IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2024] (3 May 2024)
SCA 29/2023
(Arising in CS 98/2022)

In the Matter Between

Commercial House One (Seychelles) Ltd — Appellant
(rep. by Mr. Frank Elizabeth)

And

Eden Island Development Company Ltd — 1st Respondent
(rep. by Mr. Bernard Georges)

Superyacht Services (Seychelles) Ltd — 2nd Respondent
(rep. by Messrs. Pesi Pardiwalla and Conrad Lablache)

Neutral Citation: *Commercial House One (Seychelles) Ltd v Eden Island Development Company Ltd and Anor* (SCA 29/2023) [2024] (Arising in CS 98/2022) (3 May 2024)

Before: Twomey-Woods, Robinson, Gunesh-Balaghee, JJA

Summary: Civil Code of Seychelles — Striking out — Whether res judicata under article 1351 (1) and (2) — Whether abuse of process of the Court — The Court of Appeal of Seychelles Rules 2023 — Whether ground of appeal is vague or general in terms — Rules 18 (3), (7) and (8)

Heard: 17 April 2024

Delivered: 3 May 2024

ORDER

(i) The plaint is struck out and the action in the case CS98/2022 is dismissed on the basis that the Appellant's initiation and prosecution of the Present Action constitute an abuse of the process of the Court.

(ii) The appeal is dismissed.

(iii) With costs in favour of the First and Second Respondents.

JUDGMENT

Robinson JA (Dr. M. Twomey-Woods, K. Gunesh-Balaghee JJA, concurring)

1. The Appellant (the Plaintiff then) has appealed against the ruling of the trial Court delivered on 18 September 2023. The ruling dismissed the plaint filed by the Appellant on 7 September 2022 in the case CS98/2022 (the case CS98/2022 is hereinafter referred to as the "Present Action").

2. The Appellant is challenging the trial Court's decision that —

   (i) the judgments delivered by the Supreme Court in the case CS112/2011 and the Court of Appeal in the case SCA26/2014 are res judicata in relation to the Present Action;

   (ii) the Present Action is an abuse of the process of the Court.

3. I state at the outset that I have taken note of the argument presented by Counsel for the Respondents in their skeleton heads of argument about the English law principles of issue estoppel and cause of action estoppel. It is noted that the trial Court did not address these principles in the judgment. Instead, the trial Court made its findings on res judicata under article 1351.1 of the repealed Civil Code of Seychelles. Further, upon careful reading of the first ground of appeal, it is clear that the Appellant did not base his first ground of appeal on the English law principles of issue estoppel and cause of action estoppel. Since the First and Second Respondents did not file a notice of cross-appeal in this case under rule 19 (1) of The Court of Appeal of Seychelles Rules 2023 (hereinafter referred to as "The Rules 2023"), I am unable to consider any of the submissions they have presented in their skeleton heads of argument that rely on these principles.

4. It is noted that this judgment did not make a finding on whether the English law principles of issue estoppel and cause of action estoppel apply under Seychelles law, despite previous judgments of the Seychelles' Court having applied these

principles. I remark that article 1351 (1) and (2) of the Civil Code 2020 provides the remedy of res judicata.

5. It is also observed that the ruling delivered in the Present Action was based on the repealed article 1351.1 of the Civil Code of Seychelles, *inter alia.* The Civil Code of Seychelles Act (Cap 33) has been repealed and replaced by the Civil Code of Seychelles Act 2020 (Act 1 of 2021). The Civil Code of Seychelles Act 2020 came into operation on 1 July 2021. Section 2 of the Civil Code of Seychelles Act provides that the Civil Code of Seychelles set out in the Schedule shall, following the coming into operation of the same Act, be read as a stand-alone enactment and be cited as the Civil Code of Seychelles (hereinafter referred to as the "Civil Code 2020").

