

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CC8/2016**

[2018] SCSC 858

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**KARTHIK PARTHIBAN**

Plaintiff

Versus

**SOONA OLIAJI**

First Defendant

**DARIUS OLIAJI**

Second Defendant

**MEHER OLIAJI**

Third Defendant

**BEROZE OLIAJI**

Fourth Defendant

**OLIAJI PROPERTIES AND LEISURE (OPAL) Co. LTD**

Represented by **SOONA OLIAJI**

Fifth Defendant

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Heard:

Counsel: Mr Camille for plaintiff

Mr Shah for defendants

Delivered: 19 September 2018

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**JUDGMENT**

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## Robinson J

- [1] The plaintiff is a Seychellois national. The first, second, third and fourth defendants are the shareholders of the fifth defendant. The fifth defendant is a company incorporated in Seychelles.
- [2] The plaintiff, by an amended plaint, dated 28 March, 2016, and filed on 30 March, 2016, seeks by way of specific performance of an agreement, dated 9 November, 2006, the transfer by the first, second, third and fourth defendants (the shareholders of the fifth defendant) – jointly and severally – of fifty percent of the shares held by them in the fifth defendant, to the plaintiff.
- [3] It is not disputed that on 9 November, 2006, Siva Limited Bermuda and the shareholders of the fifth defendant, represented by the first defendant, entered into a joint venture agreement for a tourism project (hereinafter referred to as the "*Joint Venture Agreement*") P3.
- [4] On 31 December, 2012, Siva Limited Bermuda and the plaintiff entered into an *ASSIGNMENT AGREEMENT* (P21), whereby Siva Limited Bermuda "*assigned the ... Joint Venture agreement dt. 09<sup>th</sup> November 2006 to and in favour of the Assignee [the plaintiff]*".
- [5] The plaintiff in his amended plaint averred at paragraph 10 —

"10. ...that in pursuance to a further agreement dated 31 December 2012, (hereinafter the "*Assignment Agreement*"), **all rights, powers and obligations** under the Agreement between Siva Limited Bermuda and/or any of its affiliates there under and the Defendants, were duly assigned onto Plaintiff and accepted by Plaintiff as per the terms and conditions stated in the same Assignment Agreement."

Emphasis is mine

- [6] The plaintiff, in his reply to the defendants' request for further and better particulars of the amended plaint, averred, "*3. Under Paragraph 10 of the Amended Plaint: ... (b) As per the same Assignment Agreement, Mr. Sivasankaran **assigned all his rights accrued** in the*

*agreement of the 9 November 2006 between the Defendants and Siva Limited Bermuda, to Plaintiff*". [Emphasis is mine].

[7] The defendants, in their defence, dated 20 September, 2016, and filed on 20 September, 2016, have raised a number of arguments in *limine litis* contesting the claim of the plaintiff, specifically —

- "1. The Defendants aver that the purported assignment by Siva Limited Bermuda to the Plaintiff dated 31<sup>st</sup> December 2012 of the joint venture agreement between Siva Limited Bermuda and the first four Defendants dated 9<sup>th</sup> November 2006 is not valid and binding on the Defendants.
2. The Defendants are not parties to the said Assignment and not having consented to this Assignment are not bound by it.
3. The 1<sup>st</sup> to 4<sup>th</sup> Defendants having signed a joint venture agreement with Siva Limited Bermuda having rights and obligations on both parties, cannot be bound by the said Assignment to the same rights and obligations as they have not consented to the Assignment replacing Siva Limited Bermuda by the Plaintiff."

[8] The defence on the merits denied the claims of the plaintiff and asked this court to dismiss the amended plaint with costs.

### **Joint Venture Agreement and *ASSIGNMENT AGREEMENT***

[9] In light of the issues raised in this suit, this court finds it appropriate to set out the Joint Venture Agreement and the *ASSIGNMENT AGREEMENT* (so far as they are relevant) —

