IN THE SUPREME COURT OF SEYCHELLES

PLATE ISLAND RESORT & VILLA LTD
(Rep. by Daniel Belle)

VS

ISLAND DEVELOPMENT COMPANY LTD
(Rep. by Glenny Savy)

Miscellaneous Case No: 13 of 2012
==========
Mr. F. Elizabeth for the Plaintiff
Mr. F. Chang Sam for the Defendant

RULING

For the purpose of this Ruling wherever reference is made to "**Sublessee"** it is a reference to the **"Applicant"** herein and the **"Plaintiff"** in the Plaint, and, wherever reference is made to "**Sublessor"** it is a reference to the "**Respondent"** herein and **Defendant** in the Plaint**.**

The Plaintiff entered a Plaint on 28th February, 2012. On the same day it entered an Application for an interlocutory injunction pursuant to Section 304 of the Seychelles Code of Civil Procedure (SCCP) praying for the following orders:

1. Order of hearing of extreme urgency.

2. Make an order of interim interlocutory injunction ordering the Respondent not to cancel the lease agreement dated 3rd August, 2006 and to maintain the status quo until further order of the Court.

3. Order the Respondent to comply with clause 21(c)(i) and (ii) of the said lease agreement forthwith pending the determination of the case before the Court.

The grounds upon which the application is based are contained in an Affidavit attached in support sworn by Mr. Danielle Belle dated 23rd February, 2012.

On 14 March, 2012 the Respondent by Counsel objected to the grant of the interlocutory injunction on the following grounds:

1. A number of material facts averred in the Affidavit in support of the Application are incorrect as averred in the Affidavit of the Respondent.

2. The termination is completed and notice thereof had already been issued prior to the filing of the Application.

3. Applicant can be compensated in damages.

4. On a point of law namely that there is no proper application before the Court.

The Chief Executive Officer of the Respondent, duly authorized by the Board of Directors, sworn an Affidavit in support of the grounds of objection.

On 19th March, 2012 Learned Counsel for the Applicant filed copy of documents that the Applicant intends to rely on at the hearing of the Application.

Learned Counsels were invited by Court to make their respective submissions at the hearing on 13th June, 2012 at 1.45 p.m.

Submissions of Applicant

Mr. F. Elizabeth Learned Counsel for the Applicant submitted that the incident which gave rise to this present action is a letter from the Respondent which purportedly terminated the Lease Agreement between Applicant and the Respondent.

Recently there had been some argument between the parties in respect of access to the island. This access could only be given by the Respondent. Respondent was to make available a plane to Applicant whilst in Seychelles to access the island. The dispute was about that access as the Respondent refused to give such access and the Respondent is alleged to have also damaged certain equipment belonging to the Respondent that were on the island. This culminated in the Applicant refusing to pay the rent of euro 15,000 every month and instead suggested that the rent is paid in an escrow account, and meanwhile the parties go to arbitration, resolved the problems and once the problems are resolved the Applicant will continue to pay the current rent as well as the arrears and the

relationship will continue. The Respondent disagreed and decided to terminate the lease.

Now the Applicant is before Court asking the Court to activate **Clause 21 (c) (i) and 21 (c) (ii)** of the Lease Agreement which provides for arbitration.

Learned Counsel for the Applicant went on to submit that when any agreement provides for an arbitration clause, the Court must look at the intention of the parties at the time when they entered into the agreement. If the intention of the parties were that if there was dispute, an arbitrator will be appointed to resolve the dispute then the Court has to give effect to these intentions by ordering the parties to appoint an arbitrator to resolve their dispute.

Learned Counsel for the Applicant also added that because the subject matter of the Lease Agreement is an island and the development on the island is worth euro 66 million, out of which about euro 5million have already been spent and for the Respondent to come to the Applicant and terminate the Lease because of certain difficulties between the two parties, would cause a lot of hardship to the Applicant.

