KHO TECK BOON **....Appellant**

AND

CHUON TZU CONSTRUCTION COMPANY SDN BHD **.....Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 2 of 2018)

Before: Burrell P, Seagroatt and Lunn JJ A.
22nd November 2018

Headnote: Contract – Appeal against trial judge's findings of fact and on credibility of witnesses – appeal dismissed.

Mrs. Veronica K Rajakanu (Messrs. Zuls Partners Law Office) for Appellant
Mrs. Hjh Rokiah Hj Swed (Messrs. Eversheds H E P) for Respondent

Cases cited in the Judgment:

Chin Win Heng v Yang Sok General Contractor (Civil Appeal 3/2015)
Muhd Irrawadey bin Metali v Ibrahim bin Maidin (Civil Appeal 14/2011)

Burrell, P.:

On 27th January 2018 the Chief Justice, as he then was, Dato Seri Paduka Hj Kifrawi, handed down a judgment wholly in favour of the defendant (the respondent in this appeal) after hearing 9 days of evidence concerning a dispute between the plaintiff (the appellant) who was the sole beneficial owner of 4 shop houses which were being renovated in or around 2005 and the defendant, a constructive company, who carried out the renovation and building works pursuant to a contract between the parties signed and dated 19th October 2005.

It was not disputed that at the time of the commencement of the works by the defendant over half of the project had already been completed by a previous contractor. The plaintiff had terminated that contract.

The contract contained a term that the works would be completed in 6 months, namely by 31st March 2006. The litigation stems from the fact that they were not.

It was a lump sum contract for $521,000 revised later to $479,617.81. However, the total amount of the defendant's 7 progress claims, submitted between October 2005 and May 2007 came to $797,030.52.

In response to these claims the plaintiff, between November 2005 and January 2007made 6 payments in the total amount of $273,744.58. This sum is disputed. The appellants claims it is higher.

The defendant's contract was terminated on 17th October 2007.

In the trial before the Chief Justice the plaintiff claimed damages from the defendant under two heads. First, $148,387.10 liquidated and ascertained damages arising from

the failure to complete on time and secondly $143,989.99 for additional expenses incurred by the plaintiff to complete the works. The defendant counterclaimed a sum of $77,591.42.

The primary issue was therefore who was at fault for, and therefore caused, the delay.

The judgment below

In a lengthy judgment the learned Chief Justice summarized the evidence of the witnesses who testified. It is trite to note that he alone had had the opportunity of hearing and seeing the witnesses in court. The outcome of this factually complex case depended to a large extent on credibility. It was necessary to make numerous findings of fact. With the sole exception of the law relating to "the limitation issue" (to which we refer later) this was a case which could only be resolved by making factual findings on the conflicting evidence presented at trial. Later in this judgment we discuss briefly some of the specific issues. It is important, however, at this stage to put such discussion in context.

Such issues are illustrative only. The overall context in which we have considered them is that the trial judge clearly preferred and relied on the respondent's evidence. The appellant's task is to demonstrate that he chose to believe the wrong side. His judgment shows that he did not believe the appellant on any of the material issues. In such circumstances Mrs Veronica, counsel for the appellant on appeal acknowledged that it is simply not helpful, appropriate or necessary for this court to consider, examine and analyze all the minutiae of evidence in correspondence, documents, oral testimony, and pleadings concerning each and every factual dispute. The tenor of the judgment below is crucial and we therefore recite the major part of the learned Chief Justice's ruling (underlining added)

> *"PW1 in his evidence blamed the defendant's company for the delay. This was, according to him, due to the company's financial problems and thus had failed to provide enough manpower to complete the project on time. PW1 also stated the sub-contractors were not paid. PW1, therefore, had to engage directly other contractors to help the defendant. PW1 stated the defendant was simply making excuses for the delay by blaming PW1. The defendant, however, stated the reason for the delay was due to late confirmation and PW1's verbal instruction to stop/hold/change works on site.*
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> *As regards the reason for the delay, on the balance or probabilities, I believe and accept the evidence of DW1 Dato Lim and DW2 Chen Min Wei. DW1 Dato Lim was a former co-owner of the partially completed shophouses. DW1 later sold his share to the plaintiff (PW1). I accept DW1's evidence when he said he knew of the problems arising between the plaintiff and the defendant throughout the entire construction period since its inception from the various correspondences to him and the plaintiff from the defendant. DW1 stated the delay in the construction was due to the delay in paying the progress payment. He already indicated to PW1 that he was willing to contribute to fund the construction due to cash flow problem. DW1 stated the defendant's company was not an overnight contractor. The company has been involved in construction for many years. According to DW1 the defendant's company*

never had a bad record. DW1 Dato Lim testified that PW1 interfered too much in this project. PW1's own Project Engineer QED in their letter dated 6th December 006 (pg.316 of DBOD) confirmed PW1 had been interfering with the defendant's construction works.

