

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram:** A. Fernando (J.A), B. Renaud (J.A), F. Robinson (J.A)]

**Civil Appeal SCA 03/2017**

**(Appeal from Supreme Court Decision CS199/2011)**

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In the Matter between

LCP Development Limited

Appellant

Versus

Island Development Company Limited

1<sup>st</sup> Respondent

The Government of Seychelles

2<sup>nd</sup> Respondent

Herein represented by the Attorney  
General

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Heard: 24 August 2018

Counsel: Mr. D. Sabino for the Appellant

Mr. F. Chang-Sam with Mr. O. Chang Leng for the 1<sup>st</sup> Respondent

Mr. H. Kumar for the 2<sup>nd</sup> Respondent

Delivered: 31 July 2018

**JUDGMENT**

**A.** Fernando (J.A)

1. The Appellant has appealed against the judgment of the learned Chief Justice wherein the Appellant's (then Plaintiff) Complaint dated 17<sup>th</sup> October 2011, filed before the Supreme Court; seeking a declaration and an order, "that the Sublease Agreement dated 5<sup>th</sup> May 2003 between the Appellant the 1<sup>st</sup> and 2<sup>nd</sup> Respondents (then 1<sup>st</sup> and 2<sup>nd</sup> Defendants) has not been terminated and is still in force and that consequently the Appellant has a right of ownership and possession over the area of Poivre to which the sublease applies, and therefore to reinstate the Appellant in the peaceful exercise of such rights", had been dismissed; by the learned Chief Justice.

2. The 1<sup>st</sup> Respondent had entered into an agreement with the Appellant for the sublease of 16.5 hectares on the North Island of Poivre, an outlying island of the Seychelles for a period of 60 years commencing from 1<sup>st</sup> December 2003 for the purpose of constructing, developing and operating a Hotel and to maintain it and perform such other works in connection therewith. The Appellant being a non-Seychellois company had requested and had been granted sanction by the 2<sup>nd</sup> Respondent to enter into this sublease.
3. The 2<sup>nd</sup> Respondent is the owner of Poivre and the 1<sup>st</sup> Respondent holds a 99 year lease from the 2<sup>nd</sup> Respondent on all Outlying Islands including Poivre and that lease is called the ‘Head Lease’. The 2<sup>nd</sup> Respondent had intervened in the Sublease Agreement as set out in the Recitals *“for the purposes of acknowledging and giving its consent to this Sublease and giving its consent or permission for anything for which such consent or permission is required to be given under the Head lease and giving its undertaking to fulfil and perform any obligation on the Republic’s part to be fulfilled and performed and which arises under or as a result of the Sublessor entering into this Sublease with the consent of the Republic.”* The Appellant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have executed the Sublease Agreement and all three parties are signatories to the SubLease Agreement. The Sublease had been made subject to the terms and conditions of the Head Lease and the 1<sup>st</sup> Respondent had subleased to the Appellant all its rights to the premises arising from the Head Lease for the sublease period. The Sublease Agreement has also made provision in clause 26 to the premature termination by the 2<sup>nd</sup> Respondent of the Sublease Agreement and payment of compensation. Thus the Sublease Agreement was a tripartite agreement.
4. It was an obligation of the Appellant under **clause 16 (a)** of the Sublease Agreement that it shall: *“start and complete the construction of the Hotel in accordance with approved plan thereof within 24 months after the grant of the planning permission by the Planning Authority or 30 months after the Commencement Date, whichever occurs last.”*
5. Thus as per clause 16 (a) of the Sublease Agreement referred to above there were one of two dates specified for the completion of the construction of the hotel, whichever

occurred last. The commencement date of the Sublease Agreement as per clause 1(c) was 1<sup>st</sup> December 2003. It is clear from the Plaintiff (*the Plaintiff*) and the Defences filed by both Respondents (*then Defendants*) that both parties had taken as the operative date for the start and completion of the construction of the hotel, the first of the two dates, namely, “within 24 months after the grant of planning permission by the Planning Authority”.

6. The Appellant had averred at paragraph 14 of its Plaintiff “Such Planning permission was granted in July 2007 by the Planning Authority. The operative date for completion of the Hotel under clause 16 (a) of the Sublease Agreement was therefore 31<sup>st</sup> July 2009.” According to the Appellant Planning Permission was granted by **P7 and P 8** which read as follows:

**P7**

“MINISTRY OF LAND USE AND HABITAT

10<sup>th</sup> July 2007

Mr. Emilien Rosette  
P O Box 990  
Victoria

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Dear Sir,

RE: SUPPLEMENTARY DRAWINGS FOR JUNIOR STAFF HOUSING AT POIVRE ISLAND FOR POIVRE ISLAND RESORT – DC/499/03

The supplementary drawings submitted on 27 June 2007 for the above application have been accepted and approved subject to the following:

- 1) Submission of structural design for approval 28 days prior to commencement of work, with a copy of this letter.

