

**IN THE COURT OF APPEAL OF MALAYSIA  
(APPELLATE JURISDICTION)  
CIVIL APPEAL NO. : W-02(C)(W)-1656-08/2017**

**BETWEEN**

**KEMBANG SERANTAU SDN. BHD.  
(NO. SYARIKAT: 224505-W) ... APPELLANT**

**AND**

**YBK USAHASAMA SDN. BHD.  
(NO. SYARIKAT: 890886-M) ... RESPONDENT**

[In the Matter of the High Court of Malaya at Kuala Lumpur,  
Wilayah Persekutuan  
Civil Suit No. 22C-35-09/2015

**BETWEEN**

**KEMBANG SERANTAU SDN. BHD.  
(NO. SYARIKAT: 224505-W) ... APPELLANT**

**AND**

**YBK USAHASAMA SDN. BHD.  
(NO. SYARIKAT: 890886-M) ... RESPONDENT**

An appeal against the decision of YA Lee Swee Seng Judge, High Court  
at Kuala Lumpur made on 24.7.2016]

**CORAM:**

**TENGGU MAIMUN TUAN MAT, JCA  
MARY LIM THIAM SUAN, JCA  
HASNAH MOHAMMED HASHIM, JCA**

**JUDGMENT OF THE COURT**

**[1]** This appeal by the Appellant is against the decision of the Kuala Lumpur High Court which had allowed the Appellant's claim in the sum RM3,900,910.44 together with interest at 5% per annum from date of writ to realisation. The learned High Court Judge had also allowed the Respondent's counterclaim in the sum of RM4,312,229.71 together with interest at 5% per annum from the date of judgment to realisation.

**[2]** After having heard submission from counsel and upon evaluating and considering the learned trial Judge's Grounds of Judgment, we decided unanimously to allow the appeal in part. We affirmed the learned Judge's decision on the claims allowed and disallowed save for idling costs in the sum of RM610,000.00 on the same terms with interest as ordered by the Judge. We dismissed the cross appeal.

**[3]** The learned High Court Judge dealt with the Claim and the Counterclaim together and we shall do the same. The Counterclaim in essence relates to two orders on suspension and termination. We now give our reasons for our decision. For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

## **Factual Background**

[4] Pursuant to a Concession Agreement dated 4.5.2010, the Defendant was awarded the concession by the Government of Malaysia to design and build a campus for Universiti Teknologi MARA (UiTM) in Mukim Semujuk, Daerah Jasin, Melaka ('the Project'). The dispute in this appeal is between the Plaintiff, the main contractor and the Defendant, the employer. By two (2) Letters of Award both dated 2.7.2010 the Plaintiff was appointed by the Defendant as the Main Contractor of the Project. The contract sum for the Enabling Works (Package 1) is RM8,610,000.00. As for Package 2 for Building & Associated Works (Package 2) the contract sum is RM201,983,000.00. Both parties agreed to be bound by the contractual terms as stipulated in the Agreement and Conditions of PAM Contract 2006 (Without Quantities) ("PAM 2006") and the Additional Provisions to the Contract ("Additional COC"). For both packages the completion period is thirty (30) months from the date of possession of site. The commencement date of the Project is 19.1.2011 and completion date is 18.7.2013.

[5] It is the Plaintiff's case that the Defendant delayed in certifying the Plaintiff's Progress Claims and effecting payments of the claims once certified. There was delay in certification and payment of Progress Claim Certificate No.13. However, there was also a delay in the certification of Progress Claim No.14. The Plaintiff issued several letters of reminders to the Defendant. Due to the recurring delays, the Plaintiff issued a Notice to Suspend warning of its intention to suspend the works when the Defendant failed to pay the Interim Claim. When the Defendant failed to pay the Interim Claim as scheduled the Plaintiff issued a Notice of Suspension dated 2.7.2012 suspended the Works from 3.7.2012. The Defendant on the other hand, contended that the Plaintiff's suspension

of work was unlawful. The Defendant through its architect, Landesign Sdn Bhd (“the Architect”), issued a Notice of Default on 3.7.2012, and proceeded to terminate the Plaintiff by the Notice of Termination dated 13.7.2012.

**[6]** The Plaintiff applied for an injunction to restrain the Defendant from calling on the Bank Guarantee as well as to restrain the Defendant from taking possession of the Site. Suffice to say the relationship between the parties were acrimonious. There were various applications for contempt and committal by the Plaintiff against the Defendant and its directors. Subsequently, all the applications for injunctions and also the committal proceedings were dismissed by the High Court.

**[7]** The parties however, managed to resolved the dispute by executing a Deed of Settlement dated 9.11.2012 (“the Deed of Settlement”). The Deed of Settlement was divided into Parts A, B and C. Under Part A of the Deed of Settlement the sum payable is RM24,053,364.55 with the agreed terms as follows:

**Part A of the Terms of Settlement** to be agreed and executed by YBKU and KSSB immediately upon signing of this Deed of Settlement as per the terms stated herein.

1. Amount Payable to KSSB:-

(i)	Total Work Done as at 20.7.2012 pursuant To agreed joint valuation carried out on 18 <sup>th</sup> , 19 <sup>th</sup> and 20 <sup>th</sup> July 2012	:	RM74,889,919.98
	[Pursuant to clause 25.6 PAM Contract 2006 (Without Quantities)]		
(ii)	Less Net Omission pursuant to Interim Final Certificate Issued by QS as per Appendix A	:	RM 337,297.43
(iii)	Less Payment made to KSSB via Interim Certificates 1 – 13	:	RM50,499,258.00
	Amount Payable to KSSB (Including Retention Sum RM7,455,262.25	:	<b>RM24,053,364.55</b>

It is hereby agreed that the sum of RM24,053,364.55 is the agreed sum payable to KSSB. It is further agreed that the payment of RM24,053,364.55 to KSSB is without prejudice to YBKU's claim in Part B and Part C therein.

2. Upon KSSB submitting the progress claim/documents to support the sum of RM24,053,364.55 being the agreed amount payable to KSSB, YBKU will within three (3) working days excluding weekends upon receiving the documents from KSSB will submit the written claim to Bank Pembangunan Malaysia Berhad in order for Bank Pembangunan Malaysia Berhad to release such payment directly to KSSB. Simultaneously, YBKU will issue a written consent to Bank Pembangunan Malaysia Berhad for the release of RM24,053,364.55 to KSSB.
3. Upon signing of this Deed of Settlement, YBKU to return the two Bank Guarantee No.06702103620013 dated 17.2.2011 and Bank Guarantee No.06702103620012 dated 18.2.2011 to KSSB without prejudice to YBKU's claim in Part B and Part C therein.
4. Upon signing of this Deed of Settlement, KSSB to instruct their solicitors to withdraw the Writ Action under Suit No: 22NCVC-964-08/2012 and the Injunction Order dated 17.8.2012 and both parties to bear their own costs. KBBS to withdraw their Appeal at the Court of Appeal with no Order as to costs. Concurrently YBKU to instruct their solicitors to withdraw their Application to set aside the said Injunction Order dated 17.8.2012 and withdraw the Notice of Appeal at the Court of Appeal vide Civil Appeal No: W-02(IM)(NCVC)-2238-09/2012.
5. Upon signing of this Deed of Settlement, KSSB to pay to YBKU the costs awarded by the Court with regard to Civil Suit No: 22NCVC-864-07/2012 amounting to RM18,000.00.
6. Upon signing of this Deed of Settlement, KSSB to instruct their solicitors to issue a letter to withdraw the Arbitration Notice dated 11.6.2012.
7. Upon signing of this Deed of Settlement, KSSB to instruct their solicitors to issue a letter to withdraw and not to enforce the Notice issued pursuant to Section 218 of the Companies Act, 1965 dated 5.10.2012 against YBKU with regard to the UiTM Jasin Project.
8. KSSB and YBKU shall hereby comply with BPMB's requirement, as follows: -
  - a. A resolution by KSSB and YBKU on the final measurement and total value of works done as at 20.7.2012;
  - b. A project closure report to be signed by both parties confined to the total value of works done as at 20.7.2012; and
  - c. A statutory declaration and undertaking that both parties will take the necessary steps to withdraw the existing legal actions to ensure the loan and UiTM Jasin Project is not placed in any danger to affect its due completion and disbursements of monies accordingly.

