DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
[RAYUAN SIVIL NO. W-02 (NCVC)-2895-11/2011]

ANTARA

MAJLIS AMANAH RAKYAT **... PERAYU**

DAN

ATLANTIC PALAFOX SDN BHD
(No. Syarikat 306679-H) **... RESPONDEN**

[Dalam perkara Guaman Sivil No. 22 NCVC-221-2011
Dalam Mahkamah Tinggi Malaya di Kuala Lumpur

ANTARA

ATLANTIC PALAFOX SDN BHD
(NO. SYARIKAT 306679-H) ... PLAINTIFF

AND

MAJLIS AMANAH RAKYAT ... DEFENDAN]

CORAM:
ABU SAMAH NORDIN, JCA
ALIZATUL KHAIR OSMAN KHAIRUDDIN, JCA
ANANTHAM KASINATHER, JCA

ANANTHAM KASINATHER, JCA
DELIVERING JUDGMENT OF THE COURT

BACKGROUND FACTS

1. The appellant ('MARA') had been entrusted to develop a new Campus for Kolej Kemahiran Tinggi MARA Rembau (`KKTM) to conduct various programmes at the Diploma level. MARA had therefore identified the various fields and new aspects of technology which would be the foundation to develop the said programmes in KKTM. Due to the shortage of offers by training institutions in Malaysia in the field of Creative and Specific designs, MARA was proposing to venture out into the said field by introducing skilled programmes at the Diploma level. The programmes proposed by the defendant were Industrial Design / Product Design, Furniture Design, Interior Design, Graphic & Advertising Design and Photography.

2. Apparently because MARA did not have expertise in the said programmes and field, after several discussions with the respondent, MARA invited the respondent to become its *Pembekal Teknologi* in Creative Design to assist MARA to realize its intention (refer to pages 1 to 9 of Bundle B). As the respondent claimed to have the necessary skill and expertise, MARA notified the respondent of the terms of reference for the

work to be undertaken by the respondent which in essence included the following:

i) Curriculum;

ii) Training Space;

iii) Mechanical and Electrical Services and ICT;

iv) Equipments, materials and training Equipments;

v) Teaching & Training Staff;

vi) Accreditation of the programmes;

vii) Support for the teaching staff;

viii) Time Period and Main Frame Work;

ix) Committee for the work project

The respondent was also provided with a *'Kos Perundingan Perunding Teknologi'* which was divided into 6 divisions being:

i) Development of Curriculum;

ii) Training space;

iii) M & E Services and ICT;

iv) Training Equipments;

v) Accreditation of the programmes;

vi) Support of the teaching staff;

vii) Consultancy Fees

3. Following the issuance of the terms of reference and the *'Kos Perundingan Perunding Teknologi',* MARA issued a Letter of Intent dated 25th July 2007 (`the First Letter of Intent') appointing the respondent as its *'Pembekal Teknologi'* for training programmes in KKTM for the provisional sum of RM 6,905,000.00 with the actual contract sum to be approved at a forthcoming meeting on the understanding that the respondent would be paid for completed works only **(see page 11 of Bundle B)**. The respondent agreed to this appointment by responding favourably *vide* its letter of 28th August 2007. This Letter of Intent required the respondent to develop 5 programmes in Kolej Kemahiran Tinggi MARA Rembau (KKTM).

4. MARA terminated the First Letter of Intent on 3rd April 2008. However, following an appeal by the respondent, MARA

reappointed the respondent as its Technology Provider by way of a Second Letter of Intent dated 23rd May 2008 (The Second Letter of Intent'). The second Letter of Intent expressly provided that the continued appointment of the respondent was to be the subject matter of further negotiations with the agreed terms to be incorporated in the subsequent Letter of Award. **(See volume 2 (10) Bahagian C at pages 2069 to 2073 of the Record of Appeal).** According to MARA, it was constrained to terminate the First Letter of Intent and issue the Second Letter of Intent upon discovering that the respondent was not capable of undertaking the 5 programmes. Following negotiations between the parties, MARA forwarded a letter to the respondent dated 13th August 2008 wherein the respondent was informed that it would only be required to undertake three programmes. These 3 programmes being Diploma and Furniture design, Diploma and Fashion Design and Diploma in interior Design. In the same letter, MARA informed the respondent that the two other programmes of Diploma in Digital Media Design and Diploma in Digital Film with animation had been withdrawn from the job scope of the respondent. The letter also notified the respondent that it would only be paid for the three courses and the contract sum for these three courses would be decided in the *Mesyuarat Runding Harga* to be held with the appellant.

