PKNS Engineering & Construction Bhd
v
Global Inter-Dream (M) Sdn Bhd

Court of Appeal – Civil Appeal No. B-02(NCvC)(W)-1642-07-2013
Zaharah Ibrahim, Anantham Kasinather and Lim Yee Lan JJCA

April 10, 2014

Contract *– Termination – Claim for damages – Alleged delay by respondent in completion of construction works resulting in contract being terminated by appellant – Whether termination unlawful – Whether delay substantially contributed to by appellant – Whether appellate intervention warranted*

Perbadanan Kemajuan Negeri Selangor ("PKNS") was on March 28, 2011 awarded a project to construct and complete 22 units of single storey houses. Following a tender exercise, the respondent was appointed as the main sub-contractor for the said project vide a letter of award dated May 18, 2011. The appellant, which is a subsidiary of PKNS claimed that there was substantial delay on the part of the respondent in proceeding with the project and proceeded to terminate the contract on February 10, 2012. The respondent commenced proceedings in High Court seeking a declaration that the termination was unlawful and also general damages. The appellant in turn and by way of counterclaim, sought a declaration that the termination was valid as well as damages.

The High Court allowed the respondent's claim and dismissed the appellant's claim primarily because it was of the opinion that the delay was substantially contributed to by the appellant. The principal ground relied upon by the High Court was the apparent failure by the appellant to discharge its responsibility by obtaining the "method statement" of works from the consultant engineer engaged by PKNS. The High Court was of the view that this delay precluded the respondent from commencing the contract works. It was further also found that the appellant had failed to co-operate with the respondent thereby causing a delay in the completion of the said project and the showroom unit.

Issues

1. Whether the High Court had erred in his finding that the appellant owed a duty to produce the "method statement" of the works and that its failure to do so, was the cause for the respondent's delay in completing the project.

2. Whether the High Court had erred in finding that the appellant had failed to co-operate with the respondent thereby causing a delay in the completion of the project.

Held, allowing the appeal

1. (a) It was not part of the respondent's pleaded case that the delay in the availability of the "method statement" of works, caused it to be behind the work schedule. Accordingly, the High Court ought not to have considered this ground at all. [*see p 891 para 15*]

   (b) Based on clause 15 of the instruction to tenderers, it is not the responsibility of the appellant to ensure the availability of the "method statement". On the contrary, the production of the work programme and the "method statement" of the works, is the responsibility of the respondent. [*see p 892 para 16*]

2. (a) The respondent admitted to having issued only two applications for extension of time in connection with the project and the showroom unit. The first letter was issued some four months after it had been put into possession of the site. The second letter was clearly frivolous since it was issued one day prior to the due date for completion. Neither letter for the extension of time included any documentary evidence justifying the request. [*see p 893 para 21 - p 894 para 21*]

   (b) The High Court erred in a material way in the reasons advanced by it in its judgment leading to the finding that it was the conduct of the appellant that caused the respondent to be behind schedule in the completion of the project. On the balance of probabilities, the respondent had failed to discharge the burden of proving that it was entitled to the extension of time sought by it for the completion of the showroom unit and the project. [*see p 894 para 22*]

Civil Suit No. B-02 (NCvC)(W)-1642-07/2013
Justin Voon and KC Chan (YN Chin & Co) for appellant
Mohaji Selamat and Ahmad Fakhri (Mohaji, Hazury & Ismail) for respondent

Civil Suit No. B-02 (NCvC)(W)-1675-07/2013
Mohaji Selamat and Ahmad Fakhri (Mohaji, Hazury & Ismail) for appellant
Justin Voon and KC Chan (YN Chin & Co) for respondent

Appeal from High Court, Shah Alam — Suit No. 22NCvC-463-04-2012

Judgment received: April 29, 2014

Anantham Kasinather JCA *(delivering the judgment of the court)*

Backgroung facts

[1] The appellant is a subsidiary of Perbadanan Kemajuan Negeri Selangor ("PKNS"). By a contract dated March 28, 2011, PKNS awarded the construction and completion of 22 units of single storey houses at Phase 2A, Laman 1 Bernam Jaya Selangor ("the said project") to the appellant.

