

IN THE COURT OF APPEAL OF SEYCHELLES
COURT OF CIVIL APPEAL

SCA No: 7 of 2005

Paul Chow

Appellant

VS

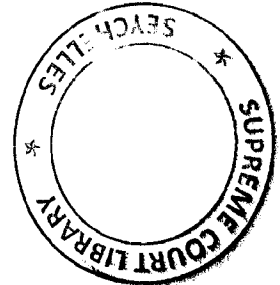
Heirs Josselin Bossy

(represented by the Executor, Me Hooper Hoareau) Respondent

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Before: Bwana, Hodoul, Domah, JJA
Counsel:

Date of Hearing: 16 November 2006
Date of Judgment: 29 November 2006



JUDGMENT OF THE COURT

Domah, JJA

[1] This is an appeal and cross-appeal on the judgment of the Supreme Court where the appellant, a lessee (defendant in the court below), is contesting an order of eviction against him from an immovable property leased by a deceased owner, the original lessor. The learned Judge, after hearing evidence, decided (a) that the lease agreement be rescinded; and (b) that the respondent heirs should be put in possession. He also dismissed a counter-claim that the appellant had lodged against the heirs represented by the executor (plaintiffs in the court below) where

the appellant was claiming a sum of money as rent collected from part of the property which had not been delivered, in derogation of the lease agreement.

[2] The relevant facts may be summarized as follows. The appellant had taken a lease from one Josselin Bossy for a term of 90 years at a rental of SR 9, 000 per month. Following the death of Josselin Bossy, the court-appointed executor sought to recover possession. He applied to the Court for a rescission order. The grounds he set forth were that the appellant had (a) failed to pay rent due, which amounted to R 434, 000; and (b) breached a purposive condition of the lease in that he had not started any development therein. The plea of the appellant formed the basis of a counter claim by the appellant against the respondent. The lessee claimed that the lessor had never given him exclusive possession of the whole of the property. Two of the houses on the land had never been delivered as such, in breach of the lease agreement, from which the lessor was continuing unlawfully to collect rent which had reached in all a figure of SR 576, 000 by November 2002.

[3] In his judgment, the learned Judge found the case for respondent proved that the underlying purpose of the lease was for development and that none whatsoever had occurred since the date of the lease. In the absence of a time within which the development should have started, the Learned Judge read into the contract a reasonability clause and decided that the reasonable time within which the project should have come off the ground was one year. He decided that since nothing had taken place within that one-year period, the contract was

deemed to have been rescinded a year from the date thereof. As regards the counter-claim, he found that it was based on a gentleman's agreement. He took the view that a gentleman's agreement is not recognized in the law of Seychelles and, therefore, is not cognizable before its courts. Accordingly, he dismissed the counter-claim.

[4] There were in all five grounds of appeal as follows:

- (a) the Learned Judge erred in dismissing the Appellant's counter-claim in its entirety on the basis that there was no evidence on record to establish the claim of the Appellant, in the face of uncontested and admissible evidence on record to support the Appellant's claim;
- (b) the Learned Judge erred in finding that Clause 1 of the Lease Agreement imposed an obligation on the Appellant to develop the property, given that Clause 1, read together with other provisions of the Lease Agreement, shows that the Appellant was at liberty to develop or not to develop the property;
- (c) the Learned Judge erred in applying Article 1135 of the Civil Code of Seychelles to the circumstances of this case and concluding that development of the property should have started within one year of the effective date of the Lease Agreement, contrary to

the clear and unambiguous terms of the Lease Agreement;

(d) in any event, the Learned Judge erred in finding that the Appellant had breached his obligation under Clause 1 of the Lease Agreement as to development of the property;

(e) in granting rescission under Article 1184 of the Civil Code of Seychelles, the learned Judge did not exercise his discretion judiciously, given the evidence before him and considering the options available to him in law.

[5] The ground in the cross-appeal is basically a challenge of the fact that the counter-claim was erroneously dismissed when there was uncontested and admissible evidence to warrant a successful claim. Accordingly, the cross-appeal forms integral part of the appeal itself.

[6] Upon our remarks, learned Counsel dwelt rather on the relative strengths and weaknesses of their respective positions. Learned Counsel for appellant conceded that his proposition that a lease of 90 years granted for a rent of SR 9000 per month was for a purpose other than development and without any purpose whatsoever looked odd. On the other hand, learned counsel for the respondent conceded that in the absence of a rescission clause in the contract, a reasonable notice should have been

granted by the party seeking a rescission. We commend both counsel for their professional stand in the matter. They mirrored what the law is on the matter which should apply to the particular facts of the case.

