

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S3-22-1091-2006

BETWEEN

ASAZTERA SDN BHD

.....PLAINTIFF

AND

LOO CHIEW KOY

.....DEFENDANT

GROUND OF JUDGMENT

This is the Defendant's appeal against the decision of the SAR in dismissing the Defendant's application under 0 18 r 19 (1) RHC to strike out the Plaintiff's claim. After consideration of the written submissions from both parties I allowed the appeal by the Defendant with costs. The plaintiff appealed against my decision. Herein below are my grounds.

Brief Facts

By a contract dated 28.6.1996 the Plaintiff was appointed by Goldcourse Sdn Bhd as the main contractor for the project known as “ the construction and completion of a 23 storey hotel and shopping complex that consist of 5 Level shopping, 3 ½ Level of car park and 14 ½ Level of Hotel at Lot 77, Bandar Klang, Daerah Klang, Selangor Darul Ehsan” (hereinafter refer to as the said project).

The Defendant was at all material times the architect and superintendent officer (hereinafter referred as ‘S.O’) for the said project.

The Plaintiff alleges that the Defendant has acted in breach of his professional duty of care in the performance of his services and obligations as architect/S.O for the said project. Particulars of the negligence are as follows :

- a) Failed to evaluate and certify the Plaintiff’s interim claim and final claim fairly and in accordance with the time period prescribed in the contract;
- b) Failed to grant timely and appropriate extension of time;
- c) Failure to take into account all factors causing delay in granting extension of time to Plaintiff
- d) Did not administer contract fairly, independently or impartially;

- e) Administered the contract in a bias manner in favour of the owner of the contract (Goldcouse Sdn Bhd) and to the detriment of the Plaintiff;
- f) Wrongfully issued Certificates of Non-Completion which prejudiced Claimant .
- g) Backdated the Certificate of Practical Completion and Certificate of Non Completion for Phase 1 and Phase 2;
- h) failure to certify the quantity surveyor's (CICQS Services Sdn Bhd) final evaluation of the Plaintiff's claim amounting to RM4,768,429.93;
- i) failure to certify variation works completed by the Plaintiff amounting to RM 1,455,015.29;
- j) failure to certify the Plaintiff's loss and expenses and prolongation costs of RM5,424,460.25;

As a result of such breaches of duty Plaintiff claims that:

- a) The Plaintiff suffered Damages by way of non-payment against Certificates of Progress Payment;
- b) The Plaintiff did not receive payment for variation works amounting to RM 1,455,015.29;
- c) Plaintiff suffered damages as a result of wrongful deductions of RM 1,990,000 as LAD;

- d) Plaintiff suffered damages as a result of wrongful set-off of retention sum of RM2, 151,078.28;
- e) Plaintiff did not receive the final claim for the sum of RM4, 768,429.93;
- f) Plaintiff suffered losses as a result of expenses on prolongation costs of RM5424,460.25;
- g) Plaintiff suffered financial losses of RM5,546,414.67

Preliminary Objection by the Plaintiff:

The Plaintiff alleges that the Defendant had premised his application for striking out on a conjunctive basis under O 18 r 19 (1) (a) and /(b) and/or (d).

I am of the view that this is without basis. Authorities are clear that when a party applies under paragraph (a) then one need not refer to any affidavits at all but just the pleadings. However a party would not be restrained if one premised the application on the other paragraphs as an alternative grounds for striking out. In the event of other than paragraph (a) as a ground for striking out, then one can refer to affidavits filed to support the application. Refer to the case of ***Malayan United Finance Bhd v Cheung Kong Plantation Sdn Bhd*** [2000] 2 MLJ 38 whereby Abdul Hamid Mohammad FCJ states as follows:

“ [1] Paragraphs (a) to (d) of 0 18 r 19 (l) are 'disjunctive'. This means that an applicant may apply any one of the paragraphs in his application. The usage of the word 'or' between the paragraphs cannot be a ground to say that para (a) cannot be applied together with the other paragraphs. The reason being, if that was the submission, paras (b), (c) and (d) also cannot be applicable together, on the same grounds (see pp 42H-43B).”

[2] The ground that under (a) affidavit evidence cannot be applied whereas the other paragraphs could, is insufficient to say that an application which applied all paras (a) to (d) fail to follow the procedure, and is furthermore null and void. The rule did not provide as such. What the court should have done is not to take into account evidence in the affidavit while hearing and deciding any application under (a), but merely based its decision on the pleadings only. However, while hearing and considering an application under other paragraphs, affidavit evidence may be read and considered (see p 43B-D).”

