11 pages.

ROYAL COURT
(Samedi Division)
11th January, 1994

3.

Before the Judicial Greffier

BETWEEN	**Beghins Shoes Limited**	**FIRST PLAINTIFF**
AND	**Island Gift Shops Limited**	**SECOND PLAINTIFF**
AND	**Avancement Limited**	**DEFENDANT**
	(by original action)	

AND

BETWEEN	**Avancement Limited**	**PLAINTIFF**
AND	**Beghins Shoes Limited**	**FIRST DEFENDANT**
AND	**Island Gift Shops Limited**	**SECOND DEFENDANT**
	(by counterclaim)	

Application by the Defendant in the original action for the present action to be stayed pending referral of the dispute between the parties to arbitration.

Advocate A.D. Hoy for the First and Second Plaintiffs in the original action.
Avancement Ltd. appeared through Robert Lawrence Weston, a director.

JUDGMENT

JUDICIAL GREFFIER: On 7th March, 1990, Beghins Shoes Ltd., (hereinafter referred to as "Beghins") leased the whole of the first and second floors of Nos. 55 King Street and 12 Broad Street, together with the use of the entrance in Broad Street and the staircase leading thereto hereinafter referred to as "the premises" to Avancement Ltd., (hereinafter referred to as "Avancement") for a term of nine years commencing on 25th March, 1990.

On 26th April, 1991, a contract lease was passed before the Royal Court in which Beghins purported to lease to Island Gift Shops Ltd., (hereinafter referred to as "Island Gift") Nos. 55 King Street and 12 Broad Street for a term of 21 years from 1st May, 1991 subject to the lease between Beghins and Avancement.

Avancement has always denied that it was possible under the Law of Jersey to insert a new tenant between the owner of the property, Beghins and Avancement.

There have clearly been disputes between the parties for some time in relation to various matters and as a result of these disputes Avancement has withheld rental payments. Beghins and Island Gift have purported to give notice of termination of the lease under proviso (a) thereof which reads as follows:-

"(a) *If the rental in respect of the said premises shall be in arrear for the space of twenty-one days after the same shall have become due (whether legally demanded or not) or should the Lessee Company fail to observe or perform any of the covenants or conditions hereinbefore contained and on its part to be observed or performed then the Lessor Company may terminate the present Agreement in which event it shall in all respects become null and void, and the Lessee Company shall thereupon vacate and give up possession of the said premises, but this shall not debar the Lessor Company from the right to take any legal action in respect of a breach of this Lease and to recover any rental which may be then due;*".

In the amended Order of Justice Beghins and Island Gift seek possession of the said premises, arrears of rental together with interest thereon and costs.

In its Answer and Counterclaim Avancement alleged various breaches of the terms of the Lease, including failure to maintain the building in a wind and watertight state and claims substantial damages which exceed the rental which has currently been withheld. Avancement also raises the matter of proviso (c) of the Lease which reads as follows:-

"(c) *If at any time hereafter any dispute, doubt or question shall arise between the parties hereto touching the construction, meaning or effect of these presents, or any clause or thing herein contained, or their respective rights or liabilities under these presents or otherwise in relation to the said premises then every such dispute, doubt or question shall be referred to the decision of the President of the Jersey Chamber of Commerce or of his nominee and such decision shall be final and binding on the parties hereto.*"

Avancement is now asking that the present action be stayed pending referral of the dispute between the parties to arbitration.

The action and the counterclaim were set down on the hearing list on 29th March, 1993 and a hearing date of 13th - 15th December, 1993 had been fixed but was vacated due to difficulties in arranging for the Bailiff or a Commissioner to sit on those dates.

The case of G.K.N. (Jersey) Limited -v- The Resources Recovery Board of the States of Jersey (1982) JJ 359 contains the following paragraphs (commencing with the third paragraph) on page 365 -

