NG SAY CHEW v INVIRON (M) SB
HIGH COURT (PULAU PINANG)
ABDUL HAMID J
GUAMAN SIVIL NO 22-238-92
25 June 1999
[1999] MLJU 332; (1999) 1 LNS 272

Contract -- Breach -- Damages -- Whether time of the essence -- Quantification of damages

ALASAN PENGHAKIMAN

These two cases are heard together. They involve the same parties. The issues and the facts are similar.

The Plaintiff is a contractor of 30 years experience. In April and May 1991 the Plaintiff obtained two contracts referred to as "Dr. Khong's project" and the "Aurora Mas Project". But, soon after that the Plaintiff suffered a stroke and was hospitalised. So the Plaintiff left everything to his younger brother, Ng Say Teong, to carry out the work.

Ng Say Teong has very impressive academic qualifications. He holds a Ph.D. in Physics from Monash University in Australia. He came back in 1990 because he could not work in Australia. Under cross-examination he said that he was employed by Ng Say Chew before he went to study in Australia. It was on-and-off during school holidays. It was from the time he was 8 - 9 years old. He worked for Ng Say Chew for about 10 years, on-and-off. He was in Australia for about 10years. (On the other hand Ng Say Chew said "when I had a stroke I asked him (Ng Say Teong - added) to work for me. That was the first time he worked for me as my employee."

I must pause here and say, with respect, that his (Ng Say Teong's) evidence lacks credibility. He was obviously trying to impress that he had a long experience in construction work.

Indeed, sad to say, in spite of his very impressive academic qualifications, he did not impress me as a reliable witness. Throughout the cross-examination, he would pause for a long time, think hard, before answering even a very simple question. He appeared to be thinking of the effect of the answer that he would give. It is not the case of a witness trying to recollect an event which he might have forgotten.

For example, when he was asked whether water was used to complete the works appearing in claim no.1, he paused for a very long time and finally answered: "Not entirely. Water is needed for workers, cleaning and use at construction site. Without water I could not complete the work."

He went to say "Before 31.5.91 there was no temporary supply of water.

Learned Counsel for the Defendant than referred him to a letter dated 22nd April 1991 from the Defendant (Bundle D, page 1) to Loh & Loh Architect which says, "We are pleased to inform you that the temporary water supply have been installed this morning".

His (Ng Say Teong's) reply was "The date is not correct".

Pressed further whether he managed to complete the works as in Claim No. 1 even without water supply. He replied "We managed to complete".

Learned Counsel for the Defendant then asked: "Can you confirm that your workers were still working on site after 30/10/91?" He answered "Yes". It was put to him that he was lying when he said that his workers were still working at the site after 30thSeptember 1991. He replied "They were still working on site". He was then referred to a letter dated 31st September 1991 (Ex. P13 in Bundle B page 41) which he admitted was signed by him in which he wrote, inter alia:

> "Our construction work in relation to the above project finished officially on the 31st of October 1991."

His reply to the question was evasive: "I did not agree to a take-over".

I reproduce these examples to show why, in my judgment he is not a credible or reliable witness. He may be a "clever witness" but not a truthful witness.

Loh Choon Wooi (PW2), was employed by the Defendant as Sales & Project Executive during the relevant period. He represented the Defendant during the negotiation with the Plaintiff. However, he was called by the Plaintiff as his witness.

22-236-92

According to the Plaintiff's statement of claim, by an Agreement which was partly oral and partly written made on or about 22nd April 1991, the Defendant awarded the Plaintiff the contract for the construction of the main building and external retaining wall of a double story detached house for one Dr. Khong Kwang Sin ("Dr. Khong's project").

According to the Plaintiff the express and implied terms of the agreement included the following:

(a) the consideration for the lump sum contract was RM230,000.00;
(b) all claims of payment shall be on monthly basis according to site progress;
(c) any additional or omission work would be charged, or deducted accordingly;
(d) the Defendant must ensure that his other sub-contractors complete their work within stipulated time and also provide temporary water and electricity supplies to the site in time;
(e) any progressive payment due and unpaid would be charged with interest at 15% per month on monthly rest basis;
(f) the Plaintiff was to be permitted to enter the site to construct and complete the said project.

According to the Plaintiff during the process of construction of the said project, the following extra works were instructed by the Defendant and completed by the Plaintiff:

(a) manhole work;
(b) spiral stair case base.

The Plaintiff alleged that, in breach of the said agreement, the Defendant:

(a) delayed in providing temporary water and electricity supplies to the site;
(b) delayed in providing basic facilities for construction workers to stay on site;
(c) Defendant's piling sub-contractor delayed in his piling work causing delay to Plaintiff's work;
(d) Delayed in making progress payments when such payments were made;
(e) Wrongfully made deductions of the progress payments when such payments were made;
(f) Failed and/or refused to pay the total sum due to the Plaintiff for the works completed before or on 30th October 1991.

The Plaintiff also alleged that the Defendant wrongfully terminated the said agreement by a letter dated 11th November 1991 and took over the construction work from the Plaintiff after which the Defendant made use of the Plaintiff's equipment and tools on the site and damaged one concrete mixer of the Plaintiff.

By a Notice of Demand dated 27th March 1992 the Plaintiff required the Defendant to pay the total sum due under the said agreement within seven days but the Defendant had failed and/or refused to pay the same until now.

Plaintiff claimed special damages of RM98,235.31, general damages, interest and costs.

