

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S6 - 22 - 1061- 2005

BETWEEN

**LETRIKON JAYA BINA SDN BHD
(NO SYARIKAT: 572775-U)**

.....PLAINTIFF

AND

**PEMBINAAN PERWIRA HARTA SDN BHD
(NO SYARIKAT: 151832-W)**

... DEFENDANT

GROUND OF JUDGMENT

This case came before me as an application to determine on only one issue, i.e. for the determination by this court on the question of whether Clause 19 of Appendix A, Supplementary Terms and Conditions of the Letter of Award dated 12.3.2004 (which was issued by the Defendant to the Plaintiff), permits the Defendant to wholly remove all of the contracted works from the Plaintiff/terminate the contract.

Background Facts:

The Defendant through a Letter of Award appointed the Plaintiff to carry out building works known as “Building and Mechanical & Electrical Works, External and Internal Electrical and Telephone Installation for Block Type C Mod A,B,C, and for Block C Flat Inclusive MSB, EMSB, Gen Set, Internal Ducting and pit for Telephone, Air conditioning and Ventilation Services for all blocks “di bawah Cadangan Pembangunan Perumahan Angkatan Tentera Di atas Tanah Milik Kerajaan Mukim Ampang, Kuala Lumpur “ for RM47 million. The Plaintiff was appointed to do the superstructure works in the project. These are contained in the Letter of Award and Appendix A that stipulates the terms and conditions binding on the parties. For trial purposes, the document is now included in the Plaintiff’s bundle of documents.

The Plaintiff could not perform its part of the subcontract works because the piling works were incomplete.

In reliance to Clause 19 of the Letter of Award (at page 3 of Ikatan Dokumen Plaintiff) , the Defendant terminated the subcontract works. The Plaintiff is claiming for the balance of price for the works done, damages for lost of profits and idling costs.

Issue:

Whether Clause 19 of Appendix A, Supplementary Terms and Conditions of the Letter of Award dated 12.3.2004 (which was issued by the Defendant to the Plaintiff), permits the Defendant to wholly remove all of the contracted works from the Plaintiff and terminate the whole Sub Contract.

Findings of the Court

To determine the issue presented by the parties, it is pertinent to study and look at the Sub Contract as a whole.

Para17 of the Letter of Award dated 12-3-2004 (page 3 Ikatan Dokumen Plaintiff) provides:

“17. You are to adhere to the other terms and conditions as stipulated in Appendix A as attached.”

Clause 19 of Appendix A (page 7 Ikatan Dokumen Plaintiff) provides:

“ 9.0 We reserve the right to omit wholly or in part of the works from the Sub-Contract. The omission of the works prescribed may be deducted from the Sub-Contract Sum. No claim whatsoever will be entertained for such omissions.”

The Defendant submits that there is no ambiguity in Clause 19. The Defendant claims that the Defendant has the right to omit any or all the works in the subcontract and the Plaintiff shall not be permitted to claim for these omitted parts. The main contract is not relevant and shall only apply when there is a lacuna in the Sub Contract. Hence the Defendant submits that they can terminate the whole of the Sub Contract Works pursuant to this Clause 19 of the Appendix A.

However, there are other clauses in Appendix A, which also gives the Defendant the right to terminate the Sub-Contract on grounds stipulated in the Clauses. These Clauses are as follows:

- a) Clause 11.4 read together with Clause 11.6, in particular sub-clause 11.6.3 of the Appendix A, permit the Defendant to terminate – if the Plaintiff falls behind in the progress of the Subcontract Works ;
- b) Clause 12 of the Appendix A gives the Defendant the power to determine the Subcontract – if the Plaintiff makes any of the defaults mentioned in the sub clause;
- c) Clause 2 of the Appendix A incorporates the contract between the Defendant and the Employer which states :

“2.0 Accordingly, the terms and provisions of the Main Contract Documents and other Main Contract Documents relating or relevant to the Sub-Contract Works shall apply MUTATIS MUTANDIS to you as if you were the Contractor

thereunder and we were the Employer thereunder in so far as they relate and apply to the Sub-Contract Works (or any portion of the same) and are not repugnant to or inconsistent with the express provisions of the Sub-Contract as if the same were severally set out herein.”