The approved architectural drawings are attached to this letter.

Please note that the conditions attached to the original application are still applicable.

Please do not hesitate to contact us if you have any queries.

Yours faithfully,

Terry Biscornet (Mr)  
SECRETARY PLANNING AUTHORITY”

**P8**

“MINISTRY OF NATIONAL DEVELOPMENT

Our Ref: **DC/499/03**

Date: 25<sup>th</sup> July 2007

Emilien Rosette  
P O Box 990  
Victoria  
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Dear Sir,

RE: HOTEL DEVELOPMENT AT POIVRE ISLAND FOR LCP DEVELOPMENT LTD

We refer to your letter dated 19 July 2007.

Please find attached the approved architectural drawings for above application, whereby we are releasing all Chalets as indicated, Health Spa and Staff Community Centre as per Environmental Authorization form with conditions (Annex 1 attached).

The remaining issues should be addressed as per Environment Impact Division (Annex 2 attached) for your perusal.

Please note that the conditions attached to the partial approved application are still applicable and subject to submission of structural design for approval **28 days** prior to commencement of work, with a **copy** of this letter.

Please do not hesitate to contact us if you have any queries.

Yours faithfully,

Terry Biscornet (Mr)  
SECRETARY PLANNING AUTHORITY”

7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents had denied the Appellant's averment that Planning Permission was granted in July 2007, and averred instead, that Planning Permission was granted by **P 6**. In **P 6** it is stated that permission is granted for the development proposal in **Application No. DC/499/03**.

8. **P 6** reads as follows:

"P.F. 11

Application No. **DC/499/03**

.....

(TO BE QUOTED ON ALL CORRESPONDENCE)

IMPORTANT This certificate does not purport to convey any approval or consent required under the Town and Country Planning Act or any written law except as provided in the Town and Country Planning (Building) Regulations, 1975.

TOWN AND COUNTRY PLANNING ACT (CAP. 237)

TOWN AND COUNTRY PLANNING (BUILDING) REGULATIONS, 1975

**CERTIFICATE OF APPROVAL**

IT IS HEREBY CERTIFIED that the Town and Country Planning Authority has granted a certificate of approval for the \*building operations/\*change of use proposed by Poivre Island Resort in application no. DC/499/03 deposited on the 27<sup>th</sup> day of May 2003 and situated at Poivre Amirante Island namely the **SUBSEQUENT APPROVAL FOR HOTEL** in accordance with the accompanying drawing(s).

- Please note that the approved structural drawings where applicable have been forwarded to your Engineer who will be responsible for the supervision of the structural work in accordance with the Engineer's Certificate that has been submitted to the Planning Authority.

Dated this 21<sup>st</sup> day of March 20 05

(Signed) .....

NB. It is important to read the notes on the back of this form.”

P.F. 4

Application No. **DC/499/03**

**IMPORTANT** This permission does not support to convey any approval or consent required under any written law other than Part IV of the Town and Country Planning Ordinance 1970.

**TOWN AND COUNTRY PLANNING ORDINANCE 1970  
TOWN AND COUNTRY PLANNING GENERAL DEVELOPMENT ORDER 1971  
NOTICE OF CONDITIONAL PERMISSION FOR DEVELOPMENT**

To Poivre Island Resort

Of C/o. Emilien Rosette, P O Box 990, Victoria

The Town and Country Planning Authority HEREBY GRANT permission for the following development

Proposal in your application No. DC/499/03

dated the 27<sup>th</sup> day of May 2003

of the land situated at Poivre Amirante Island, (Subsequent Approval for Hotel)

in accordance with the accompanying plan (s) SUBJECT to the following condition (s):-

1. The development hereby permitted **shall begin** not later than the expiration of two years beginning with the date hereof.
2. The development hereby permitted shall be carried out and completed in every respect in accordance with the detailed plans and particulars.

Subject to the following conditions:

- Standard Conditions (attached)
- Environmental Authorisation with conditions (to follow)
- Chief Fire Officer’s comments (attached)
- Structural design to be submitted 28 days prior to commencement of the works.

Note: Commencement Notice & other notices (form attached) must be hand delivered to the Planning Counter 48 hrs in advance of required inspection. Commencement Notices should be endorsed by the Project Engineer.

for the following reasons:

1. To avoid the accumulation of unimplemented planning permission thereby assuring orderly and phased development.
2. To ensure satisfactory development.

