdn.Bhd.* [1995] 4 MLJ 673).

10. By the time this trial concluded, the Plaintiff had not proven the following:-

(a) **Alleged completion of the work by the Plaintiff in Progress Claim No. 11**

The Architect has not verified the work done in Claim No. 11, (although he did so for claims No. 1-9). The Plaintiff has adduced nothing to show that the work was done. It is material to note that the Architect was still alive up till 1998 - see Exhibit D20. The Plaintiff has not called anyone else from the Architect's office to testify that the work was done. It has not called anyone from Design Group. This is similar to the situation involving Progress Claim No. 10 which was dismissed at the Sessions Court. On the other hand, it has merely stated that the whole building has now been completed. This, the Defendant does not dispute. DW1 has given evidence that the building was completed by Pembinaan dan Kejuruteraan LOL.

(b) **The Plaintiff's entitlement to pay**

The "prerequisite" for payment is the Payment Certificate issued by the Architect. The Architect on the other hand, will issue this certificate only after he is

satisfied that all the work was done by the Plaintiff as in the Progress Claim. Only where there is a payment certificate, the Plaintiff is entitled to claim payment. Even PW1 himself acknowledges this.

11. The failure to prove these essential ingredients of it's claim .is fatal to the Plaintiff.

12. The issuance of the certificate by the Architect is a prerequisite to payment. The Plaintiff has not led any credible evidence to prove that certificate No. 11 was issued by the Architect and then sent to the Defendant. The Plaintiff has not called anyone from the Architect's office to show that this certificate was issued by the Architect's office. The Plaintiff has not led any credible evidence to show why the Architect supposedly refused to issue the certificate even though he was still alive at the material time (and not dead, as alleged by PW1 in his evidence in chief). The Plaintiffs have simply not proven that certificate No. 11 was ever issued. How can the Plaintiff now insist on payment following a progress claim that was never verified, and a Payment Certificate that was never issued?

13. On the other hand, the evidence of the Defendant indicates as follows:-

(a) The Plaintiff abandoned the work site in early 1993 without completing the factory. Work stopped because the Plaintiff had failed to pay his subcontractor. PW1 himself has confirmed during cross examination that money paid by the Defendant would be on-paid to the subcontractor.

(b) The Defendant had to look for someone else to finish the works. They searched for the Plaintiff's subcontractor and discussed the works that needed to be done, and how much it would cost. Then the Defendant hired them - the letter of appointment is marked as an exhibit D18.

14. By way of summary, the Plaintiff has not proven its claim. It has not proven that it did the work in Progress Claim No. 11. The Architect did not to verify it. The Plaintiff has not shown that a Payment Certificate No. 11 was issued by the Architect which would

have trigged the requirement for payment by the Defendants. All prerequisites for payment have not been satisfied. The burden of proof on a balance of probabilities has not been satisfied.

15. In the course of their submission the Plaintiff submitted that the Court should allow the Plaintiff's claim for works done based on *quantum meruit*. The Court shall now consider this aspect of the claim.

16. Firstly, the party claiming the benefit of *quantum merit* (in this case the Plaintiffs) must not be the party at fault.
(see: *Lau Kee Ko v. Pau Ngi Sin* [1974] MLJ 21).
In the present case, the Defendant has led evidence to show that the Plaintiff was at fault because they had abandoned the contract works in the early part of 1993.

17. Secondly, in order to found a claim in *quantum meruit*, the innocent party must have had accepted the breach by the Defendant and elected to terminate the contract. Only then can the innocent

party sue in *quantum meruit*. This is what the learned author of ***Anson"s Law of Contract*, 23rd edition,** says at page 529:-

> *"First a quantum meruit claim is only available if the original agreement has been discharged. The contract must have been broken by the Defendant in such a way as to entitle the Plaintiff, according to the principles discussed in Chapter xv, to regard himself as discharged from any further performance, and he must have elected to do so. If the contract is still, as it is said, 'open', he cannot use the quantum meruit remedy, but must rely on his remedy in damages".*

18. Here, the Plaintiff has not led any evidence showing that they accepted the supposed breach by the Defendant. And that they elected to terminate the contract. Surprisingly, the Plaintiff in this instant has asserted a contrary position. It can be seen that the Plaintiff's own submissions do not support a claim in *quantum meruit*.

19. In any event, even in a claim for *quantum meruit*, the party claiming must show that they completed the works being claimed. In

this case, the Plaintiff has failed to prove that they have completed the works claimed for. In fact, they could not even establish in the Sessions Court that they had completed the works in Progress Claim No. 10, leave alone Progress Claim No. 11 here.

Conclusion

20. On the above considerations, the Court is satisfied that the Plaintiffs had, on the balance of probabilities, failed to establish their claim against the Defendant. Under the circumstances, the Plaintiffs' claim against the Defendants be dismissed with costs.

Dated: 23 May 2007

(DATUK RAMLY HAJI ALI)
JUDGE
HIGH COURT KUALA LUMPUR
(COMMERCIAL DIVISION)

Solicitors:

1. Oh Teik Keng

   Tetuan Oh Tik Keng & Partners … for the Plaintiffs

2. Jerald Gomez together with David Peter

Tetuan Jerald Gomez & Associates ... for the Defendant

Cases referred to:

1. *Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd [1995] 4 MLJ 673*

2. *Lau Kee Ko v. Pau Ngi Sin [1974] MLJ 21*

Legislation referred to:

1. Evidence Act 1950, s. 11

Other References:

1. *Anson's Law of Contract*, 23rd edition