

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
[NO. GUAMAN: D8-22-1214-2002]**

ANTARA

KABELCOM SDN BHD

(No Syarikat: 43184-A)

...

PLAINTIF

DAN

1. PAKADIRI MODAL SDN BHD

(No Syarikat: 357976-K)

2. WONG PUT HOONG

(No K/P: 561203-10-5743)

...

**DEFENDAN-
DEFENDAN**

**ALASAN PENGHAKIMAN
OLEH YANG ARIF HAKIM DATO' KANG HWEE GEE**

The plaintiff was employed as a contractor by the 1st defendant to complete its abandoned housing project at Kerteh, Terengganu.

The 2nd defendant was an individual who brought the parties together to undertake the construction works at the 1st defendant's abandoned project.

The plaintiff and the 1st defendant entered into two separate formal written agreements as follows:-

- (i) a contract for Infrastructure Works for Kerteh Jaya Intergrated Housing Development (Phase 1) Mukim Kerteh, Terengganu Darul Iman for Pakadiri Modal Sdn Bhd (Exhibit P26) for the contract sum of RM2,880,000.00; and
- (ii) a contract for Proposed Construction and Completion of Uncompleted Work of Double Storey Bungalow (20 units), 2 Storey Semi-Detached (16 units) and Double Storey Bungalow (19 units - addition) for Kerteh Jaya Integrated Housing Development (Phase 1) at Mukim Kerteh, Kemaman, Terengganu Darul Iman for Pakadiri Sdn Bhd (Exhibit P6) for the contract sum of RM1,355,598.43.

Both the contracts (herein referred to respectively as the “Infrastructure Contract” and the “Housing Contract”) adopt the terms and conditions specified in the standard PWD Form 203 Contracts.

The plaintiff case is that it had completed 95% of works in both the contracts.

In respect of the infrastructure contract it was unable to complete it because the 1st defendant had failed to provide it with the necessary culvert drawings.

In respect of the housing contract it was unable to connect the septic tanks to the external piping due to the difference in level between the septic tanks and the external piping. In consequence thereof, it could not complete the grass turfing in the compound of the houses as there would be a need to excavate the tanks before the grass is laid.

In the course of performing the contracts the plaintiff became interested in acquiring the 1st defendant company following which negotiations were entered into between the parties. In furtherance of the acquisition exercise nominees of the plaintiff were appointed to the board of directors of the 1st defendant.

The plaintiff's claim against the 1st defendant is for:-

- (i) work done in respect of the Infrastructure Contract amounting to RM2,880,000.00;
- (ii) work done in respect of the Housing Contract amounting to RM1,355,598.43;
- (iii) variation works performed on the instruction of the 1st defendant amounting to RM489,341.00; and
- (iv) the repayment of friendly loans amounting to RM461,878.00 extended to the 1st defendant as evidenced by a loan agreement and various other documents.

As against the 2nd defendant the plaintiff's claim is for the payment of three on demand personal guarantees (for the sum of RM100,000.00, RM180,000.00 and RM150,000.00 totalling RM430,000.00) issued by the 2nd defendant as security for loans granted to the 1st defendant by the plaintiff.

The 1st defendant's defence in so far as can be understood, is essentially as follows:

1. The respective contract sums of RM2,880,000.00 for Infrastructure works and RM1,355,598.43 for housing works were not the actual contract sums intended by the parties. The actual contract sums under both the agreements were supposed to be only RM2,880,000.00. The reason why the contract sums were inflated in the agreements was because the plaintiff's managing director Encik Hanif Othman Merican (PW3) wanted the sums to be marked up in order for him to obtain sufficient funds from his father Tan Sri Ir Othman Bin Merican (PW2) who controlled plaintiff's finance; and that in consequence thereof Encik Hanif Othman executed an undated letter of undertaking (Exhibit P66) to refund certain amount after deducting the agreed cost plus profit of infrastructure works to be deducted from the sum of RM2,880,000.00 as per the contract.
2. The plaintiff failed to complete both the infrastructure contract and the housing contract. It had in fact abandoned

them. In any case even if both the contracts had been completed (which is denied) the 1st defendant contends the plaintiff is not entitled to any payment as any such payments have to be used to set off:-

