MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK

AT SANDAKAN

SUIT NO. SDK-22NCvC-42/12-2014

BETWEEN

HU CHANG LIK @ HII CHANG LIK … PLAINTIFF

(NRIC No. 520212-13-5425)

AND

CHARLES LOU @ LOU CHI SIN … 1ST DEFENDANT

(NRIC No. 540403-12-5359)

LOU CHI NAM … 2ND DEFENDANT

(NRIC No. 510703-71-5417)

LOU YUNG CHI … 3RD DEFENDANT

(NRIC No. 230616-71-5527)

[sued as partners carrying on business under the firm name and style of Syarikat Pembenaan City ("City Construction Company")]

Grounds of Decision

(In respect of Enclosure 47)

Introduction

By Notice of Application dated 05.03.2018 (Enclosure 47), the Defendants apply to strike out the Plaintiff's Statement of Claim dated 05.12.2014 pursuant to Order 19 rule 19(1)(b) & (d) of the Rules of Court 2012. The primary ground for striking out is that the Plaintiff's claim against the Defendants is time-barred and consequently scandalous, frivolous, vexatious and an abuse of process.

Background

1. By a Contract in writing dated 8th April 2002 , the Plaintiff had engaged the 1st, 2nd and 3rd Defendants who are partners in a particular firm ("the Firm") to carry out "The Construction and Completion of a Retaining Wall and Drain on Pertama Side on Part of CL 075406012 at Mile 5, North Road, Sandakan" ("the Works") for the contract sum of RM1,040,000.00 upon the terms and conditions therein contained and based on other related documents which formed part of the Contract, (collectively referred to as "the Contract").

2. The Contract is subject to a Variation Order for additional works totaling RM163,390.00.

3. The Plaintiff later claimed that in breach of the Contract, the Works which were constructed by the Firm and purportedly completed pursuant to the Contract contained defects, imperfections, shrinkages or other faults.

4. The parties had referred the dispute under the terms of the Contract for arbitration on 17th January 2008 and an arbitrator, Chong Thau Sing, FCIArb, was appointed as the sole Arbitrator with the consent of the Plaintiff and the Defendants.

5. The Defendants had made an application to amend their defence and counterclaim to the Arbitrator sometime on 30th March 2009 but the Arbitrator declined to decide if the proposed amendments should be allowed and granted leave to the Defendants to refer by way of case stated to file the application for amendment to the High Court.

6. The Defendants' application to the High Court for amendment to their statement of defence and counterclaim was allowed by the High Court.

7. The Plaintiff, dissatisfied with the decision of the High Court, filed an appeal to the Court of Appeal. However, the Plaintiff's said appeal was dismissed by the Court of Appeal on 31st January 2013.

8. The Plaintiff then filed an application to the Federal Court for leave to appeal to the Federal Court against the decision of the Court of Appeal in allowing the Defendants to amend their statement of defence and counterclaim.

9. The Plaintiff had in the meantime filed an application to the Arbitrator for leave to amend his statement of case which was pending hearing.

10. Vide the Plaintiff's solicitors dated 16th January 2014 to the Defendants' solicitors, the Plaintiff wrote to the Defendants to terminate the arbitration with each party to bear their own costs and to refile their respective claims in the High Court. The Defendants' replied on 21st

January 2014 agreeing to the termination of the arbitration proceedings.

11. The Arbitrator had on 22nd January 2014 accepted the termination of his appointment as arbitrator.

12. The Plaintiff's application for leave to appeal to the Federal Court was discontinued by consent of the Plaintiff and the Defendants.

13. The Plaintiff claimed that he has filed this action in the High Court pursuant to the agreement of the Defendants.

Contention of Parties

It is submitted by counsel for the Defendants that the Plaintiff's claim against the Defendants is essentially for breach of contract and that the Plaintiff's alleged cause of action arose more than 6 years before the Writ and Statement of Claim dated 5.12.2014 was filed. Hence, it is contended that the Plaintiff's action is clearly time barred and stands to be struck out. The Defendants submit that the Plaintiff's claim is barred by the Limitation Ordinance (Sabah Cap. 72), by virtue of Section 3, and Article 20 (2 years

before 5 December 2014) and/or Article 95 (6 years before 5 December 2014) of the Schedule.