[2] Following a tender exercise, the respondent was appointed the main sub-contractor for the said project vide a letter of award dated May 18, 2011. The letter of award inter alia provided as follows:

(a) Costs of work: RM6,472,860.90;

(b) The construction period:

56 weeks (the whole contract);

24 weeks (showroom unit);

(c) Date of completion of the whole contract: June 19, 2012;

(d) Date of completion of the showroom unit: November 17, 2011;

(e) Commencement of works: May 23, 2011;

(f) Retention sum: 5% of the contract sum;

(g) Payment term: 14 days after appellant receives payment from PKNS; and

(h) Other terms as per the letter of acceptance.

[3] According to the learned trial judge, the respondent commenced works on the said project in accordance with the terms of the letter of award on May 23, 2011. However, following differences between the appellant and the respondent, the appellant alleging substantial delay on the part of the respondent in proceeding with the said project including in the completion of the showroom unit by the agreed date November 17, 2011, terminated the contract on February 10, 2012.

[4] Following the termination of its contract, the respondent commenced these proceedings in the High Court seeking a declaration that the termination was unlawful and inter alia sought general damages arising from such termination. The appellant, in turn, by way of counter claim similarly sought a declaration that the termination was valid allegedly because the appellant failed to proceed with the contract works in a timely manner and was considerably behind schedule at the time of the termination of the contract. By a reason thereof, the appellant, in turn, sought damages arising from the respondent's breach by way of the cross claim.

Judgment of the High Court

[5] The learned judge of the High Court allowed the claim of the respondent and dismissed the claim of the appellant primarily because His Lordship was of the opinion that the delay in the progress of the contract works causing the respondent to be behind schedule was substantially contributed by the appellant. According to the learned trial judge, the contributory cause on the part of the appellant took the form of its failure to ensure the timely delivery of material to the site by PKNS and the appellant. Secondly, in His Lordship's view, the appellant also failed to revert in a timely manner with the "method of statement" from the consultant engineer nominated by PKNS itself. This delay, according to the learned judge precluded the respondent from commencing the contract works notwithstanding being in possession commencing May 23, 2011. To put it in His Lordship's own words:

> Sekiranya tempoh masa yang ditetapkan di bawah kontrak asal diteliti, maka jelas terdapat kelewatan dalam kerja-kerja menyiapkan rumah contoh dan juga projek keseluruhannya. Kontrak asal memperuntukkan tempoh masa menyiapkan rumah contoh adalah 24 minggu. Tarikh rumah contoh sepatutnya disiapkan adalah pada November 17, 2012. Tempoh masa menyiapkan keseluruhan projek adalah 56 minggu. Tarikh siap keseluruhan projek adalah Jun 19, 2012.
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> Walaupun begitu keterangan yang ada jelas menunjukkan punca kelewatan disebabkan sebahagian besar oleh pihak defendan dan juga pihak PKNS serta anak syarikat milik PKNS sendiri yang mana plaintif disyaratkan mendapatkan bekalan bahan binaan.
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> Dari keterangan yang ada saya dapati sebab-sebab kelewatan telah bermula seawal kerja-kerja tanah lagi. Walaupun plaintif telah mengambil milikan tapak sejak Mei 23, 2011, namun kerja-kerja sebenar hanya boleh bermula selepas September 13, 2011 kerana defendan yang bertanggungjawab mendapatkan "method of statement" dari consultant engineer yang dilantik oleh PKNS telah lewat berbuat demikian. Tanpa "method of statement" dari consultant engineer maka kerja tanah tidak boieh dimulakan. Defendan membuat permohonan untuk "method of statement" tersebut hanya pada Ogos 16, 2011 dan kelulusan diperolehi pada Ogos 24, 2011 dan dimaklumkan kepada plaintif dalam mesyuarat yang diadakan pada September 13, 2011 sedangkan mengikut jadual asal, kerja tanah sepatutnya siap pada hujung bulan Julai.

(See paragraphs 11 to 13 of the judgment of the High Court.)

