Giga Enginering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–561 OF 2010
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
2 JUNE 2014

Contract — Joint venture — Joint venture agreement — Whether contractual relationship came into being merely on parties' invitation to plaintiff to jointly work to tender for project — Whether evidence showed no legally binding joint venture agreement came into existence — Whether plaintiff had any cause of action against parties

The appellant sued the respondents on their alleged failure to award it its portion of works for the construction of a dam ('the project'). The appellant alleged that because of its past experience in preparing tender documents, the first and second respondents ('the R1 and R2') invited it to enter into a 'three-party joint venture' under which the appellant would prepare the tender documents for the project; the tender would then be submitted through another joint venture between R2 and the third respondent ('the R2-R3 JV'); and once the project had been secured, the appellant would, in return for its efforts in preparing the tender, be awarded its portion of the works which was essentially the bulk of the works for the construction of the dam. The appellant alleged that following the three-party joint venture, it signed a 'pre-tender agreement' with R1. Under this second agreement, the R2-R3 JV — to whom the project was eventually awarded — would subcontract the entire project to R1 which would then subcontract the appellant's portion of the project to the appellant. The High Court dismissed the appellant's claim against all the respondents, finding that only the pre-tender agreement existed; that there was no agreement between the appellant and the R2 and R3 and neither was there evidence of the three-party joint venture. The court ruled the appellant had no cause of action against any of the respondents. It, however, allowed the R1's counterclaim against the appellant for damages for breach of the pre-tender agreement in causing the R1 not to be appointed as the subcontractor for the project. The appellant's instant appeal against the High Court's decision was only as against the R1 and R2 as the appeal against the R3 was withdrawn.

Held:

(1) The court agreed with the trial judge that the evidence only showed the existence of the pre-tender agreement between the appellant and the R1.

The pre-tender agreement spelt out the award to be made to the appellant for its portion of the works at the agreed price. The fact that the pre-tender agreement made no reference whatsoever to the three-party joint venture indicated there was no such latter agreement (see para 15).

(2) The trial judge rightly found that it was never the appellant's case that the R1 had breached the pre-tender agreement. Clause F of that agreement provided that the relationship between the appellant and the R1 would come to an end if the R1 was not awarded the project. The project was awarded to the R2-R3 JV and not to the R1. For that reason, the pre-tender agreement no longer subsisted and the appellant consequently had no cause of action against the R1. It was also evident that R2 and R3 were never parties to the pre-tender agreement (see paras 20–21).

(3) The trial judge erred in allowing the R1's counterclaim against the appellant on the ground the appellant had breached the pre-tender agreement when it refused to review its price thus disabling the R1 from accepting the offer to become subcontractor for the project. The pre-tender agreement stipulated that the R1 shall engage the appellant as subcontractor for the project only if the R1 was awarded the project. It was undisputed that the project was not awarded to the R1. As the pre-tender agreement became void when the R1 was not awarded the project, the R1 could not have any rights under the agreement. The appellant therefore could not be held liable for breach of the pre-tender agreement and the R1's counterclaim should have been dismissed (see paras 30–34).

(4) On the appellant's allegation that there existed a three-party joint venture agreement between itself and the R1 and R2, the mere invitation by the R1 and R2 to the appellant to participate in a joint venture to submit a tender for the project on its own did not create a contractual relationship between the three parties. At most, it was an invitation for a discussion and negotiation which culminated in the preparation and signing of the pre-tender agreement between the appellant and the R1 (see paras 25 & 27).

[Bahasa Malaysia summary

Perayu telah menyaman responden-responden kerana kegagalan mereka untuk mengawardkan kepadanya sebahagian kerjanya untuk pembinaan empangan ('projek itu'). Perayu mengatakan bahawa disebabkan pengalaman lalunya menyediakan dokumen tender, responden pertama dan kedua ('R1 dan R2') telah menpelawanya memasuki 'three-party joint venture' di mana perayu akan menyediakan dokumen tender untuk projek itu; tender itu kemudian akan dikemukakan melalui satu lagi usaha sama antara R2 dan responden ketiga ('US R2-R3'); dan selepas projek itu telah diperolehi, perayu akan, sebagai balasan untuk usahanya menyediakan tender itu, diawardkan sebahagian

