IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

TEMMY SHMULL, Appellant, v. HANPA INDUSTRIAL DEVELOPMENT CORPORATION, Appellee.	CIVIL APPEAL NOS. 12-048 & 12-049, Civil Action No. 03-384 **OPINION**
HANPA INDUSTRIAL DEVELOPMENT CORPORATION, Appellant, v. TEMMY SHMULL, Appellee,	

Decided: April 28, 2014

Counsel for Mr. Shmull: Siegfried B. Nakamura
Counsel for HANPA: William Ridpath

BEFORE: KATHLEEN M. SALII, Associate Justice; R. ASHBY PATE, Associate Justice; and KATHERINE A. MARAMAN.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

This case arises out of a series of construction contracts between Temmy Shmull (Shmull) and Hanpa Industrial Development Corporation (Hanpa) for construction work performed on Shmull's building in Ngesekes.[1] For the reasons stated below, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the trial court with instructions.

BACKGROUND

On May 8, 2003, Hanpa filed a complaint against Shmull seeking payment for construction work performed on Shmull's building in Ngesekes. On June 24, 2003, Shmull filed an answer and counterclaim, denying Hanpa's claims and seeking damages for breach of contract and breach of warranty.

The trial court issued its Findings and Decision on November 2, 2012, finding that the parties (1) entered into two building contracts—one for the construction of the first floor of the building and another for the second floor; (2) reached an agreement to build a third floor for the building but ultimately failed to create an enforceable contract out of that agreement; and (3) signed off on two valid change orders that complied with the requirements of the first two contracts.

The trial court also found that both Hanpa and Shmull were in breach of the contracts and agreements. Shmull owed Hanpa $188,118.43, and Hanpa owed Shmull

[1] We avoid using the terms "Appellant" and "Appellee" in this matter as both parties appealed the trial court's decision.

$110,469.36. The trial court ordered Shmull to pay Hanpa the difference, which amounted to $77,649.07 in damages. On November 20, 2012, both Hanpa and Shmull appealed.

STANDARD OF REVIEW

Challenges to the sufficiency of the evidence are questions of fact, which we review for clear error, only reversing the trial court's decision if its findings are not "supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion." *Dmiu Clan v. Edaruchei Clan*, 17 ROP 134, 136 (2010) (internal quotation marks and citation omitted). We review de novo the lower court's conclusions of law. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). "In cases before this Court, United States common law principles are the rules of decision in the absence of applicable Palauan statutory or customary law." *Becheserrak v. ROP*, 7 ROP Intrm. 111, 114 (1998); *see also* 1 PNC § 303 ("[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the Courts of the Republic of Palau . . .").

DISCUSSION

Although neither party carried its burden of establishing that the trial court's findings of fact were clearly erroneous, we have identified some calculation errors, as well as two instances where the trial court failed to articulate its findings of fact and

conclusions of law in such a way as to allow for meaningful review. These concerns aside, we find the trial court's reasoning to be very sound.

The parties' claims on appeal are numerous and, at times, overlapping. The Court will address each argument in turn.

I. The first and second floor extensions

Hanpa's first claim on appeal involves the cost of a change order that extended the footprint of the building. Because the change order was made pursuant to the first and second floor contracts, the contracts must briefly be addressed.

A. The first floor contract

The trial court found that, on February 22, 1997, the parties entered into a contract for the construction of the first floor of a two story building. Hanpa would construct the building and Shmull would pay Hanpa $130,000. The contract specified progress payments: (1) $30,000 upon completion of the foundation and columns, (2) $30,000 upon completion of the second floor slabs, stairs and masonry, (3) $35,000 upon completion of doors, windows, tiles, plumbing, and electric, and (4) the final installment of $35,000 upon completion of the finishings, painting and cleaning.

Hanpa received progress payments, but not in the sums listed in the contract. Hanpa received individual payments of $27,000 on May 16, July 11, and August 20, 1997; a $15,000 payment on October 10, 1997; and a final payment of $13,053.02 on November 1, 1999; for a total amount of $125,543.82. Both parties agree that the trial

court properly found that Shmull owed Hanpa the remaining $4,456.18, with an additional $11,480.34 in interest and $222.81 in late fees.

