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1. *Triumphant Gallery Sdn Bhd v Afizan bin Miskom @ Miskan (t/a D Permata Aura Enterprise) [2021] MLJU 1794*

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TRIUMPHANT GALLERY SDN BHD v AFIZAN BIN MISKOM @ MISKAN (T/A D PERMATA AURA ENTERPRISE)

CaseAnalysis

[2021] MLJU 1794

Triumphant Gallery Sdn Bhd v Afizan bin Miskom @ Miskan (t/a D Permata Aura Enterprise) [2021] MLJU 1794

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

LIM CHONG FONG J

CIVIL APPEAL NO WA-12BC-2-04 OF 2020

30 August 2021

*Leena Ang bt Basil Ang (**David Gurupatham** And **Koay**) for the appellant.*
Mohd Najib bin Omar (Najib Omar & Co) for the respondent.

Lim Chong Fong J:

GROUNDS OF DECISIONIntroduction

[1]This is an appeal against the trial judgment of the Sessions Court in respect of a terminated construction contract for the construction of a club house in Johor.

[2]The Appellant/Defendant is a private limited company involved in the construction business.

[3]The Respondent/Plaintiff is also a private limited company involved in the construction business.
Background and Preliminary

[4]By a work order dated 21 January 2015 and followed with a letter of award dated 16 March 2015 (Sub-Contract), the Appellant appointed the Respondent as its sub-contractor to construct and complete club suite mock-up and Aman Desaru Club House with 46 units club suites respectively in Pantai Timur, Kota Tinggi, Johor (“Project”).

[5]The employer of the Project is Malaysian Resources Corporation Bhd ("MRCB").

[6]During the course of the carrying of the Project, MRCB terminated the main contract with the Appellant which resulted in the termination of the Sub-Contract.

[7]The parties thereafter on 25 May 2017 executed a mutual agreement ("Mutual Agreement") primarily requiring the Respondent to assist the Appellant in its legal proceedings on the terminated main contract with MRCB in consideration of the Appellant paying the Respondent the sum of RM150,000.00. This payment of RM150,000.00 was duly paid by the Appellant.

[8]However the Appellant thereafter failed, neglected or refused to pay the Respondent its dues particularly certified payments under the Sub-Contract.

[9]As the result, the Respondent on 12 November 2018 instituted the suit against the Appellant in the Johor Bahru sessions court. The suit was later transferred to the Kuala Lumpur sessions court on 10 March 2019.

[10]After trial, the Sessions Court judge on 17 March 2020 entered judgment for the Respondent against the Appellant in the following terms:

> Defendan perlu membayar Plaintif RM726,037.59 berserta faedah pada kadar 5% setahun dari tarikh 12 November 2018 sehingga penyelesaian sepenuhnya dibuat, tuntutan balas Defendan terhadap Plaintif ditolak dan Defendan perlu membayar Plaintif kos sebanyak RM8,000.00.

[11]The Appellant was dissatisfied with the decision of the Sessions Court and has on 29 March 2020 filed its appeal to the High Court.

[12]The appeal was fixed before me on 19 August 2021. After having read the appeal record and written submissions of the parties as well as oral arguments of counsel, I dismissed the appeal with costs of RM7,000.00 subject to the usual allocator.

[13]I now provide below the grounds of my decision.

Contentions and Findings

[14]The Appellants advanced seven grounds to justification that the appeal should be allowed, viz:

(i) The learned judge erred in law and fact that the Appellant terminated the Sub-Contract;

(ii) The learned judge erred in law and fact that the Respondent's final claim has been certified in accordance with the procedure agreed between the Respondent and the Appellant;

(iii) The learned judge erred in law and fact in the interpretation of clause 12 of the Sub-Contract;

(iv) The learned judge erred in law and fact that the Appellant relied on clause 9(iv) of the Sub-Contract to avoid payment;

(v) The learned judge erred in law and fact by refusing to decide on estoppel because it was not pleaded by the Appellant;

(vi) The learned judge erred in law and fact by refusing to decide on the Mutual Agreement because it was not pleaded by the Appellant; and

(vii) The learned judge erred in law and fact in dismissing the Appellant's counterclaim because it is an afterthought.

[15]The Respondent in opposition retorted that the learned judge made her decision correctly based on the evidence and law canvassed before her. Consequently, the appeal should be dismissed.

