Usima Sdn Bhd v Lee Hor Fong (trading under the name and style of Pembinaan LH Fong)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–66–10 OF 2015(K)

ZULKEFLI PCA, SURIYADI, HASAN LAH, RAMLY ALI AND BALIA YUSOF FCJJ

6 SEPTEMBER 2017

Contract — Act done to benefit another — Whether defendant sued by plaintiff for payment for work done could not raise claim for compensation/restoration under s 71 unless it satisfied all four conditions under that section — Whether defendant could not formulate claim under s 71 for first time during appeal before Federal Court when such claim never dealt with or determined by courts below — Contracts Act 1950 s 71

Contract — Building contract — Interim certificates — Whether interim certificates issued after joint measurement had been done between the employer and main contractor to contract were final as to amounts stated therein — Whether main contractor who received payment from employer on basis of measured interim certificates could not refuse to pay its subcontractor for work done based on same interim certificates by insisting that certificates should again be subject to re-measurement — Whether estoppel and principle of approbation and reprobation applied against main contractor

The public works department ('JKR') had appointed the appellant ('Usima') to carry out certain construction works ('the works'). Usima subcontracted the works to the respondent ('LHF') pursuant to a letter of award ('LOA') which stated that the subcontract shall be governed by the terms and conditions of the main contract between JKR and Usima. Disputes between the parties led to Usima terminating the subcontract. Usima alleged that LHF had abandoned the works. LHF sued Usima, inter alia, for monies owing in respect of work done as reflected in three interim certificates. Usima raised a counterclaim, inter alia, for monies it had incurred to engage new subcontractors to complete the works. The High Court dismissed LHF's claim and allowed the counterclaim. The court found that LHF had failed to complete the works as contracted and had abandoned the construction site justifying Usima's termination of the subcontract. The court ruled that even if it was wrong to hold that Usima had not committed any breach in terminating the subcontract, the interim certificates that formed the basis of LHF's claim were, in any event, subject to re-measurement and that was not done. The Court of Appeal ('the COA') allowed LHF's appeal, set aside the High Court's decision

and dismissed Usima's counterclaim. The COA held that Usima breached the subcontract when it purported to terminate it because there was no evidence to show LHF had abandoned the works as claimed and neither were the interim certificates subject to re-measurement as they were already measured and certified by the employer's consultant before they were issued. The leave questions on which Usima was allowed to appeal to the Federal Court against the COA's decision largely concerned whether the amounts stated in the interim certificates were deemed final or whether they were subject to re-measurement. At the appeal hearing, Usima raised an issue that was not raised or deliberated upon in the courts below, ie, that the amounts in the interim certificates upon which judgment was entered for LHF by the COA included payments that Usima had made directly to third parties that LHF had engaged and that, therefore, based on s 71 of the Contracts Act 1950, those payments to the third parties should be deducted from LHF's claim.

Held, dismissing the appeal and affirming the decision of the Court of Appeal:

(1) Based on the peculiar facts and circumstances of this case, which was a contract subject to re-measurement, and based on the finding that measurement had already been done before the interim certificates were issued, the Court of Appeal was right to hold that the interim certificates on which LHF's claim was based had been jointly measured and certified by Usima and the superintending officer from JKR. That joint measurement or re-measurement was in respect of work done by LHF on Usima's behalf towards the latter's obligations under its main contract with JKR. Usima had relied upon the interim certificates for its claim against JKR and had been paid. Usima must have approved and agreed to the same before it was paid by JKR on those certificates. It was therefore unconscionable for Usima, after having received payment from JKR, to now insist that there should be a further re-measurement in respect of the same work done by LHF as its subcontractor. Usima was estopped from doing so. One could not approbate and reprobate (see paras 44, 50 & 52).

(2) Usima's reliance on s 71 of the Contracts Act 1950 was inconsequential as it failed to satisfy all the four conditions envisaged under that section. While it satisfied the condition that the act done was lawful and was not intended to be gratuitous, Usima failed to satisfy the two conditions that the doing of the act or delivery of the thing must be 'for another person' and also that 'the other person enjoyed the benefit of the act or the delivery'. It was in Usima's interest and for its own benefit that it paid the third parties so that the project could be completed. In any event, this issue of whether deduction should be made out of the sum in the interim certificates arose just because the Court of Appeal had allowed LHF's claim and it was not otherwise dealt with by the courts below. The

question posed to this court must relate to a matter in respect of which a determination had been made by the court below (see paras 57, 60–61, 63 & 65).

