CIDB CONSTRUCTION LAW REPORT 2018

(Summary of 2018 Written Judgments & Lessons Learnt)

CIDB MALAYSIA

2019 EDITION

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Construction Industry Development Board Malaysia
10th Floor, Menara Dato' Onn, Putra World Trade Centre,
No.45, Jalan Tun Ismail, 50480,
Kuala Lumpur, Malaysia

Published by Construction Industry Development Board Malaysia

ISBN No: 978-967-0997-76-6

Printed in Malaysia by

TECHNICAL COMMITTEE

Sr Dr Wan Maimun Wan Abdullah
Women in Construction Malaysia

A Mu'iz Abdul Razak
Universiti Teknologi MARA

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CIDB Malaysia

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Public Works Department Malaysia

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CIDB Malaysia

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CIDB Malaysia

Nursazwaziha Salehudin
CIDB Malaysia

Oliver H.C Wee
Master Builders Association Malaysia

T Kuhendran
The Malaysian Bar

Associate Professor Sr Ts Dr Zulhabri Ismail
Association of Construction Project Managers Malaysia

◂ CONTRIBUTORS ▸

A Mu'iz Abdul Razak
Advocate & Solicitor (Non-practising)
Lecturer, Faculty of Law, UiTM Shah Alam

Sr Ahmad Suhaimi Abdul Majid
CQS, FRISM, FRICS, MIVMM
Managing Director, AS2 Consult Sdn Bhd
Hon. Treasurer General,
Royal Institute of Surveyors Malaysia (session 2019/2020)

Chan Kheng Hoe
Advocate & Solicitor
Arbitrator, Adjudication & Mediator (AIAC)
Fellow, Chartered Institute of Arbitrators
Fellow, Malaysian Institute of Arbitrators

Chan Yew Hoong
Advocate & Solicitor
Adjudicator
Partner at Messrs Azman Davidson & Co

Sr Dainna Baharuddin
CQS, FRISM, FRICS
Director, Basar & Harun Sdn

Datin Grace Xavier
Research Fellow, Faculty of Law, UM
Advocate & Solicitor (Non-practising)
Arbitrator & Mediator

Han Li Meng
Advocate & Solicitor
Adjudicator & Mediator
Partner at Christopher & Lee Ong

J Agesh Krishendra
Advocate & Solicitor
Zul Rafique & Partners

Janice Tay
Partner at Wong & Partners
Advocate & Solicitor
Arbitrator (AIAC)
Reserved Panel of SIAC
Adjudicator & Mediator (AIAC)
FCIArb, Member of CIArb (Malaysia)
SIArb & MIArb
Committee Member, WIBM (2019)
Member, Society of Construction Law, Singapore

Ar Jasmeet S Sidhu
Principal, Arkitek JazSidhu
LAM Registered Architect & Interior Designer
Board Member, Board of Architects Malaysia (LAM)
Founding President, Association of Consuting Architects, Malaysia (ACA:M)

Sr Juwita Radzi
PQS, PMP

Ir Lai Sze Ching
Dip. Int. CArb, BE, FCIArb, FMIArb,
FMSAdj, FAIADR, PE, FIEM, Hon. AFEO, ACPE
Arbitrator, Adjudicator & Mediator
Messrs Lai Teh Adjudication & Arbitration Chamber PLT

Lee Chee Yian
Committee Member, Contracts & Practice Sub-Committee
Master Builders Association Malaysia
Executive Director, Ekar Makmur Sdn Bhd

Sr Loo Ming Chee
Chartered Quantity Surveyor (retired)
Chartered IT Professional (retired)

Sr Maselawati Shamsuddin
CQS, FRISM, MRICS
Director, Dispute Resolution Consultancy
Public Works Department Malaysia

Sr Dr Mohd Suhaimi Mohd Danuri
Senior Lecturer, Department Quantity Survey
Faculty of Built Environment
University of Malaya

Sr Dr Muhammad Ehsan Che Munaaim
FRICS, FCIOB, FCIArb, MRISM
Chartered Quantity Surveyor (UK)
Chartered Construction Manager (UK)
Consultant Quantity Surveyor (Malaysia)
Panel Adjudicator (AIAC)
Senior Consultant, HKA Global Limited (Middle East)

Nadesh Ganabaskaran
Partner at Messrs Malek, Pauline & Gan
Advocate & Solicitor
Barrister-at-Law (Middle Temple)
Adjudicator (AIAC)
Member, Bar Council Construction Law Committee (2019/2020)

Ar Ng Yean Shiunn
Principal, YS Ng Architect
LAM Registered Architect
Member, Association of Consuting Architects, Malaysia (ACA:M)

Ng Ziyang (Wu Ziyang)
PJM, FAIADR
Advocate & Solicitor
Adjudicator
The Chambers of Ng and Co

Sr Nik Hasbi Fathi
FRISM, MRICS, FCIArb, FMIArb,
FAIADR, MIVMM, AACS
Advocate & Solicitor
Adjudicator & Arbitrator
Partner at Rizal & Co
Royal Institution of Surveyors Malaysia

Oliver H.C Wee
Vice President, Master Builders Association Malaysia

Ooi Chih-wen
Associate at Wong & Partners
Advocate & Solicitor
Committee Member,
Society of Construction Law, Malaysia (2016-2019)

Razif Azmi bin Zaki
Head of Legal at Emrail Sdn Bhd
Barrister-at-Law (Middle Temple)
Adjudicator

Dato' Ir Rohaizi Mohd Jusoh
P.Eng (Mal), CCPM, MCIOB (UK)
Adj. Prof. Linton University College (LUC)
Chief Executive Officer,
Construction Research Institute of Malaysia (CREAM)

