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Editor

John M R Renaud, LLB (Lond)
Certificate in Legislative Drafting
of Lincoln's Inn, Barrister
Chairman of the Public Service Appeal Board
Practising Attorney-At-Law

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Hon V Alleear (till 31 January 2008)
Hon A R Perera (Acting Chief Justice 1 February 2008, and Chief Justice from 5 August 2008)

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Hon B Renaud
Hon D Gaswaga

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Louange v Hervieu

Civil Code - land – encroachment – demolition – Constitution

The plaintiffs claimed that the defendant's house encroached on their land. The plaintiffs sued for an order to demolish the encroaching part of the dwelling and for moral damages. The defendant admitted the encroachment but averred that it was as a result of a mistake by the builder. The defendant averred that it would be unduly harsh to demolish that part of the house and sought instead to pay compensation.

HELD

1. A plaintiff may rely on article 55(1)-(2) of the Civil Code to seek to removal of a portion of a building encroaching on their land, without compensation to either parties;

2. Every person has a constitutional right to own and peacefully enjoy their property subject to article 26(2) of the Constitution. No person may interfere with that right outside of the express limitations; and

3. A Court will not condone violations of a constitutional right and planning legislation by merely ordering a defendant to pay compensation for an encroachment.

Judgment for the plaintiff. Order for demolition and damages of R 4200 with costs.

Legislation cited
Constitution, art 26
Civil Code, art 555

Cases referred to
Behary v Finesse CS 52/1996 (Unreported)
William v Dogley (2007) SLR 56

Karen DOMINGUE for the plaintiffs
Brassel ADELINE for the defendant

Judgment delivered on 28 January 2008 by:

PERERA ACJ: The plaintiffs are the owners of a parcel of land bearing no C 3429 at Au Cap, while the defendant is the owner of the adjoining land Parcel C 3430. The plaintiffs aver that the defendant has encroached on their property and constructed part of her house, and also planted banana trees, placed a device for drying clothes, and also dumped rubbish there. The plaintiffs therefore seek an order of this Court ordering the defendant to remove the said encroachments and also to pay R 53,500 as damages.

The defendant admits the encroachment, but avers that part of the house was constructed on the plaintiffs' land as a result of a mistake caused by the contractor who constructed her dwelling house. She further avers that on a balance of hardship, it would cause less harm to the plaintiff if they are compensated for the encroachment than if she demolished the part of the dwelling house. She also avers that the encroachment does not affect the enjoyment or use of the property of the plaintiffs.

The first plaintiff testified that Parcel C 3429 was purchased by her and the second plaintiff, her husband, jointly on 4 March 1996 (P1). Thereafter they went to Singapore for studies. When her husband came to Seychelles on a visit in the year 2000, the defendant had cleared her own land. Subsequently in the year 2003, when they wanted to build the house, they found an encroachment. They surveyed the land in March 2004, and found that the defendant's house had encroached

on their land by 3.8 sq metres (exhibit P4). The plaintiff further testified that the encroachment has depreciated the value of her land and hence claimed R 25,000 as damages. She also stated that her land was only 740 sq metres in extent and that she will not be able to plan the location of a house properly, as the encroachment is at the narrowest part of the land. She therefore sought an order on the defendant to remove the encroachment as well as pay the damages claimed in the plaint. She was however agreeable to a settlement if the defendant paid adequate compensation acceptable to them. She also agreed to the defendant finding an alternative piece of land acceptable to her, so that Parcel C 3429 could be transferred to the defendant, thus enabling her to purchase the alternative land from the proceeds. Both these options had been pursued but without success. The second plaintiff, the husband of the first plaintiff, a medical doctor, corroborated the evidence of the first plaintiff on all material particulars. He stated that the encroachment was about one third the extent of the land and that only a room and toilet could be constructed in the balance. He further testified that the defendant ought to have checked the survey plans before the construction was made, and that she could not aver that it was a mistake made by her contractor. He therefore sought the removal of the encroachment, and also the payment of damages by the defendant. He however stated that although an order to demolish would be most appropriate, he would leave the matter to Court.

Michel Leon, land surveyor, produced the plan showing the encroachment (P4). He stated that the encroachment inside Parcel C 3429 was 1.9 metres. He also stated that the overhang from the wall of the building would be a further half a metre. He opined that even if the plaintiffs had wanted to construct a house, the Planning Authority would have required them to have a buffer area between the boundary and the construction, and hence that construction could not have extended to the encroached area. A similar regulation should

have applied to the defendant.

The defendant testified that she purchased her land Parcel C 3430 in the year 2001. She constructed a two bedroomed house thereon, upon obtaining planning permission. She learnt about the encroachment from a neighbour only after the construction. Thereafter she waited until the adjoining landowner came and complained. After that, when the plaintiffs' lawyer sent her a letter, she contacted Mr Pragassen, the land surveyor who prepared plan (D1) showing the encroachment. She was prepared to pay for the encroachment as she does not have the financial means to demolish and reconstruct. However, such payment would be in monthly instalments.

The defendant maintained that the encroachment occurred due to the mistake made by her building contractor. She however stated that she did not involve him in this matter as he did not have money. She further stated that the encroached area is a portion of the guest room. She also stated that if the Court decides against her, she will demolish the encroached portion.

Claude Hervieu, the husband of the defendant, testified that in June 2003, he and his wife came to know that they had built the house encroaching the property of the plaintiffs. He too blamed the contractor for the mistake, but accepted part of the blame for trusting a very young person to do the work. He agreed to compensate the plaintiff in a sum of about R 10,000 to R 12,000 for the encroached area. He further stated that he was prepared to demolish the encroached portion without paying compensation in a sum of R 25,000 to the plaintiff. In the alternative he agreed to pay R 25,000 provided that the encroached area was not demolished.

Admittedly, the defendant constructed her house partly on the plaintiffs' land without consent or approval. The architectural

plan approved by the Planning Authority (D2) clearly showed the boundary of the plaintiffs' land, and that the proposed house should be constructed at least 2 metres away from that boundary demarcated as beacons TA. 505 to AN8. Michel Leong, the land surveyor, stated that the only beacon which was missing was beacon TA 503 on the south western boundary which was replaced. Hence, beacons TA 505 and AN8 being intact, the defendant ought to have been more diligent to ensure that her contractor complied with the site plan as approved by the Planning Authority. In the case of *Charles William v Michel Dogley* (2007) SLR 56, the Court held that as the defendant had been aware of the encroachment, the encroached portion should be demolished. Damages in a sum of R 1,000 was also awarded to the plaintiff. So also in the case of *Roy Behary v S Finesse* CS 52 of 1996, this Court ordered the demolition of a boundary wall which encroached on the plaintiff's land. Damages were not awarded due to lack of evidence.

In the present case, the Court cannot accept that the defendant and her contractor were mistaken about the boundary. It was basic that they verified the boundary before commencing work. In these circumstances, it is clear that the defendant had made the encroachment deliberately with the object of stealthily gaining as much advantage as possible from the neighbour's land which was lying undeveloped for over 5 years without any action being taken by the plaintiffs who were away in Singapore. An order for demolition of a building or structure on another's land depends on the circumstances of each case.

The plaintiffs in the present case rely on article 555(1) and (2) of the Civil Code and seek the removal of the portion of the house by the defendant without compensation. In addition they claim damages and costs of action.

The defendant and her husband urged the Court to consider

the balance of hardship in ordering a demolition. They were however not averse to an order for demolition of the portion of their guest room, but without an order for payment of compensation as claimed.

In considering the hardship caused to the parties, the Court has to be mindful that the existence of the defendant's portion of the building necessitates the plaintiffs to construct their house at least two metres away therefrom, and also prevent them from building a boundary wall. These are however dependant on the decision of the Planning Authority. Hence the depreciation of the value of the plaintiffs' land may be more than the cost that the defendant will have to bear in demolishing and reconstructing the encroached portion of the house.

Further, it is a constitutional right of every person to own and peacefully enjoy property purchased in this country, subject to limitations provided in article 26(2) of the Constitution. No one has the right to interfere with that right outside these limitations. The plaintiffs are entitled to utilize their land to the fullest extent. The defendant has not only violated that right, but also contravened the Planning Regulations. In these circumstances, if the Court merely orders the defendant to pay compensation for the encroached portion, the Court would be condoning a constitutional violation as well as a breach of Planning Regulations. Hence the proper order this Court should make is an order on the defendant to demolish the 3.8 sq metres encroachment, leaving the Planning Authority to decide on the course of action to be taken as regards the violation of the Regulation.

As regards moral damages claimed, the Court is satisfied that the plaintiffs have been inconvenienced by the act of the defendant, and that they suffered financial loss having to travel from Singapore frequently to seek a just remedy. However, considering the expenses that the defendant, and

her husband, who are pensioners have to bear by the demolition, I award nominal damages in a sum of R 1000, and a further sum of R 3200 paid to G&M Surveys for location of boundaries and demarcation of the encroachment.

Accordingly, an order is hereby made ordering the defendant to demolish the encroached portion of her building 3.8 sq metres in extent and to remove all debris, plants and erections at her own expense within three months from the date hereof. If she fails to do so within that period, the plaintiffs are hereby authorized to have the said demolition done by a competent contractor causing no further damage than necessary, and to recover the demolition charges from the defendant. The defendant should however be given prior notice of such demolition.

The plaintiffs will be entitled to a total sum of R 4,200, together with interest and costs of action.

Record: Civil Side No 154 of 2005

Laporte v Laporte

Matrimonial causes - divorce – division of property – management pending determination

A husband and wife entered into an oral partnership agreement to run a business. The couple separated and divorce proceedings commenced. Initially it was declared that both parties were entitled to a half share of the business. That declaration was set aside by the Court of Appeal and a new hearing was set. While the hearing was pending, the husband applied for an injunction to restrain the wife from mismanaging the business.

HELD

1. A partner cannot manage a partnership business unilaterally to the exclusion of the other partner.

2. If there is a breakdown in the partners' relationship, the court may appoint an agent to jointly manage the partnership with the partners.

Judgment for the applicant. Orders made restraining the respondent from solely managing business, preventing unilateral dealings with property or business funds, ordering respondent to supply a full statement of business accounts.

Legislation cited
Code of Civil Procedure, s 305

Nicole TIRANT with Lucy POOL for the applicant
Frank ALLY for the respondent

Ruling delivered on 13 June 2008 by:

PERERA J: The applicant has filed a motion dated 1 April 2008 seeking an injunction on the respondent for the following orders -

(1) That the Respondent be restrained from the current Management Style of the Chalets D'Anse Forbans which is jeopardizing the profitability and long term sustainability of the business.

(2) That an interim injunction apply forthwith to prevent any dealings with the property and funds of the Chalet D'Anse Forbans by the Respondent or her servants or agents without prior consultation with and the approval of the Applicant, the other partner in partnership.

(3) That the Respondent provide the Applicant with a full account of all revenue and expenditure of the business, including the use of funds from all the foreign currency accounts, since 2006 to date.

(4) That the Respondent be ordered, with effect from the date of the order, to desist from all management decisions, including but not limited to, employment of personal, purchases, of equipment and services, building and renovation works using or in any way affecting the funds and investment of the partnership.

(5) .....

The main dispute between the parties, who were formerly

husband and wife, was that they had entered into a verbal partnership agreement to establish the business called "Chalets D'Anse Forbans" on the basis of the applicant holding 90% interest and the respondent a 10% interest, but that subsequently the respondent claimed a 50% interest and ownership of the business. The applicant therefore sought a declaration in this case that he holds a 90% interest, and for an order allowing him to manage the said business without undue interference from the respondent.

The present motion is one of several such similar motions for injunctions under section 305 of the Code of Civil Procedure filed by the applicant pending the determination of the main cause of action pleaded in the plaint dated 15 July 2005. The orders made thereon by Karunakaran J are relevant to appreciate the context in which the present motion for injunctions has been filed. I shall therefore first set out the history of these motions and the rulings based on the pleadings of the parties.

The applicant filed a motion on 9 August 2005 for an interim injunction seeking management responsibility of the business including sole and individual responsibility in all financial transactions and operations, and an order on the respondent prohibiting her from unduly interfering with the business, and being physically present on the business premises. In a supporting affidavit, the applicant averred that the respondent had no experience, training or exposure to the hotel industry and was mismanaging the business by treating guests in a hostile manner and ill-treating the staff, forcing some of them to leave. He also averred that he was not consulted on business matters, and that the premises and the property were neglected, leaving it in a state of disrepair. He also alleged fraud on the part of the respondent in respect of the revenue of the business.

On 3 November 2005, Karunakaran J granted an ex parte

interim injunction as prayed for by the applicant. The respondent who had not been heard, sought a stay of that injunction until the final disposal of the case, and the Court so ordered by order dated 7 November 2005. An inter partes hearing on the merits of the motion for injunction filed by the applicant was fixed for 30 November 2005 at 9.00 am. The applicant was absent and unrepresented when the order of 7 November 2005 was made.

On 7 November 2005 the applicant filed a motion to hold the respondent in contempt of Court for failure to obey the order of 3 November 2005. By that time the order of 3 November 2005 had been stayed. However, the respondent filed an affidavit on 14 December 2005 making counter-allegations against the applicant, who she alleged was responsible for the inability to operate and manage the business due to his unreasonable conduct towards the business, members of the staff and also members of his own family. She therefore sought an order, giving her sole responsibility to sign cheques for the business in the business accounts, specifically MCB - USD, Euro, GBP and SCR A/C No. 01712137200, and Barclays Euro A/C No 9987980 and SCR A/C No 1043371,

> on condition that accounts thereof are rendered every month to the applicant and he is paid his half share in the profits of the partnership pending the dissolution of the partnership or until such other or further order of this honourable Court.

The respondent also attached a copy of the judgment entered by Renaud J in the divorce case dated 10 October 2005, settling the matrimonial property, and inter alia holding that the parties were each entitled to a half share in the business known as Chalets D'Anse Forbans.

A further affidavit was filed by the respondent on 15 February

2006, in support of her claim that she was managing the business properly, and refuting allegations of fraud on her part in dealing with the business revenue. She alleged that the applicant was unreasonably refusing to sign business cheques, and that consequently debts were owed to clients and members of the staff. She also averred that the inflow and receipt of foreign exchange is being closely supervised by the Central Bank on a weekly basis and under her management, the business has not been investigated or charged for any improper dealings in foreign currency.

The case was fixed for mention on 1 June 2006 at 9.00 am but on that day, the respondent and her counsel were absent. Mr Derjacques who appeared for the applicant had withdrawn his appearance in favour of Mr A Juliette, who appeared for the applicant that day. The Court ordered that the case be mentioned on 13 July 2006 at 9.00 am with notice to the respondent's counsel Mr F Ally. However, the Judge made an ex parte order on the same day (1 June 2006) authorizing

> Mrs Marie Daphne Laporte to operate all bank accounts in Seychelles for and on behalf of the firm "Chalets D'Anse Forbans", *as single signatory to the cheques* and related bank documents. Further I direct all the banks in Seychelles to honour and accept the cheques and other related documents duly signed by Marie Daphne Laporte as a single signatory.

The applicant, by a motion filed on 2 June 2006, sought to set aside that ex parte order on the ground that he had been denied an opportunity to be heard. In any event, the case had already been fixed for motion on 13 July 2006, and hence, how substantial relief sought by the respondent in her affidavit of 14 December 2005 came to be granted ex parte, is not borne out in the record. Hence there had been no proper inter partes order so far.

The respondent filed an affidavit dated 6 July 2006, resisting the application to set aside the ex parte order of 1 June 2006. No order was made on that matter, until the applicant filed the instant motion dated 1 April 2008, seeking the above stated orders.

It must initially be stated that the declaration made by Renaud J in the divorce case that both parties are entitled to half share of the business, has been set aside by the Court of Appeal, and the fresh hearing on that matter has been listed for 16 June 2008. The Court of Appeal has restored the status quo of the parties until the decision of that case. The resulting position is the disharmonious relationship between the parties as regards the management of the partnership business consequent to the ex parte order of 1 June 2006. The applicant avers that the respondent, acting on the basis of that order is enjoying full and exclusive management of the Chalets and using funds without reference to him or obtaining his approval. He avers that this situation is affecting the profitability of the business, and is likely to affect the value of his shares in the venture when the matter is finally dealt with by the Court. He avers that decisions taken by the respondent unilaterally, include -

(1) Increasing the number of employees at the Chalets D'Anse Forbans.

(2) Financial statements unsigned since 2005.

(3) Absence of business accounts, and administrative and accounting records relating to the business. In this respect, it is averred that the applicant has not received any records of expenditure on the foreign exchange accounts of the business despite his requests.

(4) Absence of revenue accounts relating to the business. He avers that he is not receiving details of monthly revenue and sales of the business, although he is in possession of the financial statements for the years 2005, 2006 and 2007.

(5) Use of foreign currency accounts. In this respect, the applicant avers that the bank has the foreign currency retention quota of the business, and since there is no consultation, the respondent is using the funds to purchase a large number of items which could be purchased locally, thus saving the foreign currency reserves of the business. He also avers that he has no details of the amounts banked in that account.

(6) Rebuilding and renovation of the Chalets. The applicant has averred that large scale renovation works which are unnecessary are being carried out without consulting him, using business funds.

The applicant avers that the respondent ignores all correspondence sent by him calling for details of expenditure.

The applicant has disclosed the following particulars regarding the business accounts -

Barclays Bank
- Euro A/C No 998780
- Sey Rs A/C No 1043371 (Corporate current A/C)

Mauritius Commercial Bank
- Sey Rs A/C No 00712137200
- 7 day call A/C/ No 007712137204

- UK Pound Sterling A/C No 06712137200
- Euro A/C No 07712137200
- US Dollar A/C No 01712137200.

He avers that he has no information regarding the expenditure on these accounts.

The applicant therefore avers that as a partner and the principal investor, he should be aware of the operations and management of the Chalets, and should be directly involved in the administrative decisions taken, and also should be consulted prior to expenditure on any of the business accounts. He therefore avers that unless the Court so orders, irreparable damage and loss will be caused to his investment. He however admits that a monthly "stipend" of R 5000 he received has now been increased to R 7000 since November 2007, and that he has received two cheques of R 50,000 and R 200,000 which are supposed to be his share of the profits. Details have however not been supplied though requested. In addition to the orders sought in the motion dated 1 April 2008, the applicant prays for an order of this Court that –

(1) The respondent ceases forthwith all capital expenditure on the Chalets.

(2) The respondent consults him on all managerial issues concerning the business.

The respondent on the other hand, resisting the instant motion, avers that subsequent to the decision of the Supreme Court in case No Dv 22 of 2004, (Renaud J) she has filed a plaint for the dissolution of the partnership in Civil Side No. 461 of 2005 which is pending. In any event, a determination of the matrimonial property issues between the parties is still to be decided. Undoubtedly, one of issues therein would be the financial adjustment of the parties relating to the partnership. In the present case, the applicant seeks a declaration that he

is entitled to 90% interest and ownership of the business. Hence there are a multitude of issues being canvassed in separate cases, which the parties must ultimately decide to limit to one or the other of these cases. Should the dispute as regards the partnership be confined to the case where the respondent is seeking its dissolution, and if so be excluded from the matrimonial property case? Further, what would be the purpose in the present case to determine whether the applicant has a 90% interest in the business on the basis of an alleged agreement, if the matter is canvassed in the case of the contentious pleadings in the present matter? The pursuit of separate cases bearing on the same matter, albeit from different causes of action, might lead to conflicting decisions leaving the parties to agitate and reagitate the issue ad infinitum. Hence, until a consensus is reached on this matter, I shall confine myself to the relief sought by the applicant in his motion and affidavit of 1 April 2008.

The respondent, has in a comprehensive affidavit, supported by documents vehemently resisted the motion for interim injunctions. Considering only the averments relevant for present purposes, the respondent avers that she does not consult with the applicant regarding the business as they are not on good terms, as he is abusive and violent towards her. She however avers that she renders him regular accounts, and manages the business with utmost diligence. As regards the order of 1 June 2006, which was made on the affidavit of the respondent dated 14 December 2005, she avers that by granting her powers with regard to the "operation of the accounts" she was granted the "sole management of the business". This is contested by the applicant, in paragraph 7 of his affidavit as an erroneous interpretation of that order. The respondent, in paragraph (xi) of her affidavit dated 14 December 2005 sought sole responsibility “to sign the business cheques" on condition that accounts thereof are rendered every month to the applicant and he is paid his half share in the profits of the partnership pending the dissolution

of the partnership or until a further order of the Court.

Unfortunately, the conditional part of the prayer was not included in the ex parte order of 1 June 2006. That order was based particularly on the said paragraph (xi) of the respondent's affidavit, and gave her no more powers than to sign business cheques, as the applicant had allegedly refused to countersign them, thus causing hardship to the day to day running of the business. The respondent herself had set a condition to render monthly accounts to the applicant, and to pay his half share of the profits of the partnership.

The respondent has therefore exceeded the scope of the order of 1 June 2006 and arrogated to herself the sole management of the partnership business as well. However I have perused the averments in her affidavit and the supporting documents. The applicant's allegations regarding mismanagement and accounting irregularities cannot be fully justified. But that does not cure the legality of managing a partnership business unilaterally to the exclusion of the other partner, especially as there is no specific order of Court. As there is admittedly, no written partnership agreement, the proportion of the respective interests in the business is not known. Until that is judicially ascertained, the parties should proceed on an equal basis. The only obstacle appears to be the inability of the parties to work together due to their acrimonious relationship. This is averred in paragraph 14(xxiii) of the respondent's affidavit dated 24 April 2008. She has further averred in paragraph 17(i) that – "any *direct involvement* of the applicant in the administrative decisions of the partnership at this stage will only hinder the good management of the business....." Further she avers that –

> If the applicant is given any management powers in the partnership until it is dissolved, there is strong likelihood that the applicant will be vindictive and he will resort to his old style of

management by obstructing the proper management of the business by unreasonably refusing to sign cheques.

The respondent therefore moves that the present status quo be maintained until the partnership is dissolved in appropriate proceedings.

Mrs Nicole Tirant-Gerhardi, counsel for the applicant, after making detailed and comprehensive submissions on the respective averments of the parties, conceded that given the present relationship of the applicant and the respondent, joint management by the two parties was not feasible. She suggested that, if the Court so orders, the applicant would be prepared to manage the business with the respondent through an agent. Mrs Gerhardi, upon instructions, offered her services in that respect.

The applicant is entitled to have a more meaningful role in the management. The respondent basically is apprehensive of any "direct involvement" of the applicant in the administrative decisions of the partnership. Hence she cannot complain if the applicant is given management powers through the services of Mrs Gerhardi, or any other legal or accounting professional. The respondent shall co-operate with that person, and act in a more transparent manner. In these circumstances, the Court makes the following orders -

(1) The respondent is restrained from solely managing the Chalets D'Anse Forbans. It shall be done jointly with the agent of the applicant in a peaceful and business-like manner without conflict.

(2) An interim injunction is issued preventing any dealings with the property and funds of the business by the respondent or her servants

or agents without prior consultation or approval of the applicant through his agent.

(3) The respondent shall provide the applicant with a full account of all revenue and expenditure of the business, including the use of funds from all the foreign currency accounts since June 2006, to date. However, to prevent any further conflict, the respondent shall continue to have the power to sign cheques in terms of the order of 1 June 2006.

(4) The respondent shall, with effect from the date the applicant intimates to the respondent his choice of the agent, consult with and seek and obtain prior approval of the applicant through the agent, for all management decisions, including the employment of service personnel, purchasing of equipment and services, building and renovation works using the funds and investments of the partnership.

Ruling made accordingly.

Record: Civil Side No 253 of 2005

Gappy v Barallon

Defamation – foreign words

The parties were at a football match. The defendant loudly said in Creole that the plaintiff was a 'voler pick-up'. The plaintiff sued for defamation and claimed that the ordinary and natural meanings of the words were understood to mean that the plaintiff had stolen a pick-up truck belonging to the defendant's son. The defendant denied that the incident ever took place.

HELD

1. The law of slander and libel in Seychelles is that of England;

2. Where the words complained of are in a foreign language, the plaintiff must prove by a witness capable of being cross-examined the meaning of those words in English;

3. A general denial by the defendant of the foreign words cannot be construed as an admission of the correctness of the translation; and

4. The plaintiff must plead in the claim the English meaning of foreign words.

Judgment for the plaintiff. Damages of R 8,000 with costs.

Cases referred to
Bouchereau v Rassool (1975) SLR 238
Labrosse v Fabien (1979) SLR 15

John RENAUD for the plaintiff
Bernard GEORGES for the defendant

Judgment delivered on 26 November 2008 by:

RENAUD J: On 9 July 2004 the plaintiff entered a plaint alleging that the defendant slandered him and he claimed damages.

The defendant denied the allegation and sought the dismissal of the plaintiff's claim.

It is not in dispute that the plaintiff was a customer of one Ronny Barallon the son of the defendant who is and was at all material time carrying on the business of importation of vehicles.

The plaintiff pleaded that sometime during the year 1999 he and Mr Ronny Barallon entered into an agreement for importation of a pick-up and subsequently the said pick-up was seized on its arrival by the Custom Authority which resulted into a court case in connection with that transaction.

The plaintiff further pleaded that in connection with that transaction, on 26 August 2000 whilst he was attending a football match between St Michel and Red Star at Stade Linite the defendant falsely and maliciously, in front of a crowd, said to him the following words — "*voler pick-up".* He added that those words complained of, in their natural and ordinary meanings are understood to refer to the plaintiff and its natural and ordinary meaning are explicitly understood to mean that the plaintiff is a thief who robbed the defendant's son of his pick-up. The plaintiff alleged that the said words were false and constitute a grave slander on the plaintiff and as a result of these false and malicious allegations against him, the plaintiff has been severely injured in his credit, character and reputation and has been brought into ridicule, hatred and

contempt. The plaintiff also alleged that he has suffered prejudice and has sustained loss and damage for which he is praying this Court to enter judgment in his favour and award damages in an amount to be determined by this Court.

The defendant denied all the material allegations. He specifically denied having spoken the words complained of or any words similar to them at a football match on the day specified or at all.

In the case of *Bouchereau v Rassool* (1975) SLR 238, the Court of Appeal inter alia held that:

(i) The law of slander and libel in Seychelles is that obtainable in England, the English rule must be followed, and where the words complained of are in a foreign language the plaintiff must prove by a witness capable of being cross-examined their meaning in English. There was before the Court no evidence of the correctness of the translation into English of the alleged slanderous words.

(ii) The allegations in the plaint that plaintiff had used the words complained of in Creole and their meaning in English were met in the defence by a general denial. Though open to criticism, such denial could not be construed as an admission of the correctness of the translation.

In the case of *Labrosse v Fabien* (1979) SLR 15 the Court held that in omitting to plead the translation of the Creole words uttered is fatal.
Counsel for the defendant submitted that no proof of the words into English was made by the plaintiff and there are thus no words before the Court to ground the case.

With respect, I find otherwise, as at paragraph 5 of the plaint

the plaintiff has pleaded in paragraph 5 of the plaint that - "the said words within their natural and ordinary meaning are explicitly understood to mean that the plaintiff is a thief who robbed the defendant's son of his pick-up" to which the defendant in his statement of defence simply made a general denial.

The plaintiff and one witness testified in support of his claim and the defendant alone testified in his defence.

The determination of this case hinges on this Court accepting one of two diametrically opposed versions of the events of the day in question. On the other hand, the plaintiff and his witness who testified that the defendant accused the plaintiff of being a thief. On the other hand, the defendant states that he cannot remember the incident and denied ever calling the plaintiff a thief, at a football match or elsewhere.

In determining which of the two versions is more credible, I observed the demeanour of all the parties when they were testifying, the cogency and consistency of their evidence-in-chief and as well as under cross-examination. The evidence of the plaintiff was corroborated by that of his witness as to the material particulars. One could be tempted to believe that there could have been collaboration in preparing them. The incident happened on the remarkable occasion when two top football teams were competing. The plaintiff's witness is a police officer who by his training ought to be observant and be able to recollect such an incident. There is no reason that would lead me to doubt his testimony. The defendant's testimony was obviously self-serving as one would expect in such circumstances. He stated that he was always accompanied by either his son-in-law or his brother at such football matches but he failed to bring any witness. Of these two versions, I find on a balance of probabilities, that the version of the plaintiff is more credible than that of the defendant.

I find and conclude that on the material date and time at Stade Linite the defendant did utter the words as alleged by the plaintiff. I also find that such words were uttered loudly and were heard by other people including the witness. The words uttered amounted to a false allegation, were slanderous and malicious. By doing so, the defendant injured the credit, character and reputation of the plaintiff and brought him into ridicule, hatred and contempt.

In determining the damages that I ought to award in the particular circumstances of this case, I have taken into consideration that it was a slanderous act imputing a criminal offence, however, I do not believe that the damage caused was so severe as to merit an award of substantial damages.

For the reasons stated above, I enter judgment in favour of the plaintiff as against the defendant in the amount of R 8,000 with interest and costs on the Magistrates Court scale.

Record: Civil Side No 204 of 2004

Dubel v Soopramanian

Civil Code - land – ownership – concubinage – action de in rem verso

The parties were in a de facto relationship and living in a house held in both their names. The plaintiff sued for sole ownership on the basis that the defendant had made no financial contributions to the purchase of the property.

HELD

1. No enforceable legal rights are created or arise from the mere existence of a de facto relationship. However a cause of action de in rem verso can operate to assist a de facto partner who has suffered detriment without lawful cause to the advantage of the other partner;

2. A de facto partner cannot rely on the presumption of co-ownership under article 815 of the Civil Code on the basis of indirect contributions; and

3. A de facto partner may recover actual contributions to the extent that the other partner was unjustly enriched.

Judgment for the plaintiff.

Legislation cited
Civil Code, art 815

Cases referred to
Dingwall v Weldsmith (1967) SLR 47
Dupres v Balthide (1996) SLR 101

Edmond v Bristol (1982) SLR 353
Esparon v Monthy (1986) SLR 124
Larame v Payet (1983-87) 3 SCAR 355

Plaintiff in person
Alexia ANTAO for the defendant

Judgment delivered on 22 January 2008 by:

PERERA ACJ: The plaintiff, who was living in concubinage with the defendant for over 8 years claims a half share of a property which is registered in their joint names. The plaintiff avers that the full purchase price for the land was repaid by direct deductions from his monthly salary and that the defendant made no financial contributions. He therefore seeks to have the name of the defendant removed from the Lands Register in respect of Parcel H 5994.

Admittedly, Parcel H 5997 was transferred in the joint names of the plaintiff and the defendant on 1 March 2002 by the Seychelles Housing Development Corporation (SHDC), for a sum of R 35,000 (P1). The plaintiff produced his salary statements issued to him by the Indian Ocean Tuna Limited where he was employed as a "Fish Racker", showing that a sum of R 1500 was deducted from his monthly salary from April 2002 to November 2004 (P2). He stated that that loan has now been repaid completely.

The defendant does not dispute those payments, but avers that it was agreed between them that the plaintiff would repay the loan and that she would meet all other household expenses which she did by working in three different places as housemaid. She further avers that she contributed both financially and in kind and hence claims the market value of her half share, or a dismissal of the plaint.

The plaint was filed on 17 January 2006. The defendant

admits that the concubinage ended three years prior to that date. The defendant on being cross-examined by the plaintiff did not dispute that the concubinage ended on 2 June 2002. Questioned as to what contributions she made thereafter, she replied -

> when we broke up, we were still on good terms, you did not come to me and ask me for help, such as money, and I am a very concerned person. So if you had approached me and asked me in any way, help, to help you to repay for the piece of land, I would, but you just filed a case in Court, so I left you.

The plaintiff admitted in evidence that there was such an agreement between them for repayment of the loan. He however stated that that arrangement lasted only three months. This assertion is supported by the admission of the defendant that she made no contributions financially or in kind after they ended concubinage in June 2002. The defendant stated that she earned R 3,500 per month and that she contributed from that amount towards the payment of utility bills and the food. During this time, that plaintiff was living in the house belonging to the defendant at Union Vale. She claimed that she was also repaying a loan for that property in instalments of R 1,000 but no proof was adduced in Court. The plaintiff did not pay any rent or the utility bills, although he also contributed towards the purchase of food.

As was held in the case of *Larame v Payet* (1983-87) 3 SCAR 355, "no enforceable legal rights are created or arise from the mere existence of a state of concubinage, but a cause of action" de in rem verso "can operate to assist a concubine who has suffered detriment without lawful cause to the advantage of the other party to the concubinage." In the present case, the plaintiff is seeking to rebut the presumption of co-ownership contained in article 815 of the Civil Code, which states-

> Co-ownership arises when property is held by two or more persons jointly. *In the absence of any evidence to the contrary it shall be presumed* that co-owners are entitled to equal shares.

The defendant on the other hand is seeking to rely on that presumption on the basis of indirect contributions allegedly made by her. Since no legal rights flow from a concubinage, considerations such as domestic services rendered, the fact that she was instrumental in approaching the SHDC to obtain the land, and such other matters would not enter that equation. (*Dingwall v Weldsmith* (1967) SLR 47).

In *Dupres v Balthide* (1996) SLR 101, the plaintiff, who had been living in concubinage with the defendant, sought a declaration of her share in a property purchased and wholly paid for by the defendant while they were living together. She claimed that she had been paying maintenance of the family. The Court held that the claim must fail as it was based on property adjustment which had no place in concubinage, and as there had been no claim de in rem verso or unjust enrichment. It was also held in *Esparon v Monthy* (1986) SLR 124 that the principles of division of property between married parties cannot be applied between parties living in concubinage. In *Edmond v Bristol* (1982) SLR 353*,* the Court in similar circumstances held that the plaintiff (woman) was entitled to recover contributions only to the extent of which the defendant had been unjustly enriched.

Hence the defendant will be entitled to recover her actual contributions, albeit indirectly towards the acquisition of the property. Accepting on the basis of the admitted agreement, that her financial contributions for domestic expenses enabled the plaintiff to pay R 1,500 from his monthly salary, towards the loan repayment, but as that arrangement lasted only for

three months, the defendant will be entitled to R 4,500 (R 1,500 x 3). Limiting the rent free occupation of the defendant's house by the plaintiff to those three months, and estimating the half of the amount of the possible rent to be R 1000, it would be equitable that she be entitled to a further sum of R 3000 (R 1000 x 3).

In the circumstances of the case, the defendant cannot be considered as a co-owner with equal rights. The Court therefore holds that the plaintiff will be entitled to be the sole owner of Parcel H 5994 upon R 7,500 being paid to the defendant together with 4% interest thereon for three months. The defendant shall, upon receipt of such payment transfer her nominal half share to the plaintiff within two months thereafter, failing which the plaintiff shall register this judgment at the Land Registry as an instrument of transfer of the half share of the defendant, thus giving him sole ownership of Parcel H 5994.

There will be no order for costs.

Record: Civil Side No 6 of 2006

David v Government of Seychelles

Civil Code - delict – medical negligence – damages

A young man swallowed a fish bone which became lodged in his oesophagus. He went several times to the public hospital complaining of immense pain. He requested an x-ray or endoscopic examination to locate the fishbone. Each time the medical staff refused and instead prescribed him pain killers. Eventually he died. His family sued for damages for a total of R 600,000 for pain and suffering, moral damages, and economic loss. The defendant disputed the quantum of damages.

HELD

1. The Court should make a subjective assessment of damages in each case as it deals with it. In making a reasonable assessment, the Court has a duty to take into account all relevant circumstances, especially the cost-of-living index and the rate of inflation, as they exist at the date of hearing;

2. Damages for tort are compensatory and not punitive;

3. The heirs of a deceased are entitled to make a delictual claim in that capacity for damages suffered by the deceased before the death. Such a claim may be made irrespective of whether proceedings were commenced before the deceased's death. However the deceased must not have renounced the claim for damages in tort before death;

4. Family members are entitled to claim moral damages in their own capacity for emotional suffering in spite of also making a claim as the heirs of the deceased; and

5. Using the multiplier method to calculate the prospective financial loss of a deceased towards the maintenance of their family may not be appropriate as that formula is generally used to calculate the prospective total loss of earning of a deceased person or loss of earning capacity of an injured person.

Judgment for the plaintiffs. Total damages awarded of R 425,000 (Parents – grief and emotional suffering R 36,000; economic loss R 250,000; special damages R 10,000: Sibling – grief and emotional suffering R 25,000; special damages R 5,000; Deceased's estate – damages for pain and suffering R 75,000).

Cases referred to
Elizabeth v Morel (1979) SLR 25
Fanchette v Attorney-General (1968) SLR 11
Mederick v Monthy (1983) SLR 48
Rosalie v Duane (1987) SLR 121
Segwick v Government of Seychelles (1990) SLR 220
Ventigadoo v Government of Seychelles (2007) SLR 242

Foreign cases noted
Cumming v Danson [1942] 2 All ER 653
Foster v Tyne and Wear County Council [1986] 1 All ER 567

Antony DERJACQUES for the plaintiffs
Fiona LAPORTE for the defendant

Judgment delivered on 28 November 2008 by:

KARUNAKARAN J: Ron David, a young man - aged 22 - hereinafter referred to as "the deceased" was at all material times a resident of Takamaka. He was not married nor had any children. Since birth he had been living with his parents and his sister Ruby, in their family home at Takamaka. He was working as a plumber with Public Utilities Corporation and was devoted and hardworking. He was earning a monthly salary of R 2,600. However, when he worked overtime he was getting R 3,600 to R 3800 per month. According to his parents, the deceased was a good boy. He was a very responsible son. He was very close and affectionate towards his parents as well as to his sister. He was contributing around R 1,000 per month for the family maintenance and was very helpful not only to his family members but also to his friends and neighbours. Sometimes, he used to even do haircuts for others. The deceased was loved by all members of his family and friends. Physically, he was healthy, young and energetic. He liked to play football like most of the youngsters do. It is said "Whom the God loves die young". It may be an aphorism but in the case of the deceased, it became true. Indeed, he died at the age of 22. He died on 7 April 2007 at the ICU of the Victoria Central Hospital. Behind his death, there is a story of tragedy. Although sad to hear, his parents had to tell me that story shedding tears in Court. The story was all about a bourgeois fish bone, which the deceased had swallowed while eating food on 26 March 2007, and about the medical negligence of the doctors, which eventually devoured the very life of the deceased. We will revert to that story later. Some of you may not like to hear, and others may find it difficult to digest, nevertheless the story has to be retold to gauge the degree of "pain and suffering" the plaintiffs have undergone in order for the Court to appreciate and make a right assessment of damages claimed by them in this matter.

Be that as it may, the parents and the sister of the deceased have now brought this action in delict, claiming damages in the total sum of R 600,000 from the defendant, the Government of Seychelles. The suit is based on vicarious liability of the Government for the alleged medical negligence of the doctors it has employed at the Victoria Central Hospital. In this action, the plaintiffs are claiming damages - in their own capacity as well as heirs, legal representatives and *ayants droit* of the deceased. The defendant does not deny liability for the medical negligence of its doctors, but only disputes the quantum of damages claimed by the plaintiffs in this matter.

The undisputed facts of the case are these:

The first and the second plaintiffs are respectively, the father and mother, whereas the third plaintiff is the elder sister of the deceased. The defendant herein is the Government of Seychelles, which established, owns and administers the Victoria Central Hospital at Mont Fleuri, Mahe, and also other peripheral medical clinics in various districts within the Republic of Seychelles, including the ones at Takamaka and Anse Royale Districts. All these medical establishments are managed, administered and controlled by the Ministry of Health.

On 26 March 2007, the deceased, approximately at 1715 hours, visited the medical clinic of Anse Royale, and was referred to the casualty department of Victoria Central Hospital, with the medical history of having swallowed a fish bone of a "bourgeois species". He was accompanied by his mother. At the Anse Royale medical clinic as well as at the Victoria Hospital, the deceased was medically examined by nurses and doctors. The deceased told them that he had swallowed a fish bone, which had been stuck in his throat, pointing at his chest area, and which was extremely painful. The doctor and the medical staff conducted an x-ray of the deceased's throat and chest area and stated that there was

no fish bone stuck in his oesophagus and sent the deceased back home after giving him some painkillers.

The following day, on 27 March 2007, the deceased, in extreme pain, visited the Takamaka District medical clinic and was again referred to the Victoria Hospital. The doctor and the medical staff at the Victoria Hospital conducted a second x-ray of the deceased's oesophagus, in the chest area, and again stated that the test did not show any fish bone in his oesophagus. However, the medical doctor, who was present at that time, having conducted the clinical examination, stated that the throat area was simply "scratched". The deceased stated again that the fish bone had been stuck in his oesophagus, which pricked and hurt him each time he made movements. Only when he was still or bending down in a particular position there was some relief. The deceased repeatedly told the doctor that he did not wish to die by a fish bone like his friend one Media Bristol of Takamaka, who died two years ago of a similar trauma. The deceased begged the doctor for a medical scan and not only for an x-ray. His mother also begged the doctor for an endoscopic examination of the deceased's oesophagus. Nevertheless, the doctor insisted that there was no fish bone and refused to carry out the necessary scan or endoscopic examination to rule out what the patient was repeatedly complaining of. The doctor again sent the deceased back home after giving the usual painkillers.

On 2 April 2007, the deceased, who was still in terrible pain, visited the private clinic of one Doctor Marie and was injected with further painkillers. The pain never subsided but rather intensified. He spent sleepless nights at home and his parents too, looking at the suffering of their beloved son. On 5 April 2007, the deceased, in extreme pain, vomited blood, and practically unable to move due to unbearable agony and suffering. The deceased with intense pain visited the Anse Royale District clinic. He was again referred to the Victoria

Hospital and was transported by an ambulance. In the Victoria Hospital the deceased was further medically examined and admitted to D'offay Ward. He was given IV fluids and placed on "observation" status. The deceased was given medication for the pain. No scan, endoscopic examination or surgery was performed nor was any other treatment started.

On 6 April 2007, deceased suffered extreme pain. He started bleeding through nose, vomited blood, passed blackened stool and sweated profusely. On 7 April 2007, all came to an end; the deceased died of internal bleeding as a result of the penetration of the oesophagus and aorta by the fish bone. Admittedly, the medical staff, including the nurses, doctors and surgeons were acting during the course of their duties with the defendant as employees, servants and agents of the same. The said acts and/or omissions of the said medical staff, nurses, doctors and surgeons of the medical clinics and Victoria Hospital, undisputedly, amount to a faute, which resulted in the death of the deceased. In view of all the above, the plaintiffs have now come before this Court seeking compensation from the defendant for loss and damage they suffered, which are particularised in the plaint as follows:

(i) The first plaintiff in his capacity as administrator and next of kin of the deceased - on behalf of the deceased - claims R 100,000 for the pain and suffering the deceased personally underwent and the distress he suffered from his knowledge of impending death.

(ii) The first plaintiff being the father of the deceased, in his own capacity claims R 60,000 for moral damages he suffered from distress, shock and depression following the death of his young son.

(iii) The second plaintiff being the mother of the deceased in her own capacity claims R 60,000 for moral damages she suffered from distress, shock and depression following the death of her young son.

(iv) The third plaintiff being the sister of the deceased in her own capacity claims R 30,000 for moral damages in respect of the distress, shock and depression she suffered consequent upon the death of her younger brother.

(v) The first and the second plaintiff in their personal capacity claims R 320,000 for economic loss calculated at the rate of R 1,000 per month for 40 years less 1/3 in the projected financial contribution to the family by the deceased.

(vi) The plaintiffs claim special damages in the sum of R 30,000 for funeral, flowers, transport, advertisement, the wake and construction of a tomb.

Thus, the plaintiffs claim in all, the total sum of R 600,000 from the defendant as damages, with interest and costs. However, the defendant contended that the amount R 600,000 claimed by the plaintiffs in the given circumstances of the case, is not reasonable and manifestly excessive. Hence, counsel on both sides invited the Court to assess the quantum of damages payable by the defendant and enter judgment fixing the sum on the fair, just and reasonable assessment of the defendant's liability.

I carefully perused the entire evidence on record and the precedents cited by Mr Derjacques, counsel for the plaintiffs

on quantum and assessment of damages. I diligently went through several decisions of our Courts in this respect. In fact, most of them have been determined in the 20th century. Although the principles and assessment criteria applied by the Courts in those cases of the 20th century, are still valid and relevant today, the quantum of damages awarded therein, has now become obsolete because of the erratic behaviour of the primary determinants namely, the "cost-of-living index" and the "rate of inflation" over the passage of time. These factors have indeed, tremendously gone through the roof over the decades, making "comparative assessments" virtually impossible for the Court. In the circumstances, the Court ought to make "subjective assessment" of damages in each case as it deals with it from time to time. In making such assessments, it is in my opinion perfectly clear that the duty of the Judge is to take into account all relevant circumstances, especially, the cost-of-living index and the rate of inflation, as they exist at the date of the hearing. He ought to do so in a broad common sense way as a man of the world and come to his conclusion on reasonable assessment giving such weight as he thinks right to the various factors in the situation. As Lord Green MR stated - in *Cumming v Danson* [1942] 2 All ER 653 - that some factors may have little or no weight, others may be decisive but it is quite wrong for him to exclude from his consideration matters, which he ought to take into account. In this respect, I would add that the cost-of-living index and the rate of inflation are the primary factors and matters, which the Court ought to take into account as they exist at the date of hearing.

At the same time, one should bear in mind, in a case of tort, damages are compensatory and not punitive. As a rule, when there has been a fluctuation in the cost of living, prejudice the plaintiff may suffer, must be evaluated carefully as at the date of judgment. But damages must be assessed in such a manner that the plaintiff suffers no loss and at the same time makes no profit. Moral damage must be assessed by the

Judge even though such assessment is bound to be arbitrary. See, *Fanchette v Attorney-General* (1968) SLR 11. Moreover, it is pertinent to observe here that the continuous fall in the value of money leads to a continuing reassessment of the awards set by precedents of our case law. See, *Sedgwick v Government of Seychelles* (1990) SLR 220.

Having said that, I am reminded of what Justice Sauzier had to state in *Elizabeth v Morel* (1979) SLR 25, on the question of damages, which the heirs of the deceased are entitled to claim from the tortfeasor. His dictum reads thus:

> In law, the heirs of a deceased are entitled to claim in that capacity damages for the prejudice, material or moral, suffered by the deceased before and until his death and resulting from a tortious act whether he had, or had not, commenced an action for damages in respect of the tortious act before his death, provided he had not renounced it. When death is concomitant with the injuries resulting from the tortious act, the heirs cannot claim in that capacity and may only claim in their own capacity as in such a case the cause of action of the deceased would not have arisen before he died.

In the case of *Elizabeth* (supra), the deceased only lived for one hour after receiving her multiple injuries resulting from a road traffic accident. Justice Sauzier awarded R 6,000 moral damages for pain and suffering that lasted only for one hour and R 300 for her damaged clothing. This was awarded almost 30 years ago obviously, to suit the social necessities and commensurate with the socio-economic condition, the standard-of-living index and the rate of inflation, which prevailed in Seychelles during the second half of the 20th century.

In the case of *Fanchette v Attorney-General* (1968) SLR 11, the Supreme Court awarded R 1500 as moral damages to the widow of a person who died in a road traffic accident and R 1000 to each of his two children. This was awarded almost 40 years ago.

In the case of *Josephine Mederick v France Monthy* (1983) SLR 48, a seventeen-year-old girl died of multiple injuries sustained in a road traffic accident. Her mother and siblings claimed moral damages from the defendant. It is interesting to note, Justice Wood held:

> (a) where death was concomitant with the injuries, the heirs may claim only in their own capacity for moral damages.
>
> (b) As the deceased was unconscious throughout 14 hours after she received the injuries, she in fact suffered no pain, suffering or anxiety and the heirs could only be awarded nominal damages.

Accordingly, Justice Wood awarded the brothers and sisters of the deceased R 2000 each and the mother R 4000 for the grief, which they suffered as a result of the death of the deceased.

In the case of *Rosalie v Duane* (1987) SLR 121, an 11-year-old child died after being knocked down by a motor vehicle. Her parents claimed moral damages from the defendants. The Court having awarded a total of R 25,000 in damages held:

> (a) moral damages are awarded for the grief suffered by the plaintiffs at the death of the deceased;

(b) previous judgments on quantum of damages would be a useful guide;

(c) the rate of inflation would be a reasonable consideration;

(d) social development with its economic implications, development of the tourist industry with an increase in the number of vehicles and greater risk of accidents and the rate of insurance premiums were elements to be reckoned in deciding the quantum of damages;

(e) special legislation of other countries ought not to be followed blindly without regard to the marked differences between the countries.

I - Non-pecuniary damages

Coming back to the case in hand, the deceased was a young man, aged only 22 and died in his prime. Obviously, his death was not concomitant with the injuries. He survived two weeks undergoing severe physiological pain as well as psychological trauma, so to say, dying every day with the fear that he was also going to die like his friend Media Bristol because of the fish bone, since the doctors did not carry out proper diagnosis and treatment. Moreover, in the absence of any other evidence to the contrary and on a balance of probabilities, I conclude that the deceased despite painkillers, did suffer acute and severe pain throughout the period of two weeks because of the fish bone that was entangled in his oesophagus and of the consequent complication that arose. Therefore, the deceased is entitled to damages for the pain and suffering he underwent from the trauma.

Frankly speaking, it is impossible to use an exact mathematical standard to measure with precision the amount that an injured person is entitled to recover for physical and mental pain and suffering and loss of normal state of mind. Legally speaking, "pain and suffering" are not two separate concepts. Instead, it is one compound idea. Awards for "pain and suffering" are not apportioned into separate amounts; one for pain and one for suffering. Pain and suffering is a phrase that is always used as a single unit in legal terminology. While there may be real differences between "pain" and "suffering", it is legally impossible to separate the two, when trying to award damages vide *Ventigadoo v Government of Seychelles* (2007) SLR 242.

Be that as it may, on the face of the evidence, I find that the defendant is liable to pay damages to each of the plaintiffs as per his/her entitlement being an "ayant droit" of the deceased. However, on a careful consideration of the entire circumstances of the case, it appears to me, the quantum claimed by the plaintiff at R 100,000 in this respect is exaggerated and unreasonable. Taking all the relevant factors into account in my considered view the sum of R 75,000 would be just, reasonable and adequate in the modern context. Accordingly, I award this sum to all three plaintiffs as heirs of the deceased, to be divided among them according to their respective share entitlement.

I will now deal with the plaintiffs' claim for damages, in their own capacity for the distress, shock, depression and grief they personally and individually suffered at the death of the deceased. In this regard, I am satisfied on the evidence that the deceased formed part of a very close household of the plaintiffs. He was very affectionate to and so loved by all members of his family. Hence, his parents must have suffered irreparable loss of their only son, and the sister of her only brother. Certainly, they would have gone through extreme mental agony, depression and grief at the

unexpected and untimely death of the deceased. Therefore, the plaintiffs are entitled to moral damages in their own capacity for such mental agony and grief and so I find. However, the quantum of damages claimed by each plaintiff appears to be on the higher side and disproportionate to the actual damage in my view, each could have suffered. Having given diligent thought to all the circumstances of the case, and to the precedents cited supra I would award the parents, namely the first and the second plaintiffs damages in the sum of R 30,000 each and the sister of the deceased, namely the third plaintiff, the sum of R 25,000 for the distress, shock, depression and grief they individually suffered at the death of the deceased.

II - Pecuniary/Economic Loss

Loss of financial contribution: Under this head the plaintiffs, the parents of the deceased claim economic loss in the total sum of R 320,000 calculated at the rate of R 1,000 per month being the financial contribution the deceased was making towards the maintenance of the family. This has been calculated for a period of 40 years, minus one third from the total amount arrived at. It appears, since the deceased was only 22 at the time of death, his expectation of life being the maximum, the multiplier of 40 has been used by Mr Derjacques in his calculation. According to Ms Laporte, counsel for the defendant, when considering all the circumstances of the case, the amount claimed by the plaintiffs in this respect based on that multiplier is unreasonable. Further she argued that this Court should also adopt the same approach adopted by the Court in the case of *Fanchette* (supra), with respect to the pecuniary loss of widow, where the Court held:

> Such loss should be calculated on the amount the deceased normally expended for her, multiplied by a given number of years purchase, which purchase

> should have regard to the age of the deceased and his condition. This then should be scaled down to take into account contingencies such as widow's possibility of remarrying. That the same approach should be adopted for the children, but that the number of years' purchase should be related to the period of time during which the children might have reasonably expected their father to support and maintain them.

I gave meticulous thought to the approach suggested in *Fanchette.* However, I note, the claimant in that case was the widow, who was then a dependent of the deceased, whereas in the case in hand, the parents were not dependent nor had to live solely on the financial contribution made by the deceased. In fact, the father testified that he is self-employed. He is working as a farmer as well as a fisherman earning R 6,000 per month. Moreover, it seems to me, the multiplier used by the plaintiffs for the calculation based on the life expectancy of the deceased is inappropriate for the following reasons:

(1) the period of time, during which the parents may need financial support from the child (the deceased) depends on the life expectancy of the parents, not that of the children. In fact, the probabilities are higher for the parents to predecease the children, rather than the other way around.

(2) The probability of the child (the deceased) remaining at the family home with parents to continue the financial support for the rest of their life should also be taken into account, since there is no guarantee that the child (the deceased) would continue to live with the

> parents throughout his life time and continue making financial contribution.

Hence, I find that the multiplier method used to calculate the prospective loss of financial contribution as suggested by the plaintiffs' counsel may not be appropriate here as this formula is generally used to calculate the prospective total loss of earning of a deceased person or loss of earning capacity of an injured person. According to *Michael Jones on Medical Negligence* at page 474, 1st paragraph on loss of earning capacity as compared to loss of earning,

> In practice, awards for loss of earning capacity are more impressionistic and less susceptible to the multiplier method of calculation. The solution is to award only a moderate sum in this situation, although there is no tariff or conventional award for loss of earning capacity and each case is to be based on its own facts. Vide *Foster v Tyne and Wear Country Council* [1986] All ER 567.

Therefore, I find that the plaintiffs' claim in the sum of R 320,000 for economic loss calculated on the basis of the multiplier method is inappropriate, unreasonable and excessive. Since the plaintiffs' claim under this head depends on several probabilities and contingencies, in my judgment the Court ought to make a "subjective assessment" of the said loss after taking into account all relevant facts and circumstances, especially, the cost-of-living index and the rate of inflation, as they exist at the date of the hearing. As I stated supra, the Judge ought to do so in a broad common sense way as a man of the world and come to his conclusion on reasonable assessment giving such weight as he thinks right to the various factors in the situation.

Thus, taking all these factors into account including the

probabilities and making adjustments for all the contingencies, I am of the view that the sum of R 250,000 should be appropriate, fair and reasonable, which sum I award for the prospective economic loss of the parents namely, the first and second plaintiffs, in this matter.

The plaintiffs' claim in the sum of R 30,000 as special damages for funeral, flowers, transport, advertisement, the wake and construction of the tomb, appears to be exorbitant. Having given due consideration to all circumstances surrounding this claim, I award a global sum of R 15,000 to the plaintiffs.

Wherefore, in summing up, I award damages to each plaintiff as follows:

First Plaintiff

(a)	For distress, shock, depression and grief	R 30, 000
(b)	As a legal heir of the deceased ayant droit- share entitlement from damages due to the deceased	R 25,000
(c)	Economic loss	R 125,000; and
(d)	Special damages for funeral, flowers etc	R 5,000
	Total	R185,000

Second Plaintiff

(a)	For distress, shock, depression and grief	R 30, 000
(b)	As a legal heir of the deceased ayant droit-	

	share entitlement from damages due to the deceased	R 25,000
(c)	Economic loss	R125,000; and
(d)	Special damages for funeral, flowers etc	R5,000
	Total	R185,000

Third Plaintiff

(a)	For distress, shock, depression and grief	R25,000
(b)	As a legal heir of the deceased ayant droit-share entitlement from damages due to the deceased	R25,000
(c)	Special damages for funeral, flowers etc	R5,000
	Total	R55,000

In the final analysis and for reasons stated hereinbefore, I enter judgment for the plaintiffs and against the defendant in the total sum of R 425, 000 with interest on the said sum at 4% per annum - the legal rate - as from the date of the plaint, and with costs.

