

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , S. Domah (J.A) M. Twomey (J.A)

Civil Appeal SCA 24/2014

(Appeal from Supreme Court Decision MC 7/2017)

Ministry of Land Use and Housing

Appellant

Versus

Paula Stravens

Respondent

Heard: 19 April 2017

Counsel: Mr. Vipin Benjamin for Appellant

Mrs. Alexia Amesbury for Respondent

Delivered: 21 April 2017

JUDGMENT

M. Twomey (J.A)

- [1] The issues surrounding this case emanate from a historic decision of learned Justice Sauzier J in *Leonie Albest v Paula Stravens* (1976) SLR 254. The facts are as follows: Mrs. Albest owned Parcel V49 at Saint Louis, Mahé. In 1970, she sold a house but not the land on which it stood to her god-daughter, Mrs. Stravens, for the sum of SR400. She intended after the sale to live with Mrs. Stravens in the house but did not get on with her children. Soon after she left the house on V49 and went to live with her nephew.
- [2] In 1976 Mrs. Albest averred in a plaint that she needed the land to construct her own house and that Mrs. Stravens was bound in law to remove the house she occupied from her land.
- [3] Sauzier J, in dismissing the plaint, stated that Mrs. Stravens had acquired a *droit de superficie* over Parcel V 49 which right would only come to an end in the following two instances:

when Mrs. Stravens wanted to rebuild the house or found herself obliged to do so; or by *confusion* at the death of Mrs. Albest if she inherited the land.

- [4] Thirty-seven years later, on 21 February 2013, the Respondent in this suit (Mrs. Stravens) filed an application for administrative review of a decision by the Appellant who had initially granted approval for repairs to the house on Parcel V4140 (a subdivision of Parcel V49) and subsequently revoked it. She prayed for orders certiorari quashing the decision of the Appellant and orders mandamus compelling the appellant to re-issue the grant of approval for the constructions and repairs to her house.
- [5] In an affidavit supporting her application, the Respondent averred that on every occasion she had sought to repair the house, the new owner of the land, namely Mr. Colin Albest, had put her on notice that if she did do so, he would take legal action to stop her. She had then obtained a loan from the Housing Finance Company to effect the repairs, and permission from Planning Authority to proceed with repairs, namely the reroofing of the house and other minor repairs, which permission was granted. She attached correspondence with the Planning Authority.
- [6] She further deponed that as the owner of a *droit de superficie* she also had the right to undertake repairs on her house if those did not amount to rebuilding the house.
- [7] She also deponed that the Planning Authority's decision to revoke the permission granted, was an abuse of its power, unreasonable and so outrageous that no sensible person would have taken it and that that the revocation was a breach of the rules of natural justice in that she was not told the reasons for the revocation of the approval nor was she allowed to state her case.
- [8] In a letter dated 31 August 2011 to the Planning Authority, she states:

“The roof is leaking and needs to be changed completely. There may be one or two timber support (sic) of the top structure that may require changing because of termites attack in the past (sic). The window frames and louvres need changing. I have moved out for fear of the roof collapsing on me.”

- [9] Mr. Colin Albest made representations both to the Respondent and the Planning Authority explaining his rights as owner of the land.
- [10] Following his representations, a visit to the premises was effected by the Planning Authority's officers who reported that the house needed to be demolished on safety grounds.
- [11] The CEO of the Planning Authority swore an affidavit averring therein that the Planning Authority had granted permission for minor repairs not necessitating planning permission on the *bona fides* of the Respondent but on discovering that the house needed structural repairs or demolition and that the Respondent did not have the approval of the landowner to effect the same, the Planning Authority had revoked the initial permission granted. He further deponed that the repairs sought (minor) could have been accomplished without resorting to the Planning Authority. Rather, the Respondent wished to agitate settled legal rights between herself and the landowner under the protection of the Planning Authority to effect what amounted to structural repairs and a reroofing. He relied on the maxim *Quando aliquid prohibetur ex directo, prohibetur et per obliquum* – (when anything is prohibited directly, it is prohibited indirectly).
- [12] He also deponed that the Planning Authority had fully explained the reasons for its decision to revoke the approval of the repairs to the Respondent.
- [13] Mr. Albest made an attempt to intervene in the judicial review matter before the Supreme Court but the trial judge found that as he was not a party to the suit and that since this was purely an administrative review of a decision by an authority, he fell afoul Rule 6 of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, 1995 (hereinafter the Rules).
- [14] In a decision delivered on 3 July 2014, Renaud J issued writs *certiorari* and *mandamus* against the Appellant. He based his decision on the fact that a *droit de superficie* empowered the owner the right to *repair* a house. He relied on the dictionary meaning of *repair* as distinguished from *rebuild* finding that the Respondent only intended to repair her roof and carry out other repairs which she was entitled to do so without let or hindrance from the

