

**IN THE COURT OF APPEAL OF SEYCHELLES**

**1. MAUREEN UGO SALA**

**2. UMBERTO UGO SALA**

**APPELLANTS**

**V**

**1. SIR GEORGES ESTATE (PROPRIETARY) LTD**

**2. ATTORNEY-GENERAL**

**RESPONDENTS**

**SCA 19 of 2012**

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Counsel:      Mr Basil Hoareau for the Appellants  
                 Mr Bernard Georges for 1<sup>st</sup> Respondent  
                 Mr Vipin Benjamin for the 2<sup>nd</sup> Respondent

**JUDGMENT**

**DOMAH, S.,**

[1] Maureen Ugo Sala and Umberto Ugo Sala live at Cote d'Or, Praslin, on plot PR2464 of Sir Georges Estate (Proprietary) Ltd ("the estate"), which plot they had purchased on 7 October 1998 as one of the 26 other plots for the sum of SR170,000. The conditions that were attached to their purchase, as approved by the Planning Authority, were that they will use the plot for residential purpose only. As such, they had agreed: that they will not build more than one residential house on the said parcel; nor would they sub-divide the parcel for sale or for any other purpose; that, if minded to use the plot for any particular commercial purpose, they would seek the express written permission from the transferor on the understanding that, on no account, permission will be given for the selling of any drink, alcohol or otherwise food-stuff provision; that the houses should be mainly built of stone or brick or cement and shall be of a ground floor, having no storey or upper floor; that they will erect an enclosing fence of such height, material and colour as may be approved by the transferor.

[2] On 20 September, Maureen Ugo Sala sought authority from the estate to use their parcel PR2464 to run a small hotel. Mr Armand Souyave, on behalf of the estate, declined the permission. They made other attempts which equally failed. Believing that further application for permission would be met with similar failures, they seized the Constitutional Court for a declaration that the conditions imposed were in breach of their right to peacefully enjoy and dispose of their property as protected by Article 26 of the Constitution. Basically, they sought a right to be permitted to open a small hotel establishment on parcel PR2464 in the exercise of their constitutional right to own and enjoy the property they had bought.

[3] In a unanimous judgment, delivered by Burhan, J, with whom the learned Chief Justice and Gaswaga J agreed, the Constitutional Court decided: (a) that the limitations and the restrictions were duly prescribed by law: namely, section 53 of the Land Registration Act and Article 537 *alinéa* 2 of the Civil Code of Seychelles which makes provision for restrictive covenants in the context of contiguous tenements; (b) that the restrictive agreements and restrictive covenants in this case were necessary in the public interest; (c) that the agreement was one that was lawfully entered between private parties under articles 1134 and 1135 of the Seychelles Civil Code and did not involve constitutional issues for the purpose of obtaining constitutional remedies as such; and (d) that parcel PR2464, on the facts and circumstances, could not be dissociated from the other parcels on account of the mutual burdens and benefits attached to each.

[4] Aggrieved by the decision of the Constitutional Court, the appellants have appealed to this Court putting up the following grounds of appeal:

- (i) *The learned judges erred in law in holding that the limitations and restriction, contained in the transfer document dated the 7<sup>th</sup> of October 2008, are limitations prescribed under Section 53 of the Land Registrations Act and/or Article 573.2 of Civil Code.*
- (ii) *The learned trial judges erred in law in holding that Section 53 of the Land Registration Act and/or Article 537.2 of the Civil code satisfy the requirements of “prescribed by law”, as stated in Article 26 (2) of the constitutions, in that the provision of the said Section and/or Article are adequately accessible, precise enough to enable a citizen to regulate his conduct if he desires so in a land transaction and enable him to foresee the consequences of such restrictions.*
- (iii) *The learned trial judges erred in law in holding that the limitation and restrictions, contained in the transfer document of the 7<sup>th</sup> of October 2008, were necessary in a democratic society in the public interest and*

*therefore the restrictions fall within the permitted derogation set out in Article 26(2)(a) of the Constitution.*

- (iv) *The learned trial judges erred in law in considering the property of the Appellants in terms of Articles 26(1) of the Constitution as being the parcel of land together with the limitations and restrictions instead of considering the property as being solely the parcel of land.*