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The Plaintiff, on the other hand, contends that there was a 'without prejudice' offer to terminate the arbitration proceedings and that the parties then file their respective disputes in the High Court. This was to 'substitute' the arbitrator with the Court. According to the Plaintiff, the arbitration 110 proceedings were on going and the Defendants had agreed to the proposal and they are therefore estopped from raising limitation. In addition, the Plaintiff also raised the issue of delay on the part of the Defendants in making this striking out application.

115 **Decision**

The Plaintiff had vigorously asserted that the Defendants had agreed to the proposal that the parties file their respective disputes in the High Court after the termination of the arbitration proceedings and as such they (the Defendants) are therefore estopped from raising limitation. The Plaintiff 120 relied on the case of ***Asia General Equipment & Supplies Sdn Bhd v Mohd Sari Datuk Hj Nuar & Ors*** **[2011] 8CLJ 749** to advance his argument on the issue of estoppel. In ***Asia General Equipment & Supplies Sdn Bhd***

the Federal Court had, *inter alia*, decided that the doctrine of estoppels can bar a litigant who was guilty of unconscionable conduct from raising and relying on limitation as a defence.

The Defendants, however, with equal tenacity maintained that the Defendants never agreed to refer the dispute to the High Court after termination of the arbitration proceedings and in any event the Defendants never agreed to waive any defences, including limitation.

It is pertinent to examine the contents of the correspondences between the Plaintiff and the Defendants in order to determine whether the Defendants are estopped from raising limitation.

Vide the Plaintiff's solicitors dated 16th January 2014 ("LCN-6") to the Defendants' solicitors, the Plaintiff wrote to the Defendants to terminate the arbitration with each party to bear their own costs and to refile their respective claims in the High Court. The contents of the letter read:

"Notice of Termination of the Arbitration Proceedings

We act for the Claimant and refer to the above matter.

We have been instructed by our client to terminate the arbitration proceeding with each party to bear the costs of the arbitration incurred up to the date of the termination.

Our client proposes that parties file theirs claims in the High Court for the Court to determine on all issues.

The reason for doing this is that as it is likely that either party will not be satisfied with the decision of the Arbitrator and will resort to the courts for final determination.

In order to save time and costs, the matter should now be filed in the High Court, and parties can take the matter further to the appeal courts. Further, our client intends to remove the present Arbitrator for failing in his role.

Please let us know if your client agree to our client's proposal"

The Defendants' replied on 21st January 2014 ("LCN-7") agreeing to the termination of the arbitration proceedings. The contents of the Defendants' said letter read:

"Notice of Termination of the Arbitration Proceedings

1. *The Respondent has instructed us to respond to your letter dated 16 January 2014.*
2. *The Respondent hereby agrees to the termination of the arbitration proceedings with each party to bear the costs of the arbitration incurred up to the date of the termination. The arbitration is therefore terminated by mutual consent with immediate effect.*
3. *Nevertheless, our client still hopes that the relevant disputes could be settled amicably.*
4. *Meanwhile, our client reserves all its rights."*

Looking at the context and background of the "LCN-6" and "LCN-7", one would be hard pressed to conclude that the Defendants had agreed to refer the dispute to the High Court after termination of the arbitration proceedings as contended by the Plaintiff. On the contrary, the Defendants had wanted

to have the matter resolved amicably when they instructed their solicitors to write to the Plaintiff on a 'without prejudice basis' by letter dated 20th March 2013 (Exhibit 79). As the conduct of the Defendants is relevant to the issue of estoppel, it is pertinent to reproduce the said letter in order to be truly enlightened on the background of “LCN-6” and “LCN-7”

The Defendants’ letter dated 20th March 2013 (Exhibit 79) reads:

> *“We refer to the above matters, namely the ongoing arbitration as well as legal actions between Y.Bhag. Datuk Peter Hii JP (Datuk JP) and Datuk JP’s companies on the one hand, and our clients’ companies on the other, including all orders granted therein (collectively referred to as “the Disputes”)*
>
> ***Our clients are of the humble view that the Disputes are most regrettable and even avoidable**. All this has unnecessarily caused grievance and even made Datuk JP to feel there was lack of respect of him.*
>
> *This unhappiness was largely contributed to by encounters on site or otherwise in Datuk JP’s office.*

On reflection, this unhappy episode arose from gross misunderstandings and thus could have been avoided had there been decorum and greater respect accorded to Datuk JP.

***That being so and with the view and purpose of exploring the possibility of an amicable solution or settlement, we hereby seek, through you, your clients' willingness for discussions, with the hope that such discussion may lead to an amicable solution**. The proposed meeting for discussion may be at a place and time convenient to both parties in the presence of counsel.*

The benefit of a discussion which may lead to a settlement, is obvious. If and when successful, either party will be able to move on and concentrate on other important undertakings more profitably.

