

IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CIVIL APPEAL NO. 2 OF 1998

BETWEEN

HAJAH SAFIAH BINTI HAJI HASSAN 1st Appellant

HAJAH NORHAYATI BINTI HAJI HASSAN 2nd Appellant

AND

LIM TIONG KHENG Respondent

Before : FUAD, P.; HUGGINS, J.A. AND CONS, J.A..

Date of Hearing : 27 APRIL 1998.

Date of Judgment : 5 MAY 1998.

J U D G M E N T

CONS, J.A.:

On the 8th August 1990 Hajah Safiah Binti Haji Hassan and Hajah Norhayati Binti Haji Hassan ("the Appellants") entered into a contract with Lim Tiong Kheng ("the Respondent") for the development of 3 parcels of land in Kampong Gadong. We shall refer to some of the detailed provisions later, but for the moment it is sufficient to say that the basic plan was that the Appellants should supply the land and that the Respondent supply work and materials to construct on that land a number of two-storied shophouses. When complete he would be entitled to a 60 year lease over half of them while the rest, and the land, remained the property of the Appellants. Unfortunately, the project never reached completion.

The stumbling block was a particular feature of the land in question. It was "landlocked", that is to say, there was no access to it from the public highway except over land that belonged to third parties. Before the contract was signed the Appellants had in fact reached verbal agreement with a Dato Hapidz of the Abdul Razak Holdings Sdn. Bhd. to allow the use of a suitable access road already constructed and used for that company's own shophouses in the area, and a draft Deed of Grant had been prepared.

But nothing further was done. Subsequent to the agreement, in August 1992, when the Respondent was already actively engaged in piling and other earthworks, Abdul Razak Holdings withdrew its permission. Although efforts were made to get that permission restored or to obtain permission from other neighbouring landowners, none were successful. From that time on construction has naturally proceeded no further.

In November 1996 the Appellants, through their solicitors, served on the Respondent a notice purporting to terminate the agreement upon one month's notice, giving as the ground "unreasonable delay" on his part. Clause 13 gave them the right to take that course if the Respondent were "in breach of the terms of this Agreement and withdraw from the project". The following year, in the October, the Appellants' solicitors served a second notice on the Respondent, this time alleging that he had failed to complete the construction of the shophouses within the stipulated time, as per "Clause 10 of the Agreement", (which was two years after approval by the Land Office of the drawings and plans), and that he had "also failed to undertake Clause 3(b) of the agreement". By Clause 3 the Respondent undertakes:-

"(b) To construct the necessary drains, access and estate roads, water, gas, electrical and sewage facilities to the standard required by the relevant authorities concerned;"

The solicitors suggested at the same time that the signing of a Rescission Agreement would avoid legal action and a claim for damages. The suggestion was firmly rejected by the Respondent, through his solicitors, who stressed the Respondent's desire and willingness to carry on with the project, provided the Appellants were able to obtain access to the land.

The Appellants then initiated proceedings, seeking a declaration that the Agreement be cancelled and damages. The proceedings came before the Registrar first, then by way of appeal to the Chief Justice in Chambers, and finally, the Appellants being dissatisfied with his decision there, before the Chief Justice in Court for further argument. On the 26th January this year he delivered a reserved judgment in favour of the Respondent. He found, in effect, that the Appellants had been guilty of breach of contract and he ordered an assessment of damages suffered by the Respondent before another Registrar. The Appellants now appeal to this Court.

The Appellants commenced their proceedings by way of an Originating Summons with an affidavit in support. That is the procedure one would expect where, as in this instance, all that the Court was required to do was to construe the terms of a

written agreement and apply them to facts which were not expected to be in dispute, as in the event they turned out. The Respondent's affidavit in reply raised no challenge in that respect. Even so, we understand that before the Registrar it was suggested on his behalf that the proceeding be adjourned into Court and continued as if begun by writ. Apart from that however, at no time was any objection raised or request made to cross examine any deponent or to call any witness. We found it then difficult to understand at first how it could be seriously suggested in the Petition of Appeal that the Chief Justice erred in not taking the initiative himself. But it transpired in the course of argument that that was not the true complaint. What was suggested was that IE, despite the Appellants' own view as to the certainty of the facts in question, the Chief Justice was himself in any doubt, then in that circumstance, he ought to have acted off his own bat.

