IN THE SEYCHELLES COURT OF APPEAL

Ebrahim Suleman	1st APPELLANT
Franky Adeline	2nd APPELLANT
Cable and Wireless (Seychelles) Ltd	3rd APPELLANT

v.

Marie-Thérèse Joubert	1st RESPONDENT
Pierre Rose	2nd RESPONDENT
	SCA 27/2010

[Before: MacGregor, PCA, Fernando, Twomey, JJ)

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Mr. Conrad Lablache, Counsel for 1st and 2nd Appellants

Mr. K. Shah, Senior Counsel for 3rd Appellant

Mr. N. Gabriel, Counsel for Respondents

Judgment

Twomey JA

1. As officers of the judiciary we have to comment with a mixture of amazement and embarrassment on the complete and utter failure of the court administration to expedite this matter judiciously. We note from the proceedings that this matter was begun in 1999. The judgment of the Supreme Court was delivered almost 11 years later on 20th September 2010. By the time this court delivers its judgment this case would almost rival in time and expense the Dickensian case of *Jarnydyce v Jarndyce*. However the duration of the court proceedings is not the only troubling matter. The records of this case, some of which were essential both to the Supreme Court and this Court in reaching a decision have gone missing. We have no hesitation in laying blame squarely at the feet of the Registry of the Supreme Court. It is simply not acceptable that

in laying blame squarely at the feet of the Registry of the Supreme Court. It is simply not acceptable that stenographers having the custody of court proceedings leave their post without surrendering the same into the safe keeping of the Registrar. We are of the view that despite our attempts to bring a conclusion to this case we would have failed in our efforts to do justice to all concerned in this case as *justice delayed is justice denied.* With this reservation I now turn to the issues raised in this appeal.

Facts

2. In January 1997 rain water damage occurred to a house and the contents therein at North East Point, Mahé belonging to the two Respondents. They brought an action based in delict against the three Appellants claiming that it was as a result of their negligence and fault in the construction of their respective buildings and developments that rainwater had been diverted to their property and occasioned the damage totally Rs. 366, 965.

3. The three Appellants denied the allegations and claimed instead that their construction and development were in accordance with Planning Regulations, that they had committed no *faute* and that in any case the Respondents were according to law bound to receive water flowing to their land.

4. The Respondents at the trial led evidence to the effect that they were the first to construct in the area and that until the Appellants began development of their land which was situated on a hill behind their house they had never experienced water flowing onto their land. In cross-examination by Mr. Boullé, who was then the 1st defendant's attorney (now 1st Appellant), the1st Respondent admitted that there is a river close to the house to which damage occurred.

5. The Appellants contended that the Respondents' house had been built in a valley at the foot of a mountain in the path of a water course. They also led evidence that in any event the mortgagors of the Respondents property had rebuilt the house, complete with storm water drains and retaining wall on a different site away from the water course and if anything the

Respondent was now in a better position than before damage had occurred.

6. During the trial an important fact, though not pleaded but also not disputed by the parties emerged: there had been severe weather conditions and floods in 1997 which resulted in widespread damage all over the island. It is important to note that although parties were examined at length about this phenomenon, no mention of this is made in the judgment of the learned trial judge Karunakaran.

Judgment of the Supreme Court

7. The learned judge found in favour of the Respondents in the sum of Rs 108,000, liability apportioned equally between the three Appellants. He came to this conclusion by finding that the Respondents had committed a *faute* under Article 1382 of the Civil Code by "abusing their rights of ownership, causing damage to the plaintiff's property having exceeded the measure of the ordinary obligations of neighbourhood." This is a curious conclusion as his pronouncement seems to be based on the amalgation of *faute* under articles 1382 and as *troubles du voisinage* under article 544. He also made a finding that third parties namely the Government of Seychelles as promoter of the development, the Planning Authority (which parties had not been joined to this suit) which had given approval for the development and the building contractors who were engaged by the Appellants to put up the developments had all committed a *faute* and contributed to the diversion of the watercourse which had resulted in damage to the plaintiff's property. He then went on to hold, presumably under article1384 of the Civil Code, that the present Appellants were vicariously liable for this *faute* on the part of the building contractor but not the Government of Seychelles or the Planning Authority. He also found that the damage was caused by the "properties which the defendants had in their custody at the material time." In the final analysis he concludes that "the defendants are liable for damage caused to the plaintiffs by the properties held in their respective custody in terms of article 1384(1) of the Civil Code.

The Grounds of Appeal

8. The Appellants filed 8 grounds but for the purpose of this hearing the appeal proceeded on the following grounds only:

could only have been rebutted by the Appellants by proving that the damages to the Respondents' house were caused by the Respondents themselves or a third party or by force majeure.

c) The decision of the Judge is ultra petita
d) The learned Judge erred in holding the Appellants jointly liable for damages to the Respondents' house as there is no evidence to show or even suggest that the Appellants were part of a common enterprise, or acting jointly or with a common purpose.
e) The learned Judge erred in awarding damages against the Appellants and in any event the damages awarded were excessive inasmuch as they are not justified by evidence.
f) The learned Judge's order that interest on awarded damages be effective as of the date of the filing of the original plaint is unreasonable and unwarranted. Interest runs from the date of judgement when the sum has been liquidated.

