

**Lesperance Estate Company Limited v Intour SKL
(2001) SLR 28**

Francis CHANG SAM for the petitioner
Pesi PARDIWALLA for the respondent

[Appeal by the Appellant was dismissed on 8 August 2001 in CA 10/2001.]

Ruling delivered on 30 March 2001 by:

KARUNAKARAN, J On the application for a writ habere facias possessionem:

This is an application for a writ habere facias possessionem. The applicant herein seeks this writ against the respondent, its agents, officers, workmen, employees and licensees to leave forthwith and vacate the hotel "Emerald Cove" and any other part of the applicant's property. The applicant is a company incorporated in Seychelles. The respondent is an overseas company holding 49% of the issued share capital of the applicant-company. One Paolo Chionni, a resident of Glacis, Mahe is representing the respondent company in Seychelles. He is also a director of the applicant company.

Admittedly, the applicant is the owner of an immovable property of approximately 50 hectares of land situated at Anse Lafarine, Praslin. There is a hotel situated on the said property known as "Emerald Cove Hotel", the premises of which cover an extent of approximately 10 hectares of the said land. It is not in dispute that the respondent has been in possession and control of the premises of the said hotel since 1994. At all material times the said hotel was managed by a third entity, a management company known as "Emerald Cove Limited." Be that as it may, the applicant in its affidavit has averred that the respondent, without the authority and consent of the applicant has unlawfully taken over the control and possession of the hotel. Moreover the respondent, without authority, instituted legal proceedings in the Supreme Court of Seychelles in CS 220/1998 against the said management company Emerald Cove Limited for eviction. According to the applicant, the respondent in that proceeding, purporting to be the lessee of the said hotel, obtained a writ of habere facias possessionem to eject the said management company from the premises. The applicant further contended that the respondent in fact had no right whatsoever in or over the hotel. The respondent is therefore in unlawful possession and occupation of the hotel. It is neither a lessee nor the manager of the hotel and it had never been one at any point in time. In fact, by virtue of the provisions of the Immoveable Property (Transfer Restriction) Act, the respondent, being a foreign company, requires government sanction to take any immovable property on lease. Since the respondent has never obtained that sanction, the applicant contends that it cannot take the property on lease. Although, the applicant and respondent have entered into a number of agreements under exhibits 1, 2, 4 and 5 in respect of various transactions between them, according to the applicant none of those agreements conferred any lease or management of the hotel in favour of the respondent. As regards the arbitration clause

found in exhibit 4, the applicant submits that it is not relevant to instant dispute between the parties does not relate to any lease of hotel and so it is not subject to that agreement or any other circumstances, the applicant alleges that the respondent is not in possession of the property, Emerald Cove Hotel, and hence seeks from this Court a writ ordering the respondent to quit, leave and vacate the said property.

case on hand. The management of the hotel is in clause. In the respondent is actually occupying the property and a writ ordering the

On the other side, the respondent in essence claims that it is in possession of the property in question and so a writ of habere facias possessionem will not lie in this case. In addition, the case of the respondent and the circumstances of this particular case do not fall within the parameters of the principles that govern the writs of this nature for the following reasons.

ful possession and habere facias possessionem will not lie in this case. In addition, the case of the respondent and the circumstances of this particular case do not fall within the parameters of the principles

According to the respondent, it has invested more than Rs. 100 million towards the construction of the said hotel on the property. The various expenses incurred by the respondent to the applicant in this respect are evidenced by documents in exhibits 1 to 5. By an agreement dated 10 February 1994, the applicant undertook to grant a lease of the hotel to the respondent for a period of 20 years. It was the term of the agreement that a registerable lease contract interest in the property and hotel would be executed upon satisfaction of the respondent under the Immovable Property (Transfer of Property) Act. The respondent accordingly made the application for necessary sanction and consent of the applicant as seen in exhibit 6. In pursuance of the agreement the respondent assumed and remained in possession of the hotel and entrusted the management of the hotel to the management company, Emerald Cove Limited with the consent of the applicant. Later the respondent, in pursuance of a resolution passed by the applicant in 1997 under exhibit 9, terminated the contract with Emerald Cove Limited. It obtained the said writ from the Supreme Court in CS 220/1998 to eject the said management company. Moreover, the respondent avers that any dispute between the parties as to lease or management of the hotel should have been referred to arbitration in terms of the agreement - exhibit 4 - between the parties. However, in breach of the said terms of the agreement the course which the applicant has now taken in seeking a writ of this nature is malicious and ill-founded. Thus, counsel for the respondent contends that the respondent has, at the very least, a bona fide and serious defence to this application which can only be tried in a regular suit before the competent court of law. Hence, the respondent seeks dismissal of this application.