The Defendant in its defence admitted the existence of the written agreement but denied the alleged oral agreement. The Defendant denied the Plaintiff's allegations and said that the Plaintiff had given the Defendant a schedule for the completion of the project which the Plaintiff had failed to adhere. The Defendant stressed that the Plaintiff was permitted to enter the site to construct and complete the said project by 30th October 1991. But, as the Plaintiff failed to complete the project by that date, the Plaintiff and the Defendant mutually agreed that the contract be terminated on the said date, that no extension of time was granted and that work on the said project would be completed by the Defendant as from the said date. The Defendant denied owing the Plaintiff any money.

The Defendant also counterclaimed for damages totalling RM241,000 being agreed liquidated damages, general damages, damages for breach of contract, interest and costs.

Defence to counterclaim was filed by the Plaintiff.
In an attempt to narrow down the issues, learned counsel for the Plaintiff put in what he called "Plaintiff's issues" applicable to both cases. These are:

"Whether the Defendant has wrongfully terminated the contract?

To determine this issue the Court is invited to consider -
Whether the Plaintiff is entitled to extension of time because of:-

- delays caused by the Defendant due to water supply, electricity, other subcontractors.
- extra works required by the Defendant.
- delay in payments by the Defendant.
- interference by the Defendant.

Quantum of damages caused by breach of contract: 20% margin."

Completion date

What was the completion date in respect of Dr. Khong's project (22-236-92)? Clause 3 of the Agreement (Bundle B page 11) provides:

"3. Construction work to commence not later than 30th April 1991 and date of completion is before 30th October 1991 (duration of contract is 6 months)."

Learned Counsel for the Plaintiff argued that "time was not the essence of the contract" as there was no such provisions in the agreement.

I do not think that the argument has any merit.

First, there is the clear provision in the agreement as to when the completion date is. Secondly, the Plaintiff's own Schedule submitted to the Defendant (P38, Bundle B page 22) clearly states the various dates by when a particular activity was to be completed, the final date being 29th October 1991, one day prior to the completion dated provided in the agreement. Thirdly, the main contractor (the Defendant) would have to complete the project by a certain date, failing which he would have to pay a penalty to the owner for late delivery. It is most unreasonable to say that the main contractor, under such circumstances, would not require his sub-contractor to complete a particular work by a certain date. Here, we have evidence from the Plaintiff's own witness (PW2):

"When contract was signed it was made known to Plaintiff that Plaintiff was sub-contractor and that there was a main contract between Defendant and the Owners. Plaintiff know it was a back-to-back contract, and was running simultaneously. I think Plaintiff was aware if Defendant was late, Defendant would be imposed liability by the owner.

Time was essence of the contract."

I don't think I have to reproduce evidence of the Defendant's witness on the point as the Plaintiff's own witness has said it very clearly.

So it is clear that the completion date for Dr. Kong's project was 30th October 1991.

Was work completed by 30th Ocotber 1991?

There is no doubt that the work contracted was not completed by 30th October 1991. I do not have to discuss the evidence at length on this point.

Was contract terminated on 31/10/91?

In his evidence, PW1 confirmed that his men were still working at the site after 30th October 1991. Perhaps it is convenient that I reproduce the letter dated 8th November 1991 (P13, Bundle B page 41 which I have reproduced partly earlier), even though at this stage of the discussion only a part of it is relevant, to avoid reproducing it in bits and pieces.

> "NG SAY CHEW CONTRACTOR
> 477-A, Lorong Siakap, Bagan Serai, 34300 Perak
> Tel: 04-555391
> Our Ref: contract. Doc
> Date: 8th November 1991.
> Inviron (Malaysia) Sdn. Bhd.
> 68-B, Jalan Masjid Negeri
> 11600 Penang
> Dear Sir,
> Re: Contract Settlement - date 31/10/1991 - for a Proposed Double Storey Detached House on Lot 785, Georgetown, Section *2, N.E.D. at Taman Jesselton, Penang*
>
> This is to confirm the mutual agreement to settle the above project (your ref: LO431/LCW/LH/91). Our construction work in relation to the above project finished officially on the 31st of October, 1991.
>
> It is mutually understood that the continuation of our site foreman and construction workers on site after the 31st of October, 1991 is to promote a smooth transition for the takeover. Thus, all expanses and wages incurred in relation to our work-force and involvement is chargeable under your own account.
>
> We would very much appreciate that you ensure taking good care of our concrete mixer and other construction tools that are still in use on site.
>
> Thank you.
> Your faithfully'
> Signed
> Ng Say Chew"

Particular attention should be given to the second sentence in the first paragraph which reads:

"Our construction work in relation to the above project finished officially on 31st of October 1991."

The words "finished officially" give rise to some ambiguity. However, from the evidence, they clearly cannot mean "completed" in the sense that the contract work awarded to the Plaintiff was completed by the Plaintiff by that date.The Plaintiff did not complete the work. It was taken over by the Defendant.

In the light of the evidence as a whole the words can only mean "terminated" or "stopped". In other words the Plaintiff stopped working at the site on that date.

Loh Choon Wooi (PW2), Plaintiff's own witness, under cross-examination, was shown a letter dated 11th November 1991 from the Defendant to the Plaintiff which I am afraid I have to reproduce.

"Your Ref:
Our Ref: L0097/LCW/1h/92 INVIRON (MALAYSIA) SDN. BHD.
Date: November 11 1991
M/S Ng Say Chew Contractor
477-A, Lorong Siakap
34300 Bagan Serai
Perak Darul Ridzuan
ATTENTION : MR NG SAY CHEW
Dear Sir,
RE: PROPOSED DOUBLE STOREY DETACHED BUNGALOW ON LOT 785 GEORGETOWN, SECTION 2, N.E.D. *@ TAMAN JESSELTON, PENANG*

With reference to our contract ref. #L0431/LCW/LH/91 dated 22 April 1991, we regret to inform you that we are terminating the contract based on the following reasons:-

You have failed to complete the project according to the actual contractual completion period i.e. before 30 October 1991.

