MOHAMED ABDULLA INAMULLA@YUNUS **....Appellant**

AND

SHUKRIMEE BIN HJ ABDUL WAHAB **.....1st Respondent**
RA'EMI MALEEK BIN HJ ABDUL WAHAB **.....2nd Respondent**
JUNAIDIN BIN MOHAMMED SALLEHUDDIN **.....3rd Respondent**
HENG THAI REALTY **.....4th Respondent**
ONETEAM REALTY MANAGEMENT **.....5th Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 7 of 2019)

Before: Burrell P, Seagroatt and Lunn JJ A.
21st June 2021

Mr. Eric Siow of Messrs. J Cheok Eric for Appellant
Mr. Tan Chee Huie of Messrs. Ahmad Isa and Partners for Respondent

JUDGMENT

Seagroatt, JA.:

On the 7th November 2019 the Judicial Commissioner Kannan Ramesh gave judgment for the respondents in its action as plaintiffs against the appellant, being the defendant in the original action. The appellant now appeals that judgment.

The Judicial Commissioner's decision was itself an appellate decision since the original action had been decided by the Chief Magistrate. The respondents, as plaintiffs, brought their action in respect of breach of contract based on a Sale and Purchase Agreement dated the 24th August 2001 with the defendant, the subsequent appellant, now appearing before us in respect of the decision of the Judicial Commissioner.

<u>The terms of the Agreement</u>

Originally the first plaintiff was a Mr. Haji Abdul Wahab and on his death his place was taken by the Administrator of his estate who was also a plaintiff in his own right. The first three plaintiffs, plus the now deceased Mr. Abdul Wahab, were the owners of the land in question, and the fourth plaintiff was the developer of the land. The fifth plaintiff, to whom I shall refer as "One Team" for convenience, was appointed as the Maintenance Management Firm for the 28 shophouses which were eventually constructed on the land.

The defendant/appellant purchased leases over 3 of the shophouses contructed by the developer "Heng Thai Realty". Clause 10 of the Agreement was divided into two subsections. The first provided for the defendant, and any other lessee of the shophouses, to pay, on a pro rata basis, for the charges in respect of clearly defined

common parts, maintenance of water supply, drain cleansing, lighting etc. Such payments were to be made to the Maintenance Management Firm which itself was to be appointed by the fourth plaintiff (the developer) or by the first four plaintiffs. In this action "One Team" was wrongly made a plaintiff. It was not a party to the agreement.

The second sub-clause identified the obligations of the Management Firm in respect of the shophouses for which the shophouse lessees were to pay a monthly service fee of $BN150 for each shophouse. This fee could be increased by the developer "as and when required" on proper notice.

The appellant stopped paying the monthly service fee in or about August 2011. After trial the Chief Magistrate ordered that the appellant pay to the five plaintiffs the sum of $BN30,375 being the monthly service fees for the period 16 August 2011 to end March 2017, plus the sum of $BN150 per month with effect from beginning April 2017 to January 2019. He ordered that interest be paid at the rate of 6% from the date of judgment until full and final settlement.

It became apparent that although the specific sum of $BN30,375 reflected the service fees for 3 shophouses of which the appellant was the lessee, the judgment for the continuing payment viz. from April 2017, did not make it clear that the monthly fee to be paid was in respect of each of the three shophouses, therefore a total of $BN450 each month.

On the face of this, the crux of the action was a simple issue. The defendant owe money to the MMF.

The outcome was that both parties appealed this decision.

The Judicial Commissioner's decision

The judicial Commissioner allowed the plaintiffs to amend their Statement of Claim to aver that the relief sought from April 2017 and continuing was for $BN150 per month for each shophouse to be paid to the "One Team." Clearly there had been an omission or lack of clarity in the original pleading which had led to the Chief Magistrate making a mistaken order. It was not disputed that the defendant had leased 3 shophouses and had ceased paying the service fee for all 3 of them.

Additionally he ordered that the judgment in so far as it related to the fifth plaintiff be set aside. This of course applied also to the order for payment of interest at the rate of 6% per annum against the defendant, to the fifth plaintiff.

The Issues

Until 16 August 2011 the maintenance was carried out by the agent of Heng Thai Enterprise, the developer. There was then a decision to replace the provider of the maintenance services. A meeting to discuss the replacement was held and the defendant did not attend. However he was informed in writing that the freeholders of two lots of land within the development, which included the land on which the defendant's shophouses were situated, had agreed to the termination of the fourth plaintiff's maintenance services.

There was no reply from the defendant. 'One Team' became the new provider of the maintenance services. The first plaintiff was a partner in this business. 'One Team' had been appointed by the first four plaintiffs as provided for in the agreement. The defendant was informed. He did not reply.