million towards the construction of the said hotel on the property. The various expenses incurred by the respondent to the applicant in this respect are evidenced by documents in exhibits 1 to 5. By an agreement dated 10 February 1994, the applicant undertook to grant a lease of the hotel to the respondent for a period of 20 years. It was the term of the agreement that a registerable lease contract interest in the property and hotel would be executed upon satisfaction of the respondent under the Immovable Property (Transfer of Property) Act. The respondent accordingly made the application for necessary sanction and consent of the applicant as seen in exhibit 6. In pursuance of the agreement the respondent assumed and remained in possession of the hotel and entrusted the management of the hotel to the management company, Emerald Cove Limited with the consent of the applicant. Later the respondent, in pursuance of a resolution passed by the applicant in 1997 under exhibit 9, terminated the contract with Emerald Cove Limited. It obtained the said writ from the Supreme Court in CS 220/1998 to eject the said management company. Moreover, the respondent avers that any dispute between the parties as to lease or management of the hotel should have been referred to arbitration in terms of the agreement - exhibit 4 - between the parties. However, in breach of the said terms of the agreement the course which the applicant has now taken in seeking a writ of this nature is malicious and ill-founded. Thus, counsel for the respondent contends that the respondent has, at the very least, a bona fide and serious defence to this application which can only be tried in a regular suit before the competent court of law. Hence, the respondent seeks dismissal of this application.

As I have observed in similar cases in the past, the general principles governing the writs of habere facias possessionem are well settled by case law in our jurisprudence. It may appear monotonous to some of us but I nevertheless have to repeat and restate the principles as they are and as they should be. These principles need to be fine-tuned from time to time and from precedent to precedent to meet the changing needs of time and to suit the judicial opinion of the day. To my understanding the following are the cardinal principles normally considered and applied by the courts in cases of writs of this nature:

1. The court in granting the relief herein acts as a court of equity and exercises its equitable powers in terms of section 6 of the Courts Act (Cap 52).
2. Those who come for equity should come with clean hands. There should not be any other legal remedy available to the applicant who seeks this equitable remedy.
3. This remedy is available to the applicant whose need is of an urgent nature and where any delay in the remedy would cause irreparable loss and hardship to him.
4. The court should be satisfied that the respondent on the other hand has no bona fide and serious defence to make.
5. If the remedy sought is to eject a respondent occupying the property merely on the benevolence of the applicant then that respondent should not have any right or title over the property.

Applying the above principles to the instant case I carefully analysed the evidence adduced by the parties in this matter.

As regards the applicant's allegation of unlawful possession of the hotel premises by the respondent, I find on evidence that such an allegation is baseless and ill-founded. The untested averments of the applicant made in the affidavit in this respect are untrue and incorrect, to say the least and so I find. The documentary evidence in exhibits 1 to 10 produced by the respondent clearly show that the respondent obtained possession of the premises with the knowledge, consent and authority of the applicant. Admittedly, the respondent has been in possession of the premises since 1994. Even if one assumes for a moment that the allegation made by the applicant as to unlawful possession by the respondent and the urgent requirement of the premises are true and correct, I do not understand what then has been preventing the applicant for the past seven years from seeking a legal remedy to repossess its property. Evidently, the respondent has invested over R41 million in the applicant's property and the applicant has undertaken as per exhibit 4 to grant a lease or assign the management of the hotel to the respondent for a period of 20 years. In the circumstances and by virtue of various agreements that exist between the parties, it appears to me that the respondent has a lawful interest in the property and has the right to retain possession of the hotel unless and until the Court declares otherwise. Therefore, I believe, an issue of this complex nature can be and should be determined only on the basis and merits of evidence adduced in a regular civil action.

In any event, I find that the applicant's alleged claim and need for repossession

is not genuine and the case is not of urgent nature as portrayed by the applicant in this matter. Undoubtedly there are other legal remedies available to the applicant to resolve the connected legal issues and obtain repossession of the property from the respondent by instituting a regular civil action in this matter.

As regards the issue of reference to arbitration, it appears to me that the interpretation given by Mr Pardiwalla to the term "dispute" used under the arbitration clause in exhibit 4 is a debatable one. This issue can be determined only in a regular suit before a competent court of law. Indeed, a court of equity is not bound to accept mechanically that all deposed in the affidavit is true and correct. Before the Court relies and acts upon those affidavits it must be satisfied of its probative value: the veracity and accuracy of the facts stated in the affidavits. In this case, I attach no accuracy or correctness to the facts averred by the applicant in his affidavit. Consequently, I hold the respondent has a bona fide and serious defence to make in this matter. In my judgment, the claim made by the respondent in his counter-affidavit appears to be tenable in law and on facts. On the face of the affidavit, simple justice demands that the respondents should not be condemned without giving him an opportunity to present his defence in full canvassing all legal issues in a proper civil action.

In my final analysis therefore, I find the respondent obviously, has a bona fide and serious defence to make in this matter. Therefore, the application is liable to be dismissed. I do so accordingly awarding costs in favour of the respondent.

Record: Civil Side No 184 of 2000