IN THE HIGH COURT OF MALAYA
AT SHAH ALAM
[CIVIL SUIT No. 22-1575-2007]

BETWEEN

KC LEONG HOLDINGS SDN BHD ... PLAINTIFF

AND

DATIN MOH BEE LING ... DEFENDANT

GROUNDS OF JUDGMENT

Introduction

[1] This is a typical building contract case on a claim for final payment of completed work to be met with a cross claim for incomplete and defective work done.

[2] The Plaintiff is the main contractor for the construction of 2 luxury bungalows for the Defendant.

[3] The Defendant is the owner of 2 plots of land known as Lot LB69A and bearing postal address 42A and 42B Jalan U1/6, Glenmarie Court, 40150 Shah Alam ('the Land"). The 2 bungalows (collectively "Project" and individually "Unit 42A and Unit 42B") were built on the Land.

The Trial Process

[4] The trial consumed 6 days. The first tranche was heard on 5 to 8 November 2012 before Hinshawati Yunus J and I heard the second tranche on 7 to 8 April 2014. The trial documents were marked as Bundles A to D9 which included the documentary evidence in Bundles B1, B2 , B3 , B4 , B5 and exhibits P1, P2, D3 (A) to (C), D4, D5, D6, D7, D8 and D9. The following witnesses testified at the trial for the respective parties:

i) William Yap Ying Long (PW1), manager of the Plaintiff;
ii) Datin Moh Bee Ling (DW1), the Defendant herself;
iii) Ir Ng Khaim Choo (DW2), a civil engineer who is the Defendant's expert witness on civil and structural engineering;
iv) Sr Tony Thang Boon Eng (DW3), a registered and chartered quantity surveyor from TAQ-Surveyors who is the Defendant's expert witness on construction costs;
v) Lim Yu Meng (DW4), the sole proprietor of Walk and Turn Builders and the Defendant's rectification contractor for general works;
vi) Chew Hun Wei (DW5), the sole proprietor of Citipool Services and the Defendant's rectification contractor for the swimming pool; and
vii) Lim Teck Peng (DW6), the director of Max Stone Grind Sdn Bhd and the Defendant's rectification contractor for granite flooring.

[5] After the close of the trial, the parties submitted their respective written closing arguments in chief and in reply. There were oral clarifications held with counsel on 3 and 18 June 2014.

Background Facts

[6] The Defendant had earlier in 2004 before embarking on this Project engaged the Plaintiff to construct a luxury bungalow situated in the same vicinity as the Project bearing postal address 4 Jalan U1/10A Glenmarie Court , 40150 Shah Alam ("Unit 4").

[7] In mid 2005, the parties by an oral agreement entered into the building contract for the construction of this Project.

[8] The professional consultants that undertook the design and made the necessary building plan submission for the Project were Arkitek Barubena and Jurutera Perunding HAL for the architectural works and the engineering works respectively.

[9] The permission to commence the construction work of the Project was obtained from the Majlis Bandaraya Shah Alam on 31 May 2006.

[10] The Plaintiff completed the construction work of the Project by July 2007 and the Certificates of Completion and Compliance were issued by Ar Goh Kay Cheong of Arkitek Barubena on 15 February 2008.

[11] There was the inspection and handover meeting of the Project held on 7 July 2007 and 6 August 2007 that were attended by both parties and Ir H'ng Ah Lep of Jurutera Perunding HAL.

[12] The Defendant took possession of both Unit 42A and Unit 42B on 7 July 2007 and the Plaintiff did not thereafter undertake any rectification of defective work therein.

[13] The Plaintiff accordingly by letters dated 15 August 2007 submitted its final claim to the Defendant amounting to RM 541,765.70 for Unit 42A and RM 469,001.50 for Unit 42B respectively.

[14] By reason of the Defendant's failure or refusal to pay the Plaintiff as claimed, the Plaintiff through its solicitors K Sugu & Associates sent a letter of demand to the Defendant dated 17 August 2007 to demand for payment.

[15] The Defendant through its solicitors Cheang & Ariff replied on 21 September 2007 denying the claim. The Defendant states that she has paid the Plaintiff RM 3,158,600 and counter demanded RM 297,153.93 from the Plaintiff.

The Plaintiff's Contentions

[16] In gist, the Plaintiff contends that the Defendant is indebted to the Plaintiff for the completed Project.

[17] The pleaded claim of RM 541,765.70 for Unit 42A is made up of:

a)	original and additional work less		RM2,178,645.70
b)	previous payments		RM1,579,280.00
c)	consultancy fee received		RM57,600.00
		Total	RM541,765.70

18. As for Unit 42B, the pleaded claim of RM 469,001.50 is made up of:

a)	original and additional work less		RM2,105,881.50
b)	previous payments		RM1,579,280.00
c)	consultancy fee received		RM57,600.00
		Total	RM469,901.50

The breakdown and details of the claim for the Project are set out in the Plaintiff's letters dated 15 August 2007 computed on the same basis as that in Unit 4.

[19] Moreover the Plaintiff contends that the Plaintiff has been exonerated from liability for the alleged defects by reason that the Plaintiff was prevented by the Defendant from attending to them and the Plaintiff is consequently excused by the Defendant to compensate for those defects. In addition the Plaintiff contends that many of the defects rectified by the Defendant were detected after the defects liability period. In the result, the Plaintiff is not liable for them.

The Defendant's Contentions

[20] On the other hand, the Defendant contends that she was not indebted to the Plaintiff as claimed by reason that the Plaintiff's claims were excessive which included purported additional work that already formed part of the agreed construction costs. The Plaintiff is accordingly entitled only to claim for work done based on *quantum meruit*. Besides, the Defendant incurred the sum of RM 228,940.16 to purchase building materials such as tiles, sanitary fittings, etc. on behalf of the Plaintiff and she was entitled to set off and counterclaim this sum from the Plaintiff.

