Rukun Al-Yaqeen (RAY) International Sdn Bhd **… Plaintiff**

AND

PHH Offshore Services Sdn Bhd **… Defendant**

(High Court of Brunei Darussalam)
(Civil Suit No. 11 of 2022)

Edward Timothy Starbuck Woolley, J.C.
Dates of Hearing: 5th, 6th and 7th November, 2024.
Date of Judgment: 18th November, 2024.

Contract for dredging – whether entitled to liquidated damages for delay – whether evidence of causes of delays and responsibility for them – interpretation of contract – application of contra proferentum rule.

Mr Kamal bin Shaari and Ms Lim Li Chyi (D/C Yusof Halim & Partners) for Plaintiff.
Lt Col (Rtd) Hj Harif Bin Hj Ibrahim (D/C Lt Col (Rtd) Harif Ibrahim for Defendant.

Case cited:
Sri Sri Shiba Prasad Singh, deceased, now represented by Kali Prasad Singha v Maharajah Srish Chandra Nandi and anor (1949) 2 MLJ 657

JUDGMENT

Woolley, J.C.:

These proceedings arise out of a written agreement dated 3 August 2020 between the Plaintiff and the Defendant whereby the Defendant agreed to carry out for the Plaintiff maintenance dredging at the Integrated Marine Supply Base at Serasa. The commencement date of the contract was the date of signing, the Defendant was to mobilize their equipment and machinery within two weeks and the work was to be completed in 12 weeks from the date of signing of the contract, namely by 26 October 2020. There was also provision for the payment by the Defendant of liquidated damages of B$8,000.00 a day for each day after the time specified until completion of the work. I will consider the terms of the agreement when looking at the issues below.

2 Prior to the agreement, in July 2020, it was discovered that there were 6 sled anodes, which are apparently devices for protecting offshore structures, on the seabed in the area to be dredged, some 10 metres from the jetty, which had to be removed before dredging could commence. This was done, by 14 August 2020, and the Defendant submitted an invoice for this work to the Plaintiff for B$60,000.00, which they paid. The Plaintiff now claims reimbursement of this sum on the basis that the work was covered by the agreement and the payment was in error. I will look at the question of the anodes and their removal in more detail below.

3 The Defendant completed mobilization of their equipment by 18 August 2020, but delays occurred making it apparent that the work would not be completed by 26 October 2020. The Plaintiff granted the Defendant an extension of time to 30 November 2020, but the work was still not completed by then. On 11 December 2020 the Plaintiff issued a notice to the Defendant informing them that they would be claiming liquidated damages under the agreement at B$8,000.00 per day from 1 December 2020 until the work was completed. There appears to have been no response to this nor any request for a further extension. The Plaintiff was notified that the work was completed on 16 January 2021 and now claims the sum of B$376.000.00, being liquidated damages of $8,000.00 a day for 47 days in addition to the B$60,000.00 they claim was paid in error. The Defendant counterclaims the sum of B$585,938.55 being 61 days of "standby rate", which I will look at separately.

The Plaintiff's claim for delay

4 Clause 4.3.1 of the contract, after confirming that both parties recognize that time is of the essence, reads:

> *"Accordingly, ……. Owner and Contractor agree that as liquidated damages for delay (but not as a penalty), Contractor shall pay the Owner BND8,000.00 (BRUNEI DOLLARS EIGHT THOUSAND ONLY) for each day that expires after the time specified in Article 3, Clause 3.1 for completion until the Work is complete."*

It is admitted by the Defendant in the Defence that they notified the Plaintiff that the work was completed on 16 January 2021 and this was confirmed in evidence by their current project manager Elyas bin Abdullah Tseu (Elyas).

5 In the Defence, the Defendant blames the Plaintiff for the delay in completion of the contract and alleges:

> (i) between 14 August 2020 and 16 September 2020, the Plaintiff neglected to obtain the approval of the Maritime and Port Authority of Brunei Darussalam (MPABD) for the works to be carried out;
>
> (ii) the presence of the Plaintiff's sub-contractor's vessel at the dredging site prevented or hindered the carrying out of the works;
>
> (iii) the Plaintiff failed to disclose a hydrographic study by DHI Water & Environment (B) Sdn Bhd (DHI) until 26 November 2020, which would have enabled the Defendant to overcome problems of sedimentation and siltation.

