**IN THE COURT OF APPEAL OF SEYCHELLES**

**RESORT DEVELOPMENT LIMITED** **APPELLANT**

**v.**

**ALLIED BUILDERS (SEYCHELLES) LIMITED** **RESPONDENT**

**SCA No: 13 of 2012**

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**Before:** **Domah, Fernando and Twomey JJA**

**Counsel:** **Mr. F. Ally for Appellant**
**Mr. F. Bonte for Respondent**

**Date of Hearing:** **7 August 2014**
**Date of Judgment:** **14 August 2014**

**JUDGMENT**

**DOMAH, JA.**

**[1]** This appeal concerns a construction contract between the two above-named parties. The respondent builder had undertaken by an initial contract to construct a bungalow for the appellant employer at Soleil d'Or, Parcel H 657. There were some additional works which were eventually entrusted and the original sum of SR6,996,440.00 was revised to SR8,067,027.16 and again improved upon by SR2,871,584.36 to cater for supplementary works. It was the case of the respondent builder that they took possession of the site on 6 March 2000 as per the initial contract but that, on account of the delay caused by the appellant and its architect to provide the details for the foundation works, the respondent was unable to commence work at all until June 2000. The completion date had been set for April 2001 but on account of the various *laches* and breaches of specific terms of the contract from the part of the appellant and its architect, the works could only be completed in June 2005, notification of same having been given on 9 June 2005. The respondent brought a case in damages against the appellant based on the delays foreseen as breaches in the contract. He sought reparation in the sum of SR3,758,560.42, moral damages and an unpaid sum of SR239,245.25.

**[2]** The case, defended by the appellant, proceeded for trial and the learned trial judge found for the respondent and ordered the appellant to pay to the respondent: SR2,658,848.92 as damages for the various breaches incurred; SR239,245.25 as unpaid sums for works completed; the money retained as 'percentage of certified value of retention;' SR10,000 as moral damages; all payments to be made with interest at the commercial rate from the date of judgment, along with the costs. The learned judge also ordered that, following the practice adopted before, the above sum shall be paid in United States Dollars (USD) at the prevailing market rate.

**GROUNDS OF APPEAL**

**[3]** The appellant put up the following grounds of appeal against the judgment:

> "*1. The learned trial judge failed to adjudicate on paragraph 13(3) of the Appellant's Statement of Defence as explained in detail in paragraph 3 of the Appellant's closing address;*
> *2. The finding and award of the learned trial judge in paragraph 31(a) of his judgment is ultra petita as the Respondent never sought to amend its pleadings and is bound by them.*
> *3. The learned trial judge failed to consider the defence of the Appellant that the claim of the Respondent in this case was not for damages for breach of contract but was based on the provisions of Clause 26 which allowed the Contractor to determine the contract by notice.*
> *4. The learned trial judge was in error to allow moral damages in this case."*

**GROUND 1**

**[4]** Under Ground 1, learned counsel for the appellant has submitted that the learned judge has given scant regard to the submission he had made in his Statement of Defence, at paragraph (13(3)), where he had rested his case on what may be restrictively claimed under Clause 26(2)(b)(vi). His submission has been that once the appellant had elected to bring his claim under the basis of an action under Clause 26(2)(b)(vi), all it could claim was for the specified prejudice caused to it under its purported right of determination – i.e. direct losses; and not for all or any prejudice which may have occurred before the determination of the contract.

**[5]** We agree with the submission of learned counsel that the learned judge did not specifically pronounce himself on that issue which was part of the plea of the appellant. He should have done so even if it is quite clear from what he had stated in paragraphs 10 to 12 that this particular defence of appellant was properly in his mind.

**[6]** However, the question is whether that omission viciates the judgment. We have perused the pleadings with due regard to the plaint, the averments therein, the evidence adduced in the case as well as the reasoning and the findings of the learned judge. The plaint is elaborate not only with respect to the averments and the recital of the material facts but also as to the indication of the basis of the action. Importantly, with regard to the basis of the action, it is pretty clear from a careful reading of paragraph 17 which makes mention of Clause 26(2)(b)(vi) that the action was

not brought under paragraphs 16(i) and (ii) thereof. Paragraphs 16(i) and (ii) have been mentioned as the "reasons" for the action ("for reasons mentioned in paragraph 16(i) and (ii)"). The basis of the action is mentioned towards the end of paragraph 17 with the words "on the basis of the above paragraphs 9 to 15." These, for their part, speak of the various breaches of the Clauses which resulted in the prejudicial delays. Learned counsel is plainly not reading the whole of the very paragraph on which he relies to argue his case.

**[7]** The right to determine the contract as envisaged in Clause 26 does not preclude a Contractors' other rights which may exist under the Contract. Clause 26 affords the Contractor simply a further right: the right to determine. We cannot read in the right to determine a preclusion of the right to pursue other rights and remedies. In fact, the relevant part of Clause 26 is clear. While affording to the Contractor a right for determination by virtue of Clause 26 (2) (b) (vi), it enables him to sue for and obtain other rights and remedies. Clause 26 is predicated by the express saving provision which states that the right to determine is –

> *"Without prejudice to any other rights and remedies which the Contractor may possess*, …."

Before us, learned counsel submitted that that reservation is only with regard to Clause 26(1). However, we pointed out to him that the same reservation is specifically made with regard to sub-clause 26(2) in the following terms:

> *"Upon such determination, then without prejudice to the accrued rights and remedies of either party …."*

The basis of the action, as per paragraph 17, is not Clause 26(2)(b)(vi), but paragraphs 9 to 15: the various delays caused by failure to provide drawings and details in good time and suspension of work by the architect for more than six months, alteration in project concept: all resulting in prejudicial drag-time and dead-time in contract completion. The term "*accrued rights and remedies*" may only mean those that have occurred before the right of determination has been exercised. Learned counsel is plainly reading the contract selectively. Ground 1 has no merit and is dismissed.