B. The second floor contract

The trial court found that Shmull and Hanpa entered into a contract for the construction of the second floor on March 22, 1997. The terms required Shmull to pay Hanpa $200,000. In exchange, Hanpa would construct a second floor with a terrace, furnishings, and appliances. The contract, drafted by Hanpa, lacked a start date and a completion date. Pursuant to the contract, progress payments were to be made after each phase of work was completed. The trial court found that Shmull only paid Hanpa $177,500 for its work, with an outstanding balance of $22,500.[2]

C. The change order for first and second floor extensions

During trial, both parties alleged that a number of agreements, contracts, and change orders existed but were never put in writing. The signed contracts for the first and second floors required that any change orders modifying the construction of the building be put in writing and be signed by both Shmull and Hanpa. Subsequently, a change order meeting these requirements modified the building's floor plan by extending its footprint by 17'. However, the change order did not specify price, date of completion, or other details. At trial, Hanpa argued that the parties had, pursuant to a subsequent change order,

[2] On page seven of the trial court's Findings and Decision, it misstates the outstanding balance as "$4,456.18." It is clear that this figure is the outstanding balance for the first rather than second floor. The trial court lists the correct outstanding balance for the second floor on page 23 of its Findings and Decision.

agreed upon a price of $70,836.08 for the extensions. Believing there was no agreed-upon price, Shmull calculated the reasonable cost as $44,247.60. The trial court concluded there had been no agreement on price, and the court accepted Shmull's figure.

On appeal, Hanpa contends that the trial court erred by accepting the $44,247.60 cost estimate for these extensions. Hanpa claims that (a) Shmull ratified a change order that listed the cost for the work at $70,836.08; (b) the square footage of the extensions was larger than the trial court's determination; (c) the trial court's reasonable cost figure was based on a miscalculation and that Hanpa has a better formula to determine the costs of the extensions; and (d) prejudgment interest at the rate of 18% should be awarded on the $70,836.08 price. We will address each argument in turn.

i. Alleged ratification of the change order

Hanpa's first argument—that Shmull ratified a change order setting the price at $70,836.08—fails because Hanpa presented no direct evidence of this ratification. Instead, Hanpa suggests that because Shmull admitted to ratifying *a* change order on the extension, the change order that lists a price of $70,836.08 *must* be the ratified order. We disagree. Shmull testified that he never agreed to a change order for the extensions at the price of $70,836.08. The trial court did not clearly err in crediting this testimony.

ii. The square footage of the extensions

Next, Hanpa contends that the actual square footage of the extensions was larger than the trial court's determination thereof. The trial court concluded that the 17'

extension resulted in an expansion of each floor by 612 square feet (36' long by 17' wide). Presently, Hanpa contends that the correct length is 44.5', rather than 36'. Hanpa cites to the testimony of its own witness, Mr. Ahamed, who worked for Hanpa, as well as to the original floor plans for the building. Specifically, Hanpa argues that the original floor plans show only one longer unit (presumably 44.5') at only one end of the building, with the other units being 36' long. In contrast, the final building has two longer units, one on each end of the building. Thus, Hanpa contends that the 17' expansion resulted in an additional longer unit that is 44.5' long by 17' wide.

We do not agree with Hanpa's characterization of the floor plans. While they are somewhat unclear, the original plans appear to show five units, with two longer units on each end of the building and only three units in the middle. Pictures of the final building show two longer units on each end of the building and four units in the middle.[3] We affirm the trial court's conclusion that the 17' extension was incorporated in the middle of the building. Furthermore, there was conflicting testimony on the extensions. Hanpa's employee, Mr. Ha, testified that the extensions were 36' by 17'. Consequently, the trial court did not err in crediting the testimony that the extensions were each 36' by 17'.

