

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , S. Domah (J.A) , M. Twomey (J.A)]

Civil Appeal SCA31/2013

(Appeal from Supreme Court Decision 05/2012)

ABC Trading (Proprietary) Ltd

Appellant

Versus

1. AARTI Investment Limited

2. Peter Padayachy

Respondents

Heard: 10 April 2015

Counsel: Mr. F. Ally and Mr. B. Hoareau for the Appellant

Mr. B. Georges for the Respondents

Delivered: 17 April 2015

JUDGMENT

S. Domah (J.A)

[1] The learned judge declined to grant a perpetual injunction in an application made by the 1st respondent company, Aarti Investment Ltd (“Aarti”) against the 2nd Respondent, Peter Padayachy (“Peter”), and the Appellant company ABC Trading (Pty) Ltd, (“ABC”). Apart from the injunction the 1st respondent had filed a claim for the following orders:

- a. Declaring the instrument dated 22nd November 2011 signed by both Defendants, (Peter Padayachy and ABC) to be ineffectual to pass any rights or title in land Title PR5881 and Units GF6, GF7 and GF8 and setting it aside; (brackets added)
- b. Directing the Registrar General to delete all registration entries relating to PR 5881 and Units 6, 7 and 8 effected in the Condominium Register and the Land Register by virtue of the ineffectual transfer dated 22nd November 2011;

- c. Ordering the 1st Defendant (Peter Padayachy) to grant a lease to the Plaintiff on the same terms as to the time duration and rent in the agreement dated 7th May 2002 relating to the Condominium Property Units GF6, GF7 and GF8 and in conformity with the Act within a reasonable time fixed by the Court;
- d. Granting a permanent injunction against the 2nd Defendant, his agents and servants, not to interfere with the peaceful enjoyment and possession of the Plaintiff and its tenants of shops 6, 7 and 8 of Baie Ste Anne Business Centre, Praslin;
- e. Ordering defendants such other reliefs as the Court deems fit according to the nature and circumstances of this case.

[2] The present appeal is at the instance of the new owner, ABC, against Peter Padayachy and Aarti and the grounds are:

1. *The learned Chief Justice erred in law in failing to hold that in view that the agreement for a lease was for a period in excess of ninety-nine (99) years, the agreement for a lease was against public policy as it was contrary to paragraph 3 of article 1718 of the Civil Code of Seychelles, and consequently it did not have any legal effect and/or is null and void ab initio.*
2. *The learned Chief Justice erred in law in failing to hold that in view that the agreement for a lease did not have effect against and bind the Appellant as the agreement for a lease was not registered in the Register of Condominium Property under the Condominium Property Act as an encumbrance affecting the land parcel and/or the unit.*
3. *The learned Chief Justice erred in law in relying on the provisions of article 1718(1) of the Civil Code of Seychelles as:*
 - i. *The said provision is not applicable to parcels of land registered under the Condominium Property Act, unless the agreement for a lease is registered as an encumbrance in the Register of Condominium Property under the Condominium Property Act in respect of the parcel of land and/or units; and*
 - ii. *The First Respondent had not pleaded material particulars of the fact that the agreement for a lease had not reserved the*

right for the second Respondents to terminate the agreement for a lease upon the sale of the units in question.

THE FACTS

- [3] The facts of the case are simple. Peter Padayachy owned a parcel of land, PR 2250, at Baie Ste Anne, Praslin. In 2002, he started a condominium project on the property and ran short of cash. He approached the builder, Vijay Construction Ltd, which obliged by injecting funds to the value of SRs1,200,000.00 and completed the construction. In return, Peter gave Aarti, a subsidiary of Vijay Construction Ltd, a lease of three shops for a period of 100 years. The deed witnessing the lease is dated 7 May 2002 but was only registered on 14 December 2011. There was an agreement between them that he could buy back the lease. In 2011, he approached Aarti for the purpose but Aarti was not interested. Peter demarcated the property into several titles. The shops leased to Aarti were now under a new registration number PR 5881.
- [4] Thereupon, by deed dated 22 November 2011, Peter Padayachy sold/transferred “the land comprised in the above mentioned title” which was mentioned as PR 5881 for the sum of SRs2.4 million, registered on 24 November 2011, to ABC.
- [5] Caught by this turn of event, Aarti brought an action against Peter Padayachy and ABC for fraudulent transfer of the shops GF6, GF7 and GF8 comprised in PR 5881 and prayed for the invalidity of the sale.
- [6] Coupled with the action was also a pending Motion for an interim injunction against them pending the hearing of the main case. The injunction application came up for determination before Judge Karunakaran J, as he then was, who, despite an agreement between the parties for the maintenance of the *status quo*, declined to grant the interim order. Parties have maintained the *status quo*.
- [7] It is the then Chief Justice who heard the main case. The main case was amended on 19 March 2012. In this action, unlike in the one that was originally lodged, there is no averment of fraudulent transfer. It is an action based on the fact that Peter Padayachy

