STECON SDN BHD

v.

ECO TOWER SDN BHD

High Court Malaya, Kuala Lumpur
See Mee Chun J
[Civil Suit No: 22C- 61-12-2013]
12 March 2015

Contract: *Building contract — Sub-contract — Claim for outstanding payments due — Parties to sub-contract not registered with Construction Industry Development Board — Whether sub-contract could be enforced by reason of non-registration with said board — Whether there were fundamental breaches and/or a repudiation of sub-contract*

The defendant was employed as the main contractor for the development of a Coal Fired Power Plant Project. Some parts of the work were sub-contracted to the plaintiff by the defendant. In this instance, the plaintiff was claiming for the outstanding sum due, performance bond and loss of profit based on the sub-contract. It was not disputed that both the plaintiff and the defendant were not registered with the Construction Industry Development Board ('CIDB'). The plaintiff's claim was premised on fundamental breaches and/or repudiation of the sub-contract by the defendant and that it had accepted the defendant's repudiation which thereby terminated the sub-contract, and meant that the plaintiff was entitled to its claim. Hence, the main issues to be decided were, whether the sub-contract could be enforced by reason of the non- registration of the plaintiff with the CIDB; and whether there were fundamental breaches and/or a repudiation of the sub-contract by the defendant.

Held (allowing the plaintiff's claim with costs):

(1) The exception to the general principle that a contract is void if prohibited by law is that the law itself saves the contract which may be seen from the language of the law for example where the only sanction for contravention is criminal in nature. In the instant case, s 29 of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ('CIDB Act') only provided a penalty for non-registration and did not go beyond that. Hence, it could be said that s 25 on registration of contractors read together with s 29 of the CIDB Act was not intended to prohibit contracts but to punish those who contravened the law and this was made clear by the provision of the penal consequences. The CIDB Act did not govern the legality of contracts but the regulation of contractors by way of penal sanctions. Therefore, the sub-contract was not void by reason of the plaintiff's non-registration with CIDB. (paras 7-9)

(2) The delay in the RFC drawings, supply of anchor bolts and failure to issue purchase orders were in itself not fundamental breaches. Nonetheless, all these breaches taken collectively and along with the fundamental breach of deletion

of sheet piling work and failure to pay the plaintiff as per the progress claims went towards the plaintiff's acceptance of the defendant's repudiation of the sub-contract. Under the circumstances the defendant had shown an intention not to be bound to the sub-contract based on the breaches with the net result being the plaintiff could regard itself as discharged from the sub-contract. (paras 27-28)

Case(s) referred to:

Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd [2014] 5 MLRA 363 (refd)

Ng Siew San v. Menaka [1973] 1 MLRA 700 (refd)

Tham Kut Cheong & Anor v. Mohd Pancha Abdullah [2013] MLRAU 490 (refd)

The Co-Operative Central Bank Limited (In Receivership) v. Feyen Development Sdn Bhd [1995] 1 MLRA 753 (refd)

Legislation referred to:

Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994, ss 25(1), 29, 30

Other(s) referred to:

Chitty on Contracts, vol 1, p 1162

Hudson's Building and Engineering Contracts, 12th edn, p 1075

Julian Bailey, *Construction Law*, vol 1, p 557

Julian Bailey, *Construction Law*, vol 2, p 664

Counsel:

For the plaintiff: Kenny Chan Yew Hoong; M/s Azman Davidson & Co

For the defendant: Cheah Soo Chuan (Jasmine Ong with him); M/s Tay & Partners, Kuala Lumpur

JUDGMENT

See Mee Chun J:

[1] The defendant was employed by Mudajaya Corporation Bhd (Mudajaya) vide a letter of award dated 3 January 2013 as the main contractor for the supply, fabrication, delivery and installation for mild steel water pipeline including testing and civil work for the development of Tanjung Bin 4-X1000MW Coal Fired Power Plant Project at Johor (the main contract). There were two parts of the work, one of which the installation of fabricated steel pipes including testing and commissioning and the civil work including earth work, temporary sheet piling works and reinforced concrete saddles (civil work) was sub-contracted to the plaintiff by the defendant by a purchase order dated 26 March 2013 (PO CBD 6 12-31) and subsequently revised by another PO dated 18 April 2013 (CBD 1 329-348), the revised PO to be referred to as sub-contract. The civil work was divided into aboveground portion (s 4) and underground portion (ss 1, 2, 3 and 5) with the plaintiff being instructed to commence work at section 4 first. The plaintiff mobilised into the site on 10 April 2013.

