DALAM MAHKAMAH RAYUAN MALAYSIA (BIDANG KUASA RAYUAN)
[RAYUAN SIVIL NO: W-02(NCVC)(W)-2168-11/2019]

ANTARA

PSI INCONTROL SDN BHD **... APPELLANT**
(No. Syarikat 414225-K)

DAN

IRCON INTERNATIONAL LIMITED **...RESPONDENT**
(No. Syarikat 993425-W)

[Dalam Mahkamah Tinggi Malaya di Kuala Lumpur Guaman Sivil No.: WA-22NCVC-525-10/2017

Antara

PSI Incontrol Sdn Bhd (No. Syarikat 414225K) ...Plaintiff

Dan

Ircon International Limited ...Defendant
(No. Syarikat 993425-W)

Diputuskan oleh Pesuruhjaya Kehakiman Datin Rohani Binti Ismail di Mahkamah Tinggi Kuala Lumpur pada 24.10.2019]

CORAM:
VAZEER ALAM MYDIN MEERA, JCA
LEE HENG CHEONG, JCA
MARIANA HAJI YAHYA, JCA

GROUNDS OF JUDGMENT

Introduction

[1] This an appeal by the Appellant/Plaintiff against part of the learned Judicial Commissioner's ("the learned JC") judgement, dismissing the Plaintiff's claim for loss and expense pertaining to an extension of time granted by the Respondent/Defendant in a construction contract.

[2] The Appellant/Plaintiff, being aggrieved, appealed. Hence this appeal before us, which we heard and unanimously allowed for the following reasons.

[3] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

Background

[4] The disputes arose out of a construction contract between the Defendant who is the main contractor and the Plaintiff who is the Defendant's subcontractor for the construction and completion of the works relating to "*the Electrified Double Track project between Seremban (KM 461.234) to Gemas (KM 564.000) Stations"* ("Project"). The Government of Malaysia is the Project owner.

[5] *Vide* a letter of acceptance dated 2.4.2010 ("LOA") (found at CB 3, p. 539 - 541), the Defendant appointed the Plaintiff to complete the works stated in Annexure B to the LOA ("Works") ("Subcontract").

[6] The Subcontract documents consist of, *inter alia*, the LOA and the Conditions of Contract for Design and Build Contract PWD Form DB (Rev. 2007) ("COC") (found at CB 2, p. 264 - 328).

[7] The material terms of the Subcontract are as follows: -

7.1. The commencement date is 15 days from the LOA date, ie, by

17.4.2010. The completion period is 20 months from the LOA date, ie, by 2.12.2011 ("Original Completion Date") (CB 3, p. 541).

7.2 The agreed liquidated damages payable for any delay to the Original Completion Date are set out in Clause 45 of the COC (CB 2, p. 306).

7.3 The procedures governing a claim for extension of time ("EOT') are set out in Clause 49.1 of the COC (CB 2 p. 308- 309).

7.4 The Plaintiff is only entitled to claim for direct loss and expenses ("Losses and Expenses") incurred arising out of delay events under Clauses 49.1(b), (d), (e), (h) or (i) of the COC (Clause 49.2 of the COC) (CB 2 p. 309).

7.5 The procedures governing such a claim for the Losses and Expenses are set out in Clause 50.1 and 50.2 of the COC. Non-compliance with the mandatory requirements thereunder shall discharge the Defendant from any liability arising therefrom (Clause 50.3 of the COC) (found at CB 2, p.310).

[8] In this case, the Plaintiff claims for the followings:-

8.1 The sum of RM373,683.00, being the wrongful deduction by the Defendant in respect of Network Data Works;

8.2 The sum of RM7, 736,145.00 for the EOT claim;

8.3 In alternative to paragraph 8.2 above, the sum of RM4,852,487.00 for the EOT claim;

8.4 Interests on all sums awarded at the rate and for the period deemed appropriate by the Court;

8.5 Costs; and

8.6 Any further and/or other reliefs deemed fit and proper by the Court.

[9] After a full trial, the learned JC allowed the Plaintiff's claim for the sum of RM373,683.00 for the wrongful deduction by the Defendant in respect of the Network Data Works but dismissed the Plaintiff's claim for the EOT.

