SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. SLUHCV2004/0387

BETWEEN:

DOUBLOON BEACH CLUB LIMITED

Claimant

AND

(1) DAVID SHIMELD
(2) CARIBBEAN HOTEL CONSULTANTS LIMITED

Defendants

Appearances:
Ms. Leandra Verneiul for the Claimant
Mr. Collin Foster with him Mr. Horace Fraser for the Defendants

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2004: September 06
September 20

JUDGMENT

Introduction

1. HARIPRASHAD-CHARLES J: This claim raises an issue as to whether the condition precedent set out in Clause 4.2 of the Agreement has been fulfilled, namely that the existing head leases and sub leases held by the Defendants, David Shimeld and Caribbean Hotel Consultants Limited ("the Defendants") and /or Companies controlled by the Defendants extend to cover the whole of the Lands described in the Agreement. Doubloon Beach Club Limited contends that the head and sub leases do not extend to cover a portion of land comprising approximately 8,797 square feet in area ("the reclaimed land").

Some Background Facts

2. By an Agreement dated 16th April 2003 between Doubloon and the Defendants, Doubloon agreed to purchase and the Defendants agreed to sell and transfer all of the issued shares in the Defendants' Companies for US$2.7 million (Exhibit "DBC1"). The Companies namely: Marigot Escapes Limited, Waterhouse Limited, Doolittles Limited and Marigot Inn Limited ("the Companies") owned among them certain businesses and head and sub leases of the lands described in Clause 1 of the Agreement. Upon the fructification of the Agreement, Doubloon shall be the owner of the said shares and by virtue thereof will control and have dominion of the lands and the businesses of the Companies.

3. By Clause 4 of the Agreement, the Defendants agreed to satisfy two conditions precedent namely:

   (i) That they enter into an agreement for sale pursuant to Clause 4.1 and

   (ii) That their lawyer provide to Doubloon an opinion to the effect that the existing leases which they hold extend to cover the whole of the Lands." (Exhibits "DBC2" and "DBC3")

4. In accordance with Clause 3 of the Agreement, Doubloon paid to the Defendants a deposit of US$100,000.00 sometime in April 2003 and had 45 days within which to pay an instalment of US$900,000.00 against the purchase price of US$2.7 million upon fulfillment of the conditions precedent stipulated in Clause 4.

5. On 4th June 2003, the Defendants' solicitor wrote to Doubloon's solicitor enclosing the Opinion dated 31st May 2003 on whether the freehold and leasehold property in the possession of the VENDORS (the Defendants) are valid and the legal implications for the PURCHASER (Doubloon). He also opined that by virtue of the Agreement, the 45 days hand over period commences on the presentation of the Opinion (Exhibit "DBC4").

6. Between early June and early December 2003, there appeared to have been a series of correspondence between Mr. David Shimeld, the intended vendor and Mr. John Verity, the intended purchaser on the issue. This is highlighted in a letter dated 12th December 2003,

written by Doubloon's solicitor to Mr. Shimeld. Reference was made in particular to an e-mail by Mr. Shimeld wherein he stated:

> "At this stage I consider that I have complied with all of the conditions precedent and I have good title (without a shadow of a doubt)…"

7. In that letter which was copied to the Defendants' solicitor, Doubloon asserted that to date, the condition precedent has not been fulfilled since the Opinion provided by the Defendants' solicitor did not say in unequivocal terms that the existing leases extended to cover the whole of the Lands. Doubloon maintained that the reclaimed land is not covered by any lease from the Crown (Exhibit "DBC6").

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8. The Defendants' solicitor remained adamant that the condition precedent has been met. This is contained in a subsequent letter dated 23rd March 2004 (Exhibit "DBC5").

9. The parties are at deadlock as to whether or not the condition precedent stipulated in Clause 4.2 of the Agreement had been fulfilled. On 20th May 2004, Doubloon filed this claim seeking the assistance of the court to make a declaration that the condition precedent has not been fulfilled.