> *"The Attorney General submitted that because the Arbitration clause (Condition 36) formed part of the Contract between the parties, the principle of Jersey law that "La convention fait la loi des parties" applied to the clause and bound the parties, unless the facts of the case came within the exceptions to that principle. In Wallis v Taylor (1965) JJ 455, at 457, the Royal Court, having referred to that principle, stated that the Court would enforce agreements provided that, in the words of Pothier (Oeuvres de Pothier) Traité des Obligations, 1821 Edition, at p.91 -*
>
> > *"elles ne contiennent rien de contraire aux lois et aux bonnes moeurs, et qu'elles interviennent entre personnes capables de contracter."*
>
> *It was not suggested in the present case that the clause was contrary to the law or "aux bonnes moeurs", nor that the parties were not capable of contracting.*
>
> *However, in Basden Hotels Limited v Dormy Hotels Limited (1968) JJ. 911, the Court stated at p.919 -*
>
> > *"...it is the often quoted maxim 'La Convention fait la loi des parties'. Like all maxims it is subject to exceptions, but what it amounts to is that the courts of justice must have high regard to the sanctity of contracts and must enforce them unless there is a good reason in law, which includes the grounds of public policy, for them to be set aside."*
>
> *The Court thus extended the exceptions already listed to include grounds of public policy.*
>
> *The Attorney General, whilst conceding that the existence of the Arbitration clause did not oust the jurisdiction of the Royal Court, submitted that the undoubted delay on the part of the Defendant was not so inordinate or unreasonable as to justify the Court, on the grounds of public policy, in setting aside that which the parties had voluntarily agreed to do at the time of the formation of the contract. He further submitted that the Defendant was not in breach of the clause because there was nothing in it which prevented the Plaintiff, having failed to obtain the express acceptance or rejection of the nomination of Mr. Haswell, from proceeding to the next stage envisaged by the*

clause, which was to request the President of the Institution to appoint an arbitrator.

We consider that the duty of this Court is to follow the local precedents which we have cited and to apply to this case the principle "La convention fait la loi des parties."

Clearly the lease was entered into between parties who were capable of contracting and there does not appear to be anything contrary to good morals in the arbitration clause. I am therefore left with asking myself the questions as to whether there is anything contrary to law or whether there is a good reason in law, which includes the grounds of public policy, for it to be set aside.

In this context, inordinate or unreasonable delay in proceeding with arbitration which causes substantial prejudice to the other party could fall within the grounds of the public policy test.

The first issue which I considered was whether the cancellation of a lease requires a decision of the Royal Court or can be effected by a landlord by serving a notice when a breach occurs. Advocate Hoy argued that the principle of *la convention fait la loi des parties* ought to be applied to proviso (a) and that upon the service of the appropriate notice, the lease had been terminated and that therefore the arbitration clause could not come into operation as it had terminated with the rest of the lease.

I have no doubt whatsoever that Advocate Hoy is wrong on this point. It is very well established law in Jersey that a lease can only be cancelled by reason of a breach of its terms by a Judicial Act of the Royal Court.

Advocate Hoy produced an extract from French Law of Contract by Barry Nicholas on the matter of *Résolution*, which appears to be a French form of rescission. I am going to quote this section in full as it appears to me that it may well provide an explanation as to the reason why under English Law leases can be cancelled by the process of rescission without the need for a Judicial Act whereas under Jersey Law a judicial decision is required.

The relevant section commencing on page 236 reads as follows:-

"8. Résolution.

a Character of the remedy

Where the contract is unilateral, the unsatisfied creditor has a choice between exécution en nature, where that is available, and damages. Where the contract is

synallagmatic and the creditor has not yet performed his part, he may, as we have seen, resort to the exceptio non adimpleti contractus, but where he has already performed, or where he wishes to obtain a definitive release from his obligation in place of the temporary bar created by the exceptio, he has the further option of rescission (résolution) of the contract, with damages where appropriate. In a contract of sale of goods, for example, the unpaid seller, if he still retains the goods, can invoke the exceptio in reply to the buyer's demand for delivery, but if he wishes to sell the goods elsewhere, he must obtain résolution. If he has already made delivery, résolution may be advantageous if, for example, the market value of the goods is higher than the agreed price, or if there is a possibility of the buyer's becoming insolvent.

There is obviously a broad similarity of function between the remedy of résolution and the Common law remedy of rescission or avoidance for breach, but there are two marked differences. (i) Save in certain exceptional cases, the creditor must normally apply to the court for an order resolving the contract; he may not, as in the Common law, simply treat the debtor's breach as discharging the contract. (ii) There is no legal criterion for distinguishing those breaches which are sufficiently serious to justify the termination of the contract and those which are not. The matter lies in the pouvoir souverain of the trial judge.

We are here concerned with the action en résolution as a remedy for inexécution which is imputable to the defendant, ie which results from a breach of contract, but we have seen that the courts, in contradiction of the view held by doctrine, apply the remedy also where the inexécution is not imputable to the defendant because it results from force majeure. We have therefore already encountered some aspects of the remedy.

The textual basis for the remedy is in article 1184:

> *A resolutive condition is always implied in synallagmatic contracts to provide for the case where one of the parties does not fulfil his undertaking (ne satisfera point à son engagement).*
> *In this case the contract is not resolved by operation of law (de plein droit). The party in whose favour the undertaking has not been performed has the choice either of forcing the other to perform the agreement, where that is possible, or of claiming résolution with damages.*
> *Résolution must be claimed by action at law and further time for performance (un délai) may be*

granted to the defendant depending on the circumstances.

