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[2011] MLJU 1364

TSR Bina Sdn Bhd v Kontena Nasional Bhd

COURT OF APPEAL (PUTRAJAYA)
JEFFREY TAN JCA, ABDUL WAHAB PATAIL JCA, LINTON ALBERT JCA
RAYUAN SIVIL NO B-02-2224-2009
24 May 2011

Civil procedure -- Amendment of statement of claim -- Appeal against entry of summary judgment -- -- Summary judgment -- Statement of claim -- Construction contract -- Certificate of practical completion -- Certificate of payment

Lam Ko Luen (Nereen Kaur Veriah with him) (Shook Lin & Bok) For the Appellant

Ben Lee (Ben Lee & Co) For the Respondent

JEFFREY TAN JCA

This is an appeal against the decision of the court below dated 26.8.2009, which allowed the Respondent's 2 appeals (enclosures 11 and 13) to judge-in-chambers.

Enclosure 11 was the Respondent's appeal against the grant of leave by the learned SAR to the Appellant (Plaintiff below) to amend the statement of claim. Enclosure 13 was the Respondent's appeal against the entry of summary judgment by the learned SAR in favour of the Appellant (Plaintiff below).

On 14.8.1996, the Respondent accepted the tender of the Appellant to execute works known as "Cadangan membina dan menyiapkan pejabat dan gudang di lot 126, kawasan perindustrian Gebeng, Kuantan, Pahang Darul Makmur untuk Kontena Nasional Berhad" (see pages 102 to 109 of the Appeal Record). The Appellant proceeded to execute those works. The works were certified as completed on 22.10.1997 (see 111AR). After completion of those works, the Appellant claimed that some monies due were not paid. The Respondent disputed that.

Both parties relied on the following account in the final certificate of payment dated 27.11.2003 (see 113AR) as the gravamen of the claim or defence.

> "CERTIFICATE NO. 16 (Final)
>
> KUALA LUMPUR
>
> DATE : 27[TM] November 2003
>
> PROJECT: Cadangan Pejabat dan Gudang Diatas Lot 126, Kawasan Perindustrian Gebeng, Kuantan untuk Tetuan Kontena Nasional Berhad
>
> DR. TO M/s. TSR Bina Sdn. Bhd.
>
> No. 2-2, Jalan 4/6D, Medan Putra Business Centre Off Jaian Damansara, 52200 Kuala Lumpur
>
> ==========
>
> DETAILED DESCRIPTION OF SERVICE

Original Contract Sum ...	RM 15,945,000.00
Final Contract Sum	RM16,218,800.56
Value of Work Done ...	RM16,218,800.56

Less:

(i) Progress Payments (1-15)... RM13,719,114.07
(ii) LA.D. (106 Days)... RM 1,060,000.00
(iii) Deduction Clause 45... RM 592.684.94

RM15.371,799.01

NOW DUE... RM 847,001.55

Amount recommended for final payment = RM847,001.55

(Ringgit Malaysia : Eight Hundred Forty-seven Thousand and One and cents Fifty-five Only.)

c.c. M/s. TSR Bina Sdn. Bhd

Sgd.

HUSSEIN & k.h. CHONG SDN BHD

CONSULTING ENGINEERS

Company No. 25985X

The Appellant disputed the validity of the aforesaid deductions of RM 1,652,684.42 for late delivery and defects (clause 45 of the Conditions of Contract). Conversely, the Respondent averred that no final sum had been certified for payment. That formed the core of the dispute.

In the original statement of claim, the Appellant pleaded that if the aforesaid deductions of RM 1,652,684.94 were to be arbitrated, then the claim was for the sum of RM847,001.55. In the amended statement of claim, the Appellant dropped all reference to arbitration and proceeded to claim for RM2,140,496.01 as the total balance sum due in respect of the said works (see paragraph 7 of the amended statement of claim at page 22 of the Appeal Record). To all intents and purposes, that was the only amendment to the statement of claim. But that amendment was struck down by the court below.

Before us, the Respondent contended that the amendment was frivolous, as the claimed sum of RM2,140,496.01 was "mustahil, salah dan tidak terpakai". The Respondent further contended that the amendment would prejudice the Respondent, would confuse the court, and umay create a shame situation" in that the trial would be "sia-sia".

However, we do not find that the amendment would cause any prejudice to the Respondent that could not be compensated by costs. Yes, the quantum of the claim would be increased by the amendment. But that increase in the quantum of the claim would not change the suit from one character into a suit of another and inconsistent character. The suit would yet remain as a claim for money due in respect of the same said works. That was borne out by the amended defence, where the only consequential material amendment was with respect to the quantum of the claim (see 26AR). Given all that, we entirely agree with the Appellant that the proposed amendment should not have been refused by the court below (*see Yahama Motor Co. Ltd v Yamaha Malaysia Sdn Bhd and ors* [1983] 1 MLJ 213).