Record: Civil Side No 199 of 2007

Allied Builders (Sey) Ltd v Fregate Island (Pty) Ltd

Civil procedure - attachment order - injunction

The applicant applied for an interlocutory injunction and an order for the provisional attachment of monies belonging to the defendant which were being held by a third party.

HELD

The Court before making an attachment order must be satisfied that –

(i) the plaintiff has a claim against the defendant;

(ii) there is a clear danger that the defendant will not adhere to the judgment if the plaintiff is successful; and

(iii) the plaintiff would not be able to realise the fruits of judgment if made in their favour.

Judgment for the applicant. Attachment order made in respect of US$808,374.02 or its equivalent in rupees.

Foreign cases noted
Mareva Companies Naviera SA v International Bulkcarries SA [1980] 1 All ER 213

Ex Parte:
Kieran SHAH for the plaintiff/petitioner

Order delivered on 1 December 2008 by:

KARUNAKARAN J: This is an application filed by the plaintiff for an interlocutory injunction and an order for the provisional attachment of the monies belonging to the defendant, which are in the hands of third parties. The orders herein are sought as an urgent interim relief pending the final determination of the main suit in this matter. In this application, the plaintiff prays this Court:

(a) To order the defendant forthwith to return to the plaintiff in Mahe all its building materials more fully set out in the Memorandum signed by the defendant's representative Mr. Felix Alphonse, in July, 2008: and

(b) A provisional attachment of the monies belonging to the defendant and found in the bank accounts of the defendant or held in the name of the defendant with the banks in Seychelles namely, Barclays Bank, Nouvobanq, Mauritius Commercial Bank, cover the amount up to the extent of US Dollars 808,374.02 cts (or its equivalent in Seychelles Rupees)

By a plaint dated 31 October 2008, the plaintiff has commenced the suit in CS No 326 of 2008, against the defendant claiming the sum of US Dollars 808,374.02 and building materials from the defendant alleging a breach of contract. The suit is now pending before the Court for determination. Having thus commenced the suit, the plaintiff fears that the defendant may dispose of the plaintiff's building materials and the defendant's moneys in the bank accounts at any time before the determination of the suit, preventing the plaintiff from realizing the fruits of the judgment the Court may eventually give in their favour. Hence, the plaintiff has now

come before this Court for an urgent order of interlocutory injunction and for an order attaching provisionally any money/s belonging to the defendant with or due from third party namely, (i) Barclays Bank, (ii) Nouvobanq and (iii) Mauritius Commercial Bank all of Victoria, Mahe, Seychelles.

Upon a careful perusal of the plaint, the petition, the affidavit of facts filed in support and the documents annexed thereto, I am satisfied that the plaintiff has a bona fide claim against the defendant in this suit. From the averments on record, it appears that there is a clear danger that the defendants may avoid satisfaction of judgment, if given for the plaintiff. I reasonably believe that unless an order of provisional attachment is granted, the plaintiff would not be able to realise the fruits of the judgment, if given in its favour in the original suit. Furthermore, I find that it is an appropriate case, where the Court should make an urgent ex parte interim injunction and an order of provisional attachment of the monies belonging to the defendant, in the interest of justice. See, *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 215.

In view of all the above, I hereby make an order attaching provisionally any money/all the monies (not exceeding US Dollars 808,374.02 cts or its equivalent in Seychelles Rupees) due to or belonging to the defendant company "Fregate Island (Pty) Ltd" which is/are in the hands of or held in accounts with:

(i) Barclays Bank;
(ii) Nouvobanq; and
(iii) Mauritius Commercial Bank

all of Victoria, Mahe, Seychelles.

The above order for provisional attachment is made pending the final determination of the suit Civil Side No 326 of 2008 in this matter or until further order of this Court.

Order of interlocutory injunction

Besides, I hereby grant an interim injunction ordering the defendant "Fregate Island (Pty) Ltd" of Aarti Chambers, Mont Fleuri to deliver possession and return forthwith to the plaintiff in Mahe, all the building materials belonging to the plaintiff more fully set out in the Memorandum signed by the defendant's representative Mr Felix Alphonse, in July 2008.

Further order

In pursuance of the above orders, I direct the Registrar of the Supreme Court to issue -

(i) The warrants for the provisional attachment of the monies accordingly; and

(ii) A copy of the above order of injunction and the provisional attachment of money made herein to be served on the defendant along with a copy of the petition, plaint and the documents attached thereto.

Mention (First Time) on 27 January 2009 at 9 am before the Master and Registrar. Summons to be served on the defendants with a copy of the plaint.

Record: Civil Side No 326 of 2008

Chez Deenu (Pty) Ltd v Seychelles Breweries Ltd

Civil procedure - injunction – petition to restrain execution – procedure – plaints – petitions

The Court issued an ex parte interim injunction restraining the defendant from proceeding with a charge on immovable property owned by the plaintiff. The defendant had supplied commercial goods to the plaintiff for distribution. The plaintiff sought time for payment so that the price for goods provided on credit by the plaintiff to retailers could be received by the plaintiff in the normal course of business. The defendant claimed payment on time in accordance with the supply contract and sought to lift the injunction.

HELD

1. When section 34(3) and paragraph 2 of the Third Schedule of the Companies Act 1972 are read together, what is sought in the 'plaint' does not constitute a 'suit' or 'action' as defined in the Code of Civil Procedure;

2. The remedy sought in the 'plaint' in proper terms is a 'petition' to restrain the defendant from executing a charge over immovable property in satisfaction of a debt owed. Neither the debt nor the right of the defendant to execute the charge is contested by the plaintiff. What the plaintiff truly seeks is a delay before the debt is paid. What is before the Court, therefore is not a 'cause of action' but only a 'matter' which is defined as including 'every proceeding in the Court not a cause'; and

3. Agreements bind in respect of what is expressed in them but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.

Judgment: Injunction extended.

Legislation cited
Civil Code, art 1135
Code of Civil Procedure
Companies Act 1972, s 34

Somasundaram RAJASUNDARAM for the plaintiff
Francis CHANG SAM for the defendant

Ruling delivered on 26 March 2008 by:

PERERA ACJ: This Court issued an ex parte interim injunction on 30 November 2007, restraining the defendant company from proceeding against a charge on immovable property, land Parcel V 6922 or any other movable or immovable assets of the plaintiff including bank accounts until a further order was made. The injunction was made returnable on 14 December 2007. On that day, the defendant company filed a motion supported by an affidavit seeking the removal of the injunction for reasons adduced therein.

The defendant avers that the petition is misconceived in law and is an abuse of process. Mr Chang Sam, counsel for the defendant company referred the Court to section 34 of the Companies Act 1972 and contended that in as much as the affidavit seeking the interim injunction was filed by the "Manageress" of the petitioner company, the petition is bad in law, and that hence it should be rejected.

Section 34(3) provides that —

> Without prejudice to the generality of the foregoing, the directors of a Company, each director of a Proprietary Company shall, subject to any contrary provision of the memorandum of Articles, have power to do acts specified in the Third Schedule to this Act on behalf of the Company.

Paragraph 2 of the Third Schedule provides inter alia that the said persons could "bring or defend *proceedings in any Court* in the name or on behalf of the Company". The petition has been filed by "Chez Deenu (Pty) Ltd" represented by its Manageress Mrs KV Murthy. The affidavit supporting the motion for the interim injunction was also sworn by her on the basis as Manageress "in overall charge of the business activities of the Company Chez Deenu" and as a person being fully acquainted with the day to day business operations of the company. Although the pleadings do not strictly comply with section 34(3) read with paragraph 2 of the Third Schedule aforesaid, what is sought in the "plaint" does not constitute a "suit" or "action" as defined in the Code of Civil Procedure. The remedy sought in the "plaint" which should properly have been termed "petition" is to restrain the defendant company from executing a charge of an immovable property in satisfaction of a debt owed. Neither the debt nor the right of the defendant to execute the charge is being contested by the plaintiff. What is sought is a delay up to 30 June 2008, when the debt would be paid. What is before the Court therefore is not a "cause of action" but only a "matter" which is defined as including "every proceeding in the Court *not in a cause*". Hence the present proceedings do not fall under paragraph 2 of the Third Schedule, and consequently, the institution of those proceedings by the Manageress representing the company cannot be faulted.

The petitioner avers that there were several contracts with the respondent for distribution of their products, and that the last such contract was dated 22 July 2004. Paragraph 6.1.1 of that contract provided that the plaintiff would be allowed credit facilities up to 7 days for and in connection with the sale of the product, failing which such facility would be withdrawn. Paragraph 6.1.5 also reserved the right of the respondent not to supply products to the petitioner. It is averred that a dispute arose as regards increasing the percentage of the commission, and that the petitioner unilaterally terminated the contract by letter dated 14 August 2007. However, the petitioner has produced prior correspondence from the year 2005 regarding the commission and also intimating the desire to terminate the contract. The respondent did not agree to terminate the contract and continued with the supply of products to the plaintiff for distribution. However after protracted discussions and negotiations, the respondent company accepted the termination of the contract mooted by the petitioner, with effect from 1 December 2007. That acceptance was subject to four terms, one of which was "to settle in full all outstanding debts owed to Seychelles Breweries immediately". The matter before the Court is the complaint of the petitioner about the "sudden and unexpected acceptance" of the termination, and the consequent inability to pay all outstanding debts immediately. The petitioner avers that the debt in the region of R 2,300,000 cannot be paid until about 30 June 2008, and hence the interim injunction was sought to prevent the sale of Parcel V 6922 which is said to be worth over four million rupees, and also to prevent any other assets being provisionally seized until the disposal of this matter.

The motion for interim injunction was filed on 30 November 2007. The respondent is legally entitled to execute the charge of the property, to recover the debt owed. The circumstances in which the respondent decided to accept the termination and the proprietary of demanding payment of all debts

immediately in the context of the nature of the business involved as supplier and distributor, would be matters to be decided in the case. However for limited purposes, the Court considers article 1135 of the Civil Code which provides that -

> agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.

Hence, the request of the petitioner for a delay up to 30 June 2008 to collect the debts from the retailers to pay the debt he owes to the respondent is fair, and in the circumstances the ex parte interim injunction issued on 30 November 2007 is extended up to 30 June 2008.

Ruling made accordingly.

Record: Civil Side No 335 of 2007

Boux v Procopio

Civil procedure - injunction

The parties were in dispute over the ownership of two vehicles. The plaintiff applied for an interim injunction restraining the defendant from using the vehicles.

HELD

1. Where a plaintiff is asserting a title or right, an interim injunction should be refused if the existence of such title or right is open to serious doubt;

2. An interlocutory injunction should only be granted if it is necessary to protect a plaintiff against irreparable injury which could never be adequately remedied or atoned for by damages; and

3. Where doubt exists over the assertion of right or title, the plaintiff must show that the inconvenience they will suffer by a refusal is greater than that which the defendant will suffer by granting the injunction.

Ruling: Application dismissed.

Legislation cited
Code of Civil Procedure, s 304

Cases referred to
D'Offay v Attorney-General (1975) SLR 118

Frank ELIZABETH for the plaintiff
Daniel CESAR for the first defendant
Teresa MICOCK for the second defendant

Ruling delivered on 2 April 2008 by:

PERERA ACJ: The cause of action pleaded in the plaint is a dispute as to the ownership of two motor vehicles, Hyundai Getz STD GLS registered as S 10251 and Hyundai Matrix GLS diesel 1.5 CRDI, registered as S 11183. The plaintiff avers that he paid the purchase price of both vehicles and also the trades tax, GST, insurance and the road licence from his own funds. He however avers that upon the first defendant advising him that he could not register the vehicles in his name, he agreed to transfer vehicle No S 10251 in the name of the first defendant and the other vehicle S 11183 in the name of the company "Le Bon Bon (Pty) Ltd". The plaintiff further avers that he retained possession, use and enjoyment of the said vehicle S 10251 and allowed the first defendant to retain and use vehicle S 11183. It is now averred that on 19 October 2007, the first defendant with the assistance of the police, the second defendant, took possession of vehicle S 10251 without his approval or consent. The plaintiff therefore claims an order on the second defendant to recover vehicle S 10251 from the first defendant and return it to him, and also a similar order on the first defendant to return both vehicles to him. Further and in the alternative, he claims US Dollars 23,500 and Euro 28,000 which he avers he paid for the vehicles.

The first defendant has filed a defence and a counterclaim. In the defence, he denies the claim of the plaintiff, and avers that he is the lawful owner of vehicle S 10251, while vehicle 11183 is owned by the said company in which he is the Managing Director and also a 50% shareholder. He has produced proof of those averments. For present purposes the averments in the counterclaim need not be considered as they relate to a

wider transaction which is in dispute between the parties.

The instant matter before Court is an application for an interim injunction, purportedly under section 304 of the Code of Civil Procedure to restrain the first defendant from the alleged wrongful act or breach of the alleged agreement, and for an order that the said vehicles be returned to him until a further order is made by Court. He also seeks an injunction against the first defendant to stop harassing, threatening and disturbing him, and also for an order that he does not come within 25 metres of himself and his wife. At the hearing of this motion however, counsel for the plaintiff did not press for the latter injunction upon an undertaking given by the first defendant. He also limited the first injunction to vehicle No S 10251.

The second defendant has so far not filed a defence, nor a reply to the motion for injunction. The averments in the main defence have been reiterated by the first defendant in the reply to the motion for injunction. It is averred that the plaintiff has no legal or equitable interest in any of the said vehicles and hence the injunction sought should be refused. He avers that the company vehicle is being driven by an unknown person without insurance, and it was in these circumstances that he made a complaint to the police to seize the vehicle.

The plaintiff has in his plaint sought inter alia an order for the Seychelles Licensing Authority to register both vehicles in his name. Hence presently, vehicle No 10251 is registered in the name of the first defendant, and vehicle No 11183 in the name of the company of which he is the Managing Director. According to the particulars furnished by the Company Registry, the first defendant holds 50% shares of the said company while the balance 50% is held by one Cultreri Maria Pia. The documents produced by the first defendant show, prima facie, that the plaintiff's wife and son were employees of the restaurant business of the company and that they are no

longer working in those capacities. The capacity of the plaintiff in the company remains unsubstantiated.

The pleadings disclose a substantial dispute between the parties. It was held in the case of *D'offay v Attorney-General* (1975) SLR 118, as summarised in the headnote –

> (1) Where a plaintiff is asserting a title or right, an interim injunction should be refused if the existence of such title or right was open to serious doubt.
>
> (2) An interlocutory injunction should only be granted if it is necessary to protect a plaintiff against irreparable injury which could never be adequately remedied or atoned for by damages.
>
> (3) Where a doubt exists as to the plaintiff's right, the burden of proof is upon him to show that the inconvenience he will suffer by a refusal is greater than that which the defendant will suffer by the grant of the injunction.

In the present case, the issue of ownership of the vehicles can be determined only upon considering the respective oral and documentary evidence of the parties at the hearing on the merits. Further, the plaintiff has claimed as an alternative prayer the value of the two vehicles. Hence it cannot be said that a refusal to grant an injunction would cause irreparable injury to the plaintiff which cannot be adequately remedied or atoned for by damages. In these circumstances, the plaintiff has not established that the inconvenience he will suffer by a refusal will be greater than that which the first defendant will suffer by the grant of the injunction. The first defendant has disclosed the circumstances in which the vehicle was seized

by the second defendant, the police, at his instance as the registered owner. The propriety of such action is also a matter to be decided in the main hearing. That alone is insufficient to order a restoration of the status quo as the first defendant has provided documentary evidence disclosing prima facie that he is the registered owner. In fact such registration has been admitted by the plaintiff in paragraph 4 of the plaint. In these circumstances the application for the interim injunction is dismissed. There will however be no order for costs.

Record: Civil Side No 371 of 2007

Anscombe v Indian Ocean Tuna Ltd

Civil Code - lease – agreement to lease – bilateral promise to lease on fulfilment of condition

The plaintiff leased a residential property to the defendant who used it to house their workers. It was then allegedly agreed that the plaintiff would undertake substantial renovations and then the defendant would lease the premises at a much higher rate. The plaintiff did the work but the defendant did not enter into a new lease with the plaintiff.

HELD

1. An agreement for a lease is different from a bilateral promise to lease intended to take effect in the future on the fulfilment of a condition. An agreement to lease is a firm agreement between the parties intended to take effect immediately even if the lease is to commence at a future date;

2. If the agreement between the parties, whether written or oral, is that the lease is later to be put down in writing to become a binding contract, such an agreement is a bilateral promise to lease intended to take effect in the future on the fulfilment of a condition. It is not an agreement for a lease. The personal rights of the lessor or lessee under article 1718 of the Civil Code are distinct from the rights of parties to that promise; and

3. The exception for commercial parties to the evidence rule under article 1341 of the Civil Code of Procedure does not apply. Neither

party is primarily engaged in the business of leasing residential property. The verbal agreement to enter into a lease in the future does not constitute a commercial transaction.

Ruling: Objection upheld. Oral evidence of lease agreement inadmissible.

Legislation cited
Civil Code, arts 1341, 1715, 1718
Commercial Code, art 109

Cases referred to
D'Offay v Attorney-General Civil App 15/1976
Port Glaud Development Company Ltd v Laure (1983-1987) SCAR 152
Van Heck v La Goeletter (Pty) Ltd (1983-1987) SCAR 361

Antony DERJACQUES for the plaintiff
Pesi PARDIWALLA for the defendant

Ruling delivered on 24 March 2008 by:

KARUNAKARAN J: At all material times, the plaintiff was the owner and lessor of a dwelling house situated at Belonie and the defendant company was the tenant. By an agreement in writing dated 1 December 2003, the defendant had taken that house on a lease from the plaintiff agreeing to pay rent of R 14,000 per month.

It is averred in the plaint that during the said lease, the parties had entered into another verbal agreement to the effect that the plaintiff should carry out some extension and renovation works to the said house at her costs, and then the defendant would enter into a new agreement of lease with the plaintiff making a substantial increase in the monthly rental. The plaintiff accordingly carried out the said works to the house -

at the cost of more than R 100,000 - expecting that the defendant would sign a new agreement of lease in the future. Contrary to her expectation, the defendant in February 2005 instead terminated the original lease with the plaintiff and vacated the premises. The defendant did not enter into any new lease with the plaintiff as promised. Hence, the plaintiff now alleges that the defendant has been in breach of the said verbal agreement having failed to enter into a new lease. In the circumstances, the plaintiff has now come before this Court claiming damages in the sum of R 209,770 from the defendant.

At the outset of the hearing, when the plaintiff was giving evidence-in-chief, she attempted to testify as to the existence of the said verbal agreement between the parties. Mr Pardiwalla, counsel for the defendant swiftly objected to any oral evidence being adduced to establish the plaintiff's claim on the grounds that:

(1) The rule of law under article 1341 of the Civil Code prohibits the admission of oral evidence to establish any matter, the value of which exceeds R 5000; and

(2) The rule of law under article 1715 of the Civil Code again prohibits the admission of oral evidence to establish *any verbal agreement for a lease*, however small its price may be.

Therefore, Mr Pardiwalla submitted that no oral evidence shall be admissible to establish the alleged verbal agreement in this matter. Moreover, he contended that the case on hand does not fall under the exception to article 1341 since both parties are not traders and the transaction involved is not a commercial transaction. In any event, counsel argued that although the plaintiff solely relies upon the exception to article

1341 to prove her claim, the material fact of which has nowhere been pleaded in the plaint. Hence, in the absence of any such pleading, the plaintiff cannot now adduce evidence to prove that exception based on a commercial transaction. Furthermore, it is the contention of Mr Pardiwalla that if the agreement for a lease had even been concluded without writing, still no oral evidence shall be admissible to prove its existence in terms of article 1715 of the Civil Code. Therefore, he urged the Court not to admit any oral evidence to establish the said verbal agreement in this matter.

On the other side Mr Derjacques, counsel for the plaintiff submitted that oral evidence is admissible in this particular case, as it falls under the exception to article 1341 since both parties are traders and the transaction involved in the alleged verbal agreement is a commercial transaction. According to Mr Derjacques, the plaintiff is in the business of renting out houses to the defendant. Hence, she is a trader in the eye of the law and the transaction involved is a commercial transaction. Thus, he contended that the verbal agreement in question constitutes an exception to the rule under article 1341. The Court therefore, should allow the plaintiff to adduce oral evidence in this matter. Both counsel thus, joined issue and invited the Court to rule on the admissibility of oral evidence in this matter and hence this ruling being delivered.

Before I proceed to consider the arguments of counsel, it is pertinent to rehearse article 1341 and article 1715 of the Civil Code, which read thus:

> Article 1341
>
> Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document

> nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.
>
> The above is without prejudice to the rules prescribed in the laws relating to commerce.
>
> Article 1715
>
> If the agreement is concluded without writing and has not yet been executed, and if one of the parties denies its existence, oral evidence shall not be admissible, however small its price, and even if it is alleged that money has been given by way of earnest. However, an oath may be administered to the person who denies the agreement.

Coming back to the case in hand, I carefully analysed the arguments advanced by both counsel on this issue as to admissibility of oral evidence in this matter. In order to constitute an exception to the rule embodied in article 1341, the transaction involved in the alleged verbal agreement, should be a commercial transaction. In such a case, the provisions of the Commercial Code apply and oral evidence becomes admissible. On the contrary, if it is a non-commercial transaction it would fall within the purview of article 1341, and therefore, oral evidence shall become inadmissible. In his judgment, in *Port Glaud Development Company Ltd v Larue* (1983-1987) SCAR 152, Justice Sauzier has drawn a clear distinction between article 1341 of the Civil Code and article 109 of the Commercial Code and has given the trial Judge valuable guidance as to when he may use his discretion to allow oral evidence in matters of this nature. The relevant excerpt from that judgment runs thus:

> I would like to point out here the difference there is between the provision in paragraph 1 of article 109 of the Commercial Code of Seychelles which states that "A sale may be proved ... by evidence of witnesses admissible at the discretion of the Court" and the provision in article 1341 of the Civil Code of Seychelles which excludes the admissibility of oral evidence. Under article 1341, oral evidence is inadmissible if objected to and if the case does not come within one of the exceptions to the rule. In the course of the trial, the judge must exclude such evidence from the moment it is sought to be given when objection is taken. However, in a case where the Commercial Code applies... the trial Judge need not exercise his discretion to allow or reject the oral evidence tendered at the time when it is tendered. The trial Judge may hear the whole of the evidence and decide, when giving judgment that, in the circumstances, there should have been a writing to support the agreement.... and decline to act solely on oral evidence. There should, however, be objection raised by the party against whom oral evidence ... is tendered at the appropriate time..... That is the effect of the provision "by evidence of witnesses admissible at the discretion of the Court" in paragraph 1 of article 109 of the Commercial Code.

Therefore, if the Commercial Code applies to the instant case, then the Court need not exercise its discretion to allow or reject the oral evidence tendered at the time when it is tendered. The Court may proceed to hear the whole of the evidence and decide the issue eventually when giving judgment. On the other hand, if the Commercial Code does not apply, then the Court must exclude such evidence from

the moment it is sought to be given when objection is taken. Be that as it may, the Commercial Code undoubtedly applies only to commercial transactions. Therefore, the fundamental question that now arises for determination is this:

> Does the verbal agreement, the "promisee de bail", between the parties to enter into a lease in the future constitute a commercial transaction?

Before finding the answer to this question, it is pertinent to note that an agreement for a lease is different from an agreement of lease. The difference between these two is well defined by Justice Sauzier in *Van Heck v La Goelette (Propriety) Ltd* (1983-1987) SCAR (Volume II) 361, wherein he has rightly pointed out that an agreement for a lease is the English terminology for a "promesse de bail" but it should not be confused with a bilateral promise to lease (promesse de bail) intended to take effect in the future on the fulfilment of a condition. It is pertinent to note that article 1718 clearly stipulates that an agreement for lease shall only confer personal rights upon the parties to it, whereas an agreement of lease shall confer real rights upon the parties. Obviously, in the present case, the verbal agreement in question constitutes neither an agreement for a lease nor an agreement of lease but only a bilateral promise to lease intended to take effect in the future on the fulfilment of a condition and so I find. In other words, the defendant allegedly promised to take the premises on lease by signing a new agreement of lease on condition that the plaintiff should extend and renovate the premises. The plaintiff allegedly fulfilled her part whereas the defendant allegedly failed to fulfil his part of the promise.

As aptly observed by Justice Sauzier in *Van Hecke* (supra), in the case of *d'Offay v Attorney-General* (Civil Appeal No. 15 of 1976, judgment dated 3 February 1979), the Seychelles Court of Appeal considered the different categories of promises to lease ('promesse de bail') that there may be, and their effects.

That case depended on the law as it was prior to 1 January 1976 before the Civil Code came into force. However, what is said in that case about promises to lease is equally applicable under the new provisions of the Civil Code. There is a passage in that case which is relevant to this case and which should be quoted:

> In every case, therefore, where the parties have contemplated a writing to embody their agreement, it is necessary to consider whether the stage eventually reached prior to the execution of the written agreement was a general consensus as to what was to be incorporated in a written lease to be executed subsequently and to become a binding agreement between the parties, or a firm agreement to be followed by a written document embodying such agreement and valuable merely as proof of the agreement already reached.

The case reported in D. 1928.2.158 and the note at paragraph 123 of *Dalloz Encyclopédie de Droit Civil* 2éme Ed Vo "Bail" are of interest.

As stated above, an agreement for a lease is not to be confused with a bilateral promise to lease intended to take effect in the future on the fulfilment of the condition. An agreement for a lease is a firm agreement between the parties intended to take effect immediately even if the lease is to commence on a future date. It may be written or oral. If the agreement between the parties, whether written or oral, is that the lease is to be embodied in a written form or notarial deed and is then to become a binding lease, such agreement is a bilateral promise to lease intended to take effect in the future on the fulfilment of a condition. It is not an agreement for a lease as both counsel have misconceived in their arguments in this matter.

The personal rights which are referred to in paragraph 1 of article 1718 are personal rights as lessor or lessee. This is not to be confused with the rights which parties to a bilateral promise to lease intended to take effect in the future on the fulfilment of a condition have, to enforce or rescind such agreement or to sue for damages in case of breach, as has happened in the present case.

By virtue of paragraph 3 of article 1 of the Commercial Code, the respondent, being a body corporate, is deemed to be engaged in commerce and may be classed as a merchant. However, the principal activity of its business is tuna fish exportation, not taking dwelling houses on lease, though it takes houses on lease for the purpose of accommodating its workers. Hence, any of its acts whether entering into an agreement of lease or agreement for lease or any of its promises unilateral or bilateral for an intended lease for the future in my considered view, cannot be classified as a commercial contract and a commercial transaction.

On the other hand, the plaintiff in this matter is a Seychellois but a resident of the United Kingdom by virtue of her employment therein as a Customer Care Manager in a private concern. She owns two residential houses in Seychelles, and has rented them out to the defendant company. Obviously, she is not a merchant as she is not a person who, in the course of her business, habitually performs the acts of leasing out buildings with the main object being the acquisition of gain - vide article 1 of Commercial Code. In any event, there is no pleading in the plaint nor is there any evidence to prove that she is a trader. Indeed, the plaintiff leased out her houses to the defendant for residential purposes, not for using them to carry out any commercial activity. Therefore, I conclude that the verbal agreement, the "promesse de bail", between the parties to enter into a lease in the future on the fulfilment of a condition does not constitute a commercial transaction.

Hence, I hold that the instant case does not fall under the exception to the rule embodied in article 1341 of the Civil Code. Moreover, I quite agree with the submission of Mr Pardiwalla that although the plaintiff solely relies upon the exception to article 1341 to prove her claim, the material fact has nowhere been pleaded in the plaint. Obviously, in the absence any such pleading, the plaintiff cannot now adduce evidence to prove that exception based on a commercial transaction.

For the purpose of appeal if any, against this ruling, I would like to add that even if one assumes for a moment that the "promesse de bail" between the parties in this matter amounts to an agreement for lease as contemplated in article 1714, still no oral evidence shall be admissible in law, in view of the prohibition imposed by article 1715 of the Civil Code.

In the final analysis, I therefore uphold the objections raised by Mr Pardiwalla on both grounds mentioned supra and accordingly rule that no oral evidence shall be admissible to prove the plaintiff's claim in this matter.

Record: Civil Side No 277 of 2005

In Re: Ailee Development Corporation Ltd and the Companies Act 1972
Liquidator of Ailee Development Corporation Ltd

Civil procedure – interlocutory order – leave to appeal

The applicant applied for leave to appeal from an interlocutory order. The dispute related to the removal of registered charges following a winding-up under the Companies Act.

HELD

1. An application for leave to appeal may be made to the Supreme Court or directly to the Court of Appeal. However leave should normally be made to the Supreme Court and only in exceptional cases made directly to the Court of Appeal;

2. A Court may grant leave to appeal for a number of reasons and even if it is not satisfied that the appeal is likely to succeed.

Judgment: Leave to appeal granted.

Legislation cited
Central Bank of Seychelles Act, ss 17, 18
Civil Code, arts 2179, 2182
Companies Act, ss 222, 278
Court of Appeal Rules 2005, rule 16
Courts Act, s 12
Land Registration Act, s 20

Foreign legislation noted
Supreme Court Practice (UK), rule 52

Foreign cases noted
Smith v Gosworth Casting Processes Ltd [1997] 1 WLR 1538

Kieran SHAH for the applicant (Bank of Baroda and the Consortium Banks)
Ronny GOVINDEN for the Government of Seychelles
Francis CHANG SAM for the liquidator
Bernard GEORGES for "the beneficial holders of charges registered" - absent

Order delivered on 19 September 2008 by:

PERERA CJ: This is an application, purportedly, for leave to file an appeal to the Court of Appeal, from an interlocutory order made by this Court on 28 August 2008. Consequent to that order, certain companies and banks represented by Mr B Georges, Attorney-at-Law, identifying themselves as "beneficial holders of charges registered" filed a notice of appeal directly before the Court of Appeal. By ruling dated 10 September 2008, this Court, on an application made by the same parties for a stay of winding up proceedings, held that, the appeal filed before the Court of Appeal was incompetent as the order of 28 August 2008 was "interlocutory" and hence needed to obtain prior leave to appeal, and that in those circumstances, the application for stay could not be entertained. No application was made by that party for leave to appeal.

The present applicant supported the winding up petition, but is aggrieved by the order of 28 August 2008 "in so far as that order affects the interests of Bank of Baroda and the Consortium Banks". Unlike the other "beneficial holders of charges registered", the applicant, who is also a secured creditor, did not file an appeal before the Court of Appeal. Mr KB Shah, counsel representing them, in seeking leave to appeal, has filed an affidavit averring that the decision of the Supreme Court dated 28 August 2008, was wrong in the

following instances -

1. Interpretation of sections 17 and 18 of the Central Bank of Seychelles Act.

2. Interpretation of section 278(5)(d) of the Companies Act 1972.

3. Interpretation of section 222(d) of the Companies Act, and the alleged failure of the Court to consider section 20(c) of the Land Registration Act and articles of the Civil Code of Seychelles relating to mortgages, especially articles 2179 and 2182.

4. The propriety of the order to erase and remove registered charges, in view of article 2182.

5. The Court acting ultra petita in ordering the removal of charges, when the liquidator had only asked for an order for removal of restrictions and/or inhibitions against Title T 147.

Mr Shah concedes that this Court cannot make any pronouncement on the merits or demerits of any of those points of law. However he urges the Court to use its discretion under section 12(2)(b) of the Courts Act which provides that -

> In any such cases as aforesaid (that is, where no appeal shall lie as of right from an interlocutory order), the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.

Mr R Govinden, Deputy Attorney-General, representing the Government of Seychelles and Mr F Chang Sam, representing the liquidator, object to the granting of leave. Both counsel submitted that for this Court to exercise its discretion, the Court should be provided with the intended notice of appeal, with the grounds of appeal duly rehearsed therein. Mr Shah contended that although no such notice of appeal has been filed yet, he has set out the grounds he proposes to rely on in the appeal if leave is granted. Mr Govinden made submissions on the merits of those grounds and stated that they were frivolous and vexatious and should not be considered as being fit to be the subject matter of an appeal. Mr Chang Sam supported that view.

Before I consider the merits of the application, I wish to consider the provisions made in the Seychelles Court of Appeal Rules 2005 as regards obtaining leave from an interlocutory order of this Court. Section 12 of the Courts Act by an amendment in 1978, sets out two stages, to provide for such applications that were filed when there were no resident Justices of Appeal. Under subsection 2(b), the Supreme Court can grant leave to appeal. Subsection 2(c) provides that where the Supreme Court refuses such leave, special leave to appeal could be granted by the Court of Appeal. Rule 24 of the Seychelles Court of Appeal Rules 1978 (now repealed) provided for those two stages, unambiguously, under rule 24 thereof. However, the Rules of 2005 obliterated those two stages and provided only for special leave to appeal. Inferentially, "special leave" would imply that there should be an "ordinary" or "normal" stage of leave to appeal. There is however no specific rule, as under the 1978 Rules. Therefore the 2005 Rules of the Court of Appeal do not provide for filing an application for leave to appeal in the Supreme Court, as required by section 12(2)(b) of the Courts Act.

However, rule 16 provides that —

> Whenever an application may be made *to the Court or to the Supreme Court it should normally* be made in the first instance to the Supreme Court.

Hence whether an application for leave to appeal from an interlocutory order should be made to the Court of Appeal or to the Supreme Court, it should normally be made to the Supreme Court. Exceptionally, this procedure could be bypassed, and an application may be made direct to the Court of Appeal. Due to the ambiguity in the Rules, the present applicant cannot be penalized, and therefore, the present application should be entertained by this Court. In this respect, the requirement in rule 17(2) to file such application within 14 days of the date of the interlocutory order would apply. The present application has been made within time.

There is no requirement in the Rules that an applicant for leave should file parallelly, a notice of appeal. However, in certain cases, it would be prudent to do so, as the appeal period may lapse by the time leave is obtained. The Court would therefore consider the points of law raised in the affidavit of Mr Shah, as the grounds that he will rely on in the appeal. It was held in the case *Smith v Gosworth Casting Processes Ltd* [1997] 1 WLR 1538 that –

> There can be many reasons for granting leave even if the Court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises an issue where the law requires clarifying.

This pronouncement is consistent with section 12(2)(b) of our Courts Act. Rule 52.3.7 of the Supreme Court Practice (UK)

(2008 Edition) commenting on that passage states –

> The theoretical difficulty with the passage just quoted is that if the case raises an issue where the law requires clarifying, then, by definition the appeal does have a real prospect of success. Such clarification might operate in favour of the appellant. If the "clarification" cannot affect the outcome of the appeal, then in many cases it may be inappropriate to grant permission.

In the present case, the interpretation of section 278(5)(d), which is the basis of the grievance of the applicant has not been tested before this jurisdiction. Mr Shah submitted that an authoritative interpretation should be obtained from the highest appellate court. If such interpretation is in favour of the applicant, it will affect the outcome of the proposed appeal of the present applicant to the limited issue of removal of registered charges, consequent to a winding up under the Companies Act. Hence this is a fit case where leave to appeal should be granted to the applicant.

Accordingly leave to appeal is granted to the applicant to file a notice of appeal before the Court of Appeal.

Record: Civil Side No 27 of 2008

Ex Parte: Air Seychelles Ltd v Seychelles Civil Aviation Authority

Civil procedure - injunction – civil aviation – equitable powers

The applicant sought an interim injunction against the respondent from deregistering its plane at the request of a third party who the plaintiff had sub-sub-leased the plane. The plaintiff claimed it was entitled to reimbursement of its security costs following the cancellation of the lease and was concerned that the plane would leave Seychelles without its being reimbursed.

HELD

1. The Court has equitable powers in all cases where no sufficient legal remedy is available;

2. The Court may exercise all the powers, authorities and jurisdiction possessed and exercised by the High Court of England; and

3. An injunction or a restraining order may be granted in English law even though a plaintiff's legal rights have not as yet been infringed.

Judgment for the applicant.

Legislation cited
Courts Act, ss 4, 6

Foreign cases noted
Redland Bricks Ltd v Morris [1970] AC 652

Kieran SHAH for the applicant

Order delivered on 26 September 2008 by:

PERERA CJ: The applicant, Air Seychelles Limited, seeks an interim order on Seychelles Civil Aviation Authority (SCAA) prohibiting the deregistering of Boeing 767-204 Aircraft Manufacturers Serial No 24013 from the Seychelles aircraft register, at the instance of XL Airways UK Ltd, or London 27 Ltd or HF Eimskipafelag Islands, and also prohibiting the taking out of Seychelles the said aircraft without paying Air Seychelles the sum of US Dollars 1,173,333.

Mr K B Shah, Attorney-at-Law, supporting the application, relied on the affidavit of Captain David Savy, Chairman of the Board of Directors of Air Seychelles Limited. It is averred that Air Seychelles entered into a sub-sub-lease agreement dated 15 October 2007 relating to the said aircraft, with XL Airways UK, limited for a period ending at the earliest 15 June 2010 with the possibility of extending up to 1 May 2011. However, on 12 September 2008, XL Airways UK Limited went into legal administration, and consequently the said aircraft has grounded since then at the Seychelles International Airport. The applicant has produced a letter dated 8 May 2008 from XL Airways acknowledging receipt of a sum of US dollars 800,000 as a security deposit in terms of the said sub-sub-lease. Further, it is averred that the applicant paid the monthly lease rental of US dollars 400,000 on 8 September 2008 covering the period 10 September to 9 October 2008, but due to the grounding of the plane for the reasons stated above, the applicant has not been able to use the aircraft since 12 September 2008. A copy of the payment advice from Barclays Bank for US dollars 400,000 debited from an Air Seychelles bank account and transferred to XL Airways UK Ltd, has been produced.

It is averred that pursuant to the sub-sub-lease, Air Seychelles

had caused the aircraft to be registered in Seychelles with the SCAA, and has executed a deregistration Power of Attorney in favour of XL Airways UK Ltd, HF Eimskipafelag Islands (the head lessor) and London 27 Ltd (the sub-lessor) empowering any one of them to deregister the aircraft from the Seychelles register and to remove the aircraft from Seychelles. In this respect a letter dated 7 November 2007 has been produced, wherein the SCAA had confirmed to those parties that they would not cancel the registration except at their instance.

The applicant avers that the administrator of XL Airways UK Ltd has cancelled the sub-sub-lease, while Air Seychelles is entitled to be reimbursed its security deposit of US dollars 800,000 and the balance of the advanced rental covering the period 12 September to 9 October 2008, being US dollars 373,333, totalling US dollars 1,173,333. The applicant avers that it is in the interests of justice that the SCAA be prohibited from deregistering the aircraft, and allowing it to leave Seychelles without Air Seychelles being paid the said sum of US dollars 1,173,333. In this respect, they are prepared to negotiate with the administrator, the sub-lessor and the head lessor for a satisfactory resolution of this matter, but are concerned that there is a real likelihood that the aircraft will be deregistered in Seychelles, in which event the administrator may remove the aircraft without making the payment due to Air Seychelles. Hence the application for an interim restraining order on the SCAA.

Section 6 of the Courts Act (Cap 52) vests this Court with equitable powers in all cases where no sufficient legal remedy is available. In that respect, section 4 of that Act provides that this Court may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England. An injunction or a restraining order may be granted in English law even though a plaintiff's legal rights have not as yet been infringed. In such a case, the applicant is described as having obtained the injunction *quia timet*

(because he fears) that a wrong will be done to him if the order is not made. In the case of *Redland Bricks Ltd v Morris* [1970] AC 652 Lord Upjohn stated –

> to prevent the jurisdiction of the Courts being stultified, equity has invented the *quia timet* action, that is an action for an injunction to prevent an apprehended legal wrong, though none has occurred at present.

The applicant, Air Seychelles Ltd, is in such a situation. Hence, in the absence of a sufficient legal remedy in our law, this Court is empowered to act as a Court of equity and grant the interim restraining order sought.

Accordingly, acting pursuant to sections 4 and 6 of the Courts Act, an order is hereby made prohibiting Seychelles Civil Aviation Authority from deregistering Boeing Aircraft Manufacturers Serial No 24013 from the Seychelles aircraft register at the instance of XL Airways UK Ltd, or London 27 Ltd or HF Eimskipafelag Islands, and from permitting the taking of the said aircraft out of Seychelles without paying Air Seychelles the sum of US dollars 1,173,333, or until this Court makes a further order.

Record: Civil Side No 220 of 2008

In the Matter of Ailee Development Corporation Ltd and in the Matter of the Companies Act 1972

Companies – winding-up – alternative objects – minority shareholder rights

The petitioner was a minority shareholder in Ailee Development Corporation. The company ran a hotel. The hotel failed to meet certain tourism industry standards and got into financial difficulties. The petitioner applied for an order to wind up the company.

HELD

1. The decisive question is whether at the date of the presentation of the winding-up petition was there any reasonable hope that trading at profit, with a view to the object for which the company was formed, would be achieved. In the present case, there was no hope as the hotel was heavily indebted and barely breaking even;

2. If a shareholder has invested monies in the company's shares on the basis that the company will carry out some particular object, that shareholder cannot be forced against their will by the votes of the other shareholders to continue to venture their money on some completely different project or speculation. The petitioner invested monies in the company to facilitate tourism in Seychelles and not for an alternative purpose. It is not reasonable to accept that a company which is insolvent could pursue alternative objects when it is incapable of

achieving its main object without being indebted;

3. Where an association is formed for a particular purpose, it does not matter that it has large powers in addition to that particular purpose. If that particular purpose fails any shareholder has a right to apply to wind up the company;

4. An order by a shareholder to wind up a company whose assets far exceed the amount that shareholder seeks to recover would not be just or equitable if the company were solvent. However where the company is not solvent, the Court will consider the total assets of the company as against its total liabilities and the true value of any shares; and

5. When the substratum of the company has disappeared, the Court may consider in those circumstances that it is just and equitable to wind up the company.

Judgment: Liquidator appointed. Security bond of liquidator set at R 1,000,000.

Legislation cited
Companies Act, ss 205, 214, 217, 219, 222
Insolvency Act, s 122
Winding-up Regulations 1975, reg 47

Foreign legislation noted
Companies Act (UK), s 222

Cases referred to
Indian Ocean Fishing Club v MESA (1996) (Unreported)

Foreign cases noted
Borland's Trustee v Steel Brothers & Co Ltd [1901] 1 Ch 279
Davies & Co v Brunswick (Australia) Ltd [1936] 1 All ER 299
Ebrahami v Westbourne Galleries Ltd [1972] 2 All ER 492
Re Bleriot Manufacturing Aircraft Co Ltd (1916) 32 TLR 253
Re Davis and Collett Ltd [1935] Ch 693
Re Eastern Telegraph Co Ltd [1947] 2 All ER 169
Re German Date Coffee Co (1881) 20 Ch D 169
Re Haven Gold Mining Co (1881) 20 Ch D 151
Re Kitson & Co Ltd [1946] 1 All ER 435
Re Red Rock Gold Mining Co Ltd (1889) 61 LT 785
Re Strutton's Independence Ltd (1916) 33 TLR 98
Re Suburban Hotel Co (1867) 2 Ch App 737
Re Taldua Rubber Co Ltd [1946] 2 All ER 763

Ronny GOVINDEN, Deputy Attorney-General for the petitioner
Bernard GEORGES for the company
Kieran SHAH, for the Bank of Baroda (creditor)
Frank ELIZABETH, for Mr N Thelermont (creditor)

Judgment delivered on 23 June 2008 by:

PERERA ACJ: The petitioner, the Government of Seychelles and a shareholder of Ailee Development Corporation Ltd (the company) seeks a winding up of the company under section 205(f) of the Companies Act 1972. That provision empowers the Court to wind up a company when it "is of opinion that it is just and equitable" to do so.

Admittedly, the company was registered on 13 March 1976. The share capital of R 65,404,136 is made up of 65,404,136 shares, and the petitioner holds 8.4037% of these shares to the value of R 5,496,392. It is not in dispute that these shares

were not purchased by the petitioner as an investment for cash, but were allotted in return for tax concessions granted, and for guaranteeing a loan from the International Finance Corporation (IFC) to facilitate the development of the resort in its initial stages. This fact alone does not make the petitioner inferior in status to other shareholders. In any event, although the Government is an allottee of shares, the said shares were registered with the Registrar of Companies. As Farwell J stated in *Borland's Trustee v Steel Brothers & Co Ltd* [1901] 1 Ch 279 at 288,

> a share is the interest of a shareholder in the Company measured by a sum of money, for the purpose of liability in the first place, *and of interest* in the second, but also consisting of a series of covenants entered into by all shareholders *inter se*.....

The present petition for winding-up is being prosecuted by the Government in its capacity as a shareholder, as provided in section 207(c) of the said Act. However, the petitioner has averred in paragraph 14 of the petition that -

> to let a prime tourist property in the Seychelles to be abandoned in a country whose economy is based mainly on tourism not only affects the rights of all shareholders, but the economy of Seychelles itself.

The petitioner is therefore seeking not only to recover the indirect investment of public funds in the shares, but is also seeking to protect the tourism industry and thereby the economy of the country, in its capacity as a sovereign entity. As T Appadurai states in *The Substance of Politics (*4th Ed) at 110 —

> The modern State is a social service state..... it

> properly intervenes to uphold social standards, to prevent exploitation and manifest injustice, assure and advance the general interest against the carelessness or selfishness of particular groups.

Hence the petitioner is not only a classic shareholder who has invested money, albeit indirectly, to earn a dividend, but one who has "intervened" in a tourism business venture, foregoing legitimately due taxes to State revenue, guaranteeing loans, and having a representative director on the Board of Directors with the purpose of promoting tourism and safeguarding the economy. This was particularly so at the time the company was incorporated for the main purpose of commencing business as an hotelier. As was stated by Lord Wilberforce in *Ebrahami v Westbourne Galleries Ltd* [1972] 2 All ER 492 at 498, the words "just and equitable" must not be confined to such circumstances as affect the petitioner in his capacity as a shareholder –

> No doubt, in order to present a petition, he must first qualify as a shareholder, but I see no reason for preventing him from relying on any circumstances of justice or equity which affect him in his relations with the company.

In the present case that relationship is its interest in the tourism industry which is the backbone of the economy of this country.

The basis of the petition that the substratum of the company has disappeared consequent to the SLA not granting a licence to operate beyond 31 December 2007 needs initial consideration. In this respect the Court has to consider the affidavits of Ms Philomena Hollanda, an Inspector of the Seychelles Tourism Board (S.T.B), Mr Franky Lespoir, a Civil Engineer of the Ministry of National Development and Ms

Mina Crea, the Chief Executive Officer of the SLA, and their respective testimonies in Court. So also the affidavit and testimony of Mrs Veronique Herminie in support of the petition.

Evidence

Ms Hollanda carried out two inspections of the Plantation Club Hotel on behalf of the STB and the SLA. For present purposes, the first inspection on 27 March 2006 was made jointly with officers from the Ministry of Health, and the Fire Prevention Unit. She produced the report of that inspection titled *"Routine inspection visit of Plantation Club Hotel on 27th March 2006 — Renewal of Licence,"* marked A1. The second inspection visit on 2 November 2007 was done on behalf of the STB and SLA. That report was marked A2. She however testified that prior to that she had carried out 10 to 12 inspections of this hotel commencing for the year 2002, those visits found deficiencies with regard to the structure of the buildings and also hygiene and sanitation were observed and reported. Those reports were however not produced. There had been no major renovation since 1988, when the hotel started to operate, up to the year 2002. She stated that due to the inconsistencies in rectifying the defects, the general condition was getting worse each year. She further stated that the inspection reports are sent to the SLA with recommendations, but decisions are taken independently by that organization.

Ms Hollanda's report marked A1 addressed to the Manager of the hotel, with copies to the Environmental Health Section, the SLA, and Fire Prevention Unit is illustrated by 70 photographs depicting defects and shortcomings in the structure.

However, I shall only make general reference to them as they are not disputed, but set out the various recommendations the STB made towards their rectification and renovation, and

which they allege were not complied with.

As regards the defects observed in 14 guest rooms of different categories in different accommodation blocks (photographs 1 to 7 and 12 to 15) Ms Hollanda has stated that the inspection team was informed during the visit of 27 March 2006 that the Managing Director was on an overseas trip to source new furniture and upholstery for the refurbishment of guest rooms, and that bathroom renovation works (photographs 8 to 11) were ongoing in the upper floor of block 100, and block 200. They were also informed that renovation on physical structures of the accommodation blocks and refurbishment works of guest rooms were still ongoing. Ms Hollanda then states —

> we are recommending that a progress report is forwarded to our attention to keep us updated on the number of rooms in the different accommodation blocks that have been completely renovated and refurbished.

The defects in the Frangipani Restaurant are depicted in photographs 18 to 21. Ms Hollanda stated that those defects had been observed in the report of 29 August 2005. During the visit of 27 March 2006, the team was informed that reparation work will be done on the walls, ceiling and roof eaves after the re-roofing of that area was completed. She notes that this issue of re-roofing of the Frangipani Restaurant area and the complete re-roofing of the "back of house" areas was raised as far back as April 2003, but that no such work had started.

In the buffet area, the counter needed replacement and the stainless steel cabinet/chillers needed maintenance and cleaning. In the Lazare Restaurant the cushion covers needed replacement and the chairs to be varnished. This issue had been raised in the report of 29 August 2005, but had not been

done. In the swimming pool, renovation work had to commence in June 2005 according to an action plan put up by the hotel, but had not been done. In the walkways, the thatched ceiling and timber columns had not been replaced although recommended in October 2002. According to an action plan such work had to be completed by December 2005. Further recommendations made in a report dated 14 October 2002 regarding the scullery of the Lazare Restaurant had not been attended to, and also the defects in the ceiling of that area which the hotel had undertaken to attend to by March 2005 had not been done. Ms Hollanda has depicted these areas in photographs 37 to 55. In the Provision Store, the ceiling had damp patches, and some of the wall tiles were either chipped or missing. Those defects are shown in photographs 52 to 59. She notes that the recommendation to replace the damaged wall tiles was made in the report of 29 August 2005. Another recommendation made in the report of 15 April 2003 to repair the ceiling along the corridor to the staff changing rooms had not been complied with. As regards the staff kitchen and laundry rooms the hotel had undertaken in their action plan of March 2005 to repair the roof and the ceiling, and painting of walls, but this had not been done. Those defects are shown in photographs 60 to 64. In the kitchen of the Coco De Mer Restaurant the ceiling as well as the upper louvers needed to be cleaned, and the doors to be varnished (photographs 65 to 70). This recommendation made in the report of 20 December 2005 had not been followed. The restaurant floor tiles had also not been replaced.

In the report of 31 March 2006, Ms Hollanda notes that most of the works specified in the latest action plan submitted by the hotel had not been done, and the timeframes had expired or were being continuously postponed. She further refers to a meeting in April 2005, where the hotel was requested to submit a detailed master plan which included major renovation and refurbishment work, and any future extension

of improvement works. That request was also made in the report of 29 August 2005, but no such plan had been submitted. In forwarding that report to the SLA, Ms Hollanda stated that the recommendation made for the master plan and completion of work on the action plan were being referred for "further consideration and follow up".

Ms Hollanda testified that the issuing of a licence, upon considering the report was a matter entirely left to the SLA, and that the role of the STB was to make a report. She stated that previous non-compliance with the action plans submitted by the hotel, were also reported to the SLA in the past. She further stated that in May 2006, the SLA had called upon the company to show cause why the licence should not be cancelled on the basis of the STB report of March 2006.

Ms Hollanda also produced a subsequent inspection visit report dated 6 November 2007 (A2). Questioned by counsel for the petitioner as to the difference she saw between March 2006 and November 2007, she stated that the structural state of the building had deteriorated. The wall tiles were cracked, some areas of the ceilings were damp and wooden pillars had wood rot. The CI roofing sheets were rusting, and in some there were holes. The Harvey tiles over the Frangipani Restaurant did not appear to have been changed since 1988. Hence despite the recommendation, the re-roofing had not been done. However, the hotel was in operation. Ms Hollanda further stated in her testimony that the company would have saved a lot of money instead of just patching up little defects by maintenance just to improve the aesthetic aspect so that clients cannot see the defects as was done most of the time. In her report of 6 November 2007, she stated that -

> the only possible solution for the Plantation Club Hotel was to close down the back of house area facilities and service areas to carry out the structural renovation. We were informed that in

> view of the actual state of these areas, it will take at least six to eight months to complete all structural and refurbishment work.

She gave an example of Berjaya Hotel which closed for major renovations after being given a deadline, just as was given to the Plantation Club Hotel.

Mr Georges, counsel for the company prefaced his cross-examination of Ms Hollanda by stating thus –

> Like you, I also think, the Plantation Club itself think the hotel in certain respects needed refurbishment, upgrading, attention, repair and everything else that has been mentioned throughout the case, This is not disputed, so we are not here to say that everything which you put in your report were made up by you with the intention of harming the hotel, far from it.

Mr Georges however referred Ms Hollanda to the final recommendation in her report of 6 November 2007 which stated "as we did not received (sic) proper master/renovation plans, STB is therefore maintaining its previous recommendations that hotel closes down once the licence expires" and asked her two questions - (1) Did the STB actually recommend that the licence be not renewed? And (2) What was the main reason why the STB so recommended? She replied that the STB had recommended the non-renewal of the licence since October 2005. She also stated that the reason for such recommendation was not mainly the non-production of a master plan, but also the various discrepancies found on the inspection visits. She stated that a master plan was necessary to remedy the major defects in all the areas after closing down. Ms Hollanda further stated that from the point of view of the STB, whether there was a master plan or not the hotel had to be closed down for effecting the

repairs mentioned in the reports. She explained that the visit of November 2007 was to see whether there was an improvement in the works based on the recommendations, and not for the purpose of making a final adverse report to enable the SLA to close down the hotel. It was a monitoring inspection, as the hotel was in operation.

Further cross-examined by Mr Georges, Ms Hollanda stated that between the March 2006 visit and the 2007 visit, exterior structural renovations of seven accommodation blocks had been done. She stated that in at least 60% of the rooms she visited at random interior areas needed reparation work. There was no systematic pattern of repairs, as only the rooms in worst condition were attended to. She stated that some of the rooms could not be inspected as she was told that they were occupied.

She denied that she was purposely refraining from giving any credit to the hotel for renovations done. She produced a letter dated 18 July 2006 addressed to Mr Joseph Nourrice, Executive Director of the Seychelles Investment Bureau by Mr Mark Davidson the Managing Director of the company, in which the status of the plans for renovation in accordance with the Government directives was given. Mr Davidson had stated -

> ..... The company has decided that a partial or "soft" renovation is no longer adequate to meet the long term needs of assuming the future validity of the project. *We are now planning to close down the* resort at the end of February 2007, for a full renovation and upgrade to 4 star and to enter 5 star standard.

He had also stated —

> Financial restructuring of the massive and long

> standing debt burden of the hotel is an essential factor, if the company is to raise and apply the capital necessary to undertake such a thorough renovation on a property of this size. We have also made significant progress on this front.

In that letter, Mr Davidson undertook to furnish "preliminary plans *in the reasonable* future". Ms Hollanda stated that in her report of 6 November 2007 she recommend the closure of the hotel when its licence expired on 31 December 2007 as the master plan and renovation plans had not been submitted by the company and as Mr Davidson himself by letter dated 6 December 2006 (P3) had undertaken to close the resort with effect from 31 May 2007, but had not done so. She denied the suggestion that in December 2007, the hotel was not in such a bad state as to have its operational licence not being renewed. She stated that the STB and the SLA were being given assurances of renovations and repairs which were not fully complied with. She concluded that there would have been catastrophic consequences, especially in the main building had the hotel been permitted to operate.