[21] Furthermore, the Defendant contends that she was entitled to set off and counterclaim her costs of completion of uncompleted work and rectification of massive defective work amounting to RM 1,065,370.92 as well as damages for loss of use as the result of extensive rectification works carried out to both Unit 42A and Unit 42B.

Findings of the Court

[22] The principal issues that require the determination of this Court are as follows:

i) What are the rights and obligations of the parties under the oral building contract?;

ii) Whether the final claim made by the Plaintiff is proper and reasonable in accordance with the building contract?;

iii) Whether the Plaintiff was in breach of the building contract or negligent in the construction of the Project that resulted in extensive defective work?; and

iv) In consequence, whether the Defendant is entitled to cross claim against the Plaintiff for compensation for the rectification costs incurred and loss of use of the Project whilst undergoing rectification?

First issue: The Rights and Obligations under the Building Contract

[23] Generally the price in a building contract is an "all inclusive" price. In other words, the agreed price, whether in a lump sum typed contract or a measure and value typed contract using unit rates, is deem to include all work indispensably necessary or becoming contingently required to bring the construction work to completion. The rationale behind this "all inclusive" price is best explained in paragraph [4.037] of Hudson's Building and Engineering Contracts (11th Ed.): "*Exact definition of the work to be carried out can produce two classes of problem. In the first place, the contract may omit to mention specifically work which will nevertheless inevitably or invariably be necessary in order to carry out the prescribed work properly. In smaller ancillary work processes this factor, given practical documentary limitations, will be present in a greater or lesser degree in virtually every construction contract. But more important items of such indispensable work may also, perhaps but not necessarily inadvertently, be omitted which more general descriptions elsewhere in the documentation may nevertheless indicate must have been included in the contract intention. Secondly, possible but not certain items of expenditure, often connected with temporary*

works or the replacement of damage to the works by external causes or the encountering of site or subsoil difficulties, may or may not turn out to be necessary during the construction period in order to achieve completion of the described permanent work."

This "all inclusive" price principle can nevertheless be displaced or modified by the terms of the contract as agreed to by the parties.

[24] It is common ground that the building contract herein was made by an oral agreement between PW1 and DW1 in mid 2005. There was no written quotation provided by the Plaintiff to the Defendant. As far as the Plaintiff is concerned, the terms of the building contract were understood to be generally on the same footing as the contract between the parties for the construction of Unit 4 that was satisfactorily constructed and completed by the Plaintiff for the Defendant. In this regard, there was an initial written estimated costing done by DW1 for Unit 4 dated 18 March 2004 that was agreed to by the Defendant during their preliminary negotiations. The relevant parts of the construction costing of Unit 4 are as follows:

Architect fee: Consultation, site monitoring, C.F. approval, construction drawings, etc	RM17,000
Engineer Fee: Consultation, structural design, site monitoring, structural drawing, detailing, etc	RM18,000
Site survey fee	RM2,500
Soil testing fee	RM2,000

General Mobilisation		RM 80,000
Building Cost		
a) Ground floor area	4,400 sf	
b) 1st floor area	3,376sf	
c) Water tank area	400 sf	
d) lift shaft top slab		
inc. step to roof space	134 sf	
	8,350 sf X RM135 psf	RM 1,127,250
Platform - Excavation, soil removal add levelling Work approx. 2ft down from pressure level		RM 25,000
Provisional Sums		
a) Electrical		RM55,000
b) Plumbing and works		RM40,000
c) Plastered ceiling include cornices		RM28,000
d) M.S. grille and other steel work		RM65,000
e) N/A window epoxy coated		RM55,000
f) Doors and frames, etc		RM18,000
g) Alarm system included CCTV – monitor		RM15,000
h) Air cond		RM20,000
i) Lift unit		RM60,000
j) Lift shaft construction		RM25,000
k) Perimeter fencing inc. Pier footing and ground beam. Gate not included. Armoured cable under		RM 80,000
l) Landscaping, etc		RM 60,000
m) Renovation to existing house		RM 30,000

[25] Based on this agreed method of construction costing, the construction of Unit 4 was undertaken and the Plaintiff on 1 October 2004 wrote to the Defendant to refine the costing that was still on the same basis as the above initial estimated costing. Upon the completion of the construction of Unit 4, the Plaintiff on 1 March 2005 forwarded its written final account claim as per the initial estimated and refined costing to the Defendant. It is noted that the final account claim also contained items of additional works carried out by the Plaintiff. The Defendant paid the claim without hassle.

[26] According to the Plaintiff, the unit rate for this Project was orally agreed at RM 150 per square foot for all the areas to wit: the ground floor, first floor, water tank and car porch instead of the RM 135 per square foot earlier adopted in Unit 4. It did not include those work separately identified as well as those work categorized under "provisional sums". Furthermore as far as the Plaintiff is concerned, there was no agreed date of completion but the Plaintiff promised to complete the Project "as fast as the Plaintiff could" by reason that the Plaintiff was aware the Defendant would be making alterations as the Project progressed based on the experience encountered in Unit 4.