kerjanya yang pada dasarnya kerja untuk pembinaan empangan. Perayu mengatakan bahawa berikutan usaha sama tiga pihak itu, dia telah menandatangani 'pre-tender agreement' dengan R1. Di bawah perjanjian kedua, US R2-R3 — yang mana projek itu akhirnya telah diawardkan — akan memberi subkontrak keseluruhan projek itu kepada R1 yang kemudian akan memberi subkontrak sebahagian projek perayu kepada perayu. Mahkamah Tinggi menolak tuntutan perayu terhadap semua responden, mendapati bahawa hanya terdapat perjanjian pra-tender; bahawa tiada perjanjian antara perayu dan R2 dan R3 dan tiada keterangan tentang usaha sama tiga pihak itu. Mahkamah memutuskan perayu tidak mempunyai kausa tindakan terhadap mana-mana responden. Ia, bagaimanapun, membenarkan tuntutan balas R1 terhadap perayu untuk ganti rugi kerana pelanggaran perjanjian pra-tender yang menyebabkan R1 tidak dilantik sebagai subkontraktor untuk projek itu. Rayuan perayu ini terhadap keputusan Mahkamah Tinggi hanya terhadap R1 dan R2 kerana rayuan terhadap R3 telah ditarik balik.

Diputuskan:

(1) Mahkmah bersetuju dengan hakim bicara bahawa keterangan hanya menunjukkan kewujudan perjanjian pra-tender antara perayu dan R1. Perjanjian pra-tender menyatakan award yang perlu dibuat kepada perayu untuk bahagian kerjanya pada harga yang dipersetujui. Fakta bahawa perjanjian pra-tender tidak membuat apa-apa rujukan kepada usaha sama tiga pihak menunjukkan tiada perjanjian sedemikian (lihat perenggan 15).

(2) Hakim bicara dengan wajar mendapati ia bukan kes perayu bahawa R1 telah melanggar perjanjian pra-tender itu. Fasal F perjanjian tersebut memperuntukkan bahawa hubungan antara perayu dan R1 akan tamat jika R1 tidak diawardkan projek itu. Projek itu telah diawardkan kepada US R2-R3 dan bukan R1. Oleh sebab itu, perjanjian pra-tender tidak lagi wujud dan perayu akhirnya tiada kausa tindakan terhadap R1. Ia juga jelas bahawa R2 dan R3 bukan pihak-pihak kepada perjanjian pra-tender (lihat perenggan 20–21).

(3) Hakim bicara terkhilaf kerana membenarkan tuntutan balas terhadap perayu atas alasan perayu telah melanggar perjanjian pra-tender apabila ia enggan menyemak harganya dengan itu tidak membolehkan R1 daripada menerima tawaran menjadi subkontraktor untuk projek itu. Perjanjian pra-tender itu menetapkan bahawa R1 hendaklah melantik perayu sebagai subkontraktor untuk projek itu hanya jika R1 diawardkan projek itu. Ia tidak dipertikaikan bahawa projek itu tidak diawardkan kepada R1. Oleh kerana perjanjian pra-tender menjadi tidak sah apabila R1 tidak diawardkan projek itu, R1 tidak boleh mempunyai apa-apa hak di bawah perjanjian. Perayu dengan itu tidak boleh dipertanggungjawabkan untuk pelanggaran perjanjian pra-tender dan

tuntutan balas R1 hendaklah ditolak (lihat perenggan 30–34).

(4) Pengataan perayu bahawa terdapat perjanjian tiga pihak antaranya dan R1 serta R2, pelawaan semata-mata oleh R1 serta R2 kepada perayu untuk menyertai usaha sama bagi mengemukakan tender untuk projek itu dengan sendirinya tidak membentuk hubungan kontraktual antara ketiga-tiga pihak. Paling tidak, ia adalah pelawaan untuk perbincangan dan perundingan yang berkesudahan dengan penyediaan dan menandatangani perjanjian pra-tender antara perayu dan R1 (lihat perenggan 25 & 27).]

Notes

For cases on joint venture agreement, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5444–5448.

Cases referred to

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92

Appeal form: Civil Suit No S-22–562 of 2002 (High Court, Kuala Lumpur)

Micheal Chow (Keong Hui Jiun with him) (Michael Chow) for the appellant.
Zaidah bt Ibrahim (Ho & Co) for the first respondent.
Justin Voon (Alvin Lai with him) (Justin Voon Chooi & Wing) for the second respondent.

Balia Yusof JCA:

[1] This is an appeal against the decision of the High Court at Kuala Lumpur dismissing the appellant's claim against the three respondents and allowing the first respondent's counterclaim against the appellant.

[2] The background facts setting the appellant's/plaintiff's claim against the respondents/defendants may briefly be summarised as follows and we will refer to the parties in this appeal as they were in the court below.

