THE
SEYCHELLES
LAW REPORTS

SUPREME COURT DECISIONS

VOLUME
2001

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

Published by Authority of the Chief Justice

JUDGES OF THE SUPREME COURT

CHIEF JUSTICE

Hon V Alleear

OTHER JUDGES

Hon AR Perera
Hon D Karunakaran
Hon N Juddoo

CITATION

These reports are cited thus:
(2001) SLR

Printed by
Imprimerie St Fidèle

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Larame v Coco D'Or (Pty) Ltd

Employer's liability to employee – safe system of work – vicarious liability for employee negligence – custody of things – contributory negligence – damages for loss of limb

The plaintiff was employed by the defendant as a carpenter to carry out renovations on a building owned by the defendant. At the plaintiff's request, the defendant bought an electric saw which had an inbuilt safety system. The plaintiff was an experienced carpenter with at least 10 years' experience with the particular type of saw that caused the injury. The injury occurred because the safety mechanism had been deactivated by the employee's supervisor. The plaintiff prepared to use me electric saw which was on the work table and asked a third employee to switch it on. The electric saw ran wildly along the table and severed the plaintiff's forearm. The plaintiff's forearm had to be amputated; the plaintiff suffered a permanent disability of 50%.

The plaintiff sued the defendant for damages under article 1384(1) of the Civil Code on the grounds of failure to provide a safe work system, and vicarious liability for employee negligence. The defence claimed the injury suffered was the sole fault of the plaintiff or at least due to the plaintiff's contributory negligence.

HELD:

(i) The defendant is vicariously liable for the negligence of the employee who in the course of their employment deactivated the safety mechanism;

(ii) A prudent user of the electric saw with 10 years' of experience with that type of equipment would have checked the safety mechanism before turning the saw on. A

failure to do that resulted in 50% contributory negligence;

(iii) The damages for personal injuries for the loss of an organ or limb will be more than for fractured limbs. The amount of damages for a loss of a limb will be greater than for the loss of an organ. Where there is only partial recovery from an injury, damages will be proportionate to the resulting disability;

(iv) In calculating loss of future earnings, no distinction is to be made between wage earners who retire at the retirement age and self-employed person who continues working beyond that age; and

(v) In quantifying damages a tortfeasor is not entitled to benefit from any social welfare payments received by the plaintiff.

Judgment for the plaintiff. Damages awarded for pain and suffering and loss of future earnings - total R198,960. Reduced by 50% for contributory negligence.

Legislation cited
Civil Code of Seychelles, art 1384(1)

Cases referred to
Daniel Adeline v Koko Cars Co (Pty) Ltd (unreported) CS 57/1995
Adolphe v Donkin (1983) SLR 125
Mark Albert v UPCS (unreported) CS 157/1993
Danny Bastienne v Aquatic Sports Ltd (unreported) CS 196/91
Rene De Commarmond v Government of Seychelles SCA 1/1986

Antoine Esparon v UCPS CS 118/1983
Hardy v Valabhji (1967) SLR 98
Hoareau v UCPS (1979) SLR 155
Pool v Inpesca Fishing Ltd (1988) SLR 115
Servina v W & C French & Co (1968) SLR 127

Danny LUCAS for the plaintiff
Antony DERJACQUES for the defendant

[Appeal by the appellant was allowed on 3 November in CA 5 of 2000.]

Judgment delivered on 29 January 2001 by:

PERERA ACJ: The plaintiff sues the defendant company in delict for personal injuries suffered in the course of his employment. Admittedly, the plaintiff was employed by the defendant company as a carpenter on a monthly salary of R3,500. The defendant company is a hotel and guest house. The plaintiff worked in the carpentry section when it was being constructed.

It is averred that on 9 October 1996, his forearm was severed by an electric saw, consequent to an employee of the company having switched off the ″safety mechanism" and another employee switching on the electrical connection. The action is therefore based on article 1384(1) of the Civil Code.

Article 1384(1) provides that –

> A person is liable not only for the damage that he has caused by his own act but also for damages caused by the act of persons for whom he is responsible or by things in his custody.

The plaintiff avers that –

(a) The defendant's employees were at fault, negligent or reckless in the usage of the said electric saw.

(b) The defendant failed to employ a safe system of work and environment for his employees including the plaintiff.

(c) The defendant was negligent or reckless in all the circumstances of the case.

(d) The defendant failed to provide the plaintiff with proper and adequate facilities to work with.

(e) The defendant failed to insure the plaintiff against such risks and perils.

(f) The defendant through his servants, agents, employees or préposés was in all circumstances of the case, negligent in the performance of their duties and responsibilities.

(g) The defendant failed to adequately, properly or in any way at all supervise, instruct or inform the employees of the dangers attached to the use or misuse of the various carpentry machines and equipment on the premises.

(h) The defendant failed to properly, adequately or at all educate, instruct and/or put notices relating to the safe usage of carpentry, machines, machinery and equipment on the premises.

The defendant denies those averments and avers that the accident occurred either due to the sole negligence of the plaintiff or at least due to his contributory negligence. It is averred that the plaintiff was the custodian of the electric saw and that he asked a fellow employee to switch on the

machine for his use without ensuring that the safety device had been activated.

The plaintiff testified that he was employed with the defendant company for only 9 days prior to the date of the accident. According to his testimony, one Mr Bamboche, another carpenter, was in charge of the electric hand saw in that section; hence he obtained his permission whenever he required its use. On the material day, Bamboche used the machine and told him that he could use it. It was placed on a bench close to where he stood. The plaintiff testified that he asked Bamboche whether the safety switch was on or off and that he replied that it was off.

He did not further check the machine, and he brought some plywood to saw. He asked another employee, one Roxy Radegonde to plug the appliance to the plug point close by. Before he could handle the saw, it was activated and the circular saw started to run wildly over the bench, came in contact with his right forearm, severing it in the process. He further stated that Bamboche came running back and told him that he had forgotten to switch on the safety mechanism.

He was taken to the hospital with the blade of the machine still stuck to his arm. It was amputated, and he was warded for eight days. Dr A Korytnicov, the Consultant Orthopedic Surgeon, in his report dated 13 February 1997 (exhibit P6) states that the amputation was below the right elbow and that the plaintiff has a permanent disability of 50%. He also recommended a prosthesis for the stump.

The plaintiff, stated that he had worked as a carpenter for 49 years and that while working at Bodco Ltd, he had used electrical machinery. He stated that although at Bodco Ltd, instructions were given as to how these machines were to be used, no such instructions were given by the defendant company.

On being cross-examined, the plaintiff stated that when he commenced work at the defendant company, there was no mechanised saw to cut the wood. He requested one and Mr Stravens, the proprietor, purchased a new saw for use in the carpentry section. He maintained that Bamboche was put in charge of that machine, and that he always got his permission to use it. He admitted that he knew how the machine worked, as he had worked with similar machines for about 10 years. He stated that he had told Bamboche to take precautions when using, as improper use was dangerous.

The plaintiff also testified that the safety switch had been covered with a masking tape, and that further the guard covering the teeth of the saw had been pulled back and tied with a piece of wire. The resulting position was therefore, that when the appliance was plugged the saw would turn immediately, and since the teeth were exposed, the circular saw would run along the table. The plaintiff stated that he did not see that the switch had been taped down from the position he was in and that he took the word of Bamboche for granted. An identical machine produced in Court showed that if the switch was pressed down and taped, the saw would rotate without any other manipulation as soon as electricity was supplied. According to the evidence, it is obvious that one would tape the switch for convenience when using the machine for a long time, although it was a potentially dangerous practice.

Roxy Radegonde, the person who plugged the machine at the request of the plaintiff testified that it was in the possession of Bamboche and that the plaintiff had to get his permission to use it. He stated that Bamboche brought the machine and left it on the table where the plaintiff was preparing to cut plywood. He further stated that he did not hear the plaintiff asking Bamboche whether the machine was in a safe position. He however testified that the guard covering the teeth of the saw had been tied up with a wire, exposing the teeth, and that the switch button had been pressed down and

tied with a string. He also testified that the plaintiff took the machine from Bamboche and put in on the table where he was working, but was unable to say whether he could have seen the switch pressed down when he asked him to put the plug on.

Mr John Stravens, the proprietor of the defendant hotel and the employer of the plaintiff testified that he purchased the electric saw at the request of the plaintiff. He stated that that machine had its own safety devices and hence he could not be held liable for any injury caused as a result of the negligence of anyone using it. He further stated that the carpentry work involved was connected with the extension of hotel rooms and that the work is now complete. He however stated that Bamboche worked in the maintenance staff till recently. He maintained that there was nothing more he could have done as employer to prevent the accident.

Liability

The liability of an employer for the damages sustained by his servant in the course of employment has been considered in several cases by this Court. Some them are – *Hardy v Valabhji* (1967) SLR 98*, Servina v W & C French & Co* (1968) SLR 127, *Hoareau v UCPS* (1979) SLR 155, and *Adolphe v Donkin* (1983) SLR 125. These cases were decided on the French law principle that it was the duty of the employer to ensure that the work in which his employee is engaged should be safe and that failure on his part to do so constitutes "fault" and that he is responsible for any damages resulting therefrom which the employee may sustain.

According to the evidence in the case, the employer, supplied the electric saw, which had an inbuilt safety system. The teeth of the saw, when not in operation, closed automatically. On the basis of the evidence I accept that Bamboche, his employee, had tied it with a wire as he was using it for a long time. That was an interference with the safety system. Further the machine, after use, has to be placed on a "safety

position" by the application of a particular switch. That too was either taped down or tied. Hence both safety devices had been interfered with. Had at least the guard to the teeth of the saw been in place, the saw would not have run along the table and severed the plaintiff's hand. The plaintiff testified that he did not handle the machine at any stage, and that he did not see that the guard nor the safety switch been tied or taped. He stated that he relied on the word of Bamboche that the machine was in a safe position to use. However Radegonde testified that the plaintiff took the machine to the table he was working on, and that he did not hear him asking Bamboche whether the machine was in a "safety position". The Plaintiff testified that he had experience working with similar machines and was aware of its dangerous nature. He was in these circumstances, not acting as a prudent man, if, as he claimed, he relied solely on an assurance given by a co-worker.

Article 1384(1) holds a person liable for damages caused to a third party by the act of a person for whom he is responsible or to someone by things in his control.

In the *UCPS* case (supra) the plaintiff, a qualified blaster, was employed by the defendant in its quarry. While testing holes charged with explosives, he was seriously injured consequent to a misfiring in one of the holes. The device used by him to test the holes was to his own knowledge dangerous. He had not been instructed by the defendant to use that device. The plaintiff sued the defendant for damages alleging negligence on the part of the defendant, that it failed to provide him with proper instruments for blasting, or that they were inadequate or defective, and that it did not provide a safe system of work.

It was held that the safe system was the use of an Ohmmeter. The defendant company had one, but it was out of order. Instead, torch battery and bulb were used to explode the detonator. But that had to be done from a position away from the rock face. The plaintiff had however stood directly over the rock face, and hence the battery had generated too strong a

current which set off the detonator. It was in those circumstances held that although the explosives were in the custody of the defendant, there was direct intervention of man, and consequently article 1384(1) did not apply. The defendant was therefore found not to be liable in damages.

Another case, based on "custody of things" was *Pool* v *Inpesca Fishing Ltd* (1988) SLR 115**.** In that case the plaintiff was a crew member on board a fishing trawler. While the net was being cast mechanically, the snatch block of the winch broke and the heavy metal wire swept with great force across the deck and threw the plaintiff on his back. He suffered serious injuries. It was held that the winch was in the custody of the defendant company and that, as the accident occurred due to a defect in the winch, the defendant was liable under article 1384(1) of the Civil Code. However in that case there was evidence that thep Plaintiff had done an imprudent act by moving from a safe area with the intention of pushing the net overboard manually, and consequently he was 33 1/3 % contributorily negligent.

In the instant case, the electric saw had an inbuilt safety system which had been interfered with by an employee of the defendant company. Hence although the plaintiff himself was an employee of the defendant company, he was a third party in the accident.

In the case of *Danny Bastienne v Aquatic Sports Ltd* (CS 196/91) cited in L.E.Venchard QC *The Law of Seychelles Through the Cases* at page 499, the plaintiff was an employee of the defendant company. He was engaged in the operation of towing a yacht ashore on a trailer, together with other fellow employees. This operation involved the loading of the yacht onto a two wheeled trailer and hooking the trailer to a rope which was anchored to a pulley fixed to a tree on the shore, and the end of the rope tied to a jeep. The jeep pulled only when an employee on the beach shouted and gave a hand signal after the plaintiff who was fixing the rope

to the hook on the trailer was ready. But on the day of the accident the intermediary "hand signaler" gave the driver of the jeep the signal prematurely and he pulled before the plaintiff had fixed the hook. The rope got entangled to his right foot and dragged him on the beach injuring his right ankle. As trial judge in that case, I found the defendant company vicariously liable under article 1384(1) for the negligence of its employee.

In the instant case, the evidence of the plaintiff and his witness, Roxy Radegonde, that Bamboche had interfered with the safety mechanism of the machine, making it potentially dangerous to any user, remains uncontradicted. Hence the defendant company is vicariously liable for the negligence of Bamboche who was working in the course of his employment. However the plaintiff must bear part of the responsibility for the accident. He admitted that he had experience working with such machines and that he had himself warned Bamboche about the potential danger if misused. In these circumstances, he ought to have acted prudently and checked the safety mechanism before asking his assistant to plug on the machine. He was therefore contributorily negligent. I assess the extent of such contribution at 50 %.

Damages

Under the head of "pain and suffering", the plaintiff claims R190,000. *Kemp and Kemp on the Quantum of Damages* defines "pain" as "the physical pain caused by or consequent upon an injury", and "suffering" as the mental element of anxiety, fear, embarrassment and the like to which the injury might have given rise in the particular plaintiff. This includes the aspect of any disfigurement. Undoubtedly, the plaintiff would have suffered excruciating pain consequent to the injury. Dr Alexander, the Consultant Orthopedic Surgeon testified that the plaintiff's right forearm was already severed on admission to hospital. The bleeding was arrested by suturing. He assessed the permanent disability of the right

hand at 50%. He further stated that the harm caused to the plaintiff was both anatomical and psychological, and that psychological harm would persist for the rest of his life. Dr Alexander further testified that he recommended the use of a prosthesis for the stump so that he may have some ability to hold things better, and for cosmetic reasons, but that the Medical Board had not approved that recommendation. He also stated that even if he had the use of a prosthesis, the degree of disability would not change.

The Plaintiff was warded in hospital for a period of 8 days. He stated that throughout his life he had been a professional carpenter, but he could no longer work in that capacity. He also stated that he could not perform many routine tasks he had done previously. On the basis of the medical evidence, all these disabilities are due to the 50 % disability of the right hand. Apart from the anatomical harm, the plaintiff also suffers permanent psychological harm. Although society treats the disabled with sympathy and understanding, any disabled person suffers embarrassment and anxiety. These are relevant considerations in the assessment of damages in the instant case.

On a review of cases in respect of personal injuries, the tendency of the courts appears to be that when the claim is for a loss of an organ or a limb, there is a substantial award for such loss. On the other hand, in claims for fractured legs or arms from which a claimant recovers completely, “pain and suffering” is a main element in damages. Here too if there is only partial recovery, leaving a permanent disability, compensation is considered in proportion to the extent of such disability.

In the case of *Rene De Commarmond v The Government of Seychelles* (SCA 1/1986), where the claim was for the loss of an eye, the Court of Appeal reduced an award of this Court for loss of vision, disability and loss of amenities of life to R60,000 and only R5,000 was awarded for pain and suffering.

In *Mark Albert v UCPS* (CS 157/1993), where the claim was also for the loss of an eye. I awarded R135,000 for permanent disability and loss of amenities of life, and R10,000 for pain and suffering. The aggregate sum of R145,000 under these two heads was reduced by the Court of Appeal to R105,000. Ten years before the *Mark Albert* case, (supra) in the case of *Antoine Esparon v UCPS,* (CS 118/83), the plaintiff, who was working on a stone crushing machine, suffered injury to his arm. He suffered a total disability for heavy work and a 50% disability for light work. Although the plaintiff's action was dismissed on the ground that the accident occurred due to his sole negligence, Wood J assessed the damages for the purposes of an appeal. He stated that had the plaintiff been successful, he would have awarded R50,000 for pain, suffering, anxiety, distress and the total loss of use of the right arm.

Hence the quantum of damages for the loss of an organ or limb increased from R50,000 in 1983 to R65,000 in 1986 and to R105,000 in 1993. The instant case comes eight years after the *Mark Albert* case.

In that case the Court of Appeal affirmed the consideration of inflationary tendencies over a period of eight years between the *De Commarmond* case and that case, but reduced R40,000 from the award of R145,000 made by the Court. There is no mathematical formula for increasing comparable awards made by this Court when there is no such evidence in the case. However, comparatively, the loss of a limb is a greater handicap than the loss of an organ like an eye. Hence on a consideration of the disability of the plaintiff in the instant case, and the comparable awards made by this Court I would award an aggregate sum of R125,000 under subheads (a) and (b) of paragraph 5 of the plaint.

Under subhead (c), the plaintiff claims R118,400 as loss of future earnings at R3,500 per month for 2 years. According to exhibit P3, the plaintiff was born on 3 July 1937. Hence he

was 59 years and 3 months old at the time of the accident on 9 October 1996. He had therefore four years to reach the statutory retirement age of 63 years. The plaintiff however testified that he was a strong and robust person, and hence had it not been for the accident he could have worked as a carpenter well beyond the age of 63 years. In the case of *Daniel Adeline v Koko Cars Co (Pty) Ltd)* (CS 57/1995) I expressed the view that in calculating loss of future earnings, no distinction can be made between wage earners who retire at the age of 63 years and self-employed persons who may work beyond that age. Accordingly, on the basis of the "salary advice" (exhibit P1) the plaintiff's net salary was R3040 for November 1996. The claim in the plaint is however only for 2 years. Hence the plaintiff would be entitled to R72,960.

The plaintiff also claims R64,000 as loss of earnings for 20 months from the date of accident to the filing of the plaint at the rate of R3200 per month. However the plaintiff admitted that the defendant company paid the full salary for October and November 1996 although he had worked for only eight days in October when the accident occurred. He further stated that he is receiving social security payments ranging from R800 to R1000 since December 1996. The Court of Appeal in the *Mark Albert* case (supra) held that a tortfeasor is not entitled to benefit from any payment received by a plaintiff under the Social Security Fund. Hence the payments being received by the plaintiff from that fund are disregarded. However no award is made under this head as the award under subhead (c) has been made on a cumulative basis.

The plaintiff further claims R1000 paid for the medical report and R5400 as medical expenses. The claim for the medical report is substantiated by a receipt dated 5 March 1997 (exhibit P2), and is accordingly allowed in full. As regards hospital expenses, the plaintiff admitted that the treatment was free and that no special charges were levied from him for any medication. Hence no award is made under that sub

head.
Accordingly, the total award is as follows-

1.	Pain and suffering, disfigurement and permanent disability	-	R125,000
2.	Loss of future earnings	-	R 72,960
3.	Medical report	-	R 1,000
			R198, 960

However on the basis of the 50% contributory negligence, the plaintiff is awarded half the total award.

Judgment is accordingly entered in favour of the plaintiff in a sum of R99,480, together with interest and costs.

Record: Civil Side No 172 of 1998

Lesperance Estate Company Limited v Intour SKL

Writ habere facias possessionem – equity – lease of land by foreign company

The applicant owned land with a hotel on it that was managed by a third party. The respondent was a foreign company with a 49% share-holding in the applicant company. In 1994 it was agreed that the applicant would lease the management of the hotel to the respondent for 20 years, the lease to be executed when approval was received under the Immovable Property (Transfer Restriction) Act. Pursuant to the agreement the respondent took possession of the hotel and contracted management to a third part with the applicant's consent. In 1997 the management contract was terminated by the respondent and a Supreme Court order obtained to eject the management company from the premises. The 1994 agreement between the parties contained an arbitration clause.

The applicant disputed the right of the respondent in the hotel and sought an order for the respondent to vacate the hotel and the land. The respondent sought dismissal of the application on the ground that he had a bona fide and serious defence which could only be tried in court.

HELD:

The general principles governing the writ of habere facias possessionem are:

(i) The court in granting relief... acts as a court of equity and exercises its equitable powers in terms of section 6 of the Courts Act (Cap 52);

(ii) Those who come for equity should come with clean hands. There should not be

any other legal remedy available to the applicant who seeks this equitable remedy;

(iii) This remedy is available to the applicant whose need is of an urgent nature and where any delay in the remedy would cause irreparable loss and hardship to him;

(iv) The court should be satisfied that the respondent on the other hand has no bona fide and serious defence to make; and

(vi) If the remedy sought is to eject a respondent occupying the property merely on the benevolence of the applicant then that respondent should not have any right or title over the property.

Judgment for the respondent. Application dismissed.

Legislation cited
Courts Act Cap 52, s 6
Immovable Property (Transfer Restriction) Act

Francis CHANG SAM for the petitioner
Pesi PARDIWALLA for the respondent

[Appeal by the Appellant was dismissed on 8 August 2001 in CA 10/2001.]

Ruling delivered on 30 March 2001 by:

KARUNAKARAN, J On the application for a writ habere facias possessionem:

This is an application for a writ habere facias possessionem. The applicant herein seeks this writ against the respondent, its agents, officers, workmen, employees and licensees to leave forthwith and vacate the hotel "Emerald Cove" and any other part of the applicant's property. The applicant is a company incorporated in Seychelles. The respondent is an overseas company holding 49% of the issued share capital of the applicant-company. One Paolo Chionni, a resident of Glacis, Mahe is representing the respondent company in Seychelles. He is also a director of the applicant company.

Admittedly, the applicant is the owner of an immovable property of approximately 50 hectares of land situated at Anse Lafarine, Praslin. There is a hotel situated on the said property known as "Emerald Cove Hotel", the premises of which cover an extent of approximately 10 hectares of the said land. It is not in dispute that the respondent has been in possession and control of the premises of the said hotel since 1994. At all material times the said hotel was managed by a third entity, a management company known as "Emerald Cove Limited." Be that as it may, the applicant in its affidavit has averred that the respondent, without the authority and consent of the applicant has unlawfully taken over the control and possession of the hotel. Moreover the respondent, without authority, instituted legal proceedings in the Supreme Court of Seychelles in CS 220/1998 against the said management company Emerald Cove Limited for eviction. According to the applicant, the respondent in that proceeding. purporting to be the lessee of the said hotel, obtained a writ of habere facias possessionem to eject the said management company from the premises. The applicant further contended that the respondent in fact had no right whatsoever in or over the hotel. The respondent is therefore in unlawful possession and occupation of the hotel. It is neither a lessee nor the manager of the hotel and it had never been one at any point in time. In fact, by virtue of the provisions of the Immovable Property (Transfer Restriction) Act, the respondent, being a foreign company, requires government sanction to take any

immovable property on lease. Since the respondent has never obtained that sanction, the applicant contends that it cannot take the property on lease. Although, the applicant and respondent have entered into a number of agreements under exhibits 1, 2, 4 and 5 in respect of various transactions between them, according to the applicant none of those agreements conferred any lease or management of the hotel in favour of the respondent. As regards the arbitration clause found in exhibit 4, the applicant submits that it is not relevant to the case on hand. The instant dispute between the parties does not relate to any lease or management of the hotel and so it is not subject to that agreement or arbitration clause. In the circumstances, the applicant alleges that the respondent is now illegally occupying the property, Emerald Cove Hotel, and hence seeks from this Court a writ ordering the respondent to quit, leave and vacate the said property.

On the other side, the respondent in essence claims that it is in lawful possession and occupation of the property in question and so a writ of habere facias possessionem will not lie in this case. In addition, the case of the respondent is that the facts and circumstances of this particular case do not fall within the parameters of the principles that govern the writs of this nature for the following reasons.

According to the respondent, it has invested more than R41 million towards the construction of the said hotel on the property. The various payments made by the respondent to the applicant in this respect are evidenced by documents in exhibits 1 to 5. By an agreement dated 10 February 1994, the applicant undertook to grant a lease or assign the management of the hotel to the respondent for a period of 20 years. It was the term of the agreement that a registerable lease conveying the leasehold interest in the property and hotel would be executed upon sanction being obtained by the respondent under the Immovable Property (Transfer Restriction) Act. The respondent accordingly made the application for necessary sanction with the support and

consent of the applicant as seen in exhibit 6. In pursuance of the agreement the respondent assumed and remained in possession of the hotel since 1994 and entrusted the management of the hotel to the management company, Emerald Cove Limited with the consent of the applicant. Later the respondent, in pursuance of the company resolution passed by the applicant in 1997 under exhibit 9, terminated the management contract with Emerald Cove Limited. It obtained the said writ from the Supreme Court in CS 220/1998 to eject the said management company. Moreover, the respondent avers that any dispute between the parties as to lease or management of the hotel should have been referred to arbitration in terms of the agreement - exhibit 4 - between the parties. However, in breach of the said terms of the agreement the course which the applicant has now taken in seeking a writ of this nature is malicious and ill-founded. Thus, counsel for the respondent contends that the respondent has, at the very least, a bona fide and serious defence to this application which can only be tried in a regular suit before the competent court of law. Hence, the respondent seeks dismissal of this application.

As I have observed in similar cases in the past, the general principles governing the writs of habere facias possessionem are well settled by case law in our jurisprudence. It may appear monotonous to some of us but I nevertheless have to repeat and restate the principles as they are and as they should be. These principles need to be fine-tuned from time to time and from precedent to precedent to meet the changing needs of time and to suit the judicial opinion of the day. To my understanding the following are the cardinal principles normally considered and applied by the courts in cases of writs of this nature:

1. The court in granting the relief herein acts as a court of equity and exercises its equitable powers in terms of section 6 of the Courts Act (Cap 52).

2. Those who come for equity should come with clean hands. There should not be any other legal remedy available to the applicant who seeks this equitable remedy.

3. This remedy is available to the applicant whose need is of an urgent nature and where any delay in the remedy would cause irreparable loss and hardship to him.

4. The court should be satisfied that the respondent on the other hand has no bona fide and serious defence to make.

5. If the remedy sought is to eject a respondent occupying the property merely on the benevolence of the applicant then that respondent should not have any right or title over the property.

Applying the above principles to the instant case I carefully analysed the evidence adduced by the parties in this matter.

As regards the applicant's allegation of unlawful possession of the hotel premises by the respondent, I find on evidence that such an allegation is baseless and ill-founded. The untested averments of the applicant made in the affidavit in this respect are untrue and incorrect, to say the least and so I find. The documentary evidence in exhibits 1 to 10 produced by the respondent clearly show that the respondent obtained possession of the premises with the knowledge, consent and authority of the applicant. Admittedly, the respondent has been in possession of the premises since 1994. Even if one assumes for a moment that the allegation made by the applicant as to unlawful possession by the respondent and the urgent requirement of the premises are true and correct, I do not understand what then has been preventing the

applicant for the past seven years from seeking a legal remedy to repossess its property. Evidently, the respondent has invested over R41 million in the applicant's property and the applicant has undertaken as per exhibit 4 to grant a lease or assign the management of the hotel to the respondent for a period of 20 years. In the circumstances and by virtue of various agreements that exist between the parties, it appears to me that the respondent has a lawful interest in the property and has the right to retain possession of the hotel unless and until the Court declares otherwise. Therefore, I believe, an issue of this complex nature can be and should be determined only on the basis and merits of evidence adduced in a regular civil action.

In any event, I find that the applicant's alleged claim and need for repossession is not genuine and the case is not of urgent nature as portrayed by the applicant in this matter. Undoubtedly there are other legal remedies available to the applicant to resolve the connected legal issues and obtain repossession of the property from the respondent by instituting a regular civil action in this matter.

As regards the issue of reference to arbitration, it appears to me that the interpretation given by Mr Pardiwalla to the term "dispute" used under the arbitration clause in exhibit 4 is a debatable one. This issue can be determined only in a regular suit before a competent court of law. Indeed, a court of equity is not bound to accept mechanically that all deposed in the affidavit is true and correct. Before the Court relies and acts upon those affidavits it must be satisfied of its probative value: the veracity and accuracy of the facts stated in the affidavits. In this case, I attach no accuracy or correctness to the facts averred by the applicant in his affidavit. Consequently, I hold the respondent has a bona fide and serious defence to make in this matter. In my judgment, the claim made by the respondent in his counter-affidavit appears to be tenable in law and on facts. On the face of the affidavit, simple justice demands that the respondents should not be

condemned without giving him an opportunity to present his defence in full canvassing all legal issues in a proper civil action.

In my final analysis therefore, I find the respondent obviously, has a bona fide and serious defence to make in this matter. Therefore, the application is liable to be dismissed. I do so accordingly awarding costs in favour of the respondent.

Record: Civil Side No 184 of 2000

Marie v Attorney-General

Unlawful arrest and detention – nature of arrest – failure to inform of constitutional rights

The plaintiff was having a dispute about an access road. The police attended the scene. The plaintiff was asked by the officers to accompany them to the police station, where the plaintiff was placed in a cell then was released a short time later. No charges were laid against the plaintiff. The plaintiff was at no stage informed of his constitutional rights.

The plaintiff claimed damages for unlawful arrest and detention. The respondent claimed that the plaintiff was not under arrest and was detained because of aggressive behaviour.

HELD:

(i) An arrest may occur without any procedural formality. Where a person is detained or restrained by a police officer and has knowledge of that detention or restraint that amounts to an arrest even though no formal words may have been spoken by the officer. Whenever a person is deprived of their liberty of movement they are under arrest;

(ii) An arrest and detention must have a lawful justification. Further an arrest and detention is unlawful if the arrested or detained person is not informed of their constitutional rights; and

(iii) The quantum of damages for an unlawful arrest depends on the length of incarceration.

Judgment for the plaintiff. Damages awarded for loss of personality rights – R15,000.

Legislation cited
Constitution of Seychelles, art 18(10)
Civil Code of Seychelles, art 1149(2)

Cases referred to
Gerard Canaya v Government of Seychelles (unreported) Civil Side 42/1999.
Paul Evenor v Government of Seychelles (unreported) Civil Side 357/1998
Noella Lajoie v Government of Seychelles (unreported) Constitutional Case 1/1999

Foreign cases cited with approval
Holgate-Mohammed v Duke [1984] 1 All ER 1054
Murray v Ministry of Defence [1988] LRC (Const) 519
Namasivayam v Gunawardena (1989) 1 Sri LR 394

Frank ALLY for the plaintiff
Ronny GOVINDEN for the defendant

Judgment delivered on 12 November 2001 by:

PERERA J: This is a delictual claim based on an alleged unlawful arrest and detention by police officers who were acting in their capacity as préposés of the Government of Seychelles. The plaintiff avers that on 27 June 1998, consequent to a dispute he had with a neighbour concerning an access road, police officers stationed at the Anse Royale Police Station questioned him and arrested and detained him in a cell at the police station. He further avers that his constitutional rights were not explained to him at the time of arrest or soon thereafter. He also avers that after he was released, no charges have been filed against him to date.

The defendants aver that the plaintiff was arrested as he was

aggressive and prevented the police officers from exercising their duty to keep the peace, and that he was kept in detention only for one hour. The evidence in the case discloses that the plaintiff was taken to the Anse Royale Police Station by police officers on the orders of ASP James Savy, the Regional Commander of South Mahé. PC Barney Bristol, one of the officers who brought the plaintiff to the police station testified that he was ordered by ASP Savy to bring him if he refused to remove the obstructions on the access road. He stated that the plaintiff refused to remove the obstruction, and hence he was brought to the station where ASP Savy ordered him to place the plaintiff in a cell. He was in the cell for about one hour. He stated that when the plaintiff was brought to the station, he was neither angry nor aggressive.

L/Corp Gracia Bethew, another police officer who brought the plaintiff to the police station on the material day, testified that at the police station the plaintiff maintained that the land belonged to him. However ASP Savy ordered PC Bristol to search him and place him in a cell. She too stated that the plaintiff was in a cell for only about one hour. On being cross-examined, she stated that the plaintiff did not behave in a manner which warranted detention in a cell.

ASP Savy however testified that the plaintiff was locked up in a cell as he was aggressive, and that he was released after he became calm.

At the close of the case, counsel for the State submitted that liability has been established by the plaintiff, but to a limited degree. He submitted that on the basis of the plaintiff's own testimony, he was escorted to the police station. The plaintiff testified that he was taken to the police station when he was preparing to go to church around 4 pm that day.

An "arrest" can occur without any procedural formality. In *Holgate-Mohammed v Duke* [1984] 1 All ER 1056 Lord Diplock took the view that where a person is detained or

restrained by a police officer, and he knows that he is being detained or restrained, that amounts to an arrest of him even though no formal words of arrest were spoken by the Officer. Lord Griffith in further clarifying this concept in the case of *Murray v Ministry of Defence* [1988] LRC (Const) 519 stated

> It should be noted the arrest is a continuing act, it starts with the arrester taking a person into his custody (by action or words restraining him from moving anywhere beyond the arrester's control) and it continues until the person so arrested is either released from custody or having been brought before a Magistrate, is remanded in custody by the Magistrate's Judicial Act.

In a Sri Lankan Case similar to the present case, *Namasivayam v Gunawardena* (1989) 1 Sri LR 394, a person was arrested when he was travelling in a bus. The police officer admitted the incident but stated that he did not arrest that person but only required him to accompany him to the police station for questioning, and released him after recording a statement. The Supreme Court held that when the police officer required him to accompany him to the police station, that person was, in law, arrested, as he was prevented by that action from proceeding on his journey in the bus. Hence whenever a person is deprived of his liberty of movement, he is under arrest.

In the present case, when the plaintiff was asked by the police officers to accompany them to the police station, the arrest commenced. According to ASP Savy, the plaintiff was kept in the cell from 4.17 pm to 4.50 pm.

On the basis that the arrest commenced around 4 pm and the detention ended around 5 pm on the same day, the plaintiff's right to liberty was affected for about one hour.

However I find that there was no lawful justification for such arrest and detention of the plaintiff in the circumstances of the

case. Further, LC Bethew testified that the plaintiff was not informed of his constitutional rights. The State concedes that this makes the arrest and detention unlawful.
Article 18(10) of the Constitution provides that –

> A person who has been unlawfully arrested or detained has a right to receive compensation from the person who unlawfully arrested or detained that person or from any other person or authority including the State, on whose behalf or in the course of whose employment the unlawful arrest or detention was made or from both of them.

In the case of *Gerard Canaya v. The Government of Seychelles* (unreported) CS 42/1999 this Court, inter alia, awarded R5000 for an unlawful arrest and detention for 18 hours. An award of R5000 was made by the Constitutional Court in *Noella Lajoie v Government of Seychelles* (unreported) Constitutional Case 1/1999*)* in similar circumstances.

In the case of *Paul Evenor v Government of Seychelles* (CS 357/1998) I awarded a sum of R20,000 as moral damages for fear and emotional stress while in detention at the Grand Police Army Camp, and for loss of civil rights of personality. In the present case however there is no evidence that the plaintiff was in any state of fear or emotional stress during his short incarceration. However I would accept that he suffered some loss of rights of personality as envisaged in article 1149 (2) of the Civil Code. Hence on a consideration of all the circumstances of this case, I award a sum of R15,000 to the plaintiff.

Judgment is accordingly entered in favour of the plaintiff in a sum of R15,000 together with interest and costs.

Record: Civil Side No 424 of 1998

Marguerite v Roberts

Quantum – loss of earning capacity – multiplier-multiplicand method

The defendant was driving a motor vehicle and collided with a wall and gate. The gate hit the plaintiff injuring both his legs. The plaintiff was left with partial mobility and could not continue with his employment or sporting activities.

The plaintiff claimed damages for personal injury from the defendant under article 1383(2) of the Civil Code. The defendant admitted liability but disputed the amount of damages claimed. The plaintiff refused proper diagnosis by arthroscopy.

HELD:

(i) A failure to agree to proper medical diagnosis is a failure to mitigate damages;

(ii) Where an injured person can continue to use their pre-injured skill though not as before the injury, the multiplier-multiplicand method of the assessment of future earnings is not appropriate; and

(iii) Assessment of damages for respective loss of earning capacity is to be based on prejudice that is certain.

Judgment for the plaintiff. Damages of R82,750 awarded.

Legislation cited
Civil Code of Seychelles, art 1383(2)

Cases referred to
Harry Confiance v Allied Builders (unreported) CS 226/1997
Simon Maillot v Louise (unreported) CS 177/1990
Danny Mousbe v Jimmy Elizabeth (unreported) SCA 14/1993
SACOS v Gustave Fontaine (unreported) SCA 41/1997
Karl Seraphine v Gilbert Sultan (unreported) CS 214/1998
Simon v Kilindo (unreported) CS 225/1992
UCPS v Mark Albert (unreported) SCA 19/1994

Phillippe BOULLE for the plaintiff
Kieran SHAH for the defendant

Judgment delivered on 11 June 2001 by:

PERERA J: The plaintiff claims damages from the defendant in respect of personal injuries suffered by him. He avers that on 5 July 1998 the defendant, while driving motor vehicle S3736 collided with a wall and a gate at Belonie, and that the said gate hit him injuring both his legs. The action is based on article 1383(2) of the Civil Code. The defendant admits liability, but contests the quantum of damages claimed in the plaint.

According to the medical report dated 1 April 1999 issued by Dr Alexander, the Senior Consultant Surgeon, the plaintiff suffered the following injuries.

1. Comminuted fracture of the shaft right femur in proximal third.

2. Haemarthrosis of the right knee.

An operation was performed the same day and intramedullary nailing of the right femur was done. He was discharged from hospital on 28 August 1998. On 5 January 1999 he was still complaining of pain in the right knee and had a slight swelling. He was walking with a support. On 20 April 1999, he still had pain in the right knee. An x-ray examination of the right femur

showed a moderate unity of the right femur. He was advised to undergo an arthroscopy of the right knee, but the plaintiff disagreed. However physiotherapy was continued.

Dr Alexander in his testimony stated "haemathrosis" meant "blood inside the knee". This caused swelling and tenderness of the knee with restriction of movement. He stated that the actual effect could only have been diagnosed if an arthroscopy was done. As regards the intramedullary nailing of the right femur, he stated that it was a process involving the insertion of a nail in the shaft of the femur. He further testified that the plaintiff was bed-ridden for about a month. Explaining the persistent pain, he stated that it could be the result of the fracture, and that such pain can radiate even up to the hip. He further testified that the nail has not been removed as yet, and that although it could be there lifelong, and that some patients become psychologically affected and avoid certain activities. As a future prognosis, Dr Alexander stated that he may have slight pain when walking a long distance, but he should not lift weights.

As regards injury to the left knee averred in the plaint, Dr Alexander stated that there was only an abrasion, and that there is now a residual scar.

The plaintiff in his testimony stated that he was 29 years old at the time of the accident. He has no wife nor children. He was a welder at Laxmanbhai & Co Ltd, and did mainly roof work. He had worked for 6½ years then, and was receiving a monthly salary of R2650 plus overtime payment. He also did part time work in a garage and received R1000 per month. He stated that his employer paid him up to July 1998.

As regards his sports activities, he stated that he played football for the English River team that took part in league tournaments. He is now unable to play any football. He is also unemployed and received social security payments.
He however stated that he may be able to do a sedentary job.

Referring to the advice given by Dr Alexander to do an arthroscopy, he stated that the advantages and disadvantages were not explained to him, and hence he could not take a chance. He said that the thought that he may not get well completely was depressing.

Ms Wyda Payet the physiotherapist testified that the plaintiff had a muscle wastage of .025 on the right leg compared with the left. There is therefore consequent weakness of the quadriceps and hamstrings, and a slight limp. That limp could be due to the restriction of movement caused by the nailing of the femur shaft. Physiotherapy was done up to September 1998, and he was advised to do simple exercises at home and also hydro-therapy in a swimming pool. Although earlier he had to walk with the aid of crutches, he could now walk unaided.

Guy Albert, the former manager of the English River Football Club stated that the plaintiff played in the defence position. He described him as a very fit and able player in the team. He further stated that after the accident, they were unable to find a suitable player to play in that position and consequently the team fared badly in the league matches.

Chrysante Morel, a panel beater by profession stated that the plaintiff was his foster son. He testified that during weekends he helped him with welding work in the garage and received about R1000 per month.

Vijay Pandya, the Financial Controller at Laxmanbhai & Co Ltd testified that the plaintiff, who worked as a welder ceased to work in July 1998 consequent to the accident. He produced a statement indicating the overtime drawn by the plaintiff three months before the accident and the bonus he received for the past 4 years (exhibit P5).

Another witness for the plaintiff Fabien Valmont, a Clearing Agent, stated that the plaintiff cleaned his land on some weekends. He also assisted the contractor who built a retaining wall. He paid him R100 – R150 per day for such work.

Counsel for the defendant, who called no evidence, submitted that the claim was exaggerated. He also submitted that according to medical evidence, the plaintiff, at best would have some weakness on the right leg. He concluded that the plaintiff may not have been able to walk properly for about a year and that in any event is unable to play football. He also submitted that his present condition may have been further improved had he agreed to an arthroscopy. He invited the Court to consider that the plaintiff has no permanent disability and that he could have done the same job in a reduced capacity, or some other job and mitigated the damages.

Counsel for the plaintiff however contended that the submission that the condition of the plaintiff's injury may have improved had he agreed to an arthroscopy was speculative, as there was also the possibility that further complications may have arisen consequent to such surgical intervention.

On a consideration of the medical evidence in the case it is clear that the plaintiff is not incapacitated to a degree that he cannot engage in a gainful occupation. He should be able to work in his occupation as a welder, although it is not possible to climb roofs of buildings. In any event he should be able to do sedentary work. He is 30 years old now, and is a strong and robust person.

Whether the present pain in the right knee the Plaintiff complains of could have been cured had he agreed to a proper diagnosis by an Arthroscopy, is a moot point. In the case of *Karl Seraphine v Gilbert Sultan* (unreported) CS 214/1998 the plaintiff was advised to have an arthroscopy, but refused. Arthroscopy as explained by Dr Alexander in that

case, and in the present case, is a purely investigative process to ascertain whether there is any internal damage in the knee that needs treatment. Persistent pain may be indicative of such injury. In that case I held that the plaintiff had failed to mitigate the damages by his refusal to agree to an arthroscopy. In the present case as well, my finding is the same.

The plaintiff claims R50,000 as moral damages, pain, suffering, anxiety, distress and discomfort; and a further sum of R40,000 for disfigurement and loss of amenities of life. In personal injury cases the damages may be material or pecuniary, or moral or non-pecuniary.

In the case of *Simon Maillet v Louise* (unreported) CS 177/ 1990 the plaintiff suffered a fracture of the left tibia and fibula. He had a permanent disability of 25% and a permanent limp. I awarded a sum of R30,000 for pain and suffering and permanent disability, and R10,000 for loss of amenities of life. In *Simon v Kilindo* (unreported) CS 225/1992 for a similar injury a total sum of R35,000 was awarded under the head of moral damages. In *Danny Mousbe v Jimmy Elizabeth* SCA 14/1993, the Court of Appeal affirmed an award of R40,000 made in respect of a plaintiff who had a compound fracture of the right tibia and fibula with swelling and effusion of the knee.

In the case of *Karl Seraphine* (supra), on a consideration of the above previous awards, I awarded a sum of R25,000 for pain and suffering and R5,000 for loss of amenities of life. In that case too, the plaintiff was 36 years old, and had refused an arthroscopic examination to diagnose the swelling on his knee. He had persistent pain, and was unable to play football.

In the present case, the plaintiff has a scar on his left knee as well. However there is no medical evidence regarding the extent of any incapacity. Considering the period he was bed-ridden, the pain and suffering he had to undergo due to the injury and the nailing of the femur and his anxieties for the

future, I award a global sum of R40,000 under both items 1 and 2 of paragraph 4 of the plaint.

