Mammoth Empire Construction Sdn Bhd v Lifomax Woodbuild Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02-(NCVC)(W)-121–01 OF 2015
LIM YEE LAN, VARGHESE GEORGE AND IDRUS HARUN JJCA
22 NOVEMBER 2016

Contract — Breach — Supply of goods — Respondent supplied defective goods to appellant — Appellant refused to pay for price of defective goods — Respondent commenced action for outstanding sum — Whether there was lack of proper judicial appreciation by trial judge of evidence led before court — Whether orders by trial judge contradicted respondent's pleadings — Whether appellant's counterclaim for damages should be allowed

The appellant vide purchase orders ('P2') had ordered from the respondent steel bars with the express specification of 'Standard Grade 500' to be accompanied with respective 'Amsteel' 'Mill Certificates'. The respondent vide delivery orders ('P3') had supplied the said steel bars together with the 'Mill Certificates' to the appellant. The respondent had also raised invoices which set out the amount payable by the appellant for the goods supplied. There was also a condition stated in the delivery orders that any complaint should be made within seven days of date of delivery of goods. As for the invoices, it was provided that any dispute thereto had to be raised within 14 days of the date of the issuance of the respective invoice. As event unfolded, the appellant found that the steel bars supplied by the respondent had not complied with the specification standard Grade 500. There were four tests carried out by the appellant but reports from all the tests showed that the steel bars were not up to the standard required by the appellant. It was also discovered that the tags used on the steel bars and the 'Mill Certificates' were not issued by 'Amsteel' as later confirmed by Amsteel's personnel, PW9. The respondent had issued a letter of apology to the appellant on this matter and asked for the return of the 'underspec steel bars' but was refused by the appellant. Consequently, 'Amsteel' had brought an action against the respondent for 'passing-off' ('Suit 32') in which the court found in favour of 'Amsteel' whereas the appellant made a police report and handed over the steel bars to the police for investigation. However, after the police had classified that no further action ('NFA') was to be taken on the said report, the respondent had collected the steel bars and sold them to one 'NBH'. On the other hand, the respondent brought an action against the appellant for the amount outstanding and unpaid by the appellant for the supplied steel bars and also for compensation for loss of reputation. The appellant then counterclaimed for damages for breach of contract and/or alternatively for general damages. The trial court had allowed the respondent's

claim with regards to the outstanding sum and dismissed the claim for loss of reputation whereas the appellant's counterclaim was dismissed, hence the present appeal. The thrust of the appeal was that there had been a lack of proper judicial appreciation by the learned trial judge of the evidence led before the court. The appellant also submitted that the learned trial judge's order that the monies recoverable by the respondent would be subject to a deduction for the amount realised by the respondent from the subsequent sale of the disputed steel bars contradicted the respondent's pleadings.

Held, allowing the appeal with costs of RM60,000, setting aside the decisions of the High Court, dismissing the respondent's claim and entering judgment for the appellant on the counterclaim for damages to be assessed:

(1) If the premises of the respondent's contention were that the failure to raise a complaint within seven days or 14 days raised an estoppel against the appellant, it was trite that estoppels being based on equitable principles to aid justice and fairness between parties could not be availed of if the result was to cause injustice and unfairness. It is also trite that no person should be allowed to benefit from his wrongdoing (see para 24).

(2) The learned trial judge had failed to appreciate the sequence of events transpired and also the unequivocal admission by the respondent vide its letter of apology with regards to the 'underspec steel bars' supplied by the respondent to the appellant. The conclusion of the trial court that the respondent had 'fulfilled their obligation' and had a 'legitimate claim' was diametrically and wholly against the weight of the evidence ie the four reports adduced by the appellant and the facts that there was no credible rebuttal evidence tendered by the respondent to counter the said reports. In addition, the learned trial judge's expressed apprehension as to the 'methodology' or 'sampling' used in the four test results was no longer an issue as the plaintiff's taking away the defective steel bars and selling the same was an admission that the said steel bars came from the total quantity of steels bars supplied by the respondent to the appellant. As for the fake Mill Certificates' and the tags used, there was no evidence adduced by the respondent to challenge the testimony of PW9 (see paras 25, 28, 32–33 & 35–36).

(3) There was no prayer for 'such other sum as may be found due', or for 'the court to order assessment', thus, it meant that the respondent's recovery from the appellant was restricted to all specified amount or none at all. Even if the trial court was inclined to accept the respondent's contention that only a portion of the total quantity of the steels bars were defective, it was incumbent for the respondent to adduce proof of the actual quantity and value of the 'undefective' steel bars to constitute the sum allegedly still unpaid and due from the appellant but there was no such proof adduced by the respondent. Thus, the respondent had plainly

failed to discharge the burden on them to prove the sum claimed or any alternative amount. In the circumstances, the whole of the respondent's claim failed and ought to have been dismissed by the learned trial judge outright and not some tentative order made (see paras 38–39).