[2] The plaintiff had one witness, Mr Ooi Keat Teong (Project Manager, PW1) and the witness statements marked as WSP1 and WSP1A. Witnesses for the defendant were Mr Wong Kok Choon (Commercial & Procurement Manager, Mudajaya, DW1) and the witness statements marked as WSD1 and WSD1A, Mr Sundaramoorthy Varadhan (General Manager-Operation, DW2) and the witness statements marked as WSD2 and WSD2A and Mr Izuan bin Isa (Senior Project Engineer, DW3) and the witness statements marked as WSD3 and WSD3A.

Enforceability Of Sub-Contract

[3] The first issue relates to whether the sub-contract can be enforced by reason of the non-registration of the plaintiff with the Construction Industry Development Board (CIDB). It was not disputed the plaintiff is not registered with CIDB. For that matter neither is the defendant. Section 25(1) of Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 (CIDB Act) provides as follows:

> "25. Registration of contractors
>
> No person shall undertake to carry out and complete any construction works unless he is registered with CIDB and holds a valid certificate of registration issued by CIDB."

[4] In the Federal Court case of *Ng Siew San v. Menaka* [1973] 1 MLRA 700 the issue was on an agreement which was held to be void under the Moneylenders Ordinance 1951. It was stated at p 705:

> "…the agreement in the instant case being forbidden by law is thereby void. The principle is clearly stated by Parke B in *Cope v. Rowlands* [1836] 2 M & W 149 at p 157 in the following words:
>
> > It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear, that a contract is void if prohibited by a statute, though the statute inflicts a penalty only because such a penalty implies a prohibition. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute means to prohibit the contract."

[5] The above principle is however subject to exceptions as stated in another Federal Court case, *The Co-Operative Central Bank Limited (In Receivership) v. Feyen Development Sdn Bhd* [1995] 1 MLRA 753:

> "Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intensions which

can reasonably be read from the language of the statute itself. (See *Holman v. Johnson* [1775] 98 ER 1120 at p 1121 and *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLRA 348). **However, the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute.** This point was aptly put by Gibbs CJ in *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* [1978] 139 CLR 410 thuswise:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it **is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable.** However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that **the test is whether the contract is prohibited by the statute.** Where a statute imposes a penalty upon the making or performance of the contract, it is question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed."

[Emphasis Added]

[6] Refer also to the Court of Appeal's decision in *Tham Kut Cheong & Anor v. Mohd Pancha Abdullah* [2013] MLRAU 490, Anantham Kasinather JCA, where it was stated that:

> "d) Thirdly, in our judgment, s 32B of the Securities Commission Act is not designed to prohibit contracts as much as punish persons who act in contravention of the same. We opine to this effect because the Section only provides for penal consequences for any breach of the same. The High Court of Australia in *Yango Co Pty Ltd v. First Chicago Ltd* [1978] 139 CLR 410 when dealing with whether a contract is prohibited when a statute only provides for criminal sanctions had this to say:
>
> …
>
> Our Supreme Court when considering this passage in the case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor (supra)* acknowledged that where the only sanction for contravention of the statute is criminal in nature, then, this may be indicative of the legislature's intention to not interfere with the contract between the parties. Hashim Yeop A Sani CJ (as he then was) writing the judgment of the Court commenting on the above passage in *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd (supra)* said:
>
> > "Thus, in our view, it may stated as a general principle that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself".

> In other words, the exclusion of any reference in s 32B to civil consequences for a breach of the provision, in our opinion, implies a contrary intent on the legislature's part thereby requiring the courts as a matter of construction to treat the contract as not prohibited."

[7] Thus, the exception to the general principle that a contract is void if prohibited by law is that the law itself saves the contract which may be seen from the language of the law for example where the only sanction for contravention is criminal in nature.

[8] In this connection s 29 of CIDB Act provides as follows:

> "Penalty for carrying out construction works without being registered.
>
> A person who undertakes to carry out or carries out and completes any construction works without being registered as a registered contractor with the Lembaga shall be guilty of an offence under this Act and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit."

