IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CIVIL DIVISION)
[CIVIL SUIT NO: S3-22-380-1999]

Plaintiff

EXPRESS RAIL LINK SDN BHD

v.

Defendants

(1) METROPLEX BERHAD
(2) TRAVERS DEVELOPMENT SDN BHD

CONTRACT: *Oral agreement - Existence of oral agreement - First defendant engaged by PUTRA to construct traction power sub-station (TPSS) - PUTRA not a party to action - Redesigning and relocation of TPSS would save the second defendant's land from being compulsorily acquired - Move would cause PUTRA to incur extra costs in constructing the TPSS and abortive costs - Question of which party to bear responsibility for costs - Whether there was an oral agreement between the plaintiff, the first defendant and the second defendant on which party (or parties) was to bear the extra and abortive costs - Whether the oral agreement was subsequently confirmed by a written agreement of the parties in the form of two letters from plaintiff to first defendant and letter from first defendant to plaintiff*

Held (dismissing the plaintiff's claim with costs):

(1) Based on the evidence, there was no such oral agreement. There could not be an oral agreement involving all three parties when neither the representatives of the first nor second defendant were present at the meeting of 22 April 1997 at the plaintiff's office. There was no minutes of that meeting taken. The first defendant was merely a contractor of PUTRA, and was engaged by PUTRA to build the TPSS. The first defendant was not the contractor for the plaintiff nor the second defendant. The first defendant was not the landowner and thus would not benefit from the relocation and redesign of the TPSS or from any cancellation of the land acquisition. It did not make sense for the first defendant to agree to bear the extra costs as well as the abortive costs. The terms of the alleged oral agreement were based on an earlier proposal by the second defendant but the second defendant was not present at the meeting.

(2) Based on the evidence, the Court found that Johari Low (DW4) the executive director of the first defendant, was not present at the 22 April 1997 meeting. It was not pleaded in the statement of claim that Johari Low was present at that meeting. The evidence of PW3 (the Senior Vice President of the plaintiff company) as to the role of Johari Low at the meeting was inconsistent and confusing and this adversely affected the probative value of PW3's testimony. Johari Low, in his witness statement, had referred to the letter of the first defendant of 12 February 1998 addressed to the plaintiff which he himself had signed, which stated in no uncertain terms that the

first defendant would like ‘to set the record straight’ that he (Johari Low) was not present at the meeting of 22 April 1997 and Johari Low in his witness statement has also denied in general terms of having attended any meetings with the plaintiff. The content of the letter was undisputed and this letter of the first defendant was not responded to by the plaintiff. Further, Johari Low was not cross-examined by plaintiff’s counsel on the letter of 12 February 1998 nor was he cross-examined on his general denial of ever having attended any meetings with the plaintiff concerning the TPSS.

(3) The plaintiff’s letter to the first defendant dated 20 October 1997 did not specifically mention the name ‘Johari Low although other names were specifically mentioned. It could not be inferred that the word ‘you’ in the paragraph referred to Johari Low. The letter was not addressed personally to Johari Low, but to the first defendant and only for the attention of Johari Low. This letter was written 6 months after the alleged meeting of 22 April 1997 and no proper explanation was given for the long lapse of time. No minutes of the alleged meeting was enclosed with this letter and there was no minutes taken at all of the meeting. The evidence of PW3 given only during re-examination must be taken with a pinch of salt. Even if the Court’s finding that Johari Low was not present at the 22 April 1997 meeting was wrong, alternatively, it was the Court’s finding that Johari Low was only representing the first defendant at that meeting. There was no credible evidence to show that he was representing the second defendant as well at that meeting.

(4) The letter dated 20 October 1997 from the plaintiff to the first defendant and the letter from the first defendant dated 17 November 1997, signed by Johari Low, addressed to the plaintiff could not constitute a

