



premises or any activities whatsoever and to vacate the premises forthwith; remove all the temporary sheds, containers and workers accommodation and personal belongings; remove all construction materials, debris and machinery immediately; to allow an independent architect to be appointed to finalize the cost of the building and include the default cost in his final report and cover any rents by the Plaintiffs to third parties namely Fish Leather & Co since January 2012 at Thirty Seven Thousand Five Hundred Seychelles Rupees (S.R. 37,500/-) per month for carrying out its business activities; and pay the plaintiff the sum of Two Hundred Thousand Seychelles Rupees (S.R. 200,000/-) as special damages and interest at commercial rate from the date of filing of this suit until the whole amount claimed is paid in full and cost of this suit.

- [2] The Defendant by way of statement of defence of the 14<sup>th</sup> June 2016 denies the Plaint and further avers that the Defendant completed the building, completion notice was given to Planning Authority, and that it was the duty of the Plaintiff under the building lease agreement to obtain completion certificate since the Defendant was only the builder. That the Plaintiff upon the building being completed refused to get completion and occupancy certificate so as not to fulfil his obligations under the building lease agreement, by seeking permission from the Government to sublet the said part of the building to the Defendant.
- [3] The Defendant further by way of defence raises a counterclaim alleging that the counter-claimant has invested an amount of Three Million Seychelles Rupees (S.R. 3,000,000/-) on the leased premises and the action of the Plaintiff has highly prejudiced the counter-claimant in the said investment and further the Plaintiff is being unjustly enriched should he be allowed to succeed in his Plaint in view of the counter-claimant's investment as claimed and damages for loss of investment in the sum as referred is claimed and damages in the sum of Three Million Seychelles Rupees (S.R. 3,000,000/-)making a total of Six million Seychelles Rupees (S.R. 6,000,000/-) with interest and costs and any other Order that this Court deems fit in the circumstances of the case is sought.
- [4] The Plaintiff in its defence to the counterclaim denies same and further avers that albeit the building lease agreement between the parties, the works contracted were never completed and that there is no authority and or certificate of the Planning Authority for the building to

be occupied and claims non-fulfilment of contractual obligations by failure of completion certificate being issued by the architect. The Plaintiff agrees to compensate the counter-claimant for the works carried out as contemplated in the building lease agreement as per report and valuation of an independent quantity surveyor subject to any set off amount for the inconvenience, loss and damages suffered and claimed by the Plaintiff and due to the Plaintiff as a result of the delay and breach of the building lease agreement by the counter-claimant (supra). Hence Plaintiff moves for dismissal of the counter-claim and costs of action from the date of the filing of the plaint.

### **Factual and Procedural background**

- [5] The pertinent facts for the purpose of this Judgment are as follows.
- [6] On 24<sup>th</sup> September 2010, the Plaintiff and the Defendant signed a building lease agreement over two parcels of land namely, Titles V15933 and VI5978 situated at Providence, Mahe and the building lease agreement comprised of the construction of a commercial building that was to be finished by 24<sup>th</sup> December 2011, or after an agreed upon extended time.
- [7] According to the terms of the building lease agreement the Defendant would fund the project in exchange for rent free sub-lease of half of the project for a period of 10 years and the Plaintiff would pay monthly instalments of Twenty Five Thousand Seychelles Rupees (S.R. 25,000/-) within the first six years. The payment would commence from the sub-lease date. This provision to sub-lease a part of the project was subject to the contractual conditions being fulfilled. In other words, the sub-lease was contingent on the successful completion of the construction project. The Defendant was expressly required by the building lease agreement to ensure that the project was carried out in a professional manner in accordance with the agreed approved plan, existing laws, regulations and building practice.