landowner. In the circumstances he found that the decision of the Planning Authority revoking the grant of permission was wrong in law.

[15] From this decision, the Appellant has appealed on nine grounds procedural and substantive which may be summarised as follows:

1. The learned judge erred in refusing leave to Mr. Albest to intervene in the judicial review process.
2. The learned judge erred in finding that the work to be undertaken by the Respondent was one of repair and not rebuild.
3. The learned judge failed in his interpretation of the law relating to the *droit de superficie*.
4. The learned judge failed to appreciate that the decision taken by the Appellant to revoke the approval for repairs was based on considered reasons and did not breach the doctrine of legitimate expectation.

The Standing of Third Party Interveners.

[16] Insofar as Ground 1 is concerned, we are of the view that the learned trial judge did indeed misdirect himself as to the established law in administrative review in regard to the *locus standi* of interveners.

[17] The learned judge reasoned that as the Rules were silent on the subject of interveners, he could resort to the Seychelles Code of Civil Procedure. Since section 17 of the Code only allowed parties to intervene in suits and a suit was one commenced by a plaintiff while the administrative review was begun by petition, the intervener had no *locus standi* (standing).

[18] We are unable to follow this argument. The administrative review process is provided for both by statute and by Article 125 (1) (c) of the Constitution. There is in Seychelles no general administrative appeal tribunal to review executive decisions, instead legislation on an ad hoc basis makes provision for appeals from decisions of specific administrative bodies to the court.

- [19] Where there is no specific legislation providing for such review or the procedural Rules for administrative review are silent, sections 4 and 5 of the Courts Act apply as the fall-back position. They provide that the Supreme Court of Seychelles shall have the same inherent powers as the High Court of England to review decisions of administrative bodies. It is to the rules and jurisprudence governing administrative review that we must turn to, not the rules for civil procedure governing civil suits.
- [20] In England, the modern procedure of application for judicial review is contained in Order 53 of the Rules of English Supreme Court Act 1981 (and preceded by the Supreme Court Act of 1977) as amended. These rules are not applicable to Seychelles as we gained our independence in 1976. Up to 1983, two procedural routes for judicial review were available in England, one by way of civil proceedings under Order 15 in the High Court, the other by way of judicial review under Order 53 in the Divisional Court. In *O'Reilly v Mackman* [1983] 2 A.C. 237, Lord Diplock concluded that an application for judicial review was the most appropriate way to obtain a remedy when challenging a decision of a statutory authority.
- [21] Under the Order 15 route similar to our section 117 of the Seychelles Code of Civil Procedure, the intervener had to show an interest in the suit. Suit in this context cannot be limited to complaints or civil claims against private parties as administrative reviews necessarily concern a claim against a public authority. Case law in England established that the application for the obtention of a declaration of public rights in civil proceedings is only limited by the need to show sufficient *locus standi*. In *Gouriet v. Union of Post Office Workers* [1978] A.C. 435) the court found that a plaintiff does not have to show an actual or threatened infringement of his private rights but he does have to show that the actual or threatened infringement of public rights would cause him special damage. *Locus standi* rules were eventually widened in *R v Inland Revenue Commissioners ex parte National Federation Of Self-Employed And Small Businesses* [1982] AC 617) in which Lord Diplock stated that there would be a grave lacuna in public law if outdated technical rules of *locus standi* prevented a person bringing executive illegality to the attention of the courts. "Sufficient interest" became the new threshold question for permitting standing.

