

JESWINDER SINGH BHAN SINGH

.....Plaintiff

AND

TAN SIEW KIEN

.....Respondent

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 16 of 2018)**

Before: Burrell P, Seagroatt and Lunn JJ A.

Date of hearing: 17 April 2019

Date of Judgment: 29 April 2019

Ms. S. Rozaimarlenny DSLJ Hj Abd Rahman (Messrs. Ho & Lenny Rahman Advocates and Solicitors) for Plaintiff

Mr. Eugene Loh Jit Kuan (Messrs. Yusof Halim & Partners) for Respondent

Lunn, JA.:

The Agreement

1. By a Sale and Purchase Agreement (“the Agreement”), dated 7 December 2007, the appellant agreed to buy a plot of land in Kampong Kiarong, Mukim Gadong, together with a two-storey detached house (“the Building”) to be constructed by the respondent, “the Property” for a total of BND\$370,000.
2. Clause 10.1 of the Agreement provided that the respondent was to commence construction of the Property (“the Commencement Date”) two months after receipt of all the necessary approvals, in particular the building plans from the Government Authorities. Also, it provided that the construction of the property was to be “practically complete” within 12 months of the commencement of construction work (“the Completion Date”), failing which the vendor shall pay to the purchasers by way of agreed liquidated damages \$1,000 per month or part thereof “ from the completion date until actual practical completion of the said Building”.
3. Clause 10.2 of the Agreement provided that that the Building shall be deemed to be “practically completed” upon completion of all construction works “ as certified by the Architect excluding the connection of electricity, water and the issuance of the Occupation Certificate by the relevant authorities.” Nevertheless, the Vendor was required to apply for and obtain the issuance of the “Certificate of Fitness for Occupation” for the Building.

4. Clause 10.4 of the Agreement provided that any “defect, shrinkage or other faults in the said building which shall become apparent within a period of six (6) calendar months from the Completion Date and which are due to the defective workmanship or materials or the said Building not having been constructed in accordance with the specifications and the said building plans as approved by the appropriate authority” shall be repaired and made good by the Vendor at his own cost and expense within 30 days of the Vendor “having received written notice thereof from the Purchasers and that the defects, shrinkages or other faults complained of by the Purchasers have been verified by the Architect.”
5. Clause 12.1 of the Agreement provided that “upon receipt of full payment, the vendor shall transfer or cause to be transferred the said property to the purchaser’s nominee/s”. Clause 12.2 provided that, in the event that such transfer was not approved by his Majesty the Sultan in Council, the Vendor “shall whenever requested by the Purchaser, cause the Landowner or the Vendor as attorney of the Landowner execute further Memorandum of Transfer in favour of the nominee (s)” of the Purchaser as he at his absolute discretion so determine” until the property is so transferred.

Background

6. On 28 February 2009, the Lands Department of the Ministry of Development provided the Architect with the final approval of the Building Plans. (Appeal Bundle, page 299.) The Lands Department of the Ministry of Development issued a Certificate of Fitness for Occupation of the Building on 19 May 2011. (Appeal Bundle, page 178.) In a reply to a request for Further and Better Particulars, the solicitors representing the respondent said that the respondent “did not obtain a copy of the Certificate of Practical Completion but applied outright for an Occupational Permit which was granted on 19 May 2011.” (Appeal Bundle, page 241.)
7. There was no dispute that no written notice of defects, shrinkages or other faults verified by the Architect was given by the purchaser to the Vendor within six months of 19 May 2011. Similarly, there was no issue that at the request of the appellant the respondent had performed three sets of additional works at the Building, the first of which was requested prior to the commencement date of construction of the Building and the third of which was requested after the issue of the Occupation Certificate on 19 May 2011. On 19 October 2012, on full and final payment of the amounts due for the additional works, the respondent delivered the keys to the premises to the appellant. There was no issue that title to the Building had not been transferred to the purchaser by the vendor, albeit that there was an issue as to the circumstances obtaining.