The short answer is that the facts, which we have set out above, were not in any way in dispute and there can have been no reason at all why the Chief Justice should have felt doubt. Clearly he did not do so. We have to say that in our view nothing useful has been achieved by such a discussion before us. The sole and crucial question on liability, as it has been throughout, is 'upon a true construction of the Agreement, who was responsible for ensuring that at all times access was available to the land in question?'

To that end a great deal of time and effort has been spent, both in this Court and below, in dissecting the actions of the parties before and subsequent to the Agreement and deducing, or attempting to deduce, therefrom their beliefs or their own understandings of the terms of the Agreement. With every respect, all that was of little or no help. Subject to certain exceptions, which have no place here, the intention of parties to an agreement is to be discovered from the words of the document, and from those words alone. Extrinsic evidence is not admissible. This principle is more than well established: see Chitty on Contract, General Principles 26th edition, at paras 809 and 876.

We turn now to those provisions of the Agreement which may have some relevance to the question. They are:-

"1.The Developer shall construct on the said land 2 storey shophouses in accordance with the approval of the relevant authorities for light industrial purposes.

2. i. In consideration of the Developer bearing all the expenses, charges, fees and any incidental costs to the aforesaid project.....
3. The Developer undertakes at his own expenses:
 - (a) To prepare and submit building plans specifications engineering and road plans and all other relevant documents pertaining to the development of the said land; Provided that the owners shall be consulted, before the drawings and plans are submitted for approval;
 - (b) (We have already set out above).
 - (c) To pay all or any premiums, survey fees and incidental charges pertaining to the said land.
- and 5. (a) The Developer shall supply or caused to be supplied all necessary materials and labour inclusive of plants and machinery for the construction of all the said shophouses inclusive of site clearance and site formation, transportation, water pipes, electrical wiring to and generally to provide for the usual public amenities available."

The Chief Justice drew a distinction between the duty "to provide" an access road, i.e., to provide the land or right of way on which the road could be constructed, and the duty to construct the road itself. The former he found to be the responsibility of the Appellants, the latter to be that of the Respondent. We have no hesitation in agreeing. There is nothing in the clauses we have set out to support the contention of the Appellants. The Respondent's duty is to construct the access road. We can find nothing elsewhere which required him to do more in this respect, and he can only carry out this duty if there is land or at least a right of way on which he can lawfully work. It is implicit in the Agreement that the Appellants will make available the land on which the Respondent will carry out his other duties. It follows irresistibly that they will make available as well what is necessary for him to carry out this particular duty. They did not do so. It is, as the Chief Justice found, they who are at fault.

Nevertheless they contend, through their counsel, that even if that be so, the Respondent is still not entitled to recover damages, because the Agreement is an entire, indivisible contract, often referred to as 'a lump sum' contract, and that the Respondent has not sufficiently performed his part thereof. We have been referred to several authorities, in particular Sumpter v. Hedges [1898] 1 Q.B. 673.

With respect, this ground is misconceived for two reasons. Firstly the principle in Sumpter v. Hedges has no application where the non completion is actually due to the fault of the party to be charged. And secondly the Agreement here is not in any event in the nature of a lump sum contract. Nor is there to be, under it, any payment in the sense in which that word is used in those authorities. In reality it was a joint venture to which each party contributed something in kind - on the Appellants' part land, on the Respondent's part work and materials - and from which each party hoped to profit - the Appellants, by an enhanced value of their land, the Respondent, by a 60 year benefit of half the shophouses. Neither would receive a direct cash benefit from the completion of the venture, but could hope to do so indirectly by the sale or lease of the shophouses. That is what the Respondent has lost by reason of the Appellants' breach, and his damages will be assessed in that respect by the Registrar applying the normal principles for the assessment of damages upon breach of contract.

The appeal must be dismissed with costs.

SIR DEREK CONS
Judge, Court of Appeal

KUTLU TEKIN FUAD
President, Court of Appeal

SIR ALAN HUGGINS
Judge, Court of Appeal

Mr Shankar Ram
Assisted by Elinda (M/S Shelley Yap & Irene Appaduray)

for Appellants

Mr Rudi Lee (M/S Abrahams Davidson & Co.)

for Respondent