- i) against one million ordinary shares of RM1.00 each which is to be subscribed by the plaintiff for the sum of RM2,310,176.00 and which had been allotted to the plaintiff pursuant to an oral agreement reached between the parties for plaintiff to take up the shares. Out of the sum of RM2,310,176.00, the sum of RM1,310,176.00 was to be paid directly to Dr. Wong Foot Meow (another shareholder of the 1st defendant) to settle debts owed to him by the 1st defendant; and
 - ii) against losses and damages suffered by the 1st defendant by reason of the plaintiff's abandonment of the contracts.
3. With respect to the plaintiff's claim on the variation orders, the 1st defendant avers that no such variation works had been carried out as they formed part of the original scope of infrastructure works already specified in the contract.
4. With respect to the loan of RM461,878.00 the 1st defendant claims that these monies were not disbursed to the 1st

defendant but to the plaintiff's own contractors and suppliers and to the 2nd defendant in his personal capacity.

The 1st defendant's counterclaim (in so far as can be understood) is for:-

- a) a declaration that the actual cost of both the infrastructure and housing contracts was only RM2,880,000.00 and not RM2,880,000.00 for the infrastructure contract and RM1,355,598.43 for the housing contract as claimed by the plaintiff;
- b) damages for breach of contract for failing to complete the two contracts the details of which were mentioned in the 1st defendant's counterclaim; and
- c) payment for failure to complete the agreement to acquire the 1st defendant's shares.

FINDINGS

HOW MUCH DO BOTH THE CONTRACTS COST?

Ong Tee Kein (DW2) a director of 1st defendant who negotiated with the plaintiff gave evidence that the respective contract sums of RM2,880,000.00 for infrastructure works and RM1,355,598.43 for housing works were not the actual contract sums intended by

the parties; that the actual contract sums under both the agreements were supposed to be only for the sum of RM2,880,000.00; and that the reason why the contract sums were inflated in the agreements was because the plaintiff's managing director Encik Hanif Othman wanted the sums to be marked up in order for him to obtain sufficient funds from his father Tan Sri Ir Othman who controlled plaintiff's finance. Ong Tee Kein relied on an undated letter of undertaking (Exhibit P66) signed by Encik Hanif Othman promising to refund certain amount after deducting the agreed cost plus profit of infrastructure works to be deducted from the sum of RM2,880,000.00 as per the contract.

The letter of undertaking (Exhibit P66) is at best only evidence of a promise to pay a certain sum of money. It is not evidence that the contract price for both the contracts was only for the sum of RM2,880,000.00.

In any event, as the terms of both the contracts had been reduced to the form of documents, and under s. 91 of the Evidence Act 1950 the letter of undertaking is therefore inadmissible in so far as its purpose is to contradict the terms stipulated therein.

The evidence of Ong Tee Kein on this score must therefore be rejected.

The declaration sought by the 1st defendant that both the contracts were only worth the comprehensive sum of RM2,880,000.00 must be dismissed.

WAS THE PLAINTIFF IN BREACH OF CONTRACT?

The infrastructure contract was supposed to be completed by 15.1.2000 and by mutual agreement of the parties it was extended to 31.7.2000. The housing contract was to be completed within 39 weeks commencing from 29.12.1999 (the date of the letter of acceptance) that is to say by 30.8.2000.

The plaintiff it is clear, had failed to complete both the contracts within the period set for completion as:-

1. It did not give any appropriate notice of completion to the 1st defendant before or after the completion date; and
2. It only communicated in writing with the 1st defendant after being served with the 1st defendant's notice of termination dated 19.11.2000.

I would therefore have to accept the evidence of Ong Tee Kein the director of 1st defendant that work came to a halt in April 2000 and that no work had been carried out after that.

I would have to reject the plaintiff's contention that:

- i) with respect to the infrastructure contract the plaintiff could not complete the works due to the failure of the 1st defendant to provide the necessary drawings for the “main road crossing”; and
- ii) with respect to its inability to complete works on the housing contract due to the impossibility to connect the septic tanks in the compound of the houses to the main drain outside.

Under Clause 5(viii) of both the contracts, the plaintiff was required to consult the Superintending Officer on any matter necessary and incidental to the completion of the work. There is no evidence that such impediments had been brought formally to the attention of the 1st defendant through the Superintending Officer to have the matter resolved.

In failing to complete both the works by the respective dates the plaintiff had committed a breach of both the contracts.

