CITEX (M) SDN BHD v. Ingeback (M) SDN BHD
HIGH COURT, PULAU PINANG
ABDUL HAMID MOHAMED J
CIVIL SUIT NO.23-317-88
5 DECEMBER 1995
[1995] 1 LNS 52

CONTRACT *- Sub Contract -breach - claim for outstanding payments - counterclaim for overpayment and Damages for additional costs*

Counsel:

For the plaintiff - Teja Singh Penesar; M/s. Teja Singh Penesar & Co.

For the defendant - Rajandra Navaratnam; M/s. Azmam, Davidson & Co.

JUDGMENT:

The facts of this case are rather complicated. In order to understand what had happened shall reproduce the main events first in chronological order.

The defendant was a developer and had obtained contract from Richvale Sdn. Bhd. number of apartments as part of the Sun Moon City in Penang. The defendant engaged a subcontractor to carry out the earthworks before construction could commence. This subcontractor was Loh Trading Company (Loh Trading). Loh Trading had problems in carrying out the earthwork, mainly because it did not have a suitable dumpsite to dispose of earth and rock removed from the site. The defendant agreed to pay Loh Trading RM70,200 to terminate the contractual relations between them. However Loh Trading demanded RM120,000.

At this point, Mr.Ranjit Rai Sharma (PW3) an advocate and solicitor heard of the problem. He and his colleague, Mr.Cheah Swee Jin (PW6) purchased the plaintiff company for the purpose of securing the contract from the defendant. Mr.Sharma and Mr.Cheah managed to acquire a suitable dumpsite close to the project.

Hasty negotiations were entered between the parties. It resulted in a written agreement dated 27 June 1988. The agreement was drafted by the Mr.Sharma himself. At this stage I shall only reproduce some of the provisions. Clause 1 provides:

> 1. The maincon (defendant -added) shall pay the subcon (plaintiff - added) the sum of RM50,000 as mobilisation in the following manner:
>
> (a) upon commencement of work, the sum of RM20,000
>
> (b) within 10 days of commencement, the sum of RM30,000.

Clause 3 provides that the defendant shall provide the minimum machinery therein stated.

Clause 4 provides:

> 4. The works to be performed by the subcon (plaintiff - added) are as follows:
>
> > (a) To blast, load, transport and dispose of rock to the subcon's own dumpsite or as directed from time to time by the Maincon (defendant -added)
> >
> > The maincon shall pay the sum of RM4 for each cubic yard of rock blasted, and RM8.50 for each cubic yard blasted and removed.

Clause 7 provides:

> 7. In the event of disagreement between the parties hereto of additional machinery required, the maincon (defendant -added) shall procure such additional machinery as it sees fit and charge the subcon (plaintiff - added) for such at the prevailing market rate.

Clause 8 provides:

> 8. The parties hereto will jointly measure works done every 2 weeks and payment will be effected within one week of certification.

Clause 9 provides:

> 9. Upon final survey, allowance will be made for RM34,000 work done by the previous subcontractor, Loh Trading Co.

Clause 10 provides:

> 10. The maincon has received a claim of RM120,000 from Loh trading Company. Of this sum the maincon has already paid the sum of RM60,000 and agrees to pay another RM10,200 leaving a balance of RM48,800 (sic. It should be RM49,800).

Clause 11 provides:

> 11. The subcon shall enter into negotiations with Loh Trading on behalf of the maincon and is authorised to offer any sum up to the limit of RM60,000 and shall indemnify the maincon (defendant - added) for any sum above RM10,200.

On 7 July 1988 the site manger of the defendant wrote to the plaintiff complaining that the progress of the earthwork was found to be very slow and below expectation. The defendant requested the plaintiff to increase the number of machines and workers not later than 7 July 1989.

On the following day, 8 July 1988, the resident engineer of Sun Moon City Project complained to the project manager of the defendant that the plaintiff was not performing up to expectation and that the progress of work was behind schedule and the plaintiff had inadequate machinery on the worksite.

On 21 July 1988, the defendant wrote another letter to the plaintiff, again complaining that the progress of the earthwork was very slow and unsatisfactory. The letter said that there was only one excavator assisting the rock blasting work. There was no progress for removing earth or rock material out of the site. The letter also referred to two earlier site meetings on 8 July 1988 and 15 July 1988 and pointed out that the plaintiff's promise to provide additional machineries were not kept. The defendant gave plaintiff until 24 July 1988 to move in the machinery. Otherwise the defendant would bring in the machinery themselves and deduct the rental from the payments due to the plaintiff.

Three letters were written by the defendant to the plaintiff on 5 August 1988. The first letter refers to the incident of machinery being "tampered with" which both parties called "subotage". It also recorded Mr.Cheah's (PW3) assurance that once the engine oil and oil filter for those affected machineries and lorries were replaced, they could resume work immediately, without further delay.

In the 2nd letter, the defendant stressed that the machinery that was not affected should continue to work. The letter ended with a warning "If you were to continue to stop work we will not hesitate to take necessary action".

In the third letter of 5 August 1988 the defendant again complained that the machinery were inadequate and that there was delay in earthwork.

On 15 August 1988, the defendant again wrote to the plaintiff. It referred to a meeting held on 11 August 1988 at which the plaintiff promised that dumptrucks and excavators would arrive at the site not later than 14 August 1988. The letter pointed out that until 15 August 1988, they had not arrived.

In the meantime Richvale, the developer, repeatedly chastised the defendant for the delay in the earthwork and the insufficient number of machinery doing the work. This is to be found in letters dated 8 July 1988, 14 July 1988, 6 August 1988, 10 August 1988, 11 August 1988, 24 August 1988 and 9 September 1988.

In the meantime, for the work done the plaintiff submitted its claim fortnightly. The defendant issued its certificate for the amount of work by the plaintiff and paid in accordance with the defendant's certificate but not in accordance with the plaintiff's claim. The plaintiff claimed at RM8.50 per cubic yard. The defendant certified and paid at RM4.50 per cubic yard. In other words the defendants paid the plaintiff for transporting only and not for blasting as the defendant held the view that the blasting work had been done by Loh Trading. While complaints of delay were being made by Richvale against the defendant (main contractor) and the defendant against the plaintiff (sub contractor), the plaintiff on 28 August 1988 wrote to the defendant complaining that the defendant had not paid in full the plaintiff's claim No.3. This claim had been certificated by the defendant for RM32,412.72. Of this amount, only RM17,000 had been paid.