[Bahasa Malaysia summary

Jabatan Kerja Awam ('JKR') telah melantik perayu ('Usima') untuk menjalankan kerja-kerja pembinaan tertentu ('kerja-kerja'). Usima subkontrak kerja-kerja tersebut kepada responden ('LHF') berikutan surat award ('LOA') yang menyatakan bahawa subkontrak tersebut akan dikawal oleh terma-terma dan syarat-syarat kontrak utama di antara JKR dan Usima. Pertikaian di antara pihak-pihak membawa kepada Usima menamatkan subkontrak tersebut. Usima mendakwa bahawa LHF telah meninggalkan kerja-kerja tersebut. LHF menyaman Usima, antara lain, untuk wang yang terhutang berkaitan kerja yang siap seperti yang dibayangkan di dalam ketiga-tiga sijil interim. Usima membangkitkan tuntutan balas, antara lain, untuk wang yang telah ditanggung untuk melantik subkontraktor baru bagi menyiapkan kerja-kerja tersebut. Mahkamah Tinggi menolak tuntutan LHF dan membenarkan tuntutan balas tersebut. Mahkamah mendapati bahawa LHF telah gagal untuk menyiapkan kerja-kerja seperti yang dikontrakkan dan telah meninggalkan tapak pembinaan menjustifikasikan penamatan subkontrak tersebut oleh Usima. Mahkamah memutuskan bahawa walaupun ia adalah salah untuk memutuskan bahawa Usima tidak melakukan apa-apa kemungkiran dalam menamatkan subkontrak tersebut, sijil-sijil interim yang membentuk asas tuntutan LHF adalah, walau bagaimanapun, tertakluk kepada pengukuran semula dan tidak dilakukan. Mahkamah Rayuan ('MR') membenarkan rayuan LHF, mengenepikan keputusan Mahkamah Tinggi dan menolak tuntutan Usima. MR memutuskan bahawa Usima melanggar subkontrak tersebut apabila ia dikatakan menamatkannya kerana tidak terdapat keterangan untuk menunjukkan LHF telah meninggalkan kerja-kerja seperti yang didakwa dan juga sijil-sijil interim tidak tertakluk kepada pengukuran semula kerana ia telah diukur dan disahkan oleh pakar perunding majikan sebelum ia dikeluarkan. Soalan-soalan izin atas mana Usima dibenarkan untuk merayu kepada Mahkamah Rayuan terhadap keputusan MR sebahagian besarnya mengenai sama ada jumlah yang dinyatakan di dalam sijil-sijil interim adalah dianggap muktamad atau sama ada ia adalah tertakluk kepada pengukuran semula. Semasa pendengaran rayuan, Usima membangkitkan isu yang tidak dibangkitkan atau dibincangkan di mahkamah bawahan, iaitu bahawa jumlah di dalam sijil-sijil interim atas mana penghakiman dimasukkan untuk LHF oleh MR termasuk bayaran-bayaran yang Usima telah buat secara langsung kepada pihak ketiga yang LHF telah lantik dan bahawa, oleh itu, berdasarkan s 71 Akta Kontrak 1950, bayaran-bayaran tersebut kepada pihak ketiga patut ditolak daripada tuntutan LHF.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Rayuan:

(1) Berdasarkan fakta dan keadaan pelik kes ini, yang mana adalah kontrak tertakluk kepada pengukuran semula, dan berdasarkan atas dapatan bahawa pengukuran telah dilakukan sebelum sijil-sijil interim dikeluarkan, Mahkamah Rayuan adalah betul untuk memutuskan bahawa sijil-sijil interim atas mana tuntutan LHF didasarkan telah diukur dan disahkan bersama oleh Usima dan pegawai pengawas daripada JKR. Pengukuran dan pengukuran semula bersama tersebut adalah berkaitan kerja yang telah dijalankan oleh LHF bagi pihak Usima terhadap tanggungjawab Usima di bawah kontrak utamanya dengan JKR. Usima bergantung ke atas sijil-sijil interim tersebut untuk tuntutannya terhadap JKR dan telah dibayar. Usima semestinya meluluskan dan bersetuju kepadanya sebelum ia dibayar oleh JKR atas sijil-sijil tersebut. Oleh itu Usima tidak boleh menyangkal, selepas menerima bayaran daripada JKR, untuk sekarang mendesak bahawa sepatutnya terdapat pengukuran semula selanjutnya berkaitan kerja yang sama dibuat oleh LHF sebagai subkontraktornya. Usima diestop daripada berbuat sedemikian. Seseorang tidak dapat aprobat dan reprobat (lihat perenggan 44, 50 & 52).

(2) Penggunaan s 71 Akta Kontrak 1950 oleh Usima adalah tidak penting kerana ia gagal untuk memenuhi kesemua empat syarat yang dibayangkan di bawah seksyen tersebut. Sementara ia memenuhi syarat bahawa tindakan dilakukan secara sah dan bukan diniatkan untuk menjadi tidak bersalah, Usima gagal untuk memenuhi dua syarat bahawa buatan tindakan atau penghantaran barang tersebut semestinya 'for another person' dan juga bahawa 'the other person enjoyed the benefit of the act or the delivery'. Ia adalah dalam kepentingan Usima dan untuk faedahnya bahawa ia bayar pihak ketiga dengan itu projek boleh disiapkan. Walau bagaimanapun, isu ini sama ada penolakan patut dibuat daripada jumlah di dalam sijil-sijil interim berbangkit hanya kerana Mahkamah Rayuan telah membenarkan tuntutan LHF dan ia bukan sebaliknya dikendalikan oleh mahkamah bawahan. Persoalan yang dikemukakan kepada mahkamah ini mesti berkaitan kepada perkara yang berkaitan dengan yang mana penentuan telah dibuat oleh mahkamah bawahan (lihat perenggan 57, 60–61, 63 & 65).]

