IN THE COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)
[CIVIL APPEAL NO. B-02(IM)(NCVC)-1826-09/2022]

BETWEEN

CHINA COMSERVICE (HONG KONG) LIMITED ... APPELLANT

AND

SEDIABENA SDN BHD ... RESPONDENT

(HEARD TOGETHER WITH)

IN THE COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)
[CIVIL APPEAL NO. B-02(IM)(NCVC)-1827-09/2022]

BETWEEN

SEDIABENA SDN BHD ... APPELLANT

AND

CHINA COMSERVICE (HONG KONG) LIMITED ... RESPONDENT

[In the High Court of Malaya at Shah Alam
Civil Suit No. 22NCVC-254-05/2014

Between

China Comservice (Hong Kong) Limited ... Plaintiff

And

Sediabena Sdn Bhd ... Defendant]

CORAM

RAVINTHRAN N PARAMAGURU, JCA
SEE MEE CHUN, JCA
MOHAMED ZAINI MAZLAN, JCA

JUDGMENT

Introduction

[1] These two appeals pertain to the assessment of damages by the High Court. The dispute between the plaintiff, China Comservice (Hong Kong) Limited ('CCL') and the defendant, Sediabena Sdn Bhd ('Sediabena'), arose out of an agreement between them. CCL, in its suit against Sediabena, had, amongst others, sought a declaration that the latter had breached its obligations under the agreement and that damages were to be assessed. Sediabena responded with a Counterclaim.

[2] The High Court ruled partly in favour of CCL and ordered damages to be assessed. Sediabena's Counterclaim, however, was dismissed. CCL and Sediabena's appeals to the Court of Appeal and Federal Court were dismissed. The case was then remitted back to the High Court for assessment of damages.

[3] A portion of CCL's claim for damages was allowed. In these appeals, CCL seeks to set aside the High Court's order to include the disallowed claims, while Sediabena aims to dismiss the claims allowed and for a set-off of the costs that it had incurred on the plaintiff's behalf. Appeal No. B- 02(IM)(NCVC)-1826-09/2022 is CCL's appeal and Appeal No. B-02(IM)(NCVC)-1827-09/2022 is Sediabena's appeal. Both appeals were heard together.

Facts

[4] Sediabena and another local company had, in May 2010, entered into an agreement with Maxis Broadband Sdn Bhd ('Maxis') for the supply, construction and maintenance of the latter's network infrastructure and facilities. Sediabena and CCL then entered into a Strategic Alliance Agreement dated 23 December 2010 ('the agreement'). CCL was to execute some of the works that Sediabena was assigned to and be responsible for the operational and capital expenses. The agreement also allows both companies to continue this arrangement should they be awarded any related future projects.

[5] The financing arrangement is set out under clause 5 of the agreement. CCL's (referred to as CCSHK in the agreement) obligation is spelt out under clauses 5.1 and 5.2, which states as follows:

5.1 Subject to the terms and conditions herein and in recognition that parties in this Agreement have different responsibilities to fulfil, CCSHK is agreeable to contribute no more than RM15,811,509.00 to assist SSB in its commitment under the On-Going Projects which may include payments to its contractor.

5.2 Subject to Clause 5.3, SSB agrees and acknowledges that the contribution to be made by CCSHK to SSB under Clause 5.1 shall be made in accordance with the following tranches:-

First tranche :	*no more than RM8,321,847.00 to be paid on 24 December 2010;*
Second tranche :	*no more than RM5,825,293.00 to be paid when the total amount of invoices issued by SSB to MBSB for the On-Going Projects are no less than RM12,482,771.00; and*

Third tranche : no more than RM1,664,369.00 to be paid when CCSHK has received RM16,643,694.00 from the On-Going Projects".

[6] In gist, CCL was to have received RM16,643,694.00 from Sediabena, payable from 90% of the payments received by Sediabena from Maxis. CCL would have made a profit of RM832,185.00.

