IN THE COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: W-02(NCC)(W)-97-01/2018

BETWEEN

FUJISASH (MALAYSIA) SDN BHD ...APPELLANT

AND

FACADE TREATMENT ENGINEERING SDN BHD …RESPONDENT

[In the matter of the High Court of Malaya at Kuala Lumpur
Civil Suit Writ Saman No. WA-22NCC-9-01/2017

Between

FUJISASH (MALAYSIA) SDN BHD ...Plaintiff

And

FACADE TREATMENT ENGINEERING SDN BHD ...Defendant]

CORAM:

ZALEHA BINTI YUSOF, JCA
KAMARDIN BIN HASHIM, JCA
YEW JEN KIE, JCA

GROUNDS OF JUDGMENT

1. This is an appeal by the Appellant against the decision of the learned High Court Judge, given on 15.12.2017, in dismissing the Plaintiff's claim against the Defendant for the sum of RM7,937,243.68 due and payable for the goods supplied and delivered to the Defendant by the Plaintiff and for allowing the Defendant's counterclaim in the sum of RM623,146.94 only with 5% interests per annum on the judgment sum from 15.12.2017 until full settlement.

2. The Appellant is the Plaintiff and the Respondent is the Defendant in the High Court Suit. They will be referred to as in the High Court suit.

3. Both the Plaintiff and the Defendant are involved in the construction industry. The Plaintiff claimed that the Plaintiff had supplied and delivered goods to the Defendant upon order for which the Defendant had failed to pay despite demands made by the Plaintiff. The Defendant's defence is that the transactions between the Plaintiff and the Defendant was for the Plaintiff to supply goods [to be used in the building project] to the Defendant for processing for which the Defendant would be paid and there existed contra arrangement in respect of the outstanding balance between the parties. The

Defendant counterclaimed against the Plaintiff for the amount owing to the Defendant by the Plaintiff.

The Plaintiff's claim

4. In the Statement of Claim, the Plaintiff claimed that the Defendant had by a series of sale orders ["Sale Orders"] ordered "certain goods" from the Plaintiff.

5. The Plaintiff had by a series of delivery orders ["Delivery Orders"] delivered the "aforesaid goods" as ordered by the Defendant.

6. The Plaintiff had by a series of invoices ["Invoices"] requested payment for the "aforesaid goods" supplied.

7. However, the Defendant failed to pay the Plaintiff the sum of RM7,937,243.68 due and owing by the Defendant to the Plaintiff under the Sale Orders.

8. Both the Sale Orders and Delivery Orders carried an express term that the Plaintiff reserved the right to charge interest at 18% per annum on the overdue account. As of the date of the issuance of the Writ, interest upon the principal sum at the rate of 18% P.A. is RM5,769,771.11.

9. Hence, the Plaintiff commenced the action against the Defendant claiming a sum of RM7,937,243.68 being the debt due and payable and RM5,769,771.11 being the amount of interest due.

The Defendant's defence

10. The Defendant averred that the Plaintiff and the Defendant were involved in the contract of construction of various projects pleaded in paragraph 4 of the Statement of Defence[1].

11. There were transactions between the parties which involved the Defendant processing the goods and thereafter charging the Plaintiff for the work done, requiring certain contra or deductions be effected in the balance outstanding between the parties.

12. The Defendant filed a Counter-claim, pleading that it was the Plaintiff who had failed to make payment to the Defendant for the works performed by the Defendant for the Plaintiff, including on account of the agreed profit-sharing contribution and commission fees in respect of specific projects for the sum of RM15,081,236.72.

Issues to be tried at the High Court

13. By consent, there were only two issues to be tried in the Suit, namely:

(a) Whether the Plaintiff is entitled to recover the price of the goods delivered to the Defendant?

(b) Whether the Defendant is entitled to deduct for "KLIA2", "MKN" and "Others" against the price of the aforesaid goods?

[1] Ikatan Teras Bersama ["CCB"] [Jilid 1] p.7-8.

High Court's Decision

14. In respect of Issue (1), the learned trial Judge found that the pleadings of the Statement of Claim is defective as the Plaintiff did not plead the material facts pertaining to the Sale Orders, Delivery Orders for example what the "Certain Goods" were, when the Defendant purportedly made the orders to purchase those "Certain Goods", when the delivery was, and what were the projects involved. This is in breach of Order 18 r 12(1) (a) of the Rules of Court 2012.

15. The learned trial Judge found no merit in the Plaintiff's assertion that the Defendant cannot now challenge the Statement of Claim since the latter did not raise it in its defence or at trial, or even applied for discovery or for further and better particulars earlier. The reason being that the burden of proving its case is on the Plaintiff throughout the civil proceedings.

16. The learned trial Judge also found that the documentary evidence i.e. Sale Orders, Delivery Orders, Invoices and Statement of Accounts relied on by the Plaintiff are not adequately substantiated on grounds that they are not contemporaneous and mostly not acknowledged by the Defendant. That the Defendant had shown credible evidence of payment which had not been credibly rebutted by the Plaintiff.

17. Given that the Plaintiff had not established its claim against the Defendant on the balance of probabilities, the Plaintiff's claim was dismissed.

18. In respect of the Issue (b), the learned trial Judge held that since the bulk of the claims in the Counter-claim has been stayed for arbitration, and as agreed by the Plaintiff, the Defendant was only entitled to the commission from KLIA2 of RM623,146.94 as it was based on the Sale Orders which did not provide for arbitral reference.

The Appeal

(i) Ground Nos. 1, 3 and 13 of the Memorandum of Appeal ["MOA"]

19. Ground Nos. 1 and 3 of the MOA states as follows:

> *1. The Learned Judge erred in fact and in law by finding that the Appellant could not rely on the Sales Orders, Delivery orders and Invoices, when:*
>
> *(1) the Respondent had admitted in the Defence that the Appellant had delivered the goods to the Respondent;*
>
> *(2) the Respondent had admitted by documentary evidence almost the entire value of the goods delivered by the Appellant;*
>
> *(3) the Respondent had admitted by testimony almost the entire value of the goods delivered by the Appellant; and*

(4) the Appellant provided full particular of the Sales Order, Delivery Orders and Invoices by documentary evidence and testimony, which the Respondent did not challenge.

