

IN THE SUPREME COURT OF SEYCHELLES

Civil Side:CC 11/2012

[2013]SCSC

EDEN ISLAND DEVELOPMENT COMPANY (SEYCHELLES) LIMITED

Plaintiff

Versus

ALEXANDER KOZHAEV

Defendant

Heard: 8 March 2013 and 17 July 2013

Counsel: Francis Chang-Sam SC for the plaintiff
France Bonte for defendant

Delivered: 30 September 2013

JUDGMENT

Egonda-Ntende CJ

[1] The defendant Mr Kozhaev, who is Russian, purchased a villa and an apartment in the Eden Island development. The plaintiff (hereinafter referred to as Eden Island) is the developer that sold the properties. Title to the villa was transferred to Mr Kozhaev in July 2008. Eden Island claims that almost USD 400,000 of the purchase price for the villa was never paid. Mr Kozhaev claims that he did pay this amount. He also counterclaims for defective construction.

[2] It is common ground that a reconciliation produced by Eden Island's bank, Barclays Bank (Seychelles) Ltd, in January 2010 shows receipts from Mr Kozhaev covering the full amount of the purchase price. It is also common ground that Eden Island's lawyers in South Africa wrote to Mr Kozhaev on the strength of this reconciliation to confirm that

payment had been made in full. Eden Island now says that the reconciliation is mistaken and reflects a bank error which was promptly corrected (though never explained to Mr Kozhaev). Mr Kozhaev denies any mistake.

- [3] Eden Island is seeking judgment for USD 387,321.12 (plus interest and costs) or, in the alternative, the cancellation of the sale agreement and re-transfer of the villa. Mr Kozhaev is seeking unpaid interest on amounts held on his behalf in Eden Island's escrow account (which he wishes the Court to "audit"), damages of USD 450,000 for "non-completion" of the villa, and moral damages of USD 250,000, plus interest and costs.

The sale agreement

- [4] The sale agreement for the villa was concluded on 13 November 2007. The purchase price was USD 1,295,000. This figure is slightly higher than the figure stated in the reservation agreement which had been signed in May 2007, but nothing turns on that. A deposit of USD 129,500 was payable on the date of signature and the balance of USD 1,165,500 was payable in accordance with clause 4 of Eden Island's standard conditions of sale. An amount was also payable for fixtures and fittings to be selected by Mr Kozhaev. Eden Island pleaded that amount as USD 14,750 but failed to produce the "schedule of finishes" referred to in the sale agreement or any other evidence to support the pleaded amount. Mr Kozhaev pleaded that the relevant amount was USD 12,900. There is support for both figures in letters sent to Mr Kozhaev by Eden Island's lawyers, in 2011 and 2010 respectively, both of which were produced by Mr Kozhaev. In those circumstances I decline to accept Eden Island's claim to the higher amount and adopt the USD 12,900 figure accepted by Mr Kozhaev. That brings the total payable under the agreement to USD 1,307,900.

- [5] Clause 4 of the conditions of sale is lengthy but its effect can be summarised as follows.
- a. The 10% deposit was to be paid into one of Eden Island's two escrow accounts with Barclays and released to Eden Island from escrow on the date of transfer of title.

- b. The balance was to be paid into escrow on the date of transfer of title and released to Eden Island in tranches, reflecting the completion of each stage of construction. The first tranche, of 20% of the purchase price, was to be released from escrow to Eden Island on the transfer date itself, so that Eden Island received an aggregate amount of 30% of the purchase price on that date.
- c. Despite the requirement for payment of the balance on the date of transfer, Mr Kozhaev was obliged by clause 4.3 to give a bank guarantee for that amount, or to pay the full amount in cash, as “security” 90 days prior to the anticipated date of transfer, unless Eden Island agreed to defer this “security” to a later date. Eden Island has not relied on that sub-clause for the purpose of this proceeding.
- d. Clause 4.5 provided that all amounts paid into escrow and “all interest (if any) on such amounts” were to be held on Mr Kozhaev’s behalf. Mr Kozhaev pleaded that “all monies held in escrow should according to the contract earn interest at the rate of 6% per annum”, but Mr Bonte, his counsel, was unable to point to any provision to this effect. Eden Island’s defence to the counterclaim does however concede that clause 4.5 required the escrow account to be interest-bearing.
- e. All amounts due and outstanding from Mr Kozhaev to Eden Island were to bear interest at LIBOR plus 7.5% from the due date.

