Stronpac Construction Sdn Bhd

v

Vast Consortium Sdn Bhd

Court of Appeal – Civil Appeal No. N-02(NCvC)(W)-52-01/2017
David Wong Dak Wah, Abang Iskandar Abang Hashim
and Hasnah Mohammed Hashim JJCA

March 20, 2018

***Contract** – Breach – Claim for damages – Defendant carried out construction works based on building plans approved by Majlis Perbandaran Nilai ("MPN") – Plaintiff alleging defendant failed to comply with revised building plan – Revised plan submitted by plaintiff only after completion of construction and after issuance of certificate of fitness ("CF") – Whether breach of contract by defendant – Whether defendant must comply with approved building plan – Whether issuance of CF meant that construction was in accordance with approved building plan – Whether High Court misdirected itself in concluding that approved plans by MPN are only for purpose of issuance of CF – Whether appellate intervention warranted – Street Drainage and Building Act 1974, s 70*

The respondent ("the plaintiff") had by way of three separate contracts, appointed the appellant ("the plaintiff") as its contractor for the construction of double storey terrace houses. The plaintiff claimed that the defendant had breached the contract by failing to carry out the construction works in accordance with the drawings which expressly stipulate that the length of the living/saloon area must be 40 square feet in length. In this regard the plaintiff claimed that there was a discrepancy of 2 square feet and that as a result of the discrepancy/shortfall in the size of the living/saloon area, it had to sell the houses at a reduced price of RM230,000 per unit instead of the original price of RM250,000 per unit thus causing it to incur a total loss of RM1,220,000. The building plans which were approved by the Majlis Perbandaran Nilai ("MPN") and which specified that the length of the living/saloon area is 38 square feet and which were tendered by the defendant, corresponded with the architectural plans set out in the quotation. The plaintiff's director who discovered the discrepancy only disclosed the same two years after the defective liability period.

The plaintiff commenced proceedings against the defendant seeking inter alia a declaration that the defendant had breached the contract and damages. In its defence, the defendant argued that it had fully completed the construction works in accordance with the terms and conditions stipulated in the letter of award and that it had complied with the instructions and drawings given to it by the plaintiff's architect. The High Court however based on the evidence before it

found that the defendant had failed to comply with the revised architectural drawings that were tendered by the plaintiff and which specified that the length of the living/saloon area is 40 square feet. In arriving at its decision, the High Court further also held that the defendant's construction of the houses based on the plans approved by MPN is not the determinative factor as to whether the defendant had breached the contracts by failing to ensure that the length of the living/saloon area is 40 square feet as stipulated in the revised construction drawings; and that the failure to comply with the requirements of the Uniform Building By-Laws 1984 ("the UBBL") will only result in the non-issuance of the certificate of fitness ("the CF") by MPN. Hence the instant appeal.

Issue

Whether the defendant had breached the terms of the letter of award for failing to construct the houses according to the specifications in the contract, in particular, in respect to the length of the houses.

Held, allowing the appeal with costs; counterclaim for retention sum of RM341,971.54 and for RM90,583.43 for works done, allowed with costs

1. The High Court had fundamentally misdirected itself in concluding that the approved plans by MPN are only for the purpose of the issuance of the CF. [*see p 768 para 26*]

2. The construction and engineering drawings that were given to the defendant clearly show the length of the houses should be 38 square feet and not 40 square feet. In this regard and bearing in mind s 70 of the Street Drainage and Building Act 1974, no supporting evidence, be it oral or documentary was adduced by the plaintiff to prove that the revised architectural and structural drawings were in fact given to the defendant or that the same were approved by MPN according to the requirement of the law. [*see p 768 paras 28-30*]

3. The houses must be constructed based on the plans approved by MPN. In this regard, the CF that was issued by MPN specifically stated that the same was based on the building plans approved by it. The issuance of the CF meant that the construction of the houses was in accordance with the approved building plan. [*see p 767 para 25; p 771 para 38*]

4. The findings of the High Court were against the weight of the evidence. The fact that the revised plan was submitted by the plaintiff only after the completion of the construction and the issuance of the CF which was based on the approved plan, was not taken into consideration by the High Court. The High Court had failed to give due consideration to the material evidence before concluding that the defendant had breached the contract.

