

SAHID SDN BHD

AND

ICE PETROLEUM ENGINEERING SDN BHD

**Court of Appeal of Brunei Darussalam
(Civil Appeal No. 1 of 2021)**

Before: Burrell P, Seagroatt and Lunn JJ A.

Date of hearing: 17th November 2022

Date of Judgment: 29th November 2022

Headnote: Duty of parties to plead cases fully, identify claims, not evidence, using other procedures such as Notices to Admit, to Produce and where appropriate Interrogatories. Purpose and role of Scott Schedule; Judicial role is not to supplement practitioners' inadequate preparation.

Mr. Eric Siow Kin Seong of Messrs J Cheok Eric for Appellant

Mr. P.Roy Rajkumar a/l Prabhakaran and Mr. Kamal bin Shaari of Messrs. Yusof Halim & Partners for Respondent

Seagroatt, JA.:

This is an appeal against the judgment of the Honourable Judicial Commissioner Ramesh Kannan dated the 26th February 2021 whereby he found for the respondents (plaintiff in the action) known and referred to throughout as "Ice" against this appellant (defendant in the action) known and referred to throughout as "Sahid".

The claim by Ice was based on unjust enrichment of Sahid by reason of costs and expenses incurred by Ice by virtue of its business relationship with Sahid, originally founded on an oral Joint Venture Agreement in or about August 2014.

The history of this convoluted association which eventually collapsed, was complicated by a number of factors. When the parties eventually became involved in litigation both parties failed to use fully and clearly the standard form of procedure for setting out their respective cases in pleadings.

In the course of his meticulous and detailed judgment the Commissioner adverted to the shortcomings of the parties in respect of their pleadings on several occasions. We fully indorse his strictures in the hope that proper heed will be taken of them.

The judgment shows, and we make this point at the outset, that the Commissioner had a firm and accurate grasp of the issues, the content of the evidence and identified, when they arose, the conflicts and inconsistencies in the issues and the arguments, as well as

the law, illustrated by the cases whose facts and principles he readily identified and applied.

The judge's insistence on a Scott Schedule and the compliance with and agreement to that by the parties proved to be a vital component in this trial. It helped materially to overcome the deficiencies in the pleaded cases and became, with the other evidence adduced, the essential manual for the judge as well as for the parties.

The parties and the claim and counterclaim

Ice is a company incorporated in Malaysia. It was formerly known as PT Technic Engineering.

Sahid is a company incorporated in Brunei Darussalam. These entities made, orally, a Joint Venture Agreement to carry out subcontract works for a company known as Technip Far East – Technip for convenient reference. The project included mechanical, piping, electrical work, instrumentation and steel structure for Technip.

The two parties to the JVA, Ice and Sahid were to hold, respectively, 49% and 51% of the shares in the vehicle for the JVA known as SPTT. Each had two representatives but the board consisted only of Bruneian directors.

The parties were each to make a financial contribution of \$BN250,000 to a bank account opened by Sahid in Brunei. Banking facilities were then to be obtained to finance the work. Sahid was to be the subcontractor for the work for Technip and in turn it would appoint SPTT, the JVA vehicle, as its subcontractor. Payments from Technip were to be made to Sahid which would retain a small percentage and pay the balance to SPTT for distribution to the shareholders.

Despite the delay in the incorporation of SPTT and the non-payment of the contribution, the contract work had to proceed and Sahid issued two Purchases Orders (PO1 and PO2) to Ice. The first was the fabrication of pipe spools and pipe supports for the subcontract work and deliver them to Brunei. Under the second, Ice was to supply and deliver the steel structure for the subcontract to Brunei. It is not necessary to consider this work in detail.

In March 2015 Technip, the main contractor, issued a work order to Sahid to relocate the piping fabrication from Kuantan to Brunei. Ice contends that this relocation caused it to incur considerable costs and expenses including the cost of shipping equipment and material, urgent transportation, accommodation and administrative costs; purchases of consumables to be delivered to Brunei and the organizing of professionals, manager, technicians and skilled workers, at short notice from Malaysia and Thailand to Brunei for fabrication and field erection works. These relocation costs, Ice contended, fell outside the scope of the works in the Purchase Orders, (1 and 2), and should be separately paid for.

