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1. [*Progressive Ocean Sdn Bhd v Northern Corridor Implementation Authority \('NCIA'\)*](#)
[\[2016\] MLJU 815](#)

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PROGRESSIVE OCEAN SDN BHD v NORTHERN CORRIDOR
IMPLEMENTATION AUTHORITY (“NCIA”)

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| [2016] MLJU 815

Progressive Ocean Sdn Bhd v Northern Corridor Implementation Authority
(‘NCIA’)
[2016] MLJU 815

Malayan Law Journal Unreported

HIGH COURT (ALOR SETAR)

CHOO KAH SING JC

GUAMAN CIVIL NO. 22NCVC-4-1/2015

4 September 2016

***Hizri** Bin Hassan (Muhammad **Akram** and Ahmad Shamil with him) Tetuan **Akram Hizri** & Azad for the Plaintiff's.*

Isa Aziz Ibrahim Tetuan Ranjit Ooi & Robert Low for the Defendant's.

CHOO KAH SING JC:

JUDGMENT (2)

(Counter Claim)

Introduction

[1] On 12.5.2016, this Court dismissed the plaintiff's claim as well as the defendant's counter-claim.

[2] On 8.6.2016, the plaintiff filed a Notice of Appeal to the Court of Appeal against the decision of this court in dismissing its claim against the defendant.

[3] On 12.6.2016, I prepared my grounds of judgment (see [2016] 4 AMR 596) explaining as to why the plaintiff's claim was dismissed by this Court. My judgment did not touch on the reasons as to why the defendant's counter claim was dismissed, because the defendant did not file a cross-appeal against my decision in dismissing its counter-claim at that material time.

[4] On 23.8.2016, this Court was notified by the defendant's counsel by way of letter that the defendant had filed a cross-appeal against the decision of this court dated 12.5.2016. The Notice of Cross Appeal was filed on 30.7.2016. Hence, this judgment serves as the reasons for dismissing the defendant's counter-claim. The reasons are set down as below.

Background Facts

[5] With regard to the background facts of this case, I shall adopt the entirety of the facts as laid down in my

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previous judgment dated 12.6.2016 (see pp. 2 to 9).

[6] The references in the previous judgment shall apply and be referred hereto in this present judgment.

The Defendant's Counter Claim

[7] In gist, the defendant averred that the plaintiff had breached the following terms in the Agreements.

Tripartite Agreement

5.10 Notwithstanding Clause 5.9 above, it shall be POSB's (the plaintiff) responsibility and duty ensure that the facilitations and equipments [sic] purchased is generally insured with a reputable insurance company and such level and amount of coverage and insurance company are acceptable within the industry's standard. The insurance shall be under the name of NORTHERN CORRIDOR IMPLEMENTATION AUTHORITY for the duration of the Contract Term and any extension thereof.

6.3 POSB shall at all times allow NCIA and/or JPK, their personnel and/or authorised representatives access into POSB's premises, to enter and to remain in any part of the premises related to the provisions of this Agreement and shall render all reasonable and necessary assistance to enable NCIA and/or JPK, its personnel and authorised representatives to examine any records maintained pursuant to this Agreement.

The entire clause 8 - General and Warranties.

Facilitation Agreement

3.4 As part of its corporate social responsibility ("CSR"), POSB agrees and undertake to repay to NCIA the agreed amount of Ringgit Malaysia Three Million (RM3,000,000.00) only commencing on the twenty fifth (25th) month from the Operational Date ("Effective Date") in fourteen (14) instalments consisting of:-

(a) thirteen (13) instalments amounting to Ringgit Malaysia Two Hundred Fourteen Thousand Two Hundred Eighty Five (RM214,285.00) only EACH; and

(b) the final instalment amounting to Ringgit Malaysia Two Hundred Fourteen Thousand Two Hundred Ninety Five (RM214,295.00) only

on a half (1/2) yearly basis [on or before every 30th June and 31st December yearly] for a period of seven (7) years thereafter.

3.5 Parties agree and acknowledge that time is of essence pursuant to Clause 3.4 and 3.5 above. In the event POSB refuses, fails and/or neglects to repay as agreed, NCIA shall have discretionary right to charge and additional two percent (2%) per annum on the repayment amount due calculated on a daily basis until full settlement thereof.

3.6 POSB further agrees and undertakes to contribute to NCIA the amount of two point five percent (2.5%) per annum calculated on POSB's gross sales in one (1) single contribution payment on or before every 1st day of the month of January [except for the first (1st) contribution that shall be contributed within the fourteen (14) days of the agreed commencement date hereof] commencing from the Fifteenth (15th) month from the Operational Date for the next consecutive Fifteen (15) years.