#### *Joint Venture Agreement:*

"This agreement made this 9<sup>th</sup> day of November 2006

BETWEEN

**The Shareholders of Oliaji Properties and Leisure (OPAL) Co. Ltd**  
represented by Soona Oliaji (Soona)

AND

**Siva Limited Bermuda**

**IT IS AGREED AS FOLLOWS:**

- (1) The parties by this agreement wish to bind themselves to their main obligations stipulated below, to be followed by a more detailed agreement of terms and conditions, which shall provide for the organization, management and good order of the company and project.
- (2) Soona's contribution shall be the land parcels V8734, V8735, V8737, V8738, V8739, V8740, V8741, V8742, V9062 and V8331 situate at Beau Vallon Mahe totalling 12591 sq. metres free of any encumbrances which land is valued at 1 Million Pound Sterling.
- (3) Siva's contribution shall be the sum of Pound Sterling 1 Million, which shall only become due, once planning permission for a Hotel project is approved. However whatever monies are required for preliminary matters and planning permission will be provided by Siva.
- (4)
  - (i) Each party shall hold 50 % equity in a new company to be formed, or the existing company as may be subsequently decided by the parties.
  - (ii) Each party shall have an equal number of Directors. The Chairman for the first five years shall be nominated by Soona and the Chairman will not have a casting vote.
  - (iii) The Chairman for the subsequent 5 years shall be nominated by Siva.
- (5) Siva shall arrange (if the parties so decide) for a loan of up to 20% of the project cost at 8.5 % interest, repayment to start once the project is operational. Repayment shall be from revenue of the project on a priority basis.
- (6) The parties shall try to resolve any disputes between them amicably, but in the event that this is not possible then
  - (a) Soona shall stipulate a price for her shares over which Siva shall have the option of either buying or selling.
  - (b) In the alternate if Soona wants Siva to stipulate a price, then Soona would have the option of purchasing or selling Siva's shares at that price.
- (7) The completed project shall be managed by a reputable Hotel group.

- (8) This Agreement shall become operational only after Siva receives a due diligence on the properties by a legal counsel and communicates his satisfaction therewith to Soona, in writing.

Made in double original this day, month and year above written...".

ASSIGNMENT AGREEMENT:

**"ASSIGNMENT AGREEMENT**

This Assignment Agreement executed on 31<sup>st</sup> December, 2012

By and Between

M/s.Siva Limited Bermuda, a company incorporated under the laws of Bermuda, represented by its Director C. Sivsankanan, having its registered address at Clarendon House, 2 Church Street, Hamilton HM 11 Bermuda (hereinafter referred to as ASSIGNOR")

And

Mr. Karthik Parthiban S/o. Mr. Ganesan Parthiban aged about 23 years having address at St. Joseph, Anse royale, Mahe, Seychelles (hereinafter referred to as the "ASSIGNEE")

WHEREAS

The Assignor herein has entered into an Agreement on 9<sup>th</sup> November, 2006 ("Joint Venture Agreement") with "The Shareholders of Oliaji Properties and Leisure (OPAL) Co. Ltd", a company incorporated under the laws of Seychelles and having its registered address at Seychelles (hereinafter referred to as "the Company") for joint venture of development of land parcels V8734, V8735, V8736, V8738, V8739, V8740, V8741, V8742, V9062, V8331 situated at Beau Vallon Mahe totalling to an extent of 12 591 sq,mtrs.

Under the said Joint Venture agreement, the Assignor herein had paid advances to the said Company in a sum of GBP 50,000 on 20<sup>th</sup> December 2006 and GBP 110,000 on 9<sup>th</sup> August 2007 ("Advances").

The ASSIGNOR intends to assign the said Joint Venture Agreement to and in favour of the ASSIGNEE herein and is desirous of reducing the same on the following terms:

NOW THIS ASSIGNMENT AGREEMENT WITNESSETH AS FOLLOWS:

1. The Assignor hereby agrees and confirms to have assigned the said Joint Venture agreement dt.09<sup>th</sup> November 2006 to and in favour of the Assignee herein.

2. The said Assignment shall take effect from 31<sup>st</sup> December, 2012.
3. The Assignor hereby confirms that henceforth with effect from 31<sup>st</sup> December, 2012 all the rights accrued to the Assignor under the said Joint Venture Agreement is hereby assigned to the ASSIGNEE herein.
4. In view of the said Assignment, the ASSIGNEE herein shall accrue all rights and control over all investments, advances and services rendered by the M/s.Siva Limited Bermuda under the said Joint Venture Agreement.
5. In view of the said Assignment, the ASSIGNOR herein shall absolve itself from all responsibilities, obligations under the said Joint Venture. Any amount due and payable by the said company including but not limited to the advances GBP 160,000 made by the ASSIGNOR shall henceforth payable to the account of the ASSIGNEE.
6. In view of the said Assignment, henceforth the ASSIGNEE shall decide upon all further course of actions under the said Joint Venture Agreement and shall be legally entitled to deal with, communicate and correspond with the said Company "The Shareholders of Oliaji Properties and Leisure (OPAL) Co. Ltd".

IN WITNESS WHEREOF, THE ASSIGNOR AND ASSIGNEE  
affix their signatures on the day, month and year above written

ASSIGNOR

ASSIGNEE".

### **The evidence for the plaintiff**

- [10] *The evidence of Mr. Chinnadurai Pillai.* Mr. Pillai testified on behalf of the plaintiff, pursuant to a general power of attorney. The plaintiff is in California, where he is studying. Mr. Pillai was the "*business development manager*" of Mr. Chinnakannan Sivasankaran, who is the uncle of the plaintiff.
- [11] The *ASSIGNMENT AGREEMENT "assigned the ... Joint Venture agreement dt. 09<sup>th</sup> November 2006 to and in favour of the Assignee [the plaintiff]"*.
- [12] Mr. Pillai testified that clause 8 of the Joint Venture Agreement was fulfilled.

