

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram:** A. Fernando (JA) , M. Twomey (JA) , B. Renaud (J.)]

**Civil Appeal SCA 08/2017**

**(Appeal from Supreme Court Decision CS 339/2010)**

---

Gaston Morin

Appellant

Versus

John Pool

1st Respondent

Lioudmilla Etienne

2nd Respondent

---

Heard: 29 May 2019

Counsel: Mr. Basil Hoareau for the Appellant

Mr. Anthony Derjacques for the Respondents

Delivered: 10 May 2019

**JUDGMENT**

B. Renaud (J.A)

**Plaintiff's (Appellant's) case**

1. The Plaintiff (now Appellant) entered a Plaint in the Supreme Court of 24<sup>th</sup> November, 2010 in case CS 339/10 and complained that on 25<sup>th</sup> October 2007 he sold and transferred adjoining Parcels C948 and C949, including all immovables attached thereto, to the Defendants (now Respondents) for SR1,245,000.00. He averred that at the material time the sale price was less than half of the real value of the parcels or alternatively the price was less than half of the real value of the parcels along with the immovable attached.
2. He prayed the Court to (i) declare the contract of sale of Parcels C948 and C949 or the contract of sale of parcels C948 and C949, along, with the attached immovable the

transfer thereof liable to be rescinded on the ground of lesion; (ii) rescind the contract of sale and/or the transfer on the ground of lesion, (iii) order the Land Registrar to rectify the register in respect of parcels C948 and C949 and register the Plaintiff as the sole proprietor of those parcels of land; and, (iv) make any other order the court deems fit and necessary.

3. He filed a preliminary motion for the appointment of 3 valuers for the property in issue which motion was granted on 24<sup>th</sup> May, 2012.

### **Defendants' (Respondent's) case**

4. On 10<sup>th</sup> March, 2011 the Defendants (now Respondents) filed their Statement of Defence which included a Plea in Limine Litis, the outcome of which is not in issue before us.
5. They admitted the other averments but denied paragraph 4 of the Plaint and contended that the movables were transferred and paid for under a separate agreement. They also denied the averments in paragraph 5 of the Plaint and contended that the Appellant was paid the correct market value price and further added advantages and sums paid over and above the market value. They averred that the Appellant was a trespasser and must vacate the said property. They prayed for an order dismissing the Plaint with costs.

### **Decision of the Supreme Court**

6. The Learned Trial Judge delivered judgment in this suit on 2<sup>nd</sup> March, 2017 and *inter alia* stated at paragraph 70 of his Judgment concluded as follows –

*“On a balance of probabilities I find that the Plaintiff and Defendants agreed a price for the heritable subjects that is the land, at SR1, 245,000.00. This fell within the normal range. I find that an extra payment was agreed to be remitted in Seychelles Rupees and in US Dollars as aforesaid and was done. This extra payment plus the payment for the land was the price agreed between a willing buyer and a willing seller for the whole subjects. I disregard the valuation of SR12,*

*125,000.00, it has no real relevance, it is grossly excessive and is not a figure on which lesion can be based. I reject each application by the Plaintiff in his Plaint. I find that the First and Second Defendants are correctly registered as the co-proprietors of parcels of land C948 and C949 in the Land register”.*

7. At paragraph 71 the Learned Trial Judge stated –

*“The Plaintiff’s case fails and I find for the Defendants. The Plaintiff is in unlawful possession of the property and the Defendants are now entitled to enter and take possession of the whole property”*

8. At paragraph 72 the Learned Trial Judge ordered as follows –

*“I ORDER the Plaintiff to vacate the property on or before 15<sup>th</sup> May 2017, failing which I direct the Registrar of the Supreme Court to issue a writ of habere facias possessionem to evict the Plaintiff from the property”.*

### **Grounds of Appeal**

9. On 5<sup>th</sup> April, 2017 the Appellant filed Notice of Appeal setting out six grounds of appeal against the whole of the decision of the Learned Trial Judge delivered on 2<sup>nd</sup> March, 2017 dismissing the Plaint of the Appellant. The grounds of Appeal are as follows:

1. The learned trial judge erred in law in admitting evidence in respect of the payments over and above the sum of SR1, 245,000.00 as mentioned in the transfer document of parcels C948 and C949, dated the 27<sup>th</sup> of October, 2007.
2. The learned trial judge erred in law in relying on the payments over and above the sum of SR1, 245,000.00 as mentioned in the transfer document of parcels C948 and C949, dated 27<sup>th</sup> October, 2007, in coming to his decision.