Notes

For a case on Contracts Act 1950 (Act 136), s 71 *Mallal's Digest* (5th Ed, 2015) see para 3213.

For a case on interim certificates, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 4011.

Cases referred to

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b; [1978] 1 LNS 32, PC (refd)

A *Governor-General of India v Madura* [1948] LR 75 IA 213, HC (refd)
Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] 3 All ER 932, CA (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
B *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357, CA (refd)
Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513, FC (refd)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (refd)
State Of Rajasthan v Hanuman AIR [2001] SC 282, SC (refd)
The Minister for Human Resources v Thong Chin Yoong and another appeal C [2001] 4 MLJ 225, FC (refd)
The Tharsis Sulphur And Copper Company v M'Elroy & Sons and Others (1878) 3 App Cas 1040, HL (refd)
Watt (Or Thomas) v Thomas [1947] AC 484, HL (refd)

D **Legislation referred to**

Contracts Act 1950 s 71
Contracts (Malay States) Ordinance 1950 s 71
Indian Contract Act [IND] s 70

E **Appeal from**: Civil Appeal No K-02–2633–10 of 2011 (Court of Appeal, Putrajaya)

B Thangaraj (Sanjay Mohan with him) (Thangaraj & Assoc) for the appellant.
Gopal Sri Ram (Saw Lip Khai, YC Wong, CK Lim, Chuah Yih Chuan and David F *Yii with him) (Chooi Saw & Lim) for the respondent.*

Balia Yusof FCJ (delivering judgment of the court):

BACKGROUND FACTS

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[1] The appellant, Usima Sdn Bhd ('Usima') was appointed as the main contractor by Jabatan Kerja Raya ('JKR') to construct a water tank and carry out pipe laying works ('the main contract'). The respondent, Lee Hor Fong ('LHF') was the subcontractor appointed by Usima to carry out the works.

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[2] By a letter of award dated 5 November 2002, Usima appointed LHF as its subcontractor to carry out and complete the contract works for a total sum of RM9,510,863.51 commencing on 30 September 2001. The completion date for the contract was 7 March 2003. In the said letter of award, it was stated I that the terms and conditions of the main contract will be deemed to form and be construed as part of the subcontract.

[3] Dispute arose between the parties and by a letter dated 13 January 2003 Usima terminated the subcontract alleging that LHF had breached the terms of

the contract by abandoning the contract works.

[4] LHF commenced action against Usima in the High Court claiming for a sum of RM3,159,540.15. This claim was premised on Usima's refusal to pay for work done as represented by interim certificates No 15, 16 and 17 and a further sum of RM143,472.62 from the retention sum.

[5] Usima filed a counterclaim for a total sum of RM2,034,908.27, being the costs incurred as management fees, and the cost to engage new subcontractors to complete the project and carry out rectification works, agreed liquidated damages and interest on advance payment.

[6] On 9 October 2011, the High Court dismissed LHF's claims on the grounds that LHF had failed to complete the contract works within the stipulated time and had abandoned the construction site. The learned High Court judge also allowed the counterclaim by Usima.

DECISION OF THE HIGH COURT

[7] In dismissing LHF's claims, the learned High Court judge considered that the pertinent question before the court was, when was the contract between the parties terminated. Was it on 13 January 2003 or on 20 February 2003.

[8] The significance of these two dates may be gleaned from the judgment of the learned High Court judge found at p 16 of his judgment:

> ... although the letter of termination was dated on the 13 January 2003 and received by the plaintiff on the 20 February 2003, there were ample evidence to show that the plaintiff had abandoned the construction site as early as mid-December 2002. This is evident by the appointment of the third parties to complete the uncompleted contract works.

[9] The learned High Court judge found that LHF had abandoned the contract. At p 17 of the judgment, His Lordship opined:

> ... The court was of the further view that if cl 51(c)(i) and (ii) is relevant to be the guideline as to how the contract work should be terminated, from the evidence adduced, the defendant had complied with it by sending out notices in the form of memo before terminating the contract (agreement).
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> In the circumstances, the court was of the view that the defendant was not in breach of the contract when it terminated it and therefore was entitled to appoint other contractors to finish the uncompleted contract works. The court was also of the view that since the defendant was at all material time the main contractor of the contract work and it suffices that the issuance of the memo to the plaintiff were

A indicative that the plaintiff had abandoned the construction site.

[10] Being over cautious perhaps, the learned High Court judge also stated that if he was wrong in finding that Usima was not in breach of the contract, the amount claimed by LHF based on the interim certificates would be subjected to re-measurement.

[11] Aggrieved by the decision of the High Court, LHF lodged an appeal to the Court of Appeal. By its decision on 2 December 2013, the Court of Appeal unanimously allowed the appeal and the decision of the High Court was set aside. The Court of Appeal also dismissed Usima's counterclaim.