HOW MUCH WORK UNDER THE TWO AGREEMENTS HAD BEEN COMPLETED BY THE PLAINTIFF?

No formal report in the form of a professional survey of how much work had been completed in the two contracts by the plaintiff before it stopped work was provided at the trial to enable me to determine the quantum with exactitude.

I would however accept as true on an approximate basis, that the plaintiff had completed 95% for both the contracts, based on the letter dated 20.6.2000 (Exhibit P74) written by the 1st defendant's own director Ong Tee Kein to Mulan Holding Sdn Bhd for the purpose of obtaining financial assistance from the latter which states that:

“As at today, Kabelcom had completed up to 95% of the building works and most of the infrastructure works. A copy of the project status addressed to OBB (Oriental Bank Berhad) is enclosed.”

This was confirmed by Ong Tee Kein himself during cross-examination when he was referred to the said letter (Bundle B4 pages 975 to 976):

“This is a letter from Pakadiri Modal to shareholders and directors of Mulan Holding Sdn Bhd dated 20.6.2000. See page 976. I agree with the statement I made in the letter ie. “As at today, Kabelcom had completed up to 95% of the building works and most of the infrastructure works.” This letter was signed by me.”

The admission supports the evidence of Nilawati Binti Kasim (PW9) the contract manager of the plaintiff who visited the site to make an informal survey and assessment of the infrastructure works completed by the plaintiff which she spelled out in detail at paragraph 11 of her witness statement. She estimated that in respect of the infrastructure contract alone, work amounting to RM2,779,216.36 had been completed based on the progress claim that she had prepared.

Both the contracts were essentially contracts which require the plaintiff to complete the project left undone by the previous contractor without cost breakdown for items of work to be performed and it is clear that entire performance was not a condition precedent to payment. The doctrine of substantial performance can therefore be applied under the circumstances, given that the plaintiff had failed to complete only a mere 5% of the works in each contract its failure to be construed as merely a breach of a term of the contract. It should therefore be entitled to be paid for 95% of the contract sums subject to being liable in damages for its failure to complete the balance of 5% under the doctrine of substantial performance as it is understood in the oft cited passage of Lord Denning in *Hoening v. Isaacs* [1952] 2 All ER 176:

“... the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions and is usually calculated by the cost of making them good.”

The doctrine was applied in *Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157 at 179, where the Court of Appeal declared (per Zainun Ali JCA) that:

“It is now established by the doctrine of substantial performance that a promisor who has substantially performed his side of the contract may sue on the contract for the agreed sum, though he remains liable in damages for his partial failure to fulfill his contractual obligations.”

The claim that the plaintiff should be entitled to should be as follows:

i.	Contract sum in respect of infrastructure works	RM2,880,000.00
ii.	Contract sum in respect of completion of uncompleted houses	RM1,355,598.43
	Total sums for the two contracts	RM4,235,598.43
	Less: 5% uncompleted contract sums	RM211,779.92
		RM4,023,818.51

Less damages to be assessed arising from plaintiff's failure to complete the contracts.

VARIATION ORDERS CLAIM OF RM489,341.00 UNDER THE INFRASTRUCTURE CONTRACT

It is clear that under the Infrastructure Contract, variation works can only be instructed, measured, valued and finally be issued with interim certificates by the Superintending Officer pursuant to Clauses 24, 25 and 47 of the Infrastructure Contract respectively.

There is no evidence that such variation works had been conducted and claimed under this process and must therefore be disallowed.

CLAIM ON THE LOANS AMOUNTING TO RM461,878.00

Of all the sums constituting the loans which the plaintiff alleged had been lent to the 1st defendant, only the loan of RM100,000.00 can be substantiated by a loan agreement dated 17.7.1999 signed by Ong Tee Kein the director of 1st defendant. I would therefore accept this agreement as proof that the money was lent to the 1st defendant.

As for the rest of the loans they were clearly paid to other payees who were not the 1st defendant. No cogent evidence was led by the plaintiff to show why such sums were made payable to the respective payees on account of the 1st defendant.

On this score the plaintiff should therefore be entitled to claim only the sum of RM100,000.00 from the 1st defendant.

1ST DEFENDANT'S COUNTERCLAIM FOR PAYMENT OF SHARES ISSUED TO PLAINTIFF

Both the directors of the 1st defendant Ong Tee Kein and Dato' Abdul Razak bin Abdul (DW3) maintained that an agreement had been reached with the plaintiff for the plaintiff to acquire the whole of the 1st defendant company.