3. The learned trial judge erred in law and on the evidence in not accepting the report of the three experts appointed by the Court and the testimony of Mr. Roy Cadence and Miss Veronique Bonnelame in that:
  - (i) the three experts were all persons academically qualified to evaluate immovable property as opposed to Miss Cecile Bastille who is qualified as a Quantity Surveyor and Mr. Michel Leong who is a Land Surveyor
  - (ii) the learned trial judge failed to appreciate that in assessing the value of parcels C948 and C949 at the time of the sale, it was proper to consider the future development potential of the said parcels; and
  - (iii) the learned trial judge wrongly place emphasis on the legal definition of market value as found in Strouds Judicial dictionary.
4. The learned trial judge erred in law and on the evidence in holding that C948 and C949 are in an “agricultural zone”, in view that there is no development plan approved in accordance with the law designating the area in which parcels C948 and C949 are located as an “agricultural zone”.
5. The learned trial judge erred in law and on the evidence in relying on the valuation of Parcels C948 and C949 as established by the Stamp Duty Commissioner.
6. The learned trial judge erred in law in holding that the Appellant is in unlawful possession of the property and that the Respondents are entitled to enter and take possession of the property and in ordering the Appellant to vacate the property by or before the 15<sup>th</sup> of May 2017 and in directing the Registrar of the Supreme Court to issue a writ of habere facias possessionem to evict the Appellant does not vacate the property in that:

- (i) There was no counterclaim nor an application for a writ of habere facias possessionem on the part of the Respondents; and
- (ii) The said orders are all *ultra petita*, in that they were not prayed for.

### **Appellant's Submissions**

- 7. Learned Counsel for the Appellants have submitted that the admission by the trial judge of evidence in respect of the payments over and above the transfer price are in breach of the provisions of Article 1321 of the Civil Code, section 82 (1) of the Mortgage and Registration Act and settled jurisprudence (see *Guy v Sedgwick & Anor*, (SCA 54 of 2011) [2014] SCCA 5 (11 April 2014)).
- 8. He has also submitted that the trial judge was wrong not to accept the report and evidence of the three experts. He stated that they were academically qualified to value the properties and were better placed than those who weren't, namely Miss Bastille who was a quantity surveyor and Mr. Leong a land surveyor. The former gave a value at the time she wrote the report as opposed to the time the sale took place and the latter put too much emphasis on the fact that the parcels were in an agricultural zone with no tourism potential, and only took into account 25% of the property's potential to be developed.
- 9. In addition the trial judge's reliance of the valuation of the Stamp Duty Commissioner was misguided as no evidence of how she arrived at the value was adduced.
- 10. He further submitted that in accordance with Articles 1675 and 1677 of the Civil Code the trial judge was duty bound to take into consideration the condition and value of the property at the time of the sale including its potential value in a case of lesion. Using a legal definition in a judicial dictionary was inappropriate given the context of the provisions of the Civil Code.
- 11. With regard to the order for eviction the Appellant's submission is that this was *ultra petita*.

