

**LISA DEVELOPMENT SDN BHD
HUA CHAN NAM**

**1st Appellant
2nd Appellant**

AND

INNOTRADE AND EQUIPMENT

Respondent

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 5 of 2019)**

Before: Burrell P, Seagroatt and Lunn JJ A.

Date of Hearing: 20th November 2019

Date of Judgment: 27th November 2019

Ms Veronica K Rajakanu (Messrs Zul Partners Law Office) for Appellants

Mr Eric Siow Kin Seong (Messrs J Cheok Eric Advocates and Solicitors) for Respondent

Cases referred to in the judgment

Hadmor Productions v Hamilton [1983] AC 191

Birkett v James [1978] AC 297

Grovit v Doctor [1997] 1 WLR 640

Lunn, JA.:

1. This is an appeal, with the leave of Judicial Commissioner Woolley, against his dismissal, dated 16 September 2019 of an appeal against the decision, dated 29 September 2018, of Deputy Chief Registrar Radin dismissing the appellants' application, filed on 31 October 2017, to strike out the respondent's claim for want of prosecution.

Background

2. The writ was filed on 6 October 2009 and related to an agreement made on 22 August 2005, in which the appellant agreed to construct for the respondent twelve two-story shop houses in Kampong Sinarubai, Mukim Kilanas in Brunei for \$1,080,000. Payment was to be made, in large part, by a set-off of monies owed by the appellants. The agreement required the completion of the construction of the shop houses within 12 months of the "date of mobilisation". According to the statement of claim, the construction works were to be completed by 24 August 2006, but extended by agreement, initially to the end of December 2006 and, subsequently to the end of January 2008. The respondent claimed that the works were defective and never fully completed, in consequence of which they had to employ their own contractors at their own cost to complete and rectify the works. Those costs, together with claims for lost rental, were claimed by the respondent in the statement of claim.

Initial steps taken in the action

3. The significant steps taken in the action initially can be set out in the following chronology:
 - 6 October 2009-writ and statement of claim filed;
 - 12 December 2009-defence filed;
 - 21 December 2009-reply filed;
 - 25 January 2010-the respondent filed a summons for directions;
 - 22 February 2010-the court issued an order for directions;
 - 1 March 2010-the court fixed a pre-trial conference for 19 July 2010, subsequently
 - adjourned;
 - 23 August 2010-pre-trial conference; and
 - 1 November 2010-respondent filed a notification setting down action and a request for setting down action for trial

4. As the Commissioner noted, after the steps taken to progress the action described above, there was no further action taken to proceed with the action until 13 September 2012, when the respondent's solicitors wrote to the appellants' solicitors seeking their consent to amendments to be made to the writ and statement of claim. Next, by letter dated 27 April 2015, the respondent's solicitors asked the court to set the matter down for trial. Those two courses of action can be considered in separate chronologies.

Steps taken by the respondent to amend the writ and statement of claim

5. The steps taken by the respondent to seek leave to amend the writ and statement of claim extended over a period of no less than seven years and can be described in the following chronology:
 - 13 September 2012 the respondent's solicitors wrote to the appellants' solicitors seeking their consent to amend the written statement of claim;
 - 9 July 2013-the appellants' solicitors replied to the letter of 13 September 2012 stipulating areas of objection/non-objection;
 - 29 September 2018-in dismissing the appellants' summons to strike out the respondent's claim, Deputy Chief Registrar Radin ordered that, if the respondent intended to apply for leave to amend the statement of claim, the respondent was required to do so by 3 November 2018;
 - 24 October 2018-the respondent's solicitors filed a summons with the court for leave to amend the writ and statement of claim
 - 15 April 2019-hearing of that summons before Deputy Chief Registrar Radin; Ruling reserved;

Further steps taken in the action

6. As noted earlier, the other course taken to progress the action began with the respondent's application to the court, dated 27 April 2015, to set the matter down

for trial, but took subsequent diversions, which can be set out in the following chronology:

- 27 April 2015-the respondent's solicitors asked the court to set the matter down for trial;
- 28 May and 3 August 2015 -the respondent's solicitors reminded the court of its request of 27 April 2015;
- 9 September 2015-the court informed the parties that the matter had been fixed for hearing on 23 and 24 November 2015 before the Chief Justice;
- 10 October 2015-the court informed the parties that a pre-trial conference had been fixed before the Chief Justice on 22 October 2015;
- 22 October 2015 pre-trial conference-the court informed the parties that the hearing dates had been vacated and invited the parties to inform the court if the parties were agreeable to exploring mediation.