6. As the plaint in the Present Action was filed on 7 September 2022, the Civil Code 2020 applies to this case.

PROCEEDINGS IN CASES CS112/2011 AND SCA26/2014 AND PRESENT ACTION

7. Before analysing the submissions presented by the Appellant and Respondents in the appeal, it is proposed to give an overview of the proceedings in the cases CS112/2011 and SCA26/2014 and the Present Action.

8. In the proceedings that began in the case CS112/2011, the Appellant prayed for a judgment in its favour in the following terms —

> *"a. for an order of permanent injunction restraining the Defendants, their servants, clients, agents and invitees from trespassing on the sections of the leased Property comprised in the leased agreement between the Plaintiff and the Government;*
>
> *b. for an order of damages with interest at commercial rates in the sum of Euro Five Hundred and Fifteen Thousand Four*

Hundred and Sixty One (Euro 515,461/-) and continuing from the commencement of the lease until judgment in this suit;

c. *for an order of damages with interest at commercial rates in the sum of Seychelles Rupees Four Hundred and Seventy Five Thousand One Hundred and Fifty Two (R475,152) and continuing from the commencement of the lease until judgment in this suit;*

d. *for the above orders to be made jointly and severally against both Defendants;*

e. *for interest at commercial rates on the above claims from the filing of the Plaint and costs to be awarded to the Plaintiff to be paid by the Defendants jointly and severally;*

f. *for such other order as the Court deems just and reasonable in the circumstances."*

9. It is averred at paragraph [4] of the plaint that: *"on the 6th February 2007 the Plaintiff entered into a lease agreement with the Republic of Seychelles for the lease of an immovable property and particular facilities attached to the said property situated at Eden Island, more fully known as Land Title V12708 for the stated purpose of development of offices, commercial, business, leisure and retail facilities forming an integral part of the development, which document was registered in the Seychelles land register on 9th February 2007."*

10. It is averred at paragraph [5] of the plaint that on a date unknown to the Plaintiff, the Defendants purportedly entered into an agreement whereby the First Defendant allowed the Second Defendant, *inter alia*, the use, occupation and exploitation of certain facilities of Eden Island and the seas surrounding it and the use, occupation and exploitation of facilities contained in the leased premises.

11. It is averred at paragraph [7] of the plaint that: "[i]*t was an express term of the registered lease agreement for the Leased Premises to include the exclusive*

use by the Plaintiff of all existing or future erections buildings and structures or works situated thereon or attached facilities thereto including all existing floating pontoons, moorings, berths and quays or marinas."

12. Having heard the evidence, on 16 July 2014, the trial Judge held, *inter alia* —

> *"[49] …that the Plaintiff has not satisfied this Court on the balance of probabilities that it is the owner of the structure namely the pontoon and marina adjacent to parcel V12708, the land leased to the Plaintiff by the Republic of Seychelles. The prayer to grant a permanent injunction restraining the Defendants, their servants, clients, agents and invitees from trespassing on the sections of the leased property comprised in the leased agreement between the Plaintiff and the Republic of Seychelles is therefore declined accordingly. The Plaintiff's case is dismissed accordingly."*

13. The Court of Appeal dismissed the Appellant's appeal case SCA26/2014 in a judgment delivered on 21 April 2017. The conclusions of the Court of Appeal with respect to the ownership, exclusive use or rights over the pontoon and water in front of the property of the Appellant were as follows —

> *"[31] The appellant may not seek from the adjoining owner an exclusive right to use the infrastructure, the services or the facilities the marina comprises. It may only seek rights to use the services subject to the rights of the respondents and others.*
>
> *[32] …This was not a case of grant of absolute right of use of an existing or future property beyond the absolute right over 1238m2…*
>
> *[36] We agree that the Demise Clause has the status of an easements are transferred as a matter of course whether there is or there is no express agreement to that effect. The plans and the drawings showed that all the parcels in the integrated scheme mutually served one another. That stood good whether the property owner made the reservation or not. The rights was attachment to the land and not to the owner.* ***However, the Demise Clause was not meant to be for the exclusive use of the Appellant.***