- [22] In developing the laws regarding judicial review in Seychelles, we have been minded to adopt a very generous approach to *locus standi*. In *Michel v Dhanjee* (2012) SLR we quoted Lord Diplock in *R v Inland Revenue Commissioners* (supra) to extend *locus standi* in such reviews to genuinely concerned citizens finding that it must be possible for genuinely concerned citizens of breaches of democratic rights to bring actions and that a balancing exercise must be performed by the court in each individual case to ensure that citizens participate fully in the law whilst guarding against burdensome meddling busy bodies. Even the busy body argument however fades into insignificance if one were to consider that such argument is only a distraction and only “camouflages judicial distaste of the merits rather than describing the sufficiency of interest of the applicant” (see B. Hough, A re-examination of the case for a locus standi rule in public law (1997) 28 Cambrian Law Review 83-104.) Hough concludes that a restrictive approach to *locus standi* is a breach of the right to be heard contrary to natural justice.
- [23] It is for these reasons that we have adopted a modern approach and embrace a wide as possible method to standing for petitioners. It would be anathema to these same principles to discriminate against direct and indirect participants in the administrative review process when these participants have a clear interest in the case either as petitioners or third parties. The case of *Ridge v Baldwin* [1964] AC 40 was the benchmark of the *audi alterem partem* principle not only for petitioners in judicial review cases but by logical extension also for interested parties especially when the latter had a direct interest in the case. Hence, we find that in the normal course of events, the Respondent should have joined Mr. Albest as a party. A decision by the Court or the Planning Authority was bound to directly affect his interests in land he owned.
- [24] The learned judge may have been on stronger ground when he stated that the proposed intervenor had in any case agreed to and adopted the position of the Appellant. Courts certainly have a discretion as to whether or not to allow third parties to intervene and it is trite that an intervention is of no use if it repeats points made by someone else (see Lord Hoffman’s judgment in *Re E* [2008] UKHL 66). However, the third party in the present case was not given the opportunity to expone on the reasons for his intervention which may have

been above and beyond those of the Appellant's. We are of the view in any case apart from the fact that the administrative review in this matter raised issues of public significance, it went directly to the interests of the Respondent and Mr. Albest, the landowner. This ground of appeal therefore succeeds.

Repair or rebuild

- [25] The learned judge relying on the dictionary meaning of the words *repair* and *rebuild* found that the Respondent did not have the right to demolish and destroy the house so as to rebuild it but rather planned to repair the roof and effect some other repairs. From the affidavits, reports and correspondence available we come to a different conclusion.
- [26] The photographs provided to the court speak for themselves. Moreover the Respondent herself avers that she moved out of the house for fear that it might collapse on her (supra paragraph 8). It therefore cannot be said that the house simply needed repairs. The Planning Authority officials who visited the house stated that it needed demolition.
- [27] The learned judge ignored this evidence and the authorities referred to him by Counsel for the Appellant namely: *Brew Brothers v Snax (Ross) Ltd* [1970] 1 QB 612, CA, *Elite Investments Ltd. v T I Bainbridge Silencers Ltd* [1986] 2 EGLR 43, *Lister v Lane* [1893] 2 QB 212, CA, *Lurcott v Wakely & Wheeler* [1911] 1 KB 905, CA and an Indian case, *Muhammad Mohideen Rowther v N.N. H. Mohammad Mohidee Rowthter* AIR Mad 24 which provides much guidance in regards to the distinction between the words *repair* and *rebuild*. *Muhamad* is persuasive in that it summarises English authorities on the subject. Ramaswami J states therein :

“To repair means to make good defects, including renewal where that is necessary, i.e. patching, where patching is reasonable practical and, where it is not, you must put in a new piece. But repair does not connote a total reconstruction (Inglis v Buttery 1878 3 A.C 552; Creg v Planque (1936) 1. K.B. 669; R v Epsom (1863) 8 LT 383).

- [28] Guidance to the distinction between repairing and rebuilding is also provided in the Civil Code in relation to the duties of a usufructuary. Articles 605- 607 provide in relevant part:

“Article 605

1. *The usufructuary shall only be bound to keep the property in good repair. Any structural repairs shall be left to the owner, unless they were caused by the failure to keep the property in good repair since the beginning of the usufruct; in that case the usufructuary shall also be liable for their cost.*
2. *If the owner fails to carry out the structural repairs for which he is liable and which are Essential to maintain the property in the condition in which it was at the beginning of the usufruct, the usufructuary may carry them out on the owner's account and recover the cost...*

Article 606

Structural repairs are the repairs of the main walls and vaults, of entire floors, the renovation of beams and the restoration of the entire roof...