DECISION OF THE COURT OF APPEAL

[12] In allowing LHF's appeal, it was the unanimous view of the court that the learned High Court judge had erred in finding that LHF had abandoned the construction site. At p 5 of its judgment, the Court of Appeal found:

> ... abandonment never featured in the respondent's notices to the appellant which referred to delays by the appellant, not least the letter of termination dated 13 January 2003 which was totally devoid of any reference to abandonment. It is elementary that delay cannot be said to constitute abandonment especially where, as here, the completion date was months away and until then the appellant was entitled to programme its works as it pleased. Time was not of the essence because it was not specified to be so in the contract which also provided for liquidated agreed damages as indicated by the respondent's counterclaim therefor.

[13] The Court of Appeal also held that cl 51 of the main contract was not complied with by Usima because the letter of award ('P11') appointing LHF to execute and complete the contract expressly provided for the main contract to be part of the contract between them. The Court of Appeal found that the learned High Court judge had failed to consider whether the notices and the letter of termination dated 13 January 2003 complied with cl 51 of the main contract. In the said letter of termination dated 13 January 2003, LHF was only given seven days to make good the breach whereas cl 51(a) gives a period of 14 days.

[14] On the issue of re-measurement of the interim certificates, the decision of the learned trial judge was held to be erroneous on the ground that the interim certificates upon which LHF's claim were based, had already been measured and certified by the employer's consultant. The evidence relied on by the learned High Court judge referred to joint measurement before the issue of the interim certificates.

[15] On Usima's counterclaim, the Court of Appeal found that the trial

judge had erred in allowing the same without reference to and in the absence of any evidence to support such claims.

[16] Usima sought for leave to appeal against the decision of the Court of Appeal and this court had, on 10 September 2015 granted leave to Usima to appeal on the following questions of law:

(i) whether the termination clause (cl 51) found in the main contract (JKR 203A (Revised 10/83)) which is to be operated by the SO, can apply to the subcontract?

(ii) can interim certificates under a provisional subcontract based on bills of quantities issued by superintending officer (SO) to the applicant (main contractor) be considered as final amount of the value of work done to entitle the Court of Appeal to enter judgment based on the value of these certificates?

(iii) whether in a provisional contract based on bills of quantities, interim certificates which are subject to re-measurement and not issued to the respondent (subcontractor) can be relied on by the respondent as evidence of the value of work which they had carried out?

(iv) whether as a matter of law a party to a construction contract is entitled to programme its work as it pleases?

(v) can direct payments paid by the applicant (main contractor) directly to the sub-subcontractors be disregarded in the claim made by the subcontractor (respondent) against the applicant (main contractor)? and

[17] At the hearing of the appeal, learned counsel for Usima had abandoned questions No (i) and (iv) and proceeded to deal with questions No (ii) and (iii) together and with question No (v) to be dealt separately on its own.

Our decision: Questions (ii) and (iii)

[18] Questions (ii) and (iii) both deal with interim certificates and what merits determination by this court is whether such certificates may be considered as a final amount of the value of work done and the issue of re-measurement.

[19] We will start with the subject of interim certificates.

[20] By its very nature, an interim certificate can never be considered as a final determination of the value of works done or programmed in the contract. We reproduce below what the learned author Chow Kok Fong states in his book titled *Law and Practice of Construction Contracts* (4th Ed) Vol 1 at pp 441–442:

A 8.12 Interim certificates are certifications of payments made in accordance with some timeline stipulated in a construction contract. In essence, a certificate is a statement by the certifier (typically the architect, engineer, contract administrator or Superintending Officer) that during the period covered by the certificate, the contractor has carried out the works and supplied materials up to the value shown
B in the certificate as well as the net amount which the contractor is entitled to be paid, after allowing for the adjustments permitted by the terms of the contract. These certifications are never intended to be a precise or final determination of the value of the works. Thus, Hobhouse J in *Secretary of State for Transport v Brise-Farr Joint Venture* (1993) noted:

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> At the interim stage, it cannot always be a wholly exact exercise. It must include an element of assessment and judgment. Its purpose is not to produce a final determination of the remuneration to which the contractor is entitled but is to provide a fair system of monthly progress payments to be made to the contractor.

D 8.13 In the absence of any provision to the contrary, the sum certified in an interim certificate is thus taken to be an estimate of the value of the work done up to the date shown in the certificate. Thus, while the employer or owner is obliged to pay what is certified, the amount certified is not binding on the parties and may be adjusted upon the completion of the works.

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[21] Speaking on the same subject matter, *Keating on Construction Contracts by Stephen Furst* (8th Ed) London Sweet and Maxwell, 2006 at p 139 says:

> Interim certificates are thus approximate estimates, made in some instances for the purpose of determining whether the employer is safe in making a payment in
F advance of the contract sum, in others whether he is under a duty to pay an instalment and, if so, how much he is to pay. A contractual right to receive payments for the value of work done and materials supplied arises not upon the work being done but upon the issue of the interim certificate in respect of such work and materials. Such certificate are not normally binding upon the parties as to quality or
G amount and are subject to adjustment on completion. They have been described as having 'provisional validity' or being 'provisional estimates of the sum to which the contractor is entitled by way of instalment payments'. The sum certified is not the true final value of the work done and materials supplied but what in the opinion of the engineer is due on the basis of the monthly statements.