[8] The Plaintiff alleges in essence, that the Defendant failed to get the completion certificate after the completion of the commercial building as required and stipulated in the building lease agreement. Furthermore, the Plaintiff alleges that the Defendant breached the building lease agreement by failing to complete the commercial building project in a professional manner resulting in the Planning Authority issuing a letter stating the unsatisfactory state of the commercial building. The Plaintiff further alleges that the Defendant breached the building lease agreement by failing to adhere to the stipulated time frame in accordance with the agreed upon plan, existing laws, regulations and building practice by altering the commercial building plan, building accommodation for their temporary workers and setting up their own carpentry workshop without the permission of the Plaintiff. The result of this is that the Plaintiff was unable to use the leased premises.

[9] The Plaintiff further alleges that despite several meetings in which the Plaintiff informed the Defendant about their disappointment with the commercial building project, the Defendant responded by promising to rectify the situation which they failed to do. Therefore, the Plaintiff request as per claims illustrated above [paragraph 1 of the introduction] refers (supra).

[10] It is to be noted however, at this juncture that this Court has by way of Interim Orders arising out of Interlocutory applications, have already dealt with the prayers at paragraphs (b) (i), (ii) and (iii) and in that light reference is made to this Court's Rulings in MA Nos. 44 of 2016, 78 of 2017; and 218 of 2017 and Rulings of the 8<sup>th</sup> April 2016, 9<sup>th</sup> June 2017; and 19<sup>th</sup> October 2017. Since the Plaintiff has also sought out the services of architects to complete and rectify the alleged defects in the commercial building, therefore the prayer

relating to allowing independent architect's costing of the commercial building and defaults costs have been made redundant as a result.

[11] It follows thus, that the only relevant prayers at this stage are those as illustrated at (a) (v), (vi) and (vii) and (e) respectively.

[12] The Defendant as illustrated above [paragraph 2] refers (supra), in a gist in its defence, contests and denies the allegations of the plaint. The Defendant denies that he is in breach of the building lease agreement by being in occupation of a part of the uncompleted and uncertified premises, failing to secure approval to alter the building plan and building temporary accommodation for their workers and that his actions have resulted in the Plaintiff being served with an eviction notice by the Planning Authority.

[13] The Defendant further denies that the Plaintiff has been unable to make use of the leased premises and claims that the Plaintiff has been using the leased premises for the last 5 years and is currently using the leased premises.

[14] The Defendant further denies the Plaintiff's allegations that on completion of the commercial building they were responsible for getting the completion certificate. Instead, the Defendant alleges that it was the duty of the Plaintiff to obtain the completion certificate. Furthermore the Defendant claims that on completion of the commercial building, the Plaintiff refused to get the completion certificate because he did not want to fulfil his obligations of sub-letting part of the commercial building to the Defendant and this as per his obligations under the building lease agreement.

[15] The Defendant counter-claimed [paragraph 3] refers (supra) wherein, the Defendant moves for dismissal of the plaint and alleges that the Plaintiff has highly prejudiced the Defendant in the said investment and if the plaint should succeed the plaintiff would be unjustly enriched to its detriment through the alleged investment on its part. Thus, Defendant counter claims for loss of investment and damages in the sum of (S.R. 6,000,000/-) with interest and costs comprising of Seychelles Rupees Three million (S.R. 3,000 000/-) in loss of investment and Seychelles Rupees Three million (S.R. 3,000 000/-) for damages.

### **Evidence**

[16] During the hearing the both representatives of the Plaintiff and Defendant testified and adduced further evidence in support of their claims and defences as follows.

[17] Nigel Stanley Valentin, a Quantity Surveyor was called on behalf of the Plaintiff and testified that he was instructed by the Plaintiff to make an valuation and prepare a report of works completed on the building on the leased premises .His findings revealed that the total cost for the building as per date of valuation was in the sum of (S.R. 2,531,348/-).

[18] In cross-examination, Mr. Nigel Stanley Valentin further testified that the valued labour and cost of the building was approximately (S.R. 2, 800 000/-). He stated that there were deficiencies in the building that needed to be rectified namely, the walling which had not been constructed in accordance with the approved design, roofing was heavily corroded, there were less columns as those specified on the approved design and there concrete beams to support the structure had not been properly installed. He also found that to rectify the deficiencies on the building would cost (S.R. 506,879/-). In other words, the demolition and rectification work was valued at (S.R. 506,879/-).

