DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN
[GUAMAN SIVIL NO: BA-22NCVC-266-06/2019]

ANTARA

FL SYSTEM SDN BHD
(NO. SYARIKAT : 761124 – A) ... PLAINTIF

DAN

PLE ENGINEERING & CONSTRUCTION SDN. BHD.
(NO. SYARIKAT : 1107029 – X) ... DEFENDAN

GROUNDS OF JUDGMENT

Introduction

[1] On 25.6.2019 the Plaintiff commenced this civil suit against the Defendant for the sum of RM1,200,000.00 which it alleged was due and owing by the Defendant as at 3.6.2019 for goods sold and delivered to the Defendant.

[2] Upon the Defendant filing its Statement of Defence, the Plaintiff filed on 26.11.2020 its application *vide* Enclosure 18 for summary judgment against the Defendant.

[3] The next day, the Defendant filed its application in Enclosure 20 to strike out the Plaintiff's claim pursuant to Order 18 rule 19(1) (a), (b) and/or (d) ROC,2012.

[4] Both the applications were heard together.

[5] Written Submissions and reply submissions were filed followed by clarifications from counsels on both sides.

[6] After perusing and upon consideration of the respective submissions I had on 9 February 2021 allowed the Plaintiff's application for summary judgment and dismissed the Defendant's application for striking off. I now provide the grounds for my decision.

[7] The facts are disputed and therefore I will deal with the facts pursuant to the application in the following manner.

The Plaintiff's Claim

[8] The Plaintiff is in the business of supplying electrical goods such as distribution panels and/or related electrical goods. The Plaintiff claims that the Defendant was a customer who made orders for the goods to which the same was delivered and accepted by the Defendant.

[9] The Plaintiff states that despite numerous reminders and demand the Defendant failed, refused and neglected to make full payment for the goods that were delivered and accepted by the Defendant.

[10] Proof of the goods delivered and accepted as well as the details of the amount outstanding are found in Credit Notes, Invoices and Delivery Orders attached as exhibits in the Plaintiff's Affidavit in Support dated 26.11.2020. The Affidavit in Support also shows a tabulated form of the details of the amount outstanding in Paragraph 7.

The Defendant's Defence

[11] The Defendant states that it is the subcontractor hired by Powerlite M & E Sdn Bhd to supply engineering services and/or carry out electrical words for a project known as "P-011341 Utama Lodge (the Project).

[12] The Defendant states that at all material times it was Powerlite that ordered the goods from the Plaintiff and it was Powerlite that instructed the Plaintiff to deliver the goods to the project site. The Defendant referred to WhatsApp messages between the Plaintiff and Powerlite to support its averment.

[13] The Defendant states that it had never ordered nor did it request the Plaintiff to supply the goods referred to by the Plaintiff in its claim. The Defendant states that it did not enjoy any benefit from the goods that were delivered and the goods were only used to fulfil the Defendant's obligations as a subcontractor to Powerlite.

[14] It is the contention of the Defendant that there is no privity of contract between the parties as the Defendant is merely the recipient of the goods delivered to the site.

[15] Hence it is the contention of the Defendant that the Plaintiff is not entitled to summary judgment of its claim.

[16] For the same reasons the Defendant contends that the Plaintiff's claim is unsustainable and should be struck out.

The Summary Judgment Application

[17] It is trite that summary judgment can only be granted when there are not triable issues raised by the Defendant.

[18] This Court is guided by the principles laid down in *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220, where it was stated by the Federal Court as follows :

> *"...We think it appropriate to remind ourselves once again that in every application under O. 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O. 14. For the purposes of an application under O. 14, the preliminary requirements :-*
>
> *i. The statement of claim must have been served on the defendant;*
>
> *ii. The defendant must have entered an appearance;*
>
> *iii. The affidavit in support of the application must comply with the requirements of r. 2 of the O. 14.*
>
> *... If the plaintiff fails to satisfy either of these considerations, the summary may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why the judgment should not be given against him..."*

[19] In the case presently before this court, the Plaintiff has satisfied the preliminary requirements as laid down in the ***Kayu Raya*** case in that the statement of claim had been served on the Defendants; the Defendants have entered appearance and the affidavit in support is in compliance with O. 14 r. 2 of the ROC. Therefore the burden shifts to the Defendants to satisfy the court why judgement should not be entered against it.