Learned Counsel for the Applicant further stated that a very recent authority on "injunction" is that of ***Choppy Pty Ltd v NFJ Pty Ltd*** in which the Chief Justice basically gave a judgment quoting the case of ***America, 1975 AELR*** where the principles for the injunctions are well stated therein. Basically the Court has to weigh the balance of convenience and this is the authority on which he is now relying. It is his submission that the balance of convenience lies in favour of the

Applicant in that the Applicant will suffer more hardship if the Lease is terminated rather than the Respondent.

For the reasons submitted, the Applicant is asking the Court to make a mandatory interim injunction which will not prejudice the Respondent in any way and meanwhile refer the matter to arbitration for the parties to resolve their disputes which are believed can be resolved amicably, as a solution and a way forward can be found. The Applicant is ready to proceed with the project but cannot do so because of the letter of termination of its Lease Agreement.

Submissions of Respondent

Mr. F. Chang Sam Learned Counsel for the Respondent started by submitting that the Learned Counsel for the Applicant is giving a lot of evidence from the Bar. It is trite law that he had to submit the Affidavit and all the documents upon which he relies.

The Court at this juncture indicated that paragraph 6 of the Affidavit was being amended and a list and copy of supporting documents marked P1 to P7 were filed separately, on the 19 March 2011 on which Affidavit it is written that a copy of all these was served on Mr. Chang Sam. However, Mr. Chang Sam acknowledged having received a copy of the new Affidavit but that there were no documents attached to it. Mr. Elizabeth undertook to serve Mr. Chang Sam with the documents.

Mr. Chang Sam went on to point out that Mr. Elizabeth is relying on the Affidavit dated 29 March, 2011 and this does not match with his Application before Court.

He also pointed out that the procedure needed to be corrected before the Court.

Mr. Elizabeth agreed that Mr. Chang Sam can adopt the first affidavit as the correct affidavit and that second affidavit has no relevance to this case.

Mr. Chang Sam reiterated that he was basing his objection on a number of material facts which are wrong in the Affidavit of the Applicant, and these have been pointed out in the Affidavit of the Respondent.

Mr. Chang Sam addressed the issue of arbitration in relation to the Respondent's right to terminate the original lease based on the nonpayment of rent as shown by documents lodged before the court as **Exhibit IDC 5**. He submitted that all the correspondences between the IDC, himself and Mr. Elizabeth, relate to payment of rent which is provided for in **Clause 10** of the Lease. It requires that the money has to be paid to the Sublessor and not to be kept in client's account. In other words the rent money has to go to the funds of the Respondent every month in advance. The Respondent did not receive the rent payment. All the correspondences are clear and Mr. Elizabeth kept the money into his client's account and as a result of that, does not trigger the application of the provision related to arbitration and the Respondent Sublessor has a right to terminate where it is obvious for nonpayment of rent.

Mr. Elizabeth interjected that even if the breach is obvious, there must be a pronouncement by an Arbitrator or a judgment of the committal tribunal applying

procedures 1 and 2 and only thereafter that the Sublessor can terminate the Lease. He added that if somebody is not paying rent, that person must go to the Rent Board and follows the Court order which will follow consequences in the law. Somebody cannot act outside the premises of the law and take the law into its own hand. The other party has a right to come to Court to say that he is not in breach and the Court will judge. This provision makes it clear that even if the breach is obvious this procedure will still follow. The parties have to go to arbitration or a judgment from the committal tribunal or court or mutual discussion or agreement will follow. Citizen cannot act outside the premises of the law.

Mr. Chang Sam insisted that the parties having entered into an agreement the terms of which must prevail.

Mr. Elizabeth indicated that he is leaving the matter in the hand of the Court and if his client is aggrieved he will go to the Court of Appeal

Mr. Chang Sam reiterated that the Court can deal with injunction only where damages is not sufficient to compensate the parties, and his submission is that damages are sufficient in this particular case and there is no necessity for an injunction.

Mr. Chang Sam in his submissions emphasized that because of so many mistakes in the Affidavit, there is no proper Affidavit before the Court therefore the application is not properly supported.

Point of Law

The last issue of Mr. Chang Sam being a point procedural law, I will address this immediately.