[16]The law relating to appellate intervention generally has been succinctly set out by Nallini Pathmanathan JCA (now FCJ) in Court of Appeal case of *MMC Oil & Gas Engineeering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665 as follows:

> *"[8] The instances where an appellate court will intervene are succinctly set out in the recent English Supreme Court case of Henderson v. Foxworth Investments Limited and Another [2014] UKSC 41 where Lord Reid summarised the position thus at para. 67 of his judgment:*
>
> *It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."*

[17]Furthermore, Raus Shariff FCJ (later CJ) in the Federal Court case of *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 specifically held as follows:

> *".. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt or Thomas v. Thomas [1947] AC 484*; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309*)."*

[18]As appeals from trial judgments of the subordinate courts are re-hearings by way of review of the record, I have carefully read the grounds of decision ("Grounds") of the learned Sessions Court judge.

[19]Accordingly and as to the Appellant's first ground of challenge on termination, the learned judge held as follows:

> *"13. Mahkamah ini telah mendengar keterangan saksi-saksi serta telah meneliti hujahan dan autoriti yang telah dikemukakan oleh pihak-pihak dan berpandangan seperti yang berikut:*
>
> *(a) Plaintif telah menyiapkan kerja-kerja yang dikehendaki bagi projek ini setakat penamatan kontrak oleh Defendan dan tuntutan Plaintif yang terakhir telah diperakui dan disahkan oleh pengurus projek Defendan iaitu SP3 selepas melakukan pemeriksaan bersama ke atas kerja-kerja Plaintif. Mahkamah berpuas hati bahawa SP3 adalah pengurus projek Defendan pada masa yang material dan mempunyai kuasa yang luas sebagai pengurus projek termasuk untuk memberi pengesahan ini. Mahkamah juga mengambil maklum bahawa Defendan tidak mempertikaikan bahawa Plaintif telah melakukan kerja-kerja yang dikehendaki oleh mereka setakat tarikh penamatan."*

I am cognisant the Appellant contended that it was, as matter of fact, MRCB that terminated the Appellant's main contract mid-stream during the contractual performance and as the result Sub-Contract was terminated in consequence. It was not that the Appellant terminated the Sub-Contract when the main contract was still on-going. Albeit, I acknowledge that the learned judge was not precise in her writing of the Grounds (although she correctly appreciated the facts; see paragraph 13(b) of her Grounds below) but nothing really turns upon it. The critical issues to be tried remain the valuation of the Respondent's work done and set off (if any) by the Appellant.

[20]Moving on to the Appellant's second to fourth grounds which are connected, the learned judge held as follows in her Grounds:

> "*(b) Defendan tidak sepatutnya bergantung harapan kepada klausa 12 Surat Award untuk menafikan tuntutan Plaintif memandangkan adalah jelas klausa 12 hanya terpakai apabila kerja-kerja sub-kontraktor telah siap secara keseluruhan. Dalam hal ini, apabila MRCB menamatkan kontrak Defendan secara awal, maka kontrak Plaintif juga turut ditamatkan. Susulan itu, Plaintif sewajarnya dibenarkan untuk membuat tuntutan bagi kerja-kerja yang telah disiapkan setakat itu daripada Defendan tanpa perlu menunggu untuk Defendan dibayar oleh MRCB yang mana Mahkamah difahamkan Defendan telah memulakan tindakan timbang tara terhadap MRCB untuk membuat pembayaran bagi projek itu.*
>
> *(c) Tuntutan Plaintif telah dibuktikan oleh saksi-saksi Plaintif yang telah memberi keterangan yang konsisten dan jelas terutamanya SP2 dan SP3 berkenaan kerja-kerja yang telah dilakukan oleh Plaintif yang telah diperakui dan disahkan oleh pihak Defendan tetapi tidak dibayar atas keengganan Defendan sendiri. Dalam hal ini, Mahkamah bersetuju dengan hujahan Plaintif bahawa cubaan Defendan untuk menggunakan klausa 9(iv)Surat Award untuk mengelak pembayaran kepada Plaintif juga tidak berjaya kerana saksi Defendan sendiri mengakui tiada pertikaian di antara Plaintif dan Defendan dan tiada juga bukti dokumentari berkenaan apa-apa pertikaian."*

I am mindful that the appellant steadfastly contended that the applicable contractual payment provision and procedure is stipulated in clause 9 and 12 of the Sub-Contract. Clauses 9 and 12 are plainly interim progress payment as well as final payment provisions respectively. I also noticed that there in a "pay when paid' provision in

clause 12 which the Appellant wishes to avail and take advantage of it since the Appellant has not been yet been paid by MRCB. "Pay when paid" contractual provision is void by reason of *s. 35* of the *Construction Industry Payment and Adjudication Act 2012*; see *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd & Another Appeal* [2021] 1 CLJ 299. However, I find that there is no error of law committed by the learned judge because she rightly construed that the provisions have been rendered inapplicable by reason of the premature termination of the Sub-Contract. As the result, the work done up to the point of termination has to be valued and the Respondent paid accordingly thereafter. There is no prescribed valuation procedure in the Sub-Contract; thus the valuation of the work must be undertaken fairly and reasonably. Likewise the payment has to be made within a reasonable time thereafter.