DW2 Chen Min Wei, the Project Manager for the defendant's company gave detailed evidence as regards the late confirmation of works to be done by the defendant and PW1's verbal instruction to stop/hold/change works on site. DW2 also complained that the defendant as the main contractor was told not to carry out 9 itemised works referred earlier. The plaintiff appointed other contractors directly to do the 9 itemised works. I agree with DW2, by doing that the plaintiff had unreasonably interfered with the defendant's progress of the contract and work flow to complete the remaining works under the defendant. DW2 also stated that the claim for liquidated damages for $148,387.10 is time barred because the plaintiff filed his claim on 30th August 2012 and not on or before 31st March 2012.

The plaintiff's conduct in taking a long time to confirm quotation for additional work, not giving usual authority to his Architect (so as to save costs, since according to PW1, he had already engaged an Engineer), and not paying in full the progress claims is consistent with the evidence given by DW1 that the plaintiff was facing cash flow problem. I do not believe the plaintiff when he said the defendant did not provide enough workers on site because of the defendant's allegedly financial problem.

I also find that by not giving his Architect a proper authority to deal with variation and delay, this also contributed to the delay (despite Clause 7 of the Contract). The contract does not provide the plaintiff (as employer) with the power to deal with variation and delay.

I, therefore, dismiss the plaintiff's claim for liquidated damages because the delay was caused by the plaintiff himself. The plaintiff cannot insist on the performance of a contractual obligation by the defendant to complete the project on the agreed completion date if the plaintiff himself is the cause of the non-performance.

I agree that the plaintiff's claim for liquidated damages against the defendant is also time-barred.

As regards to claims for additional expenses incurred to complete the construction works, I accept DW2's evidence that the plaintiff engaged directly a 3rd party contractor (Hiap Hing Aluminium Works Co.) because he disagreed with the defendant's quotation to him in order to carry out the works according to the contract as stated at page 48 of the DOBD. I agree with DW2 if the plaintiff refused to follow the agreed specifications in the contract, it is unfair and unjust that the defendant had to bear the additional costs.

I also agree that when the plaintiff engaged his direct sub-contractors in 2006/2007 to carry out the omitted works from the defendant, while his contract with the defendant was still subsisting, the plaintiff was himself in breach of contract and he should bear their costs personally. Furthermore, the defendant is surely not liable to

pay additional expenses incurred for works done by 3rd party contractors which were not part of the contract between the plaintiff and the defendant.

I also note the plaintiff's claim for additional expenses incurred are not supported by invoices and receipts.

For the above reasons, I dismiss the plaintiff's claim for additional expenses incurred to complete the construction works.

As regards the counterclaim for non-payment of progress claims, I do not believe PW1's evidence that he overpaid the defendant a total of $70,000. I accept DW2's evidence that $50,000 was paid by the plaintiff on 19th October 2006 as partial payment of balance due to the defendant under Progress Claim no. 5 dated 15th august 2006. The plaintiff also paid $20,000 on 30th January 2007 as partial payment of balance due to the defendant under Progress Claim no 6 dated 15th November 2006. I accept DW2's evidence by reason of non-payment of progress claim no 7 and partial payment of the progress claims, the plaintiff is owing the defendant the sum of $61,211.42.

I, therefore, allow the defendant's counterclaim for the sum of $61,211.42.

I accept DW2's evidence that the plaintiff's direct sub-contractor had benefitted using the defendant's scaffolding, until the defendant was able to remove them in November 2007. For the reasons given by DW2 earlier, I, therefore, allow the defendant's claim for rental charges for use of defendant's scaffolding for $16,380.00

The underlined words demonstrate the fact sensitive nature of this decision. It is also apparent from a reading of the entire judgment that the learned Chief Justice did not regard the plaintiff as a reliable or impressive witness. The picture that emerges is of an un co-operative, difficult and interfering party to the contract.

The plaintiff's conduct in the progress of this litigation merits a brief reference in this context. In the 8 months since this appeal was first adjourned, in May 2018 at the plaintiff's request, he has engaged the services of 4 different firms of solicitors. In spite of this he has made 5 court appearances during that time, usually unrepresented, to ask for more time to file submissions and seek a lawyer. Mrs Veronica Rajakanu of Messrs Zuls Parnters has only been instructed recently and it is to her credit that a detailed written submission has now been filed. She acknowledges that her ultimate task is to persuade this court that the trial judge was wrong to find that the plaintiff was interfering and difficult and that when he made his key findings of fact, which were firmly against the plaintiff, they were unsupported by evidence and plainly wrong.