**[5]** The appellants are, accordingly, seeking before us an order to quash the decision of the Constitutional Court, on the above grounds, and to:

- (i) *Declare that Article 26 of the Constitution , more specifically the right to peacefully enjoy and/or dispose their property, name parcel PR2464, has been contravened in relation to the Appellants in their capacities as the co-owners of parcel S2464, by the conditions and limitations set out and paragraphs 3(i) to (iv) above and at paragraphs (a)(b) and (i) of the transfer document, of the 7<sup>th</sup> of October 1998;*
- (ii) *Declare that Article 26 of the Constitution, more specifically, the right to peacefully enjoy and/or dispose of their property, namely parcel PR 2464, is likely to be contravened in relation to the Appellants in their capacities as the co-owners of parcel S2464 by the conditions and limitations set out and paragraphs 3(i) to (iv) above and at paragraphs (a)(b) and (i) of the transfer document, of transfer document, of the 7<sup>th</sup> of October 1998;*
- (iii) *Declare that Article 26 of the Constitution more specifically the right to peacefully enjoy and/or dispose of their property, namely parcel PR2464, in their capacities as the co-owners of parcel PR2464 has been contravened in relation to the Appellants by Section 53 of the Land Registration Act;*
- (iv) *Declare that Article 26 of the Constitution, more specifically the right to peacefully enjoy and/or dispose of their property, namely parcel PR2464, is likely to be contravened in relation to the Appellants by Section 53 of the Land Registration Act;*
- (v) *Declare that section 53 of the Land Registration Act is void; and/or*
- (vi) *Make any such declaration or orders, issue such writ and give such directions as may be appropriate for the purpose of enforcing or securing the enforcement of the right of the Appellants under Article 26 of the constitution and disposing of all the issues relating to the Petition.*

**[6]** At the hearing of this appeal, we commended all three counsel, for their legal and jurisprudential contributions in this case, each to his degree of need. While not underrating the presentation of Mr Basil Hoareau and Mr Vipin Bejamin, we make special mention of the material placed before us by Mr Bernard Georges.

**[7]** Learned counsel for the appellants subsumed grounds 1 and 2 for the purposes of his argument, we consider that it would be more apt for us to deal with this appeal in the order in which the grounds have been raised above.

**GROUND 1**

[8] Under Ground 1, the appellants argue that the learned judges erred in law in holding that the limitations and restrictions, contained in the transfer document dated the 7<sup>th</sup> of October 2008, are limitations prescribed under Section 53 of the Land Registrations Act and/or Article 573 *alinéa* 2 of Civil Code.

[9] Mr Bernard Georges, in his address to us, submitted, with respect to article 537 *alinéa* 2, that it behoved him to point out that when the Constitutional Court in its reasoning decided that the legal basis for restrictive covenants in the law of Seychelles is Article 573 *alinéa* 2 of Civil Code, that was incorrect. For this, he assumed responsibility on account of his own submission to that effect before the Constitutional Court.

[10] We have gone through the two texts of the law in question. Our view of the matter is that both article 537 *alinéa* 2 of the Seychelles Civil Code and section 53 of the Land Registration Act provide for restrictive covenants in our law but on the basis of a generous interpretation attributed to a restrictive covenant.

[11] On the other hand, if we are to attribute a strict meaning to it in the sense of *servitude* as obtains in French law, then learned counsel may be correct. For the restrictive covenant in the Civil Code is one that is personal to the owners of the servient and dominant tenements whereas the restrictive covenant which section 53 of the Land Registration Act speaks about is that which, once duly registered, becomes binding on successors in title to both the owners of the respective tenements. With a generous meaning given to restrictive covenant not confined to *servitude*, neither the Constitutional Court nor Mr Bernard Georges in his original submission would be incorrect. To the extent that both texts speak in terms of restrictive agreement rather than restrictive covenant or *servitude*, we are more inclined to say that the generous interpretation should be preferred. The law with respect to restrictive agreements, as rightly decided, by the Constitutional Court is found in our Civil Code coupled with section 53 of the Land Registration Act. The argument that these laws do not prescribe but they provide is a quarrel on semantics and not in law.

[12] Ground 1, for that reason, fails. With this, we may come to Ground 2.

