IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE STATE OF FEDERAL TERRITORY MALAYSIA
(CIVIL DIVISION)
[CIVIL SUIT NO: S-22NCVC-1029-10/2011]

BETWEEN

MESINIAGA BERHAD ... PLAINTIFF

AND

TECHNOLOGY INNOVATION RESOURCES SDN BHD ... DEFENDANT

GROUNDS OF JUDGMENT

The Plaintiff's claim against the Defendant is for RM 399,000.00 and late payment interest of 2 % on the outstanding sum being the subscription fees for the fourth quarter of Year 3 (July - September 2010) of the Agreement for Business Continuity and Resiliency Services entered between the Plaintiff and the Defendant.

Background:

The Plaintiff and the Defendant entered into an Agreement dated 30.10.2007 for Business Continuity & Resiliency Services (hereinafter referred to as "the Agreement").

The Plaintiff has a separate agreement with IBM (the service provider under the contract) which contained the same terms and conditions including the same scope of works for all the parties involved.

The financial obligations of the Defendant is provided under clauses 7 which reads as follows:

"Clause 7.0:

(a) The fees/charges to provide the services in this Agreement are specified in Appendix A.3 that is quarterly payment UP FRONT for the duration of the contract.

(f) Subscription fees will be invoiced on a quarterly basis, the first invoice being due on the first day of the contract period."

"Clause 7.1:

(a) For the services to be provided under this agreement, the Customer will pay to the Plaintiff the subscription fee as specified in Appendix A.3 (page 13 of Bundle B)"

The contract period is for 36 months which commenced from 29.10.2007 and expired on 28.10.2010.

There shall be 12 quarter payments for the whole contract period and the invoice issued by the plaintiff is for each quarter payment.

It is not disputed that the Plaintiff did not issue invoices for the exact quarter according to the Agreement . It was issued out according to the confirmation from IBM that Murphy Oil has made payments to the defendant.

The Plaintiff submits that there was therefore a variation to the invoicing payment terms of the Agreement but nonetheless it had been mutually consented to by parties through their respective conduct in issuing invoices and making payments for the invoices.

In any event, the Plaintiff was of the view that it does not change the Defendant's liability to pay for all the twelve quarters of the subscription fees for the whole contract period.

The Defendant only paid for the 11 quarters of the subscription fees. The reason why the Defendant did not pay for the 12th quarter is because the Plaintiff has terminated the Agreement at the end of the 11th quarter and therefore the Plaintiff is not entitled for the 12th quarter of the subscription fees.

In any event the Plaintiff had issued the invoice for the 12th quarter (which is the final quarter) of the contract period. (Refer to page 38 of Bundle B).

The Defendant admitted receiving the Plaintiff's invoice for the 12th quarter and the reminder for the same (refer to page 38 of Bundle B).

The Plaintiff called 2 witnesses ie,:

i) Yeow Daw Swee, Director of the Plaintiff (PW 1);

ii) Aslina binti Awang, Team leader of receivables Coordinators of the Plaintiff (PW 2).

The Defendant called 2 witnesses ie,:

i) Zairul Hisham bin Ab Manan, the CEO of the Defendant (DW 1);

ii) Muhamad Hisham Abdul Razak, Account Officer of the Defendant (PW 2);

The Courts Findings:

When is the commencement date for the services provided.

The dispute between the Plaintiff and the Defendant is as to the commencement date of the Agreement.

According to the Plaintiff the commencement date of the Agreement is 27.10.2007 and period ends on 30.9.2010, while the Defendant submits that the commencement date is 1.12.2007 and period ends on 30.11.2010.

In the event the calculation of the Defendant is correct, then the Plaintiff's claim is clearly unsustainable.

My view on this is that, firstly, the Defendant did not plead this in their Amended Statement of Defence. It is trite law that parties are bound by their pleadings. Therefore the Defendant should be precluded from raising this as an issue.

