IN THE COURT OF APPEAL OF MALAYSIA

Coram: Tengku Maimun Tuan Mat, JCA; Mary Lim, JCA; Hasnah Hashim, JCA

Mega Mayang M & E Sdn Bhd v Utama Lodge Sdn Bhd and Another Appeal

Citation: [2018] MYCA 329 **Suit Number:** Civil Appeal Nos. B-02(C)(W)-2403-11/2017 & B-02(C)(W)-2404-11/2017

Date of Judgment: 04 October 2018

Contract - Interpretation and application of section 71 of the Contracts Act 1950

JUDGMENT

[1] These two appeals were heard together; the parties agreed that the decision in the first appeal would bind the second appeal as the appeals involve identical issues. The two appeals arise from two separate sub-contracts between the parties.

[2] The appellant sued the respondent for payment as the recipient of work that the appellant did which work was never intended to be done for free, a claim founded under section 71 of the **Contracts Act 1950**. Alternatively, the appellant's claim is based on *quantum meruit* and unjust enrichment.

The factual background

[3] The respondent was the developer and employer of a project known as "Cadangan Pembangunan 2 Blok Pangsapuri (542 unit) yang mengandungi 1 blok (Blok A) 24 tingkat (272 unit), 1 blok (Blok B) 24 tingkat (270 unit) termasuk kolam renang dan kemudahan rekreasi dengan 3 paras tempat letak kereta di atas Lot PT 13361 Mukim Petaling, Jalan Senangria, Kuala Lumpur untuk Tetuan Utama Lodge Sdn Bhd" (the said project). MEG Consult was the respondent's mechanical & electrical engineer, while Des Architect was the architect and Juruukur Bahan FPS Sdn Bhd, its quantity surveyor.

[4] Through a tender process, the appellant was awarded two sub-contracts dated 15.7.2011 [1st subcontract] and 22.12.2011 [2nd subcontract] respectively. The 1st subcontract is in relation to cold water and sanitary plumbing services, the 2nd subcontract is for air-conditioning and mechanical

ventilation services. The two subcontracts were entered into between the appellant and the respondent's main contractor, Sara-Timur Sdn Bhd. The appellant was identified under these sub-contracts as the domestic sub-contractor.

[5] During the project, the appellant submitted its claims for work to Sara-Timur. These claims were copied to the respondent, MEG Consult and Des Architect. The respondent paid against these claims by cheques issued to the appellant but delivered to the appellant, through Sara-Timur. The appellant claimed that its works were never assessed by Sara-Timur. Instead, Sara-Timur received profit on attendance.

[6] On 3.5.2016, Sara-Timur was wound up. The appellant submitted its final claim [Claim No. 38] for the total sum of RM1,805,203.46 for original and additional works under the 1st subcontract. A separate claim was made for the works under the 2nd subcontract.

[7] When the claim was rejected by the respondent, the appellant sued the respondent for payment under section 71 of the **Contracts Act 1950** with alternative claims based on *quantum meruit* and unjust enrichment.

[8] In the first appeal, the sub-contract is for cold water and sanitary plumbing services for the Seringgin Apartments for the sum of RM1,805,203.46. In the second appeal, the sub-contract was for air-conditioning and mechanical ventilation services for the construction project and the appellant's claim is for RM1,619,549.45.

[9] The respondent relied on the primary defence of lack of privity of contract, that there was no contract between them and that there was no cause of action against the respondent. The respondent averred that the payment method agreed under the subcontract does not create any contract between the parties and/or impose any contractual obligation on the respondent to pay the appellant.

[10] The respondent further alleged that the appellant did not complete the works under the subcontract requiring thus the respondent to appoint third parties to complete the said works and to also remedy defects in the subcontract works. These works were said to be still continuing at the time of filing.

[11] As a result, the respondent claimed to have unpaid sums due from Sara-Timur. It then proceeded to set-off these unpaid sums from Sara-Timur.

Decision of the High Court

[12] The issue before the High Court was whether the appellant was entitled to claim against the respondent pursuant to section 71 of the **Contracts Act 1950** and/or claim on the basis of *quantum meruit* or unjust enrichment.