5. At the *Mesyuarat Runding Harga* held on 8th September 2008, the parties agreed to the new contract price of RM3.8 million

for the aforesaid three courses. The agreement reached between the parties on the 3 programmes was notified to the respondent *vide* MARA's letter on 18th September 2008 **(see volume 2 (14) Bahagian C at page 3020).**

6. According to MARA, following the respondent's agreement to only undertake three programmes at the agreed price of RM3.8 million, it issued the Letter of Award of 2nd March 2009 to the respondent. MARA's letter of 2nd March 2009 elicited the following response from the respondent. Following the receipt of this letter by the respondent, a meeting was held between the parties on 5th March 2009 to discuss the detailed terms of the Letter of Award. At this meeting, the respondent questioned some of the terms included in the Letter of Award including the contract sum and the need for the guarantee to be furnished by the respondent. Subsequent to the meeting, the respondent raised the issue of the guarantee along the following lines in its letter on 11th March:

> *"Surat setuju terima yang ditandatangani beserta "Bank Guarantee" yang berjumlah 5% (RM 190,000.00) akan hanya dapat diserahkan kepada pihak MARA setelah kami mendapat suatu keputusan daripada pihak tuan berhubung dengan perkara yang dibangkitkan di surat ini di Lampiran yang dilampirkan"*

(see Volume 2 (15) Part C, at pages 3050 to 3062 of the Record of Appeal)

7. According to MARA, the respondent never accepted the Letter of Award, causing MARA to revoke the respondent's appointment as Technology Provider *vide* its letter dated 29th June 2009 **(see Volume 2 (15) Bahagian C at page 3078).** The revocation of the Letter of Award, in turn, resulted in the respondent commencing this action alleging *inter alia* that the termination by MARA was unlawful and seeking the payment of the contract sum for the five programmes that the respondent was required to undertake under the First Letter of Intent.

THE APPELLANT'S CASE

8. Learned counsel for the appellant raised several issues concerning the correctness of the decision of the Learned Trial Judge. First, counsel submitted that Her Ladyship had erred in granting judgment by proceeding on the basis that at the time of the alleged breach of contract, there was in existence a contract for the respondent to perform five different forms of work, namely:

a) Diploma in Furniture Design;

b) Diploma in Fashion Design;

c) Diploma in Interior Design;

d) Diploma in Multimedia Design (Interactive) dan yang di ubah / tukar kepada Diploma in Digital Media Design;

e) Diploma in Digital Animation dan yang diubah / tukar kepada @ Digital Film with Animation.

Learned counsel for the appellant submitted that, in fact, subsequent to the awarding of the Letter of Award dated 2nd March 2009, the parties had reached a compromise whereby the forms of work were reduced to three in number and the contract sum revised downwards to RM3.8 million from RM 6.905 million. According to counsel, this compromise can be discerned from the examination of the minutes of the meeting of 5th March 2009 and the respondent's letter to the appellant dated 11th March 2009. Secondly, the learned counsel for the appellant contended that once it is acknowledged that the respondent was only required to undertake three forms of work namely:

a) Diploma in Furniture Design;

b) Diploma in Fashion Design; and

c) Diploma in Interior Design;

then, it must follow that the contract sum of RM 6 million had to be revised downwards. Learned counsel for the appellant submitted that it was evident from the minutes of the meeting of the parties of 5th March 2009 that the respondent had agreed to the contract sum being fixed at RM 3.8 million for the three programmes.

9. Thirdly, counsel referred to the Letter of Award and highlighted the fact that the respondent's appointment was as a Provider and not as a Consultant. For this reason, Counsel contended that the learned trial judge had erred in determining the remuneration payable to the respondent based on the manual when the manual was only applicable to a person appointed as Consultant. It was also the submission of the learned counsel for the appellant that, in any event, the contract awarded to the respondent was a fixed price contract with the separate remuneration for each package thereby excluding the relevance of the remuneration scheme stipulated in the manual **(see pages 3027 and 3028 of Jilid 2 (14) of Bahagian C).**

10. Fourthly, learned counsel for the appellant contended that the respondent's claim for special damages ought to have been rejected outright as it is trite law that a claim for special damages would only be entertained by a Court of law if such damages are specifically pleaded. Learned counsel for the

appellant cited the cases of *Johore State Economic Development Corp. v. Queen Bee Sdn Bhd* [1995] 4 MLJ 371 and *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 2 MLJ 229 as authorities for this proposition. Fifthly, learned counsel for the appellant referred to that part of the judgment of the Learned Trial Judge wherein Her Ladyship determined that special damages ought to be payable to the respondent based on the manual issued by the Government of Malaysia. Learned counsel for the appellant then drew our attention to the fact that this manual only applied to determine the compensation payable to a Consultant as opposed to a Provider. The Letter of Award only contemplated the respondent being appointed a provider and not the consultant.

