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[2013] 2 MLJ 620

Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd

FEDERAL COURT (PUTRAJAYA)
ZULKEFLI CJ (MALAYA), HASHIM YUSOFF, AHMAD MAAROP, ZAINUN ALI AND SULONG MATJERAIE FCJJ
CIVIL APPEAL NO 02()-62-10 OF 2011(W)
15 January 2013

Contract -- Terms -- Interpretation of terms -- Clause in subcontract allowed main contractor to omit wholly or in part of the works from the subcontract -- Whether clause entitled main contractor to cancel entire subcontract works or merely to reduce scope of such works

The appellant, as the main contractor appointed to carry out a housing project for the army, engaged the respondent as a subcontractor to carry out certain works in the project. The respondent, however, could not execute the subcontract works because piling works on the project had yet to be completed. About nine months after it had engaged the respondent and due to certain reasons, the appellant ceased to be the main contractor. In a letter to the respondent, the appellant invoked cl 19 in the respondent's letter of appointment to purportedly omit wholly the remaining works the subcontractor was required to perform under the subcontract. Clause 19 stated that the appellant 'reserved the right to omit wholly or in part of the works from the Sub-contract. The omissions of works prescribed may be deducted from the Sub-contract sum. No claim whatsoever will be entertained for such omissions.' The respondent sued the appellant claiming the latter was not entitled to omit the remaining works of the respondent. The High Court found for the respondent holding that a literal reading of cl 19 gave the absurd result that it entitled the appellant to terminate the subcontract without there being any default on the respondent's part. On appeal, the Court of Appeal affirmed the High Court's decision, agreeing that omission of the entire subcontract works not only had the effect of terminating the subcontract; it was also against the rationale of cl 19 which was to allow works to be omitted and adjustments to be made to the subcontract sum when so necessitated by any variation of the main works by the employer. The appellant was granted leave to appeal to the Federal Court.

Held, dismissing the appeal with costs:

(1) Clause 19 was not a termination clause but a separate and independent clause on the appellant's rights to only reduce the scope of the subcontract works. It could not be relied upon by the appellant to omit all scope of works of the respondent under the subcontract (see para 16).

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(2) Clause 19 was a variation clause and so could not be invoked to omit the entire subcontract works. A variation clause gave power to make adjustments to the subcontract works but not a power to cancel the subcontract works (see paras 9-10).

(3) The specific provision on termination of the subcontract had been agreed to by the parties as contained in cll 11.6.3 and 12 of the supplementary terms and conditions which were conditioned upon default on the respondent's part. It could not have been within the contemplation of the parties that either one of them was empowered to prevent the other from performing the subcontract (see para 15).

Perayu, sebagai kontraktor utama dilantik untuk menjalankan projek perumahan untuk askar, mengambil responden sebagai subkontraktor untuk menjalankan kerja-kerja tertentu dalam projek tersebut. Responden, walau bagaimanapun, tidak dapat melaksanakan kerja-kerja subkontrak kerana kerja-kerja mencerucuk dalam projek tersebut belum lagi siap. Lebih kurang sembilan bulan selepas ia mengambil responden dan atas sebab-sebab tertentu, perayu tidak lagi menjadi kontraktor utama. Dalam surat kepada responden, perayu membangkitkan klausa 19 dalam surat pelantikan responden untuk tidak memasukkan kesemua baki kerja-kerja yang subkontraktor diperlukan untuk melaksanakannya di bawah subkontrak tersebut. Klausa 19 menyatakan bahawa perayu 'reserved the right to omit wholly or in part of the works from the Sub-contract. The omissions of works prescribed may be deducted from the Sub-contract sum. No claim whatsoever will be entertained for such omissions.' Responden menyaman perayu mendakwa perayu tidak berhak untuk tidak memasukkan baki kerja-kerja bagi responden. Mahkamah Tinggi memihak kepada responden dengan memutuskan bahawa pembacaan literal klausa 19 memberi keputusan yang tidak masuk akal yang memberi hak kepada perayu untuk menamatkan subkontrak tersebut tanpa terdapat apa-apa keingkaran oleh pihak responden. Atas rayuan, Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi, bersetuju bahawa peninggalan keseluruhan kerja-kerja subkontrak bukan sahaja memberi kesan dengan menamatkan subkontrak tersebut; ia juga bertentangan dengan rasional klausa 19 yang mana membenarkan kerja-kerja tidak dimasukkan dan pelarasan akan dibuat kepada jumlah bayaran subkontrak apabila diperlukan oleh apa-apa pelbagai kerja-kerja utama oleh majikan. Perayu diberikan izin untuk merayu kepada Mahkamah Persekutuan.

