

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 40 13 August 2021
SCA 14/2019
(Appeal from CC 22/2017)

Seychelles Yacht Club

(rep. by Mr. Frank Elizabeth)

Appellant

and

Mathew Changyumwai

(rep. by Mr. Rene Durup)

Respondent

Neutral Citation: *Seychelles Yacht Club v Changyumwai* (SCA 14/2019) [2021] SCCA 40
(Arising in CC 22/2017)
13 August 2021

Before: Twomey JA, Robinson JA, Dingake JA

Summary: Court of Appeal review of damages, loss of profit, loss of profit, loss of equipment, quantum of damages, expert report

Heard: 6 August 2021

Delivered: 13 August 2021

ORDER

Appeal dismissed with costs.

JUDGMENT

DR. O. DINGAKE, JA

INTRODUCTION

[1] This is an appeal against the decision of the Supreme Court judgement which was in favour of the Respondent.

BACKGROUND

- [2] The dispute in the Supreme Court was regarding breach of the lease agreement between the parties.
- [3] Mr Changyumwai leased the premises from the Appellant at Seychelles Yacht Club for the purpose of operating a restaurant business. The Lease was for five years starting in December 2015. Prior to the termination date of the Lease Agreement, in May 2017, the Seychelles Yacht Club had removed all the kitchen equipment and put it outside in the car park twice.
- [4] Mr. Changyumwai claimed that the Seychelles Yacht Club evicted him from the premises by force and without an order of the Rent Board and that the Seychelles Yacht Club was in breach of the Lease. The Seychelles Yacht Club averred that the lease was terminated after Mr Changyumwai committed several breaches of the agreement.
- [5] The plea in limine submitted by the Seychelles Yacht Club was dismissed by the Ruling of the Supreme Court dated 28th February 2018. The parties have agreed that the issues for the Supreme Court to determine in the main case were: (i) whether there was a breach of lease agreement; and if so (ii) damages that have been incurred. Mr Changyumwai sought damages in the sum of SCR1,418,106.16 with interest and costs. The Court decided in favour of Mr Changyumwai and awarded damages in the amount of SCR1,268, 010.3 with interest and costs.

GROUND OF APPEAL

- [6] The Appellant submitted two grounds of appeal:

Ground 1 – The presiding Judge erred when she awarded damages in the sum of SCR 139,429.30 for loss of equipment in favour of the Respondent;

Ground 2 – The presiding Judge erred when she awarded damages in the sum of SCR 1,128,581.00 for loss of profit in favour of the Respondent;

- [7] The relief sought from the court is to allow the appeal and substitute the award for damages in the sum of SCR1,268,010.3 with interest and costs with a lesser award of damages. The Appellant therefore is not appealing the finding of liability but contesting the quantum of damages.
- [8] Having regard to the facts and the grounds, the issue that falls for determination is whether the relief that was granted by the court was made out by the Respondent in terms of the evidence tendered.
- [9] It is common cause that the findings of the court were largely based on the Expert Report tendered by the Respondent which was not contested in any meaningful way. It is also important in considering this matter that the author of the Expert Report, on the basis of which the court based its findings testified, in court and was cross examined.

Court of Appeal – review of damages

- [10] It is settled law in this jurisdiction that an appellate court is “*reluctant to review damages unless it is satisfied that there are good and valid reasons for doing so*” (*Seychelles Breweries v Sabadin* SCA 21/2004). *Seychelles Breweries v Sabadin* SCA 21/2004 followed the decision in *Flint v Lovell* [1935] 1 K.B. 354 and it was held that good and valid reasons for reviewing damages are when the trial court acted on a wrong principle of law, or when the amount awarded is so large or so small that it is, in the judgment of appellate court, an entirely erroneous estimate of the damages.
- [11] On the question of damages generally, the law accepts that it is possible that on the same evidence two different minds might reach different conclusions, often by significant margins, without either being appealable, unless it is manifestly plain that such an award was wrong in principle, or unproven.
- [12] In *Jonathan Geers v Nadin Dodin* (Civil Appeal SCA 7/2017) [2019] SCCA 9 (10 May 2019) it was further stated that, “*It follows that an appellate court should not normally interfere with it [quantum of damages], unless either the Judge has made some error of*

principle or misunderstood the facts, or the award is manifestly insufficient or excessive [...]”.