(4) With regards to the appellant's counterclaim, the learned trial judge had omitted the evidence that had been led by the appellant that they had to source replacement steels bar, they had to borne the costs of additional transportation and the consequential expenses that had been caused by the respondent's breach of contract. It was also a matter of reasonable inference that there would be costs to be incurred for remedial works in consequence of the failure of the respondent to fulfill their contractual obligation. The appellant had sufficiently established on evidence that they had already incurred, and would be suffering further loss and damages, hence the learned trial judge ought to have rightfully entered judgment for the appellant in the counterclaim (see paras 41–42).

[Bahasa Malaysia summary

Melalui pesanan belian ('P2'), perayu telah memesan daripada responden bar keluli dengan spesifikasi nyata 'Standard Grade 500' masing-masing disertai dengan 'Amsteel' dan 'Mill Certificates'. Responden, melalui hantaran pesanan, telah membekalkan bar keluli tersebut dengan 'Mill Certificates' kepada perayu. Responden telah mengeluarkan invois yang menyatakan jumlah yang perlu dibayar oleh perayu bagi barang-barang yang dibekalkan. Turut terdapat syarat dalam pesanan hantaran bahawa apa-apa aduan mestilah dibuat tujuh hari daripada tarikh hantaran. Bagi invois-invois pula, diperuntukkan bahawa apa-apa pertikaian hendaklah disuarakan dalam masa 14 hari dari tarikh pengeluaran invois. Perayu mendapati bahawa bar keluli yang dibekalkan oleh responden tidak menepati spesifikasi Standard Grade 500. Empat ujian dijalankan oleh perayu tetapi laporan ujian-ujian menunjukkan bahawa keluli bar tidak menepati standard yang dikehendaki oleh perayu. Didapati juga bahawa penanda-penanda yang digunakan pada bar keluli dan 'Mill Certificates' tidak dikeluarkan oleh 'Amsteel' seperti yang disahkan oleh kakitangan Amsteel, PW9. Responden mengeluarkan surat permohonan maaf kepada perayu tentang hal ini dan meminta pemulangan 'underspec steel bars' tetapi ini dinafikan oleh perayu. Berikutan itu, 'Amsteel' memulakan tindakan terhadap responden bagi 'passing off' ('Guaman 32') dan mahkamah memutuskan berpihak pada 'Amsteel' manakala perayu membuat laporan polis dan menyerahkan bar keluli kepada pihak polis bagi siasatan. Walau bagaimanapun, selepas pihak polis menyatakan bahawa tiada tindakan susulan ('NFA') diambil bagi laporan tersebut, responden mengambil semula bar keluli tersebut dan menjualnya kepada NBH. Sebaliknya, responden memulakan tindakan terhadap perayu bagi jumlah terhutang dan tidak berbayar oleh perayu bagi bekalan bar keluli dan juga ganti rugi kehilangan reputasi. Perayu menuntut balas bagi ganti rugi pelanggaran kontrak dan/atau

secara alternatifnya ganti rugi am. Mahkamah bicara membenarkan tuntutan responden bagi jumlah terhutang dan menolak tuntutan kehilangan reputasi manakala tuntutan balas perayu ditolak. Oleh itu, rayuan ini. Teras utama rayuan adalah kurangnya pertimbangan wajar oleh hakim bicara terhadap keterangan yang dikemukakan di mahkamah. Perayu menghujahkan bahawa perintah hakim bicara bahawa yang boleh dituntut oleh responden tertakluk pada pengurangan jumlah yang terrealisasi oleh responden hasil jualan terkemudian bar keluli yang dipertikaikan bercanggah dengan pliding responden.

Diputuskan, membenarkan rayuan dengan kos RM60,000, mengetepikan keputusan-keputusan Mahkamah Tinggi, menolak tuntutan responden dan memasukkan penghakiman bagi perayu bagi tuntutan balas untuk taksiran ganti rugi:

(1) Jika asas hujahan responden adalah kegagalan membuat aduan dalam tujuh atau 14 hari membangkitkan estopel terhadap perayu, adalah matan bahawa estopel berdasarkan prinsip berekuiti iaitu untuk mendukung keadilan dan kesaksamaan antara pihak-pihak tidak wujud jika natijahnya menyebabkan ketidakadilan (lihat perenggan 24).

(2) Hakim bicara gagal mempertimbangkan rentetan kejadian yang berlaku dan juga hujahan jelas oleh responden melalui surat permohonan maafnya berkenaan 'underspec steel bars' yang dibekalkan oleh responden kepada perayu. Kesimpulan mahkamah bicara bahawa responden telah memenuhi kewajipan dan tuntutan sah yang sama sekali dan sepenuhnya bertentangan dengan berat keterangan iaitu empat laporan yang dikemukakan oleh perayu dan fakta bahawa tiada keterangan sangkalan kredibel yang dikemukakan oleh responden untuk menyangkal laporan tersebut. Tambahan lagi, hakim bicara menyatakan kekhuatirannya tentang metodologi atau pensampelan yang diguna dalam keputusan empat ujian tersebut tidak lagi menjadi isu kerana tindakan plaintif mengambil semua bar keluli yang rosak dan menjualnya adalah pengakuan bahawa bar keluli datang daripada jumlah kuantiti bar keluli yang dibekalkan oleh responden kepada perayu. Bagi 'Mill Certificates' palsu dan penanda yang digunakan, tiada keterangan yang dikemukakan oleh responden untuk mencabar testimony PW9 (lihat perenggan 25, 28, 32–33 & 35–36).