The defendant replied on 30 August 1988. The defendant pointed out they had advanced to

the plaintiff RM80,000 which was agreed to be deducted in four instalments starting from the third progress payment. In any event this balance of RM15, 412.72 was paid on 1 September 1988.

On 31 August 1988, two months after the execution of the contract and various sums of money amounting to RM80,000 were paid, the plaintiff complained in a letter to the defendant that only RM20,000 of the RM50,000 mobilisation fee had been paid. The plaintiff said that the RM50,000 was not an advance. It was a fixed sum for a definite object - mobilisation - and was not deductible.

The letter also referred to clause 11 of the agreement and said, *inter alia*, "our indemnity is for the sum of RM49,800". In that letter the plaintiff also claimed sums of money for repairs to its vehicle and equipment.

On 17 October 1988 the plaintiff submitted its 7th claim for work done during the first half of October 1988. This claim represented a cumulative assessment of work done to date and sought to adjust the rate applied for the previous six claims. In other words, in the 7th claim, the plaintiff claimed a flat rate of RM8.50 per cubic yard for all the work done including what had been claimed and paid for under claim No.1 to 6. What it means is that the plaintiff claimed at the rate of RM8.50 irrespective of whether the blasting work was done by the plaintiff or by Loh Trading. In the 7th claim, the plaintiff based its measurements on the assumption that each lorry carried up to 82% of its capacity. This was applied retrospectively to the six previous claims.

On 27 October 1988 the defendant paid the plaintiff RM56,273.95 on the same basis as it had paid the plaintiff for the first six claims. However on 28 October 1988 the defendant agreed to pay a further sum of RM20,000. The defendant claimed that it paid this amount under duress.

On the same day, the plaintiff wrote another letter to the defendant.

> We require the following sums to be paid by noon tomorrow, 29 October 1988.
>
> > 1. Full settlement of balance of claim No. 7 being RM35,319.85
> >
> > 2. Refund of deposit and rental advance on Mitsubishi 280 being RM18,000.
> >
> > 3. (i) Downtime for machines RM15,174.88
> >
> > (ii) Insurance claim on diesel tank RM2,500.00
> >
> > (iii) Downtime claim for Mitsubishi 230 RM2,925.55
> >
> > (iv) rental of Mitsubishi 280 from 13 September
> >
> > 1988 to 5 October 1988 being the period

when you told the operator not to take

instructions from us RM6,900.00

Less RM18,000.00 RM27,500.43

Less Credit Note No.1 RM18,000.00 RM304.04

RM9,196.39

4. RM30,000 being balance of mobilisation which we had had not claimed earlier to ease your cash flow problems.

Total payable is RM92,516.24.

Note we are charging you RM12,750 per day that work is not done due to your failure to pay on time. The sum is based on 150 lorry loads removed per day.

The plaintiff also stopped work on the same day, 28 October 1988 and gave notice that it would not do any further work until its claims were settled in full.

The defendant replied on the same day. In that letter, Mr.Ekman (DW1), amongst other things, complained:

> I am now informed that this morning an agreement was made with one Mr.Chua that a sum amounting to RM20,000 should be paid to you.
>
> A few hours later, we were given a letter with an ultimation to pay approximately 5 times higher amount within 24 hours failing which you will stop the work.

According to PW3 on 2 November 1993 the plaintiff started work again. This is because DW1 was coming to Penang and there was going to be a meeting on that day. But as the meeting did not result in any money being paid to the plaintiff, the plaintiff stopped work again and never resumed thereafter.

On 4 November 1988, the defendant wrote this letter to the plaintiff:

> Dear Sirs,
>
> Earthwork for the proposed Sun Moon. City, Paya Terubong (Lot 6576, 6578, 6581 & 6582, Mukim 13, Daerah Timur Laut, Paya Terubong, Penang
>
> On 29 October 1988 your Mr. Ranjit, Mr. Cheah, Mr. Chia and myself reached an agreement in your office to standarise (sic) the format of payment to RM8.50 for rock blasted and disposed off site. According to the new format there will be an amount of RM20,000 to be paid to you. Payment will only be made after certification of new claim.
>
> On 2 November 1988 afternoon, we had a meeting in our site office and

Ingeback agreed to the above format. But without any good reason you had stopped your activity of the excavators and lorries. You are now instructed to resume work immediately as you are supposed to hand over platform A by 20 October 1988. The delay in carrying out the caisson work at block A had jammed up our schedule. If you failed to clear the block A platform by 6 November 1988, we will proceed to clear block A platform ourself and charge you for all cost incurred.

The plaintiff replied on 4 November 1988

Dear Sirs,

Your letter dated 4 November 1988 refers.

1. There is no question of a new format. The rate of RM8.50 is provided for in the contract.

The simple point is that there was short payment by you.

On 29 October 1988 your Mr. Chua agreed that there was short payment but said he could not say when you could have the money to pay.

In the light of the above, your offer to pay "after certification" is clearly an attempt to delay payment.

2. Your Mr. Chua also confirmed an agreement on 13 September 1988 that every lorry load of rock removed was to be calculated at 82% of capacity.

In spite of the said agreement you have refused or failed to implement the said measurement.

Your payment is also short because of this.

3. Your letter of 4 October 1988 does not indicate any willingness to pay RM30,000 as contractually provided for mobilisation despite it being four months overdue.

4. Payment for downtime was agreed to, in August, but is still due.

You have attempted to off-set sums due by bringing in a Mitsubishi 280 so far above market rates as to make your motives suspect.

As you know, we reject the conditions imposed as being obviously exploitative.

5. Clearly if work is to be done it must be paid for.

You have failed to pay, using one excuse or another.

6. We are entirely agreeable to commencing work immediately if monies due are paid.

There is no question of us paying you costs of work done when it is clear that the breach of contract lies in you.