confirmation by the parties of what had been (allegedly) orally agreed by the parties at the meeting of 22 April 1997. As an oral agreement did not exist in the first place, the question of confirming an oral agreement in writing subsequently did not arise. Secondly, the letter dated 20 October 1997 was only addressed to the first defendant and not to the second defendant also. Even then, it was addressed in an ambiguous manner. It was an undisputed fact that Metroplex Berhad, the first defendant was never formerly known as Travers Development Sdn Bhd, the second defendant. PW3's explanation was incomprehensible because PW3 alleged that Johari Low told him that Metrolex Berhad was *also known as* Travers Development Sdn Bhd. If that was the case it begged the question why the letter was written '*Formerly* known as' instead of 'Also known as.' D4 had explained and the Court accepted his explanation that the letter of 17 November 1997 was genuinely and mistakenly issued under the first defendant's letter head when it should not have been and DW4 should not have signed it. DW4 had explained that the blunder was made by a new staff and that another contributing factor to the mistake was that the administrative offices of the first and second defendants were located in the same building. Accordingly, the plaintiff's claim against defendants was dismissed with costs.

GROUNDS OF JUDGMENT

This is a writ action by the plaintiff against the defendants for damages for breach of contract.

Acording to the plaintiff, the contract was both oral and in writing. The plaintiff alleges that there was an oral agreement reached by the parties at a meeting held at the plaintiff's office on 22 April 1997; and this oral agreement was subsequently confirmed by the parties in writing through the exchange of letters between them.

I have dismissed the plaintiff's claim with costs. I shall now explain my grounds.

I shall first set out the background facts.

In late 1996 a company known as Putra Usahasama Transit Ringan Automatik Sdn Bhd (PUTRA) began the construction of a traction power sub-station (TPSS) at the intersection of Jalan Travers and Jalan Ang Seng (near Bangsar and Brickfields) Kuala Lumpur. At the same time, however, the plaintiff (Express Rail Link Sdn. Bhd.) was constructing a railway line (called the ERL-CRS System railway) from Kuala Lumpur to the new Kuala Lumpur International Airport (KLIA). The plaintiff discovered that the proposed alignment of the ERL-CRS System railway

corridor could not pass through the remaining space between the TPSS (then in the very early stage of construction) and the KTM railway tracks. The plaintiff therefore requested PUTRA to shift the location of the TPSS in order to facilitate the construction of the proposed alignment of the ERL-CRS System railway corridor to at least 11 meters from the ERL centre-line. PUTRA agreed to this request. But this shifting of the location of the TPSS would require the compulsory acquisition of a strip of the second defendant's land that was adjacent to Jalan Ang Seng, Brickfields. So, in January 1997, the plaintiff requested the Government to commence the compulsory acquisition of the second defendant's land. The Government agreed to do so and proceedings for the compulsory acquisition of the said land were commenced. The second defendant objected to this move by the Government because it had obtained a Development Order from DBKL to develop the land. Due to the objection raised by the second defendant, further discussions were held between the affected parties to consider whether it was possible to change the layout of the TPSS so as to avoid the land acquisition. The second defendant proposed to the plaintiff a redesigning and relocation of the TPSS that would allow the alignment of the ERL-CRS System railway corridor to remain unchanged and that would also render the compulsory acquisition of the second defendant's land unnecessary. Subsequently, on 2 April 1997 PUTRA confirmed that they were agreeable to the

proposal made by the second defendant to elongate the TPSS footprint in an attempt to resolve the land issue. The final design was completed by PUTRA towards the end of April 1997. Whilst the redesigning and relocation of the TPSS would save the second defendant's land from being compulsorily acquired, such a move, however, would cause PUTRA to incur extra costs in constructing the TPSS as well as abortive costs, as some initial works had already commenced on the original construction of the TPSS. The question thus arises as to who would have to bear these costs? This is the subject-matter of the dispute in the present case.

The first defendant was engaged by PUTRA to construct the TPSS.

PUTRA is not a party to this action.

The alleged oral agreement of 22 April 1997

Was there an oral agreement between the plaintiff, the first defendant and the second defendant on 22 April 1997 on the issue as to which party (or parties) was to bear the extra and abortive costs as a result of the redesigning and relocation of the TPSS? It is the contention of the

plaintiff that there was such an oral agreement between the parties at a meeting at the plaintiff's office on 22 April 1997. It is alleged by the plaintiff that the essential terms of the oral agreement is that, firstly, the first and second defendants would bear all costs arising from the proposed redesign and relocation pf the TPSS, namely, the difference between the costs of the construction of the TPSS as originally designed and located, and the costs of the completed TPSS as redesigned and relocated, as well as the abortive costs incurred as a result of the redesign and relocation of the TPSS.

