

SHUN WEI CO. SDN BHD

... **Appellant**

AND

HJH SITI ISAH BINTI LAKIM@DY HAJAH AISHAH

... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 8 of 2014)

Before: Mortimer P, Leonard and Burrell JJ A.
24th of November, 2014

Mr Robin Cheok Van Kee for the Applicant
Mr Rudi Lee Kim Boon for Respondent

Mortimer. P:

The Appellant Defendant is a building contractor. (The contractor). The Respondent Plaintiff is the owner of a house and a plot of land.

On 14 May 2007 the owner agreed to sell the plot of land to the contractor for B\$80,000. By a subsequent agreement it was provided that in lieu of the purchase price the contractor would build an extension to the owner's house.

The contractor built the extension. Unfortunately the extension soon developed serious faults which led the owner to take proceedings against the contractor in the High Court. No occupation permit for the extension has ever been obtained. These proceedings between the owner and the contractor were compromised and a consent order was made in the High Court on the 27 November 2012. By the consent order the parties agreed to appoint a civil specialist contractor to investigate and report on the condition of the extension.

The central clauses of the order are as follows:

3. The Appointed Specialist shall prepare a comprehensive report on the findings of the investigation ("the said report") which shall be conclusive and binding on both parties and both parties shall accept and comply with the recommendations contained in the said report;
4. In the event, the finding of the said report is that there is irreparable (sic) damage at any cost to the structure of the extension of the building and that the recommendation in the said report is that the structure of the extension of the building is to be demolished, the

defendant shall have no claim to a lot number 27384, Kg Sungai Tampoi, Brunei Darussalam, containing an area more or less 0.25 acre;

The 'Appointed Specialist' (the specialist) made several reports binding on the parties.

Having obtained reports from the specialist the owner applied under the 'liberty to apply' provision in the consent order for a declaration under clause 4 that the contractor had no further claim to the lot of land because the specialist recommended that the extension be demolished. Having heard the parties on 20 May 2014 the Senior Registrar held in the owner's favour and declared that the contractor had no further claim to the lot of land together with orders for payment of 2 small sums in compensation.

The contractor appealed to the judge and on the 4 September 2014 the judge dismissed the appeal with costs.

Leave to Appeal

The contractor now seeks to appeal to this court and at the outset of the hearing the owner, through its counsel Mr Rudi Lee, contended that the appeal should be struck out because the contractor had not obtained leave to appeal. He contended that leave to appeal was necessary because the judge's order was interlocutory and not final. There is no dispute that there is a right to appeal to this court against final orders but for interlocutory orders an appellant needs leave to appeal.

Having heard counsel we ruled that the judge's order was final and no leave was necessary. However, on further reflection we have decided that we were in error. This was undoubtedly an interlocutory order as no final order or judgment can be made until the claim for damages has been resolved. This order only resolved liability in relation to the lot of land.

We have reconsidered this matter on the submissions made by counsel in court, as well as their written submissions. We now grant leave to appeal on the basis that the failure to apply for leave was marginally excusable but the contractor has an arguable case with at least a chance of success.

The Decisions Below

The meaning of clause 4 and the effect of the specialists report are the subject of this dispute.

The owner contends that 'the finding in the report is that there is irreparable (sic) damage at any cost to the structure of the extension of the said building and that the recommendation in the report is that the structure of the extension of the building is to be demolished.'

The contractor contends that the report recommends that the damage is 'repairable at any cost' as these words bear their literal meaning – costs without limit of any kind.

The Senior Registrar, having considered clause 4 of the agreement, the expert's reports and the evidence of Mr. Nava (an associate of the specialist), held in favour of the owner. She said:

“After going through the experts reports many times, I am unable to agree with the respondent that any other remedial work could be done and that the recommendation to demolish is clear. It is a danger and that such demolition should be done forthwith “before any mishaps happen to people and nearby properties” – contained in the recommendation in the final report. The demolition is the rectification that needs to be done.”

