**NGUI SZE CHIAT** **....Appellant**

**AND**

**KAMILA CONSTRUCTION SDN BHD** **.....Respondent**

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**(Court of Appeal of Brunei Darussalam)**
**(Civil Appeal No. 3 of 2017)**

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Before: Mortimer P, Burrell and Seagroatt JJ A.
**22 May 2017**

*Headnote: Order 14 judgment for part of claim and interim payment granted by the registrar. The judge dismissed an appeal against the orders. The appeal against the judge's order dismissed. No bone fide defence demonstrated.*

Mr On Hung Zheng (Messrs. CCW and Partnership) for Appellant
Ms. Wong Mew Sum (Messrs. Abrahams Davidson & Co) for Respondent

**Mortimer P:**

This is an appeal against Hairol Arni J's dismissal of an appeal from Registrar Noor Amalina Alaihuddin's granting of a summary judgment for part of the claim under Order 14 of the RSC to the respondent/plaintiff against the appellant/defendant for $2,101,187.40 representing the unpaid balance of 4 progress claims under a building contract. Further claims are made in the action.

***The History***

On 2 October 2014 Syarikat Pembangunan Makmor Jaya (the appellant's father), the employer, and the respondent, who was the contractor, made an agreement for the construction of 18 two-storey terrace houses, 10 semi detached houses and 18 two-storey shop houses to be completed in 18 months for the fixed sum of $6,800,000. This contract was signed by the appellant's father.

Under clause 1.1 under the breakdown of costs the $800,000 was described as *'Provisional and Prime Cost Sum'*. The $6 million is described as *'New Works Cost*.'

Clause 2 reads*:*

*"TYPE OF CONTRACT & INTERIM PAYMENTS*

*A) This is a Lump Sum Contract and the price is a fixed price not subject to measurement or recalculation should the actual quantities of work and materials differ from any*

*estimates available at the time of contracting, except is regard To Variations Which May Be Ordered by the Employer/Architect.*

B) *Interim payment shall be by **fixed instalments** of the Contract Sum payable on work done on site.*

C) *All Interim Payments must be paid **within 30 days** in accordance with the conditions of contract."*

Work began on the contract and in October and November 2014 the respondent made 4 progress claims as follows:

1). On 20 October 2014 for $488,055.73; 2.) On 28 October 2014 for $610,799.09; .3) On 15 November 2014 for $470,356.02; and 4) On 25 November 2014 for $586,866.82.

Each submitting the progress claim ended with the words "*for your kind approval*" followed by *"Thank you for your attention. If you have any queries please do not hesitate to contact us."*

After the first 2 claims on 12 November 2014 a cheque for $140,000 was sent to the respondent by the appellant's father in part payment. The amount of the claims was not challenged and by inference they were approved.

Later arrangements were made for the appellant to take over responsibility as employer, from his father. So, on the 28 November 2014 the appellant signed a contract (the Contract Agreement) with the respondent in the same terms as the earlier contract with his father but with the addition under clause 2 of: sub-clauses D) and E). These are not material to this decision.

Also dated 28 November 2014 an additional signed contract (the Construction Agreement) was made between the respondent and the appellant. No doubt this was to avoid any ambiguity and to clarify the appellant's personal responsibility. It is signed by the appellant affirming his liability under the building contract. Relevantly in clause C reference is made to the submission of the progress claims and the net total of $2,101,187.40 taking into account the part payment of $140,000. Copies of the progress claims were annexed to the contract (see clause C) as well as a 'schedule of progress payments' expressed as percentages of the fixed contract sum Clauses 3 and 4 of this contract are relevant and provide:

*"3. This contract is a fixed sum contract and the contract sum is not subject to re-measurement or recalculation should the actual quantities of the works and materials differ from any estimate available at the time of contracting except for variations works requested by the employer and/or project architect.*

*4. Payment of the contract sum shall be by progress claims for work done as at the date of the progress claims shall be paid within thirty (30) days from the date of the progress claim(s) made. A copy of the schedule of 4 progressive claims is annexed hereto marked as C – 5. "*

On the 29 November 2014 the appellant signed yet another agreement entitled - *Agreement on Progress Claim 1 – Progress Claim 4.*

This sets out the total sum due on the 4 claims as $2,101,187.40. The body of the document asks the appellant to agree with the 4 copies of the progress payments and the total. A breakdown of the progress claims was attached and the appellant agreed that payment was within 14 days. The appellant signed under the heading "Agreed by". There is no dispute that he signed in his personal capacity.

At this time on the face of the documents the position could not be more clear. The appellant had unequivocally agreed both the amounts of the progress claims outstanding and to pay the balance within 14 days.