Dr Shahrizal M Zin
FCIArb, FAIADR
Senior Lecturer, Faculty of Law, UiTM Shah Alam

Sharmila Ravindran
Advocate & Solicitor
Adjudicator, ACIArb (UK)
Principal at Messrs Ravindran

T Kuhendran
Advocate & Solicitor
Zul Rafique & Partners

Tan Swee Im
Dip. Int Arb., FCIArb, FCIOB, FMSAdj, FDBF
Consultant at Tan Swee Im, Siva & Partners
Barrister-at-Law (Middle Temple)
Advocate & Solicitor

Sr Wan Ainon Zuraiha W A Khalid
CQS, FRISM, MRICS
Quantity Surveyor
Principal Partner, AI Konsult

Sr Dr Wan Maimun Wan Abdullah
CQS, FRISM, PPRISM, ACPM
President, Women in Construction Malaysia
Director, Khalid Ahmad Architect

Dr Zul Zakiyuddin Ahmad Rashid
School of Housing, Building and Planning
Universiti Sains Malaysia

Associate Professor Sr Ts Dr Zulhabri Ismail
MAIADR, MCIArb, MMIArb, MMSAdj, MRISM, MACPM
Association of Construction Project Managers Malaysia
Adjudicator & Mediator
Building Surveyor
Professional Technologist

◂ ACKNOWLEDGEMENT ▸

The invaluable assistance rendered by the following
CIDB officers is much appreciated

Sr Sariah Abd Karib
Senior General Manager
Policy and Corporate Sector

Sr Mohd Zaid Zakaria
General Manager
Business and International Division

Sr Nazir Muhamad Nor
Senior Manager
Business and International Division

◂ PUBLISHER'S NOTE ▸

The Construction Industry Development Board (CIDB) in its pursuit to support and advance the development of the construction industry in Malaysia, is pleased to present the latest volume of construction related cases with case summaries derived from High Court and Appellate Courts decisions from January to December 2018.

This publication pushes ahead on the successes of previous volumes published since 2016 in promoting Quality, Safety and Professionalism as the hallmark initiatives of the Construction Industry Transformation Programme (CITP) 2016-2020. Other key strategic thrusts being advanced are Environmental Sustainability, Productivity and Internationalisation.

All efforts to achieve a comprehensive, accurate and up-to-date publication were taken and pursuant to this objective, the following have been included:

(1) Eighty summary of construction cases decided by Malaysian Courts.
(2) Thirty seven insightful commentaries by experts and professionals with vast experience in construction law and industry.
(3) 2018 statistics on construction industry.
(4) 2018 statistics on construction law cases.
(5) Subject index.

This volume contains practical new features to enhance the usability, ease of reference and research mechanism by introducing para numbers at end of each paragraph under the ***Held*** section of cases published in this volume which correspond with the relevant paragraphs in the original case judgments. Further exceptional value is showcased in the analytical commentaries by professionals from the construction industry, namely engineers, architects and quantity surveyors adding to the perspective of legal opinions provided by experts from the legal fraternity.

We are assured, our objective to equip the industry stakeholders to make professional and well informed decisions in their day-to-day affairs will be achieved through this distinctive publication.

While every effort has been taken to include all major construction related cases, some cases may have been inadvertently omitted. The readers are, therefore, encouraged to conduct further research if and when circumstances peculiar to their situations arise.

We express utmost gratitude to the technical committee appointed to guide and advance the purpose of this publication, contributors and the courts for expending their valuable time and expertise, contributing towards this noble publication.

September 2019

Pasdec Putra Sdn Bhd v Suara Hati Sdn Bhd

COURT OF APPEAL, PUTRAJAYA
CIVIL APPEAL NO: C−02-(NCVC)(W)−1528−07/2017
TENGKU MAIMUN TUAN MAT JCA, AHMADI HAJI ASNAWI JCA,
ZABARIAH MOHD YUSOF JCA
21 JUNE 2018

[2019] 1 CIDB-CLR 70

The Defendant had appointed the Plaintiff as its contractor under a construction contract ("the contract") for the development of a housing project ("the Project"). The completion date for the whole Project was on 19 March 2014, 18 months from the date of possession of the site. On 13 August 2015, the Defendant wrote to the Plaintiff expressing dissatisfaction over: (a) the Plaintiff's 37% completion of the Project; and (b) the lack of any activity on the Project site. The notice also notified the Plaintiff of the Defendant's intention to terminate the contact unless the Plaintiff restarted work. By letter dated 6 October 2015, the Defendant terminated the contract and alleged that the progress made by the Plaintiff on construction was only 37%. The Plaintiff appealed to the Defendant against the termination but by letter dated 12 November 2015, the Defendant rejected the appeal stating that despite an 18-month extension of time resulting in a 36-month completion date, the Plaintiff had only achieved a 32% performance progress. The Defendant's quantity surveyor — SD1—carried out a measurement of the Plaintiff's work on the Project site and calculated that the Plaintiff had only completed 27.15% of the work. The Defendant issued the Certificate of Non-Completion on 6 June 2016 and a new contractor took over the Project. The Plaintiff sued, *inter alia*, to recover a sum for 37% of the Project, which it claimed represented the value of work that it had completed. The Plaintiff's claim was based on the letter of the Defendant dated 6 October 2015 which had stated the completion of works was at 37%. The Defendant first filed a defence and counterclaim alleging that the final value of work completed by the Plaintiff was at 30.5%, but the Defendant later amended its defence and counterclaim to plead the value of works completed as 27.15%. The Defendant counterclaimed against the Plaintiff to recover: (i) the difference between the contract sum and the additional cost and expenses incurred by the Defendant to complete the Project; (ii) the total liquidated and ascertained damages ("LAD") due and payable by the Plaintiff to the Defendant under the contract; (iii) the LAD due and payable by the Defendant to its purchasers for late completion and delivery of the houses. In the High Court, the Judge allowed the Plaintiff's claim and dismissed the Defendant's counterclaim. The Judge held, *inter alia*, that the Defendant itself had issued letters dated 13 August 2015 and 6 October 2015 establishing the percentage of the Plaintiff's completed works at 37%. The Judge also took issue with the Defendant pleading in its Defence the percentage as 30.5% but alleging at trial the percentage as being 27.5%, without any reasonable explanation for the difference. The trial Judge rejected

