

BETWEEN

**Jong Hoke Chiang**  
**(trading under the name and style of**  
**YONG PILING & CONTRACTOR)**  
**(Brunei Yellow IC: 008445)**

**Appellant**

AND

**Kok Heng Construction Company**

**Respondent**

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**(Court of Appeal of Brunei Darussalam)**  
**(Civil Appeal No. 6 of 2006)**

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**Power, P; Mortimer and Litton, JJ.A**  
**17<sup>th</sup> May, 2007.**

Order 14 Rules of the Supreme Court. Summary Judgment for part of the plaintiff's claim based on architect's certificates issued under a building contract. Proper construction of the contract. No issue of law involved. Judge's discretion as to whether execution should be stayed pending determination of counterclaim for damages.

Mr. Selvanathan Subramaniam of Messrs. Fathan, Rudi Lee & Associates for the Appellant.

Mr. Lee Yew Choh of Messrs. YC Lee & Lee for the Respondent.

**Litton, J.A.:**

### **Introduction**

This appeal arises from proceedings brought under Ord. 14 r. 1 of the Rules of the Supreme Court, Cap. 5 for summary judgment. The application related to *part* of the plaintiffs' claims in the action: A matter of some significance on this appeal, as will be made clear later on.

The writ was issued in March 2003: More than four years ago; and the subject matter of this appeal goes back more than nine years. It arises out of a building contract dated 8 February 1998 under which the plaintiffs, building contractors, agreed to build a total of 23 units of housing at Kampong Sawang Lambak, Kilanas, under the instructions of an architect (referred to in the contract as "Superintending Officer"). The defendant, himself a piling contractor, was the employer. The total contract sum was \$1,890,500. The date for completion (subject to extension of time by the architect) was 8 April 1999.

The contract envisaged monthly payment certificates being issued by the architect “showing the estimated total value of the work done up to the date of such certificate”: Clause 36(a).

In essence, the plaintiffs’ claim for summary judgment related to eight payment certificates issued by the architect in the course of the construction of the houses. The first certificate is dated 19 March 1998. The last bears the date 7 August 1999, by which time work to the total estimated value of \$1,354,980.35 (excluding the retention fund amounting to 5% of the value of the work) had, according to the certificate, been performed by the plaintiffs.

Only part of the sums certified by the architect was paid. Hence the claim by way of summary judgment.

### **The Facts**

The facts stated below are not in dispute.

As mentioned earlier, clause 36(a) of the contract provided for the issue of monthly certificates by the architect. Clause 36(c) stipulated as follows:

“(c) Within a number of days not exceeding that referred to in the appendix of the issue of any such certificate the Employer will make payment to the Contractor in connection with the work ... referred to in that certificate.”

The appendix was blank as regards the number of days within which the sum certified must be paid. This omission, plainly, cannot negate the entire purpose of the contract: Nor has this been suggested by counsel before us. Hayati J in the court below quite rightly treated clause 36(c) as a requirement to pay within a reasonable time, and in any case not later than one month of the date of the certificate.

As mentioned earlier, the date for completion was 8 April 1999, subject to the provisions in the contract for extension of time: clause 28(b).

The work soon got underway. The first payment certificate (dated 19 March 1998) was for \$156,267.40. Over one month later, on 24 April 1998, the defendant made his first payment. But not in full: Only \$150,000. The work nevertheless proceeded. By 10 June 1998 three certificates had been issued; by then payment had lagged badly behind. On that day the plaintiffs wrote to the defendant complaining of slow payment of the sums certified. In the same letter they warned the defendant that as a result they might have to seek an extension of time, and for recovery of “expenses” in the future. There was no reply to this letter.

By 4 December 1998 five certificates had been issued. The shortfall in payment then totalled \$484,493.10. This was a substantial deficit, considering that the entire lump sum contract was for only \$1,890,500.

On 3 February 1999 the plaintiffs wrote, seeking payment of the amount then owing. About a week later (on 11 February), the defendant paid \$20,000, but there was no reply to the letter of 3 February.

On 26 March the plaintiffs wrote again, enclosing certificate No. 6 and noted that, by that time, the certified claims amounted to \$1,029,868.16 and only \$440,000 had been paid. There was no reply to that letter.

On 7 July 1999 the plaintiffs wrote yet again, enclosing certificate No. 7, saying that the certified claims totalled then \$1,227,932.48 against which only \$540,000 had been paid. The letter went on to say that they (the plaintiffs) had not been able to carry out the work at a normal rate, because of the slow payment, that they were applying for 12 months' extension of time, and would be claiming "extra expenses". On 12 July 1999 the plaintiffs sought from the architect an extension of 12 months from 8 April 1999 "for the time being".

The 8<sup>th</sup> certificate was issued by the architect on 7 August 1999 for \$127,047.87, by which time \$1,354,980.35 was outstanding.