The Findings of the High Court

[10] The learned JC found *inter alia* that the Plaintiff had failed to comply with the conditions precedent in Clauses 49, 50.1 and 50.2 of the COC and that notwithstanding the Defendant having granted an extension of time under the said Clause 49, the Plaintiff was not entitled to claim for the Losses and Expenses because they had failed to:-

10.1 Comply with Clause 49 of the COC;

10.2 Provide notice of intention to claim the Losses and Expenses under Clause 50.1 of the COC; and

10.3 Submit particulars that may be necessary to enable the claims to be ascertained under Clause 50.2 of the COC.

The Plaintiff's contentions

[11] The Plaintiff contended *inter alia* that they have obtained an extension of time to complete the Project works namely by an Extension of Time Certificate No. 1 ("EOT No. 1") and entitled to claim for the Losses and Expenses.

[12] The Plaintiff also contended in essence that the learned JC reached her conclusion on the Plaintiff's EOT claim based on a mistaken and

erroneous interpretation of Clauses 49 and 50 of the COC.

The Defendant's Contentions

[13] The Defendant in turn contended *inter alia* that the Plaintiff has failed to comply with several aspects of Clause 49 of the COC as determined by the learned JC namely:-

(i) The failure to apply "forthwith" as required under Clause 49 of the COC;

(ii) The failure to specify the particular sub-clause which they are relying on, in their EOT application;

(iii) The Plaintiff's losses were based on projected losses and thus, failed to comply with Clause 49.2 of the COC;

(iv) The delay was caused by late delivery of site possession which is not a ground for claiming the Losses and Expenses; and

(v) The failure to mitigate the delay.

[14] The Defendant thus argued that this was supported by the learned JC's finding that the Plaintiff's claim for the Losses and Expenses is based on mere *"anticipated, projected and/or forecasted costs which were never incurred, ie, not direct loss and expense and therefore, clearly not in accordance with the provision under Clause 49 of the COC"*. (See Grounds of Judgment ("GOJ") - paragraphs 45, 47 and 49 at CB 1, 194, 195 and 197).

[15] The Defendant also contended that the learned JC's findings are justified and supported by PW1's admission that the Plaintiff's claim of RM7,736,145 is based on anticipated costs. On this basis alone, the Defendant contends that the Plaintiff's claim for Loss and Expenses

must be dismissed.

The Applicable law and Principles

[16] It is trite law that the specific finding of facts by the learned JC as a trier of facts should not be disturbed by an appellate court such as this Court herein unless that finding was plainly wrong: See *Ming Holdings (M) Sdn Bhd v.Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857 (FC) [2010] 4 MLJ 577; paras 41–48.

[17] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

" ..... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. ***But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence."***

(Emphasis added)

[18] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of *"insufficient judicial appreciation of evidence"* adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

Findings of this Court

[19] Bearing in mind the above principles, we will now consider the Plaintiff's appeal.

[20] We noted that the learned JC, at paragraph 35 of her Grounds of Judgement held *inter alia* that:-

> ***"It is an undisputed fact that EOT No.1 was granted by the Defendant in accordance with Clause 49 of the COC vide its letter dated 26.3.2012.*** *... nevertheless, from the evidence and in the same letter, the Court finds that the Defendant has clearly stated that the extension of time will not enable the Plaintiff to claim compensation by way of claim/any additional costs to Defendant.* ***Plaintiff has failed to fulfil the requirements for the EOT claim pursuant to Clause 49 of the COC."***
>
> (Emphasis added)

[21] We are of the considered view that this material finding by the learned JC was inherently contradictory and erroneous in that notwithstanding having held that EOT No. 1 had been granted under Clause 49 of the COC, the learned JC could not then have held that there was non-compliance with the said Clause 49. Thus, we find that this is a serious misdirection and that there is no proper judicial appreciation of the evidence.

[22] Clause 49.1 of the COC provides as follows:-

> *"Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice to the officer named in* ***Appendix 1 as to the causes of delay and relevant information with supporting documents enabling the said officer to form an opinion as to the cause and the length of delay****. If in the opinion of the said officer the completion of the Works is likely to be delayed or has been delayed beyond the Date for Completion stated in Appendix 1 or beyond any extended Date for Completion previously fixed under this clause... (the 10 limbs of delaying events are then set*

out)

*... then the officer named in Appendix 1 may**, if he is of the opinion that an extension of time should be granted, so soon as he is able to estimate the length of the delay beyond the date or time aforesaid issue** a Certificate of Delay and Extension of Time giving a fair and reasonable extension of time for completion of the Works.*

PROVIDED THAT the Contractor has taken all reasonable steps to avoid or reduce such delay and shall do all that may reasonably be required to the satisfaction of the PD to proceed with the Works.