[7] Disputes arose between them, which led to CCL terminating the agreement. At this point, CCL had only paid the first tranche of RM8,321,847.00. CCL had refused to pay the second tranche as Sediabena did not provide the invoices to enable it to verify the amount billed to Maxis. CCL then commenced a suit against Sediabana in 2014, with the latter counterclaiming. The trial was on the issue of liability first. On 20 December 2015, the High Court gave judgment in favour of CCL and dismissed Sediabena's Counterclaim. The High Court held that CCL had validly terminated the agreement due to Sediabena's breach in failing to provide the invoices and ordered damages to be assessed.

[8] Consequent to unsuccessful appeals by both parties to the Court of Appeal and Federal Court, CCL commenced assessing damages in the High Court. Both parties called witnesses to give evidence.

CCL's claim for damages

[9] CCL's claim as set out by the High Court were as follows:

Claim No. 1

RM 16,643,694.00 based on clause 5.7 of the agreement.

Claim No. 2

RM8,321,847.00 being the first tranche of payment made by CCL under the agreement.

Claims No. 3 and 5

Sums incurred by CCL towards the operational and capital expenditure for the project under the agreement.

Claim No. 4

RM9,417,490.56 being 90% of all sums received by Sediabena from Maxis, which CCL claims it is entitled to under clause 6 of the agreement.

The High Court's decision

[10] The High Court had only allowed Claim No. 2 with interest of 4% per annum from 10 December 2015 but dismissed Sediabena's claim for set-off based on the net loss approach. The rest of Sediabena's claims were dismissed.

[11] The High Court's brief grounds in paragraph 11 of the Grounds of Judgment are as follows:

"[11] Based on the foregoing, this Court awards damages to Plaintiff as foilows:-

a) Claim No. 1. This Court agrees with the view of Defendant's counsel that there is no basis for Plaintiff to invoke clause 5.1 of the SAA to support its claim for RM16,643,694.00 as the payment of the 2nd tranche has not been made to Defendant. as such this claim is dismissed.

b) Claim No. 2. It is an undisputed fact that Plaintiff has paid this amount to Defendant in accordance with clause 5.2 of SA4 (the agreement). Hence, this Court allows this *claim of RM8,321,847.00 without being subject to the 'net loss approach'.*

c) *Claim No. 3 and Claim No. 5. Claim No. 3 is in relation to further sums allegedly incurred by Plaintiff towards operational and capital expenditure for the Project Works. Claim No. 5 is for finance and other costs allegedly incurred for the funding and expenditure. The claims are based on 3 summary sheets namely China Cost Summary, China Labour Cost Summary and Malaysia Cost Summary, prepared by Plaintiff, containing the compilation of data of all operational and capital expenditure incurred either by Plaintiff or through its associated or sister companies. This Court dismissed these claims based on the following reasons:-*

i. *The supporting documents do not show expenses incurred by Plaintiff.*

ii. *Expenses incurred by Guangdong Telecommunication Engineering Co. Ltd and CCS Comservice (Malaysia) Sdn Bhd. who are not parties to this proceeding.*

iii. *Plaintiff failed to provide any evidence to support the relationship between Plaintiff and the two companies.*

iv. *No privity of contract between Defendant and the two companies.*

v. *Defendant has no knowledge of the alleged expenses incurred by these two companies.*

vi. *Plaintiff failed to provide evidence that expenses were incurred for the Project under SAA.*

vii. *Plaintiff cannot recover more than he would have been entitled to if Defendant had not broken the contract*

d) *Claim No. 4 - This is Plaintiff's ciaim for RM9,417,490.56 being 90% of all sums received by Defendant from Maxis in accordance with clause 6.1 of SAA.*

This Court noted that the High Court's decision (affirmed by the Court of Appeal) has not allowed Plaintiff's claim on breach of trust. Similarly, this Court dismissed this claim. Based on the balance of probabilities, this Court allows damages of RM8,321,847.00 to be paid to Plaintiff with no order as to cost."

Findings

[12] There are two methods for measuring damages suffered by parties:

The expectation loss approach - where the party is restored to a position as if the contract had been performed and mainly to recover the profits that the party had lost or deprived;

The reliance loss approach - where the party is to be restored to its position before the contract is entered, to recover the expenditure incurred for the contract before the breach or termination.

CCL's failure to elect

[13] We will first address Sediabena's contention that only nominal damages can be awarded to CCL as its claim is premised on expectation and reliance loss and, therefore, uncertain.