- [13] The project obtained approval from the Seychelles Investment Bureau (hereinafter referred to as "SIB") on 18 February, 2009, P5 following which the issue of the transfer of shares of the fifth defendant to Spring Wonder Limited arose. Spring Wonder Limited is a special-purpose vehicle, which was created by Mr. Sivasankaran, on 28 January, 2010, for the hotel project. The first, second, third and fourth defendants resolved, at an *"Extraordinary General Meeting"*, held on 15 July, 2009, to authorise the directors of the fifth defendant to allot 10,000 shares of the fifth defendant to Mr. Sivasankaran. On 30 April, 2010, at a *"Meeting of Directors"*, the directors of the fifth defendant resolved to *"allot 10,000 shares of R1/- each to Spring Wonder Limited of the British Virgin Islands ..."* (P7).
- [14] Spring Wonder Limited obtained Government Sanction — *"Immovable Property Transfer Restriction Act Sanction for the acquisition of shares in Oliaji Properties and Leisure (OPAL) Limited by Spring Wonder Limited"*, IPTR/908 of 15 April, 2010, — to acquire shares in the fifth defendant P10. The said Government Sanction was extended, on 3 April, 2012, for a period of three months, effective from 3 April, 2012, to allow Spring Wonder Limited to complete the procedures for transfer of shares of the fifth defendant.
- [15] This court sets out P10 (so far as relevant) —

"Spring Wonder Limited  
C/O The Wharf Hotel and Marina  
P.O. Box 740  
Victoria

Dear Sirs

Immovable Property (Transfer Restriction) Act  
Sanction for the acquisition of shares in Oliaji Properties and Leisure  
(OPAL) Limited

Sanction is hereby granted to Spring Wonder Limited to subscribe to 10,000 shares (representing 50% shareholding) in Oliaji Properties and Leisure (OPAL) Limited, for the consideration of £1M (One Million British Pound Sterling), subject to the following conditions;

1. The sanction Processing fee of SR1000 is paid to the Ministry of National Development;
2. Money to pay the Consideration and the Sanction Processing fee must be brought into Seychelles through a

local commercial bank and exchanged into Seychelles Rupees.

Proof of payment to this effect must be produced to the Registrar General when the deed of transfer is transmitted for registration. Payment of the fee referred to above, must be made in Seychelles Rupees to the respective Government Authority specified above, calculated at the prevailing exchange rate of the Commercial Bank.

Your attention is drawn to Regulation 8(1) of the Immovable Property (Transfer Restriction) Act Fees Regulations 1974 which provides that:-

"Sanctions granted under the provisions of the Act shall automatically lapse at the end of one year from the date upon which they were first granted if during that time the immovable property or rights therein to which they relate have not been either purchased or leased as the case may be."

...".

- [16] Mr. Pillai also referred this court to a letter dated 6 May, 2010, emanating from the second defendant, in his capacity as a director of the fifth defendant (P8), whereby the fifth defendant acknowledged having received 160,000.00/- pounds sterling from Mr. Sivasankaran in relation to the issue of the transfer of 10,000 shares of the fifth defendant to Spring Wonder Limited. That letter (P8) mentioned "*on the confirmation of the receipt [GBP 840,000] by [Oliaji Properties and Leisure Ltd] bankers [they] will immediately issue the share certificate and file the return of allotment and register the same with Registrar of Companies*". Mr. Pillai testified that the project had not received planning permission on the date of receipt of the letter dated 6 May, 2010, (P8). At the time of the receipt of P8 Mr. Sivasankaran had requested for a shareholders' agreement on the basis of clause 1 of the Joint Venture Agreement. The parties could not agree to a shareholders' agreement.
- [17] On 6 October, 2011, Mr. Pillai received a letter from the first defendant — "*Re: BEAUVALLON HOTEL PROJECT*" — addressed to Mr. Sivasankaran (P12). That letter (P12) informed Mr. Pillai that the first defendant did not wish to continue with the hotel project. Mr. Sivasankaran wrote to the first defendant, by a letter dated 23 November, 2011, — "*Ref: Letter dated 6<sup>th</sup> October 2011 – Beau Vallon Hotel Project*" — informing her that he "*demand[s] that the agreement of the 9<sup>th</sup> November, 2006 which is still valid be*



*respected"* (P13). P12 and P13 led to more written communication between the parties in relation to their respective position with respect to the Joint Venture Agreement (see P15, P16, P17 and P19).