[27] The Defendant however understood the oral agreement for the costing differently and summarized her recollection as set out in her letter to the Plaintiff dated 7 July 2007. In this respect, the Defendant stated that:

i) The unit rate would be at RM 150 per square foot for the ground floor, RM 135 per square foot for the first floor and RM 135 per square foot for the water tank area.

ii) The construction costs as covered by the unit rate costing were based the Defendant's basic specifications and requirements except for furnishings and decorative installations;

iii) The basic requirements comprised the following:

a) American Standard (or equivalent) sanitary wares and fittings;
b) local ceramic wall (full height) and floor tiles;
c) aluminium windows fold and sliding doors;
d) plaster ceiling;
e) electrical installations comprising air conditioning points, lighting points, gate light points, fan points, TV/Astro points, doorbell point, booster pump point and water heater point;
f) plumbing;
g) solid timber doors with quality locksets;
h) main entrance solid timber door with etched glass side panels based on brochure showed by the Plaintiff;
i) internal wall plaster and pearl glo white;
j) external wall plaster with 5 years guaranteed weather resistant white paint;
k) 2 ½ sink basin for wet kitchen and
l) laundry tub.

In addition, the Defendant stipulated the completion date of the Project on 15 December 2006.

[28] In *Foo Sam Ming v. Archi Environ Partnership* [2004] 1 MLJ 449 which is a suit taken by an architect against the employer for fees over a disputed appointment as architect for the project, Gopal Sri Ram J (as he then was) held: *"Counsel on both sides took us through the evidence*

with meticulous care. I am grateful to them for their efforts. But at the end of the day, the evidence before the judge more than sufficiently supports her findings that it was the appellant who personally appointed the respondent to draw plans for the project in question. ***Counsel for the appellant repeatedly referred us to his client's oral evidence denying the appointment. However, our attention was drawn by counsel for the respondent to contemporary documentary evidence in the appellant's own hand that contradicted his viva voce testimony. The learned judge approached the question of appointment by preferring the contemporaneous documents to the rather tenuous and tardy and unconvincing oral explanations given by the appellant under oath...Was she right in this approach? I think that she was.*** *"* **(emphasis added)**.

[29] The construction costing as alluded to by both the parties in this Project is plainly at variance. I prefer the Plaintiff's version of the oral agreement over that of the Defendant. The documentary evidence of Unit 4 relied upon by the Plaintiff to support its version is contemporaneous in time when the parties were negotiating the contract for this Project. In contrast, the documentary evidence relied upon by the Defendant to support her version is about 2 1/2 years later and after disputes and differences have arisen between them. Hence the Plaintiff's proof is more cogent. The Plaintiff's version that the agreed costing for this Project is on similar basis to that of Unit 4 also makes commercial sense because it explains the absence of any written quotation provided by the Plaintiff to the Defendant which would otherwise normally be expected in this rather sizable project of 2 units of luxury bungalow. Moreover, the Defendant's case even on the pleadings is ambiguous and contradictory: on the one hand stating there was an

oral agreement in paragraph [3] of her Defence and on the other hand stating in paragraph [9] of her Defence that the Plaintiff's entitlement is on *quantum meruit* which connotes the absence of any agreement.

[30] As for the unit rate costing, I also prefer the testimony of the Plaintiff by reason that progressive payments were received from the Defendant as claimed by the Plaintiff without contemporaneous protest or challenge on the unit rate used by the Plaintiff. In fact, the Defendant did not even at that material time queried or demanded for the detail method and breakdown of the Plaintiff's claims. Moreover no contemporaneous protest was made by the Defendant on the written invoices of the Plaintiff dated 28 May 2007 and 18 June 2007 when the Project was nearing completion. The Plaintiff has nevertheless conceded that the unit rate costing for the water tank area was varied and reduced to RM 135 per square foot in its final claim out of goodwill to close the final account.

[31] In the premises, I find and hold that the basis of the construction costing methodology adopted for Unit 4 governs the rights and obligations of the parties. The methodology must be utilized in the final accounting for this Project. In this respect, it is plain that the measure and value by unit rate costing encompasses only part of the construction works whilst the other part categorised as work separately identified and work parked under "provisional sums" are to be paid over and above that encapsulated in the unit rate valuation. The applicable unit rate is at RM 150 per square foot for all the areas constructed save for the water tank area which is at RM 135 per square foot.

[32] Another connected issue on the rights and obligations of the parties pertains to the role of the professional consulting architect and engineer for the Project. Is this building contract a traditional or a design and build contract? In the traditional contract, the employer provides the design (often through professional consultants appointed by the employer) for the works. Conversely, the contractor in the design and build contract provides the design instead of the employer. The entity that is responsible for the design assumes liability for the consequences of any design failure or inadequacy. The philosophy behind design and build contracts is best explained in paragraph [1-027] of Keating on Building Contracts (9th Ed.): *"The traditional procedure outlined above still applied today in a majority of large building or engineering contracts. The principle that the employer, through his agents, provide the design which the contractor carries out is often not consistently applied, and in any event there have always been some contracts where the contractor has, to a greater or lesser degree accepted responsibility for design. In recent times it has become increasingly common for contractors to offer, in addition to building the works, to perform some or all of the duties of architect, engineer or even surveyor, as performed in traditional contracts.* ***The commercial argument for such an approach is either that it is necessary because the contractor alone possesses the specialist knowledge and skill to design and carry out specialist works or, in other cases, that there will be savings of costs or time or both compared with the traditional procedure.*** *Such contracts are sometimes termed "package deal" contracts. Documents proffered for consideration by contractors require scrutiny to see whether they afford reasonable protection for the employer. In particular it should be considered how far, if at all, by express terms they affect the term suitability for purpose which is ordinarily implied. This implied term is*

valuable. If the design turns out to be unsuitable it is no defence to the contractor that he had exercised reasonable skill and care in its preparation. It thus afford greater protection to the employer than he obtains under the traditional procedure where, ordinarily, it is a defence for the architect or engineer to show that he used reasonable skill and care in preparing the design." **(emphasis added)**

[33] Thus, is the oral building contract here a design and build contract? It is seen that the Plaintiff has both in Unit 4 and this Project included in its costing for the fees of the professional consulting architect and engineer. This provision *per se* does not in my view conclusively makes it a design and build contract. I find that the Plaintiff is merely a small general contractor. It does not have patented nor specialist expertise or skill in any particular form of construction work. In fact, the Plaintiff sub contracted out most of the construction work in the Project to trade sub contractors. There is also no evidence seen in the saving of cost or time in the Project due any special management expertise of the Plaintiff.