On the facts and in the circumstances there was an appealable error which justified appellate intervention. [*see p 771 paras 39-40*]

Cases referred to by the court

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 AMR 601; [2015] 2 CLJ 453, FC *(ref)*

Gan Yook Chin v Lee Ing Chin @ Lee Teck Seng [2004] 6 AMR 781; [2004] 4 CLJ 309, FC *(ref)*

Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka [2015] 1 AMR 575; [2014] 9 CLJ 1064, FC *(ref)*

Legislation referred to by the court

Malaysia
Street Drainage and Building Act 1974, s 70
Uniform Building By-Laws 1984, by-law 14

Justin Voon, KF Wong and Azmi Abdoll Aziz (KF Wong & Lee) for appellant
Jason Ng Kau, Khong Zhi Jian and Tan Keng Soon (Jason Ng & Partners) for respondent

Appeal from High Court, Seremban – Civil Suit No. 22NCvC-28-03/2015

Judgment received: March 29, 2018

Hasnah Mohammed Hashim JCA *(delivering the judgment of the court)*

[1] The appeal before us was against the decision of the learned High Court judge in Seremban High Court allowing the respondent's (the plaintiff in the High Court) claim. We had, after perusing the records of appeal and considering the written and oral submissions of learned counsel for the appellant and the respondent, unanimously allowed the appeal with costs of RM50,000 for here and below and we allowed the counterclaim with costs of RM10,000. We set aside the order of the High Court. We further ordered that the deposit be refunded. Our reasons appear below.

[2] For the purpose of this judgment, the parties will be referred to as they were referred to in the High Court.

Material facts

[3] The defendant submitted a quotation dated March 6, 2010 to the plaintiff for the construction of 50 unit of houses based on architectural drawings and structural drawings provided by the plaintiff. Based on the quotation submitted the plaintiff appointed the defendant as its contractor to carry out the project described as *"Cadangan Mendirikan Projek Perumahan Yang Mengandungi 191 Unit*

Teres Dan 1 Unit Pencawang Elektrik TNB Di Atas Tanah Lot Asal 3327,G17838 Fasa 2,Rumah Teres 2 Tingkat, Blok 1 (Lot 180-187) & Blok 2 (Lot 202-207),14 Unit Di Mukim Labu, Daerah Seremban, Negeri Sembilan Darul Khusus" ("the first contract") and *"Cadangan Mendirikan Projek Perumahan Yang Mengandungi 192 Unit Teres Dan 1 Unit Pencawang Elektrik TNB Di Atas Tanah Lot Asal 3327,G17838 Fasa 2, Rumah Teres 2 Tingkat, Blok 3 (Lot 188-195) & Blok 4 (Lot 196-201) & Blok 5 (Lot 2018-221) & Blok 6 (Lot 222-229), 36 Unit Di Mukim Labu, Daerah Seremban, Negeri Sembilan Darul Khusus"* ("the second contract").

[4] Subsequently, the plaintiff awarded the third contract to the defendant to construct an additional 11 units. In total under all the three contracts awarded by the plaintiff, the defendant was to construct a total of 61 units of double storey terrace houses ("the project"). Pursuant to the letter of award the defendant was to carry out and complete the construction works in accordance to the drawings including the engineer's structural construction drawings prepared by Messrs Jurutera Sinarunding Aidil Sdn Bhd.

[5] It is the plaintiff's pleaded case that the defendant constructed the houses with a discrepancy of 2 square feet in the living/saloon area and not as specified in the construction drawings, that is the length of the living/saloon area should have been 40 square feet instead of 38 square feet. The plaintiff claimed that the defendant failed to carry out the construction works in accordance with the construction drawings prepared by the engineer which had expressly stipulated that the length of the living/saloon area is 40 square feet. Therefore, it is contended by the plaintiff that the defendant in carrying out the construction works had wilfully, negligently and or recklessly breached the terms of the three contracts awarded.

