

IN THE SEYCHELLES COURT OF APPEAL

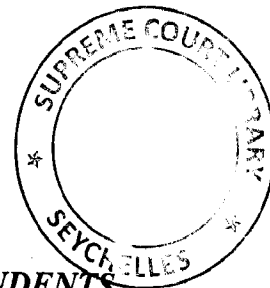
1. JOHN HENRY ATKINSON
2. MRS. BEULAH ATKINSON

APPELLANTS

VERSUS

1. SEYCHELLES GOVERNMENT
2. COMPAGNIE SEYCHELLOISE
DE PROMOTION HOTELIERE LTD
(COSPROH)
3. L'HABITATION DES ILES (PTY) LTD.

RESPONDENTS



SCA No. 20 of 2002

Mr. P. Boulle for the Appellants
Ms. C. Hoareau for the 1st Respondent
Mr. K. Shah for the 2nd Respondent
Mr. J. Hodoul for the 3rd Respondent

**COMPAGNIE SEYCHELLOISE
DE PROMOTION HOTELIERE LTD.**

APPELLANT

VERSUS

1. JOHN HENRY ATKINSON
2. MRS. BEULAH ATKINSON

RESPONDENTS

SCA No. 24 of 2002

Mr. K. Shah for the Appellant
Mr. P. Boulle for the Respondents

[Before: Ayoola, P. Silungwe and De Silva J.J.A.]

JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

The appellant Mr. John Henry Atkinson and Mrs. Beulah Atkinson, both of Mombasa, Kenya sued in the Supreme Court, Seychelles Government, Compagnie Seychelloise de Promotion Hoteliere Limited ("COSPROH") and L'Habitation des Iles (Pty) Ltd. claiming among other things that the appellants were entitled to a

usufruct and certain facilities contained in a document made between Northolme Ltd. and the Government of Seychelles. The Supreme Court dismissed the plaint against the Government on the ground that the claims against it were either statutorily barred or otherwise prescribed and against the L'Habitation on the ground that they were either prescribed or no fault was established against it. The Supreme Court found the claims against COSPROH prescribed except for the claim against it for damages for depriving the appellants of a right to use a suite in the Northolme Hotel free of charge. The appellants and COSPROH appealed.

The Northolme Hotel ("the hotel") was purchased by the Government from Northolme Ltd. by virtue of an agreement dated 29th May 1991, Clause 5 of the agreement provided as follows:-

"NOW THEREFORE the parties of this agreement have agreed as follows:-

...5. The government undertakes for itself, or any person or body corporate to which the ownership, transferred or assigned that Mr. John Henry Atkinson and his wife shall at all times during their natural lives be entitled to:-

- a. to keep their own personal belongings, but not including any material or thing of a combustible or other nature likely to be detrimental to the hotel in their existing private premises next to the suite named Curieuse and to have sole access and use of the said premises for this purpose,*
- b. upon giving reasonable notice in writing to the Hotel to use the bedroom-suite named "Curieuse" for their own use free of charge,*
- c. a discount of 15% on the normal prices of food, drink, boutique or other goods or services consumed or acquired at the hotel,*

a. to use without charge a motor vehicle and boat from the hotel provided the hotel has one reasonably available at the time.

Provided that the facilities aforesaid are to be utilised solely by Mr. and Mrs. John Henry Atkinson in person during any visit they make to Seychelles".

COSPROH purchased the hotel from the Government by virtue of a deed of transfer registered on 12th May 1982. By virtue of a lease agreement dated 17th January 1992 L'Habitation became a lessee of the hotel.

The appellant sued the three respondents because, they alleged, the respondents have refused to recognise their rights and the L'Habitation have been unlawfully occupying and using the premises mentioned since February 1992 while COSPROH during the time it owned and managed the hotel removed enumerated personal belongings of the appellants from the premises.

The defence of the Government was that no usufructuary interest or other rights were granted or created in favour of the appellants while the defence of COSPROH and L'Habitation was that they were not bound by the undertaking in clause 5 of the agreement between Northolme and the Government.