[20] In *Bank Negara Malaysia v. Mohd Ismail* [1992] 1 CLJ 627, the Supreme Court held that the duty of a judge does not end as soon as the fact is asserted by one party, or denied or disputed by the other on affidavit. The judge has a duty to reject if such assertion or denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or is inherently improbable. The Court will have to identify the issues of fact or law and to determine whether they are triable.

[21] If the Defendants can show even one triable issue, this Court will not grant summary judgment. As made clear by the Federal Court in *Voo Min En & Ors v. Leong Chung Fatt* [1982] 1 LNS 47; [1982] 2 MLJ 41, it is not enough for the Defendants to raise an issue or any issue. The Defendants must instead raise such an issue as would require a trial in order to determine it.

Evaluation and Findings of the Court

[22] In this matter, it is the finding of the court that the documentary evidence points unerringly to there being a contractual relationship between the Plaintiff and the Defendant in no uncertain terms.

[23] After the orders were made, there is evidence to show that the Defendant accepted the Plaintiff's goods as per the Orders. On this score there is evidence of acceptance by the Defendants from the Delivery Orders tendered and marked as exh EL 1 of the Plaintiff's Affidavit in support of the Notice of application.

[24] From my perusal all the Delivery Orders contain the stamps of the Defendant's name and/or its representative's signatures at the bottom of each of the Delivery Order.

[25] These acceptance of the goods by the Defendant would show proof of two things. One would be that the goods were supplied to the

Defendant and not to any other party. Secondly the goods were accepted by the Defendant without any complain. There was no refusal to accept the goods. This much was admitted to by the Defendant in Paragraph 11(d) of their Affidavit in Reply dated 22.12.2020 whereby the Defendant averred to the following *"saya sesungguhnya menyatakan bahawa wakil- wakil defendan telah menandatangani sebahagian dokumen di eksibit E- 1"*.

[26] These are admissions by the Defendant which must be taken into consideration and ought not to be ignored by the Court.

[27] It is pertinent to add that the Delivery Orders attached in the application which the Defendant has not denied receiving contain only details related to the Defendant. The Delivery Order shows the name and address of the Defendant in two places. There is nothing to show that the goods were delivered to Powerlite or ordered by another third party. The goods were delivered to the person named in the Delivery Order and in the natural order of business the goods must have been sent to the one who ordered it.

[28] If the goods were not ordered by the Defendant then certainly the Defendant would have rejected and returned the goods. If the Defendant were to be believed that the goods were not ordered by them, then there would be remarks in the Delivery Order to the effect that the goods were sent to the entity that ordered at the address to which the goods are to be delivered to. There was no intimation from the Defendant that they were merely recipients of the goods. Their conduct in accepting the goods without any qualification constituted an acceptance of the goods delivered.

[29] Quite importantly if indeed the Defendant did not order the goods, then remarks would have been recorded in the Delivery Order to that effect i.e. that the goods were received on behalf of Powerlite.

[30] From my perusal of all the Delivery Orders, they reveal that the caption of "received by" all contained the Defendant's stamped chop accompanied by the Defendant's representative signatures. I would agree with the contention of the Plaintiff that this would suffice to strongly indicate that the Defendant unconditionally accepted the Plaintiff's goods. The Defendant is thus estopped from denying otherwise.

[31] This Court accepted the Plaintiff's contention that section 42 of the Sale of Goods Act 1957 applies in the circumstances of this case.

