

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS17/2017

[2018] SCSC 548

DOMINIQUE GUICHARD

First Plaintiff

SUZANNE GUICHARD

Second Plaintiff

versus

DAVID SAVY

Defendant

Heard: 28 September 2017 & 19 March 2018
Counsel: Ms. E. Wong for plaintiffs
Mr. S. Freminot for defendant
Delivered: 11 June 2018

JUDGMENT

Vidot J

The Cause of Action

[1] The Plaintiffs sue the Defendant for breach of Contract and more specifically for breach of a Promise of Sale (Exhibit P1) in that the Defendant failed to complete an access road to access their property. The Plaintiffs property was purchased from the Defendant. The Promise of Sale was signed on 12th January 2015 and as per clause 4.3, the Defendant

was to build at his own cost, an access road which should have been completed by 12th January 2016. In default of completion of the road, as per clause 4.3, the Defendant was liable to a penalty of 1.5 % of the purchase price of the property for every month or part thereof that the road remains incomplete. They are making a claim of Euros Twenty One Thousand Four Hundred and Fifty (€21,450/-) (SR286, 357/-) for the breach and an additional Seychelles Rupees Forty Five Thousand (SR45,000/-) for anxiety and inconvenience

The Plaintiffs Evidence

- [2] Both Plaintiffs testified before Court and did not call any other witnesses. They testified that the parties entered into a Promise of Sale on 12th January 2015 (Exhibit P1) whereby the Defendant agreed to sell to the Plaintiffs a portion of land to the extent of 1500 square meters (hereafter “the Property”). This Property was to be extracted from parcel H10861. The extraction was completed around 27th April 2015 and the Property was marked as land title No. H11853. The Property was subsequently transferred to the Plaintiffs as per Instrument of Transfer 29th September 2015 (Exhibit P3) and registered at the Office of the Land Registrar on 11th November 2015.
- [3] The purchase price as per Exhibit P1 was One Hundred and twenty Thousand Euros (€120,000/-). The consideration was payable in in 3 different tranche but due to an agreement between the parties, it was agreed that if paymentis made in a lump sum, the consideration would be reduced to One Hundred and ten Euros (€110,000/-) which the Plaintiffs paid to the Defendant as per exhibit P3.
- [4] It was inter alia a term of the Promise of Sale that the Defendants would build the concrete access road from the main road to the Property. The road was to be completed by 12th January 2016. In default of the completion of the road within the prescribed time the Defendant would be liable to the Plaintiffs, a penalty equivalent to 1.5% of the sale value of the Propertyas aforementioned.
- [5] The Plaintiffs allege a breach of the Promise of Sale and that despite repeated requests the Defendant has failed and neglected to complete the road. They pray that the penalty

clause is activated and that the Defendant further makes payment of SR45,000/- for anxiety and inconvenience.

The Defence

- [6] In the Statement of Defence the Defendant does not dispute the Promise of Sale and the terms and conditions contained therein. The payment of the consideration for the purchase of the Property is acknowledged. The defence further acknowledged that the access road should have been completed within 12 months of the date of the signature of the Promise of Sale and in default, the penalty clause activated as averred in the plaint.
- [7] However, the Defence avers that the delay in completing the road access has been caused by several factors. These include *force majeure* due to heavy rains that construction works had to be put on hold; that the Plaintiff's commenced construction on their Property before the access was completed, thus hindering the possibility of completing the access road; denial of access by one Mr. Hodoul, owner of an adjacent Property, impeded progress on construction and that the Plaintiffs who visited their Property regularly, were fully aware of the challenges faced by the Defendant in constructing the road. The Defendant further claims that the Plaintiffs were further aware that the Defendant suffered some personal distress and impliedly condoned the delay.
- [8] Furthermore, the Defence seems to suggest that the claim is premature because the penalty clause can only be activated after the road has been completed.

The Defendant's Evidence

- [9] The Defendant testimony in essence consolidated averments in the Defence but says that there was no breach of the Promise of Sale. He testified that due to heavy rains for 6 days after commencement of works, the Seychelles Planning Authority intervened and gave a stop notice effective for a certain period. That is because the land had become unstable. He argued that the road already touches the boundary and that what needs to be completed is a minor portion but that he is unable to complete just yet because that would disturb the construction that it going on, on the Plaintiffs' Property. He further testified

that since construction of the access requires the blasting and removal of a huge boulder, such work would impede on the construction works at the Plaintiffs Property.

