

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
(BAHAGIAN SIVIL)  
GUAMAN SIVIL NO: S5-22-1288-2006**

**ANTARA**

**KETIKRA CONSTRUCTION SDN. BHD.  
(No. Syarikat: 427844-T)**

**... PLAINTIF**

**DAN**

**SMALLHOLDERS DEVELOPMENT  
CORPORATION SDN. BHD.  
(No. Syarikat: 38930-H)**

**... DEFENDAN**

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**GROUND OF JUDGMENT**

This is an appeal against the decision of the learned Senior Assistant Registrar dismissing with costs the application of the Plaintiff for Summary Judgment under 0 14 RHC 1980. After hearing submissions from both parties I allowed the appeal by the Plaintiff with costs. The Defendant appeal against my decision.

## **BACKGROUND FACTS**

The Plaintiff was a sub -contractor for the Defendant who was the sub contractor for the main contractor in the construction works in Kelantan for the “Projek Merekabentuk, membina Dan menyiapkan SMK Seri Aman, Pasir Puteh, Kelantan” (hereinafter referred to the Project). The original contract sum as stated in the Letter of Award is RM13,820,000.00.

### **Claims by the Plaintiff**

The Plaintiff claims that the works had been completed within the time specified.

The Defendant had made part payment towards settlement of the progress claims submitted by the Plaintiff.

The parties (Plaintiff and Defendant) then held discussions tor settlement of the claims submitted by the Plaintiff. A settlement was achieved with the final claim fixed at RM 341,788-04. Exhibit YCP-2’ of Enclosure 5 confirms the settlement sum and at page 2, the Defendant’s Finance Manager and Project Manager had endorsed on the document thus confirming the same.

As at the date of filing of the Writ of Summons on 21-12-2006, the outstanding sum of RM316,788-89 was due and owing. Subsequently on 2-04-2007, the Defendant made a partial payment of RM 10, 000-00 (Refer to exhibit YCP 11 enclosure 5). This was done after the Defendant had:

- (i) Received the Writ of Summons on 7-01-2007; and.
- (ii) Filed the Statement of Defence on 7-03-2007.

Taking into account of payment of the RM10,000.00, the outstanding sum prayed for at Enclosure 6 (Summary Judgment) is RM 306, 788-89.

The Plaintiff has thus established a prima facie case for summary judgment and is entitled to judgment.

### **ISSUES RAISED BY THE DEFENDANT**

Thus Defendant raised the following issues:

- a) There was delay by the Plaintiff in executing the works for the said project;
- (b) The amount claimed by the Plaintiff is unclear, doubtful and not final.
- (c) There was a 'Back-to-Back' or "Pay when Paid' arrangement by the main contractor to the Defendant, only then the Defendant would be able to pay to the Plaintiff.

## **THE COURT'S FINDINGS**

- a) There was delay by the Plaintiff in executing the works for the said project;

The issue of delay was brought up for the first time in the Statement of Defence in paragraph 7 (i) and the affidavit in reply of the Defendant in Enclosure 8 at para 10. However no details or particulars was ever averred or documents shown to prove that there was in fact delay committed by the Plaintiff.

This assertion seems unfounded by the conduct of the Defendant in making subsequent payments to the Plaintiff as follows:

- On 24.1.2006 a payment of RM 20,000.00 was paid (Refer to Enclosure 6 Exhibit 'YCP-6');
- on 24.3.2006 payment of RM 5,000.00 was made (Refer to Enclosure 6 Exhibit 'YCP-8');
- on 2-04-2007 payment of RM10,000.00 was made. This was made after the 'Statement of Defence' dated 7.3.2007 was filed denying the Plaintiffs claims. ( Refer to Enclosure 6 Exhibit YCP-11).

Therefore this assertion of delay on the part of the Plaintiff has not been substantiated by any documents or proof to that effect.

a) The amount claimed by the Plaintiff is unclear, doubtful and not final.

The amount which was claimed by the Plaintiff in at the point when the statement of claim is filed is RM 316, 788.89 which is derived after deducting RM 25 000 (which was paid by the defendant before the statement of claim was filed) from total amount due RM 341,788.89. Another RM 10,000 was only paid after the statement of Defence was filed. Therefore this RM 10, 000 should be deducted from the total amount claimed. As indicated in the case of ***Krishnamorthy & Anor v Malayan Finance corporation Sdn. Bhd.*** [1986] 2 MLJ 134, there is no need to amend the Statement of Claim for the making of adjustment.