(3) Tiada permohonan bagi jumlah lain yang mungkin terhutang atau untuk mahkamah memerintahkan taksiran. Oleh itu, ini bermakna tuntutan responden daripada perayu terhad pada amaun spesifik atau tiada langsung. Jika pun mahkamah bicara cenderung menerima hujahan responden bahawa hanya sebahagian kuantiti total bar keluli yang cacat, responden berkewajipan mengemukakan bukti kuantiti dan nilai sebenar bar keluli untuk menetapkan jumlah yang didakwa masih belum

berbayar dan terhutang daripada perayu tetapi bukti demikian tidak dikemukakan oleh responden. Oleh itu, responden jelas gagal melepaskan beban mereka untuk membuktikan jumlah yang dituntut atau apa-apa amaun alternatif. Dalam hal keadaan ini, keseluruhan tuntutan responden gagal dan sewajarnya ditolak bulat-bulat oleh hakim bicara dan bukan mengeluarkan perintah tentatif (lihat perenggan 38–39).

(4) Merujuk tuntutan balas perayu, hakim bicara gagal melihat keterangan yang dikemukakan oleh perayu bahawa mereka terpaksa mendapatkan sumber bar keluli penggantian, mereka terpaksa menanggung kos pengangkutan tambahan dan perbelanjaan langsung yang disebabkan oleh pelanggaran kontrak responden. Ini juga satu perkara yang secara munasabahnya boleh disimpulkan bahawa akan ada kos yang akan ditanggung bagi kerja pemulihan berikutan kegagalan responden memenuhi obligasi kontrak mereka. Perayu membuktikan secukupnya, berdasarkan keterangan bahawa mereka telah menanggung dan akan mengalami kerugian lagi dan kerosakan. Oleh itu, hakim bicara seharusnya memasukkan penghakiman bagi perayu dalam tuntutan balas tersebut (lihat perenggan 41–42).]

Notes

For cases on supply of goods, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3795–3801.

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

UEM Group Berhad (Dahulunya Dikenali Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal [2010] MLJU 2179; [2010] 9 CLJ 785, FC (refd)

Appeal from: Civil Suit No 22NCVC-131–02 of 2012 (High Court, Shah Alam)

Justin Voon (Kho Zhen Qi with him) (Justin Voon Chooi & Wing) for the appellant.

Dhanaraj Vasudevan (Devandra Balasingam with him) (Kamil Hashim Raj & Lim) for the respondent.

Varghese George JCA:

INTRODUCTION

[1] This was an appeal against the judgment of the High Court which after a full trial, had allowed the respondent/plaintiff's claim in part and which dismissed the whole of the appellant/defendant's counterclaim filed in the matter. For convenience the parties will be referred to herein as they were at the trial.

[2] The plaintiff was a supplier of construction materials. The defendant was in the construction business and at the material time was developing what was known as the 'Empire City' project at Damansara Perdana.

[3] By way of the suit the plaintiff sought to recover a sum of RM1,447,087.05 stated to be the amount outstanding and unpaid by the defendant in respect of construction materials sold and delivered by the plaintiff to the defendant. The plaintiff also claimed for compensation for loss of reputation and other damages allegedly suffered by the plaintiff as a result of the defendant's default in payment and subsequent actions.

[4] The defendant's defence was that the subject goods, or a substantial part of them, supplied by the plaintiff did not meet the expressly required specifications and the defendant was not therefore liable to pay the sum claimed. The defendant by way of counterclaim on the other hand applied for judgment in the sum of RM13,695,891 as damages for the breach of contract by the plaintiff; additionally and/or alternatively, the plaintiff be ordered to pay general damages to be assessed by the registrar for fraud/cheating, misrepresentation and/or breach of contract. There was also in the counterclaim a prayer for exemplary damages to be ordered against the plaintiff.

[5] The High Court dismissed the plaintiff's claim for damages for the loss of reputation. There was no appeal by the plaintiff against that part of the decision.

GOODS IN DISPUTE/DEVELOPMENTS

[6] The defendant had by three purchase orders ('P2') ordered from the plaintiff construction materials, namely, steel bars type Y10, Y12, Y25 and Y35 with the express specification required to be complied with, that is, of *Standard Grade 500* to be accompanied with respective 'Amsteel' *Mill Certificates*. (Grade 500 referred to the 'yield strength' of the steel bar, also understood to be

500N/mm2). There was also some order for a small amount of tiles within the purchase orders.

[7] The steel bars were supplied by the plaintiff to the defendant under several delivery orders ('P3') together with what purported to be respective 'Mill Certificates'. There were also invoices raised by the plaintiff in respect of those steel bars supplied (P4), which set out the amount due and payable by the defendant for those goods delivered.

[8] It was not in dispute that the delivery orders carried a term/condition that any complaint to be entertained thereto had to be made within *seven days* of date of delivery of the goods. In the invoices it was separately also provided that any dispute thereto had to be raised within *14 days* of the date of issuance of the respective invoice.