3.10 POSB shall at all reasonable times allow NCIA, its personnel and authorised representatives access into POSB's premises, to enter into and to remain in any part of the premises and POSB shall render all reasonable and

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necessary assistance to enable NCIA, its personnel and authorised representatives to examine any records and/or documentation maintained pursuant to this Agreement.

- 5.4 *POSB shall produce a comprehensive progress report at least once every month commencing from the date of this Agreement until the Operational Date ("Progress Report"). Thereafter the Progress Report shall be submitted at least per quarterly or as and when necessary as determined by the Joint Committee. The Progress Report is to be delivered to the Joint Committee of which the Joint Committee shall advise NCIA on the progress of the facilitation and/or payment to third party in accordance to the proposed timeline by POSB and for the purposes of post-production progress and monitoring, whichever is the case.*
- 5.5 *POSB shall include in the Progress Report all documentation pertaining to the facilitation and/or payment to third party including but not limited to any agreements, quotations, invoices, delivery orders and plans AND for Progress Reports on post production, quarterly audit reports on POSB's accounts and any other documents deemed relevant. Notwithstanding the above, Parties agree and acknowledge that the Joint Committee may deliberate and determine the contents of the Progress Report.*
- 5.6 *POSB shall be solely and fully liable for all costs, expenses and payment to third party whether direct or otherwise pursuant to any unapproved/unauthorised facilitation and/or payment to third party.*
- 6.3 *POSB shall at all times allow NCIA, its personnel and/or authorised representatives access into POSB's premises for site visit to inspect POSB's activities specifically related to the provisions of this Agreement and review POSB's accomplishments pursuant to this Agreement of which POSB shall provide reasonable assistance to NCIA, its personnel and authorised representatives in the performance of its duties.*

Expansion Phase Agreement

- 4.4 *As part of its corporate social responsibility ("CSR"), POSB agrees and undertakes to contribute to NCIA an amount equivalent to the NCIA Funding of Ringgit Malaysia Eight Million One Hundred Thousand (RM8,100,000.00) only by way of five (5) yearly instalments of equal amounts amounting to Ringgit Malaysia One Million Six Hundred Twenty Thousand (RM1,620,000.00) only per instalment commencing on the fifteenth (15th) month calculated from the date of this Agreement. POSB further agrees that each year instalment shall be contributed to NCIA on or before every thirty first (31st) day of the month of December.*
- 6.5 *POSB shall produce a comprehensive progress report ("Progress Report"), the frequency of the Progress Report shall be determined by the Joint Committee which, in turn, shall be guided by the timeline, circumstances and POSB's requests for the utilisation of the NCIA Funding. POSB shall submit the Progress Report to and advise the Joint Committee accordingly.*

[8]The defendant also averred that the plaintiff had failed to provide detailed reports, records and supporting documents in relation to its responsibilities as the anchor management company in the Programme to the defendant.

[9]The defendant averred that the plaintiff by its own conduct had either expressed or implied shown that it had no interest to carry on with the Programme, and that the defendant accepted the plaintiff's rejection to carry on with the Programme, and therefore, the plaintiff had ended the Agreements.

[10]The defendants prayed, inter alia, for the following orders:

- (i) A declaration that the Agreements have been terminated by the plaintiff, and that the plaintiff is no longer involved in the Programme;

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- (ii) An order that the plaintiff to produce, inter alia, all document in relation to the Programme, all necessary approvals from all the relevant authorities for the running of the Programme;
- (iii) An order that the plaintiff to deliver vacant possession of the site to the defendant together with all the equipment thereby purchased using the funds of the defendant;
- (iv) Further, and/or in the alternative, the defendant prayed that the plaintiff had breached the Agreements and that the defendant is claiming the "repayments" of the money contributed by the defendant under the Agreements.

Issues to be tried

[11]In the earlier judgment, this Court had dealt with the issues for the plaintiff's case as per the *Issues to be Tried* filed by the parties (encl. 69, items 1, 2, 3 and 5 [note items 1 and 2 were considered as one issue; see para 39 of the earlier judgment]).

[12]As for the defendant's counter claim, the issues to be tried were narrowed down as below:

- (i) Whether the defendant is entitled to seek an order declaring that the Agreements have been terminated with immediate effect (item 4); and
- (ii) Whether the defendant is entitled to restitution remedies or entitled to claim ownership to all the properties which were purchased through the funds provided by the defendant in the Programme (item 6).

