

Jean v Felix
(2013) SLR 205

Karunakaran J

10 May 2013

SC CS 15/2008

Counsel W Lucas for the plaintiffs

 S Rouillon for the defendants

KARUNAKARAN J

[1] The plaintiffs in this action claims the sum of R 264,520.00 from the defendants for loss and damages they suffered as a result of an alleged breach by the defendants of an implied term of a lease agreement the parties had entered into, in respect of a commercial building on Title C1441 (hereinafter referred to as the “premises”) situated at Anse Royale, Mahé. The defendants were at all material times, the owners/lessor of the “premises” and the plaintiffs were the lessee. The said implied term allegedly arose from a legitimate expectation of the plaintiffs that the defendants would renew the lease agreement for a further period on reasonable terms, following the expiry of its initial period of three years.

[2] The defendants, in their statement of defence, have not only denied the plaintiffs’ claim but have also made a counterclaim against the plaintiffs in the total sum of R 270,000.00 as compensation for loss and damage, which they allegedly suffered partly due to:

- i) loss of use in that, the plaintiffs caused loss and damage by overstaying in the premises after the expiry of the lease period; and
- ii) a fault the plaintiffs committed by entering a restriction at the Land Registry against Title C1441, which prevented the defendants from effecting registration of any dealings in respect of the said title.

It is not in dispute that the plaintiffs were the owners of a commercial building situated at Anse Royale, Mahé. The building had originally been designed for and had been used in the past as a supermarket. In September 2004, the defendants leased out the building to the plaintiffs, for commercial use, as a restaurant. The defendants also authorized the plaintiffs to effect the necessary alterations, additions and improvements/modifications to the building at the plaintiffs' own cost so as to make it suitable for restaurant-business. The lease agreement was reduced into writing (vide Exhibit P1).

[3] However, there was no expressed term in the said lease deed about the intended change of use or conversion of the building. It was a term of the said agreement inter alia, that the initial period of the lease would be three years, starting from 1 September 2004; but, thereafter renewable every three years on terms mutually agreed upon by the parties. The rent was also agreed at R 10,000 per month. The lease-agreement was thus concluded after a prolonged discussion between the parties on many issues including change of use. According to the plaintiffs (PW1), the defendants through their conduct, consent and approval, impliedly agreed that the plaintiffs would take the necessary measures to invest in the improvements and restructuring of the building, thereby converting its use from a supermarket to a restaurant.

[4] The defendants also signed the necessary documents for change of use and submitted them to the government authorities such as that of Licensing and Planning for approval. Consequently, the plaintiffs had *a legitimate expectation* that the defendants would renew the lease after the expiry of its initial period and the plaintiffs would carry on the restaurant-business in the premises for relatively a longer term since they were investing a large sum of money on improvements and alterations of the building and recovering the investments and reaching profitability would take time. The plaintiffs accordingly took a loan of R 400,000 and an additional loan of R 200,000 from the Mauritius Commercial Bank - vide exhibit P6 - and spent the amount on the improvements and alteration of the building, solely relying on the implied terms as to renewal, which gave rise to the plaintiffs' *legitimate expectation*.

[5] The construction work on the improvement and alteration of the building took about one and a half years to complete. The plaintiffs also produced in evidence some photographs taken after the building was altered to accommodate a restaurant business vide exhibit P4. Mr. Nigel Antoine Roucou (PW2), a Quantity Surveyor, who inspected the building in 2008, also testified for the plaintiffs. This expert witness produced a report in exhibit P9 describing all the works done by the plaintiffs to convert the premises for the intended use. He also gave his estimate on the current market value of the works done by the plaintiffs. This report inter alia, reads thus:

WORKS CARRIED OUT

Restaurant Sitting area, Take Away Shop and Store; the works carried out in the area include general painting works and provision of air conditioning units. Painted stud walls and doors forms the Store. The Take

Away Shop has had a door replaced and general repainting works.

Bar and Store work is limited to stud partitions and doors including all painting unit.

Kitchen, Preparation areas and Stores; works carried out include converting the existing shop stores into its intended use; new walls and door were provided; ceramic floor and wall tiling throughout fixed worktops with, stainless steel sinks and oven hood.

WCs and Lobbies; painted/ceramic wall tiling stud partition walls forms the male and female WCs and lobbies, new toilet suites, urinal and hand wash basins have been fitted.