## **The Respondents Submissions**

12. Learned Counsel for the Respondents submitted that the evidence of the accountant Ange Morel and the Respondents themselves, included documentary evidence of payments which exceeded the transfer sum as per the title deed being payments for the structures, movables and the ongoing business of a farm. The Appellant is in possession of and is enjoying the fruits of the property up to now.
13. Learned Counsel for the Respondents invited this Court to consider the laws pertaining to back letters provided for in Article 1321 of the Civil Code as well as the rule for oral evidence in Article 1341. On this point he cited the case of *Guy v Sedgwick & Barallon*, (SCA 54 of 2011) [2014] SCCA 5 (11 April 2014).
14. Further, he highlighted the evidence supporting the payment of SR1,245,000.00 to the Plaintiff and a further the sum of SR1,500,000.00 paid to the account of the Plaintiff as well as the sum US\$200,000.00 to persons in Australia at the request of the Plaintiff.
15. He submitted that three witnesses for the Respondents gave evidence as to the value of the two land parcels in issue being SR1,551,000.00 valued by Land Surveyor Michel Leong; SR1,400,000.00 as determined valued by the Stamp Duty Commissioner, and, SR1,442,000.00 valued by Quantity Surveyor Ms. C. Bastille. The learned trial judge had observed the demeanor of those witnesses and assessed their credibility.
16. He further submitted that the Plaintiff has failed to prove his case on a balance of probabilities and prayed for a judgment dismissing the appeal with costs and any order the Court may, in its discretion, order.

## **The Facts**

17. A review of the facts are instructive for this appeal. These are summarised in the trial judge's decision at paragraphs 43 onwards. Neither Counsel for the Appellant nor of the Respondent has raised any issue with regard to those facts.

18. Two parcels of land C948 and C949 (the property) situated at Anse Louis, Mahé, of an approximate area of 16,000 square metres were sold by the Appellant to the Respondents who are now registered as owners thereof.
19. The issues arising out of these transactions are (a) the value of the property at the time of sale and (b) the actual price paid by the Respondents to the Appellant for those two parcels.
20. It is not contested that before 2012 the property was used for agriculture. There is access to the property granted by a judgment of this Court in 2003. There is a house made of corrugated iron sheets on the property, a store and smaller house but these buildings or its remains were not considered for the purposes of evaluation.
21. The Appellant produced in evidence a Joint Valuation Report made by three Valuers following an inspection of the property in 2012. The Valuers considered the property ideal for cultivation and/or construction at low cost. They noted that comparable evidence was rare for this type of property but *“it can be recognized that the plot can be used for residential purposes”* and *“this property would be benefit from a change of use from agriculture to a higher yield such as tourism which would generally push the valuation towards the higher end of the scale.”* They emphasized that the value pertained to the land only as contained within the boundaries and excluded consideration of any buildings, other heritable property, appurtenances or movable property thereon.
22. The three Valuers in 2012 considered that the value of the property as at 25 October 2007 to be SR12, 215,000.00.
23. Three different witnesses who testified on behalf of the Respondents produced three contrasting valuations, as follows – Michel Leong quoted SR1, 550,720.00; Ms. Cecile Bastille quoted SR1, 442,000.00 and the Stamp Duty Commissioner used the figure SR1, 400,000.00. In the Transfer Deed the figure of SR1, 245,000.00 is entered as being the purchase price.

24. The Learned Trial Judge at paragraph 46 of his judgment *inter alia* stated that - “it is difficult to come to any other conclusion, and I so find, that the declared purchase price falls within the range of values given by the two defence witnesses, Bastille and Leong and the Stamp Duty Assessor.”
25. The Learned Trial Judge at paragraphs 51 to 55 meticulously analysed the evidence of all the Valuers for the Plaintiff as well as for the Defendants, and the figures they quoted, gave reasons as to why he reached the conclusion on the value of the property. At paragraph 56 of his judgment the Learned Trial Judge stated
- “In contrast to that approach I find that Ms. Bastille and Mr. Leong took a more balanced approach in coming to a final figure for value and their valuations are supported by the valuation of the Stamp Duty Commissioner.”*
26. The Learned Trial Judge gave further consideration as to the correct approach that ought to be followed to carry out such valuation in the light of Articles 1675 and 1676 of the Civil Code.
27. At paragraphs 62 to 69 of his judgment the Learned Trial Judge gave further consideration to the basis, formula and approach adopted by the Valuers and at paragraph 65 rejected with reasons the valuation SR12, 125,000.00 quoted in the Joint Valuation Report.