The Findings of this Court First Issue

[13]In gist, the defendant averred that the plaintiff failed to (i) insure the equipment; (ii) provide documents and/or records relating to the Programme; (iii) make "repayments" in accordance with the terms of the Agreements; and (iv) the plaintiff was in breach of condition precedents of the Agreements.

[14]Based on the above averments, the defendant asserted that the plaintiff had repudiated/breached the Agreements, henceforth, the defendant was entitled to terminate the Agreements and claim for damages.

[15]In my earlier judgment dated 12.6.2016 (see paras 69-70), I have stated that I was more inclined to accept that the plaintiff was in breach of its obligations in respect of the Agreements when it ceased operations, despite the fact that the plaintiff could have had continued with the Programme with the existing equipment and 1200 cages. I also found the reason the plaintiff could not proceed with the Programme was because it lacked financial ability.

[16]At para 60 of my judgment, I also found that the plaintiff should have delivered its books of account for verification purposes and determination of its financial standing to the defendant. Indeed, the plaintiff had breached clause 6.3 of the Tripartite Agreement as pleaded by the defendant.

[17]Sometime at the end of 2013, the plaintiff ceased operation and did not proceed with the Programmes. Several meetings were held between the parties, but no avail. The plaintiff then brought this action in January 2015.

[18]During the period between at the end of 2013 until this suit was filed in January 2015, the defendant did not exercise its rights to terminate the Agreements (see termination clause - clause 13 of the Tripartite Agreement; clause 12 of the Facilitation Agreement; and clause 13 of the Expansion Phase Agreement).

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[19] This court was of the considered view that if the defendant had intended to elect to terminate the Agreements, the defendant ought to have issued a termination notice to the plaintiff by relying on the plaintiff's failure to proceed with the Programme at the first available opportunity.

[20] However, the defendant did not terminate the Agreements, but went on to issue letters to the plaintiff requiring the plaintiff to comply with the terms of the Agreements.

[21] The defendant did not take any step to terminate the Agreements up to the time the filing of its defence and counter claim in this action. In other words, the defendant did not invoke the termination clauses in the Agreements, instead, the defendant had sought this court to declare that the Agreements had been terminated and for the plaintiff to repay the defendant as per the terms in the Agreements.

[22] The defendant's failure to issue a termination notice pursuant to the relevant termination clauses, coupled with the defendant's conduct in requiring the plaintiff to comply with the Agreements, would, in the opinion of this court, tantamount to an election to affirm the contract.

[23] This court was of the considered view that as far as the plaintiff was concerned at the time of filing the suit, the Agreements were still subsisting. It was on this premise that the plaintiff had sought for an order to compel the defendant to comply with its obligations and to proceed with the Agreements.

[24] This court was also of the considered view that since there was no formal termination notice and/or no formal demand made against the plaintiff to repay the defendant, therefore, the Agreements were still subsisting and were not terminated in law.

[25] As ventilated above, the defendant had in fact affirmed the contract and proceeded with the Agreements, without terminating the Agreements. On this premise, this Court was of the considered view that the first issue ought to be answered in the negative.

Second Issue

[26] With regard to the second issue. I will first deal with the issue whether the defendant was entitled to claim ownership to all the properties which were purchased through the funds provided by the defendant in the Programme.

[27] This Court referred to clause 5.9 of the Tripartite Agreement which stated as follows:

5.9 *For the avoidance of doubt, NCIA retains ownership and all rights including all lien rights with respect to the facilitation and the equipment purchased throughout the subsistence of this Agreement. NCIA will consider transferring the ownership of and waive and release all lien rights to the facilitation and equipment at the expiry of this Agreement PROVIDED ALWAYS that POSB is not in breach of and has complied with all its obligations within the provisions of this Agreement.*

[28] The above clause clearly stated that the defendant shall have the ownership of facilitation and equipment in the Programme. Hence, there was no necessity for this Court to decide whether or not the facilitation and equipment belong to the defendant. This court was of the opinion that the defendant need not come to the Court for

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an order to deliver vacant possession of the site of the Programme, because the defendant was and still is the owner of the site of the Programme, including the ownership of all the facilitation and equipment.

[28]With regard to the hatchery and nursery plant, it was built on the plaintiff's land. However, the defendant did not raise an objection that the plaintiff had constructed the plant on the plaintiff's land. The plaintiff did not deny that the plant belongs to the defendant. Hence, there was no issue that the hatchery and nursery plant belongs to the defendant.