[14] Sediabena contended that a party must elect to either claim for expectation loss, such as loss of profits, or reliance loss for wasted expenditure. Relying on the case of *Delpuri-Hari Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2014] CLJU 1075; [2014] 1 LNS 1075 (CA), it was submitted that a party seeking damages must elect and that it is not for the court to do so, and that a failure to do so would render the claim uncertain and that only nominal damages can be awarded, Sediabena contended that CCL had failed to make an election and that the High Court had failed to consider this legal principle by allowing CCL's claim in toto under Claim No. 2.

[15] We are disinclined to agree with Sediabena's proposition. We agree with CCL's proposition that an election is only necessary where alternative and inconsistent remedies are sought and that the election can be made at any time before judgment is given; see the Privy Council case of *Tang Min Tat (deed) (personal representative) Capacious Investments Ltd* [1996] 1 All ER 193. CCL, in this assessment, seeks compensation for Sediabena's breach, which can be assessed using either the expectation or reliance approach. These are legal approaches with the ultimate aim of compensating CCL.

[16] The *Delpuri-Hari* (supra) case is distinguishable as the appellant sought liquidated damages for loss of profits and wasted expenditures. The court there held that the appellant was not entitled to claim for both at the same time and that the appellant should have made an election and not leave it to the court to exclude reliance losses from an expectation loss or vice versa. CCL here is not seeking expectation and reliance loss concurrently but seeking to have them as an alternative. Unlike the appellant in *Delpuri-Hari*, which sought liquidated damages, CCL here is seeking to have the damages assessed.

[17] We will now address CCL's claims based on the High Court's findings.

Claim No, 1

[18] CCL's claim was premised on clause 5.7 of the agreement, which states as follows:

> *"5.7 For the avoidance of doubt, CCSHK is entitled to receive RM16,643,694.00 from the On-Going Projects and shall be paid from 90% of all payments and proceeds accruing and received by SSB under the On-Going Projects to be distributed in accordance with the Agreed Benefit Ratio under the Dedicated Account. The parties agree and acknowledge that any amount in excess of the RM16,643,694.00 from the On-Going Projects shall accrue to SSB. However, in the event the total payment received by CCSHK under the On-Going Projects is less than RM16,643,694.00 ("Shortfall"), SSB shall reimburse CCSHK for the Shortfall and such reimbursement shall be paid from the payment or share to be received by SSB under the New Projects ("SSB Share of New Projects") and CCSHK is hereby irrevocably and unconditionally authorised by SSB to make any deduction from the SSB Share of New Projects for this purpose."*

[19] CCL's primary obligation under the agreement was to provide financial support not exceeding RM15,811,509.00 in three tranches as follows:

(a) First tranche of RM8,321,847.00 on 24 December 2010;

(b) Second tranche of RM5,825,293.00 when the total amount of invoices issued by Sediabena to Maxis exceeds RM12,482,771.00; and

(c) Third tranche of RM1,664,369.00 after CCL has received RM 16,643,694 from the project.

[20] In return, CCL was to have received RM16,643,694.00 from Sediabena, which was 90% of the payments that Sediabena was to have received from Maxis. CCL contended that it would have been repaid RM16,643,694.00 and made a profit of RM832,185.00 if the agreement had proceeded in its ordinary course.

[21] It is not disputed that CCL had paid the first tranche of RM8,321,847.00. It is also beyond doubt that the High Court had found Sediabena to be in breach of the agreement, the decision of which has been upheld by the Court of Appeal and Federal Court. CCL contended that it would have made the payments due under the second and third tranche amounting to RM 16,643,694.00 plus the further agreed sum of RM832,185.00 had they not terminated the agreement due to Sediabena's breach. Learned counsel for CCL submitted that CCL would have been entitled to these sums as expectation loss, but for Sediabena's breach.

[22] CCL terminated the agreement before it was due to pay the second tranche. With the agreement terminated, the terms of the agreement are no longer applicable. CCL would only be entitled to RM 16,643,694.00 if the agreement was ongoing and CCL had paid the second tranche. If this claim is allowed, CCL would have unjustly profited from a non-performance.

