[1997] CLJU 234
[1997] 1 LNS1 234

LOW KOK HWA v. SIME DARBY URUS HARTA BERHAD

HIGH COURT, KUALA LUMPUR
KAMALANATHAN RATNAM; J
GUAMAN NO. S2-22-56-1993
22 NOVEMBER 1997

CONTRACT *- architect's fees - counterclaim for protracted fees*

Counsel:

Mr. Steven Wong for plaintiff.

(Messrs Arifin & Partners)

Mr. Robert Lazar for defendant.
(Messrs Shearn Delamore & Co)

JUDGMENT

FACTS

The dispute on the plaintiff's claim is for his fees with regard to his engagement as the architect for the "Wisma Sime Darby" project, arising from the cost overrun, experienced as a result of the said project. The plaintiff thus has brought this claim for:

> (a) The sum of RM396,258.76 being the fees due on the basis of 3.4% of the "final contract sum".
>
> (b) The sum of RM1,820,000.00 for protracted services.

Before the commencement of the case the parties, by consent, agreed that if the Court finds for the plaintiff the fees agreed was RM396,258.76 thus obviating the need to prove the quantum if the Court accepts the plaintiff's interpretation of the meaning of "the final cost of works".

CANONS IN INTERPRETING CONTRACTS

The accepted canons in relation to the interpretation of contracts can be summarised in the following propositions:

> (a) The object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed.
>
> (b) For the purpose of the construction of contracts, the intention of the parties depends on the meaning of the words they have used. There is no intention independent of the meaning.
>
> (c) The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract, in so far as that has been agreed.
>
> (d) In attempting to reach a conclusion as to the presumed intention of the parties, the Court will generally adopt an objective approach.
>
> (e) In addition to the words of the instrument and the particular facts provided by evidence admitted in aid of construction, the Court may also be assisted by a consideration of a commercial purpose of the contract.

(f) Where the words of a contract are clear, the Court must give effect to them even if they have no discernable commercial purpose.

THE LETTER OF APPOINTMENT

Bearing in mind the said canons of interpretation and referring to the lengthy letter of appointment it is pertinent to refer to certain aspects of the said letter which would bear relevance:

(a) The word "project" is used and is defined as:

"a multi-storey office building on Lots 210 and 211 Jalan Raja Laut Kuala Lumpur".

(b) The quantum of the fees is expressed as:

"the fee payable to you for the work to be undertaken by you in the Project shall be on the basis of 3.4% of final cost of works for all works that may be necessary for the proper completion of the Project ...".

THE AGREEMENTS

By an agreement dated 9.6.79 Sime Darby Holdings Limited (SDHL) entered into an agreement with the State Government of Sabah whereby SDHL sold to the State Government all the shares in the Ipoh Ice Company Sdn Bhd (Ipoh Ice) which company was the owner of the lands. By an agreement dated 9.6.79 between the State Government of Sabah as the first party and SDHL as the second party and the defendant herein as the third party, the defendant was appointed by the State Government of Sabah as agent to manage and supervise the erection of the said building upon the terms and conditions set out in the agreement.

By an agreement dated 21.10.80, the State Government of Sabah with the defendant as their authorised agent entered into a building contract with Yeoh Cheng Liam Construction Sdn Bhd (YCL) as the main contractor for the said project.

As a result of the delay in the handing over of the possession to YCL due to delay in the piling works the parties then entered into 2 addenda to the main building contract.

DEFENCE OF AGENCY

The plaintiff (PW1) testified that he first had dealings with Sime Darby Property Development Sdn Bhd (SDPD) which was what the defendant was initially known as. At SDPD's request the plaintiff submitted the said plans for approval by Dewan Bandaraya Kuala Lumpur (DBKL) and the said plans were signed by the then owners of the said lands, Ipoh Ice. After obtaining approval in principle and the development order, the defendant issued to the plaintiff the letter of appointment dated 16.3.79. He admitted that he was aware of the subsequent share sale agreement between SDHL and the State Government of Sabah dated 9.6.79 and the management agreement between the State Government of Sabah and SDHL and the defendant, also dated 9.6.79. It is pertinent to note that no other letter of appointment was given to the plaintiff other than the one dated 16.3.79 and that all the fees were initially paid by SDPD and subsequently by the defendant. The main documentary evidence rests with the letter of appointment dated 16.3.79 where the relevant parts read as follows:

"We wish to confirm your appointment as Architects in Association for design, documentation and supervision of our project, Wisma Sime Darby, a multi-storey office building on Lots 210 and 211, Jalan Raja Laut, Kuala Lumpur (hereinafter called "the Project").