purported to transfer Parcel PR5881 and the three shops 6, 7 and 8 under the Land Registration Act (Cap 107) to the ABC by way of a deed dated 22 November 2011 registered in the Land Register. From the history of the case, Aarti infers that Peter Padayachy is bound “to grant a similar lease to it (Aarti) of Units 6, 7 and 8 to be drawn up in the form and manner prescribed under section 8(1) of the Act” (The Condominium Act.)

[8] The plan of Parcel PR 5881 and the Business Centre Building including the shops GF6, GF7 and GF8 were registered as Condominium Property on 2 July 2010 under the Condominium Property Act (Chapter 41A) (“the Act”). At the time of the registration, Peter Padayachy was the owner of the land PR5881.

[9] In an elaborate judgment written by the then Chief Justice, he opined on the respective rights of the parties on the issues of law arising and in the end refused to grant the reliefs which Aarti had prayed for. This is an appeal against that judgment.

[10] Before we consider the grounds, we find it odd that it is ABC which is appealing against Peter Padayachy and Aarti. But that is not the only singular thing about this case. The learned Judge also pointed out a couple of them. We shall none the less treat the grounds in the order in which they have been raised.

GROUND 1

[11] Under Ground 1, learned counsel for the appellant has submitted that an agreement for a lease of 100 years is against public policy inasmuch as the law provides for a maximum of 99 years only. As such, the learned Judge should have declared the lease to be a nullity.

[12] The argument of learned counsel has been that there was a time when a lease which went beyond the prescribed time was reduced to 99 years. However, the jurisprudence has evolved to hold that such leases should be declared a nullity. Learned Counsel relied for his proposition of law on **Note 282 of Jurisclasseur, Fasc. 5, Article 1708-1762**. The note reads:

“282. L’interprétation que la jurisprudence a donnée de cette règle a évolué. Elle admettait autrefois que les baux consentis à perpétuité ou pour une durée de plus de quatre-dix-neuf ans, devrait être maintenus, mais réduits à cette limite (Cass. Civ. 29 nov. 1932 précité; Grenoble 11 mai 1897: D.P. 98, 3, 248; Douai 10 juill. 1934: Rec. Douai 1935, 82; Aubry et Rau, op. cit. 6^{ème} ed. T. V, no. 364, p. 198.”

[13] The above paragraph, be it noted, does not change the law with respect to leases that go beyond 99 years. These are not against public policy. The leases that are against public policy are those leases the time periods of which lie *en perpétuité* inasmuch as such a provision is a *cause illicite* in a contract which should be struck down as a nullity.

[14] One may read the following note in Jurisclasseur at Note 282, para. 3, *ibid.*:

“L’interdiction des baux perpétuel est d’ordre public et n’admet aucune dérogation (Cass. Civ. 20 mars 1929: D.P. 1930.1.13; Cass. Soc. 29 mai 1954, précité; Trib.gr. inst. Seine 26 avril 1963: Gaz. Pal. 1963. 2.265).

[15] What is a *bail perpétuel*? It is one where the lease agreement does not allow any of the parties to put an end to it at any one time and there is no expiry date mentioned therein. The mischief it seeks to prevent is the infringement of the rule against perpetuities.

“283. Le bail est considéré comme perpétuel lorsque, en l’absence d’un terme fixé pour son expiration, il ne prévoit par ailleurs aucune possibilité pour toutes les parties d’y mettre fin à certains moments.”

[16] Learned counsel for the appellant referred to **Note 137, Dalloz Civ., Vo Bail**, to submit that when the lease goes beyond 99 years, the result is not a reduction in its term of duration but a nullity of the lease itself. We are unable to follow him along that route. Read properly, the proposition contains an important qualification. The rider is that the term of the lease in such a case should be the determining cause of the contract:

“137. Lorsque le bail est conclu pour une durée supérieure à quatre dix neuf ans,

la sanction n'est pas la reduction mais la nullité pour le tout, du moins lorsque cette durée est la clause déterminante du contract (Civ. 20 mars 1929, D.P. 1930.1.13, note Voirin; 2 août 1950, J.C.P. 1951.II.6059, note Guiho. Rev. Trim. Dr. civ. 1951.92, obs. Carbonnier, et 271 obs. Salvatier; Soc. 16 déc. 1953, D.1955. Somm. 41. Rev. trim. Dr. civ. 1955.129, obs. Cabonnier; 29 mai 1954, D. 1954.640; Bordeaux, 6 juin 1957, D. 1958. Somm. 21."

