

**IN THE COURT OF APPEAL OF MALAYSIA  
(APPELLATE JURISDICTION)  
CIVIL APEAL NO: J-04-109-2006**

**BETWEEN**

**JOHOR BAHRU PYRAMID SDN. BHD. .... APPELLANT**

**AND**

**SINOMETAL PUNCHING TECHNOLOGY SDN. BHD.  
(Formerly known as Sinometal Industries Sdn. Bhd.)  
.... RESPONDENT**

**(In the matter of Civil Appeal No: MT4-12-65-2004  
In the High Court of Malaya at Johor Bahru)**

**BETWEEN**

**SINOMETAL PUNCHING TECHNOLOGY SDN. BHD.  
(Formerly known as Sinometal Industries Sdn. Bhd.)  
.... APPELLANT**

**AND**

**JOHOR BAHRU PYRAMID SDN. BHD. .... RESPONDENT**

**(In the matter Summons No: 883-22-12-1997  
In the Sessions Court at Johor Bahru)**

**BETWEEN**

**JOHOR BAHRU PYRAMID SDN. BHD. .... PLAINTIFF**

**AND**

**SINOMETAL PUNCHING TECHNOLOGY SDN. BHD.  
(Formerly known as Sinometal Industries Sdn. Bhd.)  
.... DEFENDANT**

**CORAM:**  
**SURIYADI HALIM OMAR, J.C.A.**  
**ZAINUN ALI, J.C.A.**  
**AHMAD HAJI MAAROP, J.C.A.**

**JUDGMENT OF THE COURT**

The appeal before us relates to balance of payment of monies due and owing from the respondent to the appellant for material supplied and work carried out by them.

It is not in dispute that the appellant had completed all works pursuant to the contract. It is also not in dispute that the appellant was a contractor employed by the respondent to construct a factory building on the respondent's land.

The appellant had been paid a total sum of RM2,418,705 by the respondent, leaving a balance of RM167,795 which the respondent disputed. The respondent in fact, attempted to set-off the said sum for the following reasons:

- (i) that the respondent has a claim against the appellant for Liquidated Ascertained Damages (LAD) for the sum of RM162,000; and
- (ii) that a sum of RM5,295 claimed by the appellant for additional paint work is not additional works but is part of the original contract sum.

After perusing the notes of evidence and cause papers, we find that there was overwhelming oral and documentary evidence adduced to support the appellant's case that the respondent was not entitled to claim the LAD. In fact the oral and documentary evidence adduced were raised without there being any objection whatsoever by the respondent or its counsel.

The respondent was not entitled to claim LAD for the following reasons:

- (a) The delay in completing the project was contributed by the respondent for their late rejection of the Pantech Solid Aluminium Panels.
- (b) There were additional works imposed by the respondent.
- (c) There was delay caused by the respondent's nominated sub-contractors in carrying out their respective works, and
- (d) the LAD to be imposed was decided by the respondent, and not by the Consultant Engineer.

It must be noted that the respondent failed to produce the certificate of non-completion at the trial, when it is clear that the said certificate is essential and is a condition precedent before the LAD can be deducted. (See **Peak Construction (Liverpool) Ltd. v. McKinney Foundation Ltd 1 BLR 111 1971**).

Moreover the evidence showed that it was the respondent through SD1 i.e. the Marketing Director who imposed the LAD, when the LAD should be certified by the Consultant Engineer.

As shown, the original completion date was on 30.9.1995. It is not in dispute that the date was extended twice, on 15.10.1995 and on 20.11.1995.

The conduct of the respondent and the granting of the extension indicated a waiver of the condition for making time the essence of the contract. (See **Sim Cho Huat v. Wong Ted Fui [1983] 1 MLJ 07 and Hock Huat Iron Foundry v. Naga Tembaga Sdn. Bhd. [1999] 1 CLJ.**)

Moreover, the evidence of SP2 (the appellant's Managing Director) that the sum of RM5,295 claimed by the appellant for additional paint work, went unchallenged.

In the circumstances, we were unanimous in allowing the appeal. This appeal is allowed with costs, here and below.

Dated this day 15<sup>th</sup> January 2009

**(DATUK ZAINUN BINTI ALI)**  
**Judge**  
**Court of Appeal**  
**Malaysia.**

**Counsel For the Appellant:** Dr. Wong Kim Fatt  
(Mathews George  
and John Fernandez with him)

**Solicitors For the Appellant:** Messrs R. Muthu & Co.

**Counsel For the Respondent:** P. Suppiah  
(S.Kandasamy with him)

**Solicitors For the Respondent:** Messrs Kanda & Associates