Our clients even hope, if and when Disputes are resolved, to continue enjoying the friendship of your client Datuk JP.

We look forward to hearing from you after you have taken instructions from Datuk JP. A favourable response is also anticipated." (emphasis added)

Clearly by the abovesaid letter, the Defendants expressed their intention and hope to have the matter amicably resolved. To have the arbitration proceedings terminated and thereafter have the dispute heard by the High Court is not putting to rest but only prolonging the "unhappy episode" experienced by parties.

The decision to terminate the arbitration proceedings and have the court to decide on the disputes between the parties was made by the Plaintiff. This much is admitted at paragraph 1.14 of the Plaintiff's written submission (Enclosure 56) where it is stated that "*When the Arbitrator was still deciding on the Plaintiff's application to amend his statement of case, the Plaintiff then decided to terminate the arbitration proceedings and have the court to decide on the dispute between the parties*". So, as far as the arbitration proceedings were concerned, the Plaintiff's position in "LCN-6" is clear. As submitted by the Defendants, the Plaintiff was terminating the arbitration proceedings which he had initiated. The termination was unconditional and not contingent

upon any other proposals, save for the costs aspect mentioned therein. The Plaintiff cannot turn around and makes the opposite allegation that "the Plaintiff's 'without prejudice' letter was only written to the Defendants to seek an agreement on the terms.

With reference to "LCN-7", whilst the Respondent agrees to the termination of the arbitration proceedings with each party to bear the costs of the arbitration incurred up to the date of the termination, there is no indication whatsoever therein that the Respondent agreed to refer the dispute to the High Court after termination of the arbitration proceedings. This is understandably so - why would the Defendants agree to have the disputes referred to the High Court when they are hoping for an amicable settlement "***<u>If and when successful, either party will be able to move on and concentrate on other important undertakings more profitably".</u>*** In any event, as submitted by the Defendants' counsel, the proposal was akin to asking the Defendants' consent to be sued. Any party has the right to initiate proceedings in the High Court and any defendants named in such proceedings have the right to defend the same. Consent is neither required nor relevant.

More importantly the Defendants' solicitors ended the letter ("LCN-7") stating "*Meanwhile, our client reserves all its rights.*" By stating so, the Defendants clearly did not agree to waive any of their rights, in particular they did not waive their rights to raise any defences, including the defence of limitation. Even more telling, assuming that the Defendants did agree to the Plaintiff's proposal, is the Plaintiff solicitors' unreserved statement in their letter ("LCN-6") that "*Our client proposes that parties file their claims in the High Court for the Court to determine on <u>all issues</u>."* Surely "all issues" include issue of limitation and not for the Plaintiff to pick and choose. The Plaintiff being represented by counsel cannot be said to be unaware of the limitation issue when proposing *"that parties file theirs claims in the High Court for the Court to determine on all issues"* and it was open to the Plaintiff then to make such proposal subject to the Defendants not raising the defence of limitation. To later protest against the Defendants raising the defence of limitation after having the benefit of hindsight can only be regarded as an afterthought on the part of the Plaintiff and a feeble attempt at salvaging the Plaintiff's claims from the undesirable effect of limitation.

With respect, in view of the above, I do not consider the Defendants as being guilty of any unconscionable conduct which would preclude them from raising the issue of limitation.

Next is to determine whether the Plaintiff's action is time barred.

Section 3 of the Limitation Ordinance states:

> "*Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed:*
>
> *Provided that limitation has been set up as a defence*."

The Defendants have pleaded the issue of limitation in paragraph 8 of their Amended Defence as follows: "*The Plaintiff's claim herein is barred by the Limitation Ordinance, by virtue of Section 3, and Article 20 (2 years before 5 December 2014) and/or Article 95 (6 years before 5 December 2014) of the Schedule, and therefore ought to be dismissed with costs*."

