0IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A) , M. Twomey (J.A) F. Robinson (J.A) .

Civil Appeal SCA 14/2015

(Appeal from Supreme Court Decision CS 175/2011)

Cable and Wireless (Seychelles) Ltd — Appellant

Versus

Innocente Gangadoo — Respondent

Heard: 22 August 2018

Counsel: Mr. Divino Sabino for the Appellant

Mr. S. Rajasundaram for the Respondent

Delivered: 31 August 2018

JUDGMENT

M. Twomey (J.A)

Background to the Appeal

[1] The Appellant, a company incorporated in Seychelles, entered into an agreement with the Government of Seychelles in July 1973, which agreement was renewed in August 1984, 25 March 1990 and August 2009 to operate national and international telecommunication services in Seychelles.

[2] It was inter alia a term of these agreements that the government would undertake "to assist the [Appellant] by providing and/or maintaining suitable legislation to obtain sites and/or wayleaves for the installation and maintenance of poles and pole routes, cables and cable routes, exchange buildings, stores and cabinets and public pay booths…" It was a further term of these agreements that the Appellant would construct infrastructure

necessary for its "operations and that sites used for this purpose [would] be deemed to have the approval of the Government to continue to be used by the Company for such purpose."

[3] On or around a date unknown in 1986, a structure consisting of a telecommunication box and cables was built by the Appellant in Anse Boileau on land belonging to the Government.

[4] On 5 April 2004, the Government transferred Parcel C4755 to the Respondent on which was situated the telecommunication box and in April 2008 the Respondent wrote to the Appellant asking that the structure be removed from her land. The Appellant failed to do so which culminated in the Respondent filing a Plaint in August 2009 in which she prayed for damages from the Appellant for unjust enrichment arising from the structure on her land and for the Appellant's continued access to the same.

[5] That Plaint was dismissed on the grounds that there were alternative legal remedies available to the Respondent.

[6] On September 2011, the Respondent filed a fresh plaint, this time claiming indemnity as arrears of rent from the Appellant for the telecommunication box remaining on her land from the Appellant from the time she purchased the property and continuing and also for moral damages. The learned trial judge found in favour of the Respondent for arrears of rent in the sum of SR2000 monthly from April 2004 to March 2008, SR 3000 per month from the period April 2008 to March 2012 and SR 4,000 for the period April 2012 to March 2016 and continuing. He also made an order for moral damages in the sum of SR50, 000 against the Appellant. He dismissed pleas in limine litis on limitation of the action, res judicata and abuse of process.

The grounds of Appeal

[7] From this judgment the Appellant has appealed on the following summarised grounds:

1. The learned judge failed to consider all the pleas in limine litis raised by the Appellant.

2. The learned judge failed to consider that the suit was res judicata and an abuse of process.

3. The learned judge failed to consider that the suit was prescribed.

4. The learned judge failed to take into account that this was not a claim for rent arrears, or that there was no evidence of a rental agreement between the parties, and that claims for rent are the province of the Rent Board.

5. The learned judge failed to take into consideration that the structures were built on the Respondent's land prior to her ownership with the consent of the predecessor in title and that the Respondent had notice of the structure prior to her acquiring the land.

6. The learned judge erred in awarding damages to the Respondent as no damages arose from the conduct of the Appellant.

7. The learned judge failed to appreciate that any permits, licences, easements or covenants over the land bound its purchaser.

8. The learned judge failed to appreciate that any dispute regarding compensation for telecommunication structures on land even if privately owned have to be referred to the Minister in accordance with section 19(4) of the Telecommunications and Broadcasting Act.

Grounds 1, 2 and 3 – res judicata, abuse of process and prescription

[8] These grounds relate to pleas in limine litis raised by the Appellant which were either not addressed by the learned judge in his decision or in the Appellant's submissions wrongly decided.

[9] With regard to the plea regarding res judicata, the principle is enunciated in the provisions of Article 1351 1 of the Civil Code of Seychelles and its rationale explained by the Court of Appeal in the case of *Gomme v Maurel* (2012) SLR 342 as being:

"grounded on a public policy requirement that there should be finality in a Court decision and an end to litigation in a matter which has been dealt with in an earlier case and that the proper adherence to the rule of law in a democratic society enjoins one to ensure that one is debarred from rehearsing the same issue in multifarious forms. Litigation must be reserved for real and genuine issues of fact and law".

