Patti v Carrie

(2013) SLR 613

Domah, Fernando, Twomey JJA

6 December 2013 SCA 38/2011

Counsel D Sabino for the appellant

F Ally for the respondent

The judgment of the Court was delivered by

DOMAH JA

[1] This is an appeal against the decision of the Supreme Court which, following a hearing on a claim of debt, decided that the respondent plaintiff was entitled to judgment in the sum of EURO 577,110.45 due as at 7 December 2009 when the plaint was entered and continuing with interest at the rate of 7% per annum as from 15 May 2010 until the debt was fully paid.

[2] The appellant has lodged an appeal on the following two grounds:

1) The Judge failed to apply any of the rules on the interpretation of ambiguous terms as provided for by the Civil Code of Seychelles. This must be interpreted against the party who seeks to benefit from the term, and would result in a much reduced

capital debt and on the interest based on the 7% interest calculation.

2) The Judge failed to apply the rules on penalty clauses as provided for by the Civil Code of Seychelles. This would have extinguished the numerous interest (penalty) clauses in the final agreement.

[3] The facts of the case with the relevant documents have been very well set out in the judgment. We are happy to adopt them. For the purposes of determining the points raised in this appeal, we take into account the following salient facts. The appellant subscribed to two loans from the respondent for a total sum of EURO 384,000. The parties had agreed that the loans would be repaid in full on or before 15 May 2003. The interest due was at the time of two types: fixed interest for the sum of EURO 6,000 on one loan and EURO 9,000 on the other which would be payable on the date of payment. It had been agreed also that should the appellant not pay the above sums by that set date, ie 15 May 2003, then the sums due would be subject to interest at the rate of 7% per annum for the entire year until the debt was fully paid. The defendant did not pay by 15 May 2003. This triggered the application of the 7% interest clauses. As the default continued over a couple of years, the respondent felt bound to seek a compromise agreement with the appellant which was entered into on 15 April 2009.

[4] The Compromise Agreement recalled the history of the default sum which by the material date happened to be EURO 554,075 and which by 31 December 2009 was due to become EURO 591,013. It was also agreed between the parties that if the appellant failed to pay the EURO 458,000 due as set out in the Compromise

Agreement, then a sum of EURO 591,013 would be due or any remaining balance, with the applicable interest as agreed. The appellant failed to abide by the terms of the Compromise Agreement.

[5] At the hearing of this appeal, counsel for the appellant submitted that the manner in which the interest had been calculated has been ambivalent and interest has been imposed upon interest. To him, when the agreement referred to the word "debt" it meant the sum borrowed, excluding the sums of the unpaid interest. It is the argument of the appellant that if the document was intended to include the word "unpaid interest" in the meaning of the word "debt", the agreement should have said so. Since it did not, the interpretation should be against the maker of the document. He relied on art 1162 of the Seychelles Civil Code to so argue. This article provides that, in case of doubt, the contract shall be interpreted against the person who has the benefit of the term and in favour of the person who is bound by the obligation.

[6] The same argument had been made before the trial Judge who went to some length in identifying the relevant parts of the agreements between the parties and, in the light of the evidence, concluded that there was nothing ambiguous in the plain language of the clauses. He decided that there was no need to resort to art 1162 of the Civil Code. Indeed, the Judge commented that the appellant is a businessman, is conversant with French and the circumstances showed that he had full knowledge of the purport and the consequences of what he was engaging in and the consequences of the default.

[7] We see nothing wrong in the interpretation of the word "debt" to include unpaid interest. It is a matter of common sense that whatever sum is unpaid by the time the payment has become payable

ends in inflating the sums due as unpaid debt. It is plain common sense. There is no ambiguity in it.

[8] The next argument of counsel for the appellant has been that the appellant finds himself in a situation where he is paying three types of interest: the fixed sum interest, the 7% interest and the 5% interest due if the matter is subject to litigation. The end result is that the overall sum due has shot up to 70% of the original sum he had borrowed. His argument is that all he is bound to pay is the capital debt of EURO 384,000 minus EURO 75,000 which he has paid but not any of the other heads of interest or penal sums imposed. In his interpretation, he is due to pay only the interest on the remaining capital sum which is EURO 309,000 which comes to EURO 21,630 per annum. This would reach the figure EURO 129,780 as at the date of the filing of the plaint as opposed to the EURO 225,629 which the respondent has claimed.

[9] The short answer to it is that he is being ingenuous. His calculation hides the stark fact that he would not have ended up in this financial mess, as it were, had he abided by the terms of his original contract. From a sum of EURO 577,110.45 borrowed in November 2002, which sum he had undertaken to pay by 15 May 2003, he had only paid the sum of EURO 75,000. Any sum of money unpaid becomes a debt due. A debt stops being a debt by repayment and not by an appellation of whether it is capital or interest. The whole purpose of the Compromise Agreement which the parties entered into in 2009 was to ensure that the appellant who is a businessman take cognizance of the state of his books and be encouraged to pay back the loans. As the Judge pointed out, he freely entered into the Compromise Agreement in 2009 which he also breached. This is just

to show that the plight of the appellant was brought upon him by himself.

[10] As the Judge pointed out, agreements entered into should be performed in good faith. There is little evidence of good faith on the part of the appellant in the discharge of his contractual obligations.

[11] We have given due consideration to the argument of counsel on the question of whether the sums due are not extortionate under art 1229 which provides:

> A penal clause is compensation for the damage (loss) that the creditor sustains as a result of a failure to perform the principal obligation.

[12] That there has been a failure by the appellant to abide by his repayment obligations cannot be disputed. We are in 2013. The loans were taken in 2002. If the sums that he borrowed look too huge to him, it is of his own making. And if the agreement has imposed litigation interest of 5% on the sums due, that also is of his own making. The delay which has occurred is a calculated delay and not a simple delay as counsel seems to argue.

[13] We find no merit in this appeal. It is dismissed with costs.