IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 245
CS94/2018

COUSINE ISLAND COMPANY LTD **Plaintiff**
(rep. by Danny Lucas)

and

MACHINERY AND EQUIPMENT LIMITED **Defendant**
(rep by Kelly Louise assisted by Bernard Georges

Neutral Citation: *Cousine Island Company Limited v Machinery and Equipment Li (CS94 of 2018)* [2021] SCSC ..... delivered on 21st May 2021

Summary	Dilictual action arising from a contract. Plaintiff to choose whether cause of action in contract or delict; section 92 of the Seychelles Code of Civil Procedure
Before:	Vidot J
Heard:	14-03-19, 15-03-19, 08-05-19, 15-05-19; 26-06-19; 27-01-20; 11-05-20 and 03-07-20
Delivered:	21 May 2021

JUDGMENT

VIDOT J

The Claim

[1] The Plaintiff and the Defendant are body corporates registered in the Seychelles. On the 22nd December 2014, the Plaintiff entered into an agreement with the Defendant whereby the latter was to supply, install, commission, issue warranty and deliver an air-condition

system on the latter's business and residential premises on Cousine Island. The contract price was for the sum of US$171,137.00. The parties agreed that a Daikin air-condition system would be installed, fitted and commissioned. The Defendant issued the Plaintiff with a warranty certificate on 04th December 2015. At the time of entering into the agreement, the Defendant presented itself as a licensed qualified and experienced mechanical, electrical and air-conditioning operator. These above facts are non-contentious.

[2] It is averred that after the air-conditioning system was installed, it was discovered that it was not functioning properly. Actually, it broke down that in the end the system had to be repaired and replaced, which work was effected by Cooling Plus Seychelles Ltd in 2017. This was because the Defendant refused to undertake essential replacements, remedial or other necessary action on the system until the Plaintiff paid the Defendant's costs and expenses. In May 2016 the Plaintiff formally informed the Defendant of the shortcomings of the system and asked that necessary repairs or replacement of the system be carried out which they allege was caused by the faute and negligence of the Defendant.

[3] It is alleged that that was due to negligence and fault of the Defendant's workmen or employees, agents, servants, preposes whilst in the course of their duties and employment, that the Daikin system was badly damaged by inter alia corrosion, leakages in places, not cooling correctly and the system was in alarm and imminent danger of failure. As a result of that, expensive furniture, paintings and highly priced items contained in the Plaintiff's villa were at risk of being damaged.

[4] The particulars of negligence listed in the plaint are numerous and include;

a. Failure to take in account that the villas are situated in close proximity to the sea and failed to take necessary or any precautions recommended or otherwise;

b. In view that the villas are situated on the coastline, failing to apply necessary chemical protection, including blue-chem which is essential to prevent corrosion or other chemical reactions which would adversely affect the system particularly in view of its location;

c. Failure to properly install, fix, attach and protect the Daikin system and its pipes, equipment and accessories and appliances including failure to ensure that all these were properly attached and secured to prevent dislodgement, leakages or the exertion of pressure on the system or on the ceilings or parts of the building to which they were attached;

d. Failure to follow Daikin procedures or any proper or reasonable procedures when ostensibly commissioning the Daikin system;

e. Failure to use properly accredited or approved Daikin personnel when commissioning the system and in its stead used non-Daikin approved personnel or non-qualified personnel;

f. Failure to forward the commissioning of the Daikin system to Daikin technicians or approved Daikin personnel ;

g. Failure of the Defendant to provide apply necessary standard or quality equipment, materials, labour or parts including poor galvanizing of the cable tray, poor quality insulation on the refrigerant lines, poor quality electrical / other wirings of the system;

h. Failure to install or fit air filters to any of the ducted air conditioning system and to install condensate drains as per manufacturer's specification and failure to provide necessary Maintenance Manuals or Servicing Procedures nor any instructions relating to the necessary maintenance and servicing of the Daikin system; and

i. Failure to employ fit any good workmanlike manner in the installation of the air-conditioning system.

