

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , M. Twomey (C.J.) , J. Msoffe (J.A)]

Civil Appeal SCA 03/2013

(Appeal from Supreme Court Decision 25/2012)

Platte Island Villas and Resorts Limited

Appellant

Versus

EME Management Services

Respondent

Heard: 20 August 2015

Counsel: Mr. Frank Elizabeth for the Appellant

Mr. Elvis Chetty for the Respondent

Delivered: 28 August 2015

JUDGMENT

S. Domah (J.A)

[1] There is a single ground of appeal in this simple case with a simple issue but with important monetary consequences for the parties. The then Chief Justice decided in a case of admitted facts that the appellant had failed to discharge the evidential burden of proof on one critical aspect and he dismissed the action as a matter of law. The critical question in the case was whether the penal clause in a agreement was manifestly excessive and should be mitigated.

[2] In the appellant's view: *"the Learned Chief Justice erred in law when he dismissed the Appellant's application on the grounds that the Appellant has failed to discharge the evidential burden of proof on a balance of probabilities that the penal clause in this case is manifestly excessive in the circumstances of the contract between the parties."*

[3] The respondent resists the appeal arguing that the dismissal decision was sound.

[4] We expressed our appreciation for the conduct of this civil case by way of admitted facts

which had been worked out by the parties and presented to the court with the only task of deciding whether 2% interest per month imposed on any outstanding amount on a failure to discharge a money debt amounted to a penal clause and, for that reason, bound to be reduced by the Court.

- [5] In a contract dated 23 May 2011, the appellant had agreed with the respondent that if he failed to pay the sum of US\$400,000.00 by 15 August 2011, the interest that would accrue on any outstanding amount would be calculated at 2% per month. This does mean that annually it ended up being 24% per annum.
- [6] The only knowledge the Court could obtain as bench-mark for deciding whether the interest charged in the new agreement had crossed the permissible line or not was from a statement from the Bar to the effect that bank interest on loans was 15% and on credit-cards 17.5%. To the Chief Justice who heard the case, evidence on such a crucial matter of evidence should not have been adduced from the Bar but from the witness box. We agree with learned counsel that Courts usually give a hint to that effect unless it does not immediately occur to them that it is a matter of such importance.
- [7] Be that as it may, in this particular case, determining whether or not a particular contractual condition is a penal clause is a matter of fact in evidence. Where it has to do with, not the payment but the amount, of interest as in this case, there is a need for he who alleges to prove which he may only do by ushering comparatives in evidence. All that the Court had before it was that the interest turned out to be 24% per month. From the Bar, a comment was made to the effect that the bank rate on loans was 15% per annum and on credit cards 17.5% per annum.
- [8] Learned counsel for the appellant has argued before us that judicial notice should have been taken of that fact. He has submitted no authorities in support. One may take judicial notice of legal rate but not of commercial rates of interests on balances which accrue upon a failure to pay agreed periodical terms on loans advanced. Nor have we come across any authority in support of that proposition.
- [9] With regard to the practice of banks, judicial notice may be taken of obvious and common place facts and circumstances of ordinary life: **Governor and Company of the Bank of Ireland v Keehan [2013] IEHC 631**. One may cite the example of the fact that

banks are closed on week-ends and public holidays. It would be wasteful of time and resources to call evidence on such matters which are deemed to be public knowledge in the locality in question. Judicial notice may be taken of the fact that interests are charged by banks on loans and overdrafts but judicial notice may not be taken of the rates of the interests on account of its varying nature with regard to places, times, transactions, banks etc. Likewise judicial notice may be taken of the fact that a banker's lien operates from the moment exchequer bills is unpaid: **Brandao v Barnett (1846) 12 Cl & Fin 787, HL; George v Davies [1911] 2 K.B. 445; Re Matthews, ex p. Powell (1875) 1 Ch D 501.**

[10] Judicial notice may be taken of facts so notorious and commonplace that it would be wasteful of judicial time if it were sought to be proved in the ordinary way. As such, one need not bring proof of the fact that the period of human gestation is normally nine months and not a fortnight: **R v Luffe (1807) 8 East 193**; that cats are ordinarily kept as domestic animals: **Nye v Nibblet [1918] 1 KB 23**; that a post card may be read by any person coming across it: **Huth v Huth [1915] 3 KB 32**; that documents marked 'secret' contain material the disclosure of to unauthorized persons is not in public interest: **Secretary of State for Defence v Guardian Newspapers Ltd [1984] 3 All ER 601 (HL).**