According to Dato' Abdul Razak, after several negotiations an oral agreement was finally reached between the parties at a meeting held on 17.10.2000 at Megan Phileo Avenue for the plaintiff to acquire the entire shareholding of the 1st defendant.

It was to be done in two stages.

The first stage involved a cash injection of RM1,000,000.00 by the plaintiff into the 1st defendant thereby increasing its paid-up capital from RM1,000,000.00 to RM2,000,000.00. The plaintiff would then be issued with one million fully paid up new shares of the 1st defendant of RM1.00 each to become its shareholder and be represented on its board of directors.

In addition the plaintiff was required to pay off the debt of the 1st defendant (described by Dato' Abdul Razak as "premium") of RM1,310,176.00 to its creditor, one Dr. Wong Foot Meow, and also to secure the release of its directors Ong Tee Kein and Dato' Abdul Razak as personal guarantors for loans granted to the 1st defendant by Oriental Bank by substituting them with two other guarantors acceptable to Oriental Bank.

The second stage of the acquisition was to be initiated after the completion of the 1st stage. At this stage the plaintiff will acquire the entire shareholding of the 1st defendant held by Ong Tee Kein and Dato' Abdul Razak to the terms and conditions to be negotiated between the parties.

Dato' Abdul Razak did not produce nor refer to any minutes of the meeting on 17.10.2000 held at Megan Phileo Avenue to discuss the proposed acquisition, but relied on a faxed document dated 2.3.2000 produced by the plaintiff itself as Exhibit P67 that such an agreement had been reached on the more detailed terms stated therein; and a letter dated 19.6.2000 which the plaintiff sent to Oriental Bank informing the bank of its interest in the 1st defendant the existence of which is disputed.

The faxed document although marked "without prejudice" was produced by the plaintiff itself and read as follows:

“FROM: KABELCOM SDN BHD PHONE NO.: 603 7190707 MAR. 02 2000 02:23PM

ATTENTION: CHRIS WONG
09-6243790

Proposed re-structuring of Pakadiri Modal Sdn Bhd

without prejudice

**Restructuring of Pakadiri Modal Sdn Bhd (PMSB)
By Entry of Kabelcom Sdn Bhd (KSB)**

PART A

1. Increase Paid-Up Capital

The company's paid-up capital shall be increased from existing ONE MILLION (1,000,000) ordinary shares in the following manner:-

- KSB takes a 50% stake in PMSB through the issue of ONE MILLION (1,000,000) new ordinary shares at par value RM1.00;
- A further ONE (1) ordinary share is issued to Hanif Othman Merican;
- A further ONE (1) ordinary share is issued to Wong put Hoong;

after which the new paid-up capital of the company shall be TWO MILLION AND TWO (2,000,002) ordinary shares.

2. Appointment of New Directors

THREE (3) new directors shall be appointed to the Board of PMSB from the Board of KSB bringing the total number of PMSB directors to FIVE (5).

The new directors shall assume the day to day running of the company.

Implementation of the above restructuring shall be as follows:-

1. Datuk Dr. Razak and Ong Tee Kein, as the registered shareholders of PMSB, shall hold an EGM to propose and approve the increase in the company's issued and paid-up capital as detailed above.
2. Datuk Dr. Razak and Ong Tee Kein, in their capacity as directors of the company, shall then pass the necessary resolutions instructing the company secretary to increase the paid-up capital as required.
3. The said directors shall also pass a resolution allowing payment for the ONE MILLION new ordinary shares subscribed to by KSB to be made by deduction from PMSB's outstanding account with KSB for the work already completed under KSB's infra-structure contract for Phase 1A at Kerteh Jaya. (To date, KSB has completed more than RM1.5 MILLION worth of work.)
4. Payment for the remaining TWO new ordinary shares shall be by cash.
5. Datuk Dr. Razak and Ong Tee Kein, in their capacity as directors of the company, shall then pass the necessary resolutions instructing the company secretary to appoint THREE new executive directors to the Board of PMSB who shall be the named directors of KSB.
6. At a meeting of the new Board of Directors of PMSB, the necessary resolutions shall be passed which shall give the new directors executive control of the day to day running of the company In place of the existing directors.

