

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC30/2012

[2018] SCSC 925

EASTERN EUROPEAN ENGINEERING LIMITED

Plaintiff

Versus

VIJAY CONSTRUCTION (PTY) LTD

Defendant

Heard:

Counsel: Mr Chetty for plaintiff

Mr Georges for defendant

Delivered: 10 October 2018

JUDGMENT

Robinson J

The case for the plaintiff

1. On 5 January, 2012, the plaintiff and the defendant entered into an agreement, in terms whereof the plaintiff handed over to the defendant a batching plant and a block machine in consideration of the sum of United States Dollars (\$) one hundred and twelve thousand eight hundred and ninety nine (\$112,899.00/-).
2. The plaintiff claimed that the defendant has breached the said agreement by failing to pay to it the purchase price of the batching plant and the block machine; and that the batching plant and the block machine are still in the possession of the defendant.

3. The plaintiff claimed damages from the defendant particularised as follows –

"Particulars of loss and inconvenience

a.	Loss of Equipment	-	USD 112,899/-
b.	Inconvenience	-	USD 20,000/-
c.	Total Loss	-	USD 132,899/-"

4. The plaintiff is asking this court to enter judgment in its favour in the sum of \$132,899.00/- plus interest at the commercial rate of 10% with costs.

The case for the defendant

5. In a plea in *limine litis* and on the merits, the defendant raised several arguments contesting the plaintiff's claim.
6. The defendant argued in *limine litis* that this court has no jurisdiction to determine this matter insofar as the parties to this suit are properly engaged before an international arbitration relating to matters concerning the construction of the Savoy Resort and Spa at Beau Vallon, in the context of which works the batching plant and the block machine were handed over by the defendant to the plaintiff.
7. In its defence on the merits, the defendant in paragraph 3 of the defence, denied the plaintiff's allegation that it has breached the *ACT OF HANDOVER* by failing to pay the plaintiff the purchase price of the batching plant and the block machine; and that they are still in its possession. The defendant averred, "*a. the Block-making machine was, notwithstanding the Act of Handover, never delivered to the Defendant and remains in the possession of the Plaintiff, and b. in any event if the Defendant decided to retain the equipment the cost thereof would be deducted from payments due from the plaintiff to the defendant for works carried out on behalf of the Plaintiff under four contracts between the parties, or would be accounted for from sums due to the Defendant by the Plaintiff under a new contract for works.*" Paragraph 5 of the statement of defence pleaded that, in any

event, no payments were made to the defendant; and that these sums due are *inter alia* matters in dispute before the said arbitration.

The plaintiff's evidence

8. *The evidence of Mr. Kirill Pobedinskiy.* Mr. Pobedinskiy holds the position of Financial Comptroller of the plaintiff. The company entered into an agreement on 5 January, 2012, with the defendant, the *ACT OF HANDOVER*, which is concerned with the handing over of a batching plant and a block machine by the plaintiff to the defendant. The *ACT of HANDOVER* is before this court as P3. According to P3, the plaintiff had handed over the batching plant and the block machine to the defendant.
9. With respect to the allegations contained in paragraph 3 of the statement of defence, he stated that there was no such agreement between the plaintiff and the defendant, in terms of the said paragraph 3, with respect to the block machine and the batching plant. In this respect, he stated that the defendant has not been paid for the equipment.
10. He asked this court to enter judgment for the plaintiff as against the defendant in the sum of \$132,899.00/- plus interest at the commercial rate of 10 percent.
11. When cross-examined, Mr. Pobedinskiy stated that in October, 2011, he was in Russia. He became the Financial Comptroller of the plaintiff in the beginning of January, 2012. He was not in Seychelles when the batching plant and the block machine were bought and not part of negotiations to sell the equipment to the defendant. He has seen a record of transactions.
12. He was not aware of whether the plaintiff had lodged a police case at the *CID* against the defendant, complaining that the latter had the equipment and was not giving it back. When asked whether the police had investigated the whereabouts of the equipment, as a result of the plaintiff's complaint, he stated, "*probably yes*".
13. The *ACT OF HANDOVER* stated that the block machine was handed over to the defendant. However, he was unaware of whether the block machine was at the site of the defendant. It was put to him that the block machine was still at the site of the Savoy; and that the

police investigating the plaintiff's complaint had seen it on site, to which he replied that he did not know. He was unaware of any arrangement to pay for this equipment. Bank statements indicated that the equipment had not been paid for.

