

HJH AINAH BTE HJ MD SALLEH

... **Appellant**

AND

LISA DEVELOPMENT

... **Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 6 of 2012)**

Before: Mortimer P, Davies and Leonard JJ A.

14th November, 2012.

Contract – illegal contract – Section 13, Probate and Administration Act, Cap 11 – disposing of contractual rights vested in intestate estate of deceased without grant of letters of administration prohibited – contract unenforceable.

Mr Lim Chin Wah (M/S Ahmad Zakaria & Associates) for Appellant
Ms Veronica K. Rajakanu (M/S Zuls Partners Law Office) for the Respondent

Cases cited in the Judgment:

Re an Arbitration between Mahmoud and Isfahani [1921] 2KB 716
Anderson Ltd v Daniel [1924] 1 KB 138

Leonard JA

This is an appeal from a decision of Dato Seri Paduka Hj Kifrawi, C. J., given on the 21st of April 2012 in relation to a development contract. The Chief Justice dismissed a claim by the Appellant for liquidated damages for delay and allowed the Respondent's counterclaim for specific performance but rejected its claim for damages for breach of contract. The Respondent was the first defendant in the action. A claim against a second named defendant was withdrawn on the 6th September 2011.

The Appellant is the administratrix of her late husband Hj Bujang bin Hj Kikil ("*Hj Bujang*"). On the 21st of February, 2003, Hj Bujang and Lisa Development Sdn Bhd ("*the Respondent*") executed a Deed of Development for the building of twelve three-storey residential cum shophouses on Hj Bujang's land at Lot 5360, Kampong Sungai Tali, Mukim Seria in Belait District ("*the project*"). The shophouses were to be completed by May, 2005 and the deed provided for the payment of liquidated damages for delay at the rate of \$3,000.00 per month. Hj Bujang was to receive three of the shophouses as his share of the project.

It is common ground that there was a delay due to the fault of the Respondent, which had a manpower problem. On the 21st of June, 2005, Hj Bujang and the Respondent executed a Supplementary deed (“1st Supplementary Deed”) in which it was agreed that the date of practical completion be extended to the 31st of March, 2006. Hj Bujang waived any claim for liquidated damages up to the 31st of March 2006. Liquidated damages for delay thereafter would be \$10,000.00 per month. In the same deed D1 agreed to convert the 1st floor of the 3 units earmarked for Hj Bujang into a restaurant and to pay Hj Bujang \$6,000.00. In the end, Hj Bujang changed his mind and the conversion was not carried out. There was further delay. On the 26th of January, 2009, Hj Bujang died. At that time, the project was not completed.

After the death of her husband the Appellant was in need of money and through her two brothers in law she approached D1 for financial assistance. A further Supplementary Deed (“2nd Supplementary Deed”) was executed by the Plaintiff and the Respondent on the 15th of May, 2009. It did not set a completion date and no liquidated damages were to be payable for delay but the Appellant would be paid \$1,500.00 per month for her maintenance from April, 2009 until completion of the project plus \$40,000.00, part of which was for the payment of death duties on the land in question. PW3, the Appellant’s brother in law, received the \$40,000.00 on the Appellant’s behalf. A copy of the Grant of letters of Administration to the Appellant shows that she was appointed Administratrix of Hj Bujang’s estate on the 17th of September, 2009. At the time of executing the deed both parties were aware that the Appellant had not yet obtained a grant of letters of administration. In evidence the Appellant said that she had received the \$1,500.00 per month from May 2009 until the 17th of June, 2010. It is common ground that the Appellant was demanding further payments under the 2nd Supplementary Deed even after the commencement of the proceedings out of which this appeal arises. The last payment date, the 17th June 2010 was six months after the grant of Letters of Administration. According to DW1, practical completion of the project was on the 20th of September, 2010. There was evidence, which the Chief Justice was entitled to accept, that though no completion date was specified in the deed, the parties contemplated that completion would take place in September 2010. It was, of course, in the interest of both parties to complete the project. It was not until then that the Respondent, which had financed the construction, would be able to dispose of its share; the nine shop houses and the Appellant as Administratrix could dispose of the three shop houses which were the share due to the estate.

The key issue in this appeal relates to the 2nd Supplementary Deed. The Appellant maintains that she is entitled to repudiate it on several grounds, none of which in our judgment have any substance save one, namely that the contract contained in the 2nd Supplementary Deed was prohibited by statute and unenforceable..

It was submitted for the Appellant that the contract in the 2nd Supplementary deed was prohibited by section 13(1) of the Probate and Administration Act Cap 11 which reads:

“13(1) No person other than the Probate Officer shall assume possession of, dispose of or deal with the assets of a deceased person unless he has obtained a grant of probate or letters of administration from the Probate Officer or unless he has a probate or letters of administration (within the meaning assigned to those

expressions in Part VI) sealed by the Probate Officer in accordance with the provisions of that part:

Provided that a relative or friend of a deceased person may take possession of any asset for the purpose of safe keeping pending the issue of probate or letters of administration by the Probate officer of probate or letters of administration as provided in Part VI.”