[11] Interestingly, the Constitution of the Republic of Seychelles makes special mention of the doctrine of judicial notice in its Article 48 which provides that the rights enshrined in Chapter III shall be interpreted in such a way as not to be consistent with any international obligations of Seychelles relating to human rights and freedoms and a Court shall, when interpreting the provision of this Chapter, take judicial notice of the Constitutions of other democratic States or nations in respect of their Constitutions: see **Frank Elizabeth v The Speaker of the National Assembly and Another SCA 002 of 2009**. The only difficulty with the application of this provision is how should the courts take judicial notice in any particular case that such and such a country is a democratic state: see Mitchell & Others v. Director of Public Prosecutions & Another [1986] LRC (Const.) 35.

[12] The Court did point out in the **Mitchell case**, that there precedents exist for proving legitimacy of the government of the day by way of agreed statements of fact or by affidavit evidence; and, adding that, these modes are not exhaustive.

- [13] Likewise judicial notice need be taken of the jurisprudence of the European Court of Human Rights: **People (DPP) v Gormley [2014] IESC 17** and that a particular event occurred in world scene such as the genocide of Rwanda against the Tutsi ethnic group: **Prosecutor v Edourad Karemera, Mathieu Ngirumpatse and Joseph Nzirorera (ICTR-98-44-AR73 (C) (16 June 2006))**.
- [14] Our Courts may take judicial notice of registered members of the professional organizations of some standing: that a particular land surveyor has a long standing and experience as in **Confait and Anor v Nilsen & Anor [2013] SCCA 22**; that property values have been on the increase over the years: **Esparon v Esparon [2002] SCSC 5**; that drug related offences are rampant: **R v Moustache [2011] SCSC 103**; that Cable and Wireless has been engaged in the business of public telecommunications for the past 110 years: **Gangadoo v Cable and Wireless [2011] SCSC 81**.
- [15] Courts are cautious in extending the doctrine of judicial notice to matters which need to be proved. In case of doubt, the fact, if material, should be proved by the party on whom the onus lies. Where expert evidence is required, expertise should be called in aid. In **Mac Quaker v Goddard 1940 1 KB 687**, the question arose as to whether a camel in a zoo was a wild or domestic animal. The court held that a camel is not to be regarded as a wild animal by the common law as a camel 'is, in all countries, a domestic animal, an animal that has become trained to the uses of man, and a *fortiori* accustomed to association with man.'
- [16] The decision was upheld on appeal but the fact that the learned Judge had sought expert evidence after the close of the case has continued to generate controversies in legal texts. This is an area where it is hard to lay down hard propositions and common sense should prevail.
- [17] With this, we come to the present case. Basically, what learned counsel is inviting us to rule on is that the learned judge should have had knowledge of a fact that bank rates are 15% per annum on loans and 17.5% per annum on credit cards, as he had stated from the Bar. On this matter, judicial notice may be taken of the fact that the Chief Justice concerned was not a national of Seychelles so that such matters of interests on loans given by banks, even if - judicial notice be taken – well within the knowledge of affluent

members of the Bar who deal with banks and big clients, is neither within public knowledge nor the personal knowledge of most non resident members of the Bench. While interests on loans may be obvious and common place facts and circumstances of ordinary life (see **Governor and Company of the Bank of Ireland v Keehan [supra]**, the rate charged which fluctuates from time to time is not. This is not a case of personal knowledge like that in **Director of Public Prosecutions v Bulmer [2015] EWHC 2323** where a Court took judicial notice by the regularity of appearance and other social activities of a Ms Bulmer that she was resident of the city of York.

[18] It cannot be said, accordingly, that the learned Judge erred when he decided that there was no bench-mark whereby he could assess whether or not the interest paid was excessive in the circumstances. He correctly took the view that he could not take the word of the learned counsel that bank rates are 15% per annum. The only judicial notice he could take is that Seychelles is a market economy and bank rates in such an economic system are commercial rather than official in nature.

[19] For the reasons set out above we take the view that the ground raised has no merit. The only order which may be made in the circumstances is an order for non suit rather than dismissal. The appeal is dismissed on the merits but allowed on the type of order which was given. We quash the order for dismissal of the plaint which was ordered by the learned Chief Justice and substitute thereof an order for non suit. Costs of this appeal should be shared between the parties: one third for the appellant who has been partially successful and two thirds on the respondent.

S. Domah (J.A)

I concur:. M. Twomey (J.A)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 April 2015