[6] The escrow account into which payments were to be made after the date of the agreement is defined as “Eden Island Sales Escrow, account number: 9603341” or such other account as specified by Eden Island from time to time. Eden Island did subsequently specify a new account with Nuovobanq (Seychelles International Mercantile Bank Co Ltd), as recorded in a letter from Webber Wentzel dated 10 January 2011.

[7] The conditions of sale set out the various stages of construction and provide for the progressive issue of three completion certificates (all of which were duly produced). Significantly for Mr Kozhaev’s counterclaim, clause 14 specifies the means by which construction defects are identified and rectified. Mr Kozhaev was obliged to provide a “comprehensive and final” list of defects within 90 days of receiving the “practical

completion” certificate. Eden Island was obliged to rectify these, but no others. Clause 14.2 provides that any dispute “as to whether a defect exists or whether the defect has been duly rectified” shall be finally determined by a nominated firm of architects in Cape Town. Clause 15 provides limited further protection to the purchaser in the event of major structural defects and roof leaks, provided that written notice of those defects is given within 5 years and 12 months respectively from the date of practical completion. In those circumstances Eden Island would have 90 days to begin the rectification or repair works. These provisions aside, clause 15.5 purports to disclaim liability on the part of Eden Island for “any damage or loss suffered by the purchaser, by reason of any fault, defect, or deficiency existing or arising in the parcel or the works, whether patent or latent”.

- [8] Finally I observe that the sale agreement contained a comprehensive arbitration clause (clause 25), which was not referred to by either party in the course of this proceeding. The agreement to arbitrate is expressed to cover “any dispute of any nature whatsoever arising between the parties on any matter provided for in, or arising out of this agreement”. It is unclear to me why this clause was not invoked by Mr Bonte on his client’s behalf. It would have provided a clear basis for dismissing Eden Island’s plaint and, importantly for Mr Kozhaev, may have provided a more suitable and cost-effective forum for the investigation of the concerns raised in his counterclaim. Be that as it may, since neither party wishes to invoke the arbitration clause I will not consider it further.

Events after the agreement was signed

- [9] As I have said the sale agreement was concluded on 13 November 2007. Mr Bonte originally sought to dispute his client’s consent to the agreement produced by Eden Island, but abandoned that attempt, which was as well since the relevant pleading had been admitted.

- [10] The parties agree that the land in issue was transferred into Mr Kozhaev’s name on 24 July 2008. Mr Karl Operman, financial manager for Eden Island, testified that this followed the receipt from Mr Kozhaev of a total of USD 388,500, amounting to 30% of the purchase price. Mr Bonte again sought to dispute his client’s consent to the transfer

document produced by Eden Island, but abandoned that attempt after a power of attorney was produced.

[11] Eden Island pleads that the full balance of the purchase price became payable by Mr Kozhaev into the sales escrow account on the date of transfer (24 July 2008). This outstanding balance amounted to USD 906,500 (70% of the purchase price) plus USD 12,900 (as I have found) for the “extras”, a total of USD 919,400. The plaint is not specific as to the date and amount of all payments made by Mr Kozhaev but it is pleaded that payment of a total of USD 919,400 was received in “tranches” between 25 May 2007 and 31 December 2009. So the “missing” amount is exactly equivalent to the pre-transfer payments of USD 388,500.

[12] Under the sale agreement, the USD 388,500 paid by Mr Kozhaev into escrow prior to transfer became payable to Eden Island from escrow on the date of transfer. This payment is the origin of the alleged bank error.