On appeal the judge agreed. He ruled:

“My conclusion is that, looking at the matter from the point of view of a builder and engineer, there is no sensible, practical or safe way in which the repairs could be affected and accordingly I agree with the Senior Registrar that the provisions of paragraph 4 have been met and should be complied with.”

The Appeal

Before this court the issues remain the same. The central issue is the true meaning of clause 4.

The contractor, through his counsel Mr Cheok, contends that the words ‘irreparable at any cost’ has the literal meaning that if repairs can be carried out to remedy the defects without limit of expense and without consideration of practicality, safety or economy, no question of demolition under the 2nd part of the clause arises and the clause does not apply. This he says is the true meaning of clause 4 and reflects the intention of the parties.

He further contends, therefore, that as clause 4 does not apply, his right to the plot of land is preserved.

The owner contends that the decisions below were correct. Clause 4 does not bear the literal meaning contended for by the contractor and that the specialist’s reports clearly recommend demolition on the grounds of safety practicality and economy. Clause 4 applies and the contractor no longer has any right to the plot of land.

The Meaning of Clause 4

The central issue is the true meaning of clause 4. In determining this issue it must not be overlooked that the agreement is a commercial one made between sensible practical men. If therefore a reading the whole of the clause (which is necessary) there is some uncertainty or ambiguity then the words must be construed as having practical commercial effect and certainly not with a meaning which lacks commercial practicality or which borders on absurdity.

The words in the second part of the clause “and that the recommendation in the report is that the structure of the extension of the building is to be demolished” are relevant and important in construing the words “at any cost”. As we have already indicated the clause must be read as a whole in order to determine its meaning.

Having considered the submissions of counsel as well as the considerations to which we have referred we are in no doubt that the words “at any cost” properly construed do not have their literal meaning but are limited by considerations of practicality, safety and economy in

circumstances where the specialist's report (which is binding on the parties) clearly recommends demolition for these reasons.

Conclusion

Having construed the words of clause 4 of the agreement in this way the effect of the expert's final report of 21 November 2013 is clear. This recommends:

“Due to the unstable and effective structural members, the sagging and cracks openings are getting bigger and wider day by day. This would be the phenomenon in the near future, as the defective structural members would not be able to sustain any extra loads of vibrations from the surrounding areas.

We would strongly suggest that the areas governing the new extended building be demolished and brought down before any mishaps happen to people and nearby properties. Litigations against the house owner would be unavoidable, if such unfortunate incidents occur in the near future.”

Earlier reports only reinforce the specialist's view that on the grounds of practicality safety and economy demolition is recommended. For example the report of 9 February 2010 having considered the issues of practicality and economy, considers safety and recommends:

“A fundamental understanding of the safety issues that exist presently in this new extension of the residential house, is essential that this vital factor, among others, has to be considered when determining whether to rectify the problem by carrying out some repairs or to completely demolish the existing structure (new extension).

Based on the different factors as discussed above, we would strongly recommend that the new extension of the building be demolished and, if required, reconstruct a new extension which combines sound engineering and economic principles, methods and best industry practices.”

The judge expressed doubts about Mr Nava (who did not write the specialist's report) being called as a witness before the Senior Registrar. In the circumstances we have similar doubts but it appears that there was no objection to him being called and it seems at the time his evidence was treated as an additional report. Be that as it may we have not taken into account his evidence in our decision.

Although we have reached our conclusion by a slightly different route from the judge we agree with his decision and we dismiss the appeal.

Costs

We order nisi that the costs should follow the event and the contractor will pay the costs of this appeal. If either party wishes to make further submissions notice should be given to the Registrar and to the other party on or before 4.00 pm Wednesday 26 November 2014.

Order

Appeal dismissed with order nisi that the appellant will pay the costs of the appeal.

Mortimer, P.

Leonard, J.A.

Burrell, J.A.