By a letter dated 11 November 1988, the defendant replied:

We refer to your letter dated 4 November 1988.

We have no intention of avoiding payments which are rightly due to you under the subcontract but have to strongly object to your attempt to impose us your own unilateral interpretation of the contract through stoppage of work. We have to regard this as a deliberate and fundamental breach of the terms of your subcontract and hold you liable for the consequences.

Our position on the various claims included in your letter of 28 October 1988 is as follows:

a) Balance of claim No.7- RM35,319.85 (RM23,144.80 + RM12,175.05)

a) (i) RM23,144.80 being balance between rates for blasting and blasting inclusive transport. We have agreed to pay this amount. We have done so in order to ease your cash flow. The payment can be looked upon as an advance payment, as we will pay the quantities blasted by Loh Trading (approx. 5000 cu. yd.) twice.

a) (ii) RM12,175.05 being the difference between 82% load and actually recorded load.

An agreement was made that the lorries should be recorded to be loaded to 82%. The condition was, that if the loads were obviously and constantly lower, they should be topped up when instruction was given. After the agreement, the lorries for sometime were recorded to be loaded to 82% (193 lorries). When the lorries were not topped up inspite of instructions, the loads were recorded to be 80% until some action was taken. After 336 lorries it was clear that Citex staff were not able to instruct the excavator operator to top up and in consent with the Citex staff, the loads were recorded according to earlier

procedure. This was confirmed as Citex staff signed the records.

The agreement is not valid as Citex was not able to keep their part of the agreement.

b) Refund of deposit and rental advance on Mitsubishi 280 - RM18,000.

b) (i) The market rate for a machine of this size is RM12,000 per month. Our agreement with Ken Holding is deposit RM9,000 + one month rental in advance and a rental of RM9,000 per month. These conditions are, as a whole, prevailing market rate and we have, according to the agreement, right to charge Citex for this.

c) (i) Downtime for machines - RM15,174.84 - RM304 = RM14,870.84

We have paid this amount on 27 October 1988, that means before you sent your letter, dated 28 October 1988. We look upon the payment as an advance as we only agree to pay RM10,822. The balance RM4,048.80 is rental for rainy days. According to Citex's agreement with the lorry owners, there is no payment on rainy days.

(ii) Insurance claim on diesel tank - RM2,500

We have paid RM603.61. This matter is yet to be discussed.

(iii) Downtime for Mitsubishi 230 - RM2,925.55

We have paid RM2,525.55. The balance is a mistake from your side as you charged also for Sunday.

(iv) Rental of Mitsubishi 280 from 12 September 1988 - 3 October 1988 - RM6,900

The reason for your refusal to pay 23 days rental, is that instructions were given by our staff. That is true only for less than 3 days. All work done by this machinery under these 23 days, is claimed by you. The reason for our instruction was your refusal to do work as directed by us.

(d) Balance of mobilisation - RM30,000

In the agreement is stated that Citex shall indemnify Ingeback for any sum paid to Loh Trading above RM70,200. In the agreement is also stated that mobilisation shall be paid with RM50,000.

Before the work commenced on site, Ingeback paid RM70,000 to Citex. This amount consists of RM50,000 for mobilisation and RM20,000 advance in order to ease Citex's cash flow, at that time constrained due to payment to Loh Trading. We have subsequently paid the mobilisation in full.

On the same day (11 November 1988) the defendant certified the plaintiff's 8th claim based on a flat rate of RM8.50 per cubic yard. The new method was applied retrospectively from the plaintiff's 1st to 8th claim. However, they deducted RM9,092.12 "for rock previously blasted by Loh Trading". The amount certified due from the defendant to the plaintiff under this 8th claim was RM69,496.62.

On the same day, 11 November 1988, the plaintiff wrote to the defendant claiming as follows:

M/s Ingeback (M) Sdn. Bhd.

Paya Terubong

Penang

Dear Sirs

URGENT

This is to remind you again that the following are due to us:

1. Various sums

(refer our letter dated 28 October 1988) RM57,196.39

2. Balance of claim No. 7 RM35,319.85

3. Claim No. 8

(Overdue since 7 September 1988 and RM70,436.11

in breach of contract)

4. Stoppage of work due to

inability to pay 2 September 1988 RM214,750.00

to 11 September 1988, 9 x RM12,750

(and continuing)

Total RM277,702.35

Your inability to pay give us no choice but to recourse to legal action.

Yours faithfully,

CITEX (M) SDN. BHD.

(Sgd).

Director

Four days later, on 15 November 1988 the plaintiff commenced this action.

On the next day, 16 November 1988, the plaintiff attempted to submit its 9th claim. This 9th claim consisted of:

(a) RM9,312.60 for blasting and transporting rocks

(b) RM620,98 for excavation of earth

(c) claim for downtime from 2 November 1988 to 15 November 1988 at RM12,750 per day totalling RM153,000.

However (a) and (b) were withdrawn by the plaintiff during the trial because no work was done during that period as the plaintiff had stopped work.

On 7 November 1988 the defendant terminated the contract. The letter reads as follows:

RE : TERMINATION LETTER

We request to note that despite our letter of 11 November 1988, and our payment of RM23,144.80 on 15 November 1988 you have still not resumed work on the site.

In the circumstances, we have no alternative but to treat you as having repudiated the contract with the immediate effect.

You are therefore required to take immediate steps to remove yourselves and your equipment from the site.

We will hold you liable for all damages resulting from your repudiation.

Comment on the Agreement.

The agreement which was hurriedly negotiated, drafted and signed is admitted by both sides to contain many weakness. From the problems transpired later it is clear that it does not contain provisions for time for payment, method of measurement of the earth blasted and transported, provision regarding suspension of work or termination of the contract.

Even for what it provides, it is lacking in clarity. In clause 1 it stays that defendant shall pay the plaintiff RM50,000 "as mobilsation". What does this "mobilisation" mean? The agreement does not say anything about it. Is it refundable? Again the agreement is silent. Plaintiff says that it is an outright payment. But for what? In his evidence, he said "Agree mobilisation sum is necessary to pay for deposit for machinery, *etc* ". But, clause 3 provides that it is the duty of the plaintiff to provide the machinery. If so, why should the defendant be made to pay for it? After all the plaintiff would be paid for work done with the machinery to be provided by it.

