

**IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
CIVIL DIVISION
CIVIL SUIT NO. S6-22-840-2007**

BETWEEN

ASIE SDN BHD

.....PLAINTIFF

AND

KEJURUTERAAN BINTAI

KINDENKO SDN BHD

... DEFENDANT

GROUND OF JUDGMENT

The Defendant via Enclosure 14 appealed against the decision of the SAR (the said decision) in allowing Enclosure 9 i.e. an application for Summary Judgment by the Plaintiff against the Defendant under 0 14 RHC.

Enclosure 20 is the Defendant's appeal against the decision of the SAR in dismissing the application for stay on the execution of the said of the SAR decision in making the order for Summary Judgment against the Defendants.

Both submitted in writing and after due consideration on the points raised I dismissed both the appeals by the Defendant with costs. The Defendant appealed to the Court of Appeal against my decision. Below are my grounds.

The Plaintiff's Claim

The Plaintiff's claim against the Defendant in Enclosure 9 is for inter alia the Defendant to submit to the Plaintiff the Maintenance bonds in the amount of RM1,984,659.10 and RM 516,011.90 in the name of the Government of Malaysia and the Plaintiff respectively.

Background Facts

On 9th June 2003, the Plaintiff had awarded to the Defendant the contract for the construction of parcel 2 (880 units of DBKL Public Housing Associated Infrastructure and External Works) on Lot 23113, Taman Setapak Jaya, Sri Rampai, Kuala Lumpur. (Exhibit P-1 of Enclosure 8).

The terms of this Letter of Award was accepted by the Defendant on 10.6.2003. (Refer to page 19 of Enclosure 8).

The Letter of Award dated 9th June 2003 was later incorporated as part of the Contract Documents (Turnkey with financing) for phase 2 dated 1st July 2003. (Exhibit P-2 Enclosure 8)

The initial contract sum was for RM 49,010,000.00 but on 28th July 2003, upon agreement by both parties, the total contract value was increased to RM 50,013,420.00 (Exhibit P-3 Enclosure 8).

Clauses 9 and 10 of the Letter of Award dated 9th June 2003 stipulates that the Defendant is to submit to the Plaintiff a design bond and a maintenance bond.

Clause 3 of the Letter of Award provides that the date of completion shall be the date of the issuance of Certificate of Fitness for Occupation or the Temporary Certificate of Fitness for Occupation whichever is earlier.

The Defendant had submitted to the Plaintiff 2 Design Bonds in the amount of RM 516,011.90 and RM 1,984,659.10 issued by Maybank on 25th April 2007 (exhibit P-7 in Enclosure 8). However the Defendant failed to provide the Maintenance Bonds to the Plaintiff, despite various demands made by the Plaintiff. This is the Plaintiff's claim in the application herein.

Issue raised by the Defendant

The Defendant submits that the "spirit and the effect" of the Contract is that the provision of the Maintenance Bonds is to be concurrent with the release of the 1st moiety of the retention sum.

Findings of the Court

I refer to Clause 9 of the Letter of Award and clause 47.5 of the Conditions of Contract which states as follows:

“Clause 9 of the Letter of Award – Maintenance Bond

You shall submit to us within fourteen (14) days from the Date of the Certificate of Completion of the Works, the following Maintenance Bonds (total amounting to RM 2,450,500.00 being 5% of the Contract Sum) in the form of a bank guarantee from a bank operating in Malaysia:

- a) To the Govt. of Malaysia (on behalf of Asie Sdn Bhd) for the sum of RM 1,984,659.10;
- b) To Asie Sdn Bhd for the sum of RM 465,840.90 being the balance of 5% of the contract sum.

The maintenance bonds shall remain valid for a period of thirty (30) months commencing on the Date of the Certificate of Completion of the Works.”

Clause 47.5 of the Conditions of Contract provides:

“Retention Money

47.5.1 The Retention Money retained by the Employer under Clause 47.2_1 shall be released to the Contractor in accordance with the following manner:

1. Upon completion of the whole of the Works and the submission of as built drawings as required under Clause 6.5, half of the Retention Money in respect of the said Works or section of Works shall be released to the Contractor.
2. The remaining half of the Retention Money shall be released to the Contractor upon expiry of the Defects liability Period stated in the Appendix hereto or the issue of a Certificate of Completion of Making Good Defects, whichever is the later.”

From the wordings in clause 9, it is clear that the Defendant is to submit the Maintenance Bonds to the Plaintiff within 14 days from the date of certificate of completion of the works. There cannot be any other interpretation on clause 9. In the case of ***Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v. Kabelect Sdn Bhd*** [2000] 3 MLJ 254 at 134:

“ ... the language being clear and exclusive, no extraneous evidence can be supplied or implied to the contrary or to bring about any other conclusion. “

The Defendant is to submit the Maintenance Bonds without any preconditions on the part of the Plaintiff relating to any retention sum.

The provisions of the retention sum is separate and distinct from the Defendant's obligation to provide the Maintenance Bonds under the Contract. Regarding the retention sum, the Defendant argues that it is a subject matter for arbitration and that arbitration could only be commenced upon completion of the works. This argument is untenable. The Defendant's letter dated 8th February 2007 informing the plaintiff as to the completion date and enclosing the certificate for occupation defeats this argument.

The certificate for occupation was issued by Dewan Bandaraya Kuala Lumpur on 17th January 2007(Exhibit P-5 Enclosure 8).

Moreover the Defendant via its letter dated 27.3.2007 promised to secure all the Bonds by the 1st week of April.(Refer page 164 Enclosure 8) This is an admission of the Defendant's liability to provide Designs and Maintenance Bonds.

Therefore, the Defendant should have submitted the maintenance bonds to the Plaintiff in accordance with Clause 9 of the Letter of Award on or around end of February 2007 when the works were completed.

The Defendant is aware of the responsibility to submit the Maintenance Bonds and is estopped from saying otherwise. This is evidenced from the various correspondences between the Plaintiff and the Defendant regarding 'design bonds and maintenance bonds.'(Plaintiff's letters dated 27.2.2007, 9.3.2007, 23.3.2007 in exhibit P-5 and letter dated 10.4.2007 in Exhibit P-6 Enclosure 8; Defendant's letter dated 27.3.2007 in Exhibit P-6 Enclosure 8)

Furthermore, the Defendant had submitted the design bonds to the plaintiff in accordance to Clause 10 of the Letter of Award in which said clause is worded similar to Clause 9.

The other issues raised by the Defendants are not relevant to the application herein and therefore is not been addressed.

Therefore as far as the application in Enclosure 9 is concerned there is no triable issue and therefore the SAR correctly granted the Summary Judgment prayed for. Therefore the appeal by the Defendant in Enclosure 14 is hereby dismissed with costs and the decision of the SAR is affirmed.

As far as the appeal on the decision of the SAR which refuses to grant stay on the said decision, the Defendants have not shown any special circumstances to warrant the stay and neither was there any facts shown which will have the nugatory effect shown in the event the appeal is for the Defendant.

Therefore the appeal of the Defendant in Enclosure 20 is dismissed with costs.

t.t. Datin Zabariah Mohd Yusof
Tarikh : 29.5.2009

Bagi pihak Plaintiff : Encik K.Y. Lim
Tetuan K.Y. Lim, Barnaby & Tan

Bagi pihak Defendan : Cik Shanti Subramaniam & Tan Chong Lii
Tetuan Belden