Articles 20 and 95 of the Schedule of the Limitation Ordinance (Sabah Cap. 72) stipulate the relevant periods as follows:

Description of Suit	***Period of Limitation***	***Time from which period begins to run***
Article 20: *For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for*	*Two years*	*When the malfeasance, misfeasance or non-feasance takes place*
Article 95: *For compensation for the breach of a contract in writing*	*Six years*	*When the period of limitation would begin to run against a suit brought on a similar contract not in writing.*

The Defendants referred to the decision of the Court of Appeal in ***Tetuan Mokhtar Ngah & Co (sued as a firm) v Kubu Pengkalan Sdn Bhd*** **[2015] 3 MLJ 409** which held at p417:

"*It is trite that the limitation period begins to run from the date on which the claimant's cause of action accrued*."

and at p418:

"*The effect of limitation on a suit so filed is fatal. It is similar to the rigor mortis having set in, it is irreversible and is beyond salvation. …*

Mozley and Whitley's Law Dictionary explains the terms more clearly by saying that 'a statute of limitations is one which provides that no court shall entertain proceedings for the enforcement of certain rights if such proceedings were set on foot after a lapse of a definite period of time reckoned as a rule from the violation of the right'. The law of limitation therefore places a limit in terms of the time frame within which a person who wishes to commence a legal action against another must act. If action is not so instituted, the right to sue is forever lost."

The Defendants submitted that no matter what position the Plaintiff may take as to the date on which his cause of action commenced, the same was more than 6 years before the Writ and Statement of Claim was filed, i.e. 05.12.2014. In order to escape limitation, the cause of action must have accrued not less than 6 years before that date, i.e. not later than 06.12.2008.

The following facts as laid out by the Defendants in the Affidavit in Support (Enclosure 48) are relevant:

On 13.08.2004, the Plaintiff's Engineer, Ir. Peter Liew Chau Keong ("Engineer") by his Site Instruction instructed the Defendants to stop work until further notice from the Plaintiff. The Defendants were not permitted to resume work since that date.

On 16.08.2004, the Engineer issued a "variation order" to omit works remaining under the Contract, as can be seen from paragraph 18 of the Statement of Claim.

On 11.07.2005, the Defendants' advocates rejected the Engineer's instruction to carry out remedial works, as can be seen from paragraph 22 of the Statement of Claim.

On 18.11.2005 the Plaintiff's advocates demanded that the Defendants carry out remedial works 14 days thereafter, as can be seen from paragraphs 24 to 25 of the Statement of Claim. The Defendants did not comply with the said demand.

On 20.01.2006, the Engineer issued a Certificate of Non-Completion, as can be seen from paragraph 33 of the Statement of Claim.

On 21.04.2006, the Engineer conveyed the existence of alleged defects to the Defendants, as can be seen from paragraph 39 of the Statement of Claim.

On 17.01.2008, the dispute between the parties was referred to arbitration, as can be seen from paragraph 46 of the Statement of Claim.

From the above, I agree with the Defendants' counsel that it can be seen that the Plaintiff's alleged cause of action arose more than 6 years before the Writ and Statement of Claim was filed. The above facts show that the alleged cause of action would have arisen at the latest in or before 2006. Further, the fact that the Plaintiff referred the matter to arbitration on 17.01.2008 in itself indicates that whatever causes the Plaintiff may have had to bring an action against the Defendants must have arisen before that date. It is to be noted that Plaintiff's Affidavit in Opposition has not attempted to contradict the above dates.

In view of the above, I therefore am of the considered view that the Plaintiff's cause of action against the Defendants is clearly time barred and stands to be struck out.

In respect of striking out of action on ground that the claim was statute-barred, I need only to refer to two cases cited by the Defendants. The first case is ***Tio Chee Hing & Ors v Government of Sabah*** [**1981] 1 MLJ 207** where the defendant therein applied to strike out the statement of claim on the ground inter alia that the claim was statute-barred. The High Court

allowed the application, and on appeal, the Federal Court upheld the decision, stating at p209:

"… but the learned judge agreed with Government. He delivered an admirable judgment which we do not pretend we can better and which we therefore reproduce:

"The breach alleged by the plaintiffs, if there was such a contract, had occurred more than six years ago. …

…

If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail."

With respect we entirely agree."

The second case is ***Haji Hussin Bin Haji Ali & Ors v Datuk Haji Mohamed Bin Yaacob & Ors*** **[1983] 2 MLJ 227** where the defendants therein had applied to strike out the plaintiffs' statement of claim pursuant to Order 18 rule 19 of the Rules of the High Court, 1980, the Federal Court held at p231:

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> "*We need not go further than to refer to the judgment of this Court in Tio Chee Hing & Ors v Government of Sabah where this Court referred to the Court of Appeal decision in Riches v Director of Public Prosecutions which decided that where it is clear that the defendant* 405 *was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out*."