The contract between the Defendant and the Employer is the standard JKR PWD FORM 203A type which permits the Defendant to terminate only in circumstances when the Plaintiff has committed a default. (Refer to Clause 51 of the Contract at page 37 & 38 of Ikatan Dokumen Plaintiff).

Although the JKR type contract in the Ikatan Dokumen Plaintiff is unsigned, this document may be referred to as a guidance on this issue of the rights of the Defendant to terminate contracts, since it is a standard JKR PWD FORM 203A type contract.

From the Clauses mentioned above the right to terminate is given in situations or on grounds stipulated therein. If assuming for a moment that, Clause 19 is to be interpreted to be giving the right to the Defendant to terminate the whole Sub Contract, then it would be a right to terminate without any reasons or justification. If that is so, Clause 19 of Appendix A, does not seem to be in accord with the trend of the other termination clauses as mentioned above i.e. the reasons/grounds are stated when termination can be exercised. This manner of interpretation, to my mind is absurd. I am in full agreement with the submission of Plaintiff that the very purpose of

the Sub Contract is for the Plaintiff to perform and complete the Subcontract Works. It could not have been within the contemplation of parties to the Subcontract that either one of them is empowered to prevent the other from performing the Subcontract as it is a general principle of the law of contract that one party shall not prevent the other from performing and completing the contract. Therefore, to interpret Clause 19 in such a manner would be allowing the Defendant to omit the whole Subcontract Works and also allowing the Defendant to prevent the Plaintiff from performing and completing the Subcontract Works, and this is contrary to the very purpose of the Subcontract, that is, the completion of the Subcontract Works which in the present case is the construction of 4 blocks of apartments.

Clause 19 is in essence a variation clause where it allows the Employer the right to vary or omit part or whole of a works, but not the whole/entire contract. Refer to the case of ***Commissioner for Main Roads v Reed & Stuart Pty Ltd and Another*** [1974] 48 461 Australian High Court at page 462 para G:

“Were he legally entitled to do so, it would, I think, run counter to a concept basic to the contract, namely that a contractor had covenanted that for the bulk sum of £5 million it would perform the works and supply all the materials shown in the contract documents.

At page 463 para E:

“Clause 18 is a common enough provision to be found in engineering contracts and permits of the omission from time to time by the proprietor of portion of the contract works. What it clearly enough does not permit is the taking away of portion of the contract work from the contractor so that the proprietor may have it performed by some other contractor.”

At 463 Para.F right:

“ The Commisioner was, in my view, in breach of his contractual obligation under the contract. ... Secondly, there was the closely allied act of taking away from the contractor the balance of the topsoil placement work, using imported topsoil, and in consequence, the deduction from the lump sum price ...”

Therefore premised on the above, Clause 19 of Appendix A is not a termination clause but a variation clause.

A point to note is that in Clause 19 of the Appendix A, the word “works” should be interpreted to mean part of the Sub Contract Works but not the whole of the Sub Contracts Works.

Therefore my finding is that Clause 19 of the Appendix A does not give the Defendant the right to terminate or wholly remove the whole Sub Contract Works without any reasons or justification. It is a clause which allows the Defendant the right to vary/omit part or

whole of a work but not the whole Sub Contract Works. There are other provisions in the Sub Contract which caters for termination of the whole Sub Contract with justification.

t.t. Datin Zabariah Mohd Yusof

Tarikh : 29.5.2009

Bagi pihak Plaintiff : Encik Edwin Tan

Tetuan S.C. Lim & Partners

Bagi pihak Defendan : Encik C.L. Lim

Tetuan Azam, Lim & Pang.