The difficulties facing an appellant seeking to reverse findings of fact were noted in Chin Win Heng v Yang Sok General Contractor (Civil Appeal 3/2015)

"The appeal is on fact alone an in order to succeed Chin must demonstrate that the judge's findings of fact were plainly wrong on the evidence. Usually it must be shown that in reaching his decision the judge overlooked or ignored a material part of the evidence, or made findings in the absence of relevant evidence. This is trite law

> *applied in numerous decisions of this court. When making findings of fact the judge below who sees and hears the witnesses and is able to consider the relevant documents and arguments in the light of this evidence has a massive advantage over an appellate court which simply examines the written record."*

And in Muhd Irrawadey bin Metali v Ibrahim bin Maidin (Civil Appeal 14/2011).

> *"This therefore it is an appeal on a question of fact with all the well-known difficulties which an appellant facts. The huge advantage in seeing and hearing the witnesses which a judge at first instance enjoys over an appellate court must never be overlooked. But judges make mistakes at all levels and an appeal is a rehearing on paper without the above advantages. An appellate court will only interfere with a judge's decision on a question of fact if for some well identified reason the judge's decision was plainly wrong. It is rare indeed when this can be shown but when it is shown it is an appellate court's duty to interfere."*

Grounds of Appeal

Mrs Veronica, on behalf of the appellant, aware of the difficulties summarized above, has, in the short time available to her, made a detailed and thorough examination and analysis of both the oral and documentary evidence at trial contained in a helpful 34 page written submission in support of what she realistically acknowledges is an "uphill task".

Fundamental to the appeal is the submission that the evidence of DW1 and DW2 should have been rejected and the plaintiff's evidence preferred. She examines the oral and written evidence in respect of each of the 21 "delays" which, it is said, caused the contract to overrun. The examination is designed to persuade this court that, in every instance of delay the respondent was at fault, that it was he who caused the delay and that his evidence was dishonestly given to "make excuses to cover this fact."

The numerous issues of delays is testimony to the obvious fact that this project which was, let it not be forgotten, for the completion of renovations and building works to 4 simple shop units which had already been over half completed, did not run smoothly. Merely reciting a selection of the delay issues provides sufficient illustration – additional hacking off brick walls, additional sceptic tank work, change of materials for roof trusses, alterations to aluminum windows, complications relating to sewage manholes, additional installation of glass panels, additions and extensions to kerbs and beams, installation of Jacuzzi whirlpool, air-conditioning problems and plastering on external walls. This is not a complete list.

The accusations and counter accusations as to what had been done and said and written by two parties to a contract being carried out 10 years earlier not surprisingly led to a confused overall picture. A robust approach by a trial judge was both inevitable and proper.

There are six grounds of appeal which in summary form state that:

a) the judge was wrong in law to dismiss the LAD claim ($148,387).

b) the judge was wrong to say the LAD claim was time barred.
c) the judge was wrong to find that the appellant had interfered with the works thereby delaying progress.
d) the judge was wrong to rely on DW1 and DW2's evidence.
e) the judge was wrong to allow the counterclaim of $61,211.
f) the judge was wrong to allow the additional counterclaim of $16,380.

Having given careful consideration to all matters relied on in both parties written and oral submissions we now refer briefly to illustrative issues rather than dealing with (a) – (e) seriatim.

(1) DW1 Lim Beng Thai

The appellant submits that the judge should have found DW1's evidence to have been unreliable, biased and therefore rejected it in favour of the appellant's account.

The judge was alive to the fact that DW1 had been a director of the respondent company until October 2005 and co-employer with the appellant on this project from October 2005 onwards up to the date of termination in October 2007 and thereafter. He was involved throughout. His crucial evidence that the appellant's progress payments to the respondent were late and insufficient was entirely believable. There can be no grounds to reverse such a finding. It logically follows that it was a major factor the works being delayed. The finding that it was not the respondent's cash flow nor the respondent's failure to employ sufficient workers which caused delays also follows as a matter of common sense. By the very nature of their relationship DW1 was close to the appellant, was aware of the constraints to his finances and gave evidence that he had offered to inject his own cash to help the appellant; evidence which the judge properly found to be credible and reliable.

(2) Architect's lack of authority.