Section 29 thus prescribes the penalty for non-compliance which is a fine not exceeding fifty thousand Ringgit Malaysia.

[9] Section 29 of CIDB Act only provides a penalty for non-registration and does not go beyond that. Hence it can be said s 25 read together with s 29 is not intended to prohibit contracts but to punish those who contravene the law and this is made clear by the provision of the penal consequences and nothing more. The CIDB Act does not govern the legality of contracts but the regulation of contractors by way of penal sanctions. It is this court's finding that the sub-contract is not void by reason of the plaintiff's non-registration with CIDB.

[10] The above finding is fortified by the long title to CIDB Act which states it is an Act to establish CIDB and to provide for its functions relating to the construction industry and for matters connected therewith. Further, aside from the penalty imposed by s 29, a stop work notice pursuant to s 30 may be issued to the unregistered contractor and daily fines imposed against the unregistered contractor who fails to comply with the notice. This goes towards showing the sub-contract cannot possibly be deemed void due to the plaintiff's non-registration under CIDB Act.

Plaintiff's Claim

[11] The plaintiff's claim is premised on fundamental breaches and/or repudiation of the sub-contract by the defendant. These were acts of prevention and/or hinderance in delay in providing RFC drawings and instructions, dictating the plaintiff's casting sequence of saddles, non-issuance of POs for variation work and/or making payments for the change of machineries required for the variation work; deletion of sheet piling work; non-payment of progress claims and wrongful takeover of work by dealing directly with the plaintiff's sub-contractors. The plaintiff therefore says it accepted the defendant's

repudiation on 3 October 2013 thereby terminating the sub-contract (CBD2 337). The plaintiff claims for the outstanding sum due, performance bond and loss of profit.

RFC Drawings And Anchor Bolts

[12] The plaintiff mobilised into the site on 10 April 2013. RFC drawings were provided by the defendant on 7 May 2013 (para 14 of agreed facts) while the anchor bolts were supplied on 21 June 2013 (para 17 of agreed facts). The PO dated 18 April 2013 was signed and accepted by the plaintiff on 24 April 2013 as shown on CBD1 329. The delay of 13 days from the plaintiff's acceptance of PO to the provision of RFC drawings is in itself not a material delay. Although there was a longer delay in the supply of anchor bolts of approximately two months, this too in itself is not a fundamental breach as can be seen from the work process below.

Casting Sequence Of Saddles

[13] On the casting sequence of saddles being dictated by the defendant para 18 of agreed facts states it was Mudajaya that had dictated the sequence by requiring the completion of one saddle before the rest of the saddles could proceed. The evidence from the plaintiff was that without the anchor bolt being installed the saddle cannot be casted with concrete. The defendant on the other hand had established work flow as – put rebars, carry out form works, install anchor bolts and casting of saddle by pouring the concrete. This work flow coupled with the plaintiff's evidence on what it was doing while awaiting the integrity test on the saddle shows that the work could still proceed and renders the casting sequence as dictated not a breach.

Deletion Of Sheet Piling Work

[14] On the deletion of sheet piling work, paras 19 and 20 of agreed facts state on or about 23 August 2013 Mudajaya issued major revised sheet piling design and construction work for the underground portion of the work as a result of which the defendant had decided to withdraw from the underground portion of the work. The evidence is clear the sub-contract does not confer a right to the defendant to omit any part of the plaintiff's work and this was confirmed by DW2. This is despite Mudajaya issuing major revised sheet piling design and construction work as this is allowed for under cl 21.2 of the contract between Mudajaya and the defendant. In this regard *Construction Law* (vol 1) by Julian Bailey at p 557 states:

> "Normally without some term allowing for variations under a fixed price contract to perform works, the paying party is not entitled to vary the contract by reducing the work to be done; the builder would have a right to say that he had quoted a fixed price to do certain work and he was prepared to carry out all that work in order to receive his payment."