Condition Precedent

10. Clause 4 of the Agreement is headed Conditions Precedent. It provides as follows:

> "4.1 The VENDORS shall have arranged to acquire the Head Leases by entering into an agreement for sale with the directors and shareholders of Marigot Des Roseaux Limited to purchase all of the issued shares therein and the PURCHASER shall contribute fifty percent (50%) of the actual acquisition cost of the Marigot Des Roseaux shares up to a maximum of THIRTY FIVE THOUSAND DOLLARS ($35,000.00).
>
> 4.2 The VENDORS shall provide to the PURCHASER an opinion by the VENDORS' lawyer to the effect that the existing leases held by the VENDORS extend to cover the whole of the Lands."

11. Clause 4.1 of the Agreement raises no concern. The difficulty is with respect of Clause 4.2. Under that Clause, the Defendants obligated themselves to provide to Doubloon an

Opinion by their lawyer to the effect that the existing leases which they hold extend to cover the whole of the Lands.

The Opinion

12. Mr. Foster appearing for the Defendants submitted that on 31st May and 3rd July 2003 respectively, he provided two Opinions to the effect that he was satisfied that the existing sub leases held by the Defendants covered all of the lands occupied by them save and except for an area of land measuring 3,500 square feet but which said area will become lawfully occupied by way of a valid lease on the acquisition of the first and second head leases by Doubloon. Mr. Foster also opined that the Defendants were in lawful occupation of the reclaimed land measuring 8,797 square feet and which is described in the Land Register as Block 0443B Parcel 339.

13. Mr. Foster next submitted that in accordance with Clause 4.2 he was obligated to provide an objective Opinion which he did. He argued that the condition precedent should be given its plain and simple meaning namely that an Opinion should be written *simpliciter*. In other words, Mr. Foster is saying that once he has pronounced that the Opinion is objective, it becomes sacrosanct and it cannot and should not be challenged. This is patently incorrect. Objective though the Opinion may be to the author, the other party is entitled to criticize it especially if it flies in the face of the facts.

14. Ms. Verneuil appearing as Counsel for Doubloon criticized the Opinion for its failure to assert positively that the Defendants have a lease to the reclaimed land. She launched an impassioned attack at the following clauses of the Opinion. At Clause 3.3 Mr. Foster wrote:

> "I am of the view that it would be helpful to both the PURCHASER and the VENDOR to have sight of all the survey plans referred to in such leases and now in the possession of Marigot des Roseaux Limited. This exercise may very well satisfy the PURCHASER that all that property now in the hands of the VENDOR and that area of land now belonging to Marigot des Roseaux, but to be acquired by the PURCHASER via the VENDOR at completion will enable them to occupy and possess with good title All That Land now in the possession of the VENDOR."

15. At Clause 4.5 Mr. Foster opined:

> "This lease assigned to Doolittles Limited describes that missing 2nd lot area – referred to by Bradley Paul & Associates as being without a lease. It should be observed that this particular lease stipulates covenants for the building of a restaurant, docks and jetties *and as such, the use of the reclaimed land may have been a necessity* (emphasis mine)."

16. Again, at Clause 6.1 Mr. Foster wrote:

> "In my opinion, the sub leases in the possession of the VENDOR are valid. I am also of the view that on the acquisition by the VENDOR of the Company Marigot des Roseaux –the same to be handed over to the PURCHASER on completion or thereabouts, - that such process will enable the PURCHASER to gain the benefit of generous covenants contained in the said leases whilst permitting the PURCHASER good prospects of enjoying, occupying and possessing with good title All That Land, now in the possession of the VENDOR."

17. Ms. Verneuil submitted that the ambiguities contained in the Opinion crystallize the fact that the Defendants do not have any title to the reclaimed land. She argued that the reclaimed land is not and was never leased to the Defendants. She based her arguments on the following facts.

18. Prior to the signing of the Agreement, Doubloon employed Mr. Bradley Paul, a Chartered Quantity Surveyor to carry out a due diligence search of the lands leased to the Defendants and which form the subject matter of the Agreement. The gist of his report is that there was no record of any crown lease in respect of the reclaimed land (Exhibit "DBC 8").

19. Further due diligence searches have shown that a map of the Marigot Bay area, certified by the Chief Surveyor dated 12th June 1985, showed no trace of the reclaimed land (Exhibit "DBC9").