- [10] The Defendant testified that he has never disagreed with the penalty payment of 1.5% of the purchase price of the Property pursuant to clause 4.3 of Exhibit P1, but maintains the defence of force majeure and the premature commencement of works on the Plaintiff's land. He however disputes the SR45,000/- being claimed as moral damage.

Analysis and discussions of law and evidence

The Breach

- [11] The Defendant has in his testimony admitted that the road has not been completed and maintains that the penalty clause cannot be activated for delays occasioned by him. The Court conducted a locus in quo on 20th March 2018 and the road has not been completed. That is not in dispute. At some point in his testimony, the Defendant acknowledged that he is willing to comply with the penalty clause as he is the one who suggested that it be inserted in the Promise of Sale. However, he insists that there were extraneous factors that impacted on his ability to complete the road. It is his position that the penalty clause if activated is payable only in future when the road has been completed.

- [12] In my view the issues to be resolved are;

- (i) Was the non-completion of the road the result of factors not attributed to the Defendant?
- (ii) If default is solely due to Defendant's breach of Promise of Sale, what quantum of penalty is payable, and
- (iii) Are the Plaintiffs entitled to damage for anxiety and inconvenience?

- [13] Article 1134 of the Civil Code of Seychelles ("the Code") provides;

"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 for causes which the law authorises.

They shall be performed in good faith”

The contract at the root of this action is the Promise of Sale which still stands valid as certain condition in that contract are yet to be performed and in actual fact should have already been performed. The condition yet to be satisfied is the completion of the access which includes blasting and removal of a huge boulder. The Defendant does not dispute that the access is yet to be completed. This was confirmed when the locus in quo was conducted.

- [14] Therefore, the Defendant is bound by the terms and conditions enumerated in the Promise of Sale. Article 1135 of the Code provides that *“agreements shall be binding not only in respect of all consequences which fairness, practice or the law imply into the obligation in accordance with its nature”*. The Plaintiffs seek the performance of 2 main conditions, namely; the completion of the access road and the blasting of a large boulder (as per Article 4.3 and 4.4.2 as per the agreement). The Defendant is bound by the terms of these provisions. Failure to comply with the terms of these conditions as prescribed in the Promise of Sale amounts to a breach of that agreement.

Activation of the Penalty Clause

- [15] The Defendant argued that if a breach is established, the penalty clause under Article 4.3 cannot be immediately activated. It is the Defendant’s contention that the clause can only be activated upon final completion of the road. Article 4.3 of the Promise of Sale provides that the Defendant *“will provide at his own cost, concrete road access to the Property as indicated by A in Annex1and it is expected that construction of the road in February or March 2015 construction is projected to take approximately 6 monthsand...shall be completed within a maximum of 12 months of the signing of the Promise of Sale and that in the unlikely event that the construction road was to take more than twelve (12) months, the Vendor agrees to suffer a delay penalty calculated at 1.5% of the sale value of the Property for every month or part thereof”*. The construction of the road has been delayed by more than a year.

[16] I agree with Counsel for the Plaintiffs' submission that the Defendant's proposition that the penalty clause can only be activated after the road is completed is absurd. Actually, I don't consider it to be grounded on sound legal base. The Article clearly provides that the clause shall be calculated at 1.5% for every month or part thereof, without more. There is neither express provision nor any imputation that the clause can only be activated after the road access has been completed. The Defendant was placed on notice (*mise en demeure*) as provided for under Article 1139 of the Code, (see **Attorney General v Armitage [1956-1962] SLR No. 8 273 and Jumeau v Anacoura [1978] SLR 180**) through letters dated 02nd March 2016 (Exhibit P2), 17th May 2015 (Exhibit P5(1) and 21 December 2016 (Exhibit P4(1) reminding the Defendant that payment of the penalty was due, yet there was no response to any of the letters challenging the same. Article 1146 of the Code further provides that "*damages are only due when the debtor is under notice to fulfil his obligations; provided, nevertheless that the thing which the debtor had bound himself to give or to do could only be given or done within a fixed time which he has allowed to elapse.*"

[17] Similarly as queried by Counsel for the Plaintiffs, I too ask; what if in another 4 or 5 years the access is not completed, do the Plaintiffs wait for the additional years before making a claim? That cannot be so and I don't believe that such was the intention of the parties when they entered in the agreement. Therefore, I find that the penalty clause can be activated immediately after a breach of the penalty clause.