The Appellant’s claim

8. The Appellant’s claims, settled by Messrs Zuls’s Partners Law Office, included a claim for liquidated damages of \$48,000 payable for the late delivery of the Property to the appellant of about 48 months; a claim of \$36,000 representing lost rental receivable by the appellant for a period in 2011 and 2012 in consequence of

the respondent's delay in providing vacant possession to the appellant; a claim of \$18,960, being the cost of remedying/repairing defective works; and damages for latent damages, breach of contract and negligence. Further, it was claimed that the respondent had failed to deliver title to the land to the appellant.

9. In support of his evidence in respect of alleged defects in the work performed by the respondent, the appellant relied on photographs, which he said had been taken by his daughter in December 2012, but which he acknowledged contained no dates. (Appeal Bundle, page 84.)

The respondent's case

10. The respondent accepted that there was a delay in the construction of the Building and accepted that, although the Completion Date was 28 April 2010, the Occupation Permit for the Building was not issued until 19 May 2011. In consequence, the respondent acknowledged that, pursuant to clause 10.1 of the agreement, the appellant was entitled to liquidated damages of \$1,000 per month for the period of 12 months and 21 days. The respondent denied that the appellant was entitled to liquidated damages for any period beyond 19 May 2011.
11. It was the respondent's case that the appellant had not given written notice to the respondent verified by the Architect, pursuant to clause 10.4 of the agreement, of any "defect, shrinkage or other faults" in the Building which had become apparent within a period of six months from the Completion date and which were due to defective workmanship or materials or the failure of the respondent to construct the Building in accordance with the approved specifications of the Building Plans.
12. The respondent contended that at the request of the appellant, additional work had been performed on the Property both before and after 19 May 2011 in respect of three separate requests, in consequence of which monies were due to be paid by the appellant to the respondent.
13. Furthermore, it was the respondent's case that the respondent had performed remedial work at the request of the appellant and, in addition, had afforded the appellant a discount in monies owed to the respondent for work not performed by the respondent as required and for defective work. Importantly, it was the respondent's case that the appellant and the respondent had resolved all their claims against each other in a full and final settlement reached on 15 December 2011, pursuant to which the appellant was required to pay the respondent \$54,922. (Appeal Bundle, page 349.) The final tranche of the payments due under that settlement was made on 19 October 2012. (Appeal Bundle, page 359.)

The Judgment

14. In his judgment, the judge dismissed all the plaintiff's claims and did so under three headings: (i) liquidated damages; (ii) damages for alleged defects; and (iii) delay in transfer of land title.

As to (i): liquidated damages

15. The judge found that the plaintiff's claim for liquidated damages for the delayed completion of the building was subsumed in a "full settlement of the liquidated damages" reached between the parties, in which the claim for liquidated damages was offset by monies owed by the defendant to the plaintiff for additional works performed by the defendant at the request of the plaintiff.
16. In doing so, the judge adverted to a letter addressed to the defendant, which he found to be wrongly dated 30 November 3011, in which the defendant provided a quotation for certain additional work, but which importantly contained manuscript calculations of net amounts due in respect of earlier additional work, which had been discounted in respect of work not done and for specific items, but to which had been added liquidated damages, also discounted for amounts of interests arising from late payments owed by the defendant to the plaintiff. The resulting balance was \$54,922 owed by the plaintiff to the defendant. The judge's reference "This was agreed by the plaintiff to be a full settlement of the liquidated damages, and oath", clearly was a reference to the plaintiff's answers in cross-examination. (Appeal Bundle, pages 84-85.)

As to (ii): damages for alleged defects

17. In dismissing the plaintiff's claim for damages for alleged defects in the work performed by the defendant, the judge noted that the plaintiff had failed to comply with the provisions of clause 10.4 and had provided a written notice verified by the Architect. In that context, he noted that it was not established in evidence when the photographs adduced in evidence by the plaintiff were taken in relation to the carrying out of the additional works or repairs by the defendant. Further, the judge noted that the plaintiff did not adduce into evidence any documents to support his claim for the money spent for work done to effect repairs.

As to (iii): delay in transfer of land title.