As regards the claim of R31,800 claimed as loss of earnings, the amount is based on monthly earnings calculated at R5300 up to the date of action. However according to exhibit P1, the monthly salary was R2650. He was paid up to 31 August 1998. Hence up to the date of filing the action it was 5 months. Further, according to exhibit P5, he received an average of R200 as overtime for the months of May, June and July 1998 and an annual bonus of about R2800. According to Chrysante Morel, the plaintiff received about R1000 per month for welding work done at the garage.

> This method of assessing prospective loss of earnings is open to serious objection. In fact it gives the respondent more than what he has lost.

The reasoning there was that a plaintiff gets the estimated loss of monthly or weekly earnings for a period up to the end of his working life in a lump sum, and if that sum is invested he gets a monthly interest which is more than his monthly loss. In that case a sum of R72,000 awarded on that method, with a multiplier of 26 years representing the plaintiff's balance working life, was reduced to R40,000. That sum was considered to be a fair assessment of the prospective loss of earnings.

In *UCPS v Mark Albert* (unreported) SCA 19/1994, Ayoola JA (as he then was) discounted this method of calculation as a method which was "as widely used as it is widely criticised". He stated that it involved a host of factors which may appear speculative and hence made the task of quantifying the plaintiff's loss one which could not produce a mathematically accurate result. He further stated that much must be left to the good sense of the trial judge to determine, in the final analysis, as to what is fair in the circumstances of each case

after taking into account less uncertain factors and contingencies.

In *SACOS v Gustave Fontaine* (unreported) SCA 41/ 1997 the Court of Appeal unanimously stated that the multiplicand and multiplier method of computing loss of future earnings should be avoided. In that case, an award of R228,000 made on the basis of a multiplier of 38 years representing the plaintiff's working life was reduced to R25,000.

In *Harry Confiance v Allied Builders* (unreported) CS 226/1997 the plaintiff claimed inter alia a sum of R360,000 as loss of future earnings calculated at R1000 per month for 30 years. That income was however what he received from rearing pigs outside his normal working hours. Despite a residual incapacity of 10% on his right leg, he continued to work in the company without any reduction in salary. I considered such ancillary income to be an uncertain factor, and on the basis of the *Gustave Fontaine* case (supra) awarded R10,000 under that head of damages.

In the present case, Dr Alexander in his report dated 18 July 2000 stated that the plaintiff was *"*still unable to do (the) previous job" therefore advised "light duty" for 1 year. The reason for the defendant company to refuse re-employment to the plaintiff was that the work they carried out in the section of employment the plaintiff was earlier working "did not provide for the possibility of light duties". Mr Pandya testified that the plaintiff came several times seeking re-employment. He would not have sought to work as a welder, albeit on "light duty" for some time, had he been incapacitated to such an extent that he would not be able to pursue his profession. In his testimony, he stated that his welding work involved working on roofs of buildings. Undoubtedly he would not be able to climb roofs or scaffoldings in the foreseeable future. But his skill as a welder could be utilised to work in a garage, as he did with Chrysante Morel, or be self-employed. Hence the claim for loss of future earnings based on the multiplier -

multiplicand method is inappropriate in the present case

On the basis of the principles of assessment of prospective prejudice to the earning capacity of an injured person, the present Plaintiff's "partial incapacity" is uncertain. Damages are awarded only when such prejudice is certain. Hence on the basis of the decisions in the case of *Gustave Fontaine* (supra) and *Harry Confiance* (supra), I award a sum of R25,000 under the head of loss of future earnings.

Judgment is accordingly entered in favour of the plaintiff in a sum of R82,750 together with interest and costs.

Record: Civil Side No 175 of 1999

Omisa Oil Management v
Seychelles Petroleum Company Ltd

Arbitration – New York Convention on Recognition and Enforcement of Foreign Arbitral Awards – registration of award – reciprocity

The parties participated in arbitration proceedings in 1998 in Switzerland pursuant to arbitration agreements. Switzerland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Seychelles is not a party to the Convention but has incorporated it into Seychelles law by articles 146 and 148 of the Commercial Code Act.

The arbitration was decided in favour of the plaintiff who applied to have the arbitration award registered in Seychelles under the Commercial Code Act. The respondent sought dismissal of the application on the ground that the reciprocity required by articles III and XIV of the New York Convention were not satisfied because Seychelles was not a contracting state.

HELD:

(i) Incorporation of the New York Convention provisions into Seychelles legislation does not make Seychelles a party to the Convention; and

(ii) Enforceability of foreign arbitral awards in accordance with the Convention requires reciprocity between contracting parties.

Judgment for the respondent. Application for registration dismissed.

Legislation cited
Commercial Code Act (Cap 38), arts 146-150
Foreign Judgments Reciprocal Enforcement Act (Cap 85)

Bernard GEORGES for the plaintiff
Ramnikal VALABHJI for the respondent

Ruling delivered on 23 November 2001 by:

JUDDOO J: This is an application for leave to register an arbitration award made on 7 August 1998 pursuant to arbitration proceedings held from 4 to 7 August 1998 in Geneva, Switzerland and based upon identical arbitral clauses in a Management Agreement dated 6 June 1986, a Management Agreement dated 22 January 1991, and a Finance Manager Agreement dated 7 October 1998 between the parties. An authenticated copy of the award has been deposited with the Registry of this Court. The respondent has raised objection to the instant application.

Various issues have been raised by both parties and more particularly by the respondent in his wide ranging grounds of objection. However, the instant determination shall concentrate on those issues that were made relevant in the submissions before the Court on behalf of both parties. The remaining issues that were left out of the submissions are understood not to be insisted upon.

It is common ground that the award made on 7 August 1998 is a foreign arbitration award and that the instant application for leave to register the said foreign arbitration award forms part of the enforcement proceedings brought under the provisions of articles 146 to 150 of the Commercial Code Act (Cap 38). This is confirmed as per the submissions of counsel for the applicant that

> ... this is an arbitration award, it falls outside the ambit of the Act (Foreign Judgment Reciprocal Enforcement

> Act – Cap 85). It falls within the Commercial Code of Seychelles, which specifically explains how arbitral awards are to be enforced, foreign or domestic, so this apply completely different law ... it would be my submission that articles 146 to 150 deal with the enforcement of non-domestic awards, namely foreign arbitration awards and thereafter ...we now come to the question of enforcement of the award which is in favour of the applicant and it is for this reason that this application for leave has been brought...

It is also confirmed that a prior stand that the said foreign arbitration award was enforceable without leave of the Court and which issue has been the subject of a determination from this Court that such leave was necessary is not being insisted upon. As aptly put by counsel for the applicant

> ... rather than contesting that interpretation, the applicant has chosen to come to Court and to seek leave in any event...

In summary, the submissions of the counsel for the applicant run as follows:

> My consideration of the Commercial Code (is that it is) dealing with domestic awards from articles 110 to 145... Articles 146 to 150 deal with the enforcement of non-domestic arbitration awards, namely foreign arbitration awards...
>
> The legislator has brought into our municipal domestic legislation the text of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards...
>
> The text with appropriate adaptations to the law of Seychelles now features in article 146 to 150 of the Commercial Code. Seychelles is not party

> to the Convention but Switzerland is ...
>
> There must be reciprocity between the two countries. We know that because Switzerland has signed and ratified the New York Convention, Switzerland is a party to it and that because Seychelles has in article 146 made the Convention part of our law and stated that the Convention shall apply to the recognition of arbitral awards made in a territory other than Seychelles, that Seychelles has also implemented, not by signing but by legislating for it, we are left in exactly the same position as if Seychelles has also signed and ratified the Convention. In other words, there is now reciprocity between Seychelles and Switzerland....
>
> The basis for enforcement [is] that Switzerland has ratified the Convention and is a party thereto and Seychelles has brought the Convention into municipal law...

On behalf of the respondent's objection, counsel for the respondent claimed that:

> under our laws, a non-domestic award can only become executory after registration ... Just because we enacted in the Commercial Code articles of the New York Convention does not establish reciprocity. If the award was granted in Seychelles, on the basis of this Code of ours, we could not go to Switzerland and enforce the award, because the laws of Seychelles do not apply to Switzerland. On that basis alone, there is lack of reciprocity... We have to accede to the New York Convention ... This is the very basis of our objection.

In further reply thereto on behalf of the applicant, it is argued that even in the absence of reciprocity a foreign arbitration award made in the territory of a State party to the Convention is registrable, enforceable and binding under article 146 of the Commercial Code Act.

The relevant legislation under article 146 and 148 of the Commercial Code Act (Cap 38) provides that:

> 146 – On the basis of reciprocity, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and an arbitral award within the meaning of the said Convention shall be binding. Such Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than Seychelles and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in Seychelles.
>
> 148 – Arbitral awards under the said Convention shall be recognised as binding and shall be enforced in accordance with the rules of procedure in force in Seychelles. The conditions of fees or charges on the recognition or enforcement of arbitral awards to which the said Convention applies shall not be more onerous than those required for the recognition or enforcement of domestic arbitral awards.

In addition section 227 of the Seychelles Code of Civil Procedure (Cap 213), in as far as it relates to arbitration awards, provides as follows:

> … Arbitral awards under the New York Convention, as provided under articles 146 and

> 148 of the Commercial Code of Seychelles, shall be enforceable in accordance with the provisions of Book I, Title IX of the said Code.

Elaborating upon these issues, Chloros in *Codification in a Mixed Jurisdiction* at page 156 comments as follows:

> It has become increasingly obvious that legislation in Seychelles on arbitration in business disputes was a matter of some urgency. Arbitration in business disputes has expanded widely and most trading countries subscribe to the New York Convention on Arbitral Awards, 1958. As Seychelles is a trading nation, it was important that it should acquire a modern system of arbitration, preferably one that was known and established in the world. (It is also important that Seychelles should adhere to the New York Convention at the earliest opportunity...)
>
> It was decided to introduce in the Commercial Code ... the text of the uniform law on Arbitration proposed by the European Convention on Arbitration 1967. The text was prepared by the Rome Institute for the Unification of Private law. The text, with appropriate adaptations, now features in articles 110-150 of the Commercial Code. Moreover, the New York Convention is adopted as internal law on the basis of reciprocity...(citations omitted).

The issue to be determined is whether a foreign arbitration award made in the territory of a state other than Seychelles and which is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 is registrable, and can be made enforceable and binding, under the relevant provisions of articles 146 to 150 of the

Commercial Code Act.

It is certain that the above quoted sections of the Commercial Code Act have made provision for the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award to Seychelles. However, it is equally certain that the said provisions of the Commercial Code Act can only be made to operate "on the basis of reciprocity." It is only where the condition of reciprocity is satisfied that an arbitral award within the meaning of the said Convention or an arbitral award not considered as a domestic award can be binding.

The question raised is, does the enactment of articles 146 to 150 of the Seychelles Commercial Code Act as municipal law without more provide reciprocity to the municipal legislation with regard to the country in issue, Switzerland. Reciprocity, in this instance, would necessitate that both municipal legislations would be under a mutual legal obligation with regard to each other and bound to the same extent or degree.

The enactment of articles 146 to 150 of the Seychelles Commercial Code Act as municipal law of Seychelles does not bind Switzerland to any degree or extent. The obligation of Switzerland under the Convention is only towards a State party to the said Convention and even then only to the extent that each state concerned has bound itself to apply the Convention. This is made explicit under articles III and XIV of the Convention (text found in *Russell on Arbitration* (20th ed) at p 504):

> Article III
> Each Contracting State shall recognise arbitral awards as binding and enforce them in the rules of procedure of the territory when the award is relied upon
> …

> Article XIV
> A Contracting State shall not be entitled to avail itself of the present convention against other contracting states except to the extent that it is itself bound to apply the Convention.

Seychelles is not a Contracting State to the Convention. There is no mutual legal obligation in Switzerland and Seychelles with regard to the registration and enforcement of a Convention award or a non-domestic award made in each other's jurisdiction. Accordingly, it cannot be said that there is reciprocity between the two municipal jurisdictions.

It has been further submitted, on behalf of the applicant, that even in the absence of reciprocity municipal legislation in Seychelles under the Commercial Code Act, as quoted, allows for the enforcement of a foreign award made in a territory of a state party to the Convention. Counsel stressed that the second sentence in article 146 of the Commercial Code Act should be read separately and distinctively from the first sentence and that section 148 should be read completely on its own. I cannot find that the condition of 'reciprocity' can be obliterated in such a manner. The condition of 'reciprocity' is a pre-requisite which allows the award made in a foreign country to be made binding on the recipient state albeit although valid objections may be taken and determined to the enforcement thereof.

The second issue raised by counsel for the respondent is what is termed “lack of existence” of the applicant which is alleged to amount to an `incapacity' under section 150 of the Commercial Code Act. In that respect, it is averred –

> The Applicant having through its legal advisors in Geneva emphatically asserted that it does not have its own constitutive documents on file and is unable to procure such document, has no existence in law, cannot sue or make any application.

In support of the objection, counsel for the respondent referred to 150(a) of the Commercial Code Act which reads:

> Enforcement shall be refused if the person against whom it is involved proves that a party to the arbitration agreement is (under the law applicable to him) under some incapacity...

Furthermore, counsel added that

> As regards capacity, I have produced this letter from 'Omissa' that they do not have constitutive documents and therefore they do not exist ... Lack of existence is an incapacity...

At the outset, it needs to be clarified that the respondent's legal advisors were not present in Geneva although reply, counterclaim and documents were filed. Additionally, no such letter referred to has been produced in the present proceedings. The instant determination originates from an application on behalf of the applicant to "execute the arbitration award" filed on 30 July 1999 and which, in compliance with this Court's ruling on 31 July 2000, was followed by an "application for leave to register arbitration award" filed on 16 January 2001 with all supporting documents. On behalf of the respondents an objection was filed thereto on 26 June 2001 with no supporting document.

There is indication that a prior “objection” which had been separately filed on behalf of the respondent on 21 August 1998 (C/S 258 of 1998). This was found to be a premature exercise made prior to any demand to enforce an arbitration award. The said objection was, accordingly, withdrawn on 1 December 1998.

Counsel for the respondent only made reference to *"this letter from Omissa"* and counsel for the applicant attempted to

quote from certain documents in the application which stood withdrawn. Suffice it to say that it is both inadequate and inconclusive for documents relied upon by parties not to be produced and exhibited at the proceedings under which reliance is being sought thereon. Mere reference to documents filed in an earlier application that had been withdrawn and which documents are on the face of the record incomplete does not suffice. Neither is the Court entitled to embark upon a voyage of discovering to ascertain from documents in a separate application. Accordingly, without embarking on the merits of the objection raised, I will set it aside in its present form and tenor.

In the end result, for reasons given earlier, I find that the application for registration and enforcement of the foreign arbitration award made in Switzerland, dated 7 October 1998, cannot be granted in view of the lack of reciprocity between Switzerland and Seychelles in that respect. Accordingly, the application is dismissed.

No order as to costs.

Record: Civil Side No 85 of 2000

Payet v Knowles

Negligent damage to property – custody of things

A hollow and rotten tree on the defendant's land fell and caused damage to the plaintiff's house and buildings. The damage also caused the loss of rent of the premises. The defendant claimed that there was an absence of fault or negligence on their part, and that it was the result of an act of God.

> **HELD:** On the facts, the tree was rotten and its custody was the responsibility of the defendant.

Judgment for the plaintiff. Damages awarded for loss of rent and expenses above those covered by government assistance, and moral damages - R27,200.

Kieran SHAH for the plaintiff
Nichol TIRANT for the defendant

[Appeal by the plaintiff was dismissed on 19 April 2002 in CA 14/2001]

Judgment delivered on 31 May 2001 by:

JUDDOO J: The plaintiff brings this action in tort against the defendant for damages caused by a Bois Blanc tree which fell from the defendant's land onto the plaintiff's house at Mare Anglaise on a date in the month of November 1997. The claim is resisted by the defendant who is the daughter of the plaintiff.

It is averred on behalf of the plaintiff that the Bois Blanc tree standing on the defendant's plot of land fell on the plaintiff's house and outbuildings causing extensive damage and that, prior to that date, the plaintiff had requested the defendant to cause the tree to be chopped or felled so as to avert any

danger to her property, but the defendant refused or neglected to do so. Accordingly, it is claimed that the damage caused by the falling tree was due to the fault or negligence of the defendant. It is averred in the alternative that the defendant had custody of the said tree and is liable for resulting the loss and damages.

On behalf of the defence, it is averred that the incident was due to an act of God or some inherent defect in the tree and was not due to the fault or negligence of the defendant. It is denied that the plaintiff had made any request to the defendant to fell the said tree and that the tree was not in the defendant's custody at the material time.

The plaintiff, an old lady of 72 years gave evidence that, in November 1997, a bois blanc tree from the property of the defendant fell onto the house which she had constructed with her son. The incident caused damaged to the roof of the house and the witness produced five photographs thereof, marked as exhibits P1-P5. The plaintiff added that the defendant lives in Australia but visits Seychelles regularly. During one of her visits the plaintiff drew her attention to the fact that leaves had fallen off the bois-blanc tree and it was leaning towards the house and had to be chopped down. The plaintiff added that the defendant refused to do anything about the tree and on a day in November "the tree fell because the trunk had already rotten and it crushed down part of my wall, some of the furniture and affected the roof". At the material time, the plaintiff was renting the house to one Norman Bastien for a monthly rent of R4000 and the plaintiff claims that as a result of the damage caused she did not receive rent for three months.

The plaintiff agreed that she had applied for Government assistance and received R7000 and some corrugated iron sheets. The plaintiff remitted R7000 to one Gilbert Banane, the carpenter and explained that the said assistance was not sufficient and she had to incur additional expenses for

materials of which she produced a bundle of receipts (exhibit P6) and paid the carpenter another R13,000. The plaintiff denied that the weather was gusty at the time the tree had fallen down and that it was the heavy rain in September 1997 which caused the tree to fall. Lastly, the plaintiff admitted to not being on the best of terms with the defendant and that there has been other Court proceedings between them.

Norman Bastien testified that he was renting the house for a monthly rent of R4000. One night in 1997, he recalls the tree falling on the house. The weather was calm and he had the opportunity to examine the tree after it fell down. There was a hole inside the tree and it was rotten. The witness added that he remained in the house when it was being repaired but had to move from one room to another for the repairs to progress. Accordingly, he did not pay the rental for four months. Under cross-examination, the witness revealed that he was paying R400 instead of the full rent. He maintained that the tree which fell was rotten.

Gilbert Banane, the carpenter, gave evidence on behalf of the plaintiff. He repaired the damage caused to the house, mainly the roof, except for the paint work. He had to remove and replace all the wood in the ceiling and the roof and lift the pillars. The repair works lasted for seven weeks and he was paid R7000 and a further sum of R13,000 for the said work. He had the opportunity to examine the tree which had fallen on the house and found the tree trunk to have been rotten.

Joseph Payet, son of the plaintiff, gave evidence that he had ownership of the house whilst his mother enjoys the usufructory rights. He had taken charge of purchasing and transporting the building materials needed for the repairs made to the house. He was aware that the plaintiff had received assistance from the Government for the repairs but added that the said assistance was insufficient.

Lastly, Mr Gerald Pragassen, land surveyor, was called on

behalf of the plaintiff. He had surveyed the parcels of land belonging to the plaintiff and the defendant. According to his survey and as per his plan, exhibit P7, the ascertained position of the bois blanc tree which fell was on the defendant's land is shown.

On behalf of the defence, only one Patrick Bijoux was called as a witness. He is an officer of the Disaster Relief Fund. He agreed that in August 1997 the country experienced a particular increase of incidents due to bad weather and falling trees. However, he stated that most of the trees which fell were "too old or rotten or hollow inside". The incident of a tree which had fallen on the house of the plaintiff was reported to his office and a site visit was made which revealed that the tree was hollow inside, had broken down and damaged the house of the plaintiff. The plaintiff received R7000 as financial assistance. Under cross-examination, he agreed that the financial assistance provided does not cover the full costs of the repairs.

The plaintiff stood as a strong lady of 72 years of age and gave evidence in a most straightforward and consistent manner. Her demeanor in the witness box was both serene and lucid. She strikes me as a witness of truth when she testified that the tree was showing signs of deterioration and she informed the defendant of the danger that the 'bois blanc' tree represented to her house despite her candid admission that their relation had deteriorated thereafter.

I also find from the evidence on record that the tree was hollow and rotten inside and was defective in itself. Mr Gilbert Banane is a Carpenter of some thirty years of experience and his testimony that the tree was 'rotten' inside cannot be taken lightly. Additionally, all of the other witnesses including the plaintiff, Mr Bastien and Mr Banane witnessed that the tree was rotten and hollow. This is supported by the testimony from the officer of the Disaster Relief Fund called on behalf of the defendants and by the photographs *(exhibit P2)* produced on behalf of the plaintiff. It has been established that from the

testimony of Mr Pragassen the land on which the tree was situated belongs to the defendant and I have already found that the defendant was made aware of the danger that the tree represented and refused to act.

Accordingly, I find liability to be established in favour of the plaintiff as against the defendant. I shall now turn to the issue of damages.

In essence the plaintiff claims R12,000 for 3 months loss of rent, R18,000 for additional expenses incurred in rebuilding the house and outbuilding and R10,000 for moral damages.

As far as the claim for loss of rent, the evidence from Mr Banane is that the repairs works lasted for six weeks which if one takes account of an additional time for the paint work can be equated to two months during which time one can rightly expect the tenant not to pay the full rent. The tenant, Mr Bastien admitted that he paid R400 during that time. Accordingly I award a sum of (3600 x 2) R7,200 under this head.

As far as the claim for R18,000 additional expenses, I am satisfied from the evidence on record that an additional sum of R13,000 was paid to Mr Banane, the carpenter for repairs. However as far as the receipts produced from SMB, they disclose expenses for a much later period except for two receipts in November 1997, amounting to R574.74. Additionally, I take into account the damages to the chicken coop as per exhibit P2 and outbuilding and award a total sum of R15,000 under this claim.

I find it just and reasonable to award a sum of R5,000 for moral damage. In the end result, I enter judgment in favour of the plaintiff in the sum of R27,200 in full and final settlement of the claim with interest and costs.

Record: Civil Side No 398 of 1998

Schoenebeck v Hopprich

Delict – contractual waiver of liability – public policy

The plaintiff was tricked into having sexual intercourse with the defendant by her misrepresentation. Subsequently the plaintiff and defendant agreed in writing that she would make no claim against the plaintiff in the event of an unwanted pregnancy. Following the birth of a child the defendant obtained maintenance for the child by a German court order. The plaintiff claimed material and moral damages. The defendant claimed that the contract of waiver was contrary to public policy, that the existence of the contract denied any deceit and that by his actions the plaintiff had consented to the fact that the defendant might become pregnant.

HELD

Actions in delict are matters of public policy and cannot be waived by contract.

Judgment Claim dismissed.

Frank ELIZABETH for the plaintiff
France BONTE for the defendant

Legislation referred to
Civil Code art 1382(5)

Cases referred to
Hardy v Valabhji (1963) SLR 98

Judgment delivered on 2 November 2001 by:

PERERA J: This is a delictual action based on an alleged deception, trickery or misrepresentation made by the defendant. The plaintiff avers that on 15 November 1992 he was deceived by the defendant by misrepresenting that she

was taking contraceptives and tricked him into having sexual intercourse with her. On 21 December 1992, 36 days later, both parties entered into a written agreement, wherein the defendant, inter alia, renounced any claim against the plaintiff in the event of an "unwanted pregnancy", whether it arises in Seychelles or in Germany.

The agreement (exhibit P1) is as follows -

> AGREEMENT
> Throughout this document, consisting of a page, Ms Claunada Estico and Dr Jost V Schoenebeck reach the following agreement and confirm it free and not under duress with their signatures:
>
> On the occasion of an accidental flirt on the 15. 11.92 Dr JVS wanted to undertake adequate measures of contraception before coming to sexual contacts with Ms CE. But Ms CE said she doesn't like this (preservative). On the question of Dr JVS whether there is no risk of unwanted pregnancy Ms CE answered "No, there is no risk." Therefore Dr. J.V.S. concluded that Ms. C.E. had taken sufficient contraceptive measures by herself.
>
> 2. Several days later on the same question of Dr JVS, Ms CE confirmed again that there is no risk of pregnancy saying:
> "I give you my word."
>
> 3. Therefore Ms CE renounces now and in the future any claims on Dr JVS resulting from an unwanted pregnancy, no matter whether those claims originate from Seychelles or German laws.

Victoria/ Glacis/ Mahe, Rep of Seychelles
21st December 1992
Ms Claunada Estico
Dr Jost V Schoenbeck

I have already overruled a plea in limine raised by counsel for the defendant that the cause of action pleaded was against public policy.

Amos and Walton *Introduction to French Law* (2nd edition) dealing with "waiver of right to sue" states at page 224 thus -

> ……while in the field of contract the parties are usually at liberty to waive by antecedent agreement, their right to damages for inexecution or faulty execution of their obligations, such a waiver is inoperative when the breach is intentional, and also, though less clearly, when there is gross fault. This result is generally explained by saying that the waiver of contractual responsibility leaves intact the rules of delictual responsibility. These may not be waived. In a recent decision, the Court of Causation expressed the principle in the following terms "...clauses of exoneration from or attenuation of responsibility are null in the domain of delict, articles 1382 and 1384 or the Civil Code being d'ordre public and their application incapable of being paralysed in advance by agreement." This public policy is presumably based on the view that to admit the validity of such clauses would discourage people from being as prudent as they should be in their relations with other".

In the present case, the defendant's waiver of the right to sue did not per se affect public policy. In any event, it does not affect the plaintiff's right to sue in delict in respect of any loss

or damage suffered by him (see *Hardy v Valabhji* (1963) SLR 98.) The instant action in delict is based on intentional trickery and deceit. Article 1382(5) provides that "liability for intentional or negligent harm concerns public policy and may never be excluded by agreement ……..” However as I stated in my previous ruling, the burden is on the plaintiff to establish that the defendant intentionally caused damage to him, as averred.

The plaintiff testified that on 21 December 1992, 1 month and 6 days after the act of intercourse, the defendant told him that she was probably pregnant and drew up the agreement. He also stated that she showed him some pills which she claimed were being taken by her as hormone therapy for an ovarian cyst. He further stated that upon referring to medical literature, these tablets, if taken properly would in itself have acted as a contraception. However after over a month from the date of intercourse, he doubted her sincerity when she told him that she was awaiting her menstruation, as she ought to have known that that would not happen if she was under medication. He therefore concluded that the pills were either borrowed from her sister, who is a nurse, or from a friend, to trick him. He stated that it could have been done to obtain money or to enjoy a better lifestyle, as she later married another German dentist in 1995 and is presently living with him in East Berlin.

The plaintiff further testified that the defendant filed a maintenance case in Germany and that he was ordered to pay a sum of approximately R230,400 as maintenance for the child until he reached the age of 18 years.

In that judgment (exhibit P3), it is stated that the present plaintiff produced the agreement claiming that he was deceived. However that Court held inter alia that-

> It doesn't matter in this connection whether the defendant was eventually cheated by the child's

> mother about having taken contraceptive drugs, nor, whether the child's mother has renounced any claims in connection with the pregnancy before she went to Court, because according to Section 1600 part 1 BGB, that man has to be declared the father that created the child. According to the genetics expert witness, with a probability of 99.99% it can be taken for granted that the plaintiff (child) is descending from the defendant.

The plaintiff in his testimony before this Court stated that due to this deceit, he lost his reputation as a dentist and suffered financial and psychological damage. He produced a medical report dated 24 July 1995 (exhibit P4) from a psychiatrist regarding a tremor of the right hand. That was before the German Court pronounced judgment on 4 March 1996.

The agreement discloses two distinguishable parts. First, the intention of the plaintiff to have protected sexual intercourse, but deciding on unprotected sex relying on the verbal assurance of the defendant that it was safe. According to the wording of the agreement (P1), the defendant only stated that there was no risk of a pregnancy. It was he who concluded that she was on contraceptives. The plaintiff, though a dentist, is a medical professional. It does not require one to be a gynecologist to know that no form of contraceptive affords a 100% guarantee against a pregnancy. Hence the plaintiff voluntarily consented to behaviour which he knew or ought to have known carried a very high risk of pregnancy.

The second part of the agreement is the waiver of the right to sue by the defendant, under the law of Seychelles or of Germany. The German Court rejected the agreement as that Court was only concerned with the determination of the putative father, and the granting of maintenance to the minor child.

The plaintiff is admittedly paying maintenance in accordance with the judgment of the German Court. Intercourse between two consenting unmarried parties will not of itself give rise to a claim for damages. But if such intercourse has been obtained by deceitful means, such as on a promise of marriage which one party had not intended to fulfil at the time of intercourse, then on proof of such intention, damages may be recoverable.

In the present case, the agreement signed by both parties which evidences the circumstances under which intercourse took place on 15 November 1992 and the waiver of the right to sue by the defendant, negatives any deceitful conduct on the part of the defendant. At that time, she could not be expected to have known that she would marry another German Dentist in 1995 and that a Court in Germany would grant maintenance for her child despite the waiver in the agreement. Hence the plaintiff cannot maintain an action in delict. Accordingly it is dismissed with costs.

Record: Civil Side No 350 of 1997

Seraphine v Sultan

Personal injuries - identification of tortfeasor

The plaintiff suffered injury in a hit and run accident. Evidence adduced suggested the defendant was the responsible party. The plaintiff claimed damages of R50,000 from the defendant The defendant denied involvement in the accident

HELD:

(i) Evidence insufficient to establish liability on the basis of proof beyond reasonable doubt in a criminal case may present sufficient coincidence of facts to establish liability on the balance of probabilities;

(ii) The defendant was on the balance of probabilities the driver of the vehicle that caused the injury to the plaintiff; and

(iii) Failure to agree to the arthroscopy reduced the potential award for pain and suffering.

Judgment for the plaintiff. Damages for pain and suffering and loss of amenities of life - total awarded R31,000.

Legislation cited
Civil Code of Seychelles, arts 1349, 1353, 1384(2)

Cases referred to
Therese Louise v Yvon Denis (unreported) CS 262/1998
Francis Low v Andre Beaufond (1979) SLR 118
Simon Maillet v Louise (unreported) CS 177/1990
Danny Mousbe v Jimmy Elizabeth (unreported) SCA 14/1993
Brigette Servina v Rita Jupiter (unreported) SCA 18/1994
Simon v Kilindo (unreported) CS 225/1992

Foreign cases cited with approval
Sing v Toong Fong Omnibus Co [1964] 3 All ER 925 (PC)

Frank ELIZABETH for the plaintiff
Phillippe BOULLE for the defendant

Judgment delivered on 26 March 2001 by:

PERERA J: The plaintiff claims damages for personal injuries suffered consequent to a road accident. The case for the plaintiff is that around 9.00 pm on 30 November 1995, he was driving along Francis Rachel Street towards Mont Fleuri when he saw that two other vehicles had been involved in an accident near the shop of Chaka Brothers. He was asked by a Russian person who was the driver of one of those vehicles, to inform the Central Police Station. After doing so he returned to the scene of the accident. He was once again asked by the same Russian person to put on the parking lights of his car. That car was on the land side of the road, so he came to the middle of the road to do so, as that car, which was a right hand driven vehicle was facing the area of the clock tower. He bent down and switched on the lights, and when he stood upright thereafter, a vehicle on the opposite side of the road coming from the clock tower area towards Mont Fleuri, hit him on his right hand side and proceeded without stopping. The plaintiff testified that the traffic lane to Mont Fleuri was clear but the driver of the vehicle that collided with him drove close to the center of the road without keeping more on his left side. The plaintiff further testified that he did not identify the vehicle or its driver as he became unconscious. He regained consciousness only in hospital.

Gleg Kouzime (Pw1), the Russian person who was involved in the collision between the two vehicles, corroborated the plaintiff that he came to assist him. He stated that he saw a red vehicle coming at a fast speed from the clock tower end of the road and hitting the plaintiff. He was at that time near the

shop. There was another car in front of him, but he saw the accident. The red coloured vehicle went without stopping. He did not identify the driver nor was he able to note the number of that vehicle.

Gilbert Larue (Pw2) testified that he was passing the scene of the accident involving the two vehicles. He stood there for a moment, and saw the plaintiff putting on the parking lights of the Russian person's car, and when he was about to go to the rear of that car, a red coloured jeep came from the direction of the clock tower, collided with that car and also with the plaintiff who was thrown a distance and lay fallen. As the jeep did not stop, he noted the number as S3895. He also saw the driver who was "a short chubby person with curly hair". The next day he saw the same jeep coming down at La Louise near Baba's shop. He identified the driver as the person whom he saw driving the red coloured jeep that knocked down the plaintiff. He identified the plaintiff, who fitted the description, in Court as well. Cross-examined by Mr Boulle, he stated that he did not notice anything written on the jeep to indicate that it belonged to "Petit Car Hire", as it was dark, but he noted the number and also that it had the yellow number plates of a hiring vehicle. He also stated that he did not notice the company name the next day, although he saw the jeep around 9 o'clock in the morning.

SP Roger Legras, (Pw3) who was in charge of the Traffic Division at the time of the accident testified that at the request of the State Assurance Corporation (SACOS) he sent a letter dated 28 August 1996 (exhibit P3) wherein he stated-

> Please be informed that police investigation has proved a case and Mr Gilbert Sultan has been charged with negligent driving. Case has been dispatched to AGs Chambers for process. You shall be informed of the outcome as soon as it is completely concluded.

Later, by a further letter dated 17 October 1997 (exhibit P4), he confirmed to SACOS that Mr Gilbert Sultan was charged with negligent driving and that the case had been dispatched for process. He stated that his investigation officer advised him that there was a prima facie case against Mr Sultan, and that he too, on a perusal of the case file was satisfied that there was sufficient evidence to warrant proceedings against him. However he was not certain whether Mr Sultan was ultimately charged after the case was sent to the Attorney's Department.

Mr Boulle, counsel for the defendant objected to his evidence and the two letters P3 and P4, on the ground of hearsay. He submitted that in the absence of evidence that the defendant was charged and convicted, the evidence of Mr Legras would remain an opinion which was inadmissible. The two letters were marked in evidence as exhibits subject to the Court considering the objection in the course of this judgment.

The aspect of hearsay depends on the purpose for which the two exhibits and the evidence of SP Legras are sought to be admitted. Counsel for the plaintiff submitted that the purpose was limited to the issue of identification of the defendant as the driver of the vehicle and nothing more. It was for this limited purpose that exhibits P3 and P4 were initially admitted at the hearing. Mr Legras testified that he was the officer in charge of the Traffic Division at the material time and that the investigation commenced on his directions. Although not directly involved in the investigation, he had sent P3 and P4 to SACOS on the basis of the investigations he had initiated, and the material in the file. Hence, in the absence of proof of the defendant being charged and convicted, the admission of correspondence based on an official record would not offend the heresay rule to the extent that it identified the defendant as the person investigated in connection with the accident. Although that would not be conclusive proof of identity, yet would be one of the circumstances that the Court may consider in relation to the issue of the identity of the driver of

the vehicle involved in the accident.

Ms. Lidia Evenor (Pw4), representing SACOS, testified that the plaintiff made a claim in respect of an accident involving vehicle no S3895. She produced a statement made by the defendant in connection with that claim (exhibit P5) which reads as follows -

> I, the under-signed Gilbert Sultan Beaudouin certifies (sic) that I drove a Petit Car jeep during the period 28 – 30 November 1995 inclusive.
> As I stated in my statement to the police, I did not involve myself in any accident, otherwise I would have stopped. “I can't say the time" I said to the police, because I did not have a watch.
> - Sg Gilbert R Sultan Beaudouin

Jimmy Mein, (Pw5) Managing Director of Petit Car Hire, testified that the vehicle S3895 was owned by his company. He stated that that vehicle was hired to the Ministry of Employment and Social Affairs from 28 to 30 November 1995 and that it was collected by Mr Beaudouin, the defendant in the case. He further testified that after the hire, the vehicle was left somewhere in the Bodco area, and his office was requested to take it back. After the police came on investigation it was noticed that the right hand side of the vehicle had a dent. Mr Beaudouin was contacted about it, but he denied being involved in an accident. He testified that it was Mr Beaudouin who was supposed to drive that vehicle although hired to MESA.

The defendant's evidence was very brief. In his examination-in-chief, he stated that he was the Executive Secretary of the Employers' Federation, that he heard the evidence regarding an accident but he was never involved in it. He therefore relied on a complete denial.

On being cross-examined, he stated that he was not

employed with MESA but admitted picking up vehicle S3895 from Petit Car Hire on 28 November 1995 on behalf of MESA on the instructions of one Mr Anaclet Tirant of the Ministry. He further stated that the vehicle was hired by MESA for a 3 day seminar, where he was to be a lecturer. He stated that the Ministry hired the vehicle for use at the seminar, and partly for his personal use. He also admitted that on some days he used it to go home in the night and return back the following day. But he denied that "at the time of the accident" he was driving that vehicle. Questioned as to the dates on which he drove the vehicle, he stated that on 28 November 1995, he took the vehicle home and returned the following morning. He did not drive the jeep the whole of 29 November, and Anaclet Tirant, the organiser of the seminar, gave him a lift home in the same jeep. He stated that on 30 November, he came to his office by bus, and was picked up by Mr Tirant in the same jeep and was taken to the Coral Strand Hotel where the seminar was held. He drove the jeep during day time that day. He could not recall how he got home. But he maintained that he did not use the jeep.

As regards 30 November 1995, the day material to this case, he testified that he came to his office in the morning by bus and was taken to Coral Strand Hotel by Mr Tirant in the jeep S3895. He stated that he went back home that day around 6.30 pm by taxi. He stated that the day after the seminar, the jeep had been parked overnight at his office and after the Security Guard handed the key to him on his arrival that morning, he telephoned Petit Cars to come and collect the vehicle. He stated that he did not ask the Security Guard as to who brought the jeep there and gave him the key.

Before liability under article 1384(2) of the Civil Code is considered, it is necessary for the plaintiff to establish the identity of the driver, and in the present case, the identity of the vehicle as well.

The undisputed facts in the case are-

1. A red coloured jeep bearing no S3895 belongs to Petit Car Hire Company.

2. It was hired to the Ministry of Employment and Social Affairs from 28 - 30 November 1995.

3. The said jeep was returned to Petit Car Hire on 1December 1995, with a slight dent on the right hand side of the vehicle.

4. The defendant admits that he was authorised by MESA to collect the vehicle from Petit Car Hire.

5. The defendant also admits that he drove the said jeep during the period 28 – 30 November 1995, both days inclusive (exhibit P5).

In the case of *Francis Low v Andre Beaufond* (1979) SLR 118, another hit and run case, the vehicle was identified but not the driver. The owner of the vehicle admitted ownership, but denied that he was the driver of the car at the material time. The Court applied the presumption under article 1353 of the Civil Code and held that the fact of ownership was some evidence that at the material time the car was being driven by the owner or by his servant or employee. As the defendant failed to give evidence in that case, the Court held that that presumption had not been rebutted.

In the instant case, ownership of the vehicle is admittedly with Petit Car Hire. At the material time, it was on hire to MESA. The defendant has admitted that the vehicle was being driven by him 'from 28 – 30 November 1995 inclusive." Hence, subject to proof that it was jeep bearing no S3895 which was

the vehicle involved in the accident, the defendant should be presumed to be the driver.

Although the evidence may be insufficient to establish liability on the basis of proof beyond a reasonable doubt in criminal proceedings, there is sufficient coincidence of facts to establish liability on a balance of probabilities. First, Oleg Kouzime, the Russian person who was involved in the traffic accident definitely saw a red coloured vehicle knocking down the plaintiff. Second, Gilbert Laure was a passerby, and through curiosity stood there observing the two vehicles involved in the accident. He had therefore ample opportunity to have more than a “fleeting glance" of the red coloured jeep that hit the plaintiff. In this context I accept his evidence that he was able to note the number of the vehicle and also to make the observations he stated in his evidence. He was also able to observe the bare features of the driver, and his observations were confirmed the next day when he saw the red coloured jeep bearing the number he noted being driven by the person whom he identified as the same person he saw at the scene of the accident. Third, after Gilbert Laure had made a statement to the police the following day, the police commenced investigations by interviewing Mr Mein of Petit Car Hire, and the defendant who was supposed to have been driving the vehicle at the material time. That would have obviously been done as by then they aware of the number of the vehicle. Otherwise there may be several red other coloured jeeps in the island. Fourthly, the defendant has in his statement to SACOS (exhibit P5) admitted driving the vehicle from “28 – 30 November 1995 inclusive". In these circumstances his evidence that he went home on 30 November by taxi and returned to his office on the following day by bus is not reliable in the absence of evidence as to how the jeep came to be parked overnight at his office, as claimed by him.

Article 1353 of the Civil Code provides that –

> Presumptions which do not apply by operation of law are left to the knowledge and wisdom of the judge, who shall only admit presumptions which are serious, precise and consistent and only in cases in which the law admits oral evidence.

Article 1349 defines presumptions as follows -"presumptions are the inferences which the law or the judge draws from a known fact in respect of an unknown fact".

Accordingly the known facts in the case permit this Court on a balance of probabilities to come to the conclusion that the vehicle involved in the accident was the jeep bearing no S3895 and that it was driven by the defendant at the material time.

The plaintiff was a pedestrian at the time of the accident. Article 1383(2) of the Civil Code provides that –

> The driver of a motor vehicle which, by reason of its operation, causes damage to persons or property shall be presumed to be at fault and shall accordingly be liable unless he can prove that the damage was solely due to the negligence of the injured party……

In the present case the Defendant having relied solely on a denial of causing the accident, has failed to rebut that presumption. Hence he is liable in damages.

Quantum of Damages

According to the medical report furnished by Dr Alexander, the Consultant Orthopedic Surgeon (exhibit P3), the plaintiff who was then 36 years old, had the following injuries on admission -

- Abrasion in the back of the right shoulder
- Limitative movements of the right shoulder

– Swelling and abrasion over right shoulder
– Swelling of the right knee.

It was certified that there was no deformity of the right knee, although there was tenderness and restricted movements. That knee was immobilised by a plaster cast for 5 weeks. He was warded in hospital from 30 November 1995 to 9 December 1995. He was advised for arthroscopy of the right knee. Dr Alexander testified that the plaintiff did not come for such examination. Although Dr Alexander was not asked to explain the meaning of that term, Black's Medical Dictionary defines it as –

> Arthroscope is an instrument that enables the operator to see inside a joint cavity and, if necessary, take a biopsy or carry out an operation.

Hence what was proposed was an exploratory procedure to diagnose any internal injury, with a view for treatment if necessary.

The plaintiff in his testimony stated that he is a fish Inspector and had to enter cold stores for the purpose of his job. He stated that he could not do so now as his knee becomes painful. He further stated that he cannot bend the knee properly and that he could not play football as he used to do.

The plaintiff claims R50,000 as moral damages for pain and suffering. Medically, he has no deformity, or permanent disability. If the plaintiff still suffers discomfort and pain, he may have been able to obtain proper treatment had he consented to arthroscopic examination, and thus mitigated the damages.

The medical report confirms the plaintiff's assertion that he lost consciousness as soon as he was knocked down. He would have suffered immense trauma to be in that condition.

However the injuries were mainly to his right shoulder and the right knee. On a consideration of the nature of injuries suffered by plaintiffs in traffic accidents, the injuries of the instant plaintiff fall into the category of cases where "pain and suffering" is the main element in damages. Although damages payable are "at large" the Court has to maintain a certain degree of uniformity, by reference to previous awards reflecting the consensus of judicial opinion. In this respect, Lord Morris stated thus, in the case of *Sing v Toong Fong Omnibus Co* [1964] 3 All ER 925 (PC) -

> If however, it is shown that cases bear the reasonable measure of similarity, then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized, or that there should be any attempt at rigid classification. It is but to recognize that, since in a Court of law compensation for physical injury can only be assessed and fixed in monetary terms, the best that Courts can do is to hope to achieve some measure of uniformity, by paying heed to any current trend of considered opinion. As far as possible, it is desirable that two litigants whose claims correspond should receive similar treatment, just as it is desirable that they should both receive fair treatment.