Mediation/striking out

- 31 October and 5 November 2015-the solicitors of the appellants and the respondent respectively informed the court, copied to each other, that they were agreeable to mediation; in doing so, the appellants' solicitors stated that they reserved the "*... right to apply to apply to dismiss (sic) claim for want of prosecution and delay*"; [Italics added.]
- 30 June 2016-the respondent's solicitors informed the court again the respondent was agreeable to mediation and requested the court, subject to confirmation that the respondent was similarly agreeable, to "*...arrange for a mediation to be conducted*";
- 28 September, 20 December 2016, 4 January, 2 February and 22 May 2017-the respondent's solicitors reminded the court of its request that the court arrange for mediation to be conducted, asserting in all but the first letter that the respondent had "*...no information or whether the Defendants are agreeable to the same*";
- 2 October 2017-the court invited the respondent's solicitors to refer the suggestion to the appellants for confirmation that they were open to the process suggested, which course the respondent's solicitors took;
- 16 October 2017-the appellants' solicitors informed the respondent solicitors that, "*...in view of the delay in proceeding with this matter, we give you notice that we have our client's instructions to proceed which (sic) striking out your client's claim*"; [Italics added.]
- 31 October 2017-the appellants filed a summons to strike out the respondent's claim for "*...want of prosecution, inordinate delay, procedural impropriety, abuse of process and/or general disinterestedness*"; [Italics added.]
- 30 July 2018-hearing by Deputy Chief Registrar Radin of the striking out summons.

The Judgment

Delay

7. In his judgment, having reviewed the chronological sequence of events, the Commissioner addressed the issue of delay and said:

"It is apparent that until November 2010 this action progressed with reasonable dispatch and had the application to set down for trial been proceeded with expeditiously, it may well have continued to trial and been disposed of before the end of 2011.

However, there have been lengthy periods of inaction which are largely unexplained which may be set out as follows:

March 2011 to May 2015-apart from the Plaintiff's indication of an application to amend the statement of claim which was not proceeded until after the strike out application in 2018.

October 2015 to June 2016-from pre-trial conference to first letter requesting mediation.

June 2016 to October 2017-a period of requests to the court for mediation, but no attempt by the Plaintiff to proceed with the matter in any other way."

8. Of the three periods of time of inaction which he had stipulated, the Commissioner said:

"It has to be said that the Plaintiff has at the very least displayed little interest, except in the early months of this action, of proceeding with the matter expeditiously to trial. The first period of inaction over four years is totally unexplained and could possibly be in itself a ground for striking out. Then, having been put on notice by the Defendants, at or shortly after the pre-trial conference, that they were considering an application to strike out, when it was imperative to act in a way which showed an intention to proceed timeously, the Plaintiff delayed a further 7 months before attempting to initiate a mediation and then did nothing to advance the action when it was apparent that early mediation by the court was unlikely. This last period I accept was possibly aggravated by the lack of replies from the court, and there is no duty on a party to harass judicial officers to obtain a response. So although the Plaintiff might have done more to proceed with the action during this time, in the circumstances I exclude it from the periods of inexcusable delay."

9. In the result, the Commissioner determined:

"I accordingly find that there was inordinate and inexcusable delay in proceeding with the action to trial, in respect of the first two periods listed above, and at the very least the Plaintiff showed little interest in actively pursuing it."

Subsequently, the judge found that the respondent's conduct of the action was "reprehensible and dilatory".

Prejudice to the appellants: fair trial

10. Having made his determination that the respondent was culpable of “inordinate and inexcusable delay” in proceeding with the action to trial, the Commissioner said:

“The next question is whether such delays have caused such prejudice to the defendants that there is a substantial risk that a fair trial is no longer possible.”

11. Of the appellants’ submissions, the Commissioner said that its case of prejudice rested “primarily” on the fact that the 2nd defendant, a director of the 1st defendant, had suffered a massive stroke on 23 February 2010 and that in consequence his health had deteriorated, so that “he will be in no position to remember the facts of the case or give evidence about it.” Of the contended importance of the 2nd appellant’s potential evidence, the Commissioner noted that, as managing director of the 1st defendant he had *“dealt with Plaintiff and the matters in dispute.”*
12. Having noted that the stroke suffered by the 2nd appellant had occurred “only four and a half months after these proceedings were commenced”, the Commissioner said that it was unlikely that a trial would have taken place before the middle of 2011. In that context, he posed the rhetorical question as to whether or not the 2nd appellant would have been “in a sufficient state to give evidence.” He determined that there was “... no evidence... to indicate whether the 2nd Defendant was in a better position to give evidence than as he is now.”
13. The Commissioner also noted that it had been submitted on behalf of the appellants, that prejudice arose from delay in that files had been mislaid in the move of the office premises of the 1st appellant in 2015 and from the fact that *“the architect and engineer have left the employ of the 1st defendant and “may” have left the country.”* Of those submissions, the Commissioner said that the loss of the files appeared to have been caused by carelessness, so that it could not be regarded as prejudice and noted of the latter submission that it was not supported by *“...any evidence of the difficulty of tracing the individuals involved and their ability to appear at court.”*
14. In the result, the Commissioner concluded:

“In short, I am far from satisfied that any prejudice suffered by the Defendants as a result of the delay is such as to prevent a fair trial at this stage.”
15. Of the “Draconian measure” of striking out the respondent’s claim, having regard to the fact that under the Limitation Act it would be excluded from recourse to courts, the Commissioner said, *“I do not consider such prejudice has been caused to the Defendants as would justify such action by the court.”*

The Grounds of appeal

16. Although the Grounds of appeal encompass no less than 17 sub-grounds, the thrust of the contentions can be addressed under two headings. First that, having determined that the respondents were culpable of “inordinate and inexcusable”

delay in proceeding with the action and having found their conduct to be “reprehensible and dilatory”, the Commissioner ought to have found that conduct to be an abuse of the process of the court and the basis, by itself, for dismissing the claim. Secondly, that the Commissioner erred in holding, notwithstanding his findings, that there was “no evidence that the appellants were prejudiced.”

17. In support of the first head of appeal, the appellant relied on the judgment of the House of Lords in *Grovit v Doctor* [1997] 1 WLR 640 for the proposition that to commence and continue litigation with no intention to bring it to a conclusion with consequential delay was an abuse of process for which a defendant is entitled to have the claim dismissed.

The respondent's submissions

18. In submissions on behalf of the respondent, the court was reminded that it must defer to the Commissioner's exercise of his discretion unless it was based on a misunderstanding of the law or of the evidence or upon an inference that particular facts existed or did not exist, which can be demonstrated to be wrong, or that it was so aberrant that no reasonable judge could have reached that decision. (*Hadmor Productions v Hamilton* [1983] AC 191.)
19. In short, Mr Siow submitted that no basis had been demonstrated to impugn the Commissioner's exercise of his discretion.

Discussion

20. There is no dispute that the task of this court is to determine whether or not, having regard to the well-known considerations identified by the House of Lords in *Hadmor*, the Commissioner erred in the exercise of his discretion in dismissing the appellants' application to strike out the respondents claim.
21. The Commissioner was entirely justified in finding that there was “inordinate and inexcusable delay” in proceeding with the action by the respondent and in determining of the respondent's conduct of the action that it was “reprehensible and dilatory.”

Abuse of process

22. Clearly, the Commissioner was not satisfied that the impugned conduct of the respondent fell to be regarded as “conduct amounting to an abuse of the process of the court”. (*Birkett v James* [1978] AC 297 at page 318 F. Relevant to that consideration was the observation made in the judgment of Lord Woolf in the House of Lords in *Grovit v Doctor* [1997] 1 WLR 643, at 647 G, “To commence and to continue litigation which you have no intention to bring to a conclusion can amount to an abuse of process.” In observing in his judgment that the delay of over four years in the period from March 2011 to May 2015 was not only “totally unexplained” but also “*could possibly be in itself a ground for striking out*” the Commissioner clearly had that consideration in mind. The Commissioner's conclusion fell squarely within the ambit of his discretion.

Prejudice to the appellants: the unavailability of witnesses and their ability to testify at trial 23. The 2nd appellant was clearly not in a position to give evidence in a trial. A medical report prepared by Dr Tang Kok Foo, dated 26 October 2017, described him as suffering from “*severe mixed dementia (a combination of vascular dementia and dementia of the Alzheimer’s type) since 2010*” and of being “*unable to speak*”. Further, it was Dr Tang’s opinion that the 2nd appellant could not attend court. Given the doctor’s opinion, and the fact that the appellant had suffered a debilitating stroke on 23 February 2010, it is readily understandable why the judge should have raised the question of whether or not the 2nd appellant would have been in a better position to give evidence at a trial that might have occurred in 2011. There was no evidence before the Commissioner to that effect, and nothing to the contrary has been suggested to this court, so that the Commissioner was entitled to make the finding he did.

