DROIT DE SUPERFICIE: *COELHO* VERSUS *TAILAPATHY*

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Introduction

The droit de superficie is an immovable property right found in civil law jurisdictions stemming from the ancient civil law of the Romans[1]. At its core, it is the notion of a division - and not the dismemberment - of a real right in property[2]. This leaves behind two persons owning a real right in the land: the 'bare owner', who owns the volume below the ground, and what is called the 'superficiaire', who owns the surface and volume above the ground[3], with the latter being able to possess such a right in perpetuity[4].

In our civil code, there is no provision that specifically mentions and defines superficie. However, the principle, as in our French civil code counterpart, derives from the interpretation of the principle of accession of land found in article 553 of the Civil Code of Seychelles read with article 555 of the Civil Code. In essence, a person can rebut the presumption that what is on another person's land must belong to that person (principle of accession) by showing that the land owner gave up the right to build on that land and that the builder received that right to build upon the land and exercised it. This process gives the builder a 'droit de superficie'.

This essay seeks to look briefly at two ways of creating a droit de superficie, namely through sale and through a lease, and how this impacts upon the manner in which a droit de superficie may be cancelled or terminated. In doing so, this article will look in particular at two seminal cases concerning the termination of a droit de superficie; *Coelho v Collie* (1975) SLR 78 and *Tailapathy v Berlouis* (1978 to 1982) SCAR 335.

Creation

A droit de superficie may be created in two ways: through title or through prescription[5]. The creation of a droit de superficie through transfer of title can be done in one of three ways: through local use, lease or concession or through a sale.

A droit de superficie is created through a lease where the lessor leases a piece of land to the lessee. At this point he, the lessor, gives up his right of accession over the plants and buildings already on the land and the lessee becomes superficiaire over them[6]. Some leases include the permission to plant or build on the land, which even if tacit rather than express, creates a droit de superficie[7].

Creating a droit de superficie is most commonly done through sale when a person is given the right to build upon another's land[8]. Through this sale two acts occur, namely:

i. the owner of the land cedes his right to build on the land to the intended superficiaire[9];
ii. the owner of the land cedes the volume above his land to the intended superficiaire[10].

This first act does not create the droit de superficie. Instead, it creates a personal right and obligation between the owner of the land and the intended superficiaire[11]. This is because the aim of the contract is to allow the owner of the land to cede his right of accession which results in the intended superficiaire being given a droit de superficie[12]. The **object** of the contract is the cessation of a right[13], the **result** of the contract is the creation of a new right. The object of the contract does not create a real right; it creates an obligation on the part of the owner of the land to give up his right to build on his land.

That is why a droit de superficie commences once the intended superficiaire begins to build upon the land[14]. The owner of the land now loses the volume over his land; the second act. This signifies that the right of volume over an area is a real right as it is only once this part has started that the intended superficiaire now actually has a droit de superficie[15].

Nonetheless, a droit de superficie will only be created and exist once both acts have occurred: the loss of the right to build and the ceding of the right to the volume[16].

Termination

The cases of *Coelho v Collie*[17] and *Tailapathy v Berlouis*[18] deal with the termination of a droit de superficie in two seemingly distinct and different manners.

Coelho v Collie

The facts of the case are these: the Defendant built on her grandmother's land claiming to have the permission of her father and uncle, who were her grandmother's proxies at the time, as her grandmother was living in Europe. It was proved at the hearing that both proxies were aware of the building and at no point did they object to its construction. When the grandmother came to visit Seychelles she sold the land to the Plaintiffs and instructed a lawyer to write to her granddaughter asking for the removal of the house. The Plaintiffs then brought a case against the Defendant to cause her to remove the house, despite having bought the land with the house already completed on it, a fact evidenced by the notarial deed of sale[19].

In his judgment, Sauzier J stated that whilst the grandmother may have known of the house being built on the land through being told by other persons, this did

not amount, in his opinion, to positive consent. This positive consent, because it sought to create legal effects, was a *fait juridique**[20]*** and so must be proved by writing[21].