The plaintiff received abrasions on his right shoulder and the right knee, but no fractures. However the abrasion on the knee required immobilisation by plaster cast for 5 weeks. That was due to the tenderness in that joint.

Considering some of the cases in which there was injury to limbs. In the case of *Simon Maillet v Louise* (unreported) CS 177/1990 the plaintiff suffered a fracture of the left tibia and fibula and spent some time in traction. He had a permanent disability of 25% and a permanent limp and was incapacitated

for 6 months. I awarded a sum of R30,000 for pain and suffering and the permanent disability and R10,000 for loss of amenities and enjoyment of life.

In a similar case, *Simon v Kilindo* (unreported) CS 225/1992 where there was also a fracture of the tibia and fibula, I awarded a total sum of R35,000 for pain and suffering, permanent disability and loss of amenities of life.

In the case of *Danny Mousbe v Jimmy Elizabeth* (unreported) SCA 14/1993 the Court of Appeal affirmed an award of R40,000 made in respect of a plaintiff who had a compound fracture of the right tibia and fibula, and swelling and effusion of the knee. By the time the case was heard, he had completely recovered from his injuries.

In the case of *Brigette Servina v Rita Jupiter* (SCA 18/ 1994 where the plaintiff suffered abrasions to the head, cheek and lips and bruises on the calf consequent to an assault, the Court of Appeal reduced an award made by this Court from R17,500 to R10,000, mainly on the ground that the trial judge had awarded two sets of damages against two tortfeasors in respect of one tortious act. However in the recent case of *Therese Louise v Yvon Denis* (unreported) CS 262/1998 a motor car knocked down the plaintiff and ran over her feet. There was no clinical evidence of a fracture. She had a superficial abrasion of the left big toe, superficial abrasion of the right big toe and a deep abrasion on the medical side of the right foot. As a residual disability, she suffers a weakness of the right foot. On a consideration of previous awards for injuries to limbs, I awarded a sum of R20,000 under the general head of moral damages.

The injuries suffered by the plaintiff in the present case are much less severe than those suffered by the plaintiffs in the first three cases mentioned above. On the other hand, the injuries suffered by the plaintiffs in the two latter cases cited above are comparatively less severe than suffered by the

plaintiff in the present case. Hence considering the residual pain and discomfort the plaintiff is suffering at present, I award a sum of R25,000 under the head of pain and suffering. As regards the head of loss of amenities of life, he testified that he is now unable to play football during his leisure time. His present discomfort may have been avoided had he agreed to an arthroscopy and received treatment. Hence I would award a sum of R5000 as damages under that head. However R1000 paid for the medical report as per exhibit P1 is awarded in full.

Accordingly, judgment is entered in favour of the plaintiff in a sum of R31,000, together with interest and costs.

Record: Civil Side No 214 of 1998

Seychelles Marketing Board v Bingham

Leave to appeal out of time

The respondent received judgment against the applicant on 30 May 2001. The respondent's counsel was present but neither the applicant nor its attorney were present. On 8 August 2001 the applicant filed notice of motion for leave to appeal out of time against the judgment of 30 May. The respondent resisted the motion on the ground of the applicant's dilatoriness.

HELD:

(i) The judgment in question was delivered in the absence of the applicant. It therefore cannot be safely assumed that the applicant was aware of the judgment soon afterwards;

(ii) The applicant took immediate steps to lodge an intended appeal as soon as it learnt of the judgment; and

(iii) There are sufficient grounds for treating the case as exceptional.

Judgment for applicant. Motion allowed subject to the payment of R1,000 to the respondent as exemplary costs.

Legislation cited
Courts Act
Appeal Rules, rule 5

France BONTE for the applicant
Jacques HODOUL for the respondent

Ruling delivered on 12 November 2001 by:

KARUNAKARAN J: This is an application by way of motion for leave to appeal out of time against a judgment of the Magistrate's Court. This application is made in terms of rule 5 of the Appeal Rules under the Courts Act (Cap 52), which reads thus:

> Any party desiring an extension of the time prescribed for taking any step may apply to the Supreme Court by motion and such extension as is reasonable in the circumstances may be granted on any ground which the Supreme Court considers sufficient.

The background facts of this case are as follows:

The respondent herein sued the applicant before the Magistrate's Court in Civil Side 290/2000 claiming delictual damages from the applicant. The Magistrate, having heard the case on merits, found the applicant liable and gave judgment for the respondent in the sum of R25,000 with interest and cost. The judgment was delivered in open Court. That was on 30 May 2001in the presence of the respondent's counsel, Mr Hodoul. However, a careful perusal of the record reveals that neither the applicant nor its attorney, Mr Freminot, was present at the time it was delivered. Be that as it may, following the said judgment the registrar issued a notice to Mr Freminot requesting him to attend the taxation proceeding before him on 13 July 2001. Although I see a copy of that notice in the file, I find no proof on record to show that it was in fact served either on the applicant or on its attorney, Mr Freminot. It only shows that the taxation of the bill of costs was held ex parte in the absence of the applicant.

In the circumstances, the applicant has now come before this Court seeking leave to appeal out of time as he could not file the notice of appeal within the statutory period of 14 days from the date of the judgment. According to the affidavit filed by the

applicant's counsel, due to lack of instructions it was not possible to appeal within the time prescribed. Therefore, the applicant moves this Court for an order granting leave to file this appeal out of time.

The respondent on the other side resists this motion on the ground that the applicant cannot benefit from its own laches. Moreover, it is the contention of the respondent that the applicant's attempt herein is frivolous, vexatious and groundless. Therefore, the respondent urges this Court to dismiss the applicant's motion in this matter.

I carefully perused the record of the proceedings in the Court below. I went through the affidavits filed by the parties in support of and opposing this motion. Whatever be the arguments advanced for and against this motion, the fact remains that the judgment in question has been delivered in the absence of the applicant. In the circumstances, one cannot safely presume that the applicant was aware of the judgment soon after it had been delivered in Court. Obviously, the applicant wouldn't be able to know about the judgment within 14 days unless notified by the Registry or through other means if any, available to the applicant. Indeed, had the judgment been delivered in the presence of the applicant and had the applicant been aggrieved thereof, in the normal circumstances it should have filed the notice of appeal on or before 13 June 2001. However, in this case the applicant has filed this notice of motion on 8 August 2001 after a delay of 55 days from the due date. In my view, the applicant has taken immediate steps to lodge an intended appeal as soon as he learnt about the judgment. In the given circumstances, it appears to me that the applicant has acted within a reasonable time by filing this motion for leave to appeal out of time. The intention to appeal seems to be genuine as the applicant has filed this motion prior to the receipt of the letter dated 14 September 2001 issued by the respondent demanding payment of the judgment debt.

For these reasons, I am satisfied that there exist sufficient grounds for treating this case as an exceptional one and therefore grant the applicant leave to appeal out of time. Accordingly, I extend the time until 26 November 2001 for the applicant to file the notice of appeal in this matter. Thus, I allow the motion but on condition that the applicant should pay a sum of R1000 to the respondent as exemplary costs before filing the notice of appeal.

Record: In Re Magistrate's Court Civil Side No 290 of 2000

Sinon v Dine & Or

Easements - right of way

The plaintiff and the defendant owned adjoining land. The plaintiff claimed a right of way over the defendant's land to access the public road and that this right of way had been used for a century. The defendant barred the use of that right of way. The plaintiff claimed a declaration of right a prohibitory injunction, and damages arising from the obstruction.

HELD:

(i) A right is a real right as opposed to a personal right it is attached to immovable property;

(ii) A right of way requires a document of title under article 691 of the Civil Code of Seychelles; and

(iii) A right of way is a discontinuous easement which is not created by possession.

Judgment for the defendant. Order refused.

Legislation cited
Civil Code of Seychelles, art 691

Cases referred to
Azemia v Ciseau (1965) SLR 199
Delorie v Alcindor & Another (1978-1982) SCAR 28
Payet v Labrosse & Another (1978) SLR 222

Antony DERJACQUES for the plaintiff
Kieran SHAH for the defendant

Judgment delivered on 19 March 2001 by:

KARUNAKARAN J: The ruling delivered by this Court on 29 September 1999 in respect of an application for interlocutory injunction in this matter be read mutatis mutandis as part of the judgment hereof.

The plaintiff originally instituted this suit against two defendants seeking the following relief:

(i) A declaration that the plaintiff has a right of way on the defendants' land parcel S1040 to have access from the public road to the plaintiff's land parcel S1171.

(ii) An injunction preventing the defendants from interfering with plaintiff's peaceful use and enjoyment of the said right of way; and

(iii) An award of R50,000 for the plaintiff against the defendants towards loss and damage the plaintiff allegedly suffered because of the obstruction the defendants had put up on his right of way.

When the matter was pending before this Court for hearing, the first defendant passed away. Hence, the plaintiff withdrew the case against the first defendant and proceeded only against second defendant.

The facts of the case as transpired from evidence are briefly as follows:

At all material times, the plaintiff and defendant were and are the residents of Anse Aux Pins, Mahe. The plaintiff owns a parcel of land registered as S1171 and lives in a house situated on that property. The defendant also owns and lives on an adjoining parcel of land registered as S1040. The

plaintiff testified, in essence, that he and his family had been using a right of way over the defendant's land to have access from the public road to the plaintiff's property. In the plaint, the plaintiff has averred that he has been using this right of way for the past 52 years. However, in his testimony the plaintiff stated under oath that his family had been using the same for the past 100 years. Be that as it may. The plaintiff also testified that the defendant in March 1999 blocked the said right of way with wooden boards and barbed wires causing inconvenience and hardship to the plaintiff. According to him, it is unlawful for the defendant to do so. Hence, the plaintiff suffered moral damages, which he estimated at R50,000. Further, the plaintiff testified that his land is so enclosed on all sides and that the said right of way is the sole and practicable access to his land from the public road. In the circumstances, the plaintiff seeks this Court for the relief hereinbefore mentioned.

On the other hand, the defendant denied all the claims and allegations made by the plaintiff in this matter. According to the defendant, the plaintiff has no right of way over his property. The plaintiff had no document of title for any right of way over parcel S1040 nor is parcel S1040 so burdened. Therefore, the defendant contended that he never blocked the plaintiff’s right of way, as the plaintiff at first place had no such right of way at any point of time over the defendant's property. Further, it is the contention of the defendant that the plaintiff’s property is not an enclave and the plaintiff has other accesses without having to go through the defendant's property namely, parcel S1040. Moreover, the defendant produced a copy of a judgment of the Supreme Court in Civil Side 11/1973 dated 28 February 1975. In that judgment the Court inter alia, restrained the plaintiff his predecessor in title from trespassing on the defendant's property S1040, which was then in possession and owned by Mrs and Mr Hilaire. The defendant further testified that the plaintiff has caused a lot of annoyance to the defendant and in particular has been entering the defendant's property, burning and spraying chemicals on fruit

trees and causing damage to the property. In the circumstances, the defendant seeks dismissal of the suit.

I meticulously perused the evidence including the documents adduced by the parties in this matter. Besides, I took into account the physical observations and inspection I made during my visit on locus in quo. I gave diligent thought to the submissions made by the counsels on points of law and on facts.

Firstly on the question of the right of way it is trite law that a right of way is a discontinuous easement, which cannot be created by possession even from time immemorial. Needless to say, it requires a document of title for its creation in terms of article 691 of the Civil Code of Seychelles, see *Payet v Labrosse and another* (1978) SLR 222 and *Delorie v Alcindor and another* (1978-1982) SCAR 28. To my understanding of the case laws I find that the right of way is a distinct easement attached to an immovable property. It is a real right as opposed to personal. Therefore, it requires a document of title or a declaration of the Court for its creation. In the absence of such creation of the right of way in this particular case, I find the plaintiff has no legal right of way over the defendant's property. In any event, the fact remains that the Supreme Court has already granted an injunction in CS 11/1973 restraining the plaintiff's mother from trespassing on the defendant's land in question. Obviously, the century-old right of way as claimed by the plaintiff over the defendant's property is nowhere mentioned in the said judgment. Had the plaintiff or his mother or the predecessor-in-title of their land been using the alleged right of way over the defendant's property – as the only access – for the past one hundred years as claimed by the plaintiff, then in 1975 the Court certainly would not have restrained the plaintiff's mother from using the defendant's property. At any rate, had there been such a necessity the Court then should have declared or reserved the right of way for the use by the landowner in favour of parcel S1171. In the circumstances, I find that

neither the defendant nor his predecessor in title ever had a right of way over the defendant's land. For these reasons, I decline to grant the injunction sought by the defendant in this matter. Consequently, the claim for damages should automatically fall.

On the question of enclave, from my visit of the *locus in quo* I find that the plaintiff's property is not an enclave. It has at least three possible accesses from the other directions through adjacent properties, which all once formed part of the same parent parcel. In fact, the defendant has purchased his property under exhibit D1 in 1975. The plaintiff has subsequently purchased his parcel S1171, which is a subdivision of parcel S1105, by a deed dated 15 July 1993. There is no document of title granting any right of way in favour of parcel S1171. The parent parcel has subsequently been divided into several plots, which all belong to the plaintiff's family and relatives. If the plaintiff's property is enclaved he should claim his right of way or access in terms of article 684 from the parent parcel. As rightly pointed out by Mr Shah, counsel for the defendant if the non-access arises from exchange or a division of land or from other contract the passage may only be demanded from such land, as has been the subject of such transaction. In addition, if the landowner is enclaved and requires an access over another's property, the Court should consider all the relevant circumstances of the case including how the non-access arose. Obviously, the plaintiff who came to this Court originally seeking an injunction and damages against the defendant has now converted his claim to the one based on enclave. Indeed, in *Azemia v Ciseau* (1965) SLR 199 it was held:

> (i) The land owner whose property is enclaved and who has no access whatsoever to the public road can claim a right of way over the property of his neighbour for the exploitation of his property, conditioned on giving an indemnity proportionate to the

damage he may cause.

(ii) A property may be deemed to be enclave not only from the fact that it has no access to the public road but also in the case where such road is impracticable.

(iii) If the accessibility is the result of the property having been divided by sale, exchange, partition or any other contract, a right of way can only be asked for over the properties affected by such contract.

Applying the above principles to the facts and pleadings of this case, I find that the plaintiff is not entitled to claim any right of way over the defendant's property. In the circumstances, I find that the defendant's claim based on enclave is also misconstrued and not maintainable either in law or on facts.

Therefore, the suit is accordingly dismissed with cost.

Record: Civil Side No 177 of 1999

Gabriel v Government of Seychelles

Medical misadventure - informed consent to operation - assessment of damages

The plaintiff suffered a wrist injury for which he received medical treatment. The injury did not heal and surgery was required on 3 occasions. The third occasion involved surgery to the plaintiff's ankles as well as the wrist. Informed consent was not obtained by the surgeon. The plaintiff suffered a 20% permanent disability. The plaintiff sued the defendant for damages of R95,000 for failing to provide proper medical care and for failing to fully inform him about the operation. The claim was brought under articles 1382 and 1383 of the Civil Code of Seychelles.

HELD:

(i) There was a negligent failure to determine the extent and nature of the original wound; and

(ii) There was no fault or negligence in respect of the subsequent treatment

Judgment for the plaintiff. Damages awarded for partial loss of use of left hand, ankle scars, pain and suffering, and moral damages - total R42,000.

Cases referred to
Bouchereau v Panagary (unreported) Civil Side 160/1996
Suzette Hermitte v Philipe Dacambra & Others (unreported) Civil Side 261/1998
Larame v Coco D 'or (unreported) Civil Side 172/1998
Lucas v Government of Seychelles (unreported) Civil Side 67/1994
Sinon v PUC (unreported) Civil Side 312/1999

Foreign cases cited with approval
Hopp v Lepp (1980) 112 DLR (3d) 67
Mahon v Osborne [1939] 2 KB 14

Nichole TIRANT for the plaintiff
Lucie POOL for the defendant

Judgment delivered on 22 November 2001 by:

JUDDOO J: The plaintiff claims damages in the sum of R95,000 from the defendant for failing to provide him with proper medical care and attention following injuries sustained at his wrist and for having failed to inform him that two cuts will be performed at both his ankles prior to a third operation effected to his wrist on 7 July 1997. The claim is resisted by the defendant.

The plaintiff gave evidence that he suffered a wrist injury on 1 January 1997. He called to Anse Royale Clinic. There, a nursing officer wiped his arm clean and imposed one stitch to the wound. His arm was then bandaged and he was asked to attend to examination the next day. The plaintiff added that on 2 January he called again at the Clinic. His arm was examined by a different officer and he was told he could go away. On 3 January 1997, the plaintiff noticed that his arm was swollen and he once again called to the Clinic at Anse Royale. He was examined by a lady officer who immediately referred his case to the Victoria Hospital. Reaching there, he was ushered to the Casualty Department and examined by Dr Alexander Korytnicov, a medical specialist, who informed him that his nerve tendon at the wrist had been severed and there was necessity for an operation to repair the said tendon. He consented and was immediately taken to the operating theatre where surgery was performed. After the operation, his hand was plastered and he remained in hospital for a period of about two weeks.

The plaintiff explained that one month later he was still suffering from severe pain at his wrist. He went back to Victoria Hospital and was further examined by Dr Korytnicov who informed him that his wrist needed a second operation which was performed on 24 March 1997. He remained in hospital for about a period of three weeks. After the second operation the plaintiff followed physiotherapy treatment. However, he saw no improvement to the use of his fingers and subsequently, he was further examined by Dr Alexander Korytnicov who informed him that a third operation was needed. The third operation was carried out sometime in July 1997. When he woke up after the third operation, he felt pain at both his ankles and discovered that he had been operated at both his ankles in addition to his wrist. The plaintiff explained that he agreed to the three surgical operations at his wrist but was not informed that cuts would have to be made to his ankles to remove tendons for grafting to his wrist. He added that he has not fully recovered the use of the three middle fingers in his hand. They have become "stiff and are extremely sensitive." He cannot touch anything with them. He had been a stone-mason and cannot handle such type of work any longer. The place where cuts had been made at his ankle are also sensitive spots which have remained numb.

Dr Alexander Korytnicov, Consultant Orthopedic Surgeon, gave evidence on behalf of the defendant. He has been in service for about 25 years and attached with Victoria Hospital for the last 13 years. He examined the plaintiff on 3 January 1997. The latter had a cut injury at his right wrist. It was a very bad laceration, very deep to the bone and involved the tendon and the nerve. There was a stitch to his wound. The plaintiff was immediately admitted to the operation theatre and an operation was carried to repair the nerve and tendon. "The tendon was repaired very well, some nerve tissues were alright and the operation closed." After the first operation, the plaintiff had some movements in his hand. However, those movements were accompanied by severe pain in his wrist. Accordingly, a second operation was needed for the

exploration of the wrist and to review his wound. In his own words:

> The second operation was done and the wound was not good maybe scar tissue. We had to make some improvement to separate the scar tissue from the tendon. Some tendons were together, we separated them. The nerve was in the same place. The nerve was repaired, healed and we cannot see inside.

The witness added that after the second operation, the plaintiff was still complaining of severe pain and it became necessary to perform a third operation. The purpose was once again to explore the wound, especially the nerve. After the wound was opened, it was found that the plaintiff was suffering from neuroma. In the witness's own words:

> It was bad nerve, very painful and this nerve is not working and we have to have incision on it. Maybe one cut of about two centimetres to remove the (neuroma) and a grafting should be done. That was taken from his leg.

Neuroma is defined as "a tumour connected with a nerve, such tumours being generally composed of fibrous tissue, and are of a painful nature" (*Black's Medical Dictionary*).

A letter of correspondence from Dr T Wong, Acting Director General, Hospital Services, was produced by the plaintiff as exhibit P3 without objection. This was in answer to a complaint written by the plaintiff. The relevant part of exhibits P3 reads:

> It is clear from the history and from your case notes that you have had a deep cut on your left wrist, that damage your medial nerve (the nerve

> that control movements of your first four fingers) Dr Korytnicov attempted neural graft and failed. He said that he did not inform you prior to the operation because he did not know how bad your nerve was damaged...

Dr Bernard Valentin gave evidence he was the Health Co-ordinator for Anse Royale Clinic at the material time. There is an entry in the casualty book that shortly after midnight of 1 January 1997 of the plaintiff attending the Clinic for treatment. The patient was attended to by one Laura Valmont, senior staff nurse, who examined the wound, put a single stitch on the laceration and asked the patient to call again in the morning to be examined by a medical officer. The patient was not immediately referred to a medical officer although a medical officer was on duty and residing at a premises not far from the Clinic. Additionally the witness could not say whether the plaintiff did not attend to the Clinic the next day as was requested and he added that if the plaintiff had called to the Clinic later in the morning there would be no entry in the casualty book.

Lastly, Laura Valmont gave evidence that she has been a nurse at Anse Royale Clinic for the past ten years. From the records of the Clinic, the witness agreed that she examined the plaintiff sometime in January 1997 and the latter had a laceration on his wrist. In her own words "I made a suture and then I informed the doctor on duty and the doctor told me to ask the patient to report the next morning to see him". The witness added that she only made an entry in the casualty book, left the Clinic at 8.00 am and could not say whether the plaintiff had attended to treatment as requested the next morning. Under cross-examination, the witness explained that it was a "small laceration" and the patient was not made to be examined by a doctor although one was on duty and that the wound was only "bleeding a little".

The liability issue raised in the plaint is twofold, as follows:

4. As a result of a wrongful diagnosis and/or error of judgment as to the nature and extent of the plaintiff's injury, the defendant failed to provide the plaintiff with the proper standard of care and attention that is expected from the defendant as a result of which the plaintiff was subjected to three separate surgical operations on his wrist on 3 January, 24 March and 7 July 1997, such failure amounting to a faute in law.

5. On 7 July, the plaintiff underwent a third operation to his wrist and awoke to find that he has also been subject to two cuts on either side of the left ankle, the defendant having failed to inform the plaintiff, prior to the operation taking place, that cuts or any cut would be required.

I find it established from the evidence that the plaintiff called to Anse Royale Clinic sometime about midnight on 1 January 1997 with a deep cut injury to his wrist. He was examined in the early hours of 2 January 1997 by the nurse in charge, his wound was wiped clean and a stitch grafted to close the wound. He was not immediately referred for examination by the medical officer who was on duty but was instead required to call again later in the morning for further examination. The plaintiff's testimony that he called again on the morning of 2 January 1997 stands uncontradicted by the evidence adduced on behalf of the defendant. I believe his version on that score namely to the effect that he was examined once again and requested to return home. Upon the swelling which occurred to his arm, on 3 January 1997, the plaintiff called again at Anse Royale Clinic. Not only was he immediately referred from Anse Royale Clinic to Victoria Hospital, but he was examined by a specialist on admission to the ward at Victoria Hospital. The specialist found that there was a very bad

laceration, very deep to the bone involving the tendon and the nerve. After five minutes, he was taken to the operation theatre and surgery was performed by Dr Alexander Korytnicov to attempt to repair the severed tendon and nerve. The testimony of Dr Korytnicov when the patient was referred to him is very relevant. In his own words:

> the wound was very deep to the bone and the nurse or any doctor will not go inside. It should be the specialist. The contaminated stayed inside and it is impossible to clean the wound, only under anesthetic that we can clean it.... The doctor may be did not recognise it and put a stitch on the wound. It is more or less from infection of the person ……

Accordingly, I find that there was failure to determine the extent and nature of the wrist wound injury sustained by the plaintiff at the first and second time he called at Anse Royale Clinic and to take appropriate remedies at that material time to avoid further infection or contamination.

The second part of the plaintiff's claim is that he was only informed that a graft had been necessary after he woke up following the third operation on 7 July 1997. It has been pleaded, in defence, that the plaintiff while on the "operating table" was duly informed about the possible operation of his left leg and, additionally, that the defendant did all that was required of an ordinary competent doctor. At the outset, the testimony of Dr Koritnicov discloses that the plaintiff was not informed "while at the at the operating table" for his third operation that there was a risk of incisions being performed to his ankle for grafting. In his own words:

> for the first operation I told him. The second operation there was more discussion and on the third occasion may be discussion was not the same. The second time, neuroma, may be

> incision for grafting this I remember. The second operation I did not find any neuroma and I close the wound. The third time we had to do exploration again. He did not sign for grafting of the neuroma.

That the plaintiff was informed some weeks before his third operation about the 'grafting' has not been pleaded. Moreover, there was no objection to exhibit P3, referred earlier, stating that the patient was not so informed before the third operation. However, in view of the added averment under paragraph 6 of the defence that "the defendant did all that was required of an ordinary competent doctor" it needs to be determined whether the treating surgeon was at “faute” when he did not inform his patient about the incisions at the third operation.

It is generally necessary that the patient should be sufficiently informed of the treatment which is proposed and warned of any risks which are inherent in that treatment. An important reason for informing the patient of the nature of the treatment proposed and of the risks involved, is to enable him to decide whether to undergo that treatment. However, there is no duty to warn the patient of every risk involved in his treatment, however remote. In a recent case before the Supreme Court of Canada, the Court formulated the duty of disclosure as follows, (vide: *Hopp v Lepp* (1980) 112 DLR (3d) 67):

> a surgeon, generally, should answer any specific question posed by the patient as to the risks involved and should disclose to him the nature of the proposed operation, its gravity, any material risks and special or unusual risks attendant upon the performance of the operation. However, having said that it should be added that the scope of the duty of disclosure and whether or not it had been breached are

> matters which must be decided in relation to the circumstances of each particular case.

A great deal of medical treatment, even if administered with all due care and skill, involves some degree of risk. On occasions medical treatment requires a choice to be made between competing risks. In *Mahon v Osborne* [1939] 2 KB 14, Scott LJ described the position of a surgeon in those terms:

> In applying the duty of care to the case of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention. I will mention a few ...
>
> (1) the multiform difficulties presented by the particular circumstances of the operation;
>
> (2) the condition of the patient and the whole set of problems arising out of the risks to which he is being exposed;
>
> (3) the difficulty of the surgeon's choice between risks;
>
> (4) the paramount need of his discretion being unfettered if he thinks it right to take one risk to avoid greater...

Additionally, in *Encyclopedie Dalloz Droit Civil III* Verbo “Medicine” Note 193:

> Si le churigien doit, lorsque apparait une complication au cours d’une operation surseoir... à l'intervention pour consulter le patient sur la decision à adopter, dans le cas ou il n'y a pas peril immediat, it est au contraire fondé à agir

> sans prendre le temps de s'assurer de l'assentisement du malade ou de la famille quand il y a urgence à intervenir sans delai...

In the present circumstances, the version of the treating surgeon is that he was doing exploratory surgery to the plaintiff at the third operation when he discovered a neuroma. He had operated on the wound before and had not seen a neuroma. Accordingly, he did not reasonably foresee that such a tumor had formed inside the wound so as to warn the patient specifically of the resulting consequences of finding a 'neuroma'. At the operation theatre, the specialist surgeon felt that the wound being open and taking cognisance that the patient had a tumor he decided to take one risk to avoid the greater. The urgency of the situation is summarised as follows:

> It was necessary to take a graft of about ten centimetres and put it on the wrist. This is very important for if we remove neuroma and we do not put a graft then there will be complete disability, there would not be any sensation or movement. ... It was necessary to take a graft, we know we cut his leg and this will not affect his leg .. when we carried out the operation, the patient was under anesthesia and it is impossible to wake him up. The wound is open and we cannot (wait) after 12 hours to ask him about the graft.

Accordingly, I do not find that there has been faute or negligence on behalf of the defendant in the above respect.

Having found earlier that liability of the defendant to be established on the failure to determine the extent and nature of the wound and to take appropriate remedial action, I now turn to the issue of damages resulting therefrom. In so doing I find that to a certain extent the pain, incisions and scars to the

left leg are imputable to the liability so established under the first part of the plaint.

In *Suzette Hermitte v Philipe Dacambra & Others* (unreported) CS 261/1998 the plaintiff suffered a gunshot injury on her left leg having a residual disability to 15 %. In addition, the bullet had remained embedded in her thigh near arteries and veins and could not be removed. Her left femur was fractured by pellets and was shorter than the right femur. The Court added R60,000 in respect of the injuries, pain and suffering and R15 000 for loss of amenities of life.

In *Bouchereau v Panagary* (unreported) CS 160/1996 the plaintiff suffered a comminuted fracture of the right tibia and fibula, a fracture of the maxilla bone, multiple fracture of the rigs of the right chest and multiple laceration of the skull, body, limbs and right eye. There was also a residual incapacity on the right leg, weakness and defect in the eye sight and jaws. A total of R 85,000 was awarded in respect of the injuries, pain and suffering and loss of amenities of life.

In *Lucas v Government of Seychelles* (unreported) CS 67/1994 the plaintiff suffered an amputation of part of a finger. The Court awarded R10,000 for the amputation and R10,000 for pain and suffering.

In *Sinon v PUC* (unreported) CS 312/1999 the plaintiff suffered burn injury to both hands, his right index finger had become neurotic and hence had to be amputated. Skin grafting was done to areas with deep burns and the plaintiff stayed 55 days in hospital. In addition to the physiological component of the disfigurement, a residual disability of 15% of the right hand was estimated. The Court awarded R50,000 in respect of pain, suffering and disfigurement; R20,000 for loss of amenities of life.

In *Larame v Coco D'or* (unreported) CS 172/1998 the plaintiff suffered an amputation of his right arm below the elbow. The

Court awarded R125,000 for pain, suffering and disfigurement.

In the present case, the medical report produced as exhibit P4, dated 4 November 1997, disclosed the following injuries and treatment to the plaintiff.

> On examination, there was a laceration of 4 cms transversely in the left wrist. Numbness of the 2nd and 3rd fingers of the hand. Operation was carried out on 3/10/97, 40 hours later after the assault had taken place.
>
> - Repair nervous medianus
>
> - Repair tendon in flexor digitorum longus
>
> During the post-operative period there was tenderness over the scar on the left wrist. There was restricted movements of the 2nd, 3rd and 4th fingers. Physiotherapy was advised.
>
> He was re-operated on 24/03/97 for examination of the tendons in flexor digitorum longus and on medianus.
>
> On 07/07/97 for exicision neurimonia of the medianus plus a graft to the n.shune [sic] from the left leg…….

and a further report dated 27 November 1997:

> The patient was examined in SOPD again. He is still complaining of the pain in the left wrist, weakness, of the left hand. There is restricted movement in the left hand, there is no sensation on the median and median nerve in the left hand. He is unable to do a previous job. He has

permanent disability of 20%.

In the instant case the nature of injuries sustained by the plaintiff is of a lesser degree than in *Larame v Coco D'or* (supra) and *Sinon v PUC* (supra). The award in *Lucas v Government of Seychelles* need to take account of the inflationary trend since.

Taking account of all the circumstances of the present case and the medical evidence on record, I find it just and appropriate to award the plaintiff:-

(i) for partial loss of use of left hand, R25,000.

(ii) for scars on left ankle; R2,000.

(iii) for pain, suffering, anxiety, distress and discomfort, R10,000.

(iv) moral damages, R5000.

Accordingly I enter judgment in favour of the Plaintiff in the sum of R42,000 with interest and costs.

Record: Civil Side No 432 of 1997

Finesse v Atalla & Or

Code of Civil procedure - plea in limine litis - claim against public officers

The first defendant, a Supreme Court process officer, caused damage to property while acting in the course of his duties (a wall owned by the plaintiff) not covered by his authority. He was assisted by the second defendant who was not a public officer. The Attorney-General represented the first defendant and claimed that the action against the first defendant was outside the time prescribed by the Public Officers (Protection) Act. The plaintiff claimed that the first defendant was not acting in the discharge of his duties when he caused the property damage and therefore was not entitled to the procedural restrictions available to public officers.

HELD:

Actions against both the defendants would fail if the evidence discloses that the first defendant acted lawfully.

Ruling for the defendant. The plea raised should be considered at the end of the hearing of the case.

Legislation cited
Code of Civil Procedure, s 21
Public Officers (Protection) Act, s 4(c)

Cases referred to
Joe Dingwall v Gaetan Hoareau and Wholly Pillay (1983) SLR 143
Telemaque v Volcere (1982) SLR 266

Phillippe BOULLE for the plaintiff
Dora ZATTE for the first defendant
France BONTE for the second defendant

Ruling on plea in limine litis delivered on 8 November 2001 by:

PERERA J: The plaintiff sues the first and second defendants claiming damages in respect of a demolition of a wall. She avers that:

> on 25 August 1998, the first defendant, in pursuance of a Court Order dated 9 March 1998, and with the Assistance and guidance of the second defendant, proceeded to demolish the wall built by the plaintiff on the second defendant's land. In the process of the abovementioned demolition, the defendants negligently destroyed part of the wall which was on the plaintiff's property. (emphasis added).

The cause of action therefore is the damage caused to that part of the wall on the plaintiff's land, allegedly by the two defendants, negligently. Mr Boulle, counsel for the plaintiff, submitted that although the first defendant is a process officer of this Court and was acting in the discharge of his duties, he negligently demolished a part of the wall which was not authorized to be demolished. It was therefore submitted that the first defendant is not being sued as a Public Officer, although his official address C/O Supreme Court, has been given in the caption of the plaint. It was also submitted that the plaintiff has not sued the government of Seychelles in its vicarious capacity, as a party defendant.

However, in the present case, the first defendant is being represented by State counsel, presumably considering him to have acted lawfully as a Public Officer. In a similar case, *Joe Dingwall v Gaetan Hoareau and Wholly Pillay* (1983) SLR 143, the first defendant, a Process Server of this Court, was sued in his personal capacity together with the judgment-creditor. In that case his address in the caption was given as

C/O Supreme Court, as in the present case. The irst defendant Process Server conducted a public auction, in execution of a judgment of Court, but failed to follow the procedure prescribed in the Code of Civil Procedure. He was not represented by State counsel, but by a private legal practitioner. The Supreme Court entered judgment against both defendants jointly and severally. The Court of Appeal however set aside that judgment on the basis that the plaintiff had failed to establish that failure to follow the procedure resulted in damages being caused to him. It is however within the discretion of the Attorney-General to decide whether legal representation should be given to the first defendant in the circumstances of the present case.

The Attorney-General representing the first defendant has raised a plea in limine litis that the action against the first defendant is prescribed under the Public Officers Protection Act (Cap 192). The issue to be considered in that respect is whether, although the first defendant is a Public Officer who was admittedly acting in the execution of his office, negligently acted outside its scope and damaged a portion of the wall not authorised by Court to be demolished as averred by the plaintiff.

If the plaintiff succeeds in establishing such averment, the first defendant, although a Public Officer, will not be considered as having acted in the execution of his duty. The Public Officers (Protection) Act does not exempt Public Officers from liability but only restricts the right of action against them by requiring that any action be brought within six months from the date the claim arose. In fact, section 21 of the Code of Civil Procedure (Cap 213) provides that "the Process Officers are liable in damages for neglect in levying execution or, for fraud in relation thereto, at the suit of the party prejudiced". Hence the Public Officers (Protection) Act protects only acts done in execution of their service, and not acts done outside the scope of office which would then become their personal acts. As in the case of *Telemaque v Volcere* (1982) SLR 266

where a Public Officer driving a government vehicle outside his scope of duties on a “frolic of his own", was held to be personally liable in damages, the plea in limine that the action was time barred under the Public Officers (Protection) Act was considered at the end of the trial upon hearing evidence. In that case too, the action was filed only against the defendant who was a Public Officer. He was also represented by a private legal practitioner. In the present case the second defendant is being sued for "assisting and guiding" the first defendant. If the evidence discloses that the first defendant had acted lawfully, then the second defendant, though not a Public Officer, would also get protection under section 4(c) of the Act as a person lawfully giving assistance to a Public Officer, and hence action against both defendants would fail on the basis that the action is time barred.

Hence I rule that this is a fit case where the plea raised should be considered at the end of the hearing of the case.

Record: Civil Side No 358 of 1999

F & D Structural Consultants v
City Centre Development Co Pty Ltd

Contract for professional services - architects - damages/or unlawful termination

The plaintiff contracted with the defendant to provide engineering consultancy services for a building. The contract provided for the plaintiff to receive two per cent of the final contract price of the project by way of remuneration. The defendant terminated the contract either because the plaintiff failed to follow the defendant's instructions or that it was an implied term that the contract could be terminated unilaterally by either party. The plaintiff sued for the contract fee of 2% of the instalments of the total contract price and R200,000 for moral damage. The defendant limited its liability to the plaintiff to the value of invoices received to the date of termination.

HELD:

(i) The relationship of an architect and employer is purely contractual;

(ii) A professional's work must be remunerated whereas preliminary work done by a contractor to obtain a contract will not be remunerated if the contract does not eventuate;

(iii) The contract will be interpreted in accordance with the provisions of the Civil Code;

(iv) It is not sufficient reason to terminate an agreement with one professional merely on unproven opinion of another professional in the same field. The

defence claim that the plaintiff was in breach of contract by failing to abide by the instructions of the defendant is untenable on the facts;

(v) The defendant terminated the contract unlawfully. It was not a term of the contract that either party could terminate it unilaterally;

(vi) Recommendations of the Royal Institute of British Architects which are not inconsistent with the law of Seychelles may be considered in relation to the contractual obligations of an architect and client; and

(vii) The removal of the plaintiff firm from the display board at the construction site provided a base for moral damages for a professional body.

Judgment for the plaintiff. Damages representing the unpaid contract fee plus moral damages - total awarded R492,600.

Legislation cited
Civil Code of Seychelles, arts 1134, 1135, 1149, 1150

Cases referred to
Firma SAI International Finance and Trading Company and Another v Hotel des Seychelles Ltd (1979) SLR 59

Antony DERJACQUES for the plaintiff
Phillippe BOULLE for the defendant

[Appeal by the defendant was dismissed though the amount of money was reduced slightly on 19 April 2002 in CA 15/ 2001.]

Judgment delivered on delivered on 4 June 2001 by:

PERERA J: The plaintiff, a partnership of structural engineers, sues the defendant company for the recovery of R700,000 for an alleged breach of contract. The parties entered into a written agreement on 27 June 1997 whereby the plaintiff would provide consultancy services in structural engineering to the defendant in connection with a building project named the "International Finance Centre Building". The plaintiff avers that it was a term in the contract that a sum equivalent to 2% of the final contract sum for the building project would be paid to them. It is further averred that after the plaintiff performed and carried out the services contracted for, the defendant unlawfully and unilaterally terminated the agreement. The plaintiff therefore claims R500,000 as the 2% fee of the contract price, and R200,000 as moral damages.

The defendant admits that the agreement was terminated on 17 May 1998, but avers that it was done as -

(1) The plaintiff was in breach of the contract in failing to abide by the instructions of the Defendant, and

(2) That in the alternative, it is an implied term of the contract, by virtue of fairness and practice, that it could be terminated by either party at any time.

The defendant further averred that all that was due to the plaintiff has been duly paid on the basis of the invoices received.

The terms of the engineering services contract with the plaintiff were as follows-

2.1 The Customer hereby appoints the Engineer as the Contract Engineer for the works and the Engineer hereby accepts the appointment.

2.2 Upon receipt of architectural drawings, the Engineer shall prepare all relevant structural drawings and details for the work in accordance with the principles of the standard method of measurement of building works for East Africa.

2.3 The Engineer shall visit the site when required to supervise any reinforcement laying and to inspect concreting works and to ensure that all structural works are properly executed by the building contractor, in accordance with the structural drawings and documentations.

2.4 The Engineer shall be liable to any structural defects resulting from engineering miscalculation.

2.5 The Engineer shall provide 10 sets of copies of the structural drawings and schedules.

The agreement did not however contain a clause as regards recession.

Mr Felix Morel, a partner of the plaintiff partnership, testified that structural drawings of the sub-structure were completed and approved by the Planning Authority. They were then given to the contractor to commence construction work. He explained that the "sub-structure" was the foundation up to the ground floor level, and that the construction above that, would be termed "superstructure". He further stated that his partnership completed 75%' of the work on the super-structure in advance when Mr R Merali, a director of the defendant company, sent a letter dated 17 July 1998 (exhibit P2) which is as follows –

Re-Contract Agreement Capital City

For the reason already specified to you, we are very regretful to bring to your attention that we have decided to terminate your Contract Agreement.
Please consider this to be a fifteen days notice from the date of this letter. We are confirming our verbal instruction to stop all work for the said project
Please send immediately the drawings for the work accomplished to date. We are also requesting you to send determination of your fees, at your earliest convenience.

Mr Morel stated that the only reason specified to him was the request by Mr Merali to accept plans prepared by a structural engineer, Joe Pool Associates. He stated that by that time, the contractor had commenced work on the substructure based on his plans which had been approved by the Planning Division. Mr Morel stated that his structural drawings for the foundation were based on the “Raft Principle” also known as the "floating principle" or the conventional method. He explained that he selected that method due to the nature of the site which was reclaimed land subject to subsidence on account of the tide and the presence of a river close by. He stated that "Raft Foundations" are often the choice for such sites having a "low bearing capacity", as they gave less chances for "differential settlement". In non-technical terms he stated that that method prevented or minimised the formation of cracks on the superstructure.

As regards the plans of Joe Pool Associates, he stated that the method used was the "finite method", which in his opinion was unsuitable to the ground conditions on site. He stated that the "finite method" was usually used on the superstructure, but not on foundations as its adaptability was unpredictable. Hence he disagreed to work on those plans as he was not

prepared to accept the consequences. He further stated that his partnership used the "raft principle" in most of the projects including the extension of the Central Bank Building opposite the defendant's project. As regards the building site of the defendant's project, he stated that soil tests revealed soft spots and movements. That was the reason for deciding on the "raft method".

Mr Morel further testified that Mr Merali had approached a second engineer, Mr Joe Pool, without his knowledge. He admitted that the "finite" method was cheaper as it involved smaller dimensions for the beams as well as for the reinforcement, but in his professional opinion, it was not suitable on a long term basis.

As regards the disagreement with the defendant, he stated that Mr Merali wanted him to work with Mr Joe Pool. He did not find that feasible, as both of them held different opinions on the structural construction aspects of the project.

In reply to the letter dated 17 July 1998 (exhibit P2), the plaintiff sent a letter dated 22 July 1998 (exhibit P3) through his lawyer stating inter alia that the plans of Mr Joe Pool had not been approved by the Planning Authority, and hence he could not agree to work on them and secondly, in his opinion they were not sufficiently professional.

The initial question to be decided is whether the defendant unilaterally terminated the contract or whether it was the plaintiff who "self-terminated". The relationship between the architect and the employer is purely contractual. On the basis of articles 1787 to 1799 of the Civil Code, it was held in the case of *Firma S.A.I International Finance and Trading Company and Another v Hotel des Seychelles Ltd* (1979) SLR 59 that unlike a contractor, an architect is a professional whose work must be remunerated, the distinction being that in the case of a contractor, any preliminary work done to obtain the contract will not be remunerated if the contract is not

concluded or does not eventuate. Where an employer contracts with a professional to carry out a piece of work by supplying his labour and skill, he would be contractually bound to rely on the expertise. Further, the parties would be bound by the contract, which in Seychelles would be interpreted under the provisions of the Civil Code.

Mr Merali was examined on his personal answers by counsel for the plaintiff. The unsworn evidence he gave was subsequently adopted as evidence in the case by him under oath. This evidence did not contain any reference to the dispute with the Plaintiff which culminated with the letter of termination (exhibit P2).

Article 1134 of the Civil Code provides that -

> Agreements lawfully concluded shall have the force of law for those who have entered into them.
> They shall not be revoked except by mutual consent or for causes which the law authorizes.
> They shall be performed in good faith.