- d. It is further agreed that para (a), (b) and (c) above shall be complied by KSSB and YBKU confined only to Part A of the Terms of Settlement.”

(See: paragraph 19 Statement of Defence; pages 43-44 Record of Appeal Part A (Vol 1)).

**[8]** Under the Deed of Settlement a settlement sum was paid subject to the rights of the parties to pursue their respective claims against each other as set out in Part B and Part C of the Deed of Settlement. It was agreed by the parties that with the execution of the Deed of Settlement, all pending applications, suits and appeals will be withdrawn.

**[9]** Unfortunately, the resolution to settle amicably was short-lived as parties could not agree on the various heads of claims as stated in Part B and Part C of the Deed of Settlement. The failure to settle amicably as initially expected led to the Plaintiff filing this claim and the Defendant filing the Counterclaim.

### **The Claim**

**[10]** Paragraph 58 of the Statement of Claim summarised the disputed items under the Joint Final Account for works done by the Plaintiff not certified by the Defendant:

<b>Item</b>	<b>Description</b>	<b>Amount (RM)</b>
1	Material on site on 20.7.2012	591,971.49
2	Panel (IBS) work done but not valued on 20.7.2012	2,370,774.00
3	IBS Mould	1,013,298.32
4	Probe	283,500.00
5	Machineries Idling for one month from June 2012 - July 2012	610,000.00
6	VO approved but not paid	39,700.00

Item	Description	Amount (RM)
7	Employer requested for a much bigger employer's representative office (not paid for additional cost)	173,702.66
8	Piling work done but not paid	1,198,704.78
9	Variation for M&E works as per instruction SP01, SP02, SP03, CW01, CW03, E02, E04, E05, E08, E09, E10, E11, E12, E13, E15, E16, E17, & E18.	113,029.00
10	Additional work done for building and infrastructure work due to Change of Design for Building Foundation and infrastructure work (not paid)	3,957,906.36
11	Cancellation of M&E materials due to termination	7,581,171.45
12	Variation Works (Omission)	1,282,895.00
13	Revision to value of work done for M&E works	81,000.00
	<b>TOTAL</b>	<b>• 19,976,061.09</b>

\*The total sum as stated in the Grounds of Judgment is **RM19,297,653.06** (See: paragraph 108; pages 48 and 49 of the Grounds of Judgment).

**[11]** The Plaintiff 's claims are as stated in paragraph 59 Statement of Claim:

Item	Description	Amount (RM)
a	Interest on amounts outstanding	1,253,599.21
b	Loss of Profit due on unlawful termination	20,507,546.34
c	Pre and Post Contract Expenses (loans and advances to YBKU)	5,270,000.00
d	Damage to reputation	5,000,000.00
e	Legal cost	150,000.00
	<b>TOTAL</b>	<b>32,181,145.55</b>

**[12]** In the Statement of Claim the Plaintiff sought the following reliefs:

- a) General damages;
- b) Specific damages in the sum of RM52,157,206.64;
- c) Costs; and

- d) Interest at the rate of 5% on the judgment sum from the date of filing of the writ until full realization.

(See: paragraph 60 of the Statement of Claim)

**[13]** The Defendant's Counterclaim is as set out at paragraphs 39(a)-(t) of Statement of Defence and Counterclaim. However, the prayers at paragraphs 39 (h),(i),(k) and (m) were withdrawn and consequently struck out by the High Court.

### **The High Court's decision**

**[14]** The learned High Court Judge began his meticulous judgment by considering whether the Plaintiff has the right to suspend the works under the terms of the contract. He agreed with the analysis of learned counsel for the Defendant that under the PAM 2006 the payment would be due on **28.7.2012** since Interim Certificate No. 14 for Packages 1 & 2 had been duly certified on **29.6.2012**.

**[15]** Under the Additional COC, the Defendant through their letter dated 28.6.2012 notified the Plaintiff to collect the Interim Certificate No. 14 from its office on 29.6.2012. Under the terms of the Additional COC the Interim Certificate No. 14 however, would be due for payment on 19.7.2012. The Defendant will be in default of payment on Interim Certificate No.14 only upon the expiry of **3 months and 14 days**; which would be on or about **2.10.2012**.

**[16]** Having considered the facts and evidence before him the learned Judge found that the Defendant was not in breach of the agreed terms, be it under the PAM 2006 or the Additional COC in respect of honouring the payment for Interim Certificate No. 14. The complaint of default of



the Plaintiff is not on the delay in certification but delay in payment of Interim Certificate No. 14 as stated in the Notice of Default dated 3.7.2012. His Lordship concluded that contractually the Plaintiff as the contractor had no right to suspend works on 3.7.2012.

**[17]** The learned Judge took the view that the right to suspend Works is not only found in Clause 25.1 of the PAM 2006 but in his opinion it is also implied under Clause 69.1(b) under the Additional COC because of the words used under the aforesaid clause:

...or has suspended the progress of the Works for sixty (60) Days other than as expressly permitted by the Contract.

**[18]** The learned Judge opined that in order to resolve the contradistinction, if any, the terms of the two contracts, that is, PAM Contract 2006 and the Additional COC, must be examined:

**[44]** The question of which terms prevail may be easily answered by looking at the Clause 3.0 from the Conditions of Contract PAM 2006 at page 44 of the BOD B.

**[45]** It does not matter that under Clause 3.1 of the PAM Conditions of Contract the Priority in descending order is as follows: 1) Letter of Award 2) Articles of Agreement 3) Conditions of Contract 4) Contract Drawings 5) Contract Bills 6) Other documents incorporated in the Contract Documents.

**[46]** Once the latter documents in the "Additional Conditions of Contract" had stated and sorted out the order of "Priority of Documents" that latter Documents would prevail over the earlier documents unless otherwise stated.

**[19]** Having concluded that the Additional COC prevails over PAM 2006 the learned Judge was of the view that it was incorrect to conclude that the Plaintiff's only remedy as a contractor for non-payment under the PAM 2006 was to determine the contract and that the Plaintiff's right to be paid for all works executed prior to the termination was expressly prescribed under Clause 72.2 of the Additional COC.