Secondly, presuming for a moment that it was pleaded in the Statement of Defence, it was in evidence via testimony of DW 1 in cross examination that there had never been any changes, rectification or modification in the commencement date as stated in the Agreement that was entered between the Plaintiff and the Defendant. If there is to be any changes or modification to the date of service, the Defendant must show and prove that the

change/modification has been consented to by the Plaintiff and that both parties have intended to be bound by it. This, the Defendant failed to do. I find support in the Supreme Court case of *Murugesu a/l Ponnusamy sebagai wakil Nalamah a/p Sangapillay (Plaintiff) (simati) v. Cheok Toh Gong & 4 Ors* [1996] 2 CLJ 397 where Peh Swee Chin FCJ held as follows:

> "It is important to remember that when it is sought to prove a variation, not by an express agreement, by a course of conduct, that both parties have understood the variation and intended to be bound by it."

The Supreme Court further referred to the case of *Coronation Electronic Ltd v. Lalchand Mahtani* [1987] 1 MLJ 190 at page 197 which states that:

> "It is to be borne in mind also that mere knowledge of a variation is not consent of a variation"

The Defendant attempted to prove and submits that IBM only started to provide its service on 1.12.2007 hence it is illogical for the Plaintiff to provide service to the Defendant earlier than 1.12.2007. However this line of submission by the Defendant is irrelevant because the terms as stated in the Agreement that was entered between the Plaintiff and the Defendant had stated the date when the

commencement starts and when it ends. It is agreed by the Plaintiff and the Defendant that under the Agreement, the Plaintiff is not obliged to give any services; the Plaintiff's obligation under the Agreement is only as an intermediary, or in the Defendant's own words as "middleman" and the Plaintiff is to be paid for playing that role.

Thirdly, what is stated in the IBM Agreement with the Plaintiff is irrelevant to the Defendant. This is not a tripartite agreement as submitted by the Defendant. (Refer to page 29 of Bundle zb which shows that the Agreement was signed by the Plaintiff and the Defendant only).

Thus the Defendant's argument that the Plaintiff had breached the Agreement by contracting to commence service with the Defendant prior to the signing of the Agreement with IBM is misconceived. In any event this was never raised as an issue by the Defendant before the filing of the suit herein.

Fourthly, looking at the letter by the plaintiff addressed to IBM dated 31.8.2010 at page 28 of Bundle C where the Plaintiff states that:

"...the above agreement shall accurately **end on 30.11.2011**"

Here, by this letter it shows that the IBM Agreement only ended on 30.11.2011, which was well beyond the expiry period of the Agreement (which was 28.10.2010) between the Plaintiff and the Defendant. hence clearly, this demonstrates the implausibility of the Defendant's line of arguments on the commencement date of the Plaintiff's contractual obligations in the Agreement.

Therefore, from the abovementioned, the commencement date of the Agreement which was entered between the Plaintiff and the Defendant is as stated in the Agreement ie, 29.10.2007 and there has been no evidence of any variation.

Inconsistencies between Invoice No. 90058313 at page 9 and 10 of Bundle D.

Again, this was never raised by the Defendant in its Amended Statement of Defence.

Be that as it may, for completeness, I shall address this issue in any event.

The Agreement provides that the Plaintiff is to issue invoice quarterly for upfront payment immediately after the commencement date. However in practical reality what happened was that, the Plaintiff had only issued invoices upon confirmation from IBM that the Defendant

had been paid by Murphy Oil. This was testified by PW 2 at trial which was never challenged by the Defendant. This practice have been mutually consented to by both parties through their respective conducts in issuing invoices and making payments for the invoices.

Through the evidence of DW 1 and DW 2 who admitted during cross examination that the Defendant had paid only for the 11 quarters of the subscription fees to the Plaintiff. Since the date of commencement of the Agreement was stated to be 29.10.2007, clearly the Defendant has not paid for the 12th quarter.

Perusing at the chronicles of the invoices one can draw inferences as to which of the two invoices is the correct invoice for the 3rd quarter year 3, either invoice at page 9 of Bundle D or the invoice at page 10 of the same Bundle.

It was agreed by DW 2 that the Defendant had paid for the second quarter subscription fees after receiving the invoice No. 90058233 at page 8 of Bundle D. The invoice at page 8 of Bundle D contained the mark "POSTED" and it stated that the quarter period is for Jan 2010-March 2010. This invoice was paid by the Defendant. This was testified by the evidence of DW 1 and DW 2 who said that this was paid with the payment voucher at page 7 of Bundle D.

