Anscombe v Indian Ocean Tuna Ltd
(2008) SLR 77

Antony DERJACQUES for the plaintiff
Pesi PARDIWALLA for the defendant

Ruling delivered on 24 March 2008 by:

KARUNAKARAN J: At all material times, the plaintiff was the owner and lessor of a dwelling house situated at Belonie and the defendant company was the tenant. By an agreement in writing dated 1 December 2003, the defendant had taken that house on a lease from the plaintiff agreeing to pay rent of R 14,000 per month.

It is averred in the plaint that during the said lease, the parties had entered into another verbal agreement to the effect that the plaintiff should carry out some extension and renovation works to the said house at her costs, and then the defendant would enter into a new agreement of lease with the plaintiff making a substantial increase in the monthly rental. The plaintiff accordingly carried out the said works to the house - at the cost of more than R 100,000 - expecting that the defendant would sign a new agreement of lease in the future. Contrary to her expectation, the defendant in February 2005 instead terminated the original lease with the plaintiff and vacated the premises. The defendant did not enter into any new lease with the plaintiff as promised. Hence, the plaintiff now alleges that the defendant has been in breach of the said verbal agreement having failed to enter into a new lease. In the circumstances, the plaintiff has now come before this Court claiming damages in the sum of R 209,770 from the defendant.

At the outset of the hearing, when the plaintiff was giving evidence-in-chief, she attempted to testify as to the existence of the said verbal agreement between the parties. Mr Pardiwalla, counsel for the defendant swiftly objected to any oral evidence being adduced to establish the plaintiff's claim on the grounds that:

(1) The rule of law under article 1341 of the Civil Code prohibits the admission of oral evidence to establish any matter, the value of which exceeds R 5000; and

(2) The rule of law under article 1715 of the Civil Code again prohibits the admission of oral evidence to establish *any verbal agreement for a lease*, however small its price may be.

Therefore, Mr Pardiwalla submitted that no oral evidence shall be admissible to establish the alleged verbal agreement in this matter. Moreover, he contended that the case on hand does not fall under the exception to article 1341 since both parties are not traders and the transaction involved is not a commercial transaction. In any event, counsel argued that although the plaintiff solely relies upon the exception to article 1341

to prove her claim, the material fact of which has nowhere been pleaded in the plaint. Hence, in the absence of any such pleading, the plaintiff cannot now adduce evidence to prove that exception based on a commercial transaction. Furthermore, it is the contention of Mr Pardiwalla that if the agreement for a lease had even been concluded without writing, still no oral evidence shall be admissible to prove its existence in terms of article 1715 of the Civil Code. Therefore, he urged the Court not to admit any oral evidence to establish the said verbal agreement in this matter.

On the other side Mr Derjacques, counsel for the plaintiff submitted that oral evidence is admissible in this particular case, as it falls under the exception to article 1341 since both parties are traders and the transaction involved in the alleged verbal agreement is a commercial transaction. According to Mr Derjacques, the plaintiff is in the business of renting out houses to the defendant. Hence, she is a trader in the eye of the law and the transaction involved is a commercial transaction. Thus, he contended that the verbal agreement in question constitutes an exception to the rule under article 1341. The Court therefore, should allow the plaintiff to adduce oral evidence in this matter. Both counsel thus, joined issue and invited the Court to rule on the admissibility of oral evidence in this matter and hence this ruling being delivered.

Before I proceed to consider the arguments of counsel, it is pertinent to rehearse article 1341 and article 1715 of the Civil Code, which read thus:

> Article 1341
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> Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.
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> The above is without prejudice to the rules prescribed in the laws relating to commerce.
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> Article 1715
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> If the agreement is concluded without writing and has not yet been executed, and if one of the parties denies its existence, oral evidence shall not be admissible, however small its price, and even if it is alleged that money has been given by way of earnest. However, an oath may be administered to the person who denies the agreement.

Coming back to the case in hand, I carefully analysed the arguments advanced by both counsel on this issue as to admissibility of oral evidence in this matter. In order to constitute an exception to the rule embodied in article 1341, the transaction involved in the alleged verbal agreement, should be a commercial transaction. In such a case, the

provisions of the Commercial Code apply and oral evidence becomes admissible. On the contrary, if it is a non-commercial transaction it would fall within the purview of article 1341, and therefore, oral evidence shall become inadmissible. In his judgment, in *Port Glaud Development Company Ltd v Larue* (1983-1987) SCAR 152, Justice Sauzier has drawn a clear distinction between article 1341 of the Civil Code and article 109 of the Commercial Code and has given the trial Judge valuable guidance as to when he may use his discretion to allow oral evidence in matters of this nature. The relevant excerpt from that judgment runs thus:

> I would like to point out here the difference there is between the provision in paragraph 1 of article 109 of the Commercial Code of Seychelles which states that "A sale may be proved ... by evidence of witnesses admissible at the discretion of the Court" and the provision in article 1341 of the Civil Code of Seychelles which excludes the admissibility of oral evidence. Under article 1341, oral evidence is inadmissible if objected to and if the case does not come within one of the exceptions to the rule. In the course of the trial, the judge must exclude such evidence from the moment it is sought to be given when objection is taken. However, in a case where the Commercial Code applies... the trial Judge need not exercise his discretion to allow or reject the oral evidence tendered at the time when it is tendered. The trial Judge may hear the whole of the evidence and decide, when giving judgment that, in the circumstances, there should have been a writing to support the agreement.... and decline to act solely on oral evidence. There should, however, be objection raised by the party against whom oral evidence ... is tendered at the appropriate time..... That is the effect of the provision "by evidence of witnesses admissible at the discretion of the Court" in paragraph 1 of article 109 of the Commercial Code.