[6] One unfortunate feature of this case is the discrepancy between the orders made by His Lordship in His Lordship's grounds of judgment and the seal order of the court. The orders made by His Lordship in his grounds of judgment were as follows:

(i) Jumlah RM545,829.92 bagi kerja-kerja yang telah disiapkan sebagaimana dalam sijil kemajuan terakhir;

(ii) Pemulangan ganti rugi lewat yang telah ditolak oleh defendan berjumlah RM43,000;

(iii) Bayaran 75% kerja tanah RM69,914.20;

(iv) Pemulangan nilai bon pelaksanaan berjumlah RM323.643.05;

(v) Bayaran bagi VO RM3,500; dan

(vi) Kos.

(See paragraph 24 of the judgment of the High Court.)

[7] The orders made by His Lordship according to the seal order of the court were as follows:

(1) RM203,391.32 sebagaimana dinyatakan dalam sijil interim No. 4;

(2) RM43,000 yang merupakan jumlah ditolak oleh defendan dalam bayaran interim sebagai apa yang dikatakan gantirugi lewat;

(3) RM69,914.20 yang merupakan niiai 75% kerja-kerja tanah yang telah disiapkan oleh plaintif;

(4) RM3,500 yang merupakan bayaran bagi kerja "variation order" bertarikh Februari 17, 2012;

(5) RM38,439.62 bagi harga barangan milik plaintif yang ada di tapak projek yang telah diambil oleh defendan seperti mana dipersetujui semasa semakan bersama diadakan pada February 17, 2012;

(6) Perlepasan RM96,235.52 yang merupakan wang tahanan atau "retention sum" yang telah ditolak defendan pada setiap bayaran progresif yang telah dibuat;

(7) Pemulangan wang bon pelaksanaan milik plaintif berjumlah RM323,643.05 yang dicagar kepada Continental Insurance Berhad;

(8) Faedah 5% setahun dari tarikh writ saman yang teiah dikeluarkan sehingga penyelesaian penuh penghakiman ini;

(9) Kos tindakan akan dibayar oleh defendan ke plaintif untuk ditaksirkan kecuaii dipersetujui.

Appellant's case

[8] The appellant's case based on its statement of defence was essentially that the respondent was behind schedule from the very beginning and this delay on the part of the respondent formed the subject matter of numerous letters of complaint from the appellant to the respondent. Learned counsel for the appellant conceded that the respondent had requested for an extension of time to complete works but since the applications for extension did not comply with the terms of the letter of award, the appellant refused to accommodate the request for extension. The nature and scope of the defence of the appellant is evident from an examination of paragraphs 10, 11,12 and 13 of the statement of defence which reads as follows:

(10) Defendan selanjutnya menyatakan walaupun Plaintif telah memohon lanjutan masa namun demikian Plaintif gagal mematuhi syarat-syarat untuk perlanjutan

masa seperti yang diperihalkan di Klausa 43 P.W.D Form 203A di mana Plaintif perlu melampirkan dokumen- dokumen sokongan yang dapat membantu pegawai berkenaan membuat pertimbangan berkenaan perlanjutan masa yang dipohon. Defendan telah memaklumkan Plaintif akan keperluan dokumen-dokumen sokongan tersebut tetapi Plaintif gagal membekalkannya. Selain itu, Plaintif gagal memenuhi keperluan di dalam Kluasa 50.2 P.W.D Form 203A. Oleh itu, perenggan 14 sehingga perenggan 19 Pernyataan Tuntutan yang tidak konsisten dengan perenggan di sini adalah dinafikan secara kategori dengan tegas dan Plaintif adalah diletakkan ke atas beban bukti kukuh.

(11) Defendan selanjutnya menyatakan berikut:

(a) Pada sekitar akhir bulan September 2011, timbul kelewatan di dalam kerja-kerja pembinaan unit rumah contoh dan keseluruhan unit yang perlu diselesaikan oleh Plaintif;

(b) Defendant telah menulis surat peringatan bertarikh 22.9.2011 meminta Plaintif agar mengemukakan jadual perancangan kerja untuk unit rumah contoh supaya dapat disiapkan mengikut jadual;

(c) Pada 23.9.2011, Defendan juga mengingatkan Plaintif untuk membuat kerja-kerja seperti:

(i) Mengemukakan lesen wireman;