You have failed to carry out work as per our schedules and your own schedules although a few warning letters have been drawn to your attention.

The verbal termination agreement between Mr Ng Say Chew and Mr Ng Say Teong (of M/s Ng Say Chew Contractor) and Mr Wang Hock Aun, Mr Steven Wang and Mr Loh Choon Wooi (of M/s Inviron (M) Sdn. Bhd.) @ site on 23 October 1991.

There were no workers turning up @ site to work since 30 October 1991. All works have been executed by us since 1 November 1991.

Further to this termination, we still reserve all rights and necessary action to implement L.A.D. to you.
Thank you for your attention.
Yours faithfully

INVIRON (M) SDN BHD
Signed
WANG HOCK AUN
Director"

On this letter, he said:

> "B-44.This letter is by Mr. Wang to Ng. I was aware of the termination. I was not in the project anymore. There was a slight argument between Ng Say Teong and Steven Wang. I was sent to the site. Then it was agreed the Plaintiff will withdraw. As far as I know there was a verbal agreement for Plaintiff to withdraw. I don't know the terms."

Clearly he was referring to the meeting at the site on 23rd October 1991.

We now turn to the evidence of Wang Hock Hun (DW2). Referred to the meeting on 23rd October 1991 he said "Ng Saw Chew agreed to withdraw and Defendant to continue."

He went on to say "Plaintiff did not complete the work and stopped work on31/10/91. Plaintiff agreed that Defendant take over the job."

I do not think I have to reproduce more evidence. There is only the oral evidence of Ng Say Teong (PW1) which says that the Plaintiff did not stop work on 30th October 1991. On the contrary, his own letter, evidence of his own witness (PW2) and evidence of the Defendant, oral and documentary, say otherwise.

In circumstances, I have no doubt whatsoever that the Plaintiff stopped work on 31st October 1991.

Was it by mutual consent?

On this point too, Ng Say Teong's (PW1's) oral evidence in Court stands alone. He claimed that it was not by mutual consent. He did not agree to the Defendant taking over the job. But his letter (P13, Bundle B page 41 reproduced earlier,) written eight days after work had stopped began with "This is to confirm the mutual agreement to the above project..."

His own witness (PW2) said: "I was sent to the site. Then it was agreed the Plaintiff would withdraw."

Shown the letter dated 11th November 1991 (D64, Bundle B page 44, reproduced earlier) he said. "I have knowledge of this letter. Pursuant to the meeting both parties mutually agreed to terminate the contract. From what I know Plaintiff was not forced out of contract by the Defendant."

Evidence of DW1 is to the same effect. I have reproduced some of it. I do not think it is necessary to reproduce more, except just to point out that the Plaintiff (Ng Say Chew) himself was silent on it even though unconctradicted evidence shows that he was present at the meeting on he 23rd October 1991 when that was agreed. One wonders why he chose to say nothing about it.

Considering the totality of the evidence, oral and documentary, I am satisfied on the balance of probabilities that it was mutually agreed that the Plaintiff would withdraw and the Defendant would take over, as had happened.

Was there an agreement to extend the completion date beyond 30th October 1991?

From the discussion and the evidence already reproduced, there was clearly no agreement to extend the time for completion beyond 30th of October 1991. There was not even any request for it. Both parties had agreed at the meeting on 23rd October 1991that the Plaintiff would stop work and that the Defendant would take over. And they did just that.

Delay and the causes thereof

There is no doubt that there was delay in the carrying out of the work. Indeed it was never completed by the Defendant.

What were the causes of the delay? The Plaintiff alleged that the delays were due to:

(a) delay in supply of water and electricity
(b) extra works
(c) delay on the part of the Defendant to make payments.

The Defendant on the other hand said that the delay was because of the incompetency of Ng Say Teong (PW1), who took over from his elder brother, the Plaintiff, after the Plaintiff suffered a stroke.

Delay in supply of water and electricity

Whose responsibility was it to provide water and electricity at the site?
The contract does not provide as to who should provide water and electricity at the site. PW1 said in his evidence:

> "Water and electricity to be provided by Main Contractor. Not stated in contract. Normally provision of water/electricity responsibility of Main Contractor. If it is to be provided by sub-contractor will say so".

PW1's evidence under cross examination should be reproduced.

> "Delay in supplying water/electricity - is not provided in B11, (the agreement - added) C97 - Bill is issued to owners -Dr. Khong."

(I must pause here and clarify that C97 is "Resit Rasmi Pihak Berkuasa Air, Pulau Pinang". It was issued to Dr. Khong, the owner of the house under construction for "menyediakan bekalan baru untuk "w/shed" di sebelah No. 2 Taman Jesselton Pulau Pinang" for work done on 21.05.91 for which a sum of RM322.50 was charged).

> "Put: Dr. Khong is responsible for water/electricity?

A: No".

PW2 in his evidence said:

> "Supply of water/electricity not mentioned as to whose responsibility to supply. Defendant is main contractor. There were sub-contractors besides Plaintiff".

PW3 (Plaintiff) said:

> "I don't supply water/electricity to my workers. This is the responsibility of main contractor".

Defendant's witnesses did not say categorically that the supply of water and electricity was the responsibility of the Plaintiff. During the cross-examination of PW1, a question was put to him that the supply of water and electricity was the responsibility of Dr. Khong (owner), which was denied by PW1.

