

## CHETTY v CHETTY

(2011) SLR 86

A Derjaques for the plaintiff

B Hoareau for the defendant

### Judgment delivered on 31 March 2011 by

**EGONDA-NTENDE CJ:** The plaintiff is the fiduciary of the property V5494, also known as MS Complex, by an order of Court dated 27 March 2008, and 7/10 co-owner of the property. She brings this action seeking an order of rescission of a lease over the second floor of the said MS Complex between the late Mariapen Srinivasan Chetty, the previous fiduciary and usufruct, and the defendant. The defendant is an attorney at law and niece to the plaintiff.

The late M S Chetty, acting as fiduciary of the property, leased the second floor of the building to the defendant for 99 years from 1 September 2006. The consideration for the lease was a premium of R 200,000 payable 21 days from the signature of the lease and an annual rent of R1 per year payable in advance starting from the date of signing the lease. The plaintiff contends that the lease was unlawful, void, and the lease reveals that the promise of the said fiduciary is in fact out of proportion to the promise of the said defendant (lessee) and that further, the circumstances reveal that some unfair advantage has been taken by the said defendant as against the co-owners of the land and building, and with the specific reference to the plaintiff as 7/10 co-owner of land parcel V5494.

The plaintiff further contended in her plaint, that the circumstances reveal:

- i. That Mr Mariapen Srinivasan Chetty acted without consultation and authority, nor consent of plaintiff as a 7/10 owner.
- ii. That the said Mariapen Srinivasan Chetty was involved in acrimonious litigation, with the plaintiff, and plaintiff's mother, and plaintiff's company, Excel Trading, both prior, and after the said lease was signed and registered.
- iii. That the said Mariapen Srinivasan Chetty, was extremely ill and highly vulnerable and indeed died on 12 July 2007.
- iv. That the commercial value for rental of the entire floor of the building, leased to the defendant, is R41,730 monthly.
- v. The plaintiff as co-owner has lost and continues to lose the sum of R29,211 monthly.
- vi. That the said Mariapen Srinivasan Chetty was father to the plaintiff and grandfather to the defendant.
- vii. That the said Mariapen Srinivasan Chetty did not act in conformity with his legal duties and obligations as a fiduciary.

The plaintiff seeks rescission of the said lease and costs of this action.

The defendant opposes this action. In her statement of defence she avers in response to the plaint that Mariapen Srinivasan Chetty signed the lease in his capacity as fiduciary and usufruct of parcel V5494, as at the time of signing of the

lease Mr Mariapen Srinivasan Chetty enjoyed a usufructuary interest in the property. At the time of the appointment of Mariapen Srinivasan Chetty as the fiduciary, it was agreed between Mariapen Srinivasan Chetty and all the co-owners that since Mariapen Srinivasan Chetty enjoyed a usufructuary interest of the property, Mariapen Srinivasan Chetty could enter into any agreement in respect of the property.

The defendants denied the allegations set out in the plaint save those specifically admitted to the effect that the defendant was a granddaughter of Mariapen Srinivasan Chetty and the plaintiff was a daughter of Mariapen Srinivasan Chetty. 5/10 of the plaintiffs share is being contested.

At the trial both parties called several witnesses. It appears to me that a significant portion of the relevant facts of the case are largely not in dispute. I will begin by setting out those facts that are not in dispute and then return to those facts and issues in dispute between the parties.

Mr Mariapen Srinivasan Chetty, now deceased, was the father of the plaintiff and grandfather of the defendant. The defendant is a niece to the plaintiff. Mr Mariapen Srinivasan Chetty was the fiduciary of the MS Complex. He also held the usufructuary interest in the said property. He signed a lease agreement with the defendant in respect of the whole of the second floor of MS Complex, granting her a term of 99 years from 1 September 2006 at a premium of R200,000 and an annual rent of R1.00 per year. The lessee, defendant in this case is in occupation of the premises in question. Mr Mariapen Srinivasan Chetty was not one of the co-owners of the MS Complex.

It is not in dispute on the evidence before me that one rupee per year as rent for the second floor of MS Complex is of token value grossly out of proportion with the market rental value of the said property that has been assessed at R41,730 per month, in the testimony of PW1, Ms Bastille, which is not challenged.