- [13] This Court would generally be disinclined to reverse the finding of a trial judge as to the amount of damages merely because it thinks that if it had tried the case in the first instance it would have given a lesser sum (Court in *Civil Construction Company Limited v Leon & Ors* (SCA 36/2016) [2018] SCCA 33 (14 December 2018))
- [14] Given the authorities cited earlier the success or failure of this appeal would depend on whether there is a good and valid reason for this court to review the damages awarded, namely, whether the trial court acted on a wrong principle of law or misunderstood the facts, or whether the amount awarded is manifestly insufficient or excessive that it is an entirely erroneous estimate of the damages.

STATEMENT OF ISSUES

Whether the trial court acted on a wrong principle of law or misunderstood the facts

Evidence – Damages

- [15] The Respondent claimed “*damages to business as per Financial Report*” (SCR1,318,106.16) and moral damages of SCR100,000 (Plaint – C2 of the Court of Appeal Bundle). The Trial Judge declined to award the moral damages for the reasons stated at paragraphs [31]-[32] of the Judgment.
- [16] Financial Report labelled ‘Calculation of Economic Loss due to Premature Closure’ (J16 of Court of Appeal Bundle) prepared by Certified Chartered Accountants ACM and Associates dated 10th November 2017 (the “Expert Report”) was submitted by the Respondent in support of the claim for economic damages.
- [17] The Expert Report indicates in Summary of Economic Loss (J22) that sum of SCR1,318,106.16 comprises:

- lost net profit (SCR1,128,581.42);
- extra expense (SCR50,095.44); and
- loss of equipment (SCR139,429.30).

[18] Mr Jean Marie Moutia who is a licenced accountant (Licence – Exhibit P1) was accepted by the Court as an expert witness (Court Proceedings on 15th October 2018 at 9:00 AM – page 32 of the CA Bundle). He explained in examination in chief how the Expert Report was prepared, its limitation of scope and information relied upon. Economic loss was evaluated for the period beginning 19 May 2017 through 14 November 2020 (from closure until the expiry date of the lease agreement).

[19] The Trial Judge awarded damages on the components for ‘loss of equipment’ and ‘lost net profit’ based on the amounts stated in the Expert Report. Amount for damages for ‘extra expenses’ was denied. Extra expenses as indicated by the Expert Report and confirmed by Mr Moutia included salaries of staff that had to be made redundant due to the closure of the restaurant.

The Law

Damages for breach of contract

[20] Provisions with regards to damages arising from the failure to perform the obligation are provided under Articles 1146-1155, Section IV of the Civil code; relevant provisions:

Article 1149

1. *The damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.*
2. *Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss of any of the amenities of life.*
3. *The damages payable under paragraphs 1 and 2 of this article, and as provided in the following articles, shall apply as appropriate to the breach of contract and the activity of the victim.*

[...]

Article 1150

1. *The debtor shall only be liable for damages with regard to damage which could have been reasonably foreseen or which was in the contemplation of the parties when the contract was made, provided that the damage was not due to any fraud on his part.*
2. *A stipulation which tends to exonerate in advance the debtor of his liability for fraud or negligence shall be null. This rule shall not apply to insurance contracts. However, the*

parties may agree to shift the burden of proof of any fraud or negligence from one party to the other.”