3. The Learned Judge erred in law and in fact by finding that the authenticity of the Sales Order were not free from question when the Appellant and the Respondent had agreed to the authenticity but not the content of the Sales Orders and placed them in category B.

13. The learned Judge erred in law and/or fact in dismissing the Appellant's claim, in making the following findings:

(1) that:

"the plaintiff chose to produce and rely merely on copies of the Sale Order which were only recently printed. It is not the issue of the authenticity of the documents had not been challenged. The question is why the originals, as they were issued at the material time of the transactions, could not be produced. And crucially, these are not contemporaneous."

(2) in so holding, the learned Judge erred in fact and/or law when he rejected the evidence because the originals were not produced, when in fact, the documents were agreed

and marked as "Part B" where the existence and authenticity of the documents need no formal proof.

20. Ground Nos. 1, 3 and 13 are interrelated and are therefore considered together

21. Learned counsel for the Plaintiff submitted that the Plaintiff had through the evidence of the Plaintiff's witnesses, namely, PW1, PW2, PW4 and PW5 admitted the Sale Orders, Delivery Orders and Invoices as summarized in Bundle F[2] and the statement of accounts in 15 bundles.[3]

22. It was further submitted that the learned trial Judge failed to appreciate that the originals of the Sale Orders, Delivery Orders and Invoices were produced, the maker of these documents called and documents were then put under Part B. Part B documents means that only their contents are in dispute with authenticity not being in issue. Thus, the learned trial Judge had erred

---

[2] REKOD RAYUAN JILID 2D [Bahagian C] pages A66 to 145.

[3] i. Common Bundle of Documents [CBD] 2/Bundle B1 pages 1-6 in Rekod Rayuan Jilid 2E [Bahagian C] pages 1-6.
ii. CBD/Bundle B1 pages 160-167 in Rekod Rayuan Jilid 2F [Bahagian C]pages 160-167.
iii. CBD/Bundle B2 pages 414-419 in Rekod Rayuan Jilid 2G [Bahagian C] pages 414-419.
iv. CBD4/Bundle B3 pages 746 and 747 in Rekod Rayuan Jilid 2I [Bahagian C] pages 746-747.
v. CBD4/Bundle B3 pages 750 and 751 in Rekod Rayuan Jilid 2I [Bahagian C] page 750 and Rekod Rayuan Jilid 2J page 751.
vi. CBD4/Bundle B3 pages 845 to 849 in Rekod Rayuan Jilid 2J [Bahagian C] pages 845 to 849.
vii. CBD6/Bundle B5 pages 1240 to 1241 in Rekod Rayuan Jilid 2M [Bahagian C] pages 1240-1241.
viii. CBD6/Bundle B5 pages 1276 to 1283 in Rekod Rayuan Jilid 2M [Bahagian C] pages 1276
ix. CBD7/Bundle B6 pages 1788 to 1791 in Rekod Rayuan Jilid 2P[Bahagian C] pages 1788 to 1791.
x. CBD8/Bundle B7 pages 1899 to 1902 in Rekod Rayuan Jilid 2Q [Bahagian C] pages 1899 to 1902
xi. CBD9/Bundle B8 pages 2169 to 2176 in Rekod Rayuan Jilid 2S [Bahagian C] pages 2169 to 2176.
xii. CBD10/Bundle B9 pages 2296 to 2303 in Rekod Rayuan Jilid 2T [Bahagian C] pages 2169 to 2176.
xiii. CBD10/Bundle B9 pages 2433 to 2435 in Rekod Rayuan Jilid 2T [Bahagian C] pages 2433 to 2435.
xiv. CBD10/Bundle B9 pages 2467 to 2469 in Rekod Rayuan Jilid 2T [Bahagian C] pages 2467 to 2469;and
xv. CBD10/Bundle B9 pages 2472 to 2474 in Rekod Rayuan Jilid 2T[Bahagian C] pages 2472 to 2474.

by questioning why the originals of these documents were not produced and called into question the authenticity of the documents.

23. On the other hand, learned counsel for the Defendant submitted that the Sale Orders and Delivery Orders were originally Part C document in ten volumes. Due to the voluminous documents involved and the time that would have been taken up if the Defendant were to insist to have them marked one by one, the Defendant agreed to have them to be Part B documents. However, the Defendant has always taken the stand that Delivery Orders and Sale Orders are disputed documents. Further, notwithstanding that these documents are Part B document, the Court still has the inherent jurisdiction to consider whether to accept a document or not, citing Section 90B of the Evidence Act 1950 which, submitted counsel for the Defendant, empowers the Court to consider the weight to be given to the documents and to draw reasonable inferences from the circumstances relating to the document or the statement.

24. Order 34 rule 2(2) (e) of the Rules of Court 2012 provides:

> (e) *if the parties are unable to agree on certain documents, those documents on which agreement cannot be reached shall be included in separate bundles and each such bundle shall be filed by the plaintiff and marked as follows:*
>
> (i) Part B – documents where the authenticity is not disputed but the contents are disputed;

(ii) Part C – documents where the authenticity and contents are disputed.

25. In light of the provision in Order 34(2)(e) above, it is settled law that Part B documents are documents in respect of which authenticity is not an issue. As such, there is no necessity to tender the original of these documents leaving only their contents which are in dispute subject to proof.

26. In view that the Sale Orders, Delivery Orders and Invoices had been admitted as Part B documents, the learned trial Judge in our view has erred in questioning why the originals of these documents were not produced and called into question the authenticity of the documents, that is, Sale Orders, Delivery Orders and Invoices.

27. However, we hasten to add that even though the learned trial Judge should not have questioned the authenticity of the Sale Orders, Delivery Orders and Invoices, they being Part B document, the learned trial Judge was not precluded and indeed he was entitled to make a finding of fact whether their contents have been proven based on the evidence before him.