The trial judge (Juddoo, J) found that clause 5 did not create any usufruct in favour of the appellants but a limited right of use of the premises and, in the alternative, clause 5 would not create an interest in the appellants because the appellants who were non-Seychellois lacked appropriate sanction to acquire any interest in immovable property. Considering the rest of the claims in the plaint on basis of fault, he came to the conclusions earlier stated.

The appellants appealed on one ground, namely:

“The learned trial judge erred in his finding that the agreement of sale did not confer a usufructuary interest, and that the Government was not estopped from raising the issue of lack of sanction.”

COSPROH appealed on the ground that as an assignee of the Government it was not under an obligation to honour the privilege given to the appellant in clause 5 and that, in any event, as at the date of the cause of action for which it was held liable, it had ceased to be an assignee of the hotel.

The dominant issue in this appeal is whether clause 5 created property rights or mere personal rights. The former are valid against the whole world while the latter are rights which can be claimed only against certain individuals.

The Civil Code of Seychelles (*“the Civil Code”*) provides as follows:

“Usufruct is the right to enjoy property which belongs to another in the same manner as the owner himself, but subject to the obligation to preserve the substance”: Art. 578

“A usufruct is created by law or by the will of the parties”: Art. 579

“The sale of property subject to a usufruct shall have no effect upon the right of the usufructuary; he shall continue to enjoy her usufruct unless he has formally renounced it”: Art. 621

The learned trial judge held that no usufruct was created by the Government in favour of appellants because they have been granted a limited use

of the premises in order to keep their own personal belongings. Mr. Boulle, counsel for the appellants argued that he was in error. It was argued that limitation as to use is determined by the nature of the property. An example was given of the grant of a usufruct of an apartment in a block of flats whereby "*one can only have a limited use of that apartment, if one would not be able to run a business from it, keep pigs or give noisy parties therein*". Mr. Boulle emphasised the exclusion of "*any material or thing of a combustible or other nature likely to be detrimental to the hotel*" from the personal belongs which the appellant could keep in the premises as the operative limitation which influenced the trial judge's decision.

Evidently, Mr. Boulle had not properly interpreted the trial judge's findings. The trial judge did not hold that the appellants did not acquire a usufruct merely because of the restriction on the type of personal belongings they could place in the premises. Such restrictions can be put on the use of property by even the owner without limiting the right of ownership. Article 544 of the Civil Code, for instance, acknowledges that the owner's use of his property must not be contrary to any laws or regulation. Similarly, an owner can restrict the use of his property by contract. What the judge found was that the right granted to the appellants was not a right to enjoy property but a right merely to keep their personal belongings in the property. It was, so to say, a mere right of storage, albeit for their lives. The emphasis was more on storage than on use of property as owner thereof. A right merely to keep personal belongings on the property which belongs to another can hardly be said to be a right "*to enjoy property which belongs to another in the same manner as owner thereof ...*" The enjoyment of property by the owner is not limited to keeping his personal belongings on it. The facility granted the appellants of keeping their personal belongings in the premises was not a real, but a personal, right.

The trial judge considered in the alternative the consequence of absence of sanction of the Minister pursuant to section 4(1) of the Immovable Property (Transfer Restriction) Act ("*the Act*") had he been wrong in the opinion that clause 5 did not create a real right. He held that the absence of sanction would have prevented the creation of any real right in immovable property in favour of the appellants and that the government was not estopped in so contending.

It is expedient to observe in regard to the submission that it was *ultra petita* to raise the question of sanction, that although the question of sanction was not raised by the defence, the facts essential to that issue are on record, namely, that the appellants were non-Seychellois and that they did not obtain any sanction in regard to any right they claimed in the immovable property, in terms of section 4(1) of the Act. In these circumstances it would be an abdication of judicial responsibility to ignore such matter pronounced upon by the trial judge and the prohibition contained in section 4(1) and, notwithstanding that prohibition, to hold that the appellants had acquired a real right.