As for the 3 authorities submitted by the Respondent to oppose the amendment, they concerned different kinds of applications and different jurisprudence. *Ahmad Saidi v Timbalan Menteri Hal Ehwal Dalam Neaeri Malaysia and ors* [2006] 1 CLJ 977 concerned an application to declare the appellant's restricted residence illegal. The restriction order had come to end by the time that the appeal was heard. The Court of Appeal held that since there was no longer a lis for adjudication, the court would not act in vain nor grant an academic declaration. *Lim Eye Tun v Mailis Peauam Malaysia*

& anor [2010] 2 CLJ 45, concerned an application to declare a domestic inquiry as null and void. The question which arose for determination was whether the termination of the plaintiff for misconduct was validly effected pursuant to the Legal Profession Act. The issues raised and the reliefs sought became academic, and the sought declaration was refused. And *Ngu Eng Hua v Naslei Enterprise Sdn Bhd & ors* [2009]8 CD 726 concerned an application for an injunction to restrain the operation of a business. That application was overtaken by events and the court dismissed the application on the ground that it would not act in futility and in vain.

But the instant amendment was not academic. The instant amendment was not immaterial, ineffectual or useless that ought as such to be refused (*see Ponnusamy v Nathu Ram* (1959) MLJ 228, where it was held by Good J "that the Court should look at the probable consequences of the amendment, and it would appear to follow that if the amendment would be ineffectual then it ought not to be allowed to be made"; *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* (1990) 2 MLJ 65, where the proposed amendment, which contended that the right to freedom of speech and expression was unrestricted, was not tenable, was refused; *Wona Ah Hee @ Wong Ah Mooi & anor v Low Tuck Hoona* (1994) 2 CLJ 313, where the amendments sought reliefs that could not be granted by the trial court). The claim as amended was real and tenable and could be made out at the trial (note: by filing the defence, even before the disposal of enclosures 11 and 13, the Respondent had taken a step in the proceedings, and as such had abandoned all right, if any, to refer the disputed deductions to arbitration - *see Sanwell Corp v Trans Resources Corp Sdn Bhd & anor* [2002] 2 MLJ 625). Proof of the claim as amended might be pertinent in some other application. But proof or an explanation of the quantum of the claim as amended, which was demanded by the court below (see page 4 of the Rekod Rayuan Tambahan), was entirely an irrelevant question in an application for leave to amend the claim.

We are also not with the court below in its refusal to affirm the summary judgment. The final certificate clearly certified that RM847,001.55 was payable. The application for summary judgment was for that sum of RM847,001.55. The application for summary judgment was not for the disputed deductions or any part thereof. The application for summary judgment was only for that sum certified for payment. There was nothing inconsistent in that. Just because the Appellant accepted that at least the sum of RM847/001.55 was due for payment, it was not warranted to say that the Appellant "approbated and reprobated".

The Respondent contended that no final sum had been certified for payment. But that could not be further from the truth. The certificate of payment clearly certified that a final sum of RM847,001.55 was payable. The fact that the deductions were disputed by the Appellant and or that the Respondent disputed the sum certified, changed not the fact that a final sum was certified as payable to the Appellant.

The application for summary judgment was for the sum certified for payment by a certificate of payment, which as a special and formal kind of admission (*Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33) could not be easily disputed by the Respondent. In Ellis Mechanical, Ellis wanted payment that went back to the last interim certificate where the engineers certified that a sum of GBP52,437.00 had been retained. Wates refused to pay that sum or any sum. Ellis filed a writ for GBP187,004.93, but applied for summary judgment for only GBP52,437.00. Ellis was prepared to refer the balance to arbitration. On appeal, it was held that that interim certificate proved that the GBP52437.00 was "indisputably due", was "as plain as could be" (per Lord Denning MR) and was "beyond reasonable doubt" (per Bridge U at p 37).

In *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, where the issue which arose was whether an employer under a building contract was under an obligation to pay upon being served with the penultimate progress payment certificate when it had made cross-claims for liquidated and non-liquidated damages against the builder arising from its performance of the contract, Edgar Joseph Jr. FCJ, delivering the judgment of the court, made the following general observation:

> "When, upon the proper construction of a particular contract which, of course, is a question of law, there is no obligation on the part of an employer in a main contract, or a main contractor in a sub-contract, to pay upon being served with a progress payment certificate, because of pending disputes, allegations of defects in works or materials or claims for damages for delay, without giving some reasonable amount of detail and quantification, are unlikely to result in the dismissal of an application for summary judgment

under 0 14 and leave to defend being given" (emphasis added).