On 12 September 1999 the plaintiffs told the architect that they had no alternative but to stop work. On 5 January 2000 the defendant made a further payment of \$15,000. This was the last payment they ever made under the contract.

On 8 March 2000 there was a meeting of the parties on the site in the presence of representatives from the architect's office. The defendant agreed to settle his liability by transferring certain properties to the plaintiffs, with a final balance to be paid in cash by monthly instalments. The defendant signed a memorandum to this effect. But this was never implemented.

There were continuing talks which led nowhere. At some stage the plaintiffs yielded possession of the site and the defendant engaged other contractors to complete the houses.

In January 2001 the plaintiffs' solicitors wrote demanding payment of \$741,703.50: This was the total shortfall on the eight certificates plus the sums which had been retained pending completion, less a sum of \$129,592.00 which the plaintiffs owed for piling work done by the defendant for the plaintiffs elsewhere. There was no response from the defendant to this claim.

### **The Pleadings**

In March 2003 the plaintiffs issued their writ claiming \$741,703.50, plus interest and costs, with the statement of claim indorsed.

Over a year later (in August 2004) the defendant lodged his defence. Much of it is irrelevant. Para 10 says:

“10. The defendant avers that the certificates were an approximate quantification of works that were carried out and were not supported by any proofs documents or otherwise to support the amounts claimed. The amounts stated in the certificates are over-estimated and therefore unacceptable to the defendant.”

This, too, is irrelevant. The estimate of the work completed on site, as stated in each certificate, is that of the architect and nothing in the building contract requires the contractor to provide “proof” to “support the amounts claimed”. If there was mala fides or some form of actionable wrong in issuing the certificates, the defendant’s remedy lies against the architect, not the contractor.

Para 14 of the defence alleges that the plaintiffs had wrongfully “abandoned the project” causing the defendant loss and damage. The counterclaim for “consequential loss resulting from the cessation of construction work”, as particularized, was \$1,645,730.80. This included a total of \$967,730.80 (the sum of the first four items particularized) which appears to be the full expenditure allegedly made by the defendant to complete the project: Not an *additional* amount incurred as a result of the plaintiffs’ “abandonment” of the project. This, on its face, is a gross exaggeration. Then there were two sums claimed by way of “late completion charges” (from April 1999 to 22 September 2002) amounting to a total of \$678,000: How such “charges” are justified has not been explained.

In January 2005 the statement of claim was amended to add a claim for “loss of profit arising from the defendants’ repudiation of the agreement”.

### **The Order 14 proceedings**

In February 2005 the plaintiffs took out proceedings in chambers under Order 14 r. 1 of the Rules of the Supreme Court, Cap 5, for that part of their claim as related to the eight certificates, leaving their claim for damages (pleaded as loss of profits) to the trial. The hearing in chambers was adjourned several times. It was finally fixed for hearing by the Registrar on 9 April 2005, by which time the defendant’s then solicitors had withdrawn from the case. The defendant was aware of the date of the hearing but arrived late in court. In the meanwhile the Registrar heard the application on its merits *ex parte* and gave judgment for the full claim of \$741,703.50 plus interest and costs.

He also made an award of \$252,626.24 “being interest at the rate of 6% per annum from the date of the payment certificates up to the date of judgment”: A matter of some significance, as will be explained later in this judgment.

Through fresh solicitors the defendant applied to the Registrar under Order 14 r.11 to set aside the judgment. Order 14 r. 11 permits a party “who does not appear at the hearing of an application under r.1 or r.5” to so apply. The Registrar dismissed this application summarily, holding that Ord. 14 r.11 was inapplicable, as he had earlier given judgment upon the merits in the plaintiffs’ favour.

### **Appeal to the Judge under Ord. 56**

The defendant appealed to the Judge in chambers. Hayati J held that the Registrar had erred in holding that Ord. 14 r. 11 did not apply. She then proceeded to hear the defendant's appeal against the award of summary judgment upon its merits. She said, quite rightly, that the plaintiffs' claim focused upon the architect's certificates. The shortfall, by the time the last certificate was issued, was \$1,354,980.35: See paragraph 13 above. Giving credit for the sums actually paid (\$555,000) and the amount admittedly owed by the plaintiffs to the defendant for piling work elsewhere (\$129,592.00), the amount owing by the defendant was \$670,388.35. The Judge held that the Registrar had erred to the extent that the judgment for \$741,703.50 had included retention money to which the plaintiffs were not entitled: The contract provided for the release of retention money upon strict conditions (such as a certificate by the Commissioner of Labour that all workers had been paid) which had not been fulfilled: clause 36(e). The Judge accordingly varied the Registrar's judgment by substituting the figure of \$670,388.35 for the higher figure.