Electrical, plumbing and drainage installations have been adapted to serving activities including provision of an additional septic tank, a grease trap and a condition installation has been provided, solar water heating system and gas equipment.

Externally, a covered area attached to the existing building has been constructed water storage tank with associated steel support structure.

CURRENT MARKET VALUE OF WORKS

We would estimate the Current Market Value of the Works done to be in the region of SR245, 200. 00 (Two Hundred and Forty Five Thousand and Two Hundred Seychelles Rupees

TOTAL COST OF FIT-OUT WORKS: SR245, 200.
00

[6] Besides, the plaintiff – PW1 – testified that even for the period, when alteration and improvement works were carried out, the plaintiffs were regularly and punctually paying the monthly rents to the defendants. They were also making monthly repayments for the bank-loan throughout the period, though they were not actually running the restaurant-business in the premises and making any profit.

[7] In fact, the plaintiffs were repaying the bank-loan by monthly installments and owed a balance on the interest alone in the sum of R 79,672.31 as at 7 April 2008 vide exhibit P6. Be that as it may, only during the third year of the lease-period could the plaintiffs complete the construction work and get the premises ready to start the restaurant-business. They also received the licence to operate the business only during the third year of the lease period.

[8] Before the expiry of the lease in September 2007, the business licence issued by the Seychelles Licensing Authority (SLA) for restaurant-business expired in March 2007. To renew the license, the plaintiffs requested the defendants (being the owners of the premises) to give their consent in writing for the renewal of the lease as it was so required by SLA. The defendants for reasons unclear, refused to give their consent. Hence SLA also refused to renew the business-license to the plaintiffs *vide exhibit P3*. Since all of the investments made by the plaintiffs in the premises were at stake, the plaintiffs started negotiations with the defendants to get the lease renewed for a further period. The defendants agreed to negotiate. However, the terms they imposed on the plaintiffs for renewal were very unreasonable and unjust.

[9] According to the plaintiffs, the terms defendants proposed were in fact, draconian and their investments were being held ransom. The plaintiffs – PW1 – testified that the defendant started negotiations on the condition that they would increase the rent from R 10,000 to R12,000 per month for the first six months of the renewed-period and thereafter an additional R 2, 000 every month. Then there would be an increase of R 2, 000 every month for six years. These exorbitant monthly rents demanded by the defendants were being unreasonable and not financially viable for the business and the plaintiffs therefore, refused to accept the defendants’ demands. The defendants again asked the plaintiffs to purchase the premises for R 3,500,000 vide exhibit P5. As the price demanded was too high compared to the market value for an area of 1460 square meters, the plaintiffs again declined the offer made by the defendants for sale.

[10] In the mean time since the licence for restaurant business was not renewed by SLA, and the plaintiffs had to close down the restaurant and were selling only takeaway food in the premises. This resulted in great loss and hardship to the plaintiffs. In the circumstances, the plaintiffs feared that the huge investment they made for the conversion of the building, was at stake; they felt there was a strong possibility that the defendants might sell the premises at any time to third parties and thereby deprive the plaintiffs not only from realizing the fruits of their investments but also lose the entire investment itself that they had made in the building. Because of the fear, which is obviously justified, the plaintiffs attempted to secure their interest in the premises by registering a restriction against parcel C1441 with the Land Registry. On 4 July 2007, at the request of the plaintiffs’, the Land Registrar entered a restriction in terms of s 84(1) of the Land Registration Act prohibiting the defendants from dealing with the said property. However, the defendants subsequently came

before the Supreme Court in Civil Side CS 259 of 2007 and sought an order to remove the said restriction entered by the Land Registrar. The Supreme Court in its ruling dated 27 December 2007 - vide exhibit D2 - removed the said restriction.

[11] What the plaintiffs feared and legally attempted to stop from happening, did in fact, happen. The defendants on 11 May 2009 sold the property to a third party for R 2,000,000 - vide exhibit P8 - which included the investments made by the plaintiffs in the premises. Although the plaintiffs were legally in possession of the premises by having the keys in their hands, the defendants took the law into their own hands. They forcefully took over possession from the plaintiffs and delivered to the third party.