Sauzier went further and explained the nature of the right that arises from such consent. He quoted from the judgment of a case which he found in a footnote which said:

"Un tel consentment ne saurai rester sans effet. Emportait-il abandon à titre gratuit de la propriété de la fraction du terrain anticipé? La cour a hésité à aller jusque-là préoccupée qu'elle était du vice de la donation, ***car aucun acte notarié n'avait été dressé****.* ***A défaut de donation de la propriété, il y avait du moins une convention d'une nature spéciale s'expliquant par les relations de bon voisinage entre les parties et qui (en la supposant régulièrement prouvée) devait être respectée****. Un propriétaire peut parfaitment renoncer au droit d'accession établie en sa faveur par les arts. 552 et 553 c.civ, et conférer ainsi au constructeur le droit de jouir du terrain tant que les constructions le couvriront.* ***C'est là une sorte de concession de droit de superficie temporaire****, de servitude qui grève le fonds* ***et dont il sera affranchi quand le constructeur voudra rebâtir ou se trouvera dans la nécessité de le faire****."*[22] [Emphasis author's.]

He went on to summarise that because the consent was tacit, and despite the fact that the Defendant obtained the verbal consent of the proxies, they themselves could not have given the Defendant permission to build as they did not have the power to do so under the general power granted to them[23].

Sauzier J quoted another judgment from a case in Nancy which states,

"De même la cour de Nancy, dans l'espèce rapportée, avait condamné le propriétaire à payer la plus-value donnée par l'ouvrage à son terrain.

*Mais son arret à été cassé, et it ne pouvait, nous semble-t-il en être autement. C'est que la thèse que nous venons d'exposer est critiquable. Elle l'est sur-tout quand l'accord du propriétaire a été simplment tacite, ce qui était le cas ici……Il est en effet de jurisprudence constant que le silence ou l'inaction du titualire d'un droit n'implique pas en règle générale renonciation à ce droit….****Pour qu'elle soit établie il faudrait au moins que d'autre circonstance (telles qu'un lien de parenté entre le constructeur et le propriétaire…"****[24]*** [Emphasis author's.]

Since the Defendant believed that the proxies could grant her such a right, and she built the house in good faith, Sauzier J found that she was a "*tiers de bonne fois"*(possessor in good faith)[25] and accordingly should the Plaintiffs wish to remove her from the land, they would have to compensate her for the value of the house[26].

From the above, it is clear that the ratio that came from Sauzier J's judgment is this: a droit de superficie terminates once the superficaire wishes to rebuild the

structure or finds himself in the position of having to do so. Tacit consent will not suffice to create a droit de superficie.

Tailapathy v Berlouis

This case appears to bring about a completely different ratio to *Coelho*. The facts of the case were that the Appellant was the owner of the house built on the Respondent's land and claimed permission from the anterior owners of the land to build it. The situation also involved the Appellant paying ground rent to the Respondent for the lease of the site where the house was built, with the lease having no termination date. The Respondent tried to terminate the lease by notice, but the Appellant did not vacate the premises and instead carried out extensive repairs and reparations to the house contrary to the wishes of the Respondent[27].

At first instance, the trial judge held that as the lease had terminated by notice from the Respondent, the Appellant now had a droit de superficie over the house which would terminate once the Appellant had to repair the house. As this had occurred, the trial judge found that the Appellant's droit de superficie was forfeited and so she [the Appellant] had placed herself in the position of building in bad faith[28].

Lalouette JA, on appeal, held that the Appellant had a droit de superficie conferred on her by the anterior owners of the land which would exist so long as the lease existed[29]. He quoted from Dalloz, Encyclopédie de Droit Civil, 2e Edition Verbo Superfice which stated,

" *36. Elles* [droits de superficie] ***résultant du mode de constitution de la superfice****. En effet, lorsque celle-ci à été établie par bail ou concession, le droit est nécesairement temporaire* ***et s'éteint à l'expiration du bail ou de la concession****.."*[30] [Emphasis author's]

He went further and explained the extent to which the droit de superficie subsisted. He quoted Aubre et Rau, stating,