### **The Law**

28. The law pertaining to rescission of sales for lesion are, *inter alia* articles 1674 to 1684, and 1118 of the Civil Code. However, articles 1676, 1678, 1681, 1682, 1683 and 1684 have no relevance in the instant suit. The relevant articles are reproduced below for ease of reference.
29. Article 1674 states:

*“If the price paid by the buyer is less than one half of the value of the thing bought,*



*whether it be movable or immovable, the seller shall be entitled to a rescission of the contract, even if he has expressly waived his right to do so, and even if he has declared his willingness to give up the surplus value of the property. Subject to the provisions of this article and articles 1675 and 1676, the rule of article 1118 of this Code shall have application”.*

30. Article 1675 states:

*“In order to establish whether there is a lesion of more than one half, the value of the property shall be calculated according to its condition at the time of the sale. In the case of a unilateral promise of a sale the lesion is estimated on the day of its fulfilment”.*

31. Article 1677 states:

*“To establish whether lesion occurred the Court shall take into account the condition and value of the property at the time of the sale.*

32. Article 1679 *inter alia* provides that:

*“The Court shall not admit any claims that a contract is vitiated by lesion unless the plaintiff is able to make out a prima facie case that the circumstances are sufficiently serious to warrant an investigation by the Court.*

33. Article 1680 states that:

*“To satisfy the Court that a prima case exists the plaintiff must submit a report by three experts who shall be bound to draw up a single report and to express an opinion by majority.*

*The experts shall be appointed by the Court unless both parties have jointly agreed to appoint the three experts”.*

34. Article 1118 states:

- “1. *If the contract reveals that the promise of one party is, in fact, out of all proportion to the promise of the other, the party who has a grievance may demand its rescission; provided that the circumstances reveal that some unfair advantage has been taken by one of the contracting parties. The loss to the party entitled to the action for lesion shall only be taken into account if it continues when the action is brought.*
  
2. *The defendant to an action for lesion as in the preceding paragraph shall be entitled to refuse rescission if he is willing to make an adequate contribution to the other party in such manner as to restore a more equitable balance between the contracting parties.*
  
3. *The rules of paragraphs 1 and 2 of this article relate to the policy, and shall not be excluded by the agreement of the parties. They may, however, be excluded or restricted in specific cases laid down in this Code.*

### **Discussion**

35. It is trite that trial judge may admit evidence in respect of all matters in issue but does not have to rely on some of the evidence when reaching a decision. However, rules relating to the admissibility of evidence cannot be ignored. In the instant case the Learned Trial Judge allowed evidence of the payments over and above the sum of SR1, 245,000.00 as mentioned in the transfer document of parcels C948 and C949, dated the 27<sup>th</sup> of October, 2007. This was clearly in breach of the public policy requirement contained in the provisions of Article 1321 and section 82 (1) the Mortgage and Registration Act. The law on this matter is settled and the authorities cited by the Appellant’s Counsel are to point. At the hearing of this appeal it was conceded that the law on back letters does not permit the admission of evidence over and above the consideration set down in the instrument of transfer.
  
36. Notwithstanding, the issue before the Court was whether the price stated in the transfer deed was less than half of the market value of the two parcels of land that constitute the property. The Learned Trial Judge did not rely on the payments of sums over and above

the sum of SR1, 245,000.00 as mentioned in the transfer document of parcels C948 and C949, dated 27<sup>th</sup> October, 2007, in coming to his decision as to the value of the property in issue. We shall get to this point further in our decision..

37. As concerns the value of the properties established by the three experts, it is clear from the provisions of article 680 (supra) and case law (see for example *Adrienne v Adrienne* (1978) SLR 88 and *Houareau v Houareau* (2012) SLR 239) that the value proffered by them was made in order for the Appellant to pass the first hurdle of establishing a *prima facie* case in order to proceed to a full hearing on the issue of *lesion*. At the substantive hearing, the trial judge is required to consider the totality of the evidence before him in relation to the issue under consideration. He may in the circumstances reject the valuation of those three experts if he prefers evidence contrary to it. This is what happened at the hearing. The trial judge was singularly unimpressed by what he saw as grossly inflated figures of those three valuers and having considered other evidence available to him preferred the evidence of the Respondents' valuers and that of the Stamp Duty Commissioner.

