

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** F. MacGregor (PCA), A. Fernando (J.A), F. Robinson (J.A)]

## Civil Appeal SCA03/2015

(Appeal from Supreme Court Decision CS No.195/2011)

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Nathalie Weller

Appellant

Versus

Sarah Louise Walsh

Respondent

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Heard: 29 November 2017

Counsel: Mr. B. Hoareau for the Appellant

Mr. S. Rouillon for the Respondent

Delivered: 07 December 2017

### JUDGMENT

**A.** Fernando (J.A)

1. The Appellant appeals against the judgment of the Supreme Court, dated the 19<sup>th</sup> of March 2015, entered against her in favour of the Respondent “in the total sum of GBP 228,500.00 with interest thereon at the commercial rate from the 21<sup>st</sup> August 2011 and continuing until final repayment of the total amount due”, with costs to the Respondent. The learned Trial Judge had also stated that “The proceeds of this judgment shall obviously accrue to the estate of the late Tim Walsh for the benefit of his heirs and successors, in accordance with the law.”
2. Tim Walsh had instituted action against the Appellant, as Plaintiff, on the 17<sup>th</sup> of October 2011 by his Plaint dated 14<sup>th</sup> October 2011. Tim Walsh had passed away on the 29<sup>th</sup> of November 2012 and his wife Mrs. Sara Louise Walsh had been substituted as Plaintiff on the 27<sup>th</sup> of February 2013. The Appellant’s Counsel has had no

objection to the application for substitution of Mrs. Sara Louise Walsh as plaintiff as per the recorded proceedings of 27<sup>th</sup> of February 2013. The marriage certificate of Tim Walsh and Sara Louise Walsh and the appointment of Mrs. Sara Louise Walsh as Administrator of the estate of the deceased Tim Walsh by the High Court of Justice in England; had been filed of record (**Exhibit P 1**). As per P1 the “administration of all the estate which by law devolves to and vests in the personal representative of the deceased Timothy Alan Walsh was granted to Mrs. Sara Louise Walsh” by the High Court of Justice in the District Probate Registry at Winchester.

3. The Complaint set out below verbatim, best explains the case against the Appellant.

#### PLAINT

1. The Plaintiff is a British national and an entrepreneur and business investor by trade and a resident of the United Kingdom, who is, inter alia, engaged in the activity of investing in Seychelles in partnership with a local Seychelles citizen to develop the land for a hotel resort development and the Defendant is a Seychellois resident.
2. At all material times the Plaintiff was a close friend of the Defendant and of her family dating back several years.
3. In May 2011 the Plaintiff and the Defendant, inter alia, entered into an agreement to develop certain touristic ventures and properties including on a portion of land at Bazarca Bay, Intendance, Mahe, Seychelles more fully known as Plots 1 to 5, Land Title T1985 (belonging to the Defendant and her two sisters, Deborah (Seychelles resident) and Michelle (UK resident) plus portions of T1984, T1986 and T1987 belonging to uncles and aunties of the sisters, as far as the Plaintiff has been led to believe.

4. The arrangement agreed to by the parties was to be by way of a joint venture using a Seychellois Limited Liability company whereby the Plaintiff would finance the said project by transferring funds into the project from the United Kingdom to the Seychelles.
5. It was agreed by the parties that since the Defendant had a local account funds would be transferred by the Plaintiff from overseas initially to this account until the said vehicle Limited Liability Company was set up with a bank account with the Plaintiff as a signatory thereto.
6. Pursuant to the parties agreement the parties approached several government and private authorities with a view to putting the project into effect and the Plaintiff had specific detailed and costly plans drawn up at his expense.
7. It was also agreed that any funds transferred by the Plaintiff into the account of the Defendant would remain the property of the Plaintiff until the funds were ready to be properly utilized in the projects to be agreed and finalized by the parties and the said funds should be returned to the Plaintiff if requested by the Plaintiff.
8. Pursuant to the parties agreement on the 9<sup>th</sup> August 2011 the Plaintiff transferred a sum of Pounds Sterling Two Hundred Thousand (£200,000/-) to the Seychelles Mauritius Commercial Bank Account of the Defendant for the Defendant to hold until it would be ready for use in capitalizing the Seychelles Company West Beach Holdings (Pty) Ltd, a company set up to be the trading vehicle to execute the said intended projects. This was subsequent to an earlier transfer to the same account of Pounds Sterling Thirteen Thousand Five Hundred (£13,500/-) on the 24<sup>th</sup> June 2011 to provide seed capital for expenses in getting started with the said intended project. The Plaintiff recognizes that some of that seed capital has been legitimately spent on costs incurred, but has no visibility of any accounting for such expenditure with the said intended projects.

9. On the 21<sup>st</sup> of August 2011, as part of a restructuring of the funding plan for the said intended project, the Plaintiff requested the return of the funds described in paragraph 8 to the UK to capitalize a new UK investment vehicle, West Street Asset Management Ltd, temporarily. The latter company would then in return invest the same sum in West Beach Holdings (Pty) Ltd. Specifically, these funds were to be the £200,000 capitalisation sum and the remainder of the £13,500 seed capital as described in paragraph 8. above, with accounting for expenditures to date and with advice of any outstanding invoices to be paid, which would then be paid by West Street Asset Management Ltd from England promptly on receipt of such invoices.
10. In breach of the parties' agreement his request was refused by the Defendant and she has until this date refused to honour her obligation to return the funds.
11. A portion of the funds have now been transferred to the account of the Defendants' lawyer Mr. Frank Elizabeth, Attorney at Law, who refuses to return the funds to the Plaintiff and has asked the Plaintiff to accept a sum of Pounds Sterling Fifty Thousand (£50,000/-) in full and final settlement of his claim since according to the said Attorney the Plaintiff did not have a valid legally enforceable claim in Seychelles Law and to walk away from the situation.
12. The Defendant has refused to return or account for the balance of the funds transferred to her by the Plaintiff.
13. As a result of the breach of agreement and failure to refund the Plaintiff the Pounds Sterling Two Hundred Thousand (£200,000/-) and account for the seed capital of Pounds 13,500/-, the Plaintiff is now out of pocket in the sum of £213,500 and cannot utilize the funds for the mentioned and other intended projects until he is fully reimbursed and compensated by the Defendant.

14. By reason of the aforesaid the Plaintiff has suffered loss and damages as a result of the Defendant's breach of agreement and failure to return what is not hers to the Plaintiff.

Particulars of loss and damage

	UK POUNDS
a) Money sent/given to the Defendant without any account being given to the Plaintiff	213,500.00
b) Loss of interest and opportunity and continuing	10,000.00
c) Disappointment, anxiety and moral damages	30,000.00
Total	<hr/> 253,500.00 <hr/>

15. Despite repeated requests by the Plaintiff for the return of the funds or for a proper account of how they have been dealt with the Defendant has refused to respond to the Plaintiff's requests.

Wherefore the Plaintiff prays this Honourable Court for a judgment ordering the Defendant to pay the Plaintiff the total sum of UK Pounds 253,500.00/- and continuing with interest and costs with effect from 21<sup>st</sup> August 2011.