Admittedly, there was no mutual consent for the termination. Hence, was there a legal justification for the termination conveyed by the letter dated 17 July 1998? The plaintiff gave three reasons for disagreeing with the request of the defendant to work on the plans prepared by Mr Joe Pool. Firstly, it was his professional opinion that the "finite method" was not suitable to the sub-structure due to the nature of the soil at building site. Secondly, the plans of Mr Pool had not been approved by the Planning Authority at that time. Although Mr Merali stated in evidence that they were approved, there is no documentary proof as to when that was done or even whether Mr Pool's "finite" method was used subsequently. Thirdly, it was not feasible to work with a Civil Engineer who was following a different method which if followed, according to his opinion would cause defects in the

long run. On the other hand, Mr Merali claimed that Mr Pool's method reduced the costs of construction by R2 million. There is neither the evidence of Mr Joe Pool, nor any documentary proof to substantiate this assertion.

In the letter dated 17 July 1998 (exhibit P2) the defendant confirmed the verbal instructions given to the plaintiff to stop all works for the project. Mr Boulle sought to draw a distinction between the words "stop all works" in exhibit P2 and "stop the contract". He submitted that the defendant asked the plaintiff to stop the works but not the contract, and hence it was the plaintiff who "self-terminated". This contention is untenable as stoppage of work necessarily involved stoppage of the service contracted. Hence it was the defendant who initially stopped the work verbally. That was followed by the formal letter of termination of contract. In these circumstances it is not open to the defendant to claim that the plaintiff "self-terminated" the contract. All that the plaintiff did was to preserve his rights under the contract and to refuse to compromise his professional opinion. That cannot be faulted. It was up to the defendant to agree with the plaintiff, or disagree and terminate the contract unilaterally, and be liable in damages. Mr Boulle submitted that the defendant had a right to decide upon the opinion of another engineer that it would be more economical for the building to stand on a foundation constructed on a different principle. *Halsbury* (Vol 4, para 1330), dealing with the "duties of care and skill" of architects states that the relationship between the architect and the employer is contractual. It is further stated that "it is not sufficient to establish a breach of duty to show that another architect of greater experience and ability might have used a greater degree or skill and care". Similarly, it would not be a legally accepted reason for an employer to terminate an agreement with one professional merely on an unproven opinion of another professional in the same field.

Mr Boulle submitted that the defendant sought a reasonable variation of the way the foundation was to be built so that it

would be more cost effective and also permitted the addition of an extra floor. It was therefore contended that as the plaintiff refused to comply with those instructions, he should forfeit any fees due on the contract. As I stated before, there is no proof of a saving or even that the finite method was ultimately adopted to construct the foundation. Even if that method was used, only time will tell whether Mr Morel was right or Mr Pool was right. A professional who stands by his convictions cannot be penalised just because a client who had entered into a lawful contract enlisting his services to do structural works decides to give instructions on a substantive issue like the constructing of the foundation. Mr Boulle referred to the "variations" permitted under paragraph 3.2 of the contract. But those variations refer to those necessary for the "proper completion and use of the building". Such variations cannot in any event include instructions to the architect to change his professional opinion on a fundamental issue based on the opinion of another architect, which may, or may not, be correct. Hence the averment in paragraph 3 (a) of the defence that "the plaintiff was in breach of the contract in failing to abide by the instructions of the defendant" is untenable in law.

As regards the alternative averment contained in sub-paragraph (b) that it is an implied term of the contract that by virtue of fairness and practice that it could be terminated by either party at any time, Mr Boulle produced a document entitled "Architect's appointment" containing the recommendations of the Royal Institute of British Architects (RIBA). Both counsel had no objections to the Court using it as a reference source. Paragraph 3.23 thereof states that "the architect's appointment may be terminated by either party on the expiry of reasonable notice given in writing". Such a practice would be contrary to the contractual law of Seychelles. Further, if those conditions were applicable, para 3.19 thereof provides that "neither the qrchitect nor the client may assign the whole or any part of his duties without the other's consent". That appears to be the recommended

practice for British architects. The contract in the present case provides that drawings and details of work should be prepared in accordance with the principles of the standard of measurement of building works for East Africa. What is pertinent here is not the "measurement of works" but the contractual obligations between the client and the architect, which is solely governed by the Civil Code. However, the contract between the parties contain some of the RIBA recommendations. There would a justification to consider them insofar as they are not inconsistent with the laws of Seychelles.

Hence the alternative defence averred in paragraph 3(b), that it is an implied condition by way of fairness and practice that it could be terminated by either party at any time, is contrary to the law of contract in Seychelles, and is therefore not a valid reason for the termination. The defendant is therefore liable in damages.

Article 1149 of the Civil Code is as follows -

1. The damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.

2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss of any of the amenities of life.

Sub-article 3 provides that these principles apply to a breach in contract as well as the commission of a delict.

Article 1135 however 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.

The terms of fees, and the terms of payment as agreed upon by the parties in the contract are as follows -

3.0 TERMS OF FEES

3.1 The Customer will pay the Engineer the sum equal to 2% of the final Contract sum and in the manner specified in the said conditions. This fee shall include Government Trades Tax and disbursements.

3.2 All variations involved necessary for the proper completion and use of the building shall be considered as part of the scope of works. Variations which shall provide additional facilities or significant extension over the proposed works will be reflected in the final construction cost.

4.0 TERMS OF PAYMENT

4.1 Pre-Contract:
The Customer shall pay to the Engineer 60% of the fees upon submission of the completed drawings and documentations subject to a 10% retention by the Customer which will be released as follows:-

5% upon issue of practical completion certificate,
5% upon final reception of building,

Or if the Customer abandons the projects, then released at the time when the Customer makes such a decision:

4.2 Post – Contract:
12% after completion of 25% of the works.
12% after completion of 50% of the works.
12% after completion of 75% of the works.
2% upon issue of practical completion certificate.
2% upon final reception of building.
……
40% Total post contract fees.

Mr Morel testified that the "pre-contract" fees related to the work done during the designing stages and "post-contract" the supervision of the construction work after it had been awarded to a contractor. He stated that that the substructure was estimated at R3 million, and hence he was paid 60% of 2% of R3 million, that is R36,000 less 10% retention, R.32,400 (exhibit D2). He was earlier paid R20,000 for the sub-structure drawings (exhibit D1). Mr Morel also testified that 75% of the drawing work on the super-structure had been done when the defendant terminated the contract. He produced the relevant drawings as exhibit P4. He stated that he was given time till 15 August 1998 to complete all the superstructure works, but when the termination letter dated 17 July 1998 was received, he was two days short of one month to complete the works.

The sum of R500,000 claimed is based on 2% of the final contract price of R25 million, as provided in clause 3.1 of the contract. The plaintiff had already received 60% of 2% of R3 million which was the estimated cost of the substructure. The payment of such percentage fees is a practice in contracts with architects. The plaintiff now claims the percentage fees under article 1149(1), on the basis of a breach of contract and as the loss sustained and the amount which he has been

deprived of under the contract. He however agreed that from that sum of R500,000, a sum of R32,400 already paid to him as 60% of 2% of R3 million should be deducted. He stated that the contract was for payment of 2% of the total contract price estimated by the quantity surveyor at R25 million. He disagreed with the suggestion of Mr Boulle that the first phase constituted a separate contract and that was why he was duly paid 2% of the amount for that stage. The plaintiff produced the drawings done for the super-structure, which was for the entire building, consisting of 3 floors. He however stated that only 75% - 80% of work had been completed at the time the contract was terminated on 17 July 1998, but he had not been paid for such work. Although payment for such work and the percentage fees are two different payments, the plaintiff claims the percentage fees as damages which include both. Para 4.3, of the RIBA recommendations which is consistent with article 1149 (1) of the Civil Code provides that –

> Where the architect's appointment is terminated by the client the architect will be reimbursed by the client for all expenses and disbursements necessarily incurred in connection with work then in progress and arising as a result of the termination.

This is consistent with the provisions of article 1149 of the Civil Code.

The plaintiff was prepared to discharge his obligations under the contract as agreed upon by the parties on 27 June 1997 (exhibit P1). Article 1150 of the Civil Code provides that:

> the debtor shall only be liable for damages with regard to damage which could have been reasonably foreseen or which was in the contemplation of the parties when the contract was made, provided that the damage was not due to any fraud on his part.

It was a condition in that agreement that he would be entitled to 2% of the final contract sum. That was in contemplation of both parties. This condition was breached by the unilateral and unlawful termination of the contract by the defendant. Mr Boulle contended that the granting of percentage fees to the plaintiff would mean that each succeeding architect would also be eligible to the same amount if their contracts are similarly terminated. That would not be a reason to deprive the Plaintiff of his entitlement under the contract. Each contract has to be interpreted according to its own terms and the circumstances of the termination. Fairness, practice and the law involved in agreements with architects imply that an architect whose agreement is unlawfully terminated should be fully compensated in terms agreed upon in the agreement. The plaintiff is therefore entitled to claim the percentage fees as agreed. The plaintiff admitted that the sum of R32,400 paid to him as the 2% fee for the substructure should be deducted. Hence the Plaintiff will be entitled to a sum of R467,600 under item 1 of paragraph 6 of the plaint.

The plaintiff also claims R200,000 as moral damages for humiliation, stress and anguish. This claim is based on the removal of the name of the firm from the display board at the construction site, and the substitution of another. That necessarily arose as a result of the unlawful termination of the contract. However taking into consideration that the building is being constructed in the heart of the town of Victoria, it is acceptable that many people would have noticed the change. Undoubtedly such a situation affects a professional body. Taking all the circumstances into consideration including the mental anguish and stress suffered by Mr Morel, one of the partners of the plaintiff partnership, I award a sum of R25,000 as moral damages.

Judgment is accordingly entered for the plaintiff in a sum of R492,600 together with interest and costs.

Record: Civil Side No 267 of 1998

Farm AG International Trading (Pty) Ltd v Barclays Bank Plc & Other

Payment of interest - money held by bank after payment by debtor pending exchange control approval

Money owed by the defendant to the plaintiff was paid into a suspense bank account in the name of the defendant pending the necessary exchange control clearance for transfer of the foreign currency amount to the plaintiff. Pending that clearance the collecting bank invested the money in the suspense account and credited interest quarterly to the account. The plaintiff claimed that interest. The plaintiff had no account with the collecting bank. The bank's relationship was with the defendant. There was no contractual arrangement between the plaintiff and the defendant regarding monies held with the collecting bank pending exchange control clearance. A further issue between the parties was whether the difference between the rupee amount paid in final settlement of all invoices and the rupee equivalent of the foreign currency amount paid on the same date was an overpayment by the plaintiff debtor for which restitution could be claimed.

HELD:

(i) The plaintiff has no claim against the collecting bank because the plaintiff had no account or similar relationship with the bank;

(ii) Money in the custody of a bank is the money of the bank subject only to the contract between the bank and its customer;

(iii) In accordance with Seychelles practice the bank owed interest to the account holder;

(iv) The duty to pay in an agreed currency is discharged by payment in that currency;

(v) Rupees held by the collecting bank were held pending the availability of the agreed currency of the debt and not as discharge of the debt owed by the defendant to the plaintiff;

(vi) The interest on the rupees sum held by the bank for its customer is not the property of the plaintiff; and

(vii) The various deposits made in rupees which contributed to the overpayment were known to both parties and the defendant agreed to pay the total sum on request by the plaintiff. The overpayment was not made under a mistake of fact.

Judgment for the defendant on the interest claim.
Judgment for the plaintiff on the overpayment claim.

Legislation cited
Bills of Exchange Act, s 11(1)

Foreign cases cited with approval
Foley v Hill and Ors (1848) 2 HLC 28
Great Western Railway Co v London and County Banking Co Ltd [1901] AC 414
Kelly v Solari (1841) 9 M&W 54

Phillippe BOULLE for the plaintiff
Kieran SHAH for the first defendant

Ramniklal VALABHJI for the second defendant

Judgment delivered on 5 November 2001 by:

PERERA J: The plaintiff company, based in South Africa avers that goods to the value of R1,385,128 were supplied to the second defendant company (Bodco Ltd) during the period June 1997 to December 1998. They further aver that this amount was collected by the first defendant, Barclays Bank, on their behalf, and deposited in an interest bearing account for eventual transfer to South Africa in rands. The plaintiff company on 27 August 1999 obtained payment of the whole sum of R1,385,128, which sum was, at their request, deposited in the client's account of their attorney Mr P Boulle. The instant claim for R65,429.19 is the interest paid to Bodco Ltd while that sum was in the bank. The claim against the bank is allegedly based on unlawful payment to a "third party" namely Bodco Ltd, while that against Bodco Ltd is based on unjust enrichment.

Barclays Bank avers that there was no privity of contract between them and the plaintiff and that the account holder being Bodco, interest was paid to them lawfully.

Bodco Ltd avers that the plaintiff being a non-resident company did not have an account in Seychelles and that a condition of sale was the payment in South African rand as specified in the bills of exchange. They further aver that at the time payment was made in Seychelles rupees on 27 August 1999 the amount due to the plaintiff was 1,249,048.90 rands according to the exchange rate of 0.8898 on that day. Accordingly a sum of Seychelles R136,079.10 is being counter-claimed as an over-payment.

The present dispute is as regards the entitlement of the interest paid to Bodco Ltd on the deposits made to the bank in Seychelles rupees. Bodco Ltd purchased goods from the plaintiff company on bills of exchange, negotiated through

Barclays Bank. These bills were payable within 180 days. The currency of payment was to be in South African rands (exhibit 2D2). There was no stipulation as regards payment of interest.

Admittedly, the plaintiff company was aware that there was a foreign exchange shortage in Seychelles and that hence the importer, Bodco Ltd, would be unable to remit payments in South African rands through the bank within the stipulated period due to circumstances beyond their control. Mr Michel Felix, a manager of Barclays Bank, testified that since 1996 the Bank had been unable to pay bills in foreign currency on the due dates. Therefore as the "collecting bank", they collected the Seychelles rupees equivalent from the drawee of the bills of exchange into an account entitled "bills paid awaiting exchange". This account was referred to as a "suspense account" which was in the name of Bodco Ltd.

According to exhibits 2D2 and P2, Bodco Ltd paid seven bills between the period 12 November 1997 to 23 June 1998 on the dates specified in such bills. I have prepared the following summary from particulars extracted from the documents produced in the case by all parties.

Bills paid awaiting exchange

Date of Deposit	Bank Ref.	S.A.Rands Rate	Exchange Sey. Rs	Equ in Rs. Deposits	Interest Deposit
12.1197	ABC 105/97	253,725.00	1.054	266,513.00	R 18,210.51
26.12.97	ABC 157/97	171,887.20	1.0679	183,558.00	R 12,014.24
18. 3.98	ABC 244/97	199,505.00	1.0488	209,241.00	R 10,404.72
23. 4.98	ABC 31/98	203,280.00	1.0338	210,151.00	R 8,999.07
19. 5.98	ABC 32/98	208,521.00	1.0291	214,589.00	R 8,119.10
22. 7.98	ABC 283/97	265,136.73	0.8516	225,790.00	R 5,771.56
23. 7.98	ABC 42/98	**158,861.00**	0.8516	75,286.00	**R 1.909.99**
				(135,286 less	**R65,429.19**
	S.A.R. 1,460,915.93		**R60,000 paid to Plaintiff)**		

(Less SA Rands 57,174.20
equivalent of Seychelles R60,000 paid **R1,385,128.000**
to a director of the plaintiff company
at the rate of 1.0494) = ***57,174.20***

SA Rands 1,403,741.73

Mr Felix stated that this system was introduced to assist the suppliers by ensuring that the rupee equivalent of the foreign currency due on the bill of exchange, on the date specified, was with the bank and not in the customer's account. The deposits were credited in the name of Bodco Ltd. However, the bank invested those amounts in Treasury Bills and earned interest, and consequently Bodco Ltd was paid a percentage of the interest so earned. The total amount of interest paid quarterly was R65,429.19, which is the sum in dispute.

The agreement of both parties as to payment is evidenced by the communications, between the bank and the plaintiff company each time a deposit was made by Bodco Ltd in Seychelles rupees. The standard format of such communication was as follows (exhibit P2) -

> The above-mentioned collection has been paid in Seychelles rupees on …..
> In view of foreign exchange shortage prevailing in Seychelles we are unable to remit the

> proceeds in foreign currency now.
>
> As we have several requests outstanding in our pipe line remittance is subject to a considerable delay.
> In as much as we would like to keep you informed of all the developments in the circumstances we are unable to speak of any definite date when payment may be expected. Upon realisation we will revert.

As the currency of the agreement and payment on the bills was to be in a SA rands, the usage of the word "paid" has to be qualified by the undertaking to make payment in foreign currency upon realisation.

In a fax message dated 17 April 1998, the bank informed the plaintiff company that the "waiting time" for remittance at that time was about 8-10 months from the date of payments effected in rupees. Prior to that on 28 March 1998 the plaintiff company in a fax message to Bodco Ltd stated –

> Please ensure that payment is made in rupees to the bank on 1.4.98 as we still have to wait another 8 months for forex before the bank transfer the funds to us.

This correspondence shows that although the agreed currency of payment was SA rands, the plaintiff company had agreed to accept the rupee equivalents, not as a mode of payment in satisfaction of the debt, but as a means to satisfy it, as that was the only way the bank could ensure that payment would be remitted to them in foreign currency.
Section 11(1) of the Bills of Exchange Act (Cap 51) provides that:

> A bill is payable at a determinable future time within the meaning of this Act which is

expressed to be payable:

(a) At a fixed period after date or sight.

(b) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

Although the bills in the instant case were payable at a fixed period specified therein, due to the local foreign currency situation, the drawer had agreed to be paid when foreign exchange was available. The bank by letter dated 28 September 1999 maintained that "bills paid in local currency awaiting foreign exchange" for remittances were held in drawees' names and that interest thereon was payable to them according to the policy of the bank. The plaintiff was therefore advised that arrangements should be made direct with Bodco Ltd.

The basic dispute as to the ownership, or entitlement of the accrued interest has to be considered within the relationship of the parties inter se. The plaintiff company was the exporter, the drawer of the bill and the beneficiary thereon. Bodco Ltd was the importer, the drawee of the bill and the debtor thereof. The bank functioned in its capacity as "collecting bank", and in a banker-customer, relationship with Bodco. The plaintiff company admittedly did not have an account with the bank, and hence was not a "customer". As was stated by Lord Davey in *Great Western Railway Co v London and County Banking Co Ltd* [1901] AC 414 at 420-421, "there must be some sort of account, either a deposit or a current account or some similar relation to make a man a customer of a bank". In the same case, when before the Queen's Bench Division, it was held that if a person has no account with a bank and is not about to open an account, the fact that a bank renders some casual service to him will not make him a customer.

In the present case, when Bodco Ltd deposited the rupee equivalents on the dates fixed in the bills and informed the plaintiff company that payments had been made in local currency, the bills were not discharged, as the currency of payment still remained to be remitted. The payment in SA rand was beyond their control. Hence it was only a notice of remitting local currency to facilitate the payment of the currency of agreement when available.

Therefore as far as the first defendant bank was concerned, the banker-customer relationship existed only with Bodco Ltd, who had remitted money into an account in their own name awaiting the remitting of SA rands to the plaintiff. As Lord Cottenham LC stated in the case of *Foley v Hill and others* (1848) 2 HLC28:

> the money placed in the custody of a banker is, to all intents and purposes, the money of the banker…He is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of banker in other places.

The bank in the present case had an obligation to pay interest to the account holder. They also had agreed to pay the principal sum to Bodco Ltd if some other arrangement had been made to satisfy the debt in local currency. Any dispute as regards the ownership of the interest in such circumstances had to be settled with the account holder and not with the bank. Hence the plaintiff company has no cause of action against the first defendant bank. Accordingly the case against the first defendant is dismissed with costs.

In the present transaction, between the plaintiff vompany and Bodco Ltd, the bills did not specify payment of interest on the

sums claimed, which was in SA rands, nor was there any agreement as to the payment of interest in Seychelles rupees. They were term bills payable within 180 days from the dates thereon. Mr Boulle, counsel for the plaintiff submitted that although no interest was claimed on the bills of exchange, interest is now being claimed on the proceeds of those bills. I have already held that the various deposits made by Bodco, in the "suspense account" in their own name, were payments made to obtain foreign exchange through the system operated by the bank. The obligation of Bodco Ltd to pay in the agreed currency was discharged only when the plaintiff company decided to accept the whole amount in Seychelles rupees which they wanted to be credited to the client's account of their attorney. Till then they were entitled only to the "sum certain" specified in the bill in SA rands. When they decided to accept the equivalent in Seychelles rupees that position was altered, as those deposits had been made not as a discharge of a debt owed to the plaintiff company. Hence the plaintiff company is not entitled to the interest paid by the bank to its customer the second defendant company. Accordingly the case against the second defendant is also dismissed with costs.

The counterclaim of the second defendant, Bodco Ltd, is based on the difference between R1,385,128 paid in full and final settlement of all the invoices on 27 August 1999 and R1,249,048.90, which is the rupee equivalent of SA rands 1,403.741.20, averred to be the actual amount due to the plaintiff company on that date. In the summary of invoices I have set out earlier in this judgment the total amount invoiced in SA rands is 1,460,915.93. The difference in the amount in SA rands between these two amounts is SA rands 57,174.70. This amount, at the exchange rate of 1.0494 (the rate on 19 March 1998 - exhibit 2 D3) is equivalent to R60,000 which, according to letter dated 16^{h} July 1999 in the bundle of correspondence (exhibit P3), was paid by cheque to Pierre Maingard (a director of the plaintiff company) on 19.3.99. According to exhibit P3a, interest has been calculated on

R75,286 (that is, R135,286 deposited on 23 June 1998 less R60,000 paid as aforesaid). The total of the rupee deposits up to 23 June 1998 (less R60,000) was R1,345,128. The total SA rands was 1,403,741.20.

Bodco however claims R136,079.10 as an overpayment. That sum has been calculated on the basis of the total value of the goods invoiced at SA rands 1,403,741.20 and applying the exchange rate of 0.8898 prevailing on 27 August 1999, the day a sum of R1,385,128 was paid to the plaintiff. This claim is also made on the basis that the deposits continued to belong to the second defendant and that when payment in Seychelles rupees was demanded, the total SA rands amount due on that day should have been converted at the current rate of exchange. The position of the plaintiff was that those deposits had already been accepted by them for conversion to SA rands at the rates prevailing on the dates of such deposits. However, on the basis of my finding that those deposits belonged to the second defendant company, the "sum certain" in the bills, that is, SA rands1,403,741.20 became payable. The second defendant had already deposited R1,385,128 at the rates current when the seven deposits were made, to cover the amount due in rands. By letter dated 15 August 1999, the attorney for the plaintiff company informed the bank that his client wished to accept all the deposits listed in the two schedules furnished and the accrued interest. By letter dated 26 August 1999 (exhibit 1D1), Bodco Ltd authorised the payment of R1,385,128 held in deposit to the order of Farm-Ag.

In the application form entitled "bills paid awaiting exchange" issued by the bank and used by Bodco, there is in small print, a note which states "once foreign exchange is available, I will pay any difference in exchange plus all your bank charges". Hence, the risk of the exchange rate increasing, and the consequent necessity for payment of additional Seychelles rupees was with Bodco. In addition when foreign exchange was finally available, the bank would apply the rate prevailing

on that day and also levy the bank charges. If the rate was lower than on the day the deposit was made, Bodco Ltd would still have lost the difference in Seychelles rupees, as the bank was not obliged to make any refunds.

The second defendant claims the overpayment purely on the basis of the exchange rate prevailing on the date of payment in Seychelles rupees. They do not aver any ground to justify the claim for a refund of the overpayment, although obviously if SA rands 1,403,741.20 which was due on the bills was converted at the rate of 0.8898, the rupee equivalent payable to the plaintiff was R1,249,048.90 and not R 1,385,128.

In the case of *Kelly v Solari* (1841) 9 M & W 54 (cited in *Cheshire and Fifoot on Law of Contracts*), Parke B had this to say-

> If, indeed, money is intentionally paid, without reference to the truth, or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it. But, if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.

In the present case, the seven deposits made in Seychelles rupees were known to both parties. The second defendant agreed to pay the total sum to the plaintiff when the request was made. In these circumstances payment was not made under a mistake of fact. Hence there is merit in the submission of Mr Boulle that the counterclaim is based on an afterthought. In authorising payment, the second defendant

impliedly waived the right to recalculation of the sum paid. Hence they cannot now claim any sum on the basis of an overpayment.

The counterclaim is accordingly dismissed with costs.

Record: Civil Side No 36 of 2000

Falcon Enterprise v Essack & Ors

Perishable goods - ownership claims - intervener action

The Plaintiff sought a declaration that a cargo container and its contents belonged to it. The Defendants averred that the owner of the container was the intervener company of which one of the Defendants of the company. The intervener claimed the contents of the container and sought an order for those contents to be released to it. An issue in these interlocutory proceedings whether the goods in the container were perishable. On the basis that they were perishable the intervener sought the release of their contents for their immediate sale and payment of the proceeds into Court. The Plaintiff claimed storage charges from the Defendants.

HELD:

(i) Perishable means "subject to decay or destruction". There is no evidence that un-opened tins of paint are perishable to the extent required by the definition. Any marginal loss of value can be adjusted damages order in the main case.

(ii) The intervener participated as a person interested to maintain rights in the pending suit

(iii) To determine the ownership rights of the intervener in the interlocutory proceedings would be to pre-empt the decision in the main case.

(iv) In order to properly raise the ownership issues the intervener should have been joined as a party to the proceedings.

(v) It is for the Commissioner of Taxes not for the Court to make an order affecting the rents payable to the customs warehouse for the storage of the container.

Judgment for the Defendant. Order refused.

Legislation cited
Code of Civil Procedure, ss 112, 117, 229
Commercial Code, s 102
Trade Tax Regulations, reg 247

Kieran SHAH for the Plaintiff (in the main case and appearing in connection with the Motion)
Frank ELIZABETH for the Intervener & First & Second Defendants

Appeal by the Appellant allowed on 31 July 2001 in CA 20 of 2001.

Ruling delivered on 20th day of August, 2001 by:

PERERA J: By motion dated 7th August 2001, the Intervener, Eagle Auto Parts (Pty) Ltd, seeks the following orders-

(1) That the container no. DVRU 1212985 and its contents be released to the Intervener.

(2) That the Intervener give the First Defendant his personal belongings in the said container, itemised as (a) to (m) in the motion.

(3) That the remainder of the goods be sold and the proceeds of sale be paid into Court until the final determination of the case.

(4) That the Intervener be allowed to pay the rentals, penalties, import duty and/or other taxes to the

Government out of the proceeds of sale of the goods in the container.

The Plaintiff instituted this action on 24 May 2000 against the First Defendant David Essack, the Second Defendant, the wine seller (Pty) Ltd and the 3rd Defendant Mahe Shipping Co. Ltd, the Shipping Agent. The case against the 3rd Defendant was subsequently withdrawn. The Plaintiff sought a declaration that the said container solely belongs to them and that it be released to them. A sum of R374,100 plus the continuing storage charges were also claimed. In the alternative, the Plaintiff claimed R574,000 if the container had already been released to the First and Second Defendants on a bill of loading, which the Plaintiff averred had been falsely and unlawfully altered and changed from the name of the Plaintiff to that of the Second Defendant.

The First and Second Defendants in their defence averred that the owner of the container was a Company called "Eagle Auto Parts (Pty) Ltd", in which the First Defendant was a director.

Eagle Auto Parts Ltd, thereupon sought Intervention under the provisions of section 117 of the Code of Civil Procedure, and leave was granted on 20 June 2000. In their statement of demand, the Intervener claimed inter alia for an order that the contents of the said container belongs in law to them, and that the contents of the said container be released to them. It was not averred that goods in the container were paid for by the Intervener Company. It was therefore a de Jure claim based on their interest "in the event of the pending suit", as envisaged in Section 117.

The First Defendant David Essack in his defence, averred that he purchased the goods in the container and that the container and its contents belong to the Intervener Company in which he is one of the directors. He however averred that the bill of lading was changed from the Plaintiff's name to that of the Second Defendant, the Wine Seller (Pty) Ltd, in which

Company also he is a director, in accordance with the laws of Dubai. In answer to a motion filed by the Plaintiff for the release of the container, he averred that there were no perishable goods in the container.

In the instant motion before Court, another director of the Intervener Company, one Ronny Barallon avers in his affidavit that "there are perishable goods in the said container namely a substantial quantity of thinner, quickfill and paint". The affidavits of David Essack and Ronny Barallon, the two directors of the Intervener Company are therefore contradictory as regards the perishable nature of the goods in the container.

In the main case, judgment was entered by this Court on 5th October 2000 ordering the release of the container to the Intervener subject to payment of 30% commission on the undisputed value of the goods as pleaded and admitted. The Court made a finding of fact as follows-

> In examination of the evidence in support of his version, it has been found that the Defendants and Intervener has failed in their attempt to adduce documentary proof that they had financed the whole container load. However they have satisfied the Court by documentary proof that they had sufficient means in Dubai to finance part of the container load.

The latter finding was based on an inference, and not on evidence. The Court further went on to hold that the statutory presumption in Section 102 of the Commercial Code operated in favour of the Plaintiff as consignee to be in possession of the disputed goods, but such presumption was rebutted by exhibits D1 and D2. These two documents had only been "itemised" at the hearing, but the trial judge had ex mero motu turned them into "exhibits", thus admitting them as evidence in the case without affording the party affected an opportunity to object.

In an application filed under Section 229 of the Code of Civil Procedure for execution of judgment pending appeal, it was submitted by Counsel for the Plaintiff that if the Court of Appeal held that those two documents were relied on to defeat the claim of the Plaintiff, then the whole basis of the judgment would fail. On a consideration of both legal and practical reasons, I granted a stay of execution of judgment until the final disposal of the appeal.

The Court of Appeal, by judgment dated 31 July 2001 agreed with both parties that the reception of the two documents D1 and D2 in those circumstances was a "clear breach of the Rule of fair hearing" and hence quashed the entire judgment. The case therefore has to be listed for a fresh trial in due course.

It was submitted by Mr Elizabeth, Counsel for the Intervener that Mr D Lucas Attorney at Law who appeared for the Plaintiff at the hearing of the Appeal informed the Court of Appeal that by the time the rehearing and an ensuing appeal by either party were concluded, *"the goods in the container will become worthless and as a result of his motion, he was advised by the President of the Court of Appeal that perhaps one way to safeguard the contents in the container was to sell the contents and pay the proceeds to Court, pending the final determination of the case."* This is however not reflected in the judgment of the Court. Mr Elizabeth submitted that the present motion before Court was one made in the interest of all parties. He further stated thus-

> I make this motion believing honestly and sincerely that this will be the best course of action, taking into account the circumstances of this case and the stage which we have reached after one year before the Courts, to save the goods and the money spent either by the Plaintiff, or the Defendants as the case may be, we do not know that as of now, because there is

> no Court order as to who spent the money on those goods, but in any event, at the end of the day, it would be in the interest of not only the Defendant and the Intervener, but also the Plaintiff for such an order to be made to safeguard the goods and to ensure that the parties ultimately do not end up losing everything just because of this case which is before the Court.

The judgment of this Court in favour of the Intervener was based on the premise that the presumption in Article 102 of the Commercial Code that the consignee is entitled to the possession of the goods consigned had been rebutted by the contents of the documents D1 and D2. With the decision of the Court of Appeal, that presumption reverted back to the Plaintiff. In the motion before Court the Intervener claims 14 items as being "personal items" belonging to the First Defendant David Essack. No such claim was made in the statement of demand filed by the Intervener on 26 June 2000, nor was it averred in the defence of the First and Second Defendants. In any event, Learned Counsel for the Plaintiff informed Court that that claim is being contested. Apart from those items, it was submitted that there are motor spare parts in the container. Paragraph 5 of the affidavit of Ronny Barallon, filed with the present motion avers that the perishable goods among them are thinner, quickfill and paint. These items have been in the container since it arrived at Port Victoria on 2 May 2000. The First and Second Defendants denied that there were any perishable goods in the container. They are now estopped from joining the Intervener in stating that it is otherwise. The word "perishable" means, "subject to decay or destruction". However there is no evidence that unopened tins of items like, thinner, quickfill and paint would 'perish" to such an extent that they would have no market value. In any event, this would be only a marginal issue which can be adjusted by an order for damages against the unsuccessful party at the conclusion of the case. It is an

insufficient reason to sell the bulk to save a few. Moreover the bulk of the shipment contains non-perishables of greater value.

Mr Shah, Counsel for the Plaintiff also submitted that until the issue of ownership is resolved it would be prejudicial to the interests of the Plaintiff who claims not only the ownership of the goods but also claims damages against all the Defendants on the basis of 'faute' in respect of loss of business, loss of profits and moral damages. It was therefore submitted that releasing the container to the Intervener would deprive the Plaintiff of the fruits of a judgment that may be given in their favour.

The cause of action pleaded in the case is presently against the First and Second Defendants. The Intervener has been given leave to intervene as a person "interested in the event of the pending suit" between the Plaintiff and the First Defendants, 'in order to maintain his rights". Hence his rights are dependent on the outcome of the dispute between the Plaintiff and the First and Second Defendants.

The First and Second Defendants averred that it was the Intervener Company, a separate legal entity, that was the owner of the goods. Hence they ought to have moved under Section 112 of the Code of Civil Procedure to be struck out and that the Intervener be joined as a party. That would have enabled the Plaintiff to amend their plaint, if advised. The Intervener, in the present circumstances would therefore have only ancillary and not substantial relief. Hence they cannot in law, maintain a motion which in effect would amount to an acknowledgment of the substantial issue of ownership of goods which is being disputed by the Plaintiff and the First and Second Defendants who are the main parties in the case. Had the Intervener been added as Defendant under Section 112, they could have raised triable issues. But in the pleadings, as settled in the case they cannot raise the issue of ownership as a triable issue against the Plaintiff.

Mr Elizabeth, Counsel for the Intervener however submitted that the Intervener had no objections to the Plaintiff selling the goods, apart from the items which are claimed as personal items of the First Defendant, so that either party may have an executable judgment. From what has been submitted, the container consists of motor spare parts of which the three items, thinner, quickfill and paint, claimed to be "perishable" form only a small percentage of the load. In the motion, the Intervener moves that all rentals penalties, import duty and taxes be paid out of the proceeds of the sale of these balance items. This would amount to reducing the amount of the sale proceeds that are sought to be deposited in Court. On 14 August 2001, after the Court heard the submissions of both parties on the motion, the Court reserved the ruling for today, but gave time till 9 a.m on 16 August 2001 for the Plaintiff to consider the proposal of Counsel for the Intervener. However, Mr Elizabeth and the Defendants failed to attend Court without excuse. Mr Shah submitted that the proposal was not acceptable to the Plaintiff and that no attempt had been made by the intervener to reach any other settlement. This ruling is therefore made as indicated to both parties and their Counsel on 14 August 2001.

As regards the rents payable to the customs Warehouse where the container is presently stored, the Court made order on 10 October 2000 staying execution, pending appeal due to the inherent weaknesses of the judgment as disclosed by Counsel for the Plaintiff-appellant. The Learned Justices of Appeal were well aware of the consequences that would follow a further detention of the goods. Hence unless the parties reach a settlement which is satisfactory to both parties, this Court cannot make an order which would amount to determining the issues in the case on a piece meal basis without a proper hearing on merits. In the meantime the container shall continue to be in the customs Warehouse. As the container has been detained by a judicial order at least since 10 October 2000, and not for any of the purposes mentioned in Regulation 247 of the Trade Tax Regulations, it

would be open to the Commissioner of Taxes to use his discretion and determine whether the rents should be waived. This Court cannot however make an order which would affect Government Revenue.

In the circumstances, the motion is dismissed with costs.

Record: Civil Side No 139 of 2000

Evenor v The Government of The Republic Of Seychelles

Unlawful arrest and detention

The Plaintiff was detained by the Army for 2 days and 9 hours. The Plaintiff claimed R200,000 damages for loss of personality under Article 1149(2) of the Civil Code.

Judgment for the Plaintiff. Damages awarded for R20,000.

Legislation cited
Constitution of Seychelles, arts 18(5), 18(10)
Civil Code of Seychelles, art 1149(2)
Criminal Procedure Code, s 100(1)

Cases referred to
Gerard Canaya v Government of Seychelles Civil Side 42/1999 (Unreported)
Noella Lajoie v Government of Seychelles Const case 1/1999

Foreign cases cited with approval
Samanthilaka v Perera (1990) 1 SLR LR 318

Antony DERJACQUES for the Plaintiff
Caroline HOAREAU for the Defendant

Judgment delivered on 31 May 2001 by:

PERERA J: This is an action in delict in respect of an alleged unlawful arrest and detention. The Plaintiff avers that on 23 September 1998 around 9.20 a.m he was working at the New Port in Victoria, when *"several unknown officers of the State House Security Unit"* arrived and arrested him. He further avers that he was taken to the Grand Anse Police Army Camp at Police Point, and detained there. The Defendant denies any arrest and detention by itself or its Agents.

The Plaintiff testified that three persons came in a white Peugeot car and asked whether they could take him to the gate of the New Port. He agreed and got in, but they drove past the gate and took him to the Grand Police Army Camp and left him near the gate there. At the Army Camp he was taken by Army Officers, to Major Robert Ernesta who questioned him. Thereafter he was detained in a cell up to 6 pm on 25 September 1998, a period of 2 days and 9 hours. He was then taken to Anse Royale, and he went home. The Plaintiff further testified that he identified the three persons who took him to the Grand Police Camp as Marcel Rachel, Danny Alcindor and one Marengo, who were attached to the State House Security Unit.

In the meantime, on 24 September 1998, an application for a Writ of Habeas Corpus was filed under his name as petitioner in the Supreme Court for his release, and that application was registered as C.S. 294/98. *(exhibit P1 and P1a)* A supporting affidavit was filed by his brother Sady Evenor. He was released the next day before the Court made any order on that application. He was not subsequently charged for committing any offence after his release.

Sady Evenor, the brother of the Plaintiff testified that when he heard that Paul had been arrested, he instructed Mr Derjacques, Attorney at-Law to file a Habeas Corpus application. He stated that he paid for that application, and for the present action. He further stated that the Plaintiff was released on 25 September 1998 and hence the Habeas Corpus application was not proceeded with.

Rommel Cafrine testified that he was working with the Plaintiff at the New Port at the time the Plaintiff was taken away by three persons who came there in a car. He identified one person as Marc Rachel who is in the State House Security Unit. He heard Rachel calling the Plaintiff but did not hear any other conversation. Later in the day he met the Plaintiff's brother Sady Evenor and he informed him about the incident.

He also told his employer Mr Dingwall.

As regards the defence case, Major Robert Ernesta of the SP.F testified that from August to October in 1998 there was a joint Army and Police operation to deal with crime in the country. He stated that the Army Officers assisted the Police Officers who were in command, but never arrested anybody. He denied seeing the Plaintiff or interviewing him on any matter during that period. He also denied that he was detained at the Grand Police Prison.

Sub-Inspector Sonny Legaie testified that during the joint operations of the Police and, the Army, he received instructions from the Commissioner of Police. All arrests were done by Police Officers, and not by Army Officers. He categorically denied that the Plaintiff was arrested by him or any other Police Officer under his command. He stated that he was stationed at the Grand Police for about three months and he saw Major Ernesta coming there. But he did not see him bringing anyone for detention during that period.

Corporal Marc Rachel testified that he was a member of the SPDF, attached to the State House Security Unit. He stated had never been ordered by any Superior Officer to arrest anyone. He denied going to the New Port to arrest anyone. He knew the Plaintiff while both of them were studying at the NYS. He stated that if he had arrested him, he would certainly have remembered. He further stated that he had never taken part in any joint operation with the Army Officers.

Danny Alcindor another member of the SPDF attached to the State House Security Unit denied that he ever was engaged in any joint operation with the Army to arrest persons. He also stated that he had never seen nor known the Plaintiff. He too denied going to the New Port to make any arrest.

Jamie Marengo, also an SPDF Officer, attached to State House Security Unit denied making any arrests. During the

joint operation he too denied knowing the Plaintiff in the case. He however recalled a white-coloured Peugeot car S2936 being used by the State House Security Unit. He never drove it, as he had no license. He did not even get a lift in that car.

In paragraph 2 of the plaint, the Plaintiff averred that "several unknown officers of the said Security Unit (State House Unit) acting during the course of their duties arrested and imprisoned the Plaintiff at the Grand Anse Police Camp" on 23 September 1998 around 9.20 a.m. The Defendants, the Government of Seychelles is therefore sued in a vicarious capacity as the employer of these *"unknown officers".*

However on 24 May 2000, the Plaintiff in his testimony before this Court named Major Robert Ernesta as the Officer in charge of the Grand Anse Police, and Corp Marc Rachel, Corp Danny Alcindor and Corp Jamie Marengo as the three persons who came in a white car to the New Port to arrest him. Learned Counsel for the Republic thereupon sought an adjournment to obtain further instructions. Subsequently, she filed a praecipe for summons on the three named officers on 21 September 2000. Their evidence was heard on 5 October 2000.

Learned State Counsel submitted that it was common knowledge in the country that at around the time the Plaintiff claims to have been arrested and detained, a few people were arrested by Police Officers assisted by Army Officers in a joint operation, and that gave an opportunity for those people who could not get in touch with their relatives "to assume" that they had been arrested and were being detained. It was further submitted that the Plaintiff had gone off somewhere for two days and fabricated a story of arrest and detention. As regards the filing of the habeas corpus application, it was submitted that it was filed by relatives who assumed that he had been arrested.

With respect, these submissions are outside the averments in

the defence. They are purely speculative and are unsupported by the evidence in the case either directly or inferentially. Article 18(10) of the Constitution provides that -

> A person who has been unlawfully arrested or detained has a right to receive compensation from the person who unlawfully arrested or detained that person or from any other person or authority. Including the State, on whose behalf or in the course of whose employment the unlawful arrest or detention was made or from both of them.

On a balance of probabilities, I accept the Plaintiff's case that he was arrested on 23 September 1998 around 9.20 a.m at the New Port by Officers acting on behalf of the State and detained until 6 p.m on 25 September 1998 without being produced before a Court of Law within 24 hours of such arrest as required by Section 100(1) of the Criminal Procedure Code and Article 18(5) of the Constitution.

As was held in the case of *Samanthilaka v Perera* (1990) 1 Sri Lanka Law Rep. 318:

> The State necessarily Acts through its servants, agencies and institutions. But it is the liability of the State and not that of its servants, agents or institutions that is in issue. It is not a question of vicarious liability. It is the liability of the State itself.

In the instant case, the unlawful period of incarceration was 2 days and 9 hours (57 hours). In the case of *Gerard Canaya v The Government of Seychelles* CS 42 of 1999*,* this Court inter alia awarded R5000 for an unlawful arrest and detention for 18 hours. In the case of *Noella Lajoie v The Government of Seychelles* (Constitutional case no. 1 of 1999), the Court awarded R5000 for an unlawful detention for $38^{1}/_{2}$ hours.

Article 1149(2) of the Civil Code provides that-

> Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss of any of the amenities of life.

Arrest and detention for no lawful reason, causes loss of rights of personality of the arrestee. In a delictual action he would be entitled to moral damages for fear and emotional stress as well as for loss of personality. The Plaintiff's claim of R200,000 is however grossly exaggerated. On a consideration of previous awards and the circumstances of the present case, I award a global sum of R20,000.

Judgment is accordingly entered in favour of the Plaintiff in a sum of R20,000 together with interest and costs.

Record: Civil Side No 357 of 1998

Esparon v Bristol

Work injury - employer liability - safe system of work

The Plaintiff suffered injury when pulling a trolley of bread from a bakery oven. The Plaintiff had worked on the job for 2 1/2 months and his co-worker had been at the bakery for 1 year 3 months. The Plaintiff alleged that the injury occurred because of a long-term defect of a wheel on the trolley and that the Defendant was liable for failure to provide a safe system of work and that the Defendant was negligent. The Defendant denied the trolley accident but averred that if it occurred it was due to the fault of the Plaintiff. On the visit to the locus in quo the Court noted that jerking was required to unlock the trolley from the oven.

