IN THE SEYCHELLES COURT OF APPEAL

Civil Appeal No. 11 of 1992

North Island Company Ltd — APPELLANT

VERSUS

North Island Development (Pty) Ltd — RESPONDENT

Shah for appellant
Georges for respondent

Judgment of Mustafa P.

The appellant company is the owner of an island known as North Island. It had leased the island to the respondent company. The lease agreement was dated 15th November 1983 and the term runs from 1st January 1984 to 30th November 1993, with an option for renewal.

In March 1991 the appellant filed an action in the Supreme Court alleging that the respondent was in breach of its two obligations as a tenant in terms of Article 1728 of the Civil Code of Seychelles, in that (1) it had not paid the agreed annual reserved rents and (2) it had committed waste on the island property. The appellant had purported to avail itself of the provisions of Article 109-3 of the Commercial Code of Seychelles since both the contracting parties were deemed to be merchants, and had formally informed the respondent by letter dated 8th April 1989 that the lease had been discharged by operation of law due to the alleged breaches. The appellant had prayed the Supreme Court for

an order to (1) declare the lease discharged by operation of law and for the respondent to vacate the island and (2) the respondent to repair the damage caused to the island property or pay compensation therefor.

The case came before Abban C.J. He dismissed the appellant's claim with costs. The appellant is now appealing.

The Chief Justice held (1) the rents were paid by Mr. Rasool on behalf of the respondent to a Dr. Scheeler, who was the lawful attorney of the appellant who declined to take them, i.e. that the rents were waived and (2) the respondent carried out its obligations and took good care of the island property and did not commit any waste.

The appellant in its appeal before us relies solely on the ground of non-payment of rent. It has abondoned its allegation of waste. The appellant's main ground is that at no time was it pleaded or alleged by the respondent that payment of rent was offered or made but was declined. Indeed in the statement of defence filed in answer to the plaint it was stated that the respondent had

" always paid the token rent and is up to date with the rent"

The finding of the trial judge that rent was waived is, according to the appellant, ultra petita and in any event the respondent had failed to prove it was released from its obligation to pay rent.

I will first deal with the non payment of rent. In the lease agreement, under the heading rent, are the following provisions:

" The rent payable for the land is one rupee per year until 31st December, 1986. As from January 1987 on the lessor will participate in the profit of the lessee with a percentage of 10. Profit shall mean the profit before taxation as indicated in the audited account. The rent is payable each year on 30th June the latest for the foregoing year."

It will be seen that until 31st December, 1986 the annual rent was a peppercorn rent of Re.1, and from January 1987 the annual rent was 10% of the yearly profit of the respondent before taxation as reflected in the audited accounts. The latest day for payment of rent is 30th June of the succeeding year.

The appellant, by its sole director, Mr. Ruster who testified, maintained that it did not receive any payment of rent from the respondent. Mr. Ruster stated he only lately came to know that Rs.3 had been deposited in the appellant's bank account in November, 1988. When questioned whether Dr. Scheeler ever gave him any money, presumably for the peppercorn rent, Mr. Ruster said "No". Apart

from the belated deposit of Rs.3 in the appellant's bank account in November, 1988, done without notice to the appellant, nothing in the nature of rent was received by the appellant from the respondent.

Mr. Ruster wrote a letter dated 6th July, 1988 (Exhibit C) to the respondent addressed to Mr. Rasool demanding payment of Re. 1 peppercorn rent until January 1987 and the 10% profit rent for the year 1987. He followed this up with a letter dated 5th December,1988 (Exhibit D) again bringing up the rental issue which was still unresolved.

Mr. Rasool, a director of the respondent, testified. He stated that he paid the Re.1 peppercorn rent every year in June on time. At page 77 of the transcript, when Mr. Rasool was being cross-examined, is the following passage:

Q " You (i.e.Mr. Rasool) say you paid the Re.1 to Mr Scheeler, was this all done in one year or year by year?

A I offered it to him every year that he came.

Q Did he take the offer seriously?

A He took it with a laugh but he still took it.

Q He took the money?

A Yes, he did."

Mr. Rasool stated that he had received the letter dated 6th July 1988 (Exhibit C), He said " ..... in this letter Mr. Ruster complained he has not received the total rent from me ..... I was surprised to receive this. Following this intelligence I ensured that the rent was paid by depositing the money in the account of North Island, the plaintiff Co., Rs.3 .....

As to profits after the 1st of January 1987, I did not pay 10% of the annual profits to the plaintiff co. Because I suggested to the legal representative Mr. Scheeler that I should pay --- Now, if I remember correctly, he told me it was so insignificant anyway. that we had spent a lot of money on the island which we should forget about it..."

Further Mr. Rasool said " I confirm that in 1987 the island made a profit of Rs.10,300 odd out of which Rs.1,030 was payable to the plaintiff Co..... I offered to legal representative of Mr. Rusta ..... he did not accept ..... in view we had lost a lot of money..."

When Mr. Rasool was asked " When did Mr. Scheeler say to you there was no need to pay the 10% profit? the answer was

" I cannot with any certainty tell you the time .... but presumably it must have been sometime after 1986."

