

IN THE SUPREME COURT OF SEYCHELLES

CIVIL APPEAL 9/87

ANGLO-WELSH INVESTMENTS

APPELLANT

v.

BANQUE FRANCAISE COMMERCIALE

RESPONDENT

Draft Judgment of Mr. C. d'ARIFAT.

This is an appeal against a judgment of the Chief Justice delivered on the 24th March 1987 declining to grant to the Plaintiff now Appellant a declaration to the effect that Appellant is not liable to the Respondent in respect of any charges incurred on sums that would have become payable after the compulsory acquisition of Parcel H 743 by the Government on the 13th August 1984.

The facts are not in dispute. On the 22nd January 1987 the Parties have agreed to the following facts :-

1. The Plaintiff was the owner, until 13 August 1984, of Parcel H 743 situate at Mare Anglaise, Mahé on which stands an Andalucian-style self-catering holiday village comprising nine luxury apartments, with a total of 40 bedrooms, bar and swimming-pool, the whole known as a Vacoa Village.
2. Parcel H 743 was compulsorily acquired by the Government of Seychelles on 13 August, 1984 under the Lands Acquisition Act : (Annexure 1).
3. The Plaintiff maintained, at all material times an account with the Defendant which comprised loans, and overdraft facility and guarantees of credit.
4. The account was opened on 29.7.1980: (Annexure 2).
5. As security for the loans and overdraft the Plaintiff gave the Defendant the following :
 - (a) A floating Charge on all the assets (other than immovable assets) of the Plaintiff Company : (Annexure 3),
 - (b) Fixed Charges over Title H 743 as follows :
 - (i) Charge for Rs 600 000 dated 29.7.1980 transferred to Defendant: (Annexure 4);
 - (ii) Charge for Rs 150 000 dated 16.12.1981 (Annexure 5);
 - (iii) Charge for US Dollars 43 000 dated 24.7.1981 transferred to Defendant : (Annexure 6).

The three charges and conditions thereof are similar in form and content to Annexure 5.

6. As at the 13 August, 1984, the date of acquisition by the Government of Parcel H 743, the Defendant was owed by the Plaintiff the sum of R 629 709.20: (Annexure 7). At that date the Defendant was charging interest at the rate of 15 1/2 per centum per annum on sums owed. That rate was increased on 1 October, 1986 to 20% per annum.
7. The Defendant submitted a claim to Government for compensation as a mortgagee on 8 September, 1984 in the sum of R 629 709.20 : (Annexure 8).
8. The Government and the Plaintiff agreed on 23 October 1985, on compensation for the acquisition of Parcel H 743 in the sum of R 2 Million with interest at 4% per annum from 13 August, 1984 to 23 October 1985 and at 8% per annum from 24 October 1985 on the amount outstanding. The compensation was to be payable by quarter instalments of the capital sum of R 262 257 plus interest thereon. Four instalments have so far been paid.

In his judgment the learned Chief Justice found that the Appellant's debt has not been crystallized, as at the date of acquisition, and therefore that the interest on the balance of compensation money still to be paid should be calculated at the rate agreed by the parties - and not as submitted by the Appellant at the rate provided for in section 43 of the Lands Acquisition Act, 1977.

The Appellant has appealed on the following ground:-

The learned Chief Justice erred in his finding that the debt due by the Appellant to the Respondent was not extinguished by, and did not crystallise with, the acquisition by the Government of the Appellant's property and that the Respondent is thus entitled to demand the rate of interest that was agreed between the parties, as later amended.

The relevant parts of the judgment of the learned Chief Justice are the following :-

"It is s. 31(5), perhaps, which has the greatest interest in this case"

"I believe that some guidance as to the meaning of section 35(1) (I believe that the reference should read 31(5)) is provided by a consideration of ss. 37 and 39".

The mortgage is a "contrat accessoire". It is accessory to the loan. The question which falls to be decided in the present appeal is whether on a proper construction of Part IV of the Lands Acquisition Act, 1977 it can be said that in virtue of the Act the acquisition of the land has caused the extinction of the mortgage and of the mortgage debt, or of the mortgage only.