[34] The Plaintiff merely approached Jurutera Perunding HAL to provide both the architectural and engineering design services for the Project. The written quotations provided by Jurutera Perunding HAL dated 24 May 2005 was in fact not accepted by the Plaintiff. Nevertheless it is seen that Jurutera Perunding HAL and Akitek Barubena (as the sub consultant appointed by Jurutera Perunding HAL) acted as the professional consultants and submitting persons under the Street Drainage and Building Act 1974 and Uniform Building By-Laws 1984 for the Project. From the correspondences with the Local Authority, they were dealing directly with the Defendant and her husband. The payment

of fees to Jurutera Perunding HAL was also paid partly directly and partly through the Plaintiff by the Defendant.

[35] I also observed that the Plaintiff did not enjoy any profit margin mark up on the fees of Jurutera Perunding HAL in its costing to the Defendant. In other words, the Plaintiff allowed for the fees at cost which is not in the ordinary particularly if the contractor is to assume responsibility for the performance of its designer in a design and build arrangement.

[36] In the circumstances, I find and hold that the building contract for this Project is not a design and build contract by reason that the commercial considerations as above outlined in Keating are unmet. Besides, the operational relationship amongst the parties did not appear to be consistent with such an arrangement as well. It is my view that the Plaintiff dealt with Jurutera Perunding HAL as agent of the Defendant for purposes of convenience only. As far as the legal status is concerned, this is very much a traditional building contract where Jurutera Perunding HAL acted as the professional consultant appointed by the Defendant for the design of the works.

Second issue: The Final Claim of the Plaintiff

[37] The Plaintiffs final claim for the Project is that as submitted to the Defendant by both its letters dated 15 August 2007 for Unit 42A and Unit 42B respectively. The Defendant has vehemently disputed the claim as unreasonable, excessive and not in accordance with the oral building contract. To prove her point, the Defendant appointed a registered quantity surveyor DW3 of TAQ-Surveyors to undertake an independent

assessment and valuation of the construction costing of the Project. The results are contained in TAQ-Surveyors report dated 5 August 2011.

38. The final claim of the Plaintiff just as that computed for Unit 4 can be summarized as comprising of 4 distinct heads of claim for each unit of the Project, to wit:

Unit 42A

i)	Professional consultant fees	RM64,000
ii)	Building works based on unit rate	RM1,261,961.70
iii)	Other separately identified works and Provisional Sum works	RM460,856
iv)	Additional works	RM391,828
	Total	RM2,178,645.70

Unit 42B

i)	Professional consultant fee	RM64,000
ii)	Building works based on unit rate	RM1,200,358.50
iii)	Other separately identified works and Provisional sum works	RM461,325
iv)	Additional works	RM 380,198
	Total	RM 2,105,881.50

[39] The claim of the Plaintiff in this suit as summarized in paragraph 17 above is the balance amount of its final claim minus the previous payments received from the Defendant including fees received on behalf of the professional consultant.

[40] Upon scrutiny of TAQ-Surveyor's report, I find that the assessment of the construction cost therein was undertaken based wholly on the unit rate per square foot on the gross floor area with adjustments made for variation work as recognised by the Defendant. In other words, it is a measure and value costing subject to the "all inclusive" price principle. DW3 did not consider the fact that the Plaintiff and the Defendant had previous dealings and the method of final accounting then was dissimilar based on the billing methodology done by the Plaintiff. Furthermore there were several items of work not assessed by DW3 because of incomplete information made available to him. Save for the variation work adjustment as dealt hereinafter in paragraph [42], I therefore find that the assessment is not fully comprehensive and more importantly is inconsistent with the orally agreed construction costing between the parties on the basis as per Unit 4. In the premises, I hold that the final accounting for the Project ought to follow that as claimed by the Plaintiff in its first three heads of claim.

[41] As to the fourth head of claim for additional works, it is incumbent upon the Plaintiff to prove, just like in any typical variation claim in a building contract, that there was in fact such additional work done as ordered by the Defendant. In this respect, it would be necessary for the Plaintiff to demonstrate that such work was undertaken as seen from the differences between the approved building plans and the as built building plans or photographs or other cogent documentation. In addition the Plaintiff has to establish either by documentary record (such as a letter from the Defendant or an architect or engineer's instruction, otherwise a letter or site memorandum from the Plaintiff of confirmation of instruction received) or otherwise cogent oral testimony that the Defendant requested the additional work. If that is proven, the Plaintiff

has to further establish that the price of the additional work is fair if not agreed upon. The fair price should reflect prevailing market price or the Plaintiff's cost incurred with a reasonable profit margin. The Plaintiff ought also to have submitted its additional work claim complete with particulars and substantiation on completion of the additional works as done in *Lion Pacific Sdn Bhd v. Mahkota Technologies Sdn Bhd* [2012] 1 LNS 1256 and ideally in the form of a Scott schedule. In this regard, I find and hold that the Plaintiff has not produced sufficient evidence before the court to prove its entitlement to additional works as claimed for Unit 42A and Unit 42B. The Plaintiff was only able to testify that the Defendant's instructions were verbal without any particularisation and substantiation.