[10] Learned Counsel for the Appellant has submitted that the trinity of issues necessary to support the claim for res judicata are all present. Relying on *Hoareau v Hemrick* (1973) SLR 273, he states that *cause* does not relate to cause of action but as to the facts from which the right springs. These he submits are the same in both cases: the siting of the telecommunication box on the Respondent's land.

[11] The Respondent has meanwhile submitted that while the parties and the subject matter are the same in both cases, the *cause* is different. Buoyed by the learned trials' judges conclusion in the first case relating to unjust enrichment that legal remedies were available to the Respondent, he submits that the *cause* is different in the two suits as the Respondent's capacity to sue in the second case arises from her constitutional right to property. He relies on the authorities of *Pouponneau v Janish* SCAR (1979) 290, *Moise v Morin* [1993] SLR 145 and *Julienne v Julienne* (1992) SLR 121.

[12] Confusion has arisen over the issue of *cause* given the wording of Article 1351 1. It provides:

> *"The authority of a final judgment shall only be binding in respect of the subject-matter of the judgment. It is necessary that the demand relate to the same subject-matter; that it relates to the same class, that it be between the same parties and that it be brought by them or against them in the same capacities."*

[13] It will be noted that the word cause is not used at all. However, a little excursion in legal history will give perspective to the arguments of the parties in the present case. Article 1351 1 above was the translation made by Chloros in 1975 of the French provision then in effect which read as follows:

"L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité (emphasis added).

[14] The original English translation of the provision used in Seychelles until 1975 was Blackwood's Wright's version namely:

A judgment has only the effect of res judicata as regards the subject-matter of the judgment. In order that the thing should be res judicata, the claim must be (1) for the same thing, (2) based on the same legal grounds, (3) be between the same parties, and brought by and against them respectively in the same right (emphasis added).

[15] It is generally accepted in Seychelles that the word class used by Chloros was a misprint for *cause,* an error which was never corrected. The case of *Hemrick* decided in 1973 before the new Code was enacted referred to *cause*, emanating from the original French Code which was then in use and which meaning has survived in *jurisprudence constante* to date.

[16] It must however be noted however that Souyave CJ in *Hemrick* made the following comment in explaining the three issues that has to coincide in both cases for a plea of *res judicata* to succeed:

"The "objet" is what is claimed. "La cause" is the fact, or the act, whence the right springs. It might be shortly described as the right which has been violated."

[17] *Hemrick* concerned a claim by a concubine who had first made a claim under unjust enrichment for services she had carried out for the defendant as his housekeeper. That claim was dismissed on the grounds that the cause of action arose out of an "immoral association" which the court could not condone. In her second claim, this time for the return of SR5000 which she claimed the defendant had given her to leave his home, but then had subsequently assaulted her and taken it back, the court found that the cause of action was entirely different.

[18] The cases cited by the Respondent offer no assistance to her. The plea *of res judicata* was rejected in those cases as the claims did not concern the same object or cause. In *Pouponneau* (the plea is not reported in the case cited), the first suit concerned a declaration of title to a house and the secondsuit, the ejectment of the defendant. In *Moise*, the defendant was *sued in a representative capacity in the first suit and in the second, in a personal capacity. In Julienne*, the first suit concerned a settlement of compensation among heirs and the second a *desaveu de paternité* of the defendant, who would otherwise benefit from the settlement.

[19] In the present case, the first matter related to a case based on unjust enrichment by the siting of the Appellant of the structure on the Respondent's property to the detriment of her right to enjoy her property while the second action concerned an indemnity as loss of rent as a result of the siting of the structure which also affected her right to enjoy her property. They are clearly the same cause. On that point alone the plea succeeds.

[20] We could at this juncture allow the appeal purely on this issue but have decided to explore the other grounds in order to develop the jurisprudence of Seychelles on the many issues raised by this case and also to alert the Government as to the serious consequences of their dereliction of duty in such cases.

[21] With regard to the plea relating to abuse of the legal and judiciary process, we note that the Respondent was encouraged in her first case to seek an alternative legal remedy (*vide* page 11 of the decision of the judge *a quo).* We are not therefore unconvinced that the present suit qualifies as an abuse of process.

