IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 83 OF 2012

BETWEEN	:	**TAHILA MANAGEMENT AND FINANCIAL SERVICES AND TRIZONE CORPORATION LIMITED**
		Plaintiff
A N D	:	**SPRUCE LIMITED** *trading as* **RAINTREE LODGE**
		Defendant
Counsel	:	**Mr. M. Rakai for the Plaintiff** **Mr. G. O'Driscoll for the Defendant**
Date of Hearing	:	17th April, 2014
Date of Judgment	:	2nd December, 2014

JUDGMENT

[1]. Plaintiff has filed an Originating Summons seeking for an order to appoint an Arbitrator.

Background

[2]. Plaintiff is alleged to have entered into an agreement with the defendant to manage the defendants resort known as "Raintree Lodge" on 29.11.06.

- ***On 6.12.06 the plaintiff had taken the management of the resort and had been running the resort.***
- ***The plaintiff had been paid for the management and on 16.4.2007 the defendant is alleged to have terminated the contract and thereafter the plaintiff had sought***

to resolve the dispute by Mediation as per the agreement dated 29.11.06. However on the request of the defendant the plaintiff had agreed to directly go for arbitration to resolve this dispute. It is alleged that as per the dispute resolution clause of the agreement the parties have to go for arbitration.

- ***The defendant had initially agreed for arbitration and named an Arbitrator however subsequently it is alleged that the defendant had backed out or delayed the process which had prompted the plaintiff to file this application to get an Arbitrator appointed by Court.***

[3]. The parties had filed their affidavits, supplementary affidavits in favor of the summons and opposing the summons. After several dates were taken for settlement, the court finally fixed the cause for hearing of the substantive application and gave the opportunity for both parties to file their written submissions.

[4]. The plaintiff filed their written submissions. However the defendant failed to file the written submissions. On the day of the hearing of the substantive matter in the summons the defendant raised two objections pertaining to the maintainability of the application.

(i) ***The defendant submitted that there is no valid arbitration agreement or an agreement between the party for plaintiff to file originating summons or to get an Arbitrator appointed.***

(ii) ***In any event there is no dispute to refer to arbitration as the defendant had acted under clause 4(I) of the agreement dated 29.11.06 and terminated the plaintiff's service. The defendant argued that a matter can be referred for arbitration only if there is a dispute and there cannot be a dispute as the defendant had the right to terminate the plaintiff's services under Clause 4(I) of the agreement and they have done so.***

[5]. The defendant's entire objection was based on the two grounds and I find even in the affidavit in opposition and the supplementary affidavits in opposition they have taken this objection to object the appointment of an arbitrator.

[6]. Plaintiff submitted that there was a valid agreement for management of the defendant's resort dated 29.11.06 as per the said agreement the plaintiff had taken the management

and while they were managing, the defendant had abruptly terminated the agreement thus creating a dispute between the parties which had to be referred for arbitration.

[7]. The defendant by affidavit in opposition as well as second affidavit sworn on 16.11.2012 has bought on material to demonstrate the sequence of events that led to the dispute between the parties, resulting in the ultimate termination of the PI document. However I find that this material is not relevant at this stage to the present application before me namely to appoint an Arbitrator.

Determination

[8]. As per the submission of the counsel, the defendant's main opposition is that there is no valid arbitration agreement and the plaintiff first has to show that there is an agreement by way of a writ of summons and thereafter if there is a valid agreement then they should ask for arbitration.

[9]. The plaintiff answered by submitting that the defendant had accepted the agreement and that they had acted on the agreement and manage the resort, the plaintiff had paid the management fees as per the agreement and infact the defendant had terminated the agreement which resulted in the plaintiff's application to invoke the dispute resolution clause.

[10]. Further the plaintiff submitted that management and possession of the resort, was given under the agreement and when payments were made under the agreement consideration too had passed.

[11]. The present application before court is based on the proposed agreement marked as P1 by the plaintiff. If the said document contains a valid arbitration agreement then it was submitted that plaintiff's opposition as to the mode of institution also gets resolved.

[12]. At the initial stage even though there was a dispute about the plaintiffs legal personality the court had required the plaintiff to file a supplementary affidavit to clarify the position and after the said affidavit was filed the defendants counsel did not pursue this aspect.

[13]. The plaintiff submitted that the defendants after termination of P1 had conceded that P1 is an agreement and had nominated an Arbitrator. However, after the plaintiffs agreed to the defendants proposed arbitrator the defendant had backed out of it and had taken various oppositions to delay this proceeding.

[14]. The purported agreement is marked as "P1" and submitted to court by the plaintiff. It is in the letter head of the plaintiff and is addressed to the defendants.

[15]. The caption of the purported agreement states:-

> ***"Re: Raintree Lodge – Sale and Purchase Agreement with Trizone Corporation Limited & Proposed Management Agreement with Tahila Management & Financial Services."***

[16]. Accordingly as per the reading of the heading it says it is a Sales and Purchase Agreement with a proposed management agreement. It was submitted that what is relevant for this application is the management agreement.