[9] The defendant's project manager (*DW5*) had sometime in late October 2011 detected some odd shaped steel bars and the logistics supervisor of the defendant (*DW8*) identified those bars to have been supplied by the plaintiff. There was suspicion aroused as to the quality of those steel bars. The defendant checked out with Amsteel Mills Sdn Bhd (*Amsteel*) whether those steel bars involved (Y10,Y12 types) and the purported 'Mill Certificates' were sourced from/issued by Amsteel. Amsteel confirmed they were not. Police reports were then lodged by the defendant's and Amsteel's personnel on the matter on 25 November 2011 and 01 December 2011 respectively.

[10] The defendant then raised a dispute with the plaintiff whether those steel bars had complied with the specification of standard Grade 500. A meeting was held between representatives of the parties on 26 November 2011. This was followed by a joint inspection on 1 December 2011 in the presence of representatives of the plaintiff and the defendant.

[11] On 4 December 2011, the defendant received an undated 'letter of apology' from the plaintiff. This letter was acknowledged and replied to by the defendant on 6 December 2011 wherein the defendant, while noting the plaintiff's apology/regret, declined the plaintiff's suggestion to take back 'the rejected/underspec steel bars'. There was no further correspondence on this from the plaintiff.

[12] Various tests were carried out on samples of the steel bars that was in contention by Amsteel (19 November 2011), SGS (Malaysia) Sdn Bhd (6 January 2012) and SIRIM QAS International Sdn Bhd (21 February 2012) and the results were consistent that those steel bars failed the Grade 500 specification.

[13] On 10 January 2012, the plaintiff through their solicitors issued a letter of demand to the defendant for the outstanding sum. This letter however did not refer to the issue that some of the steel bars delivered by the plaintiff were disputed as to whether they conformed to the required specification or even to the letter of apology issued earlier by the plaintiff and received by the defendant on 4 December 2011.

[14] The defendant did not return to the plaintiff the steel bars that did not meet the specification, but subsequently on or about 16 March 2012 the whole consignment of those steel bars were handed to the police for investigation into the defendant's complaint that a fraud had been perpetrated on the defendant by the plaintiff.

[15] Admittedly, the plaintiff collected back from the police those steel bars subsequently and sold them to one 'NBH'. This was after the police had classified that no further action ('NFA') was to be taken on the police report lodged. The defendant was not notified of this collection and disposal of the steel bars by the plaintiff. The plaintiff also did not disclose to the court at the trial the quantum of the proceeds realised from that sale to 'NBH' of those steel bars in contention.

[16] Amsteel, the purported issuer of the 'Mill Certificate' and the attributed source from whom the plaintiff had obtained the offending steel bars, had also brought a suit for 'passing off' against the plaintiff vide KL High Court Suit No 221P-32–07 of 2012 ('Suit 32'). The action based on the very same steel bars in contention was decided in favour of Amsteel and against the plaintiff. The plaintiff's appeal to the Court of Appeal against that decision was subsequently dismissed as well.

THE APPEAL

[17] The thrust of the defendant's submission before us was that there had been a lack of proper judicial appreciation by the learned trial judge of the evidence led before the court. It was also submitted that the learned trial judge had ignored crucial evidence, both oral testimony and documentary material, and/or had misdirected himself on the facts, in coming to the conclusions he arrived in this case.

[18] The main grounds raised in appeal by the defendant before us were as follows:

(a) there was clear and unequivocal admission by the plaintiff that the steel bars supplied by the plaintiff did not meet the specification stipulated. The learned trial judge was rather dismissive of the written admission contained in the letter of apology from the plaintiff;

(b) the defendant had adequately proven by evidence of the various test-results adduced at the trial, that the steel bars (Y10, Y12 types) supplied by the plaintiff, had failed the standard Grade 500 specification and were defective. This was compelling evidence in favour of the defence to the plaintiff's claim;

(c) the plaintiff on the other hand, had failed (by some other test result or expert opinion) to establish that the steel bars in question had complied with the Grade 500 requirement specified. Further, the plaintiff had chosen not to retain them or produce the same in court after having themselves collected the same from the custody of the police. Nor did they produce any details as to its subsequent sale or of the amount realised as proceeds therefrom;

(d) the 'Mill Certificates' purported to have been issued by Amsteel and presented by the plaintiff to the defendant had been established to be forged or fakes. Similarly, the 'Tags' used to tie the steel bars supposedly also to have originated from Amsteel, had been shown to be fakes as well; and

(e) the learned trial judge had also completely ignored the outcome of Suit 32, namely, that the plaintiff were held liable to Amsteel in respect of the same steel bars. This clearly supported the defendant's defence and also the basis for the defendant's counterclaim against the plaintiff.

OUR DELIBERATION AND DECISION

[19] It was our observation from the grounds issued for the decision that the learned trial judge in coming to the conclusion to allow the plaintiff's claim and to dismiss the counterclaim of the defendant, appeared to have been primarily influenced by two factors. They were, that the plaintiff and the defendant had some three years of business relationship without any complaint, and further that the defendant had failed to raise within seven days of delivery and/or 14 days of issue of the invoices, the issue or complaint as to the steel bars not having met the specification required.