4. The Statement of Defence filed by the Appellant before the Supreme Court was a complete denial of all the averments in the plaint. It had been the Appellant's position that there was no agreement whatsoever between her and the Appellant for any ventures, that neither she nor her sisters owned properties in their own right, that no

money is due from her to the Respondent and that the Respondent has not suffered any loss or damages, and if he had, she is not liable for it. She has elaborated on this by saying that she was never made a shareholder or director of any Seychellois Limited Liability Company and that there was no agreement with the Respondent to finance any project or to transfer funds into the project from the UK to the Seychelles. The Appellant had denied that the Respondent “transferred any money into her account for the purpose of capitalisation of West Beach Holdings (Pty) Ltd or any other Company” and that she was a shareholder or director of the West Beach Holdings (Pty) Ltd or any other Company. Having said that, the Appellant had stated at paragraph 5 of the Defence that “if there was any agreement...everything that was stated outside Court between the parties cannot be repeated in Court as the same amounts to hearsay evidence and therefore not admissible in Court” and further at paragraph 13 of the Defence “that whatever oral discussion that took place between the Plaintiff and the Defendant outside the Court is covered by the “hearsay” rule and therefore it cannot be repeated or referred to in a Court of law as the same is inadmissible as evidence in the said Court”. Further the Appellant has alleged in her Defence that the Appellant had made contradictory statements in his plaint but having perused the averments in the plaint I have not found any such contradictions.

5. At paragraph 11 of the Defence, which is in answer to paragraph 11 of the plaint, the Appellant has averred that her Attorney does not know the Respondent and “has never communicated with him in any way, shape or form”. The Appellant had stated that her “Attorney had undertaken certain ‘without prejudice’ negotiations with the Plaintiff’s (*Respondent herein*) Attorney but these negotiations were confidential and covered by lawyer/client privilege and confidentiality”. The Appellant had stated that “pleading those communication in the... plaint amounts to unethical, unprofessional and immoral conduct by the Plaintiff’s (*Respondent herein*) Attorney for which the Defendant (Appellant herein) is legally advised that the Plaintiff’s (*Respondent herein*) Attorney can be sanctioned under the Legal Practitioner’s Act. The Appellant had averred that she had been advised that “the action of the Plaintiff’s (*Respondent herein*) Attorney is so serious that she is considering making a formal complaint to the

Chief Justice to formally investigate the matter and to apply the sanction under the said Act if a wrong doing is found to have been committed by the Plaintiff's (*Respondent herein*) Attorney". The Appellant had averred that the contents of paragraph 11 of the plaint are nothing less than a desperate attempt by the Respondent "to influence the outcome of the case and give credibility to the Respondent's otherwise elaborate and implausible story."

6. I wish to make a few observations in regard to paragraph 11 of the Defence. I do not see how the contents of paragraph 11 of the plaint are nothing less than a desperate attempt by the Respondent "to influence the outcome of the case and give credibility to the Respondent's... story." The negotiations between the Appellant's Attorney and the Respondent's Attorney are certainly not covered by lawyer/client privilege and confidentiality. To allege unethical, unprofessional and immoral conduct against the Respondent's Attorney and threaten him with sanctions under the Legal Practitioner's Act, in my view is unbecoming and unprofessional on the part of the Appellant's Attorney and I warn him that this type of pleadings in a civil suit he has drafted on behalf of a client are totally unacceptable and he should in the future desist from drafting such pleadings. More so I am at a loss to understand the need for the Appellant's Attorney to undertake negotiations with the Respondent's Attorney in view of the fact that the Statement of Defence filed by the Appellant was a complete denial of all the averments in the plaint and since the Appellant's position is that there was no agreement whatsoever between her and the Appellant for any ventures.
7. At the very outset I wish to make a few observations as regards the Statement of Defence. Although the Appellant had denied in the Statement of Defence that the Respondent "transferred any money into her account for the purpose of capitalisation of West Beach Holdings (Pty) Ltd or any other Company", she had not denied specifically that the Respondent transferred money into her account and that she received such moneys from the Respondent, which is the only issue to be determined in this case. The Appellant's defence, simply is, that there was no written agreement. It is the Appellant's defence that whatever oral discussion that took place between the

Respondent and her, outside the Court, is covered by the “hearsay” rule and therefore it cannot be repeated or referred to in a Court of law as the same is inadmissible as evidence in the said Court. To give way to such a defence on the facts and in the circumstances of this case is to encourage “Daylight Robbery”, which I am not prepared to do.

8. The Appellant had made a Counter-Claim in her Statement of Defence. In it she has said that the Respondent made an offer to her to put up the properties of the estate of her late father as collateral with the bank for him to raise money for investment purposes. That the Appellant after several discussions with the Respondent realized that the Respondent did not have sufficient money to invest in his project and wanted to mortgage the properties of her late father’s estate in order to raise capital for his project. This offer had been rejected by the Appellant after consultation with all the heirs to the estate of her late father, as the Respondent could not be trusted. It had been the Appellant’s position in the Counter-Claim that if there had been an agreement as alleged by the Respondent in his plaint there would have been a clearly written contract as required by law. The Appellant had pinned her hopes on article 1341 of the Civil Code of Seychelles Act, ignoring the applicability of article 1347 of the said Code, to the facts of this case.
9. The Appellant in her Counter-Claim had claimed SCR 600,000.00 as damages from the Respondent for ‘malicious prosecution’. The Counter-Claim had been dismissed by the learned Trial Judge with costs to the Respondent and there is no appeal against the dismissal of the Counter-Claim.
10. The Appellant has filed the following grounds of appeal and sought the following relief in her Amended Notice of Appeal dated 30<sup>th</sup> October 2017:



Errors of Law:

1. The learned Judge erred in law when he gave judgment in favour of the Respondent on the basis of “some sort of mutual arrangement” rather than a legally binding agreement, between the parties.
2. The learned Judge erred in law when he overruled the Appellant’s plea in limine litis that oral evidence was not admissible in this case since the Respondent failed to satisfy the requirements of article 1341 of the Civil Code.
3. The learned Judge erred in law when he failed to adjudicate and give proper consideration to the Appellant’s case in respect of ownership of the property in terms of banking law.
4. The learned Judge erred in law when he failed to rule on the Appellant’s submission of no case to answer.
5. The learned Judge erred in law when he admitted inadmissible evidence and based his judgment substantially on the said evidence.
6. The learned Judge erred in law when he awarded moral damages in favour of the Respondent.
7. The learned Judge erred in law when he awarded interest at the commercial rate and not the legal rate.
8. The learned Judge erred in law when he ruled that the proceeds of the judgment shall accrue to the estate of the late Tim Walsh.
9. The learned Judge erred in law when he failed to make a finding that the Respondent has failed to discharge the burden of proof.