Although SPTT was incorporated on the 9th February 2015, the financial contribution was not paid by Ice and the bank account was never opened.

At a meeting on 28th April 2015 between Sahid and Ice, the minutes (by Sahid) recorded in particular:

- a) The subcontract was awarded to Sahid (by Technip); and
- b) Technip agreed the Relocation Order would issue as a variation to the subcontract “and should be also under the JV level with all recording methods following the original contract.”

The relationship between Ice and Sahid deteriorated soon after, with Sahid blaming Ice for not having sufficient funds to carry out the work, for delaying works leading to back charges being imposed by Technip and for failing to perform the piping fabrication in PO1, causing the relocation to Brunei. Ice ceased to be involved in the subcontract work on 18th October 2015.

Sahid claimed that it was Technip who removed Ice from the subcontract – Ice claimed that the action was by Sahid. At a Close-Out meeting at which equipment, consumables and personnel were handed over to Sahid – pausing here, there must have been such a meeting as an essential practical exercise – Ice claimed that Sahid agreed to reimburse Ice for all the costs and expenses it had incurred for the subcontract including the costs and expenses incurred for carrying out work on the POs. Also that the parties, Ice and Sahid, would attempt to reach consensus on the sharing of the profits under the subcontract.

Sahid denies that any such agreement was reached. It is inconceivable that these matters were not discussed.

In November 2015 Ice sent Sahid a detailed statement of account and project cost. It also proposed the sharing of profits of the subcontract as provided for in the JVA. Sahid’s attitude was decidedly negative. This persisted even after a “Final Close-Out” meeting on 23rd May 2016.

The Plaintiff’s claim

As pleaded the sum of RM19,707,142 is claimed as costs and expenses. As presented at trial the plaintiff claims these costs and expenses as incurred for the subcontract but outside the works described in the POs.

The claim is not pleaded with “*clarity and precision*” to use the judge’s phraseology and he had “*to glean the nature of the case from the closing submissions read with the pleadings*”. That of course is a considerable burden for any judge when lawyers fail to fulfil a vital part of their role in presenting an intelligible case at trial.

To overcome this omission and consequent problem, the judge, doing his patient and tolerant best, required the parties to file a Scott Schedule. In view of differing figures claimed, he properly decided that the plaintiff’s claim was limited to the “*outstanding sum*”.

He made it clear that Ice's claim based on "*unjust enrichment*" could only succeed if it could show that the costs and expenses incurred fell outside the contractual scope of the POs. Ice had not pleaded a cause of action in contract.

The Defendants (Appellant's claim)

Shortly stated it is that the initial financial contribution was a condition precedent and the failure to pay it put an end to the JVA. Secondly, that Ice was only a subcontractor under the Purchase Orders and no more.

Added to that is the contention that the outstanding sum fell within the scope of the POs, and Sahid's liability was limited to that scope. In sum, it claims it has paid for all for which it was liable.

It sets up a counterclaim based on an overpayment which it belatedly attributes to a mistake in failing to notice that Ice's work and progress claim was overvalued (and wrongly certificated). The second aspect of this counterclaim concerns alleged back charges. There was no evidence to support this either and the judge had little difficulty in dismissing the counterclaim, in toto. His clear and forthright rejection of this and its purported basis is unappealable

The law

It is not necessary for this court to review the judge's statement of the law involved, particularly in relation to the basis of the respondent plaintiff's case. Suffice to say it cannot be faulted and our appeal judgment is not a vehicle to repeat and revise his consideration.

It is sufficient to quote what he says in his opening to paragraph 26 of his judgment.

"The key question is whether Ice has pleaded the facts that support a cause of action for unjust enrichment. In my view, it has"

Our judgment is that his conclusion is unimpeachable. In paragraph 33 he sets out another material conclusion based on the evidence, which is clear cut:

"...the fair conclusion is that the oral JVA was never implemented and was brought to an end with Ice's removal from the subcontract. This is conclusively established by the fact that Ice's claim is not brought on the basis of contract (i.e. under the oral JVA) but in unjust enrichment."