[22] In respect of the ground relating to the statute of limitation, learned Counsel for the Appellant has submitted that pursuant to Article 2271 of the Civil Code, the action for payment of rent which course of action would have started in 2004 would have been prescribed in 2009, two years before the present plaint was filed. Articles 1709 and 1718 of the Civil Code make it clear that a lease only confers personal rights and not real rights. A claim for rent is therefore an action *in personam* subject to the five year limitation rule under Article 2271 of the Civil Code.

[23] Counsel for the Respondent has for his part submitted that the correspondence between the parties, namely Exhibit P5, a letter from the Appellant dated 3 October 2008 in which there is an undertaking by the Appellant for the removal of the structure subject to a shared contribution in costs interrupted the five year prescription. We do find favour with this submission.

Ground 4 - the claim for rent arrears, the lack of evidence of a rental agreement between the parties and the jurisdiction of the Rent Board.

[24] It is difficult to understand the cause of action raised in this case. It may be inferred that the Respondent is claiming delictual loss although it is not clearly stated in her plaint. Nevertheless, the learned trial judge seems to have treated her claim purely as one of encroachment by the Appellant, resulting in her right to demand compensation in the form of rent or indemnity or demand the removal of the structure. Ultimately, in his orders he grants the Respondent an indemnity in the form of a monthly rent and further orders that "future review of such rent or indemnity is to be mutually agreed between the parties or determined by the Rent Tribunal."

[25] It is these findings and orders that the Appellant find most vexatious as they are not grounded in law. He has submitted that not only was there no lease agreement between the parties but that such an agreement could not in any case be inferred and if one was in existence this matter would have had to have been taken before the Rent Board.

[26] Conversely, the Respondent has submitted that this is not a claim grounded in the non-payment of rent but rather one where the breach of the Respondent's constitutional rights to her property has converted her claim for rent as some form of indemnity. If that is the case we do not find this readily apparent from the pleadings.

[27] We are of the view that the learned judge's decision on this issue was misconceived. An indemnity in the form of monthly rent can only arise from a delict or a contract. If it arose from a contract in the form of a tenancy agreement, the proper forum for the settlement of the litigation would have been the Rent Board pursuant to section 13 of the Control of Rent and Tenancy Agreements Act. Neither cause of action is made out either in the

pleadings or in the evidence adduced. For these reasons the appeal on these grounds would also succeed.

Grounds 5, 7, 8 - The building of the structures with the consent of the Respondent's predecessor in title.

[28] It is submitted by learned Cunsel for the Appellant that the learned trial judge was wrong in concluding that the structures were built without any right or authority. He submits that from the evidence adduced the structures were built on the land in 1986 or before in accordance with the Telecommunications Licence Agreement between the Appellant and the Government when the Government owned the land, which agreement was registered. In any case the Broadcasting and Telecommunication Act 2000 as amended provides for the right of the Appellant to enter any land to construct structures necessary for the function and operation of its services under its licence and agreement with the Government.

[29] Learned Counsel for the Respondent does not contest that the structures were so built but he submits rather that the agreement permitting the same does not override the rights of the Respondent when she came to acquire the land given her constitutional right to property under Article 26 of the Constitution.

[30] He further submits that the Appellant's submission regarding the binding provisions of the Broadcasting and Telecommunication Act would have no effect with regard to the Respondent again because of her unfettered constitutional rights to property.

[31] We would first like to address the issue of the Respondent's right to property.

[32] Article 26 of the Constitution of Seychelles in relevant part provides:

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

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

(a) in the public interest;…

[33] Article 26 (1) provides for the right to property while Article 26 (2) qualifies or limits the right when these are prescribed by law and are necessary in a democratic society. In the interpretation of what is prescribed by law necessary in a democratic society in relation to a matter involving Article 22 of the Constitution, the Court of Appeal stated in *Mancienne v Government of Seychelles* (2004-2005) SCAR161, 186-187 that:

> *"the words "as may be prescribed by a law" are not just an empty rhetoric. They are clearly designed to serve a purpose which is this, namely, to include any law either statutory (such as s. 4 of the Courts Act) or the common law that may be necessary in a democratic society for protection of the values set out in sub-clauses (2) (a) (b) (c) (d) (e) and (f) of Article 22. Since the […] law […] preceded the enactment of the Constitution, Article 22 (2) must therefore be interpreted purposively as a saving clause to the […] law. In this regard, it is indeed important to bear in mind that the word "law" is defined in section (1) of the Principles of Interpretation in Schedule 2 of the Constitution to include "any instrument that has the force of law and any unwritten rule of law".*

[34] Robinson J (as she then was) in *Durup & Ors v Brassel & Anor* (2013) 1 SLR 259, in a case also involving the limitations to the right to property, further explained the meaning of law as envisioned by the drafters of the Constitution in this context as follows:

> *"the law must contain certain qualitative characteristics and afford appropriate procedural safeguards so as to ensure protection against arbitrary action. In the case of James and others v The United Kingdom (1986) 8 EHRR 123 the Chamber of the European Court of Human Rights reiterated that —*
>
> *"[…] the term "law" or "lawful" in the Convention […] also [relate] to the quality of the law, requiring it to be compatible with the rule of law".*

[32] Accordingly the Chamber of the European Court of Human Rights in the case of Silver and others v/s the United Kingdom (1983) 5 EHRR 347 interpreted the term "prescribed by law" with respect to a restriction that may be imposed by a law in terms of the European Convention on Human Rights as follows…

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

…a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail…

In the case of Silver the Chamber of the European Court of Human Rights summarises the principles of the phrase "necessary in a democratic society" as follows —

"(a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or desirable…";

(b) …

(c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" [...];

(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted […].".

[35] The principles of the UN Convention on Human rights referred to by Robinson J have been imported in the jurisprudence of Seychelles (see *Ugo Sala and another vs Sir Georges Estate (Proprietary) Ltd* (supra). In *Ugo Sala*, Domah JA stated:

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

[36] We therefore conclude that Article 26 of the Constitution confers no absolute right to property and that these rights can be necessarily restricted when there are provisions in law necessary in a democratic society for the qualification of the right.

[37] In the present matter, it remains for us to decide whether the provisions of the Broadcasting and Telecommunications Act meet the qualifications we have extrapolated above in order to be construed as permissible limitations to the right to property. The Act provides the following relevant provisions:

"12. (1) The Minister shall be responsible for the general superintendence and supervision of all matters relating to broadcasting and telecommunication and shall carry the provisions of this Act into execution.

(2) The Minister, in exercising the powers conferred by this Act, shall -

(a) take all reasonable measures to provide throughout Seychelles, such broadcasting and telecommunication that will satisfy all reasonable demand for such services, including emergency services, public pay phone services and directory information services;

(b) promote the interests of consumers, purchasers and other users of broadcasting and telecommunication services in respect of the prices charged for, and the quality and variety of, such services and equipment supplied in connection with such services;

(c) promote and maintain competition among persons engaged in commercial activities for, or in connection with, the provision of broadcasting and telecommunication services and promote efficiency and economy on the part of such persons; and

(d) promote the goals of universal service.

…

18. (1) A licensee or any person authorised by him in writing may, for the purposes of establishing a broadcasting service or telecommunication service, as the case may be -

(i) enter upon any property at any reasonable time for the purposes of such service including any preliminary survey in relation to such service;

(ii) subject to any Permission required under the Town and Country Planning Act or to any other law regulating the control and development of land, erect or place any broadcasting apparatus or telecommunication apparatus or posts, or construct works upon, over, under, across or along <u>any</u> street, road, <u>land</u>, building or other property and maintain, after or remove anything so erected, placed or constructed;

…

19.(1) In exercise of the powers under section 18, a licensee or the person authorised by him in writing shall do as little damage as may be reasonable in the circumstances.

(2) The licensee shall make full compensation to all persons for any actual damage sustained by them by reason, or in consequence, of the exercise of the powers under section 18.

(3) Any disputes concerning the amount and application of compensation under subsection (2) shall be determined by the Minister whose determination on the matter shall be final."

[38] It cannot be doubted that these sections of the Act certainly provide for the public interest, convenience and even necessity of accessing telecommunication services. We note in this context that Article 22 of the Constitution provides for the freedom of expression which includes the right "to seek, receive and impart ideas and information without interference."