[20] This was obvious from the following extract from the judgment:

> The court is of the view that the small prints in the delivery order and the invoices are not there for nothing. They are actually terms and conditions which governs the contractual relationship between the plaintiff and defendant. There are compelling evidence before the court that the goods in the form of steel bars were delivered and received by the defendant were in accordance with the specifications. There is also evidence before the court that within the time frame as stipulated in the delivery orders and the invoices no complains of any defects of the goods supplied were made except for a month later.
>
> It is the view of the court that in so far as the contract which governs the relationship

between the parties, the plaintiff has fulfilled his obligation to supply the goods and the goods were received by the defendant. It is pertinent that the terms of the contract be adhere to in that if the terms were quite onerous to any of the party, the terms and conditions could also be re-negotiated. In the instant case, presumably the said terms and conditions in the form of small prints in the delivery order and the invoices has been there for the past three years and the defendant did nothing to inform the plaintiff that it was not possible to detect the latent defect in the goods within either seven or 14 days and asked for the terms and conditions with regard to whether the goods supplied had conformed with the specification as test needed to be done on the goods by their very nature is impossible to be detected with the 'naked eyes'. The court is unable to accept the explanation by the defendant that the defects in the goods could only be detected after tests were carried out. As for the letter of 'apology' sent by the plaintiff to the defendant and marked as exh P7, that letter was issued in an attempt to resolve the alleged 'under-spec' and in the atmosphere of trying to maintain a good business relationship between the parties although not written under 'without prejudice'. The court held that the contents of P7 should not be used against the plaintiff to defeat the legitimate claim against the defendant.

[21] In our assessment, the above reasons given by the learned trial judge reflected a very superficial treatment of the evidence placed before the court or of the issue at hand in this case, especially in respect of the implication arising from an express admission by the plaintiff contained in the 'letter of apology'. We saw no relevance as to how the 'three year good business relationship' between the parties without complaint, alluded to by the learned trial judge, could be a guarantee that an incident as raised in the defence would not occur at all. Each transaction as evidenced by the particular purchase order/deliver notes/invoices and the circumstances surrounding them had to be separately analysed and appreciated properly as separate contracts.

[22] It should have been the paramount consideration of the court that the plaintiff's primary contractual obligation was to supply the steel bars ordered that complied with the required and stipulated specification. Failure to do, if established on evidence, amounted to, no doubt, a breach of contract by the plaintiff. The conditions found inserted in the delivery orders/invoices that any issue to be raised had to be within the 7/14 days specified was a subsidiary issue, in any event, to the plaintiff themselves having first duly performed and discharged that primary contractual obligation.

[23] In this case, it was indisputable that the issue as to whether the steel bars did meet or not the required specification was not something that was obvious on visible inspection upon delivery. The steel bars were accompanied by 'Mill Certificates' and tied and tagged with 'Tags' which, the plaintiff wanted the defendant to believe, were issued by Amsteel as also specified in the purchase orders. Perhaps if there was no such 'Mill Certificate' tendered, then the defendant could have been faulted for not having rejected the goods within

seven days of delivery. In this case, as was obvious, the defence was that the 'Mill Certificates' and 'Tags' were fakes and there had therefore been a misrepresentation by the plaintiff. The learned trial judge was, in our respectful view, required to analyse and weigh all evidence adduced for or against that contention in depth and not treat it rather summarily.

[24] If the premises of the plaintiff's contention was that the failure to raise a complaint within seven days/14 days raised an estoppel against the defendant, it was trite that estoppels being based on equitable principles to aid justice and fairness between parties, could not be availed of if the result was to cause injustice and unfairness. It was also trite that no person should be allowed to benefit from his wrongdoing (*nemo ex suo delicto meliorem suam conditionem facere potest* — no one can improve his position by his own wrongdoing).

[25] The defence raised was that there had been a breach of contract by the plaintiff. The conduct of the parties with relation to the 'breach of contract' complaint had necessarily to be addressed by the court by examining the turn of events as they transpired. On the facts as proved, the sequence of events were as follows:

(a) Oct/Nov 2011 — detection of the 'underspec' steel bars and lodgement of police reports by the defendant and Amsteel;

(b) 26 November 2011 — meeting between representatives of the plaintiff and the defendant;

(c) 1 December 2011 — joint inspection of the subject steel bars by the parties;

(d) 4 December 2011 — receipt by the defendant of the undated 'letter of apology';

(e) 6 December 2011 — acknowledgment of/response to letter of 4 December 2011 by the defendant to the contents of that letter; and

(f) 10 January 2012 — letter of demand issued by solicitor for the plaintiff.

[26] There was therefore no basis in the plaintiff's contention (referred to by the learned trial judge) that, it was only when the plaintiff demanded payment of the outstanding amount, that the issue as to the steel bars being not up to required specification and not accompanied by proper mill certificates, was first raised by the defendant as an excuse not to pay the outstanding sum. The learned trial judge failed to appreciate, not only that sequence in the events that had transpired, but also that it was the plaintiff vide their solicitor's letter of 10 January 2012 who chose to avoid the fact that there was already an ongoing dispute between the parties as to the quality or source of the steel bars supplied and further the plaintiff had themselves admitted to the fact of the 'underspec'

steel bars supplied by the plaintiff to the defendant.