As the contract was a lump sum contract (which in fact is the Plaintiff's case) as it was the Plaintiff who was at the site, I am of the view that it should properly be the responsibility of the Plaintiff to obtain water and electricity he required to do the job, just as it would be his responsibility to obtain his workers, equipment and materials.

Was there delay in the supply of water and electricity?

PW1, in his evidence, said:

> "Problem of water and electricity. Water is most important. The project was delayed for 2 months because of water supply problem. Electricity supply was delayed too. The Plaintiff suffered a stroke on 17/5/91 - the water/power supply not there."

He went on to say that water was supplied on 21stMay 1991. He referred to Exhibit P2 (Bundle C page97) and said that that was the bill for installing water. On 3rd June 1991 he wrote to the Defendant (regarding Dr. Khong's house), see Bundle B page 19 (P3):

> "To progress with the above, we need urgently to have temporary power supply to be connected to the site as soon as possible. We will very much appreciate your immediate attention to this request to avoid any unnecessary delay."

On this letter, PW1 said in his evidence that at that time there was no power supply yet. He continued "Electricity was supplied a few weeks later".

In his letter to the Defendant dated 19 August 1991 PW1's mentioned "delays due to temporary power and water supplies". In his evidence PW1's said that he wrote this letter when it was clear that the Defendant would not take into consideration that delay in water/electricity has affected then.

Further, he said:

> "There was no definite agreement between the parties to extend time because of delay in supply of water/electricity. We needed extra time to carry out extra work. Also time wasted because of delay of power supply."

Under cross-examination, PW1 said "Before 31.5.91 there was no temporary supply or water."

He was shown his first progress payment claim dated 31st. May 1991 and was asked whether he needed water to complete the works he claimed to have completed. His reply was: "Not entirely, water is needed for workers, cleaning and use at construction site. Without water I could not complete the work."

So, here he contradicts himself. If his evidence, which has just been reproduced, is true then his earlier evidence that there was not even temporary water supply before 31*st* May 1991 cannot be true. We now come to the evidence of Loh Choon Wooi (PW2) He said:

> "I can't recall when water was supplied".

PW2 was then shown B-18, a letter dated 3*rd* June 1991 from Plaintiff to Defendant saying, inter alia, "To progress with the above, we need urgently to have temporary power and water supply to be connected to the site as soon as possible".

Record of his evidence reads: "I can't recall there was a problem of supply." The witness further said:

> "Supply of water/electricity not mentioned as to whose responsibility to supply. Defendant is main-contractor. There were other sub-contractors besides Plaintiff".

Under cross-examination PW2 said:

"Water/electricity in respect of Dr. Khong's bungalow, this is my memo •- D42. It is addressed to Architect, c/c to owner. Water was available on that day - 22/4/91. D2 - this is the application to supply water to work site - 13/4/91. Lulus 10/5/91. D2 was submitted by plumber."

So, even Plaintiff's own witness (PW2) said that the water was available on 22nd April 1991. Application Form (Bundle D page 2) shows that the application was made on 13th April 1991, not on 4th July1991 as shown in Exhibit P2 (Bundle C page 97). If we read the application form dated 13th April 1991 with PW 2's memo dated 22nd April 1991, it is that as of 22nd April 1991 there was temporary water supply at the site of Dr Khong's project.

Exhibit P2 (bundle C page 97) for "Menyediakan bekalan baru untuk w/shed di sebelah No. 2 Taman Jesselton, Pulau Pinang". Unfortunately nobody explained what it was. But, it is reasonable to assume that it was for "water-shed" for use in construction work.

Plaintiff had submitted his first, claim for payment on 31sc May 1991 for work done. He himself had said that without water he could not have completed the work.

PW2, Plaintiff's own witness said water was available on 22nd April 1991.

DW2, the Managing Director of the Defendant, said in his evidence:

- "No delay in supply of water. Not aware (of delay - added) in supply of electricity."

In the circumstances, it is my finding of fact, on the evidence adduced in Court, that there was no delay in the supply of water in respect of Dr. Khong's project and/or the unavailability of supply of water was not one of the causes of delay in the construction of Dr. Khong's project.

Regarding electricity, unfortunately the position is not as clear. We have allegations and denials, the truth of either is difficult to ascertain. However, in view of my earlier finding that it was the responsibility of the Plaintiff to provide or obtain water and electricity supply that he required for the job, the issue does not arise.

Delay caused by extra works

Regarding Dr. Khong's project, it is not disputed that the construction of manhole was an extra work. It is also not disputed that no extra time was allowed for the construction of the manhole. The Agreement did not specifically provide for extention of time for completion if there were extra works to be done. But clearly extra work, as in any construction, was anticipated. That was why the Agreement provided:

> "(c) any additional or omissional work will be charged or deducted accordingly."

PW1 said that he required one month to construct the manhole.

In his examination-in-chief PW2 said "I can't say how long it takes to construct" (the manhole). However, under cross-examination, he said:

"Reasonable time for a competent contractor to complete manhole, a few days.

Manhole is a different structure. It would not have affected the other work.

Construction of manhole could not have delayed the construction of other part. Both can be done simultaneously."

This evidence comes from the Plaintiff's own witness.

We now come to the evidence of DW2. He said:

"Casting for manhole Form the wood structure then steel bars and then concrete. An experienced contractor would take about 3-4 days to do the work on the manhole. The work can be done simultaneously. The concrete set within 24 hours. Work can go on in spite of the manhole work.

After the concrete set (if) there are honey combs we would touch-up. It takes at the most another 2 days. For such a manhole it should not be more than one week to complete".