The appellant failed to pay but work on the site continued and on 15 December 2014 a fifth progress claim was submitted which is not the subject of this summary judgment.

On the 27 December 2014 the parties agreed in writing that the respondent would cease work on 31 December and leave the site. The appellant claims that in leaving the site the respondent was in breach of the construction agreements. But as he had not paid one cent to the respondent since he had taken over this must be nonsense. Without progress payments obviously the respondent could not continue with the work and this is the obvious and justified reason for the respondent ending the work.

As no progress payment had been made and the work was to end on 31 December 2014 payment for the total amount of work done had to be dealt with. This included the first 4 outstanding progress payments, A 5th progress in payment in December was still owing as well as payment for the total work completed by the 31st December 2014 still to be assessed.

The appellant was unable to pay so a meeting was convened between the respondents, the appellant and also the appellant's father following which the short agreement was signed by them all. The appellant agreed to satisfy the whole debt including the balance of the first 4 progress claims by using the value of shop houses yet to be built but to be completed within 12 months. Further, there was an expressed intention for a necessary sales and purchase agreement between the parties was to be signed within 2 weeks. No challenge or even query as to the correctness of the 4 claims was raised. Again the appellant accepted the correctness of the claims yet to be paid on the document he signed.

In order to complete the possible compromise of the appellant's total debt a draft Deed of Assignment was prepared. Although the total value of all the work done and therefore the number of shop houses involved was left blank the compromise came to nothing, but the appellant was still prepared to sign the draft which included this term confirming the first 4 progress claims:

*(3.2) as at the date of this Assignment a sum of Brunei dollars Two Million, One hundred and One thousand, One Hundred and Eighty Seven and Cents Forty only (B$2,101,187.40) being part of the contract sum is due and owing to the contractor. The Assignor now has confirmed that the Assignor is unable and unwilling to make further payments of the Contract Sum in accordance with the progress claims as mentioned in the Construction Agreement.*

In summary therefore, according to the contemporaneous documents, at the time the work on the construction site ended on the 31 December 2014 the appellant's father had agreed

the first 4 progress claims and had made a $140,000 part payment towards them. Thereafter the appellant had also accepted the correctness of the first 4 progress claims and had signed written agreements either acknowledging them or agreeing to pay them in 2 contracts dated the 28 November 2014, one dated 27 December 2014 and one undated assignment draft agreement shortly after 27th December. On these clear written agreements the respondent successfully obtained an order 14 judgment and an order for interim payment from the registrar which was upheld by the judge.

The contemporary documents also show an attempt to compromise the agreement to pay and satisfy the debt through the sale of shop houses yet to be built but which came to nothing. There is no contemporary document which raises any queries or dispute concerning the sums claimed until January 2015 when 2 letters were sent by the appellant to the respondent. To these we will refer.

Two questions arise as to whether there are any triable bone fide issues raised by the appellant concerning:

a) any dealings between the parties which varied the appellant's agreements to pay the first 4 claims; and

b) whether the agreements can be set aside as vitiated by fraud or misrepresentation.

***The Appellant's Case***

The appellant contends that the decisions of both the registrar and judge were wrong and that he ought to have been given leave to defend on several issues to which we now turn.

***The Construction Agreement***

We examine first the appellant's submission that there is an issue to try whether the Construction Agreement of 28 November 2014 was signed on that date or much later immediately before 15 January 2015. He says, that on dishonest misrepresentations made by the respondent that the sums in the 4 claims would not be maintained and that any excess claims would be remedied in later assessments, he was persuaded to sign this agreement at a later time. In support he makes reference to the stamp duty chop on the agreement dated 15 January 2015. With respect this allegation it is unrealistic. This bare contention is that this businessman was persuaded to undertake serious obligations in a building contract when the work had already come to an end on 31 December. It is incredible. This contract was related to and was complementary to the Contract Agreement dated the same day and closely associated with the agreement of the 29th November in which he accepted the 4 claims and agreed to pay the balance. As can be seen from the terms this was the only purpose of the agreement of the 29th November. Similar contentions that misrepresentations led to him signing the agreement on 29 November are equally unrealistic and are bare unsupported allegations.

The stamp showing the date that duty was paid on the Construction Agreement does not prove that it was signed on that day, simply that it had been signed before that date.

Finally on this point even if the contract had been signed later it would not vary agreements to pay the 4 claims in the letter of the 29th December and would later confirm both the amounts and the obligation to pay as well as agreeing to a detailed method of assessment for the claims in the fixed sum contract. The appellant's contention is untenable and properly dismissed.

Further and importantly relevant to the validity of the construction agreement are the appellant's contentions before the registrar to which we refer when considering the allegations of fraud.