[13] It is common ground that Eden Island’s two escrow accounts at Barclays were under the independent direction of Webber Wentzel, a South African law firm. Mr Operman testified that when the property was ready for transfer to Mr Kozhaev, Webber Wentzel was supposed to instruct Barclays to transfer USD 388,500 from escrow into Eden Island’s (non-escrow) collections account. For some reason that amount was instead transferred from sales escrow into reservation escrow. This mistaken transfer took place on 4 July 2008. Mr Operman was not clear as to whether the mistake originated with Barclays or Webber Wentzel. Be that as it may, according to Mr Operman the error was “picked up” on 8 July and the transfer to the reservation escrow account reversed. The same amount was then immediately re-transferred to Eden Island’s collections account. As Mr Operman put it, the initial transfer on 4 July 2008 “showed us an inflow which is not really inflow”.

[14] Palm Golding Seychelles Ltd are the sales and marketing consultants for Eden Island. Their representative, Mrs Lyn Marie, gave evidence of her first meeting with Mr Kozhaev, at Eden Island, on Friday 15 January 2010. She produced an email from herself to Eden Island employees, dated 18 January 2010, describing this meeting. That

email states that Mr Kozhaev “wants to apply for a 30% mortgage as he had already paid 70%”, and goes on to discuss potential banking arrangements. Mrs Marie confirmed in evidence that Mr Kozhaev told her in person (in French) that he still owed 30% of the purchase price. The immediately preceding email in the same chain, which is in French, is from Mr Jean-Luc Quilindo at Barclays to Mr Kozhaev, also dated 18 January 2010, regarding a possible loan by that institution.

[15] I note that Mr Kozhaev, who gave evidence in person, denies ever having seen Mrs Marie before the hearing of this case.

[16] Mrs Marie’s email of 18 January 2010 was forwarded to Ms Haniyyah Salie at Webber Wentzel, who replied, the same morning, stating that “according to our records, Mr. Kozhaev has paid the full purchase price and optional extras to date. I’m therefore not sure why he is applying for a bond?”

[17] Mr Kozhaev pleads, and Eden Island accepts, that a letter dated 20 January 2010 from Webber Wentzel (signed by Ms Salie) confirmed to him that both the purchase price (of USD 1,295,000.00) and the optional extras (of USD 12,900) had been paid in full. That confirmation is supported by an enclosed reconciliation produced by Barclays and dated 18 January 2010.

[18] Mr Operman testified that this reconciliation is false because it includes the 4 July 2008 “inflow which is not really inflow”. Mr Operman’s testimony was supported by Mr Arthur James, a partner at Webber Wentzel, who went through the reconciliation in more detail. He pointed out that the individual amounts received into escrow from Mr Kozhaev are shown as totalling USD 388,500 as at 11 June 2008. That amount is recorded as having been debited from escrow on 3 July 2008. Then a credit of exactly the same amount is recorded as reappearing on 4 July 2008. Mr James testified that Webber Wentzel gave correct instructions to Barclays and that, accordingly, it was Barclays staff who made the mistake by transferring the funds into the wrong account. While that mistake was quickly identified and reversed at the individual account level, “unfortunately whoever was responsible for the reconciliation account continued to reflect the incorrect 388,500 credit”.