14. In January, 2012, when he took over his duties at the plaintiff, the defendant was the contractor at the site of the Savoy. From January, to March, 2012, there were payments which were still due to be made by the plaintiff to the defendant for works done.
15. He stated that he knew one Ashima Ray, who was the Quantity Surveyor employed at the relevant time, by the plaintiff to consider the claims made by the defendant for payment and to certify payments after having measured the work done.
16. He did not know whether Sergey Egorov in October, 2011, while he [Mr. Pobedinskiy] was still in Russia, had written to the defendant proposing the sale of the batching plant and the block machine. He was unaware of any correspondence from Mr. Patel stating that the defendant would like to pay for the equipment in two instalments. He was also unaware of D1.
17. When cross-examined on 24 July, 2015, he stated that in November, and December, 2011, he held the position of Financial Analyst of the plaintiff. When asked by Counsel, "*what position is that?*" he answered, "*Financial Analyst examines the documents related to the business of the company and gives his opinion and delivers this opinion to the management and to the owners.*¹". He admitted that he did hold the position of Financial Comptroller of the plaintiff during that period; and that he did not have a Gainful Occupation Permit as a Financial Comptroller.
18. He was referred to a payment certificate, which he stated was issued by the plaintiff in favour of the defendant at the relevant time.
19. He testified that he had no knowledge of an agreement reached by the plaintiff and the defendant in March, 2012, in relation to the batching plant and the block machine.

¹ Proceedings of 24 July 2015 at 9 a.m. at p. 6 of 17.

20. He stated that the final sum mentioned in D1 was not paid by the plaintiff. He was aware that a few days after 30 March, 2012, the contract between the plaintiff and the defendant was terminated by the plaintiff; that an arbitration was held in Paris to determine the issues in dispute between these parties; and that a final award had been delivered. He was, however, unaware of the final award in detail.
21. The position of the defendant put to Mr. Pobedinskiy was, "*Q... that the agreement between the parties was that payment for the batching plant and the block making machine would be made by deduction from sums due by EEEL to Vijay Construction. But that because of the arbitration these sums were never paid.*"² to which he answered, "*A. That I did not know and I do not know anything about this*"³. It was further put to him that while it had been agreed to deduct €50,000.00/- for the batching plant, the block machine was actually never handed over to the defendant; and that the "*block-making machine was still and still possibly is in the custody*"⁴ of the plaintiff. His response was that he was unaware of the allegation.
22. **The defendant's evidence**
23. *The evidence of Mr. Sergey Egorov.* Mr. Egorov testified that he was employed by the plaintiff as a Project Director and was at some point in time a Director of the plaintiff. During the course of construction of the Savoy project, the plaintiff imported a concrete batching plant and a block machine, which it sold to the defendant for the price of approximately \$97,000.00/-. He stated that the *payment certificate* D1 confirmed that the plaintiff would pay the defendant a certain sum of money for works which the defendant had done up to that date. D1 mentioned, "*Less for Batching Plant and Block Making Machine : 97,103.23*"; and that the original intention was to deduct this whole amount (€97,103.23/-) from the amount due by the plaintiff to the defendant. Subsequently, the plaintiff and the defendant agreed that the defendant would pay €97,103.23/- in two instalments. In this respect, the plaintiff and the defendant agreed to deduct €50,000.00/- from the amount due by the plaintiff to the defendant, and that this was handwritten on D1.

² Ibid at p. 13 of 17.

³ Ibid at p. 13 of 17.

⁴ Ibid at p. 14 of 17.

Ashima Ray, the Quantity Surveyor of the plaintiff, Mr. Patel and himself attested to the handwritten amendments to D1. He had power to sign D1.