[37] ***In our view the only reasonable interpretation of the facts and circumstances of the case is that the Appellant is entitled to an easement over the marina through the connecting ramp to the pontoon but it is not entitled to the exclusive use thereof****.*

[38] *…The Republic is the owner of the immovable property on which the floating pontoon has been fixed by virtue of a separate agreement where Appellant is a third party. As a third party, Appellant may not obtain a right of exclusive use over the floating pontoon etc. Article 555 would apply to take into account the respective rights between the Republic and Respondent No. 1. However, as far as the rights of the Appellant are concerned, it is limited to the exercise of his easement over the marina. The connecting ramp was no more than the device to enable the Appellant as the owner of V12708 to exercise his right to benefit from the easement. It may not be taken to be evidence of the fact that the marina had become part of V12708 by horizontal annexation.*

[40] *In the light of what we have stated, we are unable to find merit in this appeal. It is dismissed with costs."* [verbatim] [Emphasis is mine]

14. The Present Action is for a judgment ordering the Defendants jointly and severally to pay the Plaintiff the sum of SCR1,500,000/- by way of damages for damage and prejudice the Plaintiff allegedly suffered together with interest and costs. Additionally, the Plaintiff prayed for the following orders to be made in its favour —

"1. Defendants to remove the floating pontoons, marina, berths in front of parcel V12708 forthwith,

2. Failing which to order the Planning Authority to issue a demolition notice to the Defendants to demolish the floating pontoons, marina, berths in front of parcel V12708,

3. Order the Defendants jointly and severally to pay damages to the Plaintiff in the sum of SCR1,500,000.00 together with interest and costs.

4. Make any other and further orders the Court deems fit and necessary in all the circumstances of the case."

15. The plaint averred at paragraph [3] that: *"it was an expressed term of the registered lease agreement that the Appellant shall have exclusive use of all existing or future erections, buildings and structures or works situated thereon or attached facilities thereto including all existing pontoons, moorings, berths and quays or marinas."*

16. The averments in paragraph [4] of the plaint in CS112/2011 are repeated at paragraph [2] of the plaint in the Present Action, [and repeated at paragraph [9] hereof].

17. The plaint in the Present Action was based on an express term of a lease agreement entered into between the Republic of Seychelles and the Plaintiff which stated that the latter should have exclusive use of all existing or future erections, buildings, structures or works situated on the parcel V12708, as well as any facilities attached to it, including all existing pontoons, moorings, berths, quays or marinas.

18. The plaint averred at paragraph [4] that the Defendants, on a date unknown, entered into an agreement to build a marina equipped with floating pontoons, moorings, berths, and quays in front of and adjacent to parcel V12708, which would be rented out to boat charter companies. This facility would allow transfers to and from boats and catamarans that would berth at the floating pontoons on, across and through parcel V12708. The marina would be available for use by clients, guests, invitees, staff, employees, and/or agents of the Second Respondent.

19. The plaint averred at paragraph [7] that: *"as Lessee of parcel V12708, it has preference and sole privilege and right to build and utilise a quay, marina, floating pontoons and berths in front of parcel number V12708."*

20. The First Respondent filed a statement of defence, raising two pleas in limine litis and reserving the defence on the merits until the same pleas are settled. The two pleas in limine litis were as follows —

"1. The case has already been determined and disposed of by the Supreme Court of Seychelles in CS112/2011 and by the Court of Appeal in SCA26/2014. To institute proceedings concerning the same cause of action regarding the same subject matter between the same parties before this Honourable Court after having already sought redress twice is an abuse of process, an abus de droit and can only be considered as forum shopping on the part of the Plaintiff.

2. The present suit is res judicata because the same matter was fully determined through the judgments of the courts. It is, yet further, a breach of the Defendant's right to a fair hearing for the Plaintiff to canvass issues which have been heard and determined in a previous case.