[5] The Plaintiff claims from the Defendant the sum of US$81,030.74 and SR 480,000.00 as loss, damage and prejudice with interest and cost of the suit. I note that despite listing numerous heads under which the claim is being made the Plaintiff did not particularise the different heads of damage claimed but rather reached a global figure.

The Defence

[6] The Defendant filed a defence on the merit but also made a plea in limine litis. The plea in limine reads that there is no proper cause of action made out in the plaint by reason of having pleaded both vacarious and primary liability.

[7] On the merits the Defendant denies liability. It attributes the alleged faults, damages and non-functioning of the Daikin system to the Plaintiff. The Defendant denies all the particulars of negligence and faute that the Plaintiff avers. It denies that the damage, corrosion and leakages was attributable to the system or its installation or treatment with necessary chemical treatment. The Defendant denies that any of its employees, agents or preposes caused any damage to the system and that the damage was caused through improper maintenance or use of the system by the Plaintiff, its employees or users of the villa.

[8] The Defendant insists that they correctly and properly installed the Daikin air-conditioning system. The Defendant insists that all equipment forming part of the air condition system was pre-treated as per recommendations of consultant of the Plaintiff, Pro-Buro and was properly installed and that the Defendant being a Daikin dealer having all the requisite qualifications to install and maintain the Daikin air-conditioning system. Therefore, it denies that it is liable to the Plaintiff in any sum whatsoever

The Plea in Limine

[9] I shall deal with the plea in limine as it is addressed in the submissions. The Defendant's plea in limine pertains to the cause of action made out in the Plaint. The Defendant submits that there is no proper cause of action because the Plaintiff has pleaded both vicarious and primary liability. In their submission the Defendant noted that the Plaintiff discloses an action for breach of contract and an action in delict ("faute") in the alternative, specifically

negligence. That seemingly is the alleged professional negligence on the part of the Defendant or its workers, employees or preposees.

[10] The Defendant quoted **Mangroo v Round Island Resort (CS22/14)[2016] 910** where Twomey CJ remarked;

"I have examined the transcript of oral evidence together with the documentary evidence adduced. I have also studied the pleadings of the Plaintiff. I am unable to discern whether the Plaintiff is alleging that their claim arises out of breach of contract or whether it is one arising from a delict. It is not permissible to claim under both or to claim under delict when it is possible to claim under contract."

[11] The Defendant goes on to add that under the principle of *non cumul de responsabilite* that the Plaintiff needs to elect to plead either contract or delict and further should there be a possibility to make a claim under contract, under the principle of **Mangroo v Round Island Resort**, the Defendant cannot plead delict.

[12] On the other hand, the Plaintiff submits that the Plaintiff does not have to elect a cause of action. They referred to **Peter Pool v Daniella Souris CA No. 20 of 1995**, and insist that unless the court directs the Plaintiff to do so, then the Plaintiff does not have to. In that case the Court found that although the Plaintiff could elect to proceed either in contract or tort, *"he had elected to proceed in tort and the trial judge was justified in arriving at the decision it did."*

[13] The Plaintiff went on to submit that even when the plaint exhibits different causes of action and there is no election, the court must examine the pleadings to determine the cause of action upon which to proceed. Quoting from **Peter Pool v Daniella Souris** (supra), the Plaintiff submitted that a *"claim for both remedies cannot simply and purely be set aside as this would offend the maxim that where there is a right there is a remedy."* The Court would then make a determination on its facts and evidence.

[14] However, it is trite that a person has to elect whether to claim in contract or delict if the facts give rise to a claim in both. So where a claimant pleads in contract and delict, the

Court will invite that claimant to elect one of these causes of action; see **Pool v Souris** (supra)

[15] So therefore, the Plaintiff is inviting this Court to give a judgement in their favour in delict even if the Defendant alleges that the Plaintiff's cause of action is grounded in contract. The Plaintiff acknowledges that the cause of action could have been filed in contract. That is actually my view as well. This Court holds the view that this case should have been more appropriately filed under contract. The Plaintiff entered into a contract with the Defendant for the provision, supply and installation of a air conditioning system which unfortunately went wrong and packed up. However, the Plaintiff differentiates the case of **Mangroo** by alleging that it turns on its own facts and has been superseded by **Pool v Daniella Souris** (supra) and **by Manette Labiche v FS Management (trading as Four Seasons (Seychelles)) CS 108/2018,** a case decided by Twomey CJ, on 24th June 2019, where although contractual duties arose, the Court awarded judgement in faute.