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[22] In the House of Lords' case of *The Tharsis Sulphur and Copper Company v M'Elroy & Sons and Others* (1878) 3 App Cas 1040 (HL) Lord Cairns LC at p 1045 had referred to what the parties called as engineers certificate issued from time to time authorising interim payments as:

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> The certificates I look upon as simply a statement of a matter of fact, namely, what was the weight and what was the contract price of the materials actually delivered from time to time upon the ground, and the payments made under those certificates were altogether provisional, and subject to adjustment or to re-adjustment at the end of the contract.

[23] The English Court of Appeal in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] 3 All ER 932 ruled that interim certificates were no more than provisional estimates of the sum to which the claimant was entitled by way of instalment payments. At the final stage, the claimant and the engineer had to perform a very different exercise and it would be an integral part of the final certificate that it would contain the engineer's statement of the contract price ascertained by him after considering the final account, as detailed supporting documentation and all information reasonably required by him for its certification.

[24] The issues that arose in the said case were (i) whether the claimant's right to receive payments for the value of work done and materials supplied arose upon the work being done and materials supplied, or only upon the issue of a certificate (ii) if it only arose upon the issue of a certificate, whether it arose once and for all as soon as the claimant was entitled to have the sum certified in an interim certificate, or whether the claimant had a continuing right to have the sum certificated in subsequent certificates, and in particular the final certificate.

[25] On the issue of re-measurement, suffice it to state that a contract containing quotations in which the sum finally due to the contractor is to be ascertained by recalculating each stated quantity from the actual amount of work performed, is referred to as re-measurement contract (*Chitty on Contracts Vol II Specific Contracts* (30th Ed)).

[26] At the outset, it is worth reminding that parties had agreed at the trial stage that the contract is subject to re-measurement. Reading exh P11, we are of the considered view that the application of the main contract agreement to the subcontract was made at the request or rather on the suggestion of Usima. LHF accepted and agreed to the same as evinced by the signature of Lee Hor Fong in his capacity as a Director of Pembinaan LH Fong. Exhibit P11 states that the condition of the main contract including addendums and appendices attached thereto, specification preambles and methods of measurement shall be deemed to form and be read and construed as part of the subcontract. Exhibit P11 is a letter of award to LHF dated 5 November 2002.

[27] We find the Court of Appeal was right in concluding at p 6 of its judgment which states 'the main contract was applicable because the letter of award dated 5 November 2002 appointing the appellant to execute and complete the contract expressly provided for the main contract to be part of the contract between the appellant and the respondent'.

[28] A perusal of the relevant clauses of the main contract and the preamble to bill of quantities fortifies Usima's contention on the issue. Clause 25 of the

main contract captioned 'Ukuran dan Penilaian Kerja Termasuk Perubahan' in sub-cl (c) provides:

> Di mana kuantiti kerja atau sebahagian daripadanya dinyatakan sebagai 'sementara' dalam Senarai Kuantiti, *amaun yang akan dibayar kepada Kontraktor berkenaan dengan Kerja tersebut atau sebahagian daripadanya apabila Kontrak ini disiapkan hendaklah ditentukan dengan mengukur semula* dan menilai ke atas Kerja termasuk apa-apa perubahan yang dibenarkan atau disahkan kemudiannya oleh P.P. secara bertulis di bawah Fasal 24 Syarat-syarat ini, sebagaimana ianya dilaksanakan sebenarnya. Penilaian pengukuran semula kerja tersebut termasuk apa-apa perubahan hendaklah mengikut kaedah-kaedah (i) dan (ii) subfasal (b) di atas. (Emphasis added.)

[29] Further, cl 26(c) on quantities states:

> (c) Sekiranya kuantiti dinyatakan sebagai *'sementara', kuantiti tersebut adalah menjadi kuantiti anggaran kerja tersebut tetapi ianya tidak akan diambil kira sebagai kuantiti yang benar atau tepat bagi Kerja* yang akan dilaksanakan oleh Kontrak ini. (Emphasis added.)

[30] Consistent with a re-measurement contract, cl 47 of the main contract deals with the issue of payment and interim certificate. Sparing the need to reproduce the entirety of the said clause, it is crucial to refer to sub-cl (c) of the same which reads:

> *(c) Amaun yang dinyatakan sebagai kena dibayar dalam Perakuan Interim hendaklah,* tertakluk kepada apa-apa persetujuan antara pihak-pihak itu mengenai pembayaran secara berperingkat-peringkat, *merupakan anggaran jumlah nilai kerja yang dilaksanakan dengan sempurnanya* dan tujuh puluh lima (75) peratus daripada nilai bahan dan barang-barang tak pasang yang diserah-hantar ke tempat Kerja atau ke tempat yang bersampingan dengan Kerja yang dicadangkan untuk digunakan di tempat Kerja itu sehingga dan termasuk pada tarikh penilaian itu dibuat, ditolak apa-apa ansuran yang dibayar dahulunya di bawah Syarat ini. Dengan syarat bahawa perakuan itu hendaklah termasuk hanya nilai bahan dan barang-barang tak pasang tersebut seperti dan dari masa ianya diserah-hantar dengan munasabah dan dengan sempurnanya dan tidak terlalu awal, ke tempat Kerja atau ke tempat yang berdampingan dengan Kerja, dan hanya jika dilindungi dengan secukupnya terhadap cuaca, kerosakan dan kemerosotan. (Emphasis added.)