They also blame bad weather for a total of 22 days, and the poor performance of their sub-contractor, although it is not explained how the latter can be blamed on the Plaintiff. In his submissions, counsel for the Defendant has also claimed that the removal of the anodes caused delay. However, this is not pleaded in the Defence, and it is clear from the undisputed sequence of events in August 2020 that the anodes were removed by 14 August, taking only two days in the process, as shown in the Defendant's daily progress reports, and it is further undisputed that mobilization of equipment was completed by the Defendant only on 18 August. There can therefore be little or no delay relating to the removal of the anodes.

6 Accordingly, the first matter to consider is the question of the approval of the MAPBD for the dredging work. Clause 8.1.16 of the contract reads as follows:

> *"The Contractor and their subcontractors shall comply with all applicable laws, rules, regulations, orders and procedures of the Government and local authorities currently*

in force relating to all labor (sic) employed and dredging operations including but not limited to the obligations set forth in the dredging tender document of June, 2020".

It is submitted on behalf of the Plaintiff that the wording of this clause, and particularly the inclusion of the word "procedures", required the Defendant to apply for the necessary approvals, and this is supported by the Defendant's own estimated timeline in Appendix 3 to the contract which allows them 4 weeks for "Documentation & Relevant Permits/Conditional Approvals, Notice to Mariner", and an internal email of the Defendant's contract manager of 8 September 2020 referring to "the relevant documentation for submission to the Marine Department". I have not been shown what that documentation was.

7 The Plaintiff's witness Zakaria bin Pehin Dato Hj Abdul Aziz (Zakaria), the chairman and director of the Plaintiff, gave evidence confirming that it was the Defendant whose responsibility it was to obtain necessary approvals, and had done so in respect of disposal of dredged material at an approved dump site, and to start dredging works while awaiting additional documentation, prior to signing the agreement.

8 The Defendant relies on a "Notice to Mariners" dated 17 September 2020 advising shipping that dredging work will take place in the areas listed from 17 September to 13 November 2020, and claims that this is the approval they required before they could commence dredging full time, by which they mean their option of two 12 hour shifts a day. My principal problem with this is that it is clearly not an approval to the Defendant for dredging, it is a notice to mariners that dredging is taking place. I have not been directed to any documents applying for such approval, nor communications from the MAPBD giving approval. It certainly does not show that the Defendant can do any more dredging than was done before and there is no evidence that the full option of two 12 hour shifts, of which there is no reference in the notice, was used at any time.

9 In any event, there is no evidence from the daily progress reports submitted that there was any change in the number of hours dredging taking place each day after the notice was issued. Indeed, I have not been directed to any of the daily progress reports which show that no dredging took place on any day because of lack of MAPBD approvals since the work started in early August 2020. This is confirmed by Liang Teng Seah (Liang) who was the Defendant's subcontractor executing the dredging work and who, in his evidence, said that at no point was he stopped from carrying out the dredging work by the authorities or by the Defendant owing to pending survey works or approvals. In considering Liang's evidence, I take into account the fact that he is party to other proceedings against the Defendant in the High Court and, while I dismissed the Defendant's counsel's application to have him excluded because of that, I recognize that his evidence may be affected by his attitude to the Defendant and his own dispute with them. In spite of that, having seen him give evidence, I accept what he says on this matter.

10 It follows that, not only is it apparent to me that it was the Defendant's responsibility under the contract to obtain the necessary approvals, there is no evidence that a lack of them caused any delay to the dredging work.

11 The next matter is the presence of another vessel at the unloading jetty which the Defendant maintains prevented or hindered their work. In the Defence it is claimed that the Plaintiff's subcontractor's vessel was there for 27 days. These days are not particularized either in the Defence or in the evidence of Elyas and the Defendant's second witness, Muhammad Khalilulah Ezel bin Elyas (Ezel). However, some are listed in an invoice sent from the Defendant to the Plaintiff on 30 December 2020, claiming a sum of B$201,716.55 for "standby rates" for 21 days in August, September and October 2020. Neither of the Defendant's witnesses have been able to point to any evidence, including in the daily progress reports,

showing days when less work, or no work at all, was possible because of the presence of this vessel at the jetty. As appears from Ezel's evidence in chief, the only effect of the presence of the vessel was to use an alternative unloading site at New Temburong Quarry (NTQ) which took more time and cost more. Again what extra time and cost was involved has not been made clear either in evidence or the documents produced.

