

**Y.C. CHIN ENTERPRISES SDN BHD v AKI KONSULT [2005] MLJU 319**

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

RAUS SHARIF, J

USUL PEMULA NO RL-25-48-2000

15 July 2005

**David Gurupatham** (**David Gurupatham** & Koay), S.K.. Liow (Liow & Co)

**JUDGEMENT**

By an amended Originating Motion (OM), filed herein, the applicant is seeking an order to set aside the final award (the award) of the learned arbitrator dated on the 9th February 2000. The applicant prays inter-alia for the following orders -

- (i) that part of the award in respect of the abortive fees RM42,416.55 for work done and completed in respect of the original building plan be set aside;
- (ii) that part of the award in respect of the work done and completed in the sum of RM8,000.00 to redesign the septic tank be set aside;
- (iii) that part of the award in respect of the work done and completed in the sum of RM42,416.55 to redesign the building plan be set aside;
- (iv) that part of the award in respect of fees for additional supply and selling of prints in the sum of RM724 and RM188 respectively be set; and
- (v) that the cost of this application and partly the cost of the arbitration proceeding be paid by the respondent to the applicant.

The applicant is a building contractor appointed by the Killinghall Tin (Malaysia) Berhad (Killinghall) to construct 204 units of low cost flats at Mukim Dengkil, Sepang, Selangor (the project). The respondent is an architecture firm employed by Killinghall to design the building plan of the project. Upon the applicant's appointment as a building contractor, Killinghall retained the respondent as an architect for the project on condition that the applicant and respondent are at liberty to negotiate on the fee.

On 17th June 1998, disputes and differences arose between the applicant and the respondent on the fee chargeable. The parties, agreed to refer their disputes to an arbitrator to be mutually agreed by the parties. Accordingly, Mr. Sundra Rajoo was appointed as the arbitrator.

The applicant was the claimant in the arbitration proceeding. Upon preliminary meeting and hearing, the learned

arbitrator made the following final award :-

"(a) Total amount due to the respondent from the claimant are as follows :-

1.	Abortive fees	RM42,416.55
2.	Re-design septic tank	RM8,000.00
3.	Re-design building plan	RM42,416.55
4.	Sales of Prints	RM724.00
5.	Additional supply of print	RM188.00
	Total fee due and payable	<u>RM93,745.10</u>

(b) Interest at the 8% per annum from the date of this award to full realization;

(c) Claimant shall pay and bear the respondent's cost in this arbitration;

(d) Claimant shall pay and bear the cost of this final award in the sum of RM15,670.00. If respondent has already paid this cost, the claimant shall reimburse the same with 21 days from the date of this award."

The applicant was not happy with the award. According to the applicant, the learned arbitrator had misconducted himself and erred in law making the award and urged the court to set it aside.

It is trite law that an application to remit or to set aside an award of an arbitrator is not a rehearing. The power of the Court to set an award is based on section 24 (2) of the Arbitration Act 1952 which reads as follows;

"24(2). Where an arbitrator or umpire has misconduct himself or the proceedings, or an arbitration award has been improperly procured, the High Court may set the award aside."

Thus, the issue is whether the learned arbitrator has misconducted himself or the proceedings or the award had been improperly procured. With respect, I do not think so. The learned arbitrator in his award stated as follows -

#### **"ABORTIVE FEES**

The respondent is claiming abortive fees of RM42,416.55 as derived from 50% of the total fees of RM84,833.10. The said abortive fees is due to the respondent from the claimant for work done but caused to be abandoned by the claimant's instruction to re-design the building plans in 1988. Upon examining the evidence, I prefer the evidence of Mr. Jimmy Tham Chee Ming that the work done and completed by the respondent had reached the Design Development Phase as in section 2.2 in the PAM's Scale (see AB p. 40). In doing so, the respondent had completed the Schematic Design Phase (15%) and the Design Development Phase (35%) as laid out section 8.1 of the said PAM Scale.

Cumulatively, I find based on the evidence that the respondent had completed 50% of the total work amounting to RM84,833.10 x 50% = RM42,416.55. The claimant has not explained or refuted the respondent's submissions and arguments. Based on the above, I find and hold that the respondent is entitled to payment of RM42,416.55 from the claimant.

**RE-DESIGN OF SEPTIC TANK**

It is a fact that on 4th August 1988, the claimant had instructed the respondent to re-design the cast insitu into precast reinforced concrete septic tank. Upon considering the evidence as a whole, I find the amount of RM8,000.00 as claimed by the respondent is reasonable and reflective of the work done. Also, I am not convinced of the claimant's explanation of this item. As such, in all the circumstances, I find and hold the claimant's explanation of this item. As such, in all the circumstances, I find and hold that the respondent is entitled to payment of lump sum of RM8,000.00 from the claimant.

**RE-DESIGN OF BUILDING PLAN**

It is a fact that on 16th August 1988, the claimant further instructed the respondent to re-design the building plans. As a result of the claimant's instruction, the original building plans were abandoned. Starting all over again, the respondent re-designed, re-drew and re-submitted new plans to the relevant authorities for approval. Majlis Daerah Sepang approved the plans. I find that whether or not the earlier work done by the respondent was useful or beneficial to the claimant has no bearing on the issue of payment for the services by the respondent. It was the claimant who instructed and directed the course of events.

Upon examining the evidence relating to the re-design of the building plan, I am satisfied that the work done and completed by the respondent had again reached the Design Development Phase in section 2.2 in the PAM's scale. In so doing, the respondent had completed the Schematic Design Phase (15%) and the Design Development Phase (35%) as laid out section 8.1 of the said PAM scale. I find based on the evidence that the respondent had completed work to the value of RM42,416.55. The claimant has not explained or refuted the respondent's submissions and arguments.

Based on the above, I find and hold that the respondent is entitled to payment of RM42,416.55 from the claimant.

**SALES OF PRINT**

The respondent had claimed a sum of RM724.00 for sale prints. This item of claim is not disputed by the claimant. As such, I find and hold that the respondent is entitled to payment of RM724.00 from the claimant.

**ADDITIONAL SUPPLY OF PRINT**

The respondent had claimed a sum of RM188.00 for additional supply of prints. This item of claim is not disputed by the claimant. As such, I find and hold that the respondent is entitled to payment of RM188.00 from the claimant."

From the above, I do not see any error committed by the learned arbitrator. The learned arbitrator gave his reasons as to why he came to such findings. Basically, his findings are findings of facts based on the evidence adduced before him. I have no reasons to interfere. I therefore, dismissed the applicant's application in RI-25-48-2000.

In suit No. RI-24-28-2000 the respondent was seeking to enforce the award in the same manner as a judgement or order to the same effect pursuant to section 27 of the Arbitration Act 1952 and to enter judgment in terms of the said award against the applicant. In this respect, on 26th July 2001, the parties had agreed to consolidate the two actions and be heard together. The parties had also agreed that the applicant's motion to set aside the award be heard first. Hence, after having dismissed the applicant's motion to partly set aside the award, I hereby allowed, on the same reasons, the respondent's application to enforce the said award in the same manner as a judgment or

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order to the same effect pursuant to section 27 of the Arbitration Act 1952 and to enter judgement in terms of the said award against the applicant.

The applicant was ordered to pay the costs of these proceedings.

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