*"****Lorsque le droit de superficie est intérgral, le propriétaire superficiaire jouit de tous les droit****, et peut exercer toutes les facultés qui appartiennent au propriétaire d'un fonds sur le dessus de ce fonds. Il peut donc en changer la culture ou le mode d'exploitation, construire de nouveaux bâtiments, et même démolir ceux qui existaient lors de la constitution du droit de superfice,* ***à moins cependant que ce droit n'ait été établi que d'une manière revocable"***[31][Emphasis author's]

Going on, Lalouette JA also cited another paragraph in Dalloz which reads,

*"****D'une manière génerale****, cette solution s'impose:* ***le superficiaire puise dan son droit de propriété le droit de démolir et de reconstruire****. La seule question qui demeure en suspense est celle de savoir s'il doit reconstruire à*

l'identique ou s'il est libre d'édifier des constructions differentes de celle qu'il avit primitivement realisées…"[32] [Emphasis author's]

In allowing the appeal, Lalouette JA said that as the notice sent by the Respondent was not a formal one, it did not constitute proper notice in law, and the lease still continued[33]. As the law provided that a droit de superficie only terminated upon the termination of the lease, the Appellant was still a superficiaire when she undertook the reparations. The termination of the lease, and consequently the termination of the droit de superficie, occurred only at the date of the institution of proceedings on 27 December[34]. The Respondent was held to acquire ownership of the house by accession and the Appellant would be assimilated to a "possesseur de bonne foi" (possessor in good faith)[35] after the termination of the lease.

Therefore, it is clear from Lalouette JA's judgment that a droit de superficie did not terminate upon a superficiaire wishing to repair the house or finding herself with the need to do so. Moreover, since the droit de superficie was created by a lease, it is only the termination of the lease that could terminate the droit de superficie.

***Coelho* or *Tailapathy*?**

From the two cases, we are presented with two conflicting ideas: on the one hand the idea that a droit de superficie terminates when repairs need to be done (*Coelho*), and on the other the idea that the termination of a droit de superficie depends entirely upon its manner of construction and that the need to repair the structure does not terminate the right if it occurs prior to the termination of the lease (*Tailapathy*).

However, upon a closer examination of the extracts quoted by Sauzier J in *Coelho*, an argument can be made that the two cases, although they appear to contrasting, can be said to have some sort of cohesion. They both speak of a droit de superficie, but they speak of different **types** of droit de superficie.

Coelho clearly speaks of the implication and scope of tacit consent. Sauzier J categorically states that because the positive consent required from the owner of the land is intended to create legal relations, such consent must be proved in writing[36].

The quote above shows that the court hesitated to give title "***car aucun acte notarié n'avait été dressé*[37]**" which translates to "because no notarial act had been made." This means that the consent being referred to in the case quoted by Sauzier J was not a positive consent; it was a tacit consent.

With this in mind, the quoted judgment goes further in explaining the effect of such tacit consent saying, "***C'est là une sorte de concession de droit de superficie temporaire*[38]**," which translates to "It is here a sort of temporary droit de superficie created by concession." This implies that this droit de superficie, which would terminate upon the superficiaire's need or wish to rebuild

or repair, is not a full or integral droit de superficie. This droit de superficie is a "sort of temporary droit de superficie"; it is a partial one.

Since it is a partial one, it is obvious that the full effects and rights which come with a full and integral droit de superficie are not included within it.

As stated in *Tailapathy* by Lalouette JA, "***Lorsque le droit de superficie est intérgral, le propriétaire superficiaire jouit de tous les droit[39]***" which translates to, "when the droit de superficie is integral, the superficiaire enjoys all the rights."

Such rights are explained further down as being, "***le superficiaire puise dan son droit de propriété le droit de démolir et de reconstruire[40]***" which translates to, "the superficiaire has within his proprietary rights, the right to demolish and to rebuild."

Consequently, an integral droit de superficie affords the holder the ability to demolish and rebuild; the right cannot end once the superficiaire wishes to repair or rebuild or finds himself with the necessity to do so.

