

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN SIVIL)**

GUAMAN SIVIL NO: S5-22-222-2008

ANTARA

WIRA CENTRAL (M) SDN BHDPLAINTIF

DAN

REGAL MERGER SDN BHDDEFENDANT

GROUND OF JUDGMENT

Enclosure 7 is an application by the Plaintiff for Summary Judgment under 14 RHC against the defendant.

Brief Facts:

The Defendant was undertaking the development of a project known as "Cadangan Pembangunan Kedai Pejabat 3 Tingkat seblk 30 unit di atas PT 83, Bandar Bukit Baru, Seksyen IV, Daerah Melaka Tengah, Me/aka" ("Project") and had engaged the Plaintiff as the contractor cum project manager for the said Project.

Regional Development Consortium Architect was the Superintending Officer/Architect ("Architect") appointed by the Defendant.

The terms and conditions of the Plaintiff's said engagement included, inter alia, the Pertubuhan Arkitek Malaysia "Agreement and Conditions of Building Contract" (Private Edition without Quantities) [1998 Edition¹ ("PAM Conditions of Contract").

The Plaintiff had commenced work on the said Project pursuant to its said engagement.

Subsequently and as evidenced by the Defendant's letter dated 19.7.2006, the Defendant assumed possession and responsibility for the said Project from the Plaintiff and thereby terminating the Plaintiff's said engagement as contractor of the said Project.

Consequently and following valuation undertaken by the said Quantity Surveyor, the Architect issued a certificate certifying a sum of RM905,480.49 (Certificate) being the amount due and owing by the Defendant to the Plaintiff for works done and materials supplied.

The said Certificate also confirmed that a sum of RM 335,312.84 had been deducted and was being held by the Defendant as retention sum.

Despite requests/demands from the Plaintiff, the Defendant had failed to pay to the Plaintiff the above sums. As such, the Plaintiff had on 22.2.2008 commenced a writ action against the Defendant to claim the said sum of RM 905,480.49 and the Retention Sum of RM335,312.84.

The Plaintiff's claim against the Defendant is for works done and materials supplied in relation to the Project before the termination of the Plaintiff's engagement as contractor on/about 19.7.2006.

The Plaintiff states that it is entitled to the payment of the said sum of RM 905,480.49 and the Retention Sum of RM 335,312.84 on the following reasons:

- a) given that the Certificate issued by the Architect was a final valuation of the works done by the Plaintiff, this Certificate is proof that the sum of RM 905.480.49 is undisputedly due from the Defendant to the Plaintiff;
- b) pursuant to Clause 30.2 of the PAM Conditions of Contract, once the said Certificate is issued by the Architect the contractor (Plaintiff) is entitled to payment within 30 days. .
- c) As the Defendant had failed to make such payments to the Plaintiff within the 30 days (i.e on/before 30.12.2007), the said sum of RM 905,480.49 ,or becomes due and payable to the Plaintiff;
- d) further, as at the date of filing of the Summons, the Defendant has not raised any complaints or evidence to show that the certified sum of RM 905,480.49 was erroneous by reason of fraud, dishonesty or fraudulent concealment of the works done or that the Defendant has a cross claim alleging defective work.

Additionally, the Plaintiff states that taking into account the termination of the Plaintiff's engagement in/around 19.7.2006 and the fact that the Defendant had failed to raise any complaints of defective work (which would allow the Defendant to make deductions from the Retention Sum), the Retention Sum of RM 335,312.84 is also due and payable to the Plaintiff.

The Court's Findings:

The Plaintiff have agreed to terminate the PAM Conditions of Contract by a letter dated 29.5.2006 and substitute it with a new contract where the parties have agreed to the new terms inter alia as follows:

- a) The plaintiff will surrender the whole project inclusive of the current on going 30 units shop office to the Defendant;
- b) A final account shall be carried out and payment terms of such due outstanding owing shall be arranged and agreed;
- c) upon receiving the final account, both parties shall discuss the matter for final agreement and formulate the method of payment;
- d) the outstanding sum agreed and accepted between both parties shall be honoured within 14 days from the date of signing of agreement for acceptance of final account of the project.

Therefore triable issue arises as to whether on the terms and conditions of the new agreement, all the obligations of the parties have been fulfilled, bearing in mind that the PAM Contract is no longer in existence.

This issue of the PAM contract has been terminated and new terms and conditions being emplaced have not been disclosed in the Statement of Claim and neither in the affidavit of the Plaintiff. (Refer to the case of Affin Bank Bhd v Datuk Ahmad Zahid Hamidi [2005] 1 CLJ 521). The matters as stated in paragraphs (b) to (d) above are issues to be tried.

Moreover, earlier a finding has been made on the issue that there are issues to be tried, by the Judge hearing the application for an injunction in Enclosure 4. Therefore I am estopped from deciding on the same issue.

Therefore, base on the above reasoning the claim by the Plaintiff for summary judgment under 0 14 RHC is dismissed with costs.

Datin Zabariah Mohd Yusof
Tarikh 10.7.2009

Bagi Pihak Plaintiff : Encik Micheal Chow
Tetuan Micheal Chow.

Bagi Pihak Defendant : Encik Haresh Mahaderan
Tetuan Haresh Mahadevan & Co.