[6] Due to the discrepancy and/or shortfall in the size of the living/the saloon area the plaintiff was unable to sell the houses at its original price of RM250,000 per unit ("the original price"). In order to be able to sell the houses with the discrepancy the plaintiff had to reduce the sale price of the houses to RM230,000 per unit ("the current price").

[7] The plaintiff contended that they suffered a total loss of RM1,220,000 for the 61 units of houses (RM20,000 x 61 units of houses). In the statement of claim, the plaintiff sought the following reliefs:

i. a declaration that the defendant breached the three contracts;

ii. an order that the defendant pays special damages in the sum of RM1,2000,000 for the breach of contract;

iii. damages, general and/or aggravated and/or equitable to be assessed;

iv. interest at such rate and for such period as the court deems fit;

v. an order that the defendant pays the plaintiff such damages as assessed; and

vi. costs.

[8] The defendant in its statement of defence denied that they had not complied with the construction's plans that were given to them. It is the defendant's pleaded case that they had complied with all the instructions and drawings given to them. The defendant was given the construction plans by the architect appointed by the plaintiff, Arkitek Saujana. The expected date of completion based on the letter of award was on or before February 11, 2011. The project was fully completed by the defendant and Arkitek Saujana had certified and approved the defendant's works. The plaintiff had admitted that the phase 2 project with 61 units was completed on time:

i. the 14 units completed in September 2010;

ii. the 36 units completed in February 2011;

iii. the 11 units completed in March 2011.

[9] The defendant contended that they completed the construction works based on the terms and conditions stipulated in the letter of award. Even though the construction of the houses has been duly completed by the defendant there is an amount still outstanding in the sum of RM90,583.43 and 5% of the retention sum of RM341,971.54. Both outstanding sums have been certified by Arkitek Saujana. The defendant's counter claim against the plaintiff is for the sum of RM432,554.97.

The High Court's findings

[10] At the High Court, several issues were raised and considered by the learned trial judge. The main issue however, before the court was whether the defendant had complied with the plaintiff's drawings specifying that the living room and/or saloon area must be 40 square foot in length. The failure by the defendant to comply would have been a breach of the contract. The learned judge concluded based on the evidence before him that the defendant failed to comply with the revised architectural drawings.

[11] As a result of the breach by the defendant in constructing the 61 units of houses with 38 square feet length instead of 40 square feet length, the plaintiff had indeed suffered losses as it had to sell the houses with at a discount or reduction of RM20,000 for each house.

Our decision

Principles of appellate intervention

[12] An appellate court will not intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion and where there has been insufficient judicial appreciation of the evidence. Justice Raus Sharif (President of the Court of Appeal as his Lordship then was) elucidated that the appellate court will intervene in a case where the trial court had so fundamentally misdirected itself (see *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2015] 1 AMR 575; [2014] 9 CLJ 1064). The Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 AMR 601; [2015] 2 CLJ 453 reiterated the principle to be adopted by an appellate court when reversing findings of fact by a trial court:

> ... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor (P) v Lee Ing Chin @ Lee Teck Seng & Anor* [2004] 6 AMR 781 at 793; [2005] 2 MLJ 1 at 10 per Steve Shim CJ (Sabah & Sarawak). More recently this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v Genisys Integrated Pte Ltd* [2011] 1 AMCR 338; [2010] 9 CLJ 785 where it was held at p 347 (AMCR); p 800 (CLJ):
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> > "It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the 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 evidence. (See *Chow Yee Way & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 6 AMR 781; [2004] 4 CLJ 309."

[13] The Federal Court in *Gan Yook Chin v Lee Ing Chin @ Lee Teck Seng* [2004] 6 AMR 781; [2004] 4 CLJ 309 held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence. The Federal Court further stated that a court hearing the appeal is entitled to reverse the decision of the trial judge after making its own comparisons and criticisms of the witnesses and of its own view of the probabilities of the case. It is also entitled to examine the process of evaluation of the evidence by the trial court and reverse a decision if it is wrong.

[14] However, the appellate court must be slow to interfere with the findings made by the trial court unless if it be shown there was no judicial appreciation of the evidence adduced before it.

