

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN SIVIL)

GUAMAN NO: S4-23-77-2006

ANTARA

CASMET SDN BHD

... PLAINTIF

DAN

UNIPAC ENGINEERING (M) SDN BHD

... DEFENDAN

ALASAN PENGHAKIMAN

OLEH YANG ARIF HAKIM

DATO' TENGGU MAIMUN BINTI TUAN MAT

Vide a letter of acceptance dated 14.6.2004 from Perunding PQS, Castmet Sdn Bhd was appointed by UMW Toyota Motor Sdn Bhd (UMW) as the Main-Contractor for a projek “Cadangan Membina Sebuah Pusat Servis Kereta 3 Tingkat di Jalan Cheras, Kuala Lumpur” (the project). Kun Lim Architect was the architect appointed by UMW for the project.

By a letter dated 2.6.2005 the architect instructed Castmet to appoint Unipac Engineering (M) Sdn Bhd as a Domestic Sub-Contractor for the project to supply and install the Hoisting Equipment & Bulk/Waste Oil System (the works). The total value of Unipac’s contract was RM520,400.00. The letter of award was not signed by Unipac as it cannot agree to some of the terms and conditions therein. Unipac nevertheless proceeded and completed the works. UMW paid Castmet RM1,647,241.61 for the works carried out which includes Unipac’s value of work amounting to RM520,400.00. Castmet did not pay Unipac the sums due.

Unipac then sent a letter of demand dated 9.11.2005 for the sum of RM368,250.00. On 17.11.2005 Castmet invited Unipac for a meeting and informed Unipac’s representative that Castmet will only make the payment after Unipac had executed the Sub-Contract Agreement and after Castmet had deducted 5% as retention sum.

Vide a letter dated 18.11.2005 (the said letter) Unipac wrote to UMW that:-

“Re: Direct Claim for Supply, Delivery, Install, Test & Commission of Hoisting Equipment at Toyota Cheras Service Center

Refer to the above, we are facing difficulties in collection, thus, we would like request (*sic*) direct payment from UMW Motor Sdn Bhd for the lifting equipment installed and commissioned in Cheras Service Center. The amount of the claim is RM368,250.00 (Inv. No. 00119240) is currently due. (Referring to main contract clause 27.3)

To avoid any delay, we would like to seek for your approval for direct claim for the Bulk Oil system from UMW Toyota Sdn Bhd, and we will start work immediately upon your confirmation.

We trust that our request is reasonable and will meet your approval. Meanwhile, we will wait for your further instruction.”

The said letter was signed by Miss Chee Yit Bing, the Assistant Sales Manager of Unipac and carbon copied to En. Abdullah Ismail, En. Zainulalim, Mr. Soo Kwok Weng and Miss Nora, all of UMW. It was also carbon copied to Castmet, to Perunding PQS and to Kun Lim Architect.

It is the case for Castmet that the said letter is defamatory and calculated to tarnish the reputation and prestige of Castmet and to invoke suspicion of UMW of Castmet; that the words in the said

letter meant and was intended to mean that Castmet was a company which was not truthful in its dealings and/or could not be trusted as a Main-Contractor to fulfill its obligations to Unipac. Castmet through their solicitors issued a letter dated 12.12.2005 to Unipac demanding a suitable apology and also demanded that Unipac make suitable proposal for payment towards damages. Vide this action Castmet is claiming for general damages in the amount of RM500,000 against Unipac for the libel. Unipac's defence is essentially one of justification.

THE EVIDENCE

Mr. Ng Kah Fun (PW1), the General Manager of Castmet said the reason for the non payment is that the sum due has to be paid in accordance with the terms of the Letter of Award which Unipac had refused to execute. Another reason why Castmet refused to pay Unipac was because the unsigned Letter of Award provided for Castmet to withhold 5% of the sum claimed as retention sum whereas Unipac was demanding full payment without deduction of the retention sum. It was further the testimony of Mr. Ng that Unipac was under a mistaken believe that it was a Nominated Sub-Contractor and need not execute the Letter of Award when in actual fact it was a Domestic Sub-Contractor and hence under a duty to execute the Letter of Award as acceptance of its appointment by Castmet. Mr. Ng explained the differences between Domestic Sub-Contractor and Nominated Sub-Contractor in that a Domestic Sub-Contractor is a contractor who the main contractor is liable for whereas the Nominated Sub-Contractor is a specialist nominated by

the project owners. A Nominated Sub-Contractor has certain rights under the PAM Form Contract between the project owners and the main contractor whereas the domestic sub contractor does not. Mr. Ng testified that the said letter was highly defamatory of Castmet and it was not true that Unipac was facing difficulty in collection.