24. When cross-examined, Mr. Egorov stated that the agreement with respect to the deduction of €50,000.00/- was made in writing and kept in the office. He stated that he made the amendments in writing on D1. He was adamant that D1 was genuine and explained that a detailed calculation of the total cost incurred for the batching plant and the block machine is contained in D1.
25. When re-examined, with reference to D1, he stated that Ashima Ray had initialled the second page, and that on the third page there is a handwritten calculation and the signatures of Mr. Kaushalkumar Patel and that of himself and the initials of Ashima Ray.
26. Upon signature of the *ACT OF HANDOVER*, the batching plant and the block machine were on the site of the Savoy Hotel. The plaintiff and the defendant inspected the batching plant and the block machine, after which the plaintiff handed them over to the defendant. The defendant was using the equipment before they were handed over to it.
27. *The evidence of Mr. Kaushalkumar Patel.* Mr. Patel stated that it was common cause between the plaintiff and the defendant that in 2011, and 2012, the defendant was carrying out works on the site of the Savoy Hotel; and that the main contractor was the defendant.
28. He was aware of the *ACT OF HANDOVER*. According to the *payment certificate* D1, the cost of the batching plant and the block machine was €97,103.23/-. With reference to D1, he stated that the manuscript writing indicated that instead of the defendant paying for the block machine and the batching plant, those sums would be deducted in two instalments from certificates due by the plaintiff to the defendant for the construction works. Those two instalments were €50,000.00/- and €47,000.00/-. D1 showed a sum due by the plaintiff to the defendant in the sum of €1,320,000.00/-. The sum as per the typed certificate is €1,272,896.77. The writing on D1 showed that they had deducted €97,103.23/- instead of €50,000.00/-, and that they had corrected the figure as per their agreement.
29. The defendant left the site when the contract was terminated and took away only the batching plant. The block machine was left in a container on the site of the Savoy. The

security guard on the site of the Savoy did not allow the defendant to remove the block machine. He was not aware of the whereabouts of the block machine. He stated that the *payment certificate* D1 was not paid to the defendant because of arbitration proceedings. The arbitrator eventually delivered an award. The conclusion of the arbitrator is before the court as D2. Accordingly, Mr. Patel stated that the defendant did not owe the plaintiff any sums for the batching plant and the block machine.

30. When cross-examined, he was not sure of whether the issue of the batching plant and the block machine was part of the award that was finally made. He confirmed that payments for the batching plant and the block machine were to be made in two instalments. He stated that it was agreed orally that deductions for the batching plant and the block machine would come from contract number 6. He stated that the defendant had paid the plaintiff for the batching plant and the block machine as per their oral agreement. The batching plant is in the possession of the defendant. The block machine is still on the site of the Savoy. The defendant was not allowed to remove the block machine.
31. When re-examined, he stated that D1 is a payment certificate made by the plaintiff in answer to the defendant's invoice dated 30 March, 2012. The invoice is in respect of contract number 6. Invoice number 6, amended or not, was not paid to the defendant by the plaintiff. He stated that he does not know in detail whether certain sums were awarded to the plaintiff as against the defendant in respect of contract number 6 because there were various agreements. The notice terminating contract number 6 was issued on 10 April, 2012, and that the *payment certificate* D1 was made on 30, March 2012. The defendant upon signature of the *ACT OF HANDOVER* did not take away the equipment. He reiterated that at some point after the termination of the contract the defendant was not allowed on site.
32. *The evidence of Mr. Deoraj Puddoo.* Mr. Puddoo is the operations Manager of Nouvobanq. He stated that with respect to loans and overdraft facilities, the prime lending rate is currently ten percent and that "*everything is depending on the customer profile and everything, everything is linked to that*". He stated that the said lending rate has been applicable for 3 years.

33. *The testimony of Mr. Marcus Jean.* Mr. Jean is a police officer attached with the *CID unit*. It was suggested to him by Mr. Georges that in the last year or two he investigated a complaint concerning a batching plant and a block machine between the owners of the Savoy and the defendant; and that Savoy made a complaint that the equipment had been stolen by the defendant. He stated that he went on the site of the Savoy on a date that he could not recall; and that he was shown a machine which was in a container. He could not remember what kind of machine it was and exactly which equipment the plaintiff suggested had been stolen. He stated that he did not proceed with the matter because he felt that it was a civil case.
34. When cross-examined, he stated that he could not recall which machinery was in the container. He added that officers from the plaintiff took him to a container and showed to him its content.