Mr Franky Lespoir, Civil Engineer attached to the Quality Assurance Section, Inspectorate Unit of the Ministry of National Development, carried out an inspection of the hotel on 28 December 2007 to assess its structural status. He testified that there was the possibility of a major collapse of some areas of the building, especially the "back of house" area. There were cracks on loadbearing columns. He produced his report dated 7 January 2008, where his observations of defects are depicted in photographs marked 1 to 8. They show an area of a wooden ceiling which had perished as a result of dampness, corrosion of steel structures, cracks on beams, lintels and wall tiles. He concluded that -

1. The actual state of the building is not safe.

2. For safety reasons, it is recommended that the establishment be closed down to carry out renovation work.

3. The management should come up with a renovation plan after a complete structural assessment is made of the whole establishment and submitted to the Planning Authority.

Mr Lespoir, on being cross-examined stated that the inspection was done with Ms Hollanda and the company engineer Mr Deepak Chopra. He said that the back of house area was in an "aggressive environment" due to the closeness to the sea, hence more corrosion of iron and metal. He stated that he did not inspect the accommodation area, but observed settlement cracks, especially in the conference room. He also did not inspect the concrete columns as they had decorative claddings. On being questioned about the corrosion of reinforcement in the concrete columns, he stated that they were in an open area, and the possible causes were the composition of the concrete, bad workmanship, and the capillary reaction of the soil working upwards. He stated that unless the cause is identified and treated, the back of house area was in danger of collapsing. He was however unaware of the "fosroc method" which was suggested by Mr Georges.

I shall now deal with the evidence of Ms Mina Crea, the CEO of the SLA who stated that the decision not to renew the licence of the company was based on the reports of the STB, Mr Lespoir and other regulatory bodies. There are six tourism conditions which a licensee should comply with, of these the three most important are (1) good hygiene, (2) physical cleanliness (3) safety. The Plantation Club Hotel had operated for 20 years, but had never been closed down for major repairs. She stated that the closure of this hotel was not a

"forced closure" but one where there had throughout been mutual agreement. The management was summoned to appear before the board on 17 May 2007 for the reason that the situation was deteriorating and most of the works specified in the action plan were yet to be completed. She stated that Mr Davidson and Mr Mondon, the General Manager appeared, and that they were given an opportunity to explain themselves before any decision regarding the renewal of the licence was taken. They wanted an extension of time, and the Board granted them time till December 2006 to submit a plan. Before that date, Mr Mondon informed the SLA that they had a master plan for long term renovation of the resort, which was under preparation. In July 2006, Mr Davidson wrote to the STB and SLA stating that the hotel would close down on 1 May 2007 for that purpose, and wanted the licence up to that date. Subsequently the liquidator has exercised his power to sell under section 222(2)(a), then, such sale can be proceeded with subject to sanction by the cabinet of Ministers, Hence I do not agree that the present application is premature.

In the final analysis, any directions given by Court would be based on an assessment of the care, diligence' and the bona fides of the liquidator in exercising his powers. Mr Georges, in his additional submissions has stated that 100% of secured creditors and 92% of the shareholders oppose the sale for R 480 million, and hence it is not right for the liquidator to sell the property against the wishes of the bulk of the shareholders and all the secured creditors.

In that respect, the case of *Leon v York-O-Matic* (supra) is apposite. In that case, the liquidator contracted to sell for £47,000, freehold and leasehold properties belonging to a company, together with equipment therein. Before the sale was completed, the plaintiff, who was a creditor made an offer of £40,000, but the liquidator did not accept that offer. Thereupon he began an action alleging that the sale was at

an undervalue. The Court conceded that there was evidence of an undervalue. However it took into consideration that the liquidator had received 60 to 70 inquiries and out of four offers received, the highest was £4,500 less than the sum the liquidator had contracted to sell. In that matter, Plowman J relied on the dicta of Harman J in the case of *Re a debtor Ex Parte the debtor v Dodwell* [1949] 1 All ER 512, which was a case under section 80 of the Bankruptcy Act, but applicable by analogy to cases under section 245(3) and 246(5) of the Companies Act 1948 (section 245(3) is identical with section 222(3) of the Companies Act of Seychelles). In that case, Harman J stated –

> (3) Maintained that the establishment was maintaining good standards of hygiene and guest satisfaction and attracting sales from weddings, prestigious annual events, government workshops and seminars and conferences, "despite the "tired" condition of our resort
>
> (4) That it is not the normal international practice for hotel establishments to be closed down for merely failing to be most modern and up to date, or for failing to present renovation plans by a certain date.
>
> (5) Health and safety issues, or issues involving repeated complaints of mistreatment of guests of travel industry operators are grounds for such actions by authorities, but that the "track record" of this hotel did not show such matters.

On being cross-examined, Ms Crea stated that the requirement of a master plan was to maintain tourism

standards as the hotel was engaging in patchwork repairing which was found to be recurring whenever the regulatory bodies inspected. She stated that the decision to close down was taken because the hotel was not in good standard. If repairs were done to the satisfaction of the regulatory bodies, then even if there was no master plan, the licence may have been given if recommend by them. But the final decision was with the SLA acting independently. In that respect, the explanations of the licensee would also be considered. Ms Crea stated that although the hotel had agreed to close down for repairs, Mr Davidson suddenly took a hard line and informed the SLA that their establishment was maintaining good standards and attracting clients, and questioned the basis of the decision to close down, when it was known to him throughout the discussions and correspondence.

As regards the claim of the SLA that only minor works were done by the hotel, Mrs Crea stated that the hotel had stated that major renovation would be done after closing down, and hence whatever was done without closing would have been minor work. She stated that the statement in the STB report that "exterior structural renovations done" should be explained by an expert, or the maker of that report. She maintained that it should be minor repairs. As regards hygiene and cleanliness, Mr Georges referred Ms Crea to a report sent to the hotel by the Ministry of Health stating that although the levels were acceptable, contamination could still occur due to poor maintenance of the buildings, and asked how and why a decision was taken to close down when this aspect was accepted. She replied that there were other reports. It must here be noted that Ms Hollanda's report of 6 November 2007 also states that an improvement was noted compared with their previous visits. Ms Crea stated that she could not produce other reports from the Ministry of Health on this matter, but maintained that the decision was taken by the SLA on the basis of reports of regulatory bodies and discussions with them. The decision to close down on 31 December 2007

was taken in May 2007 when all parties including the managers met the SLA and the licence was extended up to that date on conditions. She further stated that the STB was giving chances to the management of the hotel in good faith, but they ignored the recommendations. The STB and the SLA took into consideration the renovation work done by the hotel on a piecemeal manner. That was not acceptable to the SLA to grant a renewal of the licence. The expectation of the SLA and STB was that the hotel be closed down, and major renovation work commenced on a major plan. If they did that, they could have reapplied for a licence.

Ms Crea further testified that reports were obtained from the STB and Mr Lespoir in November and December 2007, to review the decision taken in May 2007 to close down, and not to consider that issue afresh. The repair and renovation work done was considered, but there was no substantial or major improvement. The STB maintained the view that a master plan to renovate was the only way to put the hotel back to an acceptable standard. If there were major renovations, the SLA may have reconsidered the position.

Ms Crea also stated that the management disregarded the instructions given that no bookings should be taken beyond December 2007, and Mr Davidson in a letter dated 14 December 2007 informed the SLA that the Board of Directors had decided that such prohibition was unlawful and hence bookings could continue as normal.

Ms Crea stated that the SLA was not aware of any decision on the part of the Government to file a winding-up petition, and denied that the decision to close down was influenced by the Government.

The Court on a visit of the locus in quo observed all the defects set out in the reports of the STB and Mr Lespoir. It was observed that although some attempt had been made to

effect minor repairs, the recommendations of the STB and the SLA had not been followed as required. In one of the three cantilevers holding the main roof of the Frangipani Restaurant, it was observed that the concrete hidden by the cladding had cracked into pieces. The safety of the main roof in that area is uncertain. The Bar Manager's room was atrocious. The ceiling had perished exposing the roof, and the whole room was dirty.

However, the company appeared to have been engaged in piecemeal patch work in an attempt to barely satisfy the regulatory bodies so that the SLA could at least grant extensions of the licence. But a permanent solution was not in sight at the time the petition for winding-up was filed. Mr Davidson candidly conceded that it was due to the weak financial position of the company.

The company did not produce any evidence of serious negotiations with potential investors or partners. The SLA was accommodating the company in the interest of the tourism industry, while the management of the hotel was getting deeper and deeper into debt, and systematically permitting the hotel structure to deteriorate day by day. Having agreed to submit a master plan to facilitate a major renovation and upgrade of the property by closing the hotel on 31 May 2007, the company defaulted up to 31 December 2007 when the licence was not renewed. By letter of 14 December 2007, the company took up legal issues with the SLA as regards its decision but failed to exercise its legal remedies. On the basis of these matters, and on the basis of the reports of the STB and Mr Lespoir, the hotel was in a state which was not acceptable to the tourism standards of the country, despite the fact that certain important functions were held up to January 2008.

The present petition for winding-up has been filed on the ground specified in section 205(f), on the basis that the

substratum of the company has disappeared as its ability to operate has ceased with the SLA deciding not to renew the licence beyond 3 December 2007. The petitioner's case is supported by Mrs Veronique Herminie, Principal Secretary responsible for Investment, Land Use and Industries of the Ministry of National Development, who has been duly authorized by the President of the Republic to represent the Government. In her affidavit supporting the petition, she avers that the Government owns 8% shares in the company and is represented on the Board of Directors. The main object of the company was to carry on business as an hotelier. She refers to the meetings held in April and October 2005 between the Company and the SLA where the company had agreed to submit a master plan for redevelopment of the hotel. The rest of the averments corroborate the averments in the affidavits of Mrs Crea and Ms Hollanda as regards the various correspondences between the regulatory bodies and the company. However in paragraph 14, she avers that she verily believes that the company is not ready and willing to produce a master plan and does not have the means to finance a major renovation project that is needed and which would necessarily involve a huge financial commitment which the company has admitted in its letter dated 30th November 2006 addressed to the Governor of the Central Bank, namely 18-20 million US dollars. She further avers that with the refusal of the SLA to renew the licence, the substratum of the company has disappeared. It is also averred that according to an independent auditor's report dated 1 December 2006, the company is insolvent and its ability to continue its operation is dependent on certain factors mentioned by the auditor. She further avers that to let a prime tourist property in Seychelles be "abandoned" in a country whose economy is based mainly on tourism not only affects the rights of all the shareholders but the economy itself. It is therefore averred that due to the resulting mismanagement, and the running-down of the infrastructure of the hotel, and the disappearance of the substratum, the Government as a shareholder feels that it is

losing its investment, and the only way to recover was by seeking a winding-up of the company. The petitioner in this respect relies on the affidavits of Ms Crea, Ms Hollanda and Mr Franky Lespoir.

Mrs Herminie testified that the government was pursuing the petition as a shareholder and also in its sovereign capacity as Government. She stated that the Government assisted the company to complete the construction of the hotel in 1987 by guaranteeing a loan agreement of the company with the International Finance Corporation (IFC). This was done to promote the tourism industry in Seychelles. She explained that by using the word "abandoned" in paragraph 17 of her affidavit, she meant "closed down". She denied that the Government was aware that the company had strategic partners or potential investors at the time of closure of the hotel, and that the Government was too hasty in seeking a winding up. She also denied a suggestion that the Government had any plan to sell the hotel to anyone if the company was wound up.

Mr Georges, counsel for the company further cross-examined Ms Herminie as to why the Government did not pursue other options available to a shareholder. She stated that at the time of filing the petition, the Government was not aware that the company might have been able to sell its assets, but there was a possibility that negotiations were in progress. She also stated that the Government did not consider advising the management to sell the assets. She stated that it was not reasonable to do that when it was known that the company was insolvent. Hence the government considered that winding-up was the better option. She further stated that the Managing Director had informed the Central Bank that he was not selling the company, but was only approaching the government to negotiate loans on their behalf. She agreed that the 18 to 20 million US dollars was estimated to turn the resort to a 5 star grade, but that a 4 star grade would have

cost less. The Government did not agree to assist, as now, as a matter of policy, the Government does not assist private businesses with loans. That position was taken both as a shareholder and as a sovereign entity. She denied that the Government did not contact the company after closure to ascertain what its intentions were before filing this petition, because it had wanted the hotel to close down anyway. She further stated that the Government did not consider the appointment of a receiver instead of a liquidator, in which case a winding up could have been averted and management would lie with the receiver. Mrs Herminie also stated that the possibility of the company pursuing other objects in the memorandum of association depended on the SLA. She stated that due to the closure, the Government could not recover taxes from the company. She said that the value of the assets of the company in the year 2004, according to the audit report was R 235 million (approximately 40 million US dollars), but that value has appreciated 100% over the past four years. She further stated that it was because of that, that the Government has a better chance to recover its investment. She also stated that the minority protection provision in the Companies Act was not invoked as the Government could not rely on any "oppression" which is an element in that provision. She also said that Mr Davidson as a representative of EODC which held 50% shares had indicated that the assets would not be sold. Hence the Government as a minority shareholder did not find it necessary to ask him to reconsider. She stated that the loan of US dollars 3 million given to the Government by the company is in the Treasury for repayment. It has been partly repaid, but after the death of Dr Davidson, the father of Mr Mark Davidson, a power of attorney has become necessary. For 20 years the Government has not received dividends nor taxes, and hence there was no benefit in retaining the shares. The company had operated as an hotelier since 1988, and no other licence was applied for, nor issued for any other object. The company cannot open another hotelier business abroad, as it is a local

company. The company did not contact the SLA after closure to inform of any investment opportunity that had arisen later. She clarified that only a secured creditor could ask to place a company in receivership, and hence the Government had no legal basis to do that.

Mr Mark Davidson, the Managing Director of the company testified that the company was formed, and the hotel business was launched by his father Dr Davidson. He came to Seychelles in 2004, and became the Managing Director in 2005 after the death of his father. Initial financing came from the Bank of Baroda and its Consortium banks. Later an IFC loan was obtained to complete the work. These loans have not been repaid and hence the company has not been able to reach any level of profits.

Mr Davidson stated that the closure of the company was received by him and the staff with a mixture of depression, sadness and anger, as it was not justified. Until the closure, several high profile functions were hosted in the hotel. The guests included kings, heads of States, and one Shiekh Abdul Monsin AbdulMalik Al Shaikh, a wealthy Arab who had been a repeat guest for 17 years. One Suleman Al Dahar was one of his managers. The Arabs usually booked about one hundred rooms, and were also permitted the exclusive use of an area on the property which was popularly called "Saudi City", to keep their containers. It was essentially a storage area. When he was in the hotel, he received visitors which included high ranking government officials. For the past 10 years, the Shiekh was interested in buying the hotel, but his father did not agree. In 2005, Mr Suleman approached him regarding the sale, but when he refused, he said "Mark, we can do it the easy way or the hard way". Mr Davidson stated that he took that as a threat which still subsists. He alleged that the motive of the Government is to see that the Arab party buys the hotel at a winding-up, and not the desire to recover its shares. He also stated that he had positive proof that the provisional

liquidator had allowed a container of food and drinks to enter the hotel premises after he was appointed.

As regards the events leading to the closure of the hotel, he stated that several recommendations of the STB were complied with. He admitted that as an old hotel, there was rust and peeling of paint, but stated that it was not derelict as guests continued to come until January 2008. There was upgrading in 1991-92 with the addition of rooms. Of those 8 were executive suites and 47 deluxe rooms.

Mr Davidson maintained that despite the reports of the STB, the hotel was not in such a bad state to merit closing down. Refuting the reports of Ms Hollanda, he stated that half of the rooms in block 100 were renovated, and in block 700, only 7 rooms were not done. In the walkway, three quarters of wooden posts were replaced. New Harvey tiles were fixed in the central complex. The Frangipani Restaurant was enclosed with glass partitioning, and its terrace was extended to accommodate more guests. The Coco De Mer bar was also extended. A new kitchen was installed. New equipment like washing-machines, dryers and kitchen appliances were purchased. These were observed by the Court on the visit of the locus in quo.

Mr Davidson stated that the hotel could not close down for repairs due to its financial position. Hence repairs were done while in operation. The STB wanted a "fresh product", and he was working towards it. The company was seeking strategic partners and investors, and operating under pressure. He further explained that due to the conditions attached to the existing loans, especially from the Bank of Baroda consortium, the approval of banks was necessary before accepting investments. In that respect the company contacted a Malaysian group. But negotiations failed when they wanted to buy the hotel, and also due to complexities of the debts and financing.

Mr Davidson blamed the original contractors for the poor workmanship in constructing the building. He stated that nine years ago, an Indian engineering company was engaged to do renovation work. They used a method called "fosroc," which involved a special mixture of chemicals and cement, to repair loadbearing columns and other areas. No proof was however produced to Court on this matter. Hence the Court is unable to consider the durability of those repairs. Mr Davidson claimed that the steel trusses are structurally sound and that cracks are present in some of the non-loadbearing walls and columns. He further stated that the reception desk was to be completely renovated after major renovations were complete. He also testified regarding other reparation work done to some concrete columns after December 2007. In this respect, the Court, during the visit of the locus observed that the corrosion shown in photographs 3 and 4 of Mr Lespoir's report relating to the back of the house area had been repaired. Mr Davidson refuted the aspersion in the affidavit of Mrs Herminie that the hotel was being "abandoned". However, as stated earlier, Mrs Herminie had explained in her testimony that what she meant was "closed down". In any event, paragraph 17 of the affidavit only contains a supposition, and not an allegation of abandonment in the sense of "running away" leaving the hotel unattended. Mr Davidson stated that deadlines given by SLA could not be kept due to inability to source the necessary finances anticipated. Hence it was not possible to close down. He stated that a master plan needed financing by strategic partners and also their approval. That was why plans could not be prepared. As regards health and hygiene, Mr Davidson stated that in fact the Ministry of Health in November 2007 complimented the hotel and stated "keep it up". He stated that the company contacted prestigious companies like the Carrimjee Group, the Taylor Group and Beachcomber to assist them. He claimed that negotiations were ongoing when the winding-up petition was filed. He further stated that if a winding-up order is made, after paying

the first line creditors, nothing will be left for the Government to recover. The market value of the assets was about 40 million US dollars, but the total debts exceeded 200 million US dollars. He was optimistic that the ongoing negotiations with prospective partners could end within one month. He said that Parcel T 147 on which the hotel is situated is 180 acres in extent. The hotel and the garden is on 80 acres. He said that if he sells 100 acres, he could fetch about 10 million euros. In that respect, he stated that if the Government had approached the company before filing the petition, the R 5.4 million which the Government is seeking could have been settled after such sale. It was submitted by the petitioner that Parcel T 147 is encumbered with numerous mortgages and charges and that a sale will not benefit the company.

On being cross-examined, Mr Davidson stated that from 1988 to end of December 2007, the company had only a licence to operate a hotel, which was the main object for which the company was formed. No applications were made to operate any other hotel in Seychelles or abroad. He said that he and the Board decided to ignore the directions of the SLA as they felt that the SLA was seeking to close their business for wrong reasons. They also thought that there was no legal basis for the SLA to call for a master plan. He stated that he expected the winding up petition. Questioned about the plans the company had stated were being prepared, Mr Davidson stated that some were in his office, and others had already been sent to the STB and SLA. He further stated that until the company found the necessary finances to implement comprehensive plans, they could not be submitted. He stated that the company was struggling to survive. The company has four times more debts than its assets and hence had no collateral to raise funds. He claimed that all that was needed was a "soft renovation" to be operative. He was prepared to give 50% shares of EODC, the main holding company, to save the company, even if he lost controlling rights. He maintained that there was still the possibility of finding serious

investors or partners, and also the possibility of selling part of the property or shares to save the company from being wound up. In this respect, Dr Phogat the Chief Executive of the Bank of Baroda who had given notice to appear as a creditor testified that the debt of around 130 million US dollars due to the bank and its consortium has not been paid. An attempt to foreclose, in case No 129196 (P7) also failed due to a legal technicality contained in a deferment agreement in favour of other creditors. In this respect, an earlier attempt made by another company called Air et Chaleur in case No 121 of 1991 (P6) to foreclose also had failed due to the same deferment agreement. Dr Phogat stated that the company is insolvent and therefore should be wound up. He however stated that although the company was not cooperative to settle the loan earlier, towards the year 2007, three companies approached the bank directly; they were the Carrimjee Group, the Bharti Group of India and Capital Market Finance Co of Mauritius. One group offered 5 million US dollars to settle the loan, but it was not accepted. At the time of filing the petition, the Capital Market Finance Co was keen, but negotiations were stopped with the winding-up petition being filed. These negotiations were for that company to take over the debt of the consortium banks directly. Even if that materialized, the indebtedness of the company would not have changed. The actual capital disbursement by the bank was USD 13 to 13.5 million.

The Law

The grounds for winding-up provided in section 205 of the Companies Act of Seychelles are disjunctive in nature. That section states that “a company may be wound up by Court if” and proceeds to set out six grounds (a) to (f). Section 222 of the Companies Act 1948 of the United Kingdom however, provides that "the Court may order the winding up of a company *if one or several* of the following grounds for winding up are present". The grounds are however basically the same. Hence in Seychelles, a company can be wound up "if

the Court is of opinion that it is just and equitable".

As was held by Grossman J in *Re Davies and Colett Ltd* [1935] Ch 693 at 698,

> in exercising the powers conferred by this subsection, the Courts have not limited their discretion to matters *ejusdem generis* as those enumerated in section 222 (a)-(g) of the Companies Act 1948, but have felt it free to consider in the *widest possible terms what justice and equity require.*

It was also held in the case of *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 that "the general words of the subsection should remain general and not be reduced to the sum of particular instances". Neville J's statement in *Re Bleriot Manufacturing Aircraft Co Ltd* (1916) 32 TLR 253, sums up these pronouncements, when he stated that –

> the words "just and equitable" are of the widest significance *and do not limit the jurisdiction of the Court to any case. It is a question of fact and each case must depend on its own circumstances.*

In the present case therefore, on the basis of the averments in the petition, the "just and equitable" ground could be given a wide interpretation to include the public interest element relied on by the petitioner. The petitioner has mainly averred that it is just and equitable to wind up the company as the substratum has gone as a result of the Seychelles Licensing Authority (SLA) refusing to renew the licence to operate and that hence the main object for which the company was formed has become impracticable. The company, in paragraph 8 of its affidavit avers that it is -

> not fair for the petitioner to complain that the substratum of the company has disappeared with the non-renewal of the licence. This was engineered by one or other of the Seychelles Tourism Board and the SLA, both agencies of the Government. For the same Government to use the result of an action of one of its agencies as support for an argument that the substratum of the company has disappeared and to seek winding up of the company on that ground is a circular and self-serving move which the Court should loath to entertain.

The company further avers in paragraph 9 of the said affidavit that –

> even if the company is unable to manage the resort without proper licences, it does not follow that the substratum of the company has disappeared since there are other options open to the company to pursue in order to resume operation. Amongst these are, pursuing an appeal against the refusal to licence, seeking judicial review of the decision not to licence, finding the funds to renovate and seek renewal of the licence upon this being effected, finding a strategic partner for the company with a view to effecting the renovations and reopening, selling the resort.

As regards the first option the SLA, by letter dated 4 January 2008, informed the company that the licence which expired on 31 December 2007 would not be renewed, and that consequently all business operations should cease by 31 January 2008. The present petition for winding-up was filed on 4 February 2008. Therefore the company had one month to pursue its legal option. Under section 15 of the Licences Act

(Cap 113) the company, if aggrieved with the decision of the SLA could have appealed to the Minister within 15 days thereof. This they failed to do. Further, the company could have sought judicial review of the SLA decision within three months, and sought a stay of the present proceedings pending the decision of the Court, as the essence of the present petition is the disappearance of the substratum due to the non-renewal of the licence by the SLA. No such application for judicial review was made, and in any event such application may now be considered time barred under rule 4 of the Supreme Court (Supervisory Jurisdiction) Rules, 1995.

Mr Georges, counsel for the company submitted that the appeal to the Minister was not pursued, as the company found that it would be a futile exercise knowing that the Minister of Finance, the appellate authority, would not hold in their favour as the Government was in any event contemplating filing a winding-up petition. This is legally untenable, as a person aggrieved by any order or decision must exhaust all remedies provided in law.

As regards the option to canvass the decision of the SLA by judicial review, Mr Georges submitted that there were no grounds, as the SLA had followed rules of natural justice, and had statutory powers to make the decision. This submission is also not acceptable as Mr Davidson, in his capacity as Managing Director, who can sue and be sued, stated in his letter of 14 December 2007 to the SLA that the prohibition not to take guests beyond 31 December 2007 was unlawful. He also alleged bias. He also stated that the non-submitting of renovation plans was not a lawful ground for denying an extension of the licence. Hence there were possible grounds of illegality, acting ultra vires, bias and unreasonableness available to the company. As I stated, the very basis of the present petition is the disappearance of the substratum consequent to the SLA not renewing the licence. The

company had the legal right to file an application for judicial review within three months of the SLA decision and to seek a stay of the winding-up petition. This they failed to do. It was held inter alia in the case of *The Indian Ocean Fishing Club v MESA* (1996) that the applicant's failure to contest the decision of the Minister, by way of a writ of certiorari, implied a tacit acceptance of the decision. In these circumstances, the company cannot in the present proceedings, legitimately seek to canvass the validity of the SLA decision, except as a defence to the present petition.

In contending that the substratum of the company has not failed, Mr Georges submitted that the petitioner has wrongly equated closure of the hotel business, to impossibility of pursuing other objects in the memorandum of association. He submitted that the company could still pursue objects (c), (d) and (e) which are to purchase, develop and manage any land in Seychelles. In this respect he cited the case of *Re Suburban Hotel Co* (1867) 2 Ch App 737 in which it was held that -

> before it could be said that the substratum of the company's business has gone and a winding up order might therefore be justified, it is necessary to show that the business within its objects had become in a practical sense impossible.

Other obvious cases where the substratum had failed were *In Re Haven Gold Mining Co* (1881) 20 Ch D 151, and *In Re German Date Coffee Co* (1881) 20 Ch D 169. *Palmer's Company Precedents* (17th Ed) at 29 states that the courts have over the years extended the principle, and it is now possible to say on the authorities that the substratum of a company is deemed to be gone when -

(1) The subject matter of the company is gone; or

(2) The object for which it was incorporated has substantially failed, or

(3) It is impossible to carry on the business of the company except at a loss.

Mr Georges contended that the business of the company within its other objects had not become practically impossible. He contended that if at all, there had been only a temporary setback as there is still the possibility of satisfying the requirements of the SLA, and thereby getting the licence back, and also saving the company by finding strategic partners and investors. In that respect he relied on the case of *Davies & Co v Brunswick (Australia) Ltd* [1936] 1 All ER 299 in which the Privy Council held that —

> The decisive question must be the question whether *at the date of the presentation of the winding up petition*, there was any reasonable hope that the object of trading at profit, with a view to which the company was formed, would be obtained.

With respect, I am unable to see how this decision assists the company, as it was admittedly insolvent since its inception, and Mr Davidson stated it his testimony that the hotel was barely surviving, and could only breakeven. The company was heavily indebted at the date of presentation of the petition and hence there was no "hope of trading at a profit". It was therefore impossible for the company to carry on its business of hotelier except at a loss as the main object for which it was incorporated had substantially failed.

Mr Georges however contended that in this case the company could pursue other objects in the memorandum of association and that hence a "standing over" order should be made until those objects are pursued.

He cited the case of *In Re Eastern Telegraph Co Ltd* [1947] 2 All ER 169, which held that where the business has substantially ceased to exist, a winding-up order should be made even if the majority of shareholders desired to continue to carry on the company. However Jenkins J proceeded to add an explanation to that and stated –

> That, I take it, means that if a shareholder has invested his money in the shares of the company on the footing that it is going to carry on *some particular object,* he cannot be forced against his will by the votes of his fellow shareholders to continue to adventure his money *on some quite different project* or speculation.

That authority also does not assist the company, as the Government invested in the shares, albeit indirectly, and guaranteed the IFC loan, to facilitate the tourism industry and not for the company to pursue any other object in its memorandum of association to speculate on the property market. In any event, it is not reasonable to accept that a company that is insolvent could pursue other alternative objects, when it cannot pursue its main object without being indebted.

Mr Georges relied heavily on the case of *Re Taldua Rubber Co Ltd* [1946] 2 All ER 763, in which the facts appeared to be similar. The company was formed partly to purchase a rubber estate, but with power to carry on a variety of activities. For 29 years the company carried on the business of a rubber estate on the Taldua Estate, and during that period it carried on no other business except that it purchased rubber from other estates and processed it on its own estate. When it was sold a petition for winding-up was filed on the ground that the substratum had gone, since the company had been formed solely to work the Taldua Estate. The Court held that the sale

of that particular estate did not result in a destruction of the substratum because the paramount object of the company was to carry on the business of conducting rubber estates and was not limited to the business of carrying on the particular estate.

In the present case, admittedly, the main object of the company was to carry on the business of hoteliers. The petitioner's shares were directed towards that object. The Government granted tax concessions to promote the tourism industry. Hence the petitioner can legitimately seek a winding-up on the ground that the substratum has disappeared in relation to the object that it pursued. The tax concessions were granted, and the IFC loan was guaranteed to assist the Plantation Club Hotel and no other hotel. Hence that decision should be distinguished.

The decision in *Re Kitson & Co Ltd* [1946] 1 All ER 435, which was also relied upon by Mr Georges could also be distinguished on that ground. In that case the objects of the company were in the widest terms and included power to take over a particular business and carry on the business of general engineering. The company carried on the particular business for forty six years and then sold it, but the Court refused to hold that the substratum had gone on the ground that its power to carry on general engineering was capable of fulfilment.

As Kay J stated in the case of *Re Red Rock Gold Mining Co Ltd* (1889) 61 LT 785 at 787 —

> The principle of this Court is, that where an association is formed for a particular purpose, it does not matter that it has large powers in addition to that particular purpose, if that particular purpose fails any shareholder has a right to say "put an end to it, pay me my money".

What is "just and equitable" depends on the facts and circumstances of each case. Those words, as stated in *Re Bleriot Manufacturing* (supra), do not, and should not limit the jurisdiction of the Court in any case. In deciding whether or not to make a winding-up order, the Court exercises a judicial discretion. Mr Georges invited the Court to consider whether it would be just and equitable to order a winding-up of a company whose assets are worth more than 40 million US dollars, for a shareholder to recover R 5.4 million. The answer would be a definite "no" if the company was solvent. The reality of the situation of the company is that while its assets are worth about 40 million US dollars, the total debts exceed 200 million US dollars. The Bank of Baroda consortium itself is owed nearly 130 million US dollars. According to the Audit Report of the year 2004, in respect of the demand promissory notes for advances and interest thereon, the associated companies are owed R 21,943,234. There is therefore no value in the shares. Adopting the dicta of Kay J in the case of *Re Red Rock Gold Mining Case* (supra), it would be just and equitable in the opinion of the Court for the Government to say as a shareholder "put an end to it, pay me my money", and as the sovereign entity to state "put an end to it in the interests of the tourism industry and the economy of the country".

Section 208(2) provides that –

> (2) Where the petition is presented by a creditor, shareholder, contributory or debenture holder of the company that it is just and equitable that the company should be wound up,..... the Court, if it is of opinion –
>
> (a) That the petitioner is entitled to relief either by winding up the company or by some other means;

(b) That in the absence of any other remedy it would be just and equitable that the company should be wound up;

Shall make a winding up order, *unless* it is also of the opinion both that some other remedy is available to the petitioner, and that he is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

In this respect the Court accepts the evidence of Mrs Herminie that all other legal remedies were considered and that at the time of presentation of the petition the only remedy available to the petitioner was the filing of a winding-up petition. She stated that the Government would have been acting irresponsibly if it sought to sell its shares knowing that the company was insolvent. She also saw no reason for the Government to contact the company to sell the company before the petition was filed, as the company had indicated that they did not want to sell its assets. She further stated that acquisition was not an option for the Government in this matter. As regards the suggestion of Mr Georges that the Government as a minority shareholder could have sought minority protection under the Act, the Court finds as a matter of law, that section 201(1) of the Act provides for protection of minority shareholders. The procedure is for shareholders to complain to the Registrar of Companies who may make an application by petition to Court for an order. In the United Kingdom however, section 122(1)(g) of the Insolvency Act 1986 provides for the filing of a petition for winding up by a minority shareholder on the ground that it is just and equitable to do so. In our law therefore the remedy of a minority shareholder when affairs of a company are being conducted in a manner which is oppressive or unfairly prejudicial is to complain to the Registrar for protection. The Registrar may

then file a petition for an order. The Court is therefore satisfied on the basis of the totality of the evidence that the petitioner is not acting unreasonably in seeking the winding up instead of pursuing any other remedies suggested by Mr Georges to Mrs Herminie.

Mr Georges also made an application for a "stand over" order on the ground that the shareholders could still guide the procedure for the petitioner to recover its investment, especially as at the time of closure, there was at least one serious investor as testified by Dr Phogat. I take it that this application was made under section 208(1) of the Act, as section 233(1) does not apply to a contesting company. He cited the case of *In Re Strutton's Independence Ltd* (1916) 33 TLR 98 where the Court holding that the substratum had gone, stood over the petition to enable the majority of the shareholders to put forward a scheme for buying out the others. That was done as the company had the widest of powers. In the present case all these avenues have been pursued. There was no positive proof at the date of filing the petition which would induce this Court to make a "standing over" order, especially when the petitioner has established on a balance of probabilities that the company was, when faced with imminent closure, adopted a defiant attitude even to the extent of not pursuing its legal remedies. In these circumstances, a "standing over" order would amount to granting another extension to the company to venture into an uncertain expedition for finances. Hence that application cannot be considered.

Accordingly, the Court is satisfied that at the time of the presentation of the petition there was no reasonable hope that the company could pursue its main object as an hotelier, not merely due to the licence not being renewed by the SLA, but mainly due to its inability to find partners or investors who could invest in confidence, knowing the debt situation of the company. Hence the Court does not agree that it is a

temporary setback. In the particular circumstances of this case, it was a practical impossibility. The pursuit of other objects in the memorandum of association was not a viable proposition due to the pervading insolvency of the company. This state of insolvency had not changed at the time of presentation of the petition for winding up and there had been no hope of finding prospective investors or partners to pull the company out of the quagmire they had been in since its inception. The principal creditors are tied down by the deferment agreement. The interest on those loans are mounting with the company having no hope to settle them even if they sell the assets. Therefore the Court holds that the substratum of the company has disappeared, and that in those circumstances it is “just and equitable" to wind up the company Ailee Development Corporation Ltd, and the Court so orders.

The Court also hereby approves the following claims of the creditors who have filed their claims pursuant to regulation 29 of the Winding-up Regulations 1975, as they were not contested either by the petitioner or the company.

(A)	(1) Bank of Baroda	-	USD29,080,988.38
	(2) State Bank of Indian	-	USD28,380,524.95
	(3) Indian Overseas Bank	-	USD21,831,525.51
	(4) Indian Bank	-	USD18,259.300.65
	(5) Bank of India	-	USD 2,113,470.76
	Amount as at 31 January 2008	=	USD129,665,810.76

The interest is accruing at the Libor plus rate of 2.5% and penal interest thereon.

(B) Nicole Thelermont of Bel Ombre
Award made by the Competent Officer Ministry of Employment and Social Affairs in Case No Rev/193/06 - Sey R 76,077.89.

Pursuant to section 217(2) of the Act, the provisional liquidator appointed by this Court on 8 February 2008, Mr Gerald Lincoln, the Chief Executive Officer of Ernest & Young – Mauritius, shall continue to be the liquidator of the company Ailee Development Corporation Ltd. The restrictions on his powers imposed by this Court when he was provisional liquidator shall cease to be operative forthwith, and he shall henceforth be vested with all the powers provided in section 222(1) and (2) of the Act.

Pursuant to section 213(1) of the Act, a copy of this order shall forthwith be forwarded by the liquidator of the company to the Registrar of Companies who shall make a minute thereof in the records relating to the company. Further pursuant to subsection (2) thereof, an inhibition is placed upon all dispositions of, and dealings with, Land Parcel T 147 situated at Val Mer, Baie Lazare on which the hotel is situated, and the company Ailee Development Corporation is the registered proprietor, except dispositions and dealings by the said liquidator in the exercise of his powers conferred by him under the Companies Act of Seychelles. Upon production of a copy of this winding-up order, the Registrar of Lands shall enter the inhibition against the said parcel of land.

Section 219(1)(a) of the Act provides that where in a winding-up by Court a person other than an official receiver is appointed liquidator, that person shall not be capable of acting as liquidator until he has notified the Registrar of Companies of his appointment, and given security for the proper performance of his duties in the prescribed manner to the satisfaction of the Registrar of the Court. The term "prescribed" means, prescribed by the regulations made under the Act. Regulation 47(b) provides that the Court shall fix the amount and nature of the security. Sub-regulation (c) provides that "the cost of furnishing the required security by a liquidator shall be borne by him personally and shall not be

charged against the assets of the company as an expense incurred in the winding up". On a consideration of duties that the liquidator would be performing in the winding up, and the value of the assets involved, I fix the amount of security in a sum of R 1 million, or its equivalent in any convertible foreign currency. This amount shall be furnished by way of a bond entered by the liquidator in his own recognizance with one surety to the satisfaction of the Registrar of this Court, or by providing a professional indemnity insurance cover for that amount, before acting as liquidator.

Judgment is entered, and orders are made accordingly.

Record: Civil Side No 27 of 2008

Zaccari v Andre

Civil procedure - attachment order – absent defendant

The plaintiff sued the defendant for breach of contract. Before the plaint had been heard, the defendant left the country. The plaintiff sought an attachment order of monies belonging to the defendant held by the two local banks.

HELD

1. Before granting an attachment order, the Court must be satisfied that –

   (a) the plaintiff has a bona fide claim against the defendant;

   (b) there is a clear danger that the defendant may avoid satisfying the judgment if it is in favour of the plaintiff;

   (c) unless an order is made, the plaintiff would not be able to realise the fruits of any judgment in the plaintiff's favour.

2. In the interests of justice, the Court may in appropriate cases make an urgent ex parte order of the provisional attachment of monies belonging to a defendant.

Judgment for the applicant.

Legislation cited
Code of Civil Procedure, s 280

Foreign cases noted
Mareva Companies Naviera SA v International Bulkcarries SA [1980] 1 All ER 213

Ex Parte
Daniel BELLE for the plaintiff/applicant

Order delivered on 2 October 2008 by:

KARUNAKARAN J: This is an application filed by the plaintiff under section 280 of the Code of Civil Procedure. In this application, the plaintiff seeks an order to attach provisionally the monies belonging to the defendant, which are in the hands of third parties.

By a plaint dated 28 January 2008, the plaintiff has commenced the suit in C S No 16 of 2008, claiming the sum of R 2,100,000 from the defendant for loss and damage, which the plaintiff allegedly suffered as a result of a breach of contract by the defendant. The suit is still pending before the Court for determination. The plaintiff now claims that the defendant has already disposed of his assets, and has left the jurisdiction of this Court pending the determination of the suit. Thus, the defendant is attempting to deprive the plaintiff from realizing the fruits of the judgment the Court may give in his favour. Hence, the plaintiff has now come before this Court with the present motion for an urgent order attaching any money/s belonging to the defendant with or due from third party namely, Bank of Baroda and the Mauritius Commercial Bank, both of Victoria, Mahe, Seychelles.

Upon a careful perusal of the plaint, the application, the affidavit of facts filed in support thereof, I am satisfied that the plaintiff has a bona fide claim against the defendant in this suit. From the averments on record, it appears that there is a clear danger that the defendant may avoid satisfaction of judgment, if given for the plaintiff. I reasonably believe that

unless an order of provisional attachment is granted, the plaintiff would not be able to realise the fruits of the judgment, if given in his favour in the original suit. Furthermore, I find that it is an appropriate case, where the Court should make an urgent ex parte order of provisional attachment of the monies belonging to the defendant, in the interests of justice. See, *Mareva Companies Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 215.

In view of all the above, I hereby make an order attaching provisionally any money/all the monies - but not exceeding the sum of R 2,100,000 due to or belonging to the defendant, which is/are in the hands of/due to or belonging to the defendant, with or due from Bank of Baroda and the Mauritius Commercial Bank, both of Victoria, Mahe, Seychelles.

The above order for provisional attachment is made pending the final determination of the suit Civil Side No 16 of 2008 in this matter or until further order of this Court.

Further order

In pursuance of the above order, I direct the Registrar of the Supreme Court to issue the warrants for the provisional attachment of the monies accordingly. A copy of the order made herein to be served on the defendant along with a copy of the application. Mr Daniel Bell, counsel for the plaintiff also be furnished with a copy of the above order accordingly.

Record: Civil Side No 16 of 2008

Payet v State Assurance Corporation of Seychelles

Insurance – utmost good faith – evidence – accord and satisfaction

The plaintiff contracted with the second defendant to broker insurance over his vessel by the first defendant. The defendants negotiated a policy which the plaintiff accepted. The plaintiff went to see the broker on a Friday and paid the insurance premium. He was assured by the broker that the policy was effective from that day. Over the weekend the vessel went missing. The plaintiff made all attempts to locate the vessel including travelling to nearby foreign ports. Over a month later the documentation arrived for the insurance policy. The plaintiff became aware that he had to notify the first defendant and then did so. The insurer wrote to the plaintiff advising him that his insurance policy had been repudiated because he was late in notifying the disappearance of the vessel. After the insurer learnt that the plaintiff was not aware of the notification obligation, it then again wrote to advise that the policy had been repudiated because the vessel was already lost when it issued cover. The plaintiff sought payment in accordance with the policy from the first defendant or alternatively damages from the second defendant for failing to pass on instructions for the equivalent of the insured amount.

HELD

1. The idea of good faith in the context of insurance contracts reflects the degree of openness required of the parties in the various stages of their relationship. It is not absolute. The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very

high degree of openness at the stage of the formation of the contract;

2. The Courts have consistently set their face against allowing the assured's duty of good faith to be used by the insurer as an instrument for enabling the insurer himself to act in bad faith. An inevitable consequence in the post-contract situation is that the remedy of avoidance of the contract is in practical terms wholly one-sided. It is a remedy of value to the insurer and of disproportionate benefit to them; it enables them to escape retrospectively the liability to indemnify which they had previously and validly undertaken;

3. If the implication on an insurer's allegations of 'nondisclosure' and 'false representation' or 'misrepresentation' of facts are in the nature of insinuations and suspicions, with the implication being that the insured has committed a criminal act, then the burden of proof imposed on the insurer is of a higher standard than the normal civil balance of probabilities;

4. An insured is presumed not to be complicit unless and until that has been proved by the insurer;

5. A defence of 'accord and satisfaction' is an affirmative defence. It cannot be implied by guesswork, conjecture, or surmise. The insurer must prove that:

(a) A bona fide dispute had arisen between the parties as to the existence or extent of liability under the policy and both parties had knowledge about the actual issues in a dispute.

(b) Subsequent to the dispute arising, the parties had entered into an agreement under the terms of which the dispute was compromised or settled by the refund of the premium and acceptance of it by the insured, all for the purpose of settling a dispute;

(c) The insured accepted the refund in full and final settlement of the claim made under the policy or on a waiver of all claims under the policy; and

(d) A performance by the parties of that agreement.

Judgment for the plaintiff against the first defendant. Damages awarded for the total loss of the vessel together with interest and costs. Costs awarded to the second defendant to be paid by the plaintiff.

Foreign cases noted

Drake Insurance Plc (in provisional liquidation) v Provident Insurance Plc [2004] Lloyd's Rep IR 277

Elfie A Issaias v Marine Insurance Co Ltd [1923] 15 Lloyd's Rep 186

Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (the ''Sea Star") [2001] 1 Lloyd's Rep 389

The Ikarian Reefer [1995] 1 Lloyd's Rep 455

Francis CHANG-SAM for the plaintiff
Danny LUCAS for the first defendant
Second defendant - in person

Judgment delivered on 24 March 2008 by:

KARUNAKARAN J: The plaintiff in this action seeks a judgment ordering the first defendant, State Assurance Corporation of Seychelles (SACOS) to pay him -

(a) the sum of R 380,600, being the sum for which he had insured his vessel "Agape" with the first defendant, and a sum equal to the interest which the plaintiff is liable to pay to the Development Bank of Seychelles on the loan he obtained from the Bank for the purchase of the said vessel;

(b) Alternatively, if this Court finds that the first defendant was right in repudiating the insurance policy - because the instruction to issue cover was received by the first defendant after 15 January 1999 - for an order requiring the second defendant to indemnify the plaintiff in the sum of R 380,600, being the sum for which the plaintiff had instructed the second defendant to obtain cover from the first defendant and together with an amount sufficient to cover all the interest, which the plaintiff is liable to pay to the Development Bank of Seychelles on the loan the plaintiff had obtained for the purchase of the said vessel.

It is not in dispute that the plaintiff was at all material times the owner of a vessel known as "Agape". The first defendant was at the material time and is a statutory corporation carrying on business as an insurer and the second defendant was at the material time a limited liability company carrying on business as an insurance broker. On or about 20 December 1998 the

plaintiff sought the services of and appointed the second defendant as its insurance agent and broker for the purpose of negotiating a marine hull insurance policy in respect of his vessel "Agape" with the first defendant. According to the plaintiff, following the negotiation between the first and second defendants, the first defendant on 28 December 1998 made an offer to the plaintiff through the second defendant for a hull marine insurance policy providing for cover for the plaintiff's vessel "Agape" quoting the premium in the sum of R 22, 989. It is also the case of the plaintiff that the second defendant, through its Marketing Manager Ms Jane Serving submitted the aforementioned offer to the plaintiff on 6 January 1999. On the same day, the plaintiff confirmed his acceptance of the offer made by the first defendant by instructing the said Jane Serving of the second defendant to place immediate cover for his vessel "Agape" with the first defendant and which placement the second defendant thereafter confirmed to the plaintiff.

Notwithstanding the said offer and confirmation of acceptance, according to the plaintiff, he was on 12 January 1999 asked to complete a new proposal form in respect of the same insurance cover for his vessel. The plaintiff completed and returned to Jane Serving of the second defendant the aforementioned proposal form on 15 January 1999 and also immediately paid the agreed premium of R 22, 989 to Jane Serving, the representative of the second defendant, and instructed her that the cover should take effect on 15 January 1999 itself. Ms Jane Serving assured the plaintiff that the cover for "Agape" would take effect immediately on 15 January 1999 and that she had obtained confirmation of this from the officers of the first defendant.

According to the plaintiff, on 31 March 1999 the first defendant issued a marine hull insurance policy (hereinafter referred to as the "policy") in respect of "Agape" wherein it is stated that the policy took effect from 15 January 1999. It is further

averred in the plaint that prior to the plaintiff receiving the policy document, on or about 16 January 1999 the plaintiff's vessel "Agape" went missing. The plaintiff duly notified the authorities, including the police and port, of the disappearance of his vessel "Agape" and in addition contacted various persons first on Praslin, La Digue and Mahe and then in neighbouring countries such as Mauritius and Reunion for the purpose of verifying whether they had seen his vessel but none of them had.

After attempting by all possible means to locate his vessel the plaintiff notified the first defendant of the disappearance of the vessel. The plaintiff only became aware of the policy requirement to notify the defendant after he was provided with the policy document. The first defendant issued the policy document on 31 March 1999.

The first defendant by a letter dated 26 April 1999, firstly purported to repudiate the insurance policy on the basis that the plaintiff was late in notifying it of the disappearance of the vessel.

On being advised that the plaintiff only became aware of the policy obligation to notify the first defendant after he received the policy after 31 March 1999 the first defendant by a letter dated 28 June 1999 then purported to repudiate the policy on the different ground that the vessel was already lost when it was instructed by the second defendant to issue the cover for the plaintiff's vessel. It is also the case of the plaintiff that according to the instructions he gave to the second defendant he specifically asked the second defendant to obtain cover for his vessel from 15 January 1999 and further that he in fact paid to the second defendant the agreed premium on 15 January 1999.

The plaintiff has further averred that he was assured by the second defendant that his instructions had been complied with

and that cover would be effected by the first defendant with effect from 15 January 1999. According to the plaintiff, he had a valid policy covering his vessel at the time of its loss and in accordance with that policy the first defendant is under an obligation under the policy to compensate him for the sum of R 380,600 for which he has insured his vessel under the policy. Despite repeated requests to pay the sum insured the first defendant has refused and continued to refuse to do so.

Alternatively, it is the case of the plaintiff that if the instruction to cover the plaintiff's vessel was only given by the second defendant to the first defendant, then the second defendant failed in its obligation to carry out the plaintiff's specific instruction to effect cover for his vessel with effect from 15 January 1999. As a result of the said failure of the second defendant, the second defendant is liable to compensate the plaintiff in an amount equal to R 380,600 being the sum for which it instructed the second defendant to insure his vessel with the first defendant.

Moreover, it is the case of the plaintiff, as both the first and the second defendants were aware that the plaintiff had obtained a loan from the Development Bank of Seychelles for the purchase of the vessel and that the bank has an interest in the vessel, the party liable to indemnify him for the loss of his vessel should in addition be liable to indemnify him for all the interest he is liable to pay to the Development Bank of Seychelles in respect of his loan taken for the purchase of the vessel. Hence, the plaintiff seeks judgment as above-mentioned.

On the other side both defendants deny liability. It is the case of the first defendant that the plaintiff, through the second defendant, representing himself as the owner of the vessel "Agape" requested a quotation for a marine hull insurance policy from the first defendant in respect of the said vessel. The first defendant accordingly provided a quotation to the

second defendant. However, the first defendant did not receive any confirmation of the offer or quotation from the plaintiff. Particularly, on 6 January 1999 the second defendant through its representative Jane Serving did not confirm any placement of cover of the vessel "Agape" with the first defendant.

Further it is the case of the first defendant that confirmation of acceptance of the quotation, in respect of the premium payable for the insurance of the vessel "Agape", was only made to the first defendant by the second defendant, on 21 January 1999. According to the first defendant the agreement to provide insurance cover for the vessel "Agape" was only concluded on 21 January 1999, when the second defendant confirmed that the quoted premium payable was acceptable to his client, the plaintiff. Accordingly, the first defendant issued the said policy relying on the information set out in the plaintiff's proposal form and that too, only when the second defendant had confirmed that his client, the plaintiff, had agreed to pay the premium quoted.

The first defendant further avers that it was made aware of the loss or missing of "Agape" some three months or so after the incident of disappearance. It is the case of the first defendant that as a reasonable and prudent businessman and person, and if acting in good faith the plaintiff should have known and should have informed the second defendant or the first defendant of the said loss or missing of the vessel promptly. However, the plaintiff did not do so. The first defendant avers that it would not have entered into and issued the insurance policy (Exhibit 11-A) had it known that the subject-matter, the vessel, had gone missing or was lost.

According to the first defendant, the agreement to effect cover for the period from 15 January 1999 was only concluded on 21 January 1999, when the second defendant confirmed that the quoted premium was acceptable. By that time, the plaintiff

had already known that the subject-matter - the vessel "Agape" - had gone missing and therefore, the plaintiff should have in good faith informed the first defendant of the fact. The first defendant further avers that prior to 21 January 1999, when the second defendant confirmed that its client - the plaintiff - had accepted the quotation of R 22,989 for the insurance of the vessel "Agape", no agreement had then been concluded with the second defendant or the plaintiff in respect of insurance cover for the said vessel "Agape". The first defendant further avers that the vessel "Agape" was allegedly "lost" on 16 January 1999, and that the said fact should have been made known to the first defendant in good faith and before finalisation of the insurance contract to insure the "Agape" on 21 January 1999. Had the plaintiff exercised good faith, and made full and material disclosures to the first defendant, in the absence of the subject matter, the vessel "Agape" the first defendant claims that it would not have insured the said vessel. The first defendant avers that the plaintiff's non-disclosure in this respect amounted to a breach and hence the contract of insurance was void ab initio.

Further, the first defendant avers that although the plaintiff knew that the loss of the vessel "Agape" occurred on 16 January 1999 when it was not insured, he falsely represented or misrepresented to the first defendant that the vessel was by 21 January 1999, still in his possession and custody and caused SACOS to enter into the contract of insurance. Hence, the contract of insurance is void ab initio. In the alternative, the first defendant avers that the plaintiff was advised that the contract of insurance in respect of the "Agape" was void ab initio and that the plaintiff accepted that the above was so void, by his acceptance of the reimbursement of his premium which sum was paid to and accepted by the plaintiff on 31 March 2001. Hence, the first defendant avers that the plaintiff cannot now make any claim against the first defendant as the plaintiff has no cause of action against the first defendant. In the circumstances, the

first defendant avers that it is not liable to the plaintiff.

Further the first defendant avers that in the event that there had been a valid contract of insurance in respect of the "Agape", (the same is denied) still the plaintiff was not covered for as he was in breach of the said insurance policy by reason of his having lent the said Agape to its alleged previous owner. The first defendant also avers that the said insurance policy only covered claims in respect of loss or damage arising from the use of the vessel Agape when on charter business. Further the first defendant avers that the plaintiff failed to disclose the material fact to the first defendant when he failed to inform the first defendant that he was to loan or lend the "Agape" to its former owner who was due to leave for France a few days later. Besides, the first defendant avers that had it been made aware that the "Agape" would not be under the control and possession of the plaintiff, as a prudent insurer it would not have insured the said vessel. Hence, the first defendant claims that it is not liable in any sums to the plaintiff as the plaintiff has no cause of action against it. Wherefore the first defendant prays this Court to dismiss the plaint with costs.

On the other side, the second defendant in its defence has averred that the plaintiff, the owner of the vessel "Agape" did approach the second defendant for the purpose of procuring a marine hull insurance policy for that vessel. The second defendant through its Marketing Manager Ms Jane Serving promptly and in good time took all steps necessary to obtain the insurance from the first defendant. In accordance with the instructions given by the plaintiff, the second defendant obtained a policy cover for the period commencing from 15 January 1999 to 14 January 2000 in respect of the said vessel. The premium of R 22, 989 was received from the plaintiff and the same paid to SACOS in the usual manner in accordance with the agreement that existed between the first and the second defendants. According to the second

defendant, although the insurance cover had already been effected by the first defendant from 15 January 1999 as per the instructions given by the plaintiff, after two months, the first defendant refunded the premium to the second defendant by crediting that sum into the second defendant's account with the first defendant. On 13 March 2000, the second defendant in turn, returned the said sum to the plaintiff by Barclays Cheque No 213321. In the circumstances, the second defendant contends that it is not liable to compensate the plaintiff for any reason whatsoever and so prays the Court to dismiss the plaintiff's claim against the second defendant.