38. Some of the evidence he relied on is evident from his reasoning. He appreciated the fact that in assessing the value of parcels C948 and C949 at the time of the sale, the issue of the future development potential of the said parcels did not arise. Article 1677 only requires that the value at the time of sale is to be considered for the purpose of *lesion*. Further, there is indeed no evidence of any Development Plan approved in accordance with the law designating the area in which parcels C948 and C949 are located as an "agricultural zone". Neither is there any indication that the area is in a "tourism zone" that led the Joint Valuers to increase the land's value in view of its future development potential. In this respect the learned trial judge was entitled to reject their values which was based on the potential of the property when such potential was not clearly established.

39. Although the valuation of the Stamp Duty Commissioner may be criticised because it lacked the technical backing it should have had, the evidence of Mr. Leong and Ms.

Bastille on which he relied cannot be similarly faulted. The trial judge was not minded to see a big difference between when Ms. Bastille visited the property and when she submitted her report as it was not demonstrated that such land was susceptible to any big fluctuation in price.

40. In the same context their expertise was not challenged at trial stage and cannot now be raised for the first time.
41. The Appellants have failed to convince us that the learned trial judge was acting outside his province as a judge of fact, was perverse in his finding or that he misdirected himself in this undertaking. In the circumstances in respect those related grounds of appeal are dismissed.
42. Finally, Counsel for the Appellant has submitted that the order for a writ *habere facias possession* to issue was *ultra petita*. He relied on the authority of *Charlie v Francoise* SCAR 49. Counsel for the Respondents has counter submitted that the order was made in accordance with the prayer in the Appellant's pleadings namely prayer (iv) of the Plaintiff that the Court make *any other order the court deems fit and necessary* and also in accordance with the Respondents' Statement of Defence that the Plaintiff is a trespasser and must vacate the said property.
43. *Vel v Knowles* (1998-1999) 157 is more relevant to this issue. It firmly established the principle that the court may neither formulate a case for party after listening to the evidence or grant relief that is not sought in the pleadings nor adjudicate on issues not raised in the pleadings. In *Vel*, the appellant had made an application to be appointed guardian and have custody of her minor children, she also asked for the sole occupation of the house shared with the respondent. The respondent cross-petitioned for the guardianship and custody of the children. In his decision, the trial judge ordered the appellant to pay the respondent his share of the property and to have the property conveyed to her. This had never been canvassed in the pleadings and was clearly *ultra petita* as the Court of Appeal ruled.

44. In *Leveillé v Pascal* (5 of 2004) (5 of 2004) [2005] SCCA 7 (19 May 2005) a similar issue arose. The plaintiff had in his pleadings sued the defendant for obstructing his right of way by the placing of boulders thereon. He had prayed the court inter alia for an order allowing him quiet and peaceful use of the right of way. The trial judge ordered inter alia that the defendant remove permanently the obstructions and granted a permanent injunction preventing the defendant from interfering with the plaintiff's peaceful use and enjoyment of the right of way. The plaintiff appealed claiming that the orders of the trial judge were ultra petita in view of the fact that the plaintiff had not sought to establish that he was entitled to a right of way. The Court of Appeal found that the order granting the right of way was not *ultra petita* as it had been canvassed in both the pleadings and in the evidence and was sought in the prayers. The present case falls within the realms of *Leveillé* and not those of *Charlie* and *Vel*. The orders made were clearly according to the pleadings and evidence canvassed by the Appellant himself and by the Respondent. There was a generic prayer for the grant of "any order the court deems fit" by the Appellant himself. He cannot now complain that this was made.

### **Decision**

45. We have carefully reviewed the findings of the Learned Trial Judge and his reasoning leading to those findings and conclusion, we have no reason to disturb or vary his findings these being findings of fact based on sound reasoning and judgment. So we hold.

### **Order**

46. We find no merits in all the grounds of appeal. The Appeal is dismissed in its entirety with costs to the Respondents.

B. Renaud (J.A)

**I concur:.** ..... A. Fernando (J.A)

**I concur:.** ..... M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019