- [21] With regards to case law on damages for breach of contract, it is established that damages under Articles 1149 and 1150 of the Civil Code cover the loss a person has sustained and the profit which he has been deprived of, which are the immediate and direct consequences of the failure; and which were reasonably foreseen or were in the contemplation of the parties when the contract was made (*Fisherman’s Cove v Petit and Dumbelton Ltd* (1979) SLR40; *Jumeau v Sinon* (1977) SLR 78; *Petit Car Hire v Mendelson* (1977) SLR 68; *Dubois v Nalletamby* (1979) SLR 33). *Kilindo v Morel SCA* 12/2000 LC 196 held that awards based on reasonably ascertainable damage are permissible and awards based on uncertain damage are not permissible. Loss of equipment can be compensated for by the award of damages (*Albuisson v Fryars* (1998) SLR 117).
- [22] In the case of *Vidot v Planus Dental Technology (Sey)* (259 of 2000) (259 of 2000) [2007] SCSC 3 (26 March 2007) the court stated that, “*damages are intended to compensate the innocent party for the loss that he has suffered as a result of the breach of contract, not intended to punish the one, who caused the breach*”. It was stated that in order to establish an entitlement to substantial damages for breach of contract a party needs to establish that:
- “1. *actual loss has been caused by the breach; and*
 2. *the type of loss is recognized as giving an entitlement to compensation; and*
 3. *the loss is not too remote; and*
 4. *the quantification of damages to the required level of proof*”
- [23] With regards to the foreseeability of loss of profit for breach of contract, in *University of Seychelles, American Institute of Medicine* (supra) it was stated that, “*There is no doubt that the Agreements entered into by the parties were for the Plaintiff to establish and operate a business venture for profit. Therefore, any breach of such Agreements would result in the loss of profit*” (emphasis added). Similarly, in the present case the Respondent had leased the premises to operate a restaurant business for profit. Even more so, the Lease Agreement itself imposed several conditions upon the Respondent relating to business operations, such as conditions of use of and maintenance of premises,

conditions relating to staff, operating hours of the restaurant etc. (see Lease Agreement at C5-C7 of the CA Bundle).

Burden of proof and evidence

[24] In the case of *Souffe vs Cote D’or Lodge Hotel Limited* (Commercial Case No. 24 of 2012) [2013] SCSC 25 (27 March 2013) the court emphasised the importance and burden upon the plaintiff to prove the loss that he has suffered and the quantum of the profit that he has been deprived by the breach at paragraphs [17]-[20] and concluded at paragraph [26]:

“[26]. . . All the plaintiff does is to say: 'This is what I have lost. Give it to me.' This does not amount to proof that the plaintiff lost the said sum as profit. It is not in question that he lost the profits to that contract. But he has not shown that the sum of US\$17,400.00 was the profit on that contract. He needed to show what his expenses would have been and the profit element in the contract sum. He made no effort to do this. He has failed to prove the quantum of his loss in this regard. I therefore award him nothing.”

A synopsis of the material evidence

[25] Since the Appellant’s case is that there is no evidence to justify the award for loss of equipment and loss of profit, it may be helpful to interrogate the evidence that was tendered in the lower court.

[26] With respect to loss of profit it should be noted that the Expert Report tendered by the Respondent based its evaluation of the lost net profit on analysis of the 2016 historical financial information. The Expert Report has based the projection of net profit based on 2016 net profit grown throughout the loss period (19 May 2017 – 14 November 2020) using long-term annual average inflation projections for Seychelles as per the International Monetary Fund (2.3 of the Report – Calculation of lost net profit, J19 of the CA Bundle).

Expert Report – uncontested

[27] Section 17 of the Evidence Act deals with expert opinion:

Expert opinion

17. (1) *In any trial a statement, whether of fact or opinion or both, contained in an expert report made by a person, whether called as a witness or not, shall, subject to this section, be admissible as evidence of the matter stated in the report of which direct oral evidence by the person at the trial would be admissible.*

(2)

[28] The Trial Judge pointed out at paragraph [10] of the Judgment that, “*It was further counsel’s submission that the evidence of the expert was uncontested by any other expert as to the damages incurred by the Plaintiff*”. In objecting to the report Appellant’s Counsel (then Defendant) stated during the Court Proceedings on the 15th October 2018 at 9:00 AM (page 34 of the CA Bundle) that his objection to the Report was based on:

“on evidence which I will submit are hearsay [...] in its combination I will submit that this report contains evidence which cannot be admissible before the Court [...] the limitation of scope stated that our comment are entirely based on the information, representation made to us and verification of third party evidence [...] I mean itself the very reference to third part evidence it is my submission that this seeks to render before the Court”.