You are to work in association and shall be jointly responsible with Peddle Thorp & Walker of Sydney, who have also been appointed as Architects in Association for the Project to give us full architectural service and advice whenever necessary or requested by us in relation to the Project.

...

In the event that we do not wish to proceed with the Project at any stage, you will be reimbursed with the actual cost incurred for the work done by you as a result of our instructions to the date of abandonment."

I find sections 183 and 186 of the Contracts Act 1950 very relevant to this case. Section 183 reads:

"183. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:

Presumption of contract to contrary.

(a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(b) where the agent does not disclose the name of his principal; and

(c) where the principal, though disclosed, cannot be sued."

Section 186 reads:

"186. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable."

Contract to the contrary

In the case before me I find the presumption (b) of section 183 of the Contracts Act readily applicable. No where in the letter of appointment dated 16.3.79 from the defendant to the plaintiff was it ever mentioned that the defendant was contracting as an agent for any alleged principal, let alone the Sabah State Government. In fact in the said letter of appointment, the defendant had used such words as "our project", "to give us full architectural service and advice whenever necessary or requested by us in relation to the Project" and "in the event that we do not wish to proceed with the Project at any stage, you will be reimbursed with the actual cost incurred for the work done by you as a result of our instructions to the date of the abandonment." To my mind what is of great significance is the fact that the defendant had signed the said letter of appointment on its own accord, and not on behalf of any alleged principal. Applying the presumption of a contract to the contrary, I find that the defendant was personally bound when the letter of appointment was issued.

In ***Wong Lee Sing*** v ***Mansor*****[1972] 2 MLJ 155 the respondent/defendant had entered into an agreement with the appellant/plaintiff for the sale of a piece of land. The respondent represented to the appellant that he was in a position to transfer the land to him. However, the appellant subsequently discovered that the respondent was in no position to do so and that he had no title to the land. The respondent had signed the agreement as a "vendor" and received a deposit for the land. The appellant sued for the return of the deposit. In allowing the appeal Sharma J said at page 155:**

"... Even if the defendant was allowed the latitude to go outside his pleadings and to allege that while contracting with the plaintiff he was only acting as an undisclosed agent for Ismail bin Yusof, the question which arises in this case is the application of section 186 of the Contracts Ordinance, 1950 which says:

'186. In cases where the agent is personally liable, a person dealing with him may hold either him or his principle, or both of them, liable.'

Bowstead **in his Law on Agency (Twelfth Edition) at page 257 says:-**

'Every agent who contracts personally, though also on behalf of his principal, is personally liable, and may be sued in his own name, on the contract, whether the principal be named therein, or be known to the other contracting party, or not, and either the principal or agent may be sued, unless the other contracting party elects to give exclusive credit to the principal. But no agent is personally liable on any contract made by him merely in his capacity of an agent, even if he make it fraudulently, knowing that he has not authority to do so.'

Exhibit P1 nowhere indicates that the defendant was entering into an agreement with the plaintiff as an agent. *Bowstead* again in article 116 at page 266 of the same edition goes on to say:

> **'The question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a bill of exchange, promissory note, or cheque, depends upon the intention of the parties, as appearing from the terms of the written agreement as a whole, the construction whereof is a matter of law for the court -**
>
> > **(a) if the contract be signed by the agent in his own name without qualification, he is deemed to have contracted personally, unless a contrary intention plainly appears from other portions of the document; ..."**

Nowhere in his evidence did the defendant suggest that he was the agent of Ismail bin Yusof."