- [1] Mr. Nigel Stanley Valentin further testified in cross-examination, that on completion of a building, the normal procedure is for the contractor to tell the client that the building is completed and if the client is satisfied, it is then the duty of the contractor to submit the completion notice to the Planning Authority. Mr. Nigel Valentin additionally, explained that there are two ways of looking at the completion notice namely, in that first, it is a way for the contractor to submit evidence to the client that work has been completed and in this context it is referred to as the practical completion notice. Secondly, after the fulfilment of the practical completion, the contractor submits the completion notice to the Planning Authority for occupancy. The Planning Authority then visits the site with all of the parties (the contractor and the client) and if they are satisfied that the project is complete according to the required standard they will issue the occupancy certificate.
- [2] Mr Kandan Pillay was the other witness called on behalf of the Plaintiff and testified that the commercial building was supposed to be completed within fifteen (15) months (building lease agreement was signed on 24<sup>th</sup> September 2010 to be completed by 24<sup>th</sup> December 2011) but by August 2012 when the Defendant submitted the completion certificate to the Planning Authority the building was only 50% completed. Mr Kandan Pillay showed photographs taken on the 18<sup>th</sup> March 2013, that clearly showed that the building was not completed (*Exhibit P5*).
- [3] Mr Kandan Pillay testified further that because the building was not completed, the Plaintiff was renting alternate premises works to conduct business at Providence with Fish Leather and Company for a monthly rental of (S.R. 37,000/-). Therefore, he was claiming (S.R. 1,875,000/-) to cover for the period between January 2012 until the filing of the plaint.

- [4] Mr Kandan Pillay further testified that on the 13<sup>th</sup> August 2015, there was a meeting with the Defendant and legal representatives were also present to discuss the progress of the commercial building and steps that needed to be fulfilled in order to get the certificate of completion. He emailed minutes of the meeting to Mr Bhupesh, the Director for the Defendant and all other participants. In this meeting the Defendant promised to get completion certificate within seven days. The agreement reached in the meeting was that once the completion certificate was issued Mrs Laura Valabhji would seek the necessary approval from MLUH to rent 300 square meter property to the Defendant and get the ten years lease agreement back-dated to 1<sup>st</sup> June 2012. To honour their end of the agreement the Plaintiff agreed that once the completion certificate was issued they would start paying (S.R. 25,000/-) per month as per building lease agreement.
- [5] Mr Kandan Pillay also additionally testified that he has a sixty year lease with the government with respect to the leased premises that commenced from 26<sup>th</sup> November 2007. He pays annual instalments to the Government to service the lease. Initially the rent was (S.R. 54,000/-) but from 2016, it increased to (S.R. 68,000/-). This annual lease fee should be considered as part of the special damage of (S.R. 200,000/-) that is part of the prayers of the Plaintiff.
- [6] In cross-examination, the Mr Kandan Pillay testified that they entered their portion of the commercial building in mid-June 2013 but he was not conducting his business at the leased premises because he had no licence. As such, the leased premises was being utilised for storage purposes. However, a video footage shown in open court, showing the Plaintiff using their portion of the commercial building for commercial purposes was produced by



Mr Kandan Pillay as being shot between 2015-2016 but the Defendant maintained that it was shot in November 2013.

[7] Mr Kandan Pillay further testified in cross-examination, that they were able to conduct work on the leased premises in 2016 after they received the completion certificate. In order to acquire the completion certificate the Plaintiff had to perform a number of tasks that included proper fencing of the leased premises, cleaning and painting to ensure the commercial building was completed to an acceptable standard.

[8] On the other hand, Mr Bhupesh Hirani testified on behalf of the Defendant to the effect that he was the Managing Director of the Defendant and confirmed that the Defendant started the Carpentry workshop on the leased premises because the Plaintiff did not go to Planning Authority to make an application for the change of use. Since the Plaintiff had the lease agreement with Government, it was its responsibility to go and make the application.