**[20]** In respect of whether the Letter of Termination of 13.7.2017 is valid under Clause 69.1 of the Additional COC, the Judge in his Grounds of Judgment stressed on the importance for the parties to comply with the agreed terms of the contract:

**[63]** .... As the termination of a Contract has serious consequences, the party terminating must follow the strict procedure prescribed in the Contract. Having given 14 days to the Plaintiff through its agent Landesign, the Defendant cannot now resile from that and terminate before the expiry of the 14 days by which time the default of wrongful suspension of works by the Plaintiff as Contractor would not have continued for at least 14 days.

**[64]** The termination was 4 days earlier than allowed for contractually under the provisions cited by the Defendant's Architect under Clause 25.2 of the PAM 2006 Contract. Such a termination is wrong in law for non-compliance with the procedure for termination which procedure must be strictly complied with.

**[65]** Unpleasant as the consequences are, this Court must give effect to it as the rights of the parties to terminate as well as the corresponding right to rectify the breach are governed by the terms of the Contract and must be strictly followed. There is no intervening event here. Moreover 2 wrongs do not make a right! The fact that the Plaintiff was wrong in suspending the Works does not justify the Defendant terminating the Contract before the continuing default of 14 days are up.

**[66]** The strictness of the time frame can be seen in the fact that under Clause 25.2 of the PAM Contract 2006 the Employer "may, within ten (10) Days from the expiry of the said fourteen (14) Days, by a further written notice delivered by hand or by registered post, forthwith determine the employment of the Contractor under the Contract." It is a case where premature termination before the continuing default of 14 days is as bad and as ineffective and unlawful as a termination post the 10 days after the continuing default of 14 days.

**[21]** His Lordship observed that Clause 30.7 of the PAM 2006 on the Contractor's right to suspend works for non-payment must be read harmoniously with Clause 72.1 of the Additional COC. Therefore, the termination of the Contract by the Defendant before the lapse of 14 days given to the Plaintiff for the continuing default was invalid, wrongful and unlawful.

[22] The learned High Court Judge proceeded to consider the Defendant's claim for rectification works for RM4,312,229.71 and found that the claim has merits and that the Defendant had successfully proved its claim on a balance of probabilities.

[23] His Lordship allowed the Plaintiff's claim in the sum RM3,900,910.44 together with interest at 5% per annum from date of writ to realisation as well as the Defendant's counterclaim in the sum of RM4,312,229.71 together with interest at 5% per annum from the date of judgment to realisation.

## **Our decision**

### **The Contract**

[24] It is perhaps opportune for the purpose of this appeal to highlight the types of construction contracts available in this country. In most construction projects in addition to the letter of intent as well as the letter of award the parties will execute contract documents defining amongst others, the contract period, the contract sum, the scope of work, the obligations of the parties etc. There are variety of construction contracts and the selection of the contract to be executed by the parties is generally wholly dependent of the type of project, and the constraints of the project. The commonly used types of contract in construction projects are:

- (i) Lump sum fixed price contract;
- (ii) Measure and value contract;
- (iii) Cost reimbursable contract; and
- (iv) Contracts where no price stipulated.

**[25]** To facilitate both the employers and the contractors in Malaysia four organisations produced standard forms of construction contracts, namely:

- (a) The Institution of Engineers, Malaysia (“IEM”);
- (b) Pertubuhan Arkitek Malaysia (“PAM”);
- (c) Construction Industry Development Board (“CIDB”); and
- (d) Jabatan Kerja Raya (“JKR”).

**[26]** The IEM offers 3 types of standard form of contracts specifically for construction projects involving the various engineering works i.e civil, electrical and mechanical. The IEM Conditions of Contract for Mechanical and Electrical Works which essentially follows the FIDIC (*Fédération Internationale Des Ingénieurs-Conseils* or the International Federation of Consulting Engineers) standard forms are:

- (i) IEM Conditions of Contract for Works Mainly of Civil Engineering Construction;
- (ii) IEM Standard Conditions of Sub-Contract for Civil Engineering Works; and
- (iii) IEM Conditions of Contract for Mechanical and Electrical Works.

**[27]** The PAM building contract form has two versions: with bill of quantities and without bill of quantities. CIDB has two standard forms: the CIDB Standard Form of Contract for Building Works (2000 Edition) and the CIDB Standard Form of Sub-Contract for Nominated Sub-Contractor. JKR also has a selection of standard forms for use in public sector works, both for building works and civil as well as mechanical and

electrical engineering works. The JKR 203A contracts are also commonly used in private sector contracts with or without any modifications.

**[28]** The contract in this appeal before us is a lump sum contract as defined under Article 7 (ah) of the Articles of Agreement of PAM 2006:

.....means a fixed price Contract and is not subject to re measurement or recalculation except for Provisional Quantities and Variations which shall be valued under Clause 11.0.

Low Hop Bing J (as he then was) in ***CM Indah Sdn Bhd v. UB Ushabina Sdn Bhd [2006] 4 CLJ 733*** explained the legal effect of a lump sum contract:

It is essential for me to set out the legal effect of a "lump sum contract" in relation to construction or building contracts. For this purpose, I find it instructive to refer to the views of learned authors.

In *Building Contract Litigation* by Robert Fenwick Elliot, at pp. 1 to 2, the following passage appears:

*(a) Lump sum contracts*

A lump sum contract is a contract whereby the contractor agrees for a pre-agreed price to execute certain defined building works (the building work undertaken by the contractual obligation is usually called the 'Works'). In principle, the contract is very simple but in practice there are many complicating factors.

The general rule in ordinary lump sum contracts is that the contractor is entitled to be paid the pre-agreed lump sum as and when he substantially completes the Works (*Hoening v. Isaacs* [1952] 2 All ER 176). Substantial completion does not necessarily entail the perfect execution of every detail of the Works, and if the contractor is guilty of only comparatively minor

defects and/or omissions then he is entitled to be paid the lump sum less a set-off in respect of his failings...

Although the lump sum is always the starting point, it is comparatively rare for the price the contractor is entitled to receive at the end of the day to be exactly the same as the lump sum. The lump sum is usually subject to adjustment for extra work, fluctuations sub-contractors, and so on...

**[29]** The contract documents executed by the parties comprised:

- (a) The Letter of Award dated 2.7.2010 for Enabling Works (Package 1);
- (b) The Addendum dated 9.12.2010 to the Letter of Award dated 2.7.2010 (Package 1);
- (c) The Letter of Award dated 2.7.2010 for Building and Associated Works (Package 2);
- (d) The Addendum dated 9.12.2010 to the Letter of Award dated 2.7.2010 (Package 2);
- (e) The PAM Conditions of Contract 2006 (Without Quantities) ("PAM 2006 "); and
- (f) The Additional Provisions to the Contract Agreement ("Additional COC").

(collectively referred as "the Contract Documents").

**[30]** The Learned High Court Judge examined the terms and conditions of the Contract Documents and concluded that the Additional COC prevailed over the PAM 2006. The question of which terms prevail was easily answered by looking at the Clause 3 PAM 2006:

**[43]** It is as clear as broad daylight that the "Additional Provisions to the Conditions of Contract" commonly referred to as the "Additional Conditions of

Contract" or just "Conditions of Contract" would prevail over the PAM Conditions of Contract.