In the case before me, the defendant had indeed signed the letter of appointment in his own name and had not in any way mentioned the fact that he was merely the agent of the Sabah State Government. In *Pernas Trading Sdn Bhd*v *Persatuan Peladang Bakti Melaka*[1979] 2 MLJ 124 the appellants sued the respondents for the balance of the price of goods sold and delivered to the respondents. In their defence the respondents denied liability and sought to show that the goods were ordered for a third party. The appellants applied for leave to sign final judgment but their application was dismissed by the Senior Assistant Registrar and on appeal against the Registrar's decision, the learned Judge dismissed the appellants' appeal. The appellants then appealed to the Federal Court. Salleh Abas FJ in delivering the judgment of the Court said at pages 125/126:

> **"... In our view, it is unnecessary for the court to examine the nature of the transaction any further because, irrespective of whether the respondents were ordering those goods on behalf of Syahazam Sdn. Bhd. the sales invoice and the delivery note plainly show that the respondents were the purchaser and the receiver of the goods, and no one else. Thus, even if they were contracting for and on behalf of Syahazam, we agree with the submission of Mr. Nijar that the respondents are still liable because they were contracting in such form as shows that they are personally liable. Parke B., delivering the judgment in *Higgins* v. *Senior* (151 E.R. 1279), quoted with approval the passage in *Jones* v. *Littledale*(6 Ad. & Ell 486; 1 Nev & P. 677) in which Lord Denman said that:-**
>
> > **'if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principals were or were not known at the time of the contract, relieve himself from that responsibility.'**
>
> **In our view, the sales invoice and the delivery note show that even if the respondents were agents for Syahazam in respect of the sale and delivery of those goods, they were contracting in such form as comes within the ambit of what Lord Denman said in *Jones* v. *Littledale*. Thus the respondents are clearly liable."**

In this case the defendant herein had issued the said letter of appointment as if it was personally responsible. As such, following the decision in *Jones*v *Littledale*I find that it is irrelevant if the principal, which is the Sabah State Government, was or was not known at the time of the contract. In any event the principal only came into the picture after the letter of appointment was issued as evidenced from the agreed facts and the testimony of the plaintiff himself. By virtue of section 183(c) of our Contracts Act, an agent is also personally liable when he makes no disclosure of his principal. Even though in cross-examination PW1 had testified that after becoming aware of the involvement of the Sabah State Government, he had treated the said Sabah State Government as

the principal and the defendant as the agent, the fact remains that the letter of appointment was signed by the defendant's managing director and that the defendant was consistently contracting as if the defendant was the principal, without any qualification whatsoever. As such it is my judgment that the plaintiff is entitled to sue either the principal or the agent. In the circumstances, the defence of agency must perforce fail.

MEANING OF "THE FINAL COST OF WORKS"

The starting point in respect of this issue is found in the documentary evidence of the letter of appointment from the defendant to the plaintiff where at page 200 of 1 CABD the relevant part of the letter reads:

> **"The fee payable to you for the work to be undertaken by you in the Project shall be on the basis of 3.4% of final cost of works for all works that may be necessary for the proper completion of the Project including but not limited to the design, preparation of working drawings, details and specifications and supervision of the Project as per Conditions of Engagement specified by the Malaysian Institute of Architects."**

The defendant contends that the sum of RM22,631,195.00 ought to be excluded from the sum of RM98,959,243.00 for the purpose of computing the plaintiff's fees as the said sum of RM22,631,195.00 was paid to the main contractor and the nominated sub-contractors under the main contract, and that this was wholly attributable to the delay caused by the handing over of the site to the main contractor.

As this was one of the first major sites in Kuala Lumpur experiencing a major limestone rock formation, the piling contractor having no similar experience had been having a tough time drilling through "floating" boulders to rock bed. The plaintiff's report on the delay due to the piling contractor, explains the issues involved.

The delay issue was finally resolved through a lot of negotiations and agreeing to re-negotiate on most of the outstanding claims and revising their recovery factors for fluctuations in preliminaries, labour and materials. I find that the following documentary evidence support the plaintiff's case for the agreed sum of RM396,258.76 being the sum due on the final cost of works:

> **(a) Firstly, the letter of appointment at page 200 of 1 CABD has specifically stated that "The fee payable to you for the work to be undertaken by you in the Project shall be on the basis of 3.4% of final cost of works for all works that may be necessary for the proper completion of the Project including but not limited to the design, preparation of working drawings, details and specifications and supervision of the Project as per Conditions of Engagement specified by the Malaysian Institute of Architects."**
>
> **(b) Secondly, the 2nd addendum has specifically stated that at clause 8.14 at page 40 of 1 CABD that "All sums paid to the Main Contractor by the Employer under or pursuant to the 1st Addendum and or this Addendum, and in particular (without limiting the generality of the foregoing) the sums paid pursuant to Clauses 8.6 and 8.7 hereof, shall be deemed to be monies paid under the Main Contract and shall be taken into account when calculating and deemed to be part of the monies paid to the Main Contractor before the date of determination of the Main Contract as provided in Clause 25 3(d) of the Main Contract."**
>
> **(c) Thirdly, the management agreement itself has specifically stated at clause 4 of page 49 of 1 CABD that "The total cost of the said building shall be costs of and incidental to the building of the same including but not limited to all building costs, ... , amenities and other infrastructure works and the cost of rectifications and modifications found necessary ...".**

> **(d) Fourthly, the defendant's letter dated 7.6.84 at page 432 of 3 CABD clearly states that "Under the contract it is understood that 3.4% is payable to you on the total of all costs incurred" which included the items "expenses due to delay in storage and standing time", which is actually the additional preliminaries and "ex gratia payment to builder".**

The leading case as to the construction of contract is *City Investment Sdn Bhd*v *Koperasi Serbaguna Cuepacs Tanggungan Bhd*[1985] 1 MLJ 285 where Mohamed Azmi FJ delivering the judgment of the then Federal Court said at page 288:

> **"The general principle of construction of contract applies to all contracts whether they are building contracts or not and in each case the meaning of any clause in a particular contract has to be ascertained by looking at the contract as a whole and giving effect so far as possible to every part of it (see *National Coal Board* v. *Wm Neill & Son (St Helens) Ltd ([1984] 1 All E.R. 555).* Mr. Sethu has drawn our attention to page 560, the judgment of Piers Ashworth Q.C. which states:-**
>
> > **'The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.'**
>
> **We have no quarrel with the principle of construction that a contract must be construed as at the date it was made."**

There is unfortunately no definition of the "final cost of works" in the letter of appointment. However, in the Architects (Scale of Minimum Fees) Rules 1986 (the Rules), governed by the Architects Act 1967, a lengthy interpretation is given in relation to "cost of works" which would have included every item claimed by the plaintiff. The question here is what was the intention of the parties when the letter of appointment was issued on 16.3.79 especially in respect of the "final cost of works".

It must be borne in mind that the said "final cost of works" was "for all works that may be necessary for the proper completion of the Project including but not limited to the design, preparation of working drawings, details and specifications and supervision of the Project as per Conditions of Engagement specified by the Malaysian Institute of Architects". Again, much depends on the meaning attributed to the word "including". In *Teong Piling Co* v *Asia Insurance Co Ltd*[1994] 1 MLJ 445, Edgar Joseph Jr SCJ said at page 449:

> **"In my view, applying the above approach, the words 'costs of this arbitration *including*that of the arbitrator's fees, expenses and disbursements of RM23,740' appearing in para 3 of the award, read together with words appearing under the sub-heading 'Arbitration costs' in the appraisal of award, when tested against the background of this hotly contested and long drawn dispute, clearly reveal that the *intention to be gathered from the words used by the arbitrator* in para 3 of the award was that costs were to be on a party to party basis within the meaning of Lord Atkin's dictum quoted above.**
>
> **I might add that the word 'including' appearing in the award - be it noted - is a word of extension, not of restrictive definition (see *R* v *Kershaw* (26 LJMC 19); per Channell J in *Savoy Hotel Co* v *London County Council*([1900] 1 QB 665) a point which counsel for the defendant's submission overlooks. Once this point is recognised, it becomes crystal clear that the arbitrator had**

> **separated arbitrator's fees and expenses from other costs, all three items being payable by the defendant to the plaintiff. Reason and Justice also point to the same conclusion."**

It is therefore apparent to me that the intention of the parties was to extend the definition of the words "the final cost of works" to include all works that may be necessary for the proper completion of the project. In other words it means the "final" cost of works that was necessary to complete the project including whatever payments made in respect of the delay in the handing over of the possession site and considering the negotiated figures, I have also taken assistance from the interpretation given to "cost of works" as defined in the 1986 Rules.