So, we see that DW2, the Managing Director of the Defendant, gives an estimate of the time required to complete the manhole which is longer than that given by the Plaintiff's own witness. On the evidence I find that the claim by PW1 that he required one month to construct the manhole is either an exaggeration or because of his incompetency. And the Plaintiff's own witness (PW2) as well as DW2 said that the construction of manhole should not delay other works as it was a separate work and could be done simultaneously. I have no reason not to accept their evidence.

The Plaintiff alleged that there was another extra work, *i.e.* modification of spiral staircase. According to him he required an additional of two weeks. But, in his submission, learned Counsel for the Plaintiff did not even mention it. Learned counsel for the Defendant, in his submission said that the only extra work in issue was the manhole. The claim for that extra work was only RM630.00 which means that it is a very minor work. I do not think I have to discuss it.

Delay in payment by Dafandant

Was Defendant obliged to make "progress payments" for work done?

This is a lump sum contract. However, clause 6 of the Agreement provides:

- "All claims of payment shall only be on monthly basis according to site progress."

In other words, it does not mean that the Defendant would only pay the Plaintiff one lump sum when the whole work is completed. Instead payments would be made on monthly basis according to work done. Are the payments made by Plaintiff "advances"? That depends on what is meant by "gadvances". If it means "loans", it is not. If it means periodic payments for work done so far which would total up to the contract amount plus or minus the value of additional or omission work, as the case may be, it is.

It is my finding that based on the Agreement, it was agreed by the parties that the Defendant would pay the Plaintiff on monthly basis for work done. However it must be noted that even PW1 admitted that the Defendant advanced money to the Plaintiff before the Plaintiff even started work.

The complaint of PW1 was that his claims were reduced by PW2, payments not made in full, even if endorsed by PW2 and that payments, when made, were delayed.

Now, let us look at the evidence of PW2, the Plaintiff's own witness. He said, he was not the site superintendent. He was "involved in checking the claims, not approving" them. He said that when a claim was received by him he would go to the site, check the work done and submit a report to the Defendant's Account Department. He said, "The claim is normally higher than the actual work done. If the difference is not too much I ignore it and make my own estimate. If the claim is too much I send it back to the Plaintiff to resubmit a more reasonable claim."

He said that payments were not made according to his recommendations, because the Account's

Department took other factors into consideration like delay, whether work was done according to requirement and also sometimes the main contractor (the Defendant) had to clear the rubbish.

He said further that it was his duty to certify whether work was done according to requirement or not. He only checked the quantity of work done. The quality was checked by the Defendant's Directors and the site agent.

He said he was aware that the Plaintiff requested for payment but he could not remember whether there were delays in payments. According to him the payments were "advances". He went on to say:

"when I said the amount was "advances", I mean we allow more than the actual value of work. Dr.'s house, even before the work started, Defendant had already given an advance to Plaintiff. It was partly to help the Plaintiff that I recommended more to be paid than actual value of work.
Q: Why did you recommend more?
A: It is out of incentive for Plaintiff to work harder.
.....
Ng Say Chew told me he was in financial problem.

I assisted him by recommending slightly higher. I also assisted him by lending him money."

All these come from the Plaintiff's own witness (PW2) . I have no doubt that that was the position: payments were not made for the full amount claimed because the claim was too much. Indeed the Defendant even paid a certain amount before work had started. PW2 went out of the way to assist the Plaintiff who was in financial difficulties by recommending that the Defendant pay more to the Plaintiff than the value of work done, even to the extent of lending him money.

The Real cause of delay

From the discussion of the evidence above it is clear that the delay was not caused by the reasons alleged by the Plaintiff, who puts the blame on the Defendant. On the other hand it was due to the inexperience and incompetency of PW1 who took over the management of the project from his elder brother (PW3) after the latter suffered a stroke. He was also short of funds. As he was new in the field he did not have the trust of suppliers to supply him materials on credit. He was also unable to mobilise workers as and when required.

Examples of his incompetency are to be found in the evidence of the Plaintiffs own witness, PW2. Regarding the manhole for example, PW1, in his examination-in-chief said he would require "an extra one month" to do it. Under cross-examination he said the delay caused by the construction of manhole (extra work) was two to three months.

On the other hand, the Plaintiff's own witness, PW2, said:

- "Reasonable time for a competent contractor to complete the manhole, a few days. Manhole is a different structure (It would not have affected the other work). Construction of man-hole would not have delayed the construction of other part. Both can be done simultaneously."

PW2 also said, “Most of the schedule were not followed”. This schedule (Bundle B page 22) was given by the Plaintiff.

DW1 gave evidence to the same effect regarding the time required to construct the manhole and that it can be done simultaneously with other works.

DW1, the supervisor of the project also said that the construction of the manhole could be done simultaneously with other work. He even said: "Reason for delay in projects — They did not have materials and workers.”
In fact he said, during the period PW1 went back to Australia, even though he could not remember when and for how long.

I do not think I need to reproduce any more evidence. Evidence is overwhelming as to real reason for the delay of the project which points to PWl's over inexperience and incompetency as the reason.

So, it was under the circumstances that the contract was terminated, by mutual consent, as it reasonable to expect.

The Plaintiff's claim is dismissed with costs.

Counterclaim

In respect of Dr. Khong's project the Defendant counterclaimed as follows:

(a)	Cost of completion/ remedial work	RM246,226.43
(b)	Liquidated damages	RM181,000.00
	Alternatively, unliquidated Damages	RM104,395.53
(c)	General damages at the Court's discretion	
(d)	Hitachi Cut-off machine	RM552.00
(e)	Interest at 8% on the above Sum	
(g)	Costs.	