Sale Orders

28. Learned counsel for the Plaintiff submitted that all the Sale Orders were signed by the Plaintiff and the Defendant. PW1 had explained that the originals of the some of the signed Sale Orders were missing and therefore she had to print the copies of the Sale Orders from the Plaintiff's computer

system. PW1 explained[4] that all the Sale Orders were signed at the material time, otherwise the Plaintiff would have been unable to process the Sale Orders and deliver the goods to the Defendant. It was contended that PW1's evidence that all the Sale Orders were signed by the Plaintiff and Defendant was not challenged by the Defendant in cross-examination.

29. Learned counsel for the Plaintiff further submitted that the Sale Orders had superseded the Purchase Orders. The Plaintiff's position is that the Purchase Orders are not relevant and if the Defendant regarded them as relevant, it is for the Defendant to produce them which the Defendant had not done so and no explanation was given why they did not adduce them in evidence.

30. The learned trial Judge found:

> *[29] The plaintiff submitted that all the Sale Orders were signed by the plaintiff and the defendant. But this is not clearly borne out by evidence. There are simply far too many Sale Orders which are relied on by the Plaintiff which were without the acknowledgment by the Defendant, numbering into the hundreds.*

31. Table A which listed down the Sale Orders bearing the GST number is found at Rekod Rayuan Jilid 2QQ [Bahagian C] pages 5832 – 5835.

[4] Puan Zurayda's witness statement dated 19.6.2017 [WS PW-1] at Q&A 4-7 in REKOD RAYUAN JILID 2C [Bahagian B] pages 367-368.

32. Table B which listed down the Sale Orders without the acknowledgment of the Defendant can be found in Rekod Rayuan Jilid 2QQ [Bahagian C] pages 5835 – 5836.

33. The learned trial Judge was mindful of PW1's testimony that all the Sale Orders were signed at the material time and PW1's explanation that some of the originally signed Sale Orders were missing, hence the need to print out the copies of Sale Orders for the transaction for Years 2011, 2012, 2013 and 2014 from the Plaintiff's computer system recently probably after the introduction of Gain Sale Tax ["GST"] in April 2015, based on the GST number printed on the copies thereof.

34. Nevertheless, the learned trial Judge was "perplexed" by the explanation of the Plaintiff for not able to produce the Sale Orders "issue at the material time" by which, he mean those that were issued contemporaneously at the time of the transaction and acknowledged by the Defendant. The learned trial Judge's "perplexity" was caused by the following observation:

> *[33] The plaintiff's difficulty with producing the sale orders issued by the material time is quite perplexing. Witnesses for the plaintiffs, namely PW1, PW2 and PW4 gave contradictory testimony on the number of copies of the Sale Orders kept by the plaintiff company and who in the plaintiff company had usual custody of them, in all cases not re-examined by the plaintiff's counsel for clarification. PW5 for instance testified that all the five copies of the Sale Orders are in the*

possession of the plaintiff. PW 2 in fact also testified that no one from the plaintiff company ask her to produce those Sale Orders being kept by her. This evidence was not challenged during the re-examination.

[34] Yet, the plaintiff chose to produce and rely merely on copies of the Sale Orders which were only recently printed. It is not the issue of the authenticity of the documents had not been challenged. The question is why the originals, as they were issued at the material time of the transaction, could not be produced. And crucially, these are not contemporaneous.

35. It would appear from the judgment that the learned trial Judge had observed that many of the Sale Orders produced as Part B do not have the acknowledgment of the Defendant contrary to the Plaintiff's assertion that all the Sale Orders were acknowledged by the Plaintiff and the Defendant at the material time. The learned Judge obviously did not buy the Plaintiff's explanation for the "missing" Sale Orders which necessitated the printing from the computer system as PW*2* testified that she had all the five copies of the Sale Orders but no one from the company ask her to produce those Sale Orders being kept by her. In other words, the "Sale Orders issued at the material time" could have been produced, yet the Plaintiff did not produce them and instead produced the recently printed Sale Orders. This led the learned trial Judge to question why the originals were not produced and to

reject and not accept the contents of the Sale Orders that were tendered as Part B document.

36. In our view, this is a finding of fact of the learned trial Judge based on his appreciation of the evidence before him, which does not warrant the appellate court's intervention.

Any Admission of delivery of goods by the Defendant?

37. Learned counsel for the Plaintiff submitted that the Plaintiff is entitled to claim for the delivery of the goods to the Defendant based on the Defendant's admission as pleaded in *Pernyataan Pembelaan* Page 4 paragraph 5 that reads: "*Transaksi-transaksi yang sebenarnya di antara Plaintiff dan Defendant adalah Plaintiff membekalkan barangan kepada Defendant ....*"[5]

38. Further, contended learned counsel for the Plaintiff, the Defendant's admission that the goods had been delivered can also be seen from the *Pernyataan Isu-Isu untuk Dibicarakan dated 9.6.2017"* which expressly stated "*barang-barang yang telah dihantar kepada Defendant".* The only issue raised by the Defendant was whether they were entitled to make deductions from the value of the goods delivered. It can be implied from this issue that good were in fact delivered in the first place; the issue of set off does not arise if there were no deliveries.

[5] REKOD RAYUAN JILID 1A [Bahagian A] page 240.

39. Learned counsel for the Plaintiff submitted that despite this admission in the pleadings and the question of goods being delivered not being in issue, the learned trial Judge displaced the case made by the parties and questioned whether the goods had in fact been delivered.

40. Paragraph 5 of the Statement of Defence states:

> *Transaksi-transaksi yang sebenarnya di antara Plaintif dan Defendan adalah Plaintif membekalkan barangan kepada Defendan untuk Defendan melakukan kerja-kerja ke atas barangan tersebut dan kemudiannya barangan yang telah diproses atau dikerjakan oleh Defendants akan dipasang ke atas projek-projek pembinaan tersebut dan kemudiannya Defendan mencajkan kerja-kerja tersebut ke atas Plaintif. Dengan itu, dari semasa ke samasa tolakan (contra) akan dilakuan. Dari barangan yang dibekal oleh Plaintif dan Defendan. Plaintif telah gagal memplidkan fakta yang material ini dan membuat tuntutan palsu terhadap Defendan.*

41. From the evidence on record and the submission of the parties, it can be safely said that the Plaintiff and the Defendant were involved in the construction industry and they had transactions with each other in many projects for about 10 years.