Mr. Chang Sam made reference to the Affidavit of the Respondent in support of its objections outlining a number of material facts averred in the Affidavit in support of the Application deponed to by Mr. Danielle Belle, that are incorrect. These are:

(a) That paragraph 5 of Mr. Belle's Affidavit where it is stated that "… agreed to sublet and did sub-let to the said company Platte Island for 60

years for the sum of Euro15,000 per month for the purpose of building a hotel and villas thereon".

The fact is that **only certain parts but not the whole** of Platte Island consisting of 90 acres of Platte Island for the purpose of constructing **a hotel only.** (Exhibits IDC2 and IDC3)

(b) That under paragraph 6 of the Affidavit, Mr. Belle averred that sanction to take the assignment of the leasehold title under the Agreement was granted to **La Belle Tortue**.

> The fact is that the assignment of leasehold title under the Agreement was granted to **Platte Island Resorts and Villas (PIRV).** (Exhibit IDC4)

I have verified **Exhibits IDC2, IDC3** and **IDC4** and found that the facts deponed to by Mr. Belle are not correct and the correct versions are those averred by the Respondent. These averments of Mr. Belle in his Affidavit therefore cannot stand as facts in support of the Application.

In the circumstances I find that the Affidavit in support of the Application for an interlocutory interim injunction pursuant to Section 304 of the Seychelles Code of Civil Procedure contains matters that are substantially and overtly not factual thus rendering the Affidavit lacking in substance and as such cannot support the Application. Consequentially, the Application being not supported by an Affidavit, renders it ineffective for consideration by the Court. The end result is that there is no Application for an interlocutory interim injunction pursuant to Section 304 of the Seychelles Code of Civil Procedure, before this Court.

I conclude by finding that this purported Application is therefore liable to be dismissed with cost to the Respondent.

On the Merits

However, as this process may be the subject of an appeal before the Seychelles Court of Appeal, this Court will proceed to also determine other issues raised.

Before proceeding further I believe that it is necessary that I reproduced pertinent clauses of the Lease Agreement in issue, namely **Clause 10** and **Clause 21 (c) (i) and 21 (c) (ii)**

Clause 10 concerns the sublease rent payable and Clause 21 concerns termination of the Lease Agreement by the Sublessor.

> ***" Clause 10 : The Sublessee shall pay the Sublease Rent to the Sublessor monthly in advance and the first rent payment shall be before the Commencement Date. Payment of the Sublease Rent shall be without any withholdings, deductions or set-off."***
>
> ***Clause 21(a); 21 (c) (i): 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) ……..***

> ***(c) If the Sublessee refuses or persistently (more than once) neglects to perform and observe the covenant, 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 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:"***

In the instant case the Sublease contains a specific provision with regard to the payment of Sublease Rent in accordance with Clause 10 of the Lease Agreement.

It is a mandatory requirement of the said Lease Agreement that the Sublessee shall pay the Sublease Rent, fixed at Euro15,000 monthly to the Sublessor in advance. It is further stated that such payment of the Sublease Rent shall be without any withholdings, deductions or set-off.

Clause 16(c) obligated the Sublessee to pay the Sublease Rent payable to the Sublessor under and in accordance with the terms and conditions of the Sublease fully and promptly.

The consequence for failing to pay the rent due by the due date is stipulated in Clause 21 of the Lease Agreement and the relevant part has been reproduced above.

It is not in dispute the fact that Sublease Rent remained unpaid by the Sublessee for more than two months at the time that the Sublessor terminated the Lease Agreement, that is, since November, 2011.