Based on my finding on the Plaintiff's claim, it should follow that the Defendant is entitled to get a judgment on its counterclaim for damages against the Defendant.

Section 74 of the Contracts Act 1950 provides:

> **“**74. (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

In Tham Cheow Toh v. Associated Metal Smelters Ltd. *(1)* Ali F.J, delivering judgment of the Court said:

"The measure of damage recoverable involves the consideration of section 74 of the Contracts (Malay States) Ordinance which substantially affirms the rule of common law laid down in Hadley v. Baxendale which was in two parts, namely (1) damage arising naturally, *i.e.* according to the usual course of things from the breach, and (2) when they are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. In our view this case falls within the second rule which is that the appellant would not be liable for payment of damages for loss of profits unless there is evidence before the court that the special object of the furnace had been drawn to their attention and that they contracted on the basis that delay in delivery of the particular furnace would make them liable to payment of loss of profits."

Of cause, it is easier said than done, especially in construction cases as this.

In my experience, parties usually inflate or deflate the amount of damages depending on which side they are, leaving it to the court to try to arrive at a fair figure. In a construction case as this case, in all honesty, I say that it is most difficult for the court to arrive at a fair figure, the court not having the expertise on the subject of value of work done, costs of materials, labour and so on. Indeed, during the trial I did indicate that to determine the *quantum* of damages, especially the value of work done, it would be better for the parties to refer to a person qualified and experienced in that field, *e.g.* a quantity surveyor to determine. But, parties did not seem to agree and chose to leave it to Court. So, I have no choice but to try to arrive at a figure that is fair and reasonable, relying on the burden of proof. Again, in all honesty, I say that using this •"legal approach" may or may not lead on to a fair result. But that is all, and the best, that the Court can do.

Cost of completion/remedial work

The Plaintiff did not complete the work he was supposed to do. The Defendant had to and did take over the responsibility to complete that work. Of course the Defendant should be compensated for it. But it is the determination of the *quantum* that poses a problem.

First there is the amount of RM17,749.87 being "cost of purchases" incurred by the Defendant. The Defendant produced invoices to support the claim (Bundle Fl page 3 to 24). A summary is given on page 2 of Bundle Fl. The summary is dated 30th October 1991, signed by DW2, the Managing Director of the Defendant. DW2, in his evidence, said the summary (Fl — page 2) was prepared on 30th October 1991, the day he was supposed to have signed it.

But, that is not true because, first the telephone number printed on the letter-head is a 7 digit number whereas even subsequent payment vouchers of the Defendant bear the old 6 digit number. Cross-examined by learned counsel of the Plaintiff, DW2 admitted that the 7 digit telephoned number was a new number, he could not recall when it was changed. It was put to him that the tele-

phone number was changed in November 1993, to which he had no answer.

Secondly, the letter-head also bears the company number which is not to found in the Defendant's subsequent payment vouchers. The Plaintiff has proved by a producing a letter from the Registrar . heads only -of Companies that the Company Number was required to be printed on a company letter August 1996. The paper of some of the payment vouchers though purportedly th with effect from 15 .made in 1991 appear to be very fresh.

In other words, at least in respect of some of the documents produced by the Defendant in support of its claim it is doubtful whether they were actually made on the day they were dated. Most likely some were back-dated. In the circumstances, it is not safe for the court to accept in toto the amount claimed by the Defendant. The same is also true in respect of the amount of RM228,472.56, being expenses incurred by the Defendant to complete the project. The disturbing feature is that the total amount claimed for the completion of the project is more than the contract amount with the Plaintiff (RM246,222.43 as against 230,000.00). It is undeniable that the Plaintiff had done some work, which need not be done again. We are not talking about completion of a long abandoned project that had been left to rot for years. Here, immediately after the Defendant took over from the Plaintiff, the Defendant commenced work.

Thus, I find it difficult is accept in toto what is claimed by the Defendant. But that does not mean that the Defendant had failed to prove that it had incurred anything at all to complete the work contracted to the Plaintiff.

Taking into account the contract amount (RM230,000.00), the total amount claimed by Plaintiff ***38*** for work done (RM139, 350.00 — see Bundle C page 5: Total amount previously claimed plus current claims), PW2's estimate (RM66,5449.27 — see Bundle C page 6) and the value as measured by Juru Ukur Bahan Malaysia (RM116,976.35 — see Bundle B page 68 for which, according to the Defendant the value of work done by Plaintiff was only RM52,611.26) and the total amount that had been paid by the Defendant to the Plaintiff (RM58,069.90 — see Bundle C page 105) I am of the opinion that it is fair to deduct about RM50,000.00 from the total amount claimed by the Defendant as cost for completion of the Plaintiff's unfinished work. I take into account that when the Defendant took over the work he had to incur some expenses which had been incurred by the Plaintiff when the Plaintiff first started work which would not have been incurred again had the Plaintiff completed the work. So, under this head I give judgment for the Defendant in the sum of RM196,222.43.

Liquidated damages or unliquidated damages

The Defendant claimed liquidated ascertained damages of RM1,000.00 *per* day from the date of the termination of the contract until completion and handing over to the owner totaling RM181,000.00 (RM1,000.00 x 181 days)

Alternatively, the Defendant claimed for unliquidated damages for breach of contract in the Plaintiff's failure and delay in completing the project amounting to RM63,131.72.