7. The new Board of directors shall then pass the necessary resolutions to replace the existing signatories to the companies accounts with new signatories.

On the execution of items 1 to 7, KSB will give a corporate guarantee to Oriental Bank Berhad (OBB) for the completion of Phase 1 of Bandar Baru Kerteh Jaya.

In addition, KSB shall advance a sum to be agreed upon to PMSB to begin normalization of PMSB's bank facilities with OBB. The sum shall go directly to OBB.

Expected completion time for PART A shall be 1 week.

PART B

1. Transfer of PMSB Shares to Pakadiri Sdn Bhd

The ONE MILLION ordinary shares held by Datuk Dr. Razak and Ong Tee Kein shall be transferred to Pakadiri Sdn Bhd (PSB) and held by PSB pending restructuring of PSB.

2. Resignation of Datuk Dr. Razak and Ong Tee Kein as Directors

After transfer of the shares above, Datuk Dr. Razak and Ong Tee Kein shall resign their positions from the Board of Directors of PMSB with immediate effect.

Implementation of the above restructuring shall be as follows:-

1. Datuk Dr. Razak and Ong Tee Kein shall submit the necessary forms for the transfer of their shareholdings in PMSB to PSB to the company secretary who shall file the transfer with the Registrar of Companies.
2. Simultaneously, Datuk Dr. Razak and Ong Tee Kein shall submit their resignations from the Board of PMSB.

On the execution of items 1 and 2 above, two of the remaining directors of PMSB shall agree to assume the personal liabilities of the departing directors with respect to their personal guarantees to OBB for the facilities obtained to complete Phase 1A of Bandar Baru Kertih Jaya.

Expected completion time for PART B shall be 4 weeks.”

To support his claim that a concluded contract had been reached between the plaintiff and the 1st defendant over the acquisition of the 1st defendant's shares he pointed to the indisputable fact that nominees of the plaintiff including Encik Hanif Othman, his father Tan Sri Ir Othman, both of whom were directors of the plaintiff and another person Abdul Rais bin Abdul Manas were appointed to the board of directors of the 1st defendant between 18.3.2000 and 21.3.2000.

The 1st defendant's company secretary, Yap Chee Keong (DW1) gave evidence to say that he was present during some of the negotiations and that a draft agreement (Bundle B1 pages 164 to 170) had been prepared to show that plaintiff wanted to take up one million shares in the 1st defendant company. He maintained that a share certificate for one million ordinary shares of the 1st defendant of RM1.00 each had been issued to the plaintiff and was collected by Chris Wong (the 2nd defendant) for onward transmission to Messrs. William Leong & Co., the plaintiff appointed solicitors, to hold as stakeholder pending the fulfillment of plaintiff's obligation under the agreement reached.

He produced a Registrar of Companies search dated 6.2.2001 showing among others the names of two directors of the plaintiff, Encik Hanif Othman and Tan Sri Ir Othman as directors of the 1st defendant.

He confirmed that the purchase price of RM1,000,000.00 for the one million shares had not been paid.

The plaintiff denied that an agreement had been concluded with respect to the acquisition of the 1st defendant. According to Encik Hanif Othman, the parties could not agree on a number of issues. This was what he said at Question 63 of his witness statement Exhibit P16(A):

- “(1) The total amount loaned by Kabelcom to Pakadiri Modal which may be set-off as part payment of the purchase of the shares.

According to Kabelcom’s records, the total loan to Pakadiri Modal amounted to RM461,878.00. However, Pakadiri Modal disputed the cheques which were issued in Chris Wong’s name and refused to acknowledge the sums as being loaned to Pakadiri Modal.

- (2) The value of the works carried out for the contract for infrastructure works which may be set-off as part payment of the purchase of the shares.

As of March, 2000, Kabelcom took the position that the works carried out was worth more than RM1.5 million. This, taken together with the loan amount, would mean that Kabelcom need not expend any further monies to acquire the shares in Pakadiri Modal.

However, Ong Tee Kein and Razak did not agree to this valuation.

- (3) The structure of the shareholding.

Kabelcom wanted the current shareholders to hold 1 million ordinary shares in Pakadiri Modal and Kabelcom to also hold 1 million ordinary shares. In addition, there will be 2 additional shares to be held by Chris Wong and me. This was with the view of avoiding any deadlock situation between Kabelcom and the then shareholders of Pakadiri

Modal.