The Chief Financial Officer of the Respondent, Mr. Anup Hari by letter dated **7th December, 2011** addressed to the Applicant headed - "Arrears for lease payment of Platte Island Property" - stated that despite numerous email reminders, the Sublessee had once again failed to effect payments on the due dates. The letter served as a formal notice on the continued failure by the Sublessee to pay rent as it fell due in accordance with article 10 of the lease. As at the date of that letter the Sublessee had failed to pay lease rent for the month of November and December 2011. The Sublessee was then informed that – '*you are hereby advised to forthwith pay the aforesaid outstanding rent within thirty (30) days failing which IDC reserves its rights to take such actions available to it under the lease and the law without further notice or demand'.*

Counsel for the Sublessee wrote to the Sublessor on **27th January, 2012** and informed that the monthly rental payments were in an escrow account held on trust by him. It went on to state that the Sublessee has filed an application to the Seychelles Court of Appeal for an interlocutory injunction to suspend all payments of rent to the Sublessor pending the assignment of the lease to a serious buyer as agreed in principles by the parties.

Notice of Termination is contained in a letter dated **7th February 2012** written by the Legal Counsel of the Sublessor and addressed to the Sublessee. That notice was further to the Sublessor's previous letter dated 7th December, 2011 notifying the Sublessee that it had by then failed to pay rent for November and December, 2011.

That notice of termination letter pointed out to the Sublessee that it had failed, refused and neglected, and continued as of the date of that letter to have failed, refused or neglected, to pay the stated rent and any rent since the dated on the letter of 7th December, 2011. The Sublessor in that same notification letter of 7th February, 2012 went on to notify the Sublessee that in the circumstances, pursuant to Clause 22 of the Lease Agreement that the said Lease Agreement shall, without further notice, stand terminated 30 days from the date of the letter dated 7th February, 2012 – **that is the termination is effective as from 9th March, 2012.**

In that same notification the Sublessor also demanded the Sublessee to remove all its movables from and deliver to the Sublessor vacant possession of the land

which is the subject of the Lease Agreement, by the end of the 30 days stated in the notice.

By letter dated **9th February, 2012**, the Sublessee responded to the notice of termination letter. That letter indicated to be without prejudice acknowledged the notice of termination from the Sublessor dated 7th February, 2012. Paragraph 2 of the Sublessee's letter stated that the issue was not about refusing but rather that rent is paid in an escrow account pending the decision of the Court of Appeal against the decision of the Chief Justice refusing to grant leave to its application for judicial review. It also made reference to its letter addressed to one Mr. Anup Hari the Accountant of the Sublessor dated 30th December, 2011. In that letter the Sublessee stated that alternatively it can transfer the rent due to the Registry of the Supreme Court pending the outcome of the appealed case. Counsel inter alia added that the Sublessee was not neglecting to pay rent but will pay rent henceforth in an escrow account pending the determination of the said application by the Court.

The Sublessee in that same letter of **9th February, 2012** made reference to the provision of Clause 21 of the Lease Agreement and stated that the matter should go to arbitration prior to termination by the Sublessee. The position stated by the Sublessee is that as the Sublessor had not had recourse to prior arbitration process the termination amounted to a unilateral determination of the lease. Counsel reiterated that the arbitration procedure under Clause 21 should take place.

Counsel for the Sublessor responded on **13th February, 2012** to the above stated letter by reminding the Sublessee that under Clauses 8 and 9 of the Lease Agreement rent is payable to the Sublessor and accordingly payment to the clients account of the Sublessee's Counsel does not constitute payment to the Sublessor under the aforesaid clauses of the Agreement. Secondly, the Sublessor had not been served with any application for interlocutory injunction. Thirdly, the Sublessor was not aware of any "*present impasse and current litigations between the parties concerned"* as stated in the Sublessee's letter of 9th February, 2012 as the Sublessor was not involved in any litigation with the Sublessee.

The Sublessor invoiced the Sublessee on **1st March, 2012** for rent due amounting to Euro 15,000 for the month of March, 2012.

Article 1134 of the Civil Code of Seychelles provides that agreements lawfully concluded shall have the force of law for those who have entered into them. They shall not be revoked except by mutual consent or for causes which the law authorizes.

There is shown an agreement entered into by the Sublessor and the Sublesse who are now Applicant and Respondent before this Court. The Applicant is seeking for an interlocutory interim injunction pursuant to Section 304 of the Seychelles Code of Civil Procedure for reasons stated in the Affidavit in support sworn by one Mr. Danielle Belle. For the purpose of the ruling on the merits the Court will assume that the Affidavit of Mr. Belle is factually correct.