The denial by the Defendant of owing any amount to the Plaintiff is contradicted by the conduct of the Defendant in making the various payments on the said dates as mentioned in the preceding paragraphs. When making the payments, there was no denial by the Defendant that the Defendant owes the Plaintiff. In other words the Defendant had not produced evidence whatsoever to support its contention, and neither did the Defendant presented its version of what actually is the amount due to the Plaintiff. The court refers to the case of ***Overseas Investment Pte Ltd v Anthony William O'Brien & Anor*** [988] 3 MLJ 332, where Shankar J in his judgment ruled that “where one party gives sworn uncontradicted testimony to prove a fact, that evidence must be accepted because there is nothing in the other end of the scales.” It was also held in the same

case that where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted.

A further point to note is that, the Defendant had on several occasions admitted liability as to the fact that the Defendant does owe the Plaintiff for the works on the project. Exhibit "YCP 3" in enclosure 5 is a letter from the Defendant dated 18.9.2003 stating that the amount owing to the Plaintiff is RM 264,723.61, although the amount is not the same as the amount claimed by the Plaintiff. Added to this, is another letter which was addressed to the Plaintiff requesting the Plaintiff to confirm that some moneys are due and owing to the Plaintiff. This can be found in exhibit "YCP-9" in Enclosure 5. Although the sender of "YCP-9" cannot be ascertained by looking at the letter, however upon perusing the amount that was supposed to be due to the Plaintiff as stated in the said letter, on a balance of probability, the likelihood is that the letter was from the Defendant. The amount due and owing to the Plaintiff as stated in the letter is RM 318, 480.43, which is the amount which is due to the Plaintiff. (Plaintiff in its statement of claim at para 19 states that after payments from the Defendant the amount that is due is RM 316, 788.89.) In any event the Plaintiff had asserted in its affidavit that the letter was indeed from the Defendant.

Even if assuming for a moment that the exhibit of "YCP 9" did not originate from the Defendant, documents in exhibits "YCP-6" and "YCP 8" of Enclosure 5 shows payment vouchers of the Defendant which states " Final settlement claim berjumlah RM 341, 787.89" and

“Final settlement claim berjumlah RM 341, 788.04” respectively. These payment vouchers which belongs to the Defendant are dated 24.1.2006 and 24.3.2006 respectively and at the bottom part of the said vouchers is stated “”Projek: Cadangan Merekabentuk, Membina & Menyiapkan Sekolah Menengah Kebangsaan Seri Aman, Pasir Puteh, Kelantan” which happens to be the project which payment is in dispute now between the Plaintiff and the Defendant. A point to note is that the amount stated in these payment vouchers shows the same amount as stated in exhibit “YCP-2” which the Plaintiff referred to as “the final settlement claim” in its letter in “YCP-2”. It is also to be observed that these payment vouchers “YCP-6” and “YCP-8” seems to contradict the letter issued by the Defendant to the Plaintiff earlier which is dated 18.9.2003 whereby the Defendant denies that the amount due to the Plaintiff is RM 341, 788.04.(Refer to exhibit YCP 3 in enclosure 5).

For the sake of clarity, I reproduced herein below the letter which is in exhibit “YCP 3” :

“SMALLHOLDERS DEVELOPMENT CORPORATION SDN BHD

Kepada

KETIKRA CONSTRUCTION (M) SDN. BHD.

No. 32-28, Jalan PJU 1/38,  
Sunway Mas Commercial Centre,  
47301 Petaling Jaya,  
Selangor Darul Ehsan.

Tuan.

CADANGAN MEREKABENTUK, MEMBINA DAN  
MENYIAPKAN SEKOLAH MENENGAH KEBANGSAAN SERI  
AMAN, PASIR PUTEH, KELANTAN DARUL NAIM.

-Tuntutan Bayaran Terakhir

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Surat tuan bertarikh 23 Ogos 2003 dan KCSB/SHDC/SMKI001  
bertarikh 11 September 2003 berkaitan perkara di atas adalah  
dirujuk.

2. Sebagaimana yang telah dimaklumkan kepada tuan dalam  
perbincangan tuan dan pengurus – pengurus kami pada 23  
Ogos 2003 yang lalu bahawa tuntutan tuan bernilai RM 341  
,788.04 adalah belum muktamad. Harga muktamad adalah  
berdasarkan kepada pengesahan dan persetujuan yang akan  
dicapai diantara SHDC dan Syarikat M. Amin & Ibrahim (M)  
Sdn. Bhd. (SMAI).