[29] The Counsel for Mr Changyumwai then stated that this is not a ground for not admitting the report and that the maker of the Report is in Court and can be cross-examined. The Court pointed out that this should have been dealt with at the pre-trial stage but that it tends to agree with Mr Changyumwai’s Counsel that the witness is present in court and will explain how report was compiled, therefore allowing the report (page 35 of the CA Bundle). In cross-examination of Mr Moutia (pages 37-44) the Defendant’s Counsel asked him to clarify the position regarding third party evidence (page 37) and Mr. Moutia stated that PUC bills are considered as third party evidence; and in the “*contract with Yacht Club for example there would be two instances where third party was used*”.

[30] In *Berta (Proprietary) Ltd v Panagary* (CS 111/2014) [2017] SCSC 1039 (03 November 2017) for instance the Court relied on the list of items with costs and receipts to award the damages stated therein, and to which the Defendants did not object to in Court (see paragraph [50] and [56] (i) of the *Berta (Proprietary) Ltd v Panagary*).

Expert Report – findings and reasons of the Trial Judge

[31] As noted earlier, the Trial Judge awarded damages for ‘loss of equipment’ and ‘lost net profit’ based on the amounts stated in the Expert Report and denied to make an award on the component for ‘extra expenses’, which included salaries of staff that had to be made redundant. The Trial Judge explained her reasoning regarding loss of profits and extra expenses in the following paragraphs:

[33] As for the loss of profits, the Plaintiff explained that the restaurant at the Defendant’s premises and his other restaurant at Docklands had the same business number but different POS systems. I note that the POS report slips attached to the report reflect Le Marlin which was the restaurant at the Defendant’s premises. There being no evidence of a decline in the number of customers at Le Marlin during the time it was in operation, I accept the report of Mr. Moutia that the lost profit from 19th May 2017 to 14th November 2020 would be SCR 1, 128, 581/-.

[34] I decline to make any awards on the component for extra expenses. The supporting documents indicate that the employees were those of Moloko. No explanations were offered as regards that and I am not prepared to assume that they were employed by Moloko to work at Le Marlin since Le Marlin operated under the licence of Moloko, in the absence of clear evidence.

[35] Similarly the utility bills do not show any connection with the Plaintiff’s business at the Defendant’s premises.

[32] As it appears from the Judgment, the Trial Judge declined to accept evidence produced in the PUC bills. The PUC bills, however, were included in the calculation of the net lost profit as expenses; and not relevant to the amount claimed under ‘extra expenses’. According to the Lease Agreement (J2-J9) under ‘Conditions of Use’, the Lessee is responsible for payment of all utilities, therefore utilities are not covered by rent payment and are a separate expense. Therefore, not acceptance of the PUC bills as evidence can change the amount of the net lost profit: if PUC bills actually amount to more, net profit would be less and the other way round. Since the PUC bills were not accepted but the amount awarded take them into the calculation, this could have been the miscalculation on the Trial Judge’s part, however, as there are no other utility expenses presented it is not clear whether the actual amount of expense would differ much.

Conclusion – principles of law and understanding of facts

[33] To conclude, the trial Judge relied on the correct principle of law in awarding damages for ‘loss of equipment’ (sustained loss; also see *Albuisson v Fryars* (1998) SLR 117) mentioned above) and ‘lost net profit’ as it is established law that damages under Articles

1149 and 1150 of the Civil Code cover the loss a person has sustained and the profit which he has been deprived of, which are the immediate and direct consequences of the failure; and which were reasonably foreseen or were in the contemplation of the parties when the contract was made.