- [19] Mr James did not produce any correspondence relating to the alleged mistake, either internally or with Barclays or Eden Island, in either 2008 or subsequently.
- [20] The only Barclays employee called was Mr Egbert Lawrence, head of corporate offshore business. Mr Lawrence testified that Mr Jean-Luc Quilindo, who was looking after Eden Island's escrow accounts and producing the reconciliations at the relevant time, has passed away. Mr Lawrence has been the relationship manager for Eden Island for some time, but "was not directly involved" with the transactions in issue and was not directly supervising Mr Quilindo at the time. He was however able to confirm that money is not normally transferred from sales to reservation escrow, "so clearly there was an error in how this transfer was done".
- [21] Mr Lawrence's explanation of the error was based on two interim bank statements (each dated 9 July 2008 and covering transactions on the two escrow accounts between 4 and 8 July). Mr Bonte did not object to the production of these statements. Mr Lawrence explained that there are five relevant transactions on the statements. The reservation escrow account shows a credit of USD 388,500 on 4 July 2008, with the identifier "Kozhaev", and a debit on 8 July of the same amount, identified as "R/E DD 04JUL08". Mr Lawrence stated that this is a reference back to the 4 July credit. So there is no net inflow to that account. The sales escrow account statement records a debit on 4 July 2008 with the same identifier, "Kozhaev", supporting Mr Lawrence's claim that the funds were transferred directly from sales to reservation escrow. Then there is a credit on 8 July, again with the matching identifier "R/E DD 04JUL08". Then another debit, on the same day, this time with the identifier "A Kozhaev". So there is a net outflow of USD 388,500 from the sales escrow account. That is consistent with the release of USD 388,500 from escrow into the collections account in accordance with the sale agreement. It is not consistent with the receipt of an additional amount of USD 388,500 directly from Mr Kozhaev. Mr Lawrence insisted that "there was only one amount of 388,500 that was being paid. It is only one". So the additional 4 July inflow recorded on the reconciliation is a mistake.

- [22] Mr Lawrence did not produce any correspondence relating to the alleged mistake. Nor did he produce a corrected reconciliation.
- [23] The three progress certificates required by the sale agreement were issued on 21 September 2010 (practical completion), 15 November 2011 (works completion), and 2 May 2012 (final completion). Under clause 4.2.2.2.4 of the conditions of sale, the full purchase price, save for USD 100,000, should have been released to Eden Island on the date of practical completion (September 2010). The final USD 100,000 should have been released on the date of final completion (May 2012).
- [24] On 10 January 2011, Webber Wentzel wrote to Mr Kozhaev advising him that Eden Island's escrow accounts had been shifted from Barclays to Nuovobanq. Enclosed with this letter was a statement received from Barclays, reflecting a credit in escrow of USD 105,111.54 as at 6 November 2010. That statement is consistent with the January 2010 reconciliation in showing a credit of USD 388,500 on 4 July 2008.
- [25] Eden Island pleads that it demanded payment of the alleged shortfall and interest thereon by letter dated 24 January 2012 and sent to Mr Kozhaev via email on 8 February 2012. Mr Operman described this letter as the one which "advised" Mr Kozhaev of the bank error. However the letter contains no such advice. It simply states that Mr Kozhaev has "failed to make payment" of USD 387,321.12. Mr Operman acknowledged that "from my side", ie Eden Island, he never sent any document which explained to Mr Kozhaev why Eden Island's position had changed.
- [26] Mr James testified that Webber Wentzel had "picked up towards the end 2011, beginning of 2012 there was an issue on the balancing of the escrow account", and that he was the one who directed the drafting of the letter of demand dated 24 January 2012. Until that point both Webber Wentzel and Eden Island had relied on the correctness of the Barclays reconciliations. When asked why the letter of demand did not explain the alleged bank error to Mr Kozhaev, Mr James said that he had thought this had already been done by Eden Island.

