

<b>Pg Hj Tuah Bin Pg Hj Menudin (Puting)</b>	...	<b>1<sup>st</sup> Appellant</b>
<b>Pg Hj Damit Bin Pg Hj Menudin</b>	...	<b>2<sup>nd</sup> Appellant</b>
<b>Pg Hjh Halimah Binti Pg Hj Menudin</b>	...	<b>3<sup>rd</sup> Appellant</b>
<b>Pg Hjh Fatimah Binti Pg Hj Menudin</b>	...	<b>4<sup>th</sup> Appellant</b>
<b>Pg Aisah Binti Pg Hj Menudin</b>	...	<b>5<sup>th</sup> Appellant</b>
<b>Pg Hj Kula Bin Pg Hj Sulaiman</b>	...	<b>6<sup>th</sup> Appellant</b>
<b>Pg Hjh Halimah Binti Pg Laila Raja Pg Hj Buntar</b>	...	<b>7<sup>th</sup> Appellant</b>
<b>Pg Hjh Saliah Binti Pg Hj Sulaiman</b>	...	<b>8<sup>th</sup> Appellant</b>
<b>Pg Hj Ismail Bin Pg Hj Sulaiman</b>	...	<b>9<sup>th</sup> Appellant</b>
<b>Pg Hjh Mariam Binti Pg Hj Sulaiman</b>	...	<b>10<sup>th</sup> Appellant</b>
<b>Pg Damit Bin Pg Hj Sulaiman</b>	...	<b>11<sup>th</sup> Appellant</b>
<b>Dayangku Salmiah Binti Pg Hj Sulaiman</b>	...	<b>12<sup>th</sup> Appellant</b>

AND

<b>McBrumby Development Company</b> <i>(sued as firm)</i>	...	<b>1<sup>st</sup> Respondent</b>
<b>Pg Anak Hj Abd Latif Bin Pg Anak Saifuddin</b> <b>@Pg Anak Latifuddin</b>	...	<b>2<sup>nd</sup> Respondent</b>
<b>Liew Ting Shong</b>	...	<b>3<sup>rd</sup> Respondent</b>
<b>Tan Liang Toon</b> <i>(all trading under the name and style of McBrumby Development Company)</i>	...	<b>4<sup>th</sup> Respondent</b>

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**(Court of Appeal of Brunei Darussalam)**  
**(Civil Appeal No. 1 of 2007)**

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Power, P; Mortimer and Davies, JJ.A.  
**3<sup>rd</sup> December, 2007.**

Issue of Certificate of Practical Completion by architect under a concurrent contract held to be valid. Appeal allowed. Cost sent back to trial judge to decide damages issue. Appeal dismissed on a 2<sup>nd</sup> claim.

Mr Y C Lee of Messrs. Y C Lee & Lee for the Appellants.  
Mr. B Balendran of Messrs. Ho & Siong for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.  
4<sup>th</sup> Respondent in person.

**Cases cited in the Judgment:**

*Butt v. M'Donald* [1896] 7 QJL 68, at pp 70-71.  
*Mackay v. Dick* [1881] 6 App Cas 251, at p 263.

**Mortimer, J.A.:**

This is a plaintiffs' appeal against the decision of Findlay JC dismissing their claim for damages for breaches of a development agreement dated 27 August 1996.

*The Facts*

The plaintiffs owned 2 adjacent plots of land. In the development agreement the defendants undertook to develop the land by constructing 106 shop houses. They were to bear the whole cost of the development and in return were to have a 60 year lease of half of the shop houses. Builders were employed by the defendants to do the construction work under a construction agreement signed on 13 November 1996. The contractual dates for completion were 31 July 1998 for the construction and 27 August 1998 for the development.

The plaintiffs' first claim is for loss of rent from their shop houses for the defendants' delay in proper completion of the development agreement and in obtaining the Occupation Permit.

Their second claim is for the cost of installing electricity meters in their shop houses. They contend that the defendants were obliged to install them under the development agreement but failed to do so. They installed the meters themselves and claim the cost.

*The Architect*

For projects of this kind the appointed architects play a key role but an unusual situation arose here. By clause 22.5 of the development agreement "Project Architect" means "BEP Architects" or such other architects as the developer may from time to time appoint. BEP Architects (Mr Vishnu) were appointed to act under the construction agreement (clause 2) but not, on the findings of the judge, under the development agreement. Although Mr Vishnu's firm were specifically mentioned in clause 22.5 the judge accepted his evidence that he had only been appointed under the construction agreement.

The judge found this failure to be fatal to the first claim even though it appears that neither party took the point before him. He said:

*"One basis upon which the plaintiffs' case in this action rests is that there was a Certificate of Practical Completion by the architect appointed under the development agreement. It is only on this basis that the plaintiffs seek to calculate when the defendants were obliged to apply for an Occupation Permit and seek to show that there was a failure to obtain this within a reasonable time as alleged in the implied term. On my analysis of the problems in this case, this calculation is not possible and the plaintiffs must fail on this basis."*

Two events were of particular importance in the first claim. The first is the date of “practical completion” under the development agreement. This is defined under clause 22.10 which reads in part:

*“Practical completion” means the practical completion of the construction works of the shop houses in the development project as certified by the Project Architect in accordance with the approved building plans.... not including issuance of the Occupation Permit by the relevant authorities....”*