The court has considered the document marked as P1.

It deals with the aspects the parties have agreed upon. Clause (h) of the proposed agreement states:-

> ***"We are prepared to agree to move forward on exchange of this or a varied letter of agreement on Monday 4th December 06 subject to your continued availability to meet with us."***

[17]. As per Clause "h" it is clear that the plaintiff has proposed to move forward in this venture considering the document P1 as the agreement or a varied letter of agreement on 4.12.06. As per the submissions and the documents submitted to court it is clear that the

intention of the plaintiff had been to either consider "P1" as the agreement or if there was going to be a variation, to have a varied letter of agreement on 4.12.06. However no other agreement was submitted by either party. Accordingly in the absence of any other document submitted to this court, the only constructive conclusion this court can come to is that there was no other agreement, but the parties had moved on their venture based on the document "P1".

[18]. When the court questioned about two clauses of the contract namely at page 2 which states:

"The terms of our agreement and subsequent contract shall incorporate".

And clause in page 3 which states:

"It is intended that the Management Agreement will include but not be limited the following understanding and agreements".

The plaintiff submitted that intention of parties were clear, that they were going to be the terms of the contract and as stated in clause "h" unless there was going to be another varied letter of agreement dated 4.6.06, which would incorporate these clauses and any new clauses. If not the document P1 was going to be the agreement. The management fee is also stipulated in the agreement under clause "g". It was further submitted that the defendants have paid the management fee for a couple of months under this agreement.

[19]. Examining the document "P1" I find, under Clause 4 (h) the duration of the agreement is given and 4(i) deals with the termination clause.

[20]. Clause 9 refers to the dispute resolution clause.

[21]. Court finds that both parties have placed their signatures to this document. Both parties infact admitted signing the document. No other agreement had been forwarded to this court by either party.

[22]. The plaintiff submitted that this is the only available agreement executed by the parties and as per clause "h" in page 2 in the absence of any other agreement this has to be accepted as the only valid agreement. It was also submitted pursuant to this agreement the plaintiff had moved into the premises and taken the management.

[23]. The defendant had acknowledge by annexure "TD A" three invoices pertaining to the payment of management fees. These invoices clearly states that it's pursuant to the management agreement between the parties. Accordingly it was submitted that there is consideration passed pursuant to the agreement and accepted P1 to be the agreement and that the parties by conduct has acted as per the agreement and that the plaintiff at this stage cannot challenged the agreement "P1".

[24]. Strangely the second opposition the defendant had raised is based on the document "P1". In the opposition defendant stated that the court should not appoint an arbitrator as there is no dispute. It was submitted that the termination had been done under Clause 4(i) of the agreement"P1" and that when the defendant had acted under the terms of the agreement there cannot be a dispute.

[25]. The court finds that by bringing this opposition the defendant is trying to blow hot and cold at the same instance. A party cannot approbate and reprobate at the sametime. The Defendant submit that there is no agreement, but on the other hand the defendant submits, there is no dispute to refer to arbitration as he had terminated the plaintiff's services under clause 4(I) of the agreement. The defendant's opposition negates his whole opposition pertaining to the validity of P1 and the non existence of a formal agreement.

[26]. It was brought to the notice of this court that the alleged termination had occurred in 2007 and the said letter marked as P2 sent by the defendant clearly demonstrates that the defendant had considered the letter dated 29.11.06 which was marked as P1 as a management agreement. The said letter states:

" 16th April, 2007.

The Directors
Tahila Management & Financial Services
And Trizone Corporation Limited
P.O.Box 1151,
SUVA **BY HAND**

Dear Sirs,

I write in connection with the Management Agreement for Raintree Lodge between Spruce Limited and Tahila Management & Financial Services & Trizone Corporation Limited as provided for in the letter from Tahila Management to Spruce Limited dated 29th November2006.

Your performance under the agreement has been unsatisfactory to date. In particular, losses have been recorded for December 2006 and January, February and March 2007 whereas, prior to your takeover of management, the operation was making profit.

In particular:

a) Wainiveiota Estate has not produced any income for the business.
b) Trading has not improved, rather it has declined.
c) No business plan or budget was produced within two weeks of 29th November 2006.
d) There have been a number of instances of mismanagement.

Spruce Limited is therefore terminating the Management Agreement with immediate effect.

Yours faithfully,
[sgd] T. K. Davis
Managing Director
SPRUCE LTD t/a Raintree lodge

[27]. The defendant had terminated the agreement in 2007. By the document marked P3 the plaintiff had sought to commence mediation or arbitration. After several correspondence defendant had opted for arbitration and nominated the name of an arbitrator, which the

plaintiff had accepted by the document P9. It was submitted that from there onwards the defendant had delayed this matter till 2012 where the plaintiff was compelled to file a writ of summons to get the arbitrator appointed. It was also submitted that the opposition the defendant is bringing forward was for the purpose of delaying the matter.

Conclusion

[28]. It was submitted that the both parties had intended the document marked "P1" to be the management agreement.