Edgar Joseph Jr. FCJ then further expounded as follows:

> "As for the degree of proof required of a plaintiff builder in O 14 proceedings based upon an interim certificate issued by an architect or engineer pursuant to a construction contract, this has been variously described in *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 as 'indisputably due' (per Denning MR at p 35), 'as plain as could be' (per Denning MR at p 36) or 'beyond reasonable doubt1 (per Bridge U at p 37). In his book Keating on Building Contracts (4th Ed), Mr Donald Keating QC, under the sub-heading 'Evidence supporting application for summary judgment', at p 279, says this:
>
> > 'Every case turns upon its facts but excellent evidence is either an admission by the defendant, or his authorized agent, or a certificate by the defendant's architect or engineer, which is a special and formal kind of admission. When evidence of this nature is established the court usually requires cogent evidence from the defendant before it grants leave to defend. Thus merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification is unlikely to result in leave to defend.'
>
> In this context, the following passage in the judgment of Lawton U in the Ellis case (at p 36), indicates the correct approach which our courts should adopt in ordinary builders' claims under 0 14:
>
> > "If the main contractor can turn round, as the main contractor has done in this case and say, 'Well, I don't accept your account; therefore there is a dispute1, that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life-blood. It seems to me that the administration of justice in our courts should do all it can to restore that life-blood as quickly as possible.... In my judgment it can be done if the courts make a robust approach, as the Master did in this case, to the jurisdiction under 0 14.' "

In the instant case, clause 47(d) of the Conditions of Contract (see 95AR) and the Appendix (see 101AR) provided that the Respondent shall, within 30 days of any such interim certificate, make payment to the Appellant of the amount certified as due to the Appellant in the said certificate. By letter dated 24.11.2003 (see 266AR), the consulting engineers advised the Respondent that the final account was in order and that the final certificate must be honoured within 30 days. That final certificate was issued with deductions, that is, some 6 years after practical completion. To us, it would reasonably appear that the Respondent who had 6 years to reflect on the deductions must have made all conceivable deductions, be it permitted or otherwise, in the final certificate. That certificate certified that even with deductions, the sum of RM847,001.55 was payable to the Appellant. Most evidently, the Appellant had made out a sterling case for the entry of summary judgment in the sum of RM847,001.55.

And in relation to that sum, we fail to see that there was any issue or question in dispute which ought to be tried and or that there was any reason for a trial. In the first place, the defence was a bare denial of both the original and the amended quantum (see 53AR paragraph 4). The defence averred that the Appellant was in breach of the contract (see 53AR paragraph 5) by reason of delay and the reduced height of the warehouse, and that the certificate was not conclusive. But delay and defects had already been factored in the final certificate. Payment for whatever delay and whatever defects had already been summarily deducted in the final certificate (see details of deductions at 264AR). Moreover, as the Certificate of Practical Completion certified that all works were completed on 21.10.1997 to the satisfaction of the consulting engineers who was the party to be so satisfied (see clause 4 of the Conditions of Contract at 77AR), there was no real basis for the Respondent to raise the issues of delay and defects to refuse payment of the said RM847,001.55 to the Appellant.

The certificate of payment was a final certificate. In the absence of fraud, that certificate was binding and conclusive (paraphrased from Halsbury's Laws of England 4th Edition Reissue Volume 4(3) paragraph 134).

The consulting engineers were employed by the Respondent (see clause l(a)(iv) at 75AR). On the role of architects appointed by an employer, in *Hosier & Dickinson Ltd v P & M Kave Ltd* [1971] 1 All ER 301, Lord Denning held that "the architect is the agent of the employer and owes him a duty to take care not to issue a final certificate unless he is satisfied with the work... If the architect was satisfied that the works had been properly completed, he was quite entitled to bring the matter to a close, and to issue his final certificate. Once issued, it was conclusive" (see also*Shen Yuan Fai v Dato Wee Hood Teck & ors* [1976] 1 MLJ 16, 19;*James Pna Construction v Tsu Chin Kwan Peter* [1991] 1 MLJ 449). The final certificate was issued by the agent of the Respondent. It was an admission that at the very least the sum of RM847,001.55 was payable. To that, there was no bona fide defence. Summary judgment should have been entered for that sum, with the rest of the claim to be tried.

For those reasons, we allow this appeal with costs and order the Respondent to pay to the Appellant the sum of RM847,001.55 together with interest as claimed.