[31] The status of the interim certificate referred to in cl 47(c) above is never intended to be final and conclusive as envisaged by cl 49 of the main contract which states:

> *49. KESAN PERAKUAN P.P.*
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> *Tiada perakuan P.P. di bawah mana-mana peruntukan Kontrak ini boleh disifatkan sebagai keterangan muktamad mengenai kesempurnaan apa-apa kerja, bahan atau barang-barang bagi maksud perakuan itu* dan juga tiada perakuan boleh melepaskan Kontraktor daripada liabilitinya untuk meminda dan memperbaiki semua

kecacatan, ketidaksempurnaan, kekecutan atau apa-apa jua kerosakan lain sebagaimana diperuntukkan dalam Kontrak ini. *Bagaimanapun, perakuan P.P adalah tidak muktamad dan tidak mengikat dalam apa jua pertikaian antara Kerajaan dan Kontraktor jika pertikaian itu dibawa ke hadapan seorang penimbangtara atau ke Mahkamah.* (Emphasis added.)

[32] These clauses, in our view are clear provisions in the contract document indicating and spelling out that the contract being a re-measurement contract.

[33] It is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result (see: *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357).

[34] The next question that arises is whether there was or there was no re-measurement done.

[35] The learned High Court judge found that the amount claimed by LHF is subject to re-measurement and concluded that on the evidence proffered, there was no re-measurement done.

[36] In finding that the interim certificates were subject to re- measurement, the learned High Court judge had merely relied on a piece of SP1's evidence (Ismail bin Md Zain). At p 17 of His Lordship's grounds of judgment, it was stated as follows:

If the court wrong on its finding that the defendant was not in breach of its contract with the plaintiff, then on the amount claim by the plaintiff would be subjected to re-measurement. In the evidence of SP1 it was put to him:

Put: Sebelum JKR keluarkan interim certificate untuk interim 17 apakah prosedurnya?

Jawapan: Sebelum keluarkan interim certificate, kebiasaan nya pihak kontraktor dengan pihak JKR akan mengadakan joint measurement bersama untuk kenal pasti nilai. Akan tetapi kuantiti tidak tepat sebab ada setengah kerja tidak siap sepenuhnya.

[37] We note that the above quoted passage was in our view added by the learned High Court judge as a further qualification to his finding that Usima was not in breach of the contract with LHF. It was his additional finding that there was no re-measurement. At the risk of repetition, it must be reiterated that LHF's claim against Usima failed because the learned High Court judge

found LHF had abandoned the construction site.

[38] The Court of Appeal however, found that as abandonment was never featured in Usima's notices to LHF as such notices only referred to delays by LHF in carrying out its work, the learned High Court judge had erred in holding that LHF had abandoned the site.

[39] On re-measurement, the Court of Appeal held that the issue of re-measurement did not arise as the interim certificates upon which LHF based its claim had already been measured and certified by the employers' consultant. At para 7 of its judgment, the Court of Appeal stated:

> Finally, the learned trial judge's finding that the appellant's claim was subject to re-measurement was plainly wrong because the interim certificates upon which the appellant's claim were based *had already been measured and certified by the employer's consultant*. The evidence relied on by the learned trial judge referred to joint measurement before the issue of the interim certificate. The question of re-measurement, therefore, did not arise. Hence the respondent was clearly in breach of the contract when it purported to terminate the contact by its letter dated 13 January 2003. (Emphasis added.)

[40] LHF's claims against Usima is based on interim certificates No 15, 16 and 17. SP1, an engineer in charge and who was the superintending officer of the project, stated in his evidence that the certificates were issued by JKR. The certificates show among others, the percentage of work carried out by Usima and up to the issuance of interim certificate No 17 it shows the value of work done by Usima in the sum of RM6,021,006.95 as at 22 February 2003. The witness further stated that 'Kesemua peraturan disokong oleh tuntutan kuantiti atau Bill of Quantity' and 'Perakuan ini dibuat bagi mengesyorkan bayaran interim kepada kontraktor'.

[41] SP3, a technician under the supervision of SP1 supervised the project. He was on site and prepared the bill of quantity. His evidence merely reiterated the evidence of SP1. The evidence of SP2, a senior technician who supervised directly the duties of SP3 in essence also echoed a similar tone with the evidence of SP1 on the preparation and issuance of certificates No 15, 16 and 17.

[42] Lee Hor Fong's (the plaintiff) evidence established that LHF has completed about 61% of the contract work and his claim among others is based on the interim certificates No 15, 16 and 17.

[43] We have earlier noted that the learned High Court judge had in the course of the trial when SP1 was giving evidence recorded that the parties had agreed the contract is subject to re-measurement. Beside saying in cross

examination that 'sebelum keluarkan interim certificate pihak Jabatan Kerja Raya ('JKR') akan mengadakan joint measurement bersama untuk kenal pasti nilai akan tetapi quantity tidak tepat sebab ada setengah kerja tidak siap sepenuhnya', SP1 further stated during re examination that 'Ya, sebelum interim certificate dikeluarkan pihak kontraktor akan bersama-sama dengan Jabatan Kerja Raya (JKR) mengadakan joint measurement untuk tentukan quantity dan nilai'.