The submissions of the plaintiff and the defendant and analysis

35. This court has considered the evidence in light of the pleadings and the written submissions of both Counsel.

Pleas in limine litis

36. With respect to the pleas in *limine litis* related at para [6] of this judgment, this court is not satisfied that the batching plant and the block machine were dealt with by the award of the arbitrator. Mr. Patel stated that he was not sure as to whether the batching plant and the block machine formed part of the arbitral award that was finally made by the arbitrator because there were various contracts. In any event, this court cannot consider D1 because it was not declared enforceable in Seychelles.

On the merits

37. This court mentions that the consideration for the batching plant and the block machine pleaded by the plaintiff is \$112,899.00/-. This consideration is found in P3, the *ACT OF HANDOVER*, pleaded by the plaintiff. The statement of defence admitted that, "*through an Act of Handover dated 5 January 2012 a batching Plant and Block Machine, valued at*

USD112,899, were allegedly handed over to the Defendant by the plaintiff". This court has considered the *payment certificate* number 2, D1, which stated "*Less for Batching Plant and Block Machine: 97,103.29*" and the manuscript writing found on pages 1 and 3 of D1 and noted that the amount €97,103.29/- is not part of the pleadings. Counsel for the defendant stated that the testimony of Mr. Patel is to the effect that the sum of USD112,899.00/- translated into €97,103.29/-; and that this sum was to be paid from the certificates for works done at the Savoy Hotel (a Euro contract) in two instalments of €50,000.00/- and 47,000.00/- respectively. It is not clear to this court how \$112,899.00/- was translated into €97,103.29/-. Moreover, under P3 consideration for the equipment is \$54,504.00/- and \$58,395.00/- - total \$112,899.00/-. Therefore, this court is at a loss to understand the break down contained in D1 in relation to the "*Total Cost incurred for Batching Plant and Block Machine*" to the sum of €97,103.23/-. It is noteworthy that in D1 the cost of the equipment is €91,202.26/-. Moreover, this court cannot rely on D1 because it refers to sums due which were *inter alia* matters in dispute before the arbitrator. As mentioned above, the arbitral award was not enforced in Seychelles. In the light of the foregoing, this court cannot rely on D1. This court relies on the *ACT OF HANDOVER*.

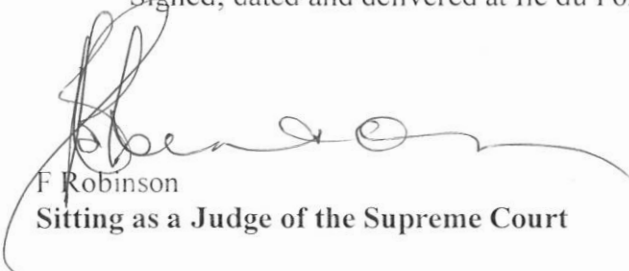
38. It is undisputed that the defendant is the owner of the batching plant and the block machine, the sale having been completed on 30 April 2012.
39. The defendant contended that delivery was simply *de jure* and not *de facto*. This court fails to understand the contention of the defendant in the light of the evidence of Mr. Patel, Mr. Egorov and Mr. Jean. Mr. Patel suggested that the defendant was barred from site after the contract between the plaintiff and the defendant was terminated. According to the evidence of Mr. Egorov and Mr. Patel, the batching plant and the block machine were handed over to the defendant on 5 January, 2012. Mr. Patel stated that the batching plant is in the possession of the defendant. According to Mr. Jean, it would seem that the block machine is still on site. This court observes that the defendant had removed the batching plant from the site of the Savoy. Mr. Patel stated that the defendant left the site when the contract was terminated and took away only the batching plant. Having considered the evidence of the witnesses for the defendant, this court is satisfied that the defendant was and is not concerned with the removal of the block machine from the site of the Savoy. The evidence

establishes that the defendant abandoned the block machine on the site of the Savoy. This court is satisfied that delivery of the block machine was done in terms of article 1603 of the Civil Code of Seychelles Act.

Decision

40. In the light of the above, judgment is entered in favour of the plaintiff in the sum of \$112,899.00/- together with interest at the commercial rate of 10 percent per annum thereon from the date hereof with costs. In the light of the merits of this case, this court makes no award for "*inconvenience*".

Signed, dated and delivered at Ile du Port on 10 October 2018



F Robinson

Sitting as a Judge of the Supreme Court