

HTC Global Services MSC Sdn Bhd v Kompakar Ebiz Sdn Bhd A

HIGH COURT (KUALA LUMPUR) — SUIT NO D8-22-1428 OF 2007 B
KANG HWEE GEE J
12 AUGUST 2008

Civil Procedure — Appeal — Summary judgment — Triable issues — Breach of contract of services — Whether defendant raised triable issues in plaintiff's application for summary judgment — Whether bare allegations constitute triable issues — Whether defendant estopped from denying transactions were properly carried out by not objecting to invoices issued and received C
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Civil Procedure — Interest — Interest for late payment — Whether plaintiff entitled to charge interest for late payment under contracts

HTC Global Services MSC Sdn Bhd ('the plaintiff') had entered into three separate contracts to provide software services to the defendant's company. The first two contracts, namely the offshore contract and the onsite contract were written agreements while the third contract, ie the PPMA contract, was an oral agreement. It was a term of the written agreements that the defendant had to make payment to the plaintiff within 30 days from the date of the invoices. The plaintiff invoiced the defendant in stages for the work it completed and in all the invoices issued to the defendant there was a clause stipulating that any discrepancies with respect to the invoices should be communicated to the plaintiff within seven days of the issuance of the invoice. However, the plaintiff alleged that the defendant had only made one payment amounting to RM5,000 after having received 16 invoices. The plaintiff thus sent a letter of demand to the defendant claiming the outstanding sum of RM418,213.11, which was the outstanding sum under the 16 invoices less the payment of RM5,000. The plaintiff then filed a suit against the defendant to recover the outstanding sum of RM418,213.11 together with interest for late payment and costs. The plaintiff later applied for summary judgment against the defendant for the sum of RM418,213.11 with interest and costs. The senior assistant registrar allowed the plaintiff's application with interest and costs and this was the defendant's appeal against that decision. The defendant submitted that it had no opportunity to verify the works carried out on the written contracts. As for the PPMA contract, it was the defendant's stand that there was evidence that the works had not commenced at all. The defendant further submitted that the plaintiff was not entitled to charge interest as there was no provision for it to do so under the three contracts. The plaintiff maintained that E
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- A the defendant was in breach of the written contracts by not paying within the term agreed upon; and that as for the PPMA contract which was based on invoices the defendant was estopped from denying that the transactions were properly carried out by not objecting to the invoices within seven days of the issuance of the invoices. The plaintiff further submitted that the allegation by
- B the defendant that they could not verify the works done was a self-serving allegation as well as a bare allegation.

Held, dismissing the appeal except for the part dealing with interest for late payment with costs:

- C (1) From the affidavits of the parties it was clear that having received the invoices issued by the plaintiff on those two written contracts the defendant had not seen it fit to lodge any complaint or disagreement on the items in the invoices until the suit was filed. It is settled law that where
- D a party failed to raise any objections on the invoice it had been served relating to any contract it was estopped from denying that payment was due from it. Similarly with respect to the PPMA contract, which was oral in nature, the defendant had failed to object to the invoices issued and received by it until the suit was filed. As such, the principle of estoppel would apply (see paras 27–28).
- E (2) It was clear that the defendant had no defence to the plaintiff's claim. There was also no triable issue save for the question of whether the plaintiff was entitled to charge interest for late payment. It was held that such interest should only be chargeable if the contract so provides and in
- F the present case there was no such provision in all the three contracts. Thus the decision of the SAR was to be varied to disallow the interest for late payment (see para 30).