- [27] The figure of USD 387,321.12 demanded in January 2012 is slightly lower than USD 388,500. Eden Island accepts that USD 3,028.88 in interest had accrued to the benefit of Mr Kozhaev on the sums paid into escrow as at 24 January 2012, and pleads that this amount was set off against the alleged shortfall before demand for payment was made. However Eden Island was proceeding on the assumption that the amount payable for “extras” was USD 14,750, not USD 12,900. So the claim is overstated by USD 1,850. It should have been for USD 385,471.12. I will proceed on that basis.
- [28] On 19 February 2012 Mr Kozhaev responded to Eden Island’s letter by email. A “rough translation” of his email, which was in Russian, was prepared by (or for) Mr Matthew Peter of Webber Wentzel and forwarded to his colleagues on 23 February 2012. The translation, which was not disputed by Mr Kozhaev’s counsel, describes the villa as “paid in full, as you are well aware, as proof of payment received from the [sic] Webber Wentzel”.
- [29] Counsel for Mr Kozhaev did not invite him to produce any evidence to support his position. However, under cross-examination by Mr Chang-Sam, Mr Kozhaev sought to rely on documents from a Russian bank which, he says, are signed by a manager there and provide proof of payment. Having extensively cross-examined Mr Kozhaev on these documents, Mr Chang-Sam objected to their admission, submitting that they had not been produced by a bank representative and could “come from anywhere”. I overruled that objection.
- [30] The alleged Russian bank documents consist of 11 individual pages in identical form, principally in Russian but with some details in English, and three additional bound pages, the first of which is in similar but not identical form, followed by a two-page certified English translation. The 11 identical pages are signed in the bottom right-hand corner, apparently by the same person, but the signature details are in Russian. The signature pane in the bottom left-hand corner is blank (again, the signature details are in Russian). There is no official stamp or other authentication.
- [31] Each of the 11 pages contains amounts and dates which appear to match all but two of the credits shown in the Barclays reconciliation dated 18 January 2010. The date in each

case is several days prior to the date on which receipt of that amount was recorded by Barclays. Each page identifies Mr Kozhaev as the “ordering customer” and Eden Island’s sales escrow account as the “beneficiary customer” (except for the earliest, which refers to the reservation escrow account). Each also includes a specific reference to the 13 November 2007 sale agreement (except for the earliest, which cites the reservation agreement). There are only two credits recorded in the Barclays reconciliation which are not reflected in these 11 documents. One is a credit of USD 8,500 (the smallest of all the individual amounts) received back in May 2007, just after the reservation agreement was signed. Mr Kozhaev was not asked to explain this omission. The other is the 4 July 2008 credit of USD 388,500. That is the transaction in issue. It is dealt with in the three bound pages.

[32] The first of the three bound pages is in similar but not identical form to the preceding 11. Some of the Russian text is missing. The “ordering customer” is not Mr Kozhaev but a Victor Momatuk, and the “ordering institution” (the Russian bank) is different. The signatory is also different. Mr Kozhaev was not cross-examined about these discrepancies (which may not have been immediately obvious to Mr Chang-Sam). The English translation describes the document as a “transfer order”, dated 2 July 2008, requesting that USD 388,500 be transferred from Mr Momatuk’s Moscow account into the Eden Island sales escrow account. The ostensible purpose of payment is identical to that on the other 11 pages: “Partial payment of contract at 13.11.2007 Alexander Kozhaev Basin 2 Parcel 207 Villa Type 6 Eden Island”. The translation clarifies that the blank signatory pane is for the client. The signature is on behalf of the bank.

[33] Mr Kozhaev says that he went to “the bank” to obtain these documents after being served with the plaint in this case. He was not cross-examined about the fact that the documents describe orders given to two Russian banks, not one. He was however asked why he had not produced the documents before the case started. Mr Kozhaev responded that it was extremely expensive for him to go to Russia, and that he had told Eden Island’s only French-speaking employee (Ms Sandra Colas) that Webber Wentzel would have to pay if they wanted him to go.

[34] After Mr Kozhaev’s evidence was complete, Mr Chang-Sam applied to recall Mr Lawrence, from Barclays Bank, to “come back and confirm whether these payments have been received or not”. He properly accepted that, should this confirmation be forthcoming, “that would be the end of the matter”. Having considered the authority of *Pomeroy v Ross* (1976) SLR 68, I declined Mr Chang-Sam’s application on the basis that there were no special circumstances warranting the exercise of my discretion to recall the witness. The issue of the extent of payments made to Barclays by Mr Kozhaev was always at the heart of the case and should have been fully dealt with in examination in chief.

[35] In closing argument Mr Chang-Sam maintained his objection to the Russian bank documents on three grounds: they were partly in Russian and only one had been translated; there are no apostilles; and the documents are on their face only instructions for transfer, which in the case of the crucial USD 388,500 payment were made by someone other than Mr Kozhaev to a different Russian bank.

