

Can a Subcontractor sue Employer Directly on *Quantum Meruit* for Monies owed by Wound-up Main Contractor?

By Vendee Chai

Introduction

This issue arose in *Bond M&E Sdn Bhd v Golden Oriental Realty Sdn Bhd [2019] 1 LNS 2048*. The case involved a typical contractual arrangement in the construction industry where the employer appointed the main contractor, and the main contractor in turn appointed the subcontractor to undertake the project. The contractual relationship of the parties is carved out separately as between the employer and the main contractor, and the main contractor with the subcontractor. After the main contractor was wound up, the subcontractor filed a claim against the employer for monies due and owing by the main contractor in relation to works carried out for the main contractor. In the absence of a contractual relationship with the employer, the subcontractor relied on *quantum meruit* under section 71 of the Contracts Act 1950 ('CA') and unjust enrichment to base its claim. The High Court refused the employer's strike-out application. On appeal, the Court of Appeal reversed the High Court's decision and struck out the subcontractor's claim. The Federal Court declined the subcontractor's application for leave to further appeal.

Case Summary

Golden Oriental Realty Sdn Bhd is the employer ('Employer') of a mixed development project in Johor Bahru ('Project'). The Employer appointed LAL Engineering Sdn Bhd as the main contractor for the Project ('Main Contractor') pursuant to the PAM Contract 2006 (with Quantities) made on 1.4.2013 ('Main Contract'). Under the Main Contract, the contract sum is RM170,001,123. The Main Contractor in turn appointed the Bond M&E Sdn Bhd as a nominated subcontractor ('Subcontractor') to carry out 2 specified works by way of 2 letters of award respectively. Under both the letters of award, the Main Contractor shall make payment to the Subcontractor within 7 days after the period of honouring certificate. The payment for the subcontractor's work was always made by the Main Contractor in accordance with the terms of the letters of award. It is not disputed that the subcontractor had completed all its works for the Project.

On 14.9.2017, a winding-up petition on the Main Contractor was filed by another subcontractor of the same Project. On 30.10.2017, the Main Contractor was ordered to be wound up by the Court. On 23.4.2019, the Subcontractor filed an action under section 71 of the CA and/or unjust enrichment against the Employer claiming the total outstanding sum owed by the Main Contractor. In the course of discovery, the Employer learned that the Subcontractor had commenced adjudication proceeding against the Main Contractor under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). The Employer then took out an application to strike out the claim on the following grounds:

- (a) There is no privity of contract between the Subcontractor and the Employer;
- (b) Section 71 of the CA is inapplicable to the facts of the case;
- (c) The Employer cannot be said to have been unjustly enriched at the expense of the Subcontractor based on the facts;
- (d) The Subcontractor's claim improperly circumvents the *pari passu* principle; and
- (e) The Subcontractor's claim amounts to double recovery as it has filed an adjudication proceeding against the Main Contractor under the CIPAA for the same debt and is thus an abuse of the process.

High Court

The High Court disallowed the Employer's strike-out application: see *Bond M&E Sdn Bhd v Golden Oriental Realty Sdn Bhd* [2019] 1 LNS 2048. The High Court was guided by the Court of Appeal's decision in *Kraas Solutions Sdn Bhd v Konesi Kota Permatamas Sdn Bhd* [2018] 9 CLJ 26 where it was held that "... Section 71 is precisely to facilitate recovery against a party with whom there is no contractual relationship but who nevertheless received the benefit of the appellant's lawful act which was never intended to be done gratuitously. This was clearly explained in *Dream Property and Tanjung Teras*." Besides, the High Court followed the Court of Appeal's decision in *Mega Mayang M&E Sdn Bhd v Utama Lodge Sdn Bhd and another appeal* [2018] 1 LNS 1452 ('Mega Mayang') where it was held that "... [g]iven that the benefit of the appellant's work is with the respondent, for which the appellant never received payment from the respondent, the respondent may be said to have been unjustly enriched were it not ordered to pay the appellant for the benefit received under both subcontracts." Hence, the High Court refused to strike out the claim and held that there were issues to be tried pursuant to section 71 of the CA. The High Court further held that the *pari passu* principle is not applicable since the Subcontractor did not file any proof of debt with the liquidator and that in any event, the Subcontractor's remedy is not confined only to the filing of a proof of debt with the Main Contractor's liquidator.

Court of Appeal

The Court of Appeal unanimously disagreed with the High Court's findings and struck out the Subcontractor's claim with costs. See *Golden Oriental Realty Sdn Bhd v Bond M&E Sdn Bhd* [2020] 1 LNS (O) 12. The argument before the Court of Appeal centred on the point that the Subcontractor's claim is a circumvention of the *pari passu* principle to gain a priority over the other creditors of the Main Contractor. As argued by the Employer, it is not disputed that the Subcontractor is a creditor of the Main Contractor and the amount claimed is a debt owing by the Main Contractor. Therefore, the proper remedy would be to file a proof of debt and the Subcontractor must not be allowed to use section 71 of the CA to oust the *pari passu* principle.

Further, the Employer argued that in the absence of a contractual obligation, the only way for the Subcontractor to obtain payment directly from the Employer is through an adjudication proceeding under CIPAA. Under s 30 of CIPAA, a subcontractor can take out an adjudication proceeding against main contractor. After obtaining an adjudicated amount, the subcontractor can request for payment from employer directly and employer is obliged to pay. Employer may then recover the amount as a debt or set off from main contractor. This section creates a statutory obligation on the part of the employer to pay the subcontractor where there is no privity of contract, but after the subcontractor obtains an adjudication decision against the main contractor. On the facts, there is evidence that the Subcontractor has commenced adjudication proceeding against the main contractor and at the same time filed the civil suit against the Employer. The Employer therefore argued that the civil suit is an abuse of the process.

Federal Court

The Federal Court has dismissed the subcontractor's application for leave to appeal: see *Bond M&E Sdn Bhd v Golden Oriental Realty Sdn Bhd* [2020] 1 LNS (O) 15 [FC].

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