[Bahasa Malaysia summary]

- G HTC Global Services MSC Sdn Bhd ('plaintif') telah memasuki tiga kontrak berasingan bagi membekal perkhidmatan perisian kepada syarikat defendan. Dua kontrak pertama, iaitu kontrak luar pesisir dan kontrak lokasi adalah perjanjian-perjanjian bertulis manakala kontrak ketiga, iaitu kontrak PPM, adalah perjanjian lisan. Adalah terma perjanjian-perjanjian bertulis bahawa
- H defendan hendaklah membuat bayaran kepada plaintif dalam tempoh 30 hari dari tarikh invois-invois. Plaintif telah memberi invois kepada defendan secara berperingkat bagi kerja yang ia telah siap dan dalam semua invois-invois yang dikeluarkan kepada defendan terdapat fasal yang menetapkan bahawa apa-apa pertikaian berkaitan invois-invois tersebut hendaklah dikemukakan kepada
- I plaintif dalam tempoh tujuh hari dari pengeluaran invois itu. Walau bagaimanapun, plaintif mengatakan bahawa defendan hanya membuat satu bayaran berjumlah RM5,000 setelah menerima 16 invois. Plaintif dengan itu telah menghantar surat tuntutan kepada defendan menuntut baki jumlah RM418,213.11, yang merupakan jumlah baki untuk 16 invois tersebut tidak

termasuk bayaran RM5,000 tersebut. Plaintiff kemudian telah memfailkan guaman terhadap defendan untuk mendapatkan semula jumlah baki RM418,213.11 berserta faedah kerana bayaran lewat dan kos. Plaintiff kemudiannya telah memohon penghakiman terus terhadap defendan untuk jumlah RM418,213.11 beserta faedah dan kos. Penolong kanan pendaftar ('PKP') telah membenarkan permohonan plaintiff berserta faedah dan kos dan ini adalah rayuan defendan terhadap keputusan tersebut. Defendan berhujah bahawa ia tiada peluang memeriksa kerja yang dijalankan terhadap kontrak-kontrak bertulis itu. Berhubung kontrak PPMA, defendan berpendirian bahawa terdapat bukti yang kerja-kerja tidak bermula langsung. Selanjutnya defendan berhujah bahawa plaintiff tidak berhak mengenakan faedah kerana tiada peruntukan untuk berbuat demikian di bawah ketiga-tiga kontrak tersebut. Plaintiff menegaskan bahawa defendan telah melanggar kontrak-kontrak bertulis tersebut dengan tidak membayar dalam tempoh yang dipersetujui; dan berhubung kontrak PPMA yang berasaskan invois-invois defendan telah diestopkan daripada menafikan bahawa transaksi-transaksi telah dijalankan dengan tidak membantah terhadap invois-invois dalam tempoh tujuh hari daripada pengeluaran invois-invois itu. Selanjutnya plaintiff berhujah bahawa dakwaan oleh defendan bahawa mereka tidak dapat mengesahkan kerja-kerja yang dijalankan merupakan pengatahan untuk diri sendiri dan dakwaan kosong.

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Diputuskan, menolak rayuan kecuali bahagian berkaitan faedah untuk bayaran lewat dengan kos:

- (1) Berdasarkan affidavit-afidavit pihak-pihak adalah jelas bahawa dengan menerima invois-invois yang dikeluarkan oleh plaintiff untuk dua kontrak bertulis tersebut defendan tidak dilihat sesuai untuk membuat apa-apa aduan atau tidak bersetuju tentang item-item dalam invois-invois itu sehinggalah guaman difailkan. Adalah undang-undang tetap bahawa jika satu pihak gagal menimbulkan apa-apa bantahan terhadap invois yang telah diserahnya berkaitan apa-apa kontrak maka ia diestop daripada menafikan bahawa bayaran perlu dibuat daripadanya. Begitu juga berhubung kontrak PPMA, yang bersifat lisan, defendan telah gagal membantah terhadap invois-invois yang dikeluarkan dan diterima olehnya sehinggalah guaman itu difailkan. Oleh itu, prinsip estoppel adalah terpakai (lihat perenggan 27-28).
- (2) Adalah jelas bahawa defendan tiada pembelaan terhadap tuntutan plaintiff. Tiada juga isu yang perlu dibicarakan kecuali persoalan tentang sama ada plaintiff berhak mengenakan faedah untuk bayaran lewat. Adalah diputuskan bahawa faedah sebegitu hanya patut dikenakan jika kontrak memperuntukkan sebegitu dan dalam kes ini tiada peruntukan sedemikian dalam semua tiga kontrak. Oleh itu keputusan PKP wajar diubah untuk tidak membenarkan faedah kerana bayaran lewat (lihat perenggan 30).]