[15] In this connection it is the court's finding that the sub-contract is lump sum and not re-measurement. This is clear from clause CC of sub-contract (CBD1 344) that "the sub-contract shall be as per this Purchase Order: All prices are firm and not subject to any escalation". Further there is no term in the sub-contract as in the main contract which states it is based on provisional quantities and subject to re-measurement. Thus the submission by the defendant that the circumstances leading to the sub-contract shows it to be provisional such as the plaintiff quoting to the defendant in the form of BQ based on the BQ of the main contract cannot be accepted in the light of the clear words in clause CC.

[16] The plaintiff had pleaded in its para 26 of amended statement of claim that sheet piling work was a substantial part of the work under the sub-contract and this was not denied. In its email to the defendant dated 24 August 2013 (CBD2 178) it was stated "Noted but please also be aware that we have been ready to commence sheet piling work since July …" and "We believe MDJ cannot just remove the sheet piling contract from us …"

[17] The deletion of sheet piling by the defendant despite there being no such power to do so constitutes a fundamental breach of the sub-contract. It is not relevant that at the time of deletion no work had been commenced.

Change Of Crane

[18] Paragraph 8 of agreed facts states a change in height limitation and pipe length from 9 to 15 meters required the plaintiff to use a 80 tonne crane for unloading and a 160 tonne crane for placement instead of the originally intended 45 tonne crane. The reason the plaintiff had required a PO is it would not be able to claim on the change of additional cost arising from the change of machinery. The defendant counters the demand for a PO was unreasonable given its insistence on an advance payment of RM10,000.00, differential rental RM6,000 per day and that the plaintiff had been paid an advance payment to mobilise equipment.

[19] The change in height limitation and pipe length which required a change in crane is a variation in that the plaintiff is now to perform its work in a manner different to that originally indicated. Given the court's finding that this is a lump sum contract and there is no variation clause in the sub-contract, the plaintiff was within its right to ask for a PO as without it, it is not required to comply with the varied work. The failure to issue a PO in itself is not however a fundamental breach.

Progress Claims Of The Plaintiff

[20] On the defendant's failure to pay the plaintiff the progress claims it was the plaintiff's evidence it had submitted progress claim no 1 on 3 June 2013 (CBD1 363-387) for work done for RM281,867.70 and preliminaries for RM737,922.00, progress claim no 2 on 3 July 2013 (CBD1 388-397) for RM264,620.27, progress claim no 3 on 23 July 2013 (CBD1 400-411) for RM402,051.51 and progress claim no 4 on 23 August 2013 (CBD1 413-423)

for RM343,084.76. Partial payment of RM545,885.54 was paid on progress claims no 1-3 and none on progress claim no 4. According to plaintiff the progress claims are based on the monthly verification of works as certified by Mudajaya. Defendant contends plaintiff can only be paid when the defendant has been paid (back to back), approval of Mudajaya on the progress claim calculation and certification of payment by Mudajaya.

[21] Clause KK of the sub-contract (CBD1 347) provides as follows:

> "2 Monthly progress claim payment shall be made on back to back basis within 34 days.
>
> …
>
> 3 Progress claim calculation shall be submitted to MDJ Site Management and get approval from MDJ Site Management and submit the same to ET."

MDJ Site Management refers to Mudajaya and ET to D.

[22] On back to back payment *Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd* [2014] 5 MLRA 363 makes it very clear at pp 382 and 383:

> "Time to honour payment to the appellant was contingent upon the time that the respondent would receive payment from the employer. That which was contingent was time for payment. But the fact that time for payment was so contingent could not reasonably extend to mean that even liability of the respondent was contingent, in the sense that the respondent would walk free 'if' the employer defaulted on the contract. For such a construction, there must be clear and unambiguous provisions to the effect that the liability of the respondent to pay the appellant, as opposed to time for payment, was contingent upon receipt of payment by the respondent from the employer … The burden is on the party who proposes otherwise, to show that payment was on an "if" basis …"

As worded there is no requirement in clause KK for the plaintiff to only be paid when the defendant is fully paid by Mudajaya.

[23] The monthly verification of works as certified by Mudajaya was done by Noah Devanson (Noah) who was a section head in Mudajaya. Defendant says Noah had no such authority to do so and in any event what was signed was a verification of percentage of work done and is not binding for the purpose of certification of the value of work done for which reference must be made to the Sub-contractor's Progress Certifcates (SPC) issued by Mudajaya at CBD1 428-989 and CBD6 36-143.