[3] The plaintiff's claim arose out of a project known as 'Rancangan Bekalan Air Greater Kuantan Fasa II-Pakej 3 Membina dan Menyiapkan Empangan Serta Kerja-Kerja Berkaitan di Sungai Chereh, Kuantan, Pahang Darul Makmur' ('the project'). The plaintiff claims that it was invited by the first and second defendants to jointly participate with them in a joint venture between the plaintiff, the first and second defendants ('the three-party joint venture') to

submit a tender to the Jabatan Bekalan Air Negeri Pahang Darul Makmur in respect of the project. On the basis and pursuant to the said joint venture, the plaintiff proceeded to prepare the tender.

[4] The essential features and the basic understanding of the three-party joint venture between the plaintiff and the first and second defendants were as follows:

(a) given the plaintiff's experience in such and/or related field of engineering and construction works, the plaintiff was requested by the first and second defendants to provide its expertise in the preparation of the tender for the said project which included aspects of pricing for the tender and preparations of the work programs and technical schedules;

(b) the tender for the said project would, however, be submitted through another joint venture between the second defendant and the third defendant ('the AAY-MMN Joint Venture'); and

(c) upon the AAY-MMN Joint Venture securing the said project, the plaintiff would be awarded a portion of the works arising from the said project ('the plaintiff's portion') with the balance to be shared by and/or between the first and second defendants.

[5] The three-party joint venture was later followed by a 'pre-tender agreement' executed on 9 August 2001 by the plaintiff and the first defendant (exh P13). This pre-tender agreement envisaged the entire project being subcontracted by the AAY-MMN Joint Venture to the first defendant. The first defendant would then subcontract the plaintiff's portion of the project to the plaintiff. Clause F of the pre-tender agreement provides that the agreement shall be void if the first defendant is not awarded the project. The second and third defendants did enter into a joint venture agreement dated 10 January 2001 whereby the third defendant holds a majority of 70% shareholding and the second defendant holds 30%. The defendants submitted the tender for the project through the AAY-MMN Joint Venture. The plaintiff says the tender was submitted using, amongst others as the starting basis, the prices which the plaintiff had prepared. By a letter dated 18 January 2002 the Jabatan Bekalan Air Negeri Pahang Darul Makmur awarded the said project to the AAY-MMN Joint Venture for a total contract sum of RM69,300,000.

[6] The plaintiff contends that having regard to, inter alia, the relationship between the parties arising from the three-party joint venture and further upon the defendants having obtained the benefits of the plaintiff's input and efforts, the defendants, in particular the first and second defendants were under the implied obligation not to act in any manner inconsistent with the three-party joint venture on the plaintiff's portion and to cooperate and take all necessary steps to ensure that the plaintiff be awarded the plaintiff's portion.

[7] With regard to the third defendant, it is the plaintiff's contention that the third defendant was aware of the understanding and agreement between the plaintiff and the first and second defendants, and that even if the third defendant denies this, as the third defendant was the second defendant's joint venture partner in the AAY-MMN Joint Venture, therefore the third defendant is bound by the acts of the second defendant, its joint venture partner. The plaintiff contends that the third defendant is bound by the pre-tender agreement on the plaintiff's portion on the basis that the AAY-MMN Joint Venture between the second and third defendants is in substance a partnership or alternatively the second defendant was at all material times the lead partner within the AAY-MMN Joint Venture. However according to the plaintiff, notwithstanding the award of the project to the AAY-MMN Joint Venture, and despite various reminders and demands by the plaintiff, the defendants have, in breach of the three-party joint venture and the JVA, failed and/or refused to award or cause to be awarded to the plaintiff the plaintiff's portion of the project.

[8] In the suit filed against the defendants, the plaintiff is claiming for the following reliefs:

(a) a declaration that the joint venture was constituted and continues to subsist between the plaintiff and the first and second defendants;

(b) a declaration that the defendants through the AAY-MMN Joint Venture hold the plaintiff's portion as constructive trustees for the plaintiff;

(c) an account of the profits made by the defendants, from the plaintiff's portion;

(d) an order for specific performance of the said agreement for the plaintiff's portion as evidenced by, inter alia, the pre-tender agreement;

(e) an order that the defendants pay to the plaintiff the profits found to have been made by them on the taking of account;

(f) damages in lieu of and/or in addition to the order for specific performance to be assessed against the defendants;

(g) a declaration that the information and documents, including in particular, the work program and technical schedules, produced in the course of and/or forming part of the said tender submitted by the AAY-MMN Joint Venture are property of the plaintiff;

(h) such other orders or directions as this honourable court deems just and fit; and

(i) interest.

[9] The learned trial judge at the conclusion of the trial dismissed the

plaintiff's claim against all the three defendants. She found that between the plaintiff and the first defendant, there was only the pre-tender agreement and there was no agreement between the plaintiff and the second and third defendants. The learned trial judge also concluded that if at all there was such a three-party joint venture as alleged by the plaintiff it appears that such alleged joint venture did not materialise by the time the pre-tender agreement was signed.