The Enrichment of Sahid at the expense of ICE

That Sahid was so enriched at Ice's expense is utterly clear on the evidence. Sahid was the sole party to the contract with Technip. The obligations under it were upon Sahid alone. Were the costs and expenses claimed by Ice within the scope of the POs?

In considering the indirect staff costs the judge fairly considered the difficulties in deciding *“how much time the relevant staff actually spent on activities relating to the subcontract outside the scope of works described in the two POs.”* He regarded the quantification of the indirect staff costs as arbitrary. In short, without going into unnecessary details, the judge disallowed the sum claim of \$RM 1,442,628.14.

Turning to the cost of consumables and tools (RM246,374.87) allegedly purchased pursuant to variation orders, again the judge was not satisfied, on the evidence, that they were purchased for works which fell outside the scope of the Purchase Orders. He thus disallowed the sum claimed.

The slugcatcher works and variations

Did the slugcatcher fall within the scope of works under the POs? The word does not appear in the POs. Sahid adduced no evidence to show that the slugcatcher works fell within the ambit of the PO works. Sahid did not plead or argue that the slugcatcher works were part of the POs or that it had instructed such work to be carried out and had paid for it. The judge therefore, logically and rationally, concluded that these works fell outside the ambit of works under the POs.

He therefore was satisfied on the evidence that these works were additional works requested by Sahid being variations to the original scope of the POs, midway through the project. It was immaterial that Technip may or may not have requested the variations. There is no evidence. Sahid simply required Ice to comply with the variations.

The sum accordingly allowed on this judicial assessment was RM866,734.56 to be reimbursed to Ice for the payments made.

Payments to Nusantara Technologies (RM128,127.38)

These were made by Ice to Nusantara for mechanical testing of the steel structure. Sahid agrees with this in that it did not dispute the fact. Evidence was to the effect that Sahid instructed Ice to undertake this additional work. Ice complied with the variation which was outside the scope of the POs. The amount was allowed.

Design and drawing work (RM155,507.79)

This related to PO2. The design and shop drawings were not within the scope of the works thereunder. There is no mention of it in PO2 or PO1. Therefore it is outside the scope of the POs and was allowed by the judge.

Relocation costs (RM225,221.86)

Technip required the shift of the piping works to Brunei. It made an additional payment of \$BN1 million to Sahid. This was outside the scope of the POs and unarguably so. Ice carried it out. It clearly benefited Sahid which had received a payment allowance for it from Technip. It was again, unarguably a benefit and unjust enrichment through Ice's action and payment.

Costs and expenses admitted by Sahid as owed

It is not necessary to traverse the evidence, and the necessary adjustments set out by the judge. The net effect is that Ice's loss to be paid by Sahid is RM2,731,346.83.

The judge recorded that Sahid broadly accepted that the amount is due and owing. There was no basis for setting off what Sahid contended was a double claim. The two credit notes were however taken into account to achieve the net figure.

Steel structure works

The judge rightly concluded that this claim could only have been sustained had ICE included a claim in contract. It had not done so. The claim appeared to be under PO2 and so did not fall within a claim for unjust enrichment. Thus it failed.

The judge went on to consider in a detailed logical review, the law and the facts relating to the history of the commercial relationship.

Again we find it unnecessary to set this out in detail. The judgment speaks for itself and although there may be a degree of repetition it was, in our judgment, inevitable, given the difficulties encountered by the judge which he largely resolved himself. The same applied to the defence put forward, including that of estoppel, and overpayment. From our point of view the judgment gave us a detailed review, analysis, record of essential and unequivocal findings.

His ultimate dismissal of Sahid's counter-claims, which Mr. Siow did not seriously challenge, was considered and dealt with in a comprehensive fashion in his reasoned dismissal of them.