[13] The appellant's claim was dismissed. The learned Judge was of the view that in any construction contract, the respondent as the developer and/or employer would ultimately benefit from the work

done by all sub-contractors including the appellant. But that did not equate to saying that the subcontractors had directly conferred a benefit to the respondent as the developer and/or employer. Contractually, the appellant, as the sub-contractor, conferred the benefit to Sara-Timur, the main contractor.

[14] For the same reasons, the High Court concluded that the respondent "cannot be said to have received unjust enrichment" since it had paid for the work done. The payment was made to Sara-Timur and not, to the appellant.

Decision of this Court

[15] This appeal deals with the interpretation and application of section 71 of the **Contracts Act 1950**, a provision which has been fairly extensively examined by this Court in **Tanjung Teras Sdn Bhd v Government of Malaysia** [2014] CLJ 123; and by the Federal Court in **Dream Property Sdn Bhd v Atlas Housing Sdn Bhd** [2015] 2 MLJ 441. The cases since such as **GDP Architects Sdn Bhd v Universiti Teknologi MARA** [2016] MLRHU, **Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd & Another Appeal** [2016] 2 CLJ 563 have gone on to apply those decisions. Given the reasoning of the High Court in this appeal, it is fit that we remind ourselves of the deliberations and conclusions drawn in those decisions.

[16] Section 71 reads as follows:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect thereof, or to restore, the thing so done or delivered.
>
> **ILLUSTRATIONS**
>
> (a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay for them.
>
> (b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

[17] In the leading case of **Siow Wong Fatt v Susur Rotan Mining Ltd & Anor** [1967] 1 MLRA 53, the Privy Council held that before a claim under section 71 may succeed, it must be shown that the doing of the act or the delivery of the thing:

i. must be lawful;

ii. must be done for another person;

iii. must not be intended to be done gratuitously; and

iv. must be such that the other person enjoys the benefit of the act or the delivery.

[18] All four requirements must be met before a claim can succeed on the principle of *quantum meruit*.

[19] Siow Wong Fatt has since been consistently applied; see for instance **Tanjung Teras Sdn Bhd v Government of Malaysia** [supra] which was also applied in **GDP Architects Sdn Bhd v Universiti Teknolgi MARA** [supra]; **Inch Kenneth Kajang Rubber Public Limited Company v Tor Peng Sie** [2013] 5 MLRA 481, and **Ch'ng Ghee Weng & Another v Lee Khoon Eng T/A Prestige Construction** [2018] MYCA 106. In **Tanjung Teras Sdn Bhd**, the Court of Appeal opined that:

> "s 71 is the statutory embodiment of the common law principle of *quantum meruit*, which provides for a just compensation as the measure of the work done as opposed to contractual damages. Liability under s 71 is not based on any existing contract between the parties. Rather it is based on the equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party."

[20] In **Tanjung Teras**, the challenge was that the 2nd and 4th requirements set out in **Siow Wong Fatt** were not met, that it was not proven that the act or thing was done for another person, and that the other person enjoyed the benefit of the act or delivery. The facts in that appeal were these.

[21] The respondent had entered into a sale and purchase agreement with a company known as Jeram Permata (Cheras Sdn Bhd) Berhad [JP] where in consideration of JP selling and constructing on land which was later transferred and registered in the respondent's name by the Federal Lands Commissioner [the said land], 226 medium cost apartments as staff quarters for the Fire Department, the respondent would pay a purchase price of over RM50 million to JP. The appellant was a subcontractor of JP appointed to construct super structure works under that project.

[22] The project was in delay which led finally to the termination of the project by the respondent. After the termination, the appellant refused to leave the site. The respondent went to Court seeking several declaratory orders to the effect that as owner of the land, it was entitled to vacant possession of the said land; that the appellant was a trespasser after the agreement had been terminated; and that the appellant be ordered to vacate the said land.

[23] Amongst the arguments raised by the appellant was its counterclaim of RM50 million against the respondent. In reply to that counterclaim, the respondent *inter alia* contended that it had no contractual relation with the appellant as it was appointed by JP, that it was not aware of the appellant's appointment, and that the appointment was without its approval.

[24] The counterclaim was dismissed by the High Court on the primary ground that the requirements of section 71 of the **Contracts Act 1950** were not fulfilled. On appeal, the Court of Appeal disagreed, finding all the requirements met.