Analysis

[36] Mr James, one of Eden Island’s lawyers, testified that “Mr Kozhaev has never ever come to us and simply said I paid \$388,500. He has proof of transfer. A transfer from xyz bank. I wish he would. It would be a lot simpler and we would not be spending money and time on this matter.” Mr Kozhaev responded that “[i]t is not me who is supposed to show it”. Mr Kozhaev is correct, in the general sense that he who alleges must prove. This is Eden Island’s case. However Mr Chang-Sam relied on article 1315 of the Civil Code of Seychelles to support the submission that the burden of proof has shifted back to Mr Kozhaev:

A person who demands the performance of an obligation shall be bound to prove it. Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation.

[37] Mr Bonte did not offer any substantive submissions on Mr Kozhaev’s behalf.

[38] It is undisputed that Eden Island has proved the existence of the payment obligation. So the burden would ordinarily fall on Mr Kozhaev to prove release through payment: see

for example *Chetty & Sons (Pty) Ltd v Pillay* CS 257/2000, [2005] SCSC 50, *Seychelles Marketing Board v Languilla* CS 210/2002, [2007] SCSC 27, and *Denis Island Development Ltd v Minister for Employment and Social Affairs* CS 348/2002, [2007] SCSC 15. The complicating factor in this case is the fact that Eden Island wrote to Mr Kozhaev volunteering its own (allegedly mistaken) proof that payment had been made in full. Does that kind of representation suffice to shift the burden back to Eden Island? Or is Mr Kozhaev still required to provide independent proof of payment?

[39] If the burden of proof remains on Mr Kozhaev I am satisfied that he is well short of discharging it. I regard the Russian bank documents he produced during cross-examination as having little if any independent probative value. I am particularly dubious about giving any weight to the “order of transfer” said to prove the payment in issue. That order would appear to have been issued by a different individual, whose relationship to Mr Kozhaev has not been explained, who was not called to give evidence, and who did not even sign the document which has been produced to the Court. Mr Kozhaev’s parol assertion that he made payment in full is directly contradicted by Mrs Marie, whose recollection on this point, supported by a contemporaneous email, I have no reason to doubt. And the January 2010 Barclays reconciliation, having been expressly disclaimed by the bank which created it, cannot be independently relied on to prove the state of the underlying accounts. No estoppel has been pleaded.

[40] That said, where a creditor has purported to release a debtor and then subsequently alleges mistake, I do consider that it is reasonable to require proof of the alleged mistake. In such a case the creditor is to some extent the author of its own misfortune. Having made the initial mistake, Eden Island has a responsibility to assist the Court by providing the necessary information to set the record straight.

[41] In circumstances such as this the result is unlikely to turn solely on the allocation of the burden of proof. I am reminded in this respect of Viscount Dunedin’s speech in *Robins v The National Trust Co Ltd & Ors* [1927] AC 515:

[I]n conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending

party, sometimes on the side of the other, or, as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole cause can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

[42] It is however still necessary to decide whether Eden Island has done enough to enable me to reach “a determinate conclusion”. The evidence from Eden Island regarding the alleged bank error in this case is, I must say, unsatisfactory. The flow of funds indicated by the interim bank statements and explained by Mr Lawrence is not directly supported by other documents (for example, by other bank documents confirming that the funds flowed between reservation and sales escrow, or by any contemporaneous correspondence or notes about the need to correct the mistake). There appears to be a second error on the reconciliation (showing a debit of USD 388,500 from escrow on 3 July 2008, not 4 or 8 July) which has never been explained. And most importantly, I have never seen a corrected reconciliation. Mr Kozhaev was certainly not given one. The January 2012 letter of demand makes no reference at all to the fact that earlier reconciliations are wrong. Eden Island, and its counsel, have thereby blurred and confused what should have been a clearcut claim of mistake.