Dated this 21<sup>st</sup> day of March 2005

(Signed)

(Your attention is drawn to the Notes overleaf) Secretary, Town & Country Planning Authority”

9. According to the Respondents “the operative date for the completion of the Hotel was 20<sup>th</sup> March 2007 being the last occurring event of the 2 events specified in Clause 16 (a), namely 24 months from the 21<sup>st</sup> March 2005 i.e. 20<sup>th</sup> March 2007.....”They had gone on to state that **P 6** “is the planning permission which authorises the Plaintiff (*Appellant herein*) to start its development on the Leased Premises on Poivre Island and as a result triggers the countdown of one of the 2 operative periods.”
10. It is to be noted that as per the first condition set out in **P 6** “The development hereby permitted shall begin not later than the expiration of two years beginning with the date hereof”, namely the 21<sup>st</sup> of March 2005. Accordingly the date for the start of the development had to be before 21<sup>st</sup> March 2007. According to the second condition set out in **P 6**“The development hereby permitted shall be carried out and completed in every respect in accordance with the detailed plans and particulars.” This is in conflict with the Respondents’ averment that the operative date for the completion of the hotel was 20<sup>th</sup> March 2007, which is based on clause 16 a of the Sublease Agreement. There has been confusion as regards the ‘approval of the development proposal and approval of plans for construction. This is made clear by **P 7 and P 8**. **P 7** (dated 10<sup>th</sup> July 2007) was approval for supplementary drawings for junior staff housing for Poivre Island Resort and it is stated in **P 7** that the conditions attached to the original application are still applicable. By **P 8** (dated 25<sup>th</sup> July 2007) approval had been granted for the architectural drawings of the chalets, health spa and staff community. It is also stated in **P 8** that “conditions attached to the partial approved application are still applicable”. In both **P 7** and **P 8** reference is made to the Application No. DC/499/03, which is referred to in **P 6**.

11. Both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had averred “that following the issuance of the letter sanction dated 27<sup>th</sup> March 2007 (**P 10**) the Hotel had to be completed by the 1<sup>st</sup> June 2008 but not in any event by 31<sup>st</sup> July 2009” as averred by the Appellant and “in consequence, that the Plaintiff (*Appellant herein*) was in breach of clause 16a of the sublease agreement as stated in the letter of 22<sup>nd</sup> July 2008”(P 14).

12. **P 10** is a letter by the Principal Secretary to the Ministry of Land Use and Habitat granting sanction to Birchley Investment Holdings Limited under the Immovable Property (Transfer Restriction) Act. The Appellant explaining the involvement of Birchley, in this agreement, states at paragraph 15 of the Complaint, “In 2007 the Appellant wanted to inject more money in the Hotel Project. This was to be done by a shareholder of the Plaintiff Company (*Appellant herein*) selling his shares to another Company, namely, Birchley Investment Holdings Limited. For the transaction to occur it was necessary for Birchley to obtain the 2<sup>nd</sup> Defendant’s (2<sup>nd</sup> Respondent herein) sanction...” Both Respondents in their defences had admitted the above averment of the Appellant, except the fact that the said “transaction had the stated effect of injecting more money into the Hotel Project”. **P 10** extended the time period for the completion of the construction of the hotel as seen in paragraph 6 thereof.

13. **P 10** reads as follows:

“Ministry of Land Use and Habitat  
Department of Land Use  
OFFICE OF THE PRINCIPAL SECRETARY  
P. O Box 199, Independence House  
Republic of Seychelles

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Please address all correspondence to the Principal Secretary

Your Ref:  
Our Ref: IPTR/745  
Enquiries to:  
Telephone:  
Date: 27<sup>th</sup> March 2007

Birchley Investment Holdings Limited  
3<sup>rd</sup> Floor  
Wolverton Place



Market Square  
St Peter Port  
Guernsey GY1 1HB  
U.K.

.....

Dear Sirs

Immovable Property (Transfer Restriction) Act

Application for Sanction to Purchase Shares in LCP Development

Sanction is hereby granted to Birchley Investment Holdings Limited to purchase 99 shares in LCP Development Limited from Mr. Leighton Curd for a consideration of R9,900/- subject to the following:-

- (1) Money to pay the purchase price and Stamp Duty must be brought into Seychelles through the Central Bank of Seychelles in a convertible foreign currency and exchanged into Seychelles Rupees. A Certificate from the Central Bank to this effect must be produced to the Registrar General when the deed of transfer is submitted for registration.
- (2) LCP Development must apply for Sanction each time it is proposed to change the beneficial ownership of Birchley Investment Holdings Limited, which application for approval shall not be unreasonably withheld. A change in the beneficial ownership of Birchley Investment Holdings Ltd without prior Government approval will constitute a breach of this Sanction.
- (3) LCP shall supply IDC with all specified materials to complete the runway on or before 30<sup>th</sup> September 2007, such material shall be delivered to Poivre Island.
- (4) All dredging works must be completed by 30<sup>th</sup> December 2007 to a minimum depth of 3 metres below Chart Datum.
- (5) The Hotel must be completed, operational and licensed by the latest 1<sup>st</sup> June 2008, failing which a penalty of US\$100,000/- per month of delay or part thereof will be payable to IDC notwithstanding that Government may consider forfeiture of the sublease beyond a delay of 1<sup>st</sup> June 2009 and/or LCP's failure to meet any penalty payments.
- (6) No application shall be considered for a residential development until the initial project is completed and operational.
- (7) All issues pertaining to management of utilities, airfield, marina and essential services must be agreed with IDC in writing.
- (8) The Sublease should be amended to reflect the above conditions.