12 It is the Plaintiff's evidence that the length of the unloading jetty was such that the vessel in question did not completely impede the Defendant's work, and, even if it did, they had arranged the second unloading site at NTQ. This supports the documentary evidence in the daily progress reports that show that work continued every day, with no apparent delays or shorter working time pointed out to me in the reports. This is also supported by Liang's evidence where he said that the vessel in question did not cause significant interruption of the work and he had never raised the issue with the Defendant. He agreed that the jetty was long enough to accommodate both the vessel and his barges, and, in any event he could use the NTQ jetty if necessary and there were no instances of having to stop work due to blockage of either jetty. This, again, is supported by the daily progress reports which show no days where work was totally stopped by the presence of the vessel. Even if it had been present at the jetty for the 27 days claimed by the Defendant, not only is there no evidence of it delaying the dredging work, but neither is there any suggestion or evidence of a complaint being made to the Plaintiff at the time, which one would expect if it was causing a serious problem.

13 I am therefore not satisfied that the Defendant has shown any serious delay to the work caused by the Plaintiff's subcontractor's vessel. For the sake of completeness I would add that I have been referred by counsel for the Defendant to an email dated 20 January 2021 from Zakaria to Elyas referring to a discussion and confirming that *".. RAY will not be obliged to pay PHH any delay claims until such time that Stratacom has paid RAY the amount claimed by PHH.*" Stratacom were the owners of the vessel in question, RAY being the Plaintiff, and PHH the Defendant. In the absence of any context to this email I am not satisfied that it takes the matter any further except to confirm that the Plaintiff felt under no obligation to compensate the Defendant.

14 As to the pleaded case of the Defendant in paragraph 9.5 of the Defence that a hydrographic study by DHI was not supplied until 26 November 2020, I can deal with this quite briefly. While there is evidence of a hydrographic report being supplied in November 2020, there is clear evidence of the relevant report being supplied to the Defendant by the Plaintiff in an email of 11 June 2020. The Defendant's witness Elyas admitted in cross-examination that this was the hydrographic report that they were expecting. It is clear therefore that the Defendant had the report well before the agreement was signed and work started.

15 The last matter raised by the Defendant as causing unavoidable delay was the weather. I think I can take judicial notice of the fact that it rains in Brunei Darussalam, fairly frequently and often very heavily. This is within the knowledge of anyone who lives and works in Brunei. It is consequently common sense that anyone negotiating a contract for outdoors work will take into account that there will be times when work is affected by rain and either allow for it in the time agreed for completion, or specifically provide for it in the contract. It might be a different matter if work was affected by weather so extreme and unexpected that it could not have been foreseen by a reasonable person at the time of the agreement. But that is not the case here. The Defendant only pleads that rain affected the work and claim that it caused a delay amounting to 22 days.

16 It is clear from the documentary evidence of the daily progress reports, which are themselves incomplete, and the oral evidence of the Defendant's witnesses, that this 22 days,

not having been particularised, was calculated by adding together numbers of hours they claim were lost on particular days because of rain, rounding them up, and dividing them by 24 to arrive at their total of days. There is no evidence of a single whole day when work was stopped completely. This is confirmed by the Defendant's own record of "weather downtime" which lists times of rain on a number of days between 23 July 2020 and 11 December 2020, a record apparently obtained from the Meteorological Office. It assumes that every moment of rain prevents work, and it is clear from this list and confirmed by the Defendant's witnesses that most, if not all, of the times have been rounded up. An example is the entry for 4 November 2020 where a total of 55 minutes of rain is rounded up to 7 hours downtime. They explain this by saying that the time needed to get back to work was included. However, these figures do not always concur with the daily progress report as to the dredging work itself, as the report for the same day, 4 November, records dredging taking place for 3 hours 45 minutes for one vessel and 3 hours 55 minutes for the other, and "onshore dredging" from 8am to noon, 1pm to 7pm, and 7.30pm to 9.30pm.

17 I should add that there is no documentation by way of daily progress reports or otherwise from 11 December 2020 to 16 January 2021. This is apparently because they are all missing from the Defendant's office, having been removed therefrom. This was reported to the police. However, it means that no documentary evidence as to the progress of the work after 11 December 2020 is available.