Relief sought from the Seychelles Court of Appeal:

1. Set aside the Judgment of the Supreme Court.
  2. Allow the Appeal.
  3. Order a re-hearing of the whole case before a differently constituted Court.
11. The above grounds of appeal had been filed after a sitting of this Court on the 24<sup>th</sup> of October 2017, where the President of the Court of Appeal had ordered Counsel for the Appellant to tidy up his grounds of appeal filed in his Amended Notice of Appeal dated 1<sup>st</sup> June 2017. The President of the Court of Appeal had pointed out to Counsel, that of the 18 grounds raised in his Notice of Appeal dated 1<sup>st</sup> June 2017, 9 of them deal with errors of facts and the best Judge of the facts is the Trial Judge and an appellate court would interfere with the Trial Judge's findings of facts only where it is "perverse or completely unreasonable". Counsel for the Appellant in his Amended Notice of Appeal dated 30<sup>th</sup> October 2017 has maintained his grounds of appeal on errors of law filed in his Notice of Appeal dated 1<sup>st</sup> June 2017 but has encapsulated his 9 grounds of appeal on errors of facts set out in the Notice of Appeal dated 1<sup>st</sup> June 2017 to one single ground in the Notice of Appeal dated 30<sup>th</sup> October 2017, namely that "The learned Judge made several errors of facts which when considered cumulatively renders the decision unreasonable".
12. The Skeleton Heads of Arguments filed on the 6<sup>th</sup> July 2017, however had been on the basis of the grounds of appeal set out in his Notice of appeal dated 1<sup>st</sup> June 2017 and I have therefore dealt with the 9 grounds of appeal on errors of facts as filed on the 1<sup>st</sup> of June 2017, namely:

Errors of facts:

1. The presiding Judge erred in fact when he commented that the parties agreed that the funds would only be used when the agreed project was finalized which was not supported by the evidence.
2. The presiding Judge erred in fact when he opined that the 13,500 pounds sterling transferred on the 24<sup>th</sup> June was transferred to the same account as the 200,000.00 pounds sterling.
3. The presiding Judge erred in fact when he commented that the Appellant entered into an agreement on behalf of the aunts and uncles. [This ground had been withdrawn when filing the Skeleton Heads of Argument]
4. The presiding Judge erred in fact when he commented that the Appellant agreed to put up the property as collateral.[This ground had been withdrawn when filing the Skeleton Heads of Argument]
5. The presiding Judge erred in fact when he surmised that the 13,500 pounds sterling and the 200,000.00 pounds sterling came from Tim Walsh.
6. The presiding Judge erred in fact when he refers to Samantha A Walsh instead of Samantha A Weller.
7. The presiding Judge erred in fact when he refers to the 13,500.00 pounds sterling paid to architect but later says that the Court has no details of the legitimate expenses to account for the funds legitimately spent.
8. The presiding Judge erred in fact when he refers to the 10,000.00 pounds sterling transferred on the 24<sup>th</sup> June.

9. The presiding Judge erred in fact when he refers to Michel Walsh as Executor of the estate of the late Brandon Hoarau. [withdrawn when filing the Skeleton Heads of Argument]
13. I set out below a summary of the evidence led in this case. They have to be understood along with the exhibits produced in the case by the Respondent and listed at paragraph 24 below.
14. **PW 2, Mrs. Sarah Walsh**, the Substituted Plaintiff, the widow of Tim Walsh and the Administrator of his estate (appointed under **Exhibit P 1** –more fully described in paragraph 2 above); testifying before the Court had said that she knows the Appellant and had met her and her sister Debra Hoareau, nieces and nephews on a number of occasions in February 2009 when she was with Tim Walsh. Tim had met them in 2007 and had a sustained relationship with them when he expressed an interest in a commercial venture. Tim according to her was a businessman. The commercial venture was to develop a piece of land in the South of Mahe for tourism, with the Appellant and her sister in partnership. For this purpose he had transferred funds into the Appellant’s personal bank account as an advance to this project. He had transferred these funds with a view of providing capital to a company to be established in the Seychelles for the purposes of this project. There had been two transfers, first one for GBP 13,5000.00 and the second for GBP 200,000.00. The first transfer was to meet the initial expenses like for surveying the land and payments for the architect. The second transfer was to provide capital for the tourism project.
15. The correspondence between Tim and the Appellant and her sister is to be found in the e-mails exchanged between them and printed from his laptop. Mrs. Walsh had produced e-mails **P 14 - 19** which clearly shows the agreement that existed between the Appellant and Mr. Tim Walsh. The authenticity of these e-mails according to Mrs. Walsh had been verified by a company specialized in forensic examination of computers, named SY 4. The e-mails from the Appellant had consistently emanated

from her e-mail address 'Nathaliehoarau@live.com'. There is no denial that this e-mail address belonged to the Appellant or that it had been hacked. The e-mail address of Mr. Tim Walsh had always been '[timalanwalsh@gmail.com](mailto:timalanwalsh@gmail.com)'.

16. In addition to these e-mails witness had produced the certificates of two companies incorporated in the Seychelles and other connected documents (**Exhibits 2 to 7**). Mrs. Walsh had produced printed brochures from the two companies indicative of the tourism venture to be undertaken (**P 12**) and a Financial plan Forecast for the company (**P 13**). Mrs. Walsh had produced bank statements (**P 9 & 10**) which showed moneys transferred to the Appellant's account by Tim Walsh. Samantha Adrienne M Weller referred to in the bank statements, had been Tim's partner but was not related to the Appellant. She had been removed as a signatory from this account in January 2012 and that was before Tim's death in November 2012. Also that account in which Samantha Weller was a partner had been closed prior to Tim's death. Mrs. Walsh had also produced an e-mail from the Appellant to Tim Walsh providing Tim with the Appellant's account details (**P 11**).
17. Tim Walsh had later realized that he being a foreigner will not be able to directly benefit from the investment. This is because he could not be a director of a Seychelles company owning immovable property as he was a foreigner. He realized that the proposed project had flaws. He had therefore requested the Appellant for the return of the funds he had sent her.
18. Under cross examination it had transpired that although at the time of the death of Tim Walsh, the Respondent had separated from him but she continued to be his legal wife and they had continued as business partners. She had a child by Tim. On her visit to the Seychelles with Tim February 2009, the Appellant had shown them the land that was to be developed which was in the south of the island. When questioned as to why she produced the e-mails to Court; Mrs. Walsh had said that it was to show the personal and business relationship between the Appellant and Tim Walsh. Mrs. Walsh had said that the relationship between the Appellant and her sister Debbie had

commenced after they had met on a plane in February 2007 and since then, they had been communicating by e-mail because of the geographic locations of the parties.

19. **PW 3, Derrick Dias** had said that he had been with Banque Francaise and then Mauritius Commercial Bank (Seychelles) [MCB] Ltd for 35 years and had been authorized by the Managing Director to represent the MCB Bank. He had produced the letter authorizing him to produce bank documents before the Court (**P22**). He had produced an affidavit (**P23**), two bank statements (**P 26& P 27**) and two documents pertaining to swift transfers (**P 24 & P 25**). He had also produced **P 28**. Commenting on **P 27** Dias had said that the account referred to in that bank statement had a nil balance prior to the credit of GBP 200,000.00 and that as at 13<sup>th</sup> March the balance had stood at GBP 122.13. He had set out the withdrawals from that account in his affidavit produced to Court (**P 23**). Both swift transfers had been from the same account (SC403219/31473468) at HSBC London and that to the Seychelles rupee (00716724000) and GBP (SC0400004000710071672400068) accounts of the Appellant at Mauritius Commercial Bank (Seychelles) Ltd.

20. **PW 4, Mr. Peter Roselie**, is a Business, Tax and Accounting Consultant and advises on formation of companies. His company is called Pro – Tax Agency. Roselie had said that he knew the Appellant and Mr. Tim Walsh and that the two of them had come to his office for business structuring. First, the Appellant had come with her sister and thereafter Mr. Walsh had come to finalize the business set up. When asked to describe the business set up; Roselie’s answer had been: “They wanted to build a hotel somewhere in Takamaka and the Hoareau sisters they had the property and Tim was supposed to be financing the project so we dived for us to create two companies, one was Westbeach Chalets Pty Limited and the other one was Westbeach Holdings and one company was going to hold the property in management and the other one was supposed to be running the business as a chalet.” (verbatim) He had said that since Mr. Tim Walsh was a non-resident at that time, and since there was the issue of restrictions placed under the Immovable Property Transfer Restrictions Act, he and one of his staff had decided to be the director and shareholder of the two companies to be formed, for the time being, until the matter was sorted out and finalized. Tim had told him that the

Appellant would pay Roselie's fees pertaining to the incorporation of the two companies. Later he had been paid SR 22,340.00 by an MCB cheque for the two invoices raised by his firm (**P 29 & 30**). He had said that he had not communicated with Sam Weller.