As regards interest, the award in the sum of \$252,626.24 was also discharged. The Judge awarded interest "at 6% p.a. on each certificate from one month after date of issue, pursuant to Ord. 24 r. 12 RSC" (The reference of "r. 12 RSC" is an obvious typographical error: The Judge clearly meant r. 13 which empowers the court to order the payment of interest "at such rate as it thinks fit on the whole or any part of the debt .... between the date when the cause of action arose and the date of the judgment").

As to costs, she ordered that the defendant should pay half the costs of the Ord. 56 appeal; she made no order regarding the costs of the application under Ord. 14 r.11 before the Registrar and otherwise ordered that the Registrar's orders for costs should remain undisturbed. But she ordered a stay of execution of judgment pending an appeal to this court.

The defendant, being dissatisfied, now appeals.

### **The Formal Order of Hayati J**

The formal order, reflecting Hayati J's judgment, was never drawn up. All that we have before us is a draft which, on its face, is defective in the sense that it fails to reflect accurately what the Judge had meant to determine regarding the payment of interest on the debt: This is a matter we need to address at the conclusion of this judgment.

### **Liability on Architect's Certificates**

On the face of things, the defendant had, from the very beginning, defaulted as regards payment. The matter got progressively worse as the project advanced. As early as June 1998 he was warned of the possible consequences of his failure. Under the building contract, the obligation to pay upon the issue of each certificate is free-standing.

Clause 36(c) of the contract, as mentioned earlier, says quite simply that the Employer “will make payment to the contractor in connection with the work and/or materials referred to in that certificate”. Full stop. On the facts as related so far, the plaintiffs would appear to have an unassailable case.

Before us, Mr Selvanathan, counsel for the defendant, says this: It is an admitted fact that at the time when the houses were being built, there were other dealings between the parties outside the scope of this contract: Witness the credit the plaintiffs had to give in the sum of \$129,592.00 for piling work which the defendant (a piling contractor) did for the plaintiffs at another site, where the plaintiffs were the defendant’s employers; hence there were accounts flowing between the parties both ways. This, counsel argues, explains the blank in the Appendix to the building contract: That is to say, why the number of days within which the defendant had to pay on each certificate was left blank: It was to give the defendant flexibility as regards payment of the precise sums stated in each certificate: Flexibility, counsel submits, regarding *what* to pay and *when* to pay. It is not possible, counsel says, to resolve liability on the eight certificates without a trial; by the arrangement the parties themselves had made, the certificates were to be treated as having only “temporary validity”, the defendant having to pay only for material actually supplied; all accounts were to be resolved when the project was finally completed.

Quite apart from the question of law as to whether evidence of some collateral verbal arrangement could properly be adduced to contradict the clear terms of the written contract, counsel faces the insuperable difficulty that there is not a scintilla of evidence to support this forensic point, however attractively put. The Judge took a robust view of the defendant’s liability to pay: Rightly so. The plaintiffs are plainly entitled to judgment for \$670,388.35 plus interest and costs. The only question that arises is how the defendant’s counterclaim should be entertained in the context of Ord. 14 proceedings.

Before turning to consider the counterclaim, it is worth making this observation: Hayati J in the course of her judgment referred to *Sumber Bahtera Contractor v Lim Chong Poi* [2002] 2 JCBD 14 where Penlington J “cited the principle that an architect’s certificate is ‘as good as cash’ and must be honoured”. Counsel submits that in this passage it can be demonstrated that the Judge had misdirected herself, treating it as a proposition of law that such certificates enjoyed a special status and must be honoured, and that as a matter of law there can be no defence of set off to a claim based upon these certificates. If the Judge had so directed herself then counsel is of course correct, for the liability to pay arises in each case upon the terms of the building contract itself. It is purely a matter of seeking the intention of the parties upon a proper construction of the contract. No law is involved. Hence it is seldom helpful to refer to other cases unless there is some ambiguity in the words used, in which case it might help to see how other courts elsewhere have construed similar words. But, reading Hayati J’s judgment as a whole, it is plain that she reached her conclusion upon the wording of clause 36(c): Not by applying some proposition of law.

## **The Counterclaim**

The foundation of the defendant's counterclaim is the plaintiffs' alleged "cessation of the construction works": para 13 of his defence. But the fact of "cessation" standing alone cannot be the foundation of liability. For the legal consequences of "cessation" it is necessary to go to the contract itself. There one sees clause 32(a) which provides for such an event. Clause 32(a)(i) says that if the contractor should, without reasonable cause, wholly suspend the works before completion, then, if such default should continue for seven days after a notice by registered post to the contractor, the "Superintending Officer" might then "by notice by registered post determine this contract". Clause 32(a) goes on to say that such notice would be void "if Employer is at the time of the notice in breach of this contract."

There is no suggestion that the architect had ever sent to the plaintiffs a clause 32(c) notice of default: And if he had, it would have been "void", since plainly the employer was in breach and had been in breach from virtually the beginning.