the evidence of SD1 on the grounds that the figure of 27.5% was not informed to the Plaintiff by any letter and neither was SD1's method of calculation provided. The Defendant appealed to the Court of Appeal.

Held, allowing the Defendant's appeal in part:

(1) Pursuant to ss 102 and 103 of the Evidence Act 1950, the burden was on the Plaintiff to prove that it had completed 37% of the Project. In the instant case, the Plaintiff led no evidence to support its case of 37% completion except to only plead the letter dated 12 November 2015 wherein the Defendant had stated that the Plaintiff had only completed 32% of the works. The Plaintiff had not pleaded the letters dated 13 August 2015 and 6 October 2015 and could not choose one letter over the others. *(see paras 18, 19)*

(2) If the Judge found the Defendants letters dated 13 August 2015 and 6 October 2015 to be conclusive evidence of the percentage of the Plaintiff's work, the Judge should have also considered the letter dated 12 November 2015, which the Judge failed to do. The letters could not be the basis to determine conclusively the 37% completion claimed by the Plaintiff. The Plaintiff's own Managing Director, SP1, had also admitted that the 37% was not based on valuation of work on site. *(see paras 19, 20)*

(3) Since the instant contract was a building contract, the calculation of work done by the Plaintiff had to be based on a measurement done on the site. The calculation of 27.5% by SD1 was based on a measurement done of the Plaintiff's work on the Project site. SD1 had been authorized to do the final calculation and had adduced more than sufficient justification and explanation on the methodology used to calculate the 27.5%. *(paras 21, 23)*

(4) Whatever percentage stated by the parties prior to the measurement by SD1 remained provisional and could not be the basis to enter judgment for the Plaintiff for the value of work done. The High Court Judge had misdirected herself by: (a) relying solely on the Defendant's letters dated 13 August 2015 and 6 October 2015; (b) rejecting the evidence of SD1 who was more than qualified to testify on the final calculation of the Plaintiff's work, especially when the Plaintiff itself failed to rebut or challenge SD1's evidence on the 27.5% completion of the work. *(paras 24, 25)*

(5) By questioning the discrepancy in the percentage of work done by the Plaintiff in the Defendant's defence, the Judge had overlooked the fact that the Court had allowed an amendment to the statement of defence. The figure of 30.5% was pleaded in the original statement of defence whereas the figure of 27.15% was pleaded in the amended defence. The trial Judge erred by concluding that the Defendant had changed the percentage to 27.5% at trial, without any reasonable explanation for the difference. *(see para 26)*

(6) On the counterclaim, the Judge had misdirected herself by failing to consider that the Plaintiff did not dispute that the Project had been delayed notwithstanding various extensions given and that the Plaintiff had agreed to pay the requisite sum per day as LAD. On the facts, there was no reason why the Defendant should not be paid the LAD as agreed by the Plaintiff. *(para 28)*

(7) Pursuant to the contract, no specific format of notice had been prescribed concerning the Defendant's intention to claim for the LAD. On the facts and circumstances of the instant case, since the Plaintiff had prematurely filed its action before the contract flow could be completed, the Defendant's counterclaim was sufficient notice to the Plaintiff of the LAD. The failure of the Defendant to give a separate notice on the LAD or the failure to issue a final account to the Plaintiff did not itself absolve the Plaintiff's liability to pay the LAD at the agreed rate. *(para 29)*

(8) The Defendant had not produced the sale and purchase agreements with the various purchasers to support its claim for the LAD in respect of late delivery of houses to the purchasers. There was nothing to show who were the purchasers, what was the period of delay and how much the Defendant was liable to pay to each of the purchasers, to enable the Court to make an order on the counterclaim for LAD to the purchasers. *(para 31)*

(9) The Defendant had failed to prove the amount claimed being the difference between the contract sum and the additional cost and expenses incurred by the Defendant to complete the project — the summary of payment tendered by the Defendant for the differential sum was not sufficient under clause 55 of the contract. *(see para 32)*

(10) Except for the claim of LAD against the Plaintiff for the requisite sum, there was no reason to disturb the Judge's decision in dismissing the rest of the Defendant's counterclaim. *(para 35)*

COMMENTARY 1

by *Ir Lai Sze Ching*
Dip. Int. CArb., BE, FCIArb, FMIArb,
FMSAdj, FAIADR, PE, FIEM, Hon AFEO, ACPE
Arbitrator, Adjudicator & Mediator
Messrs Lai Teh Adjudication & Arbitration Chamber PLT

Introduction

Suara Hati ("the contractor") was employed by Pasdec Putra ("the employer") to construct houses for a housing scheme. Three extensions of times were granted for both Phase 1 and 2 Works.