42. Our understanding of paragraph 5 of the Statement of Defence is that the Defendant is merely setting out the business relationship between the Plaintiff and the Defendant and the various projects involving the parties. In the course of which goods were delivered to the Defendant by the Plaintiff. It does not tantamount to admission to the delivery of "certain goods" pleaded in the Statement of Claim, in particular, paragraph 3 to 5, which is reproduced below for ease of reference.

> 3. *By a series of sales orders, particulars of which are known to the Defendant, the Defendant ordered certain goods from the Plaintiff (hereinafter referred to as the "Sales Orders").*
>
> 4. *By a series of delivery orders, particulars of which are known to the Defendant, the Defendant acknowledged delivery of the aforesaid goods (hereinafter referred to as the "Delivery Orders").*
>
> 5. *By a series of invoices, particulars of which are known to the Defendant, the Plaintiff requested payment of the aforesaid goods (hereinafter referred to as the "Invoices").*

43. It is worth noting that the Defendant specifically denied paragraphs 3 to 8 of the Statement of Claim in paragraph 13 of its Statement of Defence, which reads as follows:

13. Dari perenggan-perenggan di atas, Defendan menafikan dan mempertikaikan perenggan 3 ke 8 Pernyataan Tuntutan.

44. In the light of paragraph 13 of the Statement of Defence, the burden is upon the Plaintiff to prove that the "certain goods" that the Defendant had ordered from the Plaintiff and duly delivered to the Defendant as pleaded in paragraph 3-5 of the Statement of Claim.

Delivery Orders

45. Learned counsel for the Plaintiff submitted that PW2 and PW5 gave evidence that all the goods were delivered to the Defendant. PW5 explained that the goods were first delivered by the planning department to the fabrication department of the Plaintiff and then first Delivery Order was then signed off. After fabrication, the fabrication department of the Plaintiff arranged for the goods to be delivered to the Defendant and the second Delivery Order was then signed off by the Defendant. It was submitted that it is not an afterthought and is in fact explained in PW5's witness statement dated 20.6.2017. [6]

46. Further, submitted counsel for the Plaintiff, PW2 and PW5's evidence that all the goods were delivered to the Defendant was not challenged by the Defendant during cross-examination of these witnesses. Thus, the Defendant cannot now challenge the fact that all the goods had been delivered.

[6] WS PW-5 at Q&A 3 to 5 in Rekod Rayuan Jilid 2C [[Bahagian B] page 460.

47. It was further submitted for the Plaintiff that the Defendant cannot now challenge the fact that all the good were delivered, when the Defendant had admitted this in their defence and had further admitted by documents and testimony almost the full value of the goods delivered.

48. The learned trial Judge rejected the Delivery Orders for the following reasons:

a. Some of the Delivery Orders were without the requisite acknowledgment by the Defendant. There is no evidence that the Plaintiff had requested for the acknowledgment copy of the Delivery Orders from the Defendant despite PW4's unchallenged testimony that if a customer did not return the acknowledgment copy of Delivery Orders, the Plaintiff company would send emails and make phone called to the customers, such as the Defendant, to get the acknowledgment copy.

b. PW5's version of there being two sets of Delivery Orders. One set was for the Plaintiff [when the goods were first delivered to the Plaintiff's fabrication department and the Delivery Order was then signed off] and another set for the Defendant [when fabrication department delivered the fabricated goods to the Defendant and the second Delivery Order was then signed off by the Defendant]. PW1 to PW4 never mentioned this. Further, not a single set of such Delivery Orders which were signed off by the Defendant mentioned by PW5 was adduced before the Court. Accordingly, the learned

trial Judge found this version of PW5 unsubstantiated and not expressly pleaded.

c. Further, the learned trial Judge found that based on some Delivery Orders, the entity "First Façade Treatment Australia Sdn Bhd" that received the goods is plainly not the Defendant. [For the list of pages of documents showing that goods were actually to the Appellant itself, see Appendix "B" annexed to the "Hujahan Tambahan Bertulis Responden".].

d. Accordingly, the learned trial Judge made in our view, correctly a finding that the Plaintiff had failed, on the balance of probabilities, that the Defendant actually acknowledged those goods purportedly delivered to the Defendant.

\

Purchase Order

49. In light of the Plaintiff's assertion that the Defendant had ordered certain items of goods from the Plaintiff to be supplied and delivered by the Plaintiff to the Defendant, some of which remained unpaid, the learned trial Judge opined that the Purchase Orders issued by the Defendant should contain the specifics of the goods placed on order by the Defendant, yet no Purchase Orders were tendered by the Plaintiff. As a result, the learned trial Judge found – correctly in our view – that there is doubt that the goods and the

quantity allegedly delivered to the Defendant are the same as those purportedly ordered by the Defendant.

50. We find that the learned trial Judge had not misappreciated the evidence before him which led him to a finding that the Plaintiff had failed to prove, on the basis of the Delivery Orders, that on the balance of probabilities, the Defendant actually acknowledged those goods purportedly delivered to the Defendant.

(ii) Grounds Nos. 2 and 12 of the MOA

51. Grounds Nos. 2 and 12 are interrelated and are therefore considered together.

52. Ground No. 2 of the MOA states as follows:

> *2. The Learned Judge erred in fact and in law by finding that the Appellant did not provide particulars of the Sales Orders and the goods related thereto when:*
>
> *(1) the Appellant sufficient material facts in the Statement of Claim, as the Respondent filed and 8-page Defence and Counterclaim together with Annexure A in response thereto;*
>
> *(2) the Respondent did not apply to amend their Defence despite expressly reserving their right to do so under paragraph 3 of the Defence and Counterclaim;*

(3) the Respondent had knowledge of the particulars of the Sales Orders, Delivery Orders and Invoices, as the Respondent did not plead in their Defence that they lacked such knowledge in response to the Appellant's assertion in the Statement of Claim that the Respondent had such knowledge;

(4) the Respondent had knowledge of the particulars of the Sales Orders, Delivery Orders and Invoices, as the Respondent never applied for further and better particulars of these matters;

(5) the Appellant provided full particulars of the Sales Orders, Delivery Orders and Invoices by documentary evidence and testimony; and

(6) the Respondent did not object to the admission of such evidence during the trial.