An examination of section 31(5) indicates that the legislator may have distinguished between the two contracts as the two expressions are used, namely "mortgage" and "mortgage debt".

That section after laying down certain conditions precedent one of which being that "the compensation payable to the mortgagee under section 35(1) is sufficient to pay the mortgage debt", provides that "the acquisition of the land shall as at the date of acquisition be deemed to have had the effect of extinguishing the liability of the mortgagor under the mortgage". I hold the view that the words "under the mortgage" would normally be understood to mean that the presumption created by the section is restricted to the liability of the mortgagor in respect of the mortgage contract and do not extend to the contract of loan secured by the mortgage.

However a different consequence may be inferred from section 31(5) as the conditions of sufficiency of the compensation - therein mentioned - would indicate that all amounts due by the mortgagor as at the date of acquisition are accounted for with the result that the liability of the mortgagor both under the mortgage and under the loan are extinguished on that date.

Section 37 provides for a situation arising "upon payment or tender of compensation". The mortgagee is then about to receive or has received his due. The section refers to section 31(5), that reference is in my view of some significance.

Section 37 reads : "The mortgagee shall ... execute a discharge of the mortgage debt to the extent to which the mortgage debt is discharge by virtue of section 31(5)". I draw therefrom the following inferences :-

...../.....

- (i) Section 31(5) does provide for the discharge of the mortgage; now section 37 goes further and says that the mortgage debt is discharged by section 31(5);
- (ii) since section 31(5) is applicable where "the compensation payable to the mortgagee under section 35(1) is sufficient to satisfy the mortgage debt and interest, costs and charges due to the mortgagee as at the date of acquisition" the discharge must be to that extent and to no other extent and certainly to no lesser extent. I shall hereafter analyse the question of interest payable after the date of acquisition.

Section 39 is different from section 37 as it makes no reference to section 31(5) and it therefore applies to cases "where the whole or a part of the mortgage debt is not discharged by virtue of this Act, the mortgagee retains in respect of the whole or part of the debt, as the case may be, his rights and remedies against the mortgagor..."

I therefore find :

- (i) that Section 39 is not applicable to the present case because the whole of the mortgage debt as defined in section 31(5) is as at the date of acquisition payable out of the compensation;
- (ii) it is only in cases where the mortgage debt is not discharged by virtue of the Act that the mortgagee retains in respect of the outstanding debt all his rights and remedies against the mortgagor.

I shall now examine the question of interest during the period which extends from the date of acquisition to the date of payment.

Section 43(1) applies to all compensations under the Act and is in Part V "Miscellaneous" it reads :

"Subject to this Act, an amount of compensation payable in respect of the compulsory acquisition of any land under this Act bears interest from the date of acquisition of the land to the date on which payment is made to the claimant".

It is first to be noted that the provision is subject to other provisions of the Act. Then the section refers to any interest which would be payable by the mortgagor to the mortgagee "under the mortgage". In the present case interest at the rate specified in section 43 is actually being paid to the claimants.

Section 32 which is in Part IV⁴ reads :

Where an amount has been paid to or recovered by a mortgagee under a mortgage in respect of a liability which upon ~~upon~~ the making of a claim by a mortgagee is deemed to have been discharged as from the date of acquisition by virtue of section 31(5) -

- (a) the mortgagee is liable to repay that amount to the person who paid it;

Section 43 provides for a statutory interest. Section 32 prohibits the payment of interest etc. "under the mortgage" as from or after the date of acquisition. This section also shows that in section 31(5) the reference to "the mortgage" must include the loan under which interest is paid as well as the security under the mortgage.

For the above reasons I have come to the conclusion that the legislator when he used the word "mortgage" in section 31(5) must be understood as having used it to include the loan and the charge which secures the reimbursement of the loan. I am therefore of opinion that the Appellant is not liable to the Respondent in respect of any charges or sums that would have become payable under the mortgage after the compulsory acquisition of Parcel H 743, by the Government on the 13th August 1984.

^{would}
I^a therefore allow the appeal and quash the decision of the learned Chief Justice.

^{would}
I^a make no order as to costs in this Court or in the Supreme Court.

(del. 5 Aug 84)

Delivered in open court

Godwin

Just

22.7.88