[3] The pictures reveal an additional flaw in Hanpa's argument: Hanpa's damage calculation is based on the assumption that the alleged 44.5' by 17' extension results in an additional longer unit on the first and second floor. However, pictures of the completed building reveal that no longer units are present on the second floor.

iii. Alleged error and better square footage formula

In its third argument, Hanpa states that the trial court's figure of $44,247.60 is based on a miscalculation, and that Hanpa has a better formula to determine the costs of the extension. The trial court accepted Shmull's figure, which was based on the total square footage for the first and second floors as described in their respective contracts. Using these figures and the price of each floor, Shmull calculated the cost per square foot for each floor and multiplied this number by the additional square footage resulting from the extension.

In contrast, Hanpa's proposed formula improperly inflates the cost of the extensions in two ways. First, as noted above, Hanpa calculates the length of the extension as 44.5', rather than 36'. This is wrong. Second, rather than using the total square footage of the first and second floors to determine an average cost per square foot, Hanpa only uses the square footage of the original five units of each floor. This smaller square footage total omits the square footage of the building's walkways and stairs, thereby inflating the average cost per square foot. Hanpa justifies omitting these other costs and inflating its estimate because the building cost for the units is higher than the building costs for non-units (walkway, stairs, etc) and the 17' extensions add additional units. While units may be more expensive to build than non-units, Hanpa cites to no evidence for this position. More significantly, we do not agree that a more reasonable cost figure for the 17' extension is found by excluding the real costs of stairs and

walkways. In sum, we conclude that the trial court did not err in accepting the reasoning of Shmull's reasonable cost estimate.

Although Shmull's reasoning, which was adopted by the trial court, is sound and reasonable, we note minor math errors in his calculations.[4] We therefore narrowly remand this issue so the trial court can perform a new calculation using Shmull's reasoning.

iv. Pre-judgment Interest

Finally, Hanpa argues that it is entitled to prejudgment interest on the costs of the first and second floor extensions. The trial court concluded that it could not easily determine the amount due, or when the amount was due, because the memorandum signed by the parties did not specify a price or a completion date. Accordingly, the trial court awarded no pre-judgment interest on this claim. On appeal, Hanpa relies on § 354 of the Restatement of the Law, *Contracts 2d* for the position that prejudgment interest is appropriate. However, that section is only applicable "where the amount owed is fixed by the contract or can be determined with reasonable certainty." *Id.* As described above, the amount owed was not fixed or determinable with reasonable certainty by the parties.

[4] Specifically, pursuant to the first contract, Shmull took the cost of the first floor ($130,000) and divided it by the total square feet of the floor (4,215.69 sq.ft). Shmull calculates the answer as $30.80 per sq.ft. We calculate the answer as $30.84 per sq.ft. This sum multiplied by 612 sq.ft comes to $18,874.08, rather than Shmull's calculation of $18,849.60. Similarly, pursuant to the second contract, Shmull took the cost of the second floor ($200,000) and divided it by the total square feet of the floor (4,815 sq.ft). Shmull calculates the answer as $41.50 per sq.ft. We calculate the answer as $41.54. This sum multiplied by 612 sq.ft comes to $25,422.48, rather than Shmull's calculation of $25,398. We calculate the grand total as $44,296.56, rather than $44,247.60.

Rather, it was hotly contested. Furthermore, Comment C. to § 354 states, "unless otherwise agreed, interest is always recoverable for the non-payment of money *once payment has become due* and there has been a breach." *Id.* (emphasis added). In this matter, the change order was also silent as to when payment was due. Accordingly, we uphold the trial court's determination on this issue.

II. Liquidated damages awarded to Shmull

The trial court awarded Shmull liquidated damages for the delayed completion of the first floor. Pursuant to the contract, the first floor was to be finished by June 30, 1997, and Hanpa agreed to pay Shmull $100 each day until the project was finished. The floor was conditionally certified as complete on July 7, 1998. The trial court found that Hanpa was liable from June 30, 1997, to July 7, 1998. Both parties appealed this determination.