Your attention is drawn to Regulation 7 of the Immovable Property (Transfer Restriction) Fees Regulation 1974 which provides that:-

“Sanctions granted under the provisions of the Act shall automatically lapse at the end of one year from the date upon which they were first granted if during

that time the Immovable Property or rights therein to which they relate have not been either purchased or leased as the case may be”.

Our letter of Sanction IPTR/745 of 19<sup>th</sup> March 2007 is hereby revoked.

Yours faithfully

Patrick Lablache  
PRINCIPAL SECRETARY

c.c. Principal Secretary (Finance)  
Central Bank of Seychelles  
Registrar General  
Mr. Leighton Curd  
Chief Executive Officer – I.D.C  
Chief Executive Officer – S.I.B.”(emphasis added)

14. The Appellant had attempted to challenge P 10 on the basis that the conditions therein were never discussed with or agreed by the Appellant and had been arbitrarily imposed on it and was ultra vires as they purported to amend the terms of the sublease, which in fact was never amended. This challenge is misconceived as according to **section 4(2) of the Immovable Property Transfer Restrictions Act (Cap 95)**: *“The Minister may impose any conditions or restrictions on the grant of sanction under section 3 and such conditions or restrictions shall be incorporated in, and form part of, all deeds and documents relating to the transactions to which the said sanction applies”*. Further these allegations become meaningless in view of D 1 which was written by the Appellant to the 2<sup>nd</sup> Respondent and which stated:

**D1**

**“LCP DEVELOPMENTS  
LIMITED**

P. O. Box 780  
Victoria, Mahé  
SEYCHELLES  
Tel: +248 529 088; Fax: +248 323 141  
South African Representative Office  
Tel: +27 11 886 9631; Fax + 27 11 789 5480  
E-Mail: [Leighton@plp.co.za](mailto:Leighton@plp.co.za)

29 March 2007

Ministry of Land Use and Habitat  
Department of Land Use  
OFFICE OF THE PRINCIPAL SECRETARY

P.O. Box 199  
Independence House  
Republic of Seychelles

ATT: Mr. Patrick Lablache

Application for Sanction and Extension

Dear Sir

Thank you for the granting of sanction to Birchley Investment Holdings Limited, as confirmed to us on 27 March 2007.

We look forward to completing Poivre project successfully and working closely with the Ministry of Land Use and Habitat.

Yours Faithfully,

Leighton Curd  
Director”

15. The 2<sup>nd</sup> Respondent had terminated the Sublease Agreement with the Appellant, under clause 21 of the Sublease Agreement, by letter dated 13<sup>th</sup> August 2008 (**P 15**) after having given Notice by letter dated 22<sup>nd</sup> July 2008 (**P 14**).

16. **Clause 21** of the Sublease Agreement reads as follows:

“Termination by the Sublessor

The Sublessor may serve written notice of termination of this Sublease specifying the reason for termination and the date when the Sublease would stand determined, being thirty (30) days after such notice and may, after the lapse of such date, treat the Sublease as having been so terminated and re-enter upon the Premises and the Hotel to take possession and control of the same if any amicable solution cannot be found within the said period in only the following circumstances:-

(a) if the Sublessee fails to pay the Sublease Rent within thirty (30) days after receipt of a written notice from the Sublessor to pay the Sublease Rent in arrears; or

- (b) the business of the Sublessee, or its lawful sublessee or assignee as the case may be, is terminated voluntarily or compulsorily, has gone into judicial administration, receivership, bankruptcy or insolvency or is wound up voluntarily or compulsorily; or
- (c) if the Sublessee refuses or persistently (more than once) neglects to perform and observe the covenants, terms conditions and provisions or any of them on its part contained in the Head Lease or this Sublease and the Sublessor has given notice to the Sublessee to cure such breach and the time period (which shall be not less than 14 days) permitted under such notice period has elapsed without the breach having being cured, **PROVIDED ALWAYS** that, unless such breach is obvious, the Sublessee has been judged to have been at fault by either an arbitrator or judgement of a competent tribunal or court under the following procedures:-
  - i. In the first instances, attempts should be made to resolve the dispute by good faith mutual discussion and agreement. During this period, the parties may (but shall not be obliged to) jointly agree to appoint an independent expert to assist in resolving the dispute;
  - ii. If the dispute remains unresolved, then either party shall refer the matter to an arbitration in accordance with the rules and procedures set out in the Commercial Code of Seychelles which rules and procedures are deemed incorporated by reference to this Clause. The determination of the dispute by arbitration shall be final except that it may be challenged only for those reasons set out in the Seychelles Law and Practice.