THE RESPONDENT'S CASE

11. The thrust of the submission of learned counsel for the respondent was that this Court should not interfere with the findings of facts by the Learned Trial Judge. Numerous authorities on the circumstances under which appellate intervention is permitted were cited to us with the submission that based on these authorities, there was no justification for appellate intervention on the facts of this case.

12. The second submission of learned counsel for the respondent was that the termination of the First and Second Letter of Intent and the Letter of Award was unlawful in law. According to counsel, the termination was alleged to have been due to delay on the part of the respondent in complying with the requirements set out in the First Letter of Intent. However, according to counsel, there was no such delay on its part and it was the appellant which had failed to comply with the requirements of the Gant Chart. It was also the case of the respondent, that, in truth, the appellant had no genuine intention to appoint the respondent and the main reason for the termination was because MARA resolved to undertake a cost saving exercise and the termination was the result of this exercise. Finally, it was also the submission of learned counsel for the respondent that according to the procurement manual issued by the Ministry of Finance, the work to be undertaken by the respondent was to be undertaken in several stages with each stage of work being dependent on work in the earlier stages having been completed. According to the respondent, the work in some of the earlier stages could not be completed due to the conduct of the appellant thereby preventing the respondent from completing the later stages and hence the delay in completion.

JUDGMENT OF THE HIGH COURT

13. The Learned Trial Judge made the following mixed findings of facts and law.

i) There was a delay in the discharge of the respondent's obligations under the First and Second Letter of Intent. However, the Learned Trial Judge's finding was that the appellant contributed to this delay by not adhering to the time stipulations in the Gant Chart. According to the Learned Trial Judge, the delay on the part of the appellant in following the time schedule in the Gant Chart had a domino effect on the times schedule of the respondent;

ii) Secondly, the Learned Trial Judge rejected the appellant's claim that the delay in the issuance of the Letter of Award and the following Memorandum of Agreement was because the respondent had not submitted the *'Kos Perundingan'*. Her Ladyship's finding was that based on the evidence of SP1, the *`Kos Perundingan'* had already been submitted to the appellant together with the concept paper;

iii) Her Ladyship also found as a fact that the appellant had required the respondent to undertake works

beyond the original scope of works and Her Ladyship identified these additional works in paragraph 31 of Her Ladyship's judgment.

For the aforesaid reasons, Her Ladyship held the termination of the First and Second Letter of Intents to be unlawful.

14. As regards the termination of the Letter of Award which Her Ladyship described as the The 2nd termination', Her Ladyship made the following mixed findings of facts and law:

i) Following the receipt of the Letter of Award, the respondent *vide* its letter of 11th March 2009 had sought a meeting with the appellant to discuss further the terms of reference including the scope of work to be undertaken by it. In Her Ladyship's judgment, the request contained in the respondent's letter of 11th March 2009 did not amount to the respondent "failing to agree" to the terms of reference **(see paragraph 39 of the Judgment of the Court)** so as to enable the appellant to treat the respondent as having repudiated the contract and the acceptance of which repudiation result in the Letter of Award being terminated.

ii) As regards the disagreement between the parties on the question of the contract sum, Her Ladyship

ruled that the contract sum of RM3.8 million stipulated in the Letter of Award "*was only premised upon the 2nd terms of reference based on the works stated"* **(see paragraph 40 (ii) of the judgment of the Court).**

iii) According to the Learned Trial Judge, to the extent that the appellant had introduced additional works which would necessarily serve to escalate the costs, the respondent was entitled to rely on the *'Manual Perolehan'* issued by the Ministry of Finance to determine the contract sum. Her Ladyship ruled that since the appellant is a statutory body, *prima facie*, the *'Manual Perolehan'* of the Ministry of Finance is applicable and binding on the appellant. Based on this conclusion, Her Ladyship opined that the respondent's claim based on the *'Manual Perolehan'* to be correct **(see paragraphs 51 and 52 of the Judgment of the Court).**