Important to note at this point is that whilst Dalloz as cited in *Tailapathy* gives the superficiaire of an integral droit de superficie the ability to demolish and rebuild[41], Aubre et Rau qualify this vast right by saying that "***à moins cependant que ce droit n'ait été établi que d'une manière revocable,[42]***" which translates to, "provided, that is, that this right [the droit de superficie] was not established in a manner that is revocable."

From this, the only way in which a droit de superficie can be created in a way that is not revocable is through sale. A sale creating a droit de superficie must be done in writing. Therefore, the consent that is given can be proved. This positive consent, following from the argument above, creates an integral right which right does not end when the superficiaire wishes to rebuild or needs to do so.

The question that follows logically from this is where does that leave a superficiaire who has acquired his droit de superficie through revocable means, that is to say, a superficiaire who has obtained his droit de superficie through a lease or through a concession?

As stated above, a droit de superficie with a lease only ends upon the termination of that lease[43]. However, to say that merely by rebuilding or demolishing the building a superficiaire terminates his droit de superficie and in turn terminates his lease cannot make sense, unless the condition of termination of the lease is the act of rebuilding or demolishing.

Moreover, if we accept the premise that tacit consent (being consent not in writing) produces a partial right, then, since leases need to be done in writing to have effect, the absence of express consent in the lease does not necessarily imply a partial droit de superficie. The lease is in writing and so the consent,

even if not express, can be proved by writing. Since it can be proved by writing this means that the right produced cannot be partial; it must be integral. If it is integral, it cannot end upon the superficiaire's wish to rebuild or need to do so. The droit de superficie runs with the instrument that creates it: the lease. This is why the droit de superficie in *Tailapathy* only terminated upon the termination of the lease.[44]

As a result, the argument that can be put forward is this: according to Sauzier J in *Coelho*, because consent is required to be proved by writing[45], tacit consent does not give a full and integral right – it gives a partial right. This right is a temporary one which terminates when the superficiaire wishes or finds himself having to rebuild or repair the structure. The full and integral right, according to Lalouette JA in *Tailapathy,* affords the superficiaire the right to demolish and rebuild the structure[46] with the same being true even if the right is created by a lease, as the termination of the lease is the only thing capable of terminating a droit de superficie.

Does this mean, therefore, that all tacit consents, being consents that cannot be proved by writing, give rise to a partial droit de superficie that terminates only when the need to rebuild or repair arises? This author humbly submits that the answer is no.

The second extract in *Coelho* seems to suggest that the only time that such tacit consent may give rise to a partial droit de superficie is when there exist close relations between the owner of the land and the builder. This is apparent where the judgment reads, "***[p]our qu'elle soit établie*** [the droit de superficie] ***il faudrait au moins que d'autre circonstance (telles qu'un lien de parenté entre le constructeur et le propriétaire…"[47]***, which translates to "for it [the droit de superficie] to be established there would need to be at least another circumstance (such as a close lien between the builder and the owner)."

The first extract in *Coelho* also seems to suggest the same thing, where it says "***[a] défaut de donation de la propriété, il y avait du moins une convention d'une nature spéciale s'expliquant par les relations de bon voisinage entre les parties et qui (en la supposant régulièrement prouvée) devait être respectée,"[48]*** which translates to "In default of a complete donation of the property, there is at the least a convention which is of a special nature which is explained by the existence of good neighbourly relations that must be respected."

Both extracts refer to special circumstances where both parties are close and both extracts seem to suggest that this relation will be an exception to the rule that tacit consent, and on the whole silence, does not result in a person waiving their rights. This exception due to familial relations is not the first of its kind in the civil code; article 1348 provides for an exception to the rule against oral evidence for moral impossibility due to close family relations[49].

It is therefore, quite possible that tacit consent could produce a partial droit de superficie provided the right circumstances are met.

Conclusion

A droit de superficie is a complex right, the level of protection and nature of which depends entirely upon its manner of creation and the surrounding circumstances affecting the ways in which it may end.