[34] It is clear from the judgment of the court below that with respect to loss of equipment, at paragraph, 32, thereof that the court relied, among other things, on documentary evidence, such as the Bill of Entry in accepting the claim for loss of the equipment. There was no evidence countering the evidence the learned judge relied on.

[35] With respect to loss of profit it is plain that the court accepted the evidence of the Respondent's Expert witness Mr Moutia, which was not contested. The trial Judge, however, declined to take into account the PUC bills as evidence, yet awarded the 'lost net profit' amount as stated in the Expert Report, which was calculated taking into account the said PUC bills. The amount of the lost net profit therefore could be different depending on the actual utilities expenses relevant to the premises: either higher if the utilities expenses are less than stated in the Report or lower if the utilities expenses are more than accounted for.

[36] We have considered the fact that the trial Judge did not take into account the PUC bills as evidence and do not think that this fact alone constitutes a good and valid reasons for reviewing damages awarded.

Whether the amount awarded is manifestly insufficient or excessive that it is an entirely erroneous estimate of the damages

[37] As noted earlier, *Seychelles Breweries v Sabadin* SCA 21/2004 held that in determining the quantum of damages, the court must consider the evidence and the awards given in comparable cases.

[38] In *University of Seychelles, American Institute of Medicine v The Attorney General* (CS 97/2011) [2018] SCSC 874 (28 September 2018) the Court analysed each head of claim and determined whether it falls within the ambit of the applicable law and principle and

determined the quantum of damages of allowable items of claim. The Court gave detailed reasoning for making or not making of any award of damages under the heads of claim at paragraphs [30]-[43].

[39] In *Levi & Ano v Charles* (CS 07/2016) [2018] SCSC 732 (01 August 2018) the dispute was regarding breach of lease agreement where the plaintiffs claimed the sum of SCR550,200. The lease however was for a house, not premises for business. The Court considered that the amounts claimed for loss and damages appeared to be on the high side and the Court concluded at paragraph [45] that a more reasonable and appropriate sum should have been awarded.

[40] In the present case, the Lease Agreement had specifically catered for the operation of the restaurant business. As noted earlier it imposed certain obligations and conditions upon the Respondent with regards to the staff, operating hours, maintenance of the premises. The Lease Agreement was for five years. Therefore, as contemplated by the parties at the time the Agreement was made, the restaurant should have been operating for at least five years. This case can be distinguished from the cases where the plaintiffs were just planning to start a business and had not yet made any profit on which the projection of losses can be made or where the loss of rent was contemplated on the possibility that the plaintiff would actually be able to lease the premises.

CONCLUSION

[41] The Appellant is not appealing the finding of liability but contesting the quantum of damages seeking to reduce the awarded amount of damages.

[42] This Court is reluctant to review quantum of damages unless it is satisfied that there are good and valid reasons for doing so. Good and valid reason is established to be when the trial court acted on a wrong principle of law or misunderstood the facts, or when the amount awarded is so large or so small that it is, in the judgment of appellate court, an entirely erroneous estimate of the damages (*Seychelles Breweries v Sabadin*; *Flint v Lovell*; *Michel & Ors v Talma & Ors*; *Government of Seychelles v Rose*; *Ixora*

Construction & Civil Engineering Ltd v Sophola; Ah-Kong v Benoiton & Another; Theresia Melanie v Clifford Marie & Anor; Nourrice v Florentine & Ors).

[43] It is established that damages under Articles 1149 and 1150 of the Civil Code for breach of obligation cover the loss a person has sustained and the profit which he has been deprived of, which are the immediate and direct consequences of the failure; and which were reasonably foreseen or were in the contemplation of the parties when the contract was made.

[44] The trial Judge relied on the correct principle of law in awarding damages for ‘loss of equipment’ and ‘lost net profit’.

[45] In the result, this appeal is without merit and it is dismissed with costs.

Dr. O. Dingake, JA

I concur

Dr. M. Twomey JA

I concur

F. Robinson, JA

Signed, dated and delivered at Ile du Port on 13 August 2021.