[16] In **Manette Labiche v FS Management** (supra), Twomey CJ remarked

> *In any case both contractual and delictual liability cannot be invoked as the principle of* non cumul de responsibilité *operates in Seychellois law as I stated in* Mangroo. *In* Pool v Souris *(1996-1997) SCAR 23, in a similar situation where the Plaintiff seemed to have invoked both a contractual and a delictual remedy, the Court of Appeal found that where the Plaint disclosed two causes of action arising from the same set of facts, the Plaintiff should be invited to elect one of the causes of action. When this does not happen it may be clear from the plaint and the evidence which of the two causes of action the Plaintiff proceeds under."*

[17] It was clear to the Court that the cause of action was being pursued in faute. As it has been noted the cause of action is not only being implied in the Plaint but it also refers to particulars of negligence and faute. Throughout the Plaint the Plaintiff refers to the fault and negligence of the Defendant. That to my mind did not cause any confusion to Court thus the reason that the court allowed the case to proceed in delict. The fact that it is pleaded that there was an agreement does not necessarily restrict the cause of action to one of contract only. This is the reason why the Court did not consider it necessary to invoke

section 92 of the Seychelles Code of Civil Procedure and use its discretion to strike out the pleadings.

[18] Therefore, the Court finds that the plea in limine litis is devoid of merit and thus fails.

Mr. Bill Johnson

[19] The Plaintiff called Bill Johnson as an expert witness. He presented a report accompanied with pictures following an inspection he conducted in order to assess faults with the Daikin aircon system together with the manner in which the system was installed. He is a technician with 15 years' experience with aircon units and refrigeration. He spent 5 years of his career working for Daikin South African. He claims to be competently conversant with the Daiken system installed on Cousine Island. He carried out comprehensive inspection and evaluation of the air-conditioning system on 09th to 12th April 2016.

[20] The report identifies various alleged faults with the aircon system; be it with the system itself or the manner in which it was installed. In fact, the Plaintiff alleges that the Defendant was negligent is the manner it installed the system.

[21] Mr. Johnson gave detailed information regarding his observation. I shall try to condensed his evidence as best I can whilst I declare that I have considered the evidence in its entirety just as I have considered evidence of other witnesses. Similarly, I have considered the evidence of Mr. Nathan Abraham, witness for the defence who is an air-condition engineering. The time Mr. Johnson was recruited and he came down to perform the inspection and evaluation of the system installed, was the first time he met Mr. Frederick Keeley, one of the Directors of the Plaintiff company. Mr. Keeley in particular made complaint to the manner the indoor unit was installed in his villa. According to Mr. Johnson his inspection revealed that the compressor was faulty and that the system was not cooling correctly. The condenser coils and the fins were damaged from conditions of installation and salinity. The coils have not been treated for coastal conditions. They needed to be treated with blue-chem which is a product that is used and is necessary to be applied to systems that are to be exposed in such saline areas. Blue chem had to be applied to other parts of the system as well and it was not.

[22] Blue chem is a treatment that is applied to air-conditioning system for installation in coastal areas. Mr. Johnson testified that if that is applied at the factory, worldwide a label would be attached to the system to confirm the same. There was no such label on the system in question to indicate that blue chem was applied. That is not contradicted by the defence. He even added that the passage of time would not have erased the label. He produced a picture of such label (Exhibit P7).He further stated that even if bombarded with salt water, the label would remain visible. Blue chem is applied so as not to allow corrosion. At times even if a coat of blue-chem is applied, an extra coating is applied if the system is to be installed in high saline areas.