17. **P 14** reads as follows:

“LAW CHAMBERS  
OF  
**FRANCIS CHANG-SAM**  
ATTORNEY-AT-LAW  
NOTARY

The Directors,  
LCP Development Limited  
Arpent Vert Building  
Mont Fleuri,  
Mahe  
P O Box 617  
Seychelles  
Fax: 248 225289

Dated this 22<sup>nd</sup> July, 2008

Dear Sirs,

Lease Agreement dated 5<sup>th</sup> May 2003 between Islands Development Company Limited (“IDC”), acting as lessor, and LCP Development (Proprietary) Limited (“LCP”), acting as lessee, (the “Lease Agreement”)

I write on behalf of Islands Development Company Limited for whom I act and refer to the above-mentioned Lease Agreement.

My client wishes to draw your attention to the continued breach of clause 16 a of the Lease Agreement by LCP Development Limited by its failure to complete the construction of the Hotel (as defined in the Lease agreement) within the time specified in clause 16, as extended by paragraph (3) of the Letter of Sanction, reference IPTR/745, dated 27<sup>th</sup> March, 2007 from the then Ministry of Land Use and Habitat.

In accordance with clause 21 of the Lease Agreement I am instructed to give notice to LCP Development Limited, as lessee under the Lease Agreement, requiring it to cure the breach of its obligation under clause 16 a within twenty-one (21) days of the date of this letter.

Yours faithfully

Francis CHANG-SAM  
Attorney-at-Law

Copies:	LCP Development (Proprietary) Ltd	LCP Development (Proprietary) Ltd
	P O Box 2629	P O Box 780
	Randburg 2125	Victoria, Mahe
	Johannesburg	Seychelles
	South Africa	
	Fax: 27 11 789 5480”	

18. **P 15** reads as follows:

“LAW CHAMBERS  
OF  
**FRANCIS CHANG-SAM**  
ATTORNEY-AT-LAW  
NOTARY

13<sup>th</sup> August, 2008.

The Directors  
LCP Development Limited  
Arpent Vert  
Mont Fleuri  
P.O. Box 617  
Victoria

Dear Sirs

**Notice of Termination**

I write further to my letter of 22<sup>nd</sup> July, 2008.

Despite the notice issued to you under clause 21 of the Lease Agreement dated 5<sup>th</sup> May, 2003 between Islands Development Company Limited and LCP Development Limited LCP Development (the “Lease Agreement”) has failed and continues to fail to remedy the breach of clause 16 a of the Lease Agreement within the period specified in my letter of 22<sup>nd</sup> July, 2008.

Accordingly pursuant to clause 21 of the Lease Agreement on behalf of Islands Development Company Limited I hereby give you notice that the Lease Agreement shall, without further notice, stand terminated 30 days from the date of this letter.

In consequence of the termination my client would be grateful if LCP Development Limited would remove all its movables from and vacate and deliver vacant possession of the premises (as defined in the Lease Agreement) to my client by the end of the 30 days above-referred.

Yours faithfully  
Francis Chang-Sam  
Attorney-At-Law

cc.	LCP Development (Pty) Limited	LCP Development
	P.O. Box 2629	P.O. Box 780
	Randburg 2125	Victoria, Mahe
	Johannesburg, South Africa	Seychelles
	Fax: 27117895480	

Principal Secretary  
Department of Investment, Land Use and Industries  
Ministry of National Development, Victoria, Mahe, Seychelles”

19. The reason specified for termination of the Sublease in **P 14** in accordance with clause 21 of the Sublease Agreement referred to at paragraph 16 above, which requires the service of a written notice of termination, is the “continued breach of clause 16 a of the Lease Agreement by LCP Development Limited by its failure to complete the construction of the Hotel (as defined in the Lease agreement) within the time specified in clause 16, as extended by paragraph (3) of the Letter of Sanction, reference IPTR/745, dated 27<sup>th</sup> March, 2007 from the then Ministry of Land Use and Habitat.” On a perusal of **P 10** and **P 14**, it is clear that the reference in **P 14** to paragraph (3) of the Letter of Sanction (**P 10**) and the time period for the completion of the Hotel (as defined in the Lease Agreement) is incorrect. The time period for the completion of the Hotel is to be found not in paragraph 3 but, in paragraph 5 of **P 10** (see paragraph 13 above). Paragraph

3 of **P 10** makes reference to the supplying of all specified materials by the Appellant to the 1<sup>st</sup> Respondent, to complete the runway and not to the construction of the hotel and thus reference to paragraph 3 in **P 14** is clearly erroneous. Having averred and accepted the date of the Sanction Letter (**P 10**) to be that of the 27<sup>th</sup> of March 2007 as referred to at paragraph 13 above, the Respondents' Attorneys had erroneously placed reliance on an unsigned letter dated 19<sup>th</sup> of March 2007 (**P 9**) as the Sanction Letter. **P 9** had been revoked by the last paragraph of the Sanction Letter of the 27<sup>th</sup> March 2007 (**P 10**) referred to at paragraph 13 above. The learned Chief Justice had also at paragraph 25 of her judgment fallen into this same error. This makes both **P 14** and **P 15** by which the Sublease Agreement was terminated invalid.