[17] There is no merit on Ground 1, therefore. It fails.

GROUND 2 AND 3

[18] We can take grounds 2 and 3 together on account of the fact that they are interlinked. The decision of the learned Chief Justice is challenged under Grounds 2 and 3 in that he should have held that the agreement for a lease did not have effect against and bind subsequent purchasers as the agreement *in lite* was not registered in the Register of Condominium Property as an encumbrance affecting the land parcel and/or the unit. Instead, he applied Article 1718(1) of the Seychelles Civil Code which protects a particular kind of lease.

[19] There is a short answer to the above: any pronouncement on this matter would be academic. The learned Chief Justice, after explaining the law on the various issues raised, did indicate his inability to decide them on the facts because the parties had not adduced the sufficient evidence in support.

[20] As regards the law, we have looked at competing provisions. The learned Chief Justice was not incorrect in his reasoning for the simple reason that a lease or an agreement for a lease by virtue of article 1718(1) is binding upon a buyer of the property unless the landlord, by terms of the agreement, has reserved the right to terminate it upon the sale of the property and does do so. We have looked at his reasoning in the interpretation of section 8(1) of the Condominium Property Act. It is sound. However, his difficulty was in the application of same to the facts which were hazy and replete with questions and doubts.

[21] The object of the Condominium Property Act has been to create a particular regime of vertical property ownership as opposed to the hitherto horizontal property ownership on a land which comprises a building of more than one storey and the building comprises more than one residential or non residential units. The Act sits alongside with the provisions of the Civil Code, the Land Registration Act and the Mortgage and Registration Act, The Immovable Property (Judicial Sales) Act, the Immovable Property (Transfer Restriction) Act, the People's Housing Mortgages Act etc. These legislations are affected only to the extent that the Condominium Property Act specifically provides.

[22] Any claimant who is seeking the benefits of the Act should show that the protection he needs is a protection that is provided for in the Act in his favour. This is a matter of evidence. The learned Chief Justice could only state the law which he did. But for the purposes of its application he needed the relevant pleadings and the facts adduced in evidence. He expressed himself on the lack of focus and the inadequacy of the pleadings and the evidence. We agree with him. Neither the relevant Condominium plan nor the other documents relating to the ABC transfer were before the Court. The terms of the lease with respect to whether or not there was a buy back was adumbrated but not pleaded for the application of article 1718(1) of the Civil Code.

[23] Article 1718 (1) provides:

"An agreement for a lease shall only confer personal rights upon the parties to it. It shall be binding upon a buyer of the property unless the landlord, by terms of the agreement, has reserved the right to terminate it upon the sale of the property. However, if the seller has not reserved that right and if the buyer could not reasonably be expected to know of the tenancy, the latter shall be entitled to demand a reduction of the price corresponding to the loss."

We would also add to the above difficulty the absence of pleadings and evidence on the facts on which a court could have come to the conclusion that ABC could not reasonably be expected to know or not to know of the tenancy. Had ABC visited the place before purchase? Was it under a duty to do so? And so many questions more.

[24] Further, section 8(1) of the Act reads:

“8(1). Every dealing with an interest in any unit shall be effected by an instrument evidencing such dealings and the provisions of the Land Registration Act and the Land Registration Rules relating to the form, manner of execution and fees for registration of instruments affecting land shall mutadis mutandis apply to instruments effected under this section.”

[25] It is worthy of note that Aarti had asked for Peter for a lease agreement in terms of section 8(1) of the Condominium Act in the light of the events which had taken place. But Aarti, for some reason, has chosen not to appeal against the dismissal of the case by the Chief Justice. The only one appealing is ABC which is challenging the validity of the lease itself.

[26] The learned Chief Justice did give his reasons for his inability to decide in this matter because the pleadings were poor and the presentation of evidence was not particularly focused. We concede that is the case when we examine the transcript. Grounds 2 and 3 have no merits and are dismissed.

[27] We dismiss this appeal in its entirety with costs.

S. Domah (J.A)

I concur:.

F. MacGregor (PCA)

I concur:.

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 April 2015