***Allegations of Fraud***

The appellant's most significant contention is that the agreements by the appellant to pay the progress claims cannot be enforced because they are tainted with fraud. It is not open to a party in a civil action to make an allegation of fraud unless he can establish it very clearly. Obviously it has to be pleaded and when pleaded, full particulars must be given. Here the defence alleges fraud without using the term and fails to give appropriate particulars. The pleading is flawed. However, that does not dispose of the matter if the point is properly raised by affidavit in Order 14 proceedings. The allegation is that the respondent deliberately and dishonestly inflated the claims and having done so persuaded the appellant to sign clear agreement to pay the claims by dishonestly representing that any over claim would be rectified later. In order to establish fraud it is quite insufficient in the circumstances of this case to simply demonstrate that the claim is too high or is the result of mistake, or a misunderstanding or a misinterpretation of the agreement or anything similar.

Taken at its best the evidence put forward by the appellant on fraud amounts to serious allegations of dishonest inflation of the claims amounting to fraud but based on the divergences between the claims and the assessment of their own experts in March 2015. Without anything further this is simply insufficient to establish fraud.

However relevant to this consideration is the case advanced by the appellant before the registrar set out by her in the judgement as follows:

> *"The defendant contends in his show cause affidavit that at no time was he aware of nor 5 on the authenticity of such document. The defendant further submits that (the exhibit) was fabricated by the plaintiff and denies ever signing such an agreement. As such, the material agreement that is relied upon by parties is in dispute and such issue of possible fabrication ought to be assessed via forensic examination and determined upon full trial of the of the matter."*

The registrar noted that no such allegations of fraud had been pleaded in the defence.

This astonishing inconsistency between the case advanced before the registrar and this court fortifies our view of the danger of accepting bare allegations unsupported by contemporaneous correspondence or documents made by this appellant.

Although it is not part of our decision we note in passing that Ms Wong, for the respondent, had little difficulty in demonstrating to the court that the 4 progress payments were made

sufficiently in accordance with the Construction Agreement of the 28 November 2014 and in particular the percentage schedule signed and agreed by the appellant.

***Any Later Variation of the Written Agreements to Pay?***

The appellant's contention is that there is a triable issue that the liability for the first 4 progress claims was compromised in the agreement signed on the 27 December 2014 and the Deed of Assignment which followed. Although it was clearly the intention of the parties that the appellant's debt should be satisfied by the use of proceeds from the shop houses to be built, the debt could not be compromised until the Deed of Assignment was completed and made. It never was completed and the compromise came to nothing.

The appellant's remaining contentions also fail to raise any triable issue or bone fide defence. As an example the suggestions that the Construction Agreement of 28 December 2014 was invalid as lacking consideration having been signed by both parties to clarify the terms of the Contract Agreement and the appellant's personal liability is unarguable and has to fail. This and the other remaining contentions were justifiably rejected by the registrar and the judge. They are unarguable.

***Remaining Issues in the Action***

The Order 14 judgement concerns only the balance owed on the first 4 progress claims. Having clearly agreed the amount of the claims and to pay them the issues raised in January 2015 after the appellant had received his own surveyors reports do not impinge upon the concluded agreements, whether or not they raise issues still to be tried in the action. Similarly the letters in January 2015 from the appellant challenging the amount in the 4 claims are evidence of him seeking to raise the issue but too late to affect his liability.

The appellant's contention that he raised an issue with the respondent concerning the amounts claimed on a number of occasions and that he was the victim of dishonest misrepresentations raise no bone fide issue to be tried when these bare assertions are considered against the absence of any supporting contemporaneous document and the complete consistency of the contemporaneous agreements he signed.

***Conclusion***

For these reasons the appeal against the judge's decision is dismissed and the summary judgment under order 14 of the RSC stands.

***Interim Payment***

Turning to the order for interim payment. If an order 14 judgment is given for the full amount of a claim it is obviously inappropriate to order an interim payment. The defendant will satisfy the claim or the plaintiff will seek execution.

Here however there may be a procedural advantage to have an order for interim payment. The Order 14 judgement is for only part of the claim. It may be cumbersome and a waste of costs and time for the respondent to seek to execute only part of the claim when further

execution may be necessary if it succeeds on the full claim. Here the order is for interim payment within 14 days with consequences for non-compliance.

The appeal against the order for interim payment is also dismissed and the order stands.

***Costs***

We order nisi that the costs shall follow the event and the appellant shall pay the respondent's costs of this appeal to be taxed if not agreed. If either party wishes to challenge this order notice must be given to the Chief Registrar and the other party by end of business on Tuesday, 23 May 2017 and we will hear any such application on Wednesday 24th May at 9:30 AM.

**Mortimer, P.**

**Burrell, J.A.** **Seagroatt, J.A**