The employer subsequently issued a Notice of Termination terminating the Contract and alleged that the progress of work was only 37% whereas the works should have been completed by the extended completion date. The contractor sued for the portion of the work done which was unpaid and the employer counterclaimed for the additional cost in completing the works and the liquidated and ascertained damages ("LAD") suffered in the form of a specified rate for per day of delay and also the LAD payable to the house purchasers for late completion and delivery.

The High Court allowed the contractor's claim on the 37% completion and dismissed all of the employer's set-off and counterclaims. However, the Court of Appeal allowed the employer's appeal in part, i.e. for the work done which was only 27.15% as measured and the counterclaim for the LAD for the specified rate but the additional costs to complete the works and the LAD to the house purchasers were disallowed.

Issues arising from the case

In this case, the Court of Appeal was required to determine the following issues:

(1) What was the correct amount of work done upon termination of the Contract?

(2) Was the set-off for additional cost to complete the project lawful and valid?

(3) Was the imposition of LAD lawful?

Amount of work done

The contractor did not challenge the termination of the Contract but pleaded that it had completed the Works up to 37% as stated in the letter of termination. The employer on the other hand claimed that the work done was only 27.15% as measured by its quantity surveyor upon termination of the Contract. During the hearing, the employer had also indicated a different percentage of work done, namely 32% and 30.5% (as measured by the consulting engineer). The High Court held that the percentage of work done should be 37% as stated in the employer's letter of termination.

The Court of Appeal disagreed with the High Court and held that the contractor bore the burden of proof and they had failed to prove that the work done was 37%. The relevant paragraphs in its judgment were as follows:

> "[18] Under sections 102 and 103 of the Evidence Act 1950, the burden lies on the plaintiff to prove that they had completed 37% of the project. We found that the plaintiff *led no evidence to support its case of 37% completion* [emphasis added] except to rely on the defendant's letter. In this regard, the learned judge, in her grounds of judgment alluded to the defendant's letters dated 13.8.2015 and 6.10.2015."
>
> "[24] There were 29 site meetings prior to termination of the contract and in the minutes of those site meetings, *nowhere was it stated that the plaintiff had achieved 37% completion of the work* [emphasis added]. In fact, in the minutes of site meeting no. 28 on 31.7.2015, the plaintiff itself reported that their work progress was at 32%. Needless to say, whatever percentage stated by the parties prior to the measurement by SD1 remained provisional and could not be the basis to enter judgment for the plaintiff for the value of work done."

The Court then held that the employer had proven the work done of 27.15% by the measurement carried out by its quantity surveyor. The relevant paragraphs were as follows:

> "[21] This being a building contract, the calculation of the work done by the plaintiff must be based on measurement done on site. Indeed, it was the evidence of the defendant's quantity surveyor, Sharifah Norizzati binti Syed Saifudeen (SD1) that she did the measurement of the plaintiff's work on site and from her calculation, the plaintiff had only completed 27.15% of the work."

> "[23] Whilst we accept that the Certificate of Non-Completion and the final account was not prepared and served by the defendant to the plaintiff, *the percentage of 27.15% was based on measurement done of the plaintiff's work on site* [emphasis added]. SD1 had been authorized to do the final calculation and *had adduced more than sufficient justification and explanation on the methodology on the final calculation at 27.15%* [emphasis added] … ."

Additional cost to complete the works

Upon termination of the Contract, the employer employed another contractor to complete the works and counterclaimed for the additional cost incurred thereby. However the High Court did not allow for such set-off as the employer had failed to prove the costs incurred. The Court of Appeal agreed with the High Court and rejected this counterclaim as the employer had only produced a summary of payment without any particulars and details such as:

(a) the details of the new or other contractors or persons engaged to complete the project;

(b) the amount that was paid; and

(c) the period when the payment was made.

The Court stated as follows:

> "[32] Likewise, the defendant failed to prove the amount claimed being the difference between the contract sum and the additional cost and expenses incurred by the defendant to complete the project. *The document relied upon by the defendant to prove this claim was the summary of payment* [emphasis added] (Appeal Record Vol. 2H: pg. 1231-1232). We found the summary of payment *bereft of particulars* [emphasis added] as to who were the new or other contractors or persons engaged by the defendant to complete the project, how much was in fact paid and when was the payment made. We concurred with the learned judge that the *summary of payment tendered by the defendant was not sufficient proof* [emphasis added] of the amount claimed against the plaintiff for the differential sum under clause 55 of the contract."

Imposition of LAD

For the LAD of RM4,600.00 per day of delay, the Court of Appeal reversed the finding of the High Court on this issue and held that the contractor

was liable to pay for the LAD as they had agreed to the said rate in the Contract.

> "[28] On the counterclaim, we similarly found that the learned judge misdirected herself in failing to consider that the plaintiff did not dispute that the project had been delayed notwithstanding various extensions given and that *the plaintiff had agreed to pay RM4,600.00 per day as LAD* [emphasis added]. On the facts, we found no reason why the defendant should not be paid the LAD as agreed by the plaintiff."

It is noted that the Court did not discuss the Federal Court decisions in *Selva Kumar Murugiah v Thiagaraja Retnasamy* [1995] 1 MLJ 817 and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445, which were the law at the time of the decision.

For the LAD due and payable to the house purchasers for the delay in handing over the houses, the Court of Appeal affirmed the findings of the High Court that this counterclaim is disallowed as the employer had failed to prove the damages suffered. In this instant, no sale and purchase agreement was produced to prove the damages, such as who were the purchasers, what was the period of delay and how much was the employer liable to pay.

Lessons learnt from the case and best practices to be adopted

Lessons learnt

The main issue in this case is the importance of cogent evidences needed in order to support a claim or counterclaim.