A. Hanpa's arguments

Hanpa begins by arguing that the trial court erred because Shmull substantially contributed to the delays of the first floor and is therefore barred from collecting liquidated damages. Hanpa cites to letters written in late 1997 and early 1998 by Mr. Ha to Shmull. While Mr. Ha testified that Shmull's delayed payments contributed to the delay of the first floor, there was substantial evidence to the contrary. First, as noted by the trial court, the contract employed a progress payment plan and payments were to be distributed relative to completed construction phases. The trier of fact could have reasonably concluded that delayed payments were the consequence of Hanpa's delayed

work.[5] Second, Mr. Ha acknowledged that Hanpa failed even to order the building materials until October of 1997, approximately four months past the contract completion date. Third, the letters which allegedly show financial difficulties that resulted from Shmull's delays, actually suggest that Hanpa was in general financial trouble. It is telling that the letters do not specifically allege that this financial trouble was exclusively the result of Shmull's delayed project, nor specifically the result of Shmull failing to make appropriate first floor progress payments. Accordingly, we determine that the trial court did not err in finding that Shmull did not substantially contribute to the delays of the first floor.

Failing to cite any case law, Hanpa also argues that Shmull waived any claim to liquidated damages by failing to assert his claim. In his response, Shmull points to a February 20, 1998, letter he wrote to Mr. Ha, in which he reminds Mr. Ha of the contractual completion date of the first floor and that the delay prevents rentals to tenants. We also note that Shmull wrote Mr. Ha on October 24, 1998, to remind him that, per the first floor contract, Shmull, Mr. Ha, and a representative from the Palau National Development Bank needed to sign a conditional certification of completion and that the

[5] Strong evidence supports this position. In a January 1998 letter to Shmull, Mr. Ha acknowledges that the first floor is still incomplete (he contends that 5% of the necessary work remains outstanding). Pursuant to the terms of the contract, the final payment of $35,000 for the first floor was only due upon completion of the finishings, painting, and cleaning of the first floor. Nevertheless, by the time Mr. Ha was writing his letter in January of 1998, Shmull had already paid $96,000 of the total $130,000, and had made his last payment in October of the prior year. We calculate that this sum represents an overpayment of $1,000 by Shmull at that time given the progress of the first floor.

liquidated damages clause called for $100 payment each day the project remained incomplete. Accordingly, even assuming without deciding that a liquid damages claim can be waived, there was no waiver here.

B. Shmull's argument

Shmull also argues that liquidated damages should run from July 1, 1997, through the date when Hanpa repudiated its obligation to complete the work by filing suit in 2003. Shmull calculates the damages as being over $200,000. Significantly, Shmull does not allege that this sum amounts to an honest or legitimate sum of actual damages, nor that the trial court overlooked any such evidence.

In its response, Hanpa argues that if it is found liable for liquidated damages, the accrual of those damages stopped when the parties signed the Conditional Certificate of Completion on July 7, 1998. Hanpa contends that when Shmull signed the Conditional Certification of Completion for the first floor on July 7, 1998, the certification contained a clause where the parties agreed that "June 17, 1998 was the last day employees of HANPA completed work allowing the owner to make commitments to potential clients." Additionally, Hanpa argues the liquidated damages clause's purpose was to offset lost office space rentals, and that Shmull's liquidated damage claim is an extreme calculation inconsistent with the facts and the law.

We agree with Hanpa that liquidated damages ceased to accrue with the signing of the Conditional Certification of Completion. Awarding Shmull liquidated damages for

over five and a half years, at a cost of over $200,000, would be inconsistent with the purpose of the contract clause and would amount to a penalty unanchored to an honest or legitimate estimate of delay damages.

> Liquidated-damages clauses in construction contracts can be drafted to apply whenever work is begun and a specific amount of time is allowed for the work to be completed. Such liquidated-damages provisions are meant to provide an honest and legitimate estimate of damages in case of delay, promote economic efficiency, and provide an alternative resolution to contract disputes, and such damages are consistent with public policy as a means of inducing timely performance. . . . Such liquidated damages provisions will be enforced unless the provision is a penalty.