[23] However, corrosion could be observed on many parts of the system. Actually, the pictures revealed that corrosion was extensive on the system. Yet, the application of blue chem would have prevented corrosion for 10 to 12 years. This is non-contentious. Further, Mr. Johnson was adamant that lack of maintenance could not have caused corrosion. The condenser coils were damaged and that was because they were not treated with blue chem. Corrosion allowed salty air to go to untreated aluminium coils. That further damaged the system.

[24] Apart from a faulty compressor, the fins in the system had started to fall. The damaged compressor would cause the system not to run. Inspection of the system also revealed that the insulation pipes were sweating. Sweating was caused by refrigerant running through the pipes in negative temperature. Corrosion also caused sweating of the pipes. The pipes were also dripping and damaging the ceiling and causing rust of the indoor units. The sweating was also caused of the poorly insulated pipes that dripped. The insulation of the pipes was not of the right thickness and insulation was insufficient. The bonding agent utilised on the pipes were poorly administered as it did not connect the insulation on the pipes well. That caused air to condense quicker.

[25] On the external units there was a faulty motor that was not working. On an indoor unit while the unit was being used when fresh goes through the air unit there were no filters to protect the cooling unit. One of the indoor units had a faulty fan motor which was not working. The unit was being used as a fresh air unit and had no filters to protect the

cooling system. One of the under-ceiling units had a faulty evaporator motor. That evidence was contradicted.

[26] Mr. Johnson remarked that the system was being maintained. The defence's position is that it was not and /or that there was no proper maintenance as per maintenance manual it alleges it gave the Plaintiff. The witness noted that his inspection showed that it was maintained because the engine was clean and showed signed of being regularly cleaned.

[27] On the whole Mr. Johnson concluded that the system should have be replaced straight away and that the workmanship employed was sunstandard. He testified that the Defendant did not provide the Plaintiff with Daikin Commissioning report. Daikin provides a commissioning report after a system as the one in issue has been inspected by a Daikin personnel or approved person. The Defendant is not such a person. The Defendant provided a Commissioning Report which Mr. Johnson stated was inadequate and not to the standard of Daikin. That report showed that eighty percent (80%) of test of the system needed to be carried were as per the report provided by the Defendant, were not carried out. The defence did not put any questions to Mr. Johnson which would have contradicted his evidence, though Mr. Abraham, witness for the defence gave evidence that contradicted that witness testimony

[28] Similarly, the Defendant did not traverse evidence from Mr. Johnson that the it failed to provide the Plaintiff with a Daikin warranty. Normally, such warranty is provided for 3 years. Warranties for Seychelles are normally issued from South Africa only after the system has been inspected by Daikin approved persons and as above stated no such inspection was carried out.

Mr. Nathan Abraham's Evidence

[29] Mr. Abraham was called by the defence. He is a mechanical engineer since 2009. He deponed that he is an air-conditioning engineer. He has been practising for 11 years. Since the last 4 years he has been working with the Defendant company and at present he is the GM of the company. He has been project manager and senior engineer when the Defendant company got involved with the Cousine Island project in its latter phase.

I assessed that he has excellent knowledge of air-conditioning system and that being the case, I attach serious consideration to his testimony.

[30] Mr. Abraham testified that Defendant was agent for Daikin and insisted that he and his team had been trained by Daikin. He nonetheless produced no documentary evidence to confirm that. He maintained that as far as commissioning of the system Daikin trained the Defendant's employees to do that and states that unless Daikin has given training, they will not sell the system machines to that entity. He testified that he has inspected the installation of the equipment before it was commissioned. He added that Daikin does not give exclusivity to any dealers or distributors.

[31] In respect to warranty, he assured court that the Defendant holds warranty on the equipment it provides. However, he testified that the warranty could only have been validated if there was regular and proper maintenance being effected on the system and that he says, contrary to Mr. Johnson's testimony, was not being done. The maintenance had to be carried out either by Daikin approved contractors or themselves. He added that when the Defendant's personnel visited Cousine Island they did not observe any maintenance being done. He also said that they mentioned that the Defendant could provide maintenance services but that there are no written communications to that effect, other than the owner's manual.