Assessment of Evidence

Grounds a and c

9. Rarely does the Court of Appeal seek to interfere with findings of fact by the trial judge who had the opportunity to study and appraise witnesses when giving evidence ***(Mancienne v Morin (1979) SLR 135).*** However this case is unusual as a considerable length of time (8-10 years) elapsed between the hearing of evidence and the writing of the judgment undermining any benefit the trial judge may have had from observing the witnesses. Moreover, a substantial amount of the evidence adduced was not on record and the trial judge had to rely on notes compiled by the parties' attorneys. Given this unusual state of affairs we are of the view that this Court is almost equally placed as the trial judge to weigh the evidence adduced.

10. In the circumstances having reviewed the evidence on record we come to a very different conclusion to the trial judge on a number of points. We find that documentary evidence viz the report which was prepared by Marc Agrippine, a technician of the Respondent's mortgagor and builder upon complaints made by the Respondents, though of great bearing to this case is only alluded to and not taken into account by the learned trial judge in his decision. This report was prepared in November 1996, before this action arose and it states:

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> "A critical examination of cracks was examined (sic) and this reveals that the crack is mainly restricted to two things.
> 1. This is due to bad sub-structural works i.e. the vertical cracks starts from deep down form the foundation through the slab, walling and lintel.
> 2. Part of the building mainly at the front has been constructed on made up ground. And also due to a large quantity of surface water from the hill that seeps underneath the house. The water while coming down eroded the ground where the building stands. This has resulted in the collapse of an embankment opposite Mrs Joubert's house.
> ... The surface water eroded the whole property and the property has a slope of approximately 25 degrees.
> ...It is proposed that the house is demolished, reconstructed as the failures are progressive and the water keeps coming during heavy raining period..."

Although as pointed out by Mr. Gabriel for the respondents that Mr. Agrippine was not an expert we are of the view that as this report was prepared independently of the parties to this case and before this action was originally commenced it goes a long way to assist the court in determining the facts of this case. It explains the situation even before the heavy storms of 1997 and the resulting surface water whether or not their volume would have been increased by the Appellants' building work.

11. Further, although all parties in the course of their testimony mentioned the catastrophic rainstorms of 1997 which affected Seychelles and amounted to an event of force majeure this was also not a deciding factor in the decision of the court. In

12. In such circumstances applying evidentiary rules we need to find that the Respondents discharged both their evidentiary or burden of proof as is required by law. The maxim "he who avers must prove" obtains and prove he must on a balance of probabilities. In ***Re B [2008] UKHL 35***, Lord Hoffman using a mathematical analogy explaining the burden of proof stated:

> "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

Similarly in ***Rhesa Shipping Co SA v Edmunds and Another [1985] 2 All ER 712*** the House of Lords held that if the judge, regarded both competing causes as improbable, then it was perfectly appropriate for him to hold that the claimant had failed to establish his case on the balance of probabilities.
Before we can establish whether this evidentiary burden has been discharged we need to enquire as to the legal basis of this action. Is it one founded on delict (article 1382), *trouble de voisinage*- neighbourhood disturbances (article 544) or aggravation of a natural easement (article 640)?

Liability for damage- the law applicable
Ground b

13. It would appear that the trial judge based his decision on the application of both **articles 1382** and **1384 -1** of the Civil Code, that of the obligation to repair damage caused by one's fault or negligence and that of the obligation arising for the responsibility of things in one custody. The Appellants have submitted that that the Respondents did not bring their case under article 1384. We find that the pleadings are not clear on this issue. However, as we have pointed out four different provisions of the Civil Code might have application given the

based on articles 544 and 640 (compensation based on excessive damage).

14. In order for the Appellants to be liable under either article 1382 or 1384 the Respondents were bound to prove a nexus between the *faute* on the part of the Appellants or *for things in their custody* and the damage to the property. The Respondents however have not acquitted themselves of this evidentiary burden. Similarly for a claim of nuisance or *trouble du voisinage* to succeed under article 544 an evidentiary threshold must be reached. In this case the Respondents have not adduced any evidence to show that the use of the properties belonging to the Appellants were contrary to laws and regulations as required by article 544. As this case concerns an easement arising from the position of land it is therefore article 640 that should apply.

15. Articles 640 and 641 of the Civil Code state:

> "Land on lower level is bound to receive from land on higher level waters which flow naturally and without human intervention.
>
> The owner of the land shall not erect a dam which prevents an overflow. The owner of the higher level shall do nothing to increase the burden of the lower level.
>
> "Every owner shall be entitled to the use and disposal of rain water falling upon his land. If the use to which the aforementioned water is put or the direction which is given to it results in a serious increase of the burden which the natural easement of running water established by article 640 impose, the owner of the lower land shall be entitled to compensation."

