

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S7-22-687-2008

BETWEEN

ANTAH SRI RADIN

.....PLAINTIFF

AND

MH PROJECTS SDN BHD

.....DEFENDANT

GROUND OF JUDGMENT

This is the application by the Defendant pursuant to 0.41 r.6 for orders, inter alia, that paragraphs 12 to 17 and 21 of Plaintiff's affidavit in support (encl. 5A) of the Plaintiff's application for an 0 14 RHC judgement, together with exhibits MF-3, MF-4 and MF-7 be struck out.

Brief facts

The Defendant at all material times is the main contractor appointed by the Government of Malaysia for the project known as "The Design, Construction, Equipping, Commissioning and Maintenance of Hospital Alor Setar (660 Beds) and Nurses Training Collage at Alor Setar" (the project).

In executing the project the Defendant appointed 2 subcontractors, Meditechnique Sdn Bhd and Metronic Sdn Bhd. (referred to as the subcontractors)

Plaintiff was subsequently appointed by the sub contractors to deliver medical equipments for the purposes of the project. Plaintiff claims that all the deliveries have been duly executed but there are payments due from the sub contractors to the Plaintiff which have not been paid. Demand had been made against the subcontractors but to no avail.

The Defendant had offered to help settled the amount which is outstanding between the sub contractors and the Plaintiff. It is these communications via letters between the Plaintiff and the Defendant that forms the subject matter in this application herein.

Plaintiff's allege that:

The letters especially exhibit MZ-3 shows that the Defendant had made a final offer for settlement through its letter dated 13.3.2008 by enclosing 5 cheques. However, except for the first

cheque, the rest of the cheques were stopped payment by the Bank.

There is already a final settlement which is a sealed and final concluded agreement between the Plaintiff and the Defendant with respect to the amount owed to the Plaintiff.

Therefore all the letters which was marked "without prejudice" i.e. exhibits marked MF-3, MF-4 and MF-7 can now be admissible in court to show that there was negotiation for settlement which resulted in the Defendant agreeing to pay the amount owed to the Plaintiff.

Defendant Contends that:

a) Paragraphs 12 and 13 of Enclosure 5A should be expunged as it is premised upon:

- the Defendant's letter dated 18.12.2007 which is a "without prejudice" letter and marked as "MMZ-1"; and
- the Plaintiff's letter dated 3.1.2008 which is a "without prejudice" letter and marked as MF-3.

as these letters were correspondences made in the midst of negotiation between the parties.

b) paragraphs 14 and 15 of Enclosure 5A should also be expunged as it is premised upon:

- the Defendant's letter dated 11.1.2008 which is a "without prejudice" letter and is marked as "MMZ-1"; and

- the Plaintiff's letter dated 15.1.2008 which is a "without prejudice" letter and marked as MF-3.

as these letters does not form a concluded contract between the Plaintiff and the Defendant.

- c) paragraphs 16 and 17 of Enclosure 5A refers to exhibit "MF-4" which is a letter between the Plaintiff and the Defendant on a "without prejudice" basis and it does not form any concluded contract between the Plaintiff and the defendant.

The Court's Finding

The "MMZ-1" letter and "MF-3" letter

Via letter MMZ-1 the Defendant offered to the Plaintiff to pay the amount owed by Meditechnique Sdn Bhd (one of the sub contractors) to the Plaintiff to the amount of RM 869,770.14 in 8 monthly installments.

However this offer by the Defendants was not accepted by the Defendant. Instead the Defendant made a counter offer so that the Defendant is to pay the Plaintiff RM 500, 000.00 immediately and the balance to be paid in 3 installments.

This counter offer by the Plaintiff was never accepted by the Defendant.

Thus the Defendant's letter "MMZ-1" does not create a binding contract that binds the defendant. Refer to section 7 (a) of the Contracts Act 1950 which states:

“ In order to convert into a promise, the acceptance must be absolute and unqualified.”

A further point to note is that the letter MMZ-1 is clearly a “without prejudice” letter, and whatever communications in the negotiations for settlement, are not admissible in court. Paragraphs 12 and 13 of Enclosure 5A are premised on the letter “MMZ-1”. Therefore the exhibit “MMZ-1” and the paragraphs 12 and 13 of Enclosure 5 is not admissible.

The letters “MMZ-2” and “MF-4”

Paragraphs 14 and 15 are averments which are grounded upon letters marked as “MMZ-2” and “MF-4”.

Due to the failure in the first attempt to settle the matter, the Defendant proceeded with the 2nd attempt, by sending a letter dated 11.1.2008 (MMZ-1), where the Defendant offered to pay RM 869,770.00 in 6 installments.

This was again not agreed by the Plaintiff and the Plaintiff made a counter offer of the amount to be paid in 4 installments.

The letter of the Defendant “MMZ-2” is marked “without prejudice”.

Hence based on the same reason as in the earlier letters, paragraph 14 and 15 in Enclosure 5A and Exhibit MF-4” are not admissible in court.

Paragraphs 16 and 17 of Enclosure 5A

The final offer by the Defendant is contained in the Defendant's letter dated 13.10.2008 marked "MMZ-3", where the Defendant offered to pay RM 869,770.00 in 5 installment. These letters was explained in paragraphs 16 and 17 of Enclosure 5A.

The Defendant's letter is marked "without prejudice". It is to be noted that these were stated by the Defendant in the said letter;

“ We appreciate your co-operation in this matter and hope this can assist Antah Sri Radin Sdn Bhd in fulfilling the contractual obligation as required by us and our client.”

The contents of this letter does not give any indication of any admission on the part of the Defendant that the Defendant is taking over the liabilities of the sub contractors and neither does it shows that the Defendant is admitting liability that the Defendant or the sub contractors owes the Plaintiff the amount of RM 869,770.14.

Moreover the MMZ-3 letter is marked "without prejudice". Similarly the letter of the Plaintiff in MF-7 is also marked "without prejudice".

Therefore these letters cannot be admitted as evidence. Thus, paragraphs 16 and 17 of Enclosure 5A is also not admissible in court.

Issue of Waiver

The Plaintiff states that the Defendant had waived its rights when the Defendant exhibited the letters MMZ-1, MMZ-2 and MMZ-3 in the application herein.

I disagree with the contention of the Plaintiff because the exhibition of those exhibits in the application herein is unavoidable and also to explain to this court as to why those exhibits should not be admissible in court.

Thus, based on the above reasons stated, the application of the Defendant is allowed with costs.

Datin Zabariah Mohd Yusof

Tarikh : 12.6.2009

Bagi Pihak Plaintiff : Encik Amrit Pal Singh
Tetuan Amrit & Co

Bagi Pihak Defendant : Tetuan JT Chong & Associates