[27] The letter of apology (P7) itself required further analysis by the learned trial judge but that was not the case here. The material part of that letter is reproduced here:

> Re: Collect Back The Rejected/Underspec Steel Bar
>
> We refer to the above matter.
>
> Please accept our sincere *apologies* for the inconvenience you may have experienced *in respect to the rejected/underspec steel bar.*
>
> We hereby confirmed that pursuant to the agreement reached between the parties, *we will be collecting the rejected/underspec steel bar*from the site and *we shall forward a credit note to deduct the sum* being rejected/underspec *from Invoice*.
>
> Other terms and conditions of rejected/underspec steel bar *compensate* as per conversation between our director Mr. Lim and your project director Mr. Chen on 26th November 2011, at Empire Hotel.
>
> We look forward to our further co-operation opportunity.
>
> (Emphasis added.)

[28] There was definitely an unequivocal admission by the plaintiff that 'underspec steel bars' (the plaintiff's own choice of description) had been supplied to the defendant and that the plaintiff was willing to take back the defective steel bars and issue credit-notes to the defendant in respect of the same. This letter, it must be noted, was not qualified in any way (as also observed by the learned trial judge).

[29] Counsel for the defendant also referred us to the following testimony of PW2 (Lim Tau Fong) (who was the signatory of the letter of apology) under cross-examination:

> Q: Refer to page 47 P7, Mr. Lim you agree whatever in letter is true? You sign the letter? So whatever you say is true?
>
> A: Yes
>
> ...
>
> Q: Underspec means do not follow specification? Correct?
>
> A: Yes
>
> Q: And specification here means Grade 500 according to purchase order, yes?
>
> A: Yes
>
> ...

A

Q: Sorry, our client wanted Grade 500 steel bars and you supplied underspec, so you are liable for that?

A: I wrongly supply I agree to that.

Q: So you agree with my statement as far as?

B

A: Ok, ok.

[30] The significance of the contents of the letter of apology appear to have been wholly lost on the court. There was no doubt whatsoever in our minds that if the learned trial judge had considered the letter in its proper context and perspective there was no escaping the fact that the plaintiff had admitted without any reservation that the steel bars in contention supplied by the plaintiff were not up to the required specification.

C

D

[31] In the extract from the grounds of judgment reproduced above (para 20) it will be noted that the learned trial judge stated '... the plaintiff *has fulfilled his obligation* to supply the goods and the goods were received by the defendant', and to the effect that the plaintiff had '... a *legitimate claim* against the defendant'. These observations and conclusion of the learned trial judge were, in the light of the events leading to and the contents of the 'letter of apology' as discussed above, wholly unsustainable on the evidence before the court including the testimony of the plaintiff's own witness PW2.

E

[32] Further in our assessment, the conclusion of the court that the plaintiff had 'fulfilled their obligation' and had a 'legitimate claim' was diametrically and wholly against the weight of the evidence that was placed before the court. *Firstly*, the defendant had adduced and relied upon the following test results:

F

(a) joint testing in the presence of the plaintiff's Wyman Leo and the defendant's Tom Tan Chen Whang vide the report by Soils & Materials Laboratory (M) Sdn Bhd dated 2 December 2011;

G

(b) customer technical report by Amsteel dated 19 January 2011;

(c) independent report by SGS (M) Sdn Bhd dated 6 January 2012; and

H

(d) independent report by SIRIM QAS International Sdn Bhd.

[33] *Secondly,* as against the consistent and conclusiveness of those reports that the disputed steel bars (albeit, samplings thereof) did not meet the standard Grade 500 specification, it must be highlighted, there was no credible rebuttal evidence tendered by the plaintiff to counter the reports. It behoves particular attention here that the disputed steel bars left by the defendant with the police (for investigation) had by the plaintiff's own evidence been collected by the plaintiff and subsequently sold to NBH; it remained well within the plaintiff's powers, even at that stage, to have them tested and any relevant

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result(s) produced at the trial, if at all they were contrary to the findings of the test results adduced by the defendant. The failure to do so could only mean that the plaintiff accepted the four test results adduced by the defendant in court.

[34] The learned trial judge appear to have been persuaded to dismiss the evidential effect of the four test results referred above, on the grounds that there were doubts as to the source of the samplings taken for analysis. In the words of the learned trial judge:

> The court was also of the view that the testing carried by the defendant with regard to the steel bars taken at the site were not satisfactory as the information with regard to the origin of the steel bars taken and given to SD9 and SD10 came from the defendant themselves and left much ambiguity as to the origin of the identification tags. So were the other test where SD2 and SD6 were never involved in the collection of the identification Tags used in the report. Mr Nawi Sidik who collected the tags at the two sites has not testify how he collected the tags from the two sites. The tags could have come from bundle of steel bars supplied by the other 15 suppliers.
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> Therefore the court held that there was no conclusive prove that the test carried out on the samples taken at the site were actually from the steel bars supplied by the plaintiff. The methodology of collecting the samples of steel bars was not conclusively and exclusively from bundle of steel bars allegedly supplied by the plaintiff. The samples given for testing was what was given tom SD2 and SD6 respectively for testing.