It is trite law that the person who alleges must prove, otherwise his claim will fail. This common law principle of burden of proof is codified in ss 102 and 103 of the Evidence Act 1950. Therefore, the party who wishes to allege certain facts, such as to claim for the work done, must produce evidences to support the allegation or claim. The claim will fail if it is based on bare allegation or documents without any probative value.

This is also true if the employer wishes to set off the additional costs incurred due to termination of the contract. Cogent documentary evidences are needed in order to succeed in the counterclaim. The documentary evidences needed include the tenders called to complete the work, the proper carrying out of the evaluation of the tender prices, and the letter of awards issued, etc. This is also required under the law of mitigation.

Best practices

The parties must maintain proper site records showing the rate of progress, manpower and machineries maintained at the site. Experienced site staff and contract personnel must be employed to manage the site documents and records properly, such as daily site report, monthly progress report, etc.

If a contract is terminated, then tenders must be invited from other contractors to complete the work. Documentary proof of the re-tender exercise such as the tender evaluation report, letter of award, etc., must be properly maintained. This is essential for any counterclaim against the defaulting contractor later.

COMMENTARY 2

by *Sr Maselawati Shamsuddin*
CQS, FRISM, MRICS
Director, Dispute Resolution Consultancy
Public Works Department Malaysia

Introduction

This case was brought on appeal by the Appellant ("the Defendant") to challenge the decisions made by the High Court in allowing the Respondent's ("the Plaintiff's") claim and in dismissing the Defendant's counterclaim. The Appellant was the Employer/Project Owner and the Respondent was the contractor for the development of a housing project. This case provides guidance on the issues of recovery for work done for terminated projects, notice prior to the imposition of liquidated and ascertained damages ("LAD") and also highlights the need for adducing sufficient evidence to prove a party's claim.

Issues arising from the case

In arriving at its judgment, the Court of Appeal ("CA") addressed the following issues:

(1) Whether burden of proof is on the contractor to establish the value of work done.

(2) Whether the calculation for recovery of work done ought to be based on measurement basis.

(3) Whether a counterclaim by employer can be considered as sufficient notice of intention to recover liquidated and ascertained damages ("LAD") against the contractor.

Lessons learnt from the case and best practices to be adopted

Lessons learnt

Whether burden of proof is on the contractor to establish the value of work done

The CA decided that pursuant to ss 102 and 103 of the Evidence Act, the Plaintiff had failed to discharge the burden of proof on the balance of probabilities on the 37% value of claimed work done. Based on the Statement of Claim, the Plaintiff had relied on the Defendant's letter dated 12 November 2015, but what was actually stated in the Defendant's letter was that the Plaintiff had completed 32% of the Work and not 37%. In this regard the learned Judge, in her judgment

had only alluded to the Defendant's letters dated 13 August 2015 and 6 October 2015 that stated the work was at 37% completion, but had failed to consider the Defendant's letter of 12 November 2015. Thus, the different percentages stated in the Defendant's letters could not be the basis to determine conclusively the 37% completion claimed by the Plaintiff.

Whether the calculation for recovery of work done ought to be based on measurement basis

The CA stressed that since the instant contract was a building contract, the recovery of work done ought to be based on measurement done on site. Based on the facts of the case, the measurement was done by the Defendant's Quantity Surveyor who was authorised to do the final calculation and the Surveyor had adduced sufficient justification and explanation on the methodology used to calculate the percentage of completion for the project.

Whether the counterclaim by employer can be considered as sufficient notice of intention to recover LAD against the contractor

The CA found that there was no specific format of notice prescribed under the contract. The Court was of the view that based on the facts of the case, since the Plaintiff had prematurely filed their case in Court before the contract flow could be completed, the Defendant's counterclaim was sufficient notice to the Plaintiff of the LAD. Furthermore, the Plaintiff was fully aware that the project had been delayed despite three extensions of time given and had agreed to pay the requisite sum as LAD.

Rejection of counterclaims due to insufficiency of the evidence

All claims need to be proved and supported with the related evidence/ document. Failure to prove any particular claim can have a detrimental effect and it can be rejected by the Court. As to the counterclaim for LAD in relation to the purchasers, the CA agreed with the decision of the learned Judge that the Defendant had not produced the sale and purchase agreements with the various purchasers which were essential to show the identity of the purchasers, what was the period of delay and how much the Defendant was liable to pay to each of the purchases, in order to enable the Court to make an order on the counterclaim for LAD to the purchasers.

Similarly, for the counterclaim for the cost of completing the project, the Defendant had failed to prove the amount claimed, being the difference between the contract sum and the additional cost and expenses incurred by the Defendant to complete the project. It was important to

note that clause 55 of the Contract in this instant case, had provided the definition for "the Completion Cost" and detailed the respective sums, costs and expenditure. Hence, the summary of payment provided by the Defendant to substantiate the amount of differential sum claimed was not considered by the Court to be sufficient proof under the said clause.

Best practices

The burden of proof lies on the Claimant to prove the existence of any fact. Therefore, it is very crucial that related documents are recorded and kept properly during the progress and throughout the duration of the contract. Without proper and sufficient evidence, a particular claim may be rejected.

The contractor's progress of work, both physical and financial, must be monitored regularly. To prevent disputes regarding actual value of work done, especially in the case of terminated contracts, it is best that joint measurements/valuations are done on site and agreed to by both parties. Such information is of paramount importance to facilitate the preparation of a "Certificate of Termination Costs" and the process of calling a new tender to complete the uncompleted Works, including all related works such as making good defective works, and also to identify the balance of materials on site.