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A Notes
For cases on interest in general, see 2(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3955–4021.
For cases on summary judgment, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1665–1672.

B Cases referred to
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Sdn Bhd [1995] 3 MLJ 331; [1995] 3 AMR 2871, FC (refd)
Gisco Sdn Bhd v Blackgold (M) Sdn Bhd [1988] 2 MLJ 397 (refd)
C *MP Factors Sdn Bhd v Suangyan Projects Sdn Bhd & Ors* [2007] 8 MLJ 602; [2007] 4 AMR 327, HC (refd)
Ong & Company Pte Ltd v Foo Sae Heng [1990] 2 MLJ 85; [1990] 1 CLJ 856, HC (refd)
D *Sykt Pakar Kayu & Perdagangan Sdn Bhd v MAA-sk Sdn Bhd* [1986] 1 CLJ 595, HC (refd)
United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657, FC (refd)

Legislation referred to
E Civil Law Act 1956 s 11
Justin Voon (Alvin Lai with him) (Sidek Teoh Wong & Dennis) for the plaintiff. YP Wong (Chris Koh & Chew) for the defendant.

F Kang Hwee Gee J:
ENCLOSURE 16

G [1] This is an appeal against the decision of the senior assistant registrar in allowing the plaintiff's application to enter summary judgment against the defendant for the sum of RM418,213.11 with interest and cost.

[2] The plaintiff's claim arose from services provided by the plaintiff to the defendant in respect of providing software for the defendant's computers.

H [3] The plaintiff invoiced the defendant in stages as work was completed and the plaintiff's claim involves the amount payment of 16 outstanding invoices remaining unpaid as follows:

PARTICULARS				
	Date	Invoice No	Project	Amount (RM)
a)	31/12/2005	2005-06/029	'Onsite'	27,500.00
b)	31/12/2005	2005-06/029B	'Offshore'	45,000.00

c)	31/1/2006	2005-06/039	'Onsite'	27,500.00	A
d)	31/1/2006	2005-06/040	'Offshore'	45,000.00	
e)	28/2/2006	2005-06/048	'Onsite'	39,833.34	
f)	1/3/2006	2005-06/049B	'Offshore'	36,482.13	
g)	31/3/2006	2005-06/058	'Onsite'	40,282.61	B
h)	3/4/2006	2005-06/058B	'Offshore'	31,500.00	
i)	28/4/2006	2005-06/068	'Onsite'	15,757.89	
j)	2/5/2006	2005-06/069B	'Offshore'	31,500.00	
k)	31/5/2006	2005-06/077	'Onsite'	1,257.14	
l)	31/10/2005	2005-06/010	'PPMA'	20,000.00	C
m)	30/11/2005	2005-06/026	'PPMA'	15,400.00	
n)	31/12/2005	2005-06/035	'PPMA'	15,400.00	
o)	31/1/2006	2005-06/044	'PPMA'	15,400.00	
p)	28/2/2006	2005-06/054	'PPMA'	15,400.00	
		RM423.213.11			D
Less payment from the Defendant at the end of June 2007 (which is part payment for the last invoice for the 'PPMA' works dated 28/2/2006)	RM 5,000.00				E
Total principal outstanding sum	RM418.213.11				F

[4] The defendant made only one payment amounting to RM5,000 after having received all the invoices. The sum was deducted by the plaintiff from the amount due on the last invoice. G

[5] A letter of demand was sent to the defendant by the plaintiff demanding the sum claimed and in between there were negotiations without prejudice. H
 MISS YP WONG FOR THE DEFENDANT

[6] The plaintiff's claim is based on three contracts:

- (a) offshore contract for works to be done in India by the plaintiff for the defendant. This contract is a written contract dated 11 May 2005 exh 'C1' of encl 9 for works to be performed at the defendant's site in India; I
- (b) onsite works to be done locally vide a written contract exh 'C2' of encl 9;

A (c) PPMA contract — oral.