Diputuskan, menolak rayuan dengan kos:

(1) Klausa 19 bukan klausa penamatan tetapi klausa berasingan dan bebas ke atas hak-hak perayu untuk hanya mengurangkan skop kerja-kerja subkontrak. Ia tidak dapat diguna pakai oleh perayu untuk tidak memasukkan kesemua skop kerja responden di bawah subkontrak tersebut (lihat perenggan 16).

2 MLJ 620 at 622

(2) Klausa 19 adalah klausa pelbagai dan oleh itu tidak dapat dibangkitkan untuk tidak memasukkan keseluruhan kerja-kerja subkontrak. Klausa pelbagai memberi kuasa untuk membuat pelarasan kepada kerja-kerja subkontrak tetapi bukan kuasa untuk membatalkan kerja-kerja subkontrak (lihat perenggan 9-10).

(3) Peruntukan spesifik atas penamatan subkontrak telah dipersetujui oleh pihak-pihak seperti yang terdapat di dalam klausa 11.6.3 dan 12 terma-terma dan syarat-syarat tambahan yang mana telah disyaratkan atas keingkaran oleh pihak responden. Ia tidak boleh berada dalam pertimbangan pihak-pihak bahawa salah seorang daripada mereka diberi kuasa untuk menghalang pihak yang lagi satu daripada melaksanakan subkontrak tersebut (lihat perenggan 15).

Notes

For cases on interpretation of terms, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6297-6303.

Cases referred to

Commissioner For Main Roads v Reed & Stuart Ptv Ltd & Anor (1974) 48 ALJR 461, HC (refd)

Sacon Constructions Pty Ltd v Kezarne Pty Ltd (1997) NSWSC 474 (refd)

Tan Hock Chan v Kho Teck Seng [1980] 1 MLJ 308, FC (refd)

Trustees of the Stratfield Save Estate v AHL Construction Limited [2004] EWHC 3286 (refd)

Legislation referred to

Rules of the High Court 1980 O 33 r 2

Appeal from: Civil Appeal No W-02(IM)-696 of 2009 (Court of Appeal, Putrajaya)

Nitin Nadkarni (JL Foo, Hairul Azam and ML Tan with her) (Azam Lim & Pang) for the appellant.

Lim Chong Fong (Farez Jinnah with him) (SC Lim & Partners) for the respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court)

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal on 25 April 2011 dismissing the appellant's appeal against the decision of the High Court dated 13 April 2009. The appellant was granted leave to

appeal against the decision of the Court of Appeal on the following questions of law:

(a) where a contract for construction work ('construction contract') provides that the main contractor may omit any works awarded to the subcontractor, whether the omission of all remaining works under construction contract amounts to an unlawful termination or repudiation of the construction contract;
(b) whether a clause in a construction contract allowing one party to terminate the construction contract without giving any reason, is inconsistent with a clause in the same construction contract which allows for termination upon default by a party;
(c) whether a clause in a construction contract allowing the whole or part of the works to be omitted without giving any reason, is inconsistent with a clause in the same construction contract which allows for termination upon default;
(d) whether there is any principle of law that prohibits two contracting parties from agreeing that one of the parties may, without giving any reason, omit the whole or part of the works to be performed by the other party;
(e) whether there is any principle of law that prohibits two contracting parties from agreeing that one of the parties may, without giving any reason, terminate the contract; and
(f) whether the exercise by one party of a contractual power to omit the whole or part of the works without giving any reasons is, in law, an act preventing the other party from performing its contractual obligations.