[12] The plaintiffs, reposing their ultimate faith in the fairness of law, have now come before this Court claiming damages from the defendants to recover the investments they made in the premises during the tenure of the lease. According to the plaintiffs, the following are the loss and damage they suffered on account of their lease - episode with the defendants:

Breakdown on fit out works

Restaurant Sitting area, Take Away shop and store SR

13,800.00

Bar and Store SR 27,100.00

Kitchen, preparation areas and store SR 57.700.00

WC's and Lobbies SR 31,800.00

Electrical, Air-condition, Plumbing and Drainage
installations SR 57,800.00

Externals covered area, water tank and gas store SR

25,000.00

Interest on bank loan SR 21,320.00

Moral damage SR 30,000.00

Total Rs: 264,520.00

[13] Hence, the plaintiffs pray this Court to enter judgment in their favour and against the defendants in the sum of R 264,520.00 with interest and costs.

[14] On the defence side the second defendant Tahiri Felix (DW1) testified in essence that although the defendants agreed and consented for the modification of the building and change of use, the lease automatically expired after three years. Since the defendants were planning to migrate from Seychelles to the UK, they wanted to dispose of all their properties in Seychelles. Therefore, they made the first offer to sell the premises to the plaintiffs for the price of R 3,000,000; but, the plaintiffs did not accept it. So the defendants had no other choice but to sell the property to a third party. DW1 further testified that the defendants continued to occupy the premises for over a year after the expiry of the lease. As a result, the defendants suffered loss of use. Hence she claimed R 120,000 from the plaintiff for damages in this respect.

[15] Moreover, because of the restriction, which the plaintiff had entered with the Land Registry the defendants could not sell the property immediately, as and when they were in need of funds to provide medical treatment for the first defendant, who is none else than the husband of the second defendant, who was then seriously ill in England. As a result, the defendants suffered inconvenience and

hardship for which they claimed moral damages in the sum of R 150,000. In the circumstances, the defendants urged the Court to deny the plaintiffs' claim, dismiss the plaint and award the defendants' counterclaim and enter judgment for the defendants with costs.

[16] I meticulously perused the pleadings and the evidence on record including the documents adduced by the parties in this matter. I gave diligent thought to the submissions made by counsel on both sides; and I carefully examined the relevant provisions of law and the case-law applicable to the case on hand.

[17] At the outset, I note that the instant case breaks a new ground in our contract law. The Court is called upon to determine in this matter, whether a "*legitimate expectation*" of a party based on fairness/reasonableness and to an extent, based on an *implied consensus ad idem* would give rise to an *implied term* in a private contract and vice versa. This new question is an inevitable development in the evolution of contract law. This development though seemingly a new vista in contract law, is necessary for the advancement of justice in this time and age, especially when we are embarking on the voyage of revising our Civil Code and to meet the changing and challenging needs of time and society. Indeed, all social contracts governing the individual interactions in society eventually metamorphose into legal contracts or relationships such as marriage, family, trade unions, associations, government (vide *Rousseau's - 1712-1778 - social contract theory*), etc. Hence, contract law has to evolve as society progressively evolves more and more from Status to Contract as Henry Sumner Maine observed in his book *Ancient Law* (1861) thus "we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.

[18] The concept of *legitimate expectations* originally developed in English law. It is generally applied only in matters of Judicial Review and falls within the domain of public law. It is truism that this concept is not traditionally applied in matters of contracts, which entirely falls within the domain of private contract law. This concept cannot on its own constitute a valid cause of action in contract; and the courts cannot directly apply this concept to do justice in contracts invoking the principle of fairness or reasonableness.

[19] However, now time has come to rethink, remold and extend its application to other branches of law such as contract, as it constantly evolves. In my considered view, a *legitimate expectation* of a party to a contract and a breach thereof shall constitute a valid cause of action in law provided that:

- i) the said expectation is based on an implied term of the contract;
- ii) such terms are implied on the ground of fairness or reasonableness; or an implied consensus ad idem;
- iii) the aggrieved party to that contract had relied and acted upon that implied term (as has allegedly happened in this matter); and
- iv) there had been a breach thereof, by the other party to the contract.

[20] The courts of the 21st Century cannot deny justice to anyone for lack of precedents or case law in a particular branch of jurisprudence due to stagnancy in adaptation and advancement. We cannot afford our civil law to remain stagnant in the statute-books; simply because our jurisprudence is not advancing with the rest of the legal world. As

judges, we cannot simply fold our hands on the bench to say that no case has been found in which it has been done before on the ground of legitimate expectations in contract law.