[25] In relation to the second requirement, the Court of Appeal found that the High Court had held

that the works could not be said to have been done for the respondent since the works were performed by the appellant for JP and in consideration thereof, the appellant would be paid by JP, the works were not done for the respondent but for JP. The Court of Appeal disagreed:

> "We are unable to agree with the learned High Court Judge's reasoning on the second condition. She would appear to have given a very mechanical or narrow interpretation to the second condition. She had overlooked the observation made by the PC, in regard to the second condition, that at the time of the construction of the road, Susur Rotan was not doing it for the benefit of Siow but for its own benefit under the chain of contracts because it was the body that was going to exploit the mineral land. It was also clear from the facts that at the time of construction, Susur Rotan was not looking to Siow or anyone else for reimbursement of the costs involved."

[26] The Court of Appeal compared the factual matrix and found it to be-

> "...very different from *Siow Wong Fatt*. The facts here were that (1) the project was built for and on behalf of the plaintiff to be used as the staff quarters of JBDPAN; (2) the project was undertaken by JP for the plaintiff under the agreement for which JP had expected to be paid under the agreement; (3) the super structure work was part of the works under the project; (4) JP had appointed the defendant was its sub-contractor to construct the super structure work; (5) the defendant had certainly expected to be paid for the super structure work by JP on a back-to-back basis.
>
> [47] Having regard to the juristic basis behind s 71 which is premised on the equitable principle of restitution, good conscience and prevention of unjust enrichment, we hold as a matter of fact that at the time the super structure work was done by the defendant, it was done for the plaintiff as the ultimate owner of the project and the plaintiff was the direct beneficiary of the project. The defendant had intended to be paid for carrying the works. The fact that the defendant would receive payment from JP and not the plaintiff did not alter the fact that the defendant never intended the work to be done gratuitously. The second condition ought to have been found in favour of the defendant."

[27] The Court of Appeal similarly found the fourth condition fulfilled. At the High Court, the trial judge had found that the respondent had not benefitted from the appellant's work which was confined to the super structure works because the project had not been completed and another contractor had to be engaged to complete the works. The Court of Appeal disagreed with the High Court finding that the appellant there was only appointed as a subcontractor to construct the super structure work while the construction of the entire project was the responsibility of JP.

[28] According to the Court of Appeal, the respondent had benefited from the appellant's work as the respondent had since revived the project and appointed new contractors to continue to build the apartments on the "super structure work" that had already been done by the appellant. The Court further found that there was no evidence that the super structure work done by the appellant was defective or had to be demolished when the new contractors took over. For these reasons, the Court of Appeal held:

[52] Consequently, we agree with the defendant's learned counsel that the plaintiff could not deny that it had benefited from the super structure work done by the defendant. It would therefore be unjust for the plaintiff to refuse to pay any compensation to the defendant for the value of the super structure work done by the defendant.

[53] In conclusion, based on the foregoing discussions, we agree with the defendant that it had successfully proven, on a balance of probabilities, its claim under s 71 to the **Contracts Act**.

[29] In our instant appeal, the learned Judge had dismissed the claim on the basis:

i. that the respondent had paid Sara-Timur for the work done, that this was reflected in the Statement of Final Account dated 25th July 2016- see paragraph 19 of the grounds of judgment;

ii. that the appellant was aware that it was the subcontractor to the project while Sara-Timur was the main contractor- see paragraph 20; and

iii. that in any construction contract, the ultimate beneficiary of work done by all subcontractors would be the developer or employer, which in the appeal was the respondent; but "that does not equate to saying that the sub-contractors have directly conferred a benefit to the defendant as the developer or employer. Contractually, it is the plaintiff the subcontractor which conferred the benefit to Sara-Timur the main contractor"- see paragraphs 21 and 22.

[30] It would appear that the learned Judge had dismissed the claim on the basis that the fourth condition under section 71 of the **Contracts Act** was not met and that the appellant knew at all times, that it was the subcontractor, contracting with Sara-Timur and not, the respondent. We deduce from the lack of deliberations on the other three conditions that those other conditions were fulfilled on the facts. In this respect, we agree with the learned Judge that the first three conditions were in fact, satisfied. The act or works carried out by the appellant are lawful; done not for itself but for another; and, the act or works were never done gratuitously. The appellant always required payment for any of its work done pursuant to the two subcontracts.