HELD:

(i) Where an employee is engaged in a potentially dangerous occupation it is the duty of the employer to provide a safe system of work for the employee to use and to provide correct instruction as to the use of employer's machinery. A failure to fulfil these duties renders the employer liable for damage caused by “things in his custody” under Article 1384(1) of me Civil Code;

(ii) Where the duties are fulfilled by the employer and an accident occurs, the employer is not liable;

(iii) Retrieving a hot bread trolley from an oven is not potentially dangerous;

(iv) The employer had provided a safe system of work; and

(v) Assuming the trolley had been defective, the Plaintiff claimed knowledge of the defect and therefore had failed to act diligently.

Judgment for the Defendant Case dismissed.

Legislation died
Civil Code of Seychelles, 1384(1)

Cases referred to
Adolphe v Donkin (1983) SLR 125
Hardy v Valabhji (1964) SLR 98
Laveday Hoareau v UCPS (1979) SLR 155
Servina v W&C French & Co (1968) SLR 127

Phillippe BOULLE for the Plaintiff
Frank ELIZABETH for the Defendant

Judgment delivered on 22 October 2001 by:

PERERA J: The Plaintiff sues the Defendant, his former employer, for damages arising out of an injury suffered in the course of his employment. In paragraph 2 of the plaint, it is averred that "on 8 February 1996, whilst the Plaintiff was working in the course of his employment at Foret Noire, Mahe, an accident occurred when a defective bread trolley overturned and fell over his left foot."

The medical report of Dr. Alexander, Consultant Orthopedic Surgeon, dated 16th July 1996 is as follows-

> "Re-Medical Report Senville Esparon" the above person was brought to Casualty on 8.2.96 with history of heavy object fall on left foot.
> The details of sustained injuries:
>
> Left foot: rugged laceration on left foot dorsum part.

X'ray foot fracture distal end 2nd metatarsal
Period of hospitalization 8.2.96 to 4.3.96
Temporary disability about 20% and residual disability is too early to decide.

The Plaintiff avers that the accident occurred due to the fault and negligence of the Defendant, or of his Servants or Agents. Particularizing fault and negligence, he avers that -

1. The Defendant failed to employ a safe system or work for his employees including the Plaintiff.

2. The Defendant was negligent or reckless in all the circumstances of the case.

3. The Defendant failed to provide the Plaintiff with proper, safe and adequate facilities and equipment to work with.

4. The Defendant failed to insure the Plaintiff against such risks and perils.

The Defendant in his answer avers that if the trolley overturned, it was due to the fault and negligence of the Plaintiff. He also avers, in the alternative, that the accident was "faked and caused by a deliberate Act of the Plaintiff to claim damages."

According to the evidence of the Plaintiff, he had been working at the Defendant's Bakery for only 2½ months at the time of the accident. His task as a baker, that day was to remove a trolley of baked bread from the oven. The trolley is about 6 feet in height, and about 4 feet in width. It has four adjustable wheels. The baking oven is 7 feet in height, and 5 feet in width. The trolley is wheeled into the oven and taken back over a ramp. At the locus in quo, the procedure followed in baking was demonstrated. The dough produced by the

mixing machine is arranged in moulds and placed in the trolley. Two vertical iron bars are fixed to prevent the moulds from falling. The loaded trolley is first kept in a "prover oven" for a short time till the "bread has risen" and then wheeled into the baking oven. The mechanism in the oven clamps the trolley in position. Once the bread is baked, the door of the oven is opened. Usually, one person using protective cloth or gunny material hold the two vertical bars and pull the trolley forward exerting some force to dislodge the trolley from the locking device. It was while being wheeled down the ramp that the trolley is said to have fallen.

The Plaintiff in his examination in chief stated –

> It was coming straight towards me and when I went to the side it was then that it fell on my foot.

As regards the trolley, the Plaintiff testified that one wheel was defective, in that, it did not turn intermittently and that he and two others informed the employer Mr Emile Bristol about it. He further stated that Mr Bristol told him that all previous employees used the trolley in that condition and that he too should use it. He also stated that that trolley was wheeled into the oven without a problem but after it had been heated, the defective right side front wheel seized. He stated thus-

> The only way for the trolley to have overturned was because the wheel did not want to turn and if the wheel was in proper working condition, it would have just slid down the slip, but as it did not, it just overturned, because one of the wheel was not turning.

He further stated that a wheel of the trolley did not "roll over" his foot as was stated by his lawyer in the letter of demand dated 12 August 1996 *(P3)* and also in the original paragraph 2 of the plaint, but that the upper part of the trolley fell on his foot as he was trying to get to a side when the trolley was

capsizing as it came down the ramp.

The Plaintiff's testimony as regards the accident was corroborated by Michel Anaou, the other person who helped him to pull the trolley from the oven at the time of the accident. He had been working in the bakery for 1 year and 3 months. He stated that previously he had experienced difficulty in using this trolley due to the jamming of a wheel. He had brought that defect to the attention of Mr Bristol. He further stated that the guard bars were fixed on the trolley that day but they became loose after it fell. He also stated that there was only one other trolley of this size that is used in that oven. The defective trolley was however used throughout the time he was in employment at the bakery, but it was only that day that it capsized, and caused injury to someone. He further stated that the defective trolley could be distinguished from the other from the noise that came from the defective wheel. The trolley came down the ramp slowly but tilted and fell on reaching the floor as the defective wheel get blocked. There was nothing on the floor to obstruct the moving trolley. This witness also stated that it was the front right side wheel that was defective.

The Defendant testified that his bakery was in operation for 27 years, and that for the past 11 years he had installed modern equipment. As regards the unlocking procedure involved after the bread had baked, he stated that the trolley had to be "pushed slightly inside and shaken a little", then pulled out. It is then that the trolley gets unlocked from the base of the oven. The trolley is then rolled down the ramp to the floor which is fitted with metal sheeting. All these were observed by Court at the locus in quo when the whole procedure involved was demonstrated.

The Defendant Mr Bristol, however denied that a trolley had a defective wheel. However in his cross examination he stated that if there was a complaint it would have been made to Mrs Maria the Assistant Manager or to his son Peter. He further

stated that the safe system adopted was for one person to pull the trolley out using both hands on the vertical bars, but that on the day of the accident the Plaintiff had got the Assistance of another. He stated that the Plaintiff may not have fixed the guard bars that day. He also stated that on several occasions he had instructed the Plaintiff to fix these bars, but that he was very stubborn. After the accident, he did not find any bars near the fallen trolley.

Questioned by Court, he stated that if the trolley is pulled out of the oven by two persons of different strengths, it could go in a different direction. It is for that reason that it is recommended that only one person handles the trolley.

Peter Bristol, the son of the Defendant testified that although he was not present at the time of the accident, when he came there the trolley was in an upright position. He stated that at times he too had pulled the trolleys from the oven. He denied that the Plaintiff ever complained to him about a defective wheel. He too testified that it was not appropriate for two persons to pull out the trolley from the oven. However another person may help if requested.

In his cross-examination he stated that at the time of the accident the two vertical bars had been fixed on the trolley. He stated that otherwise when shaking the trolley to unlock, the hot trays would fall out. He further stated that a bolt in one of the wheels of a trolley had come out and that he told his father about it, and that he heard from someone that it was fixed. He had no personal knowledge whether it was fixed prior to the accident. He also stated that although the bolt was loose, the trolley moved freely as the wheels were fixed with good bearings.

Ms Barbara Maria, the Assistant Manager of the Bakery testified that when she came to the scene on hearing a noise, she saw the trolley fallen with the moulds and bread scattered around. The Plaintiff was also on the floor, but others were

helping him to get up. She stated that the moulds and bread would have come out as the two metal bars had not been fixed.

Liability

Article 1384(1) of the Civil Code Procedure that –

> A person is liable not only for the damage that he has caused by his own Act but also for the damages caused by the Act of persons for whom he is responsible or by things in his custody.

This sub-Article has been interpreted to mean that the damage must be caused by the "thing" per se**,** independently of any direct intervention of man.

In the instant case, of the four grounds averred against the Defendant in paragraph 3 of the plaint, evidence was adduced to establish ground 3, namely that "the Defendant failed to provide the Plaintiff with proper, safe and adequate facilities and equipment to work with". It was the case for the Plaintiff that the trolley capsized as a result of the blocking of a wheel. But that fact was not specifically pleaded in the plaint. The Plaintiff, and his witness Anaou testified that this defect was observed for some time before the accident. Even Peter Bristol, the son of the Defendant confirmed that this defect was brought to the notice of the Management. However his evidence as to whether it was repaired or not remained in conclusive. In any event, the Plaintiff in paragraph 2 of the plaint attributes this alleged defect to be the sole cause of the accident. It is significant to note that in the Plaintiffs Attorney's letter (P3) and in paragraph 2 of the plaint it was averred that a wheel of the trolley "ran over." But subsequently in the course of the hearing paragraph 2 of the plaint was amended to read as "fell over". Hence for the Plaintiff to succeed in the action, he must establish that this defect was the direct cause of the accident, independently of any intervention of man.
Reviewing a few cases where this principle was applied; in the

case *of Hardy v Valabhji* (1964) SLR 98*,* the Plaintiff injured his wrist and fingers while operating a coconut crushing machine. The Court took into consideration that the machine itself was not dangerous, but the danger lay in the way it was interfered with while in operation. On the basis of the evidence, the Court held that the employer had instructed the Plaintiff to scoop poonac while the machine was rotating, and hence the accident was due to the Plaintiff following such dangerous instructions.

In the case of *Servina v W&C French & Co* (1968) SLR 127*,* the Plaintiff's right thumb was severed while threading iron rods. Souyave J entering judgment for the Plaintiff stated –

> I do not think that the Plaintiff has the burden of going to the extent of proving what exactly caused the accident. I believe that he has only to prove that the work he was asked to do was dangerous and whilst doing so and following instructions given him, he was injured.

However, in *Loveday Hoareau v UCPS* (1979) SLR 155, the Plaintiff was engaged in a dangerous occupation as a rock blaster. Evidence revealed that the employer had not provided the Plaintiff with the necessary device for testing. However the direct cause of the explosion which injured him was that he used a torch battery and bulb, which generated too strong a current which set off the detonator. Further he was standing on the rock over the hole. The Court held that-

> I do not think that the Defendant had any duty in the circumstances to provide a safe system of work for the Plaintiff to follow. The Plaintiff was the expert at the site in charge of blasting operations. It was for himself to apply or follow common safety rules which he must have been thought whilst training to become a certified blaster.

Here, the Court took the view that although the explosives were in the custody of the Defendant there was direct intervention of man. The Plaintiff's action was therefore dismissed.

In the case of *Adolphe v Donkin* (1983) SLR 125, the Court held that boiling tar and carrying it on a ladder to a roof top was a dangerous procedure and that the employer was bound to provide a safe system of work and to give correct and safe instructions.

The ratio of these cases is that, where an employee is engaged in a potentially dangerous occupation, especially using machinery belonging to the employer, it is the duty of the employer to provide a safe system for the employee to use that machinery and also provide correct and safe instructions as to how such machinery is to be used. If he fails to do so, he would be liable for the "things in his custody" under Article 1384(1). However, where a safe system had been provided and proper instructions given, an accident occurs due to the direct intervention of the worker, as in *Hoareau* (supra), then the Defendant employer is released from liability.

In the present case, retrieving a hot bread trolley from the oven cannot be considered as potentially dangerous. No expertise or special instructions are needed for a person with average intelligence to work safely. The trolley is fixed with vertical bars to prevent the bread moulds from falling out, and also to be used as handles when pushing and pulling the trolley in and out of the oven. To permit a smooth movement from the oven to the floor, there is a ramp. The floor itself is paneled with metal sheets to permit the free movement of the loaded trolley without hitting against any object or falling into any crack or hole. Hence the employer had provided a safe system of work.

At the visit of the locus in quo, it was also observed that the

unlocking of the trolley from the oven required jerking and pulling it down the ramp. Both the Plaintiff and Michel Anaou testified that the trolley fell forward as it came down the ramp. The Plaintiff stated that it was coming straight towards him and that he tried to move away but it fell on his left foot. Anaou stated that "if the wheel was in a proper working condition, it would have just slid down the slip". Further, on being cross-examined he said -

> Q. You have testified that the wheel of the trolley seized or tightened. At that point of time what was being done to the trolley?
>
> A. While we were not able to take it out from the oven, we were trying to pull it out, to make it get out of the oven.

Both the Plaintiff and Anaou testified that although there was some defect in a wheel, it was used daily for a long time. It was observed that even if there was no defect in a wheel, the trolley would come down the ramp in a slightly tilted position due the slope. The evidence of Anaou, disclosed that there was some difficulty in pulling the trolley out of the oven at the time of the accident. The Plaintiff stated that the trolley came straight at him as it came down the ramp. Hence if there was any difficulty in taking out of the trolley, which he knew to be defective the Plaintiff should have acted more diligently. On a balance of probabilities therefore, I hold that the trolley fell forward due to the momentum created by the two men who were pulling it out from the oven over the slope of the ramp. The defect of the wheel, if any, has been used as a subterfuge. The accident was therefore not caused by the "thing" per se independently of the direct intervention of man. In these circumstances, the Defendant cannot be held liable in damages.

The Plaintiff's action is accordingly dismissed with costs.
Record: Civil Side No 311 of 1998

Ernesta v Air Seychelles

Employment law - damages for termination of employment - Employment Act - moral damages

The Plaintiff had been employed by the Defendant. The Defendant terminated the employment orally. The Plaintiff appealed to the Competent Officer who ordered that she be reinstated. The Defendant did not appeal the decision but the Plaintiff was not reinstated. The Plaintiff remained unemployed for a period and men obtained employment elsewhere. The Defendant had paid compensation at the rate of one day's pay at the rate of service plus one month's notice. She was not paid gratuity.

HELD:

(i) In calculating the amount to be paid, the gross basic salary plus all monthly allowances to be paid to the employee must be taken into account; and

(ii) The Employment Act provides a code for dealing with grievance procedures. Therefore moral damages are not available to an employee in addition to the relief available under the Act.

Judgment for the Plaintiff. Damages for loss R48,168.72.

Legislation cited
Employment Act 1995, ss 21,49(1), 61(2)(a)(ii)
Employment Amendment Act 1999

Cases referred to
Antoine Rosette v Union Lighterage Company CA 16/1994

France BONTE for the Plaintiff
Kieran SHAH for the Defendant

Judgment delivered on 15 March 2001 by:

ALLEEAR CJ: This is an action brought by the Plaintiff claiming a total of R676,376.00 "for loss and damages with costs".

The Plaintiff worked for Air Seychelles from April 1996 to July 1996 first as Manager Industry Affairs and then as Head of Planning Section. Her monthly salary was R7,850 inclusive of allowances.

In July 1996 the Defendant purported to terminate the Plaintiffs employment verbally. The Plaintiff appealed to the Competent Officer in the Ministry of Employment and Social Affairs. The Competent Officer found that the Defendant had:

> varied the terms and conditions of the Applicant's contract of employment without her consent pursuant to Section 49(1) of the Employment Act 1995. Reasons for termination have not been established by the Respondent.
>
> Therefore, pursuant to Section 61(2)(a)(ii) of the Employment Act 1995, termination of the Applicant's contract of employment was not justified.

And ordered that:-

> The Applicant is to be reinstated in her post as Head of Planning without any loss of earnings with effect from 29th July 1996 and formalise her appointment as per Section 21 of the Employment Act 1995.

The Defendant did not appeal the decision of the Competent Officer. The Plaintiff was not reinstated and according to her remained unemployed from July 1996 to April 1997. The Plaintiff's recollection as to the number of months that she remained unemployed was very vague and imprecise. The Plaintiff stated in response to a question:

> I cannot be exact ... I do not have the dates ... it has been a long time ... please forgive me if I do not have the exact details.

It is the Plaintiffs contention that as she did not work for about 35 months she is entitled to R298,385 as loss of salary. There is an additional claim in respect of Leave for R17,295. There is a further claim of R13,488 under the head of Compensation. Under the head of Gratuity there is a claim for R44,758. Under the head of Loss of Other Benefits there is a claim for R77,400 and R200,000 as moral damages.

The Plaintiff, it will be well recalled, was sent abroad for training for a period of 3 years by the Government. Whilst on training she was deemed to be the employee of the Ministry of Education. She returned to Seychelles in February 1996.

It will be noted that Air Seychelles is a parastatal organisation. Before taking on an employee therefore, it has to seek permission from the Ministry of Administration.

By April 1997 the Plaintiff obtained employment with the Ministry of Community Development and earned a salary of R7,600 per month. The Plaintiff denied in cross examination that she had received a letter from the Principal Secretary for the Ministry of Administration and Manpower dated 16th January 1998 dismissing her from Government service with immediate effect on grounds of misconduct. Nonetheless the Plaintiff admitted that she worked for the Ministry of Community Development in early December 1998 or late November 1998. According to her she stopped working for the

Ministry of Community Development because she got another offer of employment with the Indian Ocean Tuna (IOT). The Plaintiff was asked the following question:

> Q. Are you saying that your employment with the Ministry of Community Development was not terminated by the Government but that you terminated it because you wanted to take up a job with IOT?
>
> A: That is correct.

The Plaintiff admitted having received the sum of R6,162.34 as salary for the month of April 1996 from the Defendant. She was paid for the months of May and June 1996. Between April 1996 and August 1996 the Plaintiff admitted "that she was off-duty, on sick leave and on unofficial business for some time." The Plaintiff explained that during that period when she was off-work she was on sick-leave and on compassionate leave. In May 1996 she said she took time-off from work with Air Seychelles to “think things through”.

On 28 May 1997 the Defendant wrote to the Plaintiff (Exhibit D1) as follows:

> Further to your grievance lodged against Air Seychelles with the Ministry of Employment and Social Affairs, it has been approved by the Ministry of Administration and Manpower for your appointment to be terminated "in the interest" of the organisation with effect from 1st April 1997.
>
> You will note that you have been on 20 days unpaid leave for the period 13th July to 1st August 1996. Since your case is long outstanding, we have accepted to pay you the salary you were receiving at the time of your departure, up to 31st March 1997. As per my letter of even reference dated 24th

February 1997, you were paid Rs.28,389.47 as part of your terminal payments which was calculated based on your gross basic salary of Rs.4,800/- per month plus overtime, entertainment, telephone and duty allowances.

It is now felt that, although you were theoretically in employment, you were not actually working. Therefore the payment of the monthly allowances cannot be considered. Your compensation payments have thus been recalculated on your gross basic salary of Rs. 4,800/- per month broken down as follows:

Salary from 1st to 12th July 1996
Rs.4800 x 12 x 12 days ÷ 366 = Rs. 1,888.52

Salary from 2nd to 31st August 1996
Rs.4800 x 12 x 30 days ÷ 366 = Rs. 4,721.31

Salary from 1st September 1996 to 31st March 1997
Rs.4800 x 7 months = Rs.33,600.00

Annual leave from 3rd April 1996 to 31st March 1997
Rs.4800 x 12 x 20.88 ÷ 365 = Rs. 3,295.03
Rs.43,504.85
Less 5% Social Security = (Rs. 2,175.24)
Rs.41,329.61

Compensation payments from 3.4.1996 to 31.3.1997
Rs..4800 x 12 x 18 x 11 months ÷ 2080
= Rs. 2,436.92
= Rs.43,766.53
Amount already paid out = (Rs.28,389.47)
Balance Due Rs.15,377.06

The Defendant called one Fauzia Zarquani-Rose, General Manager, Human Resources Air Seychelles as its sole

witness. Mrs Zarquani-Rose worked as General Manager Human Resources Air Seychelles since January 1996 to date. The witness confirmed that in April 1996 the Plaintiff started employment with Air Seychelles. She explained that when the Plaintiff returned from abroad from a course of study in February 1996 Air Seychelles received a letter from the Ministry of Administration and Manpower requesting Air Seychelles for a vacancy for the Plaintiff. In terms of the Public Service Order all the posts that are available in an organisation are entered in a nominal roll. In February 1996 the Defendant had no post available for a person with the qualifications of the Plaintiff. However, by verbal communications between Air Seychelles and the Ministry of Administration and Manpower it was agreed that the Defendant would employ the Plaintiff pending the formalisation of a post in the organisation. The Plaintiff was thus employed "without first having sorted out what kind of a job she would do." She joined initially as Manager Industry Affairs in the Marketing Division and subsequently asked for another post. The Plaintiff felt that with her qualifications she was entitled to a higher position in the Organisation and was promoted to Head of Planning in the Finance and Planning Division.

Meanwhile Air Seychelles was in the process of requesting a transfer of the Plaintiff from the Ministry of Youth and Sports as the latter was still on the payroll of the Ministry of Youth and Sports. The transfer request never materialised as the Plaintiffs continued employment with the Organisation was put in doubt. The Plaintiff was paid all her salaries up to 31 March 1997 by the Defendant.

On 20 April 1997, the Plaintiff started working with the Ministry of Community Development (as it was then called). She did not challenge the termination of employment with Air Seychelles (Exhibit Pl). She sought and obtained employment elsewhere. She did not appeal against the said termination of employment.

Exhibit D6 shows that the Plaintiff was paid for leave taken from 8 April 1996 to 31 March 1997. She was paid compensation at the rate of one day's pay for every month of service up to 31 March 1997 vide Exhibit D1. She was not paid gratuity. The Plaintiff was paid one month's notice as per the Employment Act 1995.

In my judgment although the Plaintiff was theoretically employed and not actually working from August 1996 to 31 March 1997 this was due to non-compliance by the Defendant with the Competent Officer's order. Therefore in computing the payment of the monthly allowance, same cannot be calculated on the gross basic salary of R4,800 only. In fairness a computation must take into account all the allowances that were paid to the Plaintiff i.e. R7,850 per month. The said computation ought to reflect the figures given below.

Salary from 1 to 12 July 1996
R7850 x 12 x 12 ÷ 366 = R3,088.52

Salary from 2 to 31 August 1996
R7850 x 12 x 30 ÷ 366 = R7,721.31

Salary from 1 September 1996 to 31 March 1997
R6,850 x 7 months = R54,950

Annual leave from 3rd April 1996 to 31 March 1997
R7,850 x 12 x 20.88 ÷ 365 = R5,388.75

Total = R71,148.58

Less 5% Social Security = (67,591.16)

Compensation payments from 3.4.96 to 31.3.97
R7,850 x 12 x 18 x 11 months ÷ 2080
= R8,967.11

		R67,591.08
		R 8,967.11
		R76,559.19
The Plaintiff has received	=	R28,389.47
The balance due to her is	=	R76,558.19
		R28,389.47
		R48,168.72

The Plaintiff has received payment in respect of gratuity calculated as follows, 14 over 180 x R20,000.

The Plaintiff is claiming R200,000 moral damages. As per the judgment of the Seychelles Court of Appeal in *Antoine Rosette v Union Lighterage Company* CA 16 of 1994 and read in conjunction with the Employment Amendment Act of 1999, the Court of Appeal decided and (I share the view expressed by Ayoola P in the above judgment) that the said Act did not envisage a situation in which the worker and employer would go through the grievance procedure to finality only for the worker to commence and drag the employer through fresh proceedings based on the same cause of action in another forum.

The Plaintiff according to me is only entitled to remedies and reliefs provided for under the Act. If the legislature had intended that additional compensation by way of moral damages "is to be awarded having regard to the manner and circumstances of the termination of the employment it would have so provided". Hence I do not grant any sum under the head of Moral Damages as I do not think that was the intention of the legislature. There will accordingly be judgment for the Plaintiff in the sum of R48,168.72 with interest and costs on amount awarded. Interest payable from date of filing of action. The Registry will refund the Plaintiff the balance from filing fees.

Record: Civil Side No 160 of 1999

Esparon v Joubert

False affidavit - damages

The Plaintiff claimed damages of R50,000 for false allegations made by the Defendant in an affidavit which supported a restriction registered against the Plaintiff's land. The Defendant confused the Plaintiff with a person of the same name in respect of whom the allegations were made.

HELD:

(i) The Defendant should not have registered the restriction without making a correct identification of the individual concerned;

(ii) There was clear detriment to the Plaintiff; and

(iii) On reasonable inquiry with the Land Registrar the Plaintiff would have discovered that there was a mistake of identity and the register could have been rectified. The damages are reduced accordingly.

Judgment for the Plaintiff. Damages of R5,000.

Legislation cited
Land Registration Act Cap 170, s 86

John RENAUD for the Plaintiff
Frank ELIZABETH for the Defendant

Judgment delivered on 18 January 2001 by:

JUDDOO J: The Plaintiff claims damages in the sum of R50,000 for false allegations made to his detriment in an affidavit filed by the Defendant. The claim is resisted by the Defendant.

There is no dispute that the Plaintiff is the owner of a parcel of land situated at Bougainville and registered as Parcel T 266. On 21 October 1997, the Defendant caused to be registered a restriction against the said parcel of land with the Land Registrar. In her affidavit supporting the application the Defendant averred, inter alia,

> ...the Supreme Court gave judgment against Jean Claude Esparon and in my favour in the sum of R54,793. The judgment debtor has presently no other sources of income and if he is permitted to dispose of the land there will be no possibility of the judgment creditor recovering the judgment debt. That I have reason to believe that the said Jean Claude Esparon may attempt to sell, transfer or alienate the said property before enforcement of the judgment. That in view of the above, I have an interest in Title S 1187 and T 266 which I must protect until judgment is enforced.

The Plaintiff gave evidence that he owns Parcel T 266. He does not know the Defendant and had no prior encounter with her with respect to any proceeding in Court. The Defendant has not obtained any judgment against him and the allegations made in that respect are fallacious. The Plaintiff explained that he was worried by the restriction order placed on his land by the Defendant. Under cross examination the Plaintiff added that he intended to sell his land to his brother in law when he called at the Land Registry and learnt of the restriction order.

The Defendant testified that she knew one Jean Claude

Esparon against whom she had obtained a judgment. She instructed her lawyer to register a restriction against the property of the said judgment debtor. The Defendant added that "... when the same was to be registered, I was informed there were two Jean Claude Esparon….." and explained that it was not her intention to register any restriction against anyone other than the judgment creditor. Under cross-examination, she agreed that she had sworn the affidavit in support of the restriction order and added that she had reason to believe that the judgment debtor would attempt to sell or transfer his properties before the enforcement of the judgment delivered in her favour.

One Peggy Bamboche gave evidence on behalf of the Defendant. She explained that she had called at the Land Registry and obtained information that Land Parcel T 266 belonged to Jean Claude Esparon. Under cross-examination, she claimed that she was satisfied that the said "Jean Claude Esparon" was the very person against whom the Defendant had obtained a judgment in her favour.

The Defendant has admitted being aware of the existence of two persons bearing the name Jean Claude Esparon at the time she caused the restriction to be registered. Accordingly, it was incumbent to ascertain the correct person before going through with the registration. To the extent that the affidavit refers to the parcel of land of the Plaintiff and further states that there is cause to believe that Jean Claude Esparon, as the proprietor of land Parcel T 266, may attempt to sell or alienate the property, the averment is a fallacious statement made to the detriment of the Plaintiff. Accordingly, I find liability against the Defendant to be established on a balance of probabilities.

However, on the other hand the evidence of detriment suffered by the Plaintiff is mostly exaggerated as revealed by the following statement under cross-examination "... you were going to take everything out of me. In my mind I go crazy

when I think of my piece of land. I wanted to do something with it but you have taken it, you have put a restriction on it…." A reasonable inquiry into the matter with the Land Registrar would have revealed that there was an obvious mistake as to the identity of the proprietor of the restricted land and an application for rectification could have been duly made to the Registrar under s 86(1) of the Land Registration Act (Cap 107) or to the Court under s 86 (2) thereof. For reasons above, I assess the resulting damages at R5000 with costs taxed at the Magistrates' Court level.

Record: Civil Side No 30 of 1999

D'Offay v Hoareau & Ors

Estates - duties of executors - co-ownership as a result of succession

The Plaintiff and the three Defendants are all siblings. The Defendants were appointed as joint executors of their mother's estate. The Plaintiff claimed that the Defendants had breached their duties as executors by failing to properly itemise or value the estate assets. The Defendants averred there was no case to answer.

HELD:

(i) There is no legal requirement on an executor to obtain a valuation on a succession;

(ii) The Court has wide powers under Article 830 of me Civil Code but that does not entitle the Court to order a valuation where there is no such requirement at law; and

(iii) The Plaintiff may undertake a valuation at his own expense and if he were to do so the duty of the Defendants as joint executors and fiduciaries would be to make all relevant information available to him and the valuer.

Judgment for the Defendants. Case dismissed.

Legislation cited
Civil Code of Seychelles, arts 533, 817-818, 823, 825, 830, 1027-1028

Nichole TIRANT for the Plaintiff
Phillippe BOULLE for the Defendants

Appeal by the Appellant was dismissed on 8 August 2001 in CA 9 of 2001.

Ruling on Submission of No Case To Answer delivered on 22nd day of March, 2001 by:

JUDDOO J: The Plaintiff is one of the five children and heir to the estate of late Marie-Thérèse D'Offay (hereinafter referred as "the deceased") who passed away on 12 August 1998. The Defendants, all three children of the deceased, were appointed as joint executors under the terms of the deceased's testament. The Plaintiff claims that the Defendants have "breached and failed to comply with their duties and functions as executors of the estate..." and requires that they be removed as joint executors and be replaced by another. The plaint is resisted by all three Defendants.

At the close of the case for the Plaintiff, Learned Counsel appearing on behalf of the First and Second Defendants made a submission of "no case to answer". The 3rd Defendant who was represented by Counsel at the beginning of the instant proceedings and filed a joint defence became unrepresented at a later stage of the proceedings.

The essence of the claim by the Plaintiff is that the three Defendants have been in breach of their duties and responsibilities as joint fiduciaries of the estate of the deceased. The particulars of the alleged breach have been expressly spelt out, as follows:

(a) No inventory of the succession has been drawn up despite repeated requests by the Plaintiff that same be done.

(b) The first Defendant, as executrix and as co-heir is in a serious situation of a conflict of interest in that she is the main beneficiary under the terms of the Will and is directly enjoying an asset of the succession by virtue of her position as shareholder and director of Bougainville Investments (Pty) Ltd and has so far failed to act in the interests of the heirs to the deceased's estate.

(c) The executors have all their own personal interests in the estate and have refused to seek a valuation of the estate.

(d) The Defendants have failed to render account of movables including monies and jewellery held in reversion by their late mother since the opening of the succession..

Marie-Therese D'Offay passed away on 12 August 1998. The three Defendants were appointed joint-executors under the terms of the Will and their appointment was confirmed by an order of this Court on 17 September 1998. About one month later, by virtue of a letter, exhibit P3, the Plaintiff through his lawyer requested from the joint executors:

> … It is therefore necessary at this stage for you, as Executors of your mother's estate, to take the necessary steps to settle this succession, which must first consider what estate your mother has left in her will, taking into account the fact that during her lifetime, your mother was holding over the estate of your grandmother, Mrs. Yvonne Deltel, née Hoareau.
>
> You are aware that by the terms of the will dated the 9th February 1958, your grandmother, Mrs. Yvonne Deltel had left both immovable and

> moveable property to your mother with the express obligation of holding over this property for you and your brothers in reversion. ... There is an obvious need to determine what properties included in the will of Mrs D'Offay form that part of the estate of Mrs. Deltel and give effect to this.
>
> Furthermore, the issue of the Bougainville Guest House becomes a very pressing matter as the estate should be receiving rental from this establishment which should then be shared out equally to all the heirs. It is evident that the longer the matter remains unresolved, the greater the loss suffered by the heirs collectively....
>
> There is also a need, at this stage, to carry out an evaluation of all the properties held by your mother from which must then be made subtraction of the properties which revert to all the heirs in equal shares from the estate of your grandmother, Mrs. Deltel.
>
> The purpose of this letter is to request that you immediately carry of a full inventory of the estate of your mother and in consultation with the other heirs, seek the appointment of an executor for the estate of your grandmother so that her succession may be duly settled. The inventory will naturally cover all movable property including any monies held in banks in Seychelles or overseas and will also require an evaluation of all the immovable property comprising the estates...

By way of a reply ten days after receipt of the above request letter, the Plaintiff was informed, as per exhibit P5, that:

> An inventory has been carried out and a copy is annexed herewith. We have requested the Manager of Barclays Bank Plc, at Independence Avenue, Victoria, Mahe, to Write to the other branches of the same Bank in Jersey and Guernsey ...
>
> ...Barclays Bank in Guernsey has confirmed that our late mother Mrs. Julie Marie-Therese D'Offay did not maintain an account with them. As for Barclays Bank in Jersey, we are still awaiting a reply.
>
> We have Written to First International Bank and the Permanent Bank in South Africa and we are awaiting a reply.
>
> A bank account has been opened by us at Barclays Bank Plc, Independence Avenue, Victoria, which is operated by the three of us.
>
> Regarding the subject of Bougainville Guest House, the monthly rental has been deposited in the account above-mentioned.
>
> The large properties at Anse Soleil, Bougainville and Val D'en Dor are registered in our mother's name. It has been estimated that the valuation will cost between SR20,000 to SR30,000. It is too costly to carry out a valuation of the said properties and therefore we as Executors and Mr. Olave D'Offay, one of the heirs, have decided not to do it.
>
> Should you require any further information please do not hesitate to contact us...

The letter was accompanied by an inventory of house at Anse

Baleine (Le Bougainville) which identified those of the movables at the said house which belonged to the estate (referred therein as “heirs”) and those belonging to “Bougainvilla”, most presumably Bougainville Investments Pty Ltd and an express note at the bottom, thereof, that "All other equipments, fixtures and furnitures non listed here belongs to Bougainville Investments (Pty) Ltd."

I shall first consider the claim that the first Defendant is in a "serious situation of conflict" in that she is enjoying the benefit of an asset as shareholder and director of Bougainville Investments (Pty) Ltd. There is no evidence on record that the First Defendant was either a shareholder or a director of Bougainville Investments (Pty) Ltd. Exhibit P6, produced by the Plaintiff, discloses that the First Defendant was only the 'secretary' of the company. Taking into account that the First Defendant has resigned in her office with the company, as per exhibit P6(a), the issue does not arise for further determination. I shall therefore turn to the claim pertaining to immovable and movable properties of the estate.

In his testimony in Court, the Plaintiff testified that to his knowledge at the time of her death, the deceased left behind both movable and immovable properties. He agreed having instructed his lawyer to Write to the joint executors as per exhibit P3 and received the reply as per exhibit P5. The Plaintiff explained he was not satisfied with the reply because "the inventory was not made properly. Only part of the property was done. Only the hotel and the house at the bottom of Anse Royale where Harland lives. There is another house at Anse Baleine that belong to the heirs..." Under cross-examination, the Plaintiff admitted that the house at Anse Soleil is unoccupied, that at Val D'en D'or there are houses for the workers and at Anse Baleine "there is the hotel, the house at the bottom, and next to the hotel there is a worker's house..." The evidence of the Plaintiff pertaining to dispositions made to his two brothers, as per exhibits P8 and P8(a), are ultra petita since they were purportedly inter vivos

dispositions made by Mrs Marie-Therese D'Offay during her life time. The Plaintiff also produced, as exhibit P11, an affidavit of transfer of shares in respect of the estate of the deceased. The latter is an agreement. between four of the heirs mutually abandoning their rights in favour of each other and does not deprive, in any manner, the Plaintiff of his share to the estate. This is confirmed by the Plaintiff himself when he produced exhibit P14, a certificate of official search, disclosing his entitlement to one fifth of title T1063. In the end resort the Plaintiff agreed that the inherited parcels of land were duly surveyed by a land surveyor and the boundaries delineated and explained that his concern was "how much is my one fifth." Accordingly, the main concern of the Plaintiff boils down to his request for a valuation which shall be considered at a later stage.

With reference to the monies her mother left behind at the time of her death, the Plaintiff testified that he was shown two bank accounts, one from Barclays Bank Plc and another from Nouvobanq Ltd. He has received his "full share" of the money without any deduction for the medical expenses pertaining to the deceased before the latter passed away and without a reservation as to his share of the expenses for a “tomb” for the deceased. The Plaintiff agreed that he did not have knowledge of the overseas bank accounts of the deceased but has received his share of South African Rand five hundred (SAR500/-) from the executors. In relation to the sum of R40,000 which figures under the will of the deceased's mother, Yvonne Hoareau, it cannot be said that the intention in the will was that the said sum was included in the definition of "les biers meubles et immeubles" and accordingly held in reversion nor that the said sum was in existence at the time of Marie-Thérèse D'Offay passed away thirty years later. Additionally, by virtue of Section 533 of the Code the word movable used on its own in a private document shall not include cash.

The Plaintiff agreed that, by letter dated 21 October 1998, the

executors were informed that the deceased had withdrawn her "safe custody box" from Barclays Bank Plc in 1986. He further agreed that by letter, dated 7 October 1998, the executors have through the local branch of Barclays Bank Plc inquired about overseas accounts of the deceased, as per exhibit P4, and were informed by both Barclays Bank Finance (Company) Jersey Limited and Barclays Finance Company Guernsey Limited on 9 November and 14 October 1998 respectively that the deceased-holds no account as per exhibits D4(c) and D5. Accordingly, there is no evidence to support the claim of the Plaintiff under this head.

Lastly, with reference to the "jewellery held in reversion", the Plaintiff explained that there were some items of jewellery left behind by his grandmother to his mother and he has been informed by one of the executors, the First Defendant that they could not be traced. The least that can be said, on this score, is that there is no specific mention whatsoever, in the will of late Yvonne Hoareau, exhibit P4, of any item or items of jewellery legated thereunder. Additionally no evidence has been adduced as to the existence of such jewellery or a description thereof, however brief, been given. The mere assertion from the Plaintiff that there was “some jewellery” is insufficient to require evidence in reply. I shall now turn to the issue of valuation

Where there is co-ownership as a result of succession, the executor has the function of the fiduciary, not only in his capacity as executor but also because of the requirement of the law of co-ownership under Article 817 and 818 of the Civil Code. The duties and responsibilities of the executor are laid down under Article 1027 and 1028 of the Code:

> 1027 –The duties of an executor shall be to make an inventory of the succession to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will, as the case may be. He shall

> be bound by any debts of the succession only to the extent of its assets shown in the inventory.
>
> The manner of payment of debts and other rights and duties of the executor, insofar as they are not regulated by the Code, whether directly or by analogy to the rights and duties of successors to movable property, shall be settled by the Court.
>
> 1028 -The executor, in the capacity as fiduciary of the succession, shall also be bound by all the rules laid down in this code under Chapter VI of Title I of Book III relating to the functions and administration of fiduciaries, insofar as they may be applicable.

The chief functions of an executor appointed by the testator are to ensure compliance with the provisions of the will by preparing an inventory of the succession and by distributing the properties comprised in the succession in accordance with the terms of the will. A reading of Article 1027 discloses that there is no express requirement for a valuation of the assets. Neither can such a requirement be implied under the applicable provisions under Chapter VI, Title I, Book III of the Code.

Under Article 825, the fiduciary shall be "to hold, manage and administer the property honestly and in a business like manner..." and under Article 830 the Court is given "wide powers ... to make such orders relating to the appointment or dismissal of a fiduciary or to his management as it thinks fit ..." However, this does not entitle the Court to order a valuation where there is so such requirement in law upon the executors and additionally in the present case where four of the five heirs under the succession do not intend such a valuation as per exhibit P5. In such circumstances, the Plaintiff is entitled to embark upon a valuation exercise, if he so wishes, at his

own expense. If the Plaintiff elects to do so, the joint-executors, as fiduciaries, will only be under a duty to make available to him or his valuers all relevant information.

In the last resort, it is observed that during the course of the present proceedings, the joint executors have sold parcel T685, the land at Anse Soleil, and distributed the proceeds of sale held by the estate. There is no evidence that the Plaintiff had any dispute as to his share of the proceeds, nor that the sale value obtained was not in the interest of the heirs or alternatively that the Plaintiff accepted his share of the proceeds “under protest.”

For reasons given and to the extent determined above, the submission of “no case to answer” succeeds. I take account that the testamentary executors were appointed "jointly" under the will. By virtue of Article 823 of the Civil Code, having been appointed jointly, the executors have to act jointly. Accordingly, I find there is no case to answer against all three Defendants and dismiss the plaint but without costs.

Record: Civil Side No 401 of 1998

Didon v Albert & Ors

Company law - extraordinary general meeting - issuing shares - conflict of interest

The petitioner and the first two Respondents were the shareholders of a company. The Respondents called an extraordinary general meeting and gave the petitioner notice. The petitioner attended by proxy of his brother. At the meeting, resolutions were made by the two Respondent shareholders to remove the petitioner as Director and issue further shares. The new shares were allocated to the Respondents which resulted in reducing the petitioner's share in the company from 40 to 4.4.

HELD:

(i) The petitioner had informally agreed and consented to the holding of the extraordinary meeting in his capacity as director and was informed of that meeting and its proposed agenda in his capacity as a shareholder. The fact that a proper board meeting was not convened to call the extraordinary meeting did not cause unfair prejudice or oppression to me petitioner;

(ii) Directors are bound to offer new shares pro-rata to all existing shareholders. The mere communication of the meeting minutes is insufficient and inadequate. The petitioner had a right to accept or reject his new issue of shares within a reasonable time limit and upon conditions expressly made known to him by the directors; and

(iii) The first Respondent is to disclose his interests in the company from which the shareholders' company leased its premises.

Judgment for the petitioner. Orders made entitling the petitioner to outstanding remuneration as company director and for his pro-rata share entitlement to be accepted within 14 days. Damages awarded for inconvenience and unfair prejudice R10,000.

Legislation cited
Companies Act 1972, ss 8, 120, 128, 168, 171, 173, 201, Sch I Prt II regs 23, 52,65,

Francis CHANG-SAM for the Applicant
Anthony JULIETTE for the First and Second Respondents
Frank ELIZABETH for the Third Respondent

Judgment delivered on 29 August 2001 by:

JUDDOO J: The amended petition, made under Section 201 of the Companies Act 1972 (hereinafter referred as 'the Act'), essentially challenges the holding of an extraordinary general meeting of the Company, El's Products Ltd (hereinafter referred as the company), held on 10 April 1999, the resolutions made therein to resign the petitioner as director and to issue new shares, the resulting issue and allocation of these new shares and the conflict of interest by the First and Second Respondent in being involved in the affairs of the company and Albert Investments(Proprietary) Ltd. El's Products Ltd is a non-proprietary company.

The petitioner is a shareholder of the company incorporated on 5th April 1995 then with a share capital of 100 ordinary shares of R100 each, subscribed and held as follows:

(1) Petitioner 30 shares or 30% holding
(2) First Respondent 30 shares or 30% holding
(3) Second Respondent 40 shares or 40% holding.

The First and Second Respondents, husband and wife, were with the petitioner the three directors of the company before the resolutions passed at the extraordinary meeting of 10th April 1999. In addition, the First Respondent, Eugene Albert, also acted as company secretary at all material times.

Following the above-mentioned meeting, on 6 May 1999, a return of allotment of shares issued in the company was filed, exhibit P6. It states that 575 new shares of R450 each have been issued by the company out of which 260 were allotted to the First Respondent and 315 to the Second Respondent for a sum of R117,000 and R141,750 respectively. On the same day a further return of particulars of directors was filed, exhibit P5, stating that the petitioner had 'resigned' as director of the Company, with effect from 10 April 1999, and that one Brian Dubignon was appointed in replacement. In the minutes of meeting, exhibit P3, the said Mr. Brian Dubignon is said "to hold no executive powers however." This new issue of shares and allotment, made thereof, reduced the percentage holding of the petitioner in the company from 40% to 4.4%.