20. Doubloon conducted more searches. This time the search revealed that in August 1994, a survey was performed by Mr. Ornan Monplaisir, Licenced Land Surveyor which for the first time revealed the existence of the reclaimed land (Exhibit "DBC10").

21. On behalf of Doubloon it was urged that there is still more evidence that the Defendants do not possess a lease from the Crown to the reclaimed land. This is borne out in a letter dated 15th August 1994 from Gordon, Gordon & Co., the lawyers of Doolittle's Inn Limited (now Marigot Des Roseaux) to the Commissioner of Crown Lands, requesting that the reclaimed land be leased to Doolittle's. A reply from the Commissioner of Crown Lands dated 8th September 1994 stated that the matter has been submitted to the Cabinet of Ministers for consideration. (letters collectively tendered as Exhibit "DBC11")

22. There is a further reply to the 15th August letter. On 10th January 1995, Mr. Lester Martyr, the then Commissioner of Crown Lands wrote to Gordon, Gordon & Co. advising them that by Conclusion No. 2073 of 1994, the Cabinet of Ministers agreed to grant a lease of the reclaimed land for a term equivalent to the remaining term of years on the original lease granted to Marigot Des Roseaux in 1977.(Exhibit "DBC12")

23. On 19th March 1996, Gordon, Gordon & Co. submitted a copy of "The First Lease" to the Attorney General for approval (Exhibit "DBC14"). It appeared that the execution of the lease never took place. And if there were a lease, why then was it not tendered as an exhibit?

24. Further, on 28th August 2003, Mr. Foster wrote a lengthy letter to the Commissioner of Crown Lands copying it to Gordon, Gordon & Co. wherein he expressed somewhat ambivalent views to that contained in his Opinion which preceded this letter. In it, he stated:

> "The contentious area of land which is supposedly not covered by any lease, is, I understand, an area which covers about half the restaurant area of the Doolittles Restaurant and about half the area of the swimming pool area. If this is true, it appears the vendor has a legitimate right to operate only half of his restaurant and half of his swimming pool.
>
> In my opinion, the emphasis placed on such particularized and concise drafting was to cure the anomaly or irregularity where the Doolittle's sub lease gave 8,250 square feet to its owners for operating the restaurant and swimming pool area when that leased area in fact only covered half the restaurant and swimming pool."

25. I agree with Ms. Verneuil that the Opinion does not positively assert that the Defendants have a lease to the reclaimed land although it is common ground that the land is in their possession and control. Indeed a substantial part of the Defendants' restaurant (if not all) is built on that land.

26. It also appears that Mr. Foster erred when he stated at paragraph 12 of the same letter that:

> "Further in the events which have happened it appears that ***when the Doolittles sub-lease was granted in 1984, land had already been reclaimed to facilitate the attachment of a restaurant and swimming pool."***[Emphasis mine]

27. A study of the contemporaneous documents and in particular, Exhibit "DBC8" and Exhibit "DBC9" revealed that in June 1985, the reclaimed land was still sea-bed as the reclamation had not yet taken place. This proves that the reclaimed land could not be subject of leases and sub leases which dated back to 1977, 1981 and 1982.

28. It is to be observed that the reclaimed land is registered in the Land Registry as Block 0443B Parcel 339(Exhibit "DBC7"). It is not subject to any encumbrances or leases. This is confirmed in a letter dated 26th July 2004 by the Commissioner of Crown Lands to Mr. John Verity, the intended purchaser.

29. As it stands, by virtue of articles 355 and 376 of the Civil Code, Ch. 242 of the Revised Laws of Saint Lucia, the reclaimed land is crown domain.

Conclusion

30. Like the Claimant, I am also of the opinion that the condition precedent set out in Clause 4.2 of the Agreement for sale dated 16th April 2003 has not been fulfilled and I so declare. The counterclaim of the Defendants is withdrawn by Mr. Foster.

31. The general rule is that costs follow the event. Both Counsel have agreed on Costs of $5,000.00 to the successful party. I will award costs of $5,000.00 to Doubloon Beach Club Limited.

INDRA HARIPRASHAD-CHARLES
High Court Judge