The plaintiff Mr Peter Payet - PW2 - testified in essence that in the middle of November 1998, he purchased the vessel "Agape" from one Mr Aque Roger, a French national for the price of R 380, 000 (vide invoice dated 11 November 1998 in exhibit P1). He paid the entire purchase price to the seller by making two payments. The first payment he made was a cash payment in the sum of R 130, 000. He paid this sum as a deposit towards the purchase price and thereupon took possession of the vessel. For the balance of the purchase price ie R 250,000 the plaintiff took a loan from the Development Bank of Seychelles (DBS) vide exhibit P9 and paid that sum to the seller by a DBS cheque No 244824 dated 24 December 1998. The DBS secured that loan by taking a mortgage on the plaintiff's property Title No S1695 (vide exhibit P1) and charging interest on the loan amount at 8% per annum. Be that as it may, the plaintiff soon after obtaining possession took the vessel to the slipway of one Mr Raymond Pool, a boat builder, for repairs as one its engines was not in good condition. Mr Raymond Pool carried out the repairs and the plaintiff supplied to him the necessary materials and the spare parts required for fixing the engine. The plaintiff testified that he purchased those materials and spares from different sources like Marine Equipment Services (Pty) Limited, SMB, Dinesh Auto Parts (Pty), Naval Services Limited etc. The plaintiff also produced a number of receipts

in exhibit P2, P3, P4, P5, P7 and P8 evidencing those purchases made during the relevant period. Soon after the completion of the repairs, the plaintiff wanted to have his vessel insured at the earliest as he was intending to start his business of boat chartering. Hence, in mid-December 1998, the plaintiff retained the second defendant - the insurance broker to whom the plaintiff was a regular client - for insurance brokerage services and requested them to arrange for a marine hull insurance in respect of his vessel "Agape". The second defendant agreed to render services and accordingly, held negotiations with the first defendant (SACOS) to obtain the insurance for the vessel. After obtaining the necessary particulars and documents from the second defendant, the first defendant eventually on 14 January 1999 issued a debit note (exhibit P29) to the plaintiff through the second defendant, featuring essentially the following:

> Transaction Date: 14 January 1999
> Type of Policy: Hull Insurance
> Policy No: MAHULL000421
> Period of Cover. From 15 January
> 1999 to 14 January 2000
> Sum Insured : R 880,600
> Premium Total Due: R 22, 9891

Immediately, upon receipt of the said debit note on 15 January 1999, the plaintiff effected the payment of R 22,989 to the second defendant for the total premium due vide exhibit P14. Following the issuance of the "debit note" and payment of the premium, the first defendant issued a cover-note entitled "document of endorsement" (in exhibit P11) to the plaintiff confirming essentially, all the particulars contained in the "debit note" along with other terms and conditions of policy, which inter alia reads thus: "Policy is also subject to an excess of R 75, 000 in respect of total loss".

After about three months' presumably of bureaucratic delay,

the first defendant finally, on 31 March 1999, issued a copy of the relevant "Policy Document" to the plaintiff through the second defendant insuring the vessel "Agape" for the period of cover commencing from 15 January 1999 to 14 January 2000.

The sequence of events leading to the issuance of the above "Insurance Policy" (Exhibit 11-A) by the first defendant is well recounted chronologically in the second defendant's letter dated 28 January 2000 signed by Ms Jane Serving, addressed to the plaintiff's counsel. This letter was admitted in evidence and marked as exhibit P22, which reads thus:

> THE AGAPE
> Around 20th December 1998 an Evaluation document was sent to SACOS for a quotation for the above vessel.
>
> About four days later a quotation was given by Mr Andy Marie, but as the quotation was too high I realised. The same day I tried to discuss with Mrs. Jakie Chetty for a better deal and Mrs. Chetty told me that she would need some time and she would get back to me as soon as possible.
>
> On the 28/12/1998 we received a quotation in writing sent by fax for an amount of R22, 989.00.
>
> On the 6/1/1999 submitted the faxed quotation to Mr Peter Payet at his office at Plaisance. After checking the details Mr. Payet agreed, he asked me to place cover with immediate effect. I immediately confirmed acceptance of premium by telephone while still in Mr Payet's office and asked Mrs. Chetty to effect insurance cover with immediate effect. This was made in the presence of the ex boat Owner, Mr Payet himself, Mr D Dine and Mr Payet's secretary.

> On the 12/1/1999 I received a phone call from Mr Marie requesting on behalf of Mrs. Chetty to fill a new proposal form based on the Surveyor's reports.
>
> As Mr Payet was absent from his office I left a message and the proposal form with his secretary to get it completed. Mr Payet returned the completed form to our office on 15th January 1999 and again immediately the form was sent to SACOS as requested. I was also asked by Mr Marie on 15/1/1999 to confirm in writing the interest that Development Bank had in the said property. This was done.
>
> Again on the 21/1/1999 Mr. Marie requested for payment re: the above and also confirmed that the insurance had been effected as from 15/1/1999 to 14/01/2000, A Debit Note confirms this.
>
> On behalf of the client on several occasions we requested for his insurance policy from SACOS but unfortunately each time there was an excuse given why the document was not ready. A copy of the policy document was finally issued on 31st March, 1999.
>
> (Sd) Jane Serving

However, in the meantime, on 18 January 1999 that was, three days after the vessel "Agape" was insured, something unfortunate happened. The vessel went missing from the yachting marina, where the plaintiff used to moor his vessel. The plaintiff testified that after the completion of repairs and securing the insurance on 15 January 1999, he had moored the vessel at the yachting marina in Victoria. The weekend ensued. The plaintiff had given permission to the previous

owner Mr Roger to use it for a trip to Praslin. On Monday 18 January 1999, when the plaintiff went back to the marina, to his shock the vessel was missing from the place where it used to be moored. He immediately checked if the vessel was in Praslin and La Digue but was not found anywhere. He reported the matter to the Port Authority in Victoria and personally started searching for the missing vessel in the ports around Mahe, Praslin and La Digue. The vessel "Agape" was nowhere to be seen. He continued the search for about two days but could not get any trace of its presence in Seychelles waters. On 19 January 1999 the plaintiff reported the matter to the police (vide exhibit P16) but to no avail. On 26 January 1999, the plaintiff went to Mauritius vide immigration entries made in his passport (exhibit P17) and searched for the vessel "Agape" in the ports around Mauritius as that is the nearest foreign shore. He could not see the vessel anywhere. One Ms Cecilia Rosemary Horti (PWI), the Financial Manager of SIDEC testified that she also accompanied the plaintiff to Mauritius as she was then going there on an official visit and was with him, while he was looking for the vessel in the ports of Mauritius. Despite all reasonable and sincere efforts, the plaintiff could not find the missing vessel "Agape" anywhere either in Seychelles or Mauritius since its disappearance on 18 January 1999. After attempting all possible means to locate his vessel, the plaintiff notified the first defendant of the disappearance of the vessel. The plaintiff became aware of the policy requirement to notify the first defendant only after he was provided with the policy document. The first defendant issued the policy document only on 31 March 1999. Following the above episode of total loss of his vessel "Agape", the plaintiff lodged his claim with the first defendant requesting payment of the sum insured. But the first defendant refused to pay the plaintiff's claim according to the plaintiff, in breach its obligation under the policy of insurance. Hence, the plaintiff sought judgment against the defendants accordingly.

The first defendant called two of its employees namely, (1) Ms Jacqueline Chetty, General Manager of SACOS (DWI) and (2) Mr Andy Marie, Operations Manager of SACOS (DW2), to testify in support of the defence. DWI testified that on or around 28 December 1998 SACOS provided a quotation upon request made by the second defendant for the premium in respect of the insurance in question. The Operations Manager, DW2 was the one dealing with the plaintiff's policy in this case. DWI further testified that according to the records maintained by SACOS, the proposal form dated 15 January 1999 (exhibit D2), the valuation report and the engineer's report were delivered to SACOS only on 21 January 1999 by the broker, the second defendant with a covering letter vide exhibit D1. Besides, Ms Chetty stated that on 6 January 1999, she did not make any confirmation over telephone with Ms Jane Serving that the insurance in question would take effect from 15 January 1999. According to Ms Chetty, she did not go to work on 6 January 1999 as she was sick that day and went to see Dr Jivan, a private medical practitioner. In the same breath, she stated that she went back to another doctor by name Dr Kirkpatrick, a medical officer in charge of Anse Aux Pins Clinic and got one day sick leave from that doctor.

Further, Ms Chetty testified that the commencement date of the insurance cover for the vessel "Agape", which appears in all related documents namely, the debit note (exhibit P29), the cover note (exhibit P11) and the Insurance Policy (exhibit PII-A) issued by SACOS, is backdated and such a backdate is put therein simply for statistics purposes. That is not the effective date for insurance purposes. As far as SACOS is concerned, such date is put therein so that SACOS can have control of how much it underwrites for each month. Having thus testified Ms Chetty also stated that SACOS sometimes underwrite backdating the insurance cover at the request of their clients provided there has been no loss of the subject matter of the insurance and the client acts in good faith. According to Ms Chetty had SACOS been made aware that

the "Agape" had been lost on 16 January 1999, it would not have backdated the cover to 15 January 1999. However, only in April 1999 was SACOS informed by the broker about the loss. Furthermore, she stated that if the plaintiff had informed SACOS that the vessel had been lent out to somebody prior to the cover being taken, SACOS would not have insured the vessel at all or would have issued a policy with different conditions. On the question of the interest of any bank in the subject-matter of insurance, Ms Chetty testified that normally it is the duty of the bank concerned to notify the insurer of any such interest. Further Ms Chetty stated in her evidence-in-chief that SACOS was never asked to grant cover starting from 15 January 1999. According to Ms Chetty, as per the statement of accounts maintained by SACOS, the premium was received on 2 March 1999 and the same was refunded to the broker on 29 February 2000. The plaintiff received the refund through the broker and impliedly accepted the cancellation of the insurance. It is also the contention of Ms Chetty that with regard to marine insurance policy there is a duty on the insured to disclose to the insurer all material facts, which may increase the risks. According to Ms Chetty firstly, the plaintiff did not disclose the fact to SACOS that the vessel had been lost prior to asking them to grant insurance cover; secondly, the plaintiff did not disclose the fact that the vessel had been lent to another person, a foreigner.

Mr Andy Marie (DW2) testified in substance that on 28 December 1998 Ms Jane Serving from the second defendant company requested him to give a quotation in respect of the insurance in dispute and he provided her one. Only on 21 January 1999, he received all the documents and the confirmation from the second defendant. He issued the policy to take effect only from that date. However, since the proposal form had indicated the request from the plaintiff as from 15 January 1999, SACOS issued the policy accordingly with the effective date in the policy from 15 January 1999. Further, he testified that he never confirmed over telephone to

Ms Serving that the insurance would be effected to cover the period as from 15 January 1999. According to Mr Marie, it is the practice of SACOS in some cases, to backdate the “insurance policy” at the request of their clients. Mr Marie also confirmed in his evidence-in-chief that SACOS at times issues "insurance cover" on verbal instructions. However, in the present case, SACOS did not issue any cover through the second defendant for the vessel "Agape" on verbal instruction nor did Ms Serving requested for any such cover prior to 21 January 1999. In any event, Mr Marie testified that the "insurance" in the instant case was cancelled and the premium was refunded.

Mr Phillip Revera (DW3), the Managing Director of the second defendant company testified that the second defendant as an insurance broker carried out everything in accordance with the request made and the instructions given by the plaintiff and accordingly obtained the insurance for the vessel "Agape" covering the period from 15 January 1999 to 14 January 2000. SACOS did issue a proper "policy of insurance" in accordance with the plaintiff's request. All the procedures and formalities were properly complied with by the client, the broker and the insurer all acting in good faith. According to Mr Revera, it is untrue and incorrect for SACOS to say that it did not receive any instruction prior to 21 January 1999. The second defendant did in fact, give them the necessary documents, information, instructions and confirmation prior to the said date. On 15 January 1999, SACOS confirmed through its Operations Manager Mr Andy Marie - DW3 - that the cover would take effect as from 15 January 1999. In the circumstances, the second defendant contends that it is not liable in damages to the plaintiff either in tort or contract.

Having sieved through the entire pleadings, evidence including all exhibits on record, and the submissions made by counsel on both sides, it seems to me, the following are the fundamental questions that arise for determination in this

matter:

1. What is the effective date of the insurance in dispute?

2. Was the plaintiff in breach of his duty of utmost good faith in obtaining the insurance cover for his vessel "Agape"?

3. Was the plaintiff in breach of any of the conditions of policy implied or otherwise so as to render it voidable by the insurer, SACOS?

4. Is the insurer entitled to avoid the policy for the alleged nondisclosure or false representation or misrepresentation of facts and deny the plaintiff's claim in this matter?

5. Is the plaintiff entitled to be indemnified for the total loss of his vessel "Agape"? If so, how much?

6. Is the second defendant, the broker, in any way jointly or solely liable to compensate the plaintiff for his loss and damage?

7. Is the insurer liable to compensate the plaintiff for the interest payable to the Development Bank of Seychelles on the loan the plaintiff obtained from the bank for the purchase of the said vessel?

I will now proceed to find answers to the above questions, in light of the evidence on record and the law applicable.

Question No 1

As regards the issue as to the effective date of the insurance in question, it is evident that all crucial documents namely, the debit note (exhibit P29), the cover note (exhibit P11), and the

policy (exhibit P11-A), which SACOS issued to the plaintiff stipulate in unequivocal terms, that the period of insurance cover begins on 15 January 1999 and ends on 14 January 2000. Hence, ex facie those documents, I find that the effective date of the insurance - in the eye of law - is 15 January 1999, not 21 January 1999, as claimed by SACOS in its defence. In fact, SACOS has issued the said debit note admittedly, on 14 January 1999, that is, a week before 21 January 1999 upon which date SACOS claims to have received the proposal and acceptance from the plaintiff and concluded the contract of insurance giving effect to it. If this version of SACOS is true and correct, then how it could issue a debit note to the plaintiff, on 14 January, even before receiving the proposal and acceptance from the plaintiff. As I see it, whatever the name one gives to the transaction that took place between SACOS and the broker on 14 January 1999, this transaction has obviously culminated in the issuance of a debit note by SACOS, which note has indeed, created contractual rights and obligations between the parties. SACOS has issued that debit note, which obviously, serves the same function as an invoice indicating the amount owed by the plaintiff for the product or services it provided, which is more fully described in the debit note itself thus: "Hull Insurance Policy No: MAHULL000421 for the Period of Cover from 15 January 1999 to 14 January 2000 and total sum insured R 880, 600." In passing I note, a debit note is nothing but a bill or invoice issued by one (the creditor) who has provided products and/or services to a customer (the debtor). It is not a quotation nor an offer nor an invitation to treat as the first defendant is attempting to portray. To my mind, therefore, the date and period of insurance stipulated in the debit note is the "effective date and period of insurance", which constitute the inception date of the coverage for all legal intents and purposes and as such binding the parties, as all agreements lawfully concluded shall have the force of law for those who have entered into them (vide article 1134 of the Civil Code). In the circumstances, I hold that the effective date

of insurance in this matter is 15 January 1999.

Question No 2

It is the contention of SACOS that the plaintiff was in breach of his duty of utmost good faith in that he obtained the insurance cover for his vessel "Agape" without disclosing the material facts (i) that the vessel had in fact, been lent to its previous owner Mr Roger, a foreigner at the time the insurance was effected: and (ii) that the vessel had already been missing even before the insurance was effected. Hence, according to SACOS the "contract of insurance" is void ab initio.

Duty to disclose

It is truism that insurance contracts or policies are based on trust, *uberrima fides.* The insurer trusts the insured, the policyholder, to give precise and true details of the subject-matter to be insured. This is called the principle of 'utmost good faith'. Indeed, care should always be taken to tell the whole truth so that insurance companies can make a fair assessment of the risk they are underwriting. Particularly, a contract of marine insurance (as is the case on hand) is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Undoubtedly, the plaintiff in this matter owed a duty to disclose in good faith all material facts and circumstances and the details pertaining to the vessel "Agape", to SACOS at the inception of the insurance, in other words at the formation of the contract. Incidentally, it is clear from a number of judicial decisions that in most jurisdictions the duty of such disclosure applies both pre-contractually and post-contractually. However, what is important here is the materiality of those facts and circumstances, which the

plaintiff allegedly failed to disclose at the formation of the contract in this matter. As regards the alleged non-disclosure as to the fact of lending the vessel to the previous owner for a trip to Praslin, the question now arises: Is it a material fact in the given circumstance which, any reasonable insurer in the place of the plaintiff is expected to or would disclose in the normal course of events, unless the insurer specifically required that piece of information from the insured? In my considered judgment it is not a material fact in the given circumstances, which any reasonable innocent insurer would disclose to the insurer in the normal course of events unless he or she is asked for such information. Indeed, the materiality of a given set of circumstances and facts has to be tested at the time of the placing of the risk and by reference to the impact it would have on the mind of a prudent insurer. Obviously, as far as the assessment of the risk by the insurer is concerned, there cannot be any difference, whether the vessel is lent or chartered as both ventures involve identical use and consequential risk factors. Even if the plaintiff had disclosed the fact of lending the vessel to Mr Roger for a trip to Praslin, it would not have made any impact on the mind of SACOS in its assessment of the risk, at the formation of the contract.

Having said that, I note, the House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (the 'Star Sea')* [2001] 1 Lloyd's Rep 389, considered the duty of utmost good faith. This duty enjoins not only the insured but equally the insurer to disclose all material information with the highest degree of openness to each other. In his speech Lord Clyde stated at 392 thus:

> In my view the idea of good faith in the context of insurance contracts reflects the degrees of openness required of the parties in the various stages of their relationship. It is not an absolute. The substance of the obligation which is entailed

> can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made.

Lord Hobhouse also commented at 401 thus:

> The Courts have consistently set their face against allowing the assured's duty of good faith to be used by the insurer as an instrument for enabling the insurer himself to act in bad faith. An inevitable consequence in the post-contract situation is that the remedy of avoidance of the contract is in practical terms wholly one-sided. It is a remedy of value to the insurer and ... of disproportionate benefit to him; it enables him to escape retrospectively the liability to indemnify which he has previously and ... validly undertaken.

In the light of the above views of their Lordships, I find that the alleged non-disclosure by the plaintiff, of the information about the "lending of the vessel to the previous owner", at the formation of the insurance contract, is not a material fact, which would entail a duty on the plaintiff to disclose it in good faith to SACOS. I do not find any culpable non-disclosure or sinister motive or lack of openness on the part of the plaintiff in this respect at the inception of the insurance.

The second limb of the allegation is that although the vessel went missing even before the insurance was effected on 21 January 1999, the plaintiff failed to disclose it to the insurer. On the face of this allegation, I find it untenable, since this Court has already found (supra) that the effective date of insurance was not 21 January 1999 as claimed by the insurer, but it was 15 January 1999, which was a Friday, whereas, the

plaintiff, whom I believe, testified that it was only after the weekend, that is Monday 18 January, that he came to know that the vessel was not found either in Praslin or La Digue. In the circumstances, obviously the plaintiff cannot be expected to disclose something, which was not within his knowledge or power on 15 January 1999. Certainly, the plaintiff is an ordinary reasonable man. He cannot have the foresight of a prophet and acquire fore-knowledge of the future events. That being so, the question of non-disclosure does not arise at all for consideration in this respect. In the circumstances, I find and conclude that the plaintiff was not in breach of his duty of utmost good faith in obtaining the insurance cover for his vessel "Agape".

Question No 3

The insurer has avoided the policy alleging that the plaintiff failed to give "prompt notice" to them regarding the loss of the vessel, in breach of the conditions of the policy (exhibit P11-A). In this respect, the insurer relies upon clause 12.1 of the policy, which reads thus:

> Prompt notice shall be given to the Underwriters in the event of any occurrence which may give rise to a claim I under this insurance, and any theft or malicious damage shall also be reported promptly to the Police.

At the same time, clause 14.1 therein under the head "Duty of Assured" reads thus:

> in case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimizing a loss which would be recoverable under this insurance.

Undisputedly, the policy document (exhibit P11-A), which contained those conditions, was issued by the insurer only on 31 March 1999 after an inordinate delay of about ten weeks from the formation of the contract and the disappearance of the vessel. Whatever had been the cause for such delay bureaucratic or otherwise, the fact remains that the insured (the plaintiff) was at first place, not given prompt notice of all the conditions contained in the policy including the one, which required the insured to give "prompt notice" to the underwriters, of the occurrence that gave rise to the claim. Hence, the plaintiff as a prudent man after exhausting all possible attempts to locate the vessel in the waters of Seychelles and elsewhere and obviously, as soon as he received the "policy document" (exhibit P 11-A), has notified the insurer of the loss of the vessel. Indeed, the plaintiff in due performance of his obligation under clause 14. 1 (supra) has taken all such measures as may be reasonable for the purpose of averting the loss which would be recoverable under this insurance, despite those measures being time consuming. Moreover, it is relevant to note here that the plaintiff promptly, on 19 January 1999 reported the occurrence of the misfortune (vide exhibit P16) to the police as well as to the port authority. Having said that, I note the insurer also equally owes a duty of good faith to the insured in that, it should not avoid the policy unilaterally, in circumstances where the information on which it based its decision is incorrect. See, *Drake Insurance Plc (in provisional liquidation) v Provident Insurance Plc* [2004] Lloyd's Rep IR 277. In view of all the above, I hold that the plaintiff was not in breach of any of the conditions of policy implied or otherwise so as to render it voidable by the insurer, SACOS.

Question No 4

Against the insured, the insurer makes allegations, not only in the nature of "non-disclosure" but also of "false representation" or "misrepresentation" of facts, which are

obviously, of criminal nature, and thus the insurer avoids liability under the policy.

The burden of proof

Examining together the entire lines and nature of the defence taken by the insurer in this matter, this Court cannot help feeling that the insurer is insinuating or to say the least, suspecting that the insured did not disclose certain material facts and also falsely misrepresented some other facts, presumably acting either as an accomplice to the disappearance of the vessel or with a sinister motive of making a false insurance claim after the loss occurred accidentally, due to a wrongful act committed either by the previous owner or by any other third party. As I see it, such insinuation or suspicion levelled against the plaintiff requires strong evidence and also a higher standard of proof than the normal civil standard of the balance of probabilities (vide *The Ikarian Reefer* [1995] 1 Lloyd's Rep 455). The Court must be satisfied on the whole of the evidence that it is highly improbable that the vessel was lost accidentally. That is, the evidence has to be sufficient and strong enough to conclude that the accidental disappearance of the vessel "Agape" as claimed by the plaintiff was not true. Indeed, the more serious the allegation, the higher the degree of probability required and the more cogent the evidence required to overcome the likelihood of what is alleged and such burden lies on the insurer to prove it. See, *GIC Seychelles Ltd v SayBake (Seychelles) Ltd* (1983-1987) SCAR 250. It is also relevant to note that the insured is presumed not to have been complicit unless and until the underwriter proves that he was (*Elfte A Issaias v Marine Insurance Co Ltd* [1923] 15 Lloyd's Rep 186). However, in the present case, there is no evidence on record to reach such conclusion and the insurer has in my judgment, failed to discharge its burden in this respect. For these reasons, I hold that the insurer SACOS is not entitled to avoid the policy for the alleged non-disclosure

or false representation or misrepresentation of facts and deny the plaintiff's claim in this matter.

Question No 5

In view of all the above, undoubtedly, the plaintiff (the insured) is be indemnified and compensated by the insurer, for the total loss of his vessel "Agape" in terms of the policy of insurance. However, the "document of endorsement" (in exhibit P11) which forms part of the insurance policy stipulates along with other terms and conditions that the said policy is subject to an excess of R 75, 000 in respect of total loss. Since the sum assured as per the terms of the policy is R 380,600 the insurer is liable to pay only R 305, 600 (ie sum assured R 380,600 less excess R 75,000) to the plaintiff under the Hull Insurance Policy Number MAHULL000421 and so I find.

Question No 6

As regards the second defendant's involvement in the entire transaction, I believe Mr Phillip Revera (DW3), the Managing Director of the second defendant company in his testimony that his company as an insurance broker carried out everything in accordance with the request made and the instructions given by the plaintiff and accordingly obtained the insurance for the vessel "Agape" covering the period from 15 January 1999 to 14 January 2000. I also believe the version given by Ms Jane Serving the Marketing Manager of the second defendant company in her letter dated 28 January 2000 in exhibit P22, marshalling the sequence of events that led to the issuance of the above "insurance policy" (Exhibit 11-A) by SACOS. In the circumstances, I find that the second defendant is not either jointly or solely liable to compensate the plaintiff for his loss and damage either in tort or contract as it has not committed any fault or breach of contract with the plaintiff or with the first defendant. Hence, I hold that the

plaintiff's claim against the second defendant is not maintainable in this action.

Question No 7

I will now move on to the plaintiff's claim against the insurer, in respect of the interest on the loan he obtained from the bank for the purchase of the vessel "Agape". It is axiomatic in insurance law that an insurance policy is one of indemnity and the liability of the insurer is to indemnify the insured to the limit of the sum assured under the policy. Needless to say, all rights and liabilities of the parties and the claims made under the policy are governed by the terms and conditions stipulated therein. In my view, the insurer's refusal to pay the claim of the insured will not *ipso facto,* give rise to any extra-contractual liability that is not covered by the policy. In particular, an insurer is contractually obligated to pay only those claims that arise from the policy. Obviously, the insurer in this matter did not indemnify the plaintiff under the policy for any contingency pertaining to his liability to pay interest to the bank either on the repayment of the loan he availed for the purchase of the vessel or otherwise. Since the source of the insurer's liability to indemnify, its right to avoid liability and its right to dispute the plaintiff's claim are entirely contractual, the insurer cannot be held liable in tort, even when it erroneously denies coverage and refuses to pay the claim. In any event, I find that SACOS is not a party to the said loan agreement between the plaintiff and the Development Bank of Seychelles nor is it liable to indemnify the plaintiff for the interest he owes to the bank on the loan he obtained for the purchase of the vessel "Agape". Hence, I hold that the plaintiff's claim in this respect is not tenable either in law or on facts.

Besides, I hold that the post-contractual transactions namely, (i) the unilateral cancellation of the policy by SACOS after the dispute arose between the parties under the policy (ii) the refund of the premium to the insurance broker without the

plaintiff's knowledge pending dispute and (iii) the receipt or acceptance of that sum by the plaintiff, cannot by themselves singly or in combination constitute a valid "accord and satisfaction" by the plaintiff to exonerate the insurer from its obligations under the insurance policy. According to the defence, the premium was received on 2 March 1999 and the same was refunded to the broker on 29 February 2000. The plaintiff received the refund through the broker. Hence, the insurer contends that the plaintiff impliedly accepted the cancellation of the insurance and the dispute was thus settled. Therefore, now there is no cause of action for the plaintiff to come before this Court by entering the present suit. To my mind, a defence of this nature raised by the insurer namely, "accord and satisfaction" is an affirmative defence. It cannot be implied on guesswork, conjecture or surmise. By adducing positive evidence, the insurer must prove four elements. They are:

1. A bona fide dispute had arisen between the parties as to the existence or extent of liability under the policy and both parties had the knowledge about the actual issues in dispute.

2. Subsequent to the arising of that dispute, the parties entered into an agreement under the terms of which the dispute was compromised or settled by the refund of the premium and acceptance of it by the insured, all for the purpose of settling a dispute.

3. The plaintiff accepted the refund in full and final settlement of his claim made under the policy or on a waiver of all claims under the policy.

4. A performance by the parties of that agreement.

Although there is evidence on record to prove element No 1 above, there is not even one iota of evidence to prove elements Nos 2, 3, and 4 above. In the circumstances, I find that the defence raised by the insurer as to "implied settlement" of the dispute based on the plaintiff's acceptance of the premium refund, is not maintainable either in law or on facts. Hence, I completely reject the defence in this respect.

In the final analysis, I conclude that the vessel "Agape" owned by the plaintiff went missing during the effective period of insurance cover provided by SACOS under Policy No MAHULL000421 and the plaintiff suffered a total loss of his vessel. Consequently, I hold SACOS liable to indemnify the plaintiff for the said loss in terms of the said insurance policy.

In view of all the above and for reasons stated, I enter judgment as follows:

1. I order the first defendant (SACOS) to pay the sum of R 305,600, to the plaintiff for the total loss of his vessel "Agape" insured under Hull Insurance Policy No MAHULL000421, together with interest on the said sum at 4% per annum (the legal rate) as from the date of the plaint;

2. I dismiss the plaintiff's claim for the interest amount, which the plaintiff is liable to pay to the Development Bank of Seychelles on the loan he had obtained from the bank for the purchase of the said vessel;

3. I dismiss the plaintiff's entire claim against the second defendant namely, "Philmarjan Brokerage Services Limited";

4. I order the first defendant (SACOS) to pay the costs of this action to the plaintiff; and

5. I order the plaintiff in turn to pay the costs of this action to the second defendant.

Record: Civil Side No 116 of 2001

Sadep Builders (Pty) Ltd v Stravens

Civil Code - contract – price – extra work – set-off

The defendant contracted the plaintiff to construct a house for a set price. The plaintiff alleged that the contract price was later revised as extra work was involved. The plaintiff sued for payment of the revised price including various payments made for building materials. The defendant denied there was any agreed revised price and averred that he had provided most of the building materials. It was further averred that part of the contract price was set off by the sale of the defendant's car to the plaintiff's director.

HELD

1. Where there is an agreement to work for a lump sum on a definite plan, any increase in the stipulated price for additional work performed can only be claimed if there is written proof authorising that additional work; and

2. There can be no set off against a contract claim by obligations under a separate contract.

Judgment for the plaintiff for outstanding balance of original contract price; for the defendant for claim for extra work.

Legislation cited
Civil Code, arts 1315, 1793

Cases referred to
Lesperance v Brown (No 2) (1971) SLR 288

France BONTE for the plaintiff
Frank ALLY for the defendant

Judgment delivered on 9 May 2008 by:

PERERA ACJ: The plaintiff, a building contractor, sues the defendant, a client on an alleged breach of contract and claims a sum of R 328,519.20 for extra work done.

Admittedly, by an agreement dated 14 June 2001, the plaintiff agreed to build a dwelling-house at Carana for the defendant for a sum of R 1,475,743. While the plaintiff avers that that sum included the cost of materials and labour, the defendant avers that it was agreed that the defendant would provide most of the materials, and that accordingly, he provided all materials except for bricks, cement and crusher dust. The plaintiff avers that the contract price was later revised by an invoice dated 31 May 2007 to R 1,584,743 as extra work was involved. This is denied by the defendant. The plaintiff further avers that the defendant paid R 800,000 towards the contract price. The defendant avers that R 800,000 was not the only amount he paid and sets out other payments in paragraph 5 of the statement of defence.

The claim of the plaintiff is based on the revised contract sum of R 1,584,743. In this regard they aver that, the following were taken into consideration in claiming the sum of R 328,519.20 -

1. A deduction of R 300,000 as payment for a JCB brought by the plaintiff from the defendant.

2. R 91,755 for materials supplied by the defendant.

3. R 61,468 being payment made by the defendant to one Ralph Lesperance, the

electrical contractor.

4. R 3,000 being payment made by the defendant to one Sibert Rose, the plumber.

The defendant disputes these averments and maintains that the contract price was R 1,475,743 and not R 1,584,743. As regards the other payments he avers that –

1. The price of the JCB was R 450,000 and not R 300,000, and that it was the contract price.

2. The defendant claims that he supplied the plaintiff building materials worth in excess of R 91,755.

3. The payments to the electrical contractor and the plumber are admitted.

4. The defendant avers that he sold his Mercedes Benz motor car to the plaintiff or its director for a sum of R 400,000, and that it was agreed that that sum be set off against the contract price.

Accordingly, the defendant avers that he has paid the whole contract price, and that the plaintiff has no further claim against him.

The case for the plaintiff is based on extra work done. As was held in the case of *Lesperance v Brown (No 2)* (1971) SLR 288, where there is an agreement to work for a lump sum on a definite plan, no increase in the stipulated price for additional work performed can be claimed except if there is written proof thereof authorizing such additional work. This pronouncement is based on article 1793 of the Civil Code which contains a proviso that a claim for additional work can be made if there is an escalation clause. There is no such clause in the present

contract, and in any event is not relevant to this case. Clause 2(b) of the contract provides that -

> The said project shall be erected at a cost of R1,475,743 *inclusive* of materials and labour *as per revised quotation with exception* all wall and floor tiles, windows and sliding doors, interior wooden balustrade and pillars, all bathroom fixtures, waste and taps, kitchen cabinet and sink, electrical fittings, glass blocks and all door locks *are excluded* in the quotation.

The main issue in this case is whether there was written agreement between the parties regarding the alleged extra work outside the work agreed upon in the agreement of 14 June 2001 (P1) with the contract price at R 1,475,743. In terms of that agreement, the defendant agreed to pay R 200,000 as an advance before the contractor commenced work, and the contractor also agreed to deduct R 300,000 from the contract price for purchase of JCB excavator. Although the defendant has pleaded that the price of the JCB was R 450,000, there is no written proof to rebut clause 5 of the agreement that the agreed price was R 300,000. However the defendant in his testimony admitted that the price was R 300,000. He also conceded the amounts the plaintiff set-off from the claim, namely R 91,755 for materials supplied, R 61,468 being the payment made to the electrical contractor, and R 3,000 paid to the plumber. The disputed item is the amount paid for the "sale" of a Mercedes Benz car by the defendant to the plaintiff. The defendant testified that the purchase price was R 400,000, and that it was agreed orally, that that sum was to be deducted from the contract price as a "set out". In proof of the sale, he produced the "vehicle transfer certificate" (D1) which shows that the transfer date was 15 September 2003. Sidna Bistoquet, representing the plaintiff company denied the alleged "set-off" and stated that the vehicle was purchased for 17,000 US dollars which was paid in cash but no receipt was obtained.

That money she claimed was from her sea cucumber business in Madagascar. She stated that the vehicle transfer document acted as proof of payment. The defendant denied any cash transaction and stated that as a pilot, he had a foreign exchange account and as the plaintiff also had a car hire business and consequently had a foreign exchange account, there could have been an account to account transfer. He stated that there was no necessity for him to receive cash at a black market rate.

Article 1315 of the Civil Code provides inter alia that - "a person who claims to have been released shall be bound to prove payment of the performance which has extinguished his obligation". This applies to both parties. In the contract signed by the parties (P1), the only set-off against the contract price was R 300,000, which was the agreed price for the JCB excavator. In the statement entitled "breakdown of payment by client", dated 31 May 2004 (P4), the plaintiff included only that item as a set-off. Since the Mercedes Benz car was transferred on 15 September 2003 the plaintiff would have included the agreed price for the vehicle, whatever amount it may have been, in the statement (P4). Hence on a balance of probabilities, despite lack of proof, the Court accepts that the sale of the vehicle was independent of the obligations under the contract, and that hence, whatever the sale price was, there was no set-off against the contract price. The alleged extra works as set out in detail in exhibit P5, amounting to R 109,000, in effect increases the original contract price from R 1,475.743 to R 1,584,743.

The plaintiff has acknowledged that the defendant had paid R 1,256,223.80, and hence claims R 328,519.20. That sum includes a sum of R 62,315.53 for extra electrical works. The electrician Ralph Lesperance's quotation for the entire work including extra work was R 77,850 (P6). The plaintiff has in statement P4 acknowledged that the defendant had paid R 61,468.80 to the electrician, although in the revised quotation

(P6), the electrician had deducted the sum of R 27,900 as being the contractor's contribution under the contract. On that basis, the defendant was required to pay R 49,950 for extra work. Therefore he has in fact overpaid R 11.518.80.

As regards plumbing and drainage the agreement was that the contractor would supply only labour costing R 24,000. However the plaintiff testified that subsequently there was external plumbing work, and an underground water tank had to be constructed. She stated that the materials were supplied by the contractor, and claims R 8758.70 for extra plumbing work and R 9,700 for raising a manhole to reach backfilling level, a total of R 18,458.70. There is no written agreement for such works. The plaintiff ought to have at least furnished a valuation report for extra work in respect of plumbing as well as all the other items claimed as extra work in the statement (P5). In these circumstances, the claim of R 109,000 for extra work cannot be maintained. Hence the contract price would remain at R 1,475,743. The defendant has not adduced evidence to substantiate paragraph 8 of the defence that he has paid the entire amount payable under the contract, and in fact overpaid the plaintiff. Further, the defendant produced a receipt dated 15 May 2007 from Laxambhi & Co Ltd - for R 85,000 in respect of finishing works carried out on the premises. No counterclaim has however been made, nor is there an averment in the defence. Hence that amount is disregarded for present purposes. Accepting the admission of the plaintiff that the defendant paid R 1,256,223.80, the balance due from the defendant will therefore be R 219,519.20. From this amount, the sum of R 11,118.80 overpaid by the defendant should be deducted.

Accordingly judgment is entered in favour of the plaintiff in a sum of R 208,400.40, together with interest and costs of action.

Record: Civil Side No 25 of 2005

Shami Properties (Pty) Ltd v
Oliaji Trading Company Ltd

Civil Code - delict – collapse of building – abuse of right – role of French law – contributory negligence

The defendants constructed a building adjacent to the plaintiff's building. The plaintiff claimed that excavation and other construction works by the defendants caused damage to its building.

HELD

1. Abuse of rights of ownership is a fault under article 1382. There are three elements required to establish liability. The Court must be satisfied that –

   (a) there was damage to the plaintiff or the plaintiff's property;

   (b) there is a causal link between the alleged acts of the defendants and the damage that occurred to the plaintiff's property;

   (c) the defendant failed to take all reasonable care to ensure that their actions would not cause any damage to the plaintiff.

2. The alleged acts of the defendants must be the sole and immediate cause for the plaintiff's damage. The alleged acts must be the 'primary cause' and not simply 'a cause' amongst other possibilities;

3. An owner of land who carries on an activity on their land which causes prejudice to a neighbour if such prejudice goes beyond the measure of the ordinary obligations of the neighbourhood, commits a fault under article 1382 of the Civil Code;

4. The owner of the land is also its custodian as the owner had and never loses the use, direction and control of the land or of the constructions and other operations on it;

5. Liability under article 1384(1) of the Civil Code is 'near absolute'. There is a presumption of liability against the person who has the custody of the thing which caused the damage. The presumption may be rebutted if the person against whom the presumption operates can prove that the damage was solely due to –

   (a) an act of the victim, or

   (b) an act of a third party, or

   (c) an act of God (force majeure external to the thing itself).

6. The phrase 'dominant purpose is to cause harm' used in article 1382(3) of the Civil Code is not an element which is necessary to constitute a 'fault' in all cases. That phrase also includes 'intended acts' that may fall within the concept of fault;

7. Contributory negligence may be pleaded in a claim founded on article 1384(1) of the

French Civil Code on which article 1383 of the Civil Code has been based. The defence to such a claim may also be pleaded in accordance with article 1384(1) of the French Code; and

8. When a complainant or any person who has responsibility is found to have contributed to the damage caused, the Courts are free to decide the extent to which each party is liable for the damage.

Judgment for the plaintiff, against both defendants jointly and severally with costs.

Legislation cited
Civil Code, arts 1382, 1384

Foreign legislation noted
Civil Code (French), art 1384(1)

Cases referred to
Attorney-General v Jumaye (1980) SCAR 348
Chariot v Gobine (unreported) SSC 5/1965
Coopoosamy v Delhomme (1964) SLR 82
De Commarmond (1983-1987) 3 SCAR (Vol 1) 155
Desaubin v UCPS (1977) SLR 164

Foreign cases noted
D 1972. Somm 49, 3 civ. 8 July 1971
D 1973 Somm 148, Colmar ler ch 12, decembre 1972
Lanworks Inc v Thiara (2007) Can LII 16449
Mandin v Foubert D 1982 25
SCI Lacouture v Enterprises Caceres Bull civ 1980 HI no 206
Ste Mobil Oil Francaise v Enterprise Garrkjue Trib Inst Bayonne 14 decembre 1970 JCP 1971 16665r
Trib Grande Instance de Toulouse, 17 mai 1971, D 1972 Somm 67

Serge ROUILLON for the plaintiff
Danny LUCAS for the defendants

Judgment delivered on 5 May 2008 by:

KARUNAKARAN J: The plaintiff in this action is a company and proprietor of a business premises known as "Sound & Vision Building" (SVB) situated at Francis Rachel Street, in the heart of town Victoria, Mahe. It is a three storey building consisting of several office and shopping units on all three floors. This building was constructed in 1994-1995 by the building contractors known as "Harry Builders (Pty) Ltd".

The first defendant is also a company and the proprietor of business premises - a shopping complex - known as “Oliaji Trade Centre" (OTC) situated adjacent to the said "Sound & Vision Building". This building OTC is also a multi-storey building consisting of several offices and shopping units on all floors. The second defendant Laxmanbhai Pty Ltd is the building contractor who constructed the "Oliaji Trade Centre" in 1996-1998.

The plaintiff completed the construction of the Sound & Vision Building in September 1995 and the defendants started the construction of the Oliaji Trade Centre in 1996 and completed it in or about June 1998. The SVB was constructed on Parcel V6545 owned by the plaintiff and the OTC was constructed on the adjoining parcel of land V3247 owned by the first defendant.

The plaintiff avers in his plaint that due to the construction of the Oliaji Trade Centre adjacent to the Sound & Vision Building, the Sound & Vision Building has been materially affected by the excavation and other construction works, which were carried out by the defendants for the erection of the Oliaji Trade Centre.
As a result of the said works by the defendants, the plaintiff

avers that cracks have appeared in structural and non-structural elements of the Sound & Vision Building due to the settlement of the existing foundation of the Sound & Vision Building by a combination of various elements caused by such excavation and other construction works carried out by the defendants in putting up the OTC building. According to the plaintiff the cracks started appearing upon the commencement of excavation works on the Oliaji Trade Centre approximately in April or May 1996. There were no cracks in the plaintiff's building prior to that date.

Besides, the plaintiff claims that its building was affected by the said excavation and construction works due to the total lack of shoring up or precaution taken to protect the soil below the plaintiff's building by the defendants before any excavation works were carried out, especially as the defendants were excavating well below the plaintiff's building foundation level. Moreover, it is the case of the plaintiff that the defendants' fault in failing to shore up the land prior to construction of the Oliaji Trade Centre was the cause of the damage caused to the plaintiff's property. The soil below the plaintiff's building was also affected during construction of the OTC building due to the complete lack of precaution abovementioned by the defendant which resulted in severe earth movements when heavy machinery used in construction works loosened the soil below the plaintiff's building causing cracks in the plaintiffs building and settlement of the land.

The plaintiff further avers that remedial work was necessary inter alia, to arrest the settlement process and repair the damage to the Sound & Vision Building. Such remedial work has caused and will cause the plaintiff to incur expenses. According to the plaintiff, the remedial work is still required to repair cracks in the walls and floors of that building. Besides, the plaintiff claims that it has suffered loss and damage due to depreciation at the value of the Sound & Vision Building, because of the damage caused to that building, in addition to

other consequential losses.

It is further averred in the plaint that the first defendant being the owner and custodian of the parcel of land V3247, is liable to the plaintiff for the loss and damage hereinbefore specified in terms of article 1384 of the Civil Code of Seychelles. Moreover, the first defendant being the owner and custodian of the parcel of land V3247, which adjoins parcel V6545 owned by the plaintiff, is liable in law (under article 1382) for such loss and damage caused to the plaintiff by the defendant by abuse of its right of ownership; in that, the erection of the OTC building on parcel V3247 caused loss and damage to the plaintiff in respect of the Sound & Vision Building to an extent that went beyond the measure of the ordinary obligations of neighbourhood.

Furthermore, the plaintiff claims that the second defendant, as the contractor who constructed the Oliaji Trade Centre, is liable jointly and severally with the first defendant for the loss and damage suffered by the plaintiff.

The plaintiff thus claims that it has suffered loss, damage and inconvenience as a result of the fault of the defendants. The particulars of such loss, damage and expenses allegedly incurred by the plaintiff are shown in the schedule to the plaint as follows:

SCHEDULE

1.	Underpinning works carried out by Laxmanbhai & Co	R120,000
2.	Consultancy/supervisory fees by Joe Pool Associates	R20,000

3.	S. Dhanjee's visit to Singapore/ Malaysia to search/identify Geotechnical company in April 1998	R20,000
4.	Mr. Koo of Geolab Investigation visit to Seychelles May 1998	R20,000
5.	Geolab's grout injection work in November 1998	R20,000
6	Cost of Mr. Koo's trip to Seychelles for carrying out the grout injection works	R190,000
7	Shipping/insurance costs of Geolab's special equipment	R10,000
8	Local contractor's cost including cement /labour / transport etc… for the grout-injection works	R35,000
9	Tax of the grout injection work	R30,000
10	Cost of wok for repair of ground floor and various Cracks (refer Barker & Barton repair valuation)	R210,000
11	Barker & Barton professional fees	R2,500
12	Legal fees	R50,000

13	Moral damages	R300,000
14	Future costs including loss of future rent	R200,000
15	Incidental expenses i.e. telephone/fax etc…	R20,000
16	Loss through depreciation	R200,000
17	Cost of structural engineer (as mentioned in Mr. Koo's letter)	R10,000
18	Interest on disbursements	R10,000
	Total	R1,632,500

According to the plaintiff, despite extensive and expensive remedial measures taken by the plaintiff, the damage in the plaintiff's building still exists and is continuing.

In the circumstances, the plaintiff claims that the defendants are liable to compensate it for the said loss and damage. Therefore, the plaintiff prays this Court for a judgment against the defendants jointly and severally in the sum of R 1, 632,500 with interest at the commercial rate and costs.

On the other side, both defendants refute all material facts averred in the plaint and dispute the entire claim of the plaintiff. In their written statement of defence, the defendants deny the plaintiff's allegation that excavation and other construction works carried out by them had materially affected the Sound and Vision Building. The defendants also aver that if the plaintiff's building were materially affected the same was due to the fault and negligence of the plaintiff and/or his servants, agents, employees, contractors, architects or

structural engineers, who constructed the building.

Moreover, the defendants state that if cracks had occurred in the plaintiff's building, they were not caused by the works carried out by the defendants. The defendants further aver that cracks if any, could have been caused only by the plaintiff's employees, agents, servants, contractors, architects and engineers through their negligence and fault, in the construction of the Sound and Vision Building.

Further the defendants aver that in the event, which same is denied, of such prejudice, damages and loss, the defendants are not liable in any manner and any sums whatsoever and that such loss, prejudice and damages, if any, are due solely to the actions, omissions, fault and negligence of the plaintiff, its servants, agents, employees, contractors, architects and structural engineers. The defendants further aver that at the start of work on the "Oliaji Trading Centre", the defective nature of the plaintiff's building was drawn to the plaintiff's attention.

The first defendant denies that he is liable to the plaintiff under article 1384(1) or under any other articles of the Civil Code of Seychelles. The first defendant has averred in its defence that the construction works were contracted to the second defendant, an independent contractor and principal, who performed the works in accordance with and instructions of the architect Mr Harry Tirant and structural engineer, Mr Joe Pool, both of whom were not the servants, employees, agents or preposés of the defendants but were licensed independent contractors, principals and professionals, contracted for their professional skills and that both defendants were not responsible for them or their acts or omissions, if any. Further and in the alternative, the first defendant avers that if it is found to be at fault, which same is denied, the plaintiff was contributory negligent and at fault.

The first defendant also denies that he was in any way or manner liable to the plaintiff. The first defendant further avers that there was no abuse of its rights of ownership and that the plaintiff does not have a cause of action against the first defendant. Moreover, the second defendant avers that it was and is not liable for any damages, prejudice or loss if any, sustained by the plaintiff. According to the second defendant, the plaintiff does not have a cause of action against the second defendant. Further, the second defendant avers that in the construction of the "Oliaji Trade Centre", it followed and adhered to the plans and instructions of the architect and the structural engineer, both of whom, the second defendant avers, were not its employees, servants, agents or preposés but were both independent contractors, principals and professionals. Hence, the second defendant was and is not responsible for them. Further and in the alternative, the second defendant avers that if it is found that it was at fault, which same is denied, the plaintiff was also contributory negligent and at fault. In the circumstances, both defendants deny liability and seek dismissal of this action.

From the evidence adduced by the parties the facts are in essence, these.

Mr Shirish Dhanjee - PW2 - a director of the plaintiff company Shami Property (Pty) Ltd testified that the plaintiff company is the owner of the Sound & Vision Building. Right next door to this building lies the building "Oliaji Trade Centre" (OTC) owned by "Oliaji Trading Company" the first defendant. This building OTC was constructed by the second defendant, the construction company namely, Laxmanbhai & Co (Sey) (Pty) Ltd. The construction of the "Sound and Vision Building" (SVB) was completed in September 1995, whereas the construction work for Oliaji Trade Centre began in or around April/May 1996 and the building was completed in 1998. According to Mr Dhanjee the construction works carried out on the "Oliaji Trade Centre" caused damage to his building.

He noticed certain cracks started appearing on SVB the moment the defendants started demolishing the old structures that existed then on the site. These cracks started appearing gradually, as the construction work progressed and heavy machines such as JCB, crane etc were used. As a result there were a lot of tremors, which affected the SVB and more cracks started appearing. All the cracks on the floor and on the walls are still visible - vide photographs in exhibit P3 - despite his expensive and extensive measures to remedy the damages and maintain the structure of the building. Mr Dhanjee also testified that there were no cracks in his building before, but all started appearing only during the construction period of OTC.

Mr Dhanjee further stated that the building had been affected in several ways. All these cracks appearing on the walls and the floor obviously going down in the middle, are still there today. Certain claims had been made before and that had been paid for. But what he is claiming now is compensation for the loss and damage he suffered as a result of the remedial work he carried out to rectify and mitigate the damage caused to the building due to soil movement and settlement and also to fix the floor along the boundary and the cracks on the entire structure of the building.

He further stated that all the tenants like Mr Ramani - PW5 - in the building SVB, the staff, people who had been around, all noticed the cracks. They also felt the tremors, which were going over quite a long period of time during construction. Quite early on during the construction, there appeared lots of cracks and settlement. Not knowing what really was going on, it took Mr Dhanjee a while to decide what to do. He was advised that he needed a geo-technical engineer to come and arrest the soil movement/settlement. He did not understand what really happened to the building and the technical reasons for the cracks, soil movement, settlement etc. He did not know what it actually was and who to contact, who to

approach, who was going to assist in whatever needed to be done. Later, after taking advice from local and overseas experts in the field, he understood what really caused the damage to his building. The cause for the damage was that the soil below his building was not protected well before the defendants started the work on their site; so the soil below SVB became very loose and was completely exposed by the excavation carried out on defendants' site. In order to prevent any further soil settlement, one had to fill in the void in the loosened soil. There is a special way of doing it, called grout injection. There is no expert in this field in Seychelles to do this special job. This had to be done only by a specialist construction company from overseas. Hence, Mr Dhanjee had to make some enquires overseas and look for such specialist companies to do that job. This move took him some time and was very expensive.

Further, Mr Dhanjee stated that by the time he discovered the cause for soil loosening under his building, the whole area of "Oliaii Trade Centre" had already been totally excavated and the soil under the plaintiff's building had already been exposed. Therefore, it was too late for him to make any efforts to arrest the settlement or the damages after the event.

The defendants could not go ahead with the construction work at that stage when they realised that there was some mistake on their part in carrying out the excavation work without shoring up the adjacent soil. At that stage, that was in June 1996, Mr Joe Pool - DW4 - a civil engineer, who was in charge of the defendants' construction, immediately approached Mr Dhanjee and told him apologetically that his building - SVB - could collapse if no remedial measures were taken. In fact, Mr Pool appeared terrified when he approached Mr Dhanjee and told him that he would put up extra support along the boundary between the two buildings and arrest the loosening of soil.

The plaintiff carried out the remedial work in two phases. The second defendant Laxmanbhai and Co did the first phase locally. The plaintiff engaged this company since they were the contractors for the OTC project nextdoor; and they were already on site. The first phase involved what is technically called "under-pinning" which means strengthening the foundation by constructing concrete columns below the "pad footing" foundation of the building. This can be explained in layman's language thus: Basically the building is built on pad footings; so there are about 8 to 9 pad footings along the boundary where the defendants had excavated. They were all exposed since the defendants had already removed the earth. So, they could not bear the load of the building since the soil had been removed. The best way to solve this problem and to get on with the defendants' work on the defendants' site was to put up concrete columns below each of the pad footings. There were 8 pad footings; below each of them they had to dig obviously supporting the place first, and then somehow make an extra concrete column so that the pad footings would sit on them. That would prevent the building from sinking/going down on the side of the defendants' site. Thus, the first phase of the remedial work namely, "under-pinning" was carried out by Laxmanbhai and Co and for that job the plaintiff had to pay them a total of R 120,000.

After this work was done, the defendants proceeded with construction of their building. However, the second phase of remedial work as to settlement was still there as the soil had already been loosened. Obviously one had to solidify the soil in some way. That could be done only by a method, what is known as "grout injection". This can be explained in layman's language thus: Basically, a number of deep holes are dug around the area of loosening soil and some fluid cement material or concrete is injected through those holes using high pressure pumps with some very special machines. The injected materials enter the low pressure areas, solidify the

soil and give better bearing capacity to prevent further settlements. Since this technology and facilities are not locally available, the plaintiff had to engage an overseas company "Geolab (M) SDN BHD" from Malaysia to do the job in Seychelles and prevent further settlement and damage to the building. This company provides consultancy and geo-technical engineering services.

In fact, the plaintiff first had to travel to Singapore and then to Malaysia and search for a company, which could do the "grout injection" in Seychelles. He identified two companies, one was a Singapore company and the other one was a Malaysian company. The Singapore company was more expensive and this job was too small for them. So, they recommended the Malaysian Company "Geolab (M) SDN BHD". The plaintiff approached them and they agreed to come and first visit the building, identify the problem, find out the requirements and then they might agree to do the job. Accordingly, they came to Seychelles, surveyed the building in May 1998 and the actual job was done in November 1998. It was a grout injection work. This work was completed by "Geolab" with the help of a local construction company "Unicorn Construction", which provided workforce, transport, cement and other miscellaneous requirements, for the completion of the "grout injection". The plaintiff had to do all the organizing and arrangements to carry out this work. He had to bring in special equipment from Malaysia; it took some time; special materials were also brought in. The work took two weeks. They worked day and night so as not to cause inconvenience to the traffic, pedestrians etc. It involved boring 40 holes all around the place and then injecting cement mixture under pressure, which hardens after hours or days. This was done with a special pump which had been brought in; it sends the mixture to all spots where there were holes. It was under pressure so it could reach all soft spots to strengthen the soil under the foundation. The plaintiff had to spend around US $ 40,000 to pay for that remedial work.

Mr Dhanjee further testified that he was compensated by the defendant's insurers SACOS for some of the minor claims the plaintiff made in respect of expenses it incurred for plastering the damaged roof, paintworks, fixing the pavement outside etc. All these claims, which are not claimed in the instant suit, were paid by SACOS, which even had employed its own assessors to assess whether the plaintiff's claims were true and correct. All those claims were paid presumably since the second defendant had been very negligent and careless in what they were doing and caused loss and damage to the plaintiff, a third party. That is why their insurer (SACOS) paid for everything.

Moreover, Mr Dhanjee testified that he received a number of complaints from the tenants, who were occupying the building at the material time as they could not stay in the building due to cracks, water leaks, noise, trembles and dust all around the building, which were all caused by the construction work carried out by the defendants. For instance, water went into one of the tenant's Mr Ramani's office - PW5 - on the first floor on several occasions due to cracks and a lot of trembles affected them. On the ground floor is the Habib Bank and they were also complaining about the cracks and the noise. The bank manager, who was staying on the top floor in the apartment also moved out because of the noise and dust-vide exhibit P5.

As regards existing damage to the building, Mr Dhanjee stated that the main damage is to the floor because on one side that is, towards the OTC side the floor is sloping but not on the other side. This shows obviously, the earth had moved more along the side of the OTC building. The plaintiff employed Barker and Barton Quantity Surveyor to inspect the SVB and give an estimate of the additional costs of works still required to be done and that included all the cracks and the damage to the floor. They submitted a report quoting cost

estimate for that repair alone at R 210,000. The plaintiff paid a fee of R 2,500 to "Barker and Barton" for the same. It is not possible to do the floor work unless the tenants move out as the contractor will have to do the whole area. The entire floor will have to be redone removing the tiles and retiling it again.

Mr Dhanjee further testified that the SVB was constructed by the building contractors "Harry Builders (Pty) Ltd" at the total cost of R 2.2 million. He chose "Harry Builders" because at that time it was one of the contractors that were popular and they had built various buildings of the same size in town. For instance, they built the "Kot Baba" building at the La Misere roundabout. They have done the "Chez Deenu Building" next to the Hindu Temple. They have done the Deevas Arcade at Market Street. They have also done a few three storey buildings in town including the "Chung Faye" building at Mont Fleuri.

