Hj Abdullah Bin Hj Metassim **… Plaintiff/Respondent**

AND

Ho Guan Heng **… Defendant/Appellant**

(High Court of Brunei Darussalam)
(Civil Suit No. 28 of 2022)

Edward Timothy Starbuck Woolley, J.C.
Dates of Hearing: 27th May, 2024.
Date of Judgment: 4th June, 2024.

Appeal against refusal to strike out plaintiff's claim – principles to be followed – relevance of evidence in such an application

Hj Mansur bin Dato Paduka Dr Hj Latif of Messrs Pg Izad & Lee for the Defendant/Appellant.
Ms Nuratikah binti Awg Hj Omar of Messrs Brahms Omar for the Plaintiff/ Respondent.

Cases cited:
Ha Francesca v Tsai Kut Kan & Ors [1982] HKC 382
Malaysia Land Properties Sdn Bhd v Tan Peng Foo [2014] 1 MLJ 718

JUDGMENT

Woolley, J.C.:

This is an appeal from the decision of learned Registrar, Mohammad Marzuqi bin Sabtu, who, on 15 January 2023, dismissed an application by the defendant to strike out the plaintiff's claim on the grounds that it discloses no reasonable cause of action, it is scandalous, frivolous or vexatious or otherwise an abuse of the process of the Court, or pursuant to Order 14A of the Supreme Court Rules.

2 The plaintiff's claim is for liquidated damages in the sum of $408,000.00 arising as a consequence of delay in the construction of a commercial building in Kg Kiulap, Mukim Gadong, of which the plaintiff, as administrator of the estate of the late Hj Abdullah bin Hj Metassim, was owner, and the defendant the contractor.

3 Under the development agreement entered into between the parties dated 28 October 2014, the defendant agreed to carry out the construction of the building. The plaintiff was, at the conclusion of the construction, to receive a number of the completed units with the defendant retaining the rest. Other relevant provisions for the purpose of these proceedings are:

> *Clause 2.5: The Developer shall achieve Practical Completion of the Development Project within 36 months from the Commencement of Construction Date or such further extended date as may be permitted to the Developer under the terms of this Development Agreement.*
>
> *Clause 2.6: Notwithstanding the above, the Developer shall be allowed, without penalty, a reasonable period of extension of time (to run consecutively or concurrently as may be fair and reasonable in the circumstances), to be decided by the Project Architect, if the delay in the Practical Completion of the Development Project is due to reasons which are beyond the control of the Developer or the Developer's contractor such as:*
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> *2.6.1. by reason of force majeure, any exceptionally inclement weather, fire landslides or acts of God; or*
>
> *.....*
>
> *2.6.3 by reason of the Project Architect's instruction or certification; or*
>
> *.....*
>
> *2.6.5 by reason of any provision or order of the competent government authorities.*
>
> *Clause 2.7: Any certification for extension of time in respect of Development Project given by the Project Architect directly or indirectly, shall be construed and relied upon as valid and any such certification shall be final, conclusive and binding on the parties hereto.*

4 Construction was required to commence within 6 months of final approvals being obtained, and was to be completed within 36 months thereafter. Approvals

were obtained on 12 May 2016, construction should commence by 12 November 2016, and practical completion should have been reached by 12 November 2019. In the event, a certificate of practical completion was issued on 16 March 2020 and an occupation permit issued by the authorities on 9 May 2020. The plaintiff claimed, under the agreement, liquidated damages of $2,000.00 a month for each unit allocated, or a total of $408,000.00.

5 The defendant has claimed that the delay was due to two stop orders issued from August 2017 to March 2018 and from September 2019 to December 2019, and to delays caused by inclement weather. The former they claim were *force majeure* which was an allowed delay under the agreement, as was the latter, and have produced a letter from their architect, dated 15 June 2023, approving 125 days of extension time to 16 March 2020, the date of practical completion.

6 The defendant now relies on this letter and on clause 2.7 of the agreement above to say that they have, in effect, an unassailable defence and the claim should be struck out. Alternatively, they say that, under Order 14A the court may dismiss the action upon considering any document arising in the proceedings; here, the letter certifying the extension of time.

7 The plaintiff raises two issues here. The first is as to the two stop orders which he says were as a result of the defendant's, or his contractor's, failure to abide by safety requirements and/or their negligence, and he should not be allowed to rely on them to justify an extension of time. The second is the fact that the architect's letter certifying the extension of time was issued on 15 June 2022, over two years after practical completion, and after the defendant had received the letter from the plaintiff demanding the liquidated damages under the agreement, and which led to this action. This, it is submitted, gives rise to a doubt concerning the certificate which ought to be further investigated at trial.

8 It is clear from the two letters from the defendant's contractor to the architect dated 9 March 2022 that the latter was invited to consider the stop work orders, as well as rain and other delays, in deciding on any extension of time, and it has to be assumed that they did so. While there are clearly arguable points to be made as to the reasons for the stop orders, and whether they were as a result of any failure or negligence on the part of the defendant, there is little point in debating these if I accept the defendant's contentions regarding the architect's extension of time are correct and it is conclusive and binding on the plaintiff to the extent of striking out the claim.

9 The principles of striking out under Order 18 have been considered in a number of cases, and it has been repeated in almost all of them that the power of the court to do so should only be exercised in plain and obvious cases, which should be allowed to proceed unless the case is wholly and clearly unarguable, and a reasonable cause of action is one which has some chance of success when only the allegations in the pleadings are considered. In *Ha Francesca v Tsai Kut Kan & Ors* [1982] HKC 382, Silke JA said:

> *"The claim must be obviously unsustainable, the pleadings unarguably bad and that it be impossible, not just improbable, for the case to succeed before a court will strike out."*

10 It is on the pleadings that the court will look to see if the plaintiff has an arguable case which ought to go to trial. While the defendant has pleaded the conclusive nature of the architect's certificate in their defence, that is not necessarily the end of the matter. While I cannot here make a decision based on evidence put forward in affidavits, or documents exhibited to those affidavits, I can consider the case each party intends to put forward at trial based on the pleadings. It may well be that on consideration of all the evidence, the court at trial finds in favour of the defence case, but the plaintiff is entitled to put forward a case on the interpretation of the agreement, and possibly on the validity of the architect's certificate.

11 The defendant has referred me to the case of *Malaysia Land Properties Sdn Bhd v Tan Peng Foo* [2014] 1 MLJ 718 where it was held that an architect's certificate, in circumstances such as this, was conclusive and binding. However, that was on appeal, after a trial on the evidence, when a party had similarly sought to impugn the certificate. It is no support for saying the production of such a certificate on a striking out application should be considered the end of the matter if the plaintiff wishes to challenge it.

12 I am therefore of the view that this is not a proper case for striking out. I am unable to say that the plaintiff's case, as put forward in the pleadings, is unable to succeed, and he is entitled to a trial to challenge the case of the defendant.

13 Similarly, I am not persuaded that this is an appropriate case for determination under Order14A. The rule reads:

> *(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any*

cause or matter at any stage of the proceedings where it appears to the Court that-

(a) such question is suitable for determination without a full trial of the action; and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

14 As I have found above, this is not just a question of law or construction but consideration of a document as part of a party's evidence which, as such, the other party is entitled to challenge. It is not for me to closely examine the evidence and make a finding on it, and certainly not under this Order.

15 For these reasons I agree with the learned Registrar that this is not a proper case for striking out and the appeal is dismissed, with costs to the plaintiff to be taxed.

EDWARD TIMOTHY STARBUCK WOOLLEY
Judicial Commissioner