- [18] Mr. Basil Hoareau, an Attorney-at-Law, instructed by Mr. Sivasankaran, wrote to the first defendant, on 16 October, 2012, P19, telling her that they [the first, second, third and fourth defendants] have breached their contractual obligations and demanding *inter alia* that they transfer a "*total fifty percent of the shares in Opal to Spring Wonder Limited, failing which legal proceedings will be instituted*".
- [19] He testified that the first, second, third and fourth defendants never allotted to the plaintiff any of the shares of the fifth defendant.
- [20] He denied the allegations of the defendants, contained in their defence, that Siva Limited Bermuda had breached its agreement by not providing funds to enable the project to obtain Town and Country Planning Authority approval; and that Spring Wonder Limited did not honour Government Sanction conditions. In reply to both allegations, he stated that they were prepared to advance the money upon signature of a shareholders' agreement, which they had asked them [the first, second, third and fourth defendants] to prepare.
- [21] The plaintiff is seeking by way of specific performance of the Joint Venture Agreement, the transfer by the first, second, third and fourth defendants jointly and severally of fifty percent of the shares held by them in the fifth defendant, to the plaintiff.
- [22] Mr. Pillai was cross-examined in relation to condition 2 of the Government Sanction conditions. It was put to him that the first, second, third and fourth defendants never transferred any shares of the fifth defendant to Siva Limited Bermuda because Siva Limited Bermuda did not comply with condition 2 of the Government Sanction conditions. His response was that it was a precondition of the Joint Venture Agreement, specifically clause 1 of it, that a shareholders' agreement must be signed, by the parties, before any money is transferred to the bank. Later in the proceedings, he accepted upon being pressed by Mr.

Shah, that the Joint Venture Agreement "*does not say the pre-condition but it says an agreement should follow.*"<sup>1</sup>.

[23] He accepted that SIB's approval was subject to the conditions *inter alia* that "*Planning Authority's approval is required for this project*" P5. He also accepted that SIB's approval was valid for six months; and that within that period of six months "*the procedure for implementation of the project needs to start*" P5. With reference to clause 3 of the Joint Venture Agreement, Mr. Pillai admitted that Siva Limited Bermuda was to provide funds to finance "*preliminary matters and planning permission*". He also accepted the content of D1, which is an email, dated 4 October, 2010, emanating from the second defendant to Mr. Sivasankaran, copied to him, which principally asked Mr. Sivasankaran if "*he was able to advance the sum of £750,000.00/- ...within the next couple of months so we may inform the various parties to begin work*". That email (D1) informed them that the "*project is now at the end of the Concept Design Stage and needs to be taken to Scheme Design Stage and thereafter to Detailed Design Stage*". He also accepted the content of D2, which is an email, dated 3 August, 2009, emanating from the second defendant to him, which reiterated their demand for funds. He accepted that Mr. Sivasankaran did not advance any money. Exhibit D3, an email dated 4 October, 2010, emanating from the first defendant to Mr. Sivasankaran, copied to one Philip Haller and one Kash Chandarana, informed Mr. Sivasankaran that the first and second defendants have handed over negotiations of the *Beau Vallon Project* to their consultants, one Philip Haller and one Kash Chandarana; and that he may contact them. That email D3 informed Mr. Pillai that he should contact Philip Haller and Kash Chandarana. He admitted that he never contacted the consultants.

[24] Mr. Pillai was asked about one Mr. Sajee Ryan who, according to Mr Shah, had contacted the defendants on behalf of Mr. Sivasankaran in 2014. Mr. Pillai stated initially that he did not know whether Mr. Sajee Ryan had contacted the defendants on behalf of Mr. Sivasankaran; and that Mr. Sivasankaran had never told him that Mr. Sajee Ryan had contacted the defendants. However, later in the proceedings, he acknowledged the content of an email, dated 6 March, 2014, emanating from Mr. Sajee Ryan to the second defendant,

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<sup>1</sup> Proceedings of 11 July, 2017, at 9 a.m. at p. 35.

copied to Mr. Sivasankaran and him, which informed the second defendant "*Mr. Siva is Very seriously contemplating of taking legal action should you not reimburse 1 million pounds and do an out of court settlement ... the 2,15,000 pounds was transferred by him to you over a decade ago and with interest works to 1 million today*" (D4).

[25] In relation to the purported *Assignment Agreement*, the position of the defendants put to Mr. Pillai was that the plaintiff had never contacted them. Mr. Pillai agreed that the plaintiff, who had left Seychelles in 2014, had never contacted the defendants, but stated that he was not aware why he had not contacted them.

[26] When re-examined, he stated that he was not aware about the relationship between Mr. Sajee Ryan and Mr. Sivasankaran. He reiterated that Mr. Sivasankaran never advanced the sum of 840,000.00/- pounds sterling because a shareholders' agreement was never signed.

#### **The evidence for the defendants**

[27] *The evidence of Darius Oliaji*. The second defendant is the son of the first defendant and the third and fourth defendants are his sisters. The first, second, third and fourth defendants are the shareholders of the fifth defendant.

[28] He testified that Mr. Sivasankaran was required to pay the expenses involved in the process of obtaining Town and Country Planning Authority's approval. Mr. Sivasankaran had advanced 160,000.00/- pounds sterling, which had been used to finance some preliminary expenses, including to pay consultants who had been engaged to do the work.

[29] Spring Wonder Limited applied for Government Sanction to receive fifty percent of the shares of the fifth defendant. Exhibit P8, which referred to "*Sub: Allotment of 10,000 shares to Spring Wonder Limited*", requested Spring Wonder Limited to transfer 840,000.00/- pounds sterling to the account of the fifth defendant before the shares of the fifth defendant could be transferred to it. Mr. Sivasankaran never transferred the money in terms of Government Sanction conditions. He stated that they would have transferred the shares had payment been made in terms of Government Sanction. As a result the project stopped.