20. Reference to paragraph 6 of the revoked letter, **P 9** dated 19<sup>th</sup> March 2007 (which is the equivalent of paragraph 5 of **P 10**) would make clear the error both the 1<sup>st</sup> Respondent's Counsel and the learned Chief Justice fell into. Paragraph 6 of **P 9** states: "The hotel must be completed, operational and licensed by the latest 1<sup>st</sup> June 2008, failing which a penalty of USD 100,000/- per month of delay or part thereof will be payable to IDC, notwithstanding that Government may consider forfeiture of the sublease beyond a delay of 3 months after 1<sup>st</sup> June 2008". Thus the revoked letter **P 9** speaks of forfeiture by the Government beyond a delay of 3 months after 1<sup>st</sup> June 2008, while **P 10**, which is the valid letter and which is referred to in **P 14** speaks of forfeiture by the Government beyond a delay of 3 months after 1<sup>st</sup> June 2009. (See paragraph 5 of **P 10** referred to at paragraph 13 above).

21. The learned Chief Justice has fallen into further error by referring to **P 9** dated 19<sup>th</sup> March 2007 as the sanction letter at paragraph 25 of her judgment. She had also wrongly quoted paragraph 6 of **P 9** referred to above, thus: "The Hotel had to be completed, operational and licensed by the latest 1 June 2008 failing which a penalty of USD 100,000 would be payable per month of delay or part thereof, (the First Defendant) and notwithstanding the consideration or forfeiture of the sub lease beyond a delay of 3 months after 1 June 2008." She has thus erroneously failed to quote as clearly stated both in **P 9** and **P 10** that it was only the 'Government' that may consider forfeiture of the sublease. In

consequence she has given validity to **P 14** and **P 15**, which in our view is invalid because of **P 10** as stated earlier.

22. Paragraph 5 of **P 10** referred to at paragraph 9 above states: “that **Government may** consider the forfeiture of the sublease beyond a delay of 1<sup>st</sup> June 2009 and/ or LCP’s failure to meet any penalty payments.” The basis for termination set out in **P 14** and **P 15** referred to at paragraphs 17 and 18 above is failure to complete the construction of the hotel in breach of clause 16 (a) of the Sublease Agreement and not any failure to meet any penalty payments. This makes **P 14** and **P 15** by which the Sublease Agreement was terminated invalid as they are dated 22<sup>nd</sup> July 2008 and 13<sup>th</sup> August 2008, and it is prior to the date that ‘Government’ could have considered the forfeiture of the sublease, namely beyond the 1<sup>st</sup> June 2009. It is also to be noted that the notice of termination and the termination had been issued not by the Government, which is the 2<sup>nd</sup> Respondent but by the 1<sup>st</sup> Respondent. This too makes the termination of the Sublease Agreement invalid.

23. At the hearing before us Counsel for the 1<sup>st</sup> Respondent tried to argue that according to **P 10** the forfeiture of the Sublease could have been effected any time after 1<sup>st</sup> June 2008 by IDC, namely, the 1<sup>st</sup> Respondent. This argument is totally misconceived when one reads paragraph 5 of **P10** referred to at paragraph 13 above. It is clear two essential conditions were spelt out in paragraph 5 of **P 10**:

(a) A penalty of USD 100,000/- per month of delay or part thereof was payable to IDC if the Hotel was not completed, operational and licensed by the 1<sup>st</sup> June 2008.

(b) Notwithstanding that the Government may consider forfeiture of the sublease beyond a delay of 1<sup>st</sup> June 2009 to complete the hotel and have it licensed and operational and or LCP’s, the Appellant’s, failure to meet the penalty payments to IDC as set out in condition (a).