[32] The witness further testified that in his opinion there were two main failures to the system. First there were the coils that were falling apart and secondly the failure of the compressor caused by voltage failure. Not enough heat was being taken out of the from the compressor. He stated that there were ongoing problems with voltage and that this had been brought to the attention of the Plaintiff. That however, was not adequately resolved. That failure affected the system.

[33] Mr. Abraham insisted that the equipment was treated with blue-chem treatment. He explained that such equipment is so treated and he said that his observation of the fins and coils of the system the blueish colour which is indication of such treatment having been applied was apparent. He explained that the coils were affected by salinity in that the system was choked up with salt. He also added that the insulation problem encountered with the system was not something that can be attributed to the Defendant. The thickness

of the insulation was specified in the Bill of Quantities (exhibit D1) complied by Pro-Buro a Mauritian company, retained as a consultant for the Plaintiff company. Exhibit D1 provided for the necessary equipment needed to set up the system. This is confirmed by Mr. Keely and Dr. Gendron, the directors of the Plaintiff company.

[34] Unfortunately, even if Mr. Abraham gave what could be considered expert testimony, he did not produce any expert report. Such report would have assisted the other party in preparation of its case. This was a procedural requirement which appears not to be the case anymore as per **Meme v The Land Registrar & Ors (SCA53/2018, Appeal from CS85/2018 [2021] SCCA 10, 30th April 2021).** The non-production of a report was because initially this case was fixed ex-parte but later this Court allowed a Motion to have the case heard inter-partes. Even after the hearing had begun, no such report was prepared and produced and therefore placed the Plaintiff at a disadvantage as they were not able to put the Defendant's expert testimony to their own expert who had left jurisdiction and was not, according to the Plaintiff contactable then, as he had left Daikin South Africa. I also note that it appears to me that Mr. Abraham was not the Defendant's initial candidate to give expert testimony. The expert that the Defendant initially had intended to call was one Mr. Lambert who was granted time to prepare a report but that did not materialise and Mr. Abraham was instead called to testify of his expertise dealing with air-conditioning system.

Damage and defects of the System

[35] It is not in dispute that there were problems with the system. By letter dated 18th May 2016 (exhibit P2), addressed to the Defendant, the Plaintiff had notified the former of the problem being experienced with the air-conditioning system. These shortcomings are clearly identified by Mr. Johnson in his report. That is supported by photos showing these shortcomings clearly. The Defendant does not dispute the facts that the air-conditioning was plagued with many problems that impeded it smooth operation. This is addressed in an email dated 14th November 2016 from the Defendant addressed to Dr. Gendron. However, the reasons or cause for such problems to the system are disputed by the parties. In that email the Defendant identifies some of the problems that were plaguing the system and identifies the cause and suggested solutions. I find Mr. Johnson's report and testimony

to be a true reflection of the problems existing with the air-conditioning system and the cause of such problems. As mentioned above I have given Mr. Abraham's testimony the utmost consideration but I have reservations regarding his testimony in the absence of an expert report from the Defendant. I note also that many of the averments made by Mr. Johnson remained unchallenged by the Defendant. On the balance of probabilities, I find the testimony of the Plaintiffs witnesses in most part plausible.

Insulation of Pipes

[36] The Plaintiff complained that the Defendant was negligent in that they failed to use the correct thickness of insulation on the pipes, particular those that run in the ceiling of Mr. Keely's villa caused damage to the ceiling and to some component of the air-conditioning units that were placed in the ceiling. These are evident through the pictures that the Plaintiff produced as exhibit P6B. Due to the insulation not being of correct thickness, the pipes would sweat and condensation allowed for water to drip on some on the component that were placed in the ceiling. As a result, thereof that also caused such components to rust.

