

**Platte Island Resort v EME Management Services**

**(2013) SLR 225**

Egonda-Ntende CJ

13 May 2013

CS 3/2013

**Counsel** F Elizabeth for the plaintiff

B Hoareau for the defendant

**EGONDA-NTENDE CJ**

[1] This is a ruling on a plea in *limine litis*. I have already given a judgment on the contract between these parties. That judgment was given in an earlier case, Commercial Cause No 25 of 2012, filed by the same plaintiff. In that case the plaintiff's argument presumed the existence and enforceability of the contract. It was seeking judicial amendment of a particular provision. In this second case the plaintiff seeks to argue that the whole contract is null and void and incapable of enforcement. Can this conduct be tolerated by the Court?

[2] The timeline of events leaves no doubt that this plaintiff made a deliberate choice to pursue multiple proceedings. The first case was filed on 10 October 2012. The second case (this case) was filed on 22 January 2013, only three months later. The first case was heard on the morning of 18 February 2013. The second case came up for first appearance that afternoon. Mr Elizabeth, counsel for the plaintiff in both cases, freely conceded that the subject-matter was the

same. He suggested orally that the cases could be consolidated and heard together. It was, literally, too late in the day for such a suggestion. Mr Elizabeth was then prompted by the Court to seek leave to withdraw the second case. But he had clear instructions to pursue it.

[3] Mr Hoareau, counsel for the defendant, had understandably raised a plea in *limine litis*, asking for the second case to be dismissed on three preliminary grounds. Mr Elizabeth submitted during the hearing of the plea that it should be deferred until the case is heard on its merits. Mr Elizabeth had however already accepted on 18 February that the plea should be heard first. That is clearly the correct course.

[4] The three grounds raised by Mr Hoareau are as follows. First, the claim discloses no reasonable cause of action, because it relies on a legal concept that no longer exists in Seychelles law (the requirement of “cause” in a contract). Secondly, the claim is frivolous and vexatious; and/or thirdly, the claim is an abuse of process because of the pre-existing case between the same parties in respect of the same contract. Mr Hoareau’s client is so clearly entitled to succeed on the second and third grounds that it is unnecessary to consider the first. I do so briefly only in view of a possible appeal.

[5] Section 92 of the Seychelles Code of Civil Procedure empowers the Court to dismiss a claim which discloses no reasonable cause of action or is frivolous or vexatious. The sole basis of the claim in this case is that the contract between the parties is “unenforceable and not valid in law for it is without ‘cause’”. Mr Hoareau correctly submitted that “cause” is no longer among the essential conditions for validity of contracts in Seychelles (as stipulated in art 1108 of the Civil Code). The 1978 decision of Sauzier J in *Jacobs v Devoud* (1978) SLR 164 explains how this came

to be. In any event, as Mr Hoareau pointed out, there is no basis on the pleaded facts for contending that the obligations entered into by the plaintiff in this case were without “cause”, in the sense of reciprocity of obligation by the defendant. This was an orthodox, bilateral, onerous agreement with clearly defined mutual obligations. As such, there was no difficulty with the first and third conditions of validity in art 1108 (consent to be bound, and certainty of the object which formed the subject-matter of the undertaking). Nor did Mr Elizabeth attempt to pursue the absence of “cause” in the sense of a proper or legitimate reason for the relevant obligations. Sauzier J, as he then was, clarified in *Jacobs v Devoud* that where “cause” in this sense offends against law or public policy, the contract may be invalid under the final limb of art 1108. No such argument was raised in this case. The plaint accordingly does not disclose a reasonable cause of action.

[6] Mr Hoareau then submitted that the plaint should be regarded as frivolous and vexatious, for the same reason that it constitutes an abuse of the Court’s process: because the plaintiff has elected to file two inconsistent claims regarding the same subject-matter, conduct amounting to “clear harassment, nothing more and nothing less”.

[7] Mr Hoareau did not cite s 92 of the Code of Civil Procedure in argument, electing to rely on the pre-1976 edition of the English White Book in conjunction with ss 5 and 17 of the Courts Act. Section 92 clearly governs the position where a claim is said to be frivolous or vexatious. However, as Mr Hoareau pointed out, there is no reference in that section to the broader doctrine of abuse of process.

[8] The doctrine of abuse of process is in fact comprehensively discussed in the recent decision of the Seychelles Court of Appeal in

*Gomme v Maurel* [2012] SCCA 28, in which both counsel in this case were involved, and which I commend particularly to any practitioner who receives instructions to file a claim like the present one. The Court's authority to strike out abusive claims has been reflected in English rules of Court since well before the enactment of our Civil Code, but it is not dependent on the application of those rules. It is a paradigm example of the exercise of inherent jurisdiction, sourced in the responsibility of the Court to control its own processes.

[9] While related to the rule of res judicata (as now expressed in art 1351 of the Civil Code), abuse of process is not so strictly confined. Courts may, and indeed must, recognize and respond to abuse of process in any situation which threatens the fundamental principle of finality in litigation. As Lord Phillips MR put it in *Dow Jones & Co Inc v Jameel* [2005] EWCA Civ 75 at [54]:

An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.

[10] I have had occasion to cite this observation in another case involving multiple concurrent proceedings, *Lotus Holding Co Ltd v Seychelles International Business Authority* [2010] SCSC 19. In that case I adopted an English definition of a “vexatious” proceeding as one involving:

two or more sets of proceedings in respect of the same subject matter which amount to harassment of the

defendant in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress.

[11] In *Gomme v Maurel*, the Court of Appeal has drawn particular attention to the responsibility of legal practitioners in this regard (at [15]):

Courts cannot stay unconcerned where their own processes are abused by parties and litigants. There is a time when they have to decide that enough is enough where the lawyers have not advised their clients. Abuse of process will also apply where it is manifest on the facts before the court that advisers are indulging in various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as of harassing parties against whom they have brought actions or others who may not be parties.

[12] Those words could hardly be more apt in the present case. Mr Elizabeth was instructed to file a case which sought the Court's assistance with regard to a particular provision of a contract. There was an agreed statement of facts. It could not have been clearer that Mr Elizabeth's client accepted the validity and enforceability of the contract (save for the disputed interest provision). Yet, before that case was even heard, Mr Elizabeth acted on instructions to file a second case in which his client took a different and irreconcilable stance on the status of the same contract. It is immaterial that the validity of the contract was not specifically ruled upon the first time around, given that it is the plaintiff's own actions which brought

about that state of affairs. Multiple judicial observations to this effect are collected in *Gomme v Maurel*. It suffices here to cite the famous dictum of Sir James Wigram V-C in *Henderson v Henderson* (1843), 3 Hare 100 at 115:

[W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest; but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[13] No possible justification has been presented for this plaintiff's change of strategy over the short period between October 2012 and February 2013. In the circumstances it is difficult to resist Mr Hoareau's submission that the new claim is "clear harassment, nothing more and nothing less". It is certainly vexatious and an abuse of the Court's process.

[14] For the foregoing reasons I dismiss the plaintiff's claim with costs to the defendant.