## GROUND 2

[13] Under Ground 2, the appellants argue that neither section 53 of the Land Registration Act (“the Act”) nor Article 537 *alinéa* 2 of the Civil code satisfies the requirements of “prescribed by law”, as stated in Article 26 (2) of the Constitution, in that the provision of the said Section and/or Article are not adequately accessible, precise enough to enable a citizen to regulate his conduct if he desires and enable him to foresee the consequences of such restrictions.

[14] Further to what we have stated above in respect of the issue of the word “prescribed,” we understand his argument under this Ground to be that while the section 53 of the Act is vague and imprecise as to its meaning of restrictive covenant, the limitations with respect to the property in question, in this case, for its part is not contained in a publicly accessible document but in a private document between two private parties.

[15] To be prescribed by law, in the submission of Mr Basil Hoareau, the law should be not only accessible but also clear. He cited the case of **Silver and Others v. United Kingdom A.61 1983 at pp. 32-33**, according to which, for a law to be accepted as having been prescribed –

*“the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances, of the legal rules applicable to a given case.”*

[16] He further cited the decision as holding that “a norm cannot be regarded as “law” unless it is formulated with such precision to enable the citizen to regulate his conduct: he must be able if need be with appropriate advice to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

[17] We find the argument ingenuous. Section 53 of Land Registration Act is a public document like any other law passed by the legislature. It reads:

*“1. Where the proprietor or transferee of a land or of a lease agrees to restrict the building on or the user or other enjoyment of his land, whether for the benefit of the other land or not, he shall execute an instrument to that effect (hereinafter referred to as a restrictive agreement), and upon presentation such restrictive*

*agreement shall be noted in the encumbrances section of the register of the land or lease burdened thereby, and the instrument shall be filed.*

*2. Subject to its being noted in the register, a restrictive agreement shall be binding on the proprietor of the land or lease burdened by it and, unless the instrument otherwise provides, it shall be binding on his successors in title.*

*3. Where a restrictive agreement has been entered into for the benefit of land, the proprietor of such land and his successors in title shall be entitled to the benefit of it, unless the instrument otherwise provides.*

*4. The provisions of this section shall apply to all restrictive agreements entered into with the Government or the Republic or any statutory body whether or not any land will benefit from such agreement."*

[18] A restrictive covenant is a technical term defined in law. When section 53 of the Act speaks of a restrictive agreement, it further ensures that there is no mischief of the ignorance of its content. It is by consensual arrangement and parties involved are fully in the know of what they have agreed upon and have not agreed upon. Further, section 53 not only recognizes the freedom to contract in the matter but also to give it publicity, by registration for the purposes of its binding character to holders in due course.

[19] It is trite law that the registration of a private document in the public registry constitutes notice to the world at large. Further, a restrictive agreement of the type we are concerned with, does not come about except by up-front official sanction under the law.

[20] We are here dealing with two complementary laws: an enabling law and an enabled law. Section 53 of the Land Registration Act is the enabling law which makes it possible for the private parties subject to official approval and registration to set the conditions. The publicized and registered agreement is as clear as clear can be and formulated with such precision as to enable the parcel owners to regulate their conduct and foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The agreement requires them to seek permission before they put their plot to commercial use. The applicable legal prohibition could not be more precise.

[21] The test in whether any law is precise is not to examine the enabling law but the text of the applicable enabled law which comprises the prohibition. The prohibition was

contained in a private agreement entered into between citizens exercising in complete freedom their right to enter into a contract under the civil code in an association comprising 27 other buyers. This contract is not a secret pact of a criminal syndicate. It was submitted to the relevant public Authorities for approval and operates in an open system of government under the official and public eye. The appellants cannot be heard to say that what they have contracted to do and not to do is private, vague and imprecise. Cats and dogs are allowed but not pigs or hens or cattle; the parcel should be enjoyed in clean and salubrious condition; life within the estate should be free from the nuisance of noise, sound or smell; the plots should be enjoyed as a residential haven and foreign commercial elements should not encroach on its peace and quiet; none the less, any intended commercial use should require the permission of the Transferor. “*Plus claire que ça, tu meurs.*”

[22] We accordingly find no merit under Ground 2 either.