[37] The Plaintiff further complaints that that the joining of the insulation on the pipes are of poor workmanship. That shows negligence on the part of the Defendant. Mr. Bill Johnson evidence on that issue which was not traversed and is in my view very evident even to a lay person's eyes from the pictures exhibited. The work is shoddy. It falls below the standard of work expected of professional providing such service. The work is very amateurish. It is not disputed that as per Mr. Johnson's unchallenged testimony that to rectify the shortcomings all the insulation on the copper pipes had to be replaced and it appears that the same was done.

[38] However, as per Exhibit D1, which is a Bill of Quantities from Pro-Buro, consultant for Cousine Island, the request was for the Defendant to supply piping insulation of 19mm. The Plaintiff claims that the insulation was not of the right thickness. However, Mr. Johnson and neither did any other witnesses give evidence as to the thickness of insulation used. Therefore, in this absence of such evidence and since the Plaintiff failed on the balance of probabilities to assert that the insulation was less thick than that recommended, I can only assume that they were of 19mm. Therefore, if there was condensation and

sweating of the pipes, that cannot be attributed to the Defendant. As far as insulation is concerned, the Defendant is only responsible for that in regards the application of material used for joining of the pipes and insulation. Therefore, failure to supply insulation of correct thickness cannot be attributed to the Defendant.

Blu-Chem Treatment

[39] It is not in dispute that the condenser coils and other parts of equipment of the Daikin system had been corroded to the point where they needed replaced. Mr. Johnson's evaluation of the cause of such corrosion was that the necessary blue-chem or blue fin treatment of the air-conditioning system had not been applied. The Defendant on the other hand concluded that this happened because the system was not being properly maintained, an allegation that is denied by the Plaintiff.

[40] Blu-chem is a treatment that is normally applied to all such system as that installed on Cousine Island. Blu-Chem prevents corrosion. That is because of the high saline environment of Cousine Island. This is applied at the factory at which the parts and/or components are manufactured. Mr. Johnson testified and supported his report (exhibit P6(A)) that the condenser did not have blue-chem treatment on the condenser coils. He explained that that was visible from observation of the air-conditioning system. It only had the standard treatment from the factory. That is not sufficient for saline coastal areas as it will protect the system to a certain point only. What is needed for such areas was an extra coating of Blu-chem treatment. The Defendant is in agreement with such proposition but states that such extra coating of Blu-Chem was applied. If it was indeed applied would the condensers and other units have corroded to such an extent? I do not believe so.

[41] He notes that if no such extra treatment is applied, then coastal air starts to corrode the coils thereby causing the system to fail. The coils and the filters to be installed on the indoor units needed to be protected from coastal conditions with Blu-chem treatment. The evidence of Mr. Johnson was not traversed that the condensers coils were damaged from conditions of the installations. The compressor was damaged and caused the system not to run. Mr. Johnson testified that when a special coating of blu-chem or blue fin is applied to components or unit of an air-conditioning system to be installed in a highly saline

environment, a special sticker or seal as that shown in exhibit P7 is stuck onto those components. This was not the case here. There was no visible sticker on the units. Such sticker as per Mr. Johnson can stand environmental elements and will always be visible. Exhibit P7 was admitted without objection and the Mr. Johnson's testimony on that issue was not challenged. This shows that the Defendant did not take extra care to ensure that the air-conditioning system had all necessary protection for the saline environment where it was to be installed.

The Commissioning of the air-conditioning system

[42] The Commissioning Report was produced as exhibit P4. It is dated 22nd December 2014. The commissioning was done by Mr. Basheer Mohammed from the Defendant company. Apparently, he is a technician with the Defendant company. Mr. Abraham testified that the technician was familiar with the Daikin system. The report suggests that everything was functioning effectively with no known or identifiable problems although Mr. Abraham points out that Mr. Mohammed made entries in regards to electricity voltage of the system. The way I understand it, a system can only be commissioned after the entire system it is found to be functioning without faults. Mr. Mohammed was not called as a witness.