For Unipac, Miss Chee Yit Bing testified that:-

1. Unipac was appointed as the Nominated Sub-Contractor;
2. Unipac is the sole distributor of the specifications wanted by UMW for the hoisting equipment and that the bulk/waste oil management system is patented by Unipac;
3. the project was the second project where Unipac had supplied equipment to Castmet;
4. Unipac did not sign the Letter of Award because Unipac had experienced some difficulties in collecting outstanding amount due from Castmet for the first project and that Unipac was not agreeable to the pricing contained in the Letter of Award;
5. she called for a meeting with UMW and informed Mr. Steven Tan of Properties and Facilities Division that Unipac could not sign the Letter of Award;

6. Mr. Soo Kwok Weng of the Customer Service Operation UMW sent her an e-mail informing her of a meeting at UMW Headquarters to discuss and iron out the issues on the contractual and payment terms for the project;
7. a meeting was held on 22.7.2005 and during the meeting Mr. Steven Tan said that Unipac is a Nominated Sub-Contractor and assured Unipac that in the event Castmet fails to make payment to Unipac, Unipac can write to UMW and UMW will make direct payment to Unipac for work done;
8. she followed up with a letter to UMW for the direct payment and UMW replied by facsimile on 23.9.2005 enclosing the conditions in the Main Contract as self-explanatory attachment;
9. Unipac proceeded with the project on the assurance of direct payment given by UMW;
10. if there was no assurance from UMW, Unipac would not proceed to supply and install the equipment;
11. the work was completed in mid October 2005 and UMW acknowledged receipt on all the delivery orders.

FINDING

I accept Castmet's contention that the appointment of Unipac as a Domestic Sub-contractor was never revoked. However the events that transpired after the appointment show that Unipac was being treated by UMW as a Nominated Sub-Contractor. Hence I agree with Unipac that the label is not conclusive of the status of Unipac. In any event, the status of Unipac is not paramount in considering Castmet's claim. What needs to be considered is whether the words "having difficulties in collection" in the said letter are defamatory; whether the words refer to Castmet and whether the words were published (see *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315).

It is not disputed that the said letter was published by the plaintiff to various persons, to whom the said letter was carbon copied. The consideration now is whether the said letter refers to Castmet. Learned counsel for Castmet argued that any reasonable person and not knowledgeable on the background of this dispute will definitely conclude that Castmet is unable to pay Unipac. As could be seen from the said letter, Castmet was not mentioned therein. Therefore a reasonable person having no knowledge of the project and having no knowledge of the dispute would not be able to say that the said letter refers to Castmet and/or that Castmet was not able to pay Unipac.

Learned counsel for Castmet also argued that based on the surrounding circumstances, those who were directly connected to the project (who had received the carbon copies of the said letter) would conclude that Unipac was referring to Castmet from whom it was facing 'difficulty in collection'. I agree with learned counsel to that extent. However, the words 'facing difficulties in collection' in the natural and ordinary meaning connote that it is not easy for Unipac, in that it needed much effort on its part to obtain payment from Castmet. It does not mean that Castmet was a company which was not truthful in its dealings and/or could not be trusted as a Main-Contractor. I therefore find that the words do not bear the defamatory meaning as pleaded by Castmet.

Further, it is clear from the evidence that the letter was written for the sole purpose of collecting the outstanding payment. Given the fact that Unipac had completed the works which had been acknowledged by UMW and given that UMW had paid Castmet for the project, which payment includes Unipac's value of works, there is no reasonable ground for Castmet to still insist that Unipac sign the Letter of Award. Even if the contention of Castmet is to be accepted, i.e. that Unipac is not entitled to the full payment as 5% should be deducted for the retention monies pursuant to the unsigned Letter of Award, Castmet could and should have paid Unipac the sums due minus the 5%. The refusal by Castmet to make payment to Unipac in the circumstances is without basis.

The said letter had indeed served its purpose. Payment was eventually received by Unipac on 21.1.2006 after the intervention by UMW wherein the total amount of RM520,400 was paid by Castmet vide two separate payments. These two payments were made without any conditions attached. Castmet had also not stated that the payments were made on a without prejudice basis to the letter of demand dated 12.12.2005. Given the end result of the said letter, it could not be said that the words “we are facing difficulties in collection” are false. Castmet’s claim is therefore dismissed with costs.

(DATO’ TENGKU MAIMUN BINTI TUAN MAT)
HAKIM
MAHKAMAH TINGGI MALAYA
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Dated 27th May 2009

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