### GROUND 3

[23] Mr Basil Hoareau’s argument under Ground 3 is that the learned trial judges erred in law in holding that the limitations and restrictions, contained in the transfer document of the 7th of October 2008, were necessary in a democratic society and/or in the public interest for them to fall within the derogation permitted in Article 26(2)(a) of the Constitution.

[24] To his credit, Mr Basil Hoareau agreed with the proposition of law that when the constitutional right to property is not absolute, despite the wording in the Civil Code which so suggests. Indeed, we have moved away from the concept of right to property in the absolute sense. The Civil Code starts from the principle that ownership is the right to use and dispose of things in the most absolute sense but it ends up qualifying the absoluteness by a proviso that it should not be used in a way prohibited by laws and regulations. The Civil Code itself is full of instances where absolute ownership in land is eroded by various other rights which it defines as servitudes, easements, mortgages, encumbrances, rights to water flow, rights in matrimonial régimes and succession etc. These may exist either by operation of law or by agreement.

[25] As commented upon by **Yvaine Buffelan-Lanore, Collection Droit – Sciences Economiques, Droit civil, Première Année, 7ème ed.**, the absolutist concept of the right to dispose of property is the classical concept of property law, which has undergone an evolution which is evident, on the one hand, an appreciated value given to movable property and, on the other, restrictions attached to immovable property. At para. 757, we read:

*“... cette conception absolutiste du Code Civil ... constitue la conception classique du droit de propriété, mais il a depuis subi une évolution qui va se manifester, d'une part, par une valorisation de la propriété mobilière et, d'autre part, par un accroissement des restrictions apportées au droit de propriété immobilière.”*

[26] Learned counsel's next argument is that, granted that the right to property is not absolute, any restriction or derogation imposed, should satisfy the constitutional condition that it is necessary in a democratic society or in the public interest. In his submission, a restriction to prevent a citizen from opening a commercial unit is neither necessary nor in the public interest in a democratic society. He referred to the Indian case of **K.K. Kochuni v. State of Madras, IIR 1960 SC 1080** and the decision of the European Court of Human Rights of **James and Others, A.81 (1986) p. 30** to argue that “a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be “in the public interest.”

[27] We have no quarrel with such a proposition as the above, as rightly conceded by Mr Vipin Benjamin. But that proposition does not apply in law and on the facts in this case.

[28] In law, we have stated that The Land Registration Act as well as the Code provide for the existence of restrictive agreements. The Constitution not only provides for the freedom to acquire, enjoy and dispose of property but also for the freedom of association. The estate is the outcome of an association agreement freely entered into between the individuals in a group. The group agreement provides that *“the Transferee or his agent or the occupier of the plot sold shall keep, use and enjoy the said plot in a clean and sanitary condition and shall not cause or allow to be caused any noise, sound*



*or smell of any kind to emanate therefrom so as not to be a nuisance to owners or occupiers of the adjoining or neighbouring plots of the Estate.” As such, it does not derogate from any provision of the Constitution when section 26(1) enshrines the principle that every citizen has “the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.”*

[29] On the facts, the appellants bought a plot of land with a bundle of benefits and burdens. The benefits were that: plot owners were to enjoy the peace and quiet of a purely residential environment; still, if any residential owner was minded to start a commercial activity, he could do so but with the authorization of the administrator; in this case, the appellants sought permission to open a hotel at the place which the administrator refused. We note that one of the conditions under which the estate owners had bought the property was that on no account shall permission be granted for selling any drink, alcohol or otherwise or foodstuff or provision.

[30] The prohibition of putting the residential plot to commercial use is qualified in the sense that it should integrate with the residential character of the estate. A hotel establishment is *prima facie* inimical to the character. The agreement does provide that any plot owner may bring an action against the estate for breach of the conditions of the agreement. If we were to allow appellants to have their way, we would be exposing the estate to a spate of civil actions for breach of the conditions of the contract. It is neither democratic nor in the public interest that a Court should allow itself to sanction breaches of the law and anarchical tendencies.