[35] In our view, there was no reasonable cause for such concern as expressed by the learned trial judge if the totality of the evidence had been properly addressed by the court. The question that should have been properly asked ought to have been why, if the plaintiff actually objected to the methodology or the source of the sampling used in the four test results, the plaintiff subsequently collected all the defective steel bars from the custody of the police and proceeded to sell them, surreptitiously we would add, without further tests being carried out and without any reference or notice to the defendant. The plaintiff's aforementioned action, implicitly, if not explicitly, amounted to a concession by the plaintiff that no doubts existed as to the source of sampling taken and used for the tests carried out. In other words, the learned trial judge's expressed apprehension as to the 'methodology' or 'sampling' was no longer an issue. The plaintiff's taking away of the whole of the defective steel bars from the police and selling the same was an admission too that those defective steel bars came from the total quantity of Y10 and Y12 steel bars supplied by the plaintiff and which formed the subject of the dispute in this suit between the parties.

[36] Turning then to the evidence as regards the 'fake' mill certificates and tags used by the plaintiff to deceive the defendant as to the origin and the

quality of the disputed steel bars, suffice for us to refer to the testimony of PW9 ('Yee Sen Tat') from Amsteel. There was no evidence adduced by the plaintiff to challenge or displace this evidence, the significance of which could not be overstated:

> 13.Q: I refer you to the Mill Test Certificates 30225/11, 32450/11, 32512/11, 32500/11, 32539/11, 32626/11 (2 pages) and 32671/11 found respectively at IDB/58, IDB/60, IDB63, IDB/64, IDB/65, IDB/66-67 (2 pages) and IDB/68 which appears to be Mill Test Certificates issued by Amsteel [i.e. Amsteel Mills Sdn Bhd], are these Mill Test Certificates issue by Amsteel?
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> A: No. These are the Mill Test Certificates given by the defendant to Amsteel to verify the authenticity of the same as the defendant obtained the same from the plaintiff. Some time in early May 2012, the defendant supplied to Amsteel the said Mill Test Certificates found in IDB/58, IDB/60, IDB/63, IDB/64, IDB/65, IDB/66-67 (2 pages) and IDB/68. We checked and got back to the defendant on 7/5/2012 that the said Mill Test Certificates are not genuine and do not originate from Amsteel.
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> I have checked the record of Amsteel and found that the real and actual Amsteel Mill Test Certificate Nos. 32450/11 (2 pages), 32500/11, 32512/11, 30225/11 and 32626/11 (1 page only) can be found at IDB/69-70 (2 pages), IDB/71, IDB/72, IDB/73 and IDB/74, all with different dates and contents from the ones given by the plaintiff to the defendant. Copies of these actual Amsteel Mill Test Certificates were given to the defendant on 7/5/2012.
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> It can be seen that the contents of the actual Mill Test Certificate from Amsteel are entirely different from the false Mill Test Certificate.
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> For example; in respect of the false Mill Test Certificate No. 32450/11 at IDB/60; purportedly:
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> The Customer is 'Lifomax Woodbuild Sdn Bhd';
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> The Heat No: is '180566' and '183325';
>
> (iii) The Product/Commodity is 'Deformed Bars for Concrete Reinforcement'; and
>
> The sizes are '25mm' and '32mm'.
>
> However, in respect of the actual Mill Test Certificate No. 32450/11 at IDB/69-70;
>
> The customer in 'Winzu Hardware Sdn Bhd';
>
> (ii) The Heat Nos. are entirely different i.e. '182276', '182292', '182287', '182254' etc.
>
> (iii) The Product/Commodity is also entirely different i.e. 'Mild Steel Flat Bar'
>
> (iv) The sizes are different i.e. '6.0 x 50', '9.0 x 50' etc.
>
> Further, Mill Test Certificates with Certificate No. 32539/11 and 32671/11 do not exist in Amsteel's system and record.

[37] Counsel for the defendant submitted that the learned trial judge also

erred in the order made to the effect that the monies recoverable by the plaintiff would be subject to a deduction for the amount realised by the plaintiff from the subsequent sale of the disputed steel bars. It was contented that this order contradicted the plaintiff's pleadings and, in any event, the quantum realised had not been disclosed at the trial. The learned trial judge said as follows:

> As regards the steel bars of 121 tons taken by the plaintiff from the police and sold to a third party and was not accounted for, the court is of the view that the plaintiff should deduct the proceed of sale of the steel bars to the third party as it came from the bundle of steel bar taken from the defendant's site.

[38] In our view, there were merits in the defendant's submission on this score. From the perspective of the pleadings, the plaintiff's statement of claim prayed for:

> (a) The sum of RM 1,447,087.65 in regards to the sale and delivery of the Construction Materials; and
>
> (b) ...