PROVIDED FURTHER THAT the Contractor shall not be entitled to any extension of time where the instructions or acts of the Government or the PD are necessitated by or intended to cure any default or breach of contract by the Contractor."

(Emphasis added)

[23] The learned JC having made a determination that EOT No. 1 was granted pursuant to Clause 49.1 of the COC could not have then subsequently held that the Plaintiff had not complied with the said Clause 49. This is a clear misdirection.

[24] From the evidence adduced, we find that the Plaintiff had submitted particulars of its claim for EOT under cover of the said letter dated 17.4.2012. This letter complied with Clause 50.2 of the COC, in that the Plaintiff furnished particulars and supporting documents necessary to enable the Plaintiff's claims to be ascertained by the Project Director. PW1 testified that full details of the EOT claim for the sum of RM7,736,145.00 was submitted and acknowledged receipt by the Defendant. DW1 stated that the Project Director did not make any determination on the EOT claim and that there was also no letter from

the Defendant challenging the Plaintiff's claim or the calculation for the EOT claim. Hence, the Plaintiff's claim of RM7,736,145.00 for EOT remained unchallenged until this Writ was filed.

[25] Clause 49.2 of the COC then provides as follows:-

"If during the regular progress of the Works or any part thereof has been materially affected by reason of delays as stated under clause 49.1 (b), (d), (e), (h) and (j) hereof (and no other), and the Contractor has incurred or is likely to incur direct loss and/or expense beyond that reasonably contemplated and for which the Contractor would not be reimbursed by a payment made under any other provision in this Contract, ***then the Contractor shall be entitled to claim for such direct loss and/or expense incurred, subject always to clause 50."***

(Emphasis added)

[26] The pre-conditions of Clause 49.1 of the COC are as follows:-

(i) It must be reasonably apparent that the Works in question have been delayed;

(ii) Notice must be given as to the causes of delay and relevant information with supporting documents;

(iii) The relevant information with supporting documents must enable the officer to form an opinion as to the cause and length of delay;

(iv) The officer must then form an opinion whether the cause or causes of delay fall under any of the 10 limbs in the said Clause 49.1; and

(v) The officer may then grant an extension of time as soon as he is able to estimate the length of delay.

[27] We find that EOT No. 1 was in fact granted on 26.3.2012 and was

signed by Parmod Kumar as the Project Director, granting an extension of time from 2.12.2011 which is the initial completion date until 31.7.2013, for a period of 608 days. This showed that the Project Director must have formed an opinion as early as 26.3.2012 under Clause 49 of the COC as to firstly, the cause of delay and secondly, the length of delay. Only then would the Project Director, be in a position, to issue EOT No. 1. Thus, we find that, the fact that an extension of time of 606 days was granted, shows that the Project Director must have been satisfied that all the pre-conditions of the said Clause 49 have been fulfilled.

[28] We further find corroborative evidence which shows that when the Plaintiff gave their Notice of Delay on 2.3.2012, it identified the delaying events as the 2nd Phase Station Building and outdoor infrastructure works still being under construction and the absence of the Master Implementation Plan ("MIP") in connection with these works. The said Notice of Delay applied for an extension of time and gave notice of intention to claim the Losses and Expense as required by Clause 50.1 of the COC.

[29] We also find that the facts supporting the said Notice of Delay were further corroborated by the oral evidence adduced during trial, namely:-

29.1 PW1 testified that the MIP Rev 04 was only received on 5.2.2012 and this was the reason why the Plaintiff issued its request for extension of time under the said Notice of Delay dated 2.3.2012;

29.2 The MIP was a crucial document which lays down the schedule of works for the Defendant, which is the main contractor which in turn would enable the Plaintiff to plan and manage its own work program;

29.3 Sengottuvel Velavan (DW1) in his testimony, admitted that the

MIP was only received on 5.2.2012, after the original contract period had lapsed; and

29.4 The said Notice of Delay clearly stated that the Plaintiff's works had been disrupted and that additional resources and expenditures would be incurred for the extended completion date as stated in MIP Rev 04.

[30] Even though, an extension of time of 606 days was granted in EOT No. 1, the Defendant contended that EOT No. 1 however impose a comprehensive denial of any claims for compensation by the Plaintiff whereby the Defendant stated that the extension of time was *"... granted up to 31.07.2013, in accordance with clause No. 49 of the condition of contract without levy of liquidated damages but on the specific stipulation that this extension will not enable you to any compensation by way of a claim/any additional cost to IRCON."*

[31] We are of the considered view that the Defendant's refusal to entertain claims for loss and expense when granting an extension of time can only be justified if the Defendant had expressly stated that the cause or causes of delay did not fall under Clause 49.1(b), (d), (e), (h) or (i) of the COC.