[31] Having so decided, we have to sound a note of caution. The decision of the constitutional court should not be interpreted to mean that contractual relationships between a citizen and another citizen can never generate constitutional issues. Depending upon special facts, they may. It is comforting, in this sense, to note that the Constitution of the Republic of Seychelles embodies enhanced ideas of what a democracy is. These ideas are not to remain dead letters on the shelf of libraries but translated into reality in the life of the people. The idea of democracy in our Constitution is not confined solely to the relationship between citizen and the state but extends to the relationship between citizens and citizens insofar as they exercise power over other citizens under any law. Very few Constitutions, to our knowledge, go as far as that.

[32] Not only Constitutional Authorities, institutions, officials in their relationship with the citizen but also citizens in their relationship with citizens are bound by the constitutional provisions. To the extent that they are exercising power under any law, they must exercise it democratically and not autocratically. The Constitution makes no difference between whether power is exercised by the State, a State agent or a citizen over another citizen. The source of the power is irrelevant. So long as it is power which one citizen exercises over another, its exercise should be democratic and not otherwise. This is what in her judgment Twomey J refers to as the horizontal application of Constitutional principles as particularly enshrined in the Constitution of Seychelles.

[33] Article 40 which binds every citizen of this country to uphold the Constitution. It reads:

*“It shall be the duty of every citizen of Seychelles -*

- (a) to uphold and defend this Constitution and the law;*
- (b) to further the national interest and to foster national unity;*
- (c) to work conscientiously in a chosen profession, occupation or trade;*
- (d) to contribute towards the well-being of the community;*
- (e) to protect, preserve and improve the environment; and*
- (f) generally, to strive towards the fulfillment of the aspirations contained in the Preamble of this Constitution.”*

[34] It is our view that this concept so preciously born ahead of its time should not be allowed to blossom unseen and lose its fragrance in the desert air, as the saying goes.

[35] We have looked at the case of the appellant from this point of view. We are satisfied that there is no unconstitutionality in the private agreement as entered into by the parties. It is justified in law and on the facts.

[36] In law, the right conferred by section 26 is a right *to acquire, own, peacefully enjoy and dispose of property either individually or in association with others* . Section 26 of the Constitution of the Republic of Seychelles reads:

*“26. (1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.*

*(2) The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society-*

*(a) in the public interest;*

*(b) ...”*

[37] The appellants and the co-owners in the residential plots have done and are doing exactly what the Article 26 provides that they should do. The appellants are not prevented from moving elsewhere to start a hotel establishment. They are being simply called upon to simply abide by the law under the Constitution.

Ground 3 fails.

#### **GROUND 4**

[38] Under ground 4, it is the case of the appellants that the learned trial judges erred in law in considering the property of the Appellants in terms of Article 26(1) of the Constitution as being the parcel of land together with the limitations and restrictions instead of considering the property as being solely the parcel of land.

[39] The short answer to this is that the appellants did not buy a plot of land on its own. They bought a parcel of land in an estate comprising 27 parcels each of which is necessarily linked to the other to form a residential estate. The parcel does not exist independently nor was it acquired independently of the others as per contract. It was one of the 27 other plots where each plot shares with the others mutual benefits and burdens all representing a particular residential life style offered, sold and bought as a residential developmental product in an open market. The product exudes particular aesthetic, environmental, architectural, infrastructural features proper to itself. No purchaser in the estate can now come up and say that even if all the plots are equal, his is more equal than the others so that he has a right to use it differently and end up by changing the

very character of the estate which is clearly stated to be “for residential purpose only.” PR2464 does not prevent the appellants from starting a hotel establishment elsewhere. It only binds them not to start one without permission which is itself designed to prevent a spate of litigation under the contract and anarchy from setting in at the place.

[40] Residential estates are developmental projects dealt with by the partnership of the private sector and the public sector subject to market forces and market trends. Only recently known in developing economies, they have existed since the middle of the nineteenth century. They have been accepted as valid by the Courts. One may refer to the cases in France from which our law originates. As early as the late nineteenth century, in the case of **Compagnie du Phoenix v. Ravel [1849] S. Jur. II. 593**, the Appellate Court of Orléans upheld a restrictive covenant not to build. Likewise, the Court of Appeal of Dijon, in the case of **Chevalier v. Dijon [1843] S. Jur. II. 496**, upheld one on height limitations. Furthermore, in the case of **Lebbe v. Pelseneer [1965] J. Trib. 87**, the Court of Appeal of Brussels gave judicial approval to setback limitations between constructions. A property development project restricting use of plots to residences only known on the Continent as *habitation bourgeoise* has been upheld in the courts in other jurisdictions: see **Weill v. Fenaille [1938] D.P.I. 65; [1937] S. Jur. I. 161 (Cass. Civ. 1936)**; and the article **The Enforcement of Restrictive Covenants in France and Belgium: Judicial Discretion and Urban Planning**, Paul McCarthy, *Columbia Law Review*, Vol. 73, No. 1 pp. 6.