(ii) "filling for earthwork" yang masih belum dijalankan Plaintif; dan

(iii) Mengemukakan "shop drawing-roof truss"

(d) Namun demikian, tiada peningkatan di dalam prestasi kerja Plaintif walaupun peringatan dan peluang yang secukupnya diberikan kepadanya;

(e) Defendan amat bimbang dengan kelewatan serius Plaintif akan mengakibatkan jadual masa pembinaan yang dinyatakan di dalam Surat Setuju Terima tidak dapat dipatuhi;

(f) Defendan telah menghantar surat amaran pertama bertarikh 18.11.2011 dan meminta Plaintif untuk mempertingkatkan kerja-kerja di tapak di mana Plaintif perlu menambah bilangan tenaga kerja dan bekerja lebih masa agar kerja-kerja pembinaan dapat mengikut jadual semula;

(g) Defendan juga menghantar surat bertarikh 18.11.2011 mengingatkan Plaintif bahawa terdapat kelewatan serius terhadap kemajuan kerja keseluruhan dan meminta agar Plantif mengambil tindakan bagi mengatasi masalah ini;

(h) Defendan kemudiannya menghantar surat amaran kedua bertarikh 5.12.2011 dan mengulangi permintaan Defendan agar Plaintif mempertingkatkan kerja-kerja di tapak;

(i) Pada 5.12.2011, Defendan juga telah mengadakan satu mesyuarat di mana wakil Plantif telah dimaklumkan agar menambah bilangan pekerja di tapak

dan menambah sebuah lagi "excavator". Defendan juga memberi amaran keras bahawa jika langkah-langkah di atas tidak diambil, Defendan tidak akan teragak-agak untuk menamatkan perkhidmatan Plantif;

(j) Pada 19.12.2011, Defendan telah menghantar surat amaran ketiga mengingatkan Plantif akan kelewatan serius kemajuan kerja;

(k) Defendan juga mengeluarkan sepucuk surat bertarikh 19.12.2011 di mana Defendan akan mengenakan ganti rugi jumlah tertentu "LAD" sebanyak RM1000.00 sehari kerana kegagalan Plantif menyiapkan rumah contoh mengikut jadual;

(l) Kelewatan yang diakibatkan Plantif adalah sangat serius sehingga Defendan perlu memanggil satu mesyuarat khas pada 3.1.2012. Hasil daripada mesyuarat tersebut, ia adalah dipersetujui di antara kedua-dua pihak bahawa Plaintif hanya akan melakukan kerja-kerja pembinaan struktur sahaja manakala Defendan akan membantu Plaintif dalam penyiapan kerja-kerja di tapak (walaupun Defendan tidak mempunyai sebarang obligasi kontraktual untuk menjalankan kerja-kerja plantif);

(m) Walaupun diberikan peluang dan amaran yang secukupnya, Plaintif masih gagal, enggan dan/atau abai untuk mempertingkatkan kerja-kerjanya;

(n) Kualiti kerja-kerja Plaintif juga tidak memuaskan dan Defendan telah meminta Plaintif untuk memperbaikinya; dan

(o) Defendan kemudiannya mengeluarkan notis bertarikh 30.1.2012 bahawa sekiranya Plaintif masih lagi gagal untuk melakukan kerja-kerjanya, perkhidmatan Plaintif akan ditamatkan.

(12) Setakat 11.1.2012, kelewatan kemajuan kerja Plaintif adalah seperti berikut:

(a) Keseluruhan Projek

	Sebenar	**Jangkaan**	**Kelewatan**
11.01.2012	21.56%	50.05%	-28.49% @ 130 Hari
14.12.2011	23.98%	41.82%	-23.98% @ 109 Hari
14.11.2011	16.71%	31.53%	-14.81% @ 67 Hari
30.10.2011	14.11%	21.98%	-7.87% @ 36 Hari
30.09.2011	9.30%	13.27%	-3.98% @ 18 Hari
30.08.2011	5.32%	7.10%	-1.79% @ 8 Hari

(b) Rumah Contoh

	Sebenar	Jangkaan	Kelewatan
11.01.2012	44.01%	100.00%	-55.99% @ 125 Hari
19.12.2011	44.01%	100.00%	-55.99% @ 125 Hari
30.11.2011	35.91%	100.00%	-64.09% @ 144 Hari
30.10.2011	26.02%	60.00%	-33.98% @ 76 Hari
30.09.2011	19.87%	30.48%	-10.61% @ 24 Hari
30.08.2011	13.78%	18.92%	-5.14% @ 12 Hari

(13) Setakat 8.2.2012, tahap keseiuruhan kerja-kerja Plaintif hanyalah pada sekitar 22% yang mana sepatutnya berada pada tahap 61.59%.