3. The plaint fails to disclose a clear cause of action."

21. The Second Respondent filed a statement of defence on the merits and raised two pleas in limine litis as follows —

"(i) The Plaintiff's claims have been previously adjudicated in Civil Side 112 of 2011 by the Supreme Court and in Civil Appeal SCA26 of 2014 by the Court of Appeal, whose judgment of the 21 April 2017 on those claims are final and binding (res judicata).

(ii) In any event, the Plaint is an abuse of the process of this Honourable Court in that it seeks to litigate issues which were adjudicated or could have been properly raised in the previous proceedings (i.e., Civil Side 112 of 2011 and SCA26 of 2014)."

22. Counsel for the Appellant and Respondents have presented the submissions made before the Supreme Court in detail in their skeleton heads of argument, Speaking Notes and oral submissions. Hence, it is unnecessary to repeat the same submissions here in detail.

23. The Respondents have raised similar claims in the pleas in limine litis on the basis that the previous judgments in CS112/2011 and SCA26/2014 are res judicata in relation to the Present Action under article 1351.1 of the repealed Civil Code of Seychelles. The Second Respondent has further argued that the plea of res judicata applies based on the English law principle of res judicata.

Additionally, the Respondents have raised similar claims that the Present Action is an abuse of the process of the Court.

24. In support of their argument that article 1351.1 of the repealed Civil Code of Seychelles applies, the Respondents have argued that the Present Action had already been fully and finally determined and disposed of by the judgments delivered in CS112/2011 and SCA26/2014. It was not disputed by the parties in the appeal and the trial Court that the parties are the same and appear in the same capacities. Counsel for the Respondents have also relied on the proposition that the class ("cause") and subject-matter ("objet") in the cases CS112/2011 and SCA26/2014 and the Present Action were the same.

25. In response to the pleas in limine litis, Counsel for the Appellant contended that they should not succeed as the cause of action in the two cases was not the same. He also argued that the trial Court could not hear and dispose of the pleas in limine litis before the trial on the merits under sections 90 and 91 of the Seychelles Code of Civil Procedure as the judgments and plaints were not tendered as evidence in the Present Action; instead they were attached to the closing written submissions of the Respondents. In other words, Counsel for the Appellant submitted that the plaints and judgments could only be tendered as evidence during the trial on the merits.

26. After considering the plaints filed in the two actions and judgments delivered in the cases SCA26/2014 and CS112/2011 and various authorities, the trial Court concluded that the *"cause"* and subject-matter concerning both cases were the same, under article 1351.1 of the repealed Civil Code of Seychelles. The trial Court arrived at this conclusion after considering the matters raised in paragraphs [1] to [5] and [7] to [10] of the plaint in the Present Action, which it found to be substantially the same as those raised in the cases CS112/2011 and SCA26/2014.

27. The trial Court addressed the submission made by Counsel for the Appellant alleging that the Respondents constructed the marina without obtaining

permission from the Town and Country Planning Authority in the absence of the contention made in the notice of appeal that the claims made in the Present Action relate to a second pontoon, a vertical one, constructed after the cases CS112/2011 and SCA26/2014 had been disposed of. Hence, it is unnecessary to state the findings of the trial Court with respect to the issue.

28. At paragraphs [25] and [26] of the ruling, the trial Court gave the main reasons for its finding that the Present Action is an abuse of the process of the Court.

29. At paragraph [25], the trial Court held the view that: *"this case demonstrates such abuse whereby litigation is being prosecuted in a different guise just because the Plaintiff* [Appellant] *does not accept the decision given in the previous case and as a matter of public policy such cannot be condoned. There is clearly a misuse of the court's procedure […]."* The trial Court relied on various authorities for its findings, including **Hunter v Chief Constable of West Midlands Police and Others [1981] UKHL 13**.

