Jallcon Sdn Bhd v Nikken Metal Industries Sdn Bhd [2009] MLJU 367

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

MOHD HISHAMUDIN BIN MOHD YUNUS, J

CIVIL SUIT NO S3-22-690-1998

24 April 2009

David Lingam & H. W Yip (David Lingam & Co.) for the plaintiff
Rajesh Kumar (C.S Lam & Co.) for the defendant

MOHD HISHAMUDIN BIN MOHD YUNUS, J

GROUNDS OF JUDGMENT

This is an action for breach of contract by the plaintiff agaisnt the defendant. At the conclusion of the trial, I found for the plaintiff and awarded damages as prayed for by the plaintiff.

The plaintiff was the main contractor in a housing development project in Subang Jaya. The developer of the project is a company known as SIME UEP Homes Sdn Bhd.

The architect of the project is a firm known as T. R. Hamzah & Yeang Sdn Bhd.

The project involves the building of 42 units of double storey bungalows and 26 units of semi-detached houses. As the main contractor, the plaintiff is responsible to the developer for the construction of these houses.

The plaintiff appointed the defendant as a subcontractor to construct the windows for the houses. The plaintiff and the defendant entered into a written contract on 22 November 1996. Among the terms of the agreement (the subcontract) are that the windows are to have seamless joints, to have powder coated finnish, and to be of 'RICINNA' brand.

Under the terms of the contract, the defendant was to commence work on 2 December 1996, and to complete the work by 2 June 1997.

In this action for breach of contract, the plaintiff alleges that there is a breach of the subcontract on the part of the defendant by reason of the following:

(a) the defendant delayed in completing the work for a substantial number of days;

(b) the windows constructed by the defendant were not seamless RICCINA windows; and

(c) there was poor quality workmanship and defects in the construction of the windows.

There is a clause in the subcontract which stipulates a penalty for delay. According to clause 4(c) of the subcontract read with the Appendix of the same, the penalty provided for is RM300 per day per unit.

At the conclusion of the trial, upon a careful evaluation of the evidence as a whole, and after having given due consideration to the submissions, I found that the defendant had breached the subcontract. I found that on a balance of probbilities the plaintiff has succeeded in proving that -

(a) the defendant delayed in the completion of the work for a substantial number of days;

(b) the windows constructed by the defendant were not seamless RICCINA windows; and

(c) there were poor quality workmanship and defects in the construction of the windows.

On the issue pertaining to delay.

It is the evidence that although the defendant under the subcontract was supposed to commence work on 2 December 2006, yet they only started work in March 1997. The defendant was very slow in their work. The plaintiff had made numerous complaints and had issued notices to the defendant urging them to hasten their work. Even the architect had complained to the defendant about the delay.

By the dateline of 2 June 1997 the defendant had still not completed the work. Despite that, however, no application for an extension of time was ever made by the defendant to the architect.

Be that as it may, it is, however, claimed by the defendant that they had completed the work by 7 October 1997. But this claim was rejected by the plaintiff for the following reasons:

(1) the windows were not of the seamless RICCINA type;

(2) there was poor quality workmanship and defective work, which had caused damage to other parts of the construction, for example, water seepage into completed houses; and

(3) the defendant, instead of rectifying the defective works, had removed completed windows from the project.

The defendant, despite being put on notice by the plaintiff to remedy the delects. refused or failed to rectify the defects. Their inability to do the rectification works was due to tight financial constrains.

It is the contention of the defendant that there was no delay and that they had completed the work by 7 October 1997. The defendant acknowledges that the dateline as prescribed by the subcontract was 2 June 1997. However, the defendant contends that this dateline had been extended by the Master Work Programme. In support of their contention, the defendant refers to the judgment of Abdul Malik Ishak J (as he then was) in *Jallcon (M) Sdn Sdn v Nikken Metal Industries Sdn Bhd (No. 2)* [2001] 6 CLJ 23 where in allowing an Order 14 summary judgment application by the defendant against the plaintiff (in the present case) in respect of their counterclaim against the latter in relation to the same subcontract, the learned Judge ruled that the Master Work Programme had extended the dateline and that there was no delay on the part of the defendant.

In the present case, however, I accept the plaintiffs contention that the Master Work Programme (prepared by the plaintiffs site manager (PW4) and approved by a director of the plaintiffs company (PW2)) did not extend the dateline. 1 accept the plaintiffs argument that the Master Work Programme was only meant to be a guideline for internal use of the plaintiff and for ensuring coordination between the various parties involved in the project as well as to monitor the progress of the works of the various subcontractors, and did not in any way meant to alter or to modify the defendant's legal obligation under the subcontract as to the dateline that had already been prescribed.

In the present case, in making my finding of fact or law, I am of the view that, as a matter of principle, I am not bound by the finding of Abdul Malik Ishak j in *Jallcon (M) Sdn Sdn v Nikken Metal Industries Sdn Bhd (No. 2)* (earlier cited) on the issue of delay as that was merely a judgment pertaining to an interlocutory application by the defendant for an Order 14 summary judgment based on affidavit evidence; whereas the finding of delay that I now make in this case that is now before me is a finding made after a full trial with the benefit of hearing and evaluating the oral evidence of witnesses who had been subjected to thorough cross-examination by defence counsel. In any case that judgment is irrelevant by reason of sections 41, 42 and 43 of the Evidence Act 1950.