[43] Be that as it may, I have reached the conclusion on the available evidence that Eden Island’s version of events is significantly more likely than not to be true. The evidence cannot be said to be “evenly balanced” to the point where shifting the burden of proof back to Eden Island could alter the outcome. As Lord Hoffman put it in *In re B (Children)* [2008] UKHL 35 at [2], there is “no room for a finding that [something] might have happened. The law operates a binary system in which the only values are 0 and 1.” I am satisfied that the probability of non-payment in this case is closer to 1 than to 0 and, on that basis, Eden Island’s claim succeeds.

The counter-claim: defective construction

[44] In the February 2012 email which asserted that his villa had been “paid in full”, Mr Kozhaev also raised the issue of defective construction (again in rough translation):

Villa B2 207 was put into operation with severe disabilities (38 positions), to eliminate that nobody is going, despite my repeated requests (Mr Peter Smith thinks it beneath their dignity to respond to my written request.) Because of the continuing work on my site as well as in the immediate vicinity of the normal life of my family has become impossible (to me live an elderly woman and 85-years and the child – school student).

[45] The substance of the pleaded counterclaim is as follows:

The Defendant/Counterclaimant avers that the Plaintiff was supposed to construct a mooring for the Defendant’s yacht at the cost of USD105,236.86 which sum was placed in Escrow with Nuovobanq and they have failed to do the construction of the said mooring.

The house is of bad workmanship, foundation breaking up, floor rotting, locks and hinges rusting and the Defendant/Counterclaimant is praying this Honourable Court to appoint a valuer to assess the cost of completion of the house, the mooring and renovation of the house.

[46] Mr Chang-Sam filed a detailed defence to the counterclaim, relying on clauses 14 and 15 of the sale agreement (list of defects, final completion and warranty in respect of works):

[T]he matters complained of fall to be dealt with under clauses 14 and 15 of the SPA each of which clauses sets out a procedure and time frame for notification by the Defendant to the Plaintiff and for rectification, where required, by the Plaintiff. The Defendant has failed to comply with the said clauses and is therefore estopped and/or contractually debarred from making a claim in respect of the alleged defects.

[47] Eden Island also relies on clause 13.9 of the sale agreement, regarding practical completion, which provides that:

Should there be any dispute between the parties as to whether practical completion has been achieved, the matter shall be referred to an independent architect nominated and agreed to by the parties, or failing such agreement, as appointed by the quantity surveyor, whose decision in this regard shall be final and binding on both parties.

[48] Mr Kozhaev testified that he has been living on site for more than two years (since January 2011) and that “I have made a list of 38 things that is not in the villa”. Mr Kozhaev did not attempt to produce that list, and gave conflicting answers under cross-examination about whether he had ever put his concerns in writing. He did however explain the alleged problems (through the Court interpreter):

The swimming [pool] is not working, the handle of the door is rusty and some of doors, some does not open some does not want to close. And then at times there is the air condition with too much noise and [I] cannot sleep. And also every time it is raining the foundation subside and then it cracks around the house and [I have] taken pictures of it also]. ... Seychelles is a paradise but having living next to work site. A building, 15 metres [away]. And every day there is construction and there is lots of noise, pollution ... Because Seychelles is a paradise but it is like hell there.

... They did not complete the house, they did not put the telecommunication, I have to go to Cable & wireless, DSTV. The system of the swimming pool is not functioning well. I was unable to use the air conditioning because there was a lot of noise.

[49] Under cross-examination Mr Kozhaev also raised an issue about the plumbing system and a shortage of hot water. Mr Chang-Sam pointed out that this was not pleaded in the counterclaim. Mr Kozhaev’s response was that his lawyer had told him that “if I have anything against Eden Island and I should put them also [sic]”.

[50] Mr Chang-Sam challenged Mr Kozhaev on why he had not followed the procedure set out in the sale agreement for identifying and rectifying defects. Mr Kozhaev stated that the agreement was written in English and that, although he signed it, he could not read it. He said he has never had it translated because he “did not have the time”.