The sum of his findings was that he gave judgment in favour of ICE for a total of RM4,106,938.42 with interest of 6 percent from the 23rd May 2016 to the date of judgment, with costs.

We now turn to the appellant's case as advanced on the basis of written submissions and oral additions.

In his oral submissions Mr. Siow for the appellant chose to concentrate on attempting to refute a number of important features in Mr. Prabhakaran's written submissions, particularly in paragraph 4 where he deals with the force of the evidence adduced in one form or another viz., oral testimony, documentary support, and the Scott Schedule. Mr. Siow at the outset had conceded that he had no objection to the Scott Schedule, as such, and that it was agreed. However he said that by reason of its late appearance in the trial of the action, the appellants were significantly prejudiced because the witnesses had not been fully cross-examined on the material documents and issues and so there were gaps in the evidence.

In reply, Mr. Prabhakaran made important references to the inception, nature and purpose of the Scott Schedule to lay the basis for what he had contended in his written

submissions and to which Mr. Siow had taken objection. He moved onto a composite and dismissive answer to the particularity and generality of the appellant's submissions.

As is common practice, the witnesses gave their evidence-in-chief by way of confirmation of the contents of their affidavits/affirmations and were then subject to cross-examination. At page 52/53 of the transcript is the record of the plaintiff's counsel and the judge dealing with the role of the joint core bundle the essential manual of documentary evidence:

"Plaintiff's counsel:

I find that going through the 21 exhibits that Mr. Choo has referred to in the joint core bundle would be crucial because some of the documents are about 20 pages long and the witness would just like to highlight certain portions of it.....

...that would benefit the court and narrow down the information that needs to be gleaned from the relevant exhibits and the entire further examination that I would have is just purely restricted to those very documents....

I understand that Your Lordship take the entire joint core bundle as the exhibits themselves.

Court:

Joint bundle would be taken as a bundle of documents and the way I usually manage it is that they go into evidence directly....

Ms. Shu, would you be able to cross-examine based on this joint core bundle.

Defence Counsel

Yes, My Lord."

Mr. Prabhakaran made reference to a number of paragraphs in the judgment which deal with the generality and particularity of Mr. Siow's points on prejudice by reason of inability to challenge evidence. We cite §.27 as exemplifying the actual situation:

"§.27. I should add that it is difficult to see what prejudice Sahid has suffered. I make three points. First, it was always open to Sahid to have sought further and better particulars if it felt that ICE's failure to particularise the outstanding sum was prejudicial. It was content not to do so. Second, Sahid did not raise any objections when ICE led evidence from witnesses, both by way of affidavit evidence in chief and in oral testimony, on the costs and expenses that it had incurred (of which the outstanding sum remained to be paid). In fact counsel for Sahid adroitly and comprehensively tested such evidence under cross-examination. Third, when the parties were invited to submit on the outstanding sum by way of a Scott Schedule, Sahid did not object on the basis that the exercise was unnecessary or impermissible. It is significant that Sahid only raised the objection in closing submissions. This suggests

that Sahid's objection is really an afterthought. It is evident that Sahid has suffered no prejudice and has been fully able to meet ICE's claim."

There are other passages in the same vein but it is unnecessary to repeat them here.

We are satisfied that by reference to all the material identified by Mr. Prabhakaran, including parts of the Scott Schedule, the transcript and the judgment that there is no basis for the challenges Mr. Siow makes. The careful, detailed and progressive examination of all the evidence by the judge contradicts the assertion made on behalf of Sahid.

Accordingly this appeal is dismissed. There is no cross appeal. The counsel for ICE correctly reviews the judge's approach on the evidence, including the disallowance in respect of some of ICE's claims, as being well founded on the arguments and evidence before him.

This is an appeal in which the appellant has wholly failed. Since Sahid is unsuccessful and there is no justification for any suggestion that the judgment was ambiguous in any respect or failed to take account of any feature - in fact the judge's own initiative in organising the action into a comprehensible form did justice to both parties - the appellant must pay the respondent's costs of the appeal. This is a final order, the parties having agreed in effect, that the successful party is entitled to its costs.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A