18 To summarise, the calculation by the Defendant is not supported by the evidence, and in any event the method of calculating these days which they claim were lost, is artificial and does not reflect the reality of the situation, which is that no whole days were lost as a result of bad weather. The evidence of Liang supports this. He says that rain did not halt the progress of the dredging work and the only delays were in the Defendant's disposal of the dredged material by allowing the stockpiles at the jetties to become filled to capacity, and their failure to maintain the road access to and from the stockpiles which were made worse by rain.

19 As I have noted above, the Plaintiff granted an extension of time for completion of the contract from 26 October 2020 to 30 November 2020. This may or may not have been after an email from Mr Johnny Phang, then the project manager of the Defendant, to the Plaintiff dated 21 October 2020 giving a planned schedule for the dredging contract with an end date of 11 November 2020. In the email Mr Phang explains the delay, giving reasons which are similar to those pleaded by the Defence here – the sub-contractor's vessel at the wharf, unloading at NTQ, and rain, although he does not mention the DHI report. He also included the anodes and inability to work at night before the notice to mariners was issued on 17 September 2020, although the latter makes no mention of times of work. He put forward a recovery plan by which the work could be completed according to his new schedule. This clearly shows that the causes of any delay had been taken into account by him in estimating time for completion, and the Defendant was given a further 19 days by the Plaintiff beyond that.

20 I accordingly find that the reasons put forward in the Defence for the delay in completing this contract are unfounded and not supported by the evidence, and that the Plaintiff is entitled to their claim of B$376,000.00 as liquidated damages under the contract.

Payment for removal of the anodes

21 It is the Plaintiff's case that the payment for removal of the anodes was made in error as such work was included in the contract as a responsibility of the Defendant. Clause 8.3.3 of the contract reads as follows:

> "*Removal of Craft, Plant or Materials Obstructing the Work*

> *The Contractor shall at their own expense remove all potential obstructions (towers, piles, signs, buoys, channel markers, breakwater structures, pipelines, bulkheads, sewer lines, etc) within the limits of the work in addition to all structures adjacent to the limits of channel dredging which may impact dredging operations. The Contractor shall not proceed with any dredging work until the obstruction (sic) are cleared and removed from site."*

The Defendant maintains that the description of obstructions in this clause does not include the anodes which fall into a different category. However, it is clear from the "etc" at the end of the list of possible obstructions that it is not exclusive. Indeed, in the Defendant's tender for the work they include a sum for an item which goes even further:

> *"Carry out site clearance and disposal of any obstructions such as sunken boats, logs, wire ropes and nets, anchors and sinkers, water-logged or metal grit, timbers, concrete, boulders, explosives, etc. as may be found in connection with the works to the Contractor's own dumping ground."*

22 The evidence of Hj Md Rahimin bin Pehin Dato Hj Abdul Aziz (Rahimin), the Financial Controller of the Plaintiff, is that he was informed by the Defendant sometime in late July 2020 that the anodes would have to be removed, that it was additional work, and that it required specialized equipment and expertise. He told the Defendant to proceed with the removal of the anodes and, after their removal, received an invoice for B$60,000.00. He says that he mistakenly considered that this was separate from the agreement and paid it. It was only upon a review of payments when the work was completed in January 2021 that it was brought to his attention that it should have been included in the scope of work under the contract. Additionally, he says that he was told by the Defendant's subcontractor that it was a straightforward task and considered standard practice for removing obstructions. This was confirmed by Liang, who carried out the removal of the anodes using a crawler crane from the shore, and for which he says he did not receive any additional payment from the Defendant.

23 The Defendant has produced a document dated 6 August 2020 apparently prepared by them as a proposal for the removal of the anodes and an estimate of the cost. For two reasons I find I cannot give a great deal of weight to this document. The first is that it is not signed and accepted by the Plaintiff and there is no evidence that it was agreed by them. The second is that there is little if any evidence that the extensive work listed in the proposal was in fact necessary and carried out, and the large sums claimed to be the cost of the work have not been justified by any documentary or other evidence. In any event, I am not satisfied on the evidence that there was a contract, separate from the agreement of 3 August 2020, for the Defendant to carry out this work and the Defendant has been unable to produce any such evidence.

24 Returning to the wording of the contract itself, and the tender which gave rise to it, I can find nothing in that wording which would exclude the sled anodes here. They are clearly obstructions which had to be removed before dredging could take place, and were therefore well within the scope of work set out in the contract. I also accept the evidence of the Plaintiff's witness Rahimin that he was unaware of this when he paid the invoice for the work.