[21]Additionally, I do not detect any error in the valuation of the works too as the learned judge relied on the documentary evidence adduced as well as the testimony of the Respondent's project personnel as well as the Appellant's own project manager. Again in *MMC Oil & Gas Engineeering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd (supra),* Nallini Pathmanathan JCA (now FCJ) held as follows:

> *"[6] Similarly, the speeches of Lord Shaw of Dunfermline in Clarke v. Edinburgh and District Tramways Co Ltd [1919] SC (HL) 35, 36-37 where he said that an appellate court should only intervene where it is satisfied that the trial judge was "plainly wrong", and the dictum of Lord Greene MR in Yuill v. Yuill [1945] P 15 (at p. 19) are equally familiar. These dictaall point to the fact that it should only be on the rarest of occasions and where the appellate court is convinced by the plainest of considerations that it would be justified in finding that the trial judge had come to an erroneous conclusion on the evidence before him.*
>
> *[7] It is not only the audio-visual advantage that forms the primary basis for this rule. In McGraddie v. McGraddie and Another [2013] UKSC 58*; or *[2013] 1 WLR 2477, the English Supreme Court in addressing this issue made reference to the United States Supreme Court case of Anderson v. City of Bessemer* (1985) 470 US 564*, 574-575:*
>
> *The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be the 'main event' rather than a 'tryout on the road'... For these reasons review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception."*

I deferred to the learned judge's findings here as I clearly do not enjoy the audio visual advantage of the testimony of the witnesses.

[22]In respect of the Appellant's fifth and sixth grounds of challenge, the learned judge held as follows:

> *"(d) Berkenaan isu estoppel dan juga isu perjanjian persetujuan yang juga didakwa telah dimungkiri oleh Plaintif, Mahkamah mendapati isu-isu tidak dibangkitkan oleh Defendan dalam pliding mereka dan juga tidak disenaraikan sebagai isu-isu yang hendak dibicarakan. Oleh itu Mahkamah ini tidak akan menyentuh isu-isu dengan lebih mendalam; dan"*

It is generally correct that material facts must be pleaded especially in construction cases; see *Thyssenkrupp Elevator Malaysia Sdn Bhd v Asal Bina Sdn Bhd* *[2020] MLJU 2384* as well as later reduced and made clear in the issues to be tried. The learned judge is thus not wrong.

[23]Nevertheless, my perusal of the issues of estoppel and Mutual Agreement contended by the Appellant concerned the interpretation and construction of the Mutual Agreement. Although the learned judge might not have determined these issues in detail as stated by her, I, upon my review of the Mutual Agreement, do not find a specific contractual provision therein that the Respondent is prohibited to commence any legal proceedings against the Appellant after the execution of the Mutual Agreement. Consequently the Appellant is not so estopped. That notwithstanding, I hold that any such contractual estoppel provision would run foul of *s. 29* of the *Contracts Act 1950* and hence void. As to breach of the Mutual Agreement, I hold that the appropriate remedy is for the Appellant to sue the Respondent under the Mutual Agreement particularly for total failure of consideration and restitution of the RM150,000.00 for the alleged Respondent's failure to render the requisite assistance to the Appellant in respect of its arbitration proceedings with MRCB.

[24]As to the Appellant's fifth and final ground of challenge, the learned judge held as follows:

> *"(e) Berkenaan tuntutan balas Defendan, mahkamah ini berpandangan bahawa memandangkan jumlah RM501,281.18 tidak pernah dituntut oleh Defendan daripada Plaintif sebelum tindakan ini, tuntutan balas ini jelas merupakan suatu afterthought dan tidak dapat dibuktikan melalui keterangan dokumentari atau oleh saksi-saksi Defendan."*

[25]In this regard, I repeat my views in paragraph [23] above. In any event, I noticed that the Appellant is plainly attempting to set off its counterclaim for damages arising for the alleged Respondent's breach of the Mutual Agreement which has been found not proved by the learned judge besides her labelling the Appellant's attempt as having been made in afterthought. I therefore no see any appealable error on the part of the learned judge.

[26]Consequently, I find and hold that the Appellant has neither established that the learned judge erred in law nor in fact by failing to judicially appreciate the evidence received in the making of her decision. There is, in other words, no merit in the appeal.

Conclusion

[27]It is for the foregoing reasons that I dismissed the appeal as so ordered.

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