

**TRANS RESOURCES CORPORATION  
SWEE SDN BHD**

**....1<sup>st</sup> Plaintiff/Appellant  
....2<sup>nd</sup> Plaintiff/Appellant**

**AND**

**DANIEL LEONG NYUK MING  
BRUNEI ECONOMIC DEVELOPMENT BOARD**

**.....1<sup>st</sup> Defendant/Respondent  
.....2<sup>nd</sup> Defendant/Respondent**

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**(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 14 of 2018)**

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Before: Burrell P, Seagroatt and Lunn JJ A.  
**22<sup>nd</sup> November 2018**

Mr Raymond Lam (Messrs. Ho & Siong) for Plaintiffs/Appellants  
Mr On Hung Zheng and Ms Vanessa On Wei Yen (Messrs. CCW Partnership) for  
Defendants/Respondents

**Seagroatt, JA.:**

This is an appeal by the Plaintiff against the decision of Judicial Commissioner James Findlay dated 25<sup>th</sup> August 2018 who dismissed the Plaintiffs' appeal against the Registrar's decision of 14<sup>th</sup> July 2018 dismissing the Plaintiffs' Originating Summons. The Plaintiffs' had sought to annul the second defendant's determination on the grounds that:

1. The determination was not made after consultation between the parties;
2. The first defendant failed to give the plaintiffs an opportunity to be heard before making the determination;
3. The first defendant failed to discharge his duties in making the determination.

Ground 2 is simply a repetition of ground 1 using different wording:

Ground 3 has no particulars.

This court is entitled to expect from an appellant a factual matrix of the nature of the dispute between the parties so as to assist the court in determining the merits of an appeal whether it be on a preliminary issue or on the substantial issues. It is not for the court itself to consider volumes of documents, correspondence and affidavits in order to understand what an appellant's case is. Such a necessary narrative matrix is completely lacking in the appellant's original skeleton argument and so we have had to do the lawyer's work for them. As a consequence much time has been involved to ensure that the appellant's case can properly be understood whatever its merits or lack of them.

In this application for leave to appeal an understanding of the nature of the contract, the “novation agreement” and the role of various parties over the course of events, was essential. Happily it was not a difficult task as there is little, if any, dispute on the documents and what they mean. They are essentially agreed which is why the defendants did not need to adduce evidence in opposition to the plaintiffs’ Originating Summons, one of the few points which the skeleton submission made in passing.

We set out in what we hope is a concise survey of the relevant factual background, in the expectation that this will assist in future cases. We were much aided by the review of the few issues and arguments contained in the judgment of Judicial Commissioner James Findlay delivered on the 25<sup>th</sup> August 2018 whereby he dismissed the plaintiff’s appeal against the decision of the Registrar.

The contract between the plaintiffs and the second defendant is dated the 8<sup>th</sup> November 2011. It provided for the plaintiffs to carry out work at the Brunei Airport. The project was completed on 18<sup>th</sup> August 2015. The plaintiffs asked for a determination of their entitlement to an extension of time and prolongation claims. On the 7<sup>th</sup> August 2017 the second defendant asked the first defendant, its employee and Supervising Engineer, to make a determination in respect of the second defendant’s claim for delay damages. He did so. His decision was not binding. The plaintiff contractors were entitled to dispute and seek remedy by way of the methods provided for in the contract.

Paragraph 20.1 under “Claims, Disputes and Arbitration” specifies the period of notice to be given by the contractor if he claims entitlement to “any extension of time for completion and/or any additional payment”. This is essentially the crux of the plaintiffs’ claim under the Originating Summons.

Paragraph 20.2 stipulates “disputes shall be adjudicated by a Dispute Adjudication Board.”

20.4 – “Neither party shall be entitled to commence arbitration of a dispute, unless a notice of dissatisfaction has been given in accordance with” the procedure set out.

Where such notice of dissatisfaction has been given in accordance with the provision, the parties are to attempt an amicable settlement before the commencement of arbitration. But, arbitration maybe commenced – unless both parties agree otherwise - within a set timescale.

20.6 stipulates that in the absence of an amicable settlement, “any dispute in respect of which the Dispute Adjudication Board’s decision has not become final and binding shall be finally settled by international arbitration.” [emphasis added]

It is clear that the plaintiff’s ultimate remedial course – and that of the second defendant - is via arbitration.

However the plaintiffs’ case on appeal to the Judicial Commissioner was that the defendant could no longer rely upon the contractual provisions by reason of what has been termed a “novation agreement” which the plaintiffs sent to the second defendant on 8<sup>th</sup> December 2016. This purported to be an agreement whereby

Darussalam Enterprise, or DE, a Bruneian Statutory Corporation assumed the rights, obligations and liabilities of the second defendant under the original contract. Accordingly, the argument went, the second defendant no longer had any rights etc – they became vested in DE. The argument is fallacious. DE never signed the “novation agreement” and so did not become a party. Thus the original contract remained in being leaving the rights, liabilities and obligations of the second defendant intact even though it acted as if DE was involved in the contract.