Clause 4 specifies the rate to be paid by the plaintiff to the defendant *i.e.* RM4 for blasting and RM8.50 for blasting and removing. Reading that provision alone, it appears clear enough that if the plaintiff merely removes the rocks already blasted by Loh Trading, it would only be paid for removing *i.e.* RM8.50 - RM4.00 = RM4.50. If the defendant only blasts the rocks but does not transport it, it would be paid RM4 per cubic yard. If it does both, then only it will be paid RM8.50 per cubic yard. So is the view of the defendant. But the plaintiff says otherwise. The plaintiff says it is entitled to RM8.50 even though it merely removes the rock already blasted by Loh Trading. Plaintiff relies on clause 9 which says "Upon final survey, allowance will be made for RM34,000 worth of work done by the previous subcontractor, Loh Trading Company". If the plaintiff is entitled to the full rate of RM8.50 even if it only removes the rocks already blasted by Loh Trading, why not just say so?

Clause 10 and 11 reproduced earlier says that defendant "has received a claim of RM120,000 from Loh Trading Company. Of this sum (the defendant) has already paid the sum of RM60,000 and agrees to pay another RM10,200 leaving a balance of RM48,000.

In my view what clause 10 means is that the defendant has already paid to Loh Trading RM60,000 of the RM120,000 claimed. The word "has already paid" means paid prior to the date the agreement was signed. Regarding the claim by Loh Trading, the defendant only had RM10,200 to pay. The balance of RM49,800 and **not** RM48,800 as mentioned in the agreement was to be borne by the plaintiff. The word in the agreement is "indemnify".

From the evidence of PW3, a director and a 50% shareholder of the plaintiff company, as well as the solicitor who drafted the agreement, it is clear that he was of the view that even the RM60,000 to be paid to Loh Trading over and above the RM60,000 which the defendant had already paid to Loh Trading, must also come from the defendant. That is why of the RM80,000 admittedly paid by the defendant to the plaintiff, he said RM60,000 was paid to Loh Trading leaving a balance of only RM20,000 with the plaintiff. And that was why the plaintiff claimed that R30,000 was still owing.

So, if we take the position of the plaintiff (PW3) in particular, we have the following situation. According to the agreement: The plaintiff will do the earthwork for the defendant. The machines are to be provided by the plaintiff. But the defendant must pay the plaintiff RM50,000 as an outright payment for the defendant to pay for the rental, *etc*. for the

machines. Secondly, even though some blasting work had been done by Loh Trading, the plaintiff would be paid the full rate *i.e.* for blasting and removing. When all the work is completed, the defendant would be given an "allowance" of RM34,000. Thirdly, even though the responsibility to pay Loh Trading RM49,800 so the responsibility of the plaintiff, according to the plaintiff, the defendant must pay first. That was why Mr.Sharma used RM60,000 of the RM80,000 paid by the defendant to plaintiff to pay Loh Trading. I suppose the plaintiff will "indemnify" the defendant later.

Principal Issues:

(i) *Suspension of work by the plaintiff;*

(ii) *Termination of the contract by the defendant*

First, it must be noted here that the contract does not provide for suspension of work or termination or repudiation of the contract.

Learned Counsel for the defendant cited a passage from Keatings on *Building Contract*, 5th Edn., at p.157:

> No general right to suspend work. Although particular contracts may give the contractor express rights if certificates are not paid, there is no general right to suspend work if payment is wrongly withheld. This is consistent with the principle that, except where there is a breach of condition or fundamental breach of contract, breach of contract by one party does not discharge the other party from performance of his unperformed obligations.

Learned Counsel for both sides also cited the case of *Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1966] 2 MLJ 286.

The head-note reads follows:

> The plaintiff, a building contractor, claimed various sums in respect of a progress payment on a building contract and building materials supplied. The defendant company in their defence pleaded that the work was done under a contract, that the work was not completed on the agreed date and that the plaintiff had abandoned the work and they therefore counterclaimed for damages for breach of contract.
>
> > Held (1) the contract in this case was not an entire contract and the plaintiff was therefore entitled to payment for work completed by him;
> >
> > (2) the plaintiff was not entitled to treat the contract as repudiated for mere non-payment of the instalment and that in the circumstances, the plaintiff had repudiated the contract by abandoning it;
> >
> > (3) as the defendant company had opted to accept repudiation and sue for damages for incomplete and defective work the

> measure of damages would be the difference between the reasonable costs of completing the works as varied and the amount that would have been due to the plaintiff had he completed the work as varied.

Both learned Counsel referred me to a passage from the judgment of Earl of Selborne in *Mersey Steel & Iron Co. v. Naylor Benzon & Co.* [1884] 9 App. Cas. 434 which was quoted with approval by Raja Azlan Shah J (as he then was) in *Yong Mok Hin's* case:

> I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr* which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here.

I also find the Federal Court decision in *Ban Hong Joo Mines Ltd. v. Chen & Yap Ltd.* [1969] 2 MLJ 82 relevant on this point. The head-note reads:

> The respondents had obtained judgment in the High Court against the appellants for the sum of RM6,470 in respect of earth excavation work done by them for the appellants. The learned trial Judge found that the appellants had committed a breach of the contract by their failure to pay instalments and by their order to the respondents to stop work.
>
> Held, dismissing the appeal:
>
> > (1) the deliberate refusal of the appellants to pay for what was already done by way of fornightly payments and their order to the respondents to stop work left the respondents with no option but to treat the contract having been repudiated and to sue payment for work which they had already done;
> >
> > (2) in the circumstances the respondents are entitled to recover the amount either on the basis of work done by them at the appellant's request or by way of damages on the basis of *quantum meruit*.

Gill FC (as he then was) quoted with approval passages from *Mersey Steel & Iron Co. Ltd. v. Naylor Benzon & Co.* [1884] 9 App. Cas. 434 case, including that I have reproduced earlier, from the judgement of Lord Coleridge CJ and Keating J in *Freeth v. Burr* [1873-74] 9 CP 208 and also from Atkin LJ's judgment in *Spettabile v. Northumberland Shipbuilding Co. Ltd.* [1918-19] ALL ER Reprint 963, 968 the last mentioned passage summarises the principle thus:

> They all come to the same thing, and they all amount at any rate to this, that it

> must be shown that the party to the contract made quite plain his own intention not to perform the contract.