[31] As for the fourth requirement, we must, with respect, disagree with the learned Judge. We are of the unanimous view that even this fourth requirement is met. Contrary to the learned Judge's view, we find the factual background and arrangements between all the parties in the present appeal highly suited to a claim under *quantum meruit*.

[32] Both the appellant and the respondent are *ad idem* in that both agree that there is no contractual relationship between them. The contractual relations exists not between the parties in this appeal but between the appellant and Sara-Timur or the respondent and Sara-Timur. But, the claim was never made on that basis or just because of the payment clause found in clause 20 in the letter of award. Clause 20 provides:

"It is agreed that the Employer shall issue all payment cheques to the Sub-Contractor company name and made payable to the Sub-Contractor via Main Contractor."

[33] The learned Judge seemed to have been swayed by the fact that the respondent had paid Sara-Timur for the works- see paragraph 19 of the grounds. We find this finding erroneous.

[34] From the outset, the claim was clearly pleaded on the principle of *quantum meruit* and the trial was conducted on that basis, too. The appellant led evidence to show that throughout the progress of the project, it submitted its claims for work done to Sara-Timur with the respondent amongst the parties copied in on the claims. The claims were assessed and approved by the respondent who then paid the appellant *vide* cheques issued in the appellant's name. The appellant was never paid by Sara-Timur.

[35] Consequently, the respondent's argument that it had settled claims with Sara-Timur or that it had paid Sara-Timur for the appellant's work, is really quite immaterial to the issue at hand, more so when the settlement or payment concerns other claims or issues between those contracting parties which have nothing to do with the appellant.

[36] A closer scrutiny of the Statement of Final Account and the related documents reveal that the respondent's position is that because it does not owe Sara-Timur, there is also nothing due to the appellant. The respondent has reached this position by reducing the original value of the works on cold water and sanitary plumbing services from RM11,725,000.00 to RM8,275,787.83. The respondent further alleged that it had a substantial counterclaim for incomplete and rectification works for which a Proof of Debt was produced in support.

[37] In our opinion, what the respondent had done was to set off monies which it claimed were due from Sara-Timur to the respondent. With the set off and the reduction of the value of the subcontract works, there was therefore no monies due to the appellant; hence, the respondent's contention that it had already paid Sara-Timur.

[38] In this respect, we agree with the appellant that the letter of award does not provide for any right to set off in the manner claimed by the respondent in which case, the respondent's argument cannot stand. Since the set off is due to an exercise of contractual rights and obligations between the respondent and Sara-Timur, the respondent's set off is erroneous.

[39] Further, clause 20 had already provided for the respondent's direct payments to the appellant. The respondent was never to pay Sara-Timur and then for Sara-Timur to pay the appellant. For this added reason, the respondent's contention that it had already paid Sara-Timur is once again, irrelevant and immaterial to the appellant's claim for payment from the respondent.

[40] Even the POD and related documents produced by the respondent in support of its claim that it had paid Sara-Timur and that there was therefore nothing owing to the appellant, were actually not admitted in evidence. The appellant had objected to their production at the material time and this was not determined by the learned Judge. The learned Judge does not appear to have relied on these documents as there is no reference to them in the judgment. The respondent's sole witness, Sherald Yap Siew Mei, Senior Contract Executive was not the maker of the POD and had no personal knowledge of its contents or even of the matters that transpired between the appellant and the

respondent. Miss Yap did not seem to have any real knowledge on the two subcontracts as she only joined the respondent long after the project had been underway. She also did not attempt to explain further; neither did the respondent seek to call any other witness to deal with the POD. The POD thus, remained unreliable and is of no support to the respondent's claim.

[41] Finally, the respondent's claim for such monies as shown in the POD cannot in any case be claimed against the appellant. These claims, if at all, arise from the whole works undertaken by Sara-Timur whereas the appellant was only the subcontractor for two types of particular works.

[42] Insofar as the cold water and sanitary plumbing works were concerned, that is the works under the first appeal, the appellant had submitted 37 progress claims. On 23.8.2016, the appellant submitted its final claim no. 38. The appellant's works were always verified by MEG Consult, the approving consultant engineer for the project; and this was done for the first 37 progress claims. However, in relation to the final claim no. 38, the consultant engineer apparently left the project without verifying the claim. The respondent replaced MEG Consult with PME Consulting Engineer who never verified the appellant's claim no. 38. The final claim is for the sum of RM1,805,203.46.