- [30] He added that the defendants' request for more money came before Mr. Sivasankaran had asked them for a share holders' agreement. He testified that they did not prepare the draft shareholders' agreement. A draft shareholders' agreement was emailed to the defendants. They did not agree to various aspects of the draft shareholders' agreement and expressed their disagreement to it. A shareholders' agreement was never signed.
- [31] He testified that Mr. Sajee Ryan came to their office a few days or a few weeks before the email was sent (D4). Mr. Sajee Ryan informed them that he represented Mr. Sivasankaran; and that he has come to negotiate on behalf of Mr. Sivasankaran. They informed Mr. Sajee Ryan that they did not want to build the hotel anymore.
- [32] He stated that the plaintiff had never contacted them. He came to know of the assignment when he was served with court documents in relation to this suit. Mr. Sivasankaran did not tell him that he had assigned the Joint Venture Agreement to the plaintiff.
- [33] When cross-examined, with reference to clause 3 of exhibit P3, he agreed to the suggestion of Mr. Camille that the Joint Venture Agreement did not provide that "*anything in regards to the preliminary expenses was to be over and above ... the one million that was agreed<sup>2</sup>*".
- [34] He agreed that Mr. Sivasankaran had abide by the Joint Venture Agreement by paying 160,000.00/- pounds sterling in relation to some preliminary matters, but he was adamant that he did not pay the full amount.
- [35] He denied the suggestion of Mr. Camille that they had disagreed with the content of the draft shareholders' agreement because they did not want to pursue with the project. He accepted that they had taken the first step to terminate the Joint Venture Agreement.
- [36] The second defendant stated that they would not transfer fifty percent of the shares of the fifth defendant to Mr. Sivasankaran because he has not paid for them.

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<sup>2</sup> Proceedings of 11 July, 2017, at 13:15 at p 17 of 37.

## The submissions and analysis

### *The purported assignment*

- [37] As this court understands it the plaintiff's amended pleadings pleaded an assignment of rights and obligations to the plaintiff. The *WRITTEN SUBMISSION OF THE PLAINTIFF*<sup>3</sup> contended principally that the position of the defendants, in their *SUBMISSION ON BEHALF OF THE DEFENDANTS*<sup>4</sup>, that the assignment is not valid and binding on them, under article 1690 of the Civil Code of Seychelles Act,<sup>5</sup> is misconceived in law and unsustainable.
- [38] The Civil Code regulates (articles 1689 - 1701 of the Civil Code) the assignment of claims and other incorporeal rights. In light of the position of the plaintiff and the defendants, the relevant provisions of the Civil Code are articles 1689 and 1690, which provide —

#### "Article 1689

In the assignment of a claim or a right or an action to a third party, the delivery shall be effected between the assignor and the assignee by the handing over of the document of title.

#### Article 1690

1. With regard to third parties, the assignment shall only be effective when notice of it is given to the debtor.

Nevertheless, the assignment may also be effective as regards the assignee if the debtor accepts the assignment by a document in an authentic form.

Notwithstanding the provisions of paragraph 1 of this article, the rights resulting on behalf of any party from any assignment or transfer of any life insurance or of insurance against fire or any other casualty shall duly vest in such party after such assignment or transfer shall have been registered at the Office of the Registrar General."

- [39] *ENCYCLOPÉDIE DALLOZ CÉSSION DE CRÉANCE (Recueil, v<sup>o</sup> Cession de créance)* under "Généralités, 1-21, at notes 1, 2 and 12, states —

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<sup>3</sup> Hereinafter referred to as the "plaintiff's submissions".

<sup>4</sup> Hereinafter referred to as the "defendants' submissions".

<sup>5</sup> Hereinafter referred to as the "Civil Code".

"1. La cession de créance, appelée encore transport de créance ou quelquefois cession-transport ou transport-cession, est la convention par laquelle un créancier transmet volontairement son droit contre le débiteur à un tiers qui devient créancier à sa place...

2. La dénomination «cession de créance» englobe non seulement la transmission des créances proprement dites, mais encore celle des droits incorporels en général, pourvu qu'il s'agisse de droits personnels (AUBRY et RAU, t. 5, §359, p. 133 ; BAUDRY-LACANTINIERIE ET SAIGNAT, t. 19, nos 753 et 754 ; BEUDANT, t. 11, n° 354 ; PLANIOL et RIPERT, t. 7, n° 1112 ; Civ. 24 févr. 1931, D.H. 1931. 233).

...