[39] In this regard, the Respondent bought the property with the Appellant's structure in her full view. It is not disputed that she had grown up on the land and had always been aware of the existence of the structure but only discovered later after she had purchased the property that it was actually sited within her boundaries. Certainly a certificate of official search does not indicate any encumbrances or easements in favour of third parties. However, overriding interests need not be registered. Section 25 of the Land Registration Act specifically provides that overriding interests subsist and affect land ownership without their being noted on the Register. These overriding interests include inter alia:

> *"25 (g) the rights of a person in possession or actual occupation of land;*
>
> *(h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, reservoirs, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law;*
>
> *(k) restrictions or prohibitions imposed by, or under the authority of, any written law and relating to the building on or the user or other enjoyment of land…"*

[40] Given these provisions of the Land Registration Act and in addition the actual knowledge of these structures by the Respondent the court cannot entertain the claim as pleaded or otherwise.

[41] Further, in the context of the erection of the structure with the approval of the Respondent's predecessor in title, we need to point out that this is certainly not a matter falling within the provisions of Article 555 of the Civil Code or the other provisions as articulated in the learned trial judge's decision. If anything the Appellants' limited ownership of Parcel C4755 is a perpetual *droit de superficie*.

[42] Article 553 of the Civil Code provides in relevant part:

> *"All buildings, plantations and works on land or under the ground shall be presumed to have been made by the owner at his own cost and to belong to him unless there is evidence to the contrary; …"*

[43] The presumption arising from Article 533 is that buildings on land are presumed to be that of the landowner unless he permits another to build on the land. In consequence of this provision it is clear that rights in constructions or superficiary erections or plantations can be distinct from those rights attaching to the soil or the land. A *droit de superficie* is distinct from the rights of the owner of the land.

[44] In *De Silva v Baccarie (SCAR 1978-82) 45,* Lalouette JA expressed the view that stated that a *droit de superficie* is a real right severed from the right of ownership of land and, conferred on a party, other than the owner of the land, to enjoy and dispose of the things rising above the surface of the land, such as constructions, plantation and works. Perrera J in *Adrienne v Pillay* (2003) SLR 68 expressed the view that a *droit de superficie* would be "an overriding interest" as envisaged in Section 25 of the Land Registration Act (Cap 107) where a person is in possession or actual occupation of the land. We adopt this view.

[45] In *Adonis v Celeste*, CS 124/2012 the Supreme Court relying on *Malbrook v Barra* (1978) SLR 196 and *Youpa v Marie* (1992) SLR 249 found that:

> "[A]lthough such a right is personal to the grantee, a purchaser of land that is subject to a *droit de superficie* takes the land subject to the droit de superficie."

Hence a *droit de superficie* persists with the transfer of property from the owner of the land to his successor in title.

[46] In the present case, the Appellant's *droit de superficie* was established by a number of incidences: the operation of the law, by agreement, but also by prescription given the

evidence of Mr. Fock Tave that the structures were installed as far back as 1986 by the Appellant and persisted when the Respondent bought the land.

[47] There is therefore no right of action to force the Appellant to remove his structures or to charge it an indemnity. The action is misconceived and the trial judge's decision erroneous.

[48] That being the case it would be academic to consider the ground of appeal relating to damages Suffice it to say that damages do not arise.

[49] The appeal therefore succeeds in its entirety but given the circumstances of this case we do not award costs.

[50] We would conclude by pointing out that the failure of the Government in transferring land to the Respondent in this case without averting itself to the Appellant's existing structure and excising the portion of land was at the very least irresponsible crating an injustice. In this respect given the provisions of section 19 of the Broadcasting and Telecommunications Act, we urge both the Vice President with the portfolio for Information Communication Technology and the Minister responsible for Habitat, Infrastructure and Land Transport to consider this matter with a view to correcting the injustice caused by the Government and compensating the Respondent for the loss arising from the fact that her enjoyment of her property is limited given the continued siting the Appellant's infrastructure on her land.

[51] We would also like to tender our unreserved apology to the parties in this case who have waited a total of nine years from the filing of the first suit in this case for the matters to be concluded before the Courts of Seychelles. We sincerely hope that the matters raised are resolved urgently by the Ministries concerned to the satisfaction of the parties.

M. Twomey (J.A)

I concur:. **…….** A.Fernando (J.A)

I concur:. **…….** F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 31 August 2018