(See paragraphs 10 to 13, pp 76-79 of the statement of defence, appeal record Jilid 1 Bahagian A.)

[9] As regards the allegation that the delay was substantially caused by reason of the appellant insisting that the respondent obtain its supplies from PKNS and the appellant and that supplies failed to arrive on time, the appellant contended that there were no such contemporaneous allegations in response to the appellant's letters alleging delay. Learned counsel for the appellant drew the attention of the court to the numerous letters identified in the statement of defence requiring the respondent to maintain the progress works in accordance with the time schedule and submitted that the respondent repeatedly failed to meet the deadline. For this reason, the learned counsel for the appellant contended that this allegation was nothing but an afterthought.

[10] As regards the reliance by the respondent on the "method statement" of works, learned counsel for the appellant submitted that the learned trial judge ought not to have considered this defence since the respondent only led evidence to this effect during the cross-examination of the appellant's witnesses. According to learned counsel for the appellant, the reliance on the "method statement" of works was clearly an afterthought as this was neither pleaded nor included in the witness statement of any of the respondent's witnesses. Furthermore, according to counsel, an examination of clause 15 of the instructions to tenderers will reveal that the obligation to submit the original work programme and the "method statement" of works, were clearly the responsibility of the appellant (see p 414 of Jilid 2 (2)).

[11] Finally, learned counsel for the respondent submitted that the discrepancies between the amounts awarded in the grounds of judgment and the seal order of the court itself demonstrates a lack of certainty on the part of the learned trial judge as regards the strength of the respondent's claim. For instance, learned counsel contended that although the retention sum did not form the subject matter of any prayer in the respondent's original statement of claim, the learned trial judge awarded the return of

the retention sum in the seal order of court but not in the grounds of judgment. We observe that the validity of the prayer for the refund of the retention sum in the amended statement of claim is being challenged because the amendment was not effected in accordance with the rules of court.

[12] The appellant by way of counter claim seeks a declaration that the termination was lawful and inter alia sought damages arising from the respondent's breach of the contract and the ensuing premature termination of the contract.

Respondent's case

[13] Learned counsel for the respondent contended that the delay was because the appellant was required to buy 12 items from the appellant and its subsidiaries at costs which were non competitive. Additionally, counsel for the appellant contended that it was this delay in the delivery of the materials to the site that caused delay in the completion of the works. A further allegation was that there was a discrepancy in the platform levels furnished by the appellant thereby necessitating confirmation of these levels but such confirmation from the appellant was delayed for some two weeks (see p 999 of Jilid 2 (3)). This delay coupled with the delay on the part of the appellant in furnishing the "method statement" of works caused the respondent to seek an extension of time for the completion of the said project but the appellant failed to respond in a timely and fair manner thereby justifying the respondent's claim that the termination was unlawful.

Judgment of the court

[14] It is evident from paragraph 11 of the judgment of the High Court that the learned trial judge acknowledged that the respondent was behind schedule in the completion of both, the showroom unit and the said project. His Lordship, however, ruled that this delay was due to the failure of the appellant and its parent company, PKNS. We now propose to examine the grounds relied upon by His Lordship to justify His Lordship's findings that the appellant was the cause for the respondent being behind with the work schedule. The principal ground relied upon by the learned judge was the apparent failure of the appellant to discharge its responsibility by obtaining the "method statement" of works, from the consultant engineer engaged by PKNS. According to the learned trial judge, this compelled the respondent to commence works on the showroom unit on September 13, 2011 notwithstanding being put into possession of the site on May 23, 2011.