The petitioner, Mr. Maurice Didon, gave evidence that the Company was set up with the Respondents as they were all friends. He was appointed director and was responsible for the marketing and sale of the products as well as the collection of proceeds from clients. He was dissatisfied with the manner in which the daily finances and figures of the company's operations were not revealed to him. However, the petitioner agreed that he had been regularly informed of the yearly report which he duly signed.

Mr. Maurice Didon agreed that he had received a notice to attend the meeting of 10 April 1999 and deputed his brother, Noellin Didon, as his proxy. He also agreed to have received

a copy of the minutes of the meeting a few days later but denied that the meeting was properly held. The petitioner further denied having resigned in his capacity as director of the Company and added that he was agreeable to the increase of the share capital for which he had always been ready and willing to pay the issue price and had even called at the office of the company to do so.

As for Albert Investments (Proprietary) Ltd, the petitioner has produced a copy of its Memorandum of Association, exhibit P7. The objects of the said company are identical to that of El's Products Ltd. The petitioner agreed that El's Products Ltd. had started its operations in the premises which was owned and rented from the First and Second Respondents but stated that the business having grown since then, it would had been better for the company to invest in a building of its own instead of renting from a building from Albert Investment (Proprietary) Ltd which was owned by the First Respondent and his son. The petitioner agreed that he had attended a meeting at the company's office on 1 November 1999 when this matter was considered.

The petitioner's brother, Noellin Didon, testified that he was appointed as proxy to represent the petitioner at the meeting held on 10th April 1999. When the meeting started, he raised objection that it could not proceed since the procedure had not been complied with in the absence of a requisition from a member. An argument followed and in his own words " I say that it is not properly convened then we raised this point of argument and then seeing that they are not prepared to compromise. They are not prepared to convene the meeting as required by the Companies' Act and they are not going to change their minds so I walked out". The witness added that he requested to be shown the requisition from any member and was only shown the agenda of the meeting.

The First Respondent, Eugene Albert, gave material evidence on behalf of all three Respondents. He testified that prior to

1999 the company has been having problems with the conduct of the petitioner. The later was acting as salesman and was inclined to abusing alcohol whilst discharging his duties and even once left a truckload of meat products on the road and he was "fired" in January 1999. This led the First and Second Respondents to request a shareholders meeting, as per exhibit D1. Thereupon, the First Respondent prepared an agenda inserted it into a notice, exhibit P4, which was circulated to all the members. A few days later he received communication from the petitioner that the latter had appointed his brother, Mr Noellin Didon, to attend the meeting in his stead as proxy. On the day of the meeting the proxy came and raised objection to the meeting being held and left. The meeting proceeded and the two resolutions were passed. A few days after the meeting a copy of the minutes was drawn and sent to the petitioner by registered mail. After a period of two weeks the petitioner came and informed him that the meeting was "illegal" and that he was not interested in the minutes. One week later the petitioner came again and said that he was ready to contribute towards the new shares issue whereby the First Respondent informed him that "it's too late, it is after 21 days".

As for Albert Investments (Pty) Ltd, the First Respondent testified that the shareholders are his son and himself and added that the said company is engaged in “property development”. He explained that El's Products Ltd had started its manufacturing process in the kitchen of the First and Second Respondents but had to move to bigger premises in line with the growth that it had encountered over the years. Both the petitioner and himself searched for appropriate premises for one and a half year without success and at the same time he had called upon the petitioner to come up with some form of security, presumably for any building project, but the latter did not come up with any reply. Finally, a bank loan was taken by Albert Investments (Pty) Ltd to construct a building and he guaranteed the loan with his personal asset. The petitioner added that a meeting was held in November

1999 to consider the rental of the ground floor by the company from Albert Investments (Pty) Ltd. At the said meeting, the petitioner was present and was satisfied with the rental arrangements.

The amended petition is brought under section 201(1) of the Act which provides as follows:

> Any shareholder of a company who complains that the affairs of the company are being conducted in a manner which is oppressive or unfairly prejudicial to some part of the shareholders ... may make an application by way of petition to the Court for an order under this section.

There is little doubt, as submitted by learned counsel for the petitioner, that although s 201 followed the reciprocal provision under s 210 of the Companies Act (UK) 1948, yet the said provision was modified and adapted to the recommendations made after 1948 and is more in line with the approach that follows under s 451(1) of the Companies Act 1985 (UK). Accordingly, the operation of Section 201 is not limited to winding up remedies and instead the Court is possessed with wide discretion and powers under s 201(2) of the Act; - vide: *Pennington's Company Law*, 5th Edition, Chapter 17, p 743 and *Minority Shareholder's Rights*, Sweet & Maxwell 1990 Edition, R. Hollington, p45.

It is not disputed that the petitioner received a notice, exhibit P4, informing him "that an Extraordinary meeting of El's Product will be held at the company registered office on Saturday 10 April 1999 at 4.30pm". The said notice, dated 24 March 1999, was stated to be made "By order of the board" and was signed by the company secretary. The purpose of the meeting was:

To adopt the following ordinary resolutions:

a. To resign Mr Maurice Didon as director and appoint Mr. Bryan Dubignon in his stead.

b. To increase the share capital of the company to R303,750 by the creation of 575 ordinary shares of R450 each.

In his submissions, learned Counsel for the petitioner disputes the convocation to the meeting on the ground that there were no requisition by any member for the said meeting and no such requisition or request has been determined by the board. It has not been pleaded under paragraph 8 of the amended petition that there were no requisition in existence. What has been pleaded is that "From the minutes of meeting there is no record of such a requisition having been deposited." On behalf of the Respondents, a requisition letter was produced, exhibit D1, and the First Respondent testified that he had acted upon that letter to issue the convocation for the extraordinary meeting with notice of the agenda. There has been no objection raised to the production of the requisition letter nor has the genuineness of the document been put into cause under the cross-examination of the First Respondent as revealed by the following:

Q: Exhibit P4 is a notice of meeting?
A: Yes.
Q: You say there was a requisition?
A: Yes.

……

Q: Section 120 of the Companies Act says the directors shall call a meeting. <u>This notice was properly done but you did not follow the procedure, you did not call a prior meeting.</u>

A: Me and my wife were directors and we held a meeting... we used to do it like that I discuss it with my wife...

It is certain that the issue canvassed both in the pleadings and in the cross-examination of the First Respondent was that there were no board meeting to sanction the calling of the extraordinary general meeting which had been convened.

Before turning to the 'sanctioning' of the meeting convened, it is necessary to spell out briefly the powers to convene an extraordinary general meeting. The company has no 'Articles of Association' regulating the conduct of its affairs. Being a non-proprietary company, the regulations under the First Schedule, Part II are applicable by virtue of Section 8 of the Act. Under regulation 23, thereof, "the directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary meeting shall also be convened on such requisition, or, in default, may be convened by such requisitionists, as provided by s 120(2) of the Act..." A meeting convened through requisition under S 120 of the Act is an extraordinary general meeting to be held at the request of the shareholders of the company holding not less than one tenth of the issued share capital. Such a requisition must be deposited at the registered office of the company and must state the "intended business of the meeting to which it relates and must be signed by the requisitionist."-vide Section 120(5) of the Act. It is to be noted that the power of the directors to convene an extraordinary general assembly, under regulation independently of the power of the required number of shareholders to require the directors to convene such a meeting.

In addition to the above general power of the directors or the requisitions, to convene or require to convene an extraordinary general meeting, Section 168 of the Act is a specific piece of legislation which enables a company in a general meeting by ordinary resolution, requiring special

notice, to remove a director from office. Such a meeting may be called by "the directors, the Registrar or any other person or by order of the Court and notice of such a proposed resolution 'may be included' in the notice of the meeting at the instance of the directors or any other person." 'Any other person', in that respect, can only be taken to mean any other person entitled to require that a meeting be convened. Special notice is required under Section 168(2) of the Act by "the directors or the other person who calls the general meeting" to give Written notice of the proposal to the director whose removal is proposed. Thereupon, under Section 168(3) of the Act, the director whose removal is proposed is entitled to make Written representations in respect of the proposal to the company and requests their notification to other members and is entitled to address the meeting on the issue. The vital importance of the statutory provision under Section 168 is that it overrides anything to the contrary in the memorandum or Articles and any agreement between the company and its director.

In the absence of Articles of Association, the manner of proceedings of the board of directors is found under regulation 65 of Schedule I, Part II of the Act which provides that "The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meeting, as they think fit. Questions arising at any meeting shall be decided by a majority of votes, the chairman shall have a second or casting vote..." or by a resolution in writing signed by all the directors entitled to receive notice under regulation 73 thereof.

No Written record has been produced that a board meeting of the company has been convened or held to sanction the calling of the extraordinary general held on 10 April 1999. In *Palmers Company Law*, 21st Edition, p468, the author observes that:

> When the directors wish or are bound to call a general meeting they will normally do so by

> resolution passed at a duly convened and constituted meeting of the board ... Notice of a general meeting given by the secretary without the sanction of the directors or other proper authority is invalid – vide: Re Haycraft Gold Reduction Co (1900) 2 Ch 230 – but such a notice may be ratified by the directors before the meeting ...

and in *Pennington*, supra, p651, the author states that:-

> ... But if all the directors agree informally on a certain matter without a board resolution being held, their unanimity is equivalent to a resolution passed at a board meeting and is binding on the company: Re: *Bonelli's Telegraph Co. Collie's Claim* (1871) LR 12 Eq 246.

In the instant case, one has to take into account that the company had *only* three shareholders. All three shareholders were directors and were also engaged in the day to day running of the company. There is evidence that sometime in January 1999, the petitioner's employment in the company, presumably as a salesperson, was brought to an end. Both the First and Second Respondents had agreed and acquiesced to the calling of the extraordinary meeting with the proposed resolutions. I find truth in the testimony of the First Respondent, as confirmed in the minutes of meeting exhibit P3, that he had discussed the matter with the petitioner who had agreed to send his brother as proxy to attend the meeting.

The petitioner admitted having duly received the notice to attend the extraordinary general meeting to be held on 10th April 1999. He acted thereupon and informed the company that his brother Noellin Didon will attend the meeting in his stead as his proxy. The petitioner raised no objection whatsoever to the proposed agenda of the meeting. He did

not call any meeting of the board, as he then was a still director, to reconsider the proposed agenda and made no attempt, whatsoever, to prevent the meeting from taking place. After the meeting the petitioner raised no objection to the statement in the minutes of meeting communicated to him that "the meeting was discussed with Mr. Maurice Didon." Moreover, I find truth in the testimony of the First Respondent that the conduct of the petitioner had, by the time the meeting was called, given rise to concern to his holding his post as director of the Company and it had been seen earlier that the petitioner's employment as salesperson had already been brought to an end at an earlier date in January 1999. This state of affairs was known to the petitioner. Accordingly, I find, in the circumstances of the present case, that the petitioner had informally agreed and acquiesced to the holding of the extraordinary meeting in his conduct and capacity as a director and was duly informed of the holding of the said meeting and its proposed agenda in his capacity as a member.

Under Section 128(1) of the Act a proxy who may attend and vote instead of a member has the same right as the member to speak at the meeting. Accordingly, Mr Noellin Didon when he attended the meeting as proxy was entitled to raise any objection which the member may have raised. In that respect the Chairman of the meeting was entitled to rule on the objection and the meeting to proceed in the presence of a quorum. In essence, the Chairman ruled that the meeting could proceed. His decision on the issue cannot be faulted given that there were agreement on behalf of the First and Second Respondents and acquisance on behalf of the petitioner, to the said meeting and its agenda and all members were duly notified and present either personally or by proxy.

In as far as the resolution to 'resign' the petitioner as director, there is little doubt that the petitioner understood that what was canvassed at the meeting was his removal as director.

He knew that resignation was a self-imposed act whereas removal was an act imposed by others. What was evident from his testimony and he feared most was the exercise of the vote against him on this resolution by the majority members. In his own words,

> ... you cannot resign a director unless he or she Writes a notice that he wants to resign ... what were we going to discuss in a meeting when you get an agenda they want to resign you. Not to forget my friend and his wife. Is there something for you to discuss if you were in my place...?

It is also certain that what was convened and held on 10th April 1999 was an extraordinary meeting of the shareholders despite the irregularities in the minutes of the meeting making reference to the First and Second Respondents as directors as well as members and despite the Chairman's incomplete reference that "he" acted under Section 168 of the Act. The undisputed fact remains that the meeting was a shareholder's meeting which was conveyed with proper notice to all shareholders of the two proposed resolutions on the agenda. This was also clearly understood by the petitioner to be a shareholder's meeting when he duly deputed his proxy to attend in his stead. Having acted as director, he was well aware that one does not depute a proxy to attend a director's meeting and he was not mistaken when he deputed his brother to attend the said shareholder's meeting.

It has not been pleaded that the company is a small private company formed as a quasi-partnership in which the joint venturers expect to share in the business by reason of their continued employment therein or that the petitioner could not be removed unless a fair offer was made to him for the purchase of his shares. Such an offer of purchase has indeed not been made part of the remedy claimed by the petitioner. In the circumstances, I find that there was no unfair prejudice or

oppression which was made to bear upon the petitioner by way of the fact that a proper board meeting was not convened to sanction the calling of the extraordinary meeting and its agenda. Accordingly, I do not find cause, under the present application to intervene with the said resolution that was 'passed at the extraordinary meeting held on 10th April 1999 except for necessary rectification that the petitioner has been "removed" as director of the company and has not "resigned". The form and manner that this rectification will take will be considered in the final stage.

In so far as the resolution to increase the capital of the company is concerned, there is agreement from all sides that the resolution was in the interest of the company. There was no ambiguity in the proposed resolution "to increase the share capital of the company to R303,750 by a creation of 575 ordinary shares of R450 each." Although it is not clearly spelt out in the minutes of meeting that the vote was taken in favour of the said resolution, such is not made an issue in this case by virtue of the pleadings. Under paragraph 9 of the amended petition what is pleaded is that the "meeting acted outside the scope of the intended business for which the meeting was requisitioned by further resolving to increase the share capital of the company..." It has been found that despite the incomplete reference to Section 168 of the Act, the meeting was duly held, with proper notice of its agenda, including both 'resolutions. The minutes of the meeting reveals that the petitioner had not raised any objection to this resolution being on the agenda of the meeting but had instead "requested for a physical stock take, the banking transactions of the company and the company's up to date account..." There being no challenge to the voting process itself, or to the inaccurate record thereof, I find that the said resolution had been carried through by the meeting on 10 April 1999.

The next determination is whether in the process that followed the resolution to increase the share capital of the company, the petitioner was unfairly prejudiced or oppressed. It is

claimed under paragraph 10 of the amended petition, that

> ... Eugene Albert (First Respondent), Julina Albert (Second Respondent) and Brian Dubignon acted contrary to the resolution which provided for the shares to be alloted pro-rata when they alloted these shares solely to Eugene Albert (First Respondent) and Julina Albert (Second Respondent)... and by so doing the said directors diluted the overall percentage shareholding of the petitioner in the company from 30% to 4.4% with the result that the petitioner's control over the company was correspondingly reduced and so was his further participation in the distributable profit of the company...

In reply thereto, it is averred on behalf of the Respondents that:

> ... The minutes was sent to the petitioner by registered post and the petitioner did not respond, nor come up with the money for his share of the increased share capital. Thereafter, the First and Second Respondents paid the money and alloted the shares to themselves and then properly lodge a return of allotment under Section 51 of the Companies Act... The Plaintiff did not come up with the money within a reasonable time as prescribed by the Companies Act ... the Directors alloted the shares in proportion of cash injected into the company as the petitioner failed to come up with the cash as required under the relevant provisions of the Companies Act...

In his testimony, the petitioner stated that he understood if new shares are to be issued they are to be on a pro-rata basis as stated in the minutes of the meeting. He disputes the

allotment of the new shares made which has diluted his shareholding in a company which he has spent so much of his time and strength to create. He added that:

> ... on 27th April 1999 I came to discuss because all throughout I was happy for share capital to take place. I came with my cheque and all and every time even though the annual report came no discussion at all until in the end on 1st November 1999 that we had a meeting and we discussed and all the shares had been allocated ... On the 27th April I went to the office to discuss and all I came with my cheque to pay for whatever my shares should be. They are here they can answer and all throughout they said they were busy...

On the other hand, in reply to the above, the First Respondent testified that after the meeting he prepared the minutes and"

> ... registered a copy to Mr. Didon (the petitioner). Two weeks later he came and said the meeting was illegal and he was not interested in the minutes. Another week later he came and said I am ready to contribute. I said it is too late now, it is after 21 days...

There is evidence that the minutes of the meeting were prepared by the First Respondent subsequent to the meeting and that on 14 April 1999 it was forwarded by registered mail to the petitioner. Although the First Respondent mentions that a `letter of offer' of shares to be issued was also communicated to the petitioner, such has not been produced. In that respect, it is also noted that in their reply under paragraph 6(a) there is only mention of the minutes being sent to the petitioner. Accordingly the purported notice of registration of a letter forwarded to the petitioner on 14 April 1999, exhibit D2, could equally relate to the minutes of the

meeting. The end result is that the existence of such a letter of offer is a non sequitur. However, in essence, the version of the First Respondent remains that he granted the petitioner an opportunity to subscribe and pay for the shares within a period of 21 days from the date the meeting was held.

There is no dispute that what was resolved at the extraordinary meeting was that "the share capital is increased to R303,750 by the creation of 575 ordinary shares of R450 each to be allotted pro-rata." It is important to notice, at this juncture, that the further request in the requisition letter, exhibit D1, to the effect that "(the) capital is to be injected not later than 15th April 1999..." had been expressly withdrawn from the notice of convocation to the meeting, exhibit P4, and had thus received no further consideration at the meeting.

The duties of the directors when issuing shares which have been sanctioned by a general meeting are found under Section 173(1) of the Act which provides:

> Before issuing shares ... the directors shall offer the shares ... for subscription to the existing shareholders of the Company in proportion to the respective nominal values of their shareholders and the directors may allot shares ... in some other manner only to the extent that they are not subscribed for pursuant to the said offer...

Commenting upon the general procedure which governs, in *Palmer's Company Law*, supra p146, the author states:

> ... In the case of a rights issue, the existing shareholders are given the right to apply for the new shares ... in a fixed proportion...
>
> The normal method of making a rights issue is for the company to send an explanatory letter to

> each member, accompanied by a provisional allotment letter in respect of the shares to which each member is entitled to apply. The provisional allotment letter would have "attached a form of acceptance and a form of renunciation, so that the member is in a position to exercise his rights to the shares or he can renounce his right to apply for the shares...
>
> In due course and on or before a given date, the original member, or if he has renounced his shares, the renounces, will complete the form of acceptance and application and lodge it with the company together with a charge covering the amount payable on the application for the shares. Failure to return the document duly completed by the given date will mean that the right to apply for the shares in question lapses.

In the light of the above, it is certain that the directors of the company have faulted in their approach to the allotment and issue of the new shares as per the resolution taken at the meeting held. The meeting, itself, imposed no conditions to the allotment except for the issue of the new shares on a pro-rata basis. Under Section 173(1) the directors were bound to offer, in no ambiguous or uncertain terms, the new shares for subscription to the existing shareholders, including the petitioner, pro rata. In the present case, the mere communication of the minutes of meeting, without more, is both insufficient and inadequate. The petitioner had a right to accept or renounce to his new issue of shares in the company within the reasonable time limit and upon the conditions which should have been expressly made known to him by the directors.

Furthermore, I find truth in the version of the petitioner that he had been ready and willing to subscribe for the new shares to

be issued. In the circumstances, I find that the irregularities committed in the allotment to bear serious and unfair prejudice to the standing of the petitioner in the company and justify this Court to intervene under Section 201 of the Act to give redress to the aggrieved party on this issue. The relevant form of remedy will be considered later.

The third aspect of this petition which calls for examination is the conflict of interest issue. In essence, under paragraph 11 of the amended petition, it is claimed that the First and Second Respondents used their position in the company for their own profit in that they caused El's Products Ltd. to rent premises from Albert Investment (Proprietary) Ltd. It is further averred neither the decision to rent nor the value of the rent was submitted to the approval of the shareholders. In reply, thereof, it is averred on behalf of the Respondents that El's Products Ltd. had always been renting the premises of the First and Second Respondents for its operation prior to renting to building from Albert Investment (Proprietary) Ltd. The lease for rental agreement was made known to the petitioner at the Annual General meeting which was held on the 1st November 1999 at the company's head office and to which he did not object.

Under Section 171(f) of the Act:

> it shall be the duty of a director not to compete with the company or become a director or officer of a competing company, unless a general meeting by ordinary resolution authorises the director concerned to do so in any specific case.

And under Section 171 (g) of the Act;

> If directors have any interest, whether direct or indirect, immediate or prospective, in any contract or transaction or proposed contract

> or transaction with the company, to disclose each of their respective interests to the meeting of the directors...

In addition, under Regulation 52(1) and (2) of Part II, Schedule 1 of the Act, a director shall declare his interest in a contract or proposed contract and shall not vote in respect of such in the director's meeting.

Although the First Respondent made mention of a meeting held in November 1999 at which the petitioner was present and the lease of the premises from Albert (Proprietary) Ltd. discussed he could not clarify further. No minutes of the Annual General meeting, as averred in reply, has been produced nor has there been evidence of a board meeting to sanction or ratify the lease.

On the other hand, there has been no evidence that the rental value of the lease is merely speculative nor that the location of the building and fixtures provided in there by Albert Investments (Proprietary) Ltd. to be wholly unsuitable for the operation of El's Product Ltd. or even that there was available similar premises, with similar advantages, which the company could have leased. The decision of the First Respondent to pledge his property for the intention of a loan by Albert Investment (Proprietary) Ltd. may well be explained by the fact he did so where he finds more security by virtue of his holding 95% of the shares in that company. Additionally, the decision of Albert Investments (Proprietary) Ltd. to build a "meat processing factory including a butchery and shop" and the fact that the two companies have identical objects in their memorandum does not by themselves, constitute unfair prejudice as envisaged under 201 of the Act. As stated in *Minority Shareholder's Rights,* Sweet & Maxwell, 1990 Edition, R Hollington, supra, at p 65:

> … It is clear that the deliberate diversion of the company's business by those in control of the

> company to another business owned by them is capable of amounting to unfair prejudice of the shareholders who have no interest in the new business...

In the present case, I find that the above acts complained of fall short of establishing that there has been a deliberate diversion "of the company's business" to another company. The has been no proof of the diversion of the existing business of El's Products Ltd. to Albert Investments (Property) Ltd. so as to unfairly prejudice the interest of the petitioner. Although the Court under Section 201 of the Act has power to regulate the conduct of the company's affairs prospectively, I do not find justification for any such intervention on the facts of the present case. However, would the situation arise in the future those aggrieved will be entitled to seek appropriate remedy.

In the end result and for reasons given and in the areas highlighted above, the Court finds justification to intervene. Where this is so under Section 201 of the Act, the Court has to fashion the remedy to suit the circumstances of the case and grant the aggrieved party appropriate redress including as award of damages. (vide: pennington, supra, p.751) Before I do so, I wish to remind the parties that they should seek to put the interest and concern of the company above the intestinal differences that riddle their friendly relationship.

Taking into account the above, I grant the following orders:

(i) The petitioner is to be treated, for all intents and purposes, as having been "revoked" as director of the company as from date. This is to ensure his right, if any, to compensation or legal benefits, by virtue of his revocation otherwise than under the statutory provision under which this petition has been brought. The petitioner is also entitled to all salaries and benefits in his capacity as director until his present revocation.

Nevertheless, all acts of the board of directors done between 10 April 1999 and as of date remains valid as well as the appointment of Mr. Brian Dubignon as director.

(ii) (a) The First and Second Respondents are to relinquish their rights to the shares issued to them which were in addition to their pro-rata entitlement at the date the resolution to issue new shares was passed (i.e. 10 April 1999). The said relinquished shares are, hereby offered to the petitioner at the issue price of R450 per share. The petitioner is granted a period of 14 days (fourteen) from date to effect payment of the whole amount at the registered office of the company (or with the Court in case of inability to effect payment to the company). Upon payment the company is directed to register the shares in the name of the petitioner. Failure of the petitioner to effect payment within a period of 14 days will amount to renunciation of his entitlement and the shares shall revert back to the First and Second Respondents.

(b) Upon registration of the shares in the petitioner's name the First and Second Respondents are entitled to a refund of the amount they have paid towards the purchase value of the shares. Upon registration of the shares in the petitioner's name, any dividend to be declared for the intervening period April 1999 until date shall be shared equally between petitioner and the First or Second Respondent, as the case may be.

(iii) The First Respondent is to forward a Written statement to the Board disclosing his interest in Albert Investments (Proprietary) Ltd. The lease agreement with Albert Investments (Proprietary) Ltd. is to be

submitted to the next Annual General Assembly for approval.

(iv) Taking account of the inconvenience and unfair prejudice caused to the petitioner, I award damages in the sum of R10,000 against the First and Second Respondents.

To the extent determined above, the petition is allowed with costs against all three Respondents in equal shares. The company is ordered to rectify its records in accordance with the above orders made.

Record: Civil Side No 475 of 1999

Colman & Or v Laxmanbhai & Co. (Sey) (Pty)

Building contracts - defective and delayed performance

The Plaintiffs contracted the Defendant to carry out renovations on a house. The parties agreed that the Plaintiffs would provide materials and supplies as set out by a third party. The completion of the work was delayed and the parties entered into a second agreement in an effort to avoid formal arbitration. The Plaintiffs agreed to pay the Defendant's for all completed work and the Defendants agreed to complete certain unfinished work. The Plaintiffs claimed that the Defendant's work was defective and incomplete and sued for the cost of rectifying the work and for time penalties under the second agreement The Defendants averred that the Plaintiffs had delayed supplying materials and payments and counterclaimed for payments under the second agreement for completion of unfinished and extra work and the retention fee.

HELD:

Although the law of Seychelles on building contracts are different from the laws of England, the comments on building contract clauses in *Kaye v Hosier* are pertinent. A contractor's obligation continues through two distinct periods:

(a) The construction period which runs from possession of the site through completion of the work to the architect's satisfaction evidenced by the architect's certificate of completion. At this date it is determined whether the contractor has fulfilled the contractual obligations.

(b) The second period then follows with the employer taking possession and the

defects liability period beginning. This period ends when the contractor had made good the defects and the architect has so certified. If remedying defects results in completion being delayed beyond the completion date set in the contract me loss of the employer is the loss of the use of the building beyond the agreed completion date.

Judgment for the Plaintiffs. Damages for unfinished and defective works – total awarded R75,510.25.

Judgment for the Defendant Counterclaim for payment of work and retention fee - total awarded R 48,838.65.

Legislation cited
Civil Code of Seychelles, arts 1135,1229

Foreign cases cited with approval
P&M Kaye Ltd v Hosier & Dickinson Ltd [1972] 1 All ER 138

Phillippe BOULLE for the Plaintiffs
Kieran SHAH for the Defendant and Counter-Claimant

Judgment delivered on 12 October 2001 by:

PERERA J: This is an action in damages arising from an alleged breach of contract. On 2 November 1995, the parties entered into a Written agreement (exhibit P2) wherein the Defendant was contracted to carry out additions and alterations to a dwelling house for the Plaintiffs "as per materials supplied and to be supplied by the clients," for a contract price of R500,500. The works to be performed wore specified in the bill of quantities prepared by Hubert Alton & Co Quantity Surveyor (exhibit P1).

The Plaintiffs aver that the Defendant failed to carry out the

works as agreed and that consequently there were works that were incomplete and defective. The Plaintiffs therefore claim R23,860.25 in respect of incomplete work, and R163,278 as cost of rectifying defective works.

On 21 January 1997, the parties entered into a second agreement (exhibit P3). The object clause states that works contracted to be performed in the agreement dated 2nd November 1995 (exhibit P2) "have been suspended and the parties are in dispute," and hence the parties had agreed "to resolve their dispute without the need for formal arbitration in terms of Section 34 of the agreement." It was inter alia agreed that the Plaintiffs pay the Defendant R178,547.55 for works already completed, excluding the 5% retention fee, and that the Defendant shall "complete unfinished and extra works as described in annex one and two attached". This work was to be completed within one month, however failure to complete within time entailed a penalty sum of R.2000 per day payable to the Plaintiffs. The Plaintiffs therefore claim a further R668,000 on the penalty clause of the latter agreement on the basis that the Defendant had failed to carry out the unfinished works and to remedy the defects. The total claim is therefore R855,138.25.

The Defendant avers that works under the first agreement were suspended as the Plaintiffs withheld payments due. Upon signing the 2nd agreement (exhibit P3) a sum of R178,547.55 was paid to the Defendant "for works already completed". The Defendant therefore avers that the second agreement signed on 21 January 1997 superseded the earlier one. Under the second agreement, the Plaintiffs agreed to

(1) Pay the Defendant R46,513 upon the completion of the unfinished and extra works.

(2) Pay 50% of the retention money upon the issue of a practical completion certificate by the Architect.

The Defendant avers that the said practical completion certificate was certified by the Architect on 20 February 1997. They further aver that the Plaintiffs delayed in supplying some materials and also delayed payments as agreed. The Defendant therefore counterclaims a sum of R46,513, and the retention money as from 20 February 1997.

In answer to the defence and counterclaim, the Plaintiffs aver that the 2nd agreement did not entirely supersede the previous agreement as –

(a) The unfinished works under the previous agreement remained subject to the said previous agreement and had to be completed in accordance therewith, and

(b) The defective work made under the previous agreement and referred to in the plaint were not covered by the new agreement which only settled disputes so far arisen.

The Plaintiffs also aver that the sum of R46,513 was payable upon completion of the work, specified in the 2nd agreement as well as works remaining unfinished under the first agreement. They however admit that the Architect certified the practical completion of works on 20 February 1997, but aver that such certificate was only a partial certificate as it related only to uncompleted works under the 1st agreement and did not include the extra works agreed upon in the 2nd agreement. They also aver that the Defendant made no claim for work done under the 2nd agreement prior to making the counterclaim. The Plaintiffs further aver that no payments were made to the Defendant on the 2nd agreement as no payments were due to them and that there are still defective works which were not completed.

The Plaintiffs' claim is based on the report furnished by Ms Cecile Bastille, Quantity Surveyor, exhibited as P4, on an assessment made on site on 29 August 1997. Hence the alleged outstanding works and defective works set out in that report alone should be considered for purposes of the claim before Court. Miss Bastille states therein that although the practical completion was achieved on 20 February 1997 and the defects liability period ended on 20 August 1997, the newly built house is not complete and that there are still outstanding works to done. There are also defective works. She referred to the bills of quantities and the drawings and identified the following outstanding and defective works.

OUTSTANDING WORKS

1. Item 38-H, Rainwater shoes have not yet been installed.

2. Item 58-C&D, paving slab and channel have not been done for surface water drainage. Water is at present soaking under the house and this can cause damage to the foundation.

3. Extractor fan in the toilet of lower ground floor indicated on drawing No 95/011/23 was not done and therefore client have the fan installed by someone else.

4. The cooker hob to main kitchen is missing and therefore client had to install one himself.

DEFECTIVE WORKS

Balustrades

The 'X' design section of the balustrades to the veranda have been constructed of low quality timber and also the timber has also been affected by dry rot.

Guest quarters-lower ground floor

The wall cabinet to the kitchenette was faulty as the extractor fan did not fit into the wall cabinet.

No electrical wiring and connection was done for the extractor fan.

However these have now been rectified by the client.

The entrance is not done according to design as per annexe two.

Bathrooms

Wash hand basin to the entrance toilet has the corner broken Wash hand basin in the ground floor bathroom is broken and has been replaced by the clients, documents attached.

Ironmongery

Door furniture, item 43-k are rusted.

Painting Works

External structural painted wooden surfaces have been affected by mould. Emulsion water based paint has been used on the ceiling as per Penlac Co. Ltd report on document No 12.

Water Supply

Water supply to the kitchen sink is flowing at very low pressure.

Fixtures and Fittings

Timber used for kitchen cabinets and built-wardrobes are to be "Santol" local hardwood, Contractor's letter dated 12th June 1996. However they have been manufactured partly of plywood.

External Work

1. Timber to Japanese type Bridge has been affected by termite, as the bridge has been

partly damaged.

2. The polyethylene pipes have been left above ground, as they should have been placed underground.

The First Plaintiff, Mrs Merali testified that consequent to the first agreement, the Defendant handed over possession of the house in 1997, when certain defects were observed. She stated that the aim of the second contract was "to complete all that had not been completed and to correct the defects". On being cross examined she stated that the rock foundation and walls were built by another contractor before work was contracted with the Defendant company. She further stated that when the house was handed over in March 1997, she noticed some termites in four wooden pillars at the main entrance of the house, and also on the wooden floor and a Japanese style bridge.

The Second Plaintiff Mr Merali also stated that the Defendant company was contracted to work on a partly built house. However a second agreement was entered into as certain works, in his opinion were not in accordance with the bill of quantities. He stated that the wood used was different, and that painting had been done in water based paint and not in oil based paint as specified, he also produced several photographs which depicted termite infestation of some of the wooden pillars, the ceiling made of pine wood and the Japanese style bridge. Explaining the reference to "unfinished and extra works" in clause 3 of the 2nd agreement (exhibit P3), he stated that "unfinished work" referred to works still due to be completed in accordance with the 1st agreement, and that works specified in the two annexures to the 2nd agreement were "extra works" not included in the previous agreement. The Second Plaintiff also produced the "certificate of practical completion of the works" issued by the Architects of the project "Berlouis Mondon design studio" on 24 February 1997 as exhibit P34.

As the reference to the contract date therein is 10 November 1995, he claimed that that certificate which certified that "practical completion of works was achieved on 20 February 1997", and that the stipulation that "the defect liability period will therefore end on 20 August 1997" related to works done in respect of the 1st agreement dated 2 November 1995. He further stated that no such practical completion certificate was received in respect of the 2nd agreement.

The Second Plaintiff admitted in cross examination that he supplied some timber from a Timber Dealer called "Island Timber" and also some other timber. As regards the "extra work" of the proposed modification to lower ground floor entrance, which was depicted in annex two of the 2nd agreement, the Second Plaintiff admitted that it was done by the Defendant, but not properly. As regards the item 'fixtures and fittings" in the list of defective works in exhibit P4, he testified that plywood was to be used only in the shelves of the kitchen cabinets and that the rest of the cabinets should have been of "santol" wood. He also testified that polythene pipes to carry surface water had been left above ground level, and that he got it rectified. In general, he corroborated all the defective and outstanding works identified in Ms Bastille's report.

Peter Mcgourt, Quantity Surveyor testifying on behalf of Ms Barker and Barton supported the report exhibited as P5. He stated that he inspected the site on 26 March 1998 on the basis of the defective and outstanding works identified in Ms Bastille's Report. As regards the decorative panel at the entrance to the lower ground floor entrance, he stated that there was a "slight" difference to what was in the drawing, in that whereas the panel had to be fixed close to the frame, it had been fixed slightly off the frame, leaving a gap in between. He opined that it was not something to be considered in relation to the contract, and that the contractor may have had a reason for doing so.

He further testified that the lever handles in most of the external doors had deteriorated due to oxidization. He also stated that he was not sure whether these items were in brass, as contracted or were replicas. He also stated that the Plaintiffs had intended the kitchen cabinets to be manufactured completely in hardwood and not partly of plywood.

Ms Bastille, on whose report the claim is based was unable to distinguish between client supplied items and contractor supplied items. Her report was based on the observations of the works as at 29 August 1997. As regards rainwater shoes, (item 38 H of the B.Q.), the Plaintiffs supplied them as it was an item to be supplied by them. The paving slab and channel (item 58 C and D of the BQ.) had not been constructed. Learned Counsel for the Defendant referred to Clause 3(iv) of the B.Q wherein it is stated that "the contractor is to order materials based upon the drawings and not on the bills of quantities". Ms Bastille was unable to satisfactorily explain the relationship of the BQ to the drawings upon which the contractor was obliged to perform the works. She was unable to explain how she included the item "extractor fan for toilet of the lower ground floor" as an outstanding work in her report, and also the cooker hob, which was a client supplied item, which the Second Plaintiff admitted was lost on site. Although the contractor who was in charge of the site would be liable, yet there is no evidence as to when such loss occurred.

As regards the balustrades, she stated that 50% were affected by termites, and opined that they may have been salvaged timber. As regards brass fittings she stated that the discolouration may be due to the closeness to the sea. However regarding the molding of painted wooden surfaces she stated that the effect of the sea would not have been a contributing factor so soon. As regards the kitchen cabinets she stated that she did not see the specifications as agreed upon by the parties. She also stated that about 50% of the wood used in the Japanese style bridge was affected by

termites.

Neville Rene, a painter testified that he repainted the whole ceiling, as it had been affected by fungus due to bad quality paint being used before. He used an oil based paint which was resistant to fungus. The painting took about six months as the paint mixture went out of stock. He was paid between R40,000 to R45,000 for the job. He however stated that he would have done it for even R15,000 as he was unemployed at that time he took samples of the previous paint used on the ceiling and gave them to the Plaintiffs.

Angelin Labiche, a maintenance contractor testified that he took samples of paint from the walls of the kitchen, the living room and the bedrooms. He produced the samples together with a sample of oil based paint used subsequently. Dissolving them in separate glasses of water he demonstrated that the three samples he took were water based paints as they dissolved in water, while the oil based paint sample did not. On being cross examined he stated that the three samples of water based paints were taken on 9 February 2000.

Mr Hubert Alton, Quantity Surveyor testifying on behalf of the Defendant stated that he prepared the bills of quantities for the project. He testified that the rainwater shoes, gutters and down pipes were all client supplied items and hence the Contractor had to be paid only the labour costs. As regards the pre-cast concrete slab, he stated that it was just a "splash back for rain water" and that it had been done at the time of his visit. Regarding the form "channel" in the same item, he said that although it was in the BQ, it was not an item done on site and hence was omitted in the account, and that the contractor was not paid for it.

Testifying further, Mr Alton stated that the extractor fan and the cooker hob were not in the BQ. As regards the rainwater gutters, he stated that the contractor had not been paid.

Further, in his testimony, he proceeded to make his comments on the other items in the report, and also on the pricing aspects therein.

Mr Alton further testified that a "snag" list is prepared after all works have been completed and before handing over. Those snags have to be remedied within 6 months thereafter. A second snag list is prepared at the end of 6 months. He further stated that if an item is not in the drawings, it would not be in the contract, and hence that item would either not have been done by the contractor or he would not have been paid for it. Explaining the term "outstanding works".

He stated thus –

> It means, it is now sending work that the bill, the contract said it had to be done and it had not been done and he has paid for it, that is an outstanding work. But if he has not been paid, and the contract did not show that he is getting paid for it, it is not an "outstanding work" and you cannot expect him to ask him to pay for it now, to deduct and say, oh you have not done this, so, I have to ask you to pay me this money.

Mr Pramji, Director of the Defendant company testified that consequent to completing all unfinished and extra works, the Plaintiffs did not pay R46,513 as agreed in clause 4 of the second agreement, nor the 50% retention fee upon the issuing of the practical completion certificate. He stated that that certificate covered the outstanding work under the first contract and the extra works in the second contract. After that certificate was issued, a snag list was prepared by the Architect, and the works included therein were also completed. He testified that in the performance of the contract, the company experienced difficulties due to the clients making several changes and also not supplying items they were obliged to supply. He stated that the rainwater

shoes were not supplied, that the paving slab and channel were not items in the drawings and that the cooker hob was not a building material. As regards the built in cupboards, he stated that at a meeting with the clients and the Quantity Surveyor, the rates were reduced as plywood was to be used in some parts. He further said that the wall cabinets and the electrical connections were all done according to the drawings. As regards the design at the entrance, he stated that it was done according to the drawings, but the client wanted it repositioned. He further stated that the corner of the hand wash basin was broken when received, and that the door furniture (locks and handles) were imported from South Africa (exhibit D3) according to specifications. He denied that water based paint was used in the ceiling, and also denied liability for the timber used in the Japanese type bridge being affected by termites. He maintained that the clients supplied several items of timber in the course of construction.

Mr Pramjee further stated that in the construction business, a practical completion certificate is issued on completion of all works contracted, but still there could be a "snag list" to ensure that defects and other minor items would be attended to subsequently. In the present case, there are three snag lists produced as exhibits. Exhibit D6 dated 25 February 1997 by the Architect, exhibit D7 dated 27 February 1997 by the Second Plaintiff and exhibit P40 dated dated 11 March 1997. By letter dated 9 April 1997, Mr Pardiwalla, in his capacity as the Plaintiffs' lawyer at that time, listed 8 items as "not done", another 8 items as "uncompleted" and 4 items as defective.

Before the respective claims are considered I shall deal with the dispute as regards the two agreements and the practical completion "certificate issued by the Project Officer "Berlouis Mondon Design Studio". (exhibit P34). It is clear from the Agreement dated 21 January 1997 (exhibit P3) that the parties entered into that agreement to "resolve their dispute as regards the suspension of works that were agreed to be performed under the agreement dated 2 November 1995

(exhibit P2). The Defendant was paid R178,547.55 "for works already completed," excluding the retention fee of 5%. Hence in the 2nd agreement, the Defendant agreed to complete "unfinished and extra works described in annex one and two" of that agreement. Both "unfinished" and "extra works" were to begin on 15 January 1997 and satisfactorily completed on 15 February 1997. The Project Officer certified that practical completion of works was achieved on 20 February 1997. There are two disputes here. The Plaintiffs claim that that completion certificate related only to works under the 1st agreement as the Project Officer has specified the contract date as 10 November 1995. The Defendant submits that the 2nd agreement was signed on 21January 1997 and hence the commencement date for both "unfinished" and "extra works" ought to be read as "21 January 1997" instead of 15th January 1997 and also that the completion date should similarly be the 21 February 1997. They therefore contend that all works were completed on 20 February 1997 as certified.

Mr Jesselin Mondon, the Architect and Project Officer testified that he was aware of both agreements and that he issued the practical completion certificate upon being satisfied that all works due to be performed on both contracts had been completed. He stated that all works, except those where materials were to be supplied by the client, were attended to by the Contractor. In terms of Article 1135 of the Civil Code:

> 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.

Although legally, obligations under a contract begin to flow only from the date of the agreement, yet as no amendment was made to Claude 3 of that agreement, it should be taken that the parties agreed that the work would be completed by 15 February 1997. The Contractor, in his correspondence with

the Plaintiffs expressed their desire to complete all works by 15 February 1997 and not 21 February 1997. Clause 3 provided that the Contractor shall pay the employer R2000 per day "for the period during which the works shall so remain incomplete". The same clause provided that "the completion date shall be the date certified by the Architect in the practical completion certificate". Hence the delay was therefore 6 days.

Article 1229 of the Civil Code provides that –

> A penal clause is the compensation for the damage which the creditor sustains as a result of the failure to perform the principal obligation.
>
> He shall not demand both compensation for the principal obligation and the penalty unless the penalty has been stipulated for a simple delay in the performance.
>
> A penal clause according to which the penalty is manifestly excessive may be reduced by the Court as provided by Article 1152 of this Code.

Mr Brian Orr, the Electrical Contractor testified that electrical fittings were not supplied by the employer and that hence the P.U.C. was unable to test the electrical system. As regards the tiles, the Defendant by letter dated 7 February 1997 informed the Second Plaintiff that "missing white tiles" had not been supplied to them. By letter dated 12 February 1997, the Defendants acknowledged receipt of those tiles at their yard at Providence, and stated that there was insufficient time to send them to Praslin.

By letter dated 11 February 1997 (exhibit P35c) the Defendants informed the Second Plaintiff:

> We regret to mention that the missing materials

needed to finish the works are still outstanding inspite of several reminders we have sent to you. As per the annexed agreement you were to supply to us all materials on time for us to complete the works by 15 February 1997. As the following materials have not been supplied to us up to this time, we cannot finish the works within the specified time.