However, that is not the end of the matter as the Plaintiff has raised the issue 410 of delay in the making of this application by the Defendants. It is submitted that there is an inordinate delay in making this application which was not explained in the affidavit in support. The Plaintiff contends that the application to strike out should be made promptly and before close of pleadings. The Plaintiff cited the case of ***Blue Valley Plantation Bhd v*** 415 ***Periasamy Kuppannan & Ors*** **[2010] 4 CLJ 753**, in which the Court of

Appeal had, *inter alia*, held that an application to strike out must be made promptly and any delay must be explained. The Court of Appeal had also held that even though the rules state that an application to strike out proceedings could be made 'an any stage of the proceedings', the words "*should not be literally interpreted so as to mean that a party to a proceeding is at liberty to make the striking out application at any time he wishes however so late. As a general rule the application must be made promptly and, in any event, it should not be allowed after a very long delay, and all the more so where the long delay was not explained*."

The Plaintiff also referred to the case of ***Boo Are Ngor v Chua Mee Liang*** **[2009] 6 CLJ 617 (FC)** where the Court held at paragraph 18:

> *"[18] It is our view that O 18 r 19 (1) of the RHC 1980 does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings*.

It is submitted for the Plaintiff that the previous solicitors of the Defendants ought to have made the application promptly, before close of pleadings.

The Defendants' counsel referred to the decision of Abdul Malik Ishak J (as his Lordship then was) in ***Domnic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors*** **[2007] 2 MLJ 761** at p765:

> "It must be borne in mind that the court is empowered to make an order striking out any pleading or indorsement or anything found in it at any stage of the proceedings."

The Defendants further submitted that in any event the alleged delay was entirely caused by the Plaintiff himself and he ought not to be able to take advantage of his own conduct to attempt to defeat the application. The Plaintiff filed the action on 05.12.2014. On 08.01.2015 the Defendants filed their Defence. Shortly thereafter, on 06.02.2015 the Plaintiff applied to disqualify the Defendants' counsel, Messrs Peter Lo & Co., Advocates & Solicitors, from acting for the Defendants. The Plaintiff's application was dismissed on the 2nd day of October 2015. This led to a sequence of appeals and applications that lasted 2 years and 8 months ending on 12.10.2017 when the Defendants' application for leave to appeal to the Federal Court was dismissed. The Defendants' present solicitors, Messrs

Leong & Wong, took over on 7.12.2017 and who on 5.3.2018 filed this application in Enclosure 47.

Given the circumstances of the case and the fact that the Defendants' current solicitors only came onboard after the Federal Court had dismissed the Defendants' application for leave to appeal, the delay was somewhat inevitable. Furthermore, the case has not been set down for trial and therefore the application cannot be said to be made at the eleventh hour. Hence, I am not inclined to regard the delay as inordinate. The Plaintiff also cannot claim to be surprised by the application as the ground on which the Defendants are attempting to strike out the Plaintiff's statement of claim, i.e., limitation, was clearly pleaded in paragraphs 6 to 8 of their Defence.

Finally, I also agree with the Defendants' counsel that the purported merits of the Plaintiff's claim against the Defendants is not relevant to the issue of limitation raised in the application. The purported merits of the Plaintiff's claim would only become relevant for consideration if this Court rejects the Defendants' application herein. Since this Court agrees with the Defendants on the issue of limitation, the Plaintiff's claim / purported merits is rendered academic. In this respect I again refer to the case of ***Tetuan Mokhtar Ngah***

& Co (sued as a firm) v Kubu Pengkalan Sdn Bhd (supra) cited earlier by the Defendants where the Court of Appeal said at p416:

> "*In our view, the determination of the second issue, namely that of time-bar ought to be dealt with first, because in the event that this court was with the second defendant on this issue, the first issue on whether the second defendant owed a duty of care to the plaintiff would be rendered, with respect, academic*."

For the above reasons, I allow the Defendants' application in Enclosure 47 with costs of RM3,000.00.

Dated this day of the 13th July 2018

SIGNED

(YA BEXTER AGAS MICHAEL)

Judicial Commissioner

High Court at Sandakan

For the Plaintiff: Mr Edwin Tsen

Together with Ms Caroline Hee

Of Messrs Tan Pang Tsen & Co

Sandakan.

For the Defendant: Mr Alvin Leong

Together with Ms Wong Heu Fun

Of Messrs Leong & Wong

Kota Kinabalu.