12. *The learned Judge erred in law and/or fact in dismissing the Appellant's claim in making the following findings:*

That:

"failure on the part of the Plaintiff to plead material facts is therefore fatal to the Plaintiff's claim. The Plaintiff's claim should be dismissed on this ground alone."

(1) In so holding, the learned Judge erred in fact and/or law and has misdirected his mind to the established principles of law concerning pleadings.

53. Having read and heard the submission of both counsel on these two grounds of appeal, we do not agree that the learned trial Judge had erred in finding that the pleading in the Statement of Claim is defective for failing to plead material facts, that is, what were the "certain goods", when orders to purchase those "certain goods" were made and when the delivery was and what were the projects involved between the Plaintiff and the Defendant, and that such defect is fatal to the Plaintiff's claim.

54. Generally, the issue of "defective" pleadings ought to be taken up at the early stage of the proceeding and not at the end of the trial, after witnesses were called and evidence had been admitted. If the Defendant had found the pleading in the Statement of Claim wanting of material particulars, it ought to have applied for further and better particulars. In this case, the Defendant did not apply for such and instead filed the Statement of Defence[7]. Although the Defendant did plead in paragraph 3 of the Statement of Defence that the Plaintiff's Statement of Claim failed to plead the material facts, and reserved its right to file application to amend its Statement of Defence an Counter-claim, the Defendant never did apply.

[7] CCB [Jilid 1] p.7-14.

55. Be that as it may, the glaring fact is that the Statement of Claim are seriously lacking in material particulars. Accordingly, we find no merit in Ground No. 2 and12 of the appeal.

(iii) Ground No. 4 of the MOA

56. Ground No. 4 of the MOA states as follows:

> *4. The Learned Judge erred in fact and in law by dismissing the Appellant's claim on the grounds that the sum claimed by the Appellant is less than the sum of the Invoices adduced as evidence, when:*
>
> *(1) the Respondent did not plead this issue;*
> *(2) the Respondent did not put this issue to the witnesses on behalf of the Appellant; and*
> *(3) certain Invoices, or part thereof, adduced as evidence had been paid by the Respondent with the balance claimed by the Appellant.*

57. Learned counsel for the Plaintiff submitted that unchallenged evidence had been led through PW2 and PW4 that the Plaintiff issued all the Invoices to the Defendant, and through these witnesses all the Invoices have been admitted into evidence as part B document, the authenticity of the Invoices is not in dispute and their contents had been proven by unchallenged evidence. The particulars of the Invoices were set out in the "lampiran" annexed to her witness statement.

58. PW2 in her witness statement marked WS PW-2 at Q&A 6 and 7[8] testified that the Plaintiff's claim is based on the Invoices. The particulars in the Invoices are similar to that in the Delivery Orders. She prepared the Invoices contemporaneous with the Delivery Orders. The Invoices were despatched to the Defendant two or three days after the Delivery Orders.

59. PW4 in her witness statement marked WS PW4 at Q&A 3[9] testified that she prepared the Delivery Orders for the aluminium sections produced. These Delivery Orders and the aluminium sections were sent to the fabrication department of the Plaintiff. Once these aluminium sections were fabricated and sent to the Defendant, she would then issue the Invoices for these aluminium sections to the Defendant. The particulars of these Delivery Orders and Invoices were set out in the Appendix of her witness statement.

60. Learned counsel for the Plaintiff submitted that the evidence of PW2 and PW4 that all the Invoices were issued to the Defendant was not challenged by the Defendant during cross-examination of these witnesses. Accordingly, the Defendant cannot challenge the fact that these Invoices were issued.

61. According to the Plaintiff, the amount claimed by the Plaintiff is based on the Invoices [which were prepared based on the Delivery Orders] that were sent to the Defendant.

[8] Rekod Rayuan Jilid 2C (Bahagian B) page 373.
[9] Rekod Rayuan Jilid 2C (Bahagian B) page 390.

62. On the other hand, learned counsel for the Defendant submitted that the learned trial Judge was correct to reject Invoices allegedly sent to the Defendant in view that many of the Invoices produced by the Plaintiff during the trial are without the acknowledgment by the Plaintiff and a lot of them were not printed contemporaneously but either in late 2016 or early 2017.

63. Learned counsel for the Defendant also submitted that PW4 testified that no necessity for customers to acknowledge receipt of Invoices. PW3 testified that only Delivery Orders need acknowledgment from customers but not the Invoices.

64. PW5, however, in her cross-examination, took a different stand as she said that the Defendant had signed copies of Invoices but the Plaintiff could not find them.

65. In the Judgment[10] of the learned trial Judge, he held:

> *There is one argument of the Defendant which I find quite compelling. It is this. Whilst the invoices in the bundles are invoices which the plaintiff claimed as yet to be paid by the defendant, the one without acknowledgment from the defendant alone amounted to a staggering sum of RM56,917,774.73, far exceeding, many times over, the pleaded outstanding amount of RM7,937,243.68 (excluding interest) actually claimed by the*

[10] Rekod Rayuan Tambahan ["RRT"] page 14, paragraph [44]

plaintiff. This more than demolishes whatever semblance of substance left in the case of the plaintiff.

66. Given that this finding of fact by the learned trial Judge was arrived at based on the documentary evidence before him, we find no appealable error and therefore this ground of the appeal must fall.

