

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. P-02-669-1999**

ANTARA

DATARAN RENTAS SDN BHD ... PERAYU

DAN

BMC CONSTRUCTIONS SDN BHD ... RESPONDEN

(Dalam Perkara Mahkamah Tinggi Malaya di Pulau Pinang
Penggulungan Syarikat No. 28-87-1998

Dalam perkara mengenai Akta
Syarikat, 1965

Dan

Dalam perkara mengenai Dataran
Rentas Sdn Bhd (No. Syarikat
34953-M)

Antara

BMC Construction Sdn Bhd ... Pempetisyen

And

Dataran Rentas Sdn Bhd ... Responden)

Coram: Gopal Sri Ram, J.C.A.
Mohd Ghazali Mohd Yusoff, J.C.A.
Zulkefli bin Ahmad Makinudin, J.C.A.

JUDGMENT OF ZULKEFLI BIN AHMAD MAKINUDIN, J.C.A.

Introduction

This is an appeal by the appellant [the respondent in the Court below] against the decision of the High Court at Penang wherein on a winding-up petition filed by the respondent [the petitioner in the Court below] against the appellant the High Court had made the following orders:-

- (i) that the appellant be wound up pursuant to the provisions of the Companies Act 1965;
- (ii) that the Official Receiver be appointed the provisional liquidator of the appellant; and

- (iii) that the costs of the petition be paid out of the assets of the appellant.

Background Facts

The relevant background facts leading to the filing of the winding-up petition by the respondent against the appellant are as follows:

- (1) The respondent's claim against the appellant is for the sum of RM173,096.18 due and owing by the appellant to the respondent pursuant to four interim certificates issued under a building contract entered into between the two parties.
- (2) By a letter of award dated 29.7.1997, the appellant awarded a building contract to the respondent.
- (3) Pursuant to the letter of award, it was agreed that the terms and conditions of contract are as per PAM

Standard Form Building Contract 1969 Edition (without Quantities) [“PAM Conditions”].

- (4) Pursuant to Clause 30(1) of the PAM Conditions read together with the Appendix, the appellant was contractually obliged to pay the respondent the amount due under Interim Certificate within thirty days.
- (5) The appellant has failed to pay the following interim certificates within the stipulated time stated under Clause 30(1) of the PAM Conditions.

<u>CERTIFICATE NO.</u>	<u>DATES</u>	<u>AMOUNT DUE</u>
5	15.1.98	RM 23,876.74
6	15.2.98	RM 23,986.80
7	16.3.98	RM 68,086.41
8	16.4.98	<u>RM 57,146.23</u>
		RM173,096.18
		=====

(6) Certificate No. 1 to 4 was partly paid in cash and in kind through contra by way of respondent's purchase of one semi-detached industrial unit in the same project from the appellant as the appellant was short of cash and there was never any dispute as to the certificate.

(7) Clause 26(1)(a) of the PAM Conditions reads:

“Without Prejudice to any other rights and remedies which the contract may possess, if :-

(a) The Employer does not pay to the contractor the amount due on any certificate within the period for Honouring Certificates named in the appendix to these conditions and continues such default for seven days after receipts by registered post..... then the contractor may thereupon by notice by registered post or recorded delivery to the Employer or Architect forthwith determine the employment of the contractor under this Contract

provided that such notice shall not be given unreasonably or vexatiously.”

- (8) By virtue of the breach of contract on the part of the appellant to honour payment of interim certificates, the respondent had vide their solicitors wrote to the appellant on 11.4.1998 of intention to determine the contract unless payment of sums due under the interim certificates was made. The appellant failed to pay the said sums due.
- (9) The respondent had on 24.4.1998 vide solicitors wrote to the appellant to determine the contract under Clause 26(1)(a) of the PAM Conditions.
- (10) At that material time, the appellant did not challenge the respondent's determination of 24.4.1998 nor took steps to refer the matter for arbitration under Clause 34 of the PAM Conditions.

- (11) Following the determination of the contract, the appellant had through the architect wrote to the respondent on 26.6.1998 and proposed terms of an amicable settlement. However, parties could not agree.
- (12) On 29.7.1998, the respondent issued a Section 218(2)(1) notice under the Companies Act 1965 to the appellant who refused and neglected to pay and pursuant to that the respondent filed a winding-up petition pursuant to Section 218(1)(e) read with Section 218(2)(a) of the Companies Act 1965 to wind up the company on the basis that the company is unable to pay its debt.
- (13) On 16.9.1998, the winding-up petition was presented against the appellant. The appellant company was wound up on 13.7.1999. There is no stay of proceedings.
- (14) It was only after the presentation of the winding-up petition against the appellant that the appellant filed the

Civil Suit No. 895 in the Penang High Court on 29.10.1998 against the respondent claiming breach of contract.