[32] We agree with counsel for the Plaintiff that the said Clause 49 does not allow the Defendant, to unilaterally impose a blanket refusal to entertain any claims arising from the EOT. Pursuant to the said Clause 49, the Project Director must make a determination as to which of the limbs in the said Clause 49.1 that the EOT is allowed. The Notice of Delay dated 2.3.2012 submitted by the Plaintiff requesting for the EOT was well within the time stipulated in the said Clause 50.1, and in it, the Plaintiff had expressly stated: *"We will be submitting our claim for EOT covering all direct and indirect cost in line with our contract subsequent*

to this letter." Hence, the Plaintiff had given the Defendant, proper notice of their intention to claim for the Losses and Expenses.

[33] We are also of the respectful view that the said Clause 49 does not empower the Defendant, to reserve its rights to reject the Plaintiff's claims for the Losses and Expenses once the Defendant grants EOT No. 1. In granting EOT NO.1, the Defendant must have decided that the Plaintiff is entitled to EOT and to claim for the Losses and Expenses and the Defendant is bound to comply with the said Clause 49.

[34] Thus, we find that the Defendant was in breach of the said Clause 49.2 when it refused to entertain the Plaintiff's claims for the Losses and Expenses without having first made any decision that the causes of delay did not fall under Clause 49.1(b), (d), (e), (h) or (i) of the COC.

[35] Clause 50 of the COC provides as follows:-

" PROCEDURE FOR CLAIMS

50.1 Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any clause of this Contract, the Contractor shall within sixty (60) days of the occurrence of such event or circumstances or instructions give notice in writing to the P.D of this intention for such claim.

50.2 As soon as is practicable but not later than ninety (90) days after practical completion of the Works, the Contractor shall submit full particulars of the claims under clause 50.1 together with all supporting documents, vouchers, explanations, calculations, records and receipts for payment made which may be necessary to enable the claims to be ascertained by the PD. Upon expiry of the ninety (90) days period, the P.D shall proceed to ascertain

the claims based on such documents submitted by the Contractor. The amount of such claims ascertained by the P.D shall be added to the Contract Sum.

50.3 If the Contractor fails to comply with clause 50.1 and clause 50.2, he shall not be entitled to such claim and the Government shall be discharged from all liability in connection with the claim."

(Emphasis added)

[36] We are of the considered view that pursuant to Clause 50.1 of the COC, the Plaintiff is only required to provide notice of intention to claim additional payment within 60 days of the occurrence of the delaying event.

[37] There is no dispute that the delaying event was the late provision and receipt of MIP Rev 04 on 5.2.2012. Thus, the time limit of 60 days would therefore have expired on 5.4.2012. The said Notice of Delay was dated 2.3.2012 and it expressly stated *"We will be submitting our claim for EOT covering all direct and indirect cost in line with our contract subsequent to this letter".* Thus, we are of the view that the Plaintiff's Notice of intention to claim loss and expense had therefore been given well before the 60 days' time limit in Clause 50.1 of the COC.

[38] In our considered view, Clause 50.2 of the COC requires the Plaintiff to substantiate its claims for the Losses and Expenses, with full particulars, together with supporting documents not later than 90 days after the practical completion of Works and we find that there is no dispute that practical completion of Works was on 21.8.2013. It was however, only officially notified to the Plaintiff on 20.8.2015, some two years later.

[39] By that time, the Plaintiff had already submitted particulars of their

claims by a letter dated 17.4.2012 which was acknowledged by the Defendant, on 5.5.2012. We find that this letter complied with Clause 50.2 of the COC in that it furnished particulars and supporting documents necessary to enable the claims to be ascertained by the Project Director. PW1 testified that full details of the EOT claim for the sum of RM 7,736,145.00 was submitted.

[40] We also noted that DW1 in his testimony, admitted that the particulars of the Plaintiff's claim for the Losses and Expenses were given together with calculations and explanations but stated that they were not full particulars. DW1 nevertheless also stated that no decision was ever made by the Project Director on the claims and that there was no letter from the Defendant challenging the Plaintiff's calculations of the Losses and Expenses.