From the evidence, the Defendant had admitted that it had paid the invoice for Jan - March 2010 without any objection, then naturally the subsequent invoice for the 3rd quarter is for the period of April 2010 - June 2010 and not June 2010 - August 2010.

Therefore, the correct invoice for the 3rd quarter billing after DW 1 and DW 2 agreed to the invoice at page 8 of Bundle D, should logically be the invoice at page 9.

The Plaintiff had admitted that page 10 was wrongly issued by the Plaintiff and is not relevant. Clearly the Defendant is taking advantage of the situation to raise confusion in the matter.

Following thereto, the next invoice is the 12th and the final quarter invoice which is number 90064469 which is at page 38 of Bundle B.

Apart from stating that the Agreement commenced from 1.12.2007 thereby disputing that there are 12 quarters to be paid, the Defendant never challenged this 12th invoice.

The Defendant however alleged never receiving the 12th invoice. However when DW 2 was referred to the reminder letter dated 28.6.2011 at page 37 of Bundle C, DW 2 admitted receiving the letter. The reminder letter clearly referred to the 12th invoice and clearly the Defendant never questioned the said invoice at all.

The Plaintiff failed to give the Defendant 90 days written notice of termination of the Agreement

The Defendant submits that even if the court holds that the commencement period of the Agreement started from Oct 2007, the Plaintiff failed to give 90 days notice to the Defendant as required under Clause 8.0 of the Agreement during the automatic extension period.

From the submission of the Defendant, the Defendant contends that the Defendant only found out from the email sent by IBM Malaysia to the Defendant dated 2.9.2010. Therefore the Defendant submits that it can claim the sum of RM399 000.00 (RM133 000 x 3 months) from the Plaintiff for not giving the necessary 3 months' notice to the Defendant.

As a result of the failure of the Plaintiff giving the Defendant the required notice of 3 months (90 days), the Defendant had not enough time to look for a new IBM authorized dealer to replace the plaintiff.

The Defendant submits only managed to get a replacement for the Plaintiff after 3 months and therefore the Plaintiff should pay the Defendant RM399 000.00 (RM133 000 x 3 months) for not giving the Defendant the required 3 months notice.

Therefore the Defendant is counterclaiming or set off the sum of RM 399 000.00 from the Plaintiff.

On this issue, there was in evidence that the Plaintiff had communicated its decision not to automatically renewed the Agreement beyond the contract period as early as August 2010, there was never any objections raised by the Defendant then. This was supported by the evidence of DW 1 and DW 2 whereby they are aware and did have knowledge of the Plaintiff's decision and further admitted that the Defendant did not notify the Plaintiff of their objections. Hence the Defendant, by its conduct are deemed to have accepted the decision of the Plaintiff.

In any event, the Agreement expired by 28.10.2010.

On the disruption of service which was alleged by the Defendant when the Plaintiff ended its service on 28.10.2007, this is also misconceived as it was in evidence by the Plaintiff's letter of termination to IBM (page 28 of Bundle C) which indicated that the effective of termination with IBM was on 30.11.2010. Hence IBM service via the Plaintiff was only terminated well beyond the end of the Agreement period ie, 28.10.2007. In any event due to the Plaintiff indicating to the Defendant of the Plaintiff's intention in not renewing the Agreement as early as August 2010, the Defendant had ample time to scout for replacement as early as August 2010.

There was no evidence shown by the Defendant that after receiving the indication by the Plaintiff as early as August 2010, the likelihood that the Agreement would not be renewed, the Defendant had taken immediate step to source for replacement service provider.

Therefore, from the abovementioned, the Plaintiff had proven its claim on a balance of probabilities, whilst the Defendant failed to prove its counterclaim and set off.

The claim by the Plaintiff is allowed with costs and the counterclaim and sett off by the Defendant is dismissed.

(ZABARIAH MOHD YUSOF)
Judge of the High Court of Malaya
Kuala Lumpur

Date: 4 May 2012

COUNSEL:

For the paintiff - Afifi Ahmad & Fadzlin Yunus; M/s Azrul Afifi & Azuan

For the defendant - Alex Keong; M/s Alex Keong & Co