A sale of a droit de superficie, much like any other sale of a right, means the droit de superficie as sold is perpetual and does not terminate when the superficiaire wishes to rebuild or has to do so. This is on the basis that the consent given is a positive one proved in writing. If the consent is tacit however, it is quite possible, in circumstances where both parties have close neighbourly relations, that a tacit consent may create a partial superficie which will terminate upon the superficiaire wishing to rebuild or having to do so. This exception to the rule harks back to the exception found under article 1348.

This same exception of tacit consent creating a partial droit de superficie will not apply for a droit de superficie created by lease. The consent for a droit de superficie in a lease does not have to be express and may be tacit, but as the lease may be proved by writing, the droit de superficie created is integral. The droit de superficie will terminate only upon the termination of the lease.

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[1] Encyclopedie Dalloz, Verbo Superficie, paragraph 4

[2]Ibid, paragraph 7

[3]Ibid, paragraph 1

[4]Ibid, 35

[5]Ibid, paragraph 7

[6]Ibid, paragraph 16

[7]Ibid,paragraph 17

[8] Ibid, paragraph 9

[9] Ibid

[10] Ibid

[11] Ibid, paragraph 12

[12] Ibid, paragraph 11

[13] Ibid

[14] Ibid, paragraph 14

[15] Ibid, paragraph 13

[16] Ibid, paragraph 14

[17] (1975) SLR 78

[18] (1978 to 1982) SCAR 335

[19] *Coelho v Collie* (1975) SLR page 80

[20] Ibid, page 83

[21] Ibid,

[22] Ibid, which roughly translates to "Such a consent would not be without effect. Does it mean to give up free title to the property over the fraction of land anticipated by the consent? The courts hesitated to go so far being preoccupied instead with the problem with the donation because no notarial act had been made. In default of a complete donation of the property, there is at least a convention which is of a special nature which is explained by the existence of good neighbourly relations that must be respected. An owner can renounce the right of accession established in his favour by articles 552 and 553 of the Civil Code and confer to the builder the right to enjoy the land whilst the constructions cover the land. It is here a sort of temporary droit de superficie created by concession, a servitude which attaches to the ownership of the land and which will therefore be breached when the builder wishes to rebuild of finds himself with the necessity to do so."

[23] Ibid, page 85

[24] Ibid, page 84 which roughly translates to, "Even the Court in Nancy, in the reported case, had condemned the owner to pay the increase in value of the land brought by the work on his land. But this was stopped, and it could not, it would seem to us, be otherwise. As this theory which we have exposed is subject to criticisms. Especially when the consent of the proprietor was simply tacit which was the case here. It is in effect constant jurisprudence that the silence or inaction of the holder of title to a right does not imply a general rule of renouncing that right. For it to be established it would need another circumstance (such as a close lien between the builder and the owner".

[25] Ibid, page 85

[26] Ibid, page 86

[27] (1978 to 1982) SCAR page 342

[28] Ibid, pages 342 and 343

[29] Ibid, page 344

[30] Ibid which roughly translates to, "These rights result from the manner of constituting the superfice. In fact, when this is established by lease or concession, the right is necessarily temporary and extinguishes at the expiration of the lease or concession."

[31] Ibid, page 345 which roughly translates to, "When the droit de superficie is integral, the owner of the droit de superficie enjoys all the rights and can exercise all the faculties which belong to the owner of the volume below the ground, on the surface of the land. He can therefore change the culture or manner of exploitation, the construction of new buildings and even demolish those which existed at the time of the constitution of the droit de superfice, provided that is, that this right was not created in a manner which is revocable."

[32] Ibid, page 347 which roughly translates to, "Generally, this solution presents itself: the superficiaire has within his droit de superfice the right to demolish and rebuild. The only question which remains in suspense is to know whether he has to rebuild identically or is he free to erect constructions different to that which he had done initially".

[33] Ibid, page 346

[34] Ibid, page 348

[35] Ibid

[36] See footnote 21

[37] See footnote 22

[38] Ibid

[39] See footnote 31

[40] See footnote 32

[41] Ibid

[42] See footnote 31

[43] See footnote 34

[44] Ibid

[45] See footnote 21

[46] See footnote 32

[47] See footnote 24

[48] See footnote 22

[49] *Esparon v Esparon* [1991] SLR 59.