[29]With regard to the 800 cages, the ownership of these cages was not an issue. The plaintiff did not lay claim of ownership of these 800 cages. Therefore, the defendant was and still is the owner of these cages.

[30]Based on the above facts, this Court answered in the affirmative that the defendant was and still is entitled to the ownership of all the properties which were purchased through the funds provided by the defendant in the Programme.

[31]In view that the defendant has claimed ownership of the properties purchased through the funds it had provided, therefore, the issue whether or not the defendant was entitled to restitution remedies has become irrelevant. This was because the defendant could not on one hand claim the ownership of the properties purchased using the monies it contributed, and on the other hand also claim for the refund of the monies it had contributed for the purchase of the properties.

[32]Further, on the claim of restitution remedies, the defendant did not insist the plaintiff should comply with the repayment schedule nor did it demand the repayments as per the schedule payment clause when at the time it was due. The Court observed that the Tripartite Agreement stated clearly the Programme was a joint effort between the defendant and JPK (Jabatan Perikanan Negeri Kedah) and that the plaintiff was appointed as the anchor management company. This connotes that the defendant did not have the intention to pursue the repayments as if it was in a position as a lender and borrower relationship.

[33]This Court observed clause 3.4 of the Facilitation Agreement clause 3.4 stated as follows:

“

3.4 As part of its **corporate social responsibility** (“CSR”), POSB agrees and undertakes to repay to NCIA the agreed amount of Ringgit Malaysia Three Million (RM3,000,000.00) only commencing on the twenty fifth (25th) month from the Operational Date (“Effective Date”) in fourteen (14) instalments consisting of:-”

[34]In the Expansion Phase Agreement, clauses 4.4 and 4.5 stated as follows:

“

....

- 4.4 As part of its **corporate social responsibility** ("CSR"), POSB agrees and undertakes to **contribute** to NCIA an amount equivalent to the NCIA funding of Ringgit Malaysia Eight Million One Hundred Thousand (RM8,100,000.00) only by way of
- 4.5 Notwithstanding Clause 4.4 above, such instalments amount and the contributory time period may be varied by the Joint Committee. The Joint Committee shall be guided by factors, including but not limited to, **the ability of POSB to contribute** then and the then existing economic situation...."

[35]The clauses in the above two agreements, particularly the words (in bold) used by the parties, postulate the repayments were not intended as a loan to the plaintiff, where the plaintiff was under a contractual obligation to repay the amounts. The repayments if made could have been made in the cause as a contribution, instead of a contractual obligation. Any repayment, if made, was intended to be a contribution based on a corporate social responsibility, not as a repayment of a loan.

[36]The words used by the parties was 'contribution'. One is obliged to contribute under CSR only when its company is in a position to do so. Perhaps for this reason, clause 4.5 was provided for in the Expansion Phase Agreement. Contribution made under CSR is more of a moral obligation to the society, not a legal obligation.

[37]Based on the above, this Court was of the considered view that it could not make out any legal obligation that the plaintiff was liable to repay the defendant in the Agreements.

Other Issues

[38]This Court had considered other issues raised in the written submissions of the defendant's counsel which this Court was largely in agreement with the submissions, but they go to establish the plaintiff was in breach of the Agreements. As ventilated above, the defendant at all material time did not invoke its right to terminate the Agreements. It is not for this court to declare that the Agreements have been terminated and to find in favour of the defendant's counter claim.

[39]For the record, this Court observed, during the trial and the numerous discussion sessions with the parties' counsels with the presence of the parties, the defendant, i.e. its personnel and representatives, ought to have taken a more proactive role during the subsisting of the Agreements.

[40]The Agreements have laid down comprehensive mechanisms to ensure the success of the Programme. If the defendant monitored the Programme by following closely the mechanisms provided, it may not have come to this stage, a stage which is now irreversible.

[41]When the defendant found the plaintiff was backsliding in its obligations, the defendant, or the Joint Committee, should have taken immediate action to address the problem or potential problem. Losses could have been prevented in the Programme. It is now too late for the parties to cry over spilled milk.

Conclusion

[42]Based on the above, this Court was not prepared to grant the orders as prayed in paragraph 26 of the defendant's *Pembelaan Dan Tuntutan Balas Terpinda*. Hence, this Court dismissed the defendant's counter claim and awarded costs of RM50,000.00 to be paid to the plaintiff by the defendant.