The proviso to the subsection recognizes the common practice whereby a relative or friend of the deceased will in the interests of the estate take possession of the property for the purpose of safe keeping pending a grant of probate or letters of administration. There is, however, no mention in the proviso of disposing of or dealing with the property. It may be that in a case where a relative or friend is legitimately in possession, it might be lawful to deal with the property in some way for the purpose of safe keeping but in the present case the Appellant contracted in the 2nd Supplementary deed to dispose of contractual rights vested in the estate. On the plain meaning of Section 13(1) we feel constrained to hold that such a disposal of the property of the estate was prohibited by Section 13(1). By virtue of section 13(3) a breach of section 13(1) is a criminal offence. At the time when she executed the deed the Appellant had not received a grant of probate or letters of administration.

In the case of *In re an Arbitration between Mahmoud and Isfahani [1921] 2KB 716*, where the parties entered into a contract forbidden by an Order made under the Defence of the Realm Regulations, it was held that the contract was unenforceable as a contract which was forbidden by statute for the public benefit. That was a unanimous decision of the Court of Appeal in England. Bankes, LJ said this at page 724

“as the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract.”

See also *Anderson Ltd v Daniel [1924] 1 KB 138* where Atkin LJ said at p149:

...where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party.”

We are satisfied that the prohibition in section 13(1) is for the public benefit. In the present case, the contract in the 2nd Supplementary Deed, being prohibited by statute for the public benefit, is unenforceable and must be disregarded.

We now turn to the question of the Appellant’s claim for liquidated damages. In the 1st Supplementary Deed of the 21st June 2005, D1 being admittedly at fault up to that date, Hj Bujang waived any claim for liquidated damages up to the 31st of March 2006, the new completion date. Liquidated damages for delay thereafter would be a sum of \$10,000.00 per month. Practical completion did not take place until the 20th of September, 2010.

It has been conceded by counsel for the Appellant that there was no evidence given by the appellant or her two witnesses to prove that the Respondent was responsible for the delay in practical completion or to prove loss. On the other hand there was ample evidence of delay caused by Hj Bujang, and of delay caused by inclement weather. A request had been made as early as November 2005 by D1 that Hj Bujang sign a water service proposal but he failed and refused to do so until he finally relented and delivered a signed form to D1 on the 14th of April 2007. The evidence was that by that time the construction of the shophouses had been carried out but work could not proceed thereafter without approval for the underground laying of water pipes, which did not come until 2008. This delay was outside D1's control. Hj Bujang was the cause of further delay by applying, in or about 2004 without consulting D1, for approval for a new access road and layby which deviated substantially from the approved site plan. He maintained his application in the face of protests from D1 after it came to light. Approval for the new road only came on the 21st January 2009. Not until the approval was granted was D1 in a position to lay electrical cables, telephone lines, water pipe and pipe sleeves, in fact all underground mechanical and electrical services. A further cause of delay was inclement weather. In view of these matters, the project architect issued a letter granting an extension to not later than September, 2010. The Chief Justice accepted the unchallenged evidence adduced by the defence about the causes of delay and dismissed the Appellant's claim. He did so believing that the 2nd Supplementary Deed was valid and enforceable. However, since there is evidence which he accepted, explaining the delay as being attributable to the fault of Hj Bujang and there is no evidence of fault on the part of D1 after the execution of the 1st Supplementary Deed, it remains the case that the Appellant's claim for damages has not been established.

Specific Performance

We now turn to the order for specific performance. The situation at the time of the order was that the works had been completed. Three shop houses had been handed over to the appellant as Administratrix but she was refusing to complete the performance of the obligations imposed on the estate in clauses 5.1 and 5.2 of the Development deed. Those clauses read;

"5.1 The owner hereby promises and covenants to deliver and surrender to the Developer the document of title of the said parcel of land. The Owner shall also execute in escrow valid and registrable Memorandum (sic) of Leases of 75 years or a lease of 60 years with a subsequent lease of 15 years following immediately thereafter commencing from the date of issue of occupation permit of the shophouses in the development, to the Developer or its nominees, purchasers or lawful assigns as the case may be failing which the Developer shall be entitled to damages and specific performance

5.2 Upon the execution of this agreement, the Owner shall also execute in favour of the Developer or its nominee(s) an irrevocable Power of Attorney to develop the said parcel of land. In addition, the Owner agrees to execute another Power of Attorney with full powers as belonging to the Owner, and a Trust Deed for the Developer's share of the said development in escrow, to be registered upon the completion of the development or such time as necessary to enable the Developer to obtain financing or to sell."

This court is informed by counsel that though the appellant executed on the 10th of October 2012 the necessary Memorandum of Lease, Power of Attorney and Trust Deed for the Respondent in respect of 7 units; the Respondent's share of the shop houses, she still refuses to execute the memoranda of lease of the shop houses to the Respondent's purchasers as required by the deed. The Appellant's argument appears to be that there has been a fundamental breach of contract on the part of the Respondent so that she should not be ordered to fulfil her obligations under the development contract. It is suggested that there has been a fundamental breach because time was said to be of the essence and that there was a delay in completion. That is to ignore the realities of the situation and the history of the dealings between the parties. Her claim against the Respondent was made on the basis that she could enforce the provisions for damages for delay contained in that contract. She cannot have it both ways. The project has been completed by the Respondent, albeit later than originally intended. The Appellant must keep her side of the bargain and the order for specific performance was justified.

The appeal is dismissed. There will be an order that unless within 7 days either party makes application to the contrary the Respondent's costs of the appeal be taxed if not agreed and paid by the Appellant.

Mortimer, P.

Davies, J.A.

Leonard, J.A.