BACKGROUND FACTS

[2] The relevant background facts of the case may be summarised as follows:

(a) the appellant was engaged by Sykt Perumahan Negara Berhad-Lembaga Tabung Angkatan Tentera Joint Venture as the main contractor for an army housing project known as 'Cadangan Pembangunan Perumahan Angkatan Tentera di atas Tanah Milik Kerajaan di atas Lot PT 2082 Mukim Ampang, Kuala Lumpur' ('the Project');
(b) by a letter of award dated 12 March 2004, the appellant appointed the respondent as the subcontractor to carry out and complete the '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 and air-conditioning and ventilation services for all blocks of the project ('the subcontract');

(c) the respondent could not execute the subcontractor works, by reason that the piling works on the project remained unfinished;

(d) due to difficulties on the project, the appellant ceased to be the main contractor in December 2004;

(e) thereafter by a letter dated 2 December 2004, the appellant invoked cl 19 of Appendix A -- supplementary terms and conditions attached to the letter of award to omit wholly the remaining works awarded to the respondent under the subcontract. The said cl 19 reads as follows:

> We reserve the right to omit wholly or in part of the works from the Sub-contract. The omissions of works prescribed may be deducted from the Sub-contract sum. No claim whatsoever will be entertained for such omissions.

(f) the respondent then brought a suit against the appellant, claiming that the appellant was not entitled to omit the remaining works of the respondent.

FINDINGS OF THE HIGH COURT

[3] The sole issue determined by the High Court pursuant to O 33 r 2 of the Rules of the High Court 1980 was this:

> Whether Clause 19.0 Appendix A -- Supplementary Terms and Conditions give the power or right to the defendant to remove all scope of works of the plaintiff under the Sub-contract.

[4] The learned High Court judge found that cl 19 could not be relied upon by the appellant to omit all remaining works of the respondent. The learned judge, inter alia, held that a literal reading of the said cl 19 would be unreasonable as it would entitle the appellant to terminate the subcontract without any default by the respondent, and this would be absurd. The Australian High Court case of *Commissioner For Main Roads v Reed & Stuart Ptv Ltd & Anor* (1974) 48 ALJR 461 was cited by the learned judge to support her finding on this issue wherein it was held that a clause for omission cannot be relied upon to remove works from a contractor in order to give to another contractor.

FINDINGS OF THE COURT OF APPEAL

[5] The Court of Appeal upheld the decision of the High Court. The Court of Appeal in its finding on cl 19 made a pertinent observation as follows:

> This much we could add. Clause 19 could not be read ad litteram. As correctly submitted by learned counsel for the respondent who saw it for what it was, omission of the entire subcontract works had the effect of termination of the subcontract. Also, omission of the entire subcontract works was against the rationale of cl 19, which was to allow for the omission of works and adjustments of the amount of the subcontract when so necessitated by any variation of the main works by the employer ... (see p 11 of the additional appeal record).

DECISION OF THIS COURT

[6] Learned counsel for the appellant submitted before us amongst others that the court should not strike down a contract or a term in a contract on the ground that it is unreasonable, harsh and unfair. The function or role of the court is merely to interpret the provisions in the contract. To the appellant the said cl 19 is clear and it explicitly allows the appellant to omit wholly or in part of the works from the subcontract. The parties to the subcontract must have agreed that the appellant can omit all of the works.

[7] Learned counsel for the appellant further submitted that the appellant and the respondent had entered into the subcontract as a commercial transaction. Therefore if the respondent had intended to limit the rights or scope of the appellant to omit works from the subcontract it would have requested that this be expressly worded into the subcontract. However, this was not done. As such, there is nothing limiting the appellant's contractual right under the said cl 19 to omit the remaining works under the subcontract.

[8] It is also the contention of the appellant that both the High Court and the Court of Appeal in the present case were wrong in seeking to limit the bargain freely entered into by the appellant and in not finding that cl 19 in effect allowed for termination without default notwithstanding there is the existence of other clauses in the subcontract which provided for termination in the event of default. To the appellant the parties can in one and in the same contract have some provisions which allow for termination for convenience and other clauses which allow for termination upon default.

[9] With respect we could not agree with the above points of contention of the appellant. The principal issue to be decided in this appeal is whether the appellant can lawfully invoke cl 19 to omit the whole of the subcontract works that effectively resulted in the termination of the subcontract. We agree with

the findings of the courts below that cl 19 is a variation clause and so could not be invoked to omit the entire subcontract works.