[10] The court ruled that the plaintiff had no cause of action against the first defendant. Similarly as against the second and third defendants, the court found they are not parties to the pre-tender agreement and the plaintiff had no cause of action against them both and neither was the second defendant a party to the three-party joint venture.

[11] The first defendant had filed a counterclaim against the plaintiff alleging that the plaintiff had breached cll B and E of the pre-tender agreement and had caused losses to the first defendant for not being appointed as the subcontractor to the project.

[12] The learned trial judge had allowed the first defendant's counterclaim with cost and damages to be assessed by the registrar.

[13] The plaintiff's appeal against the High Court decision is only against the first and second defendants, having withdrawn the appeal against the third defendant.

THE APPEAL

[14] In a nutshell, the plaintiff's claim against the defendants is for a portion of works referred to as the 'plaintiff's portion' which essentially comprise the bulk of the works for the construction of the dam. The plaintiff contended that this was envisaged in the three-party joint venture which was followed by the pre-tender agreement between the plaintiff and the first defendant. The said agreement is the quid pro quo for the plaintiff agreeing to prepare the tender submissions which was used by the AAY-MMN Joint Venture to get the project from the Jabatan Bekalan Air Pahang.

[15] We agree with the findings of the learned trial judge that from the evidence proffered, there exists only the pre-tender agreement and the said pre-tender agreement is the culmination of the negotiation between the plaintiff and the first defendant. It also embodies all the terms and conditions that the plaintiff and the first defendant intended to rely on and to regulate their relationship. The said pre-tender agreement manifests their intentions. The fact that no reference whatsoever is made to the three-party joint venture

in the said pre-tender agreement merely indicates that there was no such agreement. Parties are not allowed to adduce oral evidence to contradict or vary the terms of the pre-tender agreement (ss 91 and 92 of the Evidence Act 1950). The plaintiff submitted that their claim against the first and second defendants is essentially a claim in contract with reference to the pre-tender agreement. The pre-tender agreement clearly spelt out the award to be made to the plaintiff for the plaintiff's portion at the agreed price. Reference is made to para D of the same which reads:

> YCS has agreed and covenanted that he shall engage GEC as the subcontractor for the works in the event and only in the event that YCS is awarded the Project by the Main Contractor. Unless there is amendment in any part of the Tender Document, the Contract Sum for the Works amounting to RM 37,994,385.80 (Thirty Seven Million Nine Hundred Ninety Four Thousand Three Hundred Eighty Five Ringgit and Eighty Cents) with method related charges amounting to RM 3,939,200.00 (Three Million Nine Hundred Thirty Nine Thousand Two Hundred Ringgit) shall be awarded to GEC.

[16] The plaintiff's learned counsel submitted that the learned trial judge had failed to undertake an analysis of the said provisions in the agreement and this merits our intervention. It was further submitted that the first and second defendants are one and the same person. On most of the occasions the first and second defendants were represented by Ng Kai Wai and 'DW1', Yip Kok Weng.

[17] The first and second defendants are basically family companies sharing the same office both in Kuala Lumpur and Ipoh. DW1 is the managing director of the first defendant and also the project director of the second defendant. His wife and sister are the major shareholders of the second defendant. Learned counsel submitted that the court should lift the corporate veil as it is clearly evident that the two defendants are using the cloak of separate legal entities to allow the first defendant to circumvent its contractual obligations under the pre-tender agreement.

[18] It is trite that a litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts (*Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381). We find the plaintiff had failed to establish this.

[19] In our view, the essence of the plaintiff's argument is simply that the first defendant was in breach of the pre-tender agreement and this is further made clear from the written submissions submitted to this court for purposes of this appeal.

[20] We note that the learned judge had found, and rightly so, we must say, that it was never the plaintiff's case that the first defendant was in breach of the pre-tender agreement. The plaintiff cannot argue so now in this appeal. Be that as it may, on the evidence, we find that the learned trial judge had rightly concluded that the first defendant was not awarded the project but the AAY-MMN Joint Venture was. And as provided in cl F of the pre-tender agreement, the relationship between the plaintiff and the first defendant comes to an end if and when the first defendant is not awarded the project and for that reason the pre-tender agreement no longer subsist. The plaintiff then has no cause of action against the first defendant.

[21] It is also evident that the second and third defendants were never parties to the pre-tender agreement and the plaintiff is seeking to impute liability on the second defendant simply on the ground that the evidence shows DW1 represents both the first and second defendants in the negotiations with the plaintiff.