25 Section 73 of the Contracts Act (Cap 106) (the Act) reads:

> *"A person to whom money has been paid, or anything delivered, by mistake or under coercion must repay it or return it."*

Counsel for the Plaintiff has drawn my attention to the case of *Sri Sri Shiba Prasad Singh, deceased, now represented by Kali Prasad Singha v Maharajah Srish Chandra Nandi and anor*

(1949) 2 MLJ 657 where the Privy Council held in respect of the similar section in the Malaysian Contracts Act:

> *"Payment "by mistake" in section 72 must refer to a payment which was not legally due and which could not have been enforced: the "mistake" is thinking that the money paid was due when in fact it was not due."*

Applying that definition to the payment here, from what I have found above it follows that it was not legally due and could not have been enforced. It therefore falls within section 73 of the Act and the B$60,000.00 must be repaid.

The Defendant's counterclaim

26 The Defendant bases the counterclaim for B$585,938.55 on clause 4.4 of the agreement which reads:

> "**4.4** ***STAND-BY RATES***
>
> ***4.4.1.*** *Both Parties agrees (sic) that the Contractor will also suffer financial loss if the work is not allowed to commence within the stipulated time frame and after mobilization of the contractor's equipment and personnel on site due to events beyond the control of the contractor. Accordingly, the Owner shall pay to the Contractor a daily stand-by rate of BND9,605.55 (BRUNEI DOLLARS NINE THOUSAND SIX HUNDRED AND FIVE AND CENTS FIFTY-FIVE ONLY) or a rate equivalent to twenty five percent (25%) of the normal daily operational rate."*

and maintains that this clause intends that this daily rate should be paid for any day during the contract when work is not possible due to events beyond the Defendant's control.

27 This interpretation does not stand up to close scrutiny. It is in plain English, drafted, I am told, by the Defendant, which has not been disputed, and, by using the word "commence" clearly refers to a period after mobilization of equipment and personnel but before the dredging work has started. Mobilization, it is not disputed, was completed on 18 August 2020, and, according to the daily progress reports, some dredging work had started even before that. There is no evidence of any delay in commencing the work to which this clause might refer. If the agreement intended that days on which work was not possible during the contract should be compensated, I have no doubt it would say so, but it does not. I accept the submission of the Plaintiff's counsel that the *contra proferentum* rule applies here and, if there were any doubt about how this clause should be construed, it should be against the party who prepared it. For these reasons alone the counterclaim must be dismissed.

28 However, for the sake of completeness, I will look at what the Defendant claims are the days for which they are claiming standby rates. These fall into three categories which I will look at separately.

29 The first is the purported delay in approval from MAPBD resulted in limited dredging for 24 days, which is claimed to be equivalent to 12 days being unable to work. I have already found above at paragraphs 6-10 that it was the Defendant's responsibility under the contract to obtain the necessary approvals, and it follows that any delay in doing so cannot be blamed on the Plaintiff. Further, how the 24 days of limited dredging which is claimed results in an equivalent 12 whole days has not been explained either in evidence or in submissions. This is a totally unsupported figure for which there is no credible calculation or evidence.

30 The second is a delay claimed of 22 days for bad weather. Again I have already found above, in paragraphs 15-18, that, not only is there no evidence of serious delays to the dredging work caused by the weather, the method of calculation of these 22 days is artificial and unsupported by the evidence.

31 The last reason for delay pleaded in the Defence and Counterclaim is the presence of the Plaintiff's subcontractor's vessel at the unloading jetty. I have already found, at paragraphs 11-13 above, that there is no evidence that this caused any delays to the dredging work, and no days were lost because of it's presence. Even if there were occasions when longer time was required to access the NTQ jetty, this does not appear to have caused measurable delay. The 27 days claimed here is a gross exaggeration and again unsupported by evidence.

32 The Defendant also claims damages for delay for the same reasons. This must also be dismissed for the reasons I have given.

Conclusion

33 For the above reasons I find that the Plaintiff is entitled to judgment for the sums claimed, namely:

Liquidated damages	B$376,000.00
Money paid by mistake	B$ 60,000.00
Total	**B$436,000.00**

The Defendant's counterclaim is dismissed.

34 There will be an order for costs to be paid by the Defendant to be taxed on a party and party basis, if not agreed. Although requested by the Plaintiff, I do not find that this is an appropriate case for indemnity costs.

EDWARD TIMOTHY STARBUCK WOOLLEY
Judicial Commissioner