JUDGMENT OF THE COURT

15. With respect, we are unable to agree with the Learned Trial Judge on the relevance of the First and Second Letters of Intent. First, as early as 13th August 2008, the appellant had

reduced the scope of the works to be undertaken by the respondent to the 3 programmes of:

a) Diploma in Furniture Design;

b) Diploma in Fashion Design; and

c) Diploma in Interior Design;

The documentary evidence demonstrates an acceptance on the part of the respondent of this reduction **(see the respondent's letter of 15th August 2008).** This reduction in the scope of works to be undertaken by the respondent included a corresponding reduction in the contract sum to RM3.8 million. This reduction was made known to the respondent *vide* the appellant's letter of 18th September 2008. A subsequent appeal by the respondent at a meeting between the parties held on 8th September 2008 to increase the costs was refused by the appellant *vide* its letter of 6th October 2008 **(see page 3021 of Jilid 2 (14) Bahagian C).** The respondent was also provided with a breakdown of the new reduced contract sum by way of the *"Jadual Harga Perkhidmatan Pembekal Teknologi KKTM Rembau"*.

16. Following the agreement reached between the parties to limit the scope of the respondent's work to the 3 programmes and the contract sum to RM3.8 million, a formal Letter of Award

was forwarded to the respondent on 2nd March 2009 offering the respondent the position of Technology Provider subject to the terms and conditions stipulated therein. The Letter of Award made reference to the 3 programmes and the *"Jadual Harga Bagi KKTM Rembau"* for RM 3.8 million with the breakdown of the contract sum for each of the 3 programmes **(see pages 3031 to 3034 of Jilid 2 (14) Bahagian C).** The last paragraph of the Letter of Award required the respondent to respond within 2 weeks with the duly executed Letter of Award and a bank guarantee for 5 % of the contract sum to enable the appellant to prepare the *"Memorandum Perjanjian"* for execution by the respondent. In the same letter, the respondent was notified that the offer contained in the Letter of Award would lapse if the conditions set out in the last paragraph of the Letter of Award were not complied within the time prescribed therein.

17. The respondent did not accept the Letter of Award within the required 14 days or at all. Instead, the respondent notified the appellant of its unhappiness with the scope of works and the bank guarantee. These issues were raised by the respondent's representative at a meeting with the appellant on 5th March 2009 and subsequently in the respondent's letter of 11th March 2009. As regards the scope of works, the respondent demanded an explanation as to why the contract sum was RM 3.8 million whereas the scope of works was similar to those outlined in the Second Letter of Intent. As regards the bank

guarantee, the respondent indicated that it would provide this guarantee after the issues raised by it at the meeting of 5th March 2009 and by its letter of 11th March 2009 had been resolved by the appellant. As the respondent failed to accept the Letter of Award in the manner and time stipulated therein, the appellant withdrew the offer contained in the Letter of Award.

18. The Learned Trial Judge dismissed summarily the appellant's claim that it was entitled to treat the offer contained in the Letter of Award as having lapsed arising from the respondent's failure to accept the offer in a timely manner. In Her Ladyship's judgment, the issues raised by the respondent did not amount to the respondent "failing to agree'" to the terms of reference. With respect, we are unable to agree with Her Ladyship because the fact of the matter is that the Letter of Award was only capable of acceptance within the 14 days stipulated in the offer letter unless extended by the appellant. The respondent not only failed to accept within the time period, but made known its intention to not comply with, at least, one of the conditions ie, the provision of the bank guarantee unless the appellant gave an acceptable explanation for the issues raised by it at the meeting and in its letter of 11th March 2009. In our judgment, the conduct of the respondent amounts to a rejection of the offer contained in the Letter of Award. The fact that the time stipulated in the Letter of Award was allowed to lapse whilst the parties were dealing with some of the issues raised by the

appellant does not detract from the fact that the respondent did not seek an extension of time to accept the offer and the offer to all intents and purposes lapsed on the expiration of 14 days.

19. We have not in this judgment dealt with Her Ladyship's careful analysis of the lawfulness of the appellant's termination of the First and Second Letters of Intent simply because the conduct of the respondent subsequent to the termination is consistent with the respondent having unconditionally accepted the termination in consideration of the appellant making a fresh offer in the form of the Letter of Award. In other words, in our judgment, there is no basis in law for the Learned Trial Judge to have concluded that the First and Second Letters of Intent were revived upon the respondent's refusal to accept the offer contained in the Letter of Award.