The SVB building was built according to plans, drawings and consultancy advice given by the experts in the field. Moreover, Mr Dhanjee stated that the pavement outside Habib Bank, which had been done together with the building SVB, was good before the defendants started construction on their site. However, this pavement was completely damaged because of the use of heavy machinery such as cranes, huge 10 tonne trucks, JCB, which were passing on the pavement in and out, when the defendants were doing the construction. The pavement was not made to carry such heavy loads. The plaintiff carried out remedial works for the damaged pavement. However, SACOS paid for those expenses. The plaintiff is not claiming them in the instant suit. Besides, Mr Dhanjee testified that travel fares on his trips to Malaysia and Singapore to engage overseas companies cost him R 20,000. The "grout injection" charges were almost R 200,000, and there were additional costs of freight and insurance to bring the special equipment in and the cost of accommodation. For the insurance alone, he had to pay R 20,400. It all had to be

paid in foreign currency. The external cost was paid in US dollars, whereas the local cost was paid in Seychelles rupees. Further, the plaintiff claims a sum of R 175,000 from the defendants towards interest applied at the commercial rate on all the disbursements he made for the said remedial works. According to Mr Dhanjee, the market value of his building has been adversely affected and depreciated as the public have now come to know that the building had been damaged and repaired. Mr Dhanjee further testified that because of the entire episode caused by the fault of the defendants, he suffered mentally and physically. He had to go from one expert to another for advice and consultations and had to organise different things from different sources. In that process, he had to undergo a lot of stress, psychological pressure, inconvenience and many other difficulties.

Hence, the plaintiff claims moral damage in the sum of R 300,000 from the defendants.

Furthermore, Mr Dhanjee testified that the cracks and other damage which occurred to his building were caused not by any negligence or fault or any defective workmanship on the part of his own contractors, architects and structural engineers, who built his building, but only through the fault of the contractors who built the OTC building as they failed to take the necessary precautions before any work was carried out to protect the soil below his building. In the circumstances, the plaintiff claims that both defendants are jointly and severally liable to compensate the plaintiff for the said loss and damage. Hence, the plaintiff prays for the judgment in the total sum of R 1,632,500 with interest at the commercial rate and costs.

Mr Koo Kean Siang - PW2 - the General Manager of the Malaysian Company GeoLab (M) Sdn Bhd testified that he is basically a civil engineer with a master degree in geo-technical engineering from the Asian Institute of Technology.

He has been working in the field of soil and concrete technology since he graduated in 1986. He started his career as a site engineer in Singapore. He has vast knowledge and wide experience in soil investigation, ground improvement, technical grouting and pressure grouting. He has also been involved in structural repairs, demolition of building, and soil implementation for deep excavations. He can conduct technical investigations and find out the factors that cause severe damage and cracks and even collapse of big buildings. As an expert in the geo-technical field he has given expert opinion evidence in courts of law in different countries and his evidence has been accepted. According to him, about 20 years ago we did not have modern techniques like we have today to do good foundations for big buildings. Nowadays, when we want to dig or excavate soil to lay deep foundations or very big basements for, let us say two or three storey buildings, we use lots of precautionary techniques such as shoring, strip piling, timber legging in order to protect the soil in the surrounding areas from collapsing and to save damage to buildings if any are located on such areas. "GeoLab", the company he is now working for, is specialized in this particular field of geo-technology and has branches in Singapore and three states in Malaysia.

Coming back to the case on hand, Mr Koo - PW2 - testified that Mr Dhanjee - PW2 - in 1998 approached his company's branch in Singapore and sought their services stating that his building in Seychelles had cracks due to construction carried out in the adjacent land. Mr Koo readily accepted the work for the plaintiff's building, as it came out to be quite similar to the cases his company had been dealing with in the past. Hence, in May 1998, Mr Koo came down to Seychelles to have a preliminary inspection of the site. He stayed in Seychelles from 27 to 31 May 1998 and conducted site inspection and investigated the problem. He prepared a detailed preliminary report on the assessment of damage to SVB with a remedial proposal. Mr Koo produced a copy of this report in evidence

marked as exhibit Pl. The salient parts of the report inter alia, read thus:

> 1.0 INTRODUCTION
> Our Company, Geolab (M) Sdn. Bhd. is a foundation, soil and concrete specialist, which has vast experience in undertaking inspection and remedial works to foundations. In April/May 1998, we were approached by Mr. Shirish Dhanjee of M/s Shami Properties (Pty) Ltd of Victoria, Mahe, Seychelles to inspect and advise on the reported settlement problem of Sound and Vision House in Victoria. Inspection visits were carried out on the 27th to 31st May 1998.
>
> 2.0 DAMAGE ASSESSMENT
> A 3-storey Sound & Vision building was constructed on 1994/ 1995; the foundation of the building was reported to be isolated pad footings. The building was also reported to be sound and intact i.e. without any visible crack on structural and non-structural elements such as column, beam wall and slab ever since it was constructed until prior to the adjacent new building started its construction works in 1996.
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> It was further reported that cracks appeared on walls, beams, columns and floor slab immediately after the construction activities in the erection of New Temooljee Building next door, starting from earthworks till completion of the building in 1998.
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> Our recent site inspection on the building in May '98 revealed that cracks appeared on the structural and non-structural elements such as column, existing beam, slab and wall of the building, which is due to settlement of existing foundation, which is normally caused by any one or combination of the following

factors:

1. The lowering of ground water level.
2. Soil movement
3. Consolidation of compressible layer
4. Differential settlement
5. Heavy compaction activities close by the vicinity of the building.

3.0 REMEDY

3.1 REMEDIAL METHOD

When a foundation failure occurs, various types of underpinning works can be adopted for stopping the excessive settlement permanently such as:

1. Micro piling works
2. Jet grouting
3. Pressure grouting

3.2 REMEDIAL PROPOSAL

The choice of remedial methods will depend mainly on technical, site constraints and/ or financial considerations. In the absence of information on sub-surface soil data, structural condition of existing footings and in view at space constraints and occupants within the premises, we propose to carry out remedial method which is by using pressure grouting. In this method, non-shrinkage cementations grout will be pumped into the ground with certain pressure for stabilizing the soil underneath the footing (the compressible zone) in order to prevent further settlement as well as to improve the soil bearing capacity (refer page 4&5 for the pressure grouting works quotation and terms and conditions).

4.0 CONCLUSION
The abovementioned has happened due to earthwork activities such as excavation work, ground compaction and movement of heavy machinery in the vicinity of - the existing building without taking proper precaution, and has resulted in lowering of ground water table, soil movement and differential settlement of foundation of Sound and Vision House.

Thus, after conducting his investigations, the expert Mr Koo came out with a proposal and a quotation recommending that "grout injection" was the best method to repair and arrest further settlement from occurring. Actual work started in November 1998. He sent his project coordinator to Seychelles to supervise and carry out the work for the plaintiff's building. The work was carried out accordingly. The plaintiff paid the sum US$35,000 (then) equivalent to R 200,000 to GeoLab. Mr Koo after the completion of the remedial works prepared a report in exhibit P2, which inter alia, describes the works done as follows:

Introduction
1. Remedial method by using pressure grouting to foundation of Sound and Vision House, Victoria, Mahe, Seychelles was implemented and works were carried out between 14-27th November 1998. In this method, non-shrinkage cementations grout was pumped into the ground with certain pressure for stabilizing toe sod underneath the footing (the compressive zone) in order to prevent further settlement as well as to improve the soil bearing capacity.

2. Procedure of Works
Refer below - method statement.

3. Mackintosh Probe Test Results and Pressure

Grouting Works
10 nos of Mackintosh Probe Test [M1 to M10] as indicated in location plan (Appendix A) were carried out and the test result recorded that approximately 3.0m from ground level was compressive material below 3m range between 20-30. It was further confirmed that petty clay with traces of sand were encountered during hand augering from 0 – 3m. Therefore, soil improvement by using pressure grouting was carried out from 0 - 3.0 m below ground level at 32 locations as indicated in Appendix A.

A total of 361 bags of cement were pumped into 32 grouting point and as the cement grout percolate through the annulus and voids in between soil particles the bearing capacity of the soil will definitely be improved. Generally the unconfined compressive strength of soil-cement grout mixture can be expected in the range of 30 - 5OKN/m2. Since the bearing capacity of the soil has been improved, further settlement of the building will not be expected to occur. However, settlement monitoring such as installing tell-tale on crack line will be useful to monitor/ detect any occurrence of settlement after the soil improvement works.

1. Method Statement

    1. Bore a 4" diameter hole into concrete slab near the column area where ground improvement to be carried out.

    2. To carry out soil test by using Mackintosh Probe inside the cored hole in order to determine the soil bearing capacity.

3. Extract soft material from the cored holes using hand auger method which reveals from Mackintosh Probe Test result.

4. Repeat step I to 3 at locations where soil improvement works to be carried out.

5. Patch up all the cored holes with quick hardening cement and insert inlet and outlet grout tubes for pressure grouting purpose.

6. Pressure Grouting

   6.1 Material Ordinary Portland Cement
   Sika Interplast (additive)
   Water Cement Ration = 0.45

   6.2 Mixing of Grout

   Pour 22.5 liters of water into the grout mixer first, and then add 50kg of Ordinary Portland cement (OPC) and 0.25kg of Sika Interplant-Z. For thoroughly mixing, it should continue at least 2-3 minutes by using mechanical mixer until uniform consistency is obtained.

   6. 3 Grouting Equipment

   The grout injection equipment (using high pressure piston pump) should be capable of continuous operation with a little variation in pressure and should be able to circulate the grout to fill up the voids. The equipment should usually have a delivered pressure not

exceeding 1 ON/mm2.

6.4 Pumping of Grout

Flowable cementations grout should be continuous and it should be slow enough to avoid segregation of grout. The grout must be pumped until a pressure of 20 - 30 PSI is achieved in order to ensure complete filling of the void/gaps. The grouting operation shall commence from grout pipe at lowest grout point and proceed progressively until the proceeding grouting pipe is completely filled by observation from the overflow' of the successive grout pipe.

6.5 Removal of Grouting Pipe

All qrouting pipe will be cut and removed after they are hardened.

The expert Mr Koo was cross-examined by the defendants' counsel Mr D Lucas at length challenging the accuracy and validity of the opinion evidence given by him and in the process disputed the technical aspect of his propositions on which the expert based his opinion. Mr Koo under cross-examination admitted that although it was not good to build on highly compressible materials, in modern times the geo-technology had developed to such an extent that a building can now be erected on any type of soil provided necessary precautions are taken. Now, engineers can build anything, it depends on how much you have, you can always design the structure to suit the requirements of soil because there are many modern techniques like soil improvement, etc. Technically there are so many types of foundation, pile

foundation, raft foundation, isolated footing, continuous footing, combined footing. Only soil engineers can tell after gathering a lot of information on the soil, the soil strata, etc as to which tune of foundation is the best in a particular case.

Further Mr Koo maintained in cross-examination that the purpose of his visit to Seychelles was to first find out what had caused the problem to the plaintiff's building and what the remedies he as an expert, could propose and execute to solve the problem. He did not come here to construct any building, or to testify in Court for or against a party, but only to do his specialised job of grouting and to strengthen the foundation of the plaintiff's building. In his opinion "pile foundation" is the best, for any building erected on the terrain like that of the plaintiff. Actually there are many solutions to put up a good foundation. Because proposals for the foundation will be given to the client to choose. 1, 2, 3 and 4. It will depend on the budget and depend on your design. He further stated that "jet-grout pile" by pumping cement to improve the strength of the loose soil is a very modern technique because if one says that the budget is not a problem one can use "a jet-grout pile". That is the second best in his opinion. As mentioned in *Tomlinson* (an authoritative book on geo-technology) even raft foundation can incur differential settlement.

According to Mr Koo, if a building erected on soil consists of different strata, which is prone to differential settlement, as long as one does not disturb the terrain below the building by carrying out excavation work around or by creating some soil movement around, and as long as you do not impose different loading on the foundation, then the building will not collapse or be affected. He further stated that even though "differential settlement" might happen in cases where the soil consists of "different strata" containing highly compressible organic materials beneath, such settlement might take only months not years. In fact, highly compressible material undergoes immediate settlement within months.

Further, Mr Koo stated in cross-examination that although *Tomlinson* says that differential settlement can occur within a few months and can go up to three years it all depends upon the amount of the load applied, and also it depends on the soil. Hence, each case has to be determined based on those variables. According to Mr Koo, mere variation in strata on its own will not lead to differential settlement, unless an external factor or force such as a load on the building or soil movement such as nearby excavation applies on the system.

It is correct to say that there are different measures of precaution one may take to alleviate the effect of differential settlement. One way of alleviating an effect of differential settlement is the provision of a rigid raft foundation either with a fix slab or with deep beams in two or three directions. The second way of alleviating differential settlement would be the provision of deep basements to reduce the net bearing pressure. A third way of alleviating the effects of differential settlement is the transference of foundation loading to deeper and less compressible soil by means of basements, piers or pipes. A fourth way of alleviating the effects of differential settlement is the provision of jacking pockets or brackets in columns to re-level the soil strata. There is also a fifth or final way of alleviating differential settlement. This is the provision of additional loading on variable areas. These are the five precautions, which one may take when building a foundation on different in strata. Although all these precautions suggested by *Tomlinson* are relevant, the fact remains such precautions are not necessary provided the load is within the threshold limit and there is no external variation in the soil around. In this particular case, in the Sound & Vision foundation the footing level is only 650 mm below the ground level. That is about a few feet below it. They do not involve a very high loading and the old Temooljee building adjacent to SVB, which existed then, had been built on a very shallow foundation. The necessity to arrest the settlement did not arise as it all depends on the situation whether there is a

nearby building, whether there is any sensitive building in the vicinity. Hence, according to Mr Koo there was no necessity for the plaintiff to take any preventive measure to arrest differential settlement at the time when the plaintiff constructed his building. Further Mr Koo stated that he received a total sum of $40,000 from the plaintiff for all his charges and expenses including his professional fees, his labours to carry out the works, his travel expenses plus equipment. Mr Koo also testified that if mixing concrete is not done properly, it can create only void in the material of the structure that will have no bearing to differential settlement. Further he testified to the effect that whether the plaintiff's building is orthogonal, rectangle or rhombus such shapes have nothing to do with differential settlement. Further Mr Koo stated that from the cracks pattern and the cracks waves found on the building he concluded they were only caused by differential settlement and that the excavation, ground compression and movement of heavy machinery has resulted the lowering of ground water table. The foundation was only 650mm deep.

Mr Valji Patel - PW3 - the Managing Director of the construction company "Harry Builders", testified that his company had been involved in the construction industry for 10 years. Before he started his own construction company he used to work with Laxmanbhai as supervisor and he even supervised the big projects like Central Bank Building, Unity House and Independence House, when he was working with Laxmanbhai.

Although "Harry Builders" had class 2 licence before, only in 1994 it obtained class 1 licence, which could enable them to build three storey buildings. They had obtained this licence when they built SVB. His company was the one which constructed the Sound & Vision building. One Mr Korday was the architect and Mr Prea was the engineer, who was actually involved in the project. Mr Korday left the Republic halfway

through construction and Mr Prea took charge of supervision of the work. His company has constructed a number of buildings in and around town Victoria such as Chez Deenu Building, Market Street, Hassanali Building, Chung Faye Building, New Star Building, Chalam Shopping Centre at Cascade, Mr Ramu's Building, Market Street etc. When he compared the Sound & Vision Building with the other projects, he stated that he did not come across anything special or any problem with the project of SVB. There was nothing wrong with the building because no complaint was even made and the plaintiff fully paid him for the work. He did not see anything unusual about the soil or with the earth texture at the said site when constructing the building compared to the other buildings. As usual they did the foundation as per the approved plan, it was inspected and then they continued with the work. He never had any complaint about cracks in any of the buildings he built around town. He did not take any special precaution to protect the building next door as there was no need. They started the work as they did in other places. There was an old building at the site that had to be demolished and then build the SVB. Although there was an old building adjacent to the plaintiff's property they did not dig up to their foundation. Normally, if they had to dig right up to the foundation of the other building they protect the soil from crumbling from the other property, when they do excavation by putting plywood in between the boundary of the construction site and the other property. Further Mr Patel testified that there was no negligence or fault on the part of the building contractor or the architect or the engineer in the construction of the SVB. Each and every step of the construction work was supervised and checked and approved. So there was no problem.

In cross-examination, Mr Patel testified that although they do construction in accordance with the approved plan, at times, when necessary, they make adjustments for example, on dimensions etc if it is shown to them by the project officer that such minor adjustments are necessary. Sometimes, they as

builders question even the engineer's structural plan although they are not more qualified than the engineer regarding the structures. However, if they encounter any problem in the construction they used to write to the planning authority. After investigation, when the planning authority gives the go-ahead, then they proceed. It is always the case that they have to give notice to the planning authority when they lay the concrete for the foundation; they have to inspect the place before they start the building itself. This is planning regulations; this has nothing to do with the structural engineer. They as builders have no say in the structural details given by the engineers. When they undertook the construction of Sound & Vision they had sufficient experience as a building contractor. In the construction of SVB, they did everything in accordance with the approved plan.

They dug the foundation 500 or 700 cm below datum. Almost 75% of the earth was solid earth as they started excavation. There were some with soft soil on different isolated spots, that was removed and in its place coral was placed. It was not necessary for them to dig further down because they had reached solid earth to lay the foundation. Even, had there been any necessity to dig deeper, it would not have cost any extra money for them as the client would normally be charged for such extra works. Also it was not a question of time why it was not necessary for them to dig deeper on those spots. Thus, Mr Patel concluded that "Harry Builders" did not commit any fault of any nature whatsoever or the architects or engineers, who rendered professional services in the implementation of the project in respect of SVB.

Mr Daniel Blackburn - PW4 - a Chartered Quantity Surveyor testified in substance that in March 2002, at the request of the plaintiff, he inspected the SVB for the purpose of making a cost estimate for the repairs to be carried out for the building. Upon his inspection, he noticed several cracks in the walls of the OTC side of the building and on the floor. The ground

floor had sunk for 7 to 8 cm on the OTC side of the building at an angle, which had resulted in cracks all around the floor. He prepared a detailed report on the cost estimate for the repair work required to fix those damages. His report was produced in evidence and admitted as exhibit P26, which reads thus -

> 1. General
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> I, Daniel Blackburn - Chartered Surveyor/Corporate Building Engineer, the sole proprietor of D B R Blackburn Consulting has been appointed by Mr. Shirish Dhanjee the owner of the SVB property to estimate the cost of repair works.
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> Following his instruction, I have inspected the site on the 2nd March 2002 in order to ascertain the damages. This building is partly attached to newly built Temooljee & Co. Ltd Oliaji Trade Centre on the northern side. The main structure of this building is made, of reinforced concrete frame including upper floors and stain, and whereas the walls are in rendered block work and painted both sides with the exception of the internal walls in Toilets and Tearoom which are partly faced with ceramic tiles.
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> 2. Inspection of Building
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> a) Ground Floor
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> The ground floor is occupied by Habit Bank.
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> I found that about two-third (approximately 17 meters long starting from the front) of the external Longitudinal substructure alongside Temooljee & Co. Ltd. Oliaji Trade Centre has gone down or

settled lower down the ground. As a result of that the floor in Passage, Manager's Office, Secretary Section and Computer Room has gone down by about 80 mm and caused several crack to walls. I estimate that the cost of putting into a good state of repair is as follows:

1. Passage/Manager's Office/Secretary Section /Computer Room

– Removing the contents before starting the demolition	2,000.00
– Ditto doors before starting the demolition works and set aside for reuse	1, 000 00
– Demolishing the affected part of the floor and make good to receive new one	15,000.00
– Replacing the affected concrete floor (85 square meters)	25, 000. 00
– Ditto ceramic floor tiles.	35,000.00
– Replacing the damaged block work between Safe and Record room	5,000.00
– Making good of other minor cracks in Safe and Record Room	2,500.00
– Ditto in Manager' Office	2,500.00
– Ditto in Secretary Section	1,500.00
– Ditto in Computer Room	2,000.00

– Replacing the damaged ceramic wall tiles in Computer Room's Toilet	1.500. 00
– Making good to the lintel over the main entrance door	750.00
– Touching up and palming	7,500. 00
– Placing back the contents	2, 000.00
– Fixing back the doors	1,200. 00
– Removing debris on site	4, 000.00
Sub Total	R108,450.00

b) First Floor

Two-third of the First floor is occupied by Sound and Vision on the eastern side, and the western part is occupied by an accounting firm.

There are cracks in the external and internal block walls resulted from the subsidence of the building. I estimate that the cost of putting these areas into a good state of repairs is as follows -

1. Portion occupied by Sound & Vision

– Removing the contents before starting the demolition	2,000.00
– Ditto doors before starting the demolition works and set aside for reuse	500.00

– Ditto windows	2, 000.00
– Replacing the external damaged longitudinal bloc work on the southern side	23,000.00
– Making good to other minor cracks in Manager's Office and other areas	4,000.00
– Replacing the damaged ceramic wall tiles in Toilet	1,500. 00
– Touching up and painting	7,500. 00
– Placing, back the contents	2, 000.00
– Fixing back the doors	1,200. 00
– Fixing back the windows	3,000. 00
– Removing debris on site	2,000.00
Sub Total	R50,700.00

2. Portion occupied by an accounting firm

– Removing the consents before starting the demolition	2,000.00
– Ditto doors before starting the demolition works and set aside for reuse	500.00
– Ditto windows ditto	500.00

– Replacing the external damaged block work on the northern/ western sides	3,500. 00
– Making good to other minor cracks	2,000.00
– Touching up and painting	5, 000.00
– Placing back the consents	2, 000.00
– Fixing back the doors	700.00
– Fixing back the windows	70000
– Removing debris on site	1, 000. 00
Sub Total	R 17,900. 00

3. Stairs

– Repairing the cracks in stairway	2,000.00
– Touching up and painting	2, 000, 00
Sub Total	R 4,000.00
Sub Total	R177,050.00

4. Preliminaries 17,703. 00

Total R194,755.00

5. Summary

From my inspection I formed the opinion that

> the expenditure involved in the recommendations outlined above should be sufficient to make the building thoroughly sound and fit for its purpose.
>
> (SD) D. Blackburn QSC

Mr Blackburn testified to the facts stated in the report above. According to Mr Blackburn, in estimating the cost of repairs he used the methodology which is universally applicable and is based on mark-up prices of the materials and labour. Despite a lengthy cross-examination by the defence counsel, he maintained that all the prices of the materials and of labour he applied in the valuation were reasonable, not exaggerated in any manner. He also assisted the Court when it had locus in quo and inspected the building on 12 February 2003 - vide report on locus in quo.

Mr Ramani - PW5 - a Chartered Accountant is a tenant occupying an office premises (Suite 2) on the first floor of SVB. He moved into this office in July 1995. He testified that as a tenant he had a bad experience during the period the defendants were doing the construction next door. There was a lot of dust, sound and vibrations. The tables in his office were shaking, whatever was put on the table would just move here and there. It lasted for a few months. The tenants were complaining to the plaintiff as they could not work peacefully. When he moved in, the building was perfect. There were no cracks. All the cracks started to appear in SVB only during the construction of OTC building. They were concentrated on the OTC side of the SVB. One particular day, when the work on OTC was in progress there was sudden seeping of water into his office, which destroyed a lot of files and documents. As soon as Mr Ramani noticed the cracks, he immediately complained to his landlord, the plaintiff. He further stated that during the construction of the OTC building, the contractors came to his office and were trying to put some kind of iron

bars and a number of pipes in his office to give some sort of vertical support to the structure. The cracks started only after they put up that support. It was causing the tenant a lot of inconvenience.

Mr Ramani further testified that as an accountant, under the Business Tax Act the plaintiff being the owner of SVB can claim depreciation to its building at 50% the first year after construction, and the subsequent two years at 25%. Any expenditure incurred on repairing the building will be treated as expenditure for tax purposes. However, Mr Ramani stated that the plaintiff or any company for that matter has the right to claim damages from others for causing damage to its building. The applicability of tax laws or tax liabilities attached to the company has nothing to do with such claims.

Mr Steven Madeline - PW6 - an employee of the plaintiff company testified in substance that he has been working for the plaintiff for the past 12 years. He has been working in one of the office units of the SVB. When the defendants were constructing the OTC building using big machines, they caused lots of noise and vibrations. As they progressed with their construction work, he noticed cracks started appearing in the walls and later on the floors of the building. He further stated that there were no cracks before. Moreover, the tenants in the building suffered a lot of inconvenience due to noise and dust pollution caused by the defendants' construction activities next door. He also confirmed that a Malaysian company involved in the remedial work had repaired the building foundation. He at one stage even thought that the SVB might collapse and Mr Dhanjee was also seen to be afraid and worried that his building might collapse because of the damage caused by the excavation and construction activities taking place in the adjacent property. He further stated that the defendants were making excavations close to SVB as deep as about 6 feet.

In view of all the above, the plaintiff claims that both defendants are jointly and severally liable to compensate it for the said loss and damage in the sum of R 1,632,500. Hence the plaintiff seeks judgment accordingly with interest and costs.

Both defendants on the other side having denied liability in toto, adduced the following evidence in defence.

Mrs Sonia Jamshed Oliaji - DWI - a director of the Oliaji Trading Company, owners of OTC building, testified that in 1996 the first defendant carried out development on its parcel of land V3247 adjacent to SVB. The first defendant decided to construct a complex with office blocks and to extend their supermarket on the ground floor into that area. Physical study was done and then they appointed the necessary professionals to carry out the projects. They chose "Tirant and Associates" as the architect and "Joe Pool and Company" as the engineers for consultancy services. The building contract was given to the second defendant "Laxmanbhai Company". The architect asked them to get a "quantity surveyor" and the plaintiff chose one Mr Alton for that service. The architect designed the building, supervised the building and ensured that everything was done as per his design. There is a cut-off point, where the structural side was taken care of by the structural engineer. The QS gave the certificate that the work was done to that degree as per the QS. Then, the architect told the first defendant to pay the contractors. Thus, the project was executed. According to Mrs Oliaji, those who worked with the project were not her employees or agents. They were independent professionals. They were providing services for a fee. The architect, engineers, quantity surveyors and the contractor, whom the first defendant had employed or retained for services carried out their respective jobs or rendered services very well with due diligence and she was satisfied with the construction of the building OTC.

Mrs Oliaji stated that they started the construction of the OTC after obtaining the necessary permission from the planning department. In fact, the new building OTC is an extension of an older building built in 1951. This older building borders one side of the new building whereas the plaintiff's building SVB borders the other side of the OTC. All construction activities and excavation carried out for the OTC building did not affect the said old building or its foundation nor did those activities affect the users or occupants of the old building. Absolutely no damage was caused to the adjacent old building. These two buildings have been joined together and they are still perfect. Therefore, she stated that none of the defendants are responsible for the alleged damage to the SVB. In cross-examination, she admitted that although there are some cracks in the old building, they were not caused by the construction of the OTC but those cracks appeared because the building itself was old. She also stated that even in the new building there are cracks due to soil settlement. Moreover, she admitted that she did receive complaints and claims from the plaintiff in July 1999 after the construction of the OTC asking for damages but she did not reply to them but forwarded to the architect Mr Tirant (DW4).

Mr Ravji Premji - DW2 - a Director of the second defendant company Laxmanbhai Pty Ltd, a building contractor, testified that this company was first incorporated in Seychelles in 1972 as a construction company. Since then until to date this company has carried out a number of projects of construction works and has built many buildings all over Seychelles. It constructed Mahe Beach Hotel in 1972, Lemuria Hotel in Praslin, Ste Anne Resort on St Anne Island and Fisherman's Cove in Mahe, the Central Bank Building, Independence House, SMB headquarters office block in Victoria to name a few.

They have also constructed large buildings between two existing buildings like Sham-Peng-Tong buildings in town.

However, the OTC project is the first time they have encountered a problem with a building where there has been a claim arising out of their construction. The second defendant started the OTC project in July 1996. It took about one and a half years to complete the project. There was an existing old building on the site. To clear the site first, they had to demolish that building using small excavators and a crane for lifting the trusses. They did not use any other heavy machinery for demolition work, which took over a month. According to Mr Premji, the amount of vibration caused by the demolition work in the site would have been less than that of the vehicular traffic passing on the main road near the site. Mr Premji further stated that as an experienced contractor, the movement of machinery and vibrations caused from demolition work was not sufficient to damage the SVB, had it been properly built. They have been using those machinery elsewhere but never faced such problems.

When the foundation of the old building on the site of the OTC was being removed, they noticed the foundation of the SVB was exposed as it had been only 500 - 600 mm deep from ground level. As they were excavating the ground they also noticed some organic material at 1.5 - 1.8 metres deep from the ground level. They immediately reported the matter to the structural engineer Mr Joe Pool, as it was not advisable to put up a three storey building such as the OTC on the soft soil. It is the contractor's responsibility to make sure the ground is hard enough to take the footing and to bear the load of the structure. As per the advice given by the structural engineer, they removed the organic material and refilled with coral but did not do excavation near the SVB. After having spoken to the plaintiff about the problem, the engineer asked the contractors to do underpinning to support the structure of the plaintiff's building. This was carried out in stages - portion by portion - by putting mass concrete under the existing foundation of the SVB. It was done all along the foundation of the SVB along the boundary line. It was done to strengthen

the foundation of the SVB. It took about 3 - 4 weeks to complete the work of underpinning. After underpinning, they did the excavation along the boundary where the underpinning was done. This was also done in stages.

If "Harry Builders" had failed to take advice from structural engineers after they noticed soft material underneath it is imprudent on their part to proceed with construction without taking necessary precautions. During excavation Mr Premji noticed at different places there was organic material as deep as 2.5 metres from the ground level under the foundation of the SVB. Further he stated that if the plaintiff and their contractor "Harry Builders" had proceeded to construct the SVB ignoring the fact that there had been organic material below that area, they have done so at their own risk. According to Mr Premji, the cracks found in the walls of the SVB were not caused by any of the construction activity they carried out at the OTC site. Further, he testified that the said construction activities did not affect even the old building - Temooljee Supermarket - on the other side of the site.

Mr Premji stated in cross-examination that the Managing Director of Harry Builders, Mr Patel - PW3 - was working for the second defendant Laxmanbhai before he started his own construction company. Although he had been involved in many projects like the Central Bank Building etc whilst with Laxmanbhai, he was working only as General Supervisor. On the question of damage to the SVB, Mr Premji testified that during demolition work on the OTC site they used big machines like JCB, crane etc as shown in the five sheets of photographs in exhibit P25. They took all precautions necessary to protect the building SVB. The foundation of the SVB was not deep enough. It was exposed during excavation. They did underpinning to the foundation of the SVB in stages. However, he admitted that underpinning does not protect any building against damage caused by vibrations. He stated that he noticed that the pavement of the SVB was

going down (sinking) because of their heavy trucks movement. He further admitted that the insurer SACOS paid on behalf of the second defendant, some of the claims made by the plaintiff against it for leakage. The second defendant did not cause any damage to the plaintiff's building on purpose. According to Mr Premji, had the SVB been constructed in a good workmanship manner, no damage would have been done by the construction activities carried out on the OTC site. Moreover, the SVB got damage due to defects in its design. The structural engineer at one stage expressed fears to him about the fact that the edge of the foundation was exposed. This was immediately reported to the plaintiff. During excavation shoring-up was done by iron sheet pilling. It was also not mass excavation but was done in stages. Even the organic materials were removed in stages after refilling portion by portion with coral and compression. These works did not affect the SVB causing vibration or otherwise. As regards underpinning the foundation of the Sound & Vision building, Mr Premji stated that they did everything according to the instruction given by the structural engineer. In the circumstances, Mr Premji testified that the second defendant as a building contractor did not commit any fault nor did they act or do anything negligently in the course of their construction activities on the OTC site in such a manner to cause damage to the SVB. Hence, they are not liable to compensate the plaintiff for the alleged loss and damages.

Mr Harry Tirant - DW3 - who is practising as an architect under the business name of Tirant Associates testified that he was the architect and also the lead consultant responsible for the project management of the building contract in respect of the OTC. But in the traditional appointment of the architects as the lead consultant, it is his responsibility to administer the terms of the building contract on behalf of the clients and as lead consultant obviously guide the project through. But it is slightly different from what is now called "project

management". If an architect works as "project manager" he also gets involved with procurement of materials and so on. As regards the OTC project, his specific responsibility was, apart from designing the project, producing architectural drawing, obtaining planning permission with the quantity surveyor, and also obtaining tenders for the project. Once the contractor had been appointed his role was to visit the site on a regular basis to see that the architectural work was being carried out in a competent manner and in accordance with the architectural design and drawings. Also, the terms of his appointment were to conduct site visits and to give instructions to contractors, sign payment certificates, and at the end of the contract to carry out inspections to put right any obvious defects before handing over the building to the clients.

According to Mr Tirant, in the case of a building the architects are in a way the lead consultants. They listen to the client and then interpret that and make a drawing. That drawing initially very sketchy, at some stage that drawing is approved by the client and the engineer is then brought in because his responsibility is to design the walls, the beams, the columns and effectively design the building to make it stand up. An architect without an engineer with a multi-storey structure would actually not be able to make his sketch a reality because the engineer is the one that makes it stand up. The engineer is responsible for the safety of the building. He would have to submit the drawings to the planning authority and he would have to supervise to make sure the building would be constructed according to the structural drawing. As regards the OTC project, his architectural drawings and the structural design given by the engineers were all approved by the relevant authorities. The client or the architect would not have any say in the engineering or structural design given by the engineer to design the building. But at the end of the day the engineer was the one who came up with the final solution and the architect had to accept it. In accordance with the

contracts in place in Seychelles the contractors have to build according to the drawings of the architect and the engineer. If for any reasons they feel there is need for deviation, then they would consult with the engineer and the architect.

In respect of the Oliaji Trade Centre, in the project drawings as initially produced, there was a need to modify the entrance to the building and the position of the lifts because at some point the engineer decided that he would not be able to support the lift shaft and the staircase right against the boundary. A decision was made to amend the design leaving a gap of at least 2 or 2.5 metres between the buildings so that there would be no forces directly applied on the boundary. As a result of that Mr Tirant had to modify the position of the lift and the entrance and staircase as well, which is why today there are steps leading up to the office part of the building. Effectively they did not have to excavate to that depth right up against the next building. It was because the engineer felt that the foundation of the adjoining building was not adequate or was too close to the line of the boundary and it would be wiser to take any loads of the building away from that area so as not to have additional forces on that area. Mr Tirant made a proposal to the engineer and he implemented it. According to Mr Tirant, it was successful in the sense that what he came up with was achievable according to the engineer. On the issue as to the alleged negligence on the part of the defendants, it is relevant to quote the following questions and the answers given by the architect in this respect -

> Q It has been averred by the plaintiff that works on the construction of the Oliaji Trade Centre necessarily caused damage to the adjoining building. What, if anything, do you have to say about that?
>
> A It is very difficult for me to say anything. As an architect I cannot argue technically whether it

caused damage or not because this you can prove by the engineering calculations and formulas. What I know as the architect is that we did the best we could, not to endanger the building. In fact, this is a situation you have when you build buildings on adjacent sites. As architect you make decisions with regards to loads and heights, ventilation and so on and also the architectural aspect. But beyond that the engineer decides the best foundation and design. To the best of my knowledge we did the best we could, not to endanger the adjacent building.

Q You stated that you modified the architectural design. Did you do that, on your own or the engineer advised you to modify?

A I do not recall exactly the circumstances but certainly when I first was commissioned by the client I came up with the design which was approved. By the time we came to the detailed design it was then obvious that Sound & Vision were planning to erect a building right up against the ground with a solid wall. I then proceeded to modify my design to what the building is today. After the construction, at some point - I don't recall exactly - because I was out of the country in Nairobi, I received a call from the client saying there seemed to be a problem at the site and there was need to re-look at the building. In construction, every now and then there is a hitch and the client sometimes overreacts and expects decisions quickly. In this specific case, basically the design as it was, the position of the entrance, the staircase, and the lift, it was felt that if these structures would be best moved

away from each of the boundaries so that the engineer could then design the foundation in such a way that the weight of the building was not lying directly on the boundary. And because of the foundation design, I think it was 1 or 1.5 metres deep, if we had had a beam and the same design right up next to the building we would have been below the foundation of the Sound & Vision Building. The engineer made a decision to stop at a point about 2 or 2.5 metres away from this line so that this excavation would be done here and this part of the building would be just a slab coming up against the edge without having to go down. Hence, we have the steps going up that area. If I remember rightly the engineer even suggested that the part of the loading of the Sound & Vision Building was actually coming on to the site of the Oliaji Trade Centre and hence it was better that there was no structure, that this weight was being applied additionally. And it was successful in the sense that what I suggested the engineer made it work.

Q Were you satisfied that all measures were taken by you to ensure that no harm was caused to the other building?

A Yes because it is possible to build between two structures and there was no reason why my design should have been offset from the boundaries for whatever reason. But the actual management of the structure or the forces of this building was left to the hands of somebody that I considered to be a competent engineer, Joe Pool Associates.

Q In your years of experience have you drawn a

plan of similar size?

A Yes, we have done the Sham-peng-tong Plaza; we have also done plans for Capital City and also the Air Seychelles Building the Creole Spirit. I think the Sham-peng-tong Plaza is the most similar situation as Oliaji Trade Centre in the sense that we have other buildings on the sides that we had to take into account.

Q Did you on those other projects experience similar problems as Oliaji Trade Centre?

A In the case of Sham-peng-tong there were issues like rainwater pipes and foundation projecting on to the other side. But again the engineer took measures to counter for that. There was some piling done by driving pipes down to the depth of 10 to 12 metres. In this case there were some cracks which appeared in the Srinivasen building which is a very old building and those were patched up.

Q Were major repairs done on those cracks?

A No it was a very old building of stone and by the nature of the construction of the wall cracks appeared.

Q When you say that piling was done, what is entailed in piling?

A There are different kinds of piling. In this case there was a hollow tube that was driven into the ground and the material within was excavated and then concrete was poured into the hollow tube to create a pipe.

Q How many were pipes were put?

A I don't recall, maybe 96.

Q How were the tubes driven in?

A Basically you would have a crane and weight put to drive the pipe down.

Q In such a process would there be vibrations?

A Yes.

Q What sort of vibrations?

A I cannot put it in any terms or figure but generally the vibrations would be felt around the place. From what I understand because of the nature of the subsoil the possibility of vibration travelling is there.

Q For such projects, who would be responsible for ensuring that no damage is caused on the building?

A I would say that under the building contract the contractor would have to ensure that the execution is such that he does not cause damage to adjoining property. The execution is based on drawings and specifications and instructions given by the engineer. I would say that both the engineer and the contractor. But under the building contract the implementation lies with the contractor. In a situation where the contractor feels that there is a problem with the implementation of what has been proposed or

> designed by the engineer then he would have to refer back to the engineer and say he has a problem with this or that and ask if there is another way of doing it. But he cannot go and do it his own way. The engineer has to be satisfied that the alternative way is the good way. In terms of the design it is the engineer that has to ensure that and the contractor also in implementation because you may have the best design but the implementation may cause damage.

Mr Joe Pool - PW4 - the Engineer in charge of the OTC project testified that basically he is a licensed structural engineer operating the firm Joe Pool Associates, in Seychelles. They do various structural engineering works throughout the island. He has been practising as a Structural Engineer for about 35 years. He has been involved in a number of construction projects in Seychelles. In July 1996, they were appointed as the structural engineer for the OTC project. Their services as structural engineer was to ensure that all the loads that are part of the building are transmitted correctly and safely to the ground through the foundation by whatever means they are. They are also responsible for the drawing of the structural design for the building. They are also responsible for seeing that the foundation design is followed by the contractor Laxmanbhai. The architects were Tirant Associates. The engineers supervised every single step of the construction.

First, the contractors prepared the site. Before starting the excavation for the foundation, the structural engineers generally have to make certain assumptions about the ground conditions. They make an assumption that they are going to achieve a certain amount of pressure at a certain depth. In fact, when they design the structure and drawings they normally design it based on that assumption. However, when

they actually start the excavation on the site, if they find their assumptions were incorrect, then they will have to make some other alternative arrangement. In the case of the OTC, they had assumed that at a depth of 900mm from the existing ground level, they would get the strata of the soil capable of sustaining the load of the intended structure. However, when they actually excavated the area bordering the SVB, the ground realities were different. Contrary to their assumption, they found the layer of strata at that expected depth were incapable of sustaining the load and unsatisfactory. The strata were too soft, too compressive. So they asked the contractors to excavate further without disturbing the foundation of the SVB. As they dug further they found a very deep layer approximately 60 cm deep of dead vegetation or compressible layers. Upon a wider excavation, they found out that the said compressible layer had been spread across the whole site. This layer was also progressing underneath the foundation of the SVB. Having seen the progressive condition of the compressible layer underneath the SVB Mr Pool realised the danger involved and approached Mr Dhanjee - PW2 - and explained to him that in putting the foundation for the OTC, they needed to be a little cautious. Mr Pool also asked Mr Dhanjee to give him all the structural drawings pertaining to the foundation of the SVB so that he could verify the strength of the foundation. Mr Dhanjee was very accommodating and gave all the structural drawings. Mr Pool also conducted a physical inspection of the SVB. There were some cracks in the walls between Temooljee and Dhanjee. They appeared to be old and could have occurred before they started excavation on Temooljee's site. Having examined the structural drawings of the SVB and inspecting the building, Mr Pool found that the SVB had been structurally designed very badly. According to his opinion, the structural design of the SVB was defective and likely to have an impact on the OTC project. Hence, Mr Pool compiled a report in this regard in June 1996 and submitted to their client OTC. A copy of this report dated 5 June 1996 was produced in evidence and

marked as exhibit D2, which inter alia reads -

> As the above calculations show, the pressure on the ground at the boundary can be as great as 688KN/m^2. Traditionally foundations to buildings in Victoria area (not being directly on rock) have been designed using a safe bearing capacity of 50KN/m^2. At times 75KN/m^2 has been used when it has become unavoidable. In our experience we have not come across a situation where higher bearing pressures have been used in this area. It must be emphasised that the above calculations are rough for a guideline and thus no account has been taken for possible moment connection between the footings and their columns, which would make the situation worse.
>
> Conclusion
> It is obvious that this building was designed structurally without due care and consideration. From the design concept to the working drawings there are, in our opinion, a series of errors, which have gone unchecked through the whole design and planning process. It would appear that no proper site investigation was carried out as we feel sure that the compressible layer found on the Oliaji site must extend at least partly under this building also and to knowingly construct foundations on this material would be negligent. History tells us of a landslide which occurred in the late 19th century which covered Victoria in mud. The foundations to Victoria House showed evidence of this. The Oliaji site also bears testimony to this event with the organic layer discovered. In such a situation to choose an independent pad footing type is risky

> at best but when combined with such high differential bearing pressures it becomes irresponsible.
>
> To accept bearing pressures of this magnitude in this situation is totally negligent but to impose them on a neighbouring site is unprofessional. With all the above comments and findings, one begs the questions, was the Engineer a qualified, licensed Engineer? Did the Planning Authority check the Structural calculations and drawings prior to giving them their seal of approval?
>
> Finally, one very worrying aspect of all the above, is that with time there may well be quite large settlement along the boundary with the Oliaji Trade Centre. A small rotational settlement at the base will cause the vertical wall at the top to move significantly outwards, out of plumb, even as far as to lean onto the new adjacent structure and shed load onto it.
>
> We should therefore like to propose a gap of I 00mm be maintained between the two buildings and that, this be monitored during construction and ,periodically thereafter.

Mr Pool further testified that the pressure underneath the base of the SVB was not spread evenly. It was grossly different at different points. The one along the edge of Temooljee was very high to the maximum of 688 KN/m^2, and at the central columns were giving a bearing pressure of approximately 190 KN/m^2, whereas the acceptable maximum limit for such design could be only 75 KN/m^2. They had adopted individual/ single pad footing foundation throughout the SVB, which type is not good in cases of suspicious ground like this type and

will not spread the load to its maximum. In fact, for the OTC they used raft foundation with ground beam to spread the load to its maximum. Unless it is a very lightly loaded structure, it is not advisable to put up a heavily loaded structure such as the SVB on compressible layers. On the other hand, compressible layers could be removed and replaced by solid material fillings and then a heavily loaded structure could be built on such grounds. Most of the buildings Mr Pool had done in town were 75 KN/m^2 at the absolute maximum. If it is erected on the mountain one can go up as high as 250 KN/m^2 and if built on rock can go up even to 250 KN/m^2. This assessment on standardisation is purely based on experience. The Seychelles Bureau of Standards has not done any soil investigation in Seychelles to set any standardisation in this respect.

Mr Pool having given a copy of his report - exhibit D2 - to Mr Dhanjee advised him to do the under-pinning to the foundation of the SVB to avoid or minimise the risk of damage to the building. Mr Dhanjee acting upon his advice retained the second defendant Laxmanbhai to do that job. The under-pinning was accordingly carried out by "Laxmanbhai" and the plaintiff paid for it. Mr Pool further testified that even if there were no construction activities going on nextdoor at the OTC, still the plaintiff's building would have sustained those damages due to differential settlement as the SVB is built on highly compressible lavers. According to Mr Pool, the term differential settlement means it gets settlement which is different from the various points. In structural engineering, they do not mind settlement provided it is uniform settlement. It is differential settlement that causes the problem of cracking in buildings. The SVB building stands on very soft and compressible strata on the OTC side, whereas on the other side it stands on hard strata. It is a contributory factor to differential settlement. Further Mr Pool stated that while they were doing under-pinning to the SVB, they found a log possibly around 30 cm under the SVB and they had to cut it

off with a saw in order to do the under-pinning. They did not do any "shoring up" or "sheet piling" while excavating, as there was no need for them to take those measures. According to Mr Pool the compressible layers found beneath the SVB relates to a landslide that happened there 100 years ago. The evidence was seen when they built the Victoria House.

In cross-examination, Mr Pool admitted that the second defendant used compressors to break the concrete building that existed on the OTC site. These machines generally produce substantial noise, which is louder than that of passing traffic. The initial structural design for the OTC had provided for excavation to the level up to 60 to 70 mm deep. However, they had to continue digging further down because of the presence of compressible material and could not achieve the hard strata to the required standard. Mr Pool also stated that although the acceptable load limit for buildings in the area of town would be around 50-75 Kilo Newton per metre square, it varies from one place to another, as different areas of the island are capable of taking different levels of pressure. Only, when the load exceeds the critical limit, differential settlement would take place. As they started digging close to the SVB foundation, they did not take any precautionary measures to protect the building, as there was no need to do so, at that stage. As and when they discovered that the foundation of SVB was shallow and built on compressible layers, they realised the potential danger that was likely to affect the building. Hence, Mr Pool advised Mr Dhanjee to do the under pinning in order to strengthen the foundation of the SVB. According to Mr Pool, the major cause that contributed to the damage to the SVB was its "unprofessional structural design" built on ground with compressible layers that resulted in differential settlement. In his opinion, Mr Pool concluded that the "pad footing" foundation on which the SVB stands is not good for grounds comprising compressible layers. Given the nature of the strata beneath the ground, the builders or the

engineers should have used "raft foundation" for the SVB not "pad footing". Moreover, Mr Pool stated that the construction activities carried out by the defendants on Temooljee's site would have contributed to or caused only minimal effect on the SVB. Even the adverse effects caused by "differential settlement" could have been averted by making a proper "structural design" to distribute the load and counterbalance the adverse effects due to compressible layers. Hence, Mr Pool testified that the defective structural design, differential settlement, pad footing foundation and the compressible layers found beneath the foundation of the building were the causes for the damage to the building. The defendants' construction activities did not cause the damage.

In view of all the above, the defendants contend that they are not liable in law either jointly or severally to compensate the plaintiff for the alleged loss and damage. Therefore, the defendants seek dismissal of the suit with costs.

I meticulously perused the pleadings and the evidence adduced by the parties including a number of documents marked as exhibits in this matter. I gave careful thought to the submissions of both counsel touching on several questions of law and facts. The Court also had the opportunity to visit the locus in quo. The Court observed the location of the SVB in relation to the OTC. It noted the damage including the cracks in the ground floor and in the walls around as well as the general condition of the SVB. Having diligently examined the areas of contentious issues and the relevant provisions of law, to my mind, the following are the fundamental questions that arise for determination in this suit -

1. Did the first defendant as owner of Parcel V3247 commit any fault under article 1382 by abusing its right of ownership in causing damage beyond the measure of the ordinary obligations of the neighbourhood?

2. Did the second defendant 'Laxmanbhai' commit any 'fault' in terms of article 1382 of the Civil Code in the course of the construction of the building "Oliaji Trade Centre" and in that, did it cause damage to the plaintiff's building SVB? - If yes;

3. Is the first defendant vicariously liable for the damage caused to the plaintiff's building by the fault of the second defendant?

4. Incidentally, was the damage to the plaintiff's building caused by the use of the property - land V3247 - of which the first defendant had custody as its proprietor? - If so;

5. Is the first defendant liable for the damage caused to the plaintiff by that property held in his custody in terms of article 1384 (1) of the Civil Code?

6. Was that damage caused solely due to the fault of the defendants or was there any contributory negligence on the part of the plaintiff's builders, who constructed the SVB? - If so;

7. What is the extent or degree of contributory negligence, if any?

8. What is the legal impact of such contributory negligence on the quantum of damages awardable to the plaintiff; and

9. What is the quantum of damages the plaintiff is entitled to, if any?

Indisputedly the Sound & Vision Building was constructed in September 1995 on a parcel of land V6545 owned by the

plaintiff whereas the Oliaji Trade Centre was constructed in 1996 on an adjoining parcel of land V3247 owned by the first defendant. The second defendant was at all material times, the contractor employed by the first defendant to erect the Oliaji Trade Centre. The plaintiff basically alleges that the Sound & Vision Building was materially affected by the excavation works and the construction of the Oliaji Trade Centre on the adjoining land owned by the first defendant. Remedial works were necessary to arrest the settlement process of the soil and repair the Sound & Vision Building. There is still remedial work to be done. The damage still exists and is continuing. There is loss and inconvenience allegedly incurred by the plaintiff due to the damage. The plaintiff therefore, sues both defendants conjointly under different and alternative causes of action. There are two limbs to the said cause of action, namely:

(i) the first defendant as owner of Parcel V3247 for abuse of its right of ownership, which is a fault under article 1382 and whereby caused damage beyond the measure of the ordinary obligations of neighbourhood and the second defendant as co-author of such fault of the first defendant.

(ii) Alternatively, the first defendant as owner and custodian of Parcel V3247 liable for the damage it caused to the plaintiff under article 1384-1 of the Civil Code of Seychelles and the second defendant as co-author of such fault of the first defendant.

Before one proceeds to find answers to the questions hereinbefore formulated, it is important first to determine the ancillary "issues of facts" raised by the parties, since findings

on those issues form the factual basis for the answers to the questions.

In fact, the first limb of the cause of action is based on the principle of "fault" under article 1382, the most famous of all the articles of the Civil Code. As AG Chloros has rightly observed in his book *Codification in a Mixed Jurisdiction*, in the Civil Code of Seychelles this principle has been expanded substantially beyond the brief statement of the principle of liability for fault. The original article found in the French Code is preserved in paragraph one, but four other paragraphs have been added to it. The object was to incorporate in the Code principles which require definition. Thus, it is clearly stated that the three elements required in order to establish liability are (i) damage (ii) a causal link and (iii) fault. In French law these principles were worked out by the jurisprudence; but, if the law was to be simplified, it was essential to reduce to the minimum the need to go beyond the Code and resort to the French principles and jurisprudence. Nevertheless, the expansion of article 1382 did not occur arbitrarily but is based upon the jurisprudence which it has sought to replace as Chloros observed in his book. Hence, this Court inevitably resorts to a foreign law and jurisprudence.

Having said that, paragraph 2 of article 1382 defines fault on the basis of principles adopted by the French doctrine. This paragraph stresses that fault may be the result of a positive act or of an omission. Paragraph 3 incorporates a definition of abuse of rights. This is implied in the French law but in a long process of case law development supported by the doctrine, abuse of rights acquired the status of an independent tort. I will now proceed to examine the evidence on record to find out whether all the said three elements are present in the instant case in order to establish liability against the defendants either under article 1382 or under article 1384-1 or simultaneously under both articles of the Civil Code of Seychelles.

Element (i): Damage

Obviously, as regards the requirement of the element (i) in the instant case, it is not in dispute that the plaintiff's building (SVB) has sustained structural damage including cracks in the ground floor as well as in the superstructure. The damage started to manifest itself in mid-1996, during the period the defendants had started construction of the OTC building on the first defendant's land Parcel V3247. It is also not in dispute that following the said damage to his building, the plaintiff had to carry out two major expensive and extensive remedial works to repair the building namely, (i) under-pinning and (ii) grouting injection. The nature and the extent of both works and the circumstances, which necessitated the plaintiff to carry out those works to his building, are rehearsed in detail supra. Hence, I find on the facts that the plaintiff's building SVB did sustain structural damage during the period the defendants had started the excavation and construction work on Parcel V3247 lying adjacent to the SVB.

Element (ii): Causal link

Now, the most contested and the most important issue in this matter is to find out whether there has been any causal link between the alleged acts of the defendants and the damage to the plaintiff's building. In other words, whether the construction work carried out by the defendants to put up the building "OTC" on the adjoining land owned by the first defendant solely caused or contributory caused the damage to the plaintiff's building. This alleged "causal link" is the crucial area of issue, which involves a specialised - scientific and technical knowledge - where the expert opinion evidence is much required so as to assist the Court in resolving the issue. However, this is the area where the experts' opinion remains much divided. In fact, four expert witnesses namely, the Geological and Structural Engineer Mr Koo (PW1), the

Chartered Quantity Surveyor Mr Blackburn (PW2), the Structural Engineer Mr Joe Pool (DW4) and the Architect Mr Harry Tirant (DW3) all testified giving their expert opinion on the main issue as well as on matters incidental thereto. When I carefully examined the expert evidence in this respect, three questions necessarily arose: (1) Is the subject concerning which the expert witness testified, one upon which the opinion of an expert can be received? (2) What are the qualifications necessary to entitle a witness to testify as an expert? And (3) Does the witness have the necessary experience and technical qualifications? Upon evidence, I am satisfied that the subject involves a specialized field of science and engineering. Only experts in that field can have a knowledge and understanding of the specialized matter in question, which the Judge cannot possibly hope to have. Hence, expert evidence is required and so receivable by the Court in order to obtain from them an "informed opinion" on the fact in issue. Besides, I find all four witnesses are suitably qualified and competent to give opinion evidence directly on the "fact in issue" namely, the "causal link" or touching on matters incidental thereto as the subject in issue falls within their chosen field of specialization. However, whatever the expert opinion given on any issue based on experience, knowledge and skill, the Court is not bound to blindly accept that opinion to be correct and accurate unless that expert gives reason/s to the satisfaction of the Court arriving at such opinion. The Court has the power and the wisdom to gauge the degree of accuracy and correctness of the expert opinion on the touchstone of the reasons on which that opinion is based. Only upon such satisfaction, the Court can rely and act upon that opinion. Bearing those principles in mind, I diligently examined the opinion evidence given by the experts in this matter.

It is the opinion of the expert Mr Koo that the plaintiff's building sustained damage due to settlement of the existing foundation, which is normally caused, by any one or

combination of the following factors:

1. The lowering of ground water level
2. Soil movement
3. Consolidation of compressible layer
4. Differential settlement
5. Heavy compaction activities close by the vicinity of the building.

In conclusion, Mr Koo stated that the abovementioned have happened due to earthwork activities such as excavation work, ground compaction and movement of heavy machinery in the vicinity of the existing building without taking proper precaution, (hereinafter referred to as the alleged acts) and has resulted in lowering of ground water table, soil movement and differential settlement of the foundation of the Sound & Vision Building. Further, Mr Koo testified that in his opinion "pile foundation" is the best method, for any building erected on the terrain like that of the plaintiff. He further stated that "jet-grout pile" by pumping cement to improve the strength of the loose soil is a very modern technique because if one says that the budget is not a problem one can use "a jet-grout pile". That is the second best in his opinion. He noted that as mentioned in *Tomlinson* (an authoritative book on geo-technology) even raft foundation can incur differential settlement. However, the plaintiff's building has been erected admittedly on "pad footing" foundation, which is not considered to be the best by the experts given the nature and compressible material found in the layers beneath the foundation of the SVB.