[24] According to PW1 Noah was the number one person in charge of the works they were working on and that if Noah was not authorised to sign he should have informed the plaintiff. PW1 agreed what was verified by Mudajaya was the percentage of work done at site. To a question that the progress claim calculations approved by Mudajaya is just the first tier of verification and checking process of interim claims by sub-contractors, he said yes but that

Mudajaya is not his client and whatever they did he wouldn't know. The SPCs issued by Mudajaya were not the true and actual certification of interim claims by sub-contractors for purpose of payment as it had nothing to do with the plaintiff but between the defendant and Mudajaya.

[25] For all intent and purpose Noah being a section head and in charge of the works that the plaintiff was working on is authorised to sign the claim calculation form. Any adverse inference on the failure to call Noah as a witness should be cast against the defendant as they chose to call DW1 from Mudajaya instead of Noah. Accepting the documents represents only the percentage of work done what the plaintiff did was in accordance with that when it then multiplied the estimated total value of the work done as per support base based on the sub-contract. Refer to CBD1 363, 389, 401 and 414. The SPCs could not possibly be the certification of payment for the plaintiff as that was between Mudajaya and the defendant. Clause KK only requires approval from Mudajaya Site Office which was duly signed.

[26] The defendant's failure to pay on the progress claims amounts to a fundamental breach. *Construction Law* (vol 2) by Julian Bailey at p 664 states the non-payment by the owner of the contractor sums of money owing may constitute repudiatory conduct and that repeated failure to pay money when it is due may constitute repudiation. So too in this case of the defendant failing to pay on the four progress claims.

Total Effect Of Breaches

[27] It was found earlier the delay in RFC drawings, supply of anchor bolts and failure to issue PO were in itself not fundamental breaches. However all these breaches taken collectively and along with the fundamental breach of deletion of sheet piling work and failure to pay as per progress claims go towards the plaintiff's acceptance of the defendant's repudiation of the sub-contract. As per *Hudson's Building and Engineering Contracts* (12th edn) at p 1075:

> "… Breaches of terms not in themselves fundamental may evince an intention not to be bound if persisted in for long periods, or after receipt of notice, or if willful or deliberate in character …
>
> It is important to note that in a dispute as to whether a party is in repudiatory breach, the party claiming to have accepted repudiation is not confined to a single breach …"

[28] Under the circumstances the defendant had shown an intention not to be bound by the breaches as shown earlier with the net result being the plaintiff can regard itself as discharged from the sub-contract by its letter of 3 October 2013. Refer to *Chitty on Contracts* (vol 1) at p 1162:

> "… If one party evinces an intention not to perform or declares his inability to perform some, but not all, of his obligations under the contract, then the right of the other party to treat himself as discharged depends on whether the non performance of those obligations will amount to a breach of a condition of the contract or deprieve him of substantially the whole benefit …"

Damages

[29] On outstanding sums due for work done, the plaintiff is awarded RM547,225.10 minus RM312,060.74 (cost of raw materials supplied by Mudajaya) = RM235,164.36, performance bond of RM366,250.00 and loss of profits of RM2,510,100.28 making it a total amount of RM3,111,514.64. Issues of mitigation and record of profitability as raised in the defendant's submission were never canvassed during the trial.

[30] The outstanding sum for work done was as explained by WSP1 in his witness statement, Q&A 9. The amount for the cost of raw materials is as given by DW1. The breakdown for the costs of projects was explained too by PW1 in Q&A 11 of his witness statement.

Counterclaim

[31] The refund of moneys overpaid to the plaintiff is dismissed as the terms of payment do not require plaintiff to be paid only when the defendant is fully paid by Mudajaya. The claim on additional costs and expenses on the plaintiff's termination is dismissed as it was the court's finding the defendant had shown an intention not to be bound thereby resulting in the plaintiff discharging itself from the sub-contract.

Conclusion

[32] The plaintiff's claim for a sum of RM3,111,514.64 is allowed . Interest of 5% from date of judgment to date of settlement. The defendant's counterclaim is dismissed. After hearing the oral submissions of counsels, costs of RM60,000 was awarded to the plaintiff based on the duration of the case and the legal issues arising therefrom.