Secondly, in consideration, the plaintiff would waive its legal right pursuant to the Concession Agreement (between the plaintiff and the Government) to compulsorily acquire the second defendant's land and would advise the Government to cancel the compulsory acquis ition of the second defendant's land.

The defendants deny that there was such an oral agreement.

It is my finding based on the evidence that there was no such oral agreement. The following are my reasons.

Firstly, neither the representative of the first defendant, nor the representative of the second defendant, was present at the meeting of 22 April 1997 at the plaintiff's office. Therefore, how could there be an oral agreement involving all three parties when two of the parties were absent?

Secondly, there was no minutes of that meeting taken. If parties really had intended the meeting to be a binding oral agreement, the parties would have ensured that the minutes of the meeting be taken and thereafter distributed to the relevant parties.

Thirdly, the first defendant was merely a contractor of PUTRA, and was engaged by PUTRA to build the TPSS. The first defendant was not the contractor for the plaintiff; nor was the first defendant a contractor for the second defendant.

Fourth, the first defendant was not the landowner and as such would not benefit from the relocation and redesign of the TPSS, nor from any cancellation of the land acquisition. The entity that would benefit from the

relocation and the cancellation of the acquisition would be the second defendant, as they were the landowner of the affected land; but they were not present at the meeting of 22 April. Therefore, it does not make sense for the first defendant (who did not benefit from the relocation and the cancellation of the acquisition) to agree to bear the extra costs as well as the abortive costs.

Fifthly, the terms of the alleged oral agreement were based on an earlier proposal by the second defendant; but the second defendant, as I have said earlier, was not present at the meeting.

It appears to be the position of the plaintiff that both the representative of the first defendant and the representative of the second defendant were present at the meeting of 22 April 1997 held at the plaintiff's office (I refer to the written submission of the learned counsel for the plaintiff at encl. C, page 3, paragraph 1.2). It is contended by the plaintiff that the first defendant was represented at that meeting by its executive director, one Johari Low (DW4). It is further contended by the plaintiff that the second defendant was represented at that meeting by its general manager, one Philip Woo.

But both defendants deny that their representatives were present at that meeting.

I shall first deal with the issue as to whether or not Johari Low (DW4), the executive director of the first defendant, was present at that meeting. Based on the evidence, I am making a finding of fact that he was not present. These are my reasons for finding so. Firstly, it is not pleaded in the statement of claim that Johari Low was present at that meeting of 22 April.

Secondly, the evidence of PW3 as to the role of Johari Low at the meeting is inconsistent and confusing. During examination in chief, PW3 said that Johari Low represented both defendants at the meeting (see ***Supplementary Q&A For*** PW3 at Q&A 8A at ***WS/SP3***). But when cross-examined by the learned counsel for the first defendant, PW3 said that Johari Low represented only the first defendant at the meeting; and that he could not remember who represented the second defendant at that meeting. Later, however, when re-examined by the plaintiff's counsel, PW3 said that at the meeting on 22 April he was under the impression

that Johari Low was representing the second defendant, but that *subsequent* to that meeting he got the impression that Johari Low was representing *both* the first and the second defendants at the meeting. In my view, this inconsistency and confusion in his evidence adversely affect the probative value of PW3's testimony.

Thirdly, Johari Low, in his witness statement, had referred to the letter of the first defendant of 12 February 1998 addressed to the plantiff which he himself had signed, which states in no uncertain terms that the first defendant would like '*to set the record straight*' that he (Johari Low) was not present at the meeting of 22 April 1997; and Johari Low in his witness statement has also denied in general terms of having attended any meetings with the plaintiff (see Q&A 13, Q&A 14, Q&A 15 and Q&A 16 of his witness statement). It is important to bear in mind that this letter is compiled in the Agreed Bundle of Documents (Absolute) (Bundle 'A') meaning that the content of the letter is undisputed. It is also pertinent to note that this letter of the first defendant was not responded to by the plaintiff.

Fourthly, it is pertinent to note that although Johari Low's presence at the meeting of 22 April was crucial to the plaintiff's case, yet, significantly,

Johari Low was not cross-examined by plaintiff's counsel on this letter of 12 February; nor was he cross-examined on his general denial of ever having attended any meetings with the plaintiff concerning the TPSS.