[15] The failure to consider the entirety of the evidence and material issues or the failure to make findings of fact or the making of bare findings of fact will invite appellate intervention. Such omissions by a trial judge will require the appellate

courts to take on the role of first instance judge and review the evidence in its entirety afresh.

[16] Having set out the legal principles underlying appellate intervention, we now turn to the facts of the present case.

The alleged discrepancy

[17] It is not disputed that the defendant completed the project within the time as stipulated in the contract. There was no delay in the completion of the project and no liquidated and ascertained damages was imposed. The thrust of the argument of the learned counsel for the plaintiff was that the 61 units of houses constructed by the defendant had a discrepancy of 2 square feet. The alleged discrepancy was discovered by the plaintiff's director sometime in early 2011 but he disclosed the discovery of the purported discrepancy two years after the defective liability period. It is the plaintiff's contention that the construction drawings with the purported length of the houses to be built was 40 square feet in the living and/or the saloon area were given to the defendant. The defendant contended that the construction drawings that were given to them stated that the length of the living and/or the saloon area to be built was specified at 38 square feet.

[18] The building plan for the phase 2 works dated September 2005 was approved by the Majlis Perbandaran Nilai ("MPN") on September 7, 2006. The building plan for phases 2 and 3 dated December 2011 was approved by MPN on January 30, 2012. The original plans provided by the defendant corresponded with the architectural plans as set out in the quotation dated March 6, 2010. In all the plans approved the ground floor plan showed the length of the terrace house as being 38 square feet.

[19] Learned counsel for the defendant submitted that there were no contemporaneous documents adduced as evidenced by the plaintiff to show that the drawings requiring the length of the living or saloon area to be 40 square feet in length were handed over to the defendant.

[20] The building plan for phase 2 of the project was approved by the MPN on September 7, 2006. The building plan for part of phase 2 and 3 was approved on January 30, 2012. The defendant contended that they were given the architectural plans identified and chopped as "construction drawings". All the plans specified that the length of the living/saloon area is 38 square feet. The original copes of the plans were tendered by the defendant and corresponded with the architectural plans as set out in the quotation dated March 6, 2010.

[21] The plaintiff tendered the revised architectural drawings dated December 2009 specifying that the length of the living/saloon area is 40 square feet.

[22] The certificate of fitness ("CF") for phase 2 was issued by MPN on January 31, 2012.The defective liability period expired on January 30, 2014. DW1 (Sharizal bin Yeop, MPN's Penolong Pegawai Senibina) visited the project site on February 7, 2011 and found a discrepancy in the windows of the units and directed by letter dated January 30, 2012 the architect to submit a revised building plan in respect to the amendment to the windows of the houses. It was contended by the defendant that they were only notified by the plaintiff of the alleged discrepancy through a letter dated October 13, 2014.

[23] Learned counsel for the defendant argued that the plaintiff could not have developed nor constructed phase 2 of the project without the approval of the plans by MPN. Learned counsel for the plaintiff, however, in response submitted that the defendant did not comply with the "architectural building plan" dated January 30, 2012 ("D27") where the specification of the floor length is 40 square feet which was approved by MPN.

[24] We observed that the learned judge had concluded that the failure to comply with the requirements of the Uniform Building By-Laws 1984 ("the UBBL") will only result in the local authority, in this case MPN not granting the CF:

> 56. Isu dalam kes ini ialah berkenaan dengan kontrak antara pihak- pihak. Defendan telah memungkiri surat tawaran kontrak untuk membina rumah-rumah berukuran 40 kaki persegi. Perkara ketakpatuhan mengikut peruntukan dalam Akta 133 tersebut bukan masalah Defendan. Walaupun Defendan berhujah bahawa mereka membina rumah-rumah berukuran 38 kaki persegi mengikut pelan dalam "D30" yang diluluskan oleh MPN pada 7.9.2006 ('D26" M/s 116 Ikatan Dokumen D), namun pada pandangan saya, tindakan Defendan itu masih tidak mengikut terma-terma dalam surat tawaran yang menghendaki membina rumah mengikut ukuran 40 kaki persegi berdasarkan harga kontrak yang telah dipersetujui.