Force Majeure / Act of God

[18] The Defendant pleaded force majeure and attributes the delay to adverse weather condition and other factors. In particular the Defendant testified that due to heavy seasonal rains, the terrain became clogged and precarious and that he had to seek means to stabilize the land and prevent any slides. He added that the Seychelles Planning Authority had to intervene and issued a stop notice to prevent any construction for a certain period until such time that the land was stabilized. Article 1148 of the Code provides at paragraph 1 that "*damages shall not be due when, as a result of an act of God or an inevitable accident, the debtor was prevented from giving or doing what he had*

undertaken or he did what he had been forbidden to do. If performance of the contract has only become impossible partly or by an inevitable accident and if the Defendant is also at fault, the liability of the defendant shall be reduced in proportion with his share of liability.”

[19] I take judicial notice that during the period of December to March Seychelles usually experience heavy seasonal rains. I note that the Plaintiffs’ Attorney did not challenge the Defendant through cross-examination that there wasn’t any heavy rain. Having had the opportunity of visiting the site of the road and Property, which are relatively sloppy, heavy rains will definitely affect any construction. I believe the Defendant when he testified that for 6 days there were heavy rains that hampered work progress. I also believe the Defendant’s testimony that for some days work had to be stopped to allow the site to be stabilized. However, I note that despite testifying that the Seychelles Planning Authority issued him with a stop notice, advising that construction should be stalled for a period of time, the Defendant did not produce the stop notice to confirm the same. If damages is to be awarded and in so doing that the pleading of force majeure be accepted to reduce the sum of the award, the same will be affected by the absence of such documentary evidence.

Other Intervening and/or Inevitable Matters

[20] The defendant further complained that since the Plaintiffs commenced construction on their house prematurely, that caused them unnecessary delay with the construction of the access road and in particular the blasting a big boulder necessary to complete the road to the Plaintiffs’ house. Clause 4.4.2 places an obligation on the Defendant to blast and remove that boulder as it directly obstructs the access. When the locus was conducted it was observed that the boulder was still standing.

[21] The Plaintiffs produced the Planning Authority’s permission to build certificate dated 08th March 2016 (Exhibit P6). That document confirms that the architectural plans were presented on 23rd December 2015 and approved on 08th March 2016. I believe the Plaintiffs testimony which was not traversed by the Defendant that construction on their house started in January 2017. In fact the construction of the house began after

construction of the road should have completed. Therefore, the Plaintiffs should be commended for having explored and adopted ways of commencing construction, thereby mitigating their loss.

[22] The Defendant also referred to the fact that he had had experienced a tragic personal problem, which the Plaintiffs were aware of. The Defendant has not demonstrated to court how such problem amounted to force majeure or an intervening act that impacted his obligation to complete the road. The Defendant also complained that he experienced financial difficulty. That again cannot be interpreted as force majeure. I also note as per Exhibit P4(1), the Plaintiffs assisted the Defendant in finding buyers to purchase a portion of his Property so that he could have access to finance to honour his obligation under the Promise of Sale.

[23] The Defendant testified that he is unable to blast the rock because the Plaintiffs have commenced construction. Actually, I hold the view that the Defendant should attend to such works immediately as at the time that the locus was conducted, the house was still under construction with no windows fixed. Actually if the Defendant was to wait till completion of the house to be completed, if any damage was to be caused as a result of any blasting, the impact will be not serious, unlike if done now. Therefore, I strongly recommend that such work is done immediately and that the Plaintiffs agree to allow such works. I assess that a maximum period of 4 weeks is more than sufficient to complete the blasting and removal of the boulder. I make the assessment because I recognized that since the Plaintiffs have started construction, the blasting of the rock will have to be more contained and effected with an abundance of care. I also believe that to be fair and just, the penalty clause should not have any applicability during that period of blasting and removal of the boulder

Findings

[24] After consideration of matters above, the Court makes the following findings;

- i. The Promise of Sale is still valid;

- ii. The Defendant has breached clauses 4.3 and 4.4.2 in that the access road is yet to be completed and the large boulder yet to be blasted and removed from the access area respectively;
- iii. As a result of such breach the Defendant is liable to the Plaintiffs at a rate specified in clause 4.3.
- iv. There was force majeure in the form of heavy rains that impacted on the construction of the road. However, the length of the period for which the Defendant could not perform any construction work cannot be accurately calculated as the Defendant did not call any testimony to that effect and failed to produce the alleged stop notice issued by the Planning Authority.