30. At paragraph [26] of the judgment, the trial Court held that: *"*[h]*aving considered the Plaint which is merely rehashing similar facts and claiming similar demands as that in CS112 of 2021, it would indeed be grossly unfair to the Defendants to allow this present plaint to proceed further."*

31. Additionally, the trial Court concluded that sections 90 and 91 of the Seychelles Code of Civil Procedure apply to the Present Action.

32. Hence, the trial Court concluded that the Present Action is res judicata and an abuse of the process of the Court. The trial Court ordered the plaint to be struck out, resulting in the dismissal of the Present Action.

GROUNDS OF APPEAL AND COURT'S DETERMINATION OF THEM

33. The Appellant, being dissatisfied with the trial Court's decision, has challenged it on four grounds of appeal reproduced verbatim below —

"GROUNDS OF APPEAL

1. *The presiding Judge erred when he dismissed the appellant's case on the basis that the matter was res judicata in law since, although the parties were the same as in Civil Side No. 112/2011 and SCA26/2014, the facts and cause of action were different as was pleaded in paragraphs 4, 5, 6, 7, 8, and 9 of the plaint. The facts and cause of action in Civil Side No. 112/2011 and SCA26/2014 were based on trespass to land in respect of construction of a horizontal floating pontoon adjacent to the appellant's property namely V12708, whereas in Civil Side No. 98 of 2022, the facts and cause of action were based on faute in respect of the construction of a second pontoon which was vertical in direction and also adjacent to the appellant's property without planning permission. Additional and different facts pleaded was the fact that the 1st Respondent was not the owner of the sea frontage in front of the appellant's property and could not have lawfully given permission to the 2nd appellant to build and construct the vertical pontoon in front of the appellant's property which the learned trial Judge wrongly failed to take into consideration when making his ruling.*

2. *The presiding Judge erred in law when he ruled that the appellant's action constituted an abuse of process in law as he misunderstood and did not appreciate the facts of Civil Side No. 98 of 2022 which he erroneously assumed was based on the same facts and evidence as Civil Side No. 112/2011 and SCANo.26/2014. In the circumstances, the learned trial Judge erred when he ruled on the points of law raised by the respondents before hearing the case on its merits on the basis that the points of law dispose substantially of the whole case.*

3. *The presiding Judge erred in law when he dealt with the points of law first and dismissed the appellant's case without hearing the appellant on the merits. In the circumstances, the learned trial Judge erred when he ruled on the points of law raised by the respondents before hearing the case on its merits on the basis that the points of law dispose substantially of the whole case.*

4. *The learned trial Judge erred in law when he concluded that the appellant's action constituted an abus de droit in law as the*

cause of action in Civil Side No. 98 of 2022 was different from the cause of action in Civil Side No. 112/2011."

34. The Appellant prayed for an order setting aside the trial Court's decision, allowing the appeal, and, consequently, granting a rehearing of the case before a different court.

Ground one of the grounds of appeal

35. Concerning the first ground of appeal, Counsel for the Appellant advanced several arguments in his skeleton heads of argument and oral submissions, claiming that the trial Court erred in dismissing the case on the ground that the judgments in the cases CS112/2011 and SCA26/2014 and were res judicata in relation to the Present Action.

36. Counsel for the Appellant contended that the two actions have different causes of action and subject-matter, and, hence, res judicata was not present in this case. With respect to his contention that the identity of subject-matter was not present, Counsel for the Appellant submitted in his skeleton heads of argument and additional submissions that the claims made in both cases were not related to the same pontoon. He submitted that the claims made in the Present Action were regarding a second pontoon, a vertical one, which was built after the cases CS112/2011 and SCA26/2014 had been disposed of.

37. Counsel for the Appellant further pointed out that the plaint in the Present Action alleged certain facts that were not alleged in the cases CS112/2011 and SCA26/2014, namely that the First Respondent did not own the seafront area in front of the Appellant's property and, therefore, did not have the right to permit the construction of the second pontoon, the vertical one, in front of its leased property. He also pointed out that the vertical pontoon was built without obtaining permission from the Town and Country Planning Authority.

