IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A), M. Twomey (J.A) J. Msoffe (J.A).

Civil Appeal SCA22/2013

(Appeal from Supreme Court Decision15/2008)

Wellington Felix	1st Appellant
Tahiri Felix	2nd Appellant

Versus

Allen Jean	1st Respondent
Julita Jean	2nd Respondent

Heard: 11 December 2015

Counsel: Serge Rouillon for Appellants

Clifford André for Respondents

Delivered: 17 December 2015

JUDGMENT

M. Twomey (J.A)

[1] This was a simple case of the application of Article 555 and the provisions relating to leases and hire in Chapter II of Title VIII of the Civil Code of Seychelles but for reasons best known to themselves the parties in this case spent nearly five years together with the trial judge in exploring legal options which had no application to this case or to this jurisdiction.

[2] The learned trial judge wrote a long essay on the necessity of importing a concept of administrative law, that of legitimate expectation, not only to contracts internationally but also into the contract law of Seychelles. It was unwise, unresearched and unnecessary. Yet so much ink need not have been spilled. The answer to the issues raised in the present case was

staring everyone in the face and it should have been obvious had the provisions of the Civil Code been read. It is hoped that in future this simple exercise may be followed by all concerned.

[3] The facts of this case are that in September 2004 the Appellants concluded a written lease agreement with the Respondents whereby a property belonging to the Appellants which had previously housed a supermarket was leased for the purpose of its conversion and operation by the Respondents for a take-away business and a restaurant. The period of the lease was three years renewable "every three years on terms to be mutually agreed upon by the parties."

[4] In the end it took a year for the conversion of the premises by the Respondents. They averred in their plaint that "half of the lease period have been consumed in the process of renovation and modification" (sic) and that there had been an understanding between them and the Appellants that they would be granted a long lease to safeguard their investment.

[5] They averred that the Appellants gave them notice three months before the expiry of the lease agreement that the lease would be renewed but on "draconian terms and conditions" and subsequently sold the property over their heads after the Respondents had themselves made an offer to purchase the same. The Respondents claimed the sum of SR 234,520.00 for the works they had undertaken on the premises and SR 30,000 for moral damages.

[6] The Appellants in their statement of defence and counterclaim averred that the new lease offered to the Respondents on the new terms and conditions were not accepted. They stated that the property was offered for sale to the Respondents even on payment by instalments which they did not accept. The Appellants further stated that they could not be held liable for losses incurred by the Plaintiffs miscalculation and lack of business sense in entering into a contract which they had freely negotiated. They claimed rent due for one year that had remained unpaid and moral damages.

[7] The hearing was delayed several times by both parties for reasons that we as appeal judges find unacceptable. We also sound a caution against excessive questioning by trial judges as the learned judge did in this case. While the court can put questions to a witness, it is not proper for a judge to advise Counsel how to advise their clients and to suggest what should

be done morally or legally as was the case in this particular matter. The questions put to the Appellants by the judge in this case extend to a number of pages on different occasions. This is inappropriate in our adversarial legal system. In the end it led to the Appellants alleging bias by the learned judge as will be seen in the grounds of appeal. And yet it could all have been kept very simple. Courts are referred, in this regard to Article 19 (7) of the Constitution which guarantees that for the determination of the civil rights of parties, courts should be impartial and independent. That need should be both in fact and perception.

[8] In a decision given on 26th October 2011, the learned trial judge found that the Respondents had made out their case on the grounds of a legitimate expectation that the Respondent would be granted a further lease after three years. He granted them everything they had claimed and entered judgment in the sum of SR264, 520.

[9] The appellants have appealed this decision on no less than eighteen grounds which we shall not reiterate but simply summarise as follows:

1.The learned judge relied on concepts that are not supported by the laws of Seychelles.

2.The learned trial judge erred in not properly interpreting the agreement between the parties.

3.The learned judge showed bias in favour of the respondents and did not therefore evaluate the evidence in a fair manner.

[10] We wish to dispose of this appeal by treating the grounds as a whole. We have already pointed out that this was a simple case involving the interpretation of a contract of lease. We are bound to interpret the terms of the contract as concluded by the parties and to apply the legal provisions applicable to it. Article 1134 in respecting the autonomous will of parties to agreements stipulates that lawfully concluded agreements shall have the force of law.

[11] In this particular case, it was a term of the contract that :

"1a The Lessor hereby lets and the Lessee takes ex-Supermarket building situated at Anse Royale belonging to the Lessor, hereinafter called the 'Premises' for a period of three years with effect from 2nd September 2004, renewable on every three years on

terms mutually agreed upon by the parties. The said option shall be exercisable by either party giving to the other three months' notice in writing prior to the termination of this agreement…The Lessee will pay as rent the sum of Rupees ten thousand per month…

5. Provided always and it is hereby agreed that the tenancy hereby granted may be terminated by Lessee in giving to the other three months' notice in writing and by Lessor one month notice on the day rent is due."

[12] Although there was no provision for 'fit-out' work by the Respondents, during the time they were in occupation they carried out such works to the premises with the approval of the Appellants. They became lessee builders of the premises.