[43] I consider that before the commissioning of the system is effected and before the report is produced, the Defendant would have ensured that its performance was up to par. I expect that when such a report is produced, any deficiencies or shortcomings are cured. Could it be that at the time the commissioning was done there was no problem with the generator on Cousine Island that could have occasioned voltage fluctuation? If there actually was a problem with the generator that should have featured in the report. It did not. Both Mr. Keeley and Mr. Koos had acknowledge that there was initially a problem with the generator but Mr. Koos added that there were no problems with generator in terms of the power generated. That I understand to mean that there was no voltage fluctuation which could have caused the system not to work effectively or to fail. However, they both maintained that that problem was rectified. I am inclined to belief that because that problem was attended to and rectified that the Defendant commissioned the system and produced the

report without identifying that there was a problem with the generator supplying fluctuating voltages.

[44] Furthermore, the Plaintiff, through Mr. Johnson testified that for any air-conditioning system of that nature there is need for Daikin approved technician to commission the system. Mr. Abraham nonetheless maintained that it was not necessary for Daikin South Africa to commission the system. That proposition was not put to Mr. Johnson by the Defendant. It is alleged that the only approved Daikin agent in Seychelles then was Cooling Plus Company Limited. The Defendant stated that they were Daikin approved agent. They did not produce any document to attest to that, which makes it difficult for the Court to verify the veracity of such averments. In the absence of such what this Court considers to be a pertinent document, this Court cannot but accept Mr. Johnson's version as being correct. In fact, it was Cooling Plus that finally replaced the air-conditioning system.

Maintenance Manual

[45] The Defendant argued that the system failed because there no proper maintenance. It said that immediately following the commission of the air-conditioning system it served on the Plaintiff a Maintenance Manuel, which is denied by the latter. The Defendant argues that the Plaintiff needed to have qualified people to effect the maintenance. The maintenance of the system could only effected and performed performed by Daikin qualified technician. It argues that the Plaintiff either did not carry out proper or any maintenance on the system. The Plaintiff maintains that they carried out regular maintenance in conformity with oral instructions from the Defendant. In fact, Mr. Johnson testified and produced pictures to show regular maintenance was carried out. That required mainly the cleaning of the system to prevent dust and the washing of the coils. Mr. Johnson was adamant that upon his visit it was very visible that such maintenance was being carried out from visible inspection particularly since the units was clean.

[46] The Commissioning Report is dated 22nd December 2014. That was the point whereby the system was handed over and deemed to be working efficiently and to the required standard. On 04th March 2016, Dr. Gendron had written an email (Ex D4) to the Defendant asking

that the Defendant sends his proposal for the maintenance contract. This email seems to be more aligned with the Plaintiff's position that they were not provided with a maintenance manual. If a maintenance contract was not furnished the Defendant cannot complain that there was no proper maintenance carried out. I also bear in mind Mr. Johnson's observation that there were signs of regular maintenance. I find his evidence credible. Therefore, the Defendant was negligent in failing to provide the Plaintiff with a maintenance manual which would have assisted the Plaintiff in carrying appropriate maintenance.

Quality of Workmanship

[47] It is not disputed that the setting up the air-conditioning system took far longer than was scheduled. It was supposed to have been set up in 4 months but took 10 months. According to the Plaintiff, particularly the evidence of Mr. Koos, this was largely because the work was performed only workers with no expert supervision. The Plaintiff explained that it was some Indians and Kenyan security guards who installed the system. Mr. Koos testified, which is not denied by the Defendant, that he wrote through an email to the Defendant that no senior persons were supervising the work and the security guards were involved with the setting up the system. That means that people who were not trained to engage in such technical job were involved in setting up the system without appropriate supervision. He added that there was no adequate supervision and no quality control and that the workers were complaining of lack of materials. In fact Mr. Koos complained that the workers were not following the drawings to install the Daikin system. Mr. Abraham whilst giving evidence confirmed that that the Defendant effects visit during the time of installation. However, he adds they visited particularly during the time when there were power failures. I find that the workmanship was indeed below the required standard.