All other repairs are maintenance repairs.

Article 607

Neither the owner nor the usufructuary shall be bound to rebuild what has perished by decay or what been destroyed by inevitable accident.

- [29] The distinction between rebuilding and repairing in the provisions above indicate that structural repairs are not maintenance repairs which if regularly done prevent a building from becoming dilapidated and uninhabitable. In the circumstances with regard to the term of the *droit de superficie* as conditioned by Sauzier J that “it will come to an end when the defendant will want to rebuild the house or will find herself obliged to rebuild it” - the Court was under an obligation to appreciate the works to the house intended by the Respondent and to consider whether these repairs would amount to rebuilding the house. From the evidence, by no stretch of the imagination can the magnitude of the repairs required be reduced to simple repair and a patching of the roof. It is clear that what was envisaged was the reconstruction and reroofing of the house on its old foundations and original walls. These essentially amount to a rebuilding the house which terminate the Respondent’s *droit de superficie*. This ground of appeal also succeeds.

- [30] However there is a contradiction in the law relating to the rupture or cessation of a *droit de superficie* which we address below.

The law relating to the droit de superficie

- [31] The learned judge in enunciating on the law relating to the *droit de superficie* highlights the law relating to the inability of a landowner who grants the *droit* from revoking it and states that the right only comes to an end when the building is destroyed or needs to be rebuilt. In restricting the meaning of the word rebuild to destruction of the building, the learned judge more or less created a perpetual *droit de superficie* contrary to the finding of Sauzier J in the same case (see *Albest v Stravens* (1976) (No. 2) SLR 254).
- [32] In Seychelles, there is *jurisprudence constante* that the *droit de superficie* comes to an end when a building is no longer habitable. However, in considering the circumstances of this case we have been forced to crack a nut that no court in this land has yet wished to crack and *that* simply put, is whether there are circumstances in which a *droit de superficie* is perpetual. This was alluded to by Lalouette JA in *Tailapathy v Berlouis* (1978-1982) SCAR 335 and admirably explained in Edith Wong's essay 'Droit de Superficie: Coelho versus Tailapathy' <http://www.seylii.org/content/edith-wong-droit-de-superficie-coelho-versus-tailapathy>.
- [33] In *Tailapathy*, Mrs. Tailapathy had carried out extensive repairs and renovations to the house on the land of Mrs. Berlouis which her parents had leased and from whom she had acquired tenancy rights. The Court of Appeal found that at the end of the lease Mrs. Tailapathy had acquired a *droit de superficie* over the land where the house was sited and that she could carry out the extensive repairs.
- [34] The Court of Appeal, citing Aubry and Rau, *Droit Civil Francais* 4th Ed. Vol 2 page 438-439 found that in certain circumstances a *droit de superficie* can be integral and confer the same rights to the superficiary owner as the landowner even in terms of constructing and rebuilding. Lalouette JA unfortunately did not expand on these circumstances. In the end no perpetual *droit de superficie* was accorded to the lessee, instead, she was allowed a right of retention until the landowner paid her either for the materials and labour used in the

construction of the house or the amount by which the value of her property had been enhanced by the construction of the house.

- [35] In the case of *Coelho v Collie* (1975) SLR 78, Sauzier J found that where there was no transfer evidenced by a notarial act but only a simple act granting a right to build on the land, the *droit de superficie* created would subsist temporarily at least until the building needed rebuilding. That type of *droit de superficie* is certainly distinguishable from the one in *Tailapathy* where a building but not the land is sold or leased.
- [36] There is in any case two schools of thought in France regarding the *droit de superficie*; one which considers the right to be temporary and personal and one which considers it to be perpetual and real. The majority view both in terms of *la doctrine* and *la jurisprudence* is for the latter. In contrast the *jurisprudence constante* in Seychelles has erred on the side of caution finding in most cases that the *droit de superficie* is temporary and personal. We are prepared to state that unless expressly stated or inferred otherwise from the intention of the parties, a *droit de superficie* may well be perpetual. We are fortified in our view by the dicta of Sauzier J in *Albest v Stravens* (1976) (No. 2) SLR 254 in which he continued the citation from Aubry and Rau not completed by Lalouette JA in *Tailapathy*, namely the following excerpt:

“le droit de superficie est un droit de propriété portant sur les constructions, arbres, plantes, adhérant a la surface d’un fonds (édifices et superficies) dont le dessous (tréfonds) appartient à un autre propriétaire..

