

**IN THE COURT OF APPEAL OF MALAYSIA
THE PALACE OF JUSTICE, PUTRAJAYA**

CIVIL APPEAL NO. B-02-98-2002

Appellants

- (1) FOO KHOON CHIN
- (2) SAMSUDIN BIN ABU BAKAR
- (3) PEM ENGINEERING SDN. BHD.

v.

Respondents

- (1) GAS PANTAI WORKS SDN. BHD.
- (2) GAS PANTAI TIMUR SDN. BHD.

(IN THE MATTER OF THE HIGH COURT OF MALAYA, SHAH
ALAM, CIVIL SUIT NO: 22-521-91)

Plaintiffs

(1) GAS PANTAI SDN. BHD.

(2) GAS PANTAI TIMUR SDN. BHD.

v.

Defendants

(1) FOO KHOON CHIN

(2) SAMSUDIN BIN ABU BAKAR

(3) PEM ENGINEERING SDN. BHD.

Coram: Tengku Baharudin Shah Tengku Mahmud, JCA

Zainun Ali, JCA

Mohd Hishamudin Mohd Yunus, J

JUDGMENT OF THE COURT

This is an appeal by the appellants against the decision of Faiza Tamby Chik J given at the High Court of Shah Alam on 20 June 2001. The learned Judge gave judgment in favour of the plaintiffs (now, the respondents before us in

this appeal) in their civil action against the defendants (now, the appellants before us in this appeal) for breach of contract; and had awarded them damages.

We have on 25 February 2009 dismissed the appeal with costs, and we now give our grounds.

The respondents'/plaintiffs' claim is based on a written agreement entered into by the appellants/defendants and the respondents on 29 October 1990. The respondents' claim against the appellants is that pursuant to clauses 3 and 4 of the agreement the first and second appellants are legally obliged to pay them a sum of RM261,454.

The respondents are also claiming that, by reason of clause 8 of the agreement, the first and second appellants are legally obliged to transfer 33,000 shares of Gas Pantai Works Sdn. Bhd. (that is to say, shares of the first respondent), presently registered in the name of the first and second appellants, to the second respondent at the price of RM1 per share.

It is alleged by the respondents before the High Court that the appellants failed to make the payments as required under clauses 3 and 4.

It is also alleged by the respondents that the first and second appellants had failed to transfer the 33,000 shares to the second respondent as required by clause 8.

Clauses 3 and 4 of the agreement state –

(3) GPW debtors as per Annex 1 attached

KC undertake to collect all due and outstanding debts before 31/12/90. Any undue debts will be collected by KC as and when they are due. Any debt (other than Felda, MPPJ and STM) not collected before 31/12/90 or on due date as the case may be will be deemed a loss by GPW for the purpose for computation of loss under para 4. Upon payment of the loss by KC, GPW will assign the debts to KC to enable KC to recover debt by legal action or whatever means KC deems fit.

(4) Any loss (including loss deemed to be incurred in para 3 above and any loss carried forward from 1/4/89 based on audited accounts) suffered by GPW as at 31/12/90 will be borne and paid by KC on or before 28/2/91. For purpose of this para, any overhead incurred by GPW from 1/10/90 will not be considered as GPW's expense.

Clause 8 provides as follows:

(8) 33,000 Shares in GPW

KC will immediately deliver all the share certificates together with duly executed transfers to GPT. The purchase price for the share shall be at par (\$1.00 per share) and the amount due to KC will be offset against any amount that may be due by KC.

In the above three clauses, the abbreviation 'KC' refers to the three appellants (Foo Khoon Chin, Shamsudin Bin Abu Bakar and GPW Engineering Sdn Bhd); the abbreviation 'GPW' refers to the first respondent (Gas Pantai Works Sdn Bhd); and the abbreviation 'GPT' refers to the second respondent (Gas Pantai Timur Sdn. Bhd.). All this is explained by clause 1 of the agreement.