[21] This reminds me of the great remark once Lord Denning LJ made in *Packer v Packer* [1954] P 15 at 22, which runs thus:

What is the argument on the other side? Only this: that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.

[22] In English law, the concept of legitimate expectation undoubtedly arises from administrative law, a branch of public law. The phrase “legitimate expectation” first emerged in its modern public law context in the judgment of Lord Denning in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149. The fundamental idea behind this concept - especially in matters of Judicial Review - is the application of the principles of *fairness and reasonableness* to the situation (vide *Wednesbury Principles of Reasonableness*) where a person has an expectation or interest in a public body retaining a long-standing practice or keeping a promise.

[23] It is well established that if a public body has led an individual to believe that he will have a particular procedural right, over and above that generally required by the principles of fairness and natural justice, then he is said to have *procedural legitimate expectations* that can be protected; in modern times, it appears that the courts in the UK do not hesitate to extend this concept further to protect the *substantive*

legitimate expectations of the individuals vide *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.

[24] However, the concept of legitimate expectations in the private law of contract as claimed by the plaintiffs in the instant case, presents some difficulty in tailoring it to suit our needs, jurisprudence and to accord with our civil code. This concept as such is unknown to our jurisprudence. It is nowhere to be seen in the Civil Code of Seychelles. Our judges by and large do not apply or use the language of ‘legitimate expectations’ in the context of any private law of contract particularly, in breach of contracts.

[25] This is not, however, the end of the story. Once we have understood the purpose and the role played by the concept of *legitimate expectations* in other jurisdictions, where it was conceived and developed, we will be able to circumvent the difficulty in our jurisdiction and deliver justice by applying the underlying principles of fairness and reasonableness to the situation where a person had an expectation or interest in his or her dealings or interactions with others in pursuance of any contractual or other legal relationships. The underlying principles or ideas behind this concept can indeed be found as a *hidden treasure* in our law of contract, particularly, in our Civil Code though it appears in different names and forms and using a different language of description.

[26] In fact, art 1135 of the Civil Code articulates this principle that “terms in a contract may be implied *inter alia*, for fairness/reasonableness” and a party to that contract may legitimately expect, rely and act upon that implied term, in respect of all consequences and in accordance with its nature. The courts have unfettered jurisdiction to impute or imply a term which is reasonable and necessary - as suggested by Scrutton LJ in *Reigate v Union*

Manufacturing (Ramsbottom) [1918] 1 KB 592 at 605- in the interest of justice and fairness and grant remedies accordingly. This article reads in clear terms thus:

Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature

[27] It is also pertinent to note that art 1160 of the Civil Code reads thus:

Usual clauses shall be implied in the contract even if they are not expressly stated.

[28] Therefore, it goes without saying that in our jurisdiction it is lawful for a party to have legitimate expectation that in the absence of expressed terms in a contract, fairness would come in rescue, in respect of all the consequences and give rise to the necessary implied terms in the contract in accordance with its nature, and so I hold.

[29] Coming back to the case on hand, I find on evidence that the defendants through their conduct, consent and approval impliedly agreed that the plaintiffs might take a bank-loan and invest on the improvement and restructuring of their building and thereby convert its use from that of a supermarket to a restaurant. The defendants also signed the necessary documents for change of use as required by the government authorities such as Licensing and Planning. Furthermore, I find it quite strange on part of the defendants that the property which they offered to sell for R 3,500,000 to the plaintiffs, was sold to a third party for R 2,000,000, which is an improbably generous

discount. All these swing the balance of probabilities in one clear direction.

[30] I completely accept the plaintiffs' evidence in every respect including the fact that the defendants were imposing draconian terms for the intended renewal of the lease. They did so with the intention of closing all the doors so as to prevent the plaintiffs from renewing the lease. In the circumstances, I find that the plaintiffs rightly and genuinely had *a legitimate expectation* that the defendants would renew the lease on reasonable terms after the expiry of the initial period and the plaintiffs might continue the restaurant business for relatively a longer term in the premises to protect their interest since they had invested a large sum of money on improvements and alteration of the building.