The bone of contention is that whether the termination of the Lease Agreement by the Respondent is in accordance with that Agreement. The Applicant contends that the termination must be subjected to arbitration prior to such termination whereas the Respondent contends that there was no necessity for any arbitration where it is **obvious** that the Respondent had breached the Agreement as stated in the proviso of Clause 21 (c)(i).

It is not is dispute that a term of the Lease (Clause 10) is that the Applicant pays a rent of Euro15,000.00 to the Sublessor monthly in advance and that such payment shall be made <u>without any withholdings, deductions or set-off.</u>

By virtue of Clause 16(c) of the Agreement the Applicant is obliged to pay the rent payable to the Respondent under and in accordance with the terms and conditions of the Sublease <u>fully and promptly</u>.

It is evident to this Court and this is not disputed by the Applicant that it has not paid the Respondent rent due from November, 2011 and thereafter. The Respondent has caused the Applicant to be notified of this on various occasions and the rent remained unpaid and this led to the Respondent terminating the Lease in terms of Clause 21.

The Applicant did not pay the demanded rent within thirty (30) days after receipt of a written notice from the Respondent to pay the arrears.

It is indeed a term of the Lease Agreement that if the Respondent refuses or persistently (more than once) neglects to perform and observe the covenant, terms conditions and provisions or any of them on its part contained in the Lease and the Respondent having given notice to the Applicant to cure such breach and the time period permitted under such notice period elapsed without the breach having being cured, the Respondent may terminate the Lease.

The Respondent served written notice of termination of the Sublease and specified the reason for such termination as being failure by the Respondent to pay rent due for more than one occasion. The Respondent gave the Applicant 30 days notice after the lapse of which the Respondent would then be entitled to treat the Sublease as having been terminated and may re-enter and take possession and control of the same. This was what the Respondent in fact did.

From a careful analysis of the matter before Court it is evident that the issue is that whether from the reading of the contents of Clause 21(c) (i) it was incumbent on the Sublessor and was mandatory for the latter to refer the matter of non-payment of the overdue Sublease Rent to arbitration before the termination of the Sublease. The main contention of the parties is their differing interpretation of the proviso in Clause 21(c)(i) and more particularly the words – *"**unless such breach is obvious,**"* contained in the proviso.

The proviso in Clause 21(c) is that <u>unless the breach of the Agreement is obvious,</u> in the first instance, attempts should be made to resolve the dispute by good

faith mutual discussion and agreement including that during that 30 day period, the parties may (but shall not be obliged to) jointly agree to appoint an independent expert to assist in resolving the dispute.

I find that it is obvious that the Applicant had failed to pay rent of Euro15,000 to the Respondent since November, 2011 despite requests by the Respondent and that such arrears of rent are obviously due the Respondent from the Applicant. It is my interpretation that in such circumstances, the Proviso to Clause 21(c)(i) is not applicable. My interpretation is that the Proviso to the Clause 21(c)(i) is applicable when there exist a dispute between the parties and the fact of which dispute is not so obvious.

In the present case the Applicant indicated that there had been dispute between the parties in that the Respondent which was supposed to make available a plane to Applicant to access the island but the Respondent had refused to give such access and that the Respondent had also damaged certain equipment of the Applicant that were on the island. This is my view are not so obvious dispute between the parties and it is that kind of dispute that could have been the subject of arbitration under Clause 21(c)(i). The Applicant did not refer such dispute to arbitration but instead took unilateral action by not paying the rent due.

In my view the question of the balance of hardship does not arise now as the Respondent had already terminated the Lease Agreement effective from 9th March, 2012 and this Court is in no position to reinstate the Agreement but to

compensate the Applicant by damages if the Respondent is eventually determined to be in breach of the agreement.

In the circumstances and for reasons stated above, I decline to grant the prayers of the Applicant and accordingly dismissed the Application with costs.

.....
B. RENAUD
JUDGE

Dated this 6 July, 2012 at Victoria, Mahe, Seychelles