21. At the close of the Respondent's case before the Supreme Court, Learned Counsel for the Appellant had in response to the Respondent Counsel's statement: "My friend has been put to his election and he elects to remain on his case to (*sic*) no case to answer" had said, "Yes that is correct" (vide proceedings of 17<sup>th</sup> September 2013), and vide proceedings of 6<sup>th</sup> March 2015 when Court queried "Mr. Elizabeth you elected not to produce any evidence and you stand by your submission of no case to answer?" had said "Yes that is correct". The practice sometimes adopted by the courts when a submission of no case to answer is made by Counsel, is no more than a direction to the judge to put Counsel who desires to make such a submission to his election, and to refuse to rule unless Counsel elects to call no evidence. Where Counsel has so elected he is, of course, bound, but if for any reason, be it through oversight or through a misapprehension as to the nature of the Counsel's argument, the judge does not put Counsel to his election, and no election in fact takes place, Counsel is entitled to call his evidence just as if he had never made the submission. In this case I find that the Counsel for the Appellant had been put to his election when he made a submission of no case to answer, and he has elected to call no evidence.

22. In the Court of Appeal case of **Roch Nourrice VS Francis Delorie SCA 29 of 2012** this Court had quoted a remark made by the very Counsel who appeared for the Appellant in this case before the Supreme Court in the Nourrice VS Delorie case; as per the proceedings of 19<sup>th</sup> July 2012 in the Nourrice case, where Counsel had said that he had been at the bar for 15 years and certainly aware of the procedure that he will forfeit his right to call evidence for the defendant, if the Court rules against him on the submission of no case to answer, and thus knows what he is doing. Therefore it could be said, as was said by this Court in that case, that the learned Counsel for the Appellant was well aware of the implications of making the submission of 'no case to

answer'. A 'no case to answer' submission is made where by accepting the plaintiffs evidence at its face value, no case could be established in law. Alternatively, the submission could be made on the basis that the evidence led for the plaintiff was so unsatisfactory, or unreliable, that the Court should find that the burden of proof had not been discharged. None of these could be said about the case presented to the Supreme Court by the Respondent in this case.

23. The fact that the Appellant has not adduced any evidence, in the face of the case put forward by the Respondent weighs heavily in favour of the Respondent. By electing not to produce any evidence the Appellant has failed to substantiate any of the averments set out in his Defence and to contradict the evidence of the Appellant, that of PW 3 and PW 4 and the exhibits produced by the Respondent. In the case of **YoongSze Fatt VS Pengkalen Securities Sdn. Bhd [2009]CLJ** the Court of Appeal of Malaysia held: *“In our judgment, it is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be correct: per Gopal Sri Ram, JCA in Jaafar bin Shaari, supra at p.712, citing Wasakah Singh, supra. This principle has found similar expression in a number of judgments handed down in the motherland of common law. These cases include Alexander v Rayson (1936) 1 KN 169; Boyce v Wyatt Engineering (2001) EWCA Civ.692; Miller (t/a Waterloo Plant) v Cawley (2002) EWCA Civ. 1100; and Benham Limited v Kythirra Investments Ltd (2003) EWCA Civ 1794.”* (emphasis added)

#### 24. EXHIBITS

**P 2, 3 & 4** – Certificate of Incorporation of West Beach Holdings (Pty) Ltd - 13<sup>th</sup> July 2011, particulars of its directors and secretaries (Mr. Peter J. Roselie and Mrs. Claudia B Mein); its Memorandum of Association (To invest and manage properties; to carry on the business of hotel accommodation, to carry on tourism development related activities) and Articles of Association.



**P 5, 6 & 7** - Certificate of Incorporation of West Beach Chalets (Pty) Ltd – 13<sup>th</sup> July 2011, its Memorandum of Association (to invest and manage properties; to construct hotels etc, to carry on the business of hotel accommodation, guest house and catering villas and chalets; to carry on tourism development related activities); its Articles of Association and particulars of its directors and secretaries (Mr. Peter J. Roselie and Mrs. Claudia B Mein).

**P 9 & 10** – Duplicate bank Statement of Timothy Alan Walsh & Samatha Adrienne M Weller, issued by HSBC Bank showing a transfer of GBP 13500.00 to the Appellant on the 24<sup>th</sup> of June 2011 and GBP 200000.00 to the Appellant on the 9<sup>th</sup> of August 2011 from account numbered 31473468.

**P 11** – is an e-mail from the Appellant to Tim Walsh giving the details of her GBP bank account (00716724000) at Mauritius Commercial Bank (Seychelles) Ltd, stating “I do hope this is all the info you require...”.

**P12** – Brochure of Anse Bazarca Resort and Spa, which give the names of the Appellant as its ‘Regional Director, Seychelles’; Tim Walsh as ‘Chief Executive’; **Peter Hubert** as ‘Architect and Resort Designer’; Deborah Hoarau as ‘Head of Sales and Marketing, Seychelles and the Custodians – the Hoarau sisters. The brochure shows the land, architecture and design of the resort, and the theme and profile of the resort. The brochure states under the heading ‘The custodians – the Hoarau sisters’, that the land upon which the resort will be built is their family property and ‘Tim Walsh is the CEO appointed by the sisters to realize their resort’. The Mission Statement contained in the brochure is by Tim Walsh, Group CEO.

**P 13** – Financial Plan Forecast relating to the Company to be formed.

**P 14** – is an e-mail dated 20<sup>th</sup> June 2011 from the Appellant to Tim Walsh stating “We have now had a chance to discuss your proposal with Bernard...*(Bernard and the rest of the persons referred to therein and to whom the e-mail has been copied are the*

*beneficiaries of the Appellant's father's estate*) and can confirm we are all very happy that you are prepared to fund this through to SIB, Planning and Bank etc...Agreement to this is a very big step for us and I think we feel very content now that the decision has been made with someone who has the same vision and passion for **Anse Bazarka** as we do. We are much enthused with now having the ability to get cracking on this without the hindrance of no finance, and are also committed to meeting the challenges ahead all together...I do hope you are feeling as upbeat and positive as we are now, and you too feel much new energy ready to begin what I believe will be a truly fantastic project.” (verbatim). There is reference in the e-mail to the work being carried out by Ben Prea, the surveyor, on the land.

**P 15** – is an e-mail of 10<sup>th</sup> August 2011 from the Appellant to Juliette Savy of Mauritius Commercial Bank (Seychelles) Ltd, with copy to Tim Walsh and another, thanking Juliette, for advising the Appellant of the arrival of funds.

**P 16** – is an e-mail of 10<sup>th</sup> August 2011 from the Appellant to Tim Walsh, where she states: “Tim, you mentioned a press release whilst you are there. I like the idea, but think perhaps it is a little early bearing in mind we still have SIB to fulfill and its sometimes better to do things a little quietly in Seychelles until we have satisfied all our regulations.” In this e-mail the Appellant makes reference to the e-mail sent to Juliette Savy of Mauritius Commercial Bank (Seychelles) Ltd (P 15).