[9] Mr Bhupesh Hirani testified that they completed the commercial building within 19 months instead of the 15 months stipulated in the building lease agreement because building plans were not submitted on time due to change in plans and some delays resulting from bad weather.

[10] Mr Bhupesh Hirani further testified that when the Defendant completed the commercial building they submitted the completion form on the 29<sup>th</sup> August 2012 to the Planning Authority.

[11] Under cross-examination Mr Bhupesh Hirani testified further that he *“felt that the Plaintiff did not want us to be owners on this property because he had enough time to apply for the*

*change of use and he did not do so*". When questioned that all he had to do was undertake to properly finish and get the required completion certificate he replied "*we were scared because as soon as he would get the completion certificate he would make us move out of the place*".

### **Legal analysis and discussion of evidence**

[30] The legal issue to be adjudicated upon by the Court is whether there was a breach of contract which is governed by the provisions of Article 1134 of the Civil Code of Seychelles(Cap 33) ("the Code") and which provides that:

*"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 or for causes which the law authorises. They shall be performed in good faith."*

[31] The disagreement between the parties in this case as illustrated in evidence (supra), is largely over who was responsible to obtain the completion certificate. The Defendant's interpretation of the building lease agreement was that the '*completion certificate*' is a certificate issued by the architect certifying that completion has been achieved. The building lease Agreement at paragraph 1 section 1(b) thereof states that, architect means '*any person duly appointed by the Sub-Lessor (Plaintiff)*'. According to the building lease agreement, "*the issuing of a completion certificate by the architect and its acceptance thereof by the Sub-Lessor shall be a complete and irrevocable acknowledgement by the Sub-Lessor, that the Sub-Lessee has fulfilled all its obligations under this Agreement*".

[32] The Plaintiff claims that according to paragraph 13.1 of the building Lease Agreement, the practical completion is defined as the agreement providing for the agreed work to be fulfilled within a period of 15 months from the date of this agreement. The Sub-Lessee shall not be liable for damages or delays due to (a) force majeure (b) delays in approval plans or alternation of plans (c) unavailability of materials.

[33] The Defendant also highlighted paragraph 13.6 of the building lease agreement which provides that if there is any dispute between the parties concerning the attainment of practical completion the parties have to go to an independent architect. And the independent architect will resolve the matter in dispute. The Defendant argued that the Plaintiff did not go through an independent architect appointed by the Bar Association of Seychelles to mediate the dispute.

[34] With respect to the relevant law, Article 1156 of the Code with respect to interpretation of contracts, it provides that:

*“In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words. However, in the absence of clear evidence, the Court shall be entitled to assume that the parties have used the words in the sense in which they are reasonably understood.”*

[35] In this case, the first limb of Article 1156 of the Code does not provide direction as the Plaintiff and the Defendant are in disagreement over the issue of first, what constitutes practical completion and second, who is responsible to obtain the certificate of completion.

[36] The Defendant maintained that they completed the commercial building without any defects and that it submitted the completion notice on the 29<sup>th</sup> August 2012 to the Planning Authority. The procedure is that if the Planning Authority has any queries they send a letter and the client and contractor arrange for a site visit. After this site visit the Plaintiff must give a list of defects to the Defendant (contractor). This is clearly illustrated by virtue of the contents of paragraph 14.2 of the building lease agreement which provides the obligation of the Plaintiff to provide a written list of defects within 3 months after the date of practical completion. And the Defendant was expected to rectify the defects within 6 months of receiving the list of defects. However, if the Defendant does not receive a list of defects within the stipulated 3 months period he is relieved of all its obligations to rectify the defects. The Defendant maintains that he did not receive list of defects.

[12] With respect to the breach of contract, the defence case is largely based on a substantial typing error in the building lease agreement namely, at its paragraph 14.2 wherein it provides that the sub-lessor (Plaintiff) undertakes to rectify the defects within the period of 6 months but it should read that the sub-lessee (Defendant) rectifies defects within a period of 6 months.