**[31]** We agree with the learned Judge that the Additional COC prevails over the PAM 2006. However, it is not as clear as broad daylight or that simple to conclude as such. Firstly, the terms and conditions contained in the Contract Documents must be read in their<sup>2</sup> entirety and not in isolation of the other terms and conditions. Clause 3 of the PAM 2006 provides that the Contract Documents are to be read as mutually explanatory of one another. In the event of any conflict or inconsistencies between the Contract Documents, the priority in the interpretation of such documents are as follows:

- 3.1 (a) the Letter of Award;
- 3.1 (b) the Articles of Agreement;
- 3.1 (c) the Conditions of Contract;
- 3.1 (d) the Contract Drawings;
- 3.1 (e) the Contract Bills; and
- 3.1 (f) other documents incorporated in the Contract Documents, unless expressly stated to be excluded in any of the Contract Document.

**[32]** Secondly, Clause 5.3 of the Additional COC under the heading "Priority of Documents" further stipulates and emphasises that in the event of any conflict between or among the documents the order of priority shall be as follows:

This Contract comprises of the following documents and in the event of any conflict between or among the documents the order of priority shall be in the order that they appear, which is as follows:

- (i) the Letter of Award and these conditions as attached to it;

- (ii) such further documents as the parties may agree and which are signed on behalf of both parties to identify them as documents forming part of the Contract;
- (iii) followed by the sequence of priority as provided in the PAM Conditions of Contract.

**[33]** Only if there is a discrepancy or conflict between the Contract Documents the Order of Precedence as stipulated in PAM 2006 and Additional COC will be applicable. The terms of the Additional COC will only prevail if there is any discrepancy or conflict. In the case before us we find there is no inconsistency or conflict between the Contract Documents, in particular Clause 30 PAM 2006 with Clause 68 of the Additional COC for reasons which we will explain in greater detail. Nevertheless, even if there is any conflict or inconsistencies between the Contract Documents, the PAM 2006 remains as the main contract between the parties but the terms of the additional COC will prevail.

### **Whether the suspension of the Works by the Plaintiff is valid**

**[34]** The LOA Package 1 stipulates that the completion period is 30 days from the date of possession site. Items 3.3 and 3.4 in the LOA Package 1 provides:

- 3.3 Save as otherwise provided herein, in addition to all terms and conditions of the Agreement and Conditions of Building Contract Private Edition Without Quantities issued under the sanction and approval of Pertubuhan Akitik Malaysia Edition 2006 (“the PAM Conditions of Contract”), the attached Conditions of Contract shall apply to this Letter of Award.
- 3.4 The provisions in the attached Conditions of Contract are in amplification and form an integral part of this Letter of Award.



This simply means that the Conditions of Contract are not independent but must be read together with the terms of the LOA Package 1 and vice versa.

**[35]** Item 10 of the LOA Package 1 emphasised the importance of the Concession Agreement. Item 10.2 is as a reminder to the parties that at all material times:

10.2 .....you agree to be bound by the same in the event that any provision within the Concession Agreement is invoked by the Government and/or UiTM against us at any time prior to the issuance of the Certificate of Practical Completion as shall be notified by us to you from time to time throughout the Project save and except where such provision of the Concession Agreement has been invoked against us due to our default, negligence or omission.

**[36]** This is followed by an Addendum to the LOA Package 1 dated 9.12.2010 reiterating in item 7.1 that:

Save for the additions made under this Addendum which supplement the LOA, all other terms, conditions and provisions in the LOA shall remain binding and unchanged.

**[37]** An identical letter of award for Package 2 dated 2.7.2010 (“LOA Package 2”) was subsequently issued. Item 3.3 of the LOA Package 2 stipulates that the provisions in the attached Conditions of Contract are in amplification to and form an integral part of the LOA Package 2. It is further expressly stipulated in item 3.4 that the PAM 2006 “... **have been extended and/or modified pursuant to contract documents by the inclusion of the provisions herein provided.**” There is also an Addendum to the LOA Package 2 and item 1.1 reads:

This Addendum is intended to supplement and be read as part of the Letter of Award dated 2<sup>nd</sup> July 2010 (“LOA”).

**[38]** The Plaintiff contended that there were delays in certifying the progress claims submitted and effecting payments for such certificates in particular, the certification and payment of Progress Claim No. 13. Frustrated with the delay the Plaintiff issued a payment for the Certificate No. 13 via letter dated 1.6.2012.

**[39]** In addition to the late payment for Progress Claim No. 13, the Defendant failed to certify the Plaintiff's Progress Claim No. 14 which at that point of time had become overdue and exceeded the contractual deadline of **26.5.2012**. Plaintiff issued several warning letters to the Defendant through its letters dated 5.6.2012 and 11.6.2012 but to no avail. The Plaintiff had no other option and was constrained to issue a Suspension Notice dated 18.6.2012, even at this point of time as the Defendant failed to respond to its letters and certify Progress Claim No. 14.

**[40]** The Plaintiff contended that this was the last straw in a series of contumelious conduct on the part of the Defendant persistently delaying in approving the Progress Claims and issuing the Payment Certificates.

**[41]** In support of the allegation of delays in payments the Plaintiff adduced as evidence the following:

ITEM	LETTERS	DATE
1.	Plaintiff's letter recording delay in payment for Progress work 5 & 6	25/8/2011
2.	Plaintiff's letter stating delay from progress payment from 1-6	1/10/2011
3.	Plaintiff's letter recording delay in payment	11/10/2011
4.	Plaintiff's letter to Defendant warning on delay of payment	24/10/2011

5.	Plaintiff's warning to Defendant delay in paying Certificate No. 8	19/12/2011
6.	Plaintiff's warning to Defendant Delay in Paying progress No. 8	10/1/2012
7.	Plaintiff's warning to Defendant on delay in paying Certificate 13	29/5/2012
8.	Plaintiff's warning to Defendant on delay in certifying No. 14	5/6/2012
9.	Plaintiff's warning to Defendant on failure to certify No. 14	11/6/2012
10.	Plaintiff's warning on delay to certify and pay No. 14 and Suspension Notice	18/6/2012
11.	Plaintiff's elaboration on Suspension Notice	22/6/2012
12.	Plaintiff's warning to Defendant on delay in certifying Claim No. 15	6/7/2012
13.	Termination by Defendant	13/7/2012

[42] Clause 30.7 of the PAM 2006 under which the Notice of Suspension was issued stipulates that if the employer fails or neglects to pay the Contractor the amount due as shown in the payment certificate (less any Liquidated Damages and set-off which the Employer is expressly entitled to make under the Contract) and continue such default for fourteen (14) Days from the receipt of a written notice delivered by hand or by registered post from the Contractor stating that if payment is not made within fourteen (14) Days, the Contractor may by a further written notice delivered by hand or by registered post, forthwith suspend the execution of the Works until such time payment is made.

[43] The Notice of Suspension dated 2.7.2012 from the Plaintiff to the Defendant reads as follows:

Payment of Interim Certificate No. 14

Suspension of Works

Referring to our notice previously issued to you dated 18<sup>th</sup> June 2012, we regret to inform you that it is clear that you had failed to fulfill your obligation to pay us according to the terms enumerated in the Agreement and Conditions of PAM Contract 2006 and therefore we have all the rights to suspend the works at site.

**PLEASE TAKE NOTICE** that with effect from tomorrow, Tuesday, 3<sup>rd</sup> July 2012, we shall suspend the execution of our works until such time the payment is made to us as provided under Clause 30.7 of the Agreement and Conditions of PAM Contract 2006 (Without Quantities) dated the 30<sup>th</sup> December 2010).