[43] The same position prevails for the air conditioning and mechanical ventilation works. 32 progress claims were submitted with a final claim being claim no. 33. The first 32 progress claims were approved by MEG Consult but not the final claim no. 33. It remained unapproved. This final claim is for the sum of RM1,619,549.45.

[44] The unflinching evidence led at trial showed that the respondent was always in direct control and influence over the appellant. Not only did the respondent supervise the appellant's work, it assessed and paid for the appellant's work. Although there was no contract between the parties, it is quite evident to us, that the appellant's work was always to be paid for by the respondent, the party that benefited from the appellant's work. Not only was there no evidence that the appellant carried out its works with no intention or expectation of being paid for such works, there was not even a suggestion that the appellant ever did its work gratuitously. The appellant's work involved payment; the only question who was to be the paymaster. In our view, it is clear that it was by the respondent and for the reasons as relied on by the appellant.

[45] It is our firm view that all the conditions under section 71 have been fulfilled. The appellant's work was lawfully done; it was not done for itself but for another; the work was never intended to be done gratuitously but in every expectation that it would always be paid. The learned Judge was plainly erroneous in dismissing the appellant's claim.

[46] The quantum in both claims were not in serious challenge; we understand the appellant's witnesses were not cross-examined on the details. The disagreement of the respondent was on the principle of privity of contract.

[47] This issue was not seriously pressed in this appeal. In this appeal, we find that the appellant's claim was adequately and satisfactorily proved on a balance of probabilities. The learned Judge was plainly erroneous in not allowing both the appellant's claims.

[48] With these conclusions, we are not inclined to deliberate on the issue of unjust enrichment save to say that we agree with the submissions of learned counsel for the appellant on this. Given that the benefit of the appellant's work is with the respondent, for which the appellant never received payment from the respondent, the respondent may be said to have been unjustly enriched were it not ordered to pay the appellant for the benefit received under both subcontracts.

Conclusions

[49] We therefore allow both appeals together with a single order of costs of RM20,000.00 subject to the payment of allocatur fees. The orders in respect of both appeals are set aside.

[50] In relation to the first appeal, **B-02(C)(W)2403-11/2017**, we further enter judgment for the appellant for the sum of RM1,401,780.10 together with interest at the rate of 5% per annum from the date of judgment of the High Court to the date of realization. This sum was conceded by learned counsel for the appellant as being the correct amount as a further sum of RM403,000.00 was retained by Sara-Timur and not, the respondent.

[51] In relation to the second appeal, **B-02(C)(W)2404-11/2017**, we enter judgment for the appellant for the sum of RM1,619,549.45 together with interest at the rate of 5% per annum from the date of judgment of the High Court to the date of realization.

Dated: 4th October 2018

MARY LIM THIAM SUAN
Judge
Court of Appeal, Putrajaya
Malaysia

COUNSEL

For the Appellant: Gabriel Daniel (Melissa Chan with him), Messrs Paul Ong & Associates, Unit No. B-2-8, Blok B, Tingkat 2, Megan Avenue 1, No. 189 Jalan Tun Razak, 50400 Kuala Lumpur

For the Respondent: SK Yeoh (Tan Yi Wen and Yeoh Leng Yang with him), Messrs SK Yeoh & Partners, Unit D-3A-56, Block Dahlia, 10 Boulevard, Jalan Cempaka PJU 6A (Lebuhraya Sprint), 47400 Petaling Jaya, Selangor

LEGISLATION REFERRED TO:

Contracts Act 1950, Section 71

JUDGMENTS REFERRED TO:

Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd & Another Appeal [2016] 2 CLJ 563

Ch'ng Ghee Weng & Another v Lee Khoon Eng T/A Prestige Construction [2018] MYCA 106

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441

GDP Architects Sdn Bhd v Universiti Teknologi MARA [2016] MLRHU

Inch Kenneth Kajang Rubber Public Limited Company v Tor Peng Sie [2013] 5 MLRA 481

Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 1 MLRA 53

Tanjung Teras Sdn Bhd v Government of Malaysia [2014] CLJ 123