[42] Be that as it may, I note that the DW3 has professionally assessed the variation works in the Project that were admitted by the Defendant. There were 28 and 22 items of variation work in Unit 42A and Unit 42B amounting to a nett addition of RM 49,109.55 and RM 23,283.78 respectively. The variation work included modified works such as floor and wall finishes, windows, etc. as well as additional works such as sliding metal main gate, refuse chamber, external walkway, etc. I therefore find that the assessment by DW3 constituted the fair valuation of the modified and additional works in the Project and this valuation ought to be included in substitution of the Plaintiff's claim in the final accounting of the Project

43. Accordingly I find and hold that the final accounting of the Project is as follows:

Unit 42A

i)	Professional consultant fees	RM64,000
ii)	Building works based on unit rate	RM1,261,961.70
iii)	Other separately identified works and Provisional Sum works	RM460,856
iv)	Additional works	RM49,109.55
	Total	RM1,835,927.25

Unit 42B

i)	Professional consultant fee	RM64,000
ii)	Building works based on unit rate	RM1,200,358.50
iii)	Other separately identified works and Provisional sum works	RM461,325
iv)	Additional works	RM 23,283.78
	Total	RM 1,748,967.28

Third Issue: Defective work

[44] The Defendant alleged that the constructed bungalows were not fit for its purpose of occupation by reason that there were multiple, gross and latent defects and therefore accuses the Plaintiff for having negligently constructed them. In this regard, counsel for the Defendant in the closing submission relies on the court of appeal case of *Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon* [2003] 1 CLJ 585 to justify the existence of the duty of care on the part of the Plaintiff. This court of appeal case is on the collapse of the Highland Towers where the affected residents sued various parties in negligence. Hence

the facts in that case do not concern the relationship between contractor and employer. The facts in that case are distinguishable here and I am doubtful if the duty in the tort of negligence should justly and reasonably be imposed in this case. This is because the damage suffered by the Defendant is in the nature of pure economic loss where the building is allegedly built defectively but caused no damage other than to the building itself as seen in *D & F Estates Ltd v. Church Commissioners for England* [1989] A.C.177. Besides it is also unclear whether this duty of care should arise when there is already a concurrent contractual duty on the part of a builder/contractor by implication that the work must be done to a good and workmanlike manner as held since *Duncan v. Blundell* (1820) 3 Stark (N.P.) 6. In the circumstances, I find and hold that the Plaintiff did not owe the Defendant the tortious duty of care in the circumstances as claimed here by her. For completeness, it is also seen in the Defendant's closing submission that her damages claim is made pursuant to s. 74 of the Contracts Act 1950 suggesting that it is premised on breach of contract instead.

[45] In any case, whether for breach of contract or in negligence, it is trite law that the Defendant must prove that the alleged defects were caused by the Plaintiff as a matter of fact. The classic maxim that she who asserts must prove her assertion applies here as codified in s 101 of Evidence Act 1950. The causation of a defect can however be due to design, quality of material used, workmanship, lack of maintenance, wear and tear or a combination of them. The Defendant must therefore produce cogent evidence that the cause of the defect as alleged is plainly attributable to the Plaintiff. In this regard, the Defendant obviously cannot blame the Plaintiff if the defect is due to lack of proper and regular maintenance. Likewise the Plaintiff would be exonerated if the

defect is due to design fault since this is not a design and build contract as earlier found.

[46] The Defendant alleged that the Plaintiff has refused or neglected to rectify the defects that subsisted and brought to the attention of the Plaintiff on completion of the Project. There was a site handover meeting held for both Unit 42A and Unit 42B on 7 July 2007 amongst PW1, DW1, Ir H'ng Ah Lep of Jurutera Perunding HAL and a Ken Woo who was another contractor brought in by the Defendant. There were subsequently two further meetings held on 16 July 2007 and 6 August 2007, the former in the absence of PW1 because he was ill. I accept the Plaintiff's testimony that no defects were brought to the attention of the Plaintiff at the meeting on 7 July 2007. The defects were only recorded at the meeting held on 16 July 2007 but the Plaintiff was yet to be notified of those defects. At the 6 August 2007 meeting when the list of patent defects was allegedly handed to the Plaintiff, most of the rectification work had already commenced and duly completed. There were cross contentions as to whether the Plaintiff refused to rectify the alleged subsisting patent defects or that the Defendant denied the Plaintiff the opportunity to rectify them. Nonetheless, it is pertinent to note that the Defendant had on 6 August 2007 assured the Plaintiff that the Plaintiff would be relieved and not be held responsible for the rectification of the defects discovered nor charged for their rectification. This is clearly borne out at the trial during the cross examination of DW1:

"PS : So I put it to you Datin, agree or disagree that on the 6th of August 2007 onwards you had already informed the Plaintiff that he no longer is required to come in and to do any form of remedial or rectification works and

you were not going to charge him for any defects repair costs that was currently being undertaken. Am I correct?

Datin: For the defects that we discovered up to the 6th August. For those defects.

PS: Ok. So you are basically telling him up to the 6th August whatever we discovered we don't have to remedy it. We don't have to pay for it? Correct?

Datin: I showed him the photographs (120). ***Yes****."*

In the circumstances, I find and hold that the Defendant cannot approbate and reprobate. The Plaintiff was released from the liability, if any, for patent defects that were discovered on around July-August 2007 and the Defendant must accordingly be estopped from now resiling and re-pursue her claim of rectification for those defects against the Plaintiff.