[44] Before us learned counsel for the Plaintiff argued that since the Progress Claim No.14 was issued on **29.6.2012**, the due date for payment would be **19.7.2012**. It was contended that the learned trial Judge failed to distinguish between the certification process under the PAM 2006 and the Additional COC.

[45] Learned Counsel summarised the difference between the PAM 2006 and the Additional COC:

	<b>PAM CONTRACT</b>	<b>ADDITIONAL COC</b>
Submission of Claim	the Architect	the Employer
Certification of Claim	the Architect	ICE
Period	21 days	30 days

[46] Learned counsel for the Plaintiff further argued that under the Additional COC the submission of claim must be made to the Employer, the Defendant; a fact admitted by the Defendant through its letter dated 10.2.2011.

[47] The terms for certification and payment are also different between PAM 2006 and the Additional COC, a difference of one (1) day:

<b>PAM 2006</b>			<b>ADDITIONAL COC</b>		
<b>Clause</b>	<b>Certificates and Payment</b>	<b>Time Period</b>	<b>Clause</b>	<b>Certificates and Payment</b>	<b>Time Period</b>
30.1	Issuance of Architect's Interim Certificate	<b>21 days</b> from the date of receipt of the Contractor's application	68.3	Certification of amounts in monthly statement	<b>30 days</b> after receipt of the Contractor's monthly statement submitted in accordance to clause 68.2

Appendix	Period of Honoring Certificates [if none stated is 21 days from the date of the Certificate]	<b>30 days</b>	68.3	Payment by Employer	Within <b>20 days</b> of the date of issuance of Employer's certificate of payment endorsed by ICE <b>and</b> the Employer
	<b>Total number of days</b>	<b>51 days</b>			<b>50 days</b>

**[48]** Under the Additional COC there is no provision for suspension of works by the contractor in the event of delays in payment by the Employer, i.e. the Defendant. Where there is delay, then Clause 30.7 of the PAM 2006 can be invoked by the Plaintiff:

.....if the Employer fails or neglects to pay the Contractor the amount due as shown in the payment certificate.....

**[49]** Learned counsel for the Plaintiff submitted that the learned trial Judge considered 3.5.2012 as the date of submission of Progress Claim No.14 because that was the only evidence of a date when the Architect received the claim in Package 1. This is clearly wrong as the certification terms between PAM 2006 and the Additional COC are distinguishable. The submission of the progress claim under the Additional COC, that is Clause 68, the claim must be made to the Defendant. The calculation will be from the date of submission; this the Judge failed to appreciate.

**[50]** It was further argued that the parties had in fact agreed from the very beginning that progress payment claims shall be submitted to Seri

Mendapat Project Management Sdn Bhd, the Project Management Company (PMC). The relevant date to calculate the certification period is from 26.4.2012.

**[51]** In response, learned counsel for the Defendant argued that the learned Judge had rightfully noted the difference and divergence in respect of the agreed terms of payment under the Contract Documents. Having examined the Contract Documents, the learned trial Judge had correctly made a finding that Clause 68.3 of the Additional COC on terms of payment would prevail over Clause 30.1 PAM 2006 as the complaint of default is not the delay of certification but delay in payment of the Progress Claim No. 14.

**[52]** Learned counsel for the Defendant further submitted that the learned Judge had correctly held that the Defendant is not in breach of the terms under the PAM 2006 or the Additional COC in respect of honoring the payment for Progress Claim No.14. The Judge took the view that the due payment date for Interim Certificate No.14 certified on 29.6.2012 would be 28.7.2012 and concluded that the Plaintiff had no right under the Contract Documents to suspend the Works:

**[55]** I agree with the analysis of learned counsel for the Defendant that under the PAM Conditions of Contract, Interim Certificate No. 14 for Package 1 & 2 having been certified on 29.6.2012 (Bundle J Pages 1068 and 1075 refers)/CBD pages 250 - 257, it is due for payment on 28.7.2012.

**[56]** Under the Additional Provisions to the Conditions of Contract, the Defendant vide their letter dated 28.6.2012 (at page 821 Bundle I)/CBD pages 240 - 241 had informed the Plaintiff to collect the Interim Certificate No. 14 from the Defendant's office on 29.6.2012. Under the Additional Provisions to the Conditions of Contract, Interim Certificate No. 14 will be

due for payment on 19.7.2012. Further, the Defendant will be in default of payment on Interim Certificate No. 14 upon expiry of 3 months and 14 days i.e. on or about 2.10.2012.

**[57]** I would therefore agree with the Defendant that the Defendant is not in breach of the agreed terms be it under the PAM or the Additional Provisions to the Conditions of Contract in respect of honouring the payment for Interim Certificate No. 14 when the Plaintiff suspended the works at Site effective 3.7.2012 for non-payment of Interim Certificate No. 14.

**[58]** It must be noted that the complaint of Default of the Plaintiff is not on the delay in certification but delay in payment of Interim Certificate No. 14 as stated in the caption to the Notice of Default dated 2.7.2012.

**[59]** As such, as unpleasant as the results may be, contractually the Plaintiff as Contractor has no right to suspend works on 3.7.2012.

**[53]** We are of the view that Clause 30.1 of PAM 2006 is clear and unambiguous. We do not agree with the analysis and finding of the learned Judge that there is a conflict between Clause 30.1 of the PAM 2006 with Clause 68.3 of the Additional COC with respect to the payment period once certification is issued.

**[54]** Clause 30.1 of PAM 2006 requires the Plaintiff to submit payment application i.e the Interim Claim Interval, on a monthly basis as stated in the Appendix. The payment application must be completely supported with details and particulars as required by the Architect to enable him to consider and ascertain the amount to be in the Interim Certificate. Upon receipt of the Contractor's details and particulars, the Architect shall within 21 days from the date of receipt the Plaintiff's application, issue an Interim Certificate to the Defendant with a copy to the Plaintiff. Thereafter the Defendant as the Employer shall pay. The Architect is

under a contractual obligation to issue the Interim Certificate within 21 days:

### 30.0 Certificates And Payment

- 30.1 The Contractor shall submit a payment application at the Interim Claim Interval stated in the Appendix with complete details and particulars as required by the Architect, to enable him to consider and ascertain the amount to be included in an Interim Certificate. Upon receipt of the Contractor's details and particulars, the Architect shall, within twenty one (21) Days from the date of receipt of the Contractor's application, issue an Interim Certificate to the Employer with a copy to the Contractor, and the Employer shall thereafter pay the amount certified to the Contractor within the Period of Honouring Certificates. Any failure by the Contractor to submit a payment application shall be deemed to be a waiver of his contractual entitlement for that Interim Certificate, and the Architect may or may not issue an Interim Certificate under the circumstances. After the issuance of the Certificate of Practical Completion, Interim Certificates shall be issued as and when further amounts are ascertained by the Architect as payable to the Contractor by the Employer.
- 30.2 The amount stated as due in an Interim Certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and include the percentage of the value of materials and goods stated in the Appendix up to the date of the Contractor's payment application less any amount which may be retained by the Employer under Clauses 30.5 and 30.6 and, less the amounts previously certified under Clause 30.1. The materials and goods must be for incorporation into the permanent works and have been delivered to and properly stored at the Site and be protected against loss, damage or deterioration, and be in accordance with the Contract. The certificate shall only include the value of materials and goods which are reasonably, properly and not prematurely brought to the Site.