**P 17** – An e-mail from the Appellant to Mr. Walsh, regarding setting up of bank accounts at Mauritius Commercial Bank (Seychelles) Ltd

**P 18** - is an e-mail dated 10<sup>th</sup> June 2011 from the Appellant to Peter Hubert, the architect, copied to Tim Walsh and Sam Weller, thanking Hubert for his input. In it the Appellant states: “Tim is here with us in Seychelles just for this week, and we have been extremely busy dealing with many aspects of the project and seeing all the relevant governmental departments on which we rely...Following our meeting with SIB yesterday, we have discovered that, because we have a non-Seychellois partner

(Tim) we are required to have a minimum of 15 'keyed' rooms...Our original plan was to build 4x2 bed villas for the high end self catering tourist. This will now have to be 8." In this e-mail all the plans for constructions, are discussed at length.

**P 19** - is an e-mail dated 22<sup>nd</sup> June 2011 from the Appellant to Tim Walsh and a few others, making reference to the initial drawings received from Peter, the architect, wherein she states: "Everything else will probably change as per Tim and Roos meeting yesterday".

**P 20 & 21**– are Priority payment Customer Authority documents of HSBC signed by Tim Walsh authorizing payments of GBP 13,500.00 on the 24<sup>th</sup> of June 2011 and GBP 200,000.00 on the 9<sup>th</sup> of August 2011. Both documents have been notarized as true copies and apostilled.

**P 22** - is a letter addressed to the Supreme Court by the Managing Director of the Mauritius Commercial Bank (Seychelles) Ltd, informing the Court, that Derick Dias has been appointed for the purpose of providing bank documents to Court.

**P 23** – is an Affidavit pursuant to the Evidence (Bankers 'Books) Act (Cap 75) (Sections 4 and 5) which states as follows:

I, Derick Dias of Bel Air, Mahe, of NIN. 956-0003-5-1-70, A Senior Recovery Officer employed by the Mauritius Commercial Bank (Seychelles) Limited, of Manglier Street, Victoria, Mahe, make oath and say that:

1. I am a Senior Officer at the Mauritius Commercial Bank (Seychelles) Limited, ("The Bank") of Manglier Street, Victoria, Mahe and I am expressly authorized to represent the Bank in these proceedings and to swear this Affidavit,

(Copy of authority to Act attached)

2. That I have the necessary qualifications and experience to give evidence on behalf of the Bank in terms of the rules laid down in the Evidence (Bankers Books) Act CAP 75;
  
3. That I have examined the originals and the copies of official bank documents (“The Documents”) produced by the Bank during the normal course of business, in respect of the transfer of Pounds 13,500/- on 24<sup>th</sup> June 2011; and Pounds 200,000/- on 9<sup>th</sup> August 2011 respectively by the Plaintiff the late Mr. Tim Walsh to the accounts of Ms. Nathalie Weller and hereby certify that they are genuine and reflect actual transactions and I hereby produce them herewith; namely;
  - a. Certified copies of two SWIFT incoming transfers of funds from Mr. Tim Walsh to the accounts of Mrs. Natalie Weller;
  
  - b. Certified copies of two complete Bank statements in respect of the above transactions from Mr. Tim Walsh to the recipient accounts reflecting the incoming funds abovementioned and the outgoings there from;

(Copies of SWIFT transfers and bank statements attached)

4. From the said statements it can be noted that;
  - a. The Pounds 13,500 had been deposited in a Rupee account and were still there in the converted sum of R253,808/-; and
  
  - b. The Pounds 200,000/- had been reduced to Pounds 122.13 by 3<sup>rd</sup> October 2011 in the named account.

(Copies of bank statements attached)

5. The said funds according to the statement of the bank (without mentioning bank charges) had during the period 10<sup>th</sup> August to 3<sup>rd</sup> October 2011 been distributed to the following:
  - a. Pounds 5,551.85/- by an overseas transfer to a company called Leyswood Limited dated 16/09/2011;
  - b. Pounds 115.49/- to an account number 000277170 in the same bank dated 27/9/2011;
  - c. Pounds 5,151.62/- payment to R & N Weller dated 27/9/2011;
  - d. Pounds 3,967.4/- payment to Deborah Hoarau dated 28/9/2011;
  - e. Pounds 185,064.89/- payment to Victoria law Firm dated 28/9/2011.
  
6. I also certify that the said documents form part of the bankers books under the Act; and
  - a. they were made in the ordinary course of business of the Bank;
  
  - b. the books were in the custody and control of the bank;
  
  - c. the copy of any document has been compared to the original and the entry is correct;
  
  - d. the documents were produced under the direction of a person having practical knowledge and experience in the use of computers as a means of storing, processing or retrieving information;
  
  - e. while the computer was being used for keeping the records measures were in force for preventing unauthorized interference with the computer.
  
  - f. that during that period and at the time that the document was produced by the computer the computer was operating properly.

7. That the statements made above are true and correct to the best of my belief, information and knowledge.

The above affidavit had been sworn and signed by the deponent Derick Dias on the 14<sup>th</sup> of March 2013 at Victoria, Mahe, Seychelles, before Mr. Kieran Bhogilal Shah, Notary Public.

The payment of Pounds 185,064.89/- payment to 'Victoria Law Firm' dated 28/9/2011 [5(e) under P 23 of the paragraph 20 above], in the absence of any explanation from the Appellant, is very disturbing. I am surprised to find from letter dated 11<sup>th</sup> January 2012, which is on file, written by the Attorney-at-Law who represented the Appellant at the trial below; to the Respondent's Attorney-at Law; that the said letter is on a letter head of 'Victoria Law Firm'. There was no explanation forthcoming as to for what this payment was made and it ties in with the averments in paragraph 11 of the Complaint referred to at paragraph 3 above.

The relevant provisions of the **Evidence (Bankers' Books) Act (Cap 75)**, namely **sections 4 and 5** referred to at Exhibit P 23 above are stated herein:

Proof that book is a bankers' book

4. (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

(2) Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any person authorised to take affidavits under section 170 of the Seychelles Code of Civil Procedure.

Verification of copy

5. (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

(2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any person authorised to take affidavits under section 170 of the Seychelles Code of Civil Procedure.

**P 24** - is a record of a swift transfer document dated 9<sup>th</sup> August 2011 from HSBC Bank PLC, London to Mauritius Commercial Bank (Seychelles) Limited for the sum of GBP 200,000.00 from the account of Mr. T. Walsh and Ms. S. Weller(SC403219/31473468) to the Appellant's account at MCB (SC0400004000710071672400068).

**P 25** - is a record of a swift document transfer dated 24<sup>th</sup> June 2011 from HSBC Bank PLC, London to Mauritius Commercial Bank (Seychelles) Limited for the sum of GBP 13,500.00 from the account of Mr. T. Walsh and Ms. S. Weller (SC403219/31473468) to the Appellants account at MCB (00716724000).

**P 26** – A MCB Bank statement in the name of the Appellant of a rupee account SCR06716724000 for the period 1<sup>st</sup> June 2011 to 30<sup>th</sup> June 2011 showing a balance of SR 253,808.00 as at 30<sup>th</sup> June 2011. It shows that the above sum of SR 253,808.00 had been credited to the account by a wire transfer made by Mr. T A Walsh.