One passage from the judgment of Gill FJ (as he then was) should however be reproduced as it explains clearly the reason why in that case the Federal Court came to the conclusion that it did:

> In the present case, as was stated by the learned trial Judge, the appellants were in breach of their obligation to make fortnightly payments.
>
> Their deliberate refusal to pay what was already due by way of fornightly payments was an important element on the question of their repudiation of the contract. Furthermore, they ordered the respondents to stop work. This stoppage of work by them clearly went to the root of the contract. In the circumstances, the respondents had no option but to treat the contract as at an end and to sue for payment for the work which they had already done. In our judgment they were entitled to recover the among claimed either on the basis of work done by them at the appellants' request or by way of damages on the basis of *quantum meruit.*

In the present case, the plaintiff did not repudiate the contract. It merely stopped work but considered the contract be subsisting. The reason was because the defendant had not been paying on time the claims made by the plaintiff for work done. The plaintiff also attempted to show that it was simply because the defendant had no money.

Secondly, because one Mr.Chua from the defendant Company admitted that the defendant had no money to settle the plaintiff's claim. Thirdly, it was suggested that Loh Trading barricaded the site because of the defendant's failure to pay Loh Trading. Fourthly, because the defendants's accounts how that the defendant company was not in a sound financial position.

As regards payment by Mr.Ekman (DW1) of the RM20,000 from his own pocket, I am unable to say that he did so because the defendant, had no money to pay that amount. Mr. Ekman says that he did so for reasons of expediency and was reimbursed immediately. It sounds reasonable and I accept it.

The so-called Mr.Chuah's admission that the defendant had no money to pay the plaintiff is hearsay and must be rejected.

As regards the reasons for the barricade by Loh Trading, Mr.Ekman explained that he had paid Loh Trading RM60,000 and had agreed to pay a further sum of RM10,200. According to him Mr.Loh of Loh Trading agreed but later demanded a further RM60,000 which he refused to pay. Nobody from Loh Trading was called to say otherwise. Further even in clause 10 of the agreement between the plaintiff and the defendant, it is clear the defendant was wiling to pay Loh Trading only up to RM70,200 (RM60,000 + RM10,200) in respect of the demand by Loh Trading of RM120,000.

It should be noted here that the plaintiff also called an architect of Richvale (PW2). In his examination-in-chief he said that he did not know whether the defendant had financial problems. He also did not know of the reason for stoppages of work by the defendant's earlier

sub-contractors.

However, there is the evidence of Mr.P.B. Rajendran (PW7). He is the senior regional manager of Sun-Mid Concrete Sdn. Bhd. He gave evidence that his company was supplying ready mix concrete to the defendant. The defendant could not pay by cash. They had to resort to legal notice. The developers who stood as guarantors settled the amount on behalf of the defendant. After that incident his company would only deal with the defendant on cash basis. It was also because of his company's insistence that the defendant pay cash that negotiations in October 1988 between Sun-Mix and the defendant for Sun-Mix to supply concrete to the defendant broke down. "Our terms with Ingeback (defendant) was cash. They could not pay us" he said.

I accept his evidence.

DW2, the finance director of the defendant also gave evidence. He was trying to show that the defendant was not facing any financial problem. He was subjected to lengthy cross-examination, especially on the defendant's statement of accounts. I find him not a reliable witness. The same, to a lesser extent, can be said about Mr. Ekman. Both of them are very smooth and undeniable, good talkers. They could come up with reasons that would get them out of a situation in which most other people would have been cornered. In doing so, their credibility is questionable. However, I must add that it does not mean that the whole of their evidence must be rejected.

It is clear from the cross-examination of DW2 with reference to the statement of accounts of the defendants company during that period, that the defendant company had cash-flow problem. Considering the whole of the evidence, I am of the view one of the reasons for the non-payment of the plaintiff's claims was that the defendant had cash-flow problems.

Was the plaintiff justified to stop work?

The law seems to say that even if particular contracts may give the contractor express rights if certificates are not paid, there is no general right to suspend work if payment is wrongly withheld.

In this case, there is no provision in the contract regarding suspension of work. Of course for work done the plaintiff, the defendant must pay. But this is not a case *Ban Hong Joo Mines Ltd.* the appellant deliberately refused to pay and ordered the respondent to stop work.

Here there were disputes whether the mobilisation fee was an outright payment or returnable to the defendant, whether it had been fully paid, dispute about the rate applicable, disputer about the method of measurement and dispute whether the "allowance" of RM34,000 for work done by Loh Trading could be used to set-off the plaintiff's claim. There was also dispute about rental of Mitsubishi 280 rented by the defendant because, according to the defendant, the plaintiff did not have sufficient number of machines to do work, disputes about "downtime", and insurance claim or diesel tank. The defendant had made payments to the first six claims submitted by the plaintiff, of course according to the defendant's own certification based on the method of measurement set out in clause 4 as understood by it. There was also dispute about the method of calculation of the 7th claim. However, the defendant paid for the 7th claim, according to the method of measurement of the previous six claim. This was on 27 October 1988. On the following day the plaintiff stopped work and

demanded full settlement of its 7th claim in accordance with the plaintiff's method of calculation. The plaintiff also demanded for mobilisation fee, downtime and repair claims. On the same day (28 October 1988) the defendant paid RM20,000 in settlement of the full claim though the defendant considered it as advance as, otherwise, in its view, it would be paying twice for the rock blasted by Loh Trading. The plaintiff still refused to go back to work. On the same day also the defendant paid RM15,174.90 for downtime and repair claims even though there was no provision in the agreement for such payment.

Even in its letter dated 11 November, after work had permanently stopped, the defendant still said, "We have no intention of avoiding payments which are rightly due to you under the subcontract but have to strongly object to your attempt to impose on us your own unilateral interpretation of the contract through stoppages of work...". This letter which I reproduced earlier went on to state the defendants's position regarding the sums disputed.

