IN THE COURT OF APPEAL OF SEYCHELLES

JOURDANNE GUY

APPELLANT

v

1. DIANA SEDGWICK

2. VIVIENNE BARALLON

RESPONDENTS

SCA 54 of 2011

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Counsel: Mr F. Elizabeth for the Appellant
Mr R. Rajasundaram for the Respondent

Date of hearing: 3rd April 2014
Date of judgment: 11th April 2014

JUDGMENT

TWOMEY, MATHILDA.,

[1]. The parties are sisters who jointly inherited the property comprised in title H1579 at Majoie, Mahé, from their late mother, Aline Sedgwick, who passed away in 1985. They were registered as co-owners of the property in the Land Register. Prior to her death, the deceased had mortgaged the property to Seychelles Housing Development Corporation, with the appellant and the 1st respondent acting as guarantors of the loan.

[2]. It is not disputed that the two guarantors repaid part of the mortgage: the 2nd respondent from 1981 until 1990 when she moved out of the house and the appellant from 1990 until 2002 when the loan was fully paid up. It is also not disputed that the 1st respondent did not contribute to the repayment of the mortgage having moved out of the family home in 1993.

[3]. The rest of the facts are disputed. On the one hand, the respondents contend that in May 2002, the appellant, who was then desirous of obtaining another loan from a commercial bank to clear the mortgage, approached them to transfer their shares into her sole name. The transfer of the property into her sole name would facilitate the granting of the loan. The agreement was that when that loan had been secured and paid off, the appellant would retransfer the property into all their joint names again. The respondents agreed to this and duly executed notarised transfer documents which were registered at the Land Registry.

[4]. On the other hand, it is the appellant's contention that the respondents agreed to transfer their shares in the property to her because they acknowledged and accepted that she had repaid the mortgage almost entirely by herself and that she had paid for the cost of maintaining the house and had also financed the building of an access road to the house.

[5]. It is not disputed that the consideration price of SR30, 000 to each respondent stated in the deeds of transfer was never paid by the appellant to either respondent. Subsequent to the transfers of her sisters' undivided shares in the property to her, the appellant emigrated from Seychelles in 2002 first to England and then to Australia and rented out the said house at Rs 4000 monthly. Subsequently, the respondents asked the appellant to retransfer the property into their joint names. This she refused to do and hence the resulting action by the respondents in the Supreme Court.

[6] The respondents prayed the Supreme Court to order the appellant to retransfer their respective shares in the property and to pay them a sum of Rs 71,666.67 being the value of their shares in the accrued rent from the property or alternatively to order the appellant to pay them a sum of SR 250,000 each, being the market value of their 2/3 share in the property.

[7]. The appellant raised an objection in *limine litis,* submitting that the respondents could not give oral evidence of a back letter against a notarial document. They relied on article 1321(4) of the Civil Code of Seychelles and the cases of *Ruddenklau v Botel (unreported)SCA 4/1995* and *Adonis v Larue (unreported) SCA 39/1999*. The trial judge Renaud J, reserved his ruling and gave his decision both on the plea in *limine litis* and on the merits after hearing all the evidence in the case.

[8]. Renaud J did not directly consider the rule in article 1321(4) but in his judgement stated:

> *"It is manifestly inappropriate for this Court to ignore a fundamental principle of contract simple because of the legally technical available safeguard that a party is absolutely prevented to challenge what is purported to be an authentic document. To do so will amount to a travesty of justice. On that same score, a Court cannot allow back letters to be read into a document the authenticity of which has been properly established."*

He then went to state that having considered the evidence adduced, he believed the respondents and was of the view that the appellant had convinced them to enter into a sham transfer of their respective shares for no consideration. He went on to find that

> *"…the issue of a "back-letter" cannot arise because there is no authentic binding agreement previously concluded by the parties."*

That was indeed an ingenuous way of getting around the vexing provisions contained in article 1321(4). We shall return to this judicial innovation later. In any event, he found for the respondents ordering that the appellant either pay them the sum of SR 250,000 each being their respective one third share of the property or alternatively to

retransfer the property into the joint names of the parties and to pay the respondents their share of the accrued rent proceeds from the property.

[9]. From this judgment, the appellant has now appealed on the following grounds:

1. The learned judge erred in law when he relied on a back-letter to negate a valid transfer of property.

2. The learned judge erred in law when he dismissed the appellant's plea in *limine litis.*

3. The learned judge erred in law when he failed to properly and adequately deal with the point of law raised by the appellant.