On 7<sup>th</sup> August 2017 the second defendant strangely wrote to DE asking it, as Supervising Officer to make a determination. But the first defendant was the Supervising Officer. The correspondence is confusing as the Judicial Commissioner found.

No substitution of parties took place. If there had been such, then the plaintiffs’ action against the second defendant could not be sustained – it was no longer a party to the action. The plaintiffs therefore could not and do not argue that the “novation agreement” replaced the second defendant with DE. Yet illogically the plaintiffs contend that the agreement, despite it not being signed by DE (and therefore DE was not a party to it) nonetheless operated as an assignment to DE of all the rights held by the second defendant under the contract whilst the obligations thereunder remained with the second defendant. So, the plaintiffs postulate, the second defendant could not invoke the “Claims Disputes and Arbitration” conditions and require the plaintiffs to submit to arbitration – only DE could do that. This is quite untenable as we have indicated. The so-called novation agreement was a nullity. DE did not agree to any part of it. There could be no division of rights, obligations and liabilities between DE and the second defendant without express agreement of all parties. In any event, on a commonsense approach, such a division would be irrational even had the parties agreed to it.

But the lack of logic on the part of the plaintiffs extends further. They base their action on the alleged determination by the second defendant through the first defendant. But if the novation agreement was complete and valid as the plaintiffs appear to suggest, the rights under the contract had been assigned to DE, and the second defendant had no right to make any determination.

Only the DE could do so, or the first defendant on behalf of DE. Had there been any such determination by the second defendant, the plaintiffs’ case should have been an action to set aside the determination on the basis that it had no right to make it.

It appears that the plaintiffs’ counsel accepted that the first defendant was not an independent contractor but an employee and/or agent of the second defendant, and made the determination in such capacity. Therefore the determination was the responsibility of the second defendant and only he was accountable for it. No action can lie against the first defendant.

On appeal Mr Raymond Lam nonetheless pursued the plaintiff’s contentions against the first defendant. The basic assertion was that the first defendant wore two hats – one “in his administrative role” as an employee and agent to carry out the wishes of the second defendant, and secondly “in his decision making function” in consulting both parties and arriving at a fair determination. In fact the first defendant’s determination of the plaintiffs claim for prolongation costs is still pending. This

issue, and the second defendant's claim for delay damages, were still being discussed when the plaintiffs issued the Originating Summons which they then did not serve until the 16<sup>th</sup> March 2018, a delay of about 5 months after the determination.

The wording of the signed contract is important. The first defendant was the "Supervising Officer" and part of the employer's personnel. He was not an independent contractor owing duties to the plaintiffs. He owed duties only to his employer to execute his functions properly and fairly. Although the plaintiff's submissions identify a number of cases which it relies upon as supporting the contrary view this is a mistaken premise. The facts of each case differ. The Supervising Officer in this contract is not to be equated with the role of an Architect or other independent agent. There is no privity of contract between the plaintiffs and the first defendant. Any acts or omissions on the part of the first defendant were those of the second defendant who is responsible/accountable for the actions of its employees.

We do not think that such argument by the plaintiffs is supportable given that their counsel clearly accepted, in this argument before the Judicial Commissioner, that the first defendant was not an independent contractor, but made his determination in his capacity as employee. That therefore is an end to this matter and we are not disposed to allow the plaintiff to resurrect it on some spurious basis which in any event simply lacks logic. He is not a third party entity – a state of affairs which Mr. Lim accepted – so he has no liability to the plaintiffs only to his employer.

The appellants reliance upon certain cases including *ICI-V-Merit Morrell Technology Ltd [2017] EWHC 1763*; *Scheldobouw BV-v-St. James Homes (Grosvenor Dock) Ltd [2006] EW HC 89 (TCC)* is misplaced. They were essentially concerned with the position of a third party entity such as an Architect or other professional agents, and their dual role. The construction manager example taken in Scheldobouw's case does not act alone. His dual function – as an agent to the principal and as decision-maker holding a balance fairly as between employer and contractor - does not render him an independent entity. He remains the servant or agent of his employer.

The propositions identified by Fraser, J in *Scheldebouw* make it clear that this appellant's argument to the effect that the first defendant owed an independent duty of care to the appellant contractor so as to render him liable in tort separate from his employer is not borne out. The first is that the role and duties will be determined by the terms of the contract by which he is bound; the second is that generally the decision-maker is not and cannot be regarded as independent of the employer; and thirdly he has to use his professional skills and best endeavours to reach the right decision as opposed to one that favours his employers. In the event that his decisions are called into question it is his employer who is accountable.