[41] The estate did not force the appellants to buy plot PR2464 on 7 October 1996. When the buyers did so, they all entered in a standard contract to abide by the conditions and in case of changes to go to an Administrator of the estate for the purpose. They lived happily for up to 2004 when they came across the brilliant idea that they should put their plot to a commercial use of opening a hotel establishment there. The Administrator refused. We think he did so rightly. The conditions imposed do not take away the fundamental rights of the appellants to enjoy the property as residential plot. In fact, in the *habitation bourgeoise* comprising the estate, both the servient tenements and the dominant tenements owe – and have owed - obligations to one another: see **Suyée v. Strauwen [1930] Pas. Belge.I.193 (Cass. 1er)**; cf **Cristofolo v. Guyot [1965] Bull. Civ. I. 137 (Cass. Civ. 1er)**. In a democratic society, the rights of one citizen stops where the right of the other begins.

[42] On the issue of restrictive covenants and public interest, we cannot do better than cite the comment of the learned jurist of the article cited above. At page 26, he states:

*“At the time of the French Revolution, it was assumed that the absolute right to use one’s property as one wished was required by the public interest; servitudes were therefore viewed in a hostile manner. In the course of the Nineteenth Century, this view changed, and the public interest required recognition of covenants as servitudes to provide an effective counterweight to the absolute right of property. This shift in property was a response to the need for an effective control of the use of land in an increasingly urban society, and covenants were utilized as land planning devices by French and Belgian cities, as well as private developers, into the present century. Even the absolute right to specific enforcement of covenants could be justified, at least in part, on public policy grounds as the only effective means of maintaining the common scheme of a subdivision, a goal that was generally seen to be in the public interest.”*

[43] As has been rightly pointed out by the learned judges, PR2464 cannot exist independently of the rest of the 26 plots. They rightly decide that had the appellants “purchased the land PR2464 with no conditions attached and subsequently an attempt was made to impose the said conditions then no doubt the petitioners’ right to enjoy the parcel of land PR2464 and the conditions to be imposed could be considered separately but not otherwise. As the learned author of the article above-cited comments:

*“... each subdivision resident was entitled to enforce a restriction imposed at the time the land was sub-divided, so long as the original parties intended the covenant to be for the benefit of each parcel of land in the sub-division.” Paul McCarthy, ibid. pp. 9.*

[44] The estate, in its present state, is designed to preserve and enhance the quality of life and the well-being of the persons concerned in a safe and secure environment away from the noise and din of unguarded industrialization for which society continues to pay its price and will continue to do so for a while. The duty of engaging in trade, as imposed by the Constitution is qualified in that it should be conscientious. On the other hand, the duty imposed to contribute towards the well-being of the community and to protect, preserve and improve the environment and generally, to strive towards the fulfillment of the aspirations contained in the Preamble of this Constitution is unqualified.

We find no merit in Ground 4.

[45] All the grounds having failed, we dismiss the appeal with costs.

.....  
**S.B. DOMAH**  
**PRESIDENT**

.....  
**M. TWOMEY**  
**JUSTICE OF APPEAL**

.....  
**J. MSOFFE**  
**JUSTICE OF APPEAL**

*Dated this 11<sup>th</sup> April 2014, Ile du Port, Seychelles.*

## IN THE COURT OF APPEAL OF SEYCHELLES

1. MAUREEN UGO SALA  
2. UMBERTO UGO SALA

APPELLANTS

V

1. SIR GEORGES ESTATE (PROPRIETARY) LTD  
2. THE ATTORNEY GENERAL

### RESPONDENTS

**SCA 19 of 2011**

=====

Counsel:     Mr B. Hoareau for the Appellants  
                  Mr B. Georges for the 1<sup>st</sup> Respondent  
                  Mr. Vipin Benjamin for the 2<sup>nd</sup> Respondent

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

### JUDGMENT

**TWOMEY, MATHILDA.,**

I have read my learned brother Domah's judgment with which I entirely agree. However as this is the first case where there has been a petition for the horizontal application of a constitutional right, I feel that I should add the following: While challenges in relation to breaches of Charter rights since the promulgation of the Constitution in 1993 have been numerous and have demonstrated the clear vertical application of rights, there have been no actions between private individuals or between private individuals and companies establishing the horizontal application of such rights.