[13] In that regards, the provisions of Article 1161 of the Code clearly provides that:

*“all the terms of the contract shall be used to interpret one another by giving to each other meaning which derives from the whole.”*

[39] A review of the building lease agreement reveals clearly that it is the Sub-Lessee who is responsible for rectifying defects with the commercial building. Case law has also determined the importance of interpretation of the intention of the parties in light of the

contract as a whole (Reference is made to the case in that context (**Chow v Bossy, SCA 7 of 2005**)).

[40] On the issue of who was responsible to obtain the certificate of completion, I refer to the case of (**Barry Lee Cook and Anor v Philip Lefevre, 1982 SLR 416**) *wherein it was held that ‘the subsequent behaviour of the parties shed light into the intentions of the parties’*. The fact that the Defendant applied for the completion certificate to the Planning Authority on 29<sup>th</sup> August 2012, it suggests that they were responsible to obtaining the completion certificate. The evidence from the expert witness, Mr Nigel Stanley Valentin, reveal that indeed the standard procedure in the construction industry is that on completion of a building the contractor inform the client that the building is finished and if the client is satisfied, it is then the duty of the contractor to submit the completion notice to the Planning Authority. However, it should be noted that the building lease agreement (which is legally binding) provides that it is the Plaintiff through his architect is responsible for getting the completion certificate.

[41] The Plaintiff submitted that obtaining a completion certificate was impossible because the building was incomplete, not up to standard and being used by the Defendant for purposes not agreed upon in the building lease agreement. Furthermore, the Defendant was occupying the leased premises. The Defendant entered the building in 2013 and alleges that the Plaintiff was aware that he was going to use his portion of the commercial building as a carpentry workshop. The Defendant maintained that the Plaintiff as the owner of the commercial building had failed to go to the Planning Authority to apply for change of use. Furthermore, the Defendant testified that it feared that as soon as the Plaintiff got the completion certificate it would remove the Defendant out of the commercial building.

[42] A thorough examination of the evidence, reveal that the Defendant breached the building lease agreement by failing to complete the commercial building to a satisfactory standard. Additionally, the commencement of their carpentry workshop on the leased premises without appropriate permits from the Planning Authority made it impossible for the Plaintiff to obtain the certificate of completion from the Planning Authority and this as per the building lease agreement (let alone the standard practice in the construction industry).

[43] In a lawful contract, parties are bound to each other by their mutual contractual and reciprocal obligations and therefore, *“No performance is due to one who has not himself performed”* and this is clearly enunciated in the Code. Drawing from this principle of contractual obligations which is clearly reflected by virtue of effects of contractual obligations under our Code, it is logical that without the certificate of completion the Plaintiff were not in a position to give effect the sub-lease agreement, namely to give the Defendant a sub-lease agreement to use half of the premises.

[44] In the case of failure to perform, the case of (**Armand Samson v. Noella Figaro & Ors and Noella Figaro v. Armand Samson 1983 SLR 68**), it was held that:

*“Both the law and the fairness require that before bringing a claim for failure to perform the obligations of a contract, the defaulter should first be put under notice of default and given a chance to fulfil his obligation.”*

[45] In this case, the evidence at the hearing reveal that the Plaintiff communicated to the Defendant on numerous occasions to complete the commercial building to a standard that would ensure they get the completion certificate from the Planning Authority. The response

of the Defendant was that they agree that they would honour their agreement but failed to do so.

### **Damages**

[46] Now, Article 1147 of the Code, establishes that when a breach of contract occurs, damages are payable, unless excused by force majeure, or where party has not performed his obligation correctly and in time.