[7] With respect to (i) there is no opportunity for the defendant to verify the works alleged to be carried out in view of the fact the works were done in India.

B [8] In respect of (ii) there is also no opportunity to verify the claim in the invoices.

C [9] With regards to PPMA contract (iii) above there is evidence that works did not commence at all. See e-mail of ex-CEO Mr David Ramoo exh 'C3' of encl 9 complaining that works have not begun.

D [10] The payment of RM5,000 by the defendant to the plaintiff was meant by the defendant to pay for the first invoice listed in the claim, invoice No 2005–06/029. The plaintiff has used this payment to pay for the PPMA Invoice No 2005–06/054. This should not be construed as the defendant having admitted that the claim on the PPMA contract had been completed or even commenced at all.

E [11] The subsequent e-mail exh 'S6' encl 8 between Mr David Ramoo and plaintiff's representative Mr Saji Abraham excludes the PPMA claim.

F [12] Interest portion: claim is asking interest from 1 March 2006 of 8%pa of principal sum RM418,213.11. The last invoice dated 31 May 2006 and each of the plaintiffs invoice provided a credit term of 14 working days as stipulated in the invoice itself. The interest should start running after 14 days not immediately (counsel for the plaintiff agrees interest should start running 14 days after each invoice is issued).

G MR JUSTIN VOON FOR THE PLAINTIFF

H [13] Both the contracts for the onsite works and the offshore works (i) and (ii) above contain a clause which states that payment should be made 30 days from the date of the invoices. This is in exh 'C1' para 4.2 of the contract and exh 'C2' para 11(b) of the contract. The defendant had breached this term by not paying within the time agreed upon.

I [14] As for PPMA (iii) above, although there is no written contract there are in fact invoices which had been duly issued to the defendant and they had acknowledged that they had received the same. The law is clear on contracts based on invoice. See *Ong & Company Pte Ltd v Foo Sae Heng Pte Ltd* [1990] 2 MLJ 85; [1990] 1 CLJ 856 at p 857: '... by not objecting, he had effectively affirmed that the transactions were properly carried out. He was estopped from denying the same.'

[15] On each and every invoice in exh 'S1' of encl 8, there is a clear statement 'Any discrepancies in the invoices should be informed to us within seven days from the invoice date'. There was no protest after the invoices were issued and received by the defendant. See *MP Factors Sdn Bhd v Suangyan Projects Sdn Bhd & Ors* [2007] 8 MLJ 602; [2007] 4 AMR 327 applying the Federal Court case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Sdn Bhd* [1995] 3 MLJ 331; [1995] 3 AMR 2871 per Gopal Sri Ram JCA co-opted at p 336:

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Each of the invoices also bear a clear statement that any objection to the bills or its items must be notified to them in writing within fourteen (14) days of its receipt, failing which the bills would be deemed final and conclusive against the main contractor. Consequently, these invoices are deemed good for payment as there was no objection from the main contractor within the stipulated period. More importantly, the plaintiff had acted to its detriment in releasing the initial payments to the first defendant based on the aforesaid invoices. The defendants ought now to be estopped from stating that they do not owe the plaintiff the sum claimed or any other sums.

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[16] There is also an admission from the e-mail dated 20 September 2006 of Mr David Ramoo the previous CEO of the defendant in relation to a sum of RM340,355.97 with respect to the two written contracts (excluding PPMA) by the following words: 'As mentioned on the phone, the situation is getting a little clearer and the company should be in the position to settle this within the next 2–3 months. I hope you will bear with us for a little while longer.' This was in reply to the plaintiffs e-mail dated 17 September 2006 regarding the two written contracts.

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[17] The allegation by the defendant that they cannot verify the works done is a self-serving allegation as well as a bare allegation.