It is contended for the defendant that Mr Mariapen Srinivasan Chetty signed this lease in the dual capacity of fiduciary and usufructuary. Exhibit P6 is the lease. It states in part-

I, Mr. M. Srinivasan Chetty of Victoria, Mahe, Seychelles, *in my capacity as Fiduciary of the bare ownership of the land comprised in the above-mentioned title and of the building thereon* (hereinafter referred to as the "Lessor") HEREBY LEASE to Priscille Chetty of Victoria, Mahe, Seychelles (hereinafter referred to as "the business premises") and morefully described in the attached plan, subject to the terms and conditions hereinafter contained: (Emphasis is mine)

Clearly in executing this lease it is made clear that he is doing so as a fiduciary and not as both a fiduciary and usufructuary. It is clearly unambiguous on the lease that he acted as a fiduciary in executing the lease. He then at the foot of the lease consented to it as the usufructuary in the following words, 'I, Mr M. Srinivasan CHETTY, the usufructuary of the above mentioned title hereby consent to this lease'.

Exhibit D2 which perhaps can be referred to as an agreement for a lease, cannot supersede the lease itself. The lease is fairly clear. The lessor was the fiduciary of the property. The usufructary who happened to be the same person consented to that lease but was not the lessor.

Mr Anthony Derjacques, counsel for the plaintiffs submitted that the plaintiff's action had several causes of action. Firstly, the fiduciary had no lawful authority to alienate the land/second floor in question through a lease. Secondly that Mr Chetty went beyond his powers in alienating the second floor in all the circumstances of the case as pleaded in the plaint. Thirdly, there was an unfair advantage taken by the person enjoying the lease over and above the co-owners. He questioned the legality of exhibit D1 the instrument appointing Mr Chetty the fiduciary of the property in so far as it appeared to give the fiduciary overly broad powers. He contends that the lease is contrary to public policy in terms of articles 1133 and 1135 of the CCS, in so far as exhibit D1 is in contravention of article 825 of the CCS. The 99 year lease effectually extinguishes co-owners' interest in the land without any compensation. To this extent it should be viewed as contrary to article 26(1) of the Constitution.

Mr Basil Hoareau, counsel for the defendant submitted that there was nothing unlawful in what the lessor did in this matter. He was empowered by exhibit D1. As a fiduciary he had the power to lease or even sell the property. If Mr Chetty did not act in accordance with his powers or directions the remedy is not an action against the defendant who did not act *mala fide* but must be against the estate of Mr Chetty.

Mr Hoareau further submitted that paragraph 5 of the plaint is based on article 1118 of the CCS and he was surprised that Mr Derjacques had not made any reference to it. It had the two conditions that had to be satisfied. One was that the promise of one party must be out of proportion of the other party. The second condition was contained in the proviso and that it was that one of the contracting parties had taken unfair advantage. These two conditions must be different and cannot be one and the same. In the instant case only one condition could be taken to have been shown. It has not been shown that there was an unfair advantage obtained by the defendant. He submitted that this suit should therefore be dismissed.

I agree with Mr Hoareau that Mr Chetty as fiduciary had power to enter into the lease in question. Exhibit D1 is perfectly legal and it authorised him to do so. Exhibit D1 must of course be read together with article 825 of the CCS which I shall set out below-

The functions of the fiduciary shall be to hold, manage and administer the property, honestly, diligently and in a business like manner as if he were the sole owner of the property. He shall be bound to follow such instructions, directions and guidelines as are given to him in the document of appointment by the unanimous agreement, duly authenticated, of all the co-owners or the Court. He shall have full powers to sell the property as directed by the co-owners, and if he receives no such directions, to sell in accordance with the provisions contained in articles 819, 1686 and 1687 of this Code and also in accordance with the Immovable Property (Judicial Sales) Act, Cap. 94 as amended from time to time.

It is clear to me that Mr Chetty was in total breach of his duties as a fiduciary to the co-owners to act diligently and in a business-like manner in managing the second floor of the MS Complex. By giving it away to the defendant for next to nothing on a lease of 99 years he acted in total disregard of his duty to act in a business-like manner in managing this property. This was obviously to the detriment of the co-owners who were thereby denied any income from this portion of the property. Exhibit D1 did not and could not authorise him to override his statutory duties. He had to act within his statutory duties. Of course he was the usufructuary, it has been argued that this was of no consequence as all income went to him. However this is to close one's eye to the fact that his interest was only a life interest, and to commit the co-owners to a term of 99 years' lease at a rent of one rupee per year was clearly reckless or in total disregard of the interests of the co-ownership in this property. Article 825 of the CCS forbade this kind of conduct in relation to the property of which he was the fiduciary. In any case the lease was executed in his capacity as fiduciary and not as a usufructuary.