**12. Il n'est pas toujours facile, en raison de l'imprécision ou de l'inexactitude des termes employés par les parties, de savoir si l'acte passé entre elles est une cession de créance ou un autre contrat ou convention. Pour déterminer le véritable caractère de la convention, il faut s'attacher aux clauses de l'acte plutôt qu'à la dénomination employée par les contractants ; le juge du fait constate souverainement l'existence des conventions, ainsi que les termes dans lesquels elles ont été arrêtées, d'après l'intention des contractants** (Civ. 17 mai 1858, D.P. 58. 1. 212 ; 21 mai 1879, S. 81. 1. 347 ; Req. 6 Janv. 1880, D.P. 80. 1. 361 ; 19 déc. 1923, D. P. 1925. 1. 9, note Capitant).

Emphasis is mine

- [40] The question raised in this case is whether the *ASSIGNMENT AGREEMENT* is an assignment of rights to the plaintiff, under article 1689 of the Civil Code, or is another contract? The written submissions of both Counsel have acknowledged that Siva Limited Bermuda has assigned the totality of its rights and obligations set out in the Joint Venture Agreement to the plaintiff. According to note 12, this court has to examine the clauses of the *ASSIGNMENT AGREEMENT*, in accordance with the intention of the parties, to determine the veritable character of the agreement entered into by the parties.
- [41] Siva Limited Bermuda had assigned the Joint Venture Agreement to the plaintiff (clause 1). The Joint Venture Agreement sets out the plaintiff's and the defendants' rights and obligations in relation to the Joint Venture Agreement. In relation to the parties' obligations, clause 1 of the Joint Venture Agreement sets out "[t]he parties by this agreement

wish to bind themselves to their main obligations stipulated below...". The obligations of the parties *inter alia* are —

- (a) "a more detailed agreement of terms and conditions providing for the organisation, management and good order of the company and project" (clause 1);
- (b) "whatever monies are required for preliminary matters and planning permission will be provided by Mr. Sivasankaran" (clause 3). It is undisputed that Mr. Sivasankaran had advanced 160,000.00/- pounds sterling;
- (c) "[t]he completed project shall be managed by a reputable Hotel group", (which would require both parties to agree on the Hotel group) (clause 7);
- (d) the first defendant was to contribute eleven parcels of land, which was valued at one million pounds sterling in 2006 (clause 3);
- (e) Mr. Sivasankaran was to pay one million pounds sterling, which would become due, once planning permission for a Hotel Project is approved (clause 3);
- (f) Mr. Sivasankaran "shall arrange (if the parties so decide) for a loan of up to 20 % of the project cost at 8.5 % interest ..." (clause 6).

[42] Mr. Pillai testified that clause 8 of the Joint Venture Agreement was fulfilled, which kick-started the Joint Venture Agreement. The project had obtained SIB's approval, subject to conditions. Some preliminary works had been done in relation to the project, which had reached *Concept Design Stage*. It is undisputed that Mr. Sivasankaran had advanced 160,000.00/- pounds sterling towards the project. Spring Wonder Limited had obtained Government Sanction to acquire fifty percent of the shares of the fifth defendant. The second defendant claimed that the first, second, third and fourth defendants never transferred any shares to Spring Wonder Limited because Mr. Sivasankaran had not paid 840,000.00/- pounds sterling in accordance with Government Sanction conditions. Mr. Pillai claimed that Mr. Sivasankaran would have advanced the sum of 840,000.00/- pounds sterling upon signature of a shareholders' agreement by the parties.

[43] A careful reading of Article 1689 of the Civil Code shows that it permits *inter alia* the "assignment of a right". It is pertinent to note that paragraph 10 of the plaintiff's plaint expressly pleaded "that in pursuance to ..... the "Assignment Agreement", **all rights, powers and obligations** under the Agreement between Siva Limited Bermuda ... and the Defendants, were duly assigned onto Plaintiff and accepted by Plaintiff as per the terms and conditions stated in the same Assignment Agreement". [Emphasis is mine]. Clause 4 of the ASSIGNMENT AGREEMENT stipulated "[i]n view of the said Assignment, the Assignee herein shall accrue all rights and control over all the investments, advances and services rendered by the M/s Siva Limited Bermuda assigned to the Assignee herein". It is also pertinent to note that in accordance with clause 5 of the ASSIGNMENT AGREEMENT "[Siva Limited Bermuda] shall absolve itself from all responsibilities, obligations under the Joint Venture Agreement. Any amount due and payable by the said company including but not limited to the advances GBP 160,000 made by the Assignor shall henceforth payable to the account of the Assignee". Pursuant to clause 6 of the ASSIGNMENT AGREEMENT, the plaintiff "shall decide upon all further course of actions under the said Joint Venture Agreement...".

[44] Having a due regard to the clauses of the ASSIGNMENT AGREEMENT, pursuant to the intention of Siva Limited Bermuda and the plaintiff; the subject matter of and the rights and obligations of the parties under, the Joint Venture Agreement; and the brief facts of this case, this court is satisfied that the said parties did not intend to enter into an assignment agreement under article 1689 of the Civil Code. The evidence establishes on a balance of probabilities that the ASSIGNMENT AGREEMENT consisted in transferring to the plaintiff, a third party to the Joint Venture Agreement, the "qualité de contractant"<sup>6</sup>, with the totality of the rights and obligations of SIVA Limited Bermuda, set out in the Joint Venture Agreement.