[29]. In the absence of any other agreement submitted by either party and specially considering clause "h" at page 2 of "P1", it demonstrates that the parties have agreed to move forward in the venture based on "P1". The document "P1" has been signed by both parties which show that there is a clear agreement of mind to the contracts also both parties have acted as per the document P1 and consideration has passed. The defendant submits that they had terminated the agreement also based on Clause 4(i) of P1.

[30]. To terminate an agreement there has to be an agreement and when the defendant submits that termination was based on Clause 4(i) clearly he admits that P1 is the agreement.

[31]. As per the material before this court and specially the subsequent conduct of the parties I am inclined to hold that both parties have accepted P1 as an agreement to move forward in the venture between them

Is there a valid arbitration agreement

[32]. The defendant had taken an opposition to the maintainability of the action stating there is no valid arbitration agreement.

[33]. The purported arbitration clause is in document marked "P1".

[34]. The main requirement for an arbitration agreement is that there should be an agreement between the parties to resolve their dispute through arbitration and it should be in writing.

[35]. The defendant challenges the validity of "P1" document, however at this stage what the court has to consider is whether there is a valid arbitration agreement between the parties. The following passage is relevant to answer the issue *"it is not necessary that it should be a formal agreement or that terms should all be contained in one document. All that is necessary is that the parties should agree in writing to submit present or future difference to arbitration and such an agreement may be found in correspondence consisting of a number of letters"*. (Russel on Arbitration 18th edition 40).

[36]. Arbitration agreement is defined in "International Commercial Arbitration" by Fraser P. Davidson as an agreement by the parties to submit to arbitration "all or certain disputes which have arisen or which may arise between them"... it further goes onto say "*An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*" The requirement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.

[37]. It is evident that the dispute resolution claim is incorporated in the document "P1". Under the disputes resolution clause. The parties have clearly chosen the mode of arbitration to settle disputes. The parties have signed the document "P1", both parties don't dispute signing the document "P1". Accordingly whether "P1" is a contract or a memorandum of understanding or just a letter is irrelevant to the present application. In the present application and in answering the opposition raised by the defendant at this stage the court has to decide the question as to whether there is a valid arbitration agreement between the parties to resolve their dispute.

[38]. As per the above definitions and the requirement. This Court will now see whether there is a valid arbitration agreement between parties. Both parties in agreement have signed

the document "P1" in the said document both parties have expressed their intention to resolve their disputes by arbitration. Evan if the main agreement is challenged it is well settled Law that the arbitration clause is separable from the underlying contract. This court is of the view that the court should have a pragmatic approach in giving effect to the intention of the parties as at the time of entering into agreement in dispute resolution. As per the evidence before this court the court is of the view that the intention of parties at the time of executing "P1" had been to resolve their disputes by arbitration.

[39]. In the view of the definitions and the requirement of an arbitration agreement I have mentioned earlier in the judgment. I hold that there is a valid arbitration agreement in the document "P1" where both parties have agreed to resolve their disputes through the dispute resolution mechanism. I also hold that even if the "P1" document is challenged under the doctrine of severability, the arbitration clause survives. The issue as to whether the document P1 contains a valid agreement or a memorandum of understanding or a letter is an issue arising out of the dispute thus would be subject to the arbitration.

[40]. I find the decided case **Harbour Assurance Co. (UK) Ltd–v- Kansa General International Insurance Co. Ltd** ***[1993] 1 Lloyds Law Report 455*** in support. The said case too raised a similar question.

> ***" This case raises the question whether in English law, under the principle of the separability or autonomy of the agreement expressed in an arbitration clause, which clause is contained in a written contract, the clause can give jurisdiction to the arbitrators under that clause to determine a dispute over the initial validity or invalidity or the written contract, upon the assumptions that upon its true construction the arbitration clause covers such a dispute and that the nature of the invalidity alleged does not attack the validity of the agreement expressed in the arbitration clause itself."***

[41]. It was submitted that the dispute the plaintiff is seeking to resolve is the termination of the contracts or as the defendant submits the issue whether the termination was done under Clause 4(i) of "P1" would also be one for the arbitration tribunal to decide.

[42]. For the above stated reasons court declines to accept the opposition submitted by the defendant and the plaintiff has succeeded in convincing this court to grant the relief praide for in the originating summons.

[43]. It is pertinent to note that unfortunately in this application none of the parties have cited the Arbitration Act.

[44]. The Court also observes with dismay that due to the defendants' attitude of approbation and reprobation of the document "P1" it has taken nearly seven long years for the plaintiff to get an arbitrator appointed after the termination of the agreement. Accordingly this court grants "Order 1" in the originating summons and appoints Mr. Barrie Sweetman as the Arbitrator on the dispute between the plaintiff and defendant in relation to the purported termination of the management agreement dated 29.11.2006.

[45]. Considering the facts of this case and the time period it had taken to get an arbitrator appointed, I order cost of $1500 summarily assed in favour of the plaintiff.

Mayadunne Corea

JUDGE

2.12.2014