Le droit de superficie est intégral ou partiel, suivant qu’il s’applique á tous le objects qui se trouvent à la surface du sol, ou qu’il est restreint à quelques uns d’entre eux, par exemple, soit aux constructions, soit aux plantes et aux arbres, ou même seulement à certaines arbres.

Le droit de superficie constitue une veritable propriété corporelle, immobilière. Il en resulte qu’à l’instar du droit de propriété, à la difference des servitudes, il ne se perd par le non usage.

Le droit de superficie est de sa nature perpétuel, comme tout autre droit de propriété; ce qui n'empêche pas qu'il ne puisse pas être concédé d'une manière révocable, ou pour un temps seulement.

Il peut s'établir par conventions ou disposition, et le cas échéant, quoique plus rarement, par prescription... (Aubry and Rau, Droit Civil Français 4th Ed. Vol 2 para. 223, pp 438-439).

- [37] Equally, in Dalloz we also find that a *droit de superficie* is not considered a personal right to the grantee but a real and possibly a perpetual right :

“laissant au tréfoncier la propriété du tréfonds situé au dessous du volume de l'espace qui le surplombe..

...

Extinction du droit de superficie

Etant un droit de propriété, le droit de superficie est, par sa nature, un droit perpétuel. Cependant, ce principe souffre des exceptions et tempéraments.

Exceptions

Elles resultent du mode de constitution de la superficie. En effet lorsque celle-ci a été établie par bail ou concession, le droit est nécessairement temporaire et s'éteint à l'expiration du bail ou de la concession...

Tempéraments

La perpétuité du droit de superficie ne peut donc se concevoir que lorsqu'il a été établie par vente... (Dalloz, Encyclopédie, Droit Civil Vo. Superficie (1976) parag 13- 39.

- [38] In *Albest v Stravens* (1976) (No. 1) SLR 158, Sauzier J certainly considered these two possible types of *droits de superficie* and concluded that whether the right was perpetual or for a term couldn't be decided *ex facie*. In *Albest v Stravens* (1976) (No. 2) SLR 254, after

examining the evidence he concluded that he could not say that the right was perpetual. He continued:

“I am of the opinion that it is temporary in the sense that it will come to an end when the defendant will want to rebuild or will find herself obliged to rebuild it.”

[39] Sauzier J’s opinion was based on the evidence he had appreciated and this decision was not appealed. The rights between the parties were therefore settled.

[40] In the circumstances we find that the Appellant did not err in concluding that the *droit de superficie* of the Respondent was term limited and would come to an end when she had to rebuild. We have already established that the repairs intended amounted to rebuilding. This ground of appeal therefore succeeds.

The principle of legitimate expectation and the bona fides of the Respondent

[41] As we have found that this appeal succeeds on the previous grounds, the consideration of the ground of appeal on legitimate expectation is purely academic.

[42] We have in the case of *Bouchereau & Ors v Supt. of Prison & Ors* (unreported) [2015] SCCA 3 expounded on the principle. In brief, we found the words of Lord Fraser in *O'Reilly v Mackman* [1983] 2 AC 237 apt in explaining the concept:

“Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or the existence of a regular practice which the claimant can reasonably expect to continue.”

[43] Given the fact that the Respondent misrepresented both the fact that she had permission to carry out the repairs and that the repairs would be minor, she could not have sustained any expectation, legitimate or otherwise.

[44] Once the settled rights between the parties had been established, the nature of the works involved confirmed and the law on *droit de superficie* ascertained, the Appellant cannot be faulted on the decision it took.

[45] In all the circumstances of the case we do not find that the Appellant either abused its power or acted unreasonably or in breach of the rules of natural justice in coming to the its decision to revoke permission for the works on the house over which the Respondent had *a droit de superficie*. That right has now come to an end. This appeal succeeds. We make no order as to costs.

M. Twomey (J.A)

I concur:. F. MacGregor (PCA)

I concur:. S. Domah (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 April 2017