For terminated contracts, as soon as the contract administrator is able to make an assessment of the ultimate cost to the employer of completing the Works, then it is a best practice for the contract administrator to prepare the "Certificate of Termination Costs" stating the difference between the "Completion Cost" and the "Final Contract Sum", all in accordance with the terms of the Contract. Early preparation of "Certification of Termination Costs" may prevent unnecessary disputes between parties regarding the differential sum.

Mix Target (M) Sdn Bhd v Najcom Sdn Bhd & Another Case

HIGH COURT, KUALA LUMPUR
SUITS NO: WA–22C–79–11/2016 & WA–22C–28–02/2017
LEE SWEE SENG J
14 DECEMBER 2018

[2019] 1 CIDB-CLR 152

UEM Builder-Najcom JV ("UNJV") had been awarded a contract for the design, construction, completion, testing and commissioning of the development of a Women and Children Hospital Project in Kuala Lumpur ("the Project"). UNJV, the main contractor of the Project, had appointed Najcom Sdn Bhd ("Najcom") as its subcontractor for the fire fighting system works ("the Works") under the Project. Vide a Letter of Award ("LOA") Najcom had subcontracted the entire Works to Mix Target Sdn Bhd ("Mix Target") for a fixed contract sum of RM9,900,000. Mix Target then appointed Itagres Sdn Bhd ("Itagres") to supply labour for the installation of the Works for the contract sum of RM3,200,000. As Mix Target was repeatedly falling behind time to complete the Works, Najcom had after many repeated reminders terminated Mix Target. Mix Target commenced a suit against Najcom ("the 2016 Suit") when disputes arose as to the payment to be made to the former, wherein it sought to claim (i) the balance progress claim due and owing by Najcom in the sum of RM2,650,360.10; (ii) losses and damages as a result of the premature, wrongful and invalid termination of Mix Target's contract in the sum of RM532,600; and (iii) costs. In its defence, Najcom submitted that Mix Target had over claimed for the Works done as they had unilaterally changed the rates agreed upon between the parties. Najcom maintained that the termination was valid and also counterclaimed for the extra costs incurred in rectifying the Works and engaging another rescue subcontractor to finish the Works. In the meantime, Mix Target had failed to pay Itagres under the supply of labour contract. Consequently, Itagres had filed a suit against Mix Target ("the 2017 Suit") and sought to claim RM731,000.00 for the amount outstanding under the supply of labour contract. Mix Target denied owing the said sum and contended that it had overpaid Itagres based on the payment received from Najcom. It further pleaded that Itagres had agreed that it would be paid after Mix Target had been paid by Najcom. The two related suits were heard together.

Held, allowing Itagres' claim against Mix Target with interest and costs; allowing Mix Target's claim against Najcom with interest; and dismissing Najcom's counterclaims with nominal costs to be paid by Najcom to Mix Target.

(1) In relation to the 2017 Suit, Mix Target's pleaded defence that their obligation to pay Itagres was based on what was certified by Najcom had no merit. As Itagres was not a party to the contract between Mix Target and Najcom, and had not agreed that the claims should be approved by Najcom first, its claim for the amount outstanding under the supply of labour contract had to be decided based on the terms of payment agreed between it and Mix Target. It was clear that Mix Target intended to pay and Itagres expected to receive payment progressively and not subject to certification of Mix Target's claim by Najcom/UNJV. This was further confirmed by the conduct of Mix Target issuing certificates of payment and making payments even before Najcom/UNJV issued their certifications. If Itagres had contracted with Mix Target to pay on the basis of what would be certified, approved and paid by Najcom, then that should have been written into the contract between Itagres and Mix Target, which was not the case here. In the circumstances, Itagres should be allowed to claim the sum of RM731,000 with interest from Mix Target. (*paras 22-25, 28, 29, 37, 44, 49*)

(2) From the evidence it was clear that after Progress Claim Nos. 1 to 4, Mix Target had from Progress Claim Nos 5 to 7 submitted their claim based on their unilateral increase in the Bill of Quantities ("BQ") in the items claimed without the consent of Najcom. In the particular matrix of this case in the chain of contracts, the parties ought to apply the BQ that was rationalised and approved by UNJV for otherwise there would definitely be diverging differences that would not be reconcilable. In addition, Mix Target had failed to prove or show any documentary evidence that it had purchased materials for the sum of RM670,188. In any event the contract between Najcom and Mix Target was a fixed lump contract of RM9.9 million to carry out the construction, completion, testing and commissioning of the Fire Fighting System wherein Mix Target was to supply tools, equipment, materials and labours for the performance of the same. As such, there was no place to claim the costs of materials for Works not done yet with respect to the materials bought and delivered to site. (*paras 66, 68, 73, 74, 76, 78*)

(3) Although Mix Target had said there was conspiracy between Najcom and the consultants engaged by them in the valuation of the work done by it there was no evidence of that. Mix Target had submitted that it had engaged a third-party consultant to do the verification of the Works done for which it paid RM32,400 but the said consultant was not called to testify in Court. Thus, the evidence of Najcom, which was corroborated by the independent testimony of consultants, who were independent and impartial from Najcom and Mix Target, was preferred. In determining the amount of the Works done, the Court accepted that the amount certified as RM442,275.00 had not taken into account the materials delivered to site and for which UNJV had paid directly to Mix Target. To this sum should be added the reasonable sum of RM101,013.58, which had been assessed

by the consultants as the additional value of work done just before the termination of the contract between Najcom and Mix Target. Therefore, the sum of RM442,275.00 added to RM101,013.58 = RM543,288.58. Since both Mix Target and Najcom agreed that the sum of RM324,675.00 had been paid by Najcom to Mix Target, the balance that Mix Target could claim was RM218,613.58 (RM543,288.58-RM324,675.00) with interest. (*paras 92, 96, 101-110*)