[51] Eden Island called its client services manager, Mr Kevin Walton, to produce a list of defects allegedly submitted by Mr Kozhaev in November 2010. I declined to admit this document as it was an informally translated copy. Mr Walton did however testify that he had seen a (translated) list of defects, which he described as a “regular thing” in the course of his work, and had been personally involved in the verification and rectification work. He said that he had personally checked before signing off the defects as corrected,

but that he had not spoken with Mr Kozhaev to ensure that he was satisfied, as they do not speak a common language.

[52] Eden Island also called the lead construction project manager on the Eden Island project, Mr Freddy Synicle, an employee of Indian Ocean Project Managers. Mr Synicle testified that his company was responsible for the implementation of the design – “to ensure that it is completed at a certain point in time and under certain quality” – and for issuing the three completion certificates. Mr Synicle described the “works completion” process which takes place after the practical completion certificate, the first of the three, is issued. The works completion list “entails the consultants, the architect, the engineers and others. The whole set of professional people ... The list is being issued back to the contractor, he executes that list, when it is completed ... the consultants go back in verifying”. He stated that any “snags” or defects identified by the purchaser would have been incorporated in the evaluation and rectification process. Mr Synicle confirmed that his company had signed off the final completion certificate and was satisfied that “the house is okay, there should not be any problem with it”. He acknowledged that he had not inspected the house since May 2012 (when the final certificate was issued). He did however state in cross-examination that his company has not received any notification of defects independently of this proceeding.

[53] Mr Kozhaev did not produce the photographs he had referred to, or any other evidence of the alleged defects. I declined Mr Bonte’s request for a locus in quo (site visit) but did adjourn the hearing for several months to allow for evidence from an expert witness. When the hearing resumed the proposed witness, Mr Nigel Roucou, was indisposed and Mr Bonte requested an adjournment. Mr Roucou had already prepared a report, which had been placed informally on the court file. This report was however based on a site visit in April 2013, during the period in which the case was adjourned part heard. It had not been listed in the defence (which was filed back in November 2012) and would therefore not be admissible except by leave. There was also no medical evidence to support the requested adjournment. In the circumstances I declined to grant the adjournment. There was no further evidence on the counterclaim.

Analysis

[54] No evidence was produced on the mooring issue and I deem it to have been abandoned. Issues relating to the swimming pool, telecommunications installation, and noise pollution/nuisance were not pleaded and are therefore beyond the proper scope of the claim. That leaves the issues of “bad workmanship, foundation breaking up, floor rotting, locks and hinges rusting”, the former of which I will treat for argument’s sake as extending to air conditioning and plumbing. In this regard Mr Kozhaev’s evidence, which is unsupported by documentation or expert opinion, is contradicted by two professionals who were directly involved in the construction, including the representative of the company which signed the completion certificates. In any event Mr Bonte, as counsel for Mr Kozhaev, made no attempt to explain why the contractual dispute procedures had not been followed, except to assert that his client did not understand the agreement he had signed.

[55] I have no hesitation in dismissing the counterclaim. It seems clear that at least some of Mr Kozhaev’s concerns came to the attention of Eden Island in the course of the construction and certification process. If those concerns were not allayed (as apparently they were not) then Mr Kozhaev should have pursued them formally at the time. If he did not understand his rights and obligations under the sales agreement, he should have had that agreement translated. At the least he should have asked for an informal French translation from his Eden Island contact. Private dispute resolution clauses exist for a purpose and cannot simply be ignored. Mr Kozhaev may well feel that he has not had a full opportunity to air his grievances in this forum but that is the result of the approach adopted by himself and his counsel. Even if the defective construction claims were not contractually barred they have simply not been proven.

Decision

[56] The claim is allowed to the extent of USD 385,471.12 plus interest, to be calculated at the contractual rate from the date of filing of this suit until the date of delivery of this judgment, and thereafter at the legal rate.

[57] The counterclaim is dismissed.

[58] This case would never have arisen if not for a mistake by Eden Island's advisors and bankers, a mistake which was never clearly explained to Mr Kozhaev. For that reason I direct that the costs of the case are to lie where they fall.

Signed, dated and delivered at Ile du Port this 30th day of September 2013

FMS Egonda-Ntende
Chief Justice