**GROUND 2**

**[8]** Learned counsel for the appellant also submitted under Ground 2 that the award of the learned trial judge in paragraph 31(a) of his judgment is *ultra petita* as the Respondent never

sought to amend its pleadings to cater for them in the adjudication. Learned counsel for the respondent submits that his plaint said it all and there was no need for any such amendment.

**[9]** Under paragraph 31(a), the learned judge ordered the appellant to pay to the respondent SR2,658,848.92 representing loss and/or damage incurred in the execution of works in the initial contract and claimed and adjusted under subheads (i), (ii), (iii), (v), (vi), (vii), (viii) and (ix) as follows: (i) inefficient use of site establishment – SR529,193.68; (ii) inefficient use of manpower – SR964,318; (iii) unavailed gainful permit – SR 299,690.97; (v) delay in release of payment – SR 500,000; (vi) shortfall in turnover – SR 18, 563.00; (vii) additional office overhead costs – SR200,00; (viii) inflation and escalation – SR100,000 and (ix) change in the law – SR 47,082.84. It is the argument of learned counsel for the appellant that these were not direct losses as contemplated in Clause 26(2)(b)(vi) and the judge erred in making those awards.

**[10]** Learned counsel referred to the case of **Tex Charlie v Marguerite Francoise Civil Appeal 12 of 1994** to the effect that parties in an adversarial procedure are bound by their pleadings. We agree. However, pleadings are not circumscribed by the four corners of the plea only but the four corners of plaint as well. The respondent made sure that it called evidence in support of its averments in ample details of the various averments of the plaint as per its basis of action. The appellant, for his part, rested content with only cross examining the witness of the respondent and not calling evidence. If learned counsel took the view that the respondent, then plaintiff, was going outside his pleadings, he should have raised objections and we would have benefited from a ruling. On the contrary, the cross-examination was extensive and searching on all the aspect of the deposition.

**[11]** Learned counsel for the respondent has submitted that there was evidence to that effect adduced on a plaint lodged on the basis of an action for various breaches in the sense of periodic delays and chronic failures. What we have said above for Ground 1 applies for Ground 2 as well. The pleadings properly read did not limit the right of the respondent to Clause 26(2)(b)(vi) but to other rights and remedies. Both in law and on the evidence, there was enough material on which the learned Judge could have come to the conclusion, and did come to the conclusion, that the awards made under paragraph 31 (a) were not *ultra petita*.

We find no merit in this ground either. It stems from a misreading of the plaint and a misapprehension of the issues in this case.

**GROUNDS 3**

**[12]** It is the submission of learned counsel for the appellant under Ground 3 that the learned trial judge failed to consider the defence of the Appellant that the claim of the Respondent in this case was not for damages for breach of contract but was based on the provisions of Clause 26 which allowed the Contractor to determine the contract by notice. To which learned counsel for the respondent has submitted that the argument under this Ground is a duplication of the other arguments. We agree that this is so. Over and above what we have stated above, evidence of breaches were amply made out by the respondent company through its witness: failure to supply details and drawing in a timely manner as stated in the contract; late issuance of clarifications, decisions, modifications, delay caused by alteration of original concept: all these resulting in stoppage of work on site, adding to the costs on the employer which could only have to be passed on to the employer. We are unable to accept Ground 3 as a valid ground on the facts and in law.

**GROUNDS 4**

**[1]** Learned counsel for the appellant, under Ground 4, submitted that the learned trial judge was in error when he allowed moral damages in this case. The reason he has advanced in law is that moral damages are not foreseen in the type of action brought by the respondent. He has cited *Monchouguy v Robert (1990); Kopel v Attorney-General [SLR 1936-1955]; Petit Car Hire v Mendelson 1977.* On the facts, his argument is that the Respondent did not suffer from any moral damages.

**[2]** On the other hand, learned counsel for the respondent has submitted that the learned judge has rightly awarded moral damages, recoverable under article 1149 of the Seychelles Civil Code. This was contemplated in the contract and it was reasonable to make the award.

**[3]** We have gone through the evidence and the pleadings. The award was justified. We find it specifically particularized in the Answer to Particulars and supported by evidence adduced. For example, that the *laches* which caused the delay had a prejudicial effect on the business image of the respondent. A construction which should have been completed in April 2001 or thereabouts was still not completed by 8 February 2006. **Monchouguy v Roubert *(1990)*** had to do with outstanding debt unlike the present case. **Kopel v Attorney-General judgment [1955 SLR 315]** is clear on the point that even if moral damages may not as a rule be awarded for breach of contract, in certain circumstances, the Court may do so. **Petit Car Hire v Mendelson [1977 SLR 68]** is a decision on article 1150 of the Seychelles Civil Code whereas we are dealing in this case with damages claimed under article 1149. The evidence of moral prejudice was ushered in for the public image of the contractor which had been sullied by the acts and doings of the appellant which reflected on the contractor.

**[4]** There is no merit in this Ground as well. It is dismissed.

**[5]** All the 4 grounds having been adjudged as having no merit, the appeal is dismissed with costs.

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| **S. B. DOMAH** | **T. FERNANDO** | **M. TWOMEY** |
| **Judge of Appeal** | **Judge of Appeal** | **Judge of Appeal** |

*Dated this 14 August 2014, Ile du Port, Seychelles*