[47] The other defects raised by the Defendant are allegedly latent defects that were discovered later and long after the Certificates of Completion and Compliance of the Project were issued. The Plaintiff denied liability to rectify these latent defects by reason that they were discovered and notified to the Plaintiff after the expiry of the defects liability period as seen in the court of appeal case of *Toh Ang Poo v. Jasin Construction Development (M) Sdn Bhd* [2013] 1 LNS 874. The facts of that case are however distinguishable from the facts herein. There was a defects liability period provision in that contract. There is no evidence led on such a provision agreed between the parties here. Only DW2 opined that it was understood as 12 months from completion. It is not trite law that a defects liability period provision is ordinarily implied into a building contract. In my view, this defects liability provision will not be brought in by implication based on the principles gorverning implied

terms as set out by the federal court in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 MLJ 151 particularly in satisfying the business efficacy test. The provision on defects liability period with detail procedures on rectification is therefore often inserted as an express term of a building contract, such as clause 15 of the PAM Conditions of Building Contract 2006 Edition.

[48] In any case, I am of the view that the case of *Toh Ang Poo supra* did not go as far to establish as a matter of general principle that the builder/contractor's culpability for defects ceases upon the expiry of the defect liability period. This is again explained in paragraph [5.053] of Hudson's Building and Engineering Contracts (11th edn.) that: *"It is always a question of construction whether the rights under the maintenance clause are intended to supplant the right to damages at common law altogether.* ***In the absence of express provision, the remedies under these clauses are in addition to and not in substitution for the common law rights****, and even where the defects have appeared within the period the owner may sue for damages rather than call on the contractor to do the work, subject , in that event , to the possibility that the owner's damages being limited, if he had acted unreasonably in the light of the discussion in the preceding paragraphs, to the cost to the contractor of doing the work at that time rather than the possibly greater cost of bringing in another contractor either then or at a later date..."* **(emphasis added)**.

[49] In the premises the Plaintiff would be liable to the Defendant in damages within the limitation period as prescribed by the Limitation Act 1953 for defects that were caused by the Plaintiff in breach of contract due to work carried out not to a good and workmanlike manner.

[50] On this premise, I proceed to examine each of the latent defects claimed by the Defendant. I have noted that the design and supervising professional consultants of the Project Ir H'ng Ah Lep of Jurutera Perunding HAL and Ar Goh Kay Cheong of Arkitek Barubena were not called by the Defendant to testify on the alleged defects. The Defendant instead relied on DW2 (a civil and structural engineer recommended to her by a body known as Architect Centre) who made a civil and structural audit report as well as the site observations of her rectification contractors DW4, DW5 and DW6.

[51] The first alleged latent defect as detailed in the closing submission of the Defendant pertains to the collapsed ceiling of Unit 42B. The Defendant alleged that the ceiling board collapsed on or around late 2009 and accordingly damaged the timber staircase and granite flooring beneath. According to DW4, the collapse was due to the absence of a floor trap installed at the water tank room and no waterproofing was done at that area. The Defendant did not clearly establish whether the omission of the floor trap and water proofing was a design or constructional omission or even a maintenance problem due to leakage from the water tanks. DW2 noted that the architectural drawings did not provide for water drainage in the water tank room. This is suggestive of design omission. Since I have held that the Plaintiff has not assumed design responsibility for this Project, the Defendant has not proved that the collapsed ceiling was caused by the Plaintiff.

[52] The next alleged latent defect in the closing submission concerns water leakage from the swimming pool for both Unit 42A and Unit 42B. In consequence there were water stains to the floor finishes of the

houses as well as soil settlement beneath the areas adjacent to the pool. The first complaint is that the water from the swimming pool spilled into the houses in the absence of proper channels. Secondly the balancing tank was constructed in brickwork rather than reinforced concrete that caused seepage of water. Thirdly, the buried swimming pool pipes were of inferior quality and could not therefore withstand the serviceable water pressure. The final complaint is the non provision of grating and foot valve for Unit 42B.

The Defendant primarily relied on the testimony of DW5 the swimming pool rectification contractor. DW5 is not a swimming pool design specialist. Thus the root causes of the alleged problems are in my view bore and speculative opinions of DW5. There was no in-situ testing done. Be that as it may, it is unclear whether the first and fourth complaint of the non provision of the channels, gratings and foot valve is a design or constructional omission. The nature of the complaint on the balancing tank wall problem is plainly a design choice. As to the pipe quality complaint, it could be a design or constructional fault or both. In the circumstances, I find and hold that the Defendant has not sufficiently proved that the alleged defects in the swimming pool were caused by the Plaintiff particularly since the Plaintiff did not assume design responsibility.

[53] The Defendant's third alleged defect as submitted is that the granite flooring was not properly or evenly laid. It is common ground that the granite tiles were supplied by the Defendant herself. The Defendant merely relied on the testimony of DW6. The testimony of DW6 is however ambivalent in that he agreed that the unevenness could be caused by low quality warped tiles as well as poor workmanship. In the

premises and the absence of the testimony of the supervising architect (or even, preservation of samples of the real evidence for inspection by the court), I find and hold that the Defendant has not adequately proved that the alleged uneven flooring has been caused by the Plaintiff.

[54] The Defendant fourthly submits that the Plaintiff installed unapproved upvc instead of vitrified clay sewerage pipes that resulted in breakage and subsequent leakage of waste water and sewage. Nevertheless it is seen from DW2's audit report that the laid upvc pipes were one of the alleged faults that was discovered by the Defendant during the handover inspections in August 2007. It is hence a fault that the Plaintiff had been exonerated as discussed in paragraph [46] above. In addition, the Defendant has not called the supervising consulting engineer to testify as to whether he had approved the Plaintiff's usage of the upcv pipes that were better suited for backfilled land as testified by PW1. I thus find and hold that the Defendant in the premises could not hold the Plaintiff responsible for the allegedly non compliant sewerage pipes.