18. Of the claim in respect of the delay in transferring title to the land to the plaintiff, the judge clearly accepted the evidence of Madam Rogue in which she said that, in face of a change in government policy in respect of the transfer of land in Brunei to foreigners, the plaintiff "had asked for the process to be put on hold." Of that, the judge said that it was clear "that is the Plaintiff himself who has made it difficult for the transfer of Title."

Grounds of appeal

19. In the grounds of appeal advanced on behalf of the appellant it was asserted that the judge failed to give "special considerations to the Appellant when he conducted the trial as a Litigant in Person." Secondly, it was submitted that the judge erred in finding that the appellant "had agreed under oath to full settlement of the liquidated damages." It was contended that the agreement reached on 15 December 2011 was limited to liquidated damages owing to the plaintiff up and until 19 May 2011 only and that the plaintiff was entitled to liquidated damages from that date until the property was handed over to him on 19 October 2012. In

his oral submissions, Mr Latif drew the court's attention to the evidence-in-chief of Chew Shiau Boon, called on behalf of the respondent, that the third additional works had been completed around 30 November 2011, at which date a quotation, wrongly dated 30 November 3011, had been issued by the respondent to the appellant. (Appeal Bundle; page 73, paragraph 20.)

20. Thirdly, it was submitted that the judge had erred in law in holding that the appellant was not entitled "to claim damages for defects and poor workmanship without verification by an architect" as required by clause 10.4. Notwithstanding that it was contended that the additional works requested by the appellant to be performed by the respondent were outside the Agreement, it was submitted that the six months defects liability commenced only on 19 October 2012, on which date the appellant first had access to the Property. Further, it was contended that, since the respondent was in sole control of the property until it was handed over to the appellant's on 18 October 2012, the judge ought to have relied on the photographs, which the appellant testified had been taken in December 2012, and determined that the defects and poor workmanship could only be caused by the respondent.
21. Fourthly, it was submitted that there was an insufficient evidential basis for the judge to make a determination that it was the appellant who was responsible for the delay in transfer of the title from the respondent to the appellant.

The respondent's submissions

22. Of the complaint that the judge failed to afford "special considerations" to the appellant as a litigant in person, the respondent pointed out that the appellant had been represented by Ms Veronica Rajakanu of Messrs Zuls partners Law office and then at trial was assisted by Mr Malik, a non-practising lawyer. In those circumstances, it was submitted that the appellant ought not now to be able to argue that he was not cautioned by the court about the consequences of not adducing relevant evidence.
23. The respondent submitted that, having regard to the letter to the appellant from the respondent dated 30 November 3011, on which was the manuscript calculation dated 15 December 2011 and signed by the appellant, which stipulated the sum of \$54,922 as owing to the respondent to be paid in four instalments, together with the receipts acknowledging those payments, the last of which was dated 19 October 2012, the judge was correct to determine that the parties had settled the issues of any outstanding monies due and owing to each other, including liquidated damages, on 15 December 2011.
24. Of the period over which the respondent was liable to pay liquidated damage, the respondent pointed to clause 10.1, which provided that liquidated damages would be calculated from the Completion Date, namely 28 April 2010 and the date of actual practical completion, namely 19 May 2011 on the issue of the Occupation Certificate. There was no provision within the Agreement which required payment of liquidated damages after the latter date. There was no dispute that the respondent performed additional works at the request of the appellant after 19

May 2011. Those works were not part of the Agreement and the provision for liquidated damages, which had expired anyhow, had no effect.

25. Of the claim for damages for alleged defects in the work performed by the respondent, the latter pointed to the paucity of evidence adduced by the appellant. The appellant had not provided written notice verified by the Architect. The oral evidence of the appellant was unsubstantiated. The photographs did not refer to any specific dates and it was unclear whether they were taken before or after the renovation work.