[13] The Appellants however, were within their rights to terminate the agreement as they did. Notice of the rent increase was given to the Respondents by letter dated 7th May 2007 well before the three months notice required. The Appellants indicated that they would be willing to renew the lease for a period of six years with a rent increase of SR 2, 500 monthly and that the rent would be increased at the same rate every two years.

[14] The Respondents did not agree to these terms but remained in occupation of the premises for a year after the expiry of the lease agreement.

[15] The value of the improvements they carried out is detailed by their witness one Nigel Roucou in his quantity surveyor's report. He stated in his valuation that the purpose of his report was to give a current market valuation of the fit-out works. He first estimated that the work amounted to SR 213, 200 but two months later changed his valuation to SR 245, 200. No satisfactory explanation for this increase has been forthcoming. He also admitted that in terms of the air-conditioning units his valuation was a 'guestimate'.

[16] The Appellants were not able to support their claim for a year of rent arrears; it emerged that only three months' rent was outstanding as these payments had been returned. Their new tenant, Mr. Douglas Accouche, testified that on his taking the premises a year later he had to renovate the building again and buy new air condition units and replumb and install new electrical wiring.

[17] An appellate court rarely intervenes in the findings of a trial judge but it is obvious in this case that the trial judge did not properly assess the evidence before him, perhaps because it took well over five years to complete this case and he may have lost track of the proceedings in but particularly because he seems to have been fixated with the concept of legitimate expectation which he erroneously applied to this case. In the circumstances we assess the evidence afresh and apply the correct provisions of law to the facts of the case. (See Rule 31(5) of the Seychelles Court of Appeal Rules 2005).

[18] As we have pointed out, this is a case of a lessee builder who can be equated with the third party who builds on another's land under the provisions of the Civil Code. Article 555 provides:

> 1. When plants are planted, structures erected, and works carried out by a third party with materials belonging to such party, the owner of land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them.
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> 2. If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of land.
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> 3.If the owner elects to preserve the structures, plants and works, he must reimburse the third party in a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of such reimbursement, after taking into account the present conditions of such structures, plants and works.
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> 4.If plants were planted, structures erected and works carried out by a third party who has been evicted but not condemned, owing to his good faith, to the return of the produce, the owner may not demand the removal of such works, structures and plants, but he shall have the option to reimburse the third party by payment of either of the sums provided for by the previous paragraphs.
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> 5.Where an owner, who is subject to a condition subsequent, has caused plants to be

planted, structures erected and works carried out, he shall be presumed to have acted in good faith, unless he actually knew when such acts were performed that the events, which was the subject of the condition, had already occurred. This rule shall not apply to a usufructuary or a tenant unless specific permission to plant, erect or construct had been given by the owner."

[19] In this case it is clear from the oral evidence at trial that the Appellants permitted and knew of the works carried out by the Respondents. The latter carried out the works in good faith: i.e. "au vu et au su" of the Appellants. There was however no provision as to the fate of the improvements on the expiry of the lease. There is also no evidence as to what was decided when the Respondents left the premises apart from their testimony that they took the movables but left the structures they had erected. In the circumstances since the Appellants had elected to keep these improvements they must pay the Respondents a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of such reimbursement, after account is taken of the present conditions of such structures, plants and works as is provided for under article 555(3) of the Civil Code.

[20] Although there is evidence of the value of the property on 8th May 2009, there is no evidence as to its value when it was first leased to the Respondents. We would not therefore be in a position to allow the Respondents a sum equal to the value of the increase of the property.

[21] Although we are not provided with the cost of the materials and labour spent by the Respondents, there is a quantity surveyor's report provided as to the value of what he termed "current market valuation of the fit-out works." The Court is therefore left in the unhappy position of making an arbitrary award based on these figures. We are being asked to make an actuarial evaluation of labour and materials made on premises in 2008.

[22] We have already pointed out that no satisfactory reason was given as to the increase of SR32, 000 in the valuation of the works between January and March 2008. We disallow this figure. Mr. Roucou's valuation is also, as we have pointed out, based on a market valuation. The market value of a house reflects its likely value on the real estate market. The provisions of the Civil Code relate to the materials and labour. The former would reflect a higher price

than the latter especially given the trend of increasing property prices in Seychelles. The question remains as to what the percentage of market valuation should be awarded towards the reimbursement of the material and labour costs of the Respondents where no receipts for the same have been provided.

[23] We have nothing to guide us and in the interests of fairness to both parties can only award half of the valued improvements. This amounts to SR106, 600 payable to the Respondents. Three months rent also remains unpaid at the cost of 10,000 per month. The sum of SR30,000 is therefore to be deducted from that amount. Both parties have claimed moral damages from each other. We will therefore not make an award in this respect as one would cancel out the other.

[24] This appeal is allowed and the judgement award of the Supreme Court is reduced. We make the following order:

Judgment is entered for the Respondents in the sum of SR 76,600 with interest. We make no order as to costs.

M. Twomey (J.A)

I concur:. **…….** S. Domah (J.A)

I concur:. **…….** J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on17 December 2015