It is obvious from the reading of the grounds of appeal that grounds 2 and 3 are superfluous as the only issue really is the consideration of the back-letter which was raised in the plea in *limine litis.*

[10]. Back-letters are a problematic area of the law in Seychelles as is evidenced by a series of cases on the matter. It must be noted however that there is strong and unbroken line of precedent by the Court of Appeal on the issue *vide Ruddenklau v Botel (supra), Hoareau v Hoareau (unreported) SCA 38/1996 and Adonis v Larue (supra).* The court of Appeal decisions have also been followed by the Supreme court, more recently in the case of *Aarti Investments [Proprietary] Limited v Peter Padayachy and Anor (unreported) SC 5/2012 .*In order to review the law at issue it is necessary at this stage to bring the relevant legal provisions to light:

> *"*Article 1321*
>
> *1. Back letters shall only take effect as between the contracting parties; they shall not be relied upon as regards third parties.*
>
> *2. Where a third party has an interest in declaring null a contract affected by a back letter, he may apply to the Court to set aside the ostensible transaction.*
>
> *3. Back letters purporting to show that the real consideration for the sale or exchange of immovable property or commercial property or office is greater than the consideration set down in the deed of sale or exchange, or that a gift inter vivos of immovable property, commercial property or office is in reality a sale, exchange, mortgage, transfer or charge, shall be deemed to be fraudulent and shall in law be of no force or avail whatsoever.*
>
> *4. Any back letter or other deed, other than a back letter or deed as aforesaid, which purports to vary, amend or rescind any registered deed of or agreement for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange,*

mortgage, lease or charge of or on the immovable property to which it refers."(our emphasis)

Unusually for a provision in the Civil Code, article 1321 also has a footnote:

> *"* See section 82(6) of the Mortgage and Registration Act (Cap 134) in respect of Articles 1321 to 1324 and 1326 to 1327."*

[11]. The provisions referred to in the footnote are the following:

> *"82.(1) Any counter letter (contrelettre) or other deed sous seing privé which purports to show that the real consideration for the sale or exchange of an immovable property, fonds de commerce, or ministerial office is greater than the consideration set down in the deed of sale or exchange, or that a donation inter vivos of an immovable property, fonds de commerce or ministerial office is in reality a sale, exchange, mortgage, transfer, or charge, shall be deemed to be fraudulent and shall in law be of no force or avail whatsoever.*
>
> *(2)(a) Any counter letter or other deed other than a counter letter or deed as aforesaid which purports to vary, amend, or rescind any registered deed of or agreement (promesse) for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease, or charge on any immovable property is simulated (simulé) shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease, or charge of or on the immovable property to which it refers.*
>
> *(b) Any such counter letter or other deed which shall have been made prior to the twenty seventh day of April, 1948, hereinafter called the appointed day, and which shall not have been registered within the time prescribed in paragraph (a) of this subsection shall not be deemed to be invalid by reason alone of the same not having been registered, provided that it is registered not more than three months after the appointed day.*
>
> *(3) Any counter letter or deed as described in subsection (2) drawn up prior to the appointed day, the sole copy of which is in possession of the holder of such counter letter or deed who shall be absent or away from Seychelles at the appointed day, may be registered within three months after the return of the said holder to Seychelles on application to the Supreme Court in the manner provided in subsection (5).*
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> *(4) The Supreme Court may, on the grounds of ignorance of the law due to illiteracy, fraud of any party not being the holder, incapacity of the holder due to unsoundness of mind, or imprisonment of the holder at the appointed day, extend the maximum period within which a counter letter or other deed must be registered under this section for a further period not exceeding three months in the case of fraud, incapacity, unsoundness of mind or imprisonment at aforesaid, from the time of the discovery of the fraud or the*

termination of the incapacity or imprisonment and, in the case of ignorance of the law through illiteracy for such further period as the court may think reasonable under the circumstances.

(5) Application for registration under subsections (3) and (4) shall be by petition supported by affidavit and such other evidence as the court may require. Copies of the petition shall be served on the Attorney General, the Registrar of Deeds, and the party bound by the counter letter or other deed; a copy shall be posted in a conspicuous place in the premises of the Supreme Court, and notice of the petition shall be published in the Gazette not less than fifteen days before the hearing thereof. The costs shall in all cases be borne by the petitioner.

(6)Articles 1321, 1322, 1323, 1324, 1326 and 1327 of the Civil Code of Seychelles in so far as they relate to the transactions mentioned in subsections (2), (3) and (4) of this shall be read subject to this section.(our emphasis).