[23] Furthermore, the Court of Appeal had dismissed CCL's claim for breach of trust where it had relied on the effect of, amongst others, clause 5.7. The court held that;

> *"The entire structure of the SAA* (the agreement) was *such that, the plaintiff would only earn the right to repay themselves from the Dedicated Account once the Plaintiff has paid the 1st Tranche and the 2nd Tranche. It is not in dispute that the 1st Tranche was paid, but not the 2nd Tranche."*

[24] We therefore find no compelling reasons to disturb the High Court's findings on this claim.

Claims No, 3 and 5

[25] These claims were taken together as they were expenses that CCL claimed were operational and capital expenditures (Claim no. 3) and finance and other costs (Claim no. 5) for the project. CCL had submitted three summary sheets through its witness during the assessment hearing. These sheets were a compilation of the operational and capital expenditures for the project. During submissions, learned counsel for CCL had informed us that 50 volumes of documentary evidence from CCL's records and that of its associated and sister companies were tendered to support these claims. Some of the costs expended were through its sister companies: Guangdong Telecom Engineering Co. Ltd and China Comservice (Malaysia) Sdn Bhd. The finance and other costs were the fees and costs for the financial facility that CCL had taken with a bank to fund the project. The costs allegedly incurred were CNY6,307,810.87 in China between 2011 and 2014 and RM 13,093,207.23. CCL contended that it was entitled to be restored to its position before entering the agreement, namely to recover the expenditure it incurred in carrying out its obligations under the agreement before Sediabena's breach.

[26] The High Court, in its judgment, set out seven reasons for dismissing this claim. In summary, the High Court found that the documents produced do not support CCL's claim and that the expenses were incurred by companies not parties to the agreement or the suit. Both CCL and Sediabena's counsel submitted quite extensively on the facets of these claims.

[27] It is not the function of an appellate court to interfere with the findings of the court that did the assessment, for the assessment court would have been in a better position to assess the evidence presented through the documents and witnesses. The appellate court should be slow to reverse the finding merely because it would have arrived at a different sum had it tried the case; see the Federal

Court's judgment in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 at 32.

[28] Learned counsel for Sediabena repeated the same arguments it has ventilated in the High Court, namely that the documents produced by CCL merely show expenses allegedly incurred by two of CCL's alleged sister companies. Still, no supporting evidence was provided by Sediabena to prove its relationship with CCL. Learned counsel also submitted that these companies were neither parties to the agreement nor were they parties to the suits. Learned counsel for Sediabena had also submitted in detail the discrepancies in the claims itemised in the documents, which we opine is unnecessary to reproduce.

[29] The High Court would not only have heard the evidence from the two witnesses from both sides but also have been able to peruse the voluminous documents presented concerning these two claims. Considering the submissions by the counsel for both parties and the reasons given by the High Court, we are disinclined to interfere with the findings, mainly as they were findings of fact. The expenses incurred had no nexus with the project. Furthermore, CCL is attempting to claim the costs and expenses it would have incurred even if the agreement was not breached. If the project had proceeded without any hindrance, CCL would not have claimed for these expenses. CCL would only be entitled to make these claims if they were claimable had the agreement been performed; see *PJ Spittings (Builders) Ltd v Bonus Flooring Ltd* [2008] EWHC 1516 (QB).

[30] We would add that these claims are essentially special damages and are not claimable as they were not pleaded and particularised in CCL's statement of claim. CCL's appeal concerning Claims No. 3 and 5 is therefore dismissed.

Claim no. 4

[31] CCL's claim of RM9, 417,490.56 is 90% of all sums received by Sediabena from Maxis, based on clause 6.1 of the agreement, which reads as follows:

"6.1 Agreed Benefit Ratio

Subject to the terms and conditions herein, the parties agree and acknowledge that contractual payments for the Project Works shall be apportioned in the following manner:-

(a) so long as the cumulative aggregate contractual payments for the Project Works (which does not include the contractual value of the On-Going Projects) received is less than RM200,000,000.00 and such sums are or will be credited into the Dedicated Account, the parties shall apportion the same as follows:-

(i) 90% to CCSHK; and

(ii) 10% to SSB

(b) in the event the cumulative aggregate contractual payments for the Project Works (which does not include the contractual value of the On-Going Projects) received is more than RM200,000,000.00 and such sums are or will be credited into the Dedicated Account, the apportionment for the next gross contractual payment received for the Project Works shall be apportioned in the following manner:-

(i) 95% to CCSHK; and

(ii) 5% to SSB

The parties agree and acknowledge that the respective apportionment under Clause 6.1 above shall be carried out by way of SI under the Dedicated Account."