38. Counsel for the Appellant also emphasised that the Appellant was not seeking an order for the exclusive use of the floating pontoon, moorings, berths, quays

and marinas in the plaint in the Present Action. He submitted that the Appellant was seeking the removal of the second pontoon, the vertical one, *inter alia*.

39. He also submitted that in the cases CS112/2011 and SCA26/2014, the cause of action was founded on trespass to land related to the construction of a floating pontoon, a horizontal one, in front of the Appellant's leased property. However, in the Present Action, the cause of action was founded on *"faute"* related to the construction of a second pontoon by the First Respondent, located adjacent to the Appellant's leased property.

40. The Appellant also contended that the trial Court erred in dismissing the Present Action on the basis of *res judicata* because the trial Court had only dealt with the application for a permanent injunction in the case CS112/2011 and had not made any decision on the merits of the plaint in the case CS112/2011. However, it should be noted that this point of contention was neither raised before the trial Court nor was it raised as a ground of appeal in the notice of appeal filed by the Appellant. This point of contention was being raised for the first time in the skeleton heads of argument of the Appellant. It is observed that Counsel for the Respondents did not respond to this point of contention in their skeleton heads of argument. It is enough to state that the Appellant cannot rely on this point without following the relevant procedures set forth under The Rules 2023.

41. Counsel for the First Respondent, in his skeleton heads of argument and Speaking Notes, based his argument concerning the first ground of appeal on article 1351.1 of the repealed Civil Code of Seychelles and English law principles of issue estoppel and cause of action estoppel. Both Counsel for the Second Respondent adopted and relied on the argument made by Counsel for the First Respondent regarding the law on res judicata under article 1351.1 of the repealed Civil Code of Seychelles and the English law principles of issue estoppel and cause of action estoppel in his skeleton heads of argument and

Speaking Notes. As stated earlier, the Respondents cannot rely on these principles without filing a notice of cross-appeal.

42. Counsel for the Respondents placed particular reliance on the authority of **Cable & Wireless (Seychelles) Limited** for the proposition that the three-fold identity of subject-matter, "cause", and parties (in the same capacities) must be present for a plea of res judicata under the repealed article 1351.1 of the Civil Code of Seychelles to succeed.

43. Concerning the requirement of identity of subject–matter ("objet"), all Counsel for the Respondents contended that the identity of subject-matter was not present. This submission was based on the argument that the Appellant was not seeking *"le même droit sur la même chose"* (i.e., the same right on the same thing).

44. Counsel for the Respondents refuted the argument made by Counsel for the Appellant that the plaint in the Present Action invoked events that happened after the cases CS112/2011 and SCA26/2014 had been disposed of. They submitted that the claims made in both cases were about the same pontoon. They submitted that the Appellant had raised for the first time at the appeal that the Present Action concerned the construction of a second pontoon, a vertical one, right in front of the Appellant's leased property. The Appellant presented this argument in his skeleton heads of argument and oral submissions. As such, all Counsel for the Respondents contended that the Appellant should not be allowed to pursue this line of argument for the first time on appeal.

45. Additionally, all Counsel for the Respondents submitted on the identity of "cause", which no longer applies following the repeal of the Civil Code of Seychelles. In summary, all Counsel for the Respondents submitted that the case did not meet the requirement of res judicata under article 1351 (1) and (2) of the Civil Code 2020.

Analysis of the contentions of the parties

Whether the principle of res judicata under article 1351 of the Civil Code 2020 applies to this case

46. The following issue arises for determination: whether the principle of res judicata under article 1351 (1) and (2) of the Civil Code 2020 applies to this case.