Having thus analysed the opinion evidence given by Mr Koo and other experts in totality, I conclude that even though Mr Koo did not state that the commission of "the alleged acts" by the defendants on the adjoining land was the "sole and immediate" cause for the damage to the plaintiff's building, it is very evident from his opinion that those acts were "the

primary cause" and not simply "a cause" amongst others, for the damage to the SVB as stated in the opinion evidence given by the expert Mr Pool. Indeed, the reasons given by Mr Koo for his opinion are in my view, valid, more convincing, more probable, more credible and more accurate than that of the other experts on this issue of the "causal link". Undoubtedly, the damage to the plaintiff's building has happened due to earthwork activities such as excavation work, ground compaction and movement of heavy machinery in the vicinity of the existing building without taking proper precaution, and has resulted in lowering of ground water table, soil movement and differential settlement of the foundation of the Sound & Vision Building. Hence, based on the opinion evidence given by the expert witnesses in this matter, I find and conclude that there exists the necessary causal link between the acts of the defendants and the damage caused to the plaintiff's building.

Element (iii): Fault

When the defendants carried out "the alleged acts" including the deep excavation works for the foundation of the OTC building on their site, obviously the defendants did not take necessary or any precaution and reasonable care to arrest the soil movement from the adjoining land, where the plaintiff had already built a three storey building consisting of several offices, shops and residential units on three floors. In my judgment, "the alleged acts" of the defendants in this respect were "the primary cause" for the "damage" caused to the plaintiff's building, as found supra and the defendants in that process obviously, failed to take necessary precaution and reasonable care. In fact, the first defendant as the owner and custodian of the land Parcel V3247 abused its right of ownership resulting in such loss and damage to the plaintiff and so I hold.

Indeed, an owner of land commits a fault under article 1382,

known as an "abuse of his right of ownership", if he carries on an activity on his land which causes prejudice to a neighbour if such prejudice goes beyond the measure of the ordinary obligations of neighbourhood. In the case of *Desaubin v UCPS* (1977) SLR 164, the Court held, as summarised in the headnote:

> Under the Seychelles Civil Code, although an attempt had been made in art 1382 to define and restrict the notion of "fault", the equivalent of "faute" in the French Civil Code, and the definition of fault in the Seychelles Code seemed to require an element of imprudence or negligence or an intention to cause harm, it appeared from paragraph 3 of art 1382, as well as from sect. 5 (2) of the Seychelles Code, that there was nothing exclusive in such definition and that the concept of "fault" had not been curtailed within the narrow compass of the definition in the Seychelles Code. Hence the legal position had not been changed by the enactment of the new art 1382.
>
> Under the French Civil Code, the principle evolved ……that the defendant is liable in tort only if the damage exceeds the measure of the ordinary obligations of neighbourhood.
>
> Negligence or imprudence in not taking the necessary precautions to prevent a nuisance are not indispensable for liability which may exist even where the author of the nuisance has done all he could to prevent it, and the damage is the inevitable consequence of the exercise of the industry.

The first defendant in this matter has abused its right of use

and enjoyment of the property in its custody to the detriment of the owner of the adjoining property. By triggering soil movement the defendants have caused the damage exceeding the measure of 'the ordinary obligations of neighbourhood'. This is obviously a fault in terms of article 1382(3) as discussed supra. The second defendant is also the co-author of the fault of the first defendant. Hence, I find that both defendants are jointly and severally liable in terms of article 1382(1) of the Civil Code, which reads thus:

> Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

Besides, I note, although Mr Ravji Premji - DW2 - the building contractor of the OTC testified that they did "shoring up" or "sheet piling" during the excavation work, Mr Pool - DW4 - the structural engineer who was actually involved in the project, candidly admitted in his evidence that they did not do any "shoring up" or "sheet piling" during excavation, as there was no need for them to take those measures. At the same time, it should also be noted that generally in other projects when they (the second defendant) constructed large buildings between two existing buildings in town such as the Sham-Peng-Tong building and were faced with a similar situation, they did take necessary precautions as reasonable builders to protect the adjoining building namely, the Srinivasen Building. In this regard, the architect Mr Harry Tirant - DW3 - who was also involved in the Sham-Peng-tong project testified that the piling was done in that particular project by driving pipes down to the depth of 10 to 12 metres by the contractors. Despite, such measures, according to Mr Tirant there were some cracks which appeared in the Srinivasen building, which is a very old building and those were patched up. Therefore, it is evident that the second defendant did not take precautions to the degree required of them as reasonable building contractors. In that respect, the first defendant is liable not

only for the damage it caused by abuse of its right of ownership but also for the damage caused by the act/fault of its employee the second defendant for whom the first defendant is vicariously responsible in terms of article 1384(1) of the Civil Code and so I find. In fact, under-pinning was carried out by the plaintiff, admittedly upon the advice given by the defendants' structural engineer Mr Joe Pool - DW4 - who obviously, expressed his concern if not fear, in that he impliedly forewarned the plaintiff about the possible damage the SVB might sustain if "under-pinning" were not done, prior to the erection of the OTC building. Despite his geological knowledge on the history of the landslide and the nature of the soil and the terrain on which the SVB had been built, Mr Pool being the structural engineer of the OTC project, in my view, should have advised the defendants in good time before alerting the plaintiff, about the potential danger and the damage, which the excavation and construction on the OTC site might cause to the existing building on the adjoining property of the plaintiff. He should not have allowed the contractors to start excavation on the boundary along the foundation of the SVB, without taking necessary and effective precautionary measures to arrest the possible soil movement. Although he advised the plaintiff to do "under-pinning" such measure has not proved to be fully effective and successful. In the circumstances, I find the defendants are liable for the fault or negligence of any of its employees, workers, agents or servants, when that caused damage to the plaintiff's building.

As rightly submitted by Mr Rouillon, a person is liable not only for the damage that he has caused by his own act but also for the damage caused by things in his custody. The owner of land is also its custodian as the owner has and never loses the use, direction and control of the land or of the constructions and other operations thereon vide (i) *de Commarmond* (1983-1987) 3 SCAR (Vol 1) 155, (ii) *Coopoosamy v Delhomme* (1964) SLR 82 at 86 and (iii) Trib Grande Instance de Toulouse 17 Mai 1971 D 1972 Somm 67.

In fact, liability under article 1384-1 is 'near absolute'. There is a presumption of liability raised against the person who has the custody of the thing by which the damage is caused. Such presumption may be rebutted in three cases only, that is, if the person against whom the presumption operates can prove that the damage was solely due: (1) to the act of the victim; or (2) to the act of a third party; or (3) to an act of God (force majeure) external to the thing itself per Sauzier and Goburdhun JJ in *de Commarmond* (supra).

It is also pertinent to note herein that the application of article 1384-1 of the Civil Code to cases of damage arising from soil movement due to excavations of soil and other construction works on adjoining land is supported by the authorities cited by the plaintiff's counsel vide: (i) Lalou *Traite de la Responsabilitè Civile* Paragraphes 1205 and 1206 and (ii) *Ste Mobil Oil Française v Entreprise Garrkjue* Tri gr Inst Bayonne 14 decembre 1970 JCP 1971 16665.

In *Ste Mobil Oil Francais v Entreprise Garrigue* vide Trib gr Inst Bayonne 14 Decembre 1970 JCP 1971 16665, a construction company was held liable under article 1384-1 of the Civil Code - in a similar situation to that in the present case - for the damage caused to a service station adjacent to a residential building erected by the company, following the modification of the solid and liquid elements of the subsoil making up the thing which the company had in its custody, given that such modification directly caused the movement of the sub-soil belonging to the service station which in turn damaged the building of the service station.

Because of the marshy nature of the subsoil, the building work envisaged raised inevitable risks. However the architect in this case could not be held responsible towards the construction company which had accepted the risks involved in erecting the building after having been fully informed of the

risks by the architect.

The construction company therefore had to assume the consequences and undertake the necessary repairs to the service station in spite of the flimsy nature of its construction (absence of foundations).

I too agree with the submission of Mr Rouillon that although the second defendant was an independent contractor employed by the first defendant to erect the Oliaji Trade Centre according to plans and instructions by other independent contractors, ie the architect and structural engineer, still the second defendant was in law jointly and severally liable with the first defendant for the prejudice suffered by the plaintiff as co-author of the fault of the first defendant vide: D.1972. Somm 49, 3 civ. 8 July 1971.

It is the submission of Mr D Lucas, counsel for the defendants, that any loss or damage occasioned to the plaintiff's building arose through the plaintiff's own faute or those of his agents, preposés, architects, and the structural engineer in the construction of the Shami Properties building. Expert evidence showed that damage to the plaintiff's property had occurred due to on-going differential settlement and furthermore, prior to the defendants starting construction and the evidence proves conclusively that the damage was caused by the faute of the plaintiff's engineer and contractor.

With reference to the claim under article 1382, it is the defendants' submission that such claim is not sustainable. Article 1382(3) refers to the act of causing damage to neighbouring property in a manner which goes beyond the ordinary obligations of neighbourhood (see AG Chloros *Codification in a Mixed Jurisdiction* page 123). Article 1382(3) - (abuse of rights), states that fault may consist of an act or omission, the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise

of a legitimate interest. According to Mr D Lucas there is no evidence that the defendants' dominant purpose was to cause harm to the plaintiff. Indeed the evidence on record does not show that the construction works were carried out in any way other than professionally.

I gave careful thought to various lines of defence raised by the defendants in this matter. As I see it, the second defendant as well as the first defendant may have a remedy against the other independent contractors, but following and adhering to their plans and instructions cannot in law exonerate the defendants from liability towards the plaintiff as this is not a defence under article 1384-1. As rightly submitted by Mr Rouillon, although the defendants were at liberty to join the independent contractors in guarantee as co-defendants in this suit, they did not choose that course of action for reasons best known to them. See D 1973 Somm 148 Colmar, ler ch 12 Decembre 1972.

The plaintiff has invoked two different causes of action against both defendants under article 1382 of the Civil Code. The first cause of action is based on article 1382-3 and the second rests on the application of article 1384(1) of the Civil Code. The only defence open in this case for the defendants to dispute liability with regard to both causes of action is proof by the defendants that the damage was caused solely either -

(i) by the act of the plaintiff himself;

(ii) by the act of a third party for whom the defendants were in law not responsible; or

(iii) act of God (force majeure)

Upon the evidence, I find the defendants have not established any such defence. Having said that, it is necessary to analyse in some detail the various defences raised by the defendants

and their effect on the plaintiff's claim under article 1384-1.

In the defence the defendants aver that the prejudice (if any) suffered by the plaintiff was due solely to the actions, omissions, fault and negligence of the plaintiff, its servants, agents, employees, contractors, architects and structural engineer. The defendants also aver that at the start of work on the Oliaji Trading Centre, the defective nature of the plaintiff's building was drawn to the plaintiff's attention. As pointed out by the plaintiff's counsel, this averment by the befendants is an admission of the fact that when work started on the site of the Oliaji Trade Centre, the Sound & Vision building had already been erected and was standing on the adjacent site. Having thus known the danger and foreseen the damage which their acts were likely to cause to the plaintiff's building, the defendants have indeed brought their concern to the attention of the plaintiff. This, in my considered view cannot and is not sufficient to constitute a valid defence in law, to exonerate them from liability under either article 1382 or 1384(1) of the Civil Code. If fact, the careless attitude of the defendants in carrying out the construction by taking the risk at the plaintiff's cost clearly constitutes an error of conduct, which would not have been committed by a prudent man in the special circumstances in which the damage was caused. As Mazeaud defines in *Traité Théorique et Pratique de la Responsibilité Civil*, Tome I page 504, under a quasi-delictual "fault" the person who has committed it does not act with "intention de nuire" whereas in delictual fault that person acts with "intention de nuire". Therefore, the expression "dominant purpose is to cause harm" used in article 1382(3) of our Civil Code is not an element which is necessary to constitute a "fault" in all cases, but this expression includes even "intended acts" that may fall within the concept of fault. Hence, the issue of "intent to harm" raised by defence counsel is not relevant to the case on hand. Be that as it may.

The case of the plaintiff is that the cracks and other damage

to the Sound & Vision Building only appeared after work started on the Oliaji Trade Centre. It may be that the Sound & Vision building did not have deep foundations or even had inadequate foundations given the nature of the soil. However, since it has been found supra that the soil movement under the Sound & Vision building was caused by the excavation and other construction work on the adjacent land, the owner of that land and building, that is, the first defendant is liable under article 1384-1. The case of *Mobil Francais* (supra) reported in JCP 1971 16665 is directly in point in this regard.

Contributory Negligence

I accept the evidence of the expert Mr Koo in that, even if a building erected on soil consists of different strata, which is prone to differential settlement, as long as one does not disturb the terrain below the building by carrying out excavation work around or by creating some soil movement around, and as long as you do not impose different loading on the foundation, then the building will not collapse or be affected. That is why the Court has found supra that the alleged acts of the defendants constituted the "primary cause", not the "sole cause" or "a cause" for the damage to the plaintiff's building. At the same, no reasonable tribunal can turn a blind eye to the other side of the expert evidence, which reveals that there had been other factors such as "unsuitable foundation", "uneven load distribution", and "unprofessional structural design", which have all acted cumulatively as catalysts activating the process and contributing to the damage of the SVB. I would call those catalyst factors the "secondary causes" for the damage to the SVB.

Admittedly, Harry Builders Pty Ltd, which constructed the SVB, did not completely remove the compressible layers of the organic matter found underneath all along the area before they laid or reinforced the foundation for the building.

Moreover, they used only "pad footing foundation" for the SVB paying no attention to the nature of the subsoil, which required a stronger foundation because of its extensive compressible layers found underneath. In his opinion, the expert Mr Pool also stated that the "pad footing foundation" on which the SVB stands is not good for grounds comprising compressible layers. Given the nature of the strata beneath the ground, the builders or the engineers of the plaintiff should have used "raft foundation" for the SVB, not "pad footing". Even the expert Mr Koo stated in his opinion corroborating that of Mr J Pool that "pile foundation" is the best, for any building erected on terrain like that of the plaintiff. Actually there are many solutions to put up a good foundation. They will give the client proposals for different methods of foundations to choose from. It will depend on the budget and depend on the design. He further stated that “jet-grout pile" by pumping cement to improve the strength of the loose soil is a very modern technique. If the budget is not a problem one can use "a jet-grout pile" to have a very strong foundation. That is the second best in his opinion. However, the plaintiff’s contractors or engineers obviously did not use the best or the second best method for laying a foundation strong enough to withstand the load and differential settlement. The load distribution of the SVB and the structural design were also not done properly, professionally and to the required standard, though expert opinion differs on this issue. Having considered all the evidence, in my judgment I find that the contractors, the architects and the structural engineers who constructed the plaintiff’s building have also contributed their share of the "secondary causes" to the mishap, which the plaintiff is now facing. In the circumstances, I hold that the defendants are jointly and severally liable only to the extent of their share of responsibility to the damage caused by the "primary cause". Therefore, I find there is divided responsibility - *responsibilité partagée* - as propounded by Sir Campbell Wylie CJ (as he was then) in *Chariot v Gobine* (unreported) SSC 5/1965. Hence, the plaintiff would lose his right to damages to the

extent of his responsibility for the "secondary causes" that contributed to his own damage.

Although the English law of tort recognizes "contributory negligence" on the part of the plaintiff or any third party as a valid defence against tortious liability, our law of delict under article 1382 or 1384 of the Civil Code does not seem to have expressly recognized the concept of "contributory negligence" as a defence against liability. Is then, contributory negligence available under article 1384(1)? The French commentators and the jurisprudence have answered that question in a positive way. It does exist under article 1384(1) and likewise it should also exist under article 1382(1) to (4).

Support for this proposition is found in *Dalloz Encyclopedia de Droit Civil* 2nd ed. Tome VI, Verbo Responsabilit6 du Fait des chosen inanimees, note 573, which provides that -

> 573. Alors que le fait d'un tiers ne peut normalement entraîner qu'une exonération totale de la responsabilité du gardien, à l'exclusion d'une exonération partielle, le fait ou la faute de la victime pourra entraîner aussi bien une exonération partielle qu'une exonération totale de la responsabilité, le problème ne se présentant pas de la même façon que pour le fait d'un tiers.

This refers to article 1384(1). This is what the commentators have said and again in Mazeaud *Traite Théorique et Pratique de la Responsibilité Civile*, Tome II, note 1527 at page 637:

> Aujourd'hui les arrêts affirment que le gardien doit être exonéré partiellement, dans une mesure qu'il appartient aux juges du fond d'apprécier souverainement, si le fait relève à l'encontre de la victime, quoique non

> imprèvisible ni irrésistible, a cependant contribué à la production du dommage.

This being so, since contributory negligence may be pleaded in a claim founded on article 1384(1) from which our article 1383(2) has been inspired, then that defence may also be pleaded in a claim based on article 1383(2) because, as I have said supra, that article in our Civil Code has been borrowed from article 1384(1) of the French Civil Code.

At the same time, it is interesting to note as Laloutte JA observed in *Attorney-General v Jumaye* (1980) SCAR 12, that in article 1383(2) in relation to motor accident cases, an attempt has been made to solve by legislation one of the difficulties which had arisen in France in connection with collision with motor vehicles. According to his interpretation, that legislature has removed "contributory negligence" from being raised as a defence to liability under article 1383(2). Be that as it may, in the case of *Mandin v Foubert* - Cour de cassation D 1982, 25 the Court in view of article 1382 of the Civil Code held thus:

> Given that a person whose fault, even if criminal, has caused damage is partially relieved of liability, if he proves that fault on the part of the victim contributed to the harm.

Besides, it is a recognized principle in French jurisprudence that when a complainant or any person for whom is responsible, is found to have contributed to the damage caused, the courts are free to decide the extent to which each party is liable for the damage. Vide, *SCI Lacouture v Entreprises Caceres* Bull civ 1980 HI no 206. Indeed, in any action for damages that is founded upon the fault or negligence of the defendant, if such fault or negligence is found on the part of the plaintiff or third party that contributed to the damages, the Court shall apportion the damages in

proportion to the degree of fault or negligence found against the parties respectively. See *Lanworks Inc v Thiara* (2007) CanLII 16449 (Ontario SC).

Having regard to all the circumstances surrounding the "primary cause" and the degree of "contributory negligence" on the part of the plaintiff's contractors or architects or the structural engineers who constructed the plaintiff's building, in my considered view, they are jointly or severally 35% responsible for the mishap in respect of the "secondary causes" contributed by them. Hence, the consequential damages payable by the defendants should be reduced by 35% on the actual loss and damage sustained by the plaintiff in this matter. Obviously, for the said 35% of the contribution of the "secondary causes" the defendants are not responsible and hence I hold them liable only to the extent of 65% for the actual damage. Having scrutinised the entire claim made by the plaintiff under different heads for loss and damage, I find the plaintiff's claim of R 300,000 for moral damages is excessive, unreasonable and exaggerated. In my meticulous assessment, it should be reduced by R 200,000. Having said that, in the absence of any pleadings in the defence *a fortiori* in the absence of any evidence on record to the contrary, I hold that the plaintiff did suffer actual loss and damage only in the total sum of R 1,432,500. That is, R 1,632,500 less R 200,000. And, therefore 65% of the said actual damages payable by the defendants amounts to R 931,125.

On the strength of the reasons discussed hereinbefore, I will now proceed to answer the fundamental questions in the same numerical order in which they stand formulated supra -

1. Yes, the first defendant as owner of Parcel V3247 did commit a fault under article 1382 by abusing its right of ownership in causing damage beyond the measure of the ordinary obligations of neighbourhood.

2. Yes, the second defendant "Laxmanbhai" did commit a “fault" in terms of article 1382 of the Civil Code in the course of the construction of the building "Oliaji Trade Centre" and in that, it did cause damage to the plaintiff's building SVB.

3. Yes, the first defendant is vicariously liable for the damage caused to the plaintiff’s building by the fault of the second defendant.

4. Yes, the damage to the plaintiff's building was caused by the use of the property - land V3247 - of which the first defendant had custody as its proprietor.

5. Yes, the first defendant is liable for the damage caused to the plaintiff by that property held in his custody in terms of article 1384 (1) of the Civil Code.

6. That damage was caused not solely due to the fault of the defendants. There had been contributory negligence on the part of the plaintiff’s builders/engineers/architects too, who constructed the Sound & Vision Building.

7. The extent or degree of such contributory negligence in my assessment reduces the defendants' tortious liability by 35%.

8. The legal impact of such contributory negligence accordingly, would reduce the claim or quantum of damages awardable to the plaintiff by 35%.

9. The plaintiff is hence entitled to damages in the sum of R 931,125 - payable by both defendants jointly

> and severally. This sum obviously, constitutes 65% of the actual loss and damage the plaintiff suffered and the same is awarded against both defendants in this matter.

Before I conclude, I should state that the plaintiff in its plaint has claimed interest on the said sum at the commercial rate. In the absence of any agreement between the parties as to rate of interest, and having regard to all the circumstances of the case, I find that the plaintiff is entitled only to the legal rate of interest on the sum awarded hereinbefore.

In the final analysis, I therefore enter judgment for the plaintiff in the sum of R 931,125 and against both defendants jointly and severally, with interest on the said sum at 4% per annum - the legal rate - as from the date of the plaint and with costs of this action.

Record: Civil Side No 440 of 1999

Pierre (born Timonina) v Attorney-General

Civil procedure - immigration – revocation of permit – natural justice - injunction

The plaintiff was prevented from boarding a flight to Seychelles on the basis that she was a prohibited immigrant. The plaintiff applied for an interim mandatory injunction to enable her to return before an appeal on her immigration status was determined.

HELD

1. The remedy which the plaintiff seeks is simply monetary compensation for the 'faute' the defendants allegedly committed under article 1382 of the Civil Code, whereas the remedy sought in the interlocutory application is an interim injunction to annul an administrative decision permanently. Therefore the relief sought is perpetual in nature and not interim;

2. A 'faute' is an 'error of conduct' which emanates from a breach of a duty of care. 'Illegailty' is an 'error of law' which emanates from a breach of a statutory duty;

3. A foreign national has no right to enter the country except by leave. If leave is granted for a limited time, a foreigner has no right to stay beyond that permitted time. If a permit is revoked before the time expires, a foreigner should be given an opportunity to make representations to the appropriate authorities as he or she had a legitimate

expectation of being allowed to stay for the permitted time. A foreigner has no legitimate expectation of being allowed to stay beyond the permitted time and may be refused further leave without reasons and without a hearing; and

4. Immigration has a discretion to grant or refuse permits. However that discretion must not be exercised arbitrarily. The rules of natural justice should always be observed by public authorities when making administrative decisions using discretion conferred by statute.

Judgment: Application dismissed.

Legislation cited
Constitution, art 25
Code of Civil Procedure, s 304
Immigration Decree, ss 16(1), 19

Foreign cases noted
American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504
Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149

Frank ELIZABETH for the applicant/plaintiff
Ronny GOVINDEN for the first and second respondents/defendants
Kieran SHAH for the third respondent/defendant

Ruling delivered on 12 September 2008 by:

KARUNAKARAN J: This is an interlocutory application by the plaintiffs filed under section 304 of the Seychelles Code of Civil Procedure, after the commencement of the original action - pendente lite - for an interim mandatory injunction -

(1) ordering the second defendant - hereinafter called the "Immigration" - to revoke and cancel its letter dated 19 August 2008 - hereinafter called the "impugned letter" - addressed to the third defendant - hereinafter called "Air Seychelles" - which letter notified that since the first plaintiff - hereinafter called "Ms Timonina" - being a prohibited immigrant, will not be granted entry into Seychelles and thereby causing "Air Seychelles" not to board "Ms Timonina" on its flight from Mauritius to Seychelles; and

(2) Furthermore, ordering "Air Seychelles" to allow "Ms. Timonina" to board on its flight from Mauritius to Seychelles to join her husband in Seychelles namely, the second plaintiff, a Seychellois national, domiciled and resident in Seychelles.

In support of their application, the plaintiffs have relied on the grounds set out in the plaint and the affidavit deponed by the second plaintiff and have relied on other documents produced during the hearing of the application. All those documents appear on record having been numbered and marked as exhibits as follows:

Exhibit 1 - the impugned letter - dated 19 August 2008 from the "Immigration" to "Air Seychelles".

Exhibit 2 - Certificate of Marriage - dated 28 August 2008 issued by the Central Civil Status Office,

Mauritius.

Exhibit 3 - letter dated 14 August 2008 from the "Immigration" to "Ms Timonina".

Exhibit 4 - letter dated 2 September 2008 from the "Immigration" to Mr Frank Elizabeth, Attorney for "Ms Timonina".

Exhibit 5 - a copy of the Seychelles Court of Appeal judgment in SCA No 38 of 2007.

The plaintiffs aver in the plaint that on 30 August 2008 when they were about to board an Air Seychelles flight from Mauritius to Seychelles with their three-month old baby, the representative of Air Seychelles in Mauritius refused to board "Ms Timonina" on their flight. For, the "Immigration" had, by the said "impugned letter", informed "Air Seychelles" that "Ms Timonina" was a "prohibited immigrant" (PI) and that she would be refused entry into Seychelles. According to the plaintiffs, the said letter issued by the "Immigration" in Seychelles, was false, vindictive, malicious and its contents were erroneous since "Ms Timonina" is not a PI. It is the case of the plaintiffs that although the "Immigration" in its previous decision dated 8 June 2007, had declared that "Ms Timonina" was a PI, the Seychelles Court of Appeal subsequently, by its judgment dated 14 August 2008 in SCA 38 of 2007, quashed the said decision of the Immigration and annulled her PI status. Since then, she has no longer been a PI in Seychelles. According to the plaintiffs, consequent upon the said judgment of the Court of Appeal, they were invited to a meeting with the Immigration, which advised "Ms Timonina" that as a result of the Court of Appeal judgment she should leave Seychelles and could come back to Seychelles any time as she was no longer a PI. Hence, she went to Mauritius, wherein on 28 August 2008, she got married to the second plaintiff. In the circumstances, the plaintiffs aver that the acts

of the defendants amount to a "faute" in law. As a result, both plaintiffs suffered loss and damage each in the sum of R 200,000. Hence, the plaintiffs claim that the defendants are jointly and severally liable to compensate them for the said loss and damage. The plaintiffs having thus commenced the original action only for monetary compensation, have now applied to this Court for an interim injunction pending the hearing of the claim in the main case.

In essence, it is the submission of Mr Elizabeth, counsel for the plaintiffs that the issuance of the impugned letter - Exhibit 1 - by the Immigration to "Air Seychelles" stating that "Ms Timonina" was a PI, first, illegal since no notice of PI was ever served on her by the "Immigration" after the Seychelles Court of Appeal had quashed the one which had previously been served on her without giving a valid reason. According to Mr Elizabeth, a person who is not present in the Republic cannot in law, be declared as a PI. However, in the present case, when "Ms Timonina" was out of the Republic, the Immigration has illegally and/or erroneously and/or maliciously and vindictively issued the impugned letter falsely stating therein that she was a PI. According to Mr Elizabeth, "Ms Timonina" is not a PI and she cannot be treated as such by the "Immigration" unless and until, she is served with a notice to the effect in accordance with law and more so, by giving valid reasons in accordance with the said judgment of the Court of Appeal. Moreover, the decision of the Immigration in this respect has been made arbitrarily without an opportunity being given to Ms Timonina of making representation, whilst she was out of the country.

Besides, Mr Elizabeth argued that although his client has a right to seek another remedy by way of a judicial review in this matter, that right cannot stop her from pursuing the other cause of action based on "fault" under article 1382 of our Civil Code, since the erroneous or unlawful act of the Immigration in the present action amounts to a "faute" in law, which has

caused damage to the plaintiffs. According to Mr Elizabeth, it is a continuous fault and will continue to cause damage until the impugned letter is revoked or cancelled by an order of the Court. That is why he is seeking an interim injunction to halt that fault pending the final determination of the main suit. Mr Elizabeth further contended that it is a universal human right of any person to enter into Seychelles unless he or she is declared a prohibited immigrant. In the present case, Ms Timonina is no longer a PI in view of the said judgment of the Court of Appeal. According to Mr Elizabeth, she has every right to obtain a visitor's permit and enter the country. The impugned letter has been issued in violation of her universal human right to freedom of movement. In view of all the above, Mr Elizabeth urged the Court to grant the interim injunction in favour of the plaintiffs and render justice in this matter.

On the other side, the defendants however, deny the entire claim of the plaintiffs and seek a dismissal of this application raising objections grounded on several points of law as well as on facts. According to the affidavit filed by the Immigration Officer, Mr Bacco, on 14 August 2008, Ms Timonina, after the delivery of the Court of Appeal judgment, came to the Immigration Office along with her counsel Mr Elizabeth. Whilst she was there Mr Bacco personally served on her a letter - Exhibit 3 - asking her to leave Seychelles as she did not hold any valid permit to remain in Seychelles. She was also given an airline ticket to return to her country of origin namely, the Russian Federation. However, she decided on her own to go to Mauritius instead of the Russian Federation. Mr Govinden - counsel for the "Immigration" submitted that after the expiry of her gainful occupation permit (GOP) "Ms. Timonina" was allowed to remain in the Republic until the final determination of the case that she had brought before the Seychelles Court of Appeal. She was thus allowed to remain by virtue of an order made by the Court of Appeal in view of the then pending court case and that was meant for a limited period ie until the

final judgment was delivered. Following the delivery of the said judgment by the apex Court on 14 August 2008, she neither applied for nor was she granted any other type of residential permit by the Immigration in order for her to continue her stay in the country. Since her original GOP had already expired on 25 July 2007, she had no other residential status, apart from the exceptional/limited period, which the Court had granted in view of the then pending litigation. Hence, the Immigration issued and served on her the impugned letter asking her to leave the country and hence she left. In the circumstances, Mr Govinden contended that there was no illegality or fault or malice on the part of the Immigration in the issuance of the impugned letter to Air Seychelles. According to Mr Govinden, for any non-Seychellois visitor the right to enter and remain in Seychelles is not an absolute, natural or automatic right or part of universal human rights of any nature as claimed by Mr Elizabeth. Seychelles is a sovereign state. Grant or refusal of such right to an alien falls within the sovereign power, function and discretion of the state. Besides, Mr Govinden submitted that under section 16(1) of the Immigration Act, the immigration officer is empowered to either grant or refuse a visitor's permit to any person for valid reason/s. This particular section reads that on an application being made in writing, the immigration officer may, subject to such conditions as he may deem necessary, issue a visitor's permit to any person who -

(a) is not a prohibited immigrant; and

(b) is not the holder of a dependant's permit or a gainful occupation permit.

The word "may" used in this particular section, according to Mr Govinden, clearly indicates that the said discretion has been given to the immigration officer to be exercised reasonably. In any event, he argued, it is evident from the

wording of the section that such permit shall be granted subject to conditions as the immigration officer may deem necessary.

Moreover, Mr Govinden contended that since Ms Timonina's GOP expired on 25 July 2007 and she had no other residential status at the relevant period, her further stay in Seychelles would have been a breach of the conditions of the GOP as stated in paragraph 6 of the Court of Appeal judgment. But, due to the ruling of a single judge of that Court dated 22 June 2007, she was spared the agony. In that ruling, Hodoul JA, had directed thus:

> As regards her application for a temporary suspension of the order of removal, I am of the opinion that under article 25(5) of our Constitution, she has a right not to be removed from Seychelles until the order of removal reviewed by the Competent Authority.

This has already been reviewed by the judicial authority. As Ms Timonina's GOP expired on 25 June 2007, it is contended that she is now a prohibited immigrant by operation of law in terms of section 19(1)(d) of the Immigration Decree. In the circumstances, Mr Govinden submitted that the issuance of the impugned letter by the Immigration to Air Seychelles is neither illegal nor did the Immigration commit any fault in law. The letter was therefore, not vindictive, false or malicious. Having so argued Mr Govinden also submitted that since the plaintiffs in this mater challenge the legality of an administrative decision of a quasi-judicial authority, they should have petitioned the Court for a judicial review. It is incompetent and not proper to institute a civil suit alleging fault, which is not the case. For these reasons, Mr Govinden urged the Court to dismiss the instant application and not to grant any interim relief as this application is not maintainable either in law or on the facts. Mr Shaw, counsel for the third

defendant - Air Seychelles - having filed his statement of defence to the plaint submitted in substance, that Air Seychelles did not commit any fault in this matter. Any airline for that matter, is required by international rules and regulations not to transport a person to a country, where that person will not be admitted. Having been served with the impugned letter stating inter alia, that Ms Timonina would not be granted entry into Seychelles, Air Seychelles inevitably, had to take the decision to deny her boarding its flight from Mauritius to Seychelles. In any event, Mr Shah contended that no cause of action arose against Air Seychelles to ascribe any fault on its part, as it has to act on the position taken by the Immigration on a matter pertaining to the entry of any passenger it transports into the country. Therefore, Mr Shah submitted that Air Seychelles is not liable to pay any damages to the plaintiff. Hence, he also sought an order dismissing the application and the entire claim of the plaintiffs in this action.

I meticulously analysed the arguments advanced by counsel for and against this application, which obviously, have given rise to many an issue based on facts as well as on points of law. If this Court attempts to determine all those issues raised by the parties at this stage of the proceeding, in this interlocutory application, certainly, such an attempt would in effect, dispose of the main case itself. That would be tantamount to putting the cart before the horse. This, I should not do in the thin disguise of determining the interim injunction sought by the plaintiffs pendente lite. Forgive me, for being selective in that, I should identify and determine only those issues, which are relevant to and necessary for the adjudication of the instant application for an interim injunction.

Indeed, this case has a long history of multiplicity of litigation in the courts here and above. To appreciate the issues in a proper perspective, it is important that I should first, rehearse the entire background facts of the case, as briefly as possible as marshalled in the Court of Appeal judgment cited supra;

which may be read *mutatis mutandis,* as part of the ruling hereof.

Ms Timonina, the applicant, is a Russian citizen. She was employed by "Creole Holidays" as a Group and Incentive Executive. She had a gainful occupation permit (GOP) valid for one year. Indisputedly, the said GOP has been expired since 25 July 2007. A few weeks before the expiry of the said GOP, that is, on 8 June 2007, she was served with a notice in form IMM/9 declaring her as a "prohibited immigrant" (PI). The said declaration was made pursuant to the provisions of section 19(1)(i) of the Immigration Decree, Cap 93. The reason given therein for such declaration of a PI was that the applicant's presence in Seychelles was "inimical to the public interest". The PI notice also required her to leave Seychelles before 14 June 2007 by air and en route to Moscow.

The applicant's lawyer, Mr F Elizabeth, wrote to the Minister responsible for Immigration on 14 June 2007 requesting him to reconsider his decision. That request was unsuccessful. Given the circumstances, the applicant resorted to the court process by petitioning for judicial review on 11 June 2007. She also applied to the Constitutional Court for a remedy challenging the constitutionality of the PI declaration against her. In the case of judicial review, she sought an order of certiorari, quashing the decision of the Immigration for declaring her a prohibited immigrant. She sought, as well, an order of prohibition to stop and prevent the Immigration from deporting her or otherwise requesting her to leave Seychelles until a further order of the Court.

As regards the constitutionality of the PI, Ms Timonina contended that since she had not violated any laws of Seychelles and since she was gainfully working here, she enjoyed full protection of the Constitution and as such, the PI notice constituted a violation of her constitutional rights and freedoms guaranteed by the Constitution of Seychelles. She,

therefore, requested the Constitutional Court inter alia, to declare that the said decision of the Immigration dated 8 June 2007, amounts to a contravention of the applicant's constitutional rights as provided for by article 25 of the Constitution. Consequently, she sought a writ of prohibition staying the decision of the Immigration contained in the notice dated 8 June 2007 requesting her to leave the Republic before 14 June 2007.

As observed by the Court of Appeal in paragraph 6 of its judgment, since the applicant's GOP expired on 25 July 2007 and she had no other residential status, her further stay in Seychelles would have been a breach of the conditions of the GOP. But, Hodoul JA, stated:

> I am of the opinion that under article 25(5) of our Constitution, she has a right not to be removed from Seychelles until the order of removal reviewed by the Competent Authority. But that right must be exercised in conformity with the public interest. Accordingly, I suspend the execution of the order of removal until the determination of her application by the Supreme Court, upon which the matter will be submitted to this Court for further consideration.

Further, paragraph 7 of the said judgment is also relevant to the present application. This paragraph reads thus:

> In our considered view, it is this order by Hodoul, JA, which makes the Applicant's continued stay in Seychelles valid and legal. Therefore, her application for a writ of prohibition has been granted. Its validity ends with the delivery of this judgment, thus making her residential status now to be as described in paragraph 6 above.

Subsequent to the said ruling, two matters proceeded in the

courts of law, one in the Supreme Court for judicial review and the other in the Constitutional Court for the constitutional remedy. Ms Timonina continued her stay in Seychelles due to judicial intervention made for the purpose of her pending adjudications in the courts. Judgment in the latter Court was delivered on 31 July 2007 while in the former Court it was delivered on 12 December 2007. Ms Timonina lost in both matters and hence she appealed to the Court of Appeal against the judgment in both cases. The Court of Appeal consolidated both appeals for hearing and delivered its judgment on 14 August 2008 giving finality to all the litigation instituted by Ms Timonina in the Courts of Seychelles. With these background facts, the present application has been made by the plaintiffs seeking an interim injunction in this matter.

I will now proceed to examine the merits of the present application. Before the Court can consider whether or not to grant an injunction in this matter, there are certain principles of law which must be looked at.

First, the Court must be satisfied prima facie that the claim is bona fide, not frivolous or vexatious; in other words, that there is a serious question to be tried: *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at 510. Unless the materials available to the Court at the hearing of the application for an interlocutory injunction disclose that the plaintiffs have any real prospect of succeeding in their claim at the trial, the Court should not go on to consider whether the balance of convenience lies in favour of granting or refusing the interim relief that is sought. In considering the balance of convenience, the governing principle is whether the plaintiffs would be adequately compensated by an award of damages, which the defendants would be in a financial position to pay, and if so, the interim injunction should not be granted. Where there is doubt as to the adequacy of remedies in damages available to a party, the Court would lean to such measures

as are calculated to preserve the status quo.

Having said that, the injunction is fundamentally an equitable remedy, and so the one who seeks such remedy should come before the Court with clean hands. The possibility of irreparable loss, hardship and injury, if any, the plaintiff may suffer during the inevitable interval between the commencement of the action and the judgment in the main case, should also be taken into consideration as an important factor in the determination of injunctions.

Bearing the above principles in mind, I look at the instant case as a whole, on the documents presently on record before the Court. I carefully perused them in the light of the submissions made by counsel. Indeed, the remedy, which the plaintiffs seek in the plaint, is simply a monetary compensation for the "faute" the defendants allegedly committed in terms of article 1382 of the Civil Code; whereas the remedy sought in the interlocutory application is completely different from such monetary compensation. Indeed, the so called interim relief sought herein is perpetual in nature, and in effect, a writ of "certiorari" is being sought by the plaintiffs, in the guise of an interim injunction to annul an administrative decision once and for all. Even though there is no pleading either in the plaint or in the application challenging the "legality" of the impugned letter, Mr Elizabeth in his submission raised that issue, while he canvassed in support of his application for the injunction. As I see it, "faute" is an "error of conduct" which emanates from the breach of a duty of care, whereas "illegality" is an "error of law", which emanates from the breach of a statutory duty. In the circumstances, I find that what the plaintiff seeks in the interlocutory application is a distinct, specific, complete and substantive relief by itself, which squarely falls within the ambit of administrative law. This relief though termed by the plaintiffs as "interim", to my mind, it is not interim but perpetual in nature. This has no legal nexus to the original action that is based on "fault" and seeks a remedy of only monetary

compensation. Therefore, I find that the present interlocutory application is incompetent, improper and not maintainable in law. Hence, it is liable to be dismissed in limine.

In any event, having diligently perused all the documents on record, I am not satisfied prima facie that the plaintiffs' claim is bona fide, not frivolous or vexatious; in other words, that there is a serious question to be tried. In this instant, the term "frivolous or vexatious" should be understood in the light of the obiter dictum of Lord Diplock in the *American Cyanamid* case (supra) as meaning that there is a serious question to be tried and that the plaintiff has a real prospect of succeeding. The submission by counsel for the plaintiffs with regard to the non-compliance with the rules of natural justice involves a question of law and fact which would be more appropriately argued in a petition for "judicial review" of the decision of the immigration officer not at the hearing of an action in tort. Suffice it is for me to say at this stage that I am of the opinion, based on the pleadings and affidavit and other documents so far filed, that there is no serious question to be tried. On this score as well, I am loathe to grant the interim relief sought by the plaintiffs in this action.

The next question to be considered is whether the plaintiffs would be adequately compensated by an award of damages for the loss they would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the present application and the time of the trial and whether the defendants would be in a financial position to pay such damages. Looking at the prayers in the plaint, I find that paragraph 9(a) and (b) inclusive seeks simply payment of specific amounts from the defendants in respect of the loss and moral damage, which the plaintiffs allegedly suffered by the fault committed by the defendants. However, there is no other prayer therein in respect of what is sought in this interlocutory application. Hence, I have come to the conclusion that the plaintiffs would be adequately

compensated by an award of damages for the loss and damage they have claimed in the original action. Also I note that the first and the second defendants are the Government of Seychelles and its department respectively; whereas the third defendant is the national airline. Undoubtedly, all three defendants would be in a better financial position to pay for these damages, should the plaintiffs succeed in their action.

Moreover, I note, Ms Timonina is still a Russian national. She has a country of origin. She can go back to her home country any time at will, regardless of the outcome of the instant application. Obviously, she would suffer no loss, hardship or prejudice of such a kind and substantial nature or such an extent, which cannot be compensated by a suitable monetary award. On the question of granting a visitor's permit to an alien, as rightly submitted by Mr Govinden, the Republic of Seychelles is a sovereign state; grant or refusal of such permit to an alien falls within the sovereign power, function and discretion of the state. In my view, no foreign alien can claim such permit as of right; it is simply a privilege, if I may say so, accorded to a person, upon fulfilment of the conditions that may be imposed by the state. At this juncture, it is pertinent to quote from the speech of Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, the facts of which case were strikingly similar to that of the instant one. At page 171, Lord Denning indicates how this privilege accorded to an alien should be considered in matters of this nature. His speech inter alia, reads thus:

> He (the alien) has no right to enter this country except by leave: and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked before the time limit expires he ought, I think, to be given an opportunity of making representations: for, he would have a legitimate expectation of being allowed to stay for the

> permitted time. Except in such a case, a foreign alien has no right and I would add, no legitimate expectation of being allowed to stay. He can be refused without reasons given and without a hearing.

Applying the above dicta of Lord Denning to the case in hand, I would say, the applicant has no right to enter this country except by leave. Obviously, in this particular case, she cannot have any legitimate expectation of being allowed to stay for a day longer than the permitted time under her GOP. Indeed, when her GOP was revoked by the Immigration before its time limit expired, the Court did intervene and gave her an opportunity of making representations, since she would have had a legitimate expectation of being allowed to stay for the permitted time under her GOP. Now the time permitted under her GOP has expired. Therefore, she has no right and I would add, no legitimate expectation of being allowed to stay after the expiry of the GOP. Herein I would align myself with Lord Denning in that, any foreign alien after the expiry of his or her GOP period, can be refused without reasons given and without a hearing, when there is no such legitimate expectation of being allowed to stay.

I quite agree with Mr Govinden in that, under section 16(1) of the Immigration Act, the immigration officer is empowered either to grant or refuse visitors permits to any person for valid reason/s. However, as Mr Elizabeth correctly pointed out, the said discretion should never be exercised arbitrarily. The rules of natural justice should always be observed by public authorities, while making administrative decisions using that discretion conferred upon them by statues. Be that as it may, I am, therefore, of the opinion that the balance of convenience lies with the injunction not being granted.

Although this is sufficient to dispose of this application, in deference to counsel on both sides and to their arguments

with regard to the crucial issues as to the alleged "illegality" and "falsity" of the "impugned letter" I should mention that paragraph 6 of the judgment of the Court of Appeal quoted supra, and section 19(1)(d) of the Immigration Decree, when read together throw sufficient light on the denouement of this crucial issue. This section runs thus:

> The following persons, not being citizens of Seychelles, are prohibited immigrants-
>
> (a) any person who is infected etc....
> (b) any prostitute or any person etc
> (c) any person who under any law in force....
> (d) any person in Seychelles in respect of whom *a permit under this Decree has been revoked or has expired.*

Undisputedly, Ms Timonina is not a citizen of Seychelles. She had been granted a GOP under the Immigration Decree by virtue of her contract of employment in the Republic of Seychelles; the said GOP has expired since 25 July 2007; she had no other residential status, apart from the exceptional/ limited period, which the apex Court had granted to continue her stay, in view of the then pending litigation. That litigation is now over. The final judgment has already been delivered by the Court of Appeal since 14 August 2008. In the words of their Lordships –

> her further stay in Seychelles would have been a breach of the conditions of the GOP. But, due to the ruling of a single Judge of the Court of Appeal Hodoul JA, dated 22 June 2007, she was spared from the agony.

However, the crucial question still remains. Is Ms Timonina a prohibited immigrant now, by operation of law under section 19(1)(d) of the Immigration Decree? I would prefer not to answer this question at this stage of the proceeding. If I do

otherwise, I would be judged for prejudging the plaintiffs' claim in the main case. Indeed, I still keep an open mind.

Having said all, for reasons stated hereinbefore, I decline to grant the interim injunction sought by the plaintiffs in this matter. The application is therefore dismissed with costs.

Record: Civil Side No 241 of 2008

Omath v Charles

Civil Code - delict – assault – self-defence – provocation – contributory negligence – interpretation of Civil Code

The plaintiff placed her mobile phone on the defendant's vehicle. The defendant told her to remove it. After a heated exchange and short scuffle, the defendant got in his car and drove away. The plaintiff threw something at the retreating car. The defendant then got out and allegedly assaulted the plaintiff. She sued for damages totalling R 62,399. The defendant averred that he was provoked and acting in self-defence as he was trying to protect his vehicle from being further damaged by the plaintiff.

HELD

1. Delictual liability is governed by the Civil Code of Seychelles. The Civil Code is based on and is largely a translation of the French Civil Code. However it is deemed to be an original text and is not to be construed or interpreted as a translated text. Article 1382 adds a further 4 paragraphs to the original French article. Those additional paragraphs have been tailored and incorporated into the Civil Code in order to meet the changing needs of this era and society. Therefore although these additional paragraphs have their origin in French jurisprudence, they should be interpreted independently formulating legal principles in their own right;

2. Self-defence will be a total defence to delictual liability if the Court is satisfied that the dominant purpose of the act in question

was not to cause harm to the plaintiff, even if it appears that the defendant acted in self-defence;

3. The criminal justification of self-defence does not constitute a total defence to delictual liability unless the act in question passes the primary test of dominant purpose. Where an act fails to meet the test of dominant purpose but does constitute self-defence in the criminal law, then it would only be a defence to the extent of contributory negligence; and

4. The defence of provocation in the criminal law does not amount to a total defence to delictual liability unless the act passes the dominant purpose test. Provocation as constituted in the criminal law would only amount to a defence of contributory negligence for delictual liability.

Judgment for the plaintiff. Total damages awarded of R 21,000 (pain and suffering: R 10,000; moral damages R 10,000; loss of personal property; R 1000).

Legislation cited
Civil Code, art 1382

Foreign cases noted
Tribunal Civil Strasbourg, 10 mars 1953

Antony DERJACQUES for the plaintiff
France BONTE for the defendant

Judgment delivered on 24 September 2008 by:

KARUNAKARAN J: This is a delictual action brought under article 1382 of the Civil Code of Seychelles. In this action, the plaintiff, a young woman claims the sum of R 62,399 from the defendant towards loss and damage, which she suffered due to a "fault" allegedly committed by the defendant. The defendant denies the entire claim of the plaintiff and seeks dismissal of the action.

It is not in dispute that the plaintiff and the defendant are residents of Praslin. The plaintiff is working as tourism representative for a company known as Masons Travels, whereas the defendant is a taxi operator in Praslin. The case of the plaintiff is that on 9 December 2002 in the premises of Pizzeria Complex at Cote D'or, Praslin, the defendant unlawfully assaulted the plaintiff causing severe bodily injuries by giving slaps, punches and kicks all over her body. Besides, the plaintiff avers in her plaint that during such assault by the defendant, she also lost her mobile phone and a gold chain, which was on her at the material time. As a result of the said unlawful acts of the defendant, the plaintiff now claims that she suffered loss and damage as particularised below:

Pain and suffering	R30,000.00
Moral damages for distress, humiliation and anguish	R30,000.00
Special damages (1 gold chain and 1 mobile phone)	R 2, 399.00
Total	R 62,399.00

The facts of the case as transpire from the evidence on record are these:

On Monday 9 December 2002 at around 7 pm, the plaintiff was in the company of her boyfriend Neddy Confait - PW4 -

and her sister Moira Samantha - PW3. They were all out that evening travelling in a pick-up truck. Reaching Cote D'or, Praslin, they wanted to buy some pizza from a nearby "pizzeria". They parked their pick-up truck in the roadside opposite the "pizzeria". A number of cars had already been parked around. Having disembarked from the pick-up truck the plaintiff's boyfriend Neddy walked into the pizzeria, whereas the plaintiff and her sister were waiting outside. After a while, the plaintiff also went in. The defendant, who was standing nearby, passed some derogatory remarks directed at the plaintiff. However, the plaintiff did not pay any attention to it and returned to the pick-up truck, where her sister Moira was waiting. As Moira was carrying a child, she had placed her two mobile phones on a car parked close to the pick-up truck. The plaintiff's boyfriend collected the pizzas, came out and was approaching the pick-up truck. At the same time, the defendant also came out and started to swear at the plaintiff and her sister, alleging that they had dirtied his car by putting their mobile phones on it. The plaintiff's sister immediately removed the phones from his car and moved away. However, the defendant continued to swear at the plaintiff and her sister. The plaintiff's boyfriend Neddy having heard the commotion asked the defendant what had happened. The defendant suddenly got angry and ran towards Neddy to assault him. The defendant whilst running slipped and fell down. Again, he got up and rushed towards the plaintiff and slapped on her face. The plaintiff felt dizzy and fell down. The plaintiff's sister Moira tried to calm the defendant. However, the defendant became more aggressive and hit her as well on her face. Two bystanders (Roy and Jude) intervened and restrained the defendant from continuing the assault. After their intervention, the defendant got into his car and was trying to move away from the scene. However, the plaintiff in anger ran behind the car and admittedly, picked up some macadam from the ground and threw them at the defendant's car. The defendant after driving a distance of about 50 to 60 feet stopped his car and came back to the plaintiff and again

started to assault the plaintiff. The testimony of the plaintiff in this regards reads thus:

> He (the defendant) came towards me to hit me and I grabbed him by his collar. He threatened me. He shook me and pushed me to the ground. He started to kick me in my chest...It was not only once but several times. I had fallen on my left side and I was protecting my breast with my left hand. That is when my sister came running towards me where I was, saying 'stop hitting her, you will kill her'. That is when he stopped and ran towards my sister and I had the opportunity to get up. We all embarked on the pickup. He (the defendant) went towards Villa Peche which is close by. There were lot of debris around because it had burned down. He picked something up which looked like a piece of wood. He threw it at us but the driver of the pickup swerved and it missed us. We went to the police station. I went to make a report concerning what had happened.

After thus reporting the matter to the police at Baie St Anne Police Station, the plaintiff went to the health centre and received medical treatment for the bodily injuries she sustained from the assault by the defendant. According to the plaintiff, her chest was red and there were scratches on her face. The next day the injuries on the face turned blue. Moreover, the plaintiff testified that during the said incident her beige blouse was damaged; a gold necklace and a white pearl, which she was wearing, had also been lost. However, the defendant subsequently returned these two items to the plaintiff. The plaintiff in cross-examination admitted that though her sister had placed the mobile phones on the defendant's car, she did not cause any provocation to trigger the defendant who resorted to such violent reaction. WPC

Daniella Denousse - PW2 - testified that on the alleged night at around 7 to 8 pm, while she was on duty at the Baie St Anne Police Station she received a complaint from the plaintiff concerning the alleged assault by the defendant. According to this officer, when the plaintiff came to the police station she was crying. She was seen in a very distressed state and had some marks on her face. The officer recorded the report in the occurrence book and also gave the plaintiff a police memo for medical examination. The plaintiff's sister Moira Samantha (PW3) and the plaintiff's boyfriend Neddy (PW4) also testified in substance, corroborating the evidence of the plaintiff on all material particulars pertaining to the incident of assault by the defendant. In the circumstances, the plaintiff claims that she suffered loss and damage in the total sum of R 62, 399 as particularised hereinbefore and therefore, prays this Court to enter judgment accordingly, in her favour.

On the other side, the defendant denied all the allegations made by the plaintiff in this matter. In defence, the defendant testified that he did not assault the plaintiff at the material time. However, it was the plaintiff who dirtied his new car by placing two boxes of pizza, beer and glasses on it. The defendant being provoked by the acts of the plaintiff, asked her to remove those things from his car. The plaintiff removed them having made some sarcastic remarks about the defendant. In response, the defendant told the plaintiff that if she repeats such acts, he would throw all the drinks down. Having said that, the defendant got into his car and tried to drive away from the scene. The evidence of the defendant in this respect runs thus:

> I got in my car and I was about to go when I heard Ms Omath (the plaintiff) saying "who do you think you are?" She took macadam and threw it at my car at the back. I was inside my car reversing. She came from nowhere and threw macadam on my car. I stopped and came out of my car. I asked

> her not to do this again. She was about to throw macadam again but I held her hand and told her not to do that again. She was struggling in my hand and I let go of her and she fell down. Her boyfriend came and was holding her hand and I let go of her and she fell down.

In the circumstances, it is the contention of the defendant that he did not commit any unlawful act at the material time. Whatever he did was only to protect his property from the plaintiff's attack, which resulted in injury to the plaintiff. Thus, according to the defendant, he was not at fault nor was he negligent in causing those injuries to the plaintiff. Hence, the defendant denied liability. Having agreed to leave the appreciation of evidence to the Court, counsel for the parties elected not to make any submission in this matter. I meticulously analysed the evidence adduced by both parties on facts relevant to the case. Most of the facts, which the plaintiff testified, are not disputed by the defence. Indeed, the defendant in his testimony did not deny any of the material facts and the sequence of events that led to the alleged untoward incident. However, the defendant denied he committed any physical act of assault to cause bodily injury to the plaintiff. According to the defendant, he simply held the plaintiff's hand at the material time, in order to physically prevent her from causing damage to his car, as she was attempting to throw macadam on it. In other words, he acted so in order to protect his property (the new car) from being damaged by the act of the plaintiff. As a result and in the process of his preventive measure, the plaintiff fell down and sustained those injuries. Besides, it is also the defence version that the plaintiff through her act of provocation triggered the said sequence of events, which eventually resulted in injuries to the plaintiff. In view of the lines of defence taken by the defendant in this matter, the following questions arise for determination namely,

(i) Is the defence of "self-defence" in protection of one's property, available to a defendant in a delictual action, in our jurisdiction?

(ii) If so, does it constitute a complete defence so as to exonerate the defendant from total liability? Or does it only constitute a defence of contributory negligence?

(iii) Is the defence of "provocation" available to a defendant in a delictual action, in our jurisdiction?

(iv) If so, does it constitute a complete defence so as to exonerate the defendant from total liability? Or does it only constitute a defence of contributory negligence?