**P 27** – is the bank statement of the Appellant in respect of her GBP Account GBP06716724000 at Mauritius Commercial Bank (Seychelles) Limited for the period 1<sup>st</sup> September 2011 to 3<sup>rd</sup> October 2011. The said bank statement shows that the account which had commenced with a credit balance of GBP 200,000.00 on the 1<sup>st</sup> of

September 2011 had dwindled to a sum of GBP 122.13 by the 13<sup>th</sup> of October 2011.

**P 28** – is an e-mail dated 10<sup>th</sup> August 2011 from Ms. Juliette Savy of Mauritius Commercial Bank (Seychelles) Limited to the Appellant to the effect: “The funds have arrived. We are holding it shortly until we get your account number in a while.

There is a response to this e-mail on the same date by the Appellant to Ms. Juliette Savy of Mauritius Commercial Bank (Seychelles) Limited thanking her for the e-mail. In that e-mail the Appellant had said that her sister Deborah Hoarau “will introduce Tim Walsh, our partner in this project. They can then explain our project to you and can also supply you with the documentation you require to open account and sign forms. Is this ok? Once that account is open we can transfer the moneys. I think we will need a GBP account and a SCR account for the Limited company.”

**P 29 & 30** – Invoices raised by Mr. Peter Roselie’s firm for the formation of the two companies, namely West Beach Holdings (Pty) Ltd and West Beach Chalets (Pty) Ltd for a total sum of SR 22,340.00.

25. Grounds 1 to 9 of appeal are alleged to be Errors of Law and they are dealt with below.

26. **GROUND 1 OF APPEAL** is to the effect that there was no legally binding agreement between the parties and that the learned Trial Judge had given judgment on the basis of “some sort of mutual arrangement”. The quarrel partly is about the wording used by the learned Trial Judge. This Court is only concerned to see, as to whether there was a legally binding agreement, on the basis of the evidence both oral and documentary led in this case, between the parties and not frivolous arguments as to the words used by the learned Trial Judge randomly. **Article 1101 of the Civil Code of Seychelles Act** states: “*A contract is an agreement whereby one or several persons bind themselves towards one or several others to give, do or refrain from doing something*”. A perusal of the evidence, namely the testimony of the witnesses and the exhibits produced by



the Respondent in this case show that the four conditions essential for the validity of an agreement as set out in **article 1108 of the Civil Code of Seychelles Act** have been met; namely the consent of the parties to bind themselves; both the Appellant and Mr. Tim Walsh had the capacity to enter into a contract; there was a definite object which formed the subject-matter of the undertaking and such object was not against the law or against public policy.

27. The Appellant in her Skeleton Heads has attempted to argue that she did not consent to anything with the Respondent. The absurdity of the argument comes out clearly when one considers the questions had there been no agreement why two companies had been incorporated, why brochures had been printed and what was the reason for Mr. Tim Walsh to have transferred GBP 2,01350.00 to the account of the Appellant and especially in the absence of any explanation from the Appellant for such transfer.
28. The Appellant had also attempted to argue that she had no legal capacity to enter into the alleged contract with the Respondent as the property had not vested in her name and Michelle Ward as joint executrixes and she could not have on her own acted in law on behalf of their late father. The Appellant had not placed any evidence before the Court in regard to her incapacity, nor pleaded it specifically in her Statement of Defence. Further the argument runs counter to what the Appellant had stated in her counter-claim, wherein she had put herself forward as the representative of her father's estate in entering into "several discussions with the Respondent, the heirs to the estate of her late father and her attorney" regarding the property which was the subject matter of the contract. Further this is not a legal incapacity as to prevent a person from entering into a contract as postulated by **article 1124 of the Civil Code of Seychelles Act**. Just as much as persons capable of entering into a contract shall not plead according to **article 1124** the incapacity of those with whom they have contracted; the Appellant should not be permitted to plead her own incapacity in the given circumstances of this case, after voluntarily having entered into an agreement and representing to Mr. Tim Walsh that she did have the capacity as borne out by the evidence and the exhibits produced in this case.

29. The Appellant in her Skeleton Heads has also argued that “the Respondent did not plead nor was he able to prove, that it was an expressed and or implied term of the said agreement that in the event the Respondent requests the return of the funds, the Appellant was legally bound to do so”. It is clear from paragraphs 7, 9, 10, 11, 12 and 15 of the Plaint referred to at paragraph 3 above that there is no substance in this argument. The filing of the Plaint on the 14<sup>th</sup> of October 2011, i.e. one year prior to his death (29<sup>th</sup> November 2012) by Mr. Tim Walsh also runs counter to the Appellant’s argument. The Appellant had not challenged the Respondent’s evidence that “despite repeated requests for the return of the funds nothing has been forthcoming”, by placing evidence to counter it. This argument also runs contrary to the Appellant’s position that there was no agreement whatsoever between her and Mr. Tim Walsh.

30. The Court takes note of the following articles of the **Civil Code of Seychelles Act**:

**Article 1134**

*“Agreements lawfully concluded shall have the force of law for those who have entered into them.*

*They shall not be revoked except by mutual consent or for causes which the law authorises.*

*They shall be performed in good faith.”*

**Article 1135**

*“Agreements shall be binding not only in respect of what is expressed therein **but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.**”*(emphasis added)

In the circumstances of this case fairness, practice and justice implies that in the event the project agreed upon could not be carried out the natural and necessary consequence of the agreement would be to return the GBP 213,500.00 that was transferred by Mr. Tim Walsh to the Appellant; less any money that “has been legitimately spent on costs incurred”. I also take note of the principles enunciated in the Civil Code of Seychelles Act that a person who, knowingly, receives what is not due to him, or in

bad faith receives payment; shall be bound to make restitution to the person from whom he has improperly received it. To hold otherwise with the Appellant, on this ground of appeal would amount to “daylight robbery”, which I am not, prepared to condone. It has to be noted that the Respondent did not lead any evidence in this case. I therefore dismiss ground 1 of appeal.

31. **GROUND 2, 4 & 5 OF APPEAL** according to the Skeleton Heads of Argument of the Appellant, are interlinked, and have been dealt with together by her. One such ground is to the effect that oral evidence was not admissible in this case since the Respondent failed to satisfy the requirements of article 1341 of the Civil Code. The Appellant appears to have confused this case with one where there is only oral evidence and one in which the learned Trial Judge should have considered article 1348. In doing so she had ignored the provisions of article 1347 which necessarily applies in this case. The Appellant had been made aware from the outset as admitted in her Skeleton Heads that “the agreement was oral and by e-mails between the parties and very much within the knowledge of the defendant (the Appellant herein)”.