[15] With respect, we are unable to agree with this finding of the learned trial judge. First, we agree with learned counsel for the appellant that since it was not part of the respondent's pleaded case that the delay in the availability of the "method statement" of works, caused it to be behind the work schedule, the learned trial judge ought not to have considered this ground at all. Furthermore, it was not in dispute that the non availability of the "method statement" of works as a cause for the delay was raised for the first time during the cross examination of the appellant's witnesses and not during the examination in chief of the respondent's own witnesses.

[16] Secondly, a careful examination of clause 15 of the instruction to tenderers will reveal that it was not the responsibility of the appellant to ensure the availability of the "method statement". On the contrary, the production of the work programme and the "method statement" of the works, was the responsibility of the respondent. With respect, it is significant that His Lordship did not make reference to any evidence, oral or documentary, in coming to the finding that the appellant had failed to discharge its responsibility to produce the "method statement" in a timely manner.

[17] Thirdly, on November 22, 2011, the appellant made known to the respondent that its works involving the showroom unit was behind schedule by 10.61% or 24 days. In the same letter, the appellant required the respondent to forward to it a plan of action to remedy the delay on or before September 30, 2011. This the respondent failed to do. On November 18, 2011, the appellant highlighted to the respondent that the progress in its works for the completion of the said project was behind schedule by 14.81% or 67 days and, again, required the appellant to forward its "recovery plan" for the said project on or before November 25, 2011. This the respondent again failed to do. In the same letter, the respondent was warned that the appellant may impose liquidated damages provided for in the contract, if the respondent should persist with its delay in the completion of the said project. On December 25, 2011, the appellant notified the respondent that its progress works for the said project was behind schedule as of November 30, 2011 by 21.63% or 98 days. The delay in the case of the showroom unit on the same date was 64.09% or 144 days. In the same letter, the appellant drew the attention of the respondent to clause 10.2 (paragraph 14 of the instruction to tenderers), by which clause the appellant was entitled to terminate the contract if the works were behind schedule by 10% for a continuous period of three months. It appears to us that the only response of the respondent to these allegations of delay was essentially to request for an extension of time. In the circumstances, in the light of these facts, in our judgment, the learned trial judge erred in His Lordship's first finding that the appellant owed a duty to produce the "method statement" of the works and that its failure to produce this statement, was the cause for the respondent's delay in completing the said project including the showroom unit.

[18] The second finding of the learned trial judge related to building materials which the respondent was compelled to buy from PKNS and the appellant. According to His Lordship, delay in the delivery of these materials by PKNS and the appellant was responsible for the delay in the completion of the said project. The particulars of this complaint of the respondent are pleaded in paragraphs 10 and 11 of the statement of claim. With respect, this complaint is devoid of merit as the respondent had agreed pursuant to tender questionnaire item 19 that:

> All major Building Materials to be purchased from PECB and agreed such purchases to be deducted from any payments from this contract or other contract with PECB.

(See Jilid C 2 (2) p 423.)

Furthermore, the letter imposing this condition was issued to the respondent as early as May 27, 2011 i.e some four days after the respondent had taken site possession.

Yet, the respondent raised this issue for the first time in November 2011 when the due date for completion was about to expire. In any event, item 15 of the same tender questionnaire stipulated that:

> Any shortage of materials and labour shall not prejudice the completion by the due date i.e no extension of time shall be granted due to this.

For this reason, the second finding of His Lordship is also not supported by the evidence.