[12]. We cannot underscore enough the repercussions of these draconian measures especially as they supplant or at the least qualify other provisions of the Civil Code in relation to evidence and the validity of contracts in general. The Court in *Ruddenklau, Hoareau* and *Adonis* was very much aware of this, Ayoola, JA stating:

"Before this appeal is parted with, it is pertinent to observe that it is difficult to fathom what useful purpose article 1321 (4) which, as has been seen in this case, is capable of producing harsh and unexpected results, is designed to serve... The clear and unambiguous provisions of article 1321(4) are so sweeping that it will be a daring and unnecessary piece of judicial legislation to restrict the effect of the nullity they declare of back-letters which offend the provisions of article 1321(4) to third parties only while making them valid as between the parties."(Ruddenklau at P4).

[13]. Undoubtedly, the civil law regime we have inherited deems written evidence superior to oral evidence. In general, the preference by civil law for writing is not a formal requirement, but rather an evidentiary one. Written evidence is favoured over oral evidence because it is considered more reliable and truthful than the memory of witnesses. Hence, our Civil Code like other civilist countries contains the parole evidence rule which generally excludes oral evidence whenever a written document is involved. Article 1341 declares:

"Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.

The above is without prejudice to the rules prescribed in the laws relating to commerce."

However, equally important are the few exceptions against the parol evidence rule especially article 1347 which provides:

> *"The aforementioned rules shall not apply if there is writing providing initial proof.*
>
> *This term describes every writing which emanates from a person against whom the claim is made, or from a person whom he represents, and which renders the facts alleged likely."*

In this respect, the writing is one which emanates from the party sought to be bound and which indicates the existence of the agreement which is to be proved. Insofar as the present case is concerned, this exception could well have been availed of as the appellant in her 'statement of defence' admitted that she had not paid the consideration price as stated in the deed of sale. Further, jurisprudential rules would have also applied to except the provisions of article 1341 as the parties were sisters and there may have been a moral impossibility to reduce the simulated agreement between them in writing.

[14]. The difficulty however lies in reconciling Chloros' amendment to article 1321 with the provisions of articles 1341 and 1347. Back-letters or contre-lettres, as they are known in France, although more commonly in writing, can also be oral. (See Barry Nicholas, *The French Law of Contract* (2nd edn OUP 195) and also François Terré, Philippe Simler, Yves Lequette, *Droit Civil: Les Obligations* (10e edit para 541)). However, our law has to be distinguished from both that of France and Mauritius since in those jurisdictions only the provision of article 1321(1) exists. In both France and Mauritius the law gives effect to a properly evidenced back-letter at least between the parties. If that had been the sum total of the provisions in the Mortgage and Registration Act, there would have been no collision with the rest of the Code. Hence, third parties who would have had no notice of the simulated agreement would not have been affected by it. In any case those provisions are already contained in article 1165 (1) of the Code which states:

> *"contracts shall only have effect as between the contracting parties; they shall not bind third parties and they shall not benefit them…*

[15]. We have tried to research as far back as 1948 at the enactment of the Mortgage and Registration Ordinance to ascertain what mischief section 82 of the Act was trying to cure, but to no avail. Chloros therefore, faithfully reproduces section 82 in the provisions he added to article 1321 in 1975. He states that:

> *"The Code specifically declares null those back-letters which purport to vary a transaction involving immovable or commercial property. It also declares null any simulation of a registrable deed or agreement."*

He also states in the footnote that the provisions reproduce in effect the exception to the validity of back-letters enacted by the Mortgage and Registration Ordinance. In this context it is also important to note that section 82 (6) extraordinarily provides that article 1321 of the Code shall be read subject to section 82.

[16]. The addition of article 1321(4) to our Civil Code therefore, further limits the admissibility of oral evidence under article 1341 insofar as contracts relating to immoveable property are concerned. In the light of the above, we hold that the following legal propositions should follow: 1. Back-letters are admissible against agreements (subject to certain conditions) except where these agreements concern deeds relating to immoveable property. 2. In such cases, a back-letter cannot be proved by oral testimony as it is a formal and not an evidentiary requirement.
3. Written back-letters are only admissible where they have been registered within 6 months of the making of the deed or agreement relating to immoveable property. The above falls in line with what is decided in the case of *Hoareau v Hoareau* (supra): It is only where the requirement of writing is only evidential that beginning of proof in writing and oral evidence can be accepted in substitution of writing.