The issue of fault does not arise under article 640. In the present case the only issue that needs to be determined is whether the acts of the Appellants aggravated, modified or increased the flow of water to the Respondents' land. It is clear from the provisions above that in order to succeed in their claim the Respondents have to prove that the Appellants' building works have resulted in an increase to the volume of water flowing to the Respondents' land. There is no evidence adduced showing the causal link between the acts of the Appellants and the increase in the flow of water which resulted in the damage to their house. Indeed there is no evidence that the damage to their house occurred after the construction works by the appellants.

16. Even if we were to adopt a flexible approach to the causal link

as is the approach in French courts, the Respondent would still have to show links that are "serious, specific and concordant" (« graves, précises et concordantes » **Civ. 2e, 14 déc. 1965, D. 1966, p.453)**. Similarly, the courts on occasions proceed by elimination of the various possible causes of the damage (**12 Civ. 2e, 29 avril 1969, D. 1969, p.534**). There are no indications of such a link: Mr. Agrippine's report as reproduced above clearly indicates that the Respondent's house had suffered the damage before the construction works by the Appellants had taken place. The Respondent in fact admits at P. 27 of the record when producing photographs of the damage and water flow that these were taken in January 1989 and 1993. Her own testimony at P. 40 of the record is damning of her allegations that her house was damaged by the actions of the Appellants since she accepts that her house was indeed in the path of a water course and was damaged by the unprecedented rains of Deember 1997:

Q. If you walk behind your house you are in a valley.
A. Yes there is a hill on the left of Mr. Mahoune and a hill on the right.
Q. I put it to you that in between there was a river bed.
A. The river is still there. The small water is still there.
Q. Madam I have got you verbatim, I wrote down. You said *delo ti desann apre gor lapli desanm.* For the record, the water came down with the heavy rain of December. It has dried up and there you are sadly with the heavy December rain the river got its maximum potential.
A. After they pulled down my house they built a new house for me on higher ground, it was after that that the heavy rain in December came and swept away the remining (sic) of the house away. (verbatim)

In view of the above we conclude that the Respondents have failed to establish a causal link between the damage to their house and the acts of the Appellants and therefore have not been able to discharge the burden of proof as required by them.

Ultra petita
Ground c

17. The learned trial judge in his decision stated

"As I see it, whatever be the degree of contributory negligence on the part of the building contractors or other third parties, the fact remain that the Defendants are liable not only for the damage they caused by abuse of their rights of ownership but also for the damage caused by the act of negligence/fault of their employees/servants employees/servants/préposés/agents for whom the defendants are vicariously liable in law in terms of article 1384(1) of the Civil Code."

It is a principle of our law that parties are bound by their pleadings and allegations of material facts have to be specifically pleaded. We are unable to discern from pleadings of the Respondents an averment based on the vicarious liability of servants of the Appellants or any allegation at trial that the servants for the Appellants were in any way involved. None of these servants were joined. The finding does not advance the case in any way but is also clearly ultra petita.

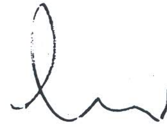
Joint liability, damages and interest
Grounds d, e and f.

18. In view of our conclusions above it is purely academic to consider consider the issues of joint liability, damages and interest. We do wish to point out however, that in delicts when multiple tortfeasors are involved and when it is difficult if not impossible to determine the extent of the personal liability of each, the case law, after some uncertainties, now favours the principle of liability in solidum. (See **Raynaud "La nature de l'obligation des coauteurs d'un dommage: Obligation in solidum ou solidarité", in Mélanges dédiés à J. Vincent, p 317 and s; M. J. Gebler, "Les obligations alternatives", Rev. Trim. Dr. Civ. 1969 p. 1 and s.).** The same principle has been extended by the courts in cases of *troubles de voisinage.*

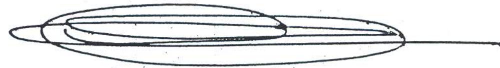
19. In terms of the ground of appeal relating to interest we accept submissions of Counsel for the Appellants that it is generally improper to order the payment of interest "from the date of the original plaint." It is obvious that damages have to be quantified before interest thereon can become payable. There are exceptions as in the case submitted by Counsel for the Respondents, namely Government of ***Seychelles v Ventigadoo (unreported SCA 28/2007). Ventigadoo*** can however be distinguished from this case as it concerned *dommages interets moratoires* and the delay in paying compensation was solely due to the fault of the defendant. That is not the case here.

20. For all the reasons above we allow this appeal. In view of both

the inordinate delays in this case not attributable to any of the parties and the important points of law it has raised we are of the view that each party should bear their own costs and so order.



M. Twomey
Justice of Appeal



I concur

F. MacGregor
President, Court of Appeal

I concur

A. Fernando
Justice of Appeal

Delivered at Victoria, Mahé, Seychelles this 31st day of August 2012.