

# IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CIVIL APPEAL NO. 5 OF 1999

BETWEEN

FOUNDATION ENGINEERING ..... 1<sup>st</sup> Appellant

PG MD TAHIR BIN PG IBRAHIM ..... 2<sup>nd</sup> Appellant

AND

RIGOH SDN. BHD. .... Respondent

Before : FUAD, P.; HUGGINS, J.A. AND SILKE, J.A.

Date of Hearing : 9<sup>TH</sup> NOVEMBER, 1999.

Reason for Judgment Dated : 24<sup>TH</sup> NOVEMBER, 1999.

## REASONS FOR JUDGMENT

**HUGGINS, J.A.:**

We dismissed this appeal with costs on 9<sup>th</sup> November 1996 and said that we would give our reasons in writing later.

The Brunei Government wished to extend the British Army's Helicopter Hangar at Seria and entered into a contract with the appellant Defendants for the execution of the necessary work. It is of only passing interest that the Defendants had been employed to build the hangar in the first instance. The Government specified that the extension should have a special type of flooring named Mastertop 1220, and the Defendants wished

to engage the respondent Plaintiff to undertake the flooring, the Plaintiff being the only supplier of Mastertop 1220 in Brunei.

It was common ground that a waterproof membrane had to be laid in the foundation for the Mastertop. The head contract specified that this membrane should be of P.V.C. 1000, but it was the opinion of the Plaintiff that a "Polibit" membrane was essential and it quoted for both installing such a membrane and applying the Mastertop 1220, a note being endorsed on the quotation in these terms:

"Item 2 is a vapour barrier waterproofing and is compulsory to incorporate below the floor slab prior to laying Mastertop 1220".

This quotation was not accepted, because the Government had budgeted for the P.V.C. 1000, which was a very much cheaper kind of membrane. The Plaintiff was then invited to quote for the Mastertop 1220 alone on the basis that the Defendants would lay the floor slab, including the membrane. The Plaintiff did submit an amended quotation but first wrote a letter dated 17<sup>th</sup> July 1996, the material part of which read:

"Please note that P.V.C. Gauge 1000 is not a good vapour barrier as compared with our proposed system. There is a possibility that blistering of the Polymer Topping will occur due to dampness rising from the concrete substrate especially during wet seasons where accumulation of high moisture contents in the concrete takes place. In view of above, we will not be held responsible for any blistering failure".

The amended quotation was not accepted, because the colour of the Mastertop was not stated, but the Plaintiff immediately re-submitted the quotation after adding a note of the colour required. This quotation was then accepted by the Defendants. The Plaintiff led evidence that it was assured by the Defendants that if, due to use of the cheaper membrane, blistering occurred, the Plaintiff would not be held responsible.

In the event the Plaintiff applied the Mastertop 1220 and blistering did occur. The Defendants refused to pay for the work.

Under the terms of the head contract the Government, in the event of non-completion by the Defendants, was entitled to employ a third party to complete the work, and in fact it employed the Plaintiff to make good the defects in the surface. The Plaintiff was duly paid for that work, but the Judge rightly held that this was irrelevant to the liability of the Plaintiff and Defendants inter se.

The Judge then held that the Plaintiff had completed the work it had contracted to perform and was entitled to the outstanding balance of the sub-contract sum, to wit \$13,847.98 and she dismissed the Defendants' counterclaim for compensation for the liquidated damages payable by the Defendants to the Government for failure to complete and for a refund of advance payment.

It was the contention of the Defendants that the Plaintiff was not entitled to payment for its work because it had not, it was said, satisfactorily completed the work and had declined to make good the defects which had developed. Counsel urged that the Plaintiff's disclaimer of liability by the letter of 17<sup>th</sup> July 1996 formed no part of the agreement which was eventually reached between the parties and that the Plaintiffs failed to perform the work in accordance with the instructions of the manufacturer of Mastertop 1220 because it did not carry out a test to determine the humidity content of the concrete slab before applying that product. Counsel submitted that, if the Plaintiff considered that Mastertop 1220 would not be satisfactory if applied above the type of membrane which had been specified in the head contract, it should have refused to do the job.

In our view the trial Judge came to the right conclusion. Whether or not the letter of 17<sup>th</sup> July 1996 formed part of the sub-contract, it was clearly part of the matrix of facts surrounding the making of that contract. The obligation of the Plaintiff was to apply the Mastertop 1220 in a workmanlike manner, and the Plaintiff did not warrant that the result would be satisfactory whatever the foundation. Any duty it owed to the Defendants in relation to the foundation was amply discharged by the endorsement on the original quotation and by the letter of 17<sup>th</sup> July 1996. If the Defendants chose to contract for the application of Mastertop 1220 above an unsuitable membrane, they did so at their own

risk. This was not a case where the work undertaken by the sub-contractor created a dangerous structure when superimposed upon an inadequate foundation and where this resulted in damage to third parties, or where the other contracting party relied upon the special skill of the Plaintiff.

The Plaintiff did in fact carry out a humidity test before applying the Mastertop 1220. It did so not to ensure that there could be no blistering due to excessive moisture in the slab at any time in the future, as the Defendants mistakenly thought, but merely to ascertain that, at the time when the Mastertop 1220 was to be applied, there was no excessive surface moisture which would prevent the Mastertop from bonding with the slab. The Judge found that the Mastertop 1220 was applied when the surface moisture was within the limits prescribed by the manufacturers and otherwise in a workmanlike manner: the blistering was due to the inadequacy of the slab. There was evidence upon which she could properly make those findings.

The Plaintiff did all that was required under the terms of the sub-contract and the Judge was right to direct payment of the outstanding balance and to dismiss the Defendants' counterclaim.

SIR ALAN HUGGINS  
Judge, Court of Appeal

DATO SERI PADUKA KUTLU TEKIN FUAD  
President, Court of Appeal

WILLIAM JAMES SILKE  
Judge, Court of Appeal

Mr Christopher Sawan

for Appellant/Defendants

Mr. F.Y. Chong

for Respondent/Plaintiff