[17]. Both Counsel for the respondents, Mr. Rajasundaram and the learned trial judge Renaud J recognised the impossibility of circumventing article 1321(4) in contracts involving immoveable property. They have therefore tried to attack the authenticity of the deeds of transfer. Renaud J held that

> "*A document is deemed authentic when it is drawn up in due form and its contents are true, correct and reflecting the free will of the parties."*

In his view since the consideration price of SR 30,000 was never paid to either of the two respondents, the deeds of transfers contained matters that were false, thus vitiating the authenticity of the document. He then went on to find that as there was no authentic document, the simulated agreement was the only agreement and not a back-letter.

[18]. We are unable to agree with the learned judge given the provisions of article 1319 of the Civil Code which states:

> *"An authentic document shall be accepted as proof of the agreement which it contains between the contracting parties and their heirs or assigns.*
>
> *Nevertheless, such document shall only have the effect of raising a legal presumption of proof which may be rebutted by evidence to the contrary. Evidence in rebuttal, whether incidental to legal proceedings or not, shall entitle the Court to suspend provisionally the execution of the document and to make such order in respect of it as it considers appropriate."*

Hence, although Renaud J was correct in assuming that the deeds of transfer only raised a presumption of proof as to the contents of the agreement it contained, he was wrong to admit evidence against it. The legal presumption of proof referred to, lays a burden on the party who impugns the document to prove its falsity. Such proof is subject to rules of evidence as contained in the provisions of the Code. These provisions included those relating to back-letters which the learned judge relied on to challenge the authentic document. The rebutting evidence he relies on, therefore, runs awry the provisions of article 1321(4) and cannot be sustained. In these circumstances the authentic document continues to have validity and full effect.

[19]. The learned trial judge decision also implies that as there was no consideration for the transfer of the respondents shares in the property to the appellant the agreement was null and void. That is also an erroneous assumption. There was a consideration price for the transfer but that was not consideration for the transfer within the meaning of consideration in our Code. For *consideration* here, I do not read the English meaning of consideration into our law of contract but rather the French meaning of *object* or *cause* as being one of the conditions for the validity of an agreement under article 1108 of the Civil Code. The object of the agreement between the parties was not the payment of money but rather to allow the appellant to obtain a loan. As rightly pointed out by Counsel for the appellant, Mr. Elizabeth, one may well state a consideration price in a land transfer without either party wanting it paid. It is inserted in some cases mainly for the purposes of calculating stamp duty. It does not nullify the transfer. The absence of consideration for the transfer is therefore misconceived.

[20]. We have also been invited to construe the wording of article 1321(4) to mean only *written* back letters which then would give full force to article 1341 and make admissible oral back letters (subject to the normal rules of evidence) against registered agreements relating to immoveable property. Whilst this argument is most tempting and would do justice in this and other cases- especially where the parties agree that the authentic document simulated the real intention of the parties- we cannot construe legislation to defeat its purpose. The simple reason for our view is that a plain reading of article 1321(4) does not invite a differentiation between written and oral back letters. If we were to adopt the mischief rule in statutory interpretation we would then run the risk of creating another mischief- that of elevating oral evidence over and above written evidence which is certainly anathema to the civilist tradition. It also would not make logical sense to allow oral evidence to be admissible against a registered deed when written evidence is itself inadmissible.

[21]. We therefore have to accede to this appeal. We not only have to do justice but have to do justice according to the law. We reiterate the views of Ayoola J in *Ruddenklau (supra)* that it would indeed be "*a daring and unnecessary piece of judicial legislation to restrict the effect of … article 1321(4)."* While a certain amount of judicial activism is necessary in some cases, we cannot ignore the very letter of the law. As we have earlier pointed out, there is also very strong line of judicial precedent on this issue and although it would be permissible to depart from it, in order to do so we would need to be convinced that the precedents cause injustice in a public law matter. We cannot be so convinced as it is clearly a matter of public policy that authentic and registered documents voluntarily and duly signed by parties and notarised must be respected and honoured.

[22]. Considering the problems that this aspect of the law has caused as is evident from judicial decisions, we can only refer this matter to the Committee presently undertaking the review of the Civil Code and ultimately the Legislature to amend the law if they so wish so as to temper the worst injustices caused by article 1321(4). We can only at this juncture urge the appellant to do what is morally just in this case. Her two sisters have been deprived of their inheritance both in-kind and in cash. It would be just and proper for her to give them their fair share of their mother's estate.

[23] For the reasons stated we therefore grant this appeal with costs.

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M TWOMEY **F. MACGREGOR** **S. DOMAH**

JUSTICE OF APPEAL **PRESIDENT** **JUSTICE OF APPEAL**

Dated this 11th April 2014, Ile du Port, Mahé, Seychelles.