This is the only logical interpretation that could be given to paragraph 5 of **P 10**, for there would be no need for a payment of a penalty of USD 100,000 to the 1<sup>st</sup> Respondent, if the 1<sup>st</sup> Respondent could have forfeited the lease after 1<sup>st</sup> June 2008. Further the second condition in paragraph 5 of **P 10** would become meaningless, for what is there for the 2<sup>nd</sup>



Respondent to consider forfeiture of the sublease beyond a delay of 1<sup>st</sup> June 2009 and/or LCP's failure to meet any penalty payments, if the 1<sup>st</sup> Respondent could have forfeited the Sublease after the 1<sup>st</sup> June 2008. In view of this arrangement the 1<sup>st</sup> Respondent was not at a loss, as it was entitled to be paid a penalty of USD 100,000/- per month of delay or part thereof by the Appellant if the Hotel was not completed, operational and licensed by the 1<sup>st</sup> June 2008. Had the Appellant defaulted in making any of its penalty payments after 1<sup>st</sup> June 2008, it was always open for the 2<sup>nd</sup> Respondent to consider forfeiture of the sublease.

24. The Principal Secretary to the Ministry of National Development in her letter dated 20<sup>th</sup> June 2008 to the Appellant (**P 13**) has confirmed what is stated at paragraph 20 above as regards the date for the termination of the Sublease Agreement, by stating:

“At this stage we wish to draw your attention more particularly to condition (5) which provides that the “Hotel must be completed, operational and licensed by the latest 1<sup>st</sup> June, 2008 failing which a penalty of USD 100,000 per month of delay or part thereof will be payable to IDC notwithstanding that Government may consider forfeiture of sublease beyond a delay of 1<sup>st</sup> June 2009 and/or LCP's failure to meet any penalty payments”.

We are aware that as of the 1<sup>st</sup> June 2008 LCP had not completed the Hotel and that as a result LCP has no licensed hotel operating on Poivre on the aforementioned date.

You are reminded in term of the said condition (5) of the Letter of sanction you are required to pay to IDC the sum of USD 100,000 for each month or part thereof that you fail and continue to fail to comply with the said condition (5). Payment of the USD 100,000 is due as from the 1<sup>st</sup> July 2008 and will continue until you fulfil the said condition.

Your attention is drawn to the fact that failure to pay the penalty may result in your leasehold interest being forfeited to the Government.”

25. The Appellant had argued that **P 16**, which is a letter dated 8<sup>th</sup> October 2008 from the Seychelles Investment Bureau, a Government Department addressed to the Appellant had stated: “That it is a condition precedent to the entering into a new lease that LCP formerly surrenders the existing lease and waives and abandons all claims and rights of actions whatsoever and howsoever arisen against the Government and all the officers and agents...” The Appellant had therefore argued that even as at 8<sup>th</sup> October 2008, i.e, 2

months after the 2<sup>nd</sup> Respondent's Termination Letter, the 1<sup>st</sup> Respondent continued to accept the Sublease Agreement as continuing.

26. At the hearing before us Counsel representing the Attorney General, namely the 2<sup>nd</sup> Respondent, conceded that there has been no valid termination of the Sublease Agreement, after the above mentioned facts were drawn to his attention and his views were sought. This should put the issue of validity of the termination of the Sublease agreement to rest.

27. We therefore note that all this squabble and unnecessary litigation between the 1<sup>st</sup> Respondent and the Appellant has been over the issue of a delay of merely two months, for the completion of the construction of the hotel. For according to the Appellant the operative date for completion of the hotel as averred at paragraph 14 of the Complaint was 31<sup>st</sup> July 2009 and as per **P 10** issued by the 2<sup>nd</sup> Respondent and relied upon by the 1<sup>st</sup> Respondent, the final date for completion was 1<sup>st</sup> June 2009.

28. At the hearing before us, we sought clarification from the Appellant as regards its averments at paragraph 24 of the Complaint, namely: "In the spirit of Clause 21 (c) of the Sublease Agreement the Plaintiff approached the 2<sup>nd</sup> Defendant to resolve the dispute that had arisen. There were lengthy and extensive discussions, followed by the drafting of a new Development Agreement and a new Sublease Agreement. In the end however the 2<sup>nd</sup> Defendant set a date, Monday 11<sup>th</sup> October 2010, as the deadline for signing the new Sublease Agreement, which deadline was unreasonable in the circumstances and which the Plaintiff could not meet for good reasons." Both Respondents had stated in their Defence "that it was not within their knowledge that the Appellant had approached the 2<sup>nd</sup> Respondent to resolve the dispute and the averments about the deadline being unreasonable and the Appellant's inability to meet the deadline for good reason and therefore denied the same". In clarifying the matter, Appellant's Counsel stated that the Appellant had commenced negotiations directly with the Government (2<sup>nd</sup> Respondent),

in view of the difficulties it had encountered with the 1<sup>st</sup> Respondent and the purported termination of its Sublease Agreement by the 1<sup>st</sup> Respondent.