It is submitted by the defendant that the delay, if at all there was any delay, was caused by the plaintiff themselves who had delayed in erecting the 'mock up' of the house. I rejected this argument. Firstly, there is nothing in the subcontract that obliges the plaintiff to construct the mock up. Secondly, paragraph 6 of the statement of defence that makes reference to the mock up is vague and general in nature. Thirdly, the defendant's sole witness. Encik Wong Swee Kong (DW1), a director of the defendant, when asked in cross-examination as to when the mock up was ready, was unable to answer the question. Fourthly, if the mock up was really that essential before the defendant could commence their work, it is pertinent to ask as to why the defendant never responded to the plaintiffs several written complaints by counter-complaining regarding the failure on the part of the plaintiff to construct the mock up. DW1, when asked during cross-examination, claims that he only complained verbally to one

'Mr. Liew', the plaintiffs site superviser; but DW1, however, gave no particulars regarding the time, date, place and the occasion when this alleged verbal complaint to the so-called Mr. Liew was made; and nor was Mr. Liew called by the defence to corroborate the defendant's evidence of having made a verbal complaint regarding the mock up.

On the issue pertaining to notice of demand.

It is a submission of the defendant that they were never served with a notice of demand in respect of-

(a) the claim for Liquidated Ascertained Damages (LAD); and

(b) the claim for expenses/damages incurred by by the plaintiff in engaging third parties for rectification works in respect of the poor quality workmanship and defective work by the defendant.

In respect of this argument, the learned defence counsel in his submission does not explain why this notice is, as a matter of law, necessary before the present suit could be filed by the plaintiff. In my judgment there is nothing in the subcontract that requires a notice of demand be served on the defendant by the plaintiff before the present action could be instituted, as suggested by the defence.

On the issue pertaining to the retention sum of RM48,665.37.

This issue is not pleaded by the defendant in their statement of defence and counter-claim, hence I do not propose to deal with it. In any case I fail to see the relevance of this issue. To raise this issue is to throw in a red herring.

On the issue pertaining to the plaintiffs claim in respect of defective works.

It is the submission of the defendant that the plaintiff must first give notice of termination of the subcontract to the defendant before engaging a third party to carry out the rectification in respect of the defective works of the defendant. For this proposition, the defendant relies on clause 11 of the subcontract. It must be appreciated that the present case is a situation where the defendant had failed to carry out rectification works despite ample notice and time being given by the plaintiff and where the defendant was - as admitted by the defendant's sole witness - in no financial position to carry out the rectification works. To my mind, there is nothing in clause 11 that states that the plaintiff must first terminate the subcontract before engaging a third party in a situation where the defendant has failed to do rectification. Clause 11 merely provides for the right of the plaintiff to terminate the subcontract in the event of certain defaults (as specified in the clause) on the part of defendant and the procedure to be complied with (such as the giving of notice) before exercising the right of termination. Clause 11 confers a right of termination on the plaitiff: it does not impose any duty on the plaintiff to terminate.

The brief details of all payments made by the plaintiff to third parties to complete or rectify the defective work can be seen in exh. P7. The supporting debit notes can be found in Bundle C. I accept the plaintiffs claim of RM49,493.35 as being for cost of engaging third parties as being proven and reasonable. In any event this amount does not appear to be seriously disputed by the defence.

On the calculation of Liquidated Ascertained Damages (LAD).

I was satisfied on the calculation of LAD for late delivery by PWl (the plaintiffs managing director, Encik Tang Tuck Hong) and that the LAD sum proven was RM2,669,700. PWl was cross-examined on the calculation of the LAD but his evidence does not appear to be seriously challenged by the defence; hence, his testimony remained unshakened. I accept his evidence as credible.

Reduction of certain sums from the amount of RM973,307.42 due to defendant.

Firstly, I accept the right of the plaintiff to make a deduction of a sum of RM172,682.16 from the subcontract sum of RM973.307.42 due and payable by the plaintiff to the defendant for the construction of the windows under the subcontract. This is because the defendant had failed to supply and instal seamless RICCINA windows as agreed under the subcontract. The defendant had, instead, installed 'mitre-joint' aluminium window frames.This reduction sum of RM 172,682.26 is based on a quotation (at pages 20-26 of Bundle C) obtained by the plaintiff from an alternative supplier, HKY Industries Sdn Bhd for the supply of mitre-joint aluminium windows. This quotation tendered by the plaintiff was, however, objected to by the defence as being inadmissible as the maker of the quotation was not called. Although I upheld the objection and only marked the quotation as exh. ID6, nonetheless, I am of the view that the defendant should not be paid the full subcontract sum as the windows supplied were not of

the type agreed under the subcontract. The subcontract sum of RM973,307.42 was for seamless RICCINA windows and not for mitre-joint aluminium windows. Therefore, a certain amount of deduction must be made from the subcontract sum, and I think the reduction sum of RM 172,682.16 is fair and reasonable.

There should also be a further reduction of RM 122,162.04 from the contract sum of RM973,307.42 as the defendant had supplied the plaintiff thinner window joints than as agreed under the subcontract. In fact it is PWl's evidence that the subcontract price was first reduced from 973,307-42 to RM971,186,63 due to variations, and subsequently further reduced to RM851,145-38 due to the defendant supplying thinner window joints than was originally proposed. I hold that this further reduction of RM122,162.04 as fair and reasonable. In any case, the plaintiffs evidence on this reduction was not seriously disputed by the defence.

I do not propose to go into further arithmetic details and to deal with other lesser sums.

The judgment sum.

In the final analysis, I gave judgment for the plaintiff in the sum of RM2,491,851.12 as calculated at pages 114-115 of the plaintiffs written submission at end. B(l).

[Judgement for the plaintiff with costs.]