(4) Despite numerous reminders to ensure compliance with the time schedule and the litany of complaints by Najcom that Mix Target's works were executed unsatisfactorily, Mix Target had failed to rectify the complaints made or failed to submit a catch-up work schedule. The allegations were serious enough and when taken together would justify termination of the LOA, but Mix Target did not see it fit to respond and the only reasonable inference was that the allegations were true. Based on the cumulative conduct of Mix Target in this case and their failure to meet the work schedule that had been set for them, this pointed to Mix Target having repudiated the contract as shown in their inability to render substantial performance of the agreement. Under the LOA, Mix Target was required to execute and complete the Works to enable Najcom to discharge their obligation under their contract with the main contractor. As such, Najcom had no alternative but to terminate Mix Target and thereafter seek the services of the new contractor to complete the Works. Thus, the termination was valid and lawful and Mix Target was not entitled to claim for losses arising out of the termination. (*paras 116, 117, 123, 124, 129, 135, 136, 138, 140, 141*)

(5) On the balance of probabilities, the need to rectify the Works could not be because of defective works done by Mix Target. As such, Najcom's counterclaim for rectification should be dismissed. (*paras 148-150*)

(6) Although the new contract between Najcom and the rescue contractor was for the same contract sum of RM9.9 million, Najcom had not shown that the balance Works to be completed by their rescue contractor was the same Works that had been awarded to Mix Target. As such, on the balance of probabilities, Najcom had not been able to prove the loss suffered as a result of any extra costs incurred in finishing the balance Works under the rescue contractor. (*paras 151-154, 156*)

COMMENTARY 1

by *Han Li Meng*
Advocate & Solicitor
Adjudicator, Mediator
Partner at Christopher & Lee Ong

Introduction

The claims brought by the respective Plaintiffs in these two cases were nothing new to the construction industry, namely, payment for work done and damages for wrongful termination. The interesting part of these cases, however, lies with the defences raised to resist the claim.

Issues arising from the case

(1) *Whether the obligation of the subcontractor to pay its subcontractor is limited to what is certified by the main contractor?*

The Court observed that Itagres (the subcontractor's subcontractor) was not a party to the contract between Mix Target (the subcontractor) and Najcom (the main contractor), and neither was there any term in the contract between Mix Target and Najcom that payment to Itagres was conditional upon the certification of Najcom. The conduct of Mix Target in making progress payments to Itagres prior to the certification by Najcom further fortifies the position of Itagres that the claims by Itagres were not subject to the certification by Najcom.

Mix Target therefore has to pay to Itagres as per the agreed terms in the written contract.

(2) *Whether the contractor was entitled to unilaterally increase the rationalised rates causing the payment to be front loaded and claim for work done?*

Mix Target did not dispute that the progress claim submitted by it was subject to the certification not only by Najcom but also the Employer.

What Mix Target did was to increase the rationalised rate for the work completed and highlighted in the shop drawings whilst the values for the items which they had not completed and claimed were reduced. This resulted in disparity between the claim submitted by Mix Target and the certification done by Najcom/ the Employer.

The Court held that Mix Target was not justified to do so for the following reasons:

(a) The contract between Najcom and the main contractor for the fire fighting system works were entirely subcontracted to Mix Target for the exact same contract sum;

(b) Under the Letter of Award ("LOA"), Mix Target was to follow, execute and comply with all the terms in the main contract with respect to the fire fighting system works;

(c) The initial rationalised rates were earlier agreed upon and should be followed;

(d) Mix Target had never raised any objection against the valuation done by the consultants until after the termination.

(3) *Whether delay alone was sufficient to repudiate a contract?*

Najcom sent several reminders to Mix Target raising, amongst others, issues on delay in the progress of works and non-compliance with the timeline. These letters were all acknowledged by the site engineer of Mix Target. Mix Target however did not reply to any of these letters.

The Court took the view that if there had been any dispute on the issues raised in these letters, Mix Target would surely have replied to those letters. Under such circumstances, the Court could only draw a reasonable inference that the allegations raised in those letters must be true.

Mix Target, however, contended that even if their work progress was slow, they still had another 19 months to complete the work. To terminate them, 5 months into the contract on grounds of delay and inability to complete the work was therefore unfair and wrong. The Court disagreed.

The Court opined that it was entitled to look at the cumulative conduct of Mix Target and their failure to meet the work schedule as well as the overall physical and financial completion to gauge whether it was reasonable for Najcom to conclude that Mix Target would not be able to complete the works on time.

The evidence and facts before the Court showed that Mix Target had failed to expedite and complete the works as scheduled. The Court also took notice that Mix Target was unable to:

(a) purchase material and equipment; (b) pay its subcontractors; (c) provide the necessary performance bond to Najcom; (d) produce the necessary shop drawings, to submit plans and coordinate its interfacing works with others; (e) provide competent site agents to supervise and coordinate its own works at the site, and more importantly, Mix Target was unable to manage the delays which were within their control.

The Court therefore held that the termination was justified.

Lessons learnt from the case and best practices to be adopted

Lessons learnt

The intention of the parties to the contract is deduced from the words used in the written contract. If the words in the written contract are clear, the court will and must give effect to the plain meaning of the words however much it may dislike the outcome. As demonstrated, the Court would not be able to imply conditional payment terms into the contract between Mix Target and Itagres as pleaded by Mix Target or to allow Mix Target to unilaterally apply the new rationalised rates in order to justify its claim.