1. Rain water gutters, downpipes and fittings.
2. 150 x 150 white wall tiles for lower ground floor toilet.
3. 150 x 150 wall tiles for ground floor kitchen and lower ground floor kitchen.
4. Light fittings
5. Toilet paper holders
6. Granite tops for kitchen

Because you have failed to supply the materials we cannot finish works associated with these materials. Apart from that we have finished all the works as agreed. We are therefore not liable if some of the works which are associated with the missing materials are not finished.

Yours faithfully
LAXAMBHAI & CO (SEY) (PTY) LTD

The 2nd agreement dated 21 January 1997 in the circumstances of this case was a supplementary contract for extra works and an agreement by the Defendant to discharge their obligations under the 1st agreement to complete unfinished work within a stipulated period. The penalty for any delay would become payable "subject to the timely supply of electrical fittings and tiles due from the employer". As is evidenced by the letter dated 11 February 1997 (exhibit P35 c) and the evidence of Mr Brian Orr, the Plaintiffs did not supply those items in time. Hence in terms of Article 1229 read with

Article 1152, I would reduce the sum agreed to R500 per day and limit the period during which the works agreed upon remained incomplete up to the date certified by the Architect in the practical competition date as envisaged in Clause 3. Hence I award a sum of R.3000 under the penalty Clause.

Although the laws of Seychelles on building contracts are different from the laws of England, yet before considering the claims for incomplete and defective works, it is of interest to consider the comments made by Lord Diplock on Clauses of the RIBA building contracts in the case of *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 AER 121 At 138. He states that-

> The primary obligation (of the contractor is) to carry out and complete the specified works in every respect of the reasonable satisfaction of the Architect (cl I (I)). The Contractor's obligation continues through two distinct consecutive periods. The first period, which I will call 'the construction period', starts when he is given possession of the site under cl 21 (I). It continues until he has completed the works to the satisfaction of the architect so far as the absence of any patent defects in materials or workmanship are concerned. It ends with the issue by the architect of a certificate of practical completion under cl 12 (I). This is the date of completion for the purpose of determining whether or not the contractor is in breach of his obligation to complete the works by the date so designated in the contract. The contractor then surrenders possession of the works to the employer, and the defects liability period starts. Where, as in the instant case the employer takes possession of a part of the works before practical completion of the whole, the construction period for that part ends and the defects liability period

for it begins.

The second period is the defects liability period. Its minimum duration is specified in the contract. If latent defects are discovered during this minimum period it is extended until the contractor has made them good and the architect has so certified. During this second period the contractor's obligation is to make to the satisfaction of the architect any latent defects that may become apparent. After the end of this second period the contractor is not liable to remedy any further defects; but the contract sum may be adjusted by reason of any defects which would not have been apparent on reasonable inspection or examination before the issue of the final certificate.

During the construction period it may, and generally will, occur that from time to time some part of the works done by the contractor does not initially conform with the terms of the contract either because it is not in accordance with the contract either because it is not in accordance with the contract drawings or the contract bills or because the quality of the workmanship or materials is below the standard required by cl 6(l). The contract places on the contract the, obligation to comply with any instructions of the architect to remedy any temporary discomformity with the requirements of the contract. If it is remedied no loss is sustained by the employer unless the time taken to remedy it results in practical completion being delayed beyond the date of completion designated in the contract.

(c) In this event the only loss caused is that the

> employer is kept out of the use of his building beyond the date on which it was agreed that it should be ready for use. For such delay liquidated damages at an agreed rate are payable under cl 22 of the contract."

According to the evidence, and the letter dated 27 March 1997 (in the bundle of correspondence marked P35), possession of the house was delivered to the Plaintiffs on 18 March 1997. Hence the "construction period" ended on that day. The snag lists are dated 25 February 1997 (D6) 27 February 1997 (D7) and 11 March 1997 (P40) respectively. The defects liability period stipulated in the practical completion certificate was 20 August 1997.

Claude 14(1) of the original contract provides that-

> (1) When in the opinion of the Project Officer the works are practically completed, he shall forthwith issue a certificate to that effect and practical completion of the works shall be deemed for all the purposes of this contract to have taken place on the day named in such certificate.
>
> (3) ……..
>
> (4) Notwithstanding sub-clause (2) of this condition, the Project Officer may whenever he considered it necessary to do so, issue instructions requiring any defect, shrinkage, or other fault which shall appear within the defect liability period named in the appendix to these conditions and which is due to materials or workmanship not in accordance with this contract to be made good, and the Contractor shall within a reasonable time after receipt of such instructions comply with the same entirely at his own cost provided that no

such instructions shall be issued after delivery of a schedule of defects or after 14 days from the expiration of the said defects liability period".

This is a general Clause which binds both agreements. Hence works included in the "snag lists" could be performed within a reasonable time. Defective and outstanding works were identified by Ms Bastille for purposes of her report on 29th August 1997, nine days after the defect liability period specified in the practical completion certificate had ended. However as the correspondence discloses that the Defendant was intimated about some of those works and also as "snag lists" were served on them, I would proceed to consider the items set out in Ms Bastille's Report for purposes of determining the liability in the case.

Outstanding works

1. *Rainwater shoes*- There is overwhelming evidence that this was a client supplied item and that it was not provided by him despite several reminders. Under that item, the Defendant had only to be paid labour charges. Hence the item cost of R.480 + 25% thereon cannot be claimed from the Defendant.

2. *Pre-Cast Concrete Paving Slabs*
   Mr McGourt in his report observed that the area adjacent to the entrance of the lower guest quarters had become waterlogged and hence recommended that concrete channels and paving slabs be installed in accordance with the contract documents. Mr Alton however testified that what was necessary was a "splash back for rainwater," which was done by the Contractor and that paving slabs were a client supplied item in the B.Q for

which the Contractor would only receive labour costs. He further stated that the Contractor was not paid for it. The Second Plaintiff on being cross examined denied any knowledge as to where the paving slabs were supposed to be and as to whether they had already been fixed. In any event this item was not in the drawings and hence in terms of Clause 3(iv) of the B.Q, the Contractor was to order materials based on the drawings and not on the B.Q. Accordingly this item cannot be considered as an outstanding work.

3. ***Form Channel***
The Second Plaintiff stated that he was not aware whether this item was in the Architects drawings. Mr Alton confirmed that although it was an item in the B.Q it was not done on site and hence the Contractor was not paid for it. In these circumstances, no claim can be made from the Contractor.

4. Installation of extractor fan in the lower ground floor kitchen
Mr Alton testified that it was not an item in the B.Q and that he did not knew how that arose. Mr Pramji however stated that that item was in the Architect's drawings, but was later modified. As it was in the drawings, the Contractor would be liable to the expenses incurred by the employer to have it installed. Hence I_would accept the evidence of Mr Alton that the sum of R.2800 claimed is reasonable.

5. ***Missing Cooker Hob***
Admittedly, it was a client supplied item and that it was stolen on site. The Contractor

would be liable if that loss occurred before the premises were handed over to the client. The premises were handed over on 18th March 1997. This item was reported to be missing in the snag list dated 11th March 1997 (P4) which has been signed by the Engineer of the Defendant company. Again on the basis of Mr Alton's rating, I award a sum of R. 1500.

6. ***Rainwater Gutters***
   There is documentary evidence that the rainwater gutters were purchased by the Plaintiffs from Bodco Ltd for R.4710.25 *(Receipt attached to Ms Bastille's Report)* this item is therefore allowed in full.

Hence the total amount payable by the Defendant under `outstanding works" would be R9010.25.

Defective works

1. **Replace all affected and low quality timer to veranda balustrades.**

   Ms Bastille testified that about 50% of the balustrades were affected by termites. Michaud Pest Services Ltd, in their Report dated 26th May 1998 (P6) stated that "the main places which have been badly infested and affected with termite were the wooden bridge in front of the house and the floor and ceiling of the entrance to the kitchen. They identified A 20 x 20 beam and T & G ceiling and stated that the wood did not have any connection route from any other area. They further stated that it was generally difficult to determine the source of the termites.

They also stated that 4 vertical pillars supporting the infected beam were drilled, but no termite infesting was found. So also other beams leading to the infested beam from inside the house and all interconnected structural timber were also examined, but no infestation was found. Hence it was concluded that the infested beam had "a route of infection within itself and most plausibly the infection was spread to the T & G ceiling which is a soft fine wood, while the infested beam was a hardwood timber which was badly affected.

The Second Plaintiff admitted in cross-examination that he supplied some timber from the Island Timber Co and also some other timber. However in his re-examination, he stated that he supplied only a beam 175 mm x 450 mm used for an internal beam. That was of Mahogany wood and it was free of termites up to date. Mr Pramji however testified that the Plaintiffs supplied the pine wood for the ceiling, and some other timber which he had in stock. Questioned as to the possible cause of termite infesting, he stated that it could have originated from the foundation which was built by the previous contractor. He also stated that all wood imported to Seychelles are treated and hence there was no possibility of there being termites at the time of supply.

On a consideration of the above evidence, there is no proof that the Contractor used low quality timber, or untreated timber. Although it is evident from the photographs exhibited that there was termite infesting, yet in

circumstances where both the Contractor and the client, supplied wood and also the possibility that infestation may have originated from an untreated foundation for which the Defendant company was not responsible, on a balance of probabilities this Court cannot award damages against the Defendant under this item.

2. **Rectification of wall cabinet and installation of extractor fan to guest quarters on lower ground floor.**
The Defendant claimed that the wall cabinet was constructed according to the drawings. But the extractor fan supplied by the client necessitated a modification. As Ms. Bastille testified, the Contractor ought to have built the cabinet to fit the fan. Hence the Contractor would be liable for this item as a defective work. I would award a sum of R2000 on the basis of Mr Alton's rating.

3. Replacing broken wash hand basins in the entrance toilet, and the ground floor bathroom (items 3 and 4)
Mr Pramji testified that one basin was found to be broken when unpacked. The basins were supplied by the client. By letter dated 30th January 1997 (P35) (k), the Defendant informed the Plaintiffs about the damage to one basin and stated "the hand wash basin was supplied to us by you a very long time ago. It could have been broken during one of the various handling and rehandling procedures. Please organize for its replacement and no cost." The Defendant, in the same letter discounted the possibility of fixing an "ordinary basin" temporarily due to

the position of the outlet as constructed. Hence it is evident that the broken basin was not fitted. According to the supporting documents in Ms Bastille's report, only one wash hand basin was imported by Air Freight on 9th March 1997 at a cost of R4,717.25. There is no evidence of two basins being found. to be damaged. There is also no evidence as to who was responsible for the damage to the basin that was replaced. In the circumstances, the Defendant cannot be charged for items 3 and 4 of the defective work.

4. ***Replace pressure valve with a non return valve from reserve tank to kitchen sink supply.***

Mr Pramji testified that water pressure was beyond the control of the Contractor. He stated that a non return valve does not control pressure, but only controls water flowing from the tank to the P.U.C. line. Hence he denied that it could be categorised as a defect. The snag list (P40) merely states "water pressure to be checked." Since water pressure depends on the P.U.C supply, the fixing of a non return valve to prevent water from flowing from the reserve tank to the P.U.C. line cannot ordinary be categorised as a defect attributable to the Contractor. However the Contractor should have anticipated this defect and made provision. Hence on the basis of Mr Alton's pricing I award a sum of R.600 for this item.

5. **Replace Door Furniture.**

Mr Alton testified that the term "door furniture" meant only the door handles. He

claimed that they were imported from South Africa according to specifications. He produced a letter dated 26th March 1996 (in the bundle of correspondence marked (D3) whereby the order was made. He stated that the items received were of brass and that oxidization and colouring would be attributable to the effect of the sea close by. This item is specified in the B.Q. as item 43 k as follows –

"Brass door furniture as B1004 comprising of lever furniture with Euro cylinder (as handles 12 nos. 900

Furniture P.O. Bar 1389, Cape Town 10,800. 8000 S.Africa)

The Contractor had priced this item at R.900 and hence 12 nos would be R10,800.

Mr Alton testified that he was not aware whether this item was replaced in full. Assuming they were replaced, he rated the item at R,300, per lever, so that 12 nos would be R3,600. It was submitted by the Plaintiff that this item was not purchased from the supplier nominated in the B.Q, for purchasing door furniture but from the supplier who was nominated to supply only windows and doors. The Defendant has not explained why he purchased both items from the same supplier. Mr McGourt in his report confirmed that only the lever handles were affected and that to remedy the defect, the lacquer coating could be removed with a paint thinner and the fittings polished, and new lacquer applied. There is no evidence on record as to what

was actually done as remedial work on this item. Ms. Bastille had identified it as a defective work and given the rating on the B.Q, adding a further unexplained amount. Hence in the absence of evidence, no award is made.

6. **Repainting External Structural Wooden Surfaces and Ceiling**

Ms Bastille's report on this item is based on the certificate issued by Penlac Ltd, confirming that according to the sample produced the paint used was emulsion paint with a water base. This was also confirmed by Barker and Baton in their report. That sample was taken from the ceiling. One Neville Rene testified that he repainted the whole ceiling with Acrylic paint and was paid R.40,000 - R.45,000 for the job. He stated that at that time he was unemployed, and hence he would have done it for even R.15,000. He also stated that the work took more than six months. In general he was not sure as to how much he was paid.

Mr Alton, in his testimony rated the re-painting on the ceiling at R.38,000 approximately.

This was on the basis that the total ceiling area was 540 sq meters. He priced the cleaning of the existing paint at R.20 per sq meter and repainting three coats of paint at R50 per sq meter.

Angelin Labiche, produced samples of scrapings taken from the ceiling after the

Court hearing on 9th February 2000. By that time Neville Rene had already painted the entire ceiling with Acrylic paint. Be that as it may, whatever may have been the reason for the development of mould on the ceiling in such a short time, the painting work could be considered as defective. There is no evidence as to painting any other area apart from the ceiling. Accordingly I prefer to accept the rating of Mr Alton and award R.38,000 for this item.

7. **Rectify quality of kitchen cabinet and built-in wardrobes from plywood to santol timber**

The basic dispute under this item is whether the cabinet and wardrobes were to be built entirely in "santol" timber. According to the Baker and Barton Report they had been constructed in plywood and faced in "santol". Reliance was placed heavily on a letter dated 12th June 1996 (in bundle of correspondence in P4). In that letter, the Contractor agreed to construct the wardrobes and kitchen cabinet in santol timber for a sum R.75,000. Mr Alton testified that he went through the quotation (exhibit D1) and reduced the amount. Thereafter the Second Plaintiff confirmed that plywood was to be used at the back of the cupboards and some shelves. He also said that the price agreed upon reflected such a construction.

However, the quotation (exhibit D1) is dated 8th May 1996. The letter dated 12th June 1996 refers to the discussions the parties had on 10th June 1996 regarding the quotation. Hence the Court accepts that his

letter contained an unqualified acceptance to construct the wardrobes and kitchen cabinets in santol timber. According to the evidence, only the panels were constructed in santol. This is definitely a defective work. In the absence of a reliable pricing for the remedial work, taking into consideration the total pricing of R.75,000, I find that R. 16,000 claimed is reasonable.

8. **Replace damaged Japanese style bridge**
This item is described as item 57 c in the B.Q as follows-

"Timber Japans bridge size 1 metre high x 2.00 metres long x 1.00 metre wide constructed of treated wrot hardwood, comprising of arched based and supports, timber posts and lattice balustrades; allow for three coats of "xyladecer" stain on timber surface."

This item was priced at R.11,500 in the B.Q. Mr Alton testified that R.5500 quoted for replacing the whole bridge was reasonable. But according to Ms Bastille about 50% of the bridge was affected by termites. She was however unable to quantify the damage with reasonable accuracy. Mr Mondon, the Architect however stated that only about 1/3 of the main post was affected by termites. He further stated that to get the curved nature of the bridge, laminated timber (layers of timber glued together) had to be used. Mr Alton priced one post at R.200. In the absence of any other evidence of the damage, I award a sum of R300, which includes 25% for labour to remove, and 25%

for replacing.

9. **Placing Polythene Pipes underground**
This item was not contested. Hence I award the sum of R. 100 claimed.

10. **Rectify entrance design as annex two**
Mr Pramjee testified that the design was constructed according to the drawings. However according to the Barker and Barton report this had been constructed to a different detail than that indicated on the drawings, and consequently it had been fixed slightly off the main frame, leaving a gap between the panel and the underside of the timber rafters. Mr Mondon also admitted that the decorative panel, as constructed, was obstructed by a beam which was not envisaged in the drawing. Since this is a defective work, and as there is no other evidence as to the pricing I award the sum of R.6500 claimed.

Accordingly the total amount awarded to the Plaintiffs against the Defendant company is R75,510.25.

As regards the counterclaim which is based on clauses 4 and 5 of the second agreement dated 21 January 1997, the Plaintiffs aver that the practical completion certificate issued by the Architect related only to the unfinished work under the 1st agreement dated 2 November 1995. However in view of my finding that this certificate related to practical completion of both unfinished and extra works and also as the evidence revealed that the outstanding and defective works listed in the report of Ms Bastille have now been completed, there is no justification for the Plaintiffs to retain the sum of R46,513 and the 5% retention fee on the 1st agreement.

Accordingly the Defendants will be entitled to a sum of R46,513 plus R2325.65 being the 5% retention for extra work totalling R48,838.65 together with interest thereon from 20 February 1997 until payment in full. In addition, they will be entitled to 5% retention fee under the 1st agreement as computed also from 20 February 1997 with interest thereon, allowing for the unfinished work which were included in the 2nd agreement.

Judgment entered accordingly. As both parties have succeeded in their respective claims, no order is made as to costs.

Record: Civil Side No 55 of 1998

Colling v Labrosse & OR

Equity jurisdiction – Ex parte injunctions

The Plaintiff was granted an ex parte interim injunction restraining the Defendants from taking possession of the Plaintiff's house. The Defendants were granted leave to appeal against the injunction and now sought to have the injunction lifted.

HELD:

(i) The power to grant an interim injunction is a power inherited from the High Court of England;

(ii) An injunction is an equitable remedy;

(iii) Equitable remedies are discretionary;

(iv) The discretion is to be exercised judicially;

(v) The exercise of the jurisdiction for an injunction pendente lite is governed by sections 304 and 305 of the Code of Civil Procedure;

(vi) Ex parte interim injunctions on urgent matters must follow the procedure of the High Court of England;

(vii) The purpose of an ex parte injunction is solely to prevent irreparable and imminent injury which is substantial in nature and which could not be adequately remedied by an award of damages; and

(viii) The imminent threat in respect of which the ex parte injunction had been issued has now passed.

Judgment for the Defendant. Injunction vacated.

Legislation cited
Code of Civil Procedure, ss 304, 305

Cases referred to
Bonte v Innovative Publications (1993) SLR 19

Ramniklal VALABJI for the Plaintiff
Philippe BOULLE for the Defendants

Ruling delivered on 13 June 2001 by:

KARUNAKARAN J: At the instance of the Plaintiff, this Court on 18 September 2000 granted an ex parte interim injunction restraining the Defendants from entering and occupying the Plaintiff's house at Glacis. This was granted following the commencement of an action instituted by the Plaintiff in Civil Side No: 206 of 2000. The Defendants being aggrieved by that injunction, on 2 October 2000 applied to this Court by way of two motions:

1. seeking an order for leave to appeal against the said injunction to the Court of Appeal; and

2. seeking an order to vacate the said injunction.

The Plaintiff resisted both motions. On the first motion, this Court by its ruling dated 22 November 2000 has already granted leave for the Defendants to appeal against the said injunction to the Court of Appeal. In the same ruling, the Court went on to state that it would deliver the ruling on the second

motion after hearing further submissions from both sides. Accordingly, the Court heard the submissions. Hence, I now proceed to deliver the ruling on the second motion. For the sake brevity, the previous ruling on the first motion may be read as part of the present ruling in this matter. Be that as it may.

Mr Boulle, the Learned Counsel for the Defendants based his arguments on a number of grounds in support of the motion. In essence, he challenged the constitutionality, legality, propriety and regularity of the said interim injunction. Further, in his submission he questioned the equitable jurisdiction exercised by this Court in granting an injunction of this nature. First, I note that the grounds relied upon by the Defendants in the second motion are nothing but replica of the grounds that were originally raised in the first motion. As the grounds in effect allege that this Court has erred in law I believe, it is not proper for the same Court to sit on appeal in order to determine whether it has erred in law or not. Indeed, this Court has no jurisdiction to do so either. That is why this Curt has already granted the Defendants leave to appeal in this matter. Since the Defendants have already preferred an appeal to the Court of Appeal, I leave those issues to the competent Court for determination.

Having said that I pause here to note that the power to grant an interim injunction has been inherited from the jurisdiction of the High Court of England. An injunction is an equitable as well as a discretionary remedy. The power to grant or refuse the injunction lies within the discretion of the Court of equity ipso facto the same Court has power to vacate, alter, or revoke the injunction it has ordered. However, that discretion should be exercised judicially not arbitrarily. Indeed, the purpose of granting an ex parte interim injunction is only to prevent an irreparable and imminent injury to a party, which is substantial and could not be adequately remedied or atoned for by damages. Notwithstanding section 304 of the Code of Civil Procedure, which set out the procedure for an injunction

pendente lite, the Court, in the exercise of its equitable jurisdiction may grant an ex parte injunction on urgent matters. In that case, the Court ought to follow the procedure of the High Court of England and is therefore not obliged to follow the procedure prescribed in section 304 and 305 of the Code of Civil Procedure. See, *Bonte v Innovative Publications* (1993) SLR 19. However, the injunction of this nature can be granted only in extraordinary circumstances, where the Court is called upon to act as a Court of equity. Therefore, as I see it, since granting the injunction if there had been any change of factual circumstances that no longer requires the injunction and if equity had already served its purpose, then the Court may vacate or revoke the injunction at any time.

Now, let us turn to the facts of the case pertaining to the injunction in question. On the 23 August 2000, the Plaintiff, who was then a minor commenced the civil action against the Defendants. Therein he sought inter alia, an order from this Court for a permanent injunction restraining the Defendants from interfering with Plaintiff's peaceful possession and enjoyment of his house. The Defendant No: 2 was a foreigner and nonresident. On 7 September 2000, that is two weeks after entering the action the Plaintiff urgently moved this Court for an ex parte interim injunction to stop the Defendants from entering and occupying the Plaintiff's house. According to Plaintiff's affidavit dated 5 September 2000 filed in support of the motion, the Defendant No: 2 was then planning to come to Seychelles from Germany within the next few weeks thence and to stay in Plaintiff's house causing irreparable loss to the Plaintiff and damage to his house and so the Plaintiff feared. In view of extraordinary circumstances, which allegedly existed then, this Court was called upon to act as a Court of equity and grant an ex parte injunction urgently in this matter. The Court being satisfied of the circumstances granted the said injunction in favour of the Plaintiff invoking equity in aid.

However, I note the extraordinary circumstances, which prevailed then due to fear and urgency as portrayed by the

Plaintiff in his affidavit has now changed. Admittedly, the Plaintiff himself is no longer a minor. The alleged period within which Defendant's intended visit to Seychelles as deponed by the Plaintiff in his affidavit has already elapsed. Many a month has passed since then. The imminent threat of interference by the Defendants and the urgent need for protection are bygones and have now vanished. As I see it, since this Court granted the injunction in this matter, the factual circumstances have changed to such an extent that the interim injunction is no longer required. Its continuation does not serve any purpose any more. In my view, the player "equity" has played his part well in the field and has rendered justice to the minor Plaintiff in this matter. However, it seems to me that he has held up the game too long after scoring the goal of justice. It is high time he should be sent off the field with appreciation. I do so accordingly and hence, vacate the said ex parte interim injunction in this matter.

Record: Civil Side No 206 of 2000

Botel v Monnaie Ruddenklau

Res judicata – disguised sale – gifts – backletters – null documents - prescription

The parties made a secret agreement in 1984 whereby the Plaintiff transferred land to the Defendant to be returned to him at a future date. In 1991 the Plaintiff issued proceedings and claimed that although legal title passed, he remained the beneficial owner. The Supreme Court found the parties had a backletter and cancelled the transfer. The Defendant appealed. The Court of Appeal held the secret agreement was not enforceable as it was unwritten. In 1997 the Plaintiff refiled the motion to cancel the transfer or in the alternative to declare the transfer a gift that was void ab initio. The Defendant averred that the action was barred by prescription and that the matter was res judicata.

HELD:

(i) The agreement was for the Defendant to temporarily hold the property on behalf of the Plaintiff. Evidence of the backletter showed that it was in oral form and therefore invalid;

(ii) Having established that there was a temporary transfer of property subject to conditions of retransfer the transaction was clearly not a gift;

(iii) The present claim renews the issue of gift and is therefore redundant on the grounds of res judicata; and

(iv) The extinctive prescription of 10 years does not apply because the nullity on which

depends cannot serve as the basis for prescription.

Judgment for the Defendant. Case dismissed.

Legislation cited
Civil Code of Seychelles, arts 894, 931, 1321, 1347, 2265, 2267

Kieran SHAH for the Plaintiff
Francis CHANG-SAM for the Defendant

Ruling delivered on 28 September 2001 by:

JUDDOO J: By way of a plaint entered against the Defendant, on 23 June 1997, the Plaintiff essentially claims that a transfer of property (H1056) to the Defendant witnessed by way a deed under private signature dated 15 October 1984 amounts to a gift inter vivos. It is further claimed that the said gift, not being by way of a notarial deed, offends against Article 931 of the Civil Code thereby rendering the deed and the transfer sought to be effected thereby null and void ab initio.

The Plaintiffs claim is resisted by the Defendant who raised a plea in limine litis as follows:-

1. The action of the Plaintiff is barred by prescription;

2. The action of the Plaintiff is res judicata.

There is no denial that a former plaint (CS57 of 1991) was filed by the Plaintiff against the same Defendant and included a request for determination pertaining to the same parcel H1056. A copy of the record was produced as exhibit.

The gist of the amended plaint in the former case, in as far as it concerns parcel H1056, was that the Plaintiff owned the property since 26 March 1980. Subsequently, in August 1984, the Plaintiff came to believe that it would be in his best interest if his property in Seychelles were to be held by a Seychellois national instead of himself. Accordingly, the Plaintiff made "certain arrangements" with the Defendant. It was averred in the amended former plaint as follows:

> 6. The Plaintiff arranged with the Defendant for her to come to Seychelles to sort things out for him. It was intended and agreed that the Plaintiff would transfer parcel H1056 to the Defendant temporarily so that she would hold the property on behalf and to the benefit of the Plaintiff until things got better in Seychelles when the property would be returned to the Plaintiff.
>
> 7. As a consequence of such arrangement the Defendant came to Seychelles where she contacted a lawyer. Ultimately, a transfer deed was signed on the 15th October 1984 by the Defendant, as purchaser, and an agent and proxy for the Plaintiff as vendor. The deed of transfer was registered in Register A.37 No. 3966 and transcribed in Volume 65 No. 36 of the Register of Transcriptions.
>
> 8. The consideration stated in such transfer deed was R500,000 which in fact was never paid by the Defendant to the Plaintiff.
>
> 9. The Plaintiff paid the sum of R83,830 towards stamp duty, tax and legal fees for

the land transfer and the power of attorney.

10. The Plaintiff paid the air fares of the Defendant and all the expenses incurred by her for coming to Seychelles on that visit.

....

15. The Plaintiff avers that the Defendant's actions in appropriating and converting the Plaintiff's property to her own use as described in paragraphs 11, 12 and 14 amount to a non-performance of the undertaking by the Defendant consequent upon the transfer of the Plaintiff's property to her on the 15th October 1984, that she would hold such property on behalf and for the benefit of the Plaintiff.

16. The Plaintiff avers, in the alternative, that as the consideration of R500,000 stated in the contract of transfer dated 15th October 1984 was never paid by the Defendant to the Plaintiff such transfer amounts to a gift inter vivos which should have been drawn up by notarial deed in accordance with paragraph 1 of Article 931 of the Civil Code of Seychelles. This defect offends a rule of public policy rendering the transfer null and void ab initio.

Wherefore the Plaintiff prays this Honourable Court:

(a) to rescind the contract of transfer dated 15th October 1984 in so far as

it concerns parcel H1056 and to restore things in the same state as they would have been if the contract had never existed;

(b) and, in the alternative, to declare the contract of transfer dated 15th October 1984, insofar as it concerned parcel H1056, to be null and void ab initio and to restore things in the same state, as they would have been if the contract never existed.

The former plaint was heard in the presence of both parties and a judgment was delivered by this Court on 10 February 1995. The relevant part, thereof, reads:

> ...The case for the Plaintiff is that although on the face of the deed there had been an outright transfer of the property for valuable consideration, what was intended by the parties was, that the Defendant should hold the property temporarily on behalf and to the benefit of the Plaintiff. This is denied by the Defendant save for the averment that she did not pay the purchase price ...
>
> According to the Defendant, the decision to effect a "disguised transfer" of the property was taken on receipt of an anonymous letter ... The transfer was effected under private signature on 15th October 1984 (P21) ... Although the parties agreed that no money passed to the vendor as consideration stated in the deed they disagreed on the reason for the transaction ...

In the instant case, the deed of transfer evidences on absolute sale of the property in consideration of the payment of the purchase price, which is duly acknowledged by the vender. However, both parties now admit that no payment was made nor received as stated in the deed. The Plaintiff avers that this was a 'disguised sale' not intended to transfer ownership. The Defendant avers it was an absolute sale in consideration of a debt owed to her husband.

On a consideration of the totality of evidence, I am satisfied on a balance of probabilities that the parties had from 1984 to 1986 conducted themselves on the basis that the Plaintiff continued to be the owner and that the document under private signature was not intended to transfer the beneficial interest in the property to the Defendant ***...***

In view of the above findings. I need not make any pronouncement on the alternative averment in paragraph 16 of the amended plaint as regards the nullity of the Deed of transfer on the basis of a "disguised gift inter vivos" which has not complied with the requirements in Article 931 as to form.

As Amos & Walton state in *The Introduction to French Law* 2nd Edition, 177:

> It may happen that for some reason or other the parties to a contract desire to conceal its character. In

> such a case they may make an apparent contract and modify this or destroy its effect by a secret agreement. This is known as simulation...
>
> In the instant case, the secret agreement to hold the property in trusteeship and to re-transfer it when requested has been established as prayed for in paragraph (a) of the prayer, "order is hereby made rescinding the contract of transfer dated 15th October 1984 in respect of parcel H1056...

An appeal was lodged against the above finding of the Supreme Court by the Defendant, then appellant. Seven grounds of appeal were filed in the Memorandum of appeal. However, at the request of the Court of Appeal, the parties were invited to address the Court on the effect of Article 1321 of the Civil Code.

After having heard the parties and in determination of the appeal the Court of Appeal found:

> ...By virtue of a deed made on 15th October 1984 and registered in the "old land register", the appellant became to all intents and purposes the ostensible owner of the property by right of purchase. She exercised rights of ownership thereon ...
>
> Peres J who tried the action succinctly summed up the main issue in the case when he stated:
>
> > After consideration of the totality of evidence the learned judge concluded

> that the document, (Exhibit P21) under private signature was not intended to transfer the beneficial interest in the property to the appellant. The secret agreement relied on by the Judge to come to that conclusion was not proved by evidence in Writing. However, the learned judge held, rightly, that the secret agreement had been established by personal answers of the appellant which is tantamount to a commencement of proof in Writing under Article 1347 supplemented by oral and documentary evidence.
>
> In this case it is evident that the 'back letter' relied on by the Respondent was not in Writing and consequently was not and could not have been registered as required by Article 1321(4) of the Code. In the result the back letter is of no force or avail whatsoever. Therefore, there was nothing that could in law be relied on as evidence that the transaction embodied in the deed of transfer (Exhibit P21) was a simulation or a sham. The ostensible agreement ought to have been given effect to ...

The core issue in the instant determination, is whether the trial Court and Appellate Court had dealt with all the issues raised in the former plaint or whether there subsists an issue raised in the pleadings which had not been so determined.

It is plain that there has been some form of a transaction between the Plaintiff and the Defendant, which transaction was attempted to be embodied in a deed by private signature on 15 October 1984. On the face of the record, the trial Court

found that the deed of transfer, per se, "evidences an absolute sale" of the property in consideration of the payment of the purchase price which is duly acknowledged by the vendor. This finding is not upset by the Court of Appeal when it quotes the trial Court on this aspect and states that it represents a proper identification of the issue.

The second finding of the trial Court was that the 'absolute sale' evidenced in the deed was in fact, on the totality of the evidence led in the case, a 'disguised sale' and was not intended to transfer the beneficial interest in the property. The only ground upon which the trial Court relied to find that the beneficial interest was not transferred was that there were in existence between the parties a different secret agreement which destroyed the apparent and ostensible effect of the deed. The said secret agreement (termed a back letter) was not proved by evidence in Writing.

The third finding of the trial Court was that the apparent and ostensible agreement in the deed ought to be rescinded by the effect of the back letter which existed between the parties.

In its determination the Court of Appeal found that by virtue of the deed made on 15 October 1984 the appellant became to all intents and purposes the ostensible owner of the property by right of purchase and that the trial Court rightly treated the case as one of simulation in which the apparent and ostensible agreement is destroyed, in effect, by a secret contract. However, the Appellate Court found the secret agreement relied by the trial Court to be void by reason of the absence of Writing and held the ostensible transaction, therefore, ought to have been given effect to.

In support of the plea in limine litis raised, learned counsel for the Defendant submitted that:

> the Plaintiff having participated in a transfer of land by sale to the Defendant cannot in

> the same breath argue that the sale was in fact not a sale but a gift. The Plaintiff must choose his cause of action and stay with it... and that although there is no pronouncement on the original alternative cause of action of the Plaintiff the result of the decision of the Court of Appeal that the deed was valid coupled with the deed provided for the payment of consideration of SR500,00 by the Defendant to the Plaintiff effectively renders redundant the alternative claim by the Plaintiff that the transaction was vitiated for want of form in that it was a gift inter vivos...

In reply it is submitted on behalf of the Plaintiff that "the first cause of action which was adjudicated upon by the Supreme Court depended upon an oral agreement between the parties which amounted in law to a back letter, which, in accordance with Article 1321(4) of the Civil Code of Seychelles was of no force or avail whatsoever. That agreement could therefore not form the basis of a rescission as was prayed for by the Plaintiff. The second alternative cause of action raised in the former plaint and not adjudicated upon is:

> whether the deed of 15th October 1984 is a disguised donation or not, depends on certain facts pleaded in the plaint and does not depend upon a secret agreement of "back letter" between the parties.

The substance of the subject matter is entirely different from the subject matter of the first cause of action determined by the Supreme Court or the Court of Appeal and is not redundant as it has never been adjudicated upon.

To bring the issue into perspective, the two alternative claims that were pleaded before the trial Court in the former case

was there was a "disguised sale" and alternatively that there was "disguised gift inter vivos." It is recalled that under paragraph 6 of the former plaint, quoted earlier, the Plaintiff pleaded that the intention and agreement reached between the parties was as follows –

> It was intended and agreed that the Plaintiff would transfer parcel H1056 to the Defendant temporarily so that she would hold the property on behalf and to the benefit of the Plaintiff until things got better in Seychelles when the property would be returned to the Plaintiff.

On these facts as pleaded the learned trial Judge when summarising the relevant issues before the trial Court succinctly stated:

> ...The case for the Plaintiff is that although on the face of the deed there had been an outright transfer of the property for valuable consideration, what was intended by the parties was, that the Defendant should hold the property temporarily on behalf and to the benefit of the Plaintiff.
>
> The issues therefore are whether the Plaintiff was, towards September 1986, attempting to obtain a re-transfer of the propert[y] under his name at the end of the two years as allegedy agreed upon ...

In the end result, the trial Court found in favour of the above facts as pleaded, namely that there was an agreement by the Defendant to temporarily hold the property for and on behalf of the Plaintiff and that in spite of the deed of sale, the Plaintiff had retained the "beneficial interest" of the land. Accordingly, the trial Court held that the ostensible sale was rescinded by the operation of a back letter. At that stage, the trial Court

could not proceed further, and determine, in the alternative, that the same transaction equally amounted to a gift (whether disguised as a sale or not) since a gift as defined under Article 894 of the Civil Code would constitute "an act whereby the donor irrevocably divests himself of the ownership of the thing in favour of the person who accepts it." The alternative claim that the transaction amounted to a gift, albeit 'disguised', became redundant.

It is important to recall that it was not the act of rescission itself that was set aside by the Court of Appeal but rather the validity of the form of the said rescission. The Court of Appeal found the ″oral″ form of the back letter was deficient and invalid and for that reason alone, the said rescission was not enforceable before a Court of law and did not "prevent the transaction embodied in the deed to be given full effect to ..." Had the form of the 'back letter' been in Writing and duly registered, it would have been enforceable. Having found that there was a temporary transfer of property by the Plaintiff to the Defendant with conditions attached to re-transfer, the trial Court was not able to also determine and hold that the same transaction amounted to a gift which necessitated an 'irrevocable' divesting of ownership.

Given that the instant plaint raises anew the issue of a gift between the same parties, pertaining to the same transaction, before the same forum, which claim was in the alternative in the former plaint and became redundant by virtue of the finding of the trial Court on the facts pleaded, the plea of res judicata succeeds.

As far as the plea of extinctive prescription of ten years under Article 2265 of the Civil Code of Seychelles is concerned, the instant claim is for the nullity of the act of transfer because of a defect of form. Accordingly, Article 2267 of the Civil Code is applicable and a title which is found null because of a defect in form cannot serve as the basis for the prescription of 10 years.

For reasons above, I uphold the plea in limine litis to the effect that the instant filed by the Plaintiff is res judicata.

Record: Civil Side No 55 of 1999

Bodco Ltd v Herminie & Or

Appeal – Extension of time for appeal

The petitioner received judgment on an administrative appeal on 20 November 1998. Application for judicial review of that decision was lodged on 16 April 1999. The petitioner was represented in the case by a third party which misconceived the proper course to follow. The Respondent pleaded that the application was out of time.

HELD:

(i) The Seychelles rule is the same as English Order 53, rule 4(1) of the Rules of the Supreme Court;

(ii) The provisions for the extension of time should be applied by taking account of matters of hardship and prejudice that may be caused by the strict application of the time limit. They should also be applied taking account of the need to safeguard proper functioning of the administration and the judicial machinery; and

(iii) An extension can only be granted for reasons which do not relate to laches on the part of the petitioner or the petitioner's representative.

Judgment for the Defendants. Case dismissed.

Legislation cited
Employment Act 1995, s 65
Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995, r 4

Foreign cases noted
O'Reilly v Mackman [1982] 3 All ER 1124
R v Stratford-on-Avon District Council ex parte Jackson [1985] 1 WLR 1319

Philippe BOULLE for the Petitioner
Ronny GOVINDEN for the Respondents

Ruling delivered on 16 May 2001 by

PERERA J: The Respondents have raised a plea in limine litis that the application of the petitioner for a Writ of certiorari has not commenced within 3 months from the date of the decision sought to be canvassed, as required by Rule 4 of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, 1995. That Rule is as follows-

> A petition under Rule 2 shall be made promptly and in any event within 3 months from the date of the order or the decision sought to be canvassed in the petition unless the Supreme Court considers that there is good reason for extending the period within which the petition shall be made.

A second ground of the plea, based on the Public Officers' Protection Act was not pursued at the hearing.

In the present case, the decision of the Competent Officer in terms of the Employment Act 1995 was conveyed to the petitioner company by letter' dated 10 December 1997. The petitioner who was dissatisfied with that decision, filed an Appeal to the Minister on 12 December 1997. That Appeal was rejected on 20 November 1998. It is that decision of the Minister, dated 20 November 1998, that is being sought to be quashed by a writ of certiorari. The Ministry by letter dated 8 March 1999 gave final notice to the petitioner to comply with

the order of compensation within 7 days, failing which legal action was proposed. The present application was filed on 16 April 1999, after informing the Ministry.

In reply to ground 1 of the plea raised by the Respondents, the petitioner avers that –

> The decision of the Appeal stated in the letter dated 20th November 1998 was followed by correspondence between the 1st Respondent and the Association of Seychelles Employers' dated 27th November 1998 and 15th February 1999, and the Appellant awaited the outcome of the representation made by the Federation of Employers which was only relied to by the 1st Respondent by their letter of 15th February 1999 after which the Appellant sought legal advice and an action was entered within two months thereafter, which was the earliest opportunity in terms of legal services available to the Appellant.

Before this averment is considered, it is necessary to consider the limitation clause in Rule 4. The use of the words "and in any event, within 3 months", puts it beyond doubt that it is a mandatory provision. This Rule, is the same as Order 53, Rule 4(1) of the R.S.C.

Rules of the United Kingdom. In the case of *R v Stratford-on-Avon District Council ex Parte Jackson* [1985] 3 All ER 769, the petitioner filed an application for judicial review six months out of time. The reason adduced for the delay was that the petitioner had applied for legal aid within time and that the delay in granting such aid was beyond her control. The Court of Appeal accepted that reason as a "good reason" for extending the time limit. Brian Thompson in his *Textbook on Constitutional and Administrative Law*, commenting on this case states that –

> The basic rationale underlying both limits is that there should be a relatively short time in which to seek judicial review, bearing in mind the consequences for good administration and third parties. The discretion in Rule 4 (same as our Rule 4) is directed towards the Applicant and seeks to be fair to that person in making a challenge to unlawful Administration, however, the factors in Section 31(6) would appear to take priority.

In that case the petitioner was seeking to quash a planning resolution to construct a Supermarket in a small historic town in Warwickshire on the ground that the planning committee had been misled by the Planning Officer. Hence there was a need to protect the interests of third parties; the inhabitants of that Town, and to ensure good Administration. Further, fairness necessitated that the petitioner should not be non-suited due to a delay in obtaining legal aid, which was beyond her control. Section 31(6) of the Supreme Court Act 1981 of the UK is as follows -

> Where the High Court considers that there has been undue delay in making an application for Judicial Review, the Court may refuse to grant -
>
> (a) Leave for making of the application:
>
> (b) Any relief sought on the application.
>
> If it considers that the granting of the relief would be likely to cause substantial hardship to, or seriously prejudice the rights of any person or would be detrimental to good Administration.

Although there is no such provision in Rules of this Court, yet

considerations of hardship and prejudice being caused to the Respondents or third parties, and the need to safeguard the proper functioning of the administrative and judicial machinery are relevant factors to be considered in the exercise of the discretion of the Court to extend the time under Rule 4. As Lord Diplock stated in *O'Reilly v Mackman* [1982] 3 ALL ER 1124 at 1131:

> the Public Interest in good Administration requires that Public Authorities and third parties should not be kept in suspense as to the legal validity of a decision the Authority has reached in purported exercise of decision - making powers for any longer period than is absolutely necessary in fairness to the person affected by that decision.

Applying these principles to the present case, the Second Respondent the employee, has been declared entitled to a sum of R34,095.77 as compensation under the Act ever since 20 November 1998. Further her termination of employment has been held to be unjustified. The Association of Seychelles Employers, representing the petitioner company sent a letter dated 27 November 1998 to the Minister seeking a review of his decision. A revocation of an order made by the Minister is now permitted under Section 65 (8) of the Employment Act 1995, as amended by Act no. 8 of 1999 which came into force on 28 October 1999. But that is limited to cases where the relevant facts in existence when the original determination was made, were not made known to the Competent Officer or the Minister. However on 27 November 1998 there was no such legal provision, and no power with the Minister to review his own decision. By letter dated 15 February 1999, still before the new amendment came into operation, the Minister reiterated through his Principal Secretary that his Ruling stood and that it should be complied with at the earliest. Admittedly the Second Respondent has not been paid the compensation due to her under the Act. For a person to be excused for the delay caused by a third party,

such delay should have arisen from the breach of a statutory or other duty by that party. In the present case, the Minister had no statutory duty at that time to review his own decision. The petitioner company was throughout the grievance procedure, represented by the "Association of Seychelles Employers". That Association ought to have been more familiar with the provisions of the Employment Act than any lay employee. Hence it would not be a "good reason" to rely on the misconceived course followed by the Association of Employers and to submit that the delay was caused by the Minister. Moreover the two time limits contained in Rule 4, that is, "promptly" and "in any event within 3 months", could be extended only upon reasons which do not carry any latches on the part of the petitioner, or on the legal or professional representatives he relies on.