It cannot be disputed that many of the problems arose because of the brief manner in which the agreement was drafted. Even now, having heard the argument of both sides, it is still difficult to understand what it means, even regarding things provided for. For this PW3 has only himself to blame, as the author of the agreement.

If I were to decide only according to common sense, I would say that where parties are in endless disputes as in this case, there is no point to require them to carry on with the contract. It would only lead to more claims and more disputes. But I must decide according to law, which, in my view does not warrant suspension of work in the circumstances of this case. So, my conclusion is that the plaintiff was not justified in law to stop work.

As the defendant had made their position clear unless the dispute sums were paid first, I am of the view that the defendant had no choice but to terminate the agreement. I hold therefore that the defendant had correctly in law terminated the agreement.

Plaintiff's Claims

My conclusion does not mean that the plaintiff claims must be dismissed in *toto*. Whatever is due to the plaintiff must be paid by the defendant. Just because the plaintiff had stopped work wrongly does not mean that the defendant should be penalised in the sense that the defendant does not have to pay what is due to the plaintiff.

The plaintiff's claim can be divided into two parts - *i.e.* pre-termination and post-termination claims. "Termination" here refers to the termination of the agreement by the defendant on 17 November 1988.

Plaintiff's claims are:

(a) Mobilisation - RM30,000.00

(b) Advance and deposit

Mitsubishi 280 - RM 18,000.00

(c) Balance of claims No.7

(i) Rate of measurement - RM 23,144.80

(ii) 82% load factor - RM 12,175.05

(d) Downtime claims - RM 9,196.39

(e) Claim No.8 - RM 70,136.11

(f) Claim No.9 - RM153,000.00

Mobilisation - RM30,000

Under the agreement, it appears to me that all the defendant has to pay to the plaintiff is RM50,000 mobilisation plus RM10,200 to Loh Trading, making a total of RM60,200. It is not disputed that the defendant paid RM80,000 in all. So it is clear to me that the defendant had in fact overpaid by RM19,800 and the plaintiff's claim that RM30,000 has not been paid is misconceived.

I therefore dismiss the plaintiff's claim for the RM30,000.

(b)*Advance and Deposit on Mitsubishi 280 - RM18,000*

Pursuant to clause 7 of the defendant, the defendant hired a Mitsubishi 280 at RM9,000 per month. The defendant charged the plaintiff a sum of RM27,000 being rental for 2 months and deposit for 1 month. The amount was deducted by the defendant from the amount due to the plaintiff. The plaintiff claimed a refund of RM18,000 and a further sum of R6,900. This latter sum represents the rental for the period when the machine operator took instructions from the defendant.

The plaintiff did not dispute that the defendant had the right to hire the said machine. The defendant did not dispute that it had to pay for the rental. But the defendant disputed that the deposit was required to be paid and that the rental was payable in advance.

Mr. Ekman gave evidence that the plaintiff hired a Mitsubishi 230, a smaller model for RM10,000 per month whilst the defendant hired a larger model for only RM9,000 per month. This evidence was not refuted by the plaintiff.

In the circumstances I accept the evidence of the defendant that RM9,000 per month is a reasonable amount of rental for the machine.

Is the plaintiff then entitled to a refund of RM18,000? This amount represents the deposit and one month's rental.

I agree that the plaintiff is entitled to a refund of the RM9,000 deposit, because a deposit, being deposit was refundable to the defendant and therefore the defendant should not charge the plaintiff for it.

Was the plaintiff entitled to the refund of another RM9,000. Here, it depends on how long the machine was rented. On this point, the plaintiff admitted that the machine was on the site for

two months, during which time the defendant was paid for the work done by the machine.

In the circumstances I am of the view that the plaintiff is not entitled to claim a further RM9,000.

Therefore, out of RM18,000 claimed by the defendant, I allow a sum of RM9,000.

Is the plaintiff entitled to a further claim of RM6,900? The basis for this claim is that during that period the machine operator was under the instructions of the defendant.

Here again Mr. Ekman's evidence that the defendant only had control of the machine for 3 to 4 days and during which time the machine did the same work for which the plaintiff would have been paid was not challenged.

That being the case I hold that the plaintiff is not entitled to claim that amount of RM6,900.

(c)*Balance of Claim No. 7*

(i)Rate of Measurement - RM23,144.80

Here clauses 4, 8 and 9 reproduced earlier are relevant. The dispute is whether the defendant should be paid RM8.50 or RM4.50 for rocks transported but not blasted by the defendant.

Reading clause 4 alone, it is beyond doubt that the plaintiff would truly be paid for what it did - for blasting RM4 per cubic yard, for blasting and transporting RM8.50 per cubic yard. Therefore, by necessary implication, for transporting alone, it should be RM4.50 per cubic yard. If the plaintiff were to be paid RM8.50 irrespective whether it transported only or blasted and transported the rocks, why should the agreement provide for a different amount to be paid for the different work done?

But the problems arises because of clause 9:

> Upon final survey, allowance will be made for RM34,000 worth of work done by the previous subcontractor, Loh Trading Company.

If the plaintiff were to be paid at the rate of RM4.50 per cubic yard for rocks blasted by Loh Trading, then clause 9 would be redundant: there is nothing to give an allowance for since the value of blasting work done by Loh Trading is not claimed by the plaintiff.

It is argued by learned Counsel for the defendant that the method of calculation was applied with regard to the first six claims. The plaintiff did not complain. He argued that the plaintiff was stopped from claiming RM8.50 per cubic yard.

It is my finding that it is not quite correct to say that the plaintiff's claim were made on the basis of RM4.50 per cubic yard. Even the very first claim (B-107) contains separate claims for blasting ((a)) and for transporting ((b)). Indeed the total amount claimed was RM46,278.68. However, only RM24,890 was approved by the defendant.

Learned Counsel for the defendant also argued that the defendant on 28 October 1988 agreed to RM20,000 in settlement of the plaintiff's demand under duress. First, it is difficult to

imagine that an international company like the defendant could be made to make payment under duress. Mr.Ekman, from his demeanour alone, is not the kind of person who could be forced to make such payment.