[10] It is to be noted that a variation clause gives power to make adjustments to the subcontract works but not a power to cancel the subcontract works. On this point in the English case of *Trustees of the Stratfield Save Estate v AHL Construction Limited* [2004] EWHC 3286 (TCC), Justice Jackson, inter alia, had this to say:

> 46. *Provisions entitling an owner to vary the work have therefore to be construed carefully so as not to deprive the contractor of its contractual right to the opportunity to complete the works and realise such profit as may then be made*. They are not in the same category as exemption clauses. They have been common for centuries and do not need to be construed narrowly. In developed forms they now offer contractors opportunities to participate actively in the success of the project and to enhance their returns (for example, by way of value engineering or the application of concepts such as partnering).
>
> 47. However, the cases do show that reasonably clear words are needed in order to remove work from the contractor simply to have it done by somebody else, whether because the prospect of having it completed by the contractor will be more expensive for the employer than having it done by somebody else, although there can well be other reasons such as timing and confidence in the original contractor. *The basic bargain struck between the employer and the contractor has to be honoured and an employer who finds that it has entered into what he might regard as a bad bargain is not allowed to escape from it by the use of the omissions clause so as to enable it then to try and get a better bargain by having the work done by somebody else at a lower cost once the contractor is out of the way (or at the same time if the contract permits others to work alongside the contractor)*. (Emphasis added.)

[11] A variation clause is distinct and different from termination for convenience clause. It is a question of construction of the contract as to the extent and scope of the permissible exercise of power of a particular clause. The particular clause must be examined in itself as well as in conjunction with the other clauses in the contract. In any case whether it is a variation clause or termination for convenience clause, they cannot be exercised unreasonably in the absence of good faith (see the case of *Sacon Constructions Pty Ltd v Kezarne Pty Ltd* (1997) NSWSC 474). It is also to be noted the variation clause cannot be utilised to omit works to be given to others (see the case of *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308 (FC)).

[12] We agree with the submission of learned counsel for the respondent that by a literal reading of cl 19, it is a variation clause dealing with omission of work and not termination of the subcontract since termination is not mentioned

2 MLJ 620 at 627

anywhere therein. We are of the view upon close examination of cl 19, the right of omission conferred by the first sentence of this variation clause is only to omit part (either partially or wholly of that part) of the works comprised in the subcontract. We noted that the whole works under the subcontract is referred to in the phrase 'Sub Contract Works' and not 'works'. Bearing in mind that the subcontract includes piling and building works, it is our judgment that cl 19 in its proper context can be utilised to omit some of the piling or the whole of the piling works but the clause cannot be utilised to omit the whole subcontract of the piling and building works altogether.

[13] We also find that the term 'Sub Contract Works' and 'works' are used for different purposes throughout the supplementary terms and conditions of Appendix A. It is our considered view that the words 'to omit wholly or in part of the works' in cl 19 cannot be equated to mean 'to omit wholly the Sub Contract Works'. This would appear to be the correct interpretation if we were to look at the second sentence of cl 19 which states that the value of the omitted works is to be deducted from the subcontract sum. This deduction can only apply if the omission is for part of the subcontract works, otherwise the whole of the subcontract sum would be deducted against itself, which in our view is absurd.

[14] Again, on close examination of the third sentence in cl 19, the clause itself through its exercise precludes the respondent from all claims whatsoever. If this clause is construed to permit the cancellation of the subcontract, it would unreasonably result in the respondent forfeiting its claim for unpaid works done up to the moment of the exercise of that clause. This in our view is plainly unjust and unreasonable.

[15] It is to be noted in the present case that the specific provision on termination of the subcontract had been agreed by the parties as contained in cll 11.6.3 and 12 of the supplementary terms and conditions which are conditioned on default on the part of the respondent. In this regard we would state here that it could not have been within the contemplation of the parties to the subcontract that either one of them is empowered to prevent the other from performing the subcontract. It is a general principle of law of contract that one party shall not prevent the other from performing and completing the contract.

CONCLUSION

[16] For the reasons above stated we find that it is not necessary to answer all the questions posed before us. It is sufficient for us to state here that cl 19 of Appendix A of the supplementary terms and conditions is not a termination clause but a separate and independent clause on the appellant's rights to only reduce the scope for the subcontract works. Clause 19 could not be relied upon

2 MLJ 620 at 628

by the appellant to omit all scope of works of the respondent under the subcontract. In the result, we would dismiss this appeal with costs. We award a sum of RM30,000 to the respondent as costs. The deposit is to be refunded to the appellant.

Appeal dismissed with costs.

Reported by Ashok Kumar