[45] This court is satisfied, therefore, that Siva Limited Bermuda did not assign rights to the plaintiff, a third party to the Joint Venture Agreement, under article 1689 of the Civil Code; and that, in consequence therefore, the plaintiff does not have a right of action against the

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<sup>6</sup> ENCYCLOPEDIE DALLOZ CESSION DE CONTRAT (Recueil, v<sup>o</sup> Contrats et obligations) Généralités A. — Définition et évolution at note 1.



first, second, third and fourth defendants for specific performance of the Joint Venture Agreement for the transfer by them jointly and severally of fifty percent of the shares held by them in the fifth defendant, to the plaintiff.

[46] Having come to the above conclusion, this court shall not consider the other issues canvassed by both Counsel, in their respective written submissions, in relation to Article 1690 of the Civil Code.

*"La cession de contrat"*

[47] In light of the above, the difficult question raised in this case is whether *"la cession de contrat"* is possible. The defendants' submissions alluded briefly to this proposition. Because this case is an appealable one, this court considers the following —

- (a) whether the purported *ASSIGNMENT AGREEMENT* is effective as regards the defendants (*"condition de forme"*)?
- (b) Arguing in the alternative, whether the Joint Venture Agreement is susceptible to be assigned (*condition de fond*)?

[48] It is pertinent to note that, although the Civil Code does not regulate the institution of *la cession de contrat*, it provides sporadically for certain *"cession de contrats"*. For instance article 1717 of the Civil Code allows a tenant to assign his lease to another and article 1743, the legal assignment of the lease in case of the sale of the property leased.

[49] *ENCYCLOPEDIE DALLOZ CESSIION DE CONTRAT (Recueil, v° Contrats et obligations) Généralités A. — Définition et evolution*, at note 1, defines *la cession de contrat* —

"1, Selon la definition la plus moderns, «la cession de contrat a pour object le remplacement d'une partie par un tiers au cours de l'exécution du contrat» (MALAURIE et AYNÉS, Droit civil. Les obligations, n° 809). Elle consiste donc à transferer à un tiers la qualité de contractant avec l'ensemble des droits et obligations qui y sont attachés..."

*"Condition de forme" — whether the purported ASSIGNMENT AGREEMENT is effective as regards the defendants?*

[50] It is to be noted that the definition, set out above, does not remove the important obstacle constituted by the presence of the "cocontractant" and the principle of the relative effect of contracts. Article 1690 of the Civil Code provides for certain procedures.

[51] This court cannot do better than to quote from ENCYCLOPÉDIE DALLOZ CIVIL CESSION DE CONTRAT SECT. 1<sup>re</sup>. — *Conditions de la cession de contrat*. Art. 2 — "CONDITION DE FORME", at notes 35 and 36 —

"§ 2. — Cessions conventionnelles

35. Ce sont les cessions conventionnelles qui constituent le domaine des conditions de forme. Si, dans les rapports entre les parties (cédant-cessionnaire) la cession de contrat n'est soumise à aucune formalité particulière, il en est différemment du cédé à la connaissance duquel doit être portée la cession. Suffit-il pour cette information d'une simple communication ou faut-il respecter les formalités prévues par l'article 1690 du code civil à propos de la cession de créance?

36. La jurisprudence a toujours déclaré que l'article 1690 du code civil constitue le système de droit commun qui doit s'appliquer aussi aux cessions de contrat. Les applications de cette formule sont innombrables, qu'il agisse de la cession de bail (Req. 4 mai 1925, D.H. 1925. 345 ; Soc. 20 nov. 1958. Bull. civ... Il faut donc soit une signification au cédé par acte d'huissier, soit une acceptation par le cédé dans un acte authentique. La simple connaissance de la cession par le cédé est, en règle générale, insuffisante pour remplacer les formalités de l'article 1690 et lui rendre la cession opposable (Ass. Plén. 14 févr. 1975. 349 ; V. Cession de créance).

[52] This court also reads from Droit Civil Les Obligations Francois Terré Phillippe Simler Yves Laquette "10<sup>e</sup> édition" Dalloz SECTION 2 CESSION DE CONTRAT 1310 *nature juridique : addition d'une cession de créance et d'une cession de dette ou concept original?*" —

"... la cession de la qualité de contractant, dès lors que des obligations y sont attachées, ne peut être opposé au cocontractant du cédant s'il n'a pas donné son accord à l'opération."

This note goes on to say that if we are in the presence of a "*cession de contrat purement conventionnelle, la signification que prévoit l'article 1690 est de toute manière insuffisante, une véritable cession exigeant une acceptation par le cocontractant. Si cette acceptation est acquise, la signification paraît superflue*".