32. **Article 1341 of the Civil Code of Seychelles Act** states:

*“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.”*

**Article 1347 is an exception to article 1341.**

**“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.* (emphasis added).

33. Article 1341 in my view is more an ‘evidential’ requirement than a ‘formal’ requirement. This is because ‘form’ is not set out as an essential condition for the validity of an agreement in article 1108. It does not make a contract void but voidable at the instance of a party. In **Amos and Walton’s Introduction to French Law 3<sup>rd</sup> edition** it is stated: “A contract which does not comply with article 1341 will be effective if the parties do not dispute their liability or if the defendant admits his liability...” **Barry Nicholas in ‘The French Law of Contract’ 2<sup>nd</sup> edition** states that the requirement of writing set out in article 1341 is only evidential.
34. The exhibits produced in this case, namely the e-mails, bank documents, documents pertaining to the establishment of the two companies and the brochures which were substantiated by oral and affidavit testimony of the witnesses who testified in this case, is a clear exception under article 1347 to the requirement set out in article 1341. The exhibits produced in this case in my view, do not merely make the agreement ‘likely’ but proves it beyond the civil standard of proof. In **Lionnet and Another VS Teemouljee & Co Ltd, Mauritius Reports 1962 p7**, a decision on appeal from the Supreme Court of Seychelles to the Supreme Court of Mauritius, it was held that counterfoils of the books of vouchers did constitute a beginning of proof in writing rendering likely the alleged contract between the parties. And once there was a beginning of proof in writing oral evidence could properly be adduced to establish all the terms and conditions of the contract. In the case of **MacGaw VS Jean and Another [1990] SLR 149**, it was held that the cheque issued by the plaintiff provided initial proof in writing.
35. In her Skeleton Heads of Argument the Appellant also complains about the procedure adopted by the Learned Trial Judge in overruling her objection taken under article 1341. It is her submission that the learned Trial Judge should have made a Ruling prior to the Respondent been permitted to lead evidence under article 1347 and i.e. no sooner the Appellant raised the objection under article 1341. I do not find any

provisions in the Seychelles Code of Civil Procedure, which deals with the procedure to be adopted in civil suits, which supports the Appellant's contention. Further article 1341 makes no reference to any procedure to be adopted when an objection under the said article is raised. It is my view that that a decision as to the applicability or non-applicability of article 1341 can be made only when the Court is seized of all the documentation. This is because it is only after the Court has had view of the documents led in the case that it can make a determination (a) whether the documents produced 'provide initial proof'; (b) 'whether such documents emanate from a person against whom the claim is made', in this case the Appellant; and (c) whether the documents 'renders the facts alleged in the plaint likely'.

36. The Appellant also complains at ground 4, that the learned Judge erred when he failed to rule in her favour, on the submission of no case to answer. However the Appellant had not made any specific submissions in respect of this ground in her Skeleton Heads of Arguments. In the case of **Natho VS Bissessur, [1953] Mauritius Reports 227** attention was invited to the pronouncement of the Court of appeal in **Alexander VS Rayson [1936] 1 K.B. 169** in regard to the general rule of practice applicable in cases where a submission of no case to answer is made to the Judge of first instance sitting without a jury, where the English Court said: *"Where an action is being heard by a jury it is, of course, quite usual and often convenient at the end of the case of the plaintiff, or of the party having the onus of proof, as the defendant had here, for the opposing party to ask for the ruling of the judge whether there is any case to go to the jury, who are the only judges of fact. It also seems to be not unusual in the Kings Bench Division to ask for a similar ruling in actions tried by a judge alone. We think, however, that this is highly inconvenient. For the judge in such cases is also the judge of fact, and we cannot think it right that the judge of fact should be asked to express any opinion upon evidence until the evidence is completed. Certainly no one would ever dream of asking a jury at the end of a plaintiff's case to say what verdict they would be prepared to give if the defendant called no evidence, and we fail to see why a judge should be asked such a question in cases he and not a jury is the judge that has to determine the facts. In such cases we venture to think that the responsibility for not*

calling rebutting evidence should be upon the other party's counsel and upon no one else."

37. It is to be noted that in the Seychelles it is only in which the accused is charged with murder a jury trial is held. In the case of **Cooposamy VS Duboil [2012]SLR 219**, this Court held: "Mr. Bonte for the Respondent has argued that when an objection is made under article 1341 at trial a voir dire should be held. We do not subscribe to this view. As we have pointed out, there are two possible objections that can be made under article 1341 and the procedure differs depending on which particular objection is being made. **Neither requires a voir dire as in any case in Seychelles there are no jury trials for civil cases**". The Court also stated "that although the oral evidence of the appellant is admissible, the trial judge still has to appreciate at the end of the case if she has proven her case". (emphasis added). I have dealt with ground 4 of appeal also at paragraph 20 and 21 above.

38. Under the Electronic Transactions Act, 2001 there is legal recognition of e-mail transmissions. The following provisions (sections 4 and 10 read with section 2 of the Interpretation section ) of the **Electronic Transactions Act, 2001** are relevant:

"Legal recognition of electronic records

4. Where any **law** provides that information or any other matter shall be in writing then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is —

(a) rendered or made available in an **electronic form**; and

(b) accessible so as to be usable for a subsequent reference."

"Attribution of electronic records

10 . An **electronic record** shall be attributed to the **originator** if it was sent —

(a) by the originator himself;

(b) by a person who had authority to act on behalf of the originator in respect of that electronic record; or

(c) by an information system programmed by or on behalf of the originator to operate automatically.”

“Interpretation

2 In this Act, unless the context otherwise requires —

“**addressee**” means a person who is intended by the originator to receive the electronic record but does not include any intermediary;

“computer” means any electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network;

“**electronic form**” with reference to information means any information generated, sent, received or stored in any computer storage media such as magnetic, optical, computer memory or other similar devices;

“electronic record” means data, record or data generated, image or sound store, received or sent in an electronic form;

“**law**” includes any instrument that has the force of law and any unwritten rule of law;

*“originator” means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;”*

The Civil Code of Seychelles Act is the **law**, which at article 1341, makes reference to a **written** document. The **originator**; of the e-mails relied upon by the Respondent to prove his case, had been the Appellant; and the **addressee** of such e-mails had been the Respondent and MCB.

I therefore dismiss ground 2, 4 and 5 of appeal.

39. **GROUND 3 AND 8 OF APPEAL** can be dealt with together. Ground 3 is to the effect that the applicable law in this case was the laws of banking and not the laws of testacy or probate and that the presiding Judge erred in law when he ruled that the proceeds of the judgment shall accrue to the estate of the late Tim Walsh. It is the Appellant’s argument that the HSBC account from which the Respondent had transferred GBP 200,000.00 to the Appellant was an account the Respondent jointly held jointly with Mrs.SamanthaWeller. The Appellant had not raised this issue in her Statement of Defence nor did the learned Trial Judge make a pronouncement that the law applicable to this case was the law of testacy or probate. The case had been decided on the basis of the law of contract. Further in view of the Appellant’s defence that there was no agreement with the Respondent and that she did not owe any money to the Respondent; this argument is misplaced. Exhibit **P 21** shows that the request for the transfer of GBP 200,000.00 was made by Mr. Tim Walsh, indicating that this was a bank account which either one of the account holders could operate and not jointly. In agreeing to the substitution of Mrs. Sarah Louise Walsh as the Plaintiff to the case, the Appellant had agreed that she was the rightful person to be substituted. According to Mrs. Sarah L. Walsh, Mrs. Samantha Weller had been removed as a signatory from this account in January 2012 and that was before Tim’s death in November 2012. Also that account in which Samantha Weller was a partner had been closed prior to Tim’s death. I therefore dismiss grounds 3 and 8.