However, whether or not the payment was made under duress, indeed, whether or not payment was made, is of no great consequence. The duty of the Court is to interpret the provisions of the contract.

In the circumstances I am of the view that the plaintiff was entitled to claim at the rate of RM8.40 per cubic yard (RM23,144.80) subject to an "allowance" to be made in favour of the defendant for RM34,000 being the value of the blasting work done by Loh Trading.

(ii) 82% Load Factor - RM23,175.05

It is not disputed that on 13 September 1988, an agreement was reached between the two parties that every lorry load of rock removed was to be calculated at 82% of the lorry's capacity. This was arrived at after an earlier dispute as to how the rock transported was to be measured despite the provision in the agreement. However, even this agreement (82%) could not solve the problem between the parties. The defendant has subsequently alleged that the lorries were loaded below capacity. Because of that the defendant reduced the amount claimed by the plaintiff by RM12,175.05. It is that amount which the plaintiff now claimed.

I am of the view that the agreement (82% load factor) was arrived at as a comprise between parties when they apparently could not agree as to the amount of rocks transported. But having agreed to that, the defendant further questioned its implementation. The defendant then said the lorries were under-loaded, meaning that they were loaded less than 82%. The 82% load is the load that each lorry is assumed to carry even though actually it might carry more, or less. In the circumstances I am of the view that the plaintiff was entitled to claim the shortfall of RM12,175.05.

(iii) Downtime and Repair Claims - RM9,198.39

The plaintiff also claimed for downtime and repairs to the machines amounting to RM9,196.39. The defendant did not deny that it agreed to pay the plaintiff for its downtime and repair claims. However, by its letter dated 11 November 1988 (B101) the plaintiff claimed that all amounts owing to the plaintiff for its downtime and repair claims had been paid but added that it (defendant) looked upon the payment as an advance and that it (defendant) reduced the amount payable to the plaintiff by RM4,048.80 being "rental for rainy days". This is the position taken by the defendant regarding almost all payments due to the plaintiff. The defendant would not pay the full amount. It would pay part of the amount claimed, saying that the other part had either been paid, not payable or it (defendant) would offset with another amount. On top of it all, even the amount paid is treated as an advance. I am satisfied on the balance of probabilities that the plaintiff has proved that this amount is due from the defendant to the plaintiff.

(d) Claim No.8 - RM70,136.11

Progress payment claim No.8 is for work done during the second half of October 1988. It was submitted by the plaintiff on 1 November 1988. The amount claimed was for RM70,436.11. It was certified on behalf of the defendant on 11 November 1988. The amount certified was

RM69,496.52. Further, there is a note "amount due should be less RM9092.12 for rock blasted previously by Loh Trading".

However, in the written submission of learned Counsel for the defendant, he argued that the amount claimed should be reduced by RM30,003, being the value of the "accumulated quantities in claims 1-7" which should not have been included. This is besides the RM9092.12 which according to the defendant should be deducted for rocks blasted by Loh Trading.

I am of the view that as the defendant had certified claim No.8 on 11 November 1988, the defendant must have been satisfied of the correctness of the amount certified *i.e.* RM69,496.52. I am also of the view that the defendant is not entitled to deduct RM9092.12 as that would be taken care of by the "allowance" of RM34,000 provided by clause 9 of the agreement. In other words I am satisfied that the plaintiff is entitled to the amount of RM69,496.52 under claim No.8 which was certified by the defendant.

(e) Progress Payment Claim No.9

With regard to this claim the plaintiff has abandoned items No.1 and 2 which is the claim for work done from 1 November to 15 November 1988. The only claim remaining is for "downtime" from 2 November to 15 November (excluding 6 and 13) at the rate of RM12,750 per day, totalling RM153,000.

Notice of this claim was first given by the plaintiff in its letter dated 28 October 1988 in the following words:

> "Note we are charging you RM12,750 per day that work is not done due to your failure to pay on time. The sum is based on 150 lorry loads removed per day." - B96.

In other words the plaintiff had suspended work because of the defendant's failure to pay on time. So for not working it charged the defendant at RM12,750 per day.

As I have held that the plaintiff had wrongly suspended work, the plaintiff is not entitled to make this claim.

(f) Plaintiff's Post-Termination Claim

Even though the claim falls under one word "damages", in his submission, learned Counsel for the plaintiff tabulated it as follows:

> <u>Phase I</u>
>
> Loss of profit on contract RM410,612
>
> Loss of profit on sale of rocks RM2,617,535
>
> Total RM3,028,147

Phase II

Loss of profit on contract RM1,302,906

Loss of profit on sale of rocks RM4,143,905

Total RM7,446,811

Phase I and II combined RM10,474,958

less RM34,000

RM49,800

RM153,000

RM236,800

Final Total RM10,238,158

In view of my decision that the defendant's termination of the contract is not unlawful, it follow that the plaintiff is not entitled to any damages at all.

However, if I am wrong, to assist the appellate Court, I shall state very briefly my conclusion on damages, if the defendant is held liable.

Loss of Profit on Phase II

First I am clearly of the view that the plaintiff is not entitled to loss of profits on Phase II. Plaintiff's own witness (PW1) confirmed that the contract between Richvale and the defendant was for Phase I only. Another witness of the plaintiff (PW2) also said "The First Phase involves 702 units". When recalled he said "Phase II has nothing to do with this case". Further article 5 of the agreement estimated the quantity of rock to be removed as 100,000 cubic meters. PW2 confirmed in cross-examination the volume refers to Phase I only. The same plaintiff's witness also said "I don't agree defendant tendered for 3866 units. Plans had not been approved... Acceptance (p. 4) is for 702 units."

So, loss of profits for Phase II should not be included.

Loss of Profits on Sale of Rocks

First, I do not think the expected profit from the sale of rocks falls within the first limb of section 74 of the Contract Act 1950, being damages which naturally arose in the usual course of things from the breach. The more relevant provision is the second limb *i.e.* damages "which the parties knew, when they made the contract, to be likely to result from the breach of it".