The Defendant was the main contractor and the Plaintiff the sub-contractor. The Defendant had to

complete the project by a certain date. It is to be expected that the sub-contractor (Plaintiff) should complete it before that date. In other words I accept that the contract between Defendant and Plaintiff was a back-to-back contract with the contract between the Defendant and the owner. It follows that if due to Plaintiff's delays, the Defendant's handing over of the project to the owner is delayed, the Defendant is liable to pay damages and the Plaintiff should compensate the Defendant. However, the contract does not contain provision for liquidated ascertained damages which the Defendant is claiming at RM1,000.00 *per* day. In the circumstances, I am of the view that the Defendant is not entitled to liquidated ascertained damages. However the Defendant is entitled to loss of profit (unliquidated damages).

DW2 gave evidence that the Defendant suffered a loss of profit of RM63,131.72 which the Defendant would have made had there been no delay on the part of the Plaintiff. See also D68 (Bundle Fl page 1) . I award the Defendant that amount.

It is also proved that the cut-off machine worth RM552.00 belonging to the Defendant was taken by Plaintiff. I award this amount to the Defendant.

In summary, regarding Dr. Khong's project (C.S. 22-236-92, I dismiss the Plaintiff's claim and give judgment for the Defendant on the Defendant's counter-claim as follows:

(a)	Cost of completion/ remedial work	RM196,222.43
(b)	Unliquidated damages (loss of profit)	RM 63,131.72
(c)	Hitachi cut-off machine	RM 552.00
		Total RM259,906.15

I also award interest at 8% on the above sum from the date of filing the counter-claim to date of judgment and thereafter at the same rate until the date of full payment. I order that costs of the counter-claim be paid by the Plaintiff to the Defendant.

22-238-92

The agreement concerning this project, referred to as the • gAurora Mas Project • h is found in a two-page letter dated 14th May 1991 addressed to the Plaintiff, signed by both the Plaintiff and the Defendant. It provides as follows:

"Re: PROPOSED DOUBLE STOREY FACTORY ON LOT 287b FREE TRADE ZONE PHASE III, BAYAN LEPAS, PENANG FOR M/S AURORA MARS ELECTRONICS SDN. BHD.

We are pleased to award the above contract to you for the main building and fencing work.

We would also like to draw your attention to the following:-

The total of this lump sum contract is M$415,000.00 (Malaysian Ringgit: Four Hundred Fifteen Thousand Only).

2.

- i) The scope of work is to construct and completion of the whole project as *per* all

drawings and details of consultants.

- ii) Work to be done by others are:—
  - (a) Air-cond
  - (b) Electrical
  - (c) Fire-fighting
  - (d) Plumbing & sanitary

(e) Drive-way & access road construction
(f) Gypsum partition
(g) Suspended ceiling
(h) Aluminium window/door
(i) Painting
(j) Sign board
(k) Insurance
(l) Carpet
(m) Road line painting

- iii) Any additional or omissional work will be charged or deducted accordingly.

iv) Piling work to be charged or deducted accordingly based on actual work done on site.

3. Construction work to commence not later than 15th May 1991 and date of completion is before 15th September 1991 (duration of contract is 4 months).
4. Defects liability period will be 12 months. (5% of retention to be issued after 6 months).
5. All works carried out should comply to consultants requirements and direct instruction from our site supervisor.
6. All claims of payment shall only be on monthly basis according to site progress.
ThanK you."

The Plaintiff alleged that the following extra works were also instructed by the Defendant:

(a) Power sub-station;
(b) the pile cap conversion; and
(c) changing of plain floor-hardener to coloured floor-hardener.

The Plaintiff said he supplied earth and engaged excavators for the purpose of earth filling. He alleged that, in breach of the said agreement, the Defendant:
(a) had delayed in providing temporary water and electricity supplies to the site;
(b) had delayed in providing basic facilities for construction workers to stay on site;
(c) Defendant's sub-contractors delayed in their works in the site and as a consequence caused delay to or hindered Plaintiff's work under the said agreement;
(d) Delayed in settling the progress claims made by the Plaintiff for the construction works completed;
(e) Wrongfully made deduction in the progress payments when such payments were made;
(f) Failed and/or refused to pay the total sum due to the Plaintiff for construction works completed under the said agreement, extra works ordered on his behalf on or before the 31st day of October, 1991;
(g) Engaged external sub-contractors to participate in the Plaintiff's work without the Plaintiff's prior consent;

(h) Interfered with the contract made between the Plaintiff and the Plaintiff's subcontractor;
(i) Purchased and received delivery of some materials on behalf of Plaintiff without prior approval and/or authorisation from the Plaintiff, and thereafter wrongfully deducted the relevant purchase sums due to the suppliers of the materials from the sums due and owing by Defendant to Plaintiff;
(j) Made payments directly to the Plaintiff's sub-contractors without prior consultation with or/and without prior approval and authorisation from the Plaintiff thereby causing loss to the Plaintiff of their control over their own sub-contractors; and"

The Plaintiff said that the Defendant wrongfully took over the said project by a letter dated 18th November 1991 thereby terminating the agreement. As a consequence the Plaintiff suffered loss and damages. The Plaintiff claimed special damages of RM66,213.38, General damages, interest and costs. In its defence, the Defendant admitted "entering into a written confirmation order dated 14th May 1991," but denied any oral agreement. The Defendant said that the Plaintiff was supposed to complete the project before 15th September 1991. But as the Plaintiff suffered a stroke and failed to adhere to the schedule given by him (Plaintiff) the Plaintiff requested the Defendant to extend the completion date to 26th September 1991 and later to 30th October 1991. Out of compassion, the Defendant agreed. However the Plaintiff failed to complete the project, abandoned the site and voluntarily left the site together with all tools, machinery and materials. Regarding the extra work, the Defendant admitted instructing the Plaintiff but denied that the Plaintiff completed them. The Defendant denied that the Plaintiff engaged an excavator. If the Plaintiff did engage the excavator it was not specified in the contract and did so at his own volition. The Defendant admitted the taking over of the project but it was because the Plaintiff had failed to complete it by the extended time.