22 Am. Jur. 2d *Damages* § 516; *see also In re Late Fee and Over-Limit Fee Litigation,* 741 F.3d 1022, 1026 (9th Cir. 2014) ("Liquidated damages are customarily unenforceable as penalties when they are in excess of actual damage caused by a contractual breach").

In sum, the trial court did not err in finding Hanpa liable for damages of $100 a day for the time period between June 30, 1997, and July 7, 1998, the date the first floor was conditionally certified as complete. However, the trial court calculated the number of days from June 30, 1997, to July 7, 1998, as 552 days for a total of $55,200. We calculate the number of days from, and including, Monday, June 30, 1997, to, but not including, Tuesday, July 7, 1998, as 372 days for a total of $37,200. We consider the trial court's error as nothing more than a scrivener's error, but remand on this narrow issue so the proper calculation may be done.

III. Parking lot paving

The trial court concluded that (1) the parties agreed to a change order whereby Hanpa would pave the parking lot and install window grills for $25,000; (2) Shmull paid Hanpa $22,000 for this work; and (3) Hanpa failed to install window grills, and Shmull had to hire a third party to do this at the cost of $2,000. Accordingly, the trial court offset Shmull's liability by $2,000 and determined that he owed Hanpa an additional $1,000.

Hanpa contends that, despite the trial court's finding, the court simply failed to include the $1,000 figure in its final damage award to Hanpa. In his response, Shmull concedes that the trial court found he owed an outstanding balance of $1,000. We agree with Hanpa that the trial court failed to include this $1,000 award in its final calculations.[6] Accordingly, we remand on this specific issue so a proper calculation may be done.

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[6] The trial court's calculation of Shmull's liability to Hanpa, before reducing it by Hanpa's liability to Shmull, was $188,118.45. We calculate this number as $1,000 shy of the actual cost. From the trial court's own figures, we calculate Shmull's liability as follows: The remaining balance for the first floor ($4,456.18 in principal, $11,480.34 in interest, $222.81 in late fees); the remaining balance for the second floor ($22,500 in principal, $63,716.70 in interest, $1,125 in late fees); the remaining balance for the third floor ($40,369.82); the remaining balance for the first and second floor 17' extensions ($44,247.60*); and the remaining balance for the paved parking lot and window grills ($1,000). This total comes to $189,118.45, $1,000 more than the total calculated by the trial court.

*In this calculation, we do not correct the trial court's figure for the first and second floor extensions so that that we may highlight and confirm the trial court's omission of the applicable $1,000.

IV. Third Floor

The trial court also found that (1) the parties had reached an agreement whereby Hanpa would build a third floor for Shmull's building; (2) the parties never agreed upon a price for this work; and (3) the work was never completed. At trial, Hanpa argued that it completed 40% of the construction of the third floor; that the agreed upon total price for the third floor was $213,897.66; and that 40% of the total price, $96,253.95, is the fair value of the improvements done to the third floor.[7] Shmull argued, based on an assessment by a professional engineer, that the fair value of the improvements was $40,369.82. The trial court accepted Shmull's valuation, finding that the professional engineer's report was "thoughtful and credible" and took into account the work and materials used. In contrast, the trial court found Hanpa's valuation "suspect" because there was no mutually agreed upon price for the third floor.

On appeal, Hanpa contends that, because the trial court found that the parties agreed to the construction of a third floor, there must be a contract and therefore an agreed upon price for the performance of contract. We disagree. Though the trial court used the word "agreement" to define the understanding between the parties that a third floor would be built, the court was also clear that there was no contract. As *Black's Law Dictionary* states, "[t]he term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less

[7] We calculate 40% of $213,897.66 to be $85,559.06, rather than $96,253.95.

technicality. Every contract is an agreement; but not every agreement is a contract." *In re National Gas Distributors, LLC*, 556 F.3d 247, 255 (4th Cir. 2009); *quoting Black's Law Dictionary,* 74 (8th ed.2004); *see also Conkling v. Turner*, 138 F.3d 577, 579 (5th Cir. 1998) ("there was no contract because there was no agreement as to price"). We conclude that the trial court did not err in holding that there was no contract for the third floor, or in finding that Shmull's valuation was more accurate.