The rocks deposited on the dumpsite belongs to the landowner - see Clause 2 of P15: This agreement (P15) was made on 15 July 1988 which is after the agreement between the plaintiff and the defendant. I do not think that it was within the contemplation of the

defendant at the time when the agreement between the plaintiff and the defendant was signed on 27 June 1988 that there would be an agreement between the plaintiff and the landowner allowing the plaintiff to sell the rocks belonging to the landowner.

Further, the landowner (PW5) in his evidence said:

> ... the rocks deposited on this lot would belong to me. There was no other agreement with plaintiff with regard to the rocks. They proposed to buy back at RM10 per lorry. They wanted to make into quarry chips for building purposes. Chairman of the plaintiff (Mr. Chia) discussed the repurchase of the rocks with me. They needed a plant to process the rocks into chips. They planned to put up a plant...

However, there was no evidence that the plaintiff had an intention to or did anything to put up the plant. Indeed it is doubtful whether the plaintiff had the means to do it.

In the circumstances, I do not think that the plaintiff would be entitled to the damages under this head even if the termination of the agreement by the defendant is unlawful.

Loss of Profit on Contract (Phase I)

I am of the view that the plaintiff would be entitled to damages for loss of profit on contract to the amount of RM410,612 if the termination of the agreement by the defendant is wrong in law.

Counter Claim by the Defendant

I have held that the plaintiff was not justified to suspend work and that the defendant's termination of the contract was justified and lawful. Therefore the defendant should be entitled to damages, if proved. The defendant's counter claim can be divided into three parts. I shall deal with each of them accordingly.

(i)RM9,800 Overpaid by the Defendant to the Plaintiff

This is admitted by the plaintiff - see plaintiff's submission at p. 58. So there is nothing more to be said about it.

(ii)Additional Costs for Completing Earthworks the Plaintiff contracted to Do

This claim clearly falls under the first limb of section 74 of the Contracts Act 1950. The expenses incurred by the defendant contains in annexure D which was tendered through Mr. Ekman (EW1). Learned Counsel for the plaintiff did not cross-examine DW1 on this annexure. No evidence was adduced to contradict it. I accept the working of the damages done by the defendant's solicitor in his submission from pp. 58 to 61 and award the defendant the sum of RM115,177.65 being additional costs for completing the earthworks the plaintiff contracted to do.

(iii)Additional Costs Incurred as Result of Delay Caused by Plaintiff

First, it must be mentioned that the defendant abandoned para. 33(1) of the defence and

counterclaim and item 1 in annexure D. What remains are:

> (i) Increase cost of revised sequence of work for Phase I to reduce idling time of Tunnel Mould RM240,000
>
> (ii) Remaining idling time for Tunnel Moulds RM66,000
>
> (iii) Cost of additional Tunnel Moulds purchased to accelerate work (lower figure) RM514,800
>
> Total RM820,000

It is true that the agreement does not stipulate a time period for work schedule. Also, it is true that the plaintiff was given the developer's work schedule. Mr.Ekman (DW1) was cross-examined on the alleged delay caused by the plaintiff's suspension of work. Amongst other things he said:

> Services of plaintiff terminated in mid-November. I don't know whether another contractor was engaged. We did the work ourselves for some time.
>
> > Put: The next contractor came only in March 1989?
> >
> > A: That shows we did the work for ourselves for some time. I can't prove the company did the work because I was not involved.
> >
> > Put: Your company did not do the work themselves?
> >
> > A: Wrong
> >
> > Put: You wasted 4 months.
> >
> > A: It can be right that the earthwork was delayed for about 4 months.

From this I am not convinced that the delay was wholly caused by the plaintiff's suspension of work.

On the other hand, it is reasonable to expect that because of the plaintiff's suspension of work the completion of the earthworks was delayed.

In the circumstances I apportion the damages for the delay 50-50.

The working of the amount is shown in annexure D. It was not cross-examined and there is no evidence to contradict it. I therefore award the defendant RM410,000 (RM820,000 / 2 = RM410,000).

Damages Caused by Mareva Injunction

In the circumstances of this case I do not think it is correct to say that the mareva injunction

should not have been granted, but it should be for a lesser amount.

DW2 put in his calculation of the damages arising from the granting of the mareva injunction to the tune of RM681,750 - Exh.G. No documentary evidence was tendered to support the figures contained in Exh.G. I also do not accept it to be a contemporaneous document. It is a calculation prepared by DW2. As I have said earlier I found DW2 not to be a very reliable witness. I am not convinced, on the balance of probabilities that there was reduction of business, or if there was, it was due solely to the existence of the mareva injunction. After all the mareva injunction was only for RM227,000. If it is true that the defendant had RM7 million in overdraft at that time as DW2 said, surely it could be utilised to settle the RM227,000. That question was put to DW2. He could not give any answer.

In the circumstances, I hold that the defendant fails under this head.

Conclusion

In conclusion, I am of the view that the plaintiff was not justified on the facts and in law to suspend work. On the other hand the defendant had lawfully terminated the agreement.

However the plaintiff is entitled, on *quantum meriut*, for the following pre-termination claims:

(a) Plaintiff is entitled to the refund of RM9,000 deposit.

(b) Plaintiff is entitled to the balance of claim No7 of RM23,144.80. However this is subject to an allowance of RM34,000 under Clause 9 of the agreement. (Taking that into account, there is in fact a credit of RM10,855.20 due to the defendant.)

(c) Plaintiff is entitled to the sum of RM12,175.05 being the shortfall for the 82% load-factor. This amount less RM10,855.20 mentioned in para.(b) above, leaves a balance of RM1,310.85 due to the plaintiff.

(d) Plaintiff is entitled to RM9176.35 for downtime and repair claims.

(e) Plaintiff is entitled to the sum of RM69,496,52 being amount certified by the defendant for claim No.8.

Total RM89,012.76.

Plaintiff is not entitled to post-termination claims.

On the counter-claim I give judgment to the defendant for the following:

(a) RM19,800 being the amount overpaid by the defendant.

(b) RM115,177.65 being damages for additional costs for completing earthworks the plaintiff contracted to do.

(c) RM410,000 being damages for additional costs incurred by the defendant

as a result of delay caused by the plaintiff.

Total : RM544,977.65.

In the circumstances of this case I order that each party pays its own costs.