[19] His Lordship's third finding was that the appellant had failed to co-operate with the respondent thereby causing a delay in the completion of the said project. We interpret His Lordship's judgment to imply that the appellant ought to have granted the extension of time sought by the respondent. His Lordship justified this finding by reciting the particulars set out in paragraph 15(a) to (v) of His Lordship's judgment. With respect, we are unable to agree with His Lordship that the particulars set out therein afford a justification for His Lordship's conclusion. For instance, His Lordship failed to appreciate that the first letter from the respondent for extension of time is dated September 23, 2011, a date some four months after the respondent had been provided with possession of the work site. Secondly, His Lordship failed to appreciate that by the time the respondent issued the second letter on November 2, 2011, there were only another 15 days for the completion of the showroom unit. The respondent provided no credible reason as to why it failed to be within the work schedule prior to November 2011. Thirdly, the respondent afforded no satisfactory explanation as to why it had not relied on the allegations contained in paragraph 15(a) to (v) of the judgment of the court, if true, to refute the appellant's claim in the numerous letters issued by it alleging delay on the respondent's part and threatening it with LAD. In our judgment, the answer to this query lies in the terms of the contract. For instance, the claim of the respondent that it did not proceed with the works because it was waiting for the surveyor to confirm the "alignment" of the slopes is contrary to the provisions of clause 19.1 of the contract, that the respondent was responsible on matters relating to the alignment. Similarly, the allegation concerning the appellant's failure to revert in a timely manner on variations to the metal door frames is refuted by the contents of the appellant's letter of November 2, 2011 (see Jilid 2 (3) page 1007).

[20] In our judgment, in the final analysis, the learned trial judge ought to have appreciated that for the respondent to succeed in its claim, it had to prove on the balance of probabilities that the termination of its contract was unlawful because it ought to have been granted an extension of time to complete the said project. In this respect, it must be noted that the respondent's pleaded case to be entitled to an extension of time was based on clause 50.2 and clause 43.1(b), (f), (i) and (j) of the contract.

[21] Clause 50.2 was clearly irrelevant as its operation was conditional on there being instructions from the appellant to suspends works. There clearly were no such instructions in this case. Clause 43.1 (b) to be operational required exceptionally inclement weather, which was not alleged to be the case here. Clause 43.1(f), although relevant based on the alleged facts of delay on the part of the appellant to furnish

drawings, is, in our opinion, without merit for the reasons set out earlier in paragraph 18 of this judgment. In any event, the respondent does not meet the requirements of the proviso since the application for extension was not made promptly having regard to the date of completion. On the facts of this case, the respondent admitted to having issued only two applications for extension of time i.e on September 20, 2011 in connection with the said project and November 16, 2011 for the showroom unit. The first letter cannot satisfy the proviso since it was issued some four months after the respondent had been put into possession of the site. The second letter is clearly frivolous since it was issued one day prior to the due date for completion on November 17, 2011. It is also significant that neither letter for the extension of time included any documentary evidence justifying the request. Clause 43.1(i) and (j) are inapplicable since it is not the pleaded case of the respondent that nominated sub-contractors failed to deliver goods "essential to the proper carrying out of the works" to the site.

[22] In our judgment, the learned trial judge erred in a material way in the reasons advanced by His Lordship in the judgment of the High Court leading to the finding that it was the conduct of the appellant that caused the respondent to be behind schedule in the completion of the said project. We are also satisfied that on the balance of probabilities, the respondent failed to discharge the burden of proving that it was entitled to the extension of time sought by it for the completion of the showroom unit and the said project. Since the aforesaid two findings of the learned trial judge were the result of the learned trial judge's failure to properly appreciate and evaluate the evidence before the court, we are constrained to rule that this is a fit and proper case for appellate intervention. Accordingly, for the reasons contained in this judgment, we allowed the appeal and set aside the orders of the High Court.

Civil Appeal No. B-02(NCvC)(W)-1675-07/2013

[23] As counsel for the appellant opted to withdraw Civil Appeal No. B-02(NCvC)(W)-1675-07/2013, the appeal was struck out with costs of the appeal reserved pending outcome of Civil Appeal No. B-02(NCvC)(W)-1642-07/2013. Following our decision to allow Civil Appeal No. B-02(NCvC)(W)-1642-07/2013, we make the following orders:

(a) Civil Appeal No. B-02(NCvC)(W)-1642-07/2013 allowed;

(b) Civil Appeal No. B-02(NCvC)(W)-1675-07/2013 struck out;

(c) All orders of the High Court set aside;

(d) We order the costs of the High Court to be taxed on a party and party basis and when so taxed to be paid by the respondent to the appellant in Civil Appeal No. B-02(NCvC)(W)-1642-07/2013;

(e) We make no order as to costs in respect of both the appeals before us; and

(f) We order the refund of the deposit to the appellant in Civil Appeal No. B-02(NCvC)(W)-1642-07/2013.