29. We invited Counsel to make written submissions with relevant authorities on the effect of paragraph 24 of the Complaint, if they so wished before the 27<sup>th</sup> of August. In their Supplementary Submissions filed at the request by this Court, Counsel for the 1<sup>st</sup> Respondent had submitted: “that the above paragraph is an admission by the Appellant that there were negotiations to enter into a new sub-lease agreement. If the Appellant always maintained that the sub-lease was valid and subsisting, why would it be involved in negotiations for a new sub-lease (emphasis mine)? It is respectfully submitted that the Appellant, at that point in time, had accepted that the 1<sup>st</sup> Respondent had terminated the lease, irrespective of what it later said in the Complaint. Its actions speak louder than its words as following the notice of termination dated 13<sup>th</sup> August, 2018 from the 1<sup>st</sup> Respondent; the Appellant removed all its structures and movables on Poivre Island and proceeded to place them on North Island. As much is confirmed by Mr. Leighton Curd, Managing Director of the Appellant in cross-examination by counsel for the 1<sup>st</sup> Respondent where he states at page 173 of Volume II of the brief that “We only got to the island to take our equipment off the island” and further on at page 174 of Volume II of the brief where he mentions that that the Appellant did manage to get its equipment. Again, as mentioned above, the 1<sup>st</sup> Respondent humbly submits that the Appellant, in removing its structures and equipment, essentially delivering vacant possession to the 1<sup>st</sup> Respondent, and in negotiating a new sub-lease, has accepted that the termination was effective and is now estopped from going back on that course of action and saying something to the contrary. Indeed, the Appellant only filed its complaint on the 17<sup>th</sup> October, 2011, more than three years after the notice of termination, only then averring that the sub-lease was subsisting. Prior to that, there was no formal mention of this by the Appellant to the 1<sup>st</sup> Respondent.

30. Counsel for the 1<sup>st</sup> Respondent has gone on to state that he relies on the English authority of **Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130** wherein **Lord Denning** sets out the circumstances which would give rise to the principle of estoppel. These are: (i) a representation or conduct amounting to a representation

intended to induce a course of conduct on the part of the person to whom the representation is made; (ii) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; (iii) detriment to the person as a consequence of the act or omission. Therefore he submits that the Appellant has by its conduct given the impression to the 1<sup>st</sup> Respondent that it had accepted that its lease in the premises on Platte Island had come to an end and the 1<sup>st</sup> Respondent has acted in consequence and that in the circumstances the Appellant is estopped from denying that the lease has been terminated. (underlining by us).

31. The simple answer to the 1<sup>st</sup> Respondent's above submission is to be found in the response of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to paragraph 24 of the Plaint, wherein both Respondents have stated "that it was not within their knowledge that the Appellant had approached the 2<sup>nd</sup> Respondent to resolve the dispute" and therefore the 1<sup>st</sup> Respondent cannot now claim that the 1<sup>st</sup> Respondent acted or omitted to act on the basis of the representation made by the Appellant to its detriment. Just as much the question is posed by the Counsel for the 1<sup>st</sup> Respondent as to why the Appellant waited for three years after the notice of termination to file its Plaint averring that the sublease was still subsisting; the question can be posed to the Respondents as to why they did not raise the issue of estoppel, which they have now raised, after 7 years of the filing of the Plaint and that too when clarification was sought from this Court from the Appellant in regard to paragraph 24 of the Plaint. There is no evidence before the Court to satisfy the three circumstances which would give rise to the principle of estoppel as enumerated by Lord Denning in the case of **Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130**, as referred to at paragraph 30 above. The Mauritian case of *Perret V Brudou* (1879) and the Seychelles cases of *Hallock v Green* [1979]SLR 72 and *Choppy v Suleman* [1990] SLR 137 relied upon by the 1<sup>st</sup> Respondent have no relevance to the facts of this case.

32. Both Respondents had prayed for a dismissal of the Plaint on the basis of P 15 referred to at paragraph 18 above and not on the basis of the Appellant's averments at paragraph 24 of the Plaint referred to at paragraph 28 above. Further the Respondents cannot make use

of its own mistakes which prompted the Appellant to approach the 2<sup>nd</sup> Respondent as a basis for the dismissal of the Plaintiff.

33. The Appellant’s prayer which it had pursued to the end of the trial is for a declaration “that the Sublease Agreement dated 5<sup>th</sup> May 2003 has not been terminated and is still in force and that consequently the Plaintiff (*now Appellant*) has a right of ownership and possession over the area of Poivre to which the sublease applies and to order the Defendants (now Respondents) to re-instate the Plaintiff (now Appellant) in the peaceful exercise of such rights.”. The prayer for the issue of an interim injunction on the Respondents to refrain from asking for tenders for further development of the Poivre Island which was prayed for in the Plaintiff had not been pursued.

34. We therefore allow the appeal and grant the relief as prayed for in the Notice of Appeal dated 28<sup>th</sup> of February 2017 to the Appellant, save the fact that the Appellant has only a right to possession over the area of Poivre to which the sublease applies.

A.Fernando (J.A)

**I concur:.** .....

B. Renaud (J.A)

**I concur:.** .....

F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 31 August 2018