20. Accordingly, in our judgment, Her Ladyship erred in a manner which invites appellate intervention by having proceeded on the premise that the respondent had in fact been appointed a Consultant as opposed to a Provider and that the earlier Letters of Intent continued to subsist. With respect, following from this error, Her Ladyship, then, erred by ordering the appellant to pay the amount quantified in pages 241 - 245 of Bundle B when, in our judgment, the parties had mutually agreed to limit the programmes to 3 and the contract sum to RM 3.8 million.

21. In our judgment, this is not a case where the respondent should be required to leave this Court empty handed. The fact of the matter is that the respondent has undertaken a substantial amount of work in the discharge of its contractual obligations under the First and Second Letters of Intent and the works in progress can and is likely to be put to use by the appellant. We opine to this effect because the 3 programmes forming the subject matter of the Letter of Award which did not materialize *inter alia* due to the disagreement over the provision of the guarantee also formed part of the earlier 6 programmes. In other words, the respondent has produced and delivered to the appellant works in progress in respect of the 3 programmes even before being offered the Letter of Award. For this reason, we adopt the pronouncements of Lord Wright in *Fibrosa v. Failbairn Ltd* [1942] 2 All ER 122 that:

> *"It is clear that any civilized system of law is bound to provide remedies for ... unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or it tort, and are not recognized to fall within a third category of the common law .... called quasi-contract or restitution"*

in ordering the appellant to pay compensation to the respondent.

22. Apart from the pronouncements of Lord Wright, Section 71 of the Contracts Act provides this Court with the necessary power to compensate the party in breach in exceptional cases. We consider this case to be one such case where the respondent ought to be compensated as otherwise the appellant would derive an unjust benefit. Since the volume and value of the works in progress achieved by the respondent for the benefit of the appellant in respect of the 3 programmes cannot be easily quantified, we ordered that the Learned Registrar do assess the compensation payable to the respondent subject to the following conditions:

a) The respondent is to be compensated only for the costs of all the works in progress completed by the respondent pursuant to the First and Second Letters of Intent and the Letter of Award limited to the 3 programmes of Diploma in Furniture Design, Diploma in Fashion Design and Diploma in Interior Design;

b) In assessing the costs of the works in progress, the Learned Registrar shall have regard to the percentage of works completed

in respect of the 3 programmes against the corresponding contractual value of the 3 programmes described as *'Jadual Harga Perkhidmatan Pembekal Teknologi KKTM Rembau'* and more particularly set out in pages 3027 and 3028 of Jilid 2 (14) Bahagian C amounting in the aggregate to RM 3.8 million.

23. We take this opportunity to explain that we used the words 'special damages' in our Broad Grounds to describe the compensation payable to the respondent only because the compensation payable according to the formula set out in this judgment takes the form of special damages.

24. Accordingly, we allow this appeal in part. We set aside the orders of the Learned High Court Judge requiring the appellant to pay general and special damages and in lieu thereof order that the Learned Senior Assistant Registrar do assess the compensation payable to the respondent based on the formula set out in paragraph 22 herein. We order the respondent to pay half costs to the appellant and which half costs is fixed by us at RM10,000.

Sgd.
(ANANTHAM KASINATHER)
JUDGE
COURT OF APPEAL MALAYSIA
PUTRAJAYA

DATED: 6 FEBRUARY 2013

Counsel:

For the appellant - Abu Daud Abd Rahim (Melinda Marie D'Angelus, Erma Syafinaz Samain and Farah Nadiah Zainudin with him); M/s Azmi & Associates

Peguambela & Peguamcara
Tingkat 14, Menara Keck Seng
203, Jalan Bukit Bintang
55100 Kuala Lumpur

For the respondent - Mohd Zaid Daud (Yustarizal Yusoff with him); M/s Zulpadli & Edham

Peguambela & Peguamcara
No. 24, Jalan Perumahan Gurney
54000 Kuala Lumpur

Case(s) referred to:

Johore State Economic Development Corp v Queen Bee Sdn Bhd [1995] 4 MLJ 371

Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 2 MLJ 229

Fibrosa v. Failbairn Ltd [1942] 2 All ER 122