Mr. Rasool has received both Exhibits C and D, the letters demanding rental dated respectively 6th July, 1988 and 5th December 1988. He knew that Mr. Ruster had not been paid any rent. Indeed as a result of Exhibit C Mr. Rasool, despite his assertion that he had paid Dr. Scheeler the Rs.3, the peppercorn annual rent for 3 years, deposited Rs. 3 in the appellant's bank account as payment of rent. From Exhibits C and D Mr. Rasool must have realised that Dr. Scheeler was not authorised to accept rent for the appellant, much less to waive payment of rent. Mr. Rasool's action in depositing Rs.3 in the appellant's bank account is an implicit recognition of that fact.

The rent for 1987, being 10% of the annual profit, which amounted to Rs.1,030, was payable on 30th June, 1988. Mr. Rasool had received notification from Mr. Ruster demanding payment of the 1987 rent in July and December, 1988. Mr. rasool did not say he had and could not possibly have, paid the 1987 rent before July 1988, since in the letter of 5th December, 1988 (Exhibit D) Mr. Ruster had complained that the audited accounts for 1987 had not yet been submitted. The 10% of the profit of 1987 could be arrived at only when the accounts had been audited. So it is clear Mr. Rasool knew, during July and December 1988, that Mr. Ruster was demanding the

1987 rent, as well as the annual peppercorn rent of Re.1 for the previous years.

Mr. Rasool was vague as to when he allegedly offered to pay Rs.1,030 to Dr. Scheeler and which Dr. Scheeler allegedly declined to accept. In any case, if such an event did occur, it must have been after Mr. Ruster had unequivocably demanded payment of the rent from Mr. Rasool. Mr. Rasool testified in part as follows:

> " The reason why I paid the rent (the peppercorn rent) although it appeared as a triviality to me because Mr. Ruster has not received payment from Dr. Scheeler and he seems so concerned about it so I decided to pay his rent. The question of profit came much later and when it was offered to Dr.Scheeler he told me there was no need ... "

Mr. Rasool did not say why he did not also bank the 1989 rent being Rs.1,030 in the appellant's bank account in the same way as he had done for the peppercorn annual rents, nor could Mr. Georges who appeared for the respondent before us give a reason why it was not done. Mr. Rasool had already paid the Re.1.00 annual rent prior to 1987 to Dr. Sheeler who had accepted such rents. Mr. Rasool nevertheless paid the Rs.3 for the previous 3 peppercorn annual rents again to the appellant after receipt of a letter (Exhibit C). He must have done so because he was aware that Dr. Scheeler had no authority to accept or waive such rents. And Mr. Rasool had that

knowledge and was put on notice when he received Exhibits C and D in 1988 before he could have paid the 1987 rent or offered, as he alleged, to pay such rent to Dr. Scheeler. There is only Mr. Rasool's word that he offered the rent to Dr. Scheeler who refused to accept it. There is no confirmation of any kind, not from Dr. Scheeler or anybody. It is obvious that Mr. Rasool has not paid the 1987 rent and he has failed to discharge the burden of proving that such rent was waived by the appellant, in terms of Article 1315 of the Civil Code which reads in part:

> " .... a person who claims to have been released shall be bound to prove the payment or the performance which had extinguished his obligation."

I now come to the issue of ultra petita. There was a clear demand for rent due and owing in the plaint, at the rate of Re.1 per year up to 31st December, 1986 and as from 1st January, 1987 the rent payable yearly was 10% of the profit. It was alleged in the plaint that despite demand letters (Exhibits C and D), no rent , not even the token Re. 1 rent had been paid. In the statement of defence filed by the respondent it was stated

> " The defendent avers that it always paid the token rent and is up to date with the rent."

There was no allegation or even suggestion that rent was offered but refused or waived. The averment was that all rent had been paid. Clearly waiver was not in issue in the pleadings.

The two letters (Exhibits C and D) have been referred to. No reply was given to either of the letters indicating that the 1987 rent was offered and refused. Indeed when Mr. Ruster was cross examined at the trial, it was never put to him that the 1987 rent was offered to Dr. Scheeler but was refused. It was only when the appellant's case had closed and the respondent's defence opened with Mr. Rasool testifying that the allegation was first made. If the defence of waiver of rent was a genuine one and not one which arose ad hoc, it is incomprehensible why it was not raised earlier, before Mr. Rasool testified in Court. At that stage the appellant had no opportunity to rebut such an allegation. I am surprised that objection was not immediately taken to such evidence being admitted or that such evidence was allowed to be given. However it is clear that waiver, for that was what the late defence amounted to, was not in issue and could not, at that stage, be raised as an issue. It was not the case for the respondent as pleaded or conducted.

The learned Chief Justice dismissed the appellant's claim for eviction for non payment of rent on the ground that there was a waiver of rent. With respect, I think the learned Chief Justice was in error in so doing. The issue was not and could not be whether there was a waiver of rent, but whether rent had been paid or not.

Mr. Georges for the appellant submitted before us that the rent clause in the lease agreement is not material and that even if a breach had occurred, that is, if the 1987 annual rent had not been paid, such breach, in view of the background to the lease, is of no consequence. This proposition is totally unacceptable, and has only to be stated to be rejected.

I would allow the appeal, set aside the judgment and order of the Supreme Court and declare that the lease has been discharged by operation of law. The respondent is to vacate the island and deliver up possession to the appellant, within 30 days of the pronouncement of this judgment. I would award costs to the appellant, both here and below.

A. Mustafa

A. Mustafa

President

Dated this 31st day of March 1993.

Delivered in open court in the presence of both counsel by Mr Justice V Alleear.

V Alleear

Judge

31/3/93