3. Lanjutan daripada persetujuan yang telah dicapai diantara  
SMAI dan SHDC pada 16 September 2003 dan perbincangan  
diantara En. Eric dan En. Ibrahim B. Uzair serta En. Tajuddin  
B. Ahmad baru-baru ini, baki bayaran yang sepatutnya  
dibayar oleh SHDC kepada pihak tuan ialah RM264,723.61  
sebagaimana ringkasan bayaran yang dilampirkan.

4. Pihak kami akan mula membuat pembayaran kepada tuan  
setelah kami mendapat bayaran pertama daripada SMAI.

Sekian, terima kasih.

Yang benar

SMALLHOLDERS DEVELOPMENT CORPORATION SON. BHD.

ABDUL MALIK BIN ABDULLAH  
Pengurus Besar”

The claim by the Plaintiff arises from the letter in “YCP-2” which was a “final settlement claim” after discussion after discussion between both parties, which is at RM 341, 788.04. This amount is the same amount as stated in the latest payment vouchers of the Defendant (exhibit YCP-8). After taking into account part payments, one of which was made after the Defendant had filed its Statement of Defence, the final sum is RM 306, 788.89.

Liability of the Defendant thus arises as a result of the admission as indicated in the letters and documents mentioned above and the following provisions and authorities therefore applies:

- Section 17 & 18 Evidence Act 1950
- ***Kes Pembinaan KSY Sdn. Bhd. v Syarikat Federal Furniture Construction and Engineering Works*** [1991] 1 MLJ 347

Therefore clearly, that this issue of outstanding amount raised is not a ‘bone fide triable issue’.

b) “Back-to-Back’ or ‘Pay when Paid’ Arrangement

The Defendant had issued the letter in YCP-3 and maintained that payment would only be made once it received payment from SMAI. The Defendant claimed that their contract with SMAI had been terminated on 29-06-2003 and that a suit had been filed for non-payment (paragraph 16 & 19 Enclosure 8).

However when demanded for payment later, the Defendant made three payments from January 2006 to April 2007 totaling RM 35,000.00 with the latest one made after their Defence had been filed. If such “‘Back-to-Back’ or ‘Pay when Paid’ arrangement did exist, surely there is no necessity for the Defendant to make payments to the Plaintiff when no payments are forthcoming from SMAI.

The Defendant further claimed that such payments made are ‘mere advances’ pending receipt of payment by the Defendant. However, there is no mention of any ‘advances’ in any of the documents from the Defendant to the Plaintiff when making the said payments to the Plaintiff. Refer to documents in exhibits ‘YCP-8’, ‘YCP-7’ and ‘YCP-11’. It was clearly indicated on the said exhibits that it was as ‘Bayaran Sebahagian daripada tuntutan’ and towards ‘Final Settlement Claim’ for the said project.

The Defendant also introduces Exhibit “‘PA-1’ and ‘PA-2’ in Enclosure 8, however exhibit “‘PA-1” is an agreement between the Defendant and SMAI whereby the Plaintiff is not privy to the agreement while exhibit ‘PA-2’ is a draft minute of discussion between the Defendant and SMAI concerning their dispute. The Plaintiff claims that the proposed plan had never been put into practice and that the Plaintiff had never taken over the project. In any event whatever arrangement between the Defendant and SMAI is not relevant to the claim between the Plaintiff and the Defendant. It is an undisputed fact that after the discussion dated 11.6.2003 the Defendant made several payments until 2007 without mentioning this arrangement at all.

Even if on the assumption that there is such an arrangement, the Defendant ought to have produced a written 'Back-to-Back' Agreement if indeed there was one, considering the big sum involved. Further, liability by the Defendant is not contingent upon receipt of payment by the Defendant from SMAI (the main contractor). (Refer to ***Royden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd*** [1992] 1 MLJ 33)

Hence, this is a non issue and the submission and assertion by the Defendant is untenable and contradicted by the Defendant's very own action or conduct.

### **Conclusion**

Therefore on the above stated considerations, the Defendant have failed to raise any bona fide triable issues that merits the case for a full trial. The issues raised by the Defendant are mere bare assertions which are not substantiated, lacking in bona fides, and inconsistent with contemporary documents.

Hence, I allowed the appeal by the Plaintiff and set aside the Order of the learned Senior Assistant Registrar dated 29.5.2008 with costs.

t.t. Datin Zabariah Mohd Yusof

Tarikh : 22.5.2009

Bagi pihak Plaintiff : Encik C.Y Chong

Tetuan C.Y. Chong & Associates

Bagi pihak Defendan : Encik Nasharuddin bin Hussin

Tetuan Nasharuddin Y.K. Chew & Partners