It will be noted that there was no prayer for '*such other sum as may be found due,* or for — *the court to order an assessment*' (unlike the alternative prayer found in the defendant's counterclaim). It meant that the plaintiff's recovery from the defendant was restricted to the whole of that amount or none; all of the specified sum quantified or none at all, in other words.

[39] From the perspective of the burden of proof on the respective parties, it was indisputable that the plaintiff had to prove to the hilt their case as pleaded (while it was for the defendant to prove their defence/counterclaim). Even if the court was inclined to accept the plaintiff's contention that only a portion of the total quantity of steel bars were defective and did not meet the specification required, (recalling the evidence that the plaintiff had admitted collecting back the same from the police and selling it to a third party), it was incumbent upon the plaintiff to adduce proof of the actual quantity and of what value such 'undefective' steel bars were, in any event, to constitute the sum allegedly still unpaid and due from the defendant. There was no evidence led to satisfy the court on that count and in the absence of such necessary evidentiary material the plaintiff had therefore plainly failed to discharge the burden on them to prove the sum claimed or any alternative amount. In the circumstances, we were of the view that the whole of the plaintiff's claim failed and ought to have been dismissed by the learned trial judge outright and not some tentative order made, as was done here, on what was for all intents and purposes a fixed quantified claim.

[40] The learned trial judge also made short shrift of the significance of the outcome of Suit 32 at the High Court which was against the plaintiff and

upheld by the Court of Appeal. Amsteel's cause of action against the plaintiff premised no doubt on a complaint of 'passing-off', involved the very same steel bars supplied to the defendant that had not met the Grade 500 specification. The findings of fact there against the plaintiff was that there was misrepresentation and deception on the part of the plaintiff in the sale of those very same steel bars to the defendant. At para 25.8 of the judgment of court in Suit 32 it was stated as follows:

> Based on ... and the documentary evidence tendered I agree ... that the defendant ('the plaintiff') in supplying the products with faked Mill Test Certificates and the faked Product Tags purportedly issued by the plaintiff ('Amsteel') had misrepresented to Mammoth ('the defendant') that the defendant ('the plaintiff') was supplying products manufactured by the plaintiff ('Amsteel').

The four test results referred to above also featured as evidence in that Suit 32.

[41] With respect to the defendant's counterclaim, the learned trial judge dismissed the same principally on the basis that such a claim was 'pre-mature' since the Empire City project was still under construction and not completed. The learned trial judge in our view without explanation omitted the evidence that had been led that the defendant had to source replacement steel bars from Yuen Fatt Corp of which relevant purchase orders, delivery orders and invoices were tendered in court (exhs D35, D36 and D41). Costs of additional transportation borne by the defendant was also shown by exhs 38(2)–(5) and 39(7)–(8). These were consequential expenses and damages that had been caused directly by the plaintiff's breach of contract in failing to supply steel bars of the required specification. It was a further matter of reasonable inference that there would be costs to be incurred for remedial works and also likely delay caused to the completion of the project resulting from the plaintiff's failure to fulfil their contractual obligation and/or the fraud perpetrated, which had to be borne by the defendant.

[42] In our assessment the defendant had sufficiently established on evidence that they had already incurred, and would be suffering further loss and damages and the learned trial judge ought to have rightfully entered judgement for the defendant in the counterclaim in terms of the alternative prayer, that is, there be general damages to be assessed by the registrar and to be paid by the plaintiff to the defendant on account of the plaintiff's fraud/cheating, misrepresentation and/or breach of contract.

CONCLUSION

[43] In our considered opinion, for the several reasons discussed and elaborated above, the decision of the learned trial judge was plainly wrong warranting our intervention. In *UEM Group Berhad (Dahulunya Dikenali*

Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal [2010] MLJU 2179; [2010] 9 CLJ 785 the Federal Court in laying out the boundaries of intervention by an appellate court on findings of fact of a trial judge said:

> It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless he trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of the evidence.

[44] The Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at pp 10–11, commented further on inadequate judicial application of evidence by a trial judge and its susceptibility to intervention by the appellate court as follows:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.

[45] As shown above, the orders made by the learned trial judge were definitely not sustainable on the evidence before the court. It was our conclusion, as deliberated and stated above, that the learned trial judge had misdirected himself on crucial aspects of the evidence and had failed to give sufficient regard to the totality of the evidence led. If assessed and weighed judicially, the weight of the evidence (or the lack of it), tilted heavily against the plaintiff's claim and assertions, and in favour of the defendant. The defendant had duly discharged the burden to prove the defence raised and their counterclaim on a balance of probabilities.

[46] Accordingly, we allowed the appeal. The decision/orders of the High Court (including costs) was wholly set aside. We ordered that the plaintiff's claim be dismissed and there be judgement entered for the defendant on the counterclaim in terms of the alternative prayer thereto, for damages to be assessed. We also ordered that the plaintiff pay the defendant costs here and below in the sum of RM60,000.

Appeal allowed with costs of RM60,000; decisions of High Court set aside; respondent's claim dismissed; judgment entered for appellant on counterclaim for damages to be assessed.

Reported by Dzulqarnain Ab Fatar