The question that arises is whether the Seychellois Constitution permits the enforcement of such rights. Some Constitutions, for example, section 8(2) of the South African Constitution states clearly that : "[a] provision of the Bill of Rights binds a natural or a juristic person..." while Article 1 (3) of the German Constitution provides that "basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law and Article 12 of the Indian Constitution limits the horizontal application of some fundamental rights as it specifically provides that some of these rights can only be invoked against the State. The Under Article 126 of the 1978 Constitution the fundamental rights jurisdiction of the Supreme court is limited to the determination of questions relating to the infringement or imminent infringement of fundamental rights by

executive or administrative action. No such provision is present in our constitution. Article 46 (1) simply states that:

“A person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may subject to this article, apply to the Constitutional Court for redress.”

This provision, in our view, clearly indicates that any power a person or body may wish to exercise in private law is subject to the Constitution.

The present case which concerns a breach of the right to enjoy property does indicate that parties are willing to challenge constitutional breaches even between individuals or, as in this case, between a private individual and a company. The imposition of duties on all Seychellois citizens in the Constitution also underscores the horizontal dimension of duties towards each other. These fundamental duties are contained in Article 40 of our Constitution which states:

*“ It shall be the duty of every citizen of Seychelles -*

- (a) to uphold and defend this Constitution and the law;*
- (b) to further the national interest and to foster national unity;*
- (c) to work conscientiously in a chosen profession, occupation or trade;*
- (d) to contribute towards the well-being of the community;*
- (e) to protect, preserve and improve the environment; and*
- (f) generally, to strive towards the fulfillment of the aspirations contained in the Preamble of this Constitution.”*

It continues to be a moot point whether such duties are enforceable. However the present case concerns fundamental constitutional rights and focuses on the balance that must be struck between ensuring the protection of contractual freedom and the protection of fundamental rights. Hence the Court is asked to trespass into the domain of private law, indeed within the realm of the privity of contract to enforce a constitutional right.

It is the limits of this interference by the Court that now concern us. In our view the proper approach should be one based on the concept of positive obligations i.e. where all state organs have a duty to protect fundamental human rights. In this perspective, the application of fundamental human rights in civil proceedings is not strictly viewed as the horizontal effect between private parties but rather as the vertical effect which applies to the exercise of all state powers, including courts adjudicating in civil proceedings. (See C. Busch, *Fundamental Rights and Private Law in the EU Member States* in C. Busch & H. Schulte-Nölke (eds), *EU Compendium Fundamental Rights and Private Law. A Comparative Casebook* (Munich: Sellier 2010) 18-19).

As far as the Seychellois Charter of Fundamental Human Rights and Freedoms is concerned, its main purpose is to protect individual freedoms and insofar as the law of contract is concerned to enable parties to enter into agreements voluntarily so as to



satisfy their needs or wishes. The binding nature of a contract is a value that should be respected. In that sense there should only be 'light touch' review and the Court should only interfere exceptionally, for example where there is excessive inequality of bargaining power. Any other type of intervention would mean that the State would be called in as arbiter in all relations between private parties.

Applying these principles to this case, it is clear that the parties validly consented to enter into the contract for the transfer of property with the restrictive covenant provisions clearly laid out in the deed of transfer. There is absolutely no evidence that either party was coerced, unduly influenced or was in a position of economic imbalance when entering into this agreement. The Appellants are not challenging the authenticity of the official document. All the grounds of appeal are untenable given that it cannot be demonstrated that the terms of the restrictive covenant in the transfer document do not fall within the normal legal requirements of the exercise of property rights in a democratic society.

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**M. TWOMEY**  
**JUSTICE OF APPEAL**