Discussion

Special consideration

26. As noted earlier, the appellant had the benefit of being represented by Messrs Zuls Partners Law office at least, so it appears, until at least August 2014. (Appeal Bundle, page 121.) Of the assertion made in the respondent's reply that at the trial the applicant was "assisted/advised by a Mr Malik (a non-practising lawyer) who was present during the entire trial of the matter", it is to be noted that in a letter dated 2 November 2016, to the Chief Registrar of the Supreme Court the appellant wrote requesting "that during the forthcoming trial, I be allowed "*my next friend*" to sit beside me as I am not physically fit". (Appeal Bundle, page 277.) At the hearing, there was no agreement between the parties as to the pattern of attendance of the "next friend", albeit that it was agreed that he was called Mr Malik, who was not qualified as a lawyer in Brunei.
27. At the hearing of 23 January 2017, at the suggestion of Counsel for the respondent, the judge referred the matter to a Deputy Registrar to fix a date for a pre-trial conference. The judge suggested that the plaintiff "may want to seek legal counsel and representation in the meantime." At the hearing in this court, Mr Eugene informed the court that a PTC was held on 20 February 2017 before Judge Masni. Although the parties requested to be provided with notes of that hearing, nothing was placed before this court.
28. The oral evidence commenced on 15 January 2018 with the plaintiff's "Opening Speech". A document in the lower court file entitled "OPENING SPEECH", is apparently signed by the plaintiff's, albeit apparently wrongly dated Monday, 15 January, 2017. It asserted, *inter alia*:

"...this case is about NON FULLFILLMENT OF CONTRACT TERMS by the defendant.

I HAVE MADE FULL PAYMENT FOR THE PURCHASE PRICE FOR THE PROPERTY and the defendant to date has neglected and fail (sic) to transfer the property, hence breached the terms of the contract.

Your honour to date this case has come up for trial five times and three PTC are held.

PTC

1. April, 2014 under Honourable Judge Hajah Masni
2. February-March 2017 under Honourable Judge Hajah Masni”

Thereafter, the document addressed the late practical completion of the Building and the alleged “37 months delay in handing over the property” and the complaint in respect of the failure to transfer title to the property. It did not address the issue of damages for defects in the works performed by the respondent.

29. In any event, it is clear that the matters about which complaint is made about the disadvantage from which the appellant allegedly suffered at trial as a litigant in person, namely his lack of understanding of the need to prove in evidence with supporting evidence the defects in the work he alleged and the costs incurred in remedial work, were pre-eminently matters of common sense, not matters of arcane, legal complexity. There is no reason whatsoever to believe that the appellant was disadvantaged in a way that in any way undermined a fair trial. There is no merit in this ground of appeal.

Liquidated damages: full settlement

30. The judge’s determination that appellant had agreed to a “full settlement of the liquidated damages” and had done so under oath is fully made out by having regard to the documents which supported and led to the agreement being signed by the appellant, dated 15 December 2011 and by the appellant’s unambiguous evidence in cross-examination.
31. In cross-examination, the appellant agreed that a series of letters addressed to him from the respondent, mistakenly dated 24 November 3011, articulated the results of negotiations between the parties in respect of various monies owing between them. First, the sum of \$46,919.20 was stipulated as being the cost of certain additional work. (Appeal Bundle, page 338-9.) Then, the sum of \$9,297.90, was stipulated as the amount that he had negotiated as “Discount Allowed & Work No Done & Additional Work”, from the original sum of \$46,919.20. (Appeal Bundle, page 341). The sum of \$12,699.30 was acknowledged as his entitlement to liquidated damages, calculated on a Completion Date of 19 May 2011 on a *pro rata* monthly rate of \$1,000. That total was reduced by \$2,000, which represented the money that he agreed he owed as “late charges interest”. (Appeal Bundle, page 343). The letter, headed “Late charges interest” stipulated an original amount due from the appellant of \$6,087.50 (Appeal Bundle, page 345.) However, another letter addressed “Discount Allowed-Late Charges Interest” and stipulated a sum of \$4,087.50. (Appeal Bundle, page 345-347). In cross-examination, the appellant agreed that “the final figure after deducting all discount is \$26,922”. (Appeal Bundle, page 85.)
32. Also, the appellant agreed that the net figure, after discounts, owed by him to the respondent for the third additional works was \$28,000. (Appeal Bundle, page 85.) In a letter, mistakenly dated 30 November 3011, the original amount claimed for the third additional works was \$32,279.40. (Appeal Bundle, page 349.) However, in a letter of the same date a discount of \$4,279.40 was afforded to the appellant from the original total for the additional work. (Appeal Bundle, page 351.)