[44] We agree with the conclusion drawn by the Court of Appeal that LHF's claims were based on the interim certificates which had been jointly measured and certified by Usima and the JKR. In our view, that joint measurement or re-measurement as one may call it, is in respect of work done by LHF on behalf of Usima towards Usima's obligations under the main contract with JKR. That was the basis and modus operandi of the contract between the parties. Usima has been paid by JKR prior to this by way of and on the basis of other earlier interim certificates. It is an undeniable fact that Usima had relied upon these interim certificates for its claim against JKR. Likewise, LHF had also been correspondingly paid by way of and on the same basis. As the evidence of the witnesses suggest, joint measurement had been done.

[45] Learned counsel for Usima contended that only certain clauses of the main contract can have application to the subcontract or rather can be imported into the same. To this end, it was submitted that those clauses of the main contract such as those that relate to the tasks and roles of the superintending officer (which happens to be SP1) cannot be imported and read into the subcontract. We find this argument to be seriously flawed for the reason of the existence of exh P11 which we have adverted to earlier. We find not a shred of evidence to controvert exh P11.

[46] The learned High Court judge was clearly in error in failing to fully appreciate the evidence in concluding that there was no re-measurement done. The evidence presented clearly suggest that the tasks carried out by SP1, SP2 and SP3 in the issuance of the interim certificates involved the process of re-measurement of the subcontract price which had been agreed in the sum of RM9,510,863.51 as stated in exh P11. Re-measurement according to the learned author of *GT Gajira's Law Relating to Building and Engineering Contracts in India* 'more often than not only means re-calculation, and physical measurements or dimension taken on site only occur in relation to work not of its nature subject to calculations of drawings'.

[47] An error of this nature on the part of the trial judge merits intervention by the Court of Appeal. No doubt an appellate court will be slow in interfering or disturbing a finding of fact recorded by a trial court but it does not end there. In *State of Rajasthan v Hanuman* AIR [2001] SC 282, Mohapatra J delivering

A the judgment of the Supreme Court of India said:

> An appellate court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. The sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion.

B

[48] It is trite that appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence (see: *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, *Watt (Or Thomas) v Thomas* [1947] AC 484, *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32).

C

[49] On that note, we see no error on the part of the Court of Appeal to have reversed the finding of the learned High Court judge on the issue of re-measurement.

D

[50] Further, in our view it is unconscionable on the part of Usima after having been paid by JKR (the employer) based on the interim certificates to now insist that there should be a 'further' re-measurement in respect of the work performed by LHF on its behalf as its subcontractor. Usima is estopped from doing so. The interim certificates were jointly measured by Usima and the superintending officer ('SP1') from JKR, the employer. Usima must have approved and agreed to the same before being paid by JKR on those certificates. It cannot now say otherwise. One cannot approbate and reprobate.

E

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[51] Again, looking back at the contract documents agreed between them and the factual scenario of the case, was it intended by the parties that re-measurement referred to therein means that there will be re-measurement of the work between Usima as the main contractor and JKR and subsequently, there is also the need for another re-measurement of the same contract work between Usima and LHF, the subcontractor? We do not think that was envisaged by the terms of the contract between the parties.

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[52] For the aforesaid reasons and as explained earlier, interim certificates are merely estimates and are not final. However, on the peculiar facts and circumstances of this case which is a contract subject to re-measurement and based on the finding that measurement had been done before the issuance of the interim certificates as found by the Court of Appeal on its re-evaluation of the evidence, we agree with the submissions of learned counsel for LHF that the answer to questions (ii) and (iii) ought to be in the affirmative.

I

Question (v)

[53] Question number (v) arises from the issue of payments made by Usima directly to third parties. It was contended by Usima's learned counsel that when the Court of Appeal allowed LHF's appeal and entered judgment for the full amount in interim certificates Nos 15, 16 and 17, it had failed to take into account such payments. During the course of the works, payments were made by Usima directly to LHF's subcontractors (the third parties) and those payments were included in interim certificates No 15, 16 and 17. Those payments were not meant for work done by LHF but by the so called third parties. LHF had thereby been unjustly enriched while Usima had been made to pay twice for the same works. Usima contended those payments must be deducted.

[54] In support of its contention, Usima had invoked s 71 of the Contracts Act 1950 which reads:

> 71 Obligation of person enjoying benefit of non-gratuitous act
>
> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[55] The scope on the application s 71 of the Contracts Act 1950 was explained by the Privy Council in the case of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 which laid down that four conditions must be satisfied to establish a claim under s 71 of the Contracts (Malay States) Ordinance 1950.