40. **GROUND 6 OF APPEAL** is against the award of moral damages in a sum of GBP 15,000.00. Mr. Tim Walsh had claimed GBP 30,000.00 for disappointment, anxiety and moral damages in his Plaintiff. The Respondent had not given any evidence in this regard. In the case of **Vidot Vs Libanotis [SLR 1977, 192] SauzierJ** said: *“In this case the learned Magistrate did not make a critical evaluation of the moral damages and based his finding only on the amount of damages claimed. That was a wrong principle of law on which the trial court acted and it is the duty of this Court as an appellate court to assess the damages on the evidence which the learned magistrate had before him”*. Moral damages are in the category of an award designed to compensate the claimant for actual injury suffered and not to impose a penalty on the wrong doer. Moral damages are not punitive in nature but are designed to compensate and alleviate the physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation and similar harm unjustly caused to a person. **Barry Nicholas in his book ‘The French Law of Contract’ second edition** states: *“dommage moral, include a very wide range of non-pecuniary loss”*. **Article 1149 (2) of the Civil Code of Seychelles Act** states: *“Damages shall also be recoverable for any injury or loss of rights of personality. These include the rights which cannot be measured in money such as pain and suffering, and aesthetic loss and loss of any amenities of life”*. To recover moral damages in an action for breach of contract the following conditions have to be met. (i) There must be an injury, whether physical, mental or psychological, sustained by the claimant. A mere allegation of “disappointment, anxiety”, are insufficient. (ii) There must be evidence that the respondent acted in bad faith, fraudulently, recklessly, out of malice or in wanton disregard of his contractual obligation. (iii) The wrongful act or omission of the respondent should be the proximate cause of the injury sustained by the claimant. I am therefore of the view that the learned Trial Judge erred in making an award for moral damages. I therefore allow this ground of appeal.
41. **GROUND 7 OF APPEAL** is against the award of interest at the commercial rate and not the legal rate. The submissions made under this ground by the Appellant in her Skeleton Heads of Arguments do not relate to this ground but an attempt to argue that

there was no place for an award of interest as there was no contract. This has been dealt with under ground 1. Thus no submission has been made in relation to ground 7 of appeal. I therefore dismiss this ground of appeal.

42. **GROUND 9** is that the learned Trial Judge had failed to make a finding that the Respondent had failed to discharge the burden of proof. This ground is dismissed in view of the oral and documentary evidence led in this case. I am of the view that the Respondent has proved the averments in the plaint more than on a balance of probabilities.

43. The Appellant has set out 9 grounds of appeal as Errors of Facts in her Notice of Appeal dated 1<sup>st</sup> June 2017 and numbered the said grounds as 10 to 17 in her Skeleton Heads of Argument.

44. **GROUND 10** – The comment made by the learned Trial Judge at ground 11 is a necessary inference to be drawn from the evidence in the case. Surely the GBP 213,500.00 was not transferred by Mr. Tim Walsh to the Appellant as a gift or a loan. Even the Appellant has not taken up such a position. Ground 10 is therefore dismissed.

45. **GROUND 11** – It is clear from exhibits P21, P20, P21, P24,P25,P26 and P27 that GBP 13,500 transferred on the 24th June was transferred to the same account as the GBP 200,000.00 was transferred. The Appellant had a GBP and a Seychelles Rupee account at MCB under the same number, namely 00716724000 and both transfers had been made to this account. Ground 11 is therefore dismissed.

46. **FOUNDATIONS 12, 13 & 18** had been withdrawn by the Appellant in her Skeleton Heads of Argument.

47. **GROUND 14** according to the evidence of Mrs. Sarah Walsh, Ms. Samantha Weller had been removed as a signatory from account numbered 403219-3147368, in January 2012 and that was before Tim's death in November 2012. Also that account in which Samantha Weller was a partner had been closed prior to Tim's death. Ground 14 is therefore dismissed.

48. **GROUND 15 & 17** are obvious typographical errors. In the same sentences in which the erroneous references to Samantha Walsh and GBP 10,000.00 has been made, the learned Trial Judge also makes reference to Exhibit P10, which clearly shows the references were in fact to Samantha A. Weller and GBP 13,500.00. Grounds 15 & 17 are therefore dismissed.
49. **Ground 16** is a challenge to the learned Trial Judge's statement that the Court "does not have a specific amount to enable it to make a conclusive order for legitimate expenses that may have been incurred by the Appellant". The learned Trial Judge cannot be faulted on this because the Respondent had denied the very existence of any agreement and had not made any claim for legitimate expenses in her Counter-Claim. Also the Respondent had not testified before the Court. However Mr. Tim Walsh at paragraph 8 of his Plea had said that he recognizes that some money "has been legitimately spent on costs incurred, but has no visibility of any accounting for such expenditure..." The Respondent in her evidence before the Trial Court had said that her late husband's request was for the return of GBP 213,500.00 less legitimate invoices..."
50. In order to substantiate this ground of appeal, the Appellant relies on a statement made by the learned Trial Judge at page 176 of the judgment in support of this ground where the learned Trial Judge had said "An e-mail from the Defendant (*Appellant herein*) to the Plaintiff (*Respondent herein*) and other persons dated 10<sup>th</sup> June 2011 was admitted as Exhibit 18. It is a 9 page document (excepting pages 3, 4, 5). The purpose of this e-mail was to introduce Mr. Peter Hubert, a British Architect, who was appointed by Defendant for the purpose of producing some technical and conceptual drawings for the project. Mr. Hubert visited the project location in August 2011 to further the project. The fees of Mr. Hubert amounting to GBP 13,500.00 were paid by the Defendant from the funds that the Plaintiff earlier transferred in Defendant's bank account." I have carefully looked at P 18 but do not see any reference to the fees of Mr. Peter Hubert amounting to GBP 13,500.00 been paid by the Appellant from the funds that Mr. Tim Walsh earlier transferred in Appellant's bank account. The

Affidavit of Mr. Derick Dias, P 23, referred to at paragraph 21 above detailing the exhibits produced in the case, does not show at paragraphs 4 & 5 of that Affidavit that a payment of GBP 13,500.00 has been paid by the Appellant to Mr. Peter Hubert from the funds that Mr. Tim Walsh earlier transferred in Appellant's bank account. For that matter the GBP 13,500.00 was still there in the Rupee account of the Appellant in the converted sum of SR 253,808.00, according to paragraph 4 of P 23.

51. I am of the view that the Appellant's submission on this ground in her Skeleton Heads, namely: "The Appellant submits that was the same GBP 13,500.00 that was transferred on the 24<sup>th</sup> June in the account of the Appellant in exhibit 10 and the presiding Judge erred when he overlooked this fact in his final decision and orders the Appellant to pay the Respondent the full amount"; runs contrary to the Appellant's submission that there was no agreement between her and Mr. Tim Walsh and Mr. Tim Walsh had not made any transfer of moneys to her. I therefore dismiss ground 16 of appeal as elaborated in the Skeleton Heads of Argument.
52. There is however the evidence of Mr. Peter Rosalie that he was paid SR 22,340.00 by the Appellant for setting up the two companies, namely West Beach Chalets (Pty) Ltd and West Beach Holdings (Pty) Ltd. He had even produced the invoices pertaining to these payments (P 29 & 30). I am of the view that this amount should be deducted from the total amount of GBP 228,500.00 ordered to be paid by the learned Trial Judge to the Respondent, by the Appellant. I therefore would allow this sum to be deducted from the total sum of GBP 228,500.00 awarded against the Appellant.
53. The appeal is allowed partly by varying the judgment of the Supreme Court to the extent that the sum of GBP 15,000.00 erroneously awarded as damages and the sum of SR 22,340.00 paid to Mr. Peter Rosalie on invoices P 29 & 30 be deducted from the sum of GBP 228,500.00 awarded against the Appellant. Subject to this variation the judgment of the Trial Court is confirmed.

**A.** Fernando (J.A)

**I concur:.**

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F. MacGregor (PCA)

Signed, dated and delivered at Palais de Justice, Ile du Port on 07 December 2017