Some of the maintenance services provided under the agreement were sub-contracted to other concerns. The defendant ceased paying the monthly maintenance fees.

Accordingly the plaintiffs commenced their action. The other purchasers had continued to pay the monthly maintenance fees.

The defendant claimed that the second to the fifth plaintiffs were not entitled to bring the claim and that there was no privity of contract between himself and the fifth plaintiff. The defendant also claimed that the second to the fourth plaintiffs had not suffered any loss or damage.

The Magistrate held that the plaintiffs were proper parties, the first to the third being the landowners and the fourth being the developer and vendor. The fifth plaintiff had been properly appointed and there had been no objection by the defendant.

The defendant argued that "One Team" had not been properly appointed as there was an implied term that the appointment would be of an independent and competent firm with a good track record and that he was free to reject the fifth plaintiff, to terminate its services or appoint another party. He made other points subsidiary to these but in all they were nonsense and the Chief Magistrate rightly rejected the defendant's contentions.

Accordingly the Chief Magistrate found the defendant in breach of his contractual obligations and made the orders referred to earlier. This the defendant appealed.

The plaintiffs had sought in their closing submissions to the Chief Magistrate leave to amend their Statement of Claim to include a prayer that the defendant *"be required to pay to the 5th plaintiff the sum of $BN150 per month per shophouse with effect from the beginning of April 2017".* Although, as will appear later, the fifth defendant, being only the maintenance provider had no legal locus for the proceedings, there was obviously some oversight on the part of the Magistrate which led her to omit that the monthly sum to be paid from the date specified should have been in respect of all three shophouses, therefore $BN450 in total, not $BN150. Whatever the reason, the Chief Magistrate was clearly in error in not giving the plaintiffs leave to amend their pleading. There could have been no prejudice to the defendant. The clause in the Agreement was clear and the Agreement itself was not disputed, only the alleged implied term which was untenable. This is the subject of the plaintiff's cross-appeal. The defendant's argument in relation to this does not hold water.

The nature of the defendant's appeal took issue with most of the Chief Magistrate's finding.

Those issues raised were:

1) Were the second to the fourth plaintiffs, proper plaintiffs;
2) Was there a contract between the defendant and the fifth plaintiff;
3) Had the fifth plaintiff been properly appointed as the maintenance firm under the Agreement and;
4) Was the fifth plaintiff's provision of maintenance services adequate or within the scope of clause 10(ii) of the Agreement.

The Judicial Commissioner dealt with the procedural complaints raised by the plaintiffs, in which they sought in effect to dismiss the defendant's appeal by reason of alleged irregularities, in short compass. The plaintiffs he decided, were in no way prejudiced by those procedural shortcomings, and set out the reasons. We do not need to repeat them. He adopted an entirely correct approach and we agree.

We now consider the real issues which were again dealt with fairly by the Judicial Commissioner and we do not find it necessary to set them out in detail.

The Judicial Commissioner gave short shrift to the defendant's argument on the validity of the contract for services with the maintenance Management Firm and was right to do so. The defendant was not privy to that contract and had no *'locus standi'* to challenge its validity. Under the Agreement, the "One Team" was properly appointed by the first to the fouth plaintiff under clause 10(i). The defendant's obligation under clause 10(ii) was to pay the monthly service fees. This is the cause of action properly pleaded against him. Everyone except the defendant had fulfilled their obligations under the payment clause (10(ii)).

The arguments raised by the defendant alleging implied terms – *"independent party"*, *"appointment of a competent entity with a good track record"* – are nonsensical. In any event he had at no time prior to this action raised any such contention and had ignored the notices sent to him following the appointment of "One Team". It is not necessary to repeat the judge's findings and rationale. They are logical and not capable of challenge. He referred to at least one argument being a *"red herring"*, and could justifiably have used that term frequently. In practical terms he pointed out that the consequence of applying the defendant's implied terms would have been that the "*management of the communal spaces and common utilities and other services"* would have been rendered completely impossible [Paragraph 38 of the judgment]. Hence our attribution of the term nonsensical to the argument advanced.

The second argument concerns whether the services provided for under clause 10(ii) were adequately provided. There had been no complaints by the defendant about such services. The other lessees or purchasers had made their payments under the clause of the Agreement without raising any complaint about the services provided. The judge detailed aspects of the services provided which had been evidenced on behalf of the plaintiffs no doubt for the purpose of illustrating the untenable nature of the defendant's argument.

The defence pleaded muddied the water in a number of respects. It persisted in first referring to the fifth plaintiff as "the plaintiff and Fung" who merely happened to be the partners of the fifth plaintiff maintenance firm. It wrongly contended that the plaintiffs were entitled only to nominal damages. Thirdly it introduced another business known as Bismi, who it alleged to be the occupiers of the defendant's units (nos. 10, 11 and 12)

without revealing what status it had, its relationship with the defendant and its relevance to any of the issues arising out of the Sale and Purchase Agreement. We will deal shortly with these unfortunate allegations in the defence which vaguely raised issues that had no reasonable basis.