[41] From our perusal of Clause 50.2 of the COC, we find that this sub clause merely requires the Plaintiff to submit *"full particulars of the claims under clause 50.1 together with all supporting documents, vouchers, explanations, calculations, records and receipts for payment made which may be necessary to enable the claims to be ascertained by the Project Director."* It does not require the Plaintiff to furnish complete particulars. We find that the attachments to the Plaintiff's letter dated 17.4.2012 provided sufficient full particulars and supporting documents for their claims to be ascertained. We further find that Clause 50.3 does not apply to this case because it only excludes a claim if the Plaintiff had failed to comply with both Clauses 50.1 and 50.2 of the COC.

[42] On the issue of whether there is a need for the Plaintiff to identify which limb of Clause 49 of the COC that they are relying on, for the extension of time, we are of the considered view that there is no requirement under the said Clause 49 for the Plaintiff to identify which limb of Clause 49.1 applies to their application for extension of time. We find that the said

Clause 49.1 requires the Project Director to, firstly, identify the cause of delay and decide which one of the 10 limbs in the said Clause 49.1 applies before he grants the extension of time. Thus, in granting the extension of time on 26.3.2012, the Project Director must have known which limb he relied upon even though EOT No. 1 did not identify which of the 10 limbs of delay under Clause 49.1 of the COC, was relied upon by the Defendant in granting the said extension of time.

[43] Clause 49.2 of the COC merely states which types of delay will permit the Plaintiff as the Defendant's contractor to claim additional cost and expense. If the EOT is granted under limb (b), (d), (e), (h) or (j) of Clause 49, the Plaintiff is entitled to make a loss and expense claim.

[44] We are of the considered view that the Defendant had no justification, after having granted the EOT No. 1, to insist on the Plaintiff identifying which limb of the said Clause 49.1 applied to their application for EOT. Before granting EOT No. 1, the Project Director would have considered firstly, the cause of delay and secondly, the length of delay. This duty is casted upon the Project Director by the said Clause 49.1 of the COC. Once the Project Director have decided to grant an extension of time to the Plaintiff, the Project Director has have considered and decided which limb of the said Clause 49.1 applied to the Plaintiff's application for EOT No.1.

[45] It is also worth noting that Velavan (DW1) admitted in cross-examination that the determination of which limb the EOT fell under was a matter for the Project Director. At p. 817 of the Notes of Proceedings, this is what DW1 said:-

"BSK: Yes, you have to. Now when it comes to 49.2, that is something for the Project Director or the Officer who is managing the project under IRCON to determine whether

the grounds come within subclause (b), (d), (e), (h), and (i). Isn't that correct?

VELAVAN: Yes .

BSK: Yes. So somebody from IRCON must come and say, your reasons for delay come under ground (b) so you are entitled to a claim. If it comes under the other grounds, we are not entitled to claim. Ok. You agree with that?

VELAVAN: Yes, these clauses."

[46] Having perused the Grounds of Judgment of the learned JC, we are of the considered view that she had misdirected herself and erred in law, by concluding at paragraphs 38 to 43 of her GOJ that the Plaintiff had failed to comply with Clauses 50.1 and 50.2 of the COC when she held *inter alia* as follows:-

46.1 At paragraph 39 of her GOJ, *" that the Plaintiff failed to show that there was written notice as to the cause of delay given by the Plaintiff to the officer named in Appendix 1";*

46.2 At paragraph 40 of her GOJ, "which the Court finds the Plaintiff has also failed to comply with Clause 50.1...";

46.3 At paragraph 40 of her GOJ, " Clause 50.3 of COC clearly provides that *"If the Contractor fails to comply with clause 50.1 and clause 50.2, he shall not be entitled to such claim and the Government shall be discharged from all liability in connection with the claim";*

46.4 At paragraph 41 of her GOJ, *" the Court is satisfied that the Plaintiff has failed to comply with Clause 50.1 and Clause 50.2 of the COC by not submitting its notice of intention to claim within*

60 days of the occurrence/event/circumstance giving rise to the delay and the supporting documents to its purported claim for loss and expense"; and

46.5 At paragraph 43 of her GOJ, *"From the facts and evidence, the Court is of the opinion that the Plaintiff's non-compliance with the conditions precedent, namely Clauses 50.1 and 50.2 of the COC would barred the Plaintiff's entitlement ..."*

[47] It is our respectful view that the learned JC's above findings clearly did not take into account of the contents of the Plaintiff's Notice of Delay was dated 2.3.2012 which clearly stated *"We will be submitting our claim for EOT covering all direct and indirect cost in line with our contract subsequent to this letter".*

[48] Further, we find that the learned JC's finding that clause 50.3 of the COC applies, is erroneous as our respectful view is that the said Clause 50.3 has no application because it excludes claims only when both sub-clauses 50.1 and 50.2 of the COC are not complied with whereas in the present appeal, it was obvious that the said sub-clauses 50.1 and 50.2 had been complied with.