(iv) Ground No. 5 of the MOA

67. Ground No. 5 of the MOA states as follows:

The Learned Judge erred in fact and in law by finding that there was insufficient evidence that the Appellant had sent the Statements of Account to the Respondent, when the Butterworth Post Office had endorsed the postal of such Statement of Account.

68. The Plaintiff sought to show that the Defendant has knowledge of the sum allegedly owed to the Plaintiff by relying on the Statements of Account.

69. Learned counsel for the Plaintiff submitted that the Statement of Account were in Part B and the Defendant did not dispute the contents of the Statement of Account prior to the action in the High Court and should be estopped from doing so now, citing Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp [established under The Strata Title Act 1985].[11]

[11] [2018] 4 MLJ 284.

70. Learned counsel for the Plaintiff submitted that the Plaintiff had adduced through PW3 that the Plaintiff issued Statements of Account to the Defendant. [12]

71. Further, submitted learned counsel for the Plaintiff, PW6 also testified that the Plaintiff issued the Statements of Account to the Defendant by post. This is confirmed by the endorsement of the Butterworth Post Office.[13]

72. Learned counsel for the Plaintiff submitted that the combined evidence of PW3, PW6 and the Butterworth Post Office endorsement clearly showed that Statements of Account were posted to the Defendant, which showed that the Defendant had knowledge of the sum owing to the Plaintiff.

73. Learned counsel for the Plaintiff submitted that the Defendant cannot now object to the Statements of Account being considered as the Defendant did not object to this evidence being adduced, citing Overseas-Chinese Banking Corporation v Philip Wee Kee Puan [14] and Superintendent of Lands & Surveys (4th Division) & Anor v Hamit bin Matusin.[15]

74. On the other hand, learned counsel for the Defendant submitted that if indeed the Plaintiff had posted those Statements of Account to the Defendant on 20.7.2016, the Plaintiff should be in the position to adduce those Statements during the trial, which the Plaintiff did not do so.

---

[12] Rekod Rayuan Jilid 2C [Bahagian B], WS PW-3 Q&A 2-5 PAGES 385-387.
[13] Nota Keterangan 20.6.2016 p. 46-50, 76 – 76 in Rekod Rayuan jilid 2B [Bahagian B], pages 186 – 190/ Exhibit P-1 in Rekod Rayuan Jilid 2D [Bahagian B] page 192.
[14] [1984] 2 MLJ 1.
[15] [1994] 3 MLJ 185.

75. We have noted that in the Judgment, the learned trial Judge held that failure on the part of the Plaintiff to plead the Statements of Account is fatal. We agree with learned counsel for the Plaintiff that the learned trial Judge had fallen into error in his view. Even though this issue was not pleaded, the fact that Statements of Account had been admitted into evidence without objection by the Defendant estopped the Defendant from objecting now.

76. We further note that even though the learned trial Judge held that failing on the part of the Plaintiff to plead Statements of Account is fatal the Plaintiff's case, the learned trial Judge nonetheless proceeded to consider the evidential weight to be given to the Statements of Account, in particular, in light of PW3's evidence in cross-examination that there is no document before the trial court to show that every month the Plaintiff issued and delivered the Statements of Account to the Defendant, yet subsequently, through PW6, the Plaintiff introduced new evidence purportedly an endorsement from Butterworth Post Office to show customer's Statements of Account posted on 20.7.2016.

77. In his Judgment, the learned trial Judge questioned the Plaintiff's reliance on the Statements of Account and uttered:

> *[51] Secondly, PW3 during cross-examination agreed that there were no documents before the Court to show that the Statements of Account were sent and issued by the plaintiff and delivered to the defendant.*

[52] Thirdly, the person who according to PW3 visited and dealt with the defendant to follow up on the alleged sums owing to the plaintiff was one Mr Lu Hanh Siong. Despite evidence that the latter was still contactable, the plaintiff conveniently chose not to call Mr Lu Hahn Siong as a witness.

[53] Fourthly, PW6 was allowed to introduce during trial what appeared to be an endorsement from the Butterworth Post Office with the title of Customer's Statements of Account posted on 20 July 2016. PW6 during examination in chief testified that these were for Statement of Accounts for the month of April, May and June 2016 and item 7 to item 22 were referred to the defendant (15 items) to demonstrate that the plaintiff indeed had posted 15 different letters on 15 different project to the Defendant.

[54] But I find these answers not convincing. The fact remains the Statements of Accounts were not available in Court. Even if it was accepted that the plaintiff did indeed post those Statements of Accounts (of the alleged transactions from 2011 to 2014) to the defendant relatively recently on 20 July 2016, surely the plaintiff should be in the position to tender the Statements of Accounts at trial.

[55] As such, the plaintiff's argument that the defendant should be estopped, applying the leading Federal Court decision in Boustead Trading (1985) Sdn. Bhd. v Arab-Malaysia Merchant Bank Bhd [1995] 3 MLJ 331 from now disagreeing with the

Statements of Account, when the defendant did not disagree with the Statements of Account upon receipt or at all, is short in substance.

78. In our view, the above finding of fact of the learned trial Judge is based on the evidence before him. We cannot find any misappreciation of the evidence to warrant the intervention of this Court.

79. Accordingly, Ground No. 5 of the MOA must fall.

(v) Grounds Nos. 6 and 7 of the MOA

80. We will take these two grounds together.

81. Grounds Nos. 6 and 7 of the MOA state as follows:

> *6. The Learned Judge erred in fact and in law by dismissing the Appellant's claim on the grounds that the Appellant had continued to deliver goods to the Respondent, although there was a substantial amount due by the Respondent to the Appellant.*
>
> *7. The Learned Judge erred in fact and in law by finding that the Respondent had paid the Appellant the amount admitted as owing by the Respondent to the Appellant, when:*

(1) the Respondent had not pleaded that they had paid the sum claimed by the Appellant for the goods delivered by the Appellant; and

(2) the Respondent admitted by testimony that none of the Invoices claimed by the Appellant had been paid by the Respondent.