V. Prejudgment Interest Against Hanpa

The trial court awarded pre-judgment interest against Hanpa at a rate of 9% from "May 8, 2003, to November 2, 1998," which, according to the trial court, came to $3,609.45. This stated time period is clearly incorrect as November 2, 1998, predates May 8, 2003. Thus, we cannot ascertain how the trial court calculated the figure of $3,609.45.

Presently, Hanpa contends that the trial court committed reversible error in awarding pre-judgment interest to Shmull. Specifically, Hanpa argues that (1) the trial court's determination is unclear as to whether it awarded prejudgment interest for the cost of repairing a poor paintjob of the building or for the liquidated damages, or both; (2) pre-judgment interest is only appropriate as to the repair costs; and (3) the period of time the trial court used in its calculation of prejudgment interest contains a clear error.

In his response, Shmull theorizes that the trial court intended to award pre-judgment interest both for the damages resulting from the poor paintjob as well as the

repair costs. Shmull also theorizes that the trial court intended pre-judgment interest to accrue from May 8, 2003, to November 2, 2012.

Meaningful appellate review requires a lower court to clearly articulate both its findings of fact and its conclusions of law. *Smanderang v. Elias*, 9 ROP 123 (2002). The trial court's decision regarding pre-judgment interest against Hanpa is unclear. We will not speculate, but instead remand this issue to the lower court.

VI. Failure to Award Certain Damages to Shmull

Finally, Shmull contends that the trial court erred in failing to award him damages for Hanpa's omitted work. Shmull notes that a review by a professional engineer found discrepancies between the plans and the completed building. The alleged omissions included a concrete arch and second floor kitchen sinks, counters, cabinets, and broom closets. Shmull claims these omissions resulted in $26,000 in savings for Hanpa and that this sum must be considered in the overall liability calculation of the parties.

Hanpa responds by citing to evidence that suggests Shmull verbally approved some of these changes and never objected to the omission of others. Hanpa also classifies these omissions as unsigned change orders that resulted from Shmull's decision to change the purpose and intended use of the second floor. Given that these changes were neither memorialized in writing nor signed by both parties, Hanpa contends that these changes should not result in a damages award.

Hanpa's argument is flawed. Hanpa claims that a change order that is not memorialized in writing and signed by both parties should not result in a damages award. While this is true for additional work that was not memorialized in writing and signed by both parties, this is not true for omitted work that was not memorialized and signed by both parties. The latter scenario applies here. According to the first and second floor contracts, Hanpa was required to construct the floors per the specification and drawings. If a change order requesting an omission was made, Hanpa needed to have the request memorialized and signed by both parties to avoid liability.

Despite this flaw in Hanpa's argument, we remand this issue to the Trial Division because, although the trial court referenced the alleged defective and omitted work, the court did not ultimately decide the issue.[8] Meaningful appellate review requires a lower court to clearly articulate both its findings of fact and its conclusions of law. *Smanderang v. Elias*, 9 ROP 123 (2002). Because the record is lacking on this issue, we remand.

CONCLUSION

For the reasons stated above, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the trial court with instructions so the damages may be recalculated in the following manner to include: (1) a new calculation using Shmull's reasoning for the first and second floor extensions, as outlined above; (2) the liquidated damages awarded to Shmull from, and including, Monday, June 30, 1997, to, but not including, Tuesday, July

[8] The trial court summarized the issue in its "Findings" section, but failed to address the merits of the issue later it its decision.

7, 1998; (3) the additional $1,000 that Shmull owes Hanpa for the parking lot; and (4) the sum for pre-judgment interest Hanpa owes Shmull for the poor paintjob, or for liquidated damages, or both. We also remand so the trial court may consider whether Shmull is entitled to up to $26,000 in damages for Hanpa's allegedly omitted work.

SO ORDERED, this 28th day of April, 2014.

KATHLEEN M. SALII
Associate Justice

R. ASHBY PATE
Associate Justice

KATHERINE A. MARAMAN
Associate Justice