[49] The learned JC was therefore also wrong to state as follows at paragraph 50 of her Grounds of Judgment as follows:-

"On that note, the Court finds that the issue raised by the Plaintiff with regard to the placement of documents in Part A is irrelevant for the Court to make any finding as the Court in dismissing the Plaintiff's EOT claim, relies purely on the failure on the Plaintiff's side to observe the provisions under Clauses 49 and 50 of the COC."

[50] In so far as the learned JC's finding that the Plaintiff did not submit the necessary particulars to enable their claims to be ascertained under the

said Clause 50.2 is concerned, we are of the considered opinion that this is erroneous as the Plaintiff's claim which was submitted under the said letter dated 17.4.2012 together with the relevant particulars and documents for RM7,737,145.52 for the Losses and Expenses, was included in Bundle A of the Agreed Bundles of Documents for trial, as agreed and admitted documents. The placement of these documents in Part A meant that the making, authenticity and contents of these letters and documents were admitted. Thus, the contents of these documents were therefore not open to challenge by the Defendant.

[51] The Defendant attempted to remove these and other documents comprised in 5 volumes of the Common Bundle of Documents which were initially agreed and identified as Part A documents to Part B documents of the Bundles of Documents. This was, however objected to by the Plaintiff, and ultimately rejected by the learned JC. There has been no challenge by the Defendant against the learned JC's ruling in this regard either by way of objection at trial, appeal or cross-appeal. Neither did the Defendant file any formal application to properly remove the documents from Part A. Therefore, they remained as Part A documents.

[52] The learned JC also misdirected herself when she held at paragraph 45 of her Grounds of Judgment as follows:-

"The Court finds that the Plaintiff's claim for the sum of RM7,737,145 .52 or the alternative sum of RM4,852,4 87.00 is not supported with any documents as the documents shown by the Plaintiff, in the Court's opinion are nothing more than just a projected figure which does not reflect the direct cost incurred as provided under Clause 49 of the COC… "

[53] Such a finding contradicts Clause 49.2 of the COC which expressly

utilizes the following words *"Contractor has incurred or is likely to incur direct loss and/or expense"*. These words were repeated by the learned JC at paragraph 49 of her GOJ and still the learned JC held that the Plaintiff's projections were not claimable. This was a serious misdirection and failure to judicially appreciate the evidence adduced because what is likely to be incurred must necessarily involve a projection.

[54] Further, we noted that the Plaintiff's documents supporting their claim of RM7.7 million for the Losses and Expenses were explained by PW1, by reference to another exhibit which was produced and marked as exhibit P1. In fact, DW1, Velavan confirmed in cross-examination that the particulars for the claim of RM7,737,145.52 were sufficient. The following exchange in DW1's cross-examination is pertinent:-

"BSK: From page 902 all the way to page 911. There's some annexures there. 902 to 911. I'm putting it to you Mr Velavan, that by this letter and the annexures, the Plaintiff or PSI has done what is required of them to put their claim for the EOT. For EOT 1 to IRCON. They have done what is necessary. They have settle the grounds and provided the basic Information to IRCON.

VELAVAN: Yes. This is the information but should have been applied according to Clause 49, 50, until 60 days in advance. 90 days in advance."

Conclusion

[55] Premised on the reasons enumerated above, we are of the considered opinion that the learned JC had erred in fact and in law in dismissing the Plaintiff's claim for loss and expense pursuant to the extension of time (EOT) that was granted by the Defendant. We also find that there has

been a clear lack of judicial appreciation of evidence and misdirection by the learned JC in coming to her decision. In the premises, we find that there are merits in the appeal. Therefore, we unanimously allowed the appeal and set aside the judgment and order of the learned HCJ in respect of dismissal of the Plaintiff's claim for loss and expense arising from the EOT (which is the subject matter of this appeal). Judgment is entered for the Appellant in the sum of RM7,736,145.00 together with interest at 4% *per annum* from date of Writ and costs here and below in the sum of RM25,000.00 subject to payment of allocator and the decision of the High Court is varied accordingly.

Dated: 1 MARCH 2022

(LEE HENG CHEONG)
Judge
Court of Appeal, Malaysia

Counsel:

For the appellant – Nahendran Navaratnam, Balvinder Singh Kenth & Gurmesh Kaur

For the respondent - Rodney Gomez & Michelle Lim