~~[7] We shall deal with ground (a) on its own; grounds (b), (c) and (d) will be taken together; and ground (e) on its own.~~

[8] Ground (a) relates to the facts as found by the Judge. They are relevant also for the counter-claim of the appellant. The argument is that the original lessor has not given exclusive possession of the property leased and was collecting rent from the two houses, such sums being used to set off against the rent he himself owed to the lessor. The learned Judge considered this arrangement between them as gentleman's agreement and dismissed it on that account. It was open to him to treat it as a mutual indulgence for the discharge of contractual obligations under the contract. That, however, does not alter the fact that the claim was inextricably linked to the claim of rent itself. The rent payable by the appellant was SR 9,000 and the rent collected from the two houses by the lessor was SR 8,000. The likelihood of one canceling the other was such that we cannot say that the finding and conclusion of fact on the matter by the learned Judge was perverse. This is the more obvious when one takes account of the allegation that the original lessor would never properly account for what he received from the two houses. The evidence that was presented to the court in relation to an alleged transaction between the appellant and a deceased

lessor was tenuous. We find no reason to upset the findings of the learned Judge on those facts.

[9] This takes us to grounds (b), (c) and (d). They turn round the crucial issue whether the parties had agreed that the agreement was for the purposes of development. This involves the interpretation of the intention of the parties to the contract as a whole.

[10] In the case of **Wilmot & Ors v. W&C. French (Seychelles) Ltd & Ors SLR 1972 144** , in a dispute which arose as to whether in a contract of sale another portion was or was not included in the transaction, the interpretation of the contract was in issue. It was held, following French jurisprudence, that -

"en premier lieu, le juge doit tout d'abord rechercher qu'elle a été la commune intention des parties contractantes, conformément aux règles d'interprétation posées par les articles 1156 et suivants du présent code ..."

[11] Other words, the judges have, in the first place, in their interpretation of the contract, to construe what the common intention of the parties was. It is to be noted that this case translates "commune intention" as real intention, not a very faithful translation of the jurisprudence on the matter. However, the more faithful translation was provided in the case of **Barry Lee Cook and Anor v Philip Lefevre, 1982 SLR 416.**

[12] On this matter, the learned Judge found that the common intention of the parties was for actual development of the property and not for option to development. That is borne out by the evidence, more especially when the defendant himself explained that following government policy and change in the law, the plans about raising condominiums and chalets had stalled. The Lease Agreement in fact provides that once the land is developed, the Appellant was to pay the Respondent "10% of the total cost of the new buildings development subject to a maximum of SR 200, 000 on any single development."

[13] This leads us to the next question whether a rescission clause could be read into the contract which did not contain one.

[14] **Article 1184 of the Civil Code of Seychelles** provides:

"A condition subsequent shall always be implied in bilateral contracts in case either of the parties does not perform his undertaking."

[15] That should answer the question. And as for the related question as to the procedure to be followed in pursuing the remedy, the article could not be clearer. Rescission implied in contracts is not available by operation of law but must be sought through court proceedings:

"In that case, the contract shall not be rescinded by operation of the law."

"Rescission must be obtained through proceedings "

[16] On the above, one may conveniently refer to the case of **Phillips v Vista Do Mar Ltd, 1973 SLR 394**. P made an advance payment for certain time-bound constructions to V. Following a ~~delay in the work~~, P unilaterally terminated the contract and denied V access to the site. It was held, inter alia, that –

"Rescission for failure by a party to a bilateral contract is not automatic but must be pronounced by the Court."

[17] Likewise, in the case of **Jumeau v Anacoura & Anor 1978 SLR 180**, the contract of a lease of land provided against the raising of any permanent structure on it without express permission of the lessor on the pain of ipso facto rescission of the contract. Sauzier J, as he then was, held that rescission of a contract for breach of a condition must normally be obtained through Court proceedings and the Court has power to grant a delay for performance.

[18] Which conveniently takes us to the issue of time for performing obligations. Article 184 adds:

"... but the defendant may be granted time according to the circumstances."

[19] The case of **Pyper v. Poole & Anor 1976 SLR 224**, the following may be cited from Répertoire Fuzier-Herman, Vo Condition No 99 –

"Que lorsqu'il n'a été stipulé aucun délai pour remplir une obligation de faire, il appartient aux tribunaux de déterminer le délai dans lequel l'engagement sera exécuté, en prenant en considération l'objet du contrat et l'intention commune des parties contractantes ..."