I also seek support for this view from the Privy Council decision in *Malayan Armed Forces Co-operative Housing Society Ltd*v *Nanyang Development (1966) Sdn Bhd*[1979] 1 MLJ 147. In this case, the respondent developers agreed to sell 208 houses on two estates they were developing in Gombak and Ampang to the appellants. The appellants started proceedings claiming that they overpaid for the houses, but the developers counterclaimed for sums which they sought to deduct from the alleged over-payment to them. Clause 8 of each agreement provided that 'all costs of the making of (water and electrical) connections inclusive of the cost of laying water mains and of electric supply and metering thereof shall be borne and paid by the purchaser'. This counterclaim succeeded before both Abdul Hamid J (as he then was) and the Federal Court.

The purchasers appealed to the Judicial Committee of the Privy Council where the appeal was dismissed. Viscount Dilhourne delivering the judgment of the Board held at page 148 of the report as follows:

> **"Clause 8 commences with an undertaking by the respondents to apply for the connection of the appellants' houses to the mains and cables of those bodies. It then goes on to provide that *all the costs* of making those connections are to be borne by the appellants. To enable those houses to be so connected, water mains and cables were laid along the roads of each estate and the cost of laying the mains and cables for that purpose was part, and in no doubt the main part, of the cost of connecting the houses to the mains of the water suppliers and to the cables of those who provided electricity.**
>
> **In their Lordships' view, if Clause 8 had not contained the words 'inclusive of the cost of laying water mains and of electric supply', the conclusion would none the less be inescapable that the cost of doing so was part of the cost of making these connections. The fact that those words are in the clause removes any doubt, if room for doubt there be, that the clause provided that the appellants should pay all the costs of laying mains and cables to their houses."**

In view of this decision and my views expressed earlier and the fact that the defendant had admitted that "the 3.4% is payable to the plaintiff on the total of all costs incurred" (page 432 of 3 CABD), it is my judgment that the words found in the letter of appointment are clear and that the words "final cost of works" included whatever payments howsoever made as a result of the delay.

<u>THE ISSUES RELATING TO EX GRATIA PAYMENT</u>,

<u>ADDITIONAL PRELIMINARIES, VARIATIONS OF</u>

<u>FLUCTUATIONS AND PAYMENT TO NOMINATED</u>

<u>SUB-CONTRACTORS</u>

PW1, PW2 and PW3 led evidence to show that the abovementioned items form part of the "final cost of works". I have no reason to doubt them on this. Besides, what is even more significant is that the arbitrator in his appraisal in the arbitration proceedings between the defendant and the main contractor, had made a finding (page 572 of 5 CABD) that the "Final Contract Sum" included the abovementioned items by virtue of the Variation Orders. In any event to seal any doubts, the documentary evidence also seem to support this view, namely:

> **(a) Clause 8.14 of the 2nd Addendum (page 40 of 1 CABD) has specifically stated that "All sums paid to the Main Contractor by the Employer under or pursuant to the 1st Addendum and or this Addendum, and in particular ... the sums paid pursuant to Clauses 8.6 and 8.7 hereof, shall be deemed to be monies paid under the Main Contract**

and shall be taken into account when calculating and deemed to be part of the monies paid to the Main Contractor before the date of determination of the Main Contract ...".

(b) What is significant is that clause 8.7 (pages 38 and 39 of 1 CABD) was in fact in respect of sums paid pursuant to the alleged "ex gratia payment".

(c) Clause 4 of the management agreement which the plaintiff was not even a party to had specifically stated at page 49 of 1 CABD that "the total cost of the said building shall be the costs of and incidental to the building of the same including but not limited to all building costs ..." which is in fact as stated in *Teong Piling*'s case above an "extended definition" by virtue of the word "including" in the said clause.

(d) Finally, the defendant's letter dated 7.6.84 found at page 432 of 3 CABD seems to imply that the defendant itself had accepted that the additional preliminaries and the ex gratia payment was certainly part of the final cost of works.

Since parties had said at the outset that if I accept the plaintiff's views attributed to the words "the final cost of works" the parties had agreed that judgment ought to be entered for the plaintiff for the sum of RM396,258.76, I accordingly gave judgment for this sum.