Section 42 states :

> *"Acceptance"*
>
> *42. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."*

[32] In the case of *JAC Malaysia Sdn Bhd v. Labels Specialist Industries Sdn Bhd* [2004] MLJU 26 the Court had the occasion to expound on the applicability of section 42 of the Sales of Goods Act 1957. The learned Judge held :

> *"Proceeding further I must refer to s. 42 of the Sale of Goods Act 1957. That section enacts that where the goods have been delivered to the buyer and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them the*

buyer is deemed to have accepted the goods. Now, in the present appeal before me, the defendant after having received the siliconised release paper processed it and then sold it to their clients for it to be made into "thermal bags". The defendant must therefore be deemed to have accepted the goods."

[33] Likewise in this case presently before me, the documentary evidence shows that the goods were delivered to the Defendant and it has not acted inconsistently with the ownership of the goods. It has accepted and used the goods without any condition. The Defendant is deemed by conduct to have accepted the goods. It brought on the unerring conclusion that having accepted and used the goods that was delivered there can be no other inference other than that the Defendant was also the party who ordered the goods from the Plaintiff.

[34] A close perusal of the tabulated details of the outstanding amount owed by the Defendant as set out in Paragraph 5 of the Statement of Claim shows that there was a recurrent relationship between the Plaintiff and the Defendant from as early as 2016. The details of the transaction cover a period of 12 months and it is shown that the Defendant made a couple of part payments leaving a balance of RM1,200,000.00 outstanding.

[35] That together with the Delivery Order showed there was privity of contract between the parties. The Plaintiff has no need to claim from the main contractor when it was the Defendant who ordered the goods as manifested in the Delivery Order.

[36] In this matter the Defendant argued that the Plaintiff did not make any offer to the Defendant for supply of the goods and the Defendant never accepted or agreed to any quotation from the Plaintiff to supply the goods. Therefore, it would not be possible for a

contract to be formed between them. Section 2(a) and (b) of the Contracts Act 1950 was referred to for support.

[37] This court would prefer to refer to s. 5 of the Sale of Goods Act 1957 where it covers a situation where a contract of sale comes about.

Section 5 of the Sale of Goods Act 1957 states as follows :

> *5(1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.*
>
> *(2) Subject to any law for the time being in force a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.*

[38] In this matter the contract of sale as attested to by the Plaintiff in Paragraph 9 of its Affidavit In Reply dated 23.12.2020 was made both orally, in writing and implied by conduct of both parties. In my judgment there was acceptance of the goods when the Defendant acknowledged receipt of it in the Delivery Orders. Applying s. 42 of the said Act, the court is of the view that the Defendant accepted the goods delivered to them and by virtue of its acceptance there arose a valid contract of sale between the parties. Having taken delivery of the goods, the Defendant must be held to be liable for the payment of the amount outstanding.

[39] From the pleadings the following can be inferred. Firstly, the Defendant had no objection to the delivery of the goods to the Defendant as shown in the Delivery Orders. Secondly the Defendant

had accepted the goods and used the goods delivered by the Plaintiff. In this scenario s. 42 of the Sale of Goods Act 1957 ought to be applied against the Defendant in favour of the Plaintiff.

The WhatsApp messages

[40] The Defendant relied on the WhatsApp messages in Exh PCJW 1 of their Affidavit in Reply dated 22.12.2020 to show that there is no privity of contract between the Plaintiff and the Defendant. The WhatsApp messages have to be perused in its perspective. The message is said to be from the representative of Powerlite. It is reproduced here below :

> *"All the ELCB Typical unit DB Block A ...still not change to Schneider*
>
> *...All cable termination done, you will take more time to change it, how to proceed with testing".*

[41] I do not see this as an affirmation that there is a contract subsisting between the Plaintiff and Powerlite. Without more it cannot amount to proof that Powerlite made those orders for the goods.

[42] In another WhatsApp message at Exh PCJW 1 of the Defendant's Affidavit in Reply dated 22.12.2020 the Defendant has written "*yes yes" "Chase u stock n payments*" and "*Ada all I need it*". Even if the Defendant were to aver that this would not amount to a contract between them and the Plaintiff it would go a long way to show that there was a relationship between the parties and the messages form part of an order from the Defendant to the Plaintiff for more supplies.

[43] The Plaintiff has brought attention to copies of three cheques which were purportedly issued by the Defendant to the Plaintiff under

its name. This is found in Exh EL 3 of the Plaintiff's AIR dated 28.12.2020.

[44] This effectively demolishes the Defendant's denial that there was any contractual relationship between the parties. These cheques show that the Defendant was in a contractual relationship with the Plaintiff. I would agree with the Plaintiff's argument that the Defendant has taken a conflicting position to avoid making payments. The Defendant cannot approbate and reprobate. It is worthwhile to refer to the case of *BCM Electronics Corporation Sdn Bhd v. Mimos Berhad* [2019] 1 LNS 973 where the court held as follows :

> *"**[33]*** The defendant's contention is that the joint stock count was only out of goodwill and the agreement to purchase 1,000 PCBA could not in any way be construed as an admission of liability. With respect I find trouble in accepting this line of argument. I do not think a GLC such as the defendant would pay another company to the tune of RM1,595,623.49 out of sheer goodwill.
>
> ***[34]*** *If it was the position of the defendant all along that there was no consensus ad idem between the parties, the defendant would not have paid the aforesaid sum to the plaintiff. The Procurement Agreement is what it is. It is not with respect a settlement agreement to discharge the parties, in particular the defendant of its respective obligations.*
>
> ***[35]*** *Learned counsel for the plaintiff submitted that the defendant cannot approbate and reprobate. It cannot say that in the absence of any PO, there was the order was never confirmed but later on paid for a portion of the "unconfirmed order". I find merit in this argument. The Court of Appeal case of Cheah Theam Kheng v. City Centre Sdn Bhd (in liquidation) and other*

appeals [2012] 2 CLJ 16 held that a part cannot be blowing hot and cold."

[45] Premised on the documentary evidence it is manifestly clear that the Defendant has failed to raise any triable issue or a question in dispute that would warrant a trial to be held. On the other hand, it is a plain and straightforward claim for goods sold and delivered. The Plaintiff is entitled to record summary judgment against the Defendant for the sum claimed.

Defendant's Application to Strike out the Plaintiff's claim.

[46] In view of my decision on the summary judgment application above, there is no premise for the Defendant to succeed in its application to strike out the Plaintiff's claim. Based on the above reasons clearly the Plaintiff's claim is obviously sustainable. The claim is not frivolous or vexatious nor is it an abuse of process of court.

Conclusion

[47] For all the reasons alluded to above, I hereby allow Enclosure 18 and dismiss Enclosure 20 with costs of RM2500 for each application after considering counsels' submissions on the same.

Dated: 3 MAY 2021

(JULIE LACK)
Judicial Commissioner
High Court of Malaya
Shah Alam, Selangor Darul Ehsan

COUNSEL:

For the plaintiff - Remyzen Moksin & Sri Lachman Kumar Ramanathan; M/s Prem & Associates

For the defendant - Joel Lim Phan Hong & Carmen Yen Pei Ying; M/s Joel & Mei

Case(s) referred to:

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220

Bank Negara Malaysia v. Mohd Ismail [1992] 1 CLJ 627

Voo Min En & Ors v. Leong Chung Fatt [1982] 1 LNS 47; [1982] 2 MLJ 41

JAC Malaysia Sdn Bhd v. Labels Specialist Industries Sdn Bhd [2004] MLJU 26

BCM Electronics Corporation Sdn Bhd v. Mimos Berhad [2019] 1 LNS 973

Legislation referred to:

Contracts Act 1950, s. 2(a), (b)

Rules of Court 2012, O. 14 r. 2, O. 18 r. 19(1) (a), (b), (d)