[32] CCL contended that had the agreement proceeded in its ordinary and intended course, Sediabena would have billed, and Maxis would have paid Sediabena for such works, of which CCL would have been entitled to at least 90% of such payments. CCL sought to rely on the progress reports it had prepared and claimed to have been affirmed by Sediabena to show the value of the work done amounting to RM10,463,878.40. Based on this amount, CCL claims it was entitled to RM9,417,490.56, 90% of this amount as an expectation loss.

[33] The High Court dismissed this claim as CCL's claim had already been denied. The High Court had previously granted a declaration that Sediabena had breached clause 3.1(f) of the agreement and that damages were to be assessed. CCL's claim under paragraphs 13(b), (c), (e) and (f) was dismissed on the basis that the 2nd tranche payment had not been made. Consequently, CCL's prayer for an account of an inquiry under paragraphs 13(b) and (c) was not allowed. As stated earlier, this decision was affirmed by the Court of Appeal and the Federal Court. Paragraph 13 of the Statement of Claim is set out below:

"13(b) an account and inquiry as to:-

(i) all Work Orders, Purchase Orders and/or Departmental Release Orders issued by Maxis to the Defendant;

(ii) all invoices issued by the Defendant to Maxis;

(iii) all payments and monies paid by Maxis and received by the Defendant whether into the Nominated Joint Account or the Dedicated Account or otherwise howsoever;

with liberty to the Plaintiff to falsify and/or surcharge such accounts;

(c) upon taking such accounts, an order for payment by the Defendant to the Plaintiff of such sums that are found to be due

to the Plaintiff under the "Strategic Ailiance "dated 23.12.2010;

(e) equitable compensation to be assessed and paid by the Defendant to the Plaintiff;

(f) such tracing orders as may be necessary in aid of the above".

[34] The High Court did not err in dismissing this claim as CCL's claim under Claim no. 4 seeks the same relief that it had sought under paragraphs 13(b), (c), (e), and (f), which had been dismissed previously, CCL's claim under Claim No. 4 is, therefore, untenable.

Sediabena's claim for net loss

[35] Sediabena contended that the High Court had failed to consider the net loss approach, where any damages awarded to CCL must be set off against its benefits due to the agreement. The High Court, in dismissing Sediabena's claim for net loss, did not give any grounds for the dismissal.

[36] Sediabena claimed that it had advanced RM4,645,302.45 to CCL during the tenure of the agreement for various work- related payments. This amount was verified by CCL, as evidenced by CCL's letter to Sediabena dated 19 October 2012. Sediabena contended that the main objective of CCL entering into the agreement with Sediabena was to gain a foothold in Malaysia's telecommunications market and that it had obtained that objective judging from the revenues it had achieved from 2012 to 2014. It was submitted that it would be unjust for CCL to benefit at the expense of Sediabena and that it would only be fair to give credit to Sediabena by setting off the amount advanced with any damages awarded to CCL, which in this case was the sum of RM8,321,847.00 under Claim No. 2.

[37] We are not inclined to agree with Sediabena's contention for the simple reason that the High Court has dismissed Sediabena's

Counterclaim for a refund of the advances made in the trial for liability. In its Counterclaim, Sediabena demanded the refund of advances amounting to RM5,504,613.50. The amount claimed here is part of the amount sought in the Counterclaim. The High Court's finding has been affirmed by the Court of Appeal and Federal Court. As Sediabena's Counterclaim has been dismissed, there is no basis for them to make this claim.

Conclusion

[38] We find that there are no appealable errors by the High Court to warrant our appellate intervention. We therefore affirm the High Court's decision and dismiss CCL and Sediabena's appeals. Both parties have consented to there being no order as to costs.

Dated: 13 MAY 2024

(MOHAMED ZAINI MAZLAN)
JUDGE
COURT OF APPEAL, MALAYSIA

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