The background facts of the case are given by one Encik Wan Ariff bin Wan Hamzah (PW1). He was at the material time the chairman of both respondents. They are as follows. The first and second appellants were, at the material time, officers of the first respondent company. What had happened was that the first respondent discovered that it was incurring losses

due to the activities of the first and second appellants. It was discovered that the first and second appellants had given credits loosely to customers of the first respondent; and, besides that, had secretly established a company, that is, the third appellant/third defendant, with the first and second appellants being the directors of that company. The third appellant company was originally named 'GPW Engineering Sdn. Bhd.'. This name (GPW Engineering Sdn. Bhd), however, was deliberately chosen by the first and second appellants to confuse members of the public as the first respondent/first plaintiff was also commonly known to the public as 'GPW'. When the incorporation of the third appellant was discovered by the first respondent, the first and second appellants tendered their resignation as officers of the first respondent on 15 October 1990. Thereafter, on 29 October 1990 the parties entered into the agreement as mentioned above.

When the establishment of GPW Engineering Sdn. Bhd. was discovered by the first respondent, the appellants, upon being required by the first respondent, agreed to change the name of the third appellant from 'GPW Engineering Sdn. Bhd.' to some other name, which name would not be similar to either the name of the first respondent or the name of the second respondent. This agreement was incorporated in the written agreement of 29

October in the form of clause 7. Subsequently the name of the third appellant was changed from 'GPW Engineering Sdn. Bhd.' to 'PEM Engineering Sdn. Bhd.'.

Under clause 3 of the agreement, the appellants agree to collect all due and outstanding debts of the first respondent as listed in Annex 1 of the agreement. Under the same clause, it is also agreed that any debt not collected before 31 December 1990 or on the due date, as the case may be, will be deemed to be a loss to the first respondent. If the appellants did not collect the debts by the said date, they must pay the first respondent a sum equivalent to the amount of debt not collected. The first respondent will then assign the debts to the appellants to enable the latter to collect the debts.

Under clause 4 of the agreement, it was agreed that any loss incurred, (including any loss deemed to be incurred by virtue of clause 3, and any loss (based on audited accounts) carried forward from 1 April 1989), by the first respondent as at 31 December 1990, will be borne and paid by the appellants on or before 28 February 1990.

PW1, in his evidence, explained that the losses reflected in the audited accounts for 31 December 1990 was RM266,492. The losses incurred before 1 April 1989 (that is, the date before the first appellant become a director of the first respondent) was RM5,038.00. The sum of RM261,454 is derived by deducting the sum of RM5,038.00 (the losses before the first defendant became a director) from the sum of RM266,492.00. In summary, the respondents' claim is –

Losses in the audited accounts as at 31 December 1990	-	RM266,492
<i>minus</i>		
Losses in the audited accounts before 1 April 1989	-	<u>RM 5,038</u>
Actual losses to be claimed	-	<u>RM261,454</u>

An argument that is raised by the appellants before us is that the learned High Court Judge erred when he failed to consider that there was absence of consideration in the written agreement between the appellants and the respondents. This argument was also canvassed by appellants before the learned High Court Judge. But, the learned Judge rejected the argument on the ground that the issue of lack of consideration was not pleaded by the appellants in their statement of defence. With respect, we are in agreement with the learned Judge. In our view, a defendant to an action for breach of

contract cannot raise the issue of lack of consideration unless he has raised that issue in his statement of defence. In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 1 CLJ (Rep) 283 George Seah FJ, in delivering the judgment of the Federal Court said (at p. 284):

We have examined the specimen forms of statement of claim based on agreements not under seal in *Bullen & Leake's Precedents* and *Atkin's Court Forms* and we are unable to find anything to indicate that 'consideration' ought to be pleaded specifically. *On the other hand, if the defence is to be based on 'no consideration' or 'a failure of consideration' then the specimen forms show clearly that such a defence should be expressly pleaded* [see O. 18 r. 11].

[Emphasis added.]