The mere fact that there was still plenty of time for the contractor to catch up on the progress of work was not a ground to resist termination. The Court would look at the conduct of the contractor in deciding whether the contractor has demonstrated his refusal or inability to perform his promise in its entirety.

Best practices

It cannot be gainsaid that the written contract contains the rights and obligations of the contracting parties. It would be an uphill task to imply terms which contradict the clear meaning of the terms stated in a written contract.

Contractors should record in writing their disagreement to any allegation raised by the counter party, be it in relation to certification, valuation, delay or non-compliance. Without these objections being recorded, the Court may draw an inference that the allegations raised were true.

COMMENTARY 2

by *Sr Maselawati Shamsuddin*
CQS, FRISM, MRICS
Director, Dispute Resolution Consultancy
Public Works Department Malaysia

Introduction

Two related trials were heard together before the High Court. The first was between Mix Target Sdn Bhd ("Mix Target") and Najcom Sdn Bhd ("Najcom") and the second was between Itagres Sdn Bhd ("Itagres") and Mix Target. UEM Builder – Najcom JV ("UNJV"), the main contractor, appointed Najcom to carry out subcontract work for the supply, installation and completion of fire fighting systems works ("the Works"), who then subcontracted the entire Works to Mix Target. Mix Target appointed Itagres to supply labour/workers for the subcontract work. These cases provide guidance on the issues of recovery for work done for terminated subcontract works, validity of the termination and claim for an outstanding amount for supply of labour and materials by the supply contractor.

Issues arising from the case

In arriving at its judgment, the Court addressed the following issues:

(1) Whether Itagres had proved the balance sum of RM731,000 owing by Mix Target for the labour and materials supplied.

(2) Whether Mix Target had proved the value of Work done of RM2,975,035.10.

(3) Whether the termination of Mix Target by Najcom was valid and lawful in the circumstances of the case.

(4) Whether Najcom had proved its claim on costs of rectification works and losses arising out of lawful termination of the contract with Mix Target.

Lessons learnt from the case and best practices to be adopted

Lessons learnt

Claim by Itagres for outstanding amount for the supply of labour and materials

Disputes as to claims for outstanding payments are common in construction contracts. The claiming party will need to prove the

claimed amount. Mix Target contended that their obligation to pay Itagres was based on what was certified by Najcom. The Court viewed that Itagres's claim for the amount outstanding had to be decided based on the terms of the payment agreement between Itagres and Mix Target. Furthermore, Itagres was not a party to the contract between Mix Target and Najcom. The agreed terms of payment were as provided in the Purchase Order, which clearly stated that payment would be made progressively. There were no terms of payment stating that payment was conditional upon the certification of Mix Target's claim by Najcom. Moreover, it was evidenced by Mix Target's conduct in issuing certificate of payments and making payments even before Najcom/UNJV issued their certificates. As to Itagres's quantum of claim, the Court had no difficulty in accepting Mix Target's admission at trial that it owed Itagres the sum as claimed and that the works were indeed completed. Hence, the Court allowed Itagres's claim on the outstanding amount of RM731,000 with interest and costs.

Claim by Mix Target for value of work done under a terminated subcontract

In practice, joint measurements/valuations are normally carried out on site to ensure that parties are able to agree on the assessed value of work done. In the case between Mix Target and Najcom, joint measurements/valuations were conducted by consultants engaged by UNJV and in the presence of Najcom and Mix Target. However, the assessed value of work done was disputed by Mix Target. At trial, Mix Target submitted that they had engaged a third-party consultant to verify the work done, but the said consultant was not called to testify in Court. Thus, the Court preferred the evidence of Najcom which was corroborated by the independent testimony of the UNJV consultants. The Court also agreed to consider further additional value of work done just before termination of the contract, which had been assessed by the consultants. Since both parties had agreed on the sum that had been paid to Mix Target by Najcom, the Court allowed Mix Target the sum of RM218,613.58, being the balance of sum due for work done with interest.

Whether Mix Target's termination by Najcom was valid and lawful

The Court viewed that despite numerous reminders to ensure Mix Target's compliance with the time schedule and complaints regarding unsatisfactory executed works, Mix Target had failed to respond, catch up with the work schedule and rectify the complaints made. The cumulative conduct, the combined breaches and non-compliance pointed clearly to Mix Target having repudiated the contract, as shown in their inability to render substantial performance of the contract.

Thus, based on the circumstances of the case, the Court decided that the termination was valid and lawful.

Claim on costs of rectification works and losses arising out of lawful termination of the contract

On the balance of probabilities, both of Najcom's claims were rejected by the Court. Najcom could not prove that its claim on cost of rectification was due to defective works contributed by Mix Target. Furthermore, some of the works were part of the uncompleted works and could not be regarded as rectification works. Similarly, Najcom failed to prove that its claim for losses suffered was due to extra costs incurred in finishing the balance of work under the rescue contractor.

Best practices

A contract administrator must closely monitor the contractor's overall physical and financial progress during project implementation. This would enable corrective and mitigative measures to be taken to avoid risk such as occurrence of delay in the execution of projects. If termination of the contract is inevitable, it should be exercised in strict compliance with the terms of the contract to prevent potential challenges by the other party.

Pursuant to a lawful termination of a contractor's employment, the employer has a right to appoint a third-party contractor to complete the balance of the Works and make a claim for any extra cost against the terminated contractor as provided for under the expressed provision of the contract. Joint measurements/evaluations should be carried out soonest possible following a termination in order to determine the value of work done up to the date of termination, and also that of defective works, goods and unfixed materials, outstanding works and other information necessary for the appointment of a new contractor to complete the balance of the Works.