Accordingly, the net amount due for the third additional works was \$28,000. Further, the appellant agreed that the resulting overall total due from him to the respondent was \$54,922. (Appeal Bundle, page 85.) That arithmetic calculation was written in manuscript on the letter (Appeal Bundle, page 349):

NEW ADDITION	28,000
PREVIOUS ADDITION	<u>26,922</u>
	<u>54,922</u>

The appellant agreed that both parties had signed the letter and “have an agreement date 15 December 2011.” (Appeal Bundle, page 85.)

33. Next to that calculation was a separate calculation, which the appellant agreed was a schedule of the payments due from him to the respondent; namely

- 5/1/2012= \$10,000
 - 10/2/2012 = \$14,974
 - 9/5/2012 = \$14,974
- | | |
|------|----------|
| | \$39,948 |
| Bal. | \$14,974 |

34. Receipts issued by the respondent to the appellant evidenced the payment of the first three payments of those monies on the dates stipulated above and the final payment on 19 October 2012. (Appeal Bundle, pages 353-359.) The final receipt stated “Full and Final Payment for Purchase house on Lot 56901 Kg. Kiarong.”

35. There is no merit in this ground of appeal.

Damages for defects in the works performed by the respondent

36. The statement made by the judge that the plaintiff had failed to invoke clause 10.4 of the Agreement in making claims of “defects and poor workmanship” is a statement of undisputed fact. However, the judge is not to be taken as stating that invoking and complying with clause 10.4 was the only way in which such a claim could be made. It was not. Rather, given that it required the claim to be made in writing and verified by the Architect, it was a process by which evidence of the alleged defects would have been made available. It was in the context of the absence of such evidence, that the judge made his subsequent statement that he approached the photographs adduced into evidenced by the appellant “warily”, in particular noting that there was no evidence “If these photographs were taken before or after work or repairs were made by the defendant.” The judge acknowledged that the photographs were “photographs of defects”.
37. Such evidence as there was of the date of the photographs came from the appellant, namely that they were taken in December 2012. Moreover, the judge observed that there was no evidence at all, in particular documentary evidence, adduced by the appellant to support his claim of the cost of such remedial work

38. As counsel for the respondent pointed out in his written submissions, the appellant acknowledged in cross-examination that the quotation to a total of \$18,960, dated 7 November 2013, he said that he had obtained from Kenwood Furniture Trading Company for various works to be done at the Building (Appeal Bundle, page 178) was not work for which he had paid. (Appeal bundle, page 86.) Although the appellant asserted in his affirmation that the work had been done by “various contractors” to a total cost of approximately. \$20,000, he produced no evidence in support. (Appeal Bundle, page 54 at paragraph 24.)
39. There is no merit in this ground of appeal.

Delay in transfer of title to the Property

40. The judge resolved the competing cases in respect of the undisputed delay in transferring title to the property to the appellant by accepting the evidence of Madam Rogue, who testified that after she had contacted the appellant in 2012 in respect of the preparation of a memorandum of transfer of title, the appellant had told her to “hold” the transfer. When asked what she understood the appellant to mean she said “I have no idea. After I told them everything, he told me to hold first.” Subsequently, she said that the context of the appellant’s direction was the introduction of new regulations from the land office. Having been referred to the receipt dated 19 October 2012 for \$14,924, but which acknowledged “Full and Final payment for Purchase house on Lot 56901 Kg Kiarong”, it appears that her contact with the appellant was on or after that date. (Appeal Bundle, pages 105-107.)
41. Having heard and seen the witness give evidence the judge was well placed to make his finding. Nothing has been advanced on behalf of the appellant that undermines the integrity of that finding in any way. There is no merit in this ground of appeal.

Conclusion

42. For the reasons that we have given, we dismiss the appellant’s appeal.

Costs

43. Having dismissed the appellant’s appeal, as foreshadowed with counsel at the hearing, we order that the respondent is to have the costs of the appeal, to be taxed if not agreed.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A