Be that as it may, in their endeavour to prove to the Court that Johari Low was indeed present at the meeting of 22 April, the plaintiff alluded to a letter from the plaintiff to the first defendant (Metroplex Berhad) dated 20 October 1997, a letter for the attention of:-

> ***Attn: Encik Johari Low Abdullah.***

This letter can be found at page 8-9 of the Agree Bundle of Documents (Normal) (Bundle B) meaning that parties agree to dispense with the need to call the maker of the document (in order to prove the document) but that the content of the document remains *disputed* by the parties. The first paragraph of this letter states:-

> *We refer to the meeting held on 22 April 1997 at our office in your presence, Mr. E. Sreesanthan of Zain & Co. and our Tuan Haji Ahmad Zainuddin and En. Zainal Abidin regarding the above subject.*

Firstly, it is to be observed that the above paragraph of the letter makes no specific mention of the name 'Johari Low': it merely says '*your presence*'; although it mentions specifically other names, namely, 'Sreesanthan', 'Haji Ahmad Zainuddin' and 'Zainal Abidin'. To my mind, it cannot be inferred that the word '*you*' in the paragraph refers to Johari Low. This is because the letter was not addressed personally to Johari Low: it was addressed to the first defendant, Metroplex Berhad - and only for the *attention* of Johari Low.

Secondly, this letter dated 20 October 1997 was written 6 months after the alleged meeting of 22 April 1997 and no proper explanation was given for this long lapse of time.

Thirdly, no minutes of the alleged meeting was enclosed with this letter; in fact there was no minutes taken at all of the meeting.

Fourthly, this letter, according to the evidence of PW3 (the Senior Vice President of the plaintiff company), was drafted by one Encik Anwar bin Mohd Ali, who was an officer (quantity surveyor) of the plaintiff, and was

signed by Dr. Aminuddin Adnan (PW2), the Chief Executive Officer of the plantiff. But admittedly neither the said Encik Anwar nor Dr. Aminuddin were present at the meeting of 22 April; and Encik Anwar was not called as a witness by the plaintiff. It is true, however, that there is the evidence of PW3 (Hj. Ahmad Zainuddn) - but only during re-examination - explaining that he supplied Encik Anwar with the information to enable the latter to draft the letter of 20 April. But how could he (PW3) have recalled what transpired on 22 April 1997 an event that happened six moths ago when no minutes were taken of the meeting; and why must the letter be drafted by Encik Anwar and not by PW3 himself or by Zainal Abidin (since both PW3 and Zainal Abidin were present at the meeting of 22 April)? This evidence of PW3 given only during re-examnation of him having supplied Encik Anwar with the necessary information to enable the latter to draft the letter of 20 October 1997, but without the said Anwar being called as a witness and without explaining as to why Anwar had to be the officer to draft the letter (and not PW3 himself or Zainal Abidin), in the absence of any minutes of the meeting of 22 April 1997, and considering the confusing and inconsistent nature of his (PW3's) evidence as to the alleged role of Johari Low at the alleged meeting of 22 April, must be taken with a pinch of salt.

Even assuming that I am wrong in my finding of fact that Johari Low was not present at that meeting, still, alternatively, it is my finding that Johari Low was only representing the first defendant at that meeting. There is no credible evidence to show that Johari Low was representing the second defendant as well at that meeting.

The learned counsel for the plaintiff in her written submission further submitted that one Mr. Philip Woo was also present at the meeting of 22 April 1997; and that the said Philip Woo was the general manager of *both* the first defendant and the second defendant at the material time. The contention that Philip Woo was the general manager of the first defendant as well as the general manager of the second defendant does not appear to be disputed by the defendants. However, the defendants (in particular, the second defendant) dispute the allegation that Philip Woo was present at the meeting of 22 April. Therefore, the question of fact to be determined is this: was Philip Woo present at the meeting of 22 April? It is my finding that Philip Woo was also not present at that meeting. Firstly, it is not specifically pleaded in the statement of claim that Philip Woo was present at the alleged meeting of 22 April 1997.

Secondly, the plaintiff relies on the evidence of PW3. PW3, as I have said earlier, was the Senior Vice President of the plaintiff company, but in his entire evidence he never said that Philip Woo was present at the meeting of 22 April. He only associated Johari Low with that meeting.