The judge decided that the appellant did not allow the "project architect" the proper authority to make decisions which should have been its responsibility. The architect had originally been employed when the former (pre 2002) construction company was on site. A proper inference from the appellant's own evidence was that he, not the architect, was the final arbiter on questions of variations and extensions of time. In two telling answers, when being cross examined on the matter, he said *"this is my property and I am the decision maker"* and when asked what the point of retaining an architect who had no authority he said *"if I asked the architect to do the same, I would have to pay double….."* Again, we find no grounds to reverse the implied finding that the appellant's attitude was, contrary to the terms of the contract, to run the show himself to the exclusion of the architect and to the obvious disadvantage of the respondent. This is clear and believable evidence of interference. When asked in cross-examination about a letter dated 6th December 2006 from the project engineer complaining about his persistent interference since the commencement of the contract he merely answered that he did not agree with the contents of the letter and was surprised that the engineers had written it. This response supports the judge's findings which reflect the appellant as authoritative and uncompromising.

(3) Further interference

The trial judge found Chen Wen Yi, the respondent's project manager (DW2) to be a reliable and credible witness. He was very experienced having managed many large projects in Brunei over many years. The judge dealt with his evidence in great detail and accepted that the appellant was consistently late in confirming works to be done, frequently told workers on site to stop what they were doing and employed other sub-contractors to carry out works without proper consultation with the respondent. We find that Mrs Veronica's valiant submissions that there is evidence upon which this court should find the direct opposite is plainly untenable.

(4) Insufficient workers on site

This is another discreet issue which turns on credibility. The appellant claimed that firstly, that the number of workers on site was inadequate and secondly, that the reason for this was the respondent's financial difficulties. The judge's findings provide credible answers; it was not the respondent but the appellant who had financial problems; resulting in under payments to the respondent and in any event the number of workers on site depended on the tasks actually being performed, whether skilled or unskilled, at any one particular time. Again, having seen and heard the competing witnesses on this issue, the findings made are irreversible. The judge said in the plainest terms that the appellant was not telling the truth.

(5) The Counterclaims

In answer to the respondent's counterclaims in the total sum of $77,591.42 the appellant claimed he had overpaid the respondent by $70,000. The appellant's first attempt to support this claim by documentary evidence came when he was being cross-examined at trial. Not surprisingly the judge regarded this timing as far too late. He accepted that the $70,000 was made up by two payments relating the progress claims. It is noted that even these payments fall well short of the amount claimed. $50,000 was paid under progress claim No 5 (which was for $116,003.31) and $20,000 under claim no 6 (which was for $91,297.87). These payments were documented. The appellant's late attempt to erode the counterclaims by reference to these payments was found to be unmeritorious.

Also documented was the underpayment under progress claim no 6, in the final sum of $61,211.42 which was a straightforward finding of undeniable fact in support of the counterclaim.

The balance of the counterclaim, $16,380 related to scaffolding rental charges which was, again, supported by credible evidence.

Decision

In a nutshell the evidence at trial produced, in respect of the five illustrative issues above, the following questions and answers.

(1) Were DW1 and DW2 biased, unreliable and dishonest? No
(2) Did the plaintiff assume the role and authority of the architect? Yes.
(3) Did the appellant interfere with the progress of the works? Yes.
(4) Were there insufficient workers on site? No.
(5) Was it the appellant's financial constraints which resulted in underpayment of progress claims and delays? Yes.
(6) Was the appellant's answer to the counterclaim honest? No.

In light of the above the appellant's uphill task of reversing many findings of fact is a wholly forlorn one. The clear findings relating to credibility and factual issues in the examples cited necessarily permeate through the entire case. The plaintiff himself was found to be the cause of the non-performance. He cannot be entitled to any damages in such circumstances.

Limitation

The judge also dismissed the appellant's claims as being time barred. Liability for liquidated and ascertained damages (LAD) commences on the date of the original end of contract date, 1st April 2006. They run until the date of actual termination 17th October 2007. It is not in dispute that the total claimable LAD would amount to $148,387.10.

The writ was filed on 30th August 2012. The 6 years limitation period therefore goes back to 30th August 2006.

The learned judge accepted the proposition that as the liability for LAD commenced 5 months before that date it is time barred.

In view of our findings on the merits, which were wholly in the respondent's favour, this issue is of academic interest only. We observe that, had the matter turned solely on the question of limitation, it is arguable that as the quantum of LAD increases arithmetically with time a cause of action was on-going at the critical moment, namely 17th October 2006, and continued thereafter. It is therefore arguable that LADs which had accumulated prior to 17th October 2006 were time barred but those which arose after 17th October 2006 were not.

Costs

The parties agreed at the hearing that if the appeal was unsuccessful then costs would inevitably follow the event and, consequently, a final order as to costs could be made in this judgment.

Order

The appeal is dismissed with costs of the appeal to the respondent to be taxed if not agreed.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**