The reason adduced by the petitioner cannot be accepted as a "good reason" for purposes of using the discretion under Rule 4 and hence is hereby rejected. Learned Counsel for the petitioner also submitted that as leave to proceed has been granted in this case, an objection under Rule 4 should not be entertained. This same submission was considered in the case of *Ex parte Jackson* (supra). The Court held that –

> Even though the Court may be satisfied in the light of all the circumstances including the particular position of the Applicant, that there is good reason for that failure, nevertheless the delay, viewed objectively, remain "undue delay". The Court therefore still retains a discretion to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay, if it consider that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good Administration.

Hence the submission of Mr Boulle that the granting of leave to proceed cures any delay in filing the petition within the time prescribed in Rule 4, is untenable.

Consequently the petition is dismissed for non-compliance with the time limits specified in Rule 4 of the Supervisory Jurisdiction Rules.

The First and Second Respondents will be entitled to costs.

Record: Civil Side No 141 of 1999

Bergue v Fregate Island Ltd

Employment law – moral damages for termination

The Defendant employer dismissed the Plaintiff for unsatisfactory performance. The Plaintiff lodged a grievance under the Employment Act 1995. The Competent Officer found that the alleged disciplinary offences were not proved and ordered the Defendant to pay the Plaintiff R18,866.05. The Plaintiff now claims moral damages of R100,000.

HELD:

(i) A Plaintiff who has lodged a grievance procedure under the Employment Act and been awarded statutory benefits for unjustified termination has no right to damages on the same cause of action; and

(ii) Where a Plaintiff has lodged a damages claim before resorting to the grievance procedure, that claim may be admitted.

Judgment for the Defendant. Case dismissed.

Legislation cited
Employment Act 1995

Cases referred to
Edwina Ernesta v Air Seychelles SC 160/1999
Genevieve Lionnet v Central Bank of Seychelles SCA 33/1998
Antoine Rosette v Union Lighterage Company SCA 16/1994

Anthony JULIETTE for the Plaintiff
Serge ROUILLON for the Defendant

Ruling delivered on 27 September 2001 by:

JUDDOO J: The issue which arises in law, is whether the Plaintiff can claim for moral damages for "unlawful termination" of his employment from his former employer.

The Plaintiff was employed as an Executive Sous-Chef by the Defendant. On 13 February 1999, the Plaintiffs employment with the Defendant was termination on the grounds of unsatisfactory performance. The Plaintiff lodged a grievance procedure under the Employment Act 1995 and on 3 March 1999 the Competent Officer ruled that "Serious disciplinary offences of repeatedly failing to obey reasonable orders given by the Defendant has not been proved" and ordered the Defendant to pay to the Plaintiff R18,866.05 as legal benefits under the Act.

The Defendant filed an appeal against the decision of the Competent Officer whereby on 14 June 1999 the determination of the Competent Officer was maintained and the said sum of R18,866.05 was paid to the Plaintiff. The Plaintiff now claims for moral damages in the sum of R100,000 with interest and costs.

In the present circumstances, the Plaintiff having lodged a 'grievance procedure with the Ministry of Employment and Social Affairs and having been awarded statutory benefits for unjustified termination of employment, the case falls squarely within the decision of the Court of Appeal in *Antoine Rosette v Union Lighterage Company* Appeal No 16 of 1994 decided on 18 May 1995, wherein Ayoola JA (as he then was) held:

> I do not think that the Act envisaged a situation in which the worker and employer would go through the grievance procedure to finality only for the worker to commence and drag the employer through fresh proceedings based on the same cause of action in another forum.

It is to note that the instant action is to be distinguished from

the latter case of *Genevieve Lionnet v Central Bank of Seychelles* Civil Appeal No 33 of 1998 (judgment delivered on 20 April 1999) wherein it was found that "admittedly, the appellant (employee) did not resort to the 'grievance procedure' prior to instituting the present action in the Supreme Court."

Additionally, in *Edwina Ernesta v Air Seychelles* Civil Side No 160 of 1999, the employee after having initiated the 'grievance procedure' under the Employment Act initiated action before the Supreme Court to obtain 'moral damages' amongst other claims. The Learned Chief Justice, V Alleear, held that the claim for moral damages could not be entertained by the Supreme Court since such would amount to:

> commence and drag the employer through fresh proceedings based on the same cause of action in another forum ... If the legislature had intended that additional compensation by way of moral damages is to be awarded having regard to the manner and circumstances of the termination of employment, it would have so provided...

For reasons above, the plea in limine litis is upheld and the plaint is dismissed. No order as to costs.

Record: Civil Side No 328 of 1999

Belize v Nicette

Damage to property – quantum of damages – punitive damages – restraining order

The parties are neighbours and had a long-running dispute about an access road on the Plaintiff's property used by the Defendant. While the Plaintiff was not home someone, alleged to be the Defendant, cleared a vegetable patch on her land. The Defendant's mother admitted clearing some vegetation that day but claimed it was only one tree. The Plaintiff claimed damages for the destruction of property and moral damages of R40,000 and a restraining order against the Defendant.

HELD:

(i) Damages, including moral damages, claimed under Article 1149 of the Civil Code are compensatory. Whether the rights of the aggrieved party were infringed deliberately, negligently, inadvertently, or mistakenly is immaterial;

(ii) For damages for trespass, the trespass must be accompanied by loss or damage to the owner of the land; and

(iii) Punitive damages are not available for trespass.

Judgment for the Plaintiff. Damages for destruction of property and moral damages R2800.

Legislation cited
Civil Code of Seychelles, art 1149

Cases referred to
Symphorien Lucas v Cement Delpech (1981) SLR 85

Charles LUCAS for the Plaintiff
Anthony JULIETTE for the Defendant

Judgment delivered on 5 February 2001 by:

PERERA ACJ: The Plaintiff and the Defendant are owners of adjoining lands at Reef Estate, Anse Aux Pins. The Plaintiff avers that on 3 February 1995, the Defendant entered her land and destroyed 4 chilli plants, 6 pumpkin bushes and 20 cassava plants, all worth R5000. She further claims R5000 for littering her land, R10,000 for trespass, R10,000 for abuse and insults and a further R10,000 as moral damages, a total of R40,000. She also seeks a restraining order on the Defendant preventing her from entering the land.

The Plaintiff testified that on 3 July 1995, she asked her son to gather a pumpkin, and he returned saying that the area had been cleared by someone. Hence, she made a complaint to the police. She claimed that the next day a police officer came to inspect the land. The Defendant and her husband who were at their residence admitted to the police officer that they cleared the place. The Plaintiff however, admitted that she did not see them doing so. Hence, it was on the basis of that admission that the action was filed against the Defendant. She further stated that it was not the first time that such a thing had happened.

The Plaintiff also testified that in 1994, the Defendant caused a coconut tree on her own property to be felled and although it fell on to her (the Plaintiff's) land it was not removed. She also stated that the Defendant had on several occasions thrown rubbish on to her land, and when she complained, she received abuse and insults from her.

The Plaintiff sent a letter dated 28 March 1995 (Ex P2)

through her lawyer, to the Defendant, requesting her to abate the nuisance and harassment. She testified that that had no effect. She further stated that although there is another road leading to the house of the Defendant, they continued to use a path on her land.

On being cross-examined the Plaintiff denied that there was an approved 4 metre road reserve over her land for the Defendant to use to get to her property, although both of them and another purchased the properties from the Seychelles Housing Development Corporation. She however stated that the SHDC called a meeting of all the surrounding landowners regarding the use of the road reserve, but it was the Defendant alone who failed to attend. She said that that was the reason why she would not permit her to use that road.

Sergeant Jean Claude Kilindo who was the officer in charge of the Anse Aux Pins Police Station at the material time, testified that there were several complaints made by the parties arising from disputes between them. He investigated the complaint regarding the damage caused to the vegetation and saw the area that was cleared. Then the concubine of the Defendant told him that the Defendant had cleared the area not knowing where the boundary was, and he apologised to the Plaintiff on her behalf. Sergeant Kilindo further testified that he told the parties that they should settle the issue of damages among themselves. Later, Surveyor Michel Leong wanted him to show the area where the damage had occurred. It was found that the plants had been on the Plaintiffs land.

Antonio Jean Baptiste, the Personal Manager of the Cement Company (Sey). Ltd where Antoine Jules, the concubine of the Defendant worked, testified that Jules worked from 6 am on 3rd February 1995 throughout the day and up to 2 am on the 4th February. Counsel for the Defendant did not cross-examine him, and hence it was established as a matter of fact that Antoine Jules could not have been the person who damaged the plants on 3 February 1995.

The Defendant testified that she too was not at home on 3rd February 1995, and that she also noticed that the plants had been cleared by someone only when she returned home. Then her mother told her that it was she who cut the plants with the help of her (the Defendant's) younger brother. As regards the coconut tree, she stated that it fell on its own and that although a portion of it was removed, the balance portion remained on the Plaintiff's land.

On being cross-examined, the Defendant admitted that Sergeant Kilindo came to investigate the matter the next day and that she spoke with him. She admitted that the cleared area was later found to be on the Plaintiff's land but maintained that she did not cut the plants. She stated that her mother lived in a different house close to her house, but she came there to clean the pathway.

Loris Finesse, the mother of the Defendant testified that it was she who cleared the pathway, but cut only one cassava plant. She further stated that there was a dispute with the Plaintiff as regards the right of way and that the Plaintiff did not permit her, or her daughter, the Defendant, to pass over her land. Questioned by counsel for the Defendant whether she told her daughter that it was she who was responsible for clearing the place, she replied that she did not ask her about it.

On being cross-examined she maintained that she cut down only a cassava plant, and stated that if pumpkin and chilli plants had been uprooted, the Plaintiff herself may have done it before lodging a complaint with the police.

Antoine Jules, the concubine of the Defendant testified that he and the Defendant were away at work on 3 February 1995 when the alleged destruction of vegetation took place. He came back home only on the following day, and the Defendant who worked at the Civil Construction Co. Ltd, worked after normal hours at a house in Cascade. He further

stated that Sergeant Kilindo came to investigate the complaint on 4 February 1995 after he returned home. He too maintained that only one cassava tree was cut, and that too by Loria. He denied that any pumpkin or chilli plants were uprooted by him; the Defendant, or Loria Finesse.

Basically, the evidence discloses a dispute between the parties regarding the use of a road which serves the lands of the Plaintiff, the Defendant and the Defendant's mother Loria Finesse. Sergeant Kilindo testified regarding several complaints received by the police in that respect. The evidence is unclear as to the identity of the tortfeasor. The Plaintiff herself did not see the Defendant causing the damage. She however stated that the Defendant was in the house that day. The Defendant denies that she was responsible. Her concubine Antoine Jules was admittedly not at home throughout 3 February 1995. The Defendant's mother, Loria Finesse admitted responsibility for cutting one cassava plant, but is unaware as to who uprooted the pumpkin and chilli plants. She suggested that the Plaintiff herself may have done it to implicate them, but she admitted that the cassava plant was cut on 3 February 1995, the same day the other vegetation was allegedly damaged. Loria Finesse did not impress me as a truthful witness. She showed her bitterness and resentment towards the Plaintiff for objecting to permit her and her daughter, the Defendant, to use the land. She was obviously taking part of the blame, to prevent the Defendant from being held liable. The Defendant did not testify that she was working at the CCCL, and that after working hours, was doing ironing in a house at Cascade, as was testified by Antoine Jules. She only stated that she is presently unemployed, and that she was not at home on 3 February 1995, but on returning home, saw that someone had cleared the road. She further stated thus:

> Q: Who had cleaned the place, do you know who cleaned the place?
> A: When I got home I saw my mother, I asked

> her who had cleaned the place, and she said it was her, together with my youngest brother.

But Loria Finesse was adamant that she cut only one cassava tree that provided shade.

In view of this contradictory evidence adduced in the defence case, the. Court has necessarily to rely on the independent evidence of Sergeant Kilindo. I accept his evidence that Antoine Jules apologised on behalf of the Defendant his concubine for cleaning the area and damaging the vegetation. On a consideration of the totality of the evidence, I find on a balance of probabilities that it was the Defendant who caused the damage.

Quantum of Damages

As was held in the case of *Symphorien Lucas v Clement Delpech* (1981) SLR 85, damages under Article 1149 of the Civil Code covered loss that the injured party had sustained and the profit he had been deprived of. Such damages, including moral damages, were compensatory, and it was immaterial whether the infringement of the rights of the injured party had been deliberate, negligent, inadvertent or was done under a bona fide mistake.

The number of the plants alleged to have been damaged remain unrebutted by evidence for the Defendant, save for the testimony of Loria Finesse and Antonio Jules that only one cassava tree was cut. On the basis of the evidence of Sergeant Kilindo, I accept the evidence of the Plaintiff that the area cleared by the Defendant would have accommodated 4 chilli plants, 6 pumpkin bushes and 20 cassava plants. The Plaintiff testified that she would pick chillis worth about R200 per week and that she received around R1200 or R1300 from the crop. It is doubtful that 4 chilli plants would have yielded such an income. In the circumstances I would consider a sum

of R200 to be adequate compensation for the loss of 4 chilli plants.

As regards the 6 pumpkin bushes, the Plaintiff claimed that she sold ten to twelve pumpkins per week at prices ranging from R25 to R30 each. However she admitted under cross examination that the creepers were only flowering and that she has been deprived of an income. For the purpose of compensation, I would base the assessment on an average of 5 pumpkins per bush at the cost of R25 each. Hence for the 6 bushes, I award a sum of R750.

Questioned by counsel for the Defendant as to how big the cassava plants were, the Plaintiff replied:

> A: A cassava tree becomes big and then branches out and the cassava is under ground.

The Plaintiff was therefore testifying about young plants in their formative stages. In the absence of reliable evidence as to the actual value of the loss, I would award a nominal amount for this item, in a sum of R250.

As regards the littering of the Plaintiff's land, it was averred that the Defendant's coconut tree fell over her land and part of it was left behind. It was also averred that the Defendant threw rubbish on to her land, and also that waste water from a pig sty was also diverted to her land. Most of these allegations remained unproved. There was however an admission that a part of the coconut tree was left behind. Hence, I award a sum of R100 as a reasonable amount incurred for clearing it.

The Plaintiff also claims R10,000 for trespass to land. It has been established that the vegetation damaged was on the Plaintiffs land. However, for delictual damages, trespass must be accompanied by any loss or damage caused to the owner of the land. Punitive damages are not payable for trespass. The damage caused has already been considered under the

previous heads, and hence no award is made under this head.

The Plaintiff further claims R10,000 each for abuse and insults, and as moral damages. The head of abuse and insults has not been proved. Hence no award is made. However, I accept that the Plaintiff suffered a certain amount of anxiety, stress and pain of mind due to the act of the Defendant. Hence, I award a sum of R1500 as moral damages.

Judgment is accordingly entered in favour of the Plaintiff in a sum of R2800, together with costs in a sum of R2200 as agreed by parties. Further, order is hereby made restraining the Defendant, her agents and servants from destroying the Plaintiff's plants, littering her land, or trespassing on her property.

Record: Civil Side No 83 of 1995

Aluminium & Steel Works Ltd v
Vijay Construction (Pty) Ltd & Or

Joint and several liability of parties – Code of Civil Procedure s 223

The Plaintiff received judgment against the Defendants jointly subject to deductions for Plaintiff delays to be agreed and made by the Defendants within 2 months. The payment was not made. The Plaintiff moved for confirmation of the judgment for the original provisional sum. The first Defendant sought further adjournment on natural justice grounds.

HELD:

(i) Delay defeats equity;

(ii) The delays resulted from lack of reasonable diligence by the first Defendant; and

(iii) Section 223 of the Code of Civil Procedure does not apply when the amount of the debt has been provisionally determined.

Judgment for the Plaintiff. Defendants liable jointly and severally liable for the debt with interest at the commercial rate till payment in full.

Legislation cited
Code of Civil Procedure, s 223

Philippe BOULLE for the Plaintiff
Antony DERJACQUES for the First Defendant
Ronny GOVINDEN for the Second Defendant

Order delivered on 18 December 2001 by:

PERERA J: This Court by judgment dated 20 October 2000

held, inter alia-

> Hence I hold that the Plaintiff is entitled to a sum of R.274,297.72 on their final claim, which sum is payable jointly and severally by the First Defendant and the Second Defendant together with interest at the Commercial rate of 14% from 1st December 1994, and costs of action on a pro-rata basis. However as the correspondence discloses delays in performance by the Plaintiff, the final sum to be paid to the Plaintiff will be subject to a proper assessment being made of the alleged delays and defects by both Defendants and deducting an appropriate sum therefrom. Since the amount payable has not been definitely determined by Court, the Plaintiff will have the right under Section 223 of the Code of Civil Procedure, with due notice to the Defendants, to apply to Court for an order fixing the amount due, if the Defendants fail to tender an acceptable amount within 2 months from the date hereof.

When the case was mentioned on 7 December 2000, Mr Boulle Learned Counsel for the Plaintiff informed Court that the Defendants had not tendered any amount in terms of the order of Court. The case was thereupon fixed for hearing on 6 June 2001. On that day Mr Frank Elizabeth stood in for Mr Derjacques who was said to have gone abroad. The Court was also informed that the First Defendant had also gone abroad. Mr Elizabeth sough further time to consult with the First Defendant as to whether he would testify himself or would call witnesses. The Court reminded Mr Elizabeth, that although there was sufficient evidence on record, what was ordered by Court was the tendering of an acceptable amount to the Plaintiff after deductions being made for the any delays and defects, failing which the Court would make an assessment. Mr Elizabeth thereupon agreed to make an offer

on 8 June 2001, and the Court made order that if such offer was not acceptable to the Plaintiff, the Court would proceed to hear evidence on 22 June 2001. On 8 June 2001, Mr Derjacques sought to tender a written offer, but Mr Boulle objected to its production to Court on the ground that the offer and acceptance was a matter to be attended out of Court jointly by the First and Second Defendants and the Plaintiff. However, on perusing the written offer, Mr Boulle informed Court that it was not acceptable to the Plaintiff. State Counsel appearing for the Second Defendant sought time to consider whether the Second Defendant would agree with the offer made by the First Defendant to the Plaintiff. As Counsel for the First Defendant informed Court that Mr Vijay Patel would be out of the Country on 22 June 2001 fixed for hearing of evidence, that date was utilised for a mention to ascertain the position of the Second Defendant. Mr Boulle however excused himself from being present in Court on that day. On 28 June 2001, State counsel agreed with the quantum of the offer made by the First Defendant, and the hearing was fixed for 3 December 2001. However on that day, Mr Patel was said to have gone abroad. No other witnesses had also been summoned for the hearing. The Court however fixed the hearing for 14 December 2001 as the “final date" and also informed Counsel for the First Defendant that if by then Mr Patel was still not available in the Country, somebody else who could testify regarding the assessment should be called so that the matter could be finalised. By a letter dated 12 December 2001, Mr Derjacques informed Court, with notice to Counsel for the Plaintiff and the Second Defendant that Mr Patel and his Quantity Surveyor "(were) both out of the Country". This assertion was challenged by Mr Boulle, who summoned an Officer from the Immigration Division. The Immigration Officer testified that Mr Patel last left the country on 29 November 2001 and arrived back in Seychelles on 6 December 2001, and that he had not left the country thereafter. Mr Derjacques explained to the Court that he had acted on the instructions given to him by Mr B.Georges, Attorney at Law who is Mr Patel's lawyer, though not officially

so on record in the present case. In any event I would accept that there has been some misunderstanding of instructions. Mr Derjacques questioned the Immigration Officer regarding the availability of Mr Roger Allen Quantity Surveyor of M/S Barker and Barton, who had prepared; the "statement of final invaluation no. 39" on 22 March 1996 (exhibit ID3). He stated that his last arrival date was 25 May 2000 and that he left Seychelles on 1 June 2000 and has not returned thereafter. There was therefore clear evidence that the assessment being of a technical nature, no attempt had been made by the First Defendant to contact Mr Allen or any other Quantity Surveyor from his firm ever since the judgment was delivered on 20 October 2000. Further, it is clear on record that the First Defendant has not pursued the order of the Court with reasonable diligence.

In this case, the Court has provisionally held that the Plaintiff is entitled to a sum of R274,297.72 together with interest at 14% from 1 December 1994, and costs of action. Mr Boulle moves for confirmation of that finding as the judgment of Court, in view of the delay caused by the lack of diligence on the part of the First Defendant to present necessary evidence to substantiate the offer made to the Plaintiff under Section 223 of the Code of Civil Procedure. Mr Derjacques submitted that to do so would be both unfair and unconstitutional. He therefore moves for a further adjournment, albeit, on costs. Although the doctrine of audi alteram partem is one of the essential ingredients of the principles of natural justice and the Constitutional Right to a fair hearing, the matter before Court arises from an ancillary issue which did not arise strictly from the pleadings.

The equivalent of Section 223 of the Code of Civil Procedure Code, in the United Kingdom, is contained in RSC Order 37. In practice, that rule is applied when the Court has decided on the liability, and either grants provisional damages, or leaves the assessment of entire damages to the master. Section 223 gives an opportunity to the parties after determination of

liability, or money to be paid, and if they fail to reach such agreement the Court would fix the amount upon hearing evidence. In the present case the sum of money payable to the Plaintiff has already been provisionally determined. An opportunity was given to the Defendants to agree on a sum to be deducted from that amount as the Court was of the view that the correspondence produced in the case as evidence, disclosed delays in performance by the Plaintiff, and that hence the final sum to be paid to the Plaintiff should be subject to a proper assessment being made of any delays and defects to be made by both Defendants. Neither the First Defendant nor the Second Defendant have in their respective statements of defence raised any averment as regards delay in performance or of any defects attributable to the Plaintiff. The opportunity was given by Court ex mero motu on equitable considerations on material arising from the correspondence, although the Court was not obliged to do so. The First Defendant has not pursued this opportunity, by delaying making an offer, and after it was rejected by the Plaintiff, by failing even to contact the Quantity Surveyor concerned, who, according to evidence disclosed now had already left the Country 1 1/2years ago. "Delay defeats equity". In these circumstances, it would not be equitable for the Court to grant any further adjournment to the First Defendant.

In the judgment dated 20 October 2000, this Court determined the liability of the Second Defendant as follows-

> The liability of the Second Defendant does not therefore arise directly vis a vis the Plaintiff. But as the First Defendant was liable to the Second Defendant, and the Plaintiff was liable to the First Defendant, the Second Defendant would be indirectly liable to the Plaintiff in respect of payments, for which the Second Defendant alone was solely liable.

The Second Defendant has averred in the defence that it had discharged its obligation under the contract with the First Defendant and made all payments due. But as that averment was not proved in the case, the Court has to proceed on the basis of joint liability.

Hence the provisional award of R274,297.72 was made payable by the First and Second Defendants jointly and severally in terms of the averment in the para 9 of the plaint. Accordingly order is hereby made confirming the award of a sum of R274,297.72 to the Plaintiff, payable by the First and Second Defendants jointly and severally together with 14% interest thereon from 1 December 1994 until payment in full, and costs of action payable by the First Defendant Second Defendants on a pro rata basis.

Record: Civil Side No 98 of 1998

Alphonse v The Government of the Republic of Seychelles

Unlawful arrest and detention – quantum of damages

The Plaintiff was arrested by soldiers and detained at the army camp. While the Plaintiff was detained he was assaulted by unknown soldiers. The Plaintiff applied for a writ of habeas corpus and was released. The Plaintiff received medical treatment for the injuries he sustained during his detention. A few days later the Plaintiff was again arrested by soldiers and detained overnight. The Plaintiff claimed R350,000 damages for loss of personality for a total of 7 days under Article 1149(2) of the Civil Code and moral damages and unlawful arrest of R350,000.

HELD:

> In quantifying damages, the length of the detention is a relevant factor but not a mathematical equation.

Judgment for the Plaintiff. Damages awarded R55,000 for loss of personality liberty and moral damages.

Legislation cited
Constitution of Seychelles, art 18
Civil Code of Seychelles, art 1149

Cases referred to
Gerard Canaya v Government of Seychelles Civil Side 42/1999 (Unreported)
Paul Evenor v Government of Seychelles Civil Side 357/1998 (Unreported)
Noella Lajoie v Government of Seychelles Const case 1/1999
Wilven Marie v Government of Seychelles Civil Side 356/1998 (Unreported)

Antony DERJACQUES for the Plaintiff
Gustave DODIN for the Defendant

Judgment delivered on 27 September 2001 by:

KARUNAKARAN J: This is an action in delict arising from unlawful arrest, detention, and assault. The Plaintiff in this action claims a sum of R350,000 from the Defendant towards loss and damage, which the Plaintiff suffered as a result of the said unlawful acts committed by the Defendant through its servants, the Seychelles Peoples Defence Forces. The Defendant during the course of the proceedings admitted liability and agreed to compensate the Plaintiff for the consequential loss and damage. However, the parties could not reach any agreement on the issue as to quantum of damages payable by the Defendant to the Plaintiff. Hence, that is the only issue before this Court, which now requires determination in this matter.

The facts of the case are briefly as follows.

At all material times, the Plaintiff, a self-employed pickup driver was resident of Le Rocher, Mahe. On 24 October 1998 at around 0130 hours, he was arrested by several soldiers of the Seychelles Peoples Defence Forces. After the arrest, he was transported to Grand Police and was detained in prison at the Army Camp. While the Plaintiff was in detention, the soldiers therein physically assaulted him repeatedly using a polystyrene pipe. They continued the assault for several hours resulting bodily injuries to the Plaintiff. The soldiers involved in the entire episode were persons unknown to the Plaintiff nevertheless they were admittedly acting in the course of their employment with the Defendant. Following the said detention, the Plaintiff applied to the Supreme Court for a Writ of Habeas Corpus. The Plaintiff was consequently released from detention on 29 October 1998. Again on 3 November the Plaintiff was rearrested at 2350 hours and was again released from detention on 4 November 1998 at around 1400 hours. In

view of all the above, the Plaintiff now claims damages from the Defendant under the following heads:

a)	Moral damages for pain, suffering as a result of assault and torture	R150, 000
b)	Moral damages for depression, emotional stress, humiliation and fear	... R100,000
c)	Unlawful arrest and illegal detention	R100,000
	Total	**R350,000**

Dr. Anne Gabriel (PW2), a senior medical officer at the Ministry of Health testified that on 29 October 1998 whilst on duty at Les Mamelles Health Centre she medically treated the Plaintiff for the said injuries. The relevant part of her testimony reads as follows:

> I went on to examine the patient (Plaintiff). When I saw him, he looked unwell, he was ill. He was pale and slightly jaundiced. His blood pressure was 140/90. Generally looking at the patient he was bruised and had multiple blood laceration on certain parts of the body. To start with the head, the right temple and the right side of the eye was bruised. The back of the neck the chest, the buttocks, the back of the thighs, legs, feet and both wrists were bruised In particular, both feet were very much swollen, red and tender and painful to touch. The injuries were bruises blunt injury to muscles.

Mr. Clint Alexander (PW1), a photographic technician testified that on 29 October 1998, at the request of the Plaintiff he took eight photographs of the Plaintiff showing the injuries on different parts of his body. All the eight photographs were

produced in evidence. They were marked as exhibits P1 to P8.

I meticulously perused the evidence on record. On the question of arrest and unlawful detention, it is not in dispute that the Plaintiff had been unlawfully detained for a period of 7 days. It is equally not in dispute that the Plaintiff was physically assaulted and subjected to bodily injuries, pain, and suffering. Hence, the Plaintiff is obviously, entitled to damages for the said unlawful detention as well as for the bodily injuries. It is pertinent to note here that Article 18(10) of the Constitution provides that:

> A person who has been unlawfully arrested or detained has a right to receive compensation from the person who unlawfully arrested or detained that person or from any other person or authority including State, on whose behalf or in the course of whose employment the unlawful arrest or detention was made or from both of them.

As regards the bodily injuries, I carefully perused the medical evidence and also observed the photographs in Exhibit P2 to P8. The picture that emerges from the agreed photographs is that the injuries the Plaintiff had sustained were mostly bruises and abrasions on the skin. Further, it appears that the bruises except the ones on the buttocks were not deep lacerations. As regards the posttraumatic consequences of those injuries, there is no evidence to show that the Plaintiff is suffering any permanent incapacity. In the circumstances, I find that the quantum of damages claimed by the Plaintiff for the said superficial bodily injuries is highly exaggerated, unreasonable, and disproportionate to the extent and nature of injuries.

In the case of *Gerard Canaya v The Government of Seychelles* CS 42 of 1999 the Court inter alia awarded R5000

for an unlawful arrest and 18 hours of detention. In the case of *Noella Lajoie v The Government of* Seychelles Constitutional Case No 1 of 1999, the Court awarded R5000 for an unlawful detention of approximately 38 hours. In the case of *Paul Evenor v The Government of Seychelles* CS 357 of 1998 the Court awarded a global sum of R20,000 for arrest, detention of 2 days and 7 hours, inclusive of moral damage for fear and emotional stress as well as for loss of personality. In the case of *Wilven Marie v The Government of Seychelles* CS No 356 of 1998 this Court yesterday awarded a total sum of R65,000 for an unlawful detention of 11 days including injuries of similar nature. Although the period of unlawful detention is a relevant factor that ought to be taken into account in the assessment of quantum, I believe, the Court cannot simply work out the rate of damages for detention on hourly or daily basis borrowing the figures from the precedents. In my view, as I have held in *Wilven Marie* (supra) the quantum in each case has to be assessed taking into account the entire circumstances that are peculiar to the particular case on hand. Having said that I note that Article 1149(2) of the Civil Code provides thus:

> Damages shall be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss may of the amenities of life.

Having regard to all the circumstances of this case and particularly, after taking into account the period of detention and the nature and extent of the injuries suffered, I award the Plaintiff the following sums:

For unlawful arrest and illegal detention	R10,000
Moral damages for pain, suffering as a result of assault	R30 000

Moral damages for depression, emotional stress, humiliation and fear	R15,000
Total	**R55,000**

Accordingly, I enter judgment for the Plaintiff in the total sum of R55,000with costs of this action.

Record: Civil Side No 394 of 1998

Bank Of Credit And Commerce International SA (In Liquidation v Berlouis

Private international law – foreign judgments – right of defence – personal service

The Defendant was a customer at the Plaintiff's branch in London. The Defendant borrowed money from the Plaintiff to purchase property in the United Kingdom. The Defendant defaulted on the loan and returned to Seychelles. The Plaintiff commenced proceedings in England with service on the Defendant in England in accordance with the loan agreement. The Defendant did not appear and the Plaintiff obtained judgment against the Defendant in his absence in the High Court of England for £195,591.88. The Plaintiff applied to have the judgment made enforceable in Seychelles. The Defendant averred that his rights had not been respected because he had not received personal service of the process.

HELD:

(i) A foreign judgment will be enforced in the Seychelles if the following conditions are met:

(a) It must be capable of execution in the country where it was delivered.

(b) The foreign Court must have had jurisdiction to deal with the matter submitted to it.

(c) The foreign Court must have applied the correct law, in accordance with the rules of the Seychelles private international law.

(d) The rights of the defence must have been respected.

(e) The foreign judgment must not be contrary to any fundamental rules of public policy.

(f) There must be absence of fraud.

(ii) Respect of the rights of defence requires personal service;

(iii) The Plaintiff should have sought leave of the English Court to serve the Defendant out of the jurisdiction; and

(iv) Service at the last known address means the address last known to the Plaintiff.

Judgment for the Defendant. Order refused.

Legislation cited
Code of Civil Procedure, s 168

Cases referred to
Privatbanken Aktieselskab v Bantele (1978) SLR 52

Foreign cases noted
Austin Rover Group Ltd v Crouch Buttersavage Associates [1986] 1 WLR 102

Bernard GEORGES for the Plaintiff
Pesi PARDIWALLA for the Defendant

Judgment delivered on 22 February 2001 by:

ALLEEAR CJ: At all material times the Plaintiff was a commercial bank in compulsory liquidation. The Defendant

was a customer of the Plaintiff at its branch at Regent Street, London, England.

It is averred in the plaint that the Defendant borrowed money from the said bank in order to purchase properties in the United Kingdom. He defaulted in repaying the said loan and interest thereon and on 4 August 1993, the Plaintiff obtained judgment against the Defendant in the High Court of Justice in England in the sum of £195,591.88.

It is the contention of the Plaintiff that all the rights of the Defendant were respected and the Defendant chose not to enter an appearance before the High Court of Justice and has not appealed against the said judgment.

Finally, the Plaintiff avers that the said judgment which is capable of execution in the United Kingdom is not contrary to public policy and was not obtained through fraudulent means.

In the present action, the Plaintiff prays this Court:

> to be pleased to make an order that the order dated 4th August 1993 made in case CH1993 C1579 in the High Court of Justice of England by Master Moncaster between Bank of Credit and Commerce International S.A. and Ogilvy Berlouis and Helda May Berlouis be rendered executory in Seychelles.

In the case of *Privatbanken Aktieselskab v Bantele* (1978) SLR 52, it was held that the correct procedure in Seychelles to obtain a judgment rendering a foreign judgment executory was, as in England, by means of an ordinary action.

It is to be noted that foreign judgments can only be enforced in Seychelles if declared executory by the Supreme Court of Seychelles, without prejudice to contrary provisions contained in an enactment or treaty. The conditions for a foreign

judgment to be declared executory in Seychelles are that:

(a) It must be capable of execution in the country where it was delivered;

(b) The foreign Court must have had jurisdiction to deal with the matter submitted to it;

(c) The foreign Court must have applied the correct law, in accordance with the rules of the Seychelles private international law;

(d) The rights of the defence must have been respected;

(e) The foreign judgment must not be contrary to any fundamental rules of public policy; and

(f) There must be absence of fraud.

While in the present case the Plaintiff contends that all the above conditions that have been complied with, the contention of the Defendant, however, is that his rights have not been respected.

On Plaintiff's counsel motion, this Court allowed the Plaintiff to prove its case by way of affidavit evidence in terms of Section 168 of the Seychelles Code of Civil Procedure, Cap 213 in spite of strong objection from Defendant's counsel to the said procedure being adopted by the Court.

The affidavit was sworn to by one Esther Caroline Rawlings, a Senior Solicitor in the employment of Denton Wilde Sapte of Five Chancery Lane, Clifford's Inn, London. As per the aforesaid affidavit, it is averred that since 1983 the Defendant had been a customer of the said bank with average credit balances of US$30,000 and £25,000. In 1987 the Defendant approached the Plaintiffs bank for loan facilities to purchase

two properties in England, namely:

(a) 11 Princess Court, Queensway, London W2;

(b) 276 The Collonades, 34 Porchester Square, London.

The Head Office of the Plaintiffs bank sanctioned the loan of £195,000 for the purpose of purchasing the said two properties.

As per the said affidavit:

> after the Defendant allegedly defaulted on the loan repayments, the Defendant visited the branch of the Plaintiff bank and advised them that he was returning to the Seychelles and would remit £50,000 by 15.12.89.

The remainder of the loan liability according to the Defendant was to be adjusted from the net proceeds of Flat 6, Arundel Court, W14, and 23 Queensgate Terrace, London SE7 which were both for sale on the market.

On 8 May 1990 the Defendant who had by then returned to the Seychelles sent a fax to the branch of the Plaintiff bank in which he stated that "he was planning to be in London to finalise the sale of certain properties and would get in touch on arrival. It does not appear, however, that Mr. Berlouis ever came back to London."

On 24 July 1990 the bank received a letter from Mrs. Berlouis on headed paper stating that "Mr. Berlouis was still in the Seychelles, his telephone number has been disconnected and that she herself was separated from Mr. Berlouis and had not been in contact with him for over a year."

The note goes on to state that the author had made investigations of a manager of the Bank of Credit and Commerce International SA in the Seychelles who, the author believed, might be in contact with Mr Berlouis and that manager had confirmed that he would be willing to assist. The note goes on to record that the author intended to address a letter to Mr Berlouis through the manager in the Seychelles.

The Bank of Credit and Commerce International SA went into provisional liquidation on 5 July 1991. On 18 November 1992 the joint liquidators sent a formal demand to Mr. Berlouis demanding the immediate repayment of the amount outstanding on the Loan Account and the Current Account as at that date, being £86,564.80 and £88,220.56 respectively. That demand was sent to Mr. Berlouis at PO Box 649, Victoria, Mahe, Seychelles.

The originating summons seeking possession of 267 The Collonades was issued on 2 March 1993 against the Defendant giving his address as 267 The Collonades. The originating summons was sent to the same address together with the requisite form of "Acknowledgement of Service" under cover of letter addressed to Mr. Berlouis dated 4 March 1993.

The Plaintiff in serving the originating summons on 267 The Collonades rather than seeking leave to serve the originating summons out of the jurisdiction, was relying on a clause contained in Order 10 rule 3 RSC which provided as follows:

> 3(1) Where –
>
> (a) a contract contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of contract or, apart from any such term, the High Court has jurisdiction to hear and

determine any such action; and

(b) the contract provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the Defendant, or on such other person on his behalf as may be specified in the contract, in such manner, or at such place (whether within or out of the jurisdiction) as may be so specified,

then, if an action in respect of the contract is begun in the High Court and the Writ by which it is begun is served in accordance with the contract, the Writ shall, subject to paragraph (12) be deemed to have been duly served on the Defendant.

The Mortgage agreement at paragraph 10(f) provided:

> It is a term of this Legal Charge that it is to be subject to and interpreted in accordance with English Law and that it is to be subject to the exclusive jurisdiction of the English Courts ... The Mortgagor [Mr. Berlouis] agrees that 267 The Collonades (sic) Porchester Square Bayswater London W2 shall be an effective address for service in respect of any proceedings commenced in the English Courts as hereinbefore defined.

On or around 12 March 1993, Mr Alder received a copy of a letter sent by a Mr Anoop Vidyarthi to the Chancery Division of the High Court marked for the attention of a Mrs Woodroffe. The letter stated:

> Mr. Berlouise (sic) has not lived in the premises for some years as he has business in Seychelles. His wife lives in the flat with their 9 year old daughter.
>
> No previous demands or correspondence has been received at 267 Colonnades previous to this Writ last Saturday.
>
> Mrs. Berlouise (sic) has managed to get in touch with her husband who wishes to defend the action, she is not familiar with the intricacy of English Law and has only today posted the documents to him at his home in the Seychelles.
>
> As the acknowledgement of service indicating his desire to defend cannot reach the Court within the required 14 days, he requests the Court's indulgence to enable him to revert and arrange to attend the Court.
>
> Please advice (sic) the possible new date for the return of the acknowledgement of service to me at the above address.

It appears that the Court replied to Mr. Vidyarthi's letter on 16 March 1993. The Court's response was copied to Wilde Sapte. It stated:

> Your letter dated 12th March 1993 was placed before the Master on 15th March 1993.
> He has made the following directions:-
>
> The Master has directed me to inform you that if the Defendant is resident in the Seychelles, the Plaintiff will need leave to serve the proceedings

> out of the jurisdiction, and no order will be made against him on the present Originating Summons. I am today sending a copy of this letter together with a copy of your letter, to Messrs. Wilde Sapte.

I should stress however, that at that stage of the proceedings, the Master did not have before him any copy of the Mortgage. If the Mortgage had not contained clause 10(f) specifically permitting service at 267 The Collonades, the Master would have been perfectly correct. As the Mortgage did contain that clause, there did not appear to be any need to make the application for leave to serve out of the jurisdiction and no such application was made.

A copy of the summons was sent to Mr Berlouis at 267 The Collonades under cover of a letter dated 31 March 1993. A copy of the summons was also sent to Mrs Berlouis at 267 The Colonnades, also under cover of a letter dated 31 March 1993.

Wilde Sapte did not receive any response from Mr Berlouis but did, on 13 April 1993, receive a fax from Barda & Co, a firm of solicitors which Mrs Berlouis had apparently instructed. The fax again referred to the fact that Mr. Berlouis was resident in the Seychelles and asserted that the Joint Liquidators required leave to serve out of the jurisdiction. Again however, Barda & Co do not appear to have seen a copy of the Mortgage (and in particular, clause 10(f) of the Mortgage when they sent that fax). Again, had it not been for the clause they would have been correct. It seems that Mr Barda of Barda & Co also telephoned Mr Dodd.

At the hearing on 14 April 1993, Mr Dodd appeared on behalf of the Joint Liquidators. The Court did not, however, make either of the orders sought. Instead, Deputy Master Powell raised a query as to the service of the Originating Summons on Mr Berlouis. It appears that Mr. Dodd did not at that

hearing refer the Deputy Master to Order 10 rule 3 RSC and that the Deputy Master was unaware of that provision enabling the parties to a contract to make provision for service in a manner not otherwise provided for by the RSC. The Deputy Master adjourned the matter generally, with 'liberty to restore', i.e. to apply for a further hearing date:

The hearing was restored for 18 May 1993. A further copy of the Summons, endorsed with the new hearing date, was sent to Mr. Berlouis under cover of a letter dated 16 April 1993 addressed to him at 267 The Colonnades. A copy was sent to Mrs. Berlouis's solicitors on the same day. Again, no response was received from Mr. Berlouis. Mrs. Berlouis' solicitors subsequently agreed to the orders sought.

Mr. Alder attended the hearing on 4 August 1993 (which was before Master Moncaster) on behalf of the Joint Liquidators. The Master evidently accepted that the Originating Summons had been validly served and made the possession order which states:

> "he Master ordered possession within 24 days of personal service upon Mr. Berlouis in the Seychelles. I objected to this, on the grounds that we did not need to serve him personally, but the Master insisted on the basis that otherwise he may not know what was happening.
>
> Judgment was granted in the sum of £195,591.88, with costs.

Having considered very carefully all the evidence led in this action for an order that judgment of the English High Court be made executory in Seychelles, I have come to the conclusion that the Plaintiffs prayer cannot be acceded to in view of the fact that there was no personal service effected on the Defendant. The Plaintiff knew very well prior to instituting legal

proceedings for the recovery of the debt owed to the bank by the Defendant that the latter was no longer residing in England. They were alive to the fact that if service would be effected at 267 The Collonades, it would not come to the notice of the Defendant. The Plaintiff ignored the advice of the Deputy Master and relying on the aforesaid term of the mortgage contract did not seek leave to serve the Defendant out of the jurisdiction. In my considered view they did this at their peril. Had the Defendant been served in Seychelles, he could have exercised any of the rights available to him in the said action. By the Plaintiffs action the Defendant was thus precluded from exercising his constitutional rights.

It is worth reproducing the following excerpts from the White Book - "Subject to certain exceptions an originating notice of process must be served personally on a Defendant unless such service is accepted under any particular rule or statutory enactment or alternative method of service is authorised. As per Order 10/1/12, if the Defendant is within the jurisdiction, he may be served by post, that is by sending a copy of the Writ by ordinary first class post to him at his usual or last known address instead of being served personally on him.. The words `last known' means last known to the Plaintiff, per May LJ in *Austin Rover Group Limited v Crouch Buttersavage Associates* [1986] 1 WLR 102.

If the Defendant had still been living at the address that he had given in the Mortgage Agreement (the Contract), and the Plaintiff was unaware that he was no longer residing in the United Kingdom, then service at that address would have been deemed to be proper.

In the peculiar circumstances of the present case, I find that one of the conditions laid down in the case of *Privatbanken Aktieselskab v Bantele* (supra) has not been met and for that reason I refuse to make the judgment given on 4 August 1993 in the High Court of England executory in the Seychelles.

Record: Civil Side No 118 of 1998