Award of Damages

[22] The Plaintiff prays for 2 major heads of damages;

- (a) Damage for breach of Clause 4.3 of the agreement, therefore activating the penalty clause which at the time of filing the Plaintiff amounted to €21,450/- or SR286,375.50;
- (b) Damage for anxiety and distress in the sum of SR45,000/-

The Plaintiffs further seek specific performance to compel and cause the Defendant to complete the road access or failing which to bear the cost of having it completed.

(a) Penalty Clause

[23] As far as the breach of Clauses 4.3 and 4.4.2, I am satisfied that the Plaintiff has discharged the burden on the balance of probability and established that the road access has not been completed and the boulder has not been blasted and removed from the Property. In fact in his testimony, the Defendant said; "*I never disagreed with the 1.5 %*" and "*I have admitted everything, except the SR45,000/-*". This is admission by the Defendant that he is liable to the Plaintiffs for the breach.

[24] As aforementioned, I consider that there was force majeure due to heavy rains. I will in making the award give the benefit for 1 month to the Defendant whereby the penalty clause will have applicability.

(b) Moral damage

[25] As regards the claim for anxiety and distress the Defendant disputes that he is liable to the Plaintiffs for that sum. That invites court to decide whether award of damages for breach of contract is permissible. I agree with Counsel for the Plaintiffs that award for moral on breach of contract may be awarded and justified in some cases. Counsel cited **Resort Development v Allied Builders (Seychelles) Limited SCA 13 of 2012**, whereby Domah JA stated;

*“We have gone through the pleadings and the judgment. The award [for moral damages for breach of contract] was justified. We find it specifically particularized in the Answer to Particulars and supported by evidence adduced. For example, that laches which caused the delay had a prejudicial effect on the business image of the respondent. A construction which should have been completed in April 2001 or thereabouts was still not completed by February 2006**Kopel v Attorney General [1955] SLR 351** is clear on the point that even if moral damages may not as a rule be awarded for breach of contract, in certain circumstances, the Court may do so”*

I agree and endorse the position adopted in the above cited case. However, it can be distinguished from the present case. In **Resort Development v Allied Builders (Seychelles) Limited** (supra) there is no indication that a penalty clause was prescribed in the agreement unlike the present case. A penalty clause as in the present case, at its root serves to compensate an aggrieved party with damages for inconvenience and anxiety. In short, it covers moral damage. Since the penalty clause, in this Court’s view caters for such damages globally considered to be moral damage, to allow this head of damage will amount to the Plaintiffs benefiting twice for the same. This head of damage is therefore denied.

[25] I further do not consider the Plaintiffs to have suffered any serious inconvenience and anxiety. The house is not yet completed. When the Court visited the Property, I noted that there is still considerable work to be performed though progress was significant. The Plaintiffs in mitigating their loss managed to get materials on site. The position would have been different if the Plaintiffs had completed the house and they were deprived the possibility of enjoying the same caused by the road access not being completed.

Final Determination.

[26] I therefore make the following award and Orders;

- (i) In terms with Clause 4.3 of the Promise of Sale the Defendant shall pay to the Plaintiffs €1,650 per month or part thereof that the access road remains incomplete. At the time of filing the Plaint the sum amounted to €21,450/- or SR286,375.50. The total sum to date for which the Defendant shall pay the Plaintiffs amounts to €47,850 less €1650 (deducted due to heavy rains) amounting to **€46,200/-** (or its equivalent in Seychelles Rupees) with interest at the legal rate. The penalty shall continue to apply until such time that the road is completed.
- (ii) The Defendant shall take such steps necessary to complete the access road and demolition and removal of the boulder as per Clause 4.4.2 of the Promise of Sale within 3 months hereof. In the alternative, parties can agree that the Plaintiffs undertakes the work but costs for the same shall chargeable to the Defendant. In the event that the Defendant starts and complete the works within 3 months, he shall benefit from a 1 month waiver of the penalty. Should the work be undertaken by the Plaintiffs, this waiver shall not apply.
- (iii) Cost is awarded to the Plaintiff.

Signed, dated and delivered at Ile du Port on 11 June 2018

A handwritten signature in blue ink, appearing to be 'M. Vidot', written over a horizontal line.

~~M. Vidot~~

Judge of the Supreme Court