Therefore, if the Commercial Code applies to the instant case, then the Court need not exercise its discretion to allow or reject the oral evidence tendered at the time when it is tendered. The Court may proceed to hear the whole of the evidence and decide the issue eventually when giving judgment. On the other hand, if the Commercial Code does not apply, then the Court must exclude such evidence from the moment it is sought to be given when objection is taken. Be that as it may, the Commercial Code undoubtedly applies only to commercial transactions. Therefore, the fundamental question that now arises for determination is this:

> Does the verbal agreement, the "promisee de bail", between the parties to enter into a lease in the future constitute a commercial transaction?

Before finding the answer to this question, it is pertinent to note that an agreement for a lease is different from an agreement of lease. The difference between these two is well defined by Justice Sauzier in *Van Heck v La Goelette (Propriety) Ltd* (1983-1987) SCAR (Volume II) 361, wherein he has rightly pointed out that an agreement for a lease is the English terminology for a "promesse de bail" but it should not be confused with a

bilateral promise to lease (promesse de bail) intended to take effect in the future on the fulfilment of a condition. It is pertinent to note that article 1718 clearly stipulates that an agreement for lease shall only confer personal rights upon the parties to it, whereas an agreement of lease shall confer real rights upon the parties. Obviously, in the present case, the verbal agreement in question constitutes neither an agreement for a lease nor an agreement of lease but only a bilateral promise to lease intended to take effect in the future on the fulfilment of a condition and so I find. In other words, the defendant allegedly promised to take the premises on lease by signing a new agreement of lease on condition that the plaintiff should extend and renovate the premises. The plaintiff allegedly fulfilled her part whereas the defendant allegedly failed to fulfil his part of the promise.

As aptly observed by Justice Sauzier in *Van Hecke* (supra), in the case of *d'Offay v Attorney-General* (Civil Appeal No. 15 of 1976, judgment dated 3 February 1979), the Seychelles Court of Appeal considered the different categories of promises to lease ('promesse de bail') that there may be, and their effects. That case depended on the law as it was prior to 1 January 1976 before the Civil Code came into force. However, what is said in that case about promises to lease is equally applicable under the new provisions of the Civil Code. There is a passage in that case which is relevant to this case and which should be quoted:

> In every case, therefore, where the parties have contemplated a writing to embody their agreement, it is necessary to consider whether the stage eventually reached prior to the execution of the written agreement was a general consensus as to what was to be incorporated in a written lease to be executed subsequently and to become a binding agreement between the parties, or a firm agreement to be followed by a written document embodying such agreement and valuable merely as proof of the agreement already reached.

The case reported in D. 1928.2.158 and the note at paragraph 123 of *Dalloz Encyclopédie de Droit Civil* 2éme Ed Vo “Bail” are of interest.

As stated above, an agreement for a lease is not to be confused with a bilateral promise to lease intended to take effect in the future on the fulfilment of the condition. An agreement for a lease is a firm agreement between the parties intended to take effect immediately even if the lease is to commence on a future date. It may be written or oral. If the agreement between the parties, whether written or oral, is that the lease is to be embodied in a written form or notarial deed and is then to become a binding lease, such agreement is a bilateral promise to lease intended to take effect in the future on the fulfilment of a condition. It is not an agreement for a lease as both counsel have misconceived in their arguments in this matter.

The personal rights which are referred to in paragraph 1 of article 1718 are personal rights as lessor or lessee. This is not to be confused with the rights which parties to a bilateral promise to lease intended to take effect in the future on the fulfilment of a

condition have, to enforce or rescind such agreement or to sue for damages in case of breach, as has happened in the present case.

By virtue of paragraph 3 of article 1 of the Commercial Code, the respondent, being a body corporate, is deemed to be engaged in commerce and may be classed as a merchant. However, the principal activity of its business is tuna fish exportation, not taking dwelling houses on lease, though it takes houses on lease for the purpose of accommodating its workers. Hence, any of its acts whether entering into an agreement of lease or agreement for lease or any of its promises unilateral or bilateral for an intended lease for the future in my considered view, cannot be classified as a commercial contract and a commercial transaction.

On the other hand, the plaintiff in this matter is a Seychellois but a resident of the United Kingdom by virtue of her employment therein as a Customer Care Manager in a private concern. She owns two residential houses in Seychelles, and has rented them out to the defendant company. Obviously, she is not a merchant as she is not a person who, in the course of her business, habitually performs the acts of leasing out buildings with the main object being the acquisition of gain - vide article 1 of Commercial Code. In any event, there is no pleading in the plaint nor is there any evidence to prove that she is a trader. Indeed, the plaintiff leased out her houses to the defendant for residential purposes, not for using them to carry out any commercial activity. Therefore, I conclude that the verbal agreement, the "promesse de bail", between the parties to enter into a lease in the future on the fulfilment of a condition does not constitute a commercial transaction. Hence, I hold that the instant case does not fall under the exception to the rule embodied in article 1341 of the Civil Code. Moreover, I quite agree with the submission of Mr Pardiwalla that although the plaintiff solely relies upon the exception to article 1341 to prove her claim, the material fact has nowhere been pleaded in the plaint. Obviously, in the absence any such pleading, the plaintiff cannot now adduce evidence to prove that exception based on a commercial transaction.

For the purpose of appeal if any, against this ruling, I would like to add that even if one assumes for a moment that the "promesse de bail" between the parties in this matter amounts to an agreement for lease as contemplated in article 1714, still no oral evidence shall be admissible in law, in view of the prohibition imposed by article 1715 of the Civil Code.

In the final analysis, I therefore uphold the objections raised by Mr Pardiwalla on both grounds mentioned supra and accordingly rule that no oral evidence shall be admissible to prove the plaintiff’s claim in this matter.

Record: Civil Side No 277 of 2005