Findings

[48] The Court wishes to draw attention to Article 1383-1 that a person is liable for the damage it has caused not merely by his act, but also by his negligence or imprudence. As a professional involved in setting up air-conditioning system, the Defendant have to exercise such trade with the skills that that trade dictates and the skill it professes it has; see **Gabriel v Government of Seychelles [2006] SLR 169** and **Labonte v Government of Seychelles**

[2007] SLR 79. I find that in this case the work performed was not fully to the standard required. That being the case, therefore the Defendant would be liable to the Plaintiff particularly since the quality of work had an impact on how the system functioned.

[49] The work done fell below that standard expected of a professional performing such job. It has to be reminded that the work that was to be performed required a certain amount of skill and the Defendant professed to have had such skills. This Court finds that the Defendant failed to produced work to that required standard. Mr. Johnson's report and the pictures forming part of that report are testimony of substandard work being performed.

[50] The Defendant failed to provide an air-conditioning unit that was appropriately treated with either blu-chem or blue fin as it was to be installed in an environment with high level of salinity. In fact the Defendant does not disputed that such treatment should have been applied. They state that such treatment was applied to the system, yet the unit was highly corroded. If such treatment was applied, it would have prevented that. I further note that there was no sticker of such treatment being applied on the units. That was pure negligence on the part of the Defendant.

[51] The work was undertaken by the Defendant's employees or preposés in the course of employment and therefore makes the Defendant vicariously liable to the Defendant. I find that the Plaintiff has established its case to the required legal standard; i.e on the balance of probabilities.

Quantum

[52] The Plaintiff claims the sum of SR480,000.00 and US$81,030.74. Though claim under various heads the Plaintiff did not seek to particularise the sum being claimed under each head.

[53] The Plaintiff called Mrs. Sita Albest, accountant to give evidence as to the costs incurred as a result of the air-conditioning unit packing up which necessitated that it be replaced. Unfortunately, I sometimes had difficulty in following Mrs. Albest evidence particularly since sometimes the same invoices included different components for items or service provided to other entities of Mr. Keely particularly Keeley Granite.

[54] I have also found that the condensation and sweating was not due to the Defendant's negligence as the Plaintiff was specific as to the thickness of the pipe insulation. The Plaintiff claims that the insulation was not of the correct thickness but the report of Mr. Johnson nor Mr. Johnson testimony could ascertain what the thickness of the insulation used was. Without proper insulation the pipes sweated causing corrosion on the indoor units. However, the corrosion was precipitated by the fact that the units were not properly treaded. I will nonetheless in the absence of any specific quantum being claimed for insulation believe that a fair deduction of about eight (8) per centum of the total award to be justifiable. That deduction will be made from the rupee component of the claim. That means that only SR441,600.00 will be allowed.

[55] Ms. Louise, Counsel for the Defendant objected to several invoices being produced as exhibits and the Court ruled against her but explaining to her that she always has to right to question Mrs. Albest in regards to the invoices. One of her main contention was that some of these invoices emanate from Keely Granite (Pty) Ltd. It was explained to Court that the major shareholder of that company is Mr. Keely and it happens that sometimes the latter company would order and at times purchased on behalf of Cousine Island and subsequently billed Cousine Island. Actually

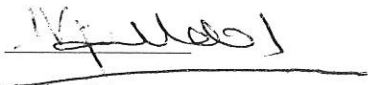
[56] I will further not allow the claim of US$10,000 being Plaintiff's counsel fees. Such fees falls to be claimed under the Court Fees (Supreme Court) and Cost Act. Therefore under the United States dollar claim only sum of US$71030.74 will be allowed. I note nonetheless, that the United States invoices together exceeds US$81,030.74 being claimed.

Conclusion

[2] I hereby enter judgment in favour of the Plaintiff against the Defendant in the sum of SR441,600.00 and US$71,030.74 with interest from the date of this judgment with cost.

[3] If unsatisfied with this judgment the Defendant may appeal against the same within 30 working days from today.

Signed, dated and delivered at Ile du Port on 21 May 2021



Vidot J