82. Learned counsel for the Plaintiff submitted that the Defendant said it had paid for the goods delivered but this was not pleaded in the Statement of Defence. Despite the objection by the Plaintiff on that ground, the learned trial Judge considered the issue and erred by placing the burden on the Plaintiff rather than on the Defendant. It was submitted that the Defendant bears the burden of proof that the goods had been paid for, which the Defendant had failed to prove.

83. On the other hand, learned counsel for the Defendant submitted at length that vide letter dated 17.6.2013[16], the Defendant proposed to settle the outstanding sum at that material time. DW1 testified that after the Defendant had issued the said letter dated 17.6.2013, the Defendant started making payment to the Plaintiff and the Defendant had made full payment to the Plaintiff.

[16] Pages A25 to A28 Rekod Rayuan Jilid 2D [Bahagian C].

84. Based on the evidence before him, the learned trial Judge made the following findings:

> *Payment by defendant*
>
> *[66] It is observed that the defendant did make a proposal in its letter dated 17 June 2013 to settle all outstanding sum at that point in time. DW1 testified that thereafter the defendant actually started making payments and had indeed made full payment to the plaintiff. In fact, the defendant tendered in Court a detailed set of documents which set out various particulars of the payments said to have been made to the plaintiff following the said letter of 17 June 2013, during the period between 19 June 2013 and 6 February 2015, with a total sum of RM5,720,240.56.*
>
> *[67] The plaintiff denied this and alleged that such payments by the defendant were made to resolve other set offs unrelated to the present claims. And to substantiate its case, the plaintiff at the stage of continued trial after several weeks in between introduced new bundles of documents which according to the plaintiff showed the reasons for the payments by the defendant.*
>
> *[68] Crucially however, the testimony of PW6 to advance this assertion is of little substantive worth. This is because of hearsay evidence which is inadmissible. PW6 gave evidence that PW4 told PW6 that one Mr Ong got the*

information as to which invoices to be set off after Mr Ong communicated with the defendant. Similarly, PW6 claimed he had spoken with PW1 who told PW6 that one Mr Lu Hann Siong had communicated with the defendant to ascertain which invoices to be set off.

[69] Clearly PW6 had no knowledge of the invoices so identified for set off, and more significantly, in the absence of Mr Ong and Mr Lu from the witness box, there is no evidence that the communication with the defendant on the purported set off actually occurred. Whatever PW6 said on this issue is hearsay.

[70] The plaintiff could have applied at least to recall PW1 and PW4. But the plaintiff did not, at least in respect of PW1. The plaintiff did try to recall PW4 to clarify on the purported instruction given by the defendant. Curiously, PW4 refused to attend again, resulting in a warrant of arrest being issued against PW4, but only to be not pursued by the plaintiff subsequently, settling instead for further examination of PW6. In contradistinction, DW2 in cross examination stood firm that she or the defendant never gave those instructions as alleged by the plaintiff.

[71] Thus, the assertion that payments had been made by the defendant following the letter 17 June 2013 and there is

no further outstanding sum from the defendant to the plaintiff is neither unconvincing nor baseless.

[72] Quite apart from the deficiencies in the evidential support sought to be adduced by the plaintiff, on the whole the claim now pursued by the plaintiff is a curious one. The transactions in question were said to be in 2010 to 2014. Yet despite the alleged outstanding sum to the tune of around RM7 million, the plaintiff only found it convenient to commence an action for recovery in 2017. And despite the claim of sums owing, the plaintiff even continued to supply and deliver goods to the defendant post-2014, and now seeks to premise its claim for sums allegedly owing from the defendant on documents of spurious nature. On the whole, in my judgment, the plaintiff did not quite manage to dispel the contention of such payments having already been made by the defendant to the plaintiff earlier.

85. We find no reason to intervene in the above finding of facts made by the learned trial Judge.

(vi) Ground No. 19 of MOA

86. Ground No. 19 of the MOA states as follows:

19. The learned Judge erred in fact and/or law when he held in his judgment that the Appellant is estopped from

claiming interest despite an express term in the contract allowing for interest.

87. Learned counsel for the Plaintiff submitted that the Plaintiff is, apart from the principal sum, entitled to recover the interest. Clause 9 of the Condition of Sale of all the Sale Orders particularized in Bundle F provides "*The Company reserves the right to charge interest at 18% per annum interest on overdue amount."*[17].

88. Similarly, submitted counsel for the Plaintiff, clause 8 of the Conditions of Delivery of Delivery Orders particularized in Bundle F provides "*The Company reserves the right to charge interest at 18% interest per annum if the above amount is not paid on due date."*[18]

89. Likewise, submitted counsel for the Plaintiff, all the invoices particularised in the same Bundle F also provide the same interest clause as in Delivery Orders and Sale Orders.

90. Further, submitted counsel for the Plaintiff, all the Statements of Account provide "interest of 1.5% per month will be charged on overdue account."[19]

---

[17] Rekod Rayuan Jilid 2D [Bahagian C] Pages A66-A145.
[18] Rekod Rayuan Jilid 2D [Bahagian C] pages A66-A145.
[19] See, Footnote No. 3 above.
i. Common Bundle of Documents [CBD] 2/Bundle B1 pages 1-6 in Rekod Rayuan Jilid 2E [Bahagian C] pages 1-6.
ii. CBD/Bundle B1 pages 160-167 in Rekod Rayuan Jilid 2F [Bahagian C]pages 160-167.
iii. CBD/Bundle B2 pages 414-419 in Rekod Rayuan Jilid 2G [Bahagian C] pages 414-419.
iv. CBD4/Bundle B3 pages 746 and 747 in Rekod Rayuan Jilid 2I [Bahagian C] pages 746-747.
v. CBD4/Bundle B3 pages 750 and 751 in Rekod Rayuan Jilid 2I [Bahagian C] page 750 and Rekod Rayuan Jilid 2J page 751.
vi. CBD4/Bundle B3 pages 845 to 849 in Rekod Rayuan Jilid 2J [Bahagian C] pages 845 to 849.
vii. CBD6/Bundle B5 pages 1240 to 1241 in Rekod Rayuan Jilid 2M [Bahagian C] pages 1240-1241.
viii. CBD6/Bundle B5 pages 1276 to 1283 in Rekod Rayuan Jilid 2M [Bahagian C] pages 1276-1283.