[56] A summary of the facts of the case as may be gleaned from the report is reproduced herein verbatim:

> The appellant made discoveries of a few hundred acres of land which gave promise of bearing iron ore. In November 1959 he obtained a prospectors licence and a mining lease was granted to him in 1961. He then formed a company called the Kota Mining Co Ltd ('Kota') and transferred all the benefits and burdens vested in him to the company. By an agreement dated September 19, 1960 Kota transferred its right under the earlier agreements to the first respondent in consideration of $40,000 and a further $40,000 was to be paid at a later stage (which was never paid) with a tribute of $2 for every ton raised. Thus by a train of subcontracts the first respondent became entitled as a matter of substance to the benefit of the prospectors licence and a right to a mining sub-lease of the mineral land. The first respondent then as commercial owners of the mining rights constructed a road eight or nine miles long leading to the mineral land. But despite that the first respondent never started to mine the land as it appeared that Kota did not carry out their part of the contract. The first respondent then sued Kota for specific performance of the

agreement dated September 19, 1960 and they joined the appellant as a defendant against whom they made a claim for specific performance of an alleged oral agreement. When the case came up before Azmi J, as he then was, counsel for the first respondent announced that the action between his client and Kota had been settled so that the action proceeded between the first respondent and the appellant, and Azmi J. held that there was no oral agreement as alleged and dismissed the action. The first respondent then appealed to the Federal Court who found against the first respondent upon the alleged oral agreement but in its favour under s 71 of the Contracts (Malay States) Ordinance and directed an inquiry as to the sum to which the first respondent was thereby entitled ([1965] 2 MLJ 45). On appeal to the Privy Council, the sole question before their Lordships was whether the Federal Court were right in holding that the first respondent had a valid claim against the appellant under s 71 of the said Ordinance in respect of their expenditure upon the road.

[57] The Privy Council held that for the successful invocation of the said provision, four conditions must be satisfied. Lord Upjohn in delivering the judgment stated:

> It has been common ground before Their Lordships that four conditions must be satisfied to establish a claim under section 71.
>
> The doing of the act or the delivery of the thing referred to in the section:
>
> (1) must be lawful
>
> (2) must be done for another person
>
> (3) must not be intended to be done gratuitously
>
> (4) must be such that the other person enjoys the benefit of the act or the delivery.
>
> In Their Lordships' judgment these matters must be answered at the time that the act is done or the thing delivered and this, Their Lordships think, is of fundamental importance. In this case the relevant time was therefore the building of the roadway in April to December, 1961.

[58] In laying down the four conditions stated, the Privy Council, relied on the observation made by Lord Simonds on s 70 of the Indian Contract Act in *Governor-General of India v Madura* [1948] LR 75 IA 213 at p 221. Section 70 of the Indian Contract Act is in terms identical with s 71 of the Contracts (Malay States) Ordinance 1950, a predecessor to the present Contracts Act 1950. Their Lordships found that the respondent had failed to satisfy the conditions except the first one that is, the act must be lawful. The appellant's appeal was allowed and the order of Azmi J was restored.

[59] Before us, learned counsel submitted that Usima has satisfied all four conditions and therefore such payments must be deducted from the claims made by LHF.

[60] On the facts and circumstances of the matter before us, we are unable to agree with that submission. While we may agree that the act was lawful, it failed to satisfy the second test which the Law Lords of the Privy Council said:

> It is the second point which in Their Lordships' judgment is decisive of this case. As a matter of phraseology the section seems clear upon it. To bring the section into play the person when doing the act or delivering the thing must do the act 'for another person' or deliver some thing 'to him'. So that his then present intention must be to do the act or to deliver the thing for or to another.

[61] We may also agree with learned counsel on the third condition that it was not intended to be gratuitously done, but again, Usima failed to satisfy the fourth condition because it was in Usima's interest and for its own benefit for the payment to be made in order to have the project completed. To achieve that, the third parties must be duly paid. The payment was for/towards the completion of the project awarded to Usima. Usima failed to satisfy the condition that the payment was made 'for another person'.

[62] In deciding on this second condition, the Privy Council found that when the road was built in 1961 by Susur Rotan and with the full knowledge of Mr Siow, Their Lordships held that it was built 'for its own benefit for under the chain of contracts it was the body who was going to exploit the mineral lands. It was not done for another' (see: *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* per Lord Upjohn at p 121).

[63] On the failure to satisfy all four conditions as envisaged under the section, Usima's reliance on s 71 of the Contracts Acts 1950 is inconsequential.

[64] We agree with the submissions of learned counsel for LHF that the answer to the question posed in the matter before us here turns very much on its own facts and circumstances. It is therefore not a question of general application. The answer to be given is only applicable to the peculiar facts and circumstances of the case alone. We shall refrain from answering question No (v).

[65] Further, in our view, this issue of whether deduction should be made out of the sum in interim certificates No 15, 16 and 17 arises pursuant to the Court of Appeal's decision in allowing the appeal and ordering LHF's claim be allowed. Reading the judgment of the courts below, we are unable to find anything to indicate that this issue was ever dealt with except that there was a finding by the trial judge that Usima had appointed third parties to complete the contract works between 13 January 2003 and 20 February 2003. We are mindful of the fact that the question posed to this court must relate to a matter in respect of which a determination has been made by the court below (see: *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513, *The Minister for Human*

A *Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225).

[66] For the reasons stated, we unanimously dismiss the appeal with costs. The decision of the Court of Appeal is affirmed.

B *Appeal dismissed with costs.*

Reported by Ashok Kumar

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