[25] We had considered very carefully the submissions of learned counsels, the appeal records and the learned High Court judge's judgment and we were unable, with respect, to agree with the learned High Court's decision. Having carefully read the judgment of the learned judge, we are satisfied that there are merits in the complaints raised by the appellant before us. It appears that the learned judge misappreciated the facts. The issue that was for determination was whether the defendant had breached the terms of the letter of award for failing to construct the houses according to specification in the contract, in particular in respect to the length of houses. However, in determining whether the defendant had breached the terms of contract the learned judge must take into consideration whether the revised architectural plan was approved by the MPN and that the said approved revised architectural plan was given to the defendant to comply. The defendant must construct the houses based on the plan approved by MPN.

[26] The learned trial judge had fundamentally misdirected himself when he concluded that the approved plans by MPN are only for the purpose of the issuance of the CF. The learned judge was of the opinion that constructing the houses based on approved plans by MPN was not the determinative factor whether the defendant had breached the contract by failing to construct the houses with the length of 40 square feet as stipulated in the revised construction drawings.

[27] We had perused the contract documents and we found no clause specifically providing that the length of the houses to be built must be 40 square feet. Item 6.0 of the letters of award (dated April 2, 2010 and October 28, 2010) merely stipulates that "The works shall be constructed and completed in accordance to the Construction Drawings, Details and Specifications. The scope shall include all specification as described in the Contract Documents". The defendant constructed the houses based on the construction drawings given to them where it was specified that the length of the houses to be built was 38 square feet. There were two plans approved by the MPN:

i. the building plan for phase 2 dated September 2005; and

ii. the building plan phase 2 and 3 dated December 2011.

[28] Five architectural plans were given to the defendant as construction drawings. The plan dated February 2010 and identified as "construction drawings" ("D30") shows the length of the houses to be 38 square feet. The engineering drawings dated December 2009 marked as exh D45 shows the length of the living/saloon area of the house to be 38 square feet and not 40 square feet.

[29] Section 70 of the Street Drainage and Building Act 1974 provides:

(1) No person shall erect any building without the prior written permission of the local authority.

(2) Any person who intends to erect any building shall cause to be submitted by a principal submitting person or submitting person –

(a) to the local authority such plans and specifications as may be required by any by-law made under this Act; and

(b) to the relevant statutory authority such plans and specifications as may be required by any other written law.

[30] The plaintiff failed to produce any of the plans which they had relied on except for the revised architectural drawing dated December 2009 and revised structural drawing dated November 2009. However, there were no supporting evidence, oral or documentary to prove that the two drawings were actually given to the defendant or approved by the MPN according to the requirement of the law.

[31] Upon perusal of the notes of evidence, we found that the defendant's witness DW1 testified that D27 did not amend the length of the living/saloon area but the amendments as ordered by the MPN was in respect of the windows of the units as indicated by the dotted red/blue lines on the plan. He also confirmed that the length of the houses remained at 38 square feet based on the pervious approved plan dated September 7, 2006 ("D26") as MPN does not have any record of any amendment to the length of the house made by the plaintiff as alledged. DW1 further explained that any plans submitted for additions or alteration must comply with by-law 14 of the UBBL.

[32] DW1 testified that he had visited the project site on December 7, 2011 and found a discrepancy in respect of the windows of the houses and issued the necessary instruction to the architect. DW1 confirmed that with regards to the length of the floor there was no amendment as there was no dotted red/blue lines on the plan. There were no records of any amendment to the length of the house:

> 39.Q. Adakah dalam pelan ini terdapat perubahan dari segi dimensi kepanjangan?
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> A: *Jika saya rujuk kepada pelan tiada yang rekod Majlis Perbandaran Nilai, tiada pindaan yang melibatkan dimensi yang dinyatakan di sini kerana tidak menyatakan garisan putus-putus warna biru dan garisan baru warna merah.*
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> (See p 485; notes of evidence; rekod rayuan jilid 2(2) Bahagian B.)