This formulation presents the remedy as resting on an implied resolutive condition (and the article is placed in the section of the Code dealing with such conditions). In this the draftsmen were following Pothier (and others before him), who linked the remedy to the practice in Roman law (which had no remedy of rescission) of inserting a resolutive condition (lex commissoria) in contracts of sale. But this derivation is not well-founded as a matter of history and is quite incompatible with the need for a court order and a fortiori with the discretion which the court exercises. The same objection can be made to doctrinal explanations in terms of cause. The courts are content to treat the action en résolution as an independent remedy without attempting any theoretical explanation.

b The judicial discretion
The option to claim the remedy is the creditor's, though the debtor can defeat the claim at any time, even during the course of appellate proceedings, by offering performance. Where the inexécution is total, the court will usually order résolution as of course, though it may accord a délai under article 1184 al 3, particularly if it thinks that the creditor is seeking to take advantage of a temporary difficulty in order to escape from a bad bargain. Where the inexécution is other than total, the jurisprudence has held that the court has a discretion. This discretion relates in the first place to the assessment of the gravity of the breach. Thus the Cour de cassation has constantly repeated that "it is for the courts ..... in case of partial inexécution, to assess, according to the particular circumstances, if this inexécution is of such importance that résolution should be pronounced immediately or whether it would not be sufficiently made good by a condemnation in damages'. In making this assessment the court will have regard to the question whether the creditor would have contracted had he foreseen the inexécution (ie whether the element unperformed could be the cause of the creditor's obligation). But it will also consider the economic circumstances in which the claim is made and the conduct of the parties, in order to achieve a proper balance between the advantage to the creditor and the disadvantage to the debtor. Résolution may be justified even where the extent of the breach is small, if the court finds indications of bad faith on the part of the debtor; and the converse, as has been said above, is also true. Moreover, the court's discretion does not relate merely to the question whether it should grant résolution or not. As we have seen, the court may also order partial résolution, with modification

of the creditor's obligation, thereby in effect setting the contract aside on terms.

c Extra-judicial résolution

In three cases the creditor need not seek a court order.

(i) The contract may expressly provide for termination. Such a provision (referred to, as an echo of its Roman origin, as a pacte commissoire) is in general valid. (It would be difficult, in view of the formulation of article 1184, to argue otherwise.) There are, however, obvious objections, not only because of the general French hostility to self-help, but also because the specification of the circumstances in which termination will occur is left entirely to the parties. There is therefore scope for abuse by the dominant party and such provisions have been restrained in two ways. In certain types of contract (eg insurance, tenancies) the legislature has intervened to regulate or exclude them. And in all cases the courts apply a restrictive interpretation and, in the absence of an express and categorical formulation, will presume that the parties intend no more than a reminder of article 1184. Moreover, even where the clause is sufficiently explicit to exclude the need for recourse to the court, the creditor must give the debtor a mise en demeure, unless this also is expressly excluded. This last possibility is obviously open to abuse, but the Cour de cassation has so far declined to regulate it, though any such clause is subject to the requirement of good faith.

(ii) In some specific instances the legislator has dispensed with the need for recourse to the court. the only such instance in the Code civil is the provision in article 1657 that where, in a contract for the sale of commodities or other movables, a date is specified by which the buyer must take delivery, the seller may after that date treat the contract as terminated by operation of law. This provision does not extend to, for example, failure by the buyer to pay the price or failure by the seller to deliver, and, though the policy of article 1657 seems reasonable it is not easy to see why the provision is so restricted.

(iii) The jurisprudence also admits unilateral termination without recourse to the court in other circumstances which appear to justify it. The scope of this exception is very difficult to define. The earliest cases concern the dismissal of employees for particularly gross breaches of duty, but the freedom to terminate has been extended to other cases where there is a special relationship of trust or confidence between the parties, where there is an urgent need to protect the creditor's interest, or where the breach is so destructive of trust as to make continuance of the contractual relationship intolerable. In such cases, fo course, as in all other cases of extra-judicial

termination, the debtor may challenge the right of the creditor to act as he has, and therefore, as in the Common law where extra-judicial termination is the norm, the matter is ultimately subject to judicial control. The creditor therefore acts at his own risk, but the elasticity of the exception is criticised as undermining the whole principle that résolution must be ordered by a court.

d Effects of résolution

In general the effect is to make the contract null, subject to the retention of provisions, such as clauses pénales, specifically directed to the eventuality of inexécution. The nullity is retrospective, with consequential restitution, but in contracts for successive or continuous performances (eg leases, contracts of insurance or employment) it is obvious that accomplished facts cannot be reversed. Moreover, the nullity affects not only the parties themselves but also third parties, who may have acquired real rights under the contract. As far as movables are concerned, the disruptive consequences of this real effect are mitigated by the rule of article 2279 Cc (qualified by article 2280) that En fait de meubles, la possession vaut titre. In the case of immovables there is a more specific mitigation provided by article 2108 Cc. Since the unpaid seller's right to seek résolution gives him in effect a real right to the property, which will prevail over the rights of any subsequent purchaser, the article provides that this privilége, if it is to be effective, must be registered within two months of the sale; and both the initiation of the action en résolution and the eventual judgment must be publicly notified. Finally, where résolution does have a real effect, it is well settled that 'acts of administration' by the interim owner are not invalidated."