Thirdly, the plaintiff relies heavily on the letter of 20 October 2007 to prove to the Court the respective representatives that were present at the meeting of 22 April. Yet this letter too makes no mention of Philip Woo.

Since it is the position of the plaintiff that Philip Woo was present at the meeting 22 April 1997, the legal burden therefore lies on the plaintiff to prove this allegation. The best way of discharging that legal burden is to call Philip Woo himself as a witness for the plaintiff. But, alas, for reasons best known to the plaintiff, Philip Woo was never called as a witness by the plaintiff. Further, when DW4 (Johari Low) was cross-examined by the plaintiff's counsel it was never put to him that Philip Woo was present at the meeting of 22 April.

The alleged written agreement

It is the contention of the plaintiff that the oral agreement was subsequently confirmed by a written agreement of the parties, that written agreement in the form of two letters, namely, -

(a) a letter dated 20 October 1997 from the plaintiff addressed to the first defendant; and

(b) a letter from the first defendant dated 17 November 1997, signed by Johari Low, addressed to the plaintiff.

It is my finding that these two letters cannot constitute a confirmation by the parties of what had been (allegedly) orally agreed by the parties at the meeting of 22 April. To begin with, I have made a finding that an oral agreement does not exist in the first place. So, if no oral agreement existed in the first place, the question of confirming an oral agreement in writing subsequently does not arise.

Secondly, letter (a) above is only addressed to the first defendant. It is not also addressed to the second defendant. Even then, it was

addressed in an ambiguous manner. It was addressed in the following manner:-

> *Metroplex Berhad*
>
> *(Formerly known as Travers Development Sdn Bhd)*

What is perplexing is that it is an undisputed fact that Metroplex Berhad (the name of the first defendant) was *never* formerly known as Travers Development Sdn Bhd (the name of the second defendant)! The former was a public listed company whilst the latter was a private limited company. PW3, being a Senior Vice President of the plaintiff, and allegedly the real author of the letter, should have known that the first and second defendant are two separate and different types of corporate entities, and that he could not so easily assume (or be led to believe) Metroplex Berhad to be formerly known to be Travers Development Sdn. Bhd. without making a proper company search. Further, PW3, when asked to explain as to why the letter was addressed to Metroplex Berhad in that manner, said:-

> **Q:** ***Mengapakah perkataan*** **-**

'(Formerly known as Travers Development Sdn Bhd)' digunakan di dalam surat ini?

A: Di dalam mesyuarat tersebut, pihak kami bertanya kepada Encik Johari Low kepada siapakah jawapan atau persetujuan yang dicapai di dalam mesyuarat tersebut ditujukan. Dan Encik Johari Low seingat saya mengatakan bahawa surat tersebut hendaklah ditujukan kepada Metroplex Bhd yang juga dikenali sebagai 'Travers Development Sdn Bhd'.

Reading the above answer, I am unable to accept that PW3 can be that naive as he portrayed himself to be. Moreover and in any case the above explanation is incomprehensible to me because in the above answer PW3 (assuming I were to believe him) alleges that Johari Low told him that Metrolex Berhad was *also known as (juga dikenali sebagai)* Travers Development Sdn Bhd. If this is the case then why was the letter written '*Formerly* known as' instead of 'Also known as'?

As to letter (b) it was explained by Johari Low (DW4) (whose explanation I accept) that it was genuinely and mistakenly issued under the letter head of the first defendant. It should not have been isued under the letter-head of the first defendant and he (DW4) should not have signed it. DW4 explained that the blunder was made by a new staff, one Alex

Chong. DW4 also explained that a factor that contributed to the mistake was the fact that the administrative office of the first defendant and the administrative office of the second defendant were located in the same building.

[Plaintiff's claim against defendants dismissed with costs.]

DATO' MOHD HISHAMUDIN BIN MOHD YUNUS
Judge, High Court
(Civil Division)
Kuala Lumpur

Date of decision: 2 JULY 2009

Date of written grounds of judgment: 14 NOVEMBER 2009

For the plaintiff - R Vatsala & N Sharmini; M/s Zain & Co

For the first defendant - Wong Rhen Yen & Dennis Appaduray; M/s Denis Nik & Wong

For the second defendant - Steven Wong; M/s Arifin & Partners