[33] He further confirmed that any construction works on site must comply with the plans as approved by the MPN:

> *Sebarang pembinaan yang dijalankan ditapak perlulah mengikut kepada pelan yang diluluskan oleh Majlis Perbandaran Nilai.*
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> (See Q 40 p 485; notes of evidence; rekod rayuan jilid 2 (2) Bahagian B.)

[34] The plaintiff's own witness SP3, the director of the company testified that he had discovered the discrepancy by using a tape measurement before February 2011 but chose to remain silent for two years after the full completion of the construction. He explained that it was his strategy not to disclose that fact for two years until after the defective liability period is over in order to ensure that the defendant will complete the construction and not leave during the maintenance period:

> 47. Q: When did you discover this?
>
> A: *I repeat when it's completed. When the structures was completed.*
>
> ...
>
> 50. Q: When you discover it?
>
> A: *Just before handover.*

51. Q: When did you handover the property?

A: *February 2011.*

54. Q: When you discovered the irregular works, did you notify the contractor?

A: *No.*

...

69. Q: So, you did not give them any notification in regards to discrepancy, right?

A: *No.*

70. Q: Why didn't you give them the notification?

A: *Because it was two years' maintenance period. If I told them about this discrepancy, to the high chance they may have left the job, not follow the full contract obligation. So, I decided to wait until the period was up and taking all the defects, then I will inform them.*

(See pp 413-417; notes of evidence; rekod rayuan jilid 2(2) Bahagian B.)

[35] We find it rather strange that the plaintiff, an experienced developer, would keep such a discovery of a discrepancy for two years and waited until the full completion of the construction of the houses before raising non-compliance to architectural plans. The discrepancy with regards to the floor length was only made known by the plaintiff to the defendant on October 13, 2014 after the defendant through their solicitors issued a notice of demand dated August 29, 2014 for the sum of RM432,554.97 for retention sum due and for outstanding sum due for infrastructure works done.

[36] Apart from the testimony of SP3 there was no evidence adduced by the plaintiff that the defendant constructed the houses in breach of the approved plans. Throughout the construction period that was no evidence of non-compliance or delay by the defendant. In fact, the architect appointed by the plaintiff certified and approved all the works that were completed by the defendant. If at all the defendant had constructed the living/saloon area not in accordance with the plans, the architect would have not certified that all works were duly constructed.

[37] The architect himself had admitted that the revised architectural drawings dated January 30, 2012 were only submitted to MPN after the construction of the 61 units were completed:

113. Q: In this particular case, did you submit the revise architectural drawings to MPN?

A: *Yes.*

114. Q: Is it before construction or during construction or after the construction has been completely done?

A: *After.*

(See p 325; notes of evidence; rekod rayuan jilid 2(2) Bahagian B.)

[38] The CF that was issued by MPN specifically stated that it was based on the approved building plan dated September 7, 2006. The CF issued meant that the construction of the 61 unit of houses was in accordance with the approved building plan.

[39] The learned High Court judge had failed to consider that the plaintiff only submitted the revised plan after the completion of the construction of the houses and the CF was issued based on the approved plan dated September 7, 2006. In our view, the learned trial judge had failed to give due consideration of material evidence to conclude that the defendant had breached the contract.

Conclusion

[40] Having considered the decision of the learned High Court judge in its entirety in light of the materials placed before us and the able submissions by both learned counsel, oral as well as written, we were of the respectful view that there was an appealable error that had been shown by the appellant that could properly justify an appellate intervention. We found that the findings of the High Court judge were against the weight of all the evidence that was before him.

[41] For the reasons we discussed above, we were constrained to hold that the learned judge had failed to judicially appreciate the evidence and/or the law presented before him so as to render his decision plainly wrong and upon curial scrutiny it merited our appellate intervention.

[42] Hence, we had unanimously allowed the appeal with costs of RM50,000 for here and below. We also had allowed the counterclaim by the defendant for the retention sum of RM341,971.54 and RM90,583.43 for works done as well as costs of RM10,000. All costs subject to the payment of allocator. We set aside the order of the High Court order.