[31] At the time, when the parties entered into the lease agreement, if they had given a thought for a moment to the possibility of non-renewal of the lease after the expiry of the first tenure for some reason or the other (as has happened now) they would have certainly inserted a term in fairness to secure or recover the investment made by the plaintiffs in the premises. However, this did not happen. They did not give a thought to provide for such contingency. There is no expressed term in the lease agreement to save such contingency. Hence, fairness dictates that the Court should *imply into the contractual obligation and read* an implied term in the lease agreement (exhibit P1) to the effect that at the expiry of the lease, in case the renewal was not possible, the defendants shall compensate the plaintiffs for the investments made on improvements and alterations of the building. Having regards to all the circumstances of the case, it is reasonable and necessary for the Court to impute or imply the said term - in order to do what is fair and just between the parties. This is the view, which

Lord Denning also put forward in *Greaves & Co (Contractors) v Baynham Meikle & Partners* [1975] 1 WLR 1095 and expressed more fully in *Liverpool City Council v Irwin* [1976] 1 QB 319.

[32] Now, one may query “what is the extent of the implied term a court may impute?” This cannot be solved by simply speculating what term both parties would have agreed upon, had they foreseen the contingency at the time they entered into the agreement or simply ascertaining what was necessary in the circumstances; but, the Court indeed, has to decide “what is reasonable having regard to all the circumstances of the case under consideration?”. This is to be decided as a matter of law, not as matter of fact. As the Right Hon Lord Wright of Durley put it lucidly in his book *Legal Essays and Addresses* (Cambridge University Press, 1939) 259:

the truth is the Court ... decides this question in accordance with what seems to be just or reasonable in its eyes. The judge finds in himself the criterion of what is reasonable. The court is in this sense making a contract for the parties - though it is almost blasphemy to say so.

[33] It is also pertinent herein to note what Lord Radcliff stated so elegantly in *Davis Contractors v Fareham Urban District Council* [1956] AC 696, 728, when he said of the parties to an implied term thus:

their actual person should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than

the anthropomorphic conception of justice, is and must be the court itself.

This is the approach the Court has also pursued in this matter in order to meet the changing needs of time in the evolving domain of contract law, and to accord with reasoning and justice.

[34] I shall now turn to the defendants' counterclaim against the plaintiffs for damages. In fact, I do not find on the evidence any reasonable cause of action to sustain the counterclaim in law against the plaintiffs. The first limb of the defendants' claim is that the plaintiffs continued to occupy their premises over a year after the expiry of the lease, which overstay according to them was illegal. Consequently, the defendants claim that they suffered loss of use. Obviously, it is not illegal for any tenant to continue occupy the demised premises after the expiry of the written lease agreement.

[35] Upon expiry of the lease, the tenant becomes a statutory tenant by operation of law and retains possession in terms of s 12(1) of the Control of Rent and Tenancy Agreements Act - vide: *Babema Company (Seychelles) v Green* (1979) SLR 82 following *Remon v City of London Real Property* [1921] 1 KB 49, 54. As a statutory tenant, the occupant is entitled to the benefits of all the terms contained in the lease agreement as long as he observes all the terms expressed or implied in it. He is deemed to be in lawful occupation in the eye of law unless and until evicted by due process of law. In any event, the plaintiffs in this matter had substantive rights to legally retain possession of the premises even after the expiry of the lease, since they had invested in the superstructure of the premises - *droit de superficie* - vide art 555 of the Civil Code and *Samson v. Mousbe* (1977) SLR 158.

[36] The second limb of the defendants' claim is that the plaintiffs committed a fault and caused hardship and inconvenience by entering a restriction against land Title C1441 with the Land Registry. This prevented the defendants from effecting registration of any dealing in respect of the said title. According to the defendants, they could not sell the property immediately. This caused them loss and damages.

[37] As I see it, the plaintiffs evidently had a legal right and justification to enter a restriction with Land Registry against the said title, since they had a right of retention and a substantive interest in the property until they were compensated by the defendants for the investments they had made therein. Hence, I hold that the defendants' counterclaim against the plaintiffs in this respect is also not maintainable in law. Accordingly, I dismiss the defendants' counterclaim in its entirety.

[38] In the final analysis and for the reasons stated hereinbefore, I enter judgment for the plaintiffs and against the defendants in the total sum of R 264,520.00 with interest on the said sum at 4% per annum (the legal rate) as from the date of plaint and with costs of this action.