Advocate Hoy submitted that under Jersey Law the cancellation of a lease, where there was a cancellation clause such as exists in this lease could occur without a judicial decision. As I have said before there is an abundance of legal authority in Jersey to the contrary. Furthermore, it is clear from section C(i) of the above quotation that that is not the position in France.

It is clear to me that there is an abundance of authority that the power to cancel is a discretionary power and that it is vested in the Royal Court only.

It is therefore clear to me that the issue as to whether or not the lease ought to be cancelled is not a matter which can be referred to arbitration.

The next issue which I considered was whether another landlord, namely Island Gift, could be inserted between the owner

and Avancement. This appears to me to be purely a matter of law and therefore not a matter which can conveniently be dealt with by an arbitrator.

I then went on to consider whether there were any matters which could properly be referred to an arbitrator. It appears to me that most, if not all, the allegations of breach of contract against Beghins and Island Gift could have been dealt with by an arbitrator, as could the question of damages flowing therefrom if they had been the only points of dispute. However, if they were so to be referred and findings of fact made, then the Royal Court, in determining whether or not to exercise its discretion to cancel the lease, would have to take account of the findings of the arbitrator. This appears to me to be an unsatisfactory state of affairs inasmuch as the same factual matters which had already been looked at by the arbitrator would have to be looked at again by the Royal Court.

Volume 2 of Halsbury's Laws of England contains at paragraph 637 on Arbitration the following section -

> ***"637. The balance of convenience. An applicant who has failed to apply promptly may be refused a stay. If the matter is urgent, the court may deal with it itself rather than refer it to the slower process of arbitration. It is not material that, if the stay is granted, the plaintiff will be out of time to commence an arbitration. A stay may be refused if the result of its being granted would be that identical or connected issues would be tried in more than one forum. This might arise because the arbitration agreement covers only part of the matters in dispute, or because the arbitrator could not grant part of the relief claimed, or because the same or connected issues are being or will be tried in another action between different parties."***

The law in Jersey in relation to arbitration is different to that in England. We do not have an Arbitration Act and we do not slavishly follow the terms of the English Arbitration Act. Nevertheless, in exercising a discretion as to whether or not to grant a stay it appears to me to be relevant, as a matter of public policy, to consider whether the granting of a stay would lead to identical or connected issues being tried in more than one forum. I believe that the effect of granting a stay pending the determination of the issues which would be capable of being dealt with by arbitration, if they were the only points of dispute, would have exactly this effect.

I have also considered the matter of delay. I am satisfied that Avancement has always wanted the disputes to be dealt with by agreement or by arbitration and this was clear from its earliest answer. However, it did not take steps to apply for a stay until

very late in the day. That application was made so late in the day that I would, as a matter of public policy, have refused it if the original Court dates had been retained. However, once the pleading had been filed by Avancement containing the allegation that the matter ought to be referred to arbitration, Beghins and Island Gift could have taken out a Summons themselves asking either the Greffier or the Inferior Number of the Royal Court to rule on the matter as to whether a stay should be granted. In my view, in a case in which a Defendant pleads that a matter ought to go to arbitration, but does not take out a Summons to this effect, in Jersey a Plaintiff ought to take this initiative.

However, as the December 1993 dates have been vacated and in light of the above comments, I would not have exercised my discretion against Avancement purely upon this basis.

However, I am refusing the application upon the grounds that the issues as to whether the lease should be cancelled and as to whether an intermediate landlord can be inserted are not issues which can properly be determined by an arbitrator and further upon the basis that if I were to stay the action pending arbitration in relation to other issues then that would have the effect of causing identical or connected issues to be tried in more than one forum.

I will need to be addressed by both parties on the matter of the costs of and incidental to the application for a stay.

Authorities

G.K.N. (Jersey) Ltd. -v- Resources Recovery Board (1982) JJ 359 @ 365.

Nicholas: "French Law of Contracts": p.236: Résolution.

4 Halsbury 2: paragraph 637.

Tirel -v- Sinel & Anor. (19th July, 1993) Jersey Unreported.

Cleveland Bridge & Enginerring Company Ltd. -v- Sogex (International) Ltd. (1982) JJ 101.