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[18] In relation to item (iii) ie the PPMA works, the e-mail referred to in exh 'C-3' of encl 9 is not evidence of any bona fide dispute. It also contains a self-serving allegation and a bare allegation that purportedly the works have not been implemented. In this regard the defendant who had received all the invoices issued for the PPMA works had failed to timely object to each of the said invoices within the seven days stipulated therein. In addition I submit that it is a bare allegation because it failed to condescend to any particulars as to which invoices are disputed and the basis for such dispute. In this regard the e-mails at exh 'S6' of encl 8 do show that on 21 July 2006 the plaintiff had e-mailed to the defendant's ex-CEO had mentioned therein 'the PPMA implementation' but the defendant's reply via e-mail dated 24 July 2006 did not at any time alluded to the implementation of the PPMA works that the plaintiff had undertaken.

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A [19] In relation to the part payment of RM5,000 the plaintiff did not dispute that the sum was used to offset the last invoice. In any event this cannot be a triable issue because the principal amount outstanding remained the same ie RM418,213.11 after taking into account this part payment of RM5,000.

B [20] The plaintiff admits that interest on late payment is not provided for under all the three contracts but the court has the discretion under s 11 of the Civil Law Act 1956 to award such interest.

REPLY BY MISS YP WONG

C [21] The plaintiff is not entitled to charge interest in any case as there is no provision for it to do so under the three contracts. Further the plaintiff appears to have unlawfully charged interest as it had calculated interest from the date before the payment is due on the last invoice.

D [22] The defendant in its affidavit in reply dated 4 February 2008 para 11 takes the position that the payment of RM5,000 was made for onsite works which the defendant had verified been carried out for that particular works only.

E [23] See *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657. See also *Gissco Sdn Bhd v Blackgold (M) Sdn Bhd* [1988] 2 MLJ 397.

F FINDINGS AND DECISION

[24] Having heard the submission of parties, I am in full agreement with Mr Justin Voon that the senior assistant registrar was right in allowing the plaintiff's claim.

G [25] The plaintiff's claim arose from three separate contracts, the first two of which were vide two written agreements. With respect to the first agreement, cl 4.2 provides that 'payment shall be made by the defendant to the plaintiff within 30 days from the date of invoices' and cl 11(b) of the second agreement provides the same condition of payment although differently worded. In all the invoices issued to the defendant there is a clause stipulating that any discrepancies with respect to the invoices must be communicated to the plaintiff within seven days of the issuance of the invoice.

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[26] The agreements were not disputed. To determine whether there is any triable issue or defence to the plaintiff's claim, all that is necessary for the court to consider is whether the invoice had been issued and received and whether any disagreement over the item stated therein has been communicated to the plaintiff.

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[27] It is clear from the affidavits of the parties that after having received those invoices on those two written contracts the defendant did not see it fit to lodge any complaint or disagreement on the items in the invoices until the suit was filed.

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[28] The law is clear. Where a party fails to raise any objection on the invoice of which they have been served relating to any contract it is to be estopped from denying that payment is due from them. See *Sykt Pakar Kayu & Perdagangan Sdn Bhd v MAA-sk Sdn Bhd* [1986] 1 CLJ 595; *MP Factors Sdn Bhd v Suangyan Projects Sdn Bhd & Ors* [2007] 4 AMR 327.

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[29] Similarly with respect to the third contract which is oral in nature, it is the duty of the defendant to object to the invoices that had been issued and received by them and having failed to do so the same principle of estoppel will apply. It is clear that in respect of the five invoices pertaining to the third contract no such objection had been lodged with the plaintiff until the suit is filed.

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[30] In the event it is clear that there is no defence to the plaintiffs claim and no triable issue to go for trial save for the question of whether the plaintiff is entitled to charge interest for late payment. Such interest should only be chargeable if the contract so provides and in the present case there is no such provision in all of them.

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[31] Accordingly, the appeal is dismissed with costs. The decision of the senior assistant registrar is to be varied by disallowing the interest for late payment by removing prayer (ii) of the judgment.

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[32] Enclosure 17: struck out with no order as to costs. It should be left there.

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[33] Enclosure 19: academic — struck out with no order as to costs.

[34] Enclosure 29: academic — struck out with no order as to costs.

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A *Appeal dismissed except for the part dealing with interest for late payment with costs.*

Reported by Kohila Nesan

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