Before finding answers to these questions, it is important to examine the position of law in our jurisprudence with respect to "self-defence" and "provocation", especially in delictual actions. In fact, delictual liability in Seychelles is basically governed by article 1382 of the Civil Code of Seychelles. This is the most famous of all the articles of the Civil Code as it embodies the codified law of delict, which has a more limited and rational character than its uncodified counterpart namely, "tort" under the English legal system. Paragraph 1 of this article lays down the general rule for all torts, which is that liability rests on the general concept of fault. This paragraph is obviously - word by word - a replica of the corresponding article in the French Civil Code, which was in force prior to the present Civil Code. Indeed, "fault" is defined in paragraph 2 of this article as being an error of conduct, which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It also stresses that the fault may be the result of a positive act or omission. Paragraph 3 of the said article completes the definition and states as follows:

> Fault may also consist of an act or omission the

> dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.

Paragraph 4 reads thus:

> A person shall only be responsible for fault to the extent he is capable of discernment: provided that he did not knowingly deprive himself of his power of discernment.

Paragraph 5 provides that liability may not be excluded by agreement except for the voluntary assumption of risk. Be that as it may. Our Civil Code came into force on 1 January 1976. Although the Code is based on and is largely a translation of the French Civil Code, the latter was repealed by Act 13 of 1975, which stated that the former shall be deemed for all purposes to be an original text and shall not be construed or interpreted as a translated text. However, it is pertinent to note here that the original article 1382 found in the French Civil Code is preserved under paragraph 1 in our Civil Code, whereas four other paragraphs 2-5 (inclusive) in our Code, have been added to it. Undoubtedly, these additional paragraphs have been tailored and incorporated in our Civil Code in order to meet the changing needs of our time and Seychellois society. Therefore, in my considered view, although all these additional paragraphs including paragraph 3 and 4 quoted supra have their origin in French jurisprudence, they should be interpreted independently formulating legal principles on their own, in the context of our unique Seychellois jurisprudence without mechanically, resorting to the French Code and jurisprudence, unless an inherent ambiguity in our provision necessitates us to do otherwise.

In the light of the above provisions of law, I now approach the issue on hand. Under the French jurisprudence, obviously it

is trite and settled law that self-defence is a valid and total defence to a delict – *responsabilité délictuelle.* Hence, if such a defence is proved in a delictual action, it would constitute a complete defence in France and exonerate a defendant from total liability, as it applies in criminal cases. See, nos. 633 & 637 of Alex Weill & Francois Terre - *Droit Civil, Les Obligations* - precis Dalloz. Indeed, it is settled French case law –

> légitime défense constitue un fait justificatif excluant toute faute et ne peut donner lieu à une action en dommage intérêts en faveur des ayants cause de celui qui l'a rendue nécessaire par son action... (Tribunal Civil Strasbourg 10 mars 1953).

However, it is evident from paragraph 3 under article 1382 of our Civil Code that even if it appears that a defendant had acted in the exercise of his legitimate interest so to say, to protect his life, body or property in self-defence, still his act would constitute a "fault" if the dominant purpose of his act was to cause harm to the plaintiff. Hence, as I see it, our law does not recognise an act of self-defence as a total defence to delict unlike its French counterpart, simply because it satisfies the usual tests required in criminal law such as, the necessity of the situation, reasonableness, degree and proportionality of the force used, contemporaneity etc. Therefore, the primary test required to be applied here in Seychelles to render an act of self-defence a total defence to delictual liability is the test of dominant purpose. The Court has to be satisfied that the dominant purpose of the act in question was not to cause harm to the plaintiff, even if it appears that the defendant had acted in self-defence. Hence, I hold that the defence of self-defence we normally encounter in criminal cases, cannot as such constitute a total defence to delictual liability unless the act in question passes the primary test propounded supra. If it does, then it would constitute a total defence to liability

consonant with the position of law in the French jurisprudence.

On the other hand, a situation may arise where the act in question may pass the usual tests required in criminal law but may fail the primary test hereinbefore mentioned. In such cases, it would still constitute a defence, but only to the extent of contributory negligence by virtue of paragraph 4 quoted supra. That is, the defendant shall only be responsible for fault to the extent that he was capable of discernment as such ability is impaired in proportion to the gravity of the situation created by the act of the plaintiff.

On the question of "provocation" too, for identical reasons stated supra, I hold that the defence of "provocation" normally encountered in criminal cases, cannot constitute a total defence to delictual liability unless the act in question passes the primary test propounded supra. However, it would still constitute a defence, but only to the extent of contributory negligence by virtue of paragraph 4 quoted supra. That is, the defendant shall only be responsible for fault to the extent that he was capable of discernment as such ability is impaired in proportion to the gravity of the situation created by the act of the plaintiff.

In view of all the above, I find answers to the above questions as follows:

(i) The defence of "self-defence" in protection of one's property is available to a defendant in a delictual action, in our jurisdiction.

(ii) It would constitute a complete defence and exonerate the defendant from total liability, provided the dominant purpose of his act was not to cause harm to the plaintiff or else it would only constitute a defence of contributory

negligence and reduce the quantum of damages.

(iii) Likewise, the defence of "provocation" is also available to a defendant in a delictual action, in our jurisdiction.

(iv) It would also constitute a complete defence and exonerate the defendant from total liability, provided the dominant purpose of his act was not to cause harm to the plaintiff or else it would only constitute a defence of contributory negligence and reduce the quantum of damages.

Having thus set out the principles of law on the issues above, I will now move on to examine the evidence on record. First, on the issue of self-defence to protect one's property, it is so obvious from the evidence of the defendant in this matter, that he had time, opportunity and circumstances to retreat from the scene and avoid the plaintiff's threat of causing damage to his car. Indeed, the defendant had the choice to drive away from the scene as he had already driven about 50 to 60 feet away from scene. However, he did not choose that course of action rather he stopped his car and came back to the scene to retaliate. He then admittedly, caught hold of the plaintiff's hand and engaged in a brawl with her. Even if one accepts the version of the defendant to be true, still his act of brawl with the plaintiff was the cause for her fall to the ground and the resultant injuries. In my view, the circumstances were not so grave or compelling to warrant the defendant to take such a course of action and apply such a degree of force and measure as he did. As I see it, the defendant did deliberately choose that course of action to retaliate, which eventually resulted in injuries to the plaintiff and so I find. In any event, I accept the evidence of the plaintiff and her witnesses in that the defendant did physically assault the plaintiff by giving

slaps, punches and kicks all over her body and continued the assault despite her fall to the ground. Besides, I find on the evidence that during such assault by the defendant, the plaintiff also lost her mobile phone and a gold chain, which was on her at the material time. Having said that, I note, the nature and location of injuries as observed by WPC Daniella Denousse - PW2 - soon after the alleged incident, particularly the marks found on the face of the plaintiff, could have been caused by slaps rather than a fall to the ground. Hence, the plaintiff's version as to cause of injuries appears to be more probable, consistent and more logical than the defendant's version.

In the circumstances, I find that the defendant did not act in self-defence in the entire episode. He physically assaulted the plaintiff by giving slaps, punches and kicks all over her body and continued the assault despite her fall to the ground and the dominant purpose of his act was to cause bodily harm to the plaintiff. Hence, the alleged act of self-defence put up by the defendant in this action does not constitute a complete defence to exonerate him from total delictual liability. However, having regard to all the circumstances of the case, the defendant, who failed in his duty to retreat, appears to have acted in the exercise of his legitimate interest to protect against possible threat issued out by the plaintiff. Therefore, I find it would only constitute a defence of contributory negligence as formulated supra, which should proportionately reduce the quantum of compensation payable to the plaintiff for delict.

As regards the element of provocation, having regard to the entire circumstances of the case, I find on evidence that the plaintiff has also acted in provocation, which triggered the defendant to overreact the way and manner he did in that situation. However, the said provocation by the plaintiff cannot constitute a complete defence and exonerate the defendant from total liability since the dominant purpose of his act in the

entire episode was to cause harm to the plaintiff. Therefore, I find that the plaintiff's provocation in this matter would only constitute a defence of contributory negligence and would reduce the quantum of damages accordingly.

In the final analysis, I hold that the defendant is liable in delict to compensate the plaintiff for the consequential loss and damages. However, the amount claimed by the plaintiff under each head of loss and damage, appears to be unreasonable, exorbitant and disproportionate to the actual injuries she suffered. Besides, to my mind, the plaintiff suffered those injuries not solely due to the fault of the defendant, but also due to her own contributory negligence in depriving the defendant of his power of discernment for which I would apportion the blame to 50%. As regards the plaintiff's claim for material loss of the gold chain and white pearl, admittedly, the defendant has returned those items to the plaintiff after the commencement of this suit.

In view of all the above, I award the plaintiff the following sums:

Pain and suffering	R10,000.00
Moral damages for distress, Humiliation and anguish	R10,000.00
Loss of mobile phone	R 1,000.00
Total	R21,000.00

Accordingly, I enter judgment for the plaintiff and against the defendant in the sum of R 21,000 with interest at 4% per annum - the legal rate - on the said sum as from the date of the plaint and with costs.

Record: Civil Side No 22 of 2003

Padayachy v Pool

Unjust enrichment – concubinage – property sharing

The parties were in a de facto relationship for 7.5 years until an interim protection order was made against the defendant restraining him from entering the family home. As a result the relationship ended. The house was registered solely in the defendant's name. The plaintiff alleged that she used her personal finances for the house. She sued the defendant for unjust enrichment and moral damages.

HELD

1. The plaintiff is not entitled to be reimbursed for any expenses she made towards the household during the time the couple were living together in a de facto relationship; and

2. The plaintiff is entitled to claim the contributions she made to the assets of the defendant which resulted in his being enriched by those contributions.

Judgment for the plaintiff. Damages for unjust enrichment R 101,000 with costs.

Legislation cited
Matrimonial Causes Act

Cases referred to
Albert v Hoareau (unreported) SSC 1982
Cadeau v Leveaux (1984) SLR 69
Dodin v Malvina (1990) SLR 288
Edmond v Bristol (1982) SLR 353
Esparon v Monthy (1986) SLR 124

Hallock v D'Offay (1983-1987) 3 SCAR (Vol 1) 295
Payet v Larame (1987) SLR 78

Foreign cases noted
Moutou v Mauritius Government Railways (1933) MR 102
Naikoo v Société Héritiers Bhogun (1972) MR 66

Frank ALLY for the plaintiff
William HERMINIE for the defendant

Judgment delivered on 30 October 2008 by:

RENAUD J: The plaintiff is claiming from the defendant an undivided share in Title S4043 or the house thereon and R 50,000, or the sum of R 450,000.

The plaintiff is an executive secretary and the defendant is a taxi driver. The parties were in a common law relationship (concubinage) for 7 years and 6 months until the Family Tribunal made an interim protection order against the defendant restraining him from approaching the house or removing any fixtures from the house and as a result thereof their relationship came to an end. Out of their relationship a child was born, namely, Dwayne Pool who is still a minor. The defendant is the registered proprietor of the land comprised in Title S4043 situated at Montague Posee, Mahe, on which stands a house which the parties resided in and occupied during their relationship. The plaintiff was in gainful employment during the subsistence of their relationship.

The plaintiff alleged that she used her income, several loans which she borrowed and repaid, and monies obtained as part of the settlement from her previous marriage in sums exceeding R 20,000 and her labour to invest in the said house and the health and welfare of the defendant and the family. The plaintiff particularized her alleged investment, expenses and domestic services. She alleged that the value of the

house is R 800,000. She also alleged that during their relationship and immediately after the defendant had harassed and ill-treated her, which resulted in the protection order of the Family Tribunal, which act amounts to a faute in law. On the basis of all her allegations, the plaintiff averred that based on her investments and the defendant's present ownership of the said title, the defendant has been unjustly enriched to her detriment. Further and alternatively to these allegations, the plaintiff averred that based on her investments and the necessity of an equitable distribution of the said property she is entitled to an undivided half share in Title S4043 or half share in the present market value of the house based on her contributions or be reimbursed her contribution at the present market value. The plaintiff claimed to have suffered loss and damage as follows:

(i)	Contributions at present market value	R 400, 000.00
(ii)	Moral damage for ill-treatment	R 50, 000.00

The defendant claimed to have already been the owner of the house when he met the plaintiff. The defendant also contended that the house belongs to him and that the plaintiff is not entitled to any share therein.

The defendant further denied each and every material allegation of the plaintiff and put her to strict proof thereof.

Prior to the hearing, this Court granted an inhibition order in favour of the plaintiff restricting any dealing in Title S4043.

One Alexis Buron applied for and was granted leave to intervene in the matter. He claimed to have, in good faith, purchased the property Title S4043 in the intervening period from the defendant for consideration, and, that his intervention

would be necessary in order for him to defend and protect his interest.

The plaintiff and the defendant are not married and the property in issue is not deemed to be matrimonial property. As such this Court cannot resolve this matter in terms of the Matrimonial Causes Act which is applicable to the settlement of matrimonial property.

There have been various cases of a similar nature which had come up before the Court for adjudication. I will cite some notorious ones and how the Court adjudicated in each of those cases.

In the case of *Payet v Larame* (1987) SLR 78 the Court in awarding the plaintiff a 30% share of the value of house and car, held,

(1) An immoral association would disqualify a claim based on a contract if the cause of the contract was remuneration for the immoral association.

(2) The present action was not based on the immoral association but was claim for what the defendant benefited out of the help provided by the plaintiff.

(3) On the evidence the plaintiff had suffered an impoverishment of her patrimony and had a cause of action under article 1381 CCSey.

The case of *Payet v Larame* (1987) SLR 78 is distinguished for the reason that the parties therein lived together for 10 years and during that period the parties bought the land on which later a house was built, and purchased a car which was used by the defendant as a taxi. In the present case the defendant had bought the land in his own name and had already built a house, and was the owner and operator of a

taxi before he met with and started living with the plaintiff. At the most the present plaintiff can only claim contributions she made towards any addition, upgrading and alteration to the existing house.

In the case of *Dodin v Malvina* (1990) SLR 288 - the parties had lived together for about five years in a house built with the respondent's money on land which he had purchased. The plaintiff claimed a share in the property on the ground of her contribution to the household. After reviewing the case of *Hallock v D'offay* (1983-1987) 3 SCAR (Vol 1) 295, the Court held that the plaintiff was not entitled to any share in the property.

The case of *Dodin v Malvina* (1990) SLR 288 can also be distinguished from the present case, in that the plaintiff in the case cited was claiming a share in the defendant's property on the ground of her contribution to the household. This case established the principle that a plaintiff cannot in law claim a share in the property for any contribution made towards the day to day running of the household, which in my view includes expenses incurred for going on holiday etc.

In the case of *Cadeau v Leveaux* (1984) SLR 69 it was held that -

(1) In an action de in rem verso a concubine could claim remuneration for domestic services in the paramour's house if she had suffered "appauvrissement" of her own "patrimoine".

(2) Such a claim based on past immoral association should fail.

(3) On the facts the defendant had looked after and maintained the plaintiff as wife and as such the plaintiff had not suffered any "appauvrissement" of

her own "patrimoine".

(4) The plaintiff was only entitled to the return of her movables which in this case was her bed valued at R 205.

(5) The defendant had not proved any arrangement to bank money sent by him but all his payments were for the maintenance of the plaintiff and the home.

(6) The defendant had failed to prove his claim or movables alleged to be in the possession of the plaintiff.

In the present case the plaintiff is not making her claim based on an action de in rem verso as she was in fulltime employment during the whole period that she was living in concubinage with the defendant. Therefore the principles enunciated in the cited case of *Cadeau v Leaveau* is not on all fours with the present case.

In the case of *Esparon v Monthy* (1986) SLR 124, the plaintiff lived in concubinage with the defendant for a period of about 15 years. During that period they started to run a shop and out of its profits erected a building on the defendant's land which was used to run the business profitably. Thereafter out of the profits of the shop they built a house on that land. The plaintiff assisted in running the shop as well as in the domestic tasks as a housewife. The concubinage ended in 1985, and the defendant threatened to evict the plaintiff from the house. The plaintiff claimed in that action her share in the property.

The Court held that —

(1) The principles of division of property between married parties could not be applied between parties living in concubinage.

(2) The intention of the parties determined the issues.

(3) Where two parties by their joint efforts acquired property for their joint benefit it would be inequitable for the holder of the legal estate to deny the other party the beneficial interest.

In the case of *Albert v Hoareau* (unreported) SSC 1982, following the case of *Moutou v Mauritius Government Railways* (1933) MR 102*, and Naikoo v Société Héritiers Bhogun* (1972) MR 66, it was held that the relationship of concubinage was not one which was protected by law in the field of tort.

It is established therefore that the principles of division of property between married parties do not apply between parties living in concubinage. In the latter cases it is the intention of the parties which determined the issued. However, where two parties by their joint efforts acquired property for their joint benefit it would be inequitable for the holder of the legal estate to deny the other party the beneficial interest.

In the case of *Edmond v Bristol* (1982) SLR 353, the plaintiff and the defendant lived as man and wife for nine years during which they built a house on the property of the defendant's mother. The plaintiff contributed towards the cost of the house by working with the defendant at the business of buying and selling vegetables and in making vacoa bags herself and selling them. Her contribution was half the cost of the house.

After separating from the defendant, the plaintiff asked for a declaration of her share in the house and for an order on the defendant to allow her and her family to live in the house. In the alternative she asked that she be allowed to remove the house to her family land or for an order on the defendant to pay her the value of her share of the house.

It was held that -

(1) The plaintiff did not have the same rights as a married woman would have in the matrimonial home and therefore could not claim a right to live in the house.

(2) Where unmarried parties living together had separated, each of them could claim a partition of the properties if a partnership existed between them or the claim of each party could be dealt with under the principles of indivision or unjust enrichment.

(3) In the instant case the defendant had been unjustly enriched to the extent of the contribution which the plaintiff had made in respect of the house.

(4) The plaintiff was entitled to recover the contribution from the defendant.

Some of the cases I have cited above although they are not on all fours with the present case, provide this Court with a wide field of reference when it comes to the adjudication of matters involving unmarried couples who have been living together in "concubinage" and were making claims against the other party.

In cases of this nature the contending parties always try to lay before the Court a load of evidence and something going as far as splitting hairs. I bear in mind that at the time the parties were happily living together they did not draw up documents for each financial transaction between themselves regarding their respective contributions towards the improvement of their house and household expenses. It is now for the Court to endeavour to discern the trees and not be encumbered by the forest.

I have observed both parties when giving evidence and I am satisfied that their common intention was to make inputs towards their house and household for their joint future wellbeing as well as that of their family.

I find that indeed the defendant had purchased the land and had built his house before he met the plaintiff. However, I also find that after meeting the plaintiff and after they started living together the standard of the original structure was further improved and an addition was also made to that structure. Other improvements were also made to the landscape.

As the law stands, supported by jurisprudence cited above, the plaintiff is not entitled to be reimbursed for any expenses she made towards the household during the time they were living together in concubinage. The plaintiff is entitled to claim only the contributions she made to the assets of the defendant the end result of which was that the defendant was somewhat enriched by those contributions. If the plaintiff is now to pack her belongings and leave the house to the defendant the latter would be richer through the inputs of the plaintiff. It is therefore for the plaintiff to prove to Court on a balance of probabilities that she made certain contributions towards enriching the defendant and she is now not able to benefit from the contributions she made towards enriching the defendant.

It is now for this Court to determine the contributions the plaintiff made towards the house of the defendant which stands on land Parcel 54043, which I will do based on the relevant evidence which I believe and accept.

Having meticulously analysed the evidence after hearing the parties and observing their respective demeanours I find and conclude that the plaintiff did indeed make certain contributions towards the improvement of the asset in issue,

namely to the house of Parcel S4043 and their common intention was for both to benefit from such improvement. Now that the defendant is claiming the whole asset it is fair just and necessary that the defendant compensate the plaintiff for her contributions otherwise the defendant would be unjustly enriched to the detriment of the plaintiff.

The plaintiff reckoned that when she left the house, the market value, in her view was R 800,000. There is no professional evidence to support that valuation.

I also find that the plaintiff does not have any undivided share in the property S4043 apart from her contributions towards adding value to that property of the defendant to the detriment of her own patrimony. I also find that there is no basis for the plaintiff's alternative claim of R 450,00 against the defendant which I accordingly reject.

The plaintiff is claiming for moral damage for ill-treatment by the defendant. I do not believe that such claim would arise in a case for unjust enrichment following a concubinage relationship. I will make no award under this head of claim which I reject.

The plaintiff claimed to have contributed the whole amount of R 60,000 which she received from her previous marriage settlement. It may be true that she received such sum when her relationship with the defendant was on a level that she believed that the defendant would be living with her as husband and wife in the house in issue and that it would be in her interest to contribute towards the upgrading and extending the house. On the other hand I do not believe that a woman would invest every cent of that sum in the house. It is rational to believe that a woman would have other personal needs that she would have to attend to upon receiving such sum of money. I find that on a balance of probabilities that the plaintiff contributed some and not all of that money towards

the construction of the addition to the defendant's house. I would adjudge it fair to conclude that the plaintiff contributed only half of that sum, that is, R 30,000 towards the defendant's house.

The plaintiff took certain loans from the Credit Union during the time she was living with the defendant. The evidence shows that on her application form for such loans she gave her reasons for applying for those loans, which reasons I will set out later. I do not see any reason why a person would apply for loans and give the reason she did were it not for the purpose she stated. In February 1997 she took a loan from the Credit Union of R 6,000 for "finishing of house". In January 2000 she took another loan of R 15,000 for "house extension". In September 2000 she took R 5,000 "to complete house extension". In July 2001 she took R 15,000 for "finishing of verandah extension". In January 2003 she took R 30,000 to "build a retaining wall". During the period February 1997 to January 2003 the plaintiff took a total of R 71,000 all for the purposes she stated. The plaintiff repaid all these loans by monthly instalments from her own means. The defendant denied that these were ever used towards the building of the extension to his house and retaining wall. I do not believe the defendant on that score. I find that on a balance of probabilities the plaintiff contributed the sum towards adding value to the asset of the defendant, namely the house in issue.

The defendant claimed that the house was worth only R 250,000 – the price that he sold the house for. From the evidence I find that the defendant, after purchasing the land for R 30,000, took a first loan of R 150,000 and an additional loan of R 50,000 from SHDC for the construction of the house. He also won R 50,000 from the Casino. He invested this total sum of R 280,000 towards the purchase of the land and the construction of the house which he sold in July 2005 for R 250,000 together with its contents. Who would believe that? –

definitely not this Court. It is a well-known fact that the value of property has increased more than two-fold over the last five years. He said that when he sold the house the property was cleared of any mortgage as he had already repaid SHDC for the loans, yet he said that it was after he sold the house and its contents for R 250,000 that he received the money to clear his outstanding loan from SHDC.

I also find that either the defendant or the intervener was not truthful to the Court with regard to the sale transaction. The defendant testified that he sold the house to the intervener for that price because the latter was a personal friend of his and he had known him for a long time and that he used to stay at his place when he went to England. Yet the intervener testified that he came to know the defendant through a friend of his who is a taxi driver who had informed him that the defendant had a property for sale. He is not a very good friend of the defendant and was not even aware that the defendant was "in trouble" with the plaintiff.

In any event even if the defendant had chosen to dispose of his asset for free this will not in any way affect the right of the plaintiff in the said asset.

I do not believe that in cases of this nature, reasonable deductions ought to be made for the period that the plaintiff lived in or enjoyed the use of that house for the simple reason that both the plaintiff and defendant lived together and contributed towards the household which included the child of the defendant from a previous relationship as well as the child of the parties. Both parties were then living as husband and wife and it was their joint intention for both to enjoy the house freely and they did so. It can therefore be said that both the defendant and the plaintiff enjoyed their respective contributions during that period.

In the final analysis I conclude and find on a balance of

probabilities that the defendant had been unjustly enriched to the extent of the contribution which the plaintiff had made in respect of the house which sum I find to be R 101,000 with interests and costs.

I accordingly enter judgment in favour of the plaintiff as against the defendant in the sum of R 101,000 with interest and costs.

Record: Civil Side No 272 of 2005

Republic v Dodin

Procedure – examination and re-examination of witness

The defence objected to the re-examination of a witness by the counsel for the Attorney-General who was appearing alongside the prosecution. The defence contended that the evidence of the witness had been led by the prosecutor and therefore the prosecutor should carry out any re-examination unless there was a good reason that prevented them from doing so. The prosecution contended that where two or more counsel appear jointly for a party, it is up to counsel how they should conduct their case.

HELD

1. The Criminal Procedure Code is silent on whether counsel who led a witness in their evidence must carry out any re-examination;

2. The Constitution of Seychelles only sets out the rights of an accused to be represented by counsel of their choosing without giving further specifications; and

3. When a witness is under examination by a junior counsel, the leading counsel may interpose and finish the examination. But after one counsel has brought their examination to an end, counsel on the same side may not also put questions to the witness. Therefore once one counsel embarks on the examination of a witness, they should complete the whole testimony of that witness including any re-examination.

Ruling: Objection upheld.

Legislation cited
Constitution
Courts Act, s 4
Criminal Procedure Code
Evidence Act, s 12

David ESPARON with Ronny GOVINDEN for the Republic
Basil HOAREAU (for Charles LUCAS) for the first accused
Basil HOAREAU for the second, third, and fifth accused
Bernard GEORGES for the fourth accused

Ruling delivered on 1 October 2008 by:

GASWAGA J: When Inspector Francois (Pw4) was testifying Mr Georges raised an objection to the witness being re-examined by Mr Govinden, the Deputy Attorney-General who had all along been appearing together with State Counsel, Mr Esparon for the prosecution. The said witness was called to the stand and taken through the entire examination-in-chief by Mr Esparon. The defence contends that in such circumstances Mr Esparon should finish off with his witness unless it so turns out that for one reason or another he is prevented from carrying through his exercise - For example where the examining counsel is taken ill, withdraws from the case, dies, etc.

Mr Esparon submitted that if two or more counsel are appearing jointly for a party it is up to them to agree and organize themselves on how to conduct their case. They speak with one voice but may appear alternatingly whenever necessary or called upon to address any issue that may come up before the Court. He cited Adrian Keane *The Modern Law of Evidence* (4th ed, Butterworths, London, 1996) at 170, which states that "a witness who has been cross-examined may be re-examined by the party who called him." The

essence here is that the party does the examination-in-chief as well as the re-examination but if represented by one or more counsel any of them would be at liberty to chip in anytime and play any role on behalf of the client. This is not restrictive.

A perusal of the Criminal Procedure Code, Cap 54 reveals that our law is silent on the matter. The Constitution only spells out the right of an accused to be represented by counsel of his or her choosing without giving further specification. In such circumstances section 4 of the Courts Act, Cap 52 is instructive:

> The Supreme Court shall be a Superior Court of Record and, in addition to any other jurisdiction conferred by this Act or any other law, *shall have and may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England.*

Further, with regard to evidential matters section 12 of the Evidence Act, Cap 74 is relevant and I find it apposite to reproduce it:

> Except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, *the English law of evidence for the time being shall prevail.*

My attention has been drawn to paragraph [8-55] of John Frederick Archbold *Pleading, Evidence and Practice in Criminal Cases* (44th ed, Sweet & Maxwell, London, 1992) vol 1 which states that "after the witness has been sworn or has made the necessary affirmation or declaration Counsel for the party who calls him proceeds to examine him". But paragraph 514 of John Frederick Archbold *Pleading, Evidence and Practice in Criminal Cases* (39th ed, Sweet & Maxwell,

London, 1976) goes beyond and caters for a situation where examination-in-chief is done by two counsel. It reads:

> When a witness is under the examination of a junior Counsel, the leading Counsel may interpose, take the witness into his own hands, and finish the examination; but after one Counsel has brought his examination to a close, no other Counsel on the same side can put a question to the witness.

As for re-examination John Frederick Archbold *Pleading, Evidence and Practice in Criminal Cases* (44th ed, Sweet & Maxwell, London, 1992) at [8-246] states:

> If any new fact arises out of the cross-examination, *the witness may be examined as to it by the Counsel who first examined him.*

It is now clear that only the leading counsel can take over the examination of a witness at any point from a junior counsel. Although a change of counsel does not prejudice the defence in any way, the above authorities suggest that once a counsel embarks on the examination of a witness he should complete the whole testimony including the re-examination.

Accordingly, Mr Georges' objection is upheld.

Record: Criminal Side No 47 of 2008

Republic v Crispin

Penal Code - manslaughter – provocation - sentence

The convict pleaded guilty to manslaughter. The deceased was her de facto partner whom the convict claimed had a history of violence towards her and had provoked her leading up to his suffering fatal injuries. She was aged 32, unemployed and a mother of 3. In determining an appropriate sentence, the Court considered relevant cases.

Ruling: Custodial sentence of 5 years imposed.

Legislation cited
Penal Code, s 195

Cases referred to
Juliette v Republic SCA 6/2006
Republic v Accouche Cr 109/2004 (Unreported)
Republic v Finesse Cr 16/1989 (Unreported)
Republic v Labrosse Cr 41/2006 (Unreported)
Republic v Marie Cr 18/1993 (Unreported)
Republic v Quatre (1993) SLR 152

Ronny GOVINDEN for the Republic
Karen DOMINGUE for the accused

Sentence delivered on 31 March 2008 by:

GASWAGA J: Maureen Crispin has been convicted of the offence of manslaughter contrary to section 195 of the Penal Code. It will be recalled that the charge alleged that Maureen Crispin on 18 May 2007 at Bel Air, Praslin, unlawfully killed Jourdan Bristol.

The facts disclosed are that on 17 May 2007 the accused came back at 10:00 pm and found the door of her house open. Jourdan, the deceased was lying on her bed. The accused asked him to leave because the previous night they had had a fight. The deceased refused to go away. The accused returned to her mother's house to avoid further problems. At some point in time the accused saw Jourdan outside the house speaking to one of their neighbours namely Ricky. Jourdan also had a club in his hands. The accused seized that opportunity to rush into her house. She closed the door and refused to open it fearing that the deceased would assault her. Jourdan then headed for the window which only had a cloth curtain as the louver blades had been broken by the deceased himself long before. By this time the deceased had already started hitting the accused with the club. Being tired of the abuse and physical assault always inflicted upon her by the deceased, she grabbed a knife which was on the nearby table and stabbed him several times. She did not know which part of the body she had stabbed. The deceased did not cry and everything went silent. She believed that the deceased had left. It was after a while when she looked through the window that she saw Jourdan lying on the ground facing upwards. She noticed a cut on his chest that was still bleeding. She covered it with a piece of cloth. It was the next day, while under police custody, that she learnt of Jourdan's death.

The convict has saved the precious time of the Court by pleading guilty. She has showed remorse. Her previous

record shall be disregarded since it does not relate to the current offence. She regrets her actions and during mitigation she was crying in the dock.

The probation report and the address in mitigation have been of immense assistance in helping the Court to arrive at a suitable sentence. It was disclosed that the deceased who was always aggressive towards the accused had provoked her on the material day. Several reports to that effect had been filed by the accused at the police station before the incident.

I have taken into account the fact that the convict, aged 32, is unemployed and a mother of three children. She was cohabiting with the deceased, a man she says she loved so much. The Court also had the opportunity to consider all the authorities cited by defence counsel. *Republic v Claude Labrosse* Cr No 41 of 2006 (3 years), *Annette Juliette v Republic* SCA 6 of 2006 (9 years reduced to 5 years), *Republic v Marc Expedie Quatre* (1993) SLR 152 (4 years), *Republic v Yvon Rafael Marie* Cr No 18 of 1993 (8 years), *Republic v Jean Accouche* Cr No 109 of 2004 (7 years), *Republic v Daien Finesse* Cr No 16 of 1989 (5 years).

A comparison of sentences passed in similar offences by this Court and the Court of Appeal which in most cases reduced the sentences has been done. It is noted that those sentences indeed reflect the then prevailing crime situation in the country. Today the crime situation is completely different.

The victim died of stab wounds occasioned by the accused. Although she was provoked she should not have taken the law into her hands.

In those circumstances, it is opined by this Court that the most appropriate sentence would be 5 years imprisonment.

The time spent on remand is to be counted as part of this sentence.

The convict is free to appeal against the sentence.

Record: Criminal Side No 25 of 2007

Republic v Edmond

Penal Code – sexual interference – amendment of charge

The accused was charged with "sexual interference" of a 6 year old girl. After the prosecution had called all its witnesses but before it closed its case, it sought to have the charge amended to "an act of indecency". The defence objected to the amendment on the basis that there was no such offence as "sexual interference".

HELD

If the statement and particulars of an offence fairly relate to and are intended to charge a known and subsisting criminal offence but are pleaded in inaccurate, incomplete or otherwise imperfect terms, the Court must be satisfied before affirming a conviction or an indictment that the error in the pleading does not in any way prejudice or embarrass the accused. In the present case, there is prima facie evidence of an act of indecency as particularised in the amended charge that is sought to be filed.

Ruling: Amended charge accepted. Objection overruled.

Legislation cited
Penal Code, s 135

Cases referred to
Hibonne v R (1976) SLR 44
Jules v R SCA 11/2005, LC 286
R v Camille (1972) SLR 35

Foreign cases noted
Ayres v R [1984] AC 447
R v Teong Sun Chuah (1991) Crim L Rev 463

Joel CAMILLE for the Republic
Alexia AMESBURY for the accused

Ruling delivered on 28 September 2008 by:

PERERA CJ: The accused was charged with the following offence -

> Count 1
> Statement of Offence
> *Sexual Interference* with a child contrary to section 135(1) of the Penal Code as amended by Act No 15 of 1996 and punishable under the same.
>
> Particulars of the Offence
> Simon Pierre Edmond of Bel-Ombre, Mahe, on 17 March 2004, at Roche Caiman, Mahe, *sexually assaulted* one A, a girl of 6 years of age by inserting his finger in the said A's vagina.

At the stage when the prosecution had called witnesses but not formally closed its case, counsel for the porosecution sought to amend the charge to read as follows -

> Count 1
> Statement of Offence
> *An act of indecency* towards a child under the age of 15 years contrary to section 135(1) of the Penal Code (amended by Act 15 of 1996) and punishable under the same section.
>
> Particulars of the Offence
> Simon Pierre Edmond of Bel-Ombre, Mahe, on 17 March 2004 at Roche Caiman, Mahe, *committed an act of indecency* towards A, a girl under the age of 15 years, by inserting his finger

in the said A's vagina.

Mrs Amesbury, counsel for the accused, objected to the amendment on the ground that on the authority of *June Evans Jules v R* (SCA 11 of 2005) there was no offence called "sexual interference" in our law, save that it is only a marginal note for the offence of "an act of indecency" under section 135(1) of the Penal Code. She further submitted that the prosecution evidence was that the accused "sexually assaulted" the complainant as particularized in the charge. She therefore contended that in the proposed charge, it is alleged that the accused committed "an act of indecency" towards the said complainant. Mrs Amesbury submitted that if the amendment is allowed, the Court should order that the prosecution recalls the witnesses to support the charge, as otherwise, the accused would be prejudiced and consequently there would be injustice.

Mr Camille, counsel for the prosecution, submitted that the amendment became necessary in view of the pronouncement by the Court of Appeal in the case of *Jules* (supra) that there is no offence of "sexual interference" as known to law, and that all the amendment seeks to do is to formalize the charge under section 135(1). He further submitted that the substance of the charge has not changed, and consequently the accused will not be prejudiced.

In the case of *Jules* (supra), the accused was unrepresented. In the statement of the offence, the offence was stated as "sexual interference" and the penal provision as section 135(1). The Court to Appeal agreed that the particulars of the offence on the two counts in that case were clearly given. That meant that the accused understood the charges against him. The Court also approved the views of Lord Bridge in the case of *Ayres v R* [1984] AC 447 that –

if the statement and particulars of offence can

> be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant.

Although, the Court of Appeal could have dismissed the appeal for those reasons, the Justices of Appeal took into consideration the fact that the accused had been unrepresented and in those circumstances, the trial Judge (Alleear CJ, as he then was) had observed the defect, but proceeded with the trial without amending it. In those circumstances, the Court of Appeal thought it fit to refer the case back to this Court for the purpose of amending the charge in conformity with section 135(1) and for the accused to plead to the amended charge before proceeding with a trial de novo. The accused in that case was charged on two counts of committing an act of indecency and committing sexual intercourse on his own daughter. The trial de novo is still pending.

In the present case, the accused is being represented by counsel from the date of commencement of the trial. Moreover, the evidence of the complainant, an 8 year old girl, was that the accused put his hand inside her vagina and also put his penis. The mother of the child testified that she saw blood and scratch marks on her child's vagina. The medical officer had also noted a scratch mark there.

Hence there is prima facie evidence of an act of indecency as particularized in the amended charge sought to be filed. It cannot therefore be stated that the accused would be prejudiced and that injustice would be caused unless the

prosecution witnesses are recalled.

In the case of *Hibonne v R* (1976) SLR 44 the charge was laid under the wrong section of the Penal Code, and also the elements of the offence had not been given in the charge. The Court held that the defects did not render the charge bad in law. So also in *R v Camille* (1972) SLR 35. The accused was charged with criminal trespass contrary to section 294 that he entered upon the property in lawful possession of the complainant, and unlawfully remained there with intent to annoy the complainant. The evidence for the prosecution showed that the accused had unlawfully entered upon the property in the lawful possession of the complainant, with intent to intimidate him. The Court held that the defect in the particulars of the offence did not embarrass or prejudice the accused and had not occasioned a failure of justice.

In the case of *R v Teong Sun Chuah* (1991) Crim L Rev 463, appropriate charges were substituted for inappropriate charges at the end of the prosecution case. The Court held that no injustice was caused to the defendant as the substance of the allegation remained unchanged.

In the present case, the position would be the same. The decision of the Court of Appeal in the case of *Jules* (supra) is not inconsistent with the principles set out in the above cases. However it must be distinguished, as a trial de novo was ordered in view of the peculiar circumstances of that case.

Accordingly, the objection is overruled. The amended charge is accepted. However the accused should plead to the amended charge before the trial proceeds.

Record: Criminal Side No 38 of 2004

Republic v Norah

Penal Code - grievous bodily harm - sentence

The convict stabbed his de facto partner following a dispute over access to the couple's child. He was found guilty of grievous bodily harm and acquitted of attempted murder. The Court considered sentencing in past cases and found there was no uniform pattern. The Court then considered the circumstances in which the offence was committed and the severity of the injury.

Ruling: Sentence of 5 years imprisonment and fine of R 15,000.

Legislation cited
Criminal Procedure Code, s 151

Cases referred to
Aglae v R Crim App 15/1997
R v Anna Crim Side 8/2004 (Unreported)
R v Hoareau Crim Side 100/2004 (Unreported)
R v Lesperance Crim Side 52/2006 (Unreported)
Rene v R Crim App 28/1988

Ronny GOVINDEN for the Republic
John RENAUD for the accused

Appeal by the appellant was withdrawn on 4 August 2008 in CA 1 of 2008

Sentence delivered on 3 March 2008 by:

PERERA ACJ: The convict was originally charged with two counts, (1) for attempted murder (2) for committing an act intended to cause grievous harm. For the reasons stated in the judgment dated 20 December 2007, the Court acquitted the convict on the charge of attempted murder, and convicted him for the offence under Count 2.

The stab injury caused by the convict was so serious that it caused permanent damage to the kidney of the complainant necessitating its removal.

Counsel for the convict in pleading for mitigation relied on the probation report dated 13 February 2008. On that basis he pleaded for leniency.

I have considered the comprehensive report furnished by the probation officer. The convict has stated that the immediate cause for the incident was the refusal of his concubine, the victim, to have access to the child. He now shows remorse for his hasty action. The victim on the other hand has stated that the injury has caused a negative impact on her physical and emotional state. She has still not overcome the trauma, and has recently stopped working. She is also undergoing costly treatment to regain her health.

In the case of *R v Franke Lesperance* (Crim Side 52 of 2006), the accused was similarly charged under two counts, (1) attempted murder (2) committing an act intended to cause grievous harm. In the course of the trial, the prosecution withdrew Count 1, and thereupon the accused pleaded guilty to Count 2. In that case, the victim suffered two stab wounds, one on the left shoulder and the other in the middle of the back over the spine. The convict was sentenced to a term of 3 years imprisonment and the payment of a fine of R 15,000. Considering other previous cases; in *Roger Aglae v R* (Crim

Appeal No 15 of 1997), a sentence of 4 years imprisonment was imposed for causing unlawful wounding by stabbing penetrating the lungs of the victim. In *Gaetan Rene v R* Crim 28 of 1988, three accused were sentenced to terms of 7 years imprisonment each for causing grievous harm by cutting the penis of the victim circumferentially.

In *R v Joseph Anna* (Crim Side 8 of 2004), the accused was sentenced to 10 years imprisonment for stabbing the victim with a knife causing a 10 cm penetrative wound which caused active bleeding in the thorax and air escaping from the wound. However in *R v Louis Hoareau* (Crim Side 100 of 2004), where a brutal attack was made by the accused on the victim leaving the victim in a pool of blood to die, a sentence of 4 years was imposed.

On a consideration of these previous sentencing patterns, it is not possible to identify any uniformity. However considering the circumstances in which the present accused stabbed the victim, and the severity of the injury, I impose a sentence of 5 years imprisonment, and in addition a fine of R 15,000. Pursuant to section 151(1)(b) of the Criminal Procedure Code, out of the said fine of R 15,000, a sum of R 10,000 shall be paid to the victim Suzette Estro as compensation. In default of payment of the fine, the convict will serve a further period of six months as default sentence. Time spent on remand will count towards the sentence of 5 years imprisonment.

The accused will have a right of appeal to the Court of Appeal within 30 days from today.

Record: Criminal Side No 6 of 2007

In Re: Central Stores Development Ltd v Commissioner Of Taxes

Income tax – sale of assets – accessible income – evidence and information

The appellant owned a commercial building. It converted some of the floors into condominiums. Over a period of 3 years, it sold the units off to third parties. Throughout this period, it declared in its tax returns the profits from those sales as non-taxable. These returns were accepted. However the respondent then reopened the previous assessments. Following an investigation of the appellant's business activities, it was determined that the profit on the sale of the units was assessable income. The appellant disputed the re-assessments.

HELD

1. The judicial meaning of 'evidence' is different from 'information' which may be relied upon by public authorities. All judicial 'evidence' results from 'information'. However not all 'information' is admissible as 'evidence';

2. Statutory authorities when carrying out investigations receive and accept information from different sources as they are acting under a duty to do so. They must compile documents or records containing that information whatever the source or nature or the manner or means in which it was obtained;

3. In relation to any actions or transactions that affect or are likely to affect tax liability,

a taxpayer may make voluntary disclosure by giving a full and true disclosure of all material facts expressing their intentions and purposes explicitly in clear terms. However constructive disclosure may be achieved by inferring the intentions and purposes of any action or transaction from the circumstantial facts and information which the Commissioner may possess or obtain through an investigation;

4. Under the Business Tax Act, assessable income has an inclusive meaning which may cover all profits or income or gains except those specifically exempted by the statute; and

5. An asset which was not originally acquired for a profit-making purpose may be realised even though actions or transactions were carried out systematically and in a business-like way to obtain the greatest sum of money possible. Those proceeds would not be profit or income for the purposes of tax liability. However if the asset is used in an act of carrying on a business such as redevelopment for speculation, then it will be subject to tax liability.

Judgment: Appeal dismissed.

Legislation cited
Business Tax Act, ss 7, 9, 21, 22, 93, 97, 104, 105, 106, 108, 110
Companies Act, s 122
Condominium Property Act

Immovable Property (Transfer Restriction) Act

Foreign cases noted
AL Hamblin Equipment Pty Ltd v FC of Taxes (1974) 159 CLR 131
Austin Distributors Pty Ltd v FC of Taxes (1964) 13 ATD 429
California Copper Syndicate (Limited and Reduced) v Harris (1904) 5 TC 159
Commissioner v Glenshaw Glass Co (1955) 348 US 426
FC of Taxes v McClelland (1969) 118 CLR 353
FC of Taxes v Whitfords Beach Pty Ltd (1982) 150 CLR 355
Kuruma, son of Kaniu v R [1955] AC 197
R v Sang [1980] AC 402

Philippe BOULLE for the appellant
Fiona LAPORTE for the respondent

Judgment delivered on 27 June 2008 by:

KARUNAKARAN J: This is an appeal preferred under section 106 of the Business Tax Act - hereinafter referred to as the "Act" - against the decision of the Commissioner of Taxes - hereinafter referred to as the "respondent" - on the amended assessment of business tax payable by the appellant, namely, "Central Stores Development Ltd" for the tax years 2000, 2001 and 2002, hereinafter collectively referred to as the "relevant years".

The appellant, Central Stores Development Ltd - hereinafter referred to as the "CSD" - is a company that was incorporated in Seychelles in 1972. During the years 1972-76 the company acquired a plot of land Parcel V815 in the heart of Victoria and constructed a multi-storey building thereon consisting of several office and shop units, known as "Victoria House". In fact the land on which the "Victoria House" now stands, was previously owned by one "Messrs Jwan Jetha and Company". On 26 December 1972, the CSD purchased this land from the

previous owners for one hundred and fifty thousand pounds sterling and then it constructed the building thereon. Although the original objective of CSD is unknown, since its incorporation it has been engaged only in the business activity of generating rental income by leasing/renting out various units in the building to different tenants and incidentally maintaining the building and providing lease-related services to its tenants. Undisputedly, this has been the main activity of CSD for more than a quarter of a century, up to 1998. The ownership and control of the "CSD" was until 1998, in the hands of non-resident shareholders. Indeed in 1976 one Fidelity Holdings SA (Societe Anonyme) owned 714 shares in CSD out of its 1000 shares on issue, which represented 71.4% of the shares in CSD. Out of the said 1000 shares on issue, 101 shares were held by another company by name, "Hyson Limited", whereas 184 shares in it were held by yet another company namely, "Frank et Compagnie".

Be that as it may, at all material times one "Remali Investments (Ply) Ltd" hereinafter referred to as "Remali Investments" was and is a company registered in Seychelles. This company's main business activity has been property development in Seychelles, including construction and selling of condominiums and generating income therefrom. One Mr Remutulah Merali was the major shareholder and director of the "Remali Investments" and his wife Mrs Merali was also a director and shareholder. In fact, in 1997 Mr Merali owned 99% of the shares in Remali Investments, which in the course of its normal trading had undertaken a number of property developments and construction of condominiums in Mahe. It had undertaken one at Roche Caiman and another development in town called "City Centre Building". Indeed, the City Centre building project was carried out through another corporate entity called "City Centre Development Ltd", in which again, the Miralis were the major shareholders and directors. Obviously, the Miralis were the promoters and natural persons behind the corporate entities "Remali

Investments" and "City Centre Development Ltd" and indisputedly, had been engaged in the business of construction and selling of condominiums and generating income therefrom.

With this background, I will now turn to the material facts that gave rise to the business tax assessments and subsequent amendments made thereto by the Commissioner of Taxes in respect of the income, which the Central Stores Development Ltd (CSD) derived from selling different units of Victoria House, during the tax years 2000 to 2003.

It is not in dispute that in 1998, the majority shareholder of CSD namely, Fidelity Holdings SA, which owned 714 shares in CSD, went into liquidation. Consequently, on 27 May 1998 Fidelity Holdings sold all its 71.4% interest therein to "Remali Investments" for US$1.3 million. Following the acquisition of the said 714 shares, "Remali Investments" controlled the major interest - a 71.4 holding - in CSD. In addition thereto, on 31 December 1998, "Remali Investments" acquired 101 shares and 184 shares in CSD from the remaining shareholders "Hyson Limited" and “Frank et Compagnie" respectively. Thus, by the end of 1998, "Remali Investments” owned a total of 999 shares in CSD out of the 1000 shares on issue taking its holding to 99.9 in CSD. Incidentally, it is also not in dispute that the 1997 annual return lodged by "Remali Investments" showed that 99% of the shares in "Remali Investments" were owned by Mr Remutulah Merali.

In August 1998, the CSD - whose majority shareholder was then "Remali Investments" - carried out major renovation work to the building “Victoria House" incurring a cost of R 1,379,518 and also in 1999 it again carried out similar work at a cost of R 62,720. On 24 March 1999, CSD appointed a land surveyor to survey and prepare plans to transform the building "Victoria House" into condominiums. Thereafter, CSD embarked on a process of subdivision and registration of the units. In fact,

four floors of the Victoria House were subdivided into 33 units. In August 1999 the CSD registered those units with the Land Registry under the Condominium Property Act. Having thus converted the building into condominiums, CSD gradually started selling the individual units to third parties. The activity of its sale of the units started in 2000 and continued up to 2003. In fact, the CSD, on 31 July 2000 sold the first unit in the building to a third party as per document no 14 in the file. In the following months and throughout 2001, 2002 and 2003, it sold all remaining units in the building to different parties. Indeed, all the units in the building were thus sold out during the period between 2000 and 2003. The CSD recorded substantial profits in its accounts on the sale of those units in each of the years 2000 to 2003. The profits, which the CSD earned from those sales, were declared as non-taxable in its tax returns lodged for the relevant tax years. The Commissioner of Taxes originally assessed the tax returns as lodged by the CSD for the tax years 2000, 2001 and 2002, with minor adjustments, which were not related to the issues involved in the instant appeal.

However, the Commissioner subsequently - in 2003 - reopened the previous assessments for the relevant years. He conducted an investigation through his officer Mr R Herbert to ascertain the business activities, which CSD had been carrying out during the previous year's namely, 2000, 2001 and 2002. In fact, the officer Mr Herbert, on 26 June 2003, interviewed the representatives of the CSD Mr R Merali in the presence of his wife Mrs Merali and one Mr Bhadresh Mehta, presumably another representative of CSD. Following that interview - vide document no 12 in the file - and the information allegedly revealed therefrom, the Commissioner amended the previous assessments. In fact, by issuing the notice of amended assessments dated 26 April, 2004 the Commissioner amended the previous assessments in respect of tax returns for the years 2000, 2001 and 2002 and included profit on the sale of the units hereinbefore mentioned as

assessable income, as well as a depreciation related adjustment therein.

Indisputedly, the CSD had, in lodging its returns from 2000 to 2002, excluded the profits on disposal of condominiums. The tax returns were indeed, assessed without the inclusion of any profit on disposal of condominiums. Thus, the assessments of the relevant years were subsequently - in 2004 - amended by the Commissioner after investigation and disclosure of certain information allegedly made by Mr Merali in the said interview.

Being dissatisfied with the said amended assessment issued by the Commissioner, for the tax years 2000, 2001, and 2002 the CSD exercised its right under section 104 of the Business Tax Act and served on the Commissioner its objections in writing to those amended assessments – vide letters dated 15 June 2004. However, the Commissioner in his considered decision - in terms of section 105 of the Act - disallowed those objections. The CSD therefore, in terms of section 106 of the Act, requested the Commissioner to treat those objections as an appeal against his decision and refer the matter to the Supreme Court for determination. The Commissioner accordingly, referred the matter to the Supreme Court with the relevant records in terms of section 106(1) of the Act and hence this appeal.

Pursuant to section 108(1) of the Act, the Commissioner filed his submission in relation to the appeal, setting out his reasons both on facts and on law in support of his decision made under section 105 of the Act. The Commissioner's contentions are in essence, as follows:

1. He had the power to amend the 2000 year tax return, because section 97(3) did not apply. A full and true disclosure was not made to the

Commissioner prior to the original assessment or the first amendment;

2. The profit on sale of the units is assessable under section 21 of the Business Tax Act;

3. Alternatively, if not assessed by section 21, the profit is assessable under section 22(1)(g); and

4. If the profit is assessed under section 22(1)(g) the Commissioner is not prevented from making an assessment under section 48(2).

On the other side, the appellant through its counsel Mr Boulle filed a written defence of objection dated 20 June 2005 under section 108(2) of the Act, in response to the submission filed by the Commissioner. This defence of objection inter alia reads thus:

1. Defence to respondent's 1st contention namely that "He had the power to amend the 2000 year tax return because section 97 (3) did not apply as a full and true disclosure was not made to the Commissioner prior to the original assessment in the first amendment".

In his reasons for the above contention the Commissioner rests his case on a single fact stated in paragraph 17 of his reasons namely that:

> However, the purpose of Remali Investments in acquiring the shares in Central Stores was eventually disclosed to the Commissioner on the 26 June 2003 vide Document 12 in file and it is that information which set in train the process towards amending the 2000 year tax return a

second time.

According to the appellant, the above reason is flawed on 2 grounds founded in law and on facts.

On the point of law, the appellant contends that document 12, the record of interview, is an inadmissible document to prove any of the facts stated therein for the reason that it was prepared by an employee of the respondent and is therefore -

(1) Hearsay as an employee related the facts to the Commissioner;

(2) Hearsay upon hearsay due to the fact that the interviewer got the answers of Mr Merali from his wife as admitted by Mr Herbert when he states in his record of the interview that "his wife was able to pass on questions and answers to me";

(3) Self-serving;

(4) Not signed by any of the parties present, except the interviewer; and

(5) It was abuse of power and unethical for Mr Herbert to interview someone who was under, as he put it, "a disability, perhaps Parkinson's disease or similar" and to assume that "he understood our discussion", in the light of which it is inadmissible as evidence until proof is placed before the Court that the state of mind of Mr Merali was such that he was capable of responding to an

interview.

Furthermore, it is the contention of the appellant that the Commissioner in exercising his power to review the assessment did not bother to find out the nature or extent of the illness of Mr Merali which was a most crucial factor in determining the true nature of the intention of Mr Merali, which it was his duty to search for.

On the facts, the appellant contends as follows:

(A) REGARDING THE ALLEGED DISCLOSURE IN THE INTERVIEW

1. The record of the interview relating to the intention of Remali Investments in acquiring the building, where it is stated that “They said yes” renders the Commissioner’s statement at paragraph 17 of his reasons that “the purpose of Remali Investments in acquiring the shares in Central Stores was eventually disclosed to the Commissioner on 26 June 2003”, totally incorrect as the interviewer had not attributed the answer to Mr. Merali or any representative of Remali Investments, such that the reliance of the Commissioner on that report is completely unreasonable and irrational.

2. Faced with the report of the interviewer - Document 12 - who interviewed a sick disabled man, which contained statements such as "they answered yes” on the one hand and a letter from Mr Remutulah Merali dated 2nd July 2003 rectifying the records of the interview agreed to by the Commissioner in manuscript on the said letter and by a subsequent letter dated 9 July 2003 it is irrational to argue in terms of paragraph 17 that "the purpose of Remali Investments in acquiring the shares in Central

Stores was eventually disclosed to the Commissioner on 26 June 2003.

3. The credibility of the entire report is also put in serious doubt when it stated that "I asked if Victoria House was the only assets of Central Store? They said yes", in the light of the fact that at the date of the interview Central Stores Development owned another property in Victoria registered Parcel No v 5409 acquired in August 2002 which it is leasing to tenants, which leads to either one or more of the following conclusions:

   (a) the interviewer's report is not correct or credible

   (b) Mr Merali was not capable of dealing with an interview due to his illness

   (c) The interviewer could not properly understand the answers given by Mr Merali.

4. The company's records show original shareholders of the Central Stores Development and the date the shares were transferred to Remali's Investment as follows:

   Fidelity Holdings - Luxemburg - 714 shares - 27th May 1998 Frank et Comp - Switzerland - 184 shares -31st - December 1998 Hyson Ltd - Jersey - 102 shares - 31st December 1998.

Under the provisions of section 122 of the Companies Act if a company intends to dispose of a major part of its fixed assets, a resolution of shareholders is required. It is therefore impossible to conceive that a person would invest US$ 1.3 M in the Seychelles for selling condominiums at a future date

with the uncertainties of:

(i) Getting the other shareholders to agree to the proposal to sell Victoria House without infringing minority rights;

(ii) Being successful in buying out minorities to proceed with the scheme; and

(iii) That there would be enough Seychellois buyers for the condominium as non-Seychellois buyers would be subject to the Immovable Property (Transfer Restriction) Act.