In reality, the defendant appears to have, at best, a shadowy counterclaim for damages: A counterclaim which has a barely tenuous connection with the plaintiffs' claim based upon the architect's eight certificates.

## **The Judge's Discretion**

As to how a court might properly entertain a counterclaim in the context of Ord. 14 proceedings, the court has a discretion. Often, where the counterclaim arises out of the same transaction as the plaintiff's claim and the plaintiff appears to have otherwise an unanswerable case, the court would give judgment for the plaintiff but orders a stay of execution pending the determination of the counterclaim. This has the merit of saving costs by limiting the scope of the trial and doing justice to the defendant. If the defendant is successful, judgment on the counterclaim would reduce or extinguish the sum awarded to the plaintiff. But the discretion to be exercised under Ord. 14 r.3 is not a blind one. The court has the duty to weigh the apparent merits of the counterclaim, and to judge the scope of the connection between the claim and the counterclaim. Here Hayati J exercised her discretion by declining to order a stay, saying that "the defendant is not denied of his right to proceed with his claim against the [plaintiffs] as to matters raised in [his] counterclaim." This is well within the broad scope of the Judge's discretion. The defendant had, from the beginning, been in default as regards payment. The matter got progressively worse as the project advanced. The Judge in these circumstances acted robustly. I cannot see how she can be faulted in this regard.

## **The Interest**

From the outset, the Registrar awarded interest at the rate of 6%; and he did so "from the date of the payment certificates". The sum amounted to \$252,626.24, as is apparent from his order of 12 April 2005. This sum, we are told by counsel, took into account all the payments made by the defendant (\$555,000) plus the credit of

\$129,592.00, as if all the earlier certificates had been discharged. On this basis, the first three certificates would have been discharged, the amount owing on the 4<sup>th</sup> certificate would have been \$45,319.60, leaving the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> certificates undischarged. There were, however, two errors made by the Registrar: (i) The debt included the return of the retention fund and (ii) the calculation was made from the dates of the certificates, not *one month* after such dates.

These two errors were corrected by the Judge with the effect that interest would start to run from 30 days after the date of each undischarged certificate. The rate of interest, 6% per annum, has never been in dispute. It is unfortunate that the formal order pursuant to Hayati J's judgment was never drawn up. This however cannot affect the issue before us. We would affirm the Judge's award of interest and, for the avoidance of doubt, order that a draft minute incorporating the award of interest, as a lump sum, calculated in accordance with the formula outlined in paragraph 38 above, be lodged in court for our approval.

### **“Interlocutory Order or Judgment”**

Very late in the day, counsel for the respondent took this point: That the appeal cannot properly be entertained by this Court as no leave to appeal was ever given by the Judge or by us. Section 20(2)(f) of the Supreme Court Ordinance cap.5 says that no appeal shall lie without leave from *any interlocutory order or judgment*. Counsel submits that as the judgment here originates in Ord.14 proceedings it necessarily means that the judgment here is interlocutory; given the nature of Ord.14 proceedings finality can at best go only one way since the defendant, on showing cause, could have been given leave to defend, with or without conditions. Moreover, the action itself has not been finally determined since the plaintiffs are still pursuing their claim for damages.

There is much case law on the meaning of the words “any interlocutory order or judgment” in s.20(2)(f). As we have not heard full argument on the point, it would be inappropriate for us to finally determine this issue. All the material for resolving this appeal upon its merits is before us; it would be unfortunate if the appeal were to turn upon a mere procedural point. For the purposes of this appeal we would treat, in the appellant's favour, the judgment appealed against as a final judgment, and that the appeal lies to this court without leave. The definitive categorization of summary judgments under Ord. 14 as *interlocutory* or *final* will have to await another day.

### **Conclusion**

We would affirm the Judge's orders and award the costs of the appeal to the plaintiffs. It goes without saying that the Judge's order for stay of execution is discharged upon the conclusion of this appeal. The orders we make are as follows:

- (1) There will be judgment for the plaintiffs in the sum of \$670,388.35.

- (2) In addition, the plaintiffs are entitled to interest on the basis of the formula set out in paragraph 38 above. The solicitors for the plaintiffs must lodge in court a minute of judgment, incorporating the sum to be awarded in accordance with this formula within 3 days of the date of this judgment. In the event that the solicitors for the defendant dispute the correctness of this sum, they must give notice within 24 hours of receipt of the draft and the parties will appear before this Court on **Saturday, 26 May 2007 at 9.00 am** when the court will resolve the matter in dispute.
- (3) There will be an order nisi that the defendant pays all the costs of the appeal, to be taxed if not agreed; the order to be made absolute within 3 days of the date of this judgment unless the defendant contends otherwise, in which event the Court will hear the parties on **Saturday, 26 May 2007 at 9.00 am**.