91. It was further submitted that PW3 has provided a detailed calculation of the interest.[20]

92. It was submitted that the Plaintiff is entitled to interest at the rate of 18% per annum, as this rate has been agreed between the parties, citing the Federal Court case of Chuah Eng Khong v Malayan Banking Bhd.[21]

93. In his Judgment, the learned trial Judge gave several reasons why the Plaintiff is not entitled to claim the interest at the rate of 18% per annum but in final analysis, he said:

> *[69] In any event, given the considerable gaps in the evidentiary value of the documents tendered by the plaintiff which disentitled it from succeeding in the claim for the alleged sum owing from the defendant, the plaintiff's claim for interests, which was also premised on the same document, now discredited, could, as a consequence, similarly no longer be sustained.*

---

ix. CBD4/Bundle B3 pages 845 to 849 in Rekod Rayuan Jilid 2J [Bahagian C] pages 845 to 849.
x. CBD4/Bundle B3 pages 845 to 849 in Rekod Rayuan Jilid 2J [Bahagian C] pages 845 to 849.
xi. CBD4/Bundle B3 pages 845 to 849 in Rekod Rayuan Jilid 2J [Bahagian C] pages 845 to 849.
xii. CBD4/Bundle B3 pages 845 to 849 in Rekod Rayuan Jilid 2J [Bahagian C] pages 845 to 849.
xiii. CBD4/Bundle B3 pages 845 to 849 in Rekod Rayuan Jilid 2J [Bahagian C] pages 845 to 849.
xiv. CBD4/Bundle B3 pages 845 to 849 in Rekod Rayuan Jilid 2J [Bahagian C] pages 845 to 849.
xv. CBD4/Bundle B3 pages 845 to 849 in Rekod Rayuan Jilid 2J [Bahagian C] pages 845 to 849.

[20] Ota keterangan 19.6.2017 page 48 lines 20-33 eekr Jilid 2A [Bahagian B page 48.

[21] [1998] 3 MLJ 97.

94. Based on our earlier view on the learned trial Judge's finding on the Sale Orders, Delivery Orders, Statements of Account, we see no error in the learned trial Judge's decision to disallow the interest claim.

(vii) Ground No. 8 of the MOA

95. Ground No. 8 of the MOA states as follows:

> *8. The Learned Judge erred in fact and in law by finding that the Appellant could not make a claim for the Persona Metro Project because it was the same project which was the subject of a stay order when:*
> *(1) the Ampang Sub-Sub-Contract and the Sales Orders are separate and distinct contracts;*
> *(2) the Ampang Sub-Sub-Contract provides for arbitration. The Sales Orders do not provide for arbitration;*
> *(3) the Appellant applied on 21.2.2017 to stay all proceedings in relation to the Ampang Sub-Sub-Contract pursuant to section 10 of the Arbitration Act 2005; and*
> *(4) by an Order made on 17.4.2017, the High Court stayed all proceedings in relation to the Ampang Sub-Sub-Contract pursuant to section 10 of the Arbitration Act 2005.*

96. Learned counsel for the Plaintiff submitted that the Defendant had not only not pleaded in its defence that payment had been made but also failed to discharged the burden that the goods had been paid for.

97. It was submitted that deduction sought to be made for "MKN" and "others" are devoid of particulars and unsustainable. DW2 admitted in cross-examination that neither the contract nor the invoices nor any particulars for Terrace Houses claims had been provided to the Court.

98. It was submitted that deduction was sought to be made in relation to the Ampang Sub-Sub-Contract and the Mont Kiara Sub-Sub-Contract ["the said two sub-sub-contracts"], which proceedings by order of the court are both stayed for arbitration. It was submitted that the said two sub-sub-contracts and the Sale Orders are separate and distinct contracts. As such, the Sale Orders in respect of the Ampang Sub-Sub-Contract [22] do not provide for arbitration. Likewise with Mont Kiara Sub-Sub Contract which is a separate and distinct contract and the Sale Orders in respect thereof.[23]

99. It was submitted that the Defendant cannot, in the wake of the order of the Court made on 17.4.2017 upon application by the Plaintiff pursuant to section 10 of the Arbitration Act 2005, staying all proceedings in relation to the said two sub-sub-contracts. However, the stay order does not apply to the Sale Orders which do not contained an arbitration clause.

100. Suffice it for us to say that this ground of appeal is a non-starter. We say so because the learned trial Judge had agreed with the stance of the Plaintiff, that is, the Defendant cannot seek deduction for the said two sub-sub-

[22] Bundle F in Rekod Rayuan Jilid 2D [Bahagian C] PAGES A66-A145.
[23] Bundle F in Rekod Rayuan Jilid 2D [Bahagian C] pages A66-A145.

contracts because the proceedings on the Ampang sub-sub-contract as well as Mont Kiara sub-sub-contract had been stayed.

101. As for the Plaintiff's argument that the Plaintiff could claim on the Sale Orders, suffice it for us to say that we have earlier agreed with the learned trial Judge's decision for disallowing the Plaintiff's based on the Sale Orders. See, Issue (i) above.

102. We are of the view that the grounds of appeal addressed to by us in the above is sufficient to dispose of this appeal without having to consider the remaining grounds.

Conclusion

103. For all the reasons given aforesaid, it is our unanimous decision that there is no merit in the appeal to warrant the appellate court's intervention. The decision of the High Court dated 15th January 2017, is affirmed and the appeal is therefore dismissed with costs of RM15,000.00 subject to payment of allocator fees. The deposit, if paid, should be refunded.

Dated: 21 August 2019

Sgd

YEW JEN KIE
(delivering judgment of the court)
Court of Appeal Judge
Putrajaya

For Appellants : THAYANANTHAN A/L BASKARAN
(BASKARAN)

For Respondents : SO CHIEN HAO
(C.H SO & ASSOC.)

Notice: This copy of the court's reasons for judgment is subject to editorial revision.