47. The law of Seychelles on res judicata is found in article 1351 (1) and (2) of the Civil Code 2020 —

> *"1351(1) A final judgment has the effect of res judicata only in respect of the subject matter of the judgment.*
>
> *(2) It is necessary that the demand relate to the same subject matter, that it relate to the same cause of action, that it be between the same parties and that it be brought by them or against them in the same capacities."*

48. The repealed article 1351.1 of the Civil Code of Seychelles stipulated as follows —

> "*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 relate 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.*"

49. Article 1351 of the Civil Code 2020 has repealed the requirement of identity of class/"cause" and replaced it with the identity of *"cause of action"*.

50. It is opined that the authorities on res judicata under article 1351.1 of the repealed Civil Code of Seychelles still apply, namely **Cable & Wireless (Seychelles) Limited**; **R . Natarajan Pillay v. Bank of Baroda Civil Appeal No. 28 of 2001** (18 December 2003) and ***Hoareau v Henrick 1973 SLR 273***, except for

the analysis of the principle of "cause" in the same article. The following extract from **Hoareau**, in which the learned Judge referred to French authorities, may be aptly reproduced —

> *"The plea of res judicata is governed by art. 1351 of the Civil Code which reads:*
>
> > *"Art. 1351 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."*
>
> *For the plea of res judicata to be applicable, there must be between the first case and the second case the threefold identity of "object", "cause", and "personnes".*
>
> *The "objet" is what is claimed. "La cause"…. (See Bertier de Sauvigny & ors. V. Coubevoie ltée MR 215)."*

51. I quote the following from **Encyclopédie Dalloz, Droit Civil Vol III Vº Chose Jugée at Note 1** on the definition of res judicata *"autorité de la chose"* —

> "*1. L'autorité de la chose jugée peut être définie comme une force exceptionnelle attachée aux décisions de justice, qui interdit, de remettre en cause ce qui a été définitivement jugé. La notion d'autorité de la chose jugée se manifeste par deux aspects: 1º la chose jugée peut avoir, en premier lieu, une fonction négative. La partie qui a succombé ne peut plus engager une nouvelle instance pour obtenir d'une manière directe ou indirecte, ce qui lui a été refusé par un premier jugement … 2º en second lieu, l'autorité de la chose jugée peut revêtir un aspect positif. En effet le plaideur dont le droit a été reconnu par une décision de justice peut exercer toutes les prérogatives qui y sont attachées: le jugement constitue pour lui un titre dont le contenu ne peut plus être discuté. Dès lors, l'autorité de la chose jugée remplit un rôle probatoire, puisqu'elle s'impose au juge sans qu'il lui sont permis d'en discuter la légitimité.*"

52. In **Gomme**, the Court of Appeal stated that the plea of res judicata provided for in article 1351.1 of the repealed Civil Code of Seychelles (article 1351 (1)

and (2) of the Civil Code 2020) is designed to stop the abuses of multiplicity of litigations.

53. The case of **Cable & Wireless (Seychelles) Limited** reiterated that the three-fold identity of subject-matter, "cause", and parties (in the same capacities) must be present for a plea of res judicata under article 1351.1 to succeed. I agree that under article 1351 (1) and (2) of the Civil Code 2020, the three-fold identity of subject-matter, cause of action and parties (in the same capacities) must be present for the plea of res judicata to apply.

54. The Seychellois Court has sought guidance from English law to define the term *"cause of action."* In the case of **Andre v Jupiter SCA19/2018** (10 May 2019), the Court of Appeal, referring to English authorities, stated the following about the term *"cause of action"* —

> *"The term cause of action comprise, according to English authorities, every fact which is material to be proved to enable a plaintiff to succeed; in other words, every fact which, if traversed, the plaintiff must prove to obtain judgment… [Cooke v Gill, L.R. 8 C.P. p.116 Buckley v Hann, 5 Exch. 43; Read v Brown, 22 Q.B.D. p.131, C.A.]."*

55. I now consider the identity of subject-matter and cause of action. The subject-matter is what is claimed based on the settled jurisprudence of the Seychelles' Court. I read from **JