

**IN THE MAGISTRATES' COURT AT KUANTAN
IN THE STATE OF PAHANG
[CIVIL SUIT NO: CA-A72NCvC-398-11/2019]**

BETWEEN

KHAIRUL ANNUAR BIN MOHD YUSOF

[IDENTITY CARD NO.: 611227065101]

... PLAINTIFF

AND

HABIBAH BINTI MOHD SALLEH

[IDENTITY CARD NO.: 621004715014]

[PERUNDING HS NO. PEND 001555175-T]

... DEFENDANT

GROUND OF JUDGMENT

Introduction

[1] The Plaintiff had filed a civil suit (Enclosure 1) against the Defendant for breach of contract (the offer letter dated 5th Mac 2013) in that there was a failure of the Defendant to pay the amount of salary upon the completion of the contract.

[2] The application for summary judgment (Enclosure 7) was dismissed by this Court on 5th August 2020 and the case had proceeded with a full trial. The Plaintiff had called 1 witness meanwhile the Defendant had submitted no case to answer.

[3] I had dismissed the Plaintiff's claim with costs, for the reasons I shall now elaborate.

The Background Facts

[3] The Plaintiff was employed as an Assistant Resident Engineer of the Defendant's company.

[4] The Defendant is a sole proprietor of an engineering consulting company under the name of Perunding HS with registration number of 001555175-T incorporated in Malaysia.

[5] By an offer letter dated 5th Mac 2013, entered into between the parties, the Defendant had agreed to appoint the Plaintiff as an Assistant Resident Engineer to work on a construction project of Ibu Pejabat Polis Daerah [IPD] Pekan, Pahang.

[6] The contract period stipulated in the offer letter is 20 months or upon the completion of construction on site and add another 3 months of post contract period (whichever lesser) from 1st Mac 2013. Upon the completion of the project on 30th June 2016, Suria Synergy Constructors (M) Sdn Bhd had issued the Certificate of Practical Completion which is 38 months and 30 days later from the date of the agreement.

[7] The Plaintiff had claimed that the Defendant ought to pay the amount of salary upon the completion of the construction amounting to RM18,746.00 as an Assistant Resident Engineer for the months of August and September 2016. Hence, a legal action to claim the amount of RM18,746.00 for the professional work done by the Plaintiff as an Assistant Resident Engineer was filed before this Court.

The Plaintiffs' arguments

[8] The Plaintiff had submitted the contract period between parties had never lapsed and still exists on the date prescribed in the claim. The Plaintiff further asserted that the Defendant's contention on the terms of "whichever is lesser" was fallacious and misdirected from its original intention derived from the offer letter. The meaning behind the word of "post-contract period" is a period after "defect liability period" which is after 3 months of the completion of the construction, which led to 30th September 2016 (if the additional 3 months is added). The Defendant strictly submitted that the contract period still exists until 30th September 2016 which entitles the Plaintiff's right to claim for the said amount of RM18,746.00.

The Defendant's arguments

[9] On the other side of the picture, the Defendant asserted that the contract period had ceased by way of an effluxion of time. The Defendant further contended that the contract period had started on 1st Mac 2013. As per stated in the offer letter, the contract period should be 20 months (additional 3 months) from the 1st March 2013 which was on February 2015 or upon the completion of the construction (additional 3 months) which was on 30th June 2016, which led to 30th September 2016 (if the additional 3 months is added). The Defendant firmly submitted that the contract period had already ended on February 2015 which had denied Plaintiff's right to claim for the said amount of RM18,746.00, applying the "whichever is lesser" terms provided in the item 5 of the said offer letter.

Reasons for the decision

Whether the contract period had ceased by way of an effluxion of time;

[10] There were several points raised by both parties, but I am of the opinion that this very material point is of cardinal importance to scrutiny first as it could change the whole course of this case. Now back to the main issue here which is whether the contract period stipulated in the offer letter had already ceased by way of an effluxion of time.

[11] To answer this issue, reference must be made to the offer letter itself as below:

CONTRACT PERIOD: Your contract period is 20 months or completion of construction on site and add another 3 months of post contract period (whichever is lesser)

[12] SP1 himself conceded to this fact and it can be reflected in the cross-examination of SP1 as below:

“Pemeriksaan Balas

8) Soalan: Tempoh kontrak kamu bertulis di Perenggan 5, surat bertarikh 5.3.2013 di muka surat 1, Ikatan Dokumen Bersama, betul?

Jawapan: Ya.

9) Soalan: Situ dia kata “Your contract period is 20 months or completion of construction on site” Nampak?

Jawapan: Nampak.

10) Soalan: Ada perkata “or”, nampak?

Jawapan: Nampak.

11) Soalan: Sebagai seorang jurutera awam, kamu mesti tahu apa maksud “or”?

Jawapan: Ya.

12) Soalan: Di situ juga ada tulis “add another 3 months of post contract period”?

Jawapan: Ada.

13) Soalan: Akhir sekali ada tulis “whichever is lesser”, betul?

Jawapan: Betul.

14) “Whichever is lesser” ini kamu kata dalam jawapan di Soalan 5 adalah YANG MANA LEBIH AWAL, betul?

Jawapan: Betul.

15) Soalan: Saya nak beritahu kamu, surat ini ada Bahagian A. Sekarang, lihat ada tulisan tangan pada Bahagian tepi Perenggan 5 itu. Nampak?

Jawapan: Ya.

16) Soalan: Lihat pula muka surat 5 Ikatan Pliding, pada Perenggan 4 (i). Sebut tarikh di situ?

Jawapan: 1 Mac 2013.

17) Soalan: Kembali semula ke muka surat 1 Ikatan Dokumen Bersama, tadi kamu kata tarikh ialah 1.3.2013 di dalam pliding. Soalan saya, sama tak tarikh 1.3.2013 dengan catitan tulisan tangan di tepi Perenggan 5?

Jawapan: Sama.

18) Soalan: Lihat Perenggan 5 semula, dia tulis 20 bulan. Ikut kiraan matematik mudah, 20 bulan daripada tarikh 1.3.2013 habis pada 31.10.2014 lah kan?

Jawapan: Tidak setuju.

19) Soalan: Bila tarikh sepatutnya kalau ikut kiraan kamu?

Jawapan: Sekitar November 2014.

20) Soalan: Projek siap pada 30.6.2016, kan?

Jawapan: Ya

21) Soalan: Antara November 2014 sehingga 30.6.2016, mestilah November 2014 yang lebih awal, kan?

Jawapan: Betul.

22) Soalan: Jadi, tempoh kontrak kamu sepatutnya ialah "WHICHEVER IS LESSER", yang mana lebih awal, betul?

Jawapan: Betul.

23) Soalan: Oleh sebab yang lebih awal ialah 31.10.2014, tuntutan kamu adalah di luar dari tempoh kontrak, betul?

Jawapan: Betul.

24) Soalan: Disebabkan kamu jawab pada Soalan 6 Penyata Saksi bahawa tidak ada syarat atau terma tambahan, saya katakan selain dari surat lantikan di muka surat 1 Ikatan Dokumen Bersama, tiada apa-apa persetujuan lain tentang lanjutan tempoh masa kontrak?

Jawapan: Betul.”

[13] From the cross-examination conducted, I can derive several points:

- i) the offer letter is the only agreement signed by both parties;
- ii) the contract period is 20 months or upon the completion of construction with an additional 3 months;
- iii) the terms “whichever is lesser” tantamount to either 20 months or completion of construction (additional 3 months); and
- iv) no additional terms and agreement in regard of extension of time.

[14] I referred to **Section 26 of the Contract Act 1950** which states as below:

*(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, **if the intention of the parties was that time should be of the essence of the contract.***

[15] Through my careful reading, it is pertinent to reproduce what was held by the Federal Court case of **SPM MEMBRANE SWITCH SDN BHD v. KERAJAAN NEGERI SELANGOR [2016] 1 CLJ 177**, where it was unanimously decided as follows:

“The court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. **If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable.** An unexpressed term can be implied if and only if courts finds that the parties must have intended that term to form part of their contract.”

[16] Having thoroughly went through the case referred, I am unduly adhering to apply the principle set out by the Federal Court in the present case. In the present case, the terms in offer letter is very clear to express that the period of contract should be 20 months or upon the completion of construction with an additional 3 months (whichever is lesser). I have to agree with the submission of the Defendant that the terms “whichever is lesser” tantamount to either 20 months or upon the completion of construction with an additional 3 months of either one.

[17] As averred by the Defendant, the contract period had started on 1st Mac 2013. As per stated in the offer letter, the contract period should be 20 months (additional 3 months) from the 1st March 2013 which was on February 2015. Meanwhile the completion of the construction was on 30th June 2016 30th June 2016, which led to 30th September 2016 (if the additional 3 months is added). There were 2 important dates as prescribed in the offer letter.

[18] The main issue here is which date should be the final date the contract had ended which tantamount to the contract period between the parties? It's either February 2015 or 30th September 2016. Hence, the "whichever is lesser" terms should come into picture. Applying the terms expressly provided in the offer letter, I am opinionated that February 2015 was the date the contract period had ended.

[19] I cannot comprehend the Plaintiff's assertion on the meaning behind the phrase of "post-contract period" where the Plaintiff had contended that is a period after "defect liability period". The plaintiff did not prove such assertion before this Court, thus I cannot consider it into my thorough evaluation. Bare assertions do not constitute evidence as they do not give rise to any issues. The Plaintiff also had alleged that the Defendant did not challenge about the phrase of "post-contract period", but through my careful reading, the Defendant had challenged it during the cross-examination and SP1 had conceded the fact that the contract had ended. (see above)

[20] To cut the chase, it is with this sage opinion in my mind to say that the terms of the agreement as stipulated in the offer letter dated 5th March 2021 were agreed by the parties themselves and they had no choice but to be bound by it. In conclusion, I am of the view that the Plaintiff had lost his right to claim the amount of salary amounting to RM18,746.00 as an Assistant Resident Engineer for the months of August and September 2016 as the contract period had ceased or lapsed by way of an effluxion of time.

Conclusion

[21] For the reasons elucidated, I dismissed Plaintiff's claim with costs based on the ROC 2012.

DATED: 29th OCTOBER 2021



(NOR IZZATI BINTI ZAKARIA)

Magistrate

Magistrates' Court

Kuantan, Pahang

Counsels:

For the Plaintiff:

Ab Aziz B Ab Rahman; Messrs. Ab. Aziz & Rakan Rakan

For the Defendant:

Mohd Shukri bin Zulkipli; Messrs. Abdul Razak Zulkifli & Partners

Case referred:

- 1) *SPM MEMBRANE SWITCH SDN BHD v. KERAJAAN NEGERI SELANGOR* [2016] 1 CLJ 177

Legislation referred:

- 1) *SECTION 26 OF THE CONTRACT ACT 1950*