[55] The fifth complaint of the Defendant as submitted relates to the roof gutter that was allegedly not installed to the proper gradient as well as that the downpipe openings were not closed properly with silicone that resulted in rainwater leakage. The Defendant in this respect merely relied on the opinion of DW4 that they were caused by bad workmanship. I observed that DW4 only discovered the problem in 2010 with no photographic evidence to substantiate his findings. The Defendant did not call the supervising consulting architect to testify on the problem. As the architect of the Project, he is most suited to explain what happened as the work must be carried out to his satisfaction.

Besides, the problem could likely have been attributed to lack of maintenance as well. In the circumstances, I find and hold that the Defendant has not adequately proved that this gutter problem has been caused by the Plaintiff.

[56] Sixthly the Defendant complained on various general defects such as painting of the gates and boundary wall, installation of electrical items at roof and gutter area and replacement of cracked wall tiles that were discovered by DW4 in 2009-2010 who then rectified them. The Defendant has however not produced photographic evidence of the defects as alleged. The photographs tendered in court were only those showing rectification being undertaken. These photographs on rectification are in my view unhelpful to ascertain the cause of the problems as they could be due to design fault, poor workmanship, wear and tear or lack of maintenance. Consequently, I find and hold that the Defendant has again not sufficiently proved that the problems were caused by the Plaintiff.

[57] The seventh defect pointed out by the Defendant in the closing submission is on the retaining wall. In this regard, the Defendant relied on the opinion of DW2 in his audit report. According to DW2, the 5 meter high retaining wall was constructed with small and irregularly placed weep holes to discharge water. The weep holes did not discharge water probably by reason of blockage. He speculated merely by visual observations made in 2011 that the retaining wall may collapse without adequate sub soil drainage to relieve the earth water pressure behind the wall. DW2 however admitted that there were no cracks seen on the retaining wall. The design and supervising consulting engineer was not available in court to explain the situation especially whether the provision of

the weep holes by the Plaintiff was done in accordance with his design and direction. DW2 also conceded that there is no general design standard on providing weep holes. Thus it is an engineering judgment of the designer but DW2 did not undertake any engineering calculation to substantiate his opinion. In the premises, I find and hold that the Defendant has not adequately proved that the weep holes were lacking or at all defective. The blocked weep holes could have been due to lack of maintenance too.

[58] The Defendant eightly in reliance on DW2's audit report complained that the foundations were defective/inadequate without pile foundation particularly since the soil beneath the pad footings was not properly compacted and thus settled leaving voids. The proper identification and analysis of the root cause of the problem here requires detail investigation. It is seen just as for the weep holes in the retaining wall that DW2's opinion and conclusion were made merely by visual observation without in-situ testing and engineering calculation. The court does not also have the benefit of the views of the design consulting engineer. In fact it is seen there are inconsistent views on the cause of the soil settlement, to wit: DW2 blaming it on inadequate soil compaction whereas DW5 attributing it to water leakage from the swimming pool. Nevertheless DW2 admitted at the trial that both Unit 42A and Unit 42B are structurally safe. I therefore find and hold that the Defendant has not in the circumstances satisfactorily proved that the Plaintiff caused the problem particularly as the non provision of pile foundation has more to do with the design solution of the foundations.

[59] The ninth defect as submitted is that the boundary drains were not constructed as open drains in accordance with the approved drawings.

This is again based on the testimony of DW2. In the absence of the testimony of the consulting architect and engineer of the Project, I am unable to find that the Plaintiff is to be blamed here too because the drainage design might have been varied by them since the Certificates of Completion and Compliance have been issued for the Project. Moreover, the problem is not a latent defect as it was plainly discoverable, if not discovered during the handover inspection in July/ August 2007. Accordingly the Plaintiff would have been exonerated as discussed in paragraph [46] above.

[60] The tenth problem raised by the Defendant pertains to the water tank and the tank room where the water tanks were housed. It is in gist alleged that there were 5 instead of 3 stainless steel water tanks installed and the structural design of the flooring of the water tank room might not have been adequate to sustain the water tank loadings. The Defendant relied on DW2's audit report and the opinion of DW4. There was no explanation sought by the Defendant from the consulting engineer. As a matter of common sense, the increased number of water tanks must have been instructed by the Defendant because no contractor would have voluntarily at its costs simply provided additional tanks. The structural inadequacy of the flooring has not been proved by DW2 with structural calculations. There is also no evidence of structural distress such as cracking if indeed the floor had been overloaded. Consequently I find and hold that the Defendant has merely advanced her allegations based on speculation without adequate proof that the problem was attributed to the Plaintiff. The sufficiency of the design and discrepancy between drawings relating to the water tanks should be raised by the Defendant with her own professional consultants.

[61] Finally the Defendant also submitted on the problem of lack of direct access to the water tank room from the first floor in Unit 42B as brought up by DW2 and DW4. This is clearly a design matter and since I have held that the contract between the parties is not a design and build contract, the Plaintiff is not responsible for this alleged problem.

62. In summary, I have found and held that the Defendant has not sufficiently proved that all her allegations of latent defects were in fact and law the responsibility of the Plaintiff. There was grave dispute over the final accounting of the Project between the Defendant and the Plaintiff. Consequently, the Defendant has in my view gone ahead to rectify all purported defects encountered in the Project as superficially advised to her by DW2 and DW4 to DW6 without proper analysis and allocation of blameworthiness and thereafter simply backcharged the costs incurred onto the Plaintiff.