[47] The Plaintiff is claiming One million Eight Hundred and Seventy Five Seychelles Rupees (S.R. 1,875,000/-) from January 2012 until the filing of the Plaint claiming that the Defendant's breach has given the Plaintiff no choice but to rent a commercial space at Fish & Leather to conduct its business activities. However, the evidence on record reveal that the Plaintiff has been in occupation of the premises between 2013 and 2016 conducting commercial activity albeit him claiming that he was not able to conduct any business on the leased premises and used as a storage facility. Hence, this Court noting the evidence that the Plaintiff was conducting commercial activities on the leased premises as of 2013 to 2016, the rents as claimed for this period shall be deducted from the amount claimed and hence the equivalent shall be paid accordingly by the Defendant to the Plaintiff.

[48] The Plaintiff has also claimed(S.R. 200,000/-) as special damages and same is to comprise annual rental payment to the Government for the property under the '*head lease*' in the sum of (S.R. 68,000/-). Between 2007 and 2016, the annual payment was Fifty Four Thousand Seychelles Rupees (S.R. 54,000/-) and it went up to Sixty Eight Thousand Seychelles Rupees (S.R. 68,000/-) in 2016.

[49] Further, it is to be noted that as per evidence, the Plaintiff secured a certificate of completion from the Planning Authority in 2016 after completing substantial work on the premises. Unfortunately, they did not provide the amount that was spent on this substantial work. The expert witness estimated that the work to rectify the building would cost Five Hundred and Six Eight Hundred and Seventy Nine Seychelles Rupees (S.R. 506,879/-).

[50] With respect to special damages which arises under contracts, it is trite that there should be no legal basis to award such damages against the Defendant in the absence of bad faith. In the case of **(Michel v/s Talma (2012) SLR 95)**, the Court of Appeal held that in the case of exemplary damages, it should be awarded only in cases of “*oppressive, arbitrary, or unconstitutional actions by servants of governments.*”

[51] Noting the above principle, I find based on the evidence on record that albeit the Defendant acting in bad faith in its dealings in preventing the Plaintiff from being able to apply for the certificate of completion on time hence breaching the building lease agreement and disallowing the Plaintiff to give effect to the sub-lease agreement, the actions of the Defendant calls for payment of special damages but not in the quantum as prayed for by the Plaintiff which is considered on the high in all the circumstances of this case. And further the Court notes that payment of monthly rental for the head lease should not be incorporated in its calculation of this category of damages. It follows thus that this Court considers that a sum of Seventy Five Thousand Seychelles Rupees (S.R. 75,000/-) is reasonable as special damages in all the circumstances of the case.

### **Revocation of the building lease agreement**



[52] The Plaintiff also requests for the revoking of the building lease agreement between the Plaintiff and the Defendant signed on the 24<sup>th</sup> of September 2010.

[53] By virtue of the provisions of Under Article 1134 of the Code, the Court is granted the power and authority to revoke contracts for causes which the law authorises and noting that all contracts shall be performed in good faith. The evidence at the hearing has shown that the building lease agreement has been breached by the Defendant and as such this Court revokes the building lease agreement accordingly.

### **Counterclaim**

[54] With respect to the counterclaim of the Defendant for the award of damages at (SR 6, 000,000/-), based on all the circumstances of this case and evidence , it is undisputed that substantial amounts of work was completed on the uncompleted commercial building, thus the Plaintiff is ordered to pay to the Defendant the sum of Two million Five Hundred and Thirty One Three Hundred and Forty Eight Seychelles Rupees (SR 2,531,348.00/-) invested by the Defendant on the commercial building prior to its completion by the Plaintiff and subsequent obtention of the completion certificate from the Planning Authority. The basis of the quantum awarded is based on Exhibit P1 which is the only evidence with respect to the amount of works done by the Defendant and its quantification in figures. As to the claim of Three million Seychelles Rupees (S.R. 3,000,000/-) as special damages. I find that the Defendant has failed to prove same in evidence hence it is accordingly dismissed.

[55] Both the granting of the Plaint and partial grant of the Counterclaim are granted with costs and interests as claimed.

Signed, dated and delivered at Ile du Port on 20<sup>th</sup> May, 2019.

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**ANDRE J**