Section 4(1) of the Act prohibits a non-Seychellois, among other things, from purchasing or acquiring by any means whatsoever any immovable property situated in Seychelles or any right therein or entering into any agreement which includes an option to purchase or lease any such property or rights without having first obtained the sanction of the Minister.

Mr. Boule argued that the government is estopped from contending that the appellants did not obtain the Minister's sanction. It was submitted that the government having entered into a contract with the appellants granting certain rights which under normal circumstances would need the permission of the government to acquire brings into operation the principle of estoppel by conduct.

For the COSPROH it was submitted that it is moot whether the principle of estoppel applied in Seychelles. Reference was made to *Teemooljee Company Ltd v. Pardiwalla* 1975 SLR39. Notwithstanding *Teemooljee* (supra) it is evident that courts in Seychelles by virtue of section 6 of the Courts Act are empowered to apply the principles of equity.

The type of estoppel claimed by Mr Boule is estoppel by representation or conduct. The principle of such estoppel is both of law and equity. In equity it is applied only to cases where a person had entered into a contract on the faith of a representation made. In equity that party must "make his representation good". See Halsbury's Laws of England 4th Ed., Vol 16, para 1391. In Halsbury's (Op. Cit.) para 1592, it was stated

"To form the basis of an estoppel a representation may be made either by statement or conduct".

The representation must be as to existing fact. The principle of estoppel by representation or conduct has no application in case of something future.

There is no representation, whatsoever, by the government that the appellants are exempt from applying to the Minister for a sanction under section 4(1) of the Act. The question whether the Government is estopped from denying that the appellants were entitled to be granted sanction would not arise until and unless the appellants have applied for one. They have not so applied. Since the appellants have not applied for a sanction the question whether or not the Government would have acted unfairly (acting through the Minister) to deny them a sanction did not arise. For these reasons the argument raising the issue of estoppel was misconceived.

The remaining question is whether the personal right created by clause 5 has any effect on third parties. As to that, the applicable law is set out in Articles 1165, 1119 and 1120 of the Civil Code. Contracts have effect only between the contracting parties. However, a person may undertake that another shall perform an obligation. The person who has given the undertaking or has promised that a contract shall be ratified by another party shall be liable for damages if that party refuses to do so.

The undertaking in clause 5 by the government "for itself or any person or body corporate to which the ownership, possession or management of the hotel may be transferred or assigned" is of the nature of an undertaking provided for in article 1120 of the Civil Code. The Government would be liable if these other persons did not perform the obligation. No question of ratification arises.

In terms of article 1120 an assignee does not only by the fact of being an assignee come under an obligation to perform an obligation notwithstanding that the assignor had undertaken that it would be performed by the assignee. The relationship of assignor and assignee does not by itself create an exception to the general rule stated in article 1120. Indeed, in this case the appellants' counsel did not canvass such exception. His response to the appeal of COSPROH was that a real right was created by clause 5. Once we have held that no such right had been created, that should be the end of the matter. COSPROH cannot be said to have committed any error of conduct by not observing an obligation which the law does not enjoin it to perform. The law is clear that if an action, or omission, is not unlawful there can be no tortious liability flowing from it. [see Dickson: Introduction to French Law p157]

The opinion we hold that clause 5 did not create a real right in favour of the appellants and the conclusion we have arrived at that by virtue of articles 1165 and

1120 of the Civil Code COSPROH was not under any duty to perform the obligation undertaken by the Government in clause 5 are sufficient to dispose of the appeal of the appellants and that of COSPROH.

In the result the appellants' appeal is dismissed. The appeal of COSPROH is allowed. The judgment entered against COSPROH by the Supreme Court is set aside. In place therefor judgment is entered dismissing the action against COSPROH in its entirety. All the respondents are entitled to costs of the appeal against the appellants. COSPROH is entitled to costs of the trial in the Supreme Court as well.

Dated at Victoria, Mahe this ... 5 ... Day of Decem 2003