The Defendant also counter-claimed for damages, interest and costs.

Generally, my discussion of fact and law in C.S. 22-236-91 is applicable in this case.

Completion date

There is no dispute that original completion date was 15th September 1991. It was extended twice. The last date being 30th October 1991.

Was work completed by 30th October 1991?

At the answer is very clear: No.

What was/were the cause/causes of delay?

Delay in supply of electricity and water

My finding that the Plaintiff was responsible to obtain or provide water and electricity that he required to do the job contracted to him is applicable.

Furthermore, based on the totality of the evidence, including that which I will discuss later, I find that water and electricity supply was not the cause of delay.

Causes of delay alleged in para 7 (b) , (c), (g), (h) of the Statement of Claim

No evidence was adduced to substantiate these allegations. Anyway why should it be the responsibility of the Defendant to provide "basic facilities" for the Plaintiff's workers?

Regarding interference by other sub-contractors, PW2 said • gI am not aware of complaint about interference by other sub-contractors • h. This answer was given by him when he was shown the letter dated 11th November 1991 by PW1 to the Defendant. Anyway this allegation concerns what happened after the extended completion date.

In my judgment allegations in para 7 (b), (c), (g), and (h) of the Statement of Claim have not been proved.

Causes of delay alleged in para 7 (d), (e) and (f)

My discussion of C.S. 22-236-91 on this subject is applicable in this case. I shall not repeat. The Plaintiff overcharged the Defendant for work done. PW2 had gone out of the way to certify a higher amount than the value of actual work done and even gave loan to the Plaintiff. The Plaintiff did not have the finance to carry out the work, after the Plaintiff (PW3) was hospitalised.

Cause of delay alleged in para 7(I) and (j) of the Statement of Claim

DW2 in his evidence, said:

"Meeting 15/9/91 - it was at Ng Say Chew's office. We told him the schedule was very far behind. He requested us to help to get subcontractor and purchase material on his behalf.
Reason - suppliers were not supplying materials….."

Even PW1, when shown P32 admitted that two sums each RM25,036.55 and RM15,286.28 were paid direct to suppliers at his request. He should not be heard to complain about those amounts being deducted from his claims now.

Real cause of delay

My finding as to the real cause of delay in this case is similar to the other case. The reasons are also similar and I do not propose to repeat, nor reproduce the evidence again. All I want to add is that in respect of the Aurora Mas project, there is very strong evidence both oral and documentary, of complaints by the consultant engineer regarding the unsatisfactory work done by the Plaintiff. The evidence does not only come from the Defendant's witnesses, but also from the Plaintiff's own witness, PW2.

I find that it is the Plaintiff who is to be blamed for the delays, not the defendant.

Was contract mutually terminated

Again there is overwhelming evidence that as the Plaintiff could not complete the project in time, even after an extension of time of 47 days, it was mutually agreed that the contract be terminated and that the Defendant would take over the project.

PW2, he Plaintiff's own witness said:

- **"**Aurora Project - Plaintiff left the site by mutual agreement. The reasons are the same. It was mutually agreed that Defendant take over. Plaintiff did not want to continue because they were out of schedule. Plaintiff was out of their own schedule."

I do not have to reproduce evidence of the Defendant's witness the same effect.

In the circumstances, and for the reasons as in C.S. 22-236-92 I dismiss the Plaintiff's claim with costs.

Counterclaim

The Defendant counterclaimed RM171,165.30 for cost of completion/Remedial work, liquidated damages of RM84,000.00 (RM1,000.00 *per* day x 84 days) alternatively, unliquidated damages (loss of profit) of RM104,395.53, general damages at court's discretion, interest and costs.

My reasons on the topic in 22-236-92 is also applicable here.

Regarding costs of completion and the purchases learned counsel for the Defendant submitted:

> "(a) For C.S.22-238-92 the purchases incurred by the Defendant is as reflected in Exhibits D-85 Bundle E pages 1 – 138. These are 7 Debit notes with attached invoices by the creditors/suppliers to the Aurora Mars project together with the payment vouchers. In addition the Defendant also incurred expenses for completion of the project amounting to RM20,902.71. the total amount incurred by the Defendant to complete the Aurora Mars project as claimed by the Defendant as supported by the relevant documents is RM171,165.30. This sum is the amount arrived by totalling the debit notes (RM150,262.59) and the expenses incurred after the Plaintiff left site (RM20,902.71)."

I see no reason why I should not accept it.

<u>Liquidated or unliquidated damages</u>

For the same reasons stated in respect of C.S. 22-236-92 I prefer to award unliquidated damages, being loss of profit of RM104,395.53 as shown in the calculation shown in Bundle E page 145 and the explanation given by DW2.

To summarise, I give judgment to the Defendant on the Defendant's counterclaim as follows:

(a)	Cost of completion/ remedial work	RM171,165.30
(b)	Unliquidated damages (loss of profit)	RM104,395.53

Total RM275,560.83
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I also award interest at 8% *per annum* on the above sum from the date of filing of the counterclaim until date of judgment, and thereafter at the same rate until the date of full payment and also costs on the counterclaim to the Defendant.

Cheah Choo Kheng (Cheah Choo Kheng & Shamsuddin) for plaintiff

KL Ong (Ghazi & Lim) for defendant