However, Ong Tee Kein and Razak did not agree to this.”

He claimed that the one million shares had never been issued by the 1st defendant and the share capital of the 1st defendant had remained at one million shares as evidenced by the Registrar of Companies search on the 1st defendant dated 15.4.2002. After negotiation had broken down, the plaintiff attempted without success to re-negotiate the acquisition of the entire shareholding of the 1st defendant because it was concerned with whether it could recover from the 1st defendant the contract sums and loans which it had given to the 1st defendant. This is evidenced by the

letter sent by the plaintiff's solicitors dated 20.10.2000 (B1 pages 111-113).

The only reason why the nominees of the plaintiff were elected to the board of directors according to Encik Hanif Othman was because the parties were optimistic at the time that an agreement could be reached on the acquisition of 50% of the 1st defendant's shareholding.

The 1st defendant was unable to provide documentary evidence such as minutes or records of negotiations that such an agreement had been reached between the plaintiff and the 1st defendant.

Nevertheless, in my judgment the 1st defendant had succeeded in proving by the testimony of its director Dato' Abdul Razak that there was an orally concluded contract with respect to the first stage of the acquisition process to the extent that the plaintiff had agreed to inject RM1,000,000.00 into the 1st defendant by subscribing to one million new shares of the 1st defendant. The finding is consistent with the undisputed fact that the nominees of the plaintiff namely Encik Hanif Othman, Tan Sri Ir Othman and another person Abdul Rais bin Abdul Manas, were subsequently elected directors of the 1st defendant albeit for the short duration between 18.3.2000 and 4.4.2000.

There is doubt whether a share certificate for the one million shares of the 1st defendant had been issued and delivered to the firm of Messrs. William Leong & Co. but this is insignificant as it can be issued later after payment for the shares had been received.

The 1st defendant has however, failed to prove that any agreement had been reached requiring the plaintiff to pay a premium of RM1,310,176.00 over the one million fully paid-up shares at RM1.00 per share that it had agreed to subscribe and to pay this sum directly to the creditor of the 1st defendant, Dr. Wong Foot Meow and to provide two substitute guarantors acceptable to Oriental Bank Berhad to replace Ong Tee Kein and Dato' Abdul Razak. The faxed document (Exhibit 67) is not evidence that such an agreement had been reached, being nothing more than a note of proposal without any commitment. At best it is indicative of the fact that negotiation over the acquisition of the 1st defendant did take place on matters stated therein. The letter dated 19.6.2000 purporting to inform Oriental Bank that the plaintiff had acquired the 1st defendant is inadmissible as the plaintiff had denied its existence.

The 1st defendant's counterclaim should therefore be allowed only to the extent of the plaintiff's liability to pay the 1st defendant RM1,000,000.00 for the shares which it had agreed to subscribe.

WHAT THE PLAINTIFF SHOULD GET.

This should work out as follows:

RM4,023,818.51 less damages to be assessed plus RM100,000.00 (loan) less RM1,000,000.00 being payment for the shares it subscribed.

Assessment of damages is to be conducted by the Registrar under Order 37 of the Rules of the High Court 1980 based on the law with respect to the doctrine of substantial performance as it is applied to construction contract.

The plaintiff and the 1st defendant are to bear their own costs and there shall be no chargeable interest before judgment on any sum awarded.

Judgment is to be entered against the 2nd defendant with costs in respect of the plaintiff's claim on the guarantee for the sum of RM100,000.00.

DATO' KANG HWEE GEE
Hakim Mahkamah Tinggi
Bahagian Dagang 8
Kuala Lumpur.

Tarikh: 12 MAY 2010

Didengar pada 12.3.2007, 13.3.2007, 14.3.2007, 23.5.2007, 25.5.2007, 17.9.2007, 31.1.2008, 27.3.2008, 30.6.2008, 3.7.2008, 9.9.2008, 10.9.2008, 4.12.2008, 8.1.2009, 11.2.2009, 12.2.2009, 13.1.2010, 30.3.2010, 31.3.2010, 12.4.2010, 13.4.2010 11.5.2010 dan 12.5.2010.

Counsel:

For the plaintiff - KL Pang (with SY Cheong); M/s Cheah, Teh & Su

For the 1st defendant - N Rajentharan; M/s GH Tee & Co