The evident truth of the matter according to the appellant, is that after acquisition of the shares, Mr Merali's health was deteriorating and along with the fact that his other projects such as Capital City required additional finance led him to believe that the time had come for him to rearrange his financial affairs, which he proceeded to do by realizing all his investments in the following manner:

(i) sell Victoria House to finance the completion of another building in Victoria, namely Capital City, and it was envisaged that the most expeditious way to do so was to divide Victoria House into condominium units to be sold individually, which proved to be a viable commercial strategy;

(ii) sell Capital City which he had to do even before its completion due to further deterioration of his health, which like Victoria House he had never intended to sell but did so due to changed circumstances;

(iii) place all his other assets on the market, some of which has been sold, while others including a third building in Victoria are still up for sale.

(A) REGARDING FULL AND TRUE DISCLOSURE OF ALL MATERIAL FACTS NECESSARY FOR ASSESMENT UNDER SECTION 97(3) OF THE BUSINESS TAX ACT

The Commissioner has based his right to re-open previously assessed taxation on the grounds that:

> (Para 3)- The tax return and attached documents did not disclose sufficient information to allow a determination by the Commissioner whether the disposals were done to make a profit or were the mere realization of some assets.
>
> (Para 5)- The determining factor on full and true disclosure as per *Austin Distributors Pty Ltd v FC of T (1964) 13 ATD 429 runs thus:*
>
> > If advice had been sought by the tax payer whether or not the sum in question was ...taxable . . . would the person from whom advice was sought require more information than this return disclosed to the Commissioner?

According to the appellant the year 2000 assessment has to be looked at in the context of events which took place during the following timeframe:

> 28 September 2000: Date return lodged
> 5 December 2001: Date 1st Assessment, disallowing bad debts

14 December 2001: Objection to Assessment, for bad debts disallowed

13 March 2002: Request, for variation of 2002 taxation, mentioning disposal of condominiums

14 March 2002: Agreement to variation

14 March 2002: Letter from Commissioner having reviewed CSD file

15 March 2002: Agreement to CSD's objection

27 May 2002: Amended Assessment

6 August 2002: Review seeking income and details of depreciation on disposal of fixed assets, confirming that the Commissioner had agreed to disposal of condominiums as disposal of depreciated assets.

26 April 2004: Amended assessment on ground that full and true disclosure was not made.

With the first return, which was in full compliance with section 88 of the Business Tax Act and the Fourth Schedule to the said Act, the various documents submitted included the following:

(A) Schedule L4 enclosed showing subdivision of Victoria House in 33 condominiums of which 22 were sold at a profit of R 14,525,202. It should be noted that the 22 condominiums were purchased by only two entities. At no time did the company advertise to the public to sell individual condominiums, contrary to the Commissioner's allegation that the conversion

of Victoria House to condominium amounts to converting its asset to a corresponding trading stock.

(B) The sales of condominiums disclosed in the statutory accounts are highlighted as follows:

(i) Director Report Activities
During the year the company subdivided the "Victoria House" and sold 48.9% of the floor area as condominiums.
Results
Profit on disposal of condominiums has resulted in a profit of R 14,525,202 net of tax.

(ii) Profit and Loss account
As exceptional items "profit on disposal of Condominiums net of taxation"- R 14,525,202.

(iii) Note 3 of the accounts
"Exceptional item arises from disposal of 48.9 of "Victoria House" as condominiums as computed as follows".

(C) Taxation schedule ZF2 showed profit on sale of 22 condominiums of R 14,525,202 as exempt income out of a total profit for the year of R 15, 076, 962.

Hence, it is the contention of the appellant that full and true disclosure was made on the nature of disposal of condominiums, which the taxpayer believed to be exempt income by virtue of the fact that there is no capital gains tax in Seychelles.

Based on information provided to the Commissioner of Taxes, by making the assessments of 5 December 2001 and 27 May 2002 according to the appellant, the Commissioner was satisfied that he did not require additional information over

and above that which had been submitted to him. Partial disposal of a building as condominiums is not a routine event in the Seychelles, and hence, the Commissioner, when raising the assessments of 5 December 2002 and 27 May 2003, obviously concurred with the view that such sales should be treated as disposal of depreciated property.

The appellant further submitted that the above view is confirmed by the letter of the Commissioner of 6 August 2002. Under the heading "Depreciation- Balancing charges", the letter confirms that "we have observed depreciation has been claimed in full on all assets despite the sale of certain condominiums".

In all his submissions, according to the appellant, the Commissioner has not shown any credible information of significance has come to his attention since 5 December 2001 which would justify his claim that a full and true disclosure was not made by the taxpayer when submitting the return on 28 September 2001. The appellant thus contends that the evidence provided to the Court herewith proves the opposite, ie that the taxpayer went out of his way to disclose the sale of condominiums as an exceptional event.

As regards the respondent's second contention (supra) that "The profit on sale of the units is assessable under section 21 of the Business Tax Act" the appellant submitted in defence thus:

> The Commissioner states at paragraph 17 page 11 that –
>
> It is acknowledged that after the significance of his intention was explained to Mr Merali, he sought to withdraw that statement by letter dated 2 July 2003. However, the Court will observe that the actions of Central Stores from 1998

> through to 2003 are consistent with the Commissioner's understanding of his (Mr Merali's) (mine) intentions in 1998. That is, to subdivide and sell the property.

According to the appellant, once again the Commissioner relies on the intentions of the taxpayer in order to fit the profits on sale within the definition of income under section 21(1) of the Business Tax Act. The appellant repeats and relies on its arguments set out in its defence to the respondent's first contention (supra) to meet the Commissioner's second contention.

The appellant argues that it is most significant to note that the Commissioner is in this instance inviting the Court to "observe that the actions of Central Stores from 1998 through 2003 are consistent with the Commissioner's understanding of his (Mr Merali's) (mine) intentions in 1998", which actions were all disclosed to the Commissioner in the accounts and tax returns. Therefore, the appellant contends that the Commissioner is admitting in no uncertain terms that there was true and full disclosure of all the material facts necessary for his assessment under section 97(3) of the Business Tax Act.

As regards the respondent's third contention that "Alternatively, if not assessed by section 21, the profit is assessable under section 21(1)(g)" the appellant submitted that the Commissioner's argument ignores the crucial and irresistible conclusion which can be drawn from all the surrounding facts, namely that Central Stores very simply found a clever way to dispose of its assets. In the event that Central Stores had only sold the land and building without dividing it into condominiums it would evidently likewise have made a profit and probably a larger one, in the light of which the argument that the subdivision into condominiums was a profit-making scheme as opposed to a mere disposal of

assets rests on an unrealistic proposition.

Furthermore the appellant argues that the Commissioner impliedly reveals in his arguments that there was true and full disclosure of all the material facts for his assessment when he argues at paragraph 16 and 17 at pages 13 and 14 of his submissions as follows:

> 16. If there was not plan in May 1998 when Remali Investments acquired the interest in Central Stores, it is apparent that it had become the plan for a course of action by March 1999 when a land surveyor was engaged. The time of formulation of the scheme is not crucial, it is only necessary for there to be a scheme.
>
> 17. Irrespective of the time that the plan or scheme was formulated, it is clear from the actions of Central Store that a profit making scheme was carried out. The company -
>
> - Sought the services of a surveyor in March 1999 (vide Document 13)
> - registered the subdivided units in August 1999
> - Commenced selling those units in July 2000 (vide Document 14).

In view of all the above, the appellant urged the Court to allow this appeal upholding its objections to the respondent's amended assessments for the tax years 2000, 2001 and 2003.

I meticulously perused the appellant's objections to the assessments in dispute, as well as the submission of the

respondent setting out his reasons for those assessments. I also perused the written defence of the appellant filed in the appeal proper. I gave diligent thought to the arguments advanced by both counsel on points of law as well as on the facts in issue.

Before I proceed to examine the main issues of substantive law and of facts, it is important to determine the issue, which the appellant has raised on a point of procedural law relating to the admissibility of documentary evidence. It is not in dispute that the Commissioner has used a piece of information contained in document 12 namely, the interview report dated 26 June 2003, which set in train the process towards amending the tax return a second time to make amended assessments for the relevant years. In this respect, Mr Boulle, counsel for the appellant, submitted that the interview report, which the respondent has accepted, relied and acted upon for his assessment, is inadmissible in law (as evidence) since -

(i) This document is hearsay;

(ii) it was prepared by an employee of the respondent;

(iii) self-serving;

(iv) was not signed by any of the parties present, except the interviewer; and

(v) it is an abuse of power and unethical for Mr Herbert to interview Mr Merali, who was suffering from "Parkinson's disease or similar".

In substance, the appellant contends herein that the respondent has admitted this report, in breach of the rules of

evidence relating to admissibility of documents, as well as in abuse of his powers under the Act. Moreover, according to counsel, it is unethical for the respondent's officer to interview Mr Merali, who was then suffering from "Parkinson's disease or similar" at the material time.

I deeply analysed the contention of the appellant on this point. It seems to me that counsel for the appellant is overstretching the judicial meaning of the term "evidence" used in this respect, to include "information", which the respondent had obtained from investigation for making his tax assessments. With due respect to the views of Mr Boulle, it seems to me that there is a world of difference between the concept of "judicial evidence" that is accepted and acted upon by a Court of law in the legal proceedings and the "information" that is received and acted upon by any investigative agency in furtherance of their statutory duties. Obviously, "judicial evidence" is a species, whereas "information" is the genus. Although all "judicial evidence" emanates from "information", the converse is not true as all "information" may not pass the test of admissibility rules and qualify to become "judicial evidence". Indeed, courts of law usually have to find that certain facts are proved to exist, before pronouncing on the rights, duties and liabilities of the parties, and the information which courts receive/admit in furtherance of this task, is called "judicial evidence". This may consist of testimony, hearsay, documents, things and facts. The Courts will accept/admit them as evidence, if and only if, that information passes the test of the admissibility rules. However, on the other hand, statutory authorities such as the Commissioner of Taxes, immigration officers, police officers and the like usually when carrying out investigations also accept or receive "information" from different sources as they are acting under a duty to do so. They compile documents or records containing that information. It could be a simple statement of a person, hearsay, documents, things, interview reports signed or unsigned by the parties etc. Whatever the source or nature of

such information, whatever the manner or the means in which it was obtained the fact remains that they all simply constitute "information", not "judicial evidence" by any stretch of interpretation. If such information is otherwise relevant and admissible in accordance with the rules of evidence, it will be admitted as judicial evidence regardless of the manner it was obtained vide *Kuruma, Son of Kaniu v R* [1955] AC 197, 203 per Lord Goddard CJ; *R v Sang* [1980] AC 402. This however, in criminal cases, does not affect the judges rules that a confession made by a defendant must have been obtained in the absence of oppression and of circumstances likely to render it unreliable, since the issue involved therein is one of admissibility of confession, not of the means by which the confession was obtained as such. Be that as it may.

Obviously, in order to make tax assessments, the Commissioner of Taxes in this matter, has accepted, relied and acted upon a piece of "information" contained in the document - interview report - compiled by his officer Mr Herbert, who had interviewed the taxpayer, exercising the powers of the Commissioner in terms of section 7(1) of the Act. It is evident, the Commissioner is authorized by section 93(1) of the Act to use such information, which he may have in his possession or obtain from other sources for the purpose of assessment. He is not bound to admit or accept or look for any "judicial evidence", nor to adhere to any rules as to admissibility of documentary evidence such as "hearsay rule" etc while making his tax assessment. What he needs for his assessment is simply "information", which should however, be relevant, accurate and reliable. I find therefore, the "rules of evidence" regarding admissibility of documents, and their applicability to "judicial evidence" have nothing to do with "information", which the Commissioner may have in his possession or obtain or accept from other sources for the purpose of making tax assessments against any taxpayer. This is evident from section 93(1) of the Act, which runs thus:

> From the returns, and from any other information in his possession, or from any one or more of those sources, the Commissioner shall make an assessment of the amount of the taxable income of any business, and of the tax payable thereon by the owner of the business.

As regards the issue of the alleged abuse of power by the Commissioner, I find no scintilla of evidence on record to substantiate this allegation. In fact, section 9 of the Act describes a number of circumstances from which one may infer abuse of power by an officer or any other person employed in carrying out the provisions of the Act as well as it creates statutory offences therefor. Obviously, the evidence on record does not disclose any of those circumstances. Hence, I find that the respondent did not abuse any of his statutory powers conferred on him by the Act, in conducting the interview with the taxpayer through his officer. As regards the allegation of unethical conduct, I do not find any unethical conduct on the part of the investigator Mr Herbert in interviewing Mrs and Mr Merali in exercise of powers conferred on him by the Act for the management and collection of the tax. Had Mr Merali been suffering from such sickness - why did he in the first place, agree to meet the officer for an interview, having fixed the venue, date and time by himself? His wife Mrs Merali, who had known the physical and mental condition of her husband better than anyone else at that time, never objected to the interview. She had not only been present but also has been actively participating in the interview along with another gentleman, Mr Bhadresh Mehta. Having regard to all these circumstances surrounding the interview, I find nothing unethical on the part of the officer who conducted the interview. Therefore, the appellant's argument on the alleged admissibility of documentary evidence in this respect, does not appeal to me in the least.

Having said that, I also find on a point of law that this

particular ground of objection as to admissibility of documentary evidence is not maintainable in law for the following reason. This particular issue has been raised by the appellant for the first time only in the instant appeal before this Court under section 106 of the Act. Obviously, this ground has not been stated by the appellant in its written objections served - at first instance - on the Commissioner under section 104 of the Act vide documents nos 4, 5 & 6.

In fact, the Act prevents the appellant from raising grounds in the appeal, which were not raised in the first instance before the Commissioner. Section 110 of the Act reads thus:

> On any appeal to the Supreme Court under section 106 –
>
> (a) the owner of a business shall be limited to the grounds stated in his objection served under section 104, and
> (b) the burden of proving that the assessment is excessive shall lie upon the owner of a business.

In the circumstances, I hold that the objection relating to admissibility of the interview report, raised by the appellant in the instant appeal, is not maintainable in law and liable to be dismissed in limine.

I will now turn to the main issues raised by the parties on points of substantive law and on the facts. First of all, I note that the objections of the appellant do not refer to the Commissioner's method of calculating the profits or depreciation adjustments or the amounts. The calculations and numbers used are not the subject of dispute. The following are indeed, the fundamental questions that require determination in this matter -

1. In relation to the 2000 year amended assessment, does section 97(3) prevent the Commissioner from amending the original assessment?

2. Is the profit on sale of the units assessable under section 21 of the Business Tax Act?

(Alternatively)

3. Is the profit assessable under section 22(1)(g)? and

5. Does assessment of the profit under section 22(1(g) preclude the Commissioner from also making an assessment under section 48(2) for the same transaction?

As regards question no 1, it is important, first, to peruse section 97 of the Act in its entirety so that one can understand the myriad of factual circumstances in which the Commissioner may make amendments to previous tax assessments.

From a plain reading of section 97(1)(2)(a) and (b), it is evident that in cases where the Commissioner is of the opinion that a taxpayer had not made a full and true disclosure of all material facts for the assessment in respect of any assessment year and had thus avoided payment of tax fraudulently or evasively, the Commissioner has the power to amend that particular assessment subsequently at any time. In other words, there is no timelimit in those cases preventing the Commissioner from reopening and making such amendments to the previous assessments. However, in other cases where such non-disclosure was presumably not due to fraud or evasion by the taxpayer, the Commissioner has the

power to amend that assessment only within six years from the date when the notice of the original assessment was issued. In other words, there is a statutory limitation of six years in such cases preventing the Commissioner from reopening and making such amendments beyond that limitation period. On the other hand section 97(3) stipulates that in cases where if a taxpayer had made a full and true disclosure to the Commissioner of all material facts necessary for the assessment, and if an assessment had already been made after that disclosure, then no amendment of the assessment increasing the liability of the taxpayer shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the end of the tax year in which the assessment was made.

Now, coming back to the case on hand, in relation to the 2000 year amended assessment, the Commissioner claims that he was of the opinion that the appellant had not made a full and true disclosure of all material facts necessary for that assessment and had thus avoided tax payment; he has therefore, reopened and amended that assessment. A case of such non-disclosure obviously, falls under section 97(1)(2)(b). Hence, the Commissioner in such cases, has the power to reopen and amend that assessment within six years, from the date when the notice of the original assessment was issued. On the other hand, section 97(3) obviously refers to cases of disclosure, where the taxpayer had made a full and true disclosure to the Commissioner of all material facts necessary for the assessment. In such cases, the Commissioner has no power in law to reopen and amend that assessment after the expiration of three years subject to the exceptions stated supra. Hence, it follows that if and only if the appellant had failed to make a full and true disclosure, the Commissioner is entitled to amend the 2000 year tax assessment on 26 April 2004, since that date falls well within the said six year limitation period.

Hence, the crucial question now arises as to whether the appellant had made a full and true disclosure to the Commissioner as required under section 97 (3) above, in order to prevent the Commissioner from making amendment after the expiration of three years. According to the Commissioner, the tax return and attached documents did not disclose sufficient information to allow a determination by him of whether the disposals of the individual units in the said Condominium were done to make a profit, or were the mere realization of some assets.

It is correct as submitted by the respondent that section 97(3) of the Act is identical to a corresponding former provision in the Australian Income Tax Assessment Act (1936), which has been considered by Australian courts on many occasions. While not binding our Courts in Seychelles, such cases however, provide significant guidance in interpreting our tax laws.

In the case of *Austin Distributors Pty Ltd v FC of T (*1964) 13 ATD 429 the Australian court has in fact, propounded a test for full and true disclosure in cases of this nature. This runs thus:

> If advice were to have been sought by the taxpayer whether or not the sum in question was.., taxable..., would the person from whom advice was sought have required more information than this return disclosed to the Commissioner?

In other words, if advice was to be sought from a tax agent, a lawyer, the Commissioner or indeed the Court - was there some information not disclosed which would be important in framing that advice? The Commissioner argues that there

was important information not disclosed to him. The critical information, which was not provided to the Commissioner, was the purpose of the taxpayer's actions leading up to the disposals and the purpose of those disposals. Indeed, to allow a proper decision on the assessability of the profits on disposal of property, as rightly argued by the Commissioner, it is necessary to know the purposes of the taxpayer in carrying out their actions.

In my considered view, the intentions and purposes of the taxpayer in carrying out their actions or transactions that affect or likely to affect their tax liability, may be revealed directly and openly by the taxpayer to the Commissioner by making a full and true disclosure of all material facts expressing those intentions and purposes explicitly in clear terms. This, I would call a “voluntary disclosure”. On the contrary, when there is no such “voluntary disclosure” by the taxpayer, the said intentions and purposes, may, of course be inferred from the circumstantial facts and information, which the Commissioner may possess or obtain through investigation carried out under the provisions of the Act. This, I would call a "constructive disclosure".

Now let me recount the taxpayer's actions leading up to the disposals of the condominium units in the present case and the "constructive disclosure" of the purpose of those disposals.

Obviously, in 1998 Remali Investments suddenly acquired a total of 999 shares in CSD out of the 1000 shares on issue and took over its control gaining its holding to 99.9% in CSD. Since then, the nature of its business objective and activity has drastically changed. Before the major acquisition, CSD was simply carrying on the business of leasing out the building to different tenants and lease related services. However, soon after the said acquisition, it started to convert the building into condominiums, registered the units with the

Land Registry under the provisions of the Condominium Property Act and started selling the units to others for a profit. In fact, in August 1998, the CSD - whose majority shareholder was then "Remali Investments" - carried out a major renovation work to the building “Victoria House" incurring a cost of R 1,379,518 and also in 1999 it carried out a similar work at a cost of R 62,720. On 24 March 1999, CSD appointed a land surveyor to survey and prepare plans to transform the building "Victoria House" into condominiums. Thereafter, CSD embarked on a process of subdivision and registration of the units. In fact, four floors of the Victoria House were subdivided into 33 units. In August 1999 the CSD registered those units with the Land Registry under the Condominium Property Act. Having thus converted the building into condominiums, CSD gradually started selling the individual units to third parties. The activity of its sale of the units started in 2000 and continued up to 2003. In fact, the CSD, on 31 July 2000 sold the first unit in the building to a third party as per document no 14 in the file. In the following months and throughout 2001, 2002 and 2003, it sold all remaining units in the building to different parties. Indeed, all the units in the building were thus sold out during the period between 2000 and 2003. The CSD thus recorded substantial profits in its accounts on the sale of those units in each of the years 2000 to 2003.

From the sequence of all these actions, which CSD carried out over the relevant years, the only logical inference any reasonable tribunal can draw is the fact that the intentions and purposes of CSD behind all those actions ought to have been to make profit or derive income from disposing of the units. However, the CSD, whose control had then been taken over by "Remali Investments", as I see it, never made any voluntary disclosure (vide supra) of all material facts constituting those intentions and purposes in any of its tax returns submitted for the relevant years.

As invited by the appellant I looked at the disputed assessments in the context of events, which took place during the relevant years and the documents submitted by the appellant to the Commissioner while lodging the tax returns for those years. However, I find that none of those events or documents or any content thereof reveals the intention or purpose for which CSD in 1998 changed its line of business activity of generating income from leasing out the units to the one of selling them out for a profit.

It is also relevant to note that in *AL Hamblin Equipment Pty Ltd v FC of Taxes* (1974) 159 CLR 131 it was held that for there to be a full and true disclosure of all material facts for the purposes of assessable income, the taxpayer must disclose the purpose of its actions. Stephen J stated:

> The purpose of the taxpayer at the time of acquisition is a fact and a highly material one and it is apparent from the taxpayer's returns that this fact was not disclosed. That is, in my view, fatal to the taxpayer's contention that disclosure was full and true. It is well established that the disclosure required is of the relevant facts and not of the tax consequences which they may produce and it may seem to be demanding an excessive disclosure to require a taxpayer to volunteer the nature of the purpose actuating him in acquiring assets which he subsequently sells. However where the taxation legislation fixes upon a taxpayer's purpose as decisive of liability to tax, as does section 26(a), it appears to me to be inescapable that full disclosure calls for disclosure of the relevant purpose.

Although the results of transactions involving disposal of units were disclosed in the 2000 tax return and the profits were

declared, those profits were evidently, characterized by the appellant as capital and not assessable income. These profits were therefore, excluded from the net income declared by the appellant. In effect, the sales were characterized as mere disposals of some of the assets of the company. The appellant did not address or reveal the underlying intentions, purposes and motivations of the company in its dealings with Victoria House from 1998 to 2000. In *Austin Distributors Pty Ltd v FC of T* (1964) 13 ATD 429 it was held that any disclosure which leaves the Commissioner to speculate as to some of the material facts, is not at all sufficient in order to constitute full and true disclosure. As rightly submitted by the Commissioner the intentions and purposes of a company are the intentions and pulses of those who control the company. To know the company's intentions and purposes, it is necessary to know the intentions and purposes of its management and controllers.

Obviously, the purpose of Remali Investments in taking over CSD in 1998 was not disclosed in the 2000 tax return or prior returns, nor was it disclosed in any other correspondence leading up to the original or first amendment of the 2000 year tax assessment. However, the purpose of Remali Investments in acquiring the shares in CSD was eventually disclosed to the Commissioner on 26 June 2003 (document 12) - a voluntary disclosure - and it is that information which set in train the process towards amending the 2000 year tax return a second time and so I find.

In the circumstances, I conclude that in relation to the 2000 year amended assessment, the CSD did not make a full and true disclosure of all the material facts to the Commissioner as contemplated under the Act. Hence, I find that section 97(3) (supra) does not prevent the Commissioner from amending the original assessment despite the expiration of three years from the end of the tax year in which the original assessment was made. This finding of the Court answers the question no

1 above.

Coming back the question no 2 above, it is important to note that section 21(1) of the Act reads thus:

> Subject to this Act the assessable income of a business includes the gross income derived, or deemed to be derived, from a source in Seychelles by the business, whether directly or indirectly, which is not exempt income.

It is the contention of the Commissioner that the profits on the sale of the units received by the appellant during the relevant years were assessable income under section 21 of the Business Tax Act. In order to attract section 21(1) the CSD transactions in question in my view, should satisfy three conditions namely, (1) the profits must be income (2) must have been derived from a source in Seychelles and (3) by the business activity it carried out directly or indirectly.

Obviously, the term "assessable income" is not defined in the Act. The section obviously, does not restrict the scope of this term by defining what it means; rather it broadens the scope by using the word "includes" in order to enlarge the meaning of the term. In short, it is an inclusive definition, which may cover all profits or income or gains except those specifically exempted by the statute.

Indeed, in *Commissioner v Glenshaw Glass Co* (1965) 348 US 429-30 - referring to the statute's words “income derived from any source whatever”, the US Supreme Court stated, “this language is used by the legislature to exert in this field the full measure of its taxing power”. And the Court has given a liberal construction to this broad phraseology in recognition of the intention of the legislature to tax all gains except those specifically exempted.

However, where the owner of an ordinary investment chooses to realize it and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business vide *California Copper Syndicate (Limited and Reduced) v Harris* (1904) 5 TC 159.

Therefore, in determining the application of section 21(1) the following question must be answered - was the disposal of the units by CSD merely the realization of an asset, or was it an act of carrying on or carrying out of a business?

Undisputedly, CSD acquired the land and built the building during the 1970s. It held the property for many years, several decades, all along obtaining only rental income. Although, as rightly submitted by the respondent that the company's original intentions are unknown, it is reasonable to infer that it did not originally construct the property for resale at a profit by developing condominiums. In any event, there was not even the necessary legislation in place those days – in Seychelles - to create and regulate condominium properties. Hence, to my mind, no real estate developers of those days would have even thought about such business scenario. Evidently, the property was not originally acquired for profit-making by sale of condominiums, but which has been subsequently put to that use after the major takeover by “Remali Investments” and so I find.

It is also pertinent to note here that in the case of *FC of Taxes v McCelland* (1969) 118 CLR 353, Barwick CJ while considering the taxable nature of income derived from the property acquired as an inheritance, which was clearly not originally acquired for a profit-making purpose, held:

> The realization of an inheritance even though carried out systematically and in a businesslike way to obtain the greatest sum of money it will produce, this does not make the proceeds either profit or income for the purposes of the Act. But if the inheritor ventures the inheritance as the capital of a business, for example, of land jobbing or developing, the income of that business will be taxable... according to ordinary concepts of income.

From the above, it is clear that although CSD did not originally acquire the property or construct the Victoria House for profit making by sale of its units, since 1998 it has however, changed its direction towards the business of developing condominiums and selling its units for profit. This, undoubtedly, constitutes assessable income for the purposes of the Act.

The case in point is this respect is the famous "Whitfords Beach Case" - *Federal Commissioner of Taxes v Whitfords Beach Pty Ltd* (1982) 56 ALJR 240 - the facts of which are pretty similar to that of the present case.

Whitfords Beach Pty Ltd was a company which held, for passive purposes, certain property for many years. Eventually the original shareholders sold their shares to new shareholders, who came with different intentions for the property. Their intentions were to subdivide and sell off the property for profit, which were carried out over successive years. In determining the assessability of the income, which the company derived from those sales, Gibbs CJ said:

> In the present case I gravely doubt whether the profits arising from the development, subdivision and sale of the land would have been taxable if it

> had not been for the events that occurred on 20 December 1967 (sale of all shares in the company to new shareholders). Had that not occurred, the situation would have been analogous to that of the company in *Scottish Australian Mining Co Ltd v Federal Commissioner of Taxes*. However, on 20 December 1967, the taxpayer was transformed from a company which held land... to a company whose purpose was to engage in a commercial venture with a view to profit. Counsel for the taxpayer submitted that it was not permissible to blur the distinction between the company and its shareholders. That of course is true, but in deciding whether what was done was an operation of business, it is relevant to consider the purpose with which the taxpayer acted, and, since the taxpayer is a company, the purposes of those who control it are its purposes.

In short, the takeover of Whitfords Beach by new shareholders who had the intention and ultimately carried out that intention of subdivision and sale of units was crucial in determining that there was a business of trading in property. Besides, Gibbs CJ made it clear when he stated thus:

> The purpose of those controlling the taxpayer was to engage in a business venture with a view to profit. Moreover, although the taxpayer was not formed for the purpose of selling land, after December 1967 it became a company which existed solely for the purpose of carrying out the business operation on which the new shareholders had decided to embark when they acquired their shares.

In the case of CSD, I find that the purpose of Remali

Investments in acquiring all - save one - of the shares in the company was to subdivide and sell units in the building. This is also corroborated by the information revealed in an interview between a representative of the Commissioner and the substantial shareholder of Remali Investments Mr Merali on 26 June 2003. From the time CSD was under new control, its business metamorphosed dramatically. It was transformed from a passive property owner into a company that acted with a scheme, planned to subdivide and sell the property for profit. It is evident that after the significance of his intention was explained to Mr Merali he sought to withdraw that statement by a letter dated 2 July 2003 to the respondent.

Moreover, I note that the actions of CSD from 1998 to 2003 are consistent with the Commissioner's understanding of its intentions in 1998. That is, to subdivide and sell the property. From the time Remali Investments gained control, CSD was in the business of selling units for a profit, it had no other apparent business though it did continue to collect its routine rental income during the relevant years.

In the final analysis and for the reasons hereinbefore stated, I conclude that the profit, which the appellant derived during the relevant years from sale of the units in Victoria House is assessable income under section 21 of the Business Tax Act as it satisfies all three conditions stated supra namely, (1) the profits must be "income" (2) must have been derived from a source in Seychelles and (3) by the business activity it carried on indirectly for the purpose of making profit.

Having said that, I hold that the disposal of the units by CSD was not merely the realization of an asset; it was undoubtedly, an act of carrying on or carrying out a business. Remali Investments acquired control of CSD from the outset for the purpose of resale of the Victoria House with a scheme of developing it into condominiums and this action forms part of the normal trading activities of the business, in which "Remali

Investment" had been and has been habitually engaged. Therefore, in my judgment, it is assessable income under section 21(1) of the Act as any profit on disposal of the units will be ordinary income derived from the business.

Hence, I find answer to question no 2 in the affirmative thus;

> yes, the profit on sale of the units is assessable under section 21 of the Business Tax Act.

Obviously, the answers thus far found for the first two questions have substantially and effectively disposed of this appeal. In the circumstances, I believe it is not necessary for the Court to determine the third and the fourth questions, as they stand formulated in the alternative to questions one and two.

In view of all the above, and taking all the circumstances of the case into consideration, I find no ground for disturbing the decision of the Commissioner of Taxes in this matter. His conclusion to disallow the appellant's objections to the 2000, 2001 and 2002 assessments or amended assessments cannot be faulted on any of the ground founded in law or on the facts, and I am in agreement with that conclusion. The appeal is therefore dismissed and I make no orders as to costs.

Record: Court of Appeal (Civil No 11 of 2006)

Republic v Albert

Sexual interference with child – evidence – corroboration

The accused was charged with sexual interference with a 12 year old girl. After the complainant had given her evidence, the prosecution added a second charge for sexual interference. The defence contended that both charges were null because no such offence existed on the statute books.

HELD

1. The reference to 'sexual interference' in the marginal note to section 135(1) of the Penal Code should be treated as having been inserted for convenience or ease of reference and not as part of the Act. The essence of that section is the act of indecency;

2. Indecency must be manifested by conduct at lease to the extent that 'right-minded persons' would consider indecent, without regard to any motivations the defendant may have had. If the act is considered indecent, then the uncommunicated motive of the defendant may be considered in order to characterise the conduct as indecent or decent according to that motive. Whether particular conduct can be categorised by sexual motive is a matter for the judge;

3. Sexual assault includes any intention to touch another person without that person's consent or without lawful excuse. The

touching does not necessarily have to be hostile, rude, or aggressive;

4. Section 135(1) of the Penal Code deals with offenders who commit acts of indecency against children in the same sense if the complainants were adults; and

5. Sexual offences always require corroboration by an independent testimony of some material fact tending to implicate the accused to the crime. However corroboration will only be required if the testimony of the complainant is credible. If the testimony is not and there is no other cogent evidence then the accused should be acquitted even if corroborative evidence is capable of being found.

Judgment: Accused acquitted on both counts.

Legislation cited
Interpretation and General Provisions Act, s 7
Penal Code, 135

Cases referred to
Hibonne v R (1976) SLR 47
Lespoir v R (1989) 2 SCAR 197
Mellie v R SCA 1/2005 (unreported)

Foreign cases noted
Faulknor v Talbot [1981] 3 All ER 468
R v Court [1988] 2 All ER 221
R v McVitie [1960] 2 All ER 498

David ESPARON for the Republic
Basil HOAREAU for the accused

Judgment delivered on 24 January 2008 by:

PERERA ACJ: The accused stands charged with the offence of sexual interference with a child, contrary to section 135(1) of the Penal Code. That section provides that —

> A person who commits an act of indecency towards another person who is under the age of fifteen years is guilty of an offence and liable to imprisonment for 20 years.

According to the particulars of offence, the accused, allegedly had sexual intercourse with one A, a girl of 12 years of age, at Anse Royale on 28 January 2005.

After the complainant had given evidence, the prosecution added a second charge under Count 2, based on section 135(1) but the particulars of the offence were –

> Romel Albert on 28 January 2005, at Anse Royale, Mahe, committed an act of indecency towards another person, namely A, a girl of 12 years of age, by touching the breast and the vagina of the said A.

Counsel for the accused had no objections to that addition, and consequent to that count being put to the accused, he pleaded not guilty. The trial proceeded on the basis of two counts thereafter.

In his closing submissions, however, counsel for the accused contended as a matter of law that the charge under Count 1 was a nullity on the ground that there was no offence known to law as "sexual interference". He submitted that the offence specified in section 135(1) was "an Act of indecency towards another person" and not "sexual interference" as stated in Count 1. He therefore submitted that that charge was a

nullity, and that for the same reason, Count 2 was also a nullity.

The reference to "sexual interference" in the marginal note to section 135(1), should, pursuant to section 7 of the Interpretation and General Provisions Act (Cap 103), be treated as having being inserted for convenience or reference only, and not as part of the Act.

The essence of that section is the act of indecency. The House of Lords, in the case of *R v Court* [1988] 2 All ER 221 affirmed that a sexual motive could not of itself render an assault indecent. It was held that indecency must be manifested in conduct, at least to the extent that "right-minded persons" would consider, without reference to any uncommunicated motive of the defendant, that the conduct in question might involve indecency. If it does, the uncommunicated motive of the defendant can be referred to in order to characterize the conduct as indecent or decent according to the presence of sexual motivation. "Whether particular conduct can be a candidate for sexual characterization is a matter for the Judge". In that respect, Prof Glanville Williams defined the word "indecent" as "overtly sexual". So also Lord Lane CJ in *Faulknor v Talbot* [1981] 3 All ER 468 at 471 defined "sexual assault" to include –

> any intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile, rude or aggressive as some of the cases seem to indicate.

Section 135(1) deals with offenders who sexually interfere with children under the age of 15 years, by committing acts of indecency in the sense discussed above.

In the present case, Count 1 which particularizes the offence

as sexual intercourse, could well have been based on section 130(2)(d). In the case of *Hibonne v R* (1976) SLR 47, it was contended on appeal that the charge was defective in that in the statement of offence section 291 should have read section 292, and that in the particulars of the offence mention should have been made of all the elements of the felony of breaking into a building with the intent to steal. Sauzier J following the case of *R v McVitie* [1960] 2 All ER 498 held that those defects did not make the charge bad in law, but only made it defective. He applied section 331(a) of the Criminal Procedure Code, and held that no failure of justice had been occasioned and that the accused had not been prejudiced. In the present case as well, although the statement of offence in Count 1 is defective as to form, it could not be stated that the accused was prejudiced in his defence, as the offence was clearly particularized. For similar reasons, Count 2 is also not bad in law.

The complainant, who was 12 years old at the time of the alleged incident (born 2 August 1992), and 14 years old at the time of testifying in Court on oath, was reluctant to answer questions put to her in examination-in-chief. However, making allowance for her tender age and the exposure to Court proceedings, evidence was recorded with much delay due to her remaining silent when being questioned on material particulars. She however stated that she came to the house of one B on her way home from school. Later she told her that she was going to her own home with another girl called C, a friend, to change her clothes. C drank some water and left. She saw the accused outside, so she ran inside her house and closed the door, but did not lock it. There was no one else at home at that time. The accused pushed the door, and came in. She was hiding in her room, when the accused came there and grabbed her. She asked him to release her, but he pressed her to the bed. The complainant stated that she could not remember what happened thereafter. At that stage the prosecution, with counsel for the accused not

objecting, gave the statement to the complainant to refresh her memory. Thereafter she stated that the accused touched her breasts, and her vagina. She also stated "and then he had sex with me". However, despite persistent questioning by counsel for the prosecution, the complainant did not explain what she meant by "sex". Counsel for the defence objected to further evidence on that matter and submitted that in the statement to the police, the complainant had only stated "he pulled me and he did a lot of bad things with me, and I stopped him". The complainant further testified that in April 2005, that is about four months after the alleged incident, her mother accused her of visiting one D at his house. She denied going there. In the examination-in-chief, she stated that she made a second statement to the police on 20 April 2007 stating that she did not want to proceed with the case, but now she wanted to proceed as her mother wanted it.

Questioned by Court once again as to what she meant by stating that the accused had "sex" with her, she continued to be silent, as she did when questioned by counsel for the prosecution on that matter. It was thereafter that the prosecution added Count 2.

E (Pw2) the mother of the complainant testified that one B asked her whether the complainant was sent for an errand at D's house, and she said no. She was also told that the complainant had got a letter, but when she asked her for it, she refused to give it. Thereafter she took her to the hospital for a medical examination where Dr Michel confirmed that she was sexually active. The report dated 26 April 2005 (P1) issued by Dr Michel, the gynaecologist reads thus -

> Re A – 12 years
> Patient A aged 12 years has been brought by mother for examination. Apparently she has been coming out from the house of a young men (sic).

On Examination

- no bruises
- vulva – slight whitish discharge
- hymen not intact
- old laceration marks
- Diagnosis - sexually active

Sgd. Dr. Michel
GYNAECOLOGIST

The doctor was not called to testify regarding this report.

E further testified that although others told her that the complainant was speaking to D, she herself had not seen that.

Corp Agnes Julius (Pw3) produced a statement under caution made by the accused on 4 August 2005. According to the personal details thereon, the accused was a prisons officer at the Long Island Prison. That statement was admitted in evidence without objections from the defence (P3). In that statement, the accused had stated -

> I am staying at Anse Royale with my mother Jeanne Pothin, A it could be five years since I knew her. From where she lives is not too far from my place. I know her mother very well and I used to talk with them before. A used to come to my place and sometimes my concubine made her go to the shop for her. Sometimes my concubine is there when she comes to my place and sometimes I am alone. She came to my place only when I called for her or my concubine called her. When A came to my place she helps me by holding woods for me or if am cleaning

> the water tank I gave her the pail to hold. Any help I need she gave me. I don't gave A any money but when its school term I gave her some school items. Her mother knew that she came to my place to help me. I have never taken A in my bedroom to do sexual intercourse. I have learnt that A had done sexual intercourse with a namely D who actually came to a neighbour's place namely B. Me I have never done sexual intercourse with A. I don't know why A is saying those lies against me because I have never had any problems with her and with her mother. I think A is 13 years old. Now A and her mother had stopped talking to me regarding this problem.
>
> SGN: R ALBERT

B (PW4) testified that the complainant came to her house whenever her mother E was not at home. On the material day, the complainant came from school, and left to change her clothes. Apart from that she did not know what happened. When the complainant returned, she was normal, and did not make any complaint to her. The witness further stated that the complainant and the accused were "like two friends, are like my children and while A is at my place, Romel could sometimes take her to his place, but only when his wife is around". Later she added that the complainant was taken even when the accused's wife was not at home. However one day, she saw the accused exposing himself to the complainant outside her house, when she was doing her school homework inside the house. The accused, who was wearing a pair of shorts, had lowered it exposing his "private part". She told the mother of the complainant about that incident, but she did not take any notice.

At the end of the case for the prosecution and upon being

called to present the defence, the accused elected to make a statement from the dock and to call one witness. He stated —

> I am Romel Albert, I live at Anse Royale, with my wife Jeanne Pothin. I have known A for about 5 years. She will come to my place sometimes when my wife is there, and sometimes, if ever I am alone, I need a little help, I ask her, and she comes. Her Mum was aware that she used to come, whenever I need her, or, when my wife ever needs some help, maybe to go to the shop to buy a few stuff, she will call her and she will send her to the shop. Whenever she comes to do a few chores, maybe help me doing a few stuffs in the house, I never gave her money, but when, in the beginning of the term, after Vacation, I helped her with the stationeries, bags, a few stuffs like this. So, I heard from the green pipes that she was having an affair with somebody named D.
>
> O.K, that is when her Mum decided to take her to have an examination, and was brought to the Police to give evidence on whoever took her virginity, or whatever. So, I was shocked when I found out that my name came up, after we have been, I mean, like brothers and sisters, like friends and families. What I can say is that I have never had any sexual intercourse or sexual affairs with her, and something else I would like to add, of what the lady said, I never went in her backyard or whatever, to stand nude and showing my private parts to the girl, and she said that I am not talking to her, but now can I do it, I am under a caution of R10,000 and she is a witness? One thing I can say is that, my wife, she is still in good terms with my wife, even

> though I am not talking to them. My wife goes there and exchanges some ideas. I do not know what they say, but I never go there. That is all my statement.

F (DW1) testified that he was living in the house of D's family at Anse Royale. At that time, only D was living with him there as the rest of that family had left. He lived there only for the month of April 2005. During that time, the complainant came there to inquire about D. He had not seen both of them inside the house, or talking to each other. On being cross-examined, he stated that he knew the accused. He further stated that D was an irresponsible person, and had "trouble with the Police". His parents asked him to build a wall on the property and to look after the building materials. As he was there only in April 2005, he could not testify as to whether the complainant visited D in January 2005. He further stated that D made him go to prison for 8 years, and hence he did not want to see him implicate anyone else and get away for what he has done.

As was stated by the Court of Appeal in the case of *Raymond Mellie v R* SCA No 1 of 2005 -

> …….corroboration is always required in sexual offences. However, in addition to that, corroboration, which is an independent testimony of some material fact tending to implicate the accused with the crime, will be required only if the witness herself is credible. If the contrary is the case and if there is no other cogent evidence, then the accused should be acquitted even if corroborative evidence is capable of being found.
>
> ……there are situations or cases requiring corroboration, but that the same cannot be easily

> available. In such cases, the trial Court can still convict an accused on uncorroborated evidence after warning itself. Failure to do so, an accused must be acquitted.

Analysing the evidence in the present case, the alleged incident involving the accused occurred on 28 January 2005. The complainant had not informed her mother or B about that. It was only in April 2005 after B informed the mother of the complainant about seeing her at the house of D that she was taken for a medical examination. Considering Count 1, the gravamen of the charge is that the accused sexually interfered with the complainant by having sexual intercourse with her on 28 January 2005. The medical evidence is that her hymen was not intact, and that there were "old laceration marks". There is no evidence as to whether those marks were caused by sexual intercourse or by any other act of indecency. The complainant did not explain what she meant when she stated that the accused had "sex" with her despite questions from both counsel and the Court. The closest she get was when she stated the accused touched her vagina. In these circumstances, it is unsafe to convict the accused under Count 1.

As regards Count 2, the complainant's "expressed" evidence is that the accused touched her breasts and her vagina. Some corroboration of this evidence can be found in the medical evidence that there were old laceration marks on the hymen. Corroboration is required in sexual offence cases, especially when young children are victims, due to the danger that allegations can be easily fabricated, and it becomes extremely difficult for the accused to refute. However, as a matter of law, such corroboration is not required to be corroborated where the trial Judge is satisfied, after warning himself of the danger of convicting on uncorroborated evidence, that the victim is truthful. These are all matters of fact. In the case of *Lespoir v R* (1989) 2 SCAR 197 the acceptance of the

evidence of police officers and a doctor regarding the distressed condition of the complainant soon after the incident, coupled with the findings of a knife which implicated the accused as proving corroboration, was approved by the Court of Appeal.

In the present case, the accused in his statement under caution and the statement from the dock maintained that his relationship with the complainant was purely platonic, and that he never committed any sexual act with her. He also expressed knowledge of a sexual relationship of the complainant with D. The evidence of F (DW1) also shows that the complainant had some relationship with D. The complainant herself stated that she knew him, but denied that she had anything to do with him. Although the complainant was medically examined only in April 2005 after B informed the mother of the complainant about the complainant visiting D's house, yet, who committed the act of indecency to cause the laceration on the hymen of the complainant is not conclusive. The evidence of the complainant therefore stands uncorroborated on that issue. Although the complainant was initially unresponsive to questions being put regarding the acts allegedly committed by the accused, she became emotional and vociferous when evidence emerged about D. She attempted to defend him and inculpate the accused. On the totality of the evidence the friendship between the complainant and D had existed prior to April 2005. The Court has here to consider that she made no complaint about any act of indecency done by the accused on 28 January 2005 in particular, until she was questioned by her mother in April 2005 about her friendship with D. On 20 April 2005, six days before the medical examination, she made a second statement to the police stating that she did not wish to proceed with the charge against the accused. However subsequently, her mother prevailed upon her to proceed. In these circumstances, the Court cannot attach any credibility to the evidence of the complainant. The accused must therefore

be given the benefit of the doubt.

The prosecution having failed to establish the charges against the accused under both Counts 1 and 2, the accused is acquitted.

Record: Criminal Side No 4 of 2006

Republic v Bouchereau

Misuse of drugs – cultivation – evidence

Police officers went to the home of the accused about a neighbourly dispute. The accused fled into the bushes upon their arrival. When the accused later returned, the officers were waiting there for him. They were suspicious and entered the house. Inside they found cannabis drying on a table. The accused claimed that he had found the plants growing in the bush. He showed the officers the plantation. The officers did not believe that the accused was being truthful and arrested him. The accused was charged with two counts under the Misuse of Drugs Act.

HELD

1. 'Cultivation' like 'possession' of a dangerous drug requires a mental element.

2. Evidence of some overt act to connect the accused with crime is not necessary for conviction where the circumstantial evidence points to an irresistible inference of cultivation.

Judgment: Accused convicted on one count.

Legislation cited
Misuse of Drugs Act

Cases referred to
R v Gill (1983) SLR 22

Foreign cases noted
Rampersad v R (1975) MLR 5

David ESPARON for the Republic
Basil HOAREAU for the accused

Judgment delivered on 22 September 2008 by:

PERERA CJ: The accused stands charged under two counts under the Misuse of Drugs Act. Count 1, trafficking in a controlled drug, namely 153.3 grams of cannabis, and count 2 cultivation of 85 plants of cannabis, which at the time of analysis, was 3.1 kilograms.

The case for the prosecution is that on 22 October 2007 Corp Louis Rath (PW1) together with two other officers went to the residence of the accused in connection with a complaint made against him by a neighbour that he had injured some dogs. Upon seeing the officers he ran towards the bushes. The officers went back, but returned. Once again he ran, but was caught by the officers. Thereupon while going round the house, PC Clothide saw herbal material put to dry on a table behind the house near the bathroom. The accused told them that the material did not belong to him and stated that he saw a plantation in that area which he volunteered to show them. He went there with PC Mathiot and PC Aglae. They came back with several plants suspected to be cannabis. The plants and the herbal material were kept in a locker in the office of PC Mathiot who brought them from Praslin to Mahe the following day. The exhibits were taken by him to Dr Jakaria the analyst after obtaining the necessary documentation (P4) from the Adams Unit at New Port. The witness identified the signature of P Cecile and that of Dr Jakaria on the letter (P4) and the packages which were sealed after analysis. Thereafter they were kept in the safe at the Adams Unit in the custody of Corp Lablache. The analyst certified that the 85 green plants were cannabis plants weighing 3.1 kilograms (P6). Corp Rath stated in his testimony that there were 15 seeds and buds of plants that were seized from the table behind the house. They were

taken to the analyst by him with a letter (P1). The analyst certified that the herbal material in one plastic bag with branches and leaves of green plants was cannabis, weighing 153.3. grams. They were also kept in a safe in the office of Corp Lablache.

PC Cliff Mathiot, an Officer of the SSU testified that he was directed to assist the Baie Ste Anne Police to investigate a complaint regarding someone cutting dogs. When they went, the accused ran away to the bush. He and PC Cesar ran after him. When the gun was shown, he returned to the house. Once again he tried to run but was stopped by two officers. He was under pressure as he had cut a dog's head. He told them "there is a drug plantation in the woods, if you want I can show it to you". He accompanied them to that plantation which was near a boulder. 85 plants were uprooted and seized. There was also a spade and a box with plants there.

Dr Jackaria the analyst testified regarding the procedure he followed in analysing the 85 plants and the 15 shoots and buds handed to him by PC Mathiot and PC Rath. He then produced the reports marked P3 and P6. The expertise of the analyst was not challenged by the defence. The Court is satisfied that the prosecution has established the chain of evidence in producing the exhibits from the time of seizure up to the time they were analysed and later produced in Court. The Court is also satisfied that those exhibits are cannabis as certified by the analyst.

PC Darrel Clothilde was the driver of the vehicle in which the officers went to the residence of the accused regarding the complaint of injuring dogs. He ran to the woods stating he had not done anything wrong. When he and PC Rath went to the back of the house, they saw some herbal material left to dry on a table. The accused said that he did not know what it was and who had put it there. They picked up 15 shoots. The

accused told them about the plantation and pointed to a rock. Two officers went there and brought the plants.

Corp Maryse Souffe was attached to the Drug Squad at New Port when the accused was brought there on 23 October 2007. She cautioned him around 10.35 am. After the rights were explained, he spoke about the offence for which he had been arrested and stated that he came to give a statement. The statement was recorded by her in the presence of PC Janet Thelermont and PC Terence Dixie who was also in the office.

The defence objected to the admission of that statement on the ground of oppression and non-compliance with the Judges Rules. Consequently a voire dire was held. After the prosecution adduced the evidence of Corp Souffe and UC Thelermont to establish the voluntariness of the statement, the accused also testified that the two officers who took him from the Central Police Station to the Adams Unit at New Port told him that if he gave a statement he could be released. He stated that those officers told him that twice or thrice on the way to New Port. So he believed them. He was also under pressure as his wife and the children were in Praslin. Hence when he came to the New Port Office he said “ok no problem, I would give a statement". He decided not to ask for a lawyer as the two police officers had told him that he would be released after recording the statement. He was however unable to identify those two officers except to say that "one was a bit big and dark and the other of fair colour." On being cross-examined he denied that he had decided to make a confession even before he was being taken to the New Port. He further stated that in Praslin he went with the police officers to show the plantation he had seen. As regards the statement, he stated "yes, there is nothing wrong, I just told them the truth". Questioned as to whether he wanted to tell the truth even before the police officers came, he stated "yes this was in my brain". In answer to a question by the Court

whether he asked Corp Souffe and L/C Thelermont who recorded the statement whether it was true that he would be released after making the statement, he was evasive and replied that they only asked him to come and give the statement. Questioned further whether they promised anything, once again he stated "No, I expected to be released after the statement".

By a ruling dated 25 April 2008, the Court admitted the statement as having been made voluntarily, on the ground that the accused, as a mature and intelligent person would not have made an incriminating statement merely on an alleged promise made by two police officers that he would be released. The Court also held that, even if those officers had given that assurance, he could have verified the position from Corp Souffe before making the statement. As regards the ground that the Judges Rules had not been followed, the Court, for reasons stated in that ruling held that the nature of the caution administered by Corp Souffe in no way affected the voluntary nature of the statement made by the accused.

The statement under caution is as follows -

> I am residing at Anse La Blague, Praslin, for a long period of time; my house is situated at the same place. Two weeks ago whilst walking along the forest at Anse La Blague looking for dry latanier leaves for one Jose Accouche who works with the hotels on Praslin, I came across a drug plantation at about my height which were planted on a rock. I do not know how many plants were there. I did not say anything to anyone, and that same date, I picked some branches from a plant for me to make them dry to smoke. I placed those drugs to dry on a table behind my house. So, yesterday which was on Monday 22nd of October 2007, I got a small

> problem with my neighbour namely Paolo, who is an Italian residing close to my house, and the police came to arrest me, and they saw the drugs on that table where I placed them to dry. I was arrested, and brought to Grand Anse Police Station. Whilst at the Police Station, I told the Police that I've got those branches from a drug plantation on a rock in the forest at Anse La Blague, and from there I went to show the police the drug plantation. They uprooted them, but i do not know how many plants were there altogether*. I know that it was drug because I consume it.* I know that the drugs are for Dann Rosalie, because he used to cultivate on Praslin, and me, I've cut the leaf and stole two small branches.
>
> Sgd. Alcide Bouchereau

At the end of the case for the prosecution, the Court called upon the accused to present his defence. He elected to make an unsworn statement from the dock, which is as follows -

> I was working, as I said in my statement, I found this small plantation. I was fully corporative with the Police. I have gone to the Police and made a complaint that they have to assist me at my home, I have a problem. They never cooperated with me. I have cooperated to show them this little plantation and they have destroyed it. They have gone to the forest and destroyed this plantation. That is all I wish to say. I have no witnesses to call, but honestly, this plantation was not for me.

I shall first consider the charge of cultivation under Count 2. "Cultivation" like "possession" of dangerous drugs required

some mental element. In the case of *R v Gill* (1983) SLR 22, Seaton CJ following the decision in *Rampersad v The Queen* (1975) MLR 5, held that the prosecution had "failed to establish any overt act to connect the accused with the crime" and hence acquitted the accused. However, in the Canadian case reported in the English and Empire Digest (Vol 15) para 1082, *R v Busby*, it was held that –

> Evidence of some overt act is not necessary for conviction where the circumstantial evidence points to an irresistible inference of cultivation.

In the present case, there is no evidence that the accused was tilling, manuring, watering or doing any act to connect him with the offence of cultivation. The statement of the accused in the confession that he came across a drug plantation in the forest which belonged to someone else is corroborated by the evidence for the prosecution that the accused told the police officers that there was such a plantation in the forest and volunteered to take them there. Hence there is no circumstantial evidence to implicate the accused with the offence of cultivation of cannabis plants. In those circumstances, it is unsafe to convict the accused under Count 2. Accordingly he is acquitted under Count 2.

As regards Count 1, the accused stated in his confession that he stole two small branches from the plantation in the forest and placed them on a table to dry for his consumption. The analyst, in his report (D3) stated that he analysed "one plastic bag with branches and leaves of green plants". PC Rath took "15 shoots of cannabis plants of various sizes, from 25 cms to 35 cms". In his evidence he called them "15 hearts or buds". He admitted that he referred to them as plants. When they were counted in Court, it was observed that the shoots had dried and some of them had broken in the process of handling. There were therefore 16 such shoots. Hence this evidence corroborates the accused's statement that he stole

two branches from the plantation. What was found on the table were shoots and not separate plants. They should therefore have been from those branches. The accused had therefore knowledge that what he was in possession was cannabis.

In these circumstances, the Court is satisfied that the retracted confession has been corroborated on material particulars implicating the accused with the offence charged under Count 1.

As regards the presumption of trafficking, the mere fact that the quantity is above 25 gms is insufficient. Here the burden is on the accused to rebut the presumption. In his statement from the dock he limited himself to the offence of cultivation. If the accused sought to rebut the presumption of trafficking for the offence under Count 1, he would necessarily be pleading guilty to the offence of possession.

In the statement under caution, which the Court has admitted as one having being made voluntarily, the accused has sought to rebut the presumption by stating that he knew that the herbal material was drugs because he consumed it. This statement is insufficient to rebut the presumption that he was trafficking. The quantity of cannabis he was in "possession" of was 153.3 grams, which is far in excess of the statutory limit for the presumption to operate. Hence the presumption has not been rebutted. Accordingly, the accused is convicted under Count 1 for the offence of trafficking in a controlled drug, namely 153.3 grams of cannabis.

Record: Criminal Side No 61 of 2007