Another issue raised before us by the appellants is that the first respondent had revoked the agreement by reason of two letters that it had issued. The first letter is the first respondent's letter to the first and second appellants dated 22 December 1990. The second letter is the first respondent's letter of 1 December 1990 to one of its customers, a company known as Multi-flow Engineering Sdn. Bhd.. This issue was also canvassed by the appellants before the High Court but was also dismissed on the ground that it was not pleaded in the statement of defence. We are of the view that the learned

Judge was correct in rejecting the appellants' argument. Just as in the case of the earlier issue, this issue of revocation was also not raised in the statement of defence (see *Gimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Sdn. Bhd.* [1987] 1 MLJ 302; and *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ (Rep) 330). What we do note, however, is that there is a vague averment in paragraph 4 of the statement of defence to the effect –

4. Secara alternatifnya, sekiranya didapati bahawa perjanjian tersebut adalah sah (dan ini dinafikan), adalah menjadi pertikaian Defendan-defendan bahawa oleh sebab Plaintiff telah memungkirkan perjanjian tersebut dan kemungkirkan telah diterima oleh Defendan-defendan, maka Perjanjian tersebut tidak sah lagi.

What we observe from the above pleading is that, firstly, what is being alleged is not 'revocation' of the agreement, but a 'breach' (*memungkirkan*) of the agreement. Secondly, it is not elaborated in the paragraph in what manner the alleged 'breach' was committed. With respect, we do not think that paragraph 4 can be relied upon by the appellants to contend that the issue of revocation had been pleaded in the statement of defence. In any case we have examined the contents of the two letters and in our view it is far-fetched for the appellants to assert that the letters amount to a revocation of the agreement of 29 October.

Another issue raised by the appellants in this appeal is that the respondents had failed to prove before the High Court Judge that they had incurred a loss of RM261,454 with interest as claimed in the statement of claim. In our judgment, how this loss came about had been adequately explained and proved before the trial Judge. PW1, in his evidence, had explained that the losses had been shown in the audited accounts for 1988, 1990, 1991, and 1997. These audited accounts were tendered by PW1 at the trial, and their admissibility were never objected to by the appellants; and hence they have been marked as exhs. P3, P2, P4 and P5, respectively. The losses as shown by exh. P2 amount to RM266,492. We have pointed out earlier how the sum of RM261,454, as is now claimed by the respondents in their action against the appellants, is derived. In this regard, we further note that at the trial the respondents had, through PW1, introduced an affidavit of an auditor, one Encik Ab. Halim bin Mohyiddin (a registered accountant) affirmed on 23 October 1997. The tendering of this affidavit was not objected to by the appellants at the trial, and it was accordingly marked as exh. P7. Encik Halim, in his affidavit (exh. P7), confirmed that all the contents of the audited accounts of the first respondent from 1988 to 1991, as exhibited in

his affidavit, were true and fair. At the trial, PW1, when cross-examined by the appellants' counsel, was never challenged as to the truth and accuracy of the accounts; nor as to the correctness of the respondents' understanding of the same. In fact he was not cross-examined at all on the accounts. We are, therefore, satisfied that the respondents' claim as to their losses is satisfactorily supported by credible documentary evidence. It is also significant to note that in this appeal the issue of the admissibility, accuracy or the correctness of the respondents' interpretation of exhs. P2, P3, P4, P5 and P7 are not specifically raised in the memorandum of appeal.

With regard to the claim for the 33,000 shares in Gas Pantai Works Sdn. Bhd., this claim by the respondents is not denied by the appellants at the trial. Indeed, during cross-examination, both the first and second appellants admitted that the shares have not been delivered and transferred to the second respondent.

In this appeal before us there are other issues raised by the learned counsel for the appellants in his submissions. However, we do not propose to deal with them as they are not set out in the memorandum of appeal.

[Appeal dismissed with costs]

(DATO' MOHD HISHAMUDIN BIN MOHD YUNUS)

Judge, Court of Appeal

Kuala Lumpur

[Then a High Court Judge sitting as a member of the panel of the Court of Appeal]

Date of decision: 25 February 2009

Date of written grounds of judgment: 15 June 2009

Encik T. S. Lai (*Messrs Lai & Associates*) for the appellants

Puan Norzidatul Aini bt. Mohd Nazri and Puan Nor Aziza Ismail (*Messrs Ariff & Co.*) for the respondents