Therefore the preliminary objection by the Plaintiff is dismissed.

Merits of the application by the Defendant

a) Whether there is a cause of action against the Defendant

The claim by the Plaintiff against the Defendant is for the negligence of the Defendant as architect and S.O. for the project. Particulars are

as stated in the earlier paragraphs. This is a claim in tort for breach of duty of care by the Defendant in issuing out the certificate of payments which was due to the Plaintiff. The Plaintiff relies on Halsbury's Law of Malaysia pages 161, 163 and 164 which states as follows:

"[40.199] As there is no contractual relationship between the architect or engineer and the contractor, the only liability that can be incurred towards the contractor is in negligence"

"[40.202] An architect or engineer will be liable to the contractor if he acts fraudulently to the contractor's detriment, whether in preparing drawings or in refusing to certify or in certifying dishonestly and whether in collusion with his employer or not He will similarly be liable if fraudulently he falsely asserts that he has authority to order additional work."

The Plaintiff also seeks to rely on the cases of :

- ***Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors*** [2000] 4 MLJ 200;
- ***Dr. Abdul Hamid Rashid & Anor v Jurusan Malaysia Consultants (sued as a Firm) & Ors*** [1997] 3 MLJ 546;
- ***Lim Teck Kong v Dr. Abdul Hamid Abdul Rashid & Anor*** [2006] 1 CLJ 391,

which the Plaintiff submits to support the contention that the Defendant has a duty of care against the Plaintiff as the main contractor in the said project.

There is no dispute that there is no contractual relationship between the architect or engineer and the contractor. However what the Plaintiff fails to point out to this court and as was pointed out by the Defendant's counsel that the Plaintiff's counsel had failed to cite the whole paragraph of 40.199 in Halsbury's Laws of Malaysia which reads:

"[40.199] As there is no contractual relationship between the architect or engineer and the contractor, the only liability that can be incurred towards the contractor is in negligence (and then only in situations recognized in law)...."

This particular sentence which was missing carries with it a reference to a footnote which cites the case of ***Pacific Associates Inc. v Baxter*** [1990] 1 QB 993.

A reading of the ***Pacific Associates Inc's*** case shows that it has similar facts with our case in that:

- a) The Plaintiff in that case was a contractor who sued the Defendant who was the engineer in a project and his role was to supervise the project as per the contract;
- b) The Plaintiff in that case alleged the defendant had failed to certify the Plaintiff's claims;

- c) The plaintiff in that case had commenced arbitration proceedings against the Employer;
- d) The Plaintiff in that case brought an action against the defendant for damages economic loss,

which are also present in our case herein. In that case the Judge had allowed the application for striking out by the Defendant and the decision was upheld on appeal.

The gist of the ***Pacific Associates Inc's*** case is that there is no duty of care owed by the engineer directly to the contractor, as there is no direct contractual relationship between the contractor and the engineer. The case also ruled that recovery of economic loss allegedly caused by an engineer is not allowed by law.

However Halsbury Laws Of Malaysia does state that architect or engineers are liable for fraudulent acts. But nowhere in our case does the Plaintiff pleads fraud on the part of the Defendant. The rule of pleadings is that fraud must be specifically pleaded with particulars. (Refer to ***Khoo Khen Sim v Khoo Chooi Leong*** [2002] 5 MLJ 345 and 018 r 12 (1) RHC)

Therefore on this alone the Plaintiff has no cause of action against the Defendant.

b) Whether the action by the Plaintiff is time barred

Many of the Plaintiff's complaints (paragraph 8 of the Statement of Claim) occurred before 31.10.00. The suit herein was filed on 1.11.2006.

Phase 1 of the project was completed on 19.11.1998.

Phase 2 of the project was completed on 12.7.1999.

Therefore clearly the action by the Plaintiff against the Plaintiff is time barred.

Therefore based on the above reasons the Plaintiff has no cause of action against the Defendant and this suit herein is clearly frivolous and vexatious and therefore an abuse of the court's process. The case is obviously unsustainable as envisaged by the case of ***Bandar Builder Sdn Bhd v United Banking Corporation Bhd*** [1993] 3 MLJ 36.

Thus, the appeal by the Defendant is allowed with costs and the decision of the SAR is set aside.

Datin Zabariah Mohd Yusof
Tarikh 29.6.2009

Bagi pihak Plaintiff : Encik Edwin Lim
(Tetuan Edwin Lim & Suren)

Bagi pihak Defendan : Encik H. L Choon
(Tetuan Raja Darryl & Loh)