Decision of the Court on Appeal

We are of the view based on Clause 26(1)(a) of the PAM Conditions, it gives the respondent the contractual right to determine the respondent's employment under the contract in the event of the failure of the appellant to pay within the time stipulated under Clause 30(1). On this point it is to be noted that in the case of **Pembinaan Leow Tuck Chui & Sons Sdn. Bhd. v. Dr. Leela Medical Centre Sdn. Bhd. [1995] 2 AMR 1289**, the Federal Court held inter alia that by virtue of the express provisions of the Contract allowing contractual right of set off, it was construed that the Contract excludes the operation of common law rights of set off. As such, the employer's right of set off against the sum due under the Contract is restricted to those expressly allowed under the Contract. In the present case the

appellant have no permissible set off under the PAM Contract against the certified sum. There was no architect's instruction given under Clause 2(1) that the works carried out by the respondent was defective. Neither was there any instruction of the architect given under Clause 6(4) for the removal from site of any work, materials or goods which are not in accordance with the Contract at all material time prior to the determination of the contract on 24.4.1998.

Applying the legal principles laid down by the Federal Court in **Pembinaan Leow Tuck Chui**'s case, it is our judgment that the appellant have no right to deduct or set off against the sums certified under the interim certificates. The respondent is entitled to payment immediately and as such the debt cannot be disputed and the appellant has no meritorious defence. The appellant's allegation that the determination of contract by the respondent was wrong and that there were defective works is an afterthought. It is wholly inconsistent with their conduct both before and after the

determination of the contract on 24.4.1998. Prior to the determination of the contract there was never any complaint from the architect in the form of architect's instructions of any failure or breach of contract on the part of the respondent. A reference to the Architect's Interim Certificates No. 5, 6, 7 and 8 would show the architect had stated in all these certificates a statement which reads "*Addition/Deduction for works not in accordance with the Contract*" as being "RM nil". This fact clearly shows there was no breach by the respondent. There was also no cross-claim which has been certified by the architect which entitles the appellant to set off such cross-claim against the certificates issued in favour of the respondent. It therefore follows that the respondent's contractual determination on 24.4.1998 under Clause 26(1)(a) of the PAM Conditions was justified and rightly made. The appellant's allegation that it was a wrongful determination must fail and the appellant is not entitled to any right of set off. The appellant has no bona fide dispute or counterclaim against the respondent.

We are also of the view if the appellant thought the determination of the contract was wrong, they should have referred the matter for arbitration. There is a provision in Clause 34 of the PAM Conditions which states that the disputes between the appellant and the respondent may be referred to arbitration. Instead the appellant had sought to negotiate with the respondent for a reduction of the sums due and resumption of work. It is also noted that the appellant did not call upon the Insurance Guarantee granted by Malaysia British Assurance Berhad dated 23.9.1997 which guaranteed the sum of RM140,000.00 in favour of the appellant in the event the respondent failed to perform the contract. The guarantee was effective from 2.8.1997 to 6.12.1998. If there is any truth in the appellant's allegation that the respondent was in breach in determining the contract on 24.4.1998, one would have expected the appellant to call on the guarantee.

The appellant only filed the Civil Suit No. 895 against the respondent after the Winding-up Petition was filed. This shows that the appellant was not acting bona fide and their allegations were mere afterthought. Furthermore the lack of bona fides in the appellant's purported claim can be seen in the report of Messrs. Mokhtar & Associates which was undated and upon which the appellant have sought to rely to support their contention that their claim is more than the amount as claimed by the respondent in the interim certificates. This report was undated and was only introduced by way of the appellant's affidavit dated 19.4.1999. This was about one year after the determination of the contract on 24.4.1998. This report was not sanctioned nor verified by the architect who was the Superintendent Officer of the project concerned. It is indeed strange why the appellant did not engage the architect to prepare a report of his inspection since it was the architect who carried out the joint inspection in 1998 following the determination of the contract.

Conclusion

For the reasons already stated we would dismiss the appellant's appeal with costs and make an order that the deposits be paid to the respondent to account of taxed costs.

(DATO' ZULKEFLI BIN AHMAD MAKINUDIN)
Judge
Court of Appeal

Dated: 25th September 2007.

Counsel for the appellant: Mr. J. A. Yeoh.

Solicitors for the appellant: Messrs. Shearn Delamore & Co.

Counsel for the respondent: Ms. Karin Lim.

Solicitors for the respondent: Messrs. Lim Leng Han & Co.