Relief for this breach of his duties can be taken against his estate as Mr Hoareau submitted and not against the defendant in her individual capacity as the lessee. It is possible an action could be maintained against the estate of Mr Chetty. However, that is not to say no other relief may be open to the plaintiff.

I now turn to an action for rescission under article 1118 of the CCS. Article 1118 states -

- (1) If the contract reveals that the promise of one party is, in fact, out of all proportion to the promise of the other, the party who has a grievance may demand its rescission; provided that the circumstances reveal that some unfair advantage has been taken by one of the contracting parties. The loss to the party entitled to the action for lesion shall only be taken into account if it continues when the action is brought.
- (2) The defendant to an action for lesion as in the preceding paragraph shall be entitled to refuse rescission if he is willing to make an adequate contribution to the other party in such manner as to restore a more equitable balance between the contracting parties.
- (3) The rules of paragraphs 1 and 2 of this article relate to public policy, and shall not be excluded by the agreement of the parties. They may, however, be excluded or restricted in specific cases laid down in this Code.

Paragraph 5 of the plaint states -

Plaintiff avers that the said lease is unlawful, void, and the lease reveals that the promise of the said fiduciary, Mr Mariapen Srinivasan Chetty, in fact is out of all proportion to the promise of the said defendant (lessee) and that further, the circumstances reveal that some unfair advantage has been taken by the said defendant as against the co-owners of the land and building, and with specific reference to plaintiff as 7/10 co-owner of land parcel V5494.

I note that there was no equivalent provision in the French Civil Code of 1804 or Civil Code of Mauritius. Neither was there a similar provision in the French Civil Code as of 2005. Article 1118 of the CCS was considered in the case of *La Gigolette Ltd v*

*Durup*(1978) SLR 101, the facts of which I need not recount. Sauzier J (as he then was), stated at 106 -

Article 1118 of the Civil Code of Seychelles introduces a new concept in our law. It extends the principle of lesion to all contracts. A party to a contract may demand its rescission that is a declaration by the court that the contract is null, if the contract reveals that the promise of that party is, in fact, out of all proportion to the promise of the other. This however is subject to the safeguards that an unfair advantage has been taken by the other party and that the loss of the aggrieved party is of a continuing nature.

I agree with the foregoing comment by Sauzier J that there must be three conditions to be met for article 1118 to apply. The promise of one party must be out of proportion to the promise of the other party, the other party must have taken an unfair advantage, and lastly the loss suffered by the party claiming relief must be of continuing nature.

Clearly this has been established. One rupee for the second floor of a building in Victoria, the capital city of Seychelles, is clearly out of proportion. The second condition of unfair advantage by the defendant has been set out in paragraph 5 of the plaint set out above and paragraph 6 which is that the defendant took unfair advantage of the co-owners to take over their property without any worthwhile payment of rent.

The defendant, a practising attorney, was fairly aware of the ownership of this property. She knew that the fiduciary who was also the usufruct was of advanced age and was unwell. She stated in her testimony that he was suffering from cancer though in her opinion it could not be presumed that he would die sooner rather than later. She knew that a 99 year lease at one rupee a year would afford her possession of a choice property at almost nil payment. That the co-owners who would be entitled to rent after the usufructuary ended with the death of Mr Chetty would be locked out of any income from this property for both her own lifetime and the lifetime of the co-owners. I am satisfied that she took unfair advantage of the co-owners of the property in being a party to the terms of the lease in question.

I note that the loss suffered by the co-owners in terms of denial of any income from the second floor of MS Complex is of a continuing nature and will continue for as long as the lease in question is permitted to continue.

Article 1118(2) of the CCS offers a party in the position of the defendant –

To refuse rescission if he is willing to make an adequate contribution to the other party in such manner as to restore a more equitable balance between the contracting parties.

The defendant has not resisted rescission on this ground nor made an offer that would restore a more equitable balance between the contracting parties.

In the result I am left with no alternative but to order rescission of the lease between the parties with immediate effect and with costs against the defendant.

**Record: Civil Side No 98 of 2008**