A Certificate of Practical Completion was issued by Mr Vishnu specifically under the construction agreement on 3 November 2000. However as between the parties to this action they had agreed by clause 22.5 that BEP Architects (Mr Vishnu) was the ‘Project Architect’ and under clause 22.10 above that he should issue the Certificate of Practical Completion. There is no doubt that both parties treated the certificate as having been issued for all purposes including those under the development agreement. It is also clear that by implication the architect was appointed in paragraph 2.4 of the developer’s letter of 6 July 1996 to undertake duties which were required under the development agreement and not under the construction agreement. This records one of his obligations as:

*2.4 “Liaising with the authority for obtaining the public utility services, i.e. electricity, telephone and water supply.”*

The Certificate is an important step towards the obtaining of an Occupation Permit. An Occupation Permit cannot be applied for until practical completion has been certified by the Project Architect and no utilities can be supplied to the buildings until there is an Occupation Permit. Under clause 8.1.2 of the development agreement the developer must apply for an Occupation Permit.

The judge also held that the first claim failed because the developer was not obliged to do more than *apply* for an Occupation Permit under the above clause. He rejected an implied term to obtain it within a reasonable time and failed to go on to consider clause 8 (ii) of the Statement of Claim which alleges an implied term that:

*(ii) The defendant would exercise due diligence to procure the issuance of the Occupation Permit.*

Had the judge considered this plea he would have been driven to hold that such a term is implied in this agreement following well established authority. See Lord Blackburn in *Mackay v. Dick* [1881] 6 App Cas 251, at p 263:

*“...as a general rule . . . where in a written agreement it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the agreement is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.”*

*Also Griffith C.J. in Butt v. M'Donald* [1896] 7 QJL 68, at pp 70-71:

*"It is a general rule applicable to every agreement that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the agreement."*

Both these findings were erroneous and they put an end to the plaintiffs' first claim for delay in obtaining an Occupation Permit without which they could not install any utilities in the properties. Further, without a Certificate of Practical Completion under the development agreement no delay in obtaining the Occupation Permit could be shown especially as the judge decided that there was no obligation other than to apply for one.

#### *The claim for delay*

Under clause 22.10 the Certificate of Practical Completion could be granted "notwithstanding the fact that any defects or matters of a minor nature may exist which the developer are liable to rectify" not including the supply of the usual utilities.

When the Certificate of Practical Completion was issued the Occupation Permit could not be applied for immediately as there were 5 "minor" matters to be completed by the developer. These were:

1. The installation of fire safety equipment.
2. The building of a slipway.
3. The completion of sub-division works.
4. The installation of louvre windows to fire escape doors.
5. The installation of pre-paid meters in the shop houses.

The evidence of both the architect Mr Vishnu and the expert Mr Wee was that normally an Occupation Permit would be obtained within 3 months of the Certificate of Completion. Here it was not obtained for 8½ months. The plaintiffs say that this delay was unreasonable and was the developer's fault in not completing the above work in a timely fashion. But, having decided against the plaintiffs on liability, the judge did not go on to make any findings on the delay in the event that he was wrong.

On the first claim therefore we allow the appeal and find the defendants liable for any unreasonable delay between the issue of the Certificate of Practical Completion and the Occupation Permit brought about by any failure of the defendants.

In the circumstances we will remit the case back to the trial judge to make findings on damage and quantum on the evidence he has already heard.

#### *The Electricity Meters*

The plaintiffs claim reimbursement for the cost of installing 147 electricity meters at B\$695 each.

They claim that the development agreement requires the defendants to install these meters. The judge found that there was no such requirement in the development agreement and consequently no obligation on the defendants to install them. It was a Government requirement to install them which arose after the signing of the agreement.

Mr Lee for the plaintiffs seeks to persuade us that such a requirement can be found in various provisions in clauses 1, 8.1.4 and 8.1.5 of the development agreement but we can find no justification for this submission. In the alternative, he contends that if the requirement arose after the agreement clause 13 (i) applies under which the expenses will be born equally by the parties. This we accept.

As the plaintiffs had installed half the total meters required in the whole development and no more the judge adopted a practical broad brush approach which in our view meets the justice of the case. He held that as the plaintiffs had borne half the total cost of all the meters, as they were required to do under Clause 13 (i), their claim should fail.

### *Conclusion*

Accordingly we allow the appeal on the first claim and dismiss it on the second claim. We remit the case back to the judge to make such findings as we now order on whether there was any unreasonable delay in obtaining the Occupation Permit and, if so, whether such delay caused any loss or damage on the evidence he has already heard. We appreciate that this will involve sending to him the papers in the case and his notes of evidence. In the event that he requires further written submissions he will, no doubt, make any necessary directions.

### *Costs*

Pending the judge's decision on damages we reserve the costs of the appeal to this court. The costs issue to be listed before this court during its May 2008 session if not agreed.

### *Order*

1. Appeal allowed on the 1<sup>st</sup> claim relating to alleged unreasonable delay in the defendants completing work in a timely fashion and obtaining the Occupation Permit.
2. Appeal dismissed on the 2<sup>nd</sup> claim relating to the electricity meters.
3. 1<sup>st</sup> claim remitted to the judge to make the following findings on the evidence he has already heard:
  - a) whether the defendants were guilty of unreasonable delay in the completion of necessary work and the obtaining of the Occupation Permit;
  - b) If so, whether the delay caused loss and damage to the plaintiffs;

- c) If so, the amount of such loss and damage.
- 4. The judge to give judgment in accordance with his findings.

**Power, P.**

**Mortimer, J.A.**

**Davies, J.A.**