24. Such evidence as had been adduced in the lower courts of the unavailability of witnesses for the appellants was tenuous to say the least. In the first Affidavit-in-Support of the summons, it had been asserted simply that “other witnesses like the (sic) some of the site managers of the construction are no longer with the 1st Defendant company”. (Paragraph 47.) In the respondent’s affidavit in opposition, the observation was made “Even if the 2nd defendant is unwell, I believe that there are other qualified professionals involved in the construction like the engineer and architect who can be called to give evidence”. (Paragraph 39.) However, in response, in the 2nd affidavit filed in support of the appellants, it was asserted merely: (paragraph 21)

“...apart from the 2nd Defendant, there are other witnesses who due to the flux of time, the Defendants no longer have contact which including the architect or the engineer and even if the Defendants and/or the Plaintiff can secure such witnesses, there is no guarantee that such witnesses can properly remember the facts and/or events. Documents and plans are also not easily located.”

25. In her oral submissions, Ms Veronica Rajakanu said that in October 2015, at which time the appellant’s solicitors had asserted in correspondence with the court, copied to the respondent’s solicitors, that the appellants reserved the right to apply to dismiss the respondent’s claim for “want of prosecution and delay”, consideration had been given to identifying the prejudice to the appellants. Of the fact that the summons to dismiss the respondent’s claim had not been filed until 31 October 2017, fully two years later, she explained that regard had been had to what she said was the difficulty of succeeding in the courts of Brunei in an application to dismiss a claim for want of prosecution. The appellants had the right to choose whether and when to file the application. However, given that the appellants had done nothing proactive to advance the proceedings, there is less force in their complaints of prejudice for delay. Nevertheless, she acknowledged that, when the application was finally filed, no evidence whatsoever had been put before the court then or subsequently which addressed:

- the attempts made to try to locate witnesses that the appellants wished to call at trial; the results of such attempts;
- the attempts made to persuade any such witnesses now residing outside Brunei to return to Brunei to give evidence and the results of those attempts;

- the relevance of such prospective testimony, having regard to the issues outstanding between the parties at any future trial; and
- whether or not such evidence was to be given by witnesses whose memories could not be refreshed by reference to documentary evidence.

26. The obvious need for and relevance of such evidence was adverted to in the judgment of Lord Woolf in *Grovit v Doctor*: (page 643E)

"In order to establish prejudice a defendant is required usually to show that the delay has prejudiced him in the conduct of his defence. This will involve him in having to demonstrate, for example, that his witnesses' recollection has been adversely affected."

27. The complaint that, although the Commissioner made findings about the absence of evidence from the appellants of "the difficulty of tracing" the architect and engineer, he had failed to make any findings about the likely frailties of memory of those witnesses, or for that matter other witnesses, is misplaced. That issue was only given particular relevance by evidence of the issues about which the witnesses were to testify and the availability/absence of documentary evidence, such as drawings, photographs and reports, to assist in refreshing the memory. There was no such evidence. In the absence of such evidence, the Commissioner was not permitted to, let alone required to, speculate what those difficulties might be.
28. The judge was entitled to be dismissive of the claim of prejudice caused by the fact that the appellants had mislaid some relevant files in the course of moving their offices in 2015 to describe that conduct as carelessness, which could hardly be prayed in aid of a claim of prejudice caused by the conduct of the respondent.

Delay resulting from the respondent's late application to amend the pleadings

29. As noted earlier, although on 13 September 2012 the respondent's solicitors had first canvassed with the appellants' solicitors obtaining their consent to applying to amend the writ and statement of claim, the summons seeking such leave was not filed with the court until 24 October 2018. The Commissioner was clearly alive to the submissions made on behalf of the appellants, adverted to the circumstances in his judgment and noting that the respondent "...took no further action on the proposed amendment until the hearing of the strike out application on 29 September 2018."
30. It was not necessary for the Commissioner to address this discrete issue separately in his judgment. Clearly, it was a matter encompassed in his overall finding that he was "... far from satisfied that any prejudice suffered by the Defendants as a result of the delay is such as to prevent a fair trial at this stage."
31. In the result, we are satisfied that the Commissioner exercised his discretion appropriately in dismissing the appellants' appeal, but nevertheless awarding the appellants their costs in any event.

Conclusion

32. Accordingly, we dismiss the appeal.

Costs

33. We make an order *nisi*, which is to become absolute if no application is made to the court to vary before 10:00 a.m. on Saturday 30 November 2019, that the respondent is to have the costs of this appeal to the Court of Appeal, to be taxed if not agreed.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A