**[55]** If there is any failure or neglect by the Defendant to pay the Plaintiff the sum due as shown in the payment certificate and the delay in payment continues for 14 days from the receipt of such notice, the



Plaintiff possesses the contractual right to issue a written notice to suspend the execution of the works until such time the due payment is made. Such notice of suspension must not be given unreasonably or vexatiously.

**[56]** Clause 30.7 of the PAM 2006 reads:

Suspension of Works for Non-Payment.

Without prejudice to the Contractor's right to determine his own employment under Clause 26.0, if the Employer fails or neglects to pay the Contractor the amount due as shown in the payment certificate (less any Liquidated Damages and set-off which the Employer is expressly entitled to make under the Contract) and continue such default for fourteen (14) Days from the receipt of a written notice delivered by hand or by registered post from the Contractor stating that if payment is not made within fourteen (14) Days, the Contractor may by a further written notice delivered by hand or by registered post, forthwith suspend the execution of the Works until such time payment is made. Provided always that such notice shall not be given unreasonably or vexatiously.

**[57]** Clause 68.3 of the Additional COC on the other hand, deals with the certification of amounts in monthly statement. Unlike Clause 30.7 PAM 2006 where the payment application is submitted to the Architect, under Clause 68.3 of the Additional COC the Plaintiff's monthly statement must be submitted to the Defendant in the manner prescribed under the said provision. Clause 68.3 provides that the Defendant as the Employer is required to ascertain the amount that the Contractor is entitled to be paid:

68.1 Monthly Statement

The Contractor, shall submit to the Employer prior to the seventh day of each month his monthly statement showing separately:

- [a] the estimated value of the Works based on the Method of Measurement and the Schedule of Payments, properly carried out up to the end of the preceding month with Dayworks included therein but shown separately;
- [b] Not Used;
- [c] the value of steel reinforcements delivered on Site specifically designated for the Project and which steel reinforcements have been duly certified by Employer and the Independent Checking Engineer with copies of invoices and other supporting documentation provided by the Contractor; and
- [d] the cumulative amount of Costs for which the Employer has considered due to the Contractor in accordance with Clause 60 [*Procedure for Claims*].

The amount included in the monthly statement shall be the sum of the above items less:

- [a] a retention of the percentage named in Appendix 1 to these Conditions of Contract until the amount retained shall reach the limit of retention money named therein [hereinafter called ["the retention money"]];
- [b] amounts (if any) paid directly to the Contractor's sub-contractor or supplier;
- [c] the cumulative amount of payments previously certified as due to the Contractor;
- [d] Not used;
- [e] Not Used; and
- [f] any amounts recoverable from the Contractor in accordance with the Contract.

#### 68.2 Form of monthly statements

The Contractor's monthly statement shall be prepared on forms supplied by and at the expense of the Contractor and the style and number of copies thereof shall be as the Employer may determine. The monthly statement shall be submitted with a list attached showing claims for additional Costs submitted but for which there has been no notification from the Employer pursuant to Clause 60 [*Procedure for Claims*].

#### 68.3 Certification of amounts in monthly statement

Within thirty (30) Days after receipt of the Contractor's monthly statement submitted in accordance with sub-clause 68.1, the Employer shall ascertain on the basis of the Contractor's monthly statement the amount which, in the opinion of the Employer, the Contractor is entitled to be paid after giving credit to the Employer for any sums to which the Employer is entitled under the Contract

which are in addition to those sums for which credit has been given to the Employer in any relevant monthly statement submitted by the Contractor in accordance with sub-clause 60.1 and, subject to verification by the Independent Checking Engineer, the Employer shall so certify to the Contractor. Within twenty [20] days of the date of issue of the Employer's certificate of payment endorsed by the Independent Checking Engineer and the Employer, the Employer shall make payment to the Contractor of the amount certified by the Employer less any sums expressed to be due and payable by the Contractor to the Employer pursuant to any agreement to which the Employer and the Contractor are parties other than the Contract.

**[58]** It was contended that by the Plaintiff that they had duly submitted the Progress Claim No.14 on 21.4.2012. The Defendant, on the other hand, argued in response that the certification and payment could not be made as the Plaintiff failed to comply with the Architect's Instructions (AI) that was issued to the Plaintiff pertaining to proof of payments to sub-contractors and suppliers. The Architect issued the Notice of Default to the Plaintiff invoking Clause 25.1(b) of the PAM 2006 and declared that the Plaintiff to be in default as the suspension of the works was without reasonable cause. The Architect denied that its client, the Defendant had been in default of payment as under the terms of the Contract Documents the Defendant has three (3) months and fourteen (14) days to pay from the date of issuance of the Certificate of Payment. In response, the Plaintiff through their letter dated 5.6.2012 highlighted that the Contract Documents does not have a specific provision requiring that the AI must be complied before certification of the Interim Certificate. The Interim Certificate was certified and ready for collection on 29.6.2012.

**[59]** Having examined the Contract Documents in its entirety in particular the PAM 2006 and the Additional COC, we are of the view that

there are no contradictions, discrepancies or inconsistencies between the terms and conditions under the PAM 2006 and the Additional COC. Clause 30 PAM 2006 is specifically relating to Interim Claim Interval, whereas Clause 68 of the Additional COC is in respect of the monthly statement as well as certification of the monthly statement. On the facts and the evidence, the Plaintiff had submitted its Progress Claim No.14 pursuant to Clause 30 PAM 2006 Contract. Any delay of payment or failure to pay by the prescribed time, the Plaintiff is at liberty, after giving the necessary notice, to invoke Clause 30.7 PAM 2006 suspending the execution of the Works until payment is made.

**[60]** The learned High Court Judge had fallen into error when he found that the Plaintiff had no right to suspend works pursuant Clause 30.7 PAM 2006. The finding of the learned Judge goes against the essence and purpose of clause 30. Clause 30.7 is clear and unambiguous giving the Plaintiff as the contractor the right to suspend the works in the event of failure to pay by the Defendant. Therefore, the Notice of Suspension dated 18.6.2012 issued by the Plaintiff is valid and lawful.

**[61]** Based on chronological events we find that the Notice of Suspension was not given unreasonably or vexatiously, and was properly issued by the Plaintiff within the time frame as provided under Clause 30.7 of the PAM 2006 due to delay in payment by the Defendant. Even if the time frame prescribed under Clause 68 Additional COC applies, the Notice of Suspension remains valid. Even if the time frame prescribed under Clause 68 Additional COC applies, the Notice of Suspension remains valid.

## The Termination

**[62]** In response to the Plaintiff's Notice of Suspension the Defendant's Architect issued a Notice of Default by the Contractor on 3.7.2012 pursuant to Clause 25.1 (b) of the PAM 2006. In the said Notice of Default, the Defendant stated that the Plaintiff was in breach of Clause 25.1(b) of the Conditions of Contract of the PAM 2006 Contract for suspending the Works without reasonable cause:

Ref: Cadangan Pembangunan Universiti Teknologi Mara (UiTM) Kampus Jasin di atas PT 1016 (Lot Lama 1005) Mukim Semujuk, Daerah Jasin, Melaka:

Kontrak No: 2010/YBKU/KSSB/P2

- Notice of Default by the Contractor

The above matters, your letter dated 2 July 2012 to Messrs. YBK Usahasama Sdn. Bhd. (YBKU) in suspending the works effective 3 July 2012 kindly refers.