[20] Where, however, a term of a contract provides for rescission, such rescission takes place by operation of law, but only after notification to the party in breach by the other party with a clear indication that the latter intends to avail himself of the specific contractual term. In the case of in the case of **Jumeau v Anacoura & Anor (supra)**, Sauzier J also held that any rescission by plaintiff on the ground of the breach could only take effect from the date of a notice given by the plaintiff to the defendants to the effect that he was exercising his right of rescission. Defendant, in that case was given time to demolish. He was then ordered to vacate at the expiry of such time. We agree with the reasoning except for the order to vacate in the case which does not follow either his earlier logic or the law on the matter inasmuch as the order for eviction should have only occurred in case of a failure to demolish and not coupled with an order to demolish.

[21] We agree with the submission of Mr Valabhji that in a matter of ordering a rescission, the more so when a rescission clause is not inserted in a contract but read into it – as in the present case - a court should exercise its power to rescind judiciously. As it is with a rescission order, so it is with the failure to observe

any contractual obligation. We endorse the view of E.E. Seaton, C.J. in the case of **Armand Samson v. Noella Figaro & Ors and Noella Figaro v. Armand Samson 1983 SLR 68:**

"Both the law and the fairness require that before bringing a claim for failure to perform the obligations of a contract, the defaulter should first be put under notice of default and given a chance to fulfill his obligation."

[22] In this case, it is amply clear that the defendant was not given time. The learned Judge not only read a rescission clause into the contract – which was permissible – but he also, relying on the provisions of article 1135, inserted a time factor into it, which was also permissible. What was not permissible, however, was that the time should start from the operative date of the contract rather than from the time of the order. That the court had no power to do. It was neither the law nor fair nor judicious to order the rescission of the lease retrospectively. The appellant should have been given prospective time to remedy his breach.

[23] It may well be that the learned Judge took into account the fact that the appellant has barely done anything to exploit the premises after the change of government policy and law related to foreign exchange. Be that as it may, the facts show that appellant's interest in the property waned in course of time. No concrete step (pun unintended) has been taken on the evidence since 1996. He did not even maintain the house in which he lived in good repair.

[24] As has been settled in the jurisprudence which has inspired the Seychelles Code, it was open to the appellant to pray for some time to execute his part of the bargain as it was open to the Court to allow him that possibility:

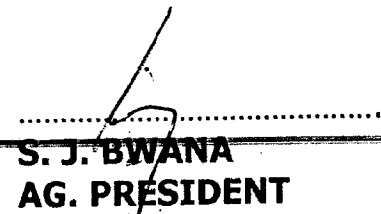
"La résolution demande est facultative par le juge - celui-ci disposant en la matière d'un pouvoir souverain d'appréciation quant à la gravité de l'inexécution et à son caractère fautif ...Il peut tenir compte d'une offre d'exécution de débiteur faite en cours d'instance (Req. 17 juillet 1923, D.P. 1923.1.240; civ. 17 mai 1954. Gaz. Pal. 1954.2.82) ou accorder à celui-ci un délai (c. civ. Art. 1184, al. 3; v req. 16 mai 1933, Gaz. Pal. 1933.2.422) ce qui est une application de la règle d'après laquelle le débiteur malheureux et de bonne foi peut obtenir un délai de grâce (c. civ. Art. 1244) mais ce délai n'est pas renouvelable." Encyclopédie Dalloz, Vol. III, Contrats et Obligations, § 246.

[25] We, accordingly, amend the judgment pronounced against the appellant and give the appellant ^{thirty four} ~~eighteen~~ months from the date of judgment to comply with the condition of developing the leased premises, failing which the lease shall be deemed to be rescinded by virtue of this judgment. We dismiss the cross-appeal for the reason set out at paragraph 3 above. With costs.

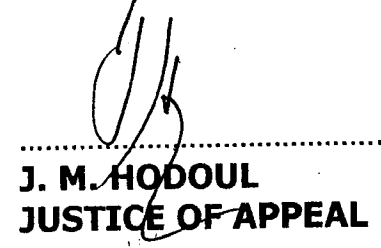


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B. DOMAH
JUSTICE OF APPEAL

I concur:


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S. J. BWANA
AG. PRESIDENT

I concur:


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J. M. HODOUL
JUSTICE OF APPEAL

Delivered on 29 November 2006, Victoria, Seychelles