Fourth Issue: The cross claims of the Defendant

[63] The Defendant's cross clam is massive comprising of essentially 3 heads of claim. Firstly there is special damages amounting to RM 1,065,370.92 for remedying and rectifying multiple, gross and latent defects as submitted. In this respect, the Defendant has in substantiation produced the invoices of her rectification contractors such as Walk & Turn Builders, Shin Tat Construction Trading Sdn Bhd, DJ Deconway Furniture, Itex Power Enterprises, Kim Soon Electrical Engineering, etc. that accumulated to that amount. There is no serious dispute that the Defendant has paid against these invoices.

[64] On scrutiny of the invoices, I find that the items therein comprise of purported remedial work beyond those dealt under the Third Issue herein. In other words, there is a lot of other unexplained work. The Defendant has merely collated all her payments made to the rectification contractors and held them entirely to the account of the Plaintiff. This is plainly unsatisfactory and does not meet the requirement of proof of damages as held by the court of appeal in *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 2 AMR 229. In building contract litigation, I have expected the complainant to carefully sieve through and tabulate each and every relevant defect and the costs of remedying them systematically preferably also in a Scott schedule. The tabulation must cross refer to the defect as substantiated preferably by photographic records or other cogent mode of proof together with the corresponding item of expenses or costs incurred to remedy the defect as substantiated by the work invoices. The complainant must in honesty disregard those works that constituted improvement or addition/modification rather than rectification. In short, the complainant cannot "throw the whole kitchen sink" of alleged unprocessed defects and expenses to the court to have them sorted out as presented by the Defendant here.

[65] Moreover, it is incumbent on the Defendant to satisfy the court that she has mitigated her damages, see *Kebatasan Timber Extraction Co v. Chong Fah Shing* [1969] 2 MLJ 6. The Defendant is thus obliged to show that she had acted reasonably in the appointment of the rectification contractors by calling tenders or alternative quotations, otherwise to satisfactorily explain why such steps were not carried out. The Defendant has not led any evidence on this aspect.

[66] I have found under the Third Issue that the Plaintiff is not liable for the defects as specifically alleged by the Defendant; hence the Defendant is not entitled to claim for them. Besides and for reasons as explained above, I further find and hold that the Defendant has not cogently proved the special damages of rectification costs so incurred to rectify the alleged defects. In the premises the Defendant's claim of RM 1,065,370.92 is rejected.

[67] The second head of claim of the Defendant is for the loss of use of both Unit 42A and Unit 42B for the period between 7 July 2007 to 30 June 2010 amounting to RM 1,316,000.00 computed at 47 months x RM 14,000 per unit x 2 units for prolonged inability to rent out the bungalows. The justification of the Defendant appears to be that the bungalows were infested with defects that required prolonged rectification. Though loss of use is claimable in principle pursuant to s 74 of the Contracts Act 1950, Illustration (l), I find and hold that the Defendant is also not entitled to this claim by reason that the alleged defects were not proved to be caused by the Plaintiff as found by this court. Furthermore, the claim is in my view excessive in quantum particularly for the period claimed, for example; the Defendant did not explain why it took her so long before appointing the rectification contractors. Hence this claim of RM 1,316,000.00 is also rejected.

[68] The Defendant finally also claimed the sum of RM 228,940.16 for material and finishing such as granite tiles and sanitary fittings purchased by her on behalf of the Plaintiff that should be recovered from the final accounting. The Plaintiff has conceded at trial to bear the costs of the sanitary fittings only amounting to RM 98,352.00.As for the purchase of granite tiles amounting to RM 113,838.16, it is for the varied

floor finishes work ordered by the Defendant as assessed by DW3. Since it was not part of the original unit rate costing, it cannot in principle be recovered from the Plaintiff. The alleged payment of RM 16,750.00 for uncompleted work has not been satisfactorily explained by the Defendant and is thus rejected.

[69] In recapitulation, the Defendant's cross claim that should be set off from the final accounting is for the amount of RM 98,352.00 only for the supply of sanitary fittings.

Conclusion

[70] This is a classic case that is common in bungalow construction where the relationship between the contracting parties have seriously gone sour over the final value of work done and the work quality achieved that ultimately required formal dispute resolution. The dispute should have been mediated where compromises may be made. It was regrettably not pursued.

[71] Accordingly and based on the above findings of the court, the amount payable under final accounting as per paragraph [43] above is RM 1,835,927.25 and RM 1,748,967.28 for Unit 42A and Unit 42B respectively totalling to RM 3,584,894.53. The previous payments made by the Defendant to the Plaintiff totalled to RM 3,158,560.00 for both Unit 42A and Unit 42B as admitted by the Defendant. If the further set off of RM 98,352.00 as per paragraph [69] above is accounted, the final payment due and payable to the Plaintiff for the Project is hence RM 327,982.53.

[72] In the premises, I order that judgment be hereby entered in the sum of RM 327,982.53 for the Plaintiff in respect of its claim. The counterclaim of the Defendant is dismissed.

[73] Based on s 11 of the Civil law Act 1956 and Rules of Court 2012, I further order that the Defendant pays the Plaintiff interest at 5% per annum on the judgment sum of RM 327,982.53 from 5 September 2007 until full realization.

[74] I also order costs of RM 50,000.00 be paid by the Defendant to the Plaintiff.

DATED: 30 JUNE 2014

(LIM CHONG FONG)
JUDICIAL COMMISSIONER
HIGH COURT OF MALAYA

For the Plaintiff - Vasanthi Sathasivam; Sugu & Associates

For the Defendant - Felix Dorairaj (Dolorish Sarim with him); Dorairaj, Low & Teh