CLAIM FOR PROTRACTED SERVICES

The basis for claiming the protracted services is by virtue of condition 4.7 of the Pertubuhan Akitek Malaysia (PAM) guidelines. This condition is invoked when:

> **"If the Architect's service is protracted due to causes beyond his control such as decisions of the Client, breach of contract by either of the parties to the building contract, strikes, etc., and which involves the Architect in additional time or work."**

Therefore it is a clear requirement, and I see no reason not to accept PAM's standard conditions, that the architect must be involved in additional time or work to be entitled to this. The mere fact that there was delay on the project does not necessarily mean that the architect was involved in additional time or work. I find that there was no evidence adduced to show that because of the delay there was additional time or work that was spent. The plaintiff ought to show:

(a) what his hours would have been if the project had proceeded according to time; and

(b) the actual time that he spent on the project.

The difference between (a) and (b) would therefore be the time of protracted services. I find that the plaintiff totally failed to adduce any credible evidence of this aspect at all in proving the quantum. The uncertainty faced by the plaintiff himself is exemplified by his own admission in evidence in prefacing this claim under 3 alternative heads, namely on the hourly rate basis of RM100.00, RM150.00 and RM200.00 per hour. However in his written submission the plaintiff concedes, albeit, in my view, an illusory concession, that it should be at the rate of RM100.00 per hour.

With regard to the resident architect's salary, it is clear that the resident architect's salary was paid for by the employer and yet the plaintiff is still making a claim for this component. PW1 had admitted in cross-examination that the resident architect's salary had been reimbursed dollar for dollar by the defendant.

It is my judgment that the plaintiff had failed to prove the actual amount of time that would have been spent on this project apart from the time that would have been ordinarily spent. Now the starting point for proving all these would have been the production of the time sheet records. The plaintiff could not produce any of these and during his re-examination he offered the explanation that they could be misplaced or destroyed. I have no hesitation in drawing an adverse inference under section 114(g) of the Evidence Act 1950. I am tempted to hold that there are not in existence, such documents. The plaintiff had prepared his case with scrupulous tenacity and to my mind it seems out of context of his conduct not to have preserved such documents for the eventual production at trial of the said documents, if indeed he had such documents. I reject the evidence of

the plaintiff without supportive time sheets that at least 70% to 80% of the time was spent on the "Wisma Sime Darby" project. This was guess work and speculation at its profoundest, and emanating from a witness whose evidence on this point would be clearly self-serving. I draw to mind the pertinent observation of Edgar Joseph Jr J (as he then was) in *Popular Industries Limited* v *Eastern Garment Manufacturing Sdn Bhd*[1989] 3 MLJ 360 at 367:

> **"It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti* v *Williams* (109 ER 842)). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon* v *Deveridge* ((1825) 2 C&P 109; 172 ER 50) and *Twyman* v *Knowles* (138 ER 1183)."**

I therefore make no award on this item of the claim more so in the light of counsel's fair admission that no evidence exists to support this claim.

THE COUNTERCLAIM

The defence admit that their counterclaim is predicated on section 73 of the Contracts Act 1950 which reads as follows:

> **"A person to whom money has been paid or anything delivered, by mistake or under coercion, must repay or return it."**

Since section 73 of the Contracts Act was the linch-pin of the counterclaim I was moved to ask counsel for the defendant whether he had pleaded mistake or coercion. In his usual forthright manner, Mr. Lazar readily agreed he had not. He also readily agreed that no evidence was led regarding mistake. I also find that no evidence was led with regard to coercion.

In any event it is not necessary for me to consider these issues because having rejected the plaintiff's claim for protracted services and having also rejected the defendant's interpretation of "cost of works", there would therefore be no basis for the counterclaim to exist. The counterclaim is therefore dismissed.

INTEREST

I was of the view that justice would best be served if interest on the sum of RM396,258.76 was awarded at 4% per annum from the date of the issuance of the Certificate of Practical Completion of the whole building.

COSTS

Having considered the entire case and the final outcome and whatever might have originated in the epoch in question to necessitate the commencement of these proceedings there can be no *arca auri* or a windfall by way of costs to either party. I ordered each party to bear its own costs.

Dated the 22nd day of November 1997.

DATO' KAMALANATHAN RATNAM

JUDICIAL COMMISSIONER

HIGH COURT

KUALA LUMPUR

[1997] 1 LNS1 234