[22] DW1 on the other hand maintains that the first and second defendants are separate and independent entities. They have a working arrangement that if the second defendant manage to get substantial projects it may subcontract the works to the first defendant. The first defendant is not a subsidiary or a holding company of the second defendant. There are no common directors or shareholders between the two entities.

[23] The learned trial judge had made a specific finding that she accepted the evidence of DW1 and considered that 'DW1 could not deal with the plaintiff as representative of the second defendant in view of the fact that the second defendant is a partner of the AAY-MMN Joint Venture and any decision if made on behalf of the second defendant would have to take into account the third defendant who is the majority shareholder and the controlling partner in the AAY-MMN Joint Venture'.

[24] We do not find anything perverse with the said finding and we find no justifiable ground to disturb the same.

[25] The plaintiff further contended that there was a joint venture agreement between the plaintiff with the first and second defendants. This joint venture agreement is what the learned trial judge referred to as the three-party joint venture.

[26] The nature of the joint venture referred to by the plaintiff is set-out in para 4 of the plaintiff's amended statement of claim which reads as follows:

Sometime in early July 2001, the Plaintiff was invited by the 1st and 2nd defendants to jointly participate with them in a joint venture ('the Joint Venture') to submit a tender to the Jabatan Bekalan Air Negeri Pahang Darul Makmur in respect of the Project known as 'Rancangan Bekalan Air Greater Kuantan Fasa II-Pakej 3 Membina Dan Menyiapkan Empangan Serta Kerja-Kerja Berkaitan di Sungai Chereh, Kuantan, Pahang Darul Makmur' ('the Project') as more particularly described in the Tender Documents ('the Tender Documents').

[27] In our view, the invitation to participate in the joint venture to submit a tender to the Jabatan Bekalan Air Negeri Pahang in respect of the project on its own does not create a contractual relationship between the plaintiff and the first and second defendants. At most it is an invitation for a discussion and negotiation which culminates in the preparation and signing of the pre-tender agreement between the plaintiff and the first defendant.

[28] DW1 in his evidence had stated that except for the pre-tender agreement, there was no other understanding, representation or agreement between the plaintiff and the first defendant. There was no joint venture, partnership or any understanding between the plaintiff and the first and second defendants. The learned trial judge had accepted DW1's evidence and we see no reason why Her Ladyship should not. We are in no better position to say otherwise. As a trier of fact, the findings of the learned trial judge deserve great respect. Nothing is demonstrated before us to justify our intervention either in the learned trial judge's findings of facts or her assessment or appreciation of the evidence.

[29] We find no merits in the plaintiff's appeal against the dismissal of its claim and to that extent this appeal is dismissed.

[30] In respect of the appeal against the granting of the first defendant's counterclaim against the plaintiff, in our considered view, the learned trial judge had erred in allowing the first defendant's counterclaim against the plaintiff on the ground that 'the 1st defendant was disabled from accepting the offer to be the AAY-MMN Joint Venture subcontractor due to the refusal of the plaintiff to review its price' (see p 62 *rekod rayuan Jld* 1).

[31] We have earlier referred to para D of the pre-tender agreement which stipulates that the first defendant shall engage the plaintiff as the subcontractor for the project only in the event that the first defendant is awarded the project by the main contractor which is the AAY-MMN Joint Venture. It is an undisputed fact that the first defendant was not awarded the project by the AAY-MMN Joint Venture.

[32] The learned trial judge had concluded that the plaintiff was in breach of the pre-tender agreement in its refusal to revise or reduce and rationalise their rates thus depriving the first defendant from being appointed as the subcontractor of the project.

[33] We found merits in the plaintiff's learned counsel's submissions that the plaintiff cannot be in breach of an agreement which is void. The pre-tender agreement becomes void if the first defendant is not awarded the project (para F of the pre-tender agreement). Consequently, the first defendant could not have any rights under the agreement and to allow the first defendant to claim a right under the aforesaid void agreement is a serious error committed by the learned trial judge.

[34] For the aforesaid reason, the plaintiff could not be held liable for breach of the said pre-tender agreement and the first defendant's counterclaim against the plaintiff ought to have been dismissed. Consequently, the order of the learned trial judge allowing the first defendant's counterclaim against the plaintiff with costs and damages to be assessed by the registrar is set aside.

[35] In the upshot, our final order will be, the plaintiff's appeal is allowed in part in respect of the counterclaim by the first defendant and the rest of the appeal is hereby dismissed. We award cost in the sum of RM20,000 to the first defendant and RM10,000 to the second defendant. Deposit to be refunded.

Order accordingly.

Reported by Ashok Kumar