Please be reminded that Yg Berbhg Dato' had agreed that The Employer have a three (3) months and Fourteen (14) days to make payment due to the contractor. As such your referred letter informing suspension of work is in breach of clause 25.1(b) of PAM condition of contract.

Your office had to date also fail to comply to various AI issued (duly attached) apart from the many non-compliance report (duly attached) still unattended with some requires various rectification work with the method of rectification requires prior approval from the consultant. The number of workforce also had been reduced significantly since June 2012.

As such it is necessary for us to serve notice that Kembang Serantau Sdn. Bhd. is in default of clause 25.1 of the contract. Should Kembang Serantau Sdn. Bhd. continue to be in default for 14 days from receiving this notice, the Employer will initiate action allowable in the contract.

**[63]** Clause 25.1 of the PAM 2006 needs to be examined. It provides as follows:

The Employer may determine the employment of the Contractor if the Contractor defaults in any of the following:

- 25.1(a) if without reasonable cause, he fails to commence the Works in accordance with the Contract;
- 25.1(b) if without reasonable cause, he wholly or substantially suspends the carrying out of the Works before completion;
- 25.1(c) if he fails to proceed regularly and/or diligently with the Works;
- 25.1(d) if he persistently refuses or neglects to comply with an AI;
- 25.1(e) if he fails to comply with the provisions in Clause 17.0; or
- 25.1 (f) if he abandoned the Works.

**[64]** It is important to note that under Clause 25.1 (b) PAM 2006 the Defendant can terminate only if the Plaintiff without reasonable cause, wholly or substantially suspends the carrying out of the Works before completion, which is not the case here. The Plaintiff suspended the works after giving notice as required under Clause 30 PAM 2006 due to the Defendant's failure to certify and to make payment after submission of claims.

**[65]** Clause 25.2 of the PAM 2006 further prescribes the procedure for determination. The Plaintiff is given 14 days from the date of receipt of the Notice of Default to rectify the breach. If the breach continues for 14 days, the Defendant may within 10 days from the expiry of the aforesaid 14 days determine the Contract. The Defendant, however, terminated the Contract by their letter to the Plaintiff dated 13.7.2012 with immediate effect (See: pages 328-329 CBD Vol 2):

We refer to the Notice of Default by the Contractor issued by Landesign Architect dated 3.7.2012 in respect of the above matter.

We further refer to your letter dated 11.6.2012 on the Notice Refer To Arbitration and your letter dated 18.6.2012 on Notice of Suspension of Works followed by your letter dated 2.7.2012 wherein your good selves suspended execution of all works and directed all your sub-contractors to equally suspend works. Your conduct in suspending all works affirms your intention not to carry out your primary obligation to

proceed regularly and/or diligently with the works. Your refusal not to be bound by the Contract Documents, your blatant noncompliance with the Architect's Instructions and suspending all works without a valid legal cause is itself a repudiatory breach which entitles us to invoke our rights of termination without any further notice.

Despite our letters dated 19.6.2012 and 27.6.2012 reiterating the agreed terms between the parties in the Contract Documents, your goodselves vide your letters dated 25.6.2012... and 6.7.2012 have clearly evinced your intention not to be bound by the agreed terms in the Contract Documents. As such, your continued act to suspend works at the site is clearly in breach of the Concession Agreement dated 4.5.2010 which you have agreed to observe, perform and comply vide Clause 1.6 in the Additional Provisions To The Conditions of Contract. The Concession Agreement expressly stipulates that the Concession Company i.e. YBKU would be in default during the construction period if there is a continuous period of 30 calendar days of suspension of works or any part thereof.

**Under the circumstances, and in view of your apparent and expressed intention and conduct not to adhere and be bound by the Contract Documents, we have no alternative but to terminate your goodselves as the Main Contractor for Package 2 - Building and Associated Works and Package 1 - Enabling Works for the abovementioned Project.**

**PLEASE TAKE NOTICE that effective from service of this Letter of Termination you are hereby terminated as the Main Contractor for Package 2 - Building and Associated Works and Package 1 - Enabling Works for the above mentioned Project. You are hereby instructed to vacate the Site and return possession of the Site to YBKU with immediate effect.**

**PLEASE TAKE FURTHER NOTICE that upon service of this Letter of Termination on your good selves, it is the responsibility of YBKU as the Concession Company to protect and maintain the Project Site and Land until completion of the Project. We will not tolerate any interference of our rights and your goodselves will be notified in writing by the Architect for a joint inspection of the Site to determine the extent of your works executed and the materials and goods delivered to the Site.**

**[66]** Even though the Defendant's position is that the certification of the Progress Claim comes under Clause 68 of the Additional COC, when the Plaintiff was terminated, the Defendant decided to invoke Clause 25.1 of the PAM 2006 instead. This is expressly stated in the architect's written Notice of Default dated 3.7.2012 (See: pages 306-307 CBD Vol 2):

... Please be reminded that Yg Berbhg Dato' had agreed that The Employer have a (sic) three (3) months and Fourteen (14) days to make payment due to the contractor. As such your refered (sic) letter informing suspension of work is **in breach of clause 25.1(b) of PAM condition of contract...**

.....

As such it is necessary for us to serve notice that Kembang Serantau Sdn Bhd **is in default of clause 25.1 of the contract**. Should Kembang Serantau Sdn Bhd continue to be in default for 14 days from receiving this notice, the Employer will initiate action allowable in the contract.

(emphasis added)

**[67]** Clause 25.1 of PAM 2006 expressly provides the definitive time periods as well as the specified circumstances the Defendant can determine the contract. This procedure as prescribed in this clause must be strictly applied. Under the aforesaid clause the Defendant does not possess the legal right to terminate before the expiry of the 14 days as the default by the Plaintiff must be continuous for at least fourteen (14) days from the receipt of the written notice and only at the expiry of the fourteen (14) days the Defendant may within ten (10) days from the expiry of the said fourteen (14) days, by a further written notice delivered by registered post, determine the contract:

25.2 Upon the occurrence of any default under Clause 25.1, and if the Employer decides to determine the Contractor's employment, the Employer or Architect on his behalf shall give to the Contractor a written notice delivered by hand or by registered post specifying the default. **If the Contractor shall continue with such default for fourteen (14) Days from the receipt of such written notice, then the Employer may, within ten (10) Days from the expiry of the said fourteen (14) Days, by a further written notice delivered by hand or registered post,** forthwith determine the employment of the Contractor under the Contract. Provided always that such notice shall not be given unreasonably or vexatiously.

(emphasis added)



[68] The Defendant in its haste to terminate the Plaintiff completely ignored the procedures as prescribed under PAM 2006 and the Additional COC. By choosing to do so tainted the legality of the termination which it had issued to the Plaintiff.

[69] In this regard we agree with the learned Judge on his findings that the termination by the Defendant is invalid and unlawful, but for different reasons. The termination by the Defendant was four (4) days earlier than the period prescribed under Clause 25.2 of the PAM 2006. Termination of a contract has far reaching consequences; as such the procedure as provided under the contract must be strictly adhered. The Defendant cannot jump from one terms of contract to the other contract, merging unrelated terms with another term as and when it suits or pleases them, completely ignoring the purpose and intent of the contractual provisions.