Mr. Siow confirmed to this court that Bismi was simply a business owned and controlled by the defendant, a fact which had not been disclosed hitherto by the defendant. The defendant had implied that Bismi had undertaken some of the maintenance services voluntarily, replacing the need for the services of "One Team". This, apart from being misleading, was quite irrelevant, as was the pleading.

Were the plaintiffs, entitled to bring their claim?

The defendant's suggestion and argument that the second to the fourth defendants were not entitled to bring their claim smacks of unreality on its part. They and the defendant are the parties to an action under the Agreement by which the defendant has contracted to pay specified maintenance fees. For some unaccountable reason, and without any basis in logic, it contended that this did not constitute any loss or damage.

By the Agreement the defendant agreed to pay fees for the maintenance of the common parts and other services (from which it was to, and did benefit). The maintenance firm have to be paid for its services. It would look to the plaintiffs to make up any shortfall in such payments so that it would be properly remunerated under its agreement with them. In other words their loss would be in the form of a claim against these plaintiffs. Therefore these plaintiffs had a right to sue the defendant to recover such loss under the Agreement from him. That loss was unarguably quantified by the accumulated sum of money which the defendant had failed to pay, in respect of the maintenance fees, due under the Contract. The Commissioner quantified this as a simple equation. The defendant/appellant has no answer to it.

In their action against the defendant the Judicial Commissioner held that the first to the fourth plaintiffs were enforcing their rights under the Sale and Purchase Agreement. The obligation to pay the MMF – and in this case "One Team" – was part of the consideration under the agreement. It was there to discharge the debt that the first to fourth plaintiffs would owe "One Team" under the contract for services between them. The defendant's failure to pay the fees clearly constituted a loss to the first to fourth plaintiffs. The Judicial Commissioner referred to Furmston and Tolhurst's "Privity of Contract" at paragraph 6.25, and Chitty on Contracts, Vol.1. 33rd Edition at 18-064 as underlining the situation where the contract provided for payment by the defendant to a third party, the effect of which was to discharge a debt the vendors (plaintiffs) owed to the third party.

The position is different however in relation to the fifth plaintiff ("One Team") which was appointed under clause 10(i) of the agreement by the first to the fourth plaintiffs. The fifth plaintiff was not a party to the Contract. It was appointed as the plaintiffs' agent by that clause. The plaintiffs at the appeal hearing before the Commissioner abandoned its contention that the defendant had contracted with the fifth plaintiff and rightly so. It had never been pleaded. Accordingly the Commissioner set aside the Chief Magistrate's finding on this issue, holding that the judgment was enforceable only by the first to fourth plaintiffs. He was correct to do so.

The plaintiffs' cross-appeal

The Commissioner had already allowed the plaintiffs' to amend their Statement of Claim as we have set out earlier, to correct a clear error or anomaly in relation to the amount of the maintenance fees due in respect of all three shophouses.

The first to the fourth plaintiffs had conceded at the hearing before the Commissioner that they had not pleaded that the contract with the defendant included the fifth plaintiff and abandoned any argument to maintain that. The Chief Magistrate's order against the defendant in respect of the fifth plaintiff was therefore set aside. This applied equally to the defendant's liability to pay 6% interest in respect of any sum awarded. The one falls with the other so the defendant's liability under the order and judgment is only to the first to fourth plaintiffs.

There remains only the matter of costs. The appeal before us fails, we confirm the judgment of the Commissioner and so the costs of this appeal will be paid by the defendant to the plaintiffs.

However the Commissioner in dismissing the defendant's appeal before him, save in respect of the issue concerning the former position vis-à-vis the fifth plaintiff, allowed the plaintiffs only half their costs. But this issue arose only as a result of the Magistrate's order; the plaintiffs had not pleaded that the contract made the defendant liable to the fifth plaintiff, and it is clear that this issue was barely contested before the Commissioner. The procedural argument was of minimal significance ultimately. We consider that an award of only half of the costs of the preceding appeal does not do justice to the plaintiffs. The real issue was the defendant's liability under the contract, and the defendant also sought to take advantage of the obvious mistake in the Magistrate's order. The plaintiffs had to amend the Statement of Claim to correct an obvious omission as it was necessary to make sense of the order in the lower court. It hardly involved significant attention.

We therefore adjust the Commissioner's order in respect of costs of the appeal before him, to order that the plaintiffs shall have 4/5 (four fifths) of their costs to be paid by the defendant.

Subject to that variation this appeal is dismissed with costs to be taxed if not agreed.

Burrell, P.

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