[53] Both Counsel have dealt extensively with the "*conditions de forme*" in relation to an assignment of a right under article 1689. Mr. Shah has contended that the defendants' consent is required for the purported *ASSIGNMENT AGREEMENT* to be effective as regards them. In light of the evidence, the question raised by the submissions as to whether or not notice of the purported *ASSIGNMENT AGREEMENT* is sufficient does not arise for the consideration of this court. Mr. Pillai admitted that the plaintiff did not notify the defendants of the assignment of the Joint Venture Agreement<sup>7</sup>. In fact the second defendant stated that they came to know of the purported *ASSIGNMENT AGREEMENT* when they were served with court documents in relation to this suit.

[54] In consequence therefore, if this court were to conclude that the *ASSIGNMENT AGREEMENT* is "*une cession de contrat*", this court would, nevertheless, have concluded that the plaintiff could not, in any case, oppose the *ASSIGNMENT AGREEMENT* to the defendants, third parties to it. The effects of the *ASSIGNMENT AGREEMENT* are regulated by article 1165 of the Civil Code. The plaintiff, in this court's opinion, would not have had a right of action against the defendants.

*"Condition de fond" — Arguing in the alternative, whether the Joint Venture Agreement is susceptible to be assigned?*

[55] This question involves a consideration of whether the Joint Venture Agreement could be the object of an assignment. Where the "*conditions de fond*" of "*la cession de contrat*" are concerned a distinction is made between "*les cession légales et les cessions conventionnelles*". In relation to the "*cessions conventionnelles*" *ENCYCLOPÉDIE DALLOZ CIVIL CESSION DE CONTRAT SECT. 1<sup>re</sup>. — Conditions de la cession de contrat. Art. 1<sup>er</sup>. — CONDITIONS DE FOND. § 2. — Cessions conventionnelles* at notes 19, 20 and 21, states —

"19. Les conditions de fond des cession conventionnelles sont de deux ordres: les unes sont relatives au contrat transmis, les autres à l'accord de volontés.

A. — Conditions relatives au contrat.

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<sup>7</sup> Each of the defendants should have been notified: Rouen, 15 Juin 1847, D. 49 2. 25, S. 49. 2. 241.

20. Pour pouvoir faire l'objet d'une cession, un contrat doit répondre à une double caractéristique : être un contrat successif et être cessible.
21. a) Seuls les contrats successifs, c'est à dire ceux dont l'obligation principale s'inscrit dans la durée, sont susceptible d'être cédés (V. MALAURIE et AYNÉS, loc. Cit. ; AYNÉS, op. cit., n<sup>os</sup> 262 et s.)".

[56] *ENCYCLOPEDIE DALLOZ CIVIL III CO – DIS CONTRATS ET CONVENTIONS chap. préliminaire, 1-76 SECT. 2 — Classification des contrats, 30-76, ART. 4. — CLASSIFICATION SELON LEUR MODE D'EXÉCUTION : "CONTRATS INSTANTANÉS ET CONTRATS SUCCESSIFS, at note 66, states —*

"66. Cette distinction n'est pas formulée par le code civil. Son intérêt essentiel se manifeste au cas de nullité ou de résolution du contrat. Normalement, celles-ci doivent aboutir à une remise des choses dans l'état antérieur à l'accord ayant eu lieu. Or s'agissant d'un contrat successif, tel que le louage ou le contrat de travail, cette restitution *in integrum* est impossible car on ne peut faire disparaître la jouissance qui a été celle du bailleur ou la prestation de travail dont l'employeur a bénéficié. Il faut donc maintenir au moins dans une certaine mesure, la prestation reçue par l'autre partie. Si le contrat est déclaré nul, on le fait en parlant généralement d'indemnité. S'il est attaqué sur la base de l'article 1184 du code civil, on substitute à la notion de résolution rétrocative, celle de résiliation n'opérant que dans l'avenir ...".

[57] In light of the distinction at note 66 above, this court thinks that the Joint Venture Agreement is not a "*contrat successif*". For instance the various obligations set out in the Joint Venture Agreement are not susceptible of "*résiliation*". This court ought to find therefore, that the Joint Venture Agreement is not susceptible to be assigned. In light of this finding, this court shall not consider the question raised as to whether the purported *ASSIGNMENT AGREEMENT* is "*cessible*" or not.

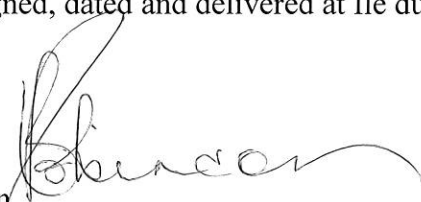
*Article 109 (3) of the Commercial Code*

[58] The defendants' submissions state that article 109 (3) of the Commercial Code applies in this case. This court cannot make a finding in relation to this issue because the defendants defence has not pleaded the material facts.

**The decision**

[59] In light of the above, this court is satisfied that the plaintiff has not proven his claim against the defendants on a balance of probabilities and dismisses his case with costs.

Signed, dated and delivered at Ile du Port on 19 September 2018

  
F Robinson  
**Sitting as a Judge of the Supreme Court**