[70] Even if there is no right of suspension, the termination was premature. This Court cannot and should not rewrite the terms of the contract agreed by the parties. The Defendant had clearly relied on Clause 25 of the PAM 2006 to terminate. In ***Attorney General of Belize v. Belize Telecom [2009] UKPC 10***, delivering the advice of the board, Lord Hoffman said:

The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms or make it fairer or more reasonable. If it is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed... It is this objective meaning which is conventionally called the intention of the parties or the intention of Parliament, or

the intention of whatever person or body was or is deemed to have been the author of the instrument.

[71] Lord Pearson in *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973]1WLR 601, HL where His Lordship remarked:

....the court does not make a contract for the parties. The court will not even improve the contract 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 the courts finds that the parties must have intended that term to form part of their contract.

[72] The Notice of Termination dated 13.7.2012, issued by the Defendant in our view is patently premature, invalid and unlawful. Furthermore, since the Plaintiff has the right to suspend Works under the PAM 2006, and given the Notice of Suspension which we find is valid, the Defendant has no right to terminate by reason of the suspension. Even if there is no right to suspend the Works, the termination is premature. As Lord Pearson in *Trollope* (supra) said the courts will not even improve the terms which the parties have made themselves, however desirable the improvement may be. Based on the terms and conditions of the Contract Documents the termination by the Defendant is wrong in law for non-compliance with the procedure for termination as stipulated under clause 25 of the PAM 2006.

[73] We find support for our view in the Federal Court case of ***SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177*** which relied upon the principles of construction stated by Lord Hoffman in ***West Bromwich v. Investors Compensation Fund [1998] 1 WLR 896:-***

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd* [1995] 1 WLR 1 508.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong

with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

### **Idling costs**

[74] The learned Judge had allowed only certain heads of claim explaining his reasons for allowing so. In substance, it was a matter of a lack of proof. We have examined those reasons and we find no cause, in law or in fact, to disturb them. However, we cannot say the same for the claim for idling costs. The Plaintiff contended that its machineries were idled for one month from the month of June 2012 until July 2012. The cost of the idled machineries is in the sum of RM610,000.00. The machineries were left idled since the Plaintiff issued the Notice of Intention to suspend works (on 18.6.2012) until the termination on 13.7.2012 by the Defendant. The Defendant had only certified the Progress Claim No. 14 on 29.6.2012 but no payment was made despite the certification.

[75] Since we had earlier held that the suspension of the works by the Plaintiff to be lawful, the Plaintiff is entitled to claim for the idling costs of the machineries in the sum of RM610,000.00.

### **Rectification costs**

[76] The Interim Payment Certificate No. 3 (Rectification & Variation Works) as valued are as follows:

- |      |                      |                         |
|------|----------------------|-------------------------|
| (i)  | Rectification Works: | RM4,312,229.71          |
| (ii) | Variation Works      | : RM973,011.60          |
|      | <b>Total</b>         | <b>: RM5,285,241.31</b> |

**[77]** Learned counsel for the Plaintiff argued that the claim for rectification works was not specifically pleaded by the Defendant. In response learned counsel for the Defendant contended that the Plaintiff was at all material time, even during the trial, fully aware of the Defendant's claim for rectification works. The Plaintiff had in fact even cross examined the Defendant's witness, in particular, DW4, Ir Abdul Rani Abdul Aziz (the Structure Consultant for the project) on the costs for rectification.

**[78]** It was only after the Defendant had closed its case that the learned High Court Judge gave written directions for both parties to submit further on the claim for rectification costs which was not pleaded. Learned counsel for the Defendant argued that the claim for rectification works fall within the general damages claimed at paragraph 39 (q) of the Counter Claim. Learned counsel submitted that the Defendant's Counter Claim for rectification costs is not too radical a departure from the pleadings. The High Court Judge took cognisance that from the notes of evidence it was recorded that the Defendant's claim for rectification works will be included in para 39 (q) of the Counter Claim under the head of General Damages. His Lordship agreed with the Defendant's submission that at no material time did the Plaintiff through its learned counsel, raise any objection to the Defendant's claim for rectification works:

**“[308]** The Defendant further submitted that the Plaintiff had not been taken by surprise by the Defendant's claim for rectification works. On the contrary, the Plaintiff had participated without objection and cross examined the Defendant's Witness DW4 on this claim. Notes of Evidence on 14.2.2017 in particular at pages 51, 52, 55 and 57 marked as Appendix - 3 refers. I agree that the Plaintiff's assertion that the rectification costs is not reflected in the Final Account has no merits for the retention monies have been released to the Plaintiff in the Deed of Settlement. The

Defendant further submitted that the Defendant's claim for rectification works is not too radical a departure from the pleadings but in fact are damages common in the building industry.”

[79] With respect, we disagree with the learned Judge. In the case of *Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd [2014] 2 MLJ 322* it was decided by this Court that to decide on a claim which was not specifically pleaded will deny the opposing party the right to answer the claim by adducing material facts at the trial as it might find necessary to forward to the court to advance its case against the claim. The injustice that could be occasioned to the opposing party in such a situation. Similarly, in this instant appeal before us the same consideration would also apply. The Plaintiff was denied the opportunity to present its case on the issue of the claim on rectification costs, more so in this case when it was only highlighted at the trial and no attempt made to amend the Counter Claim.

[80] Rectification costs are costs incurred by the employer to rectify any defect or omission by the contractor. We are of the view that such costs are not general damages but must be specifically pleaded and proved, especially so as it emanates from a breach of a contractual obligation of the parties. Furthermore, in this case there is a return of the retention sum in the Deed of Settlement between the parties. In any event since the termination is invalid as we have explained above, the Defendant is not entitled to such claim. Furthermore, the retention sum was part of the Settlement between the parties.

[81] Based on the reasons we have stated above, the Defendant's Counterclaim for rectification costs as allowed in order (k) and (l) ought to have been dismissed.

**Whether the Defendant can rely on its common law rights to terminate the Plaintiff without Notice on ground of the Plaintiff having repudiated the Contract**

[82] Learned counsel for the Defendant contended that the suspension of Works by the Plaintiff as Contractor amounts to repudiation of the Contract which entitled the Defendant as Employer to terminate without further notice as stated in paragraph 2 of the Letter of Termination.

[83] We agree with the learned Judge that in order to exercise such common law right the Defendant must strictly adhere to the terms and provisions which parties have contractually agreed. The rights and remedies in common law cannot be arbitrarily exercised to deny the Plaintiff of its contractually agreed rights.

[84] Having regard to the circumstances of the case it cannot be said here that the termination is justified under the common law right to terminate on ground that the Plaintiff had repudiated the contract when the time frame has been prescribed and agreed contractually by the parties.

**Conclusion**

**[85]** In the circumstances, and for the reasons stated, we unanimously allowed the appeal in part in respect of the the claim for idling costs of machineries in the sum of RM610,000.00 on the same terms with interest as ordered by the learned Judge. We dismissed the cross appeal. Paragraphs (a),(k) and (l) of the High Court Order dated 24.7.2017 are set aside. The other orders of the High Court are affirmed. Costs of RM50,000.00 here and below to be paid to the Appellant. Deposit refunded.

**Sgd**

**(HASNAH MOHAMMED HASHIM)**

Judge

Court of Appeal, Malaysia

Putrajaya

Date: 4.10.2019



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