The first defendant was not a party to the contract. The novation agreement was of no effect because DE did not sign it and therefore was not a party to it. The first defendant was not therefore an independent party with liabilities to the plaintiffs. The so-called "wearing of two hats" is entirely misconceived. His administrative role was a decision-making role carried out as employee or agent of the second defendant. He was responsible/accountable to his employer, the second defendant. Only his employer had any responsibility to the plaintiffs and that was under the contract with the plaintiffs. If the plaintiffs had any valid cause of action by reason of alleged

shortcomings on the part of the first defendant, then the second defendant had vicarious liability for any that could be proved. The appellant's contention defies commonsense, fact and the law. The Judicial Commissioner was right to give it short shrift.

We now turn to the repeated arguments used in the appellants case against the second defendant. We have to say that they are equally specious. The primary obstacle is the form and content of the contract – the novation agreement has no legal basis for the reason already referred to in the judgment of Judicial Commissioner Findlay. Any argument advanced on the premise that this so-called “novation agreement” reflects legal obligations on the part of either plaintiff or defendants, or takes away from either party its rights under the contract, is not valid. One has only to note that this argument suggests that an ineffective novation agreement takes away from the second defendant its contractual rights under the valid contract, whilst leaving it with the obligations under the valid contract. It is unworthy of any detailed consideration.

The appellants have sought to turn the “novation agreement” into a “deed of absolute assignment”, relying on section 136 of the Law of Property Act. The wording is identical in both documents. The word “deed”, though used, does not alter the nature of the document. It is still an incomplete invalid document. It was not signed by DE nor acted upon by the appellant contractor. It did not alter the parties to the original contract or the terms contained therein, particularly clause 20. It cannot be substituted for the arbitration agreement quite simply because it has no legal substance. Finally the scope of the originating summons is a challenge to the determination made by the respondent's employee pursuant to the contract. That is an end to the matter.

Whatever may or may not be the merits of any claim concerning the essential dispute arising from the determination by or on behalf of the second defendant – viz that the determination was not made after consultation between the parties as to how the respective claims on the Performance Security of BN\$13 million were to be dealt with – any such claim is to be determined in accordance with the provisions of paragraph 20 of the contract.

The final desperate effort by the plaintiff is a claim for injunctive relief or urgent declaratory relief relying on paragraph 20.10 of the Conditions of Particular Application. Quite apart from the fact that the plaintiffs did not issue their Originating Summons until 3 1/2 months after the determination, there is no urgent need for relief made out.

The plaintiffs reliance upon clause 20.10 is equally misconceived. That clause does not override or preclude the arbitration clauses (which include clause 20.10). Its application requires, to use its own terminology, a basis for a claim of “injunctive relief or urgent declaratory relief.”

There is no evidence to support any argument for an injunction or urgent declaratory relief so there is no urgency nor is there an identification of the declaratory relief sought. The plaintiffs' avenue for any relief is by way of arbitration. In any event the plaintiffs delay in seeking such, even if sustainable and identifiable, is critical. There is a lapse of 5 months between the determination and the service of the Originating

Summons. That negates any supposed urgency. Within that time-frame the plaintiffs could, if they so wished, have set in motion the arbitration process. They failed to do so.

There is also a somewhat bizarre contention that the first defendant by entering appearance and seeking to dismiss the claim against him has taken a step in the proceedings thereby accepting the jurisdiction of the court. This is quite simply a non sequitur, as the Judicial Commissioner, in effect, found. This does not call for further consideration by this court.

Yet the plaintiffs argued that despite the fact that DE did not sign the agreement the second defendant had assigned to DE all the rights under the contract whilst retaining or being bound by the obligations. Therefore, so they contend, the second defendant could not exercise its right to have the dispute resolved by arbitration. There is a complete absence of any rational basis for such an argument. The “novation agreement” was a nullity. It could not be converted into an assignment.

There were subsidiary arguments advanced on behalf of the plaintiffs before the Judicial Commissioner with which he deals in his judgment and they do not bear reconsideration by us save in one respect in order to reflect the patent lack of merit. It was suggested that the matter could not be dealt with by arbitration because there was no dispute. The Judicial Commissioner, when he heard this breathtaking approach, rightly asked why he was being asked to decide a case in which there was no dispute. The issue was who was entitled to a payment or retention of \$13 million, or any part of it, the subject of the determination. That was the dispute for the resolution of which the contract had provided a mechanism, namely arbitration.

In our view there is no sustainable argument on law or fact, for any of the plaintiffs’ contentions to support their actions and their proceedings.

The appeal is dismissed with costs to the defendants/respondents.

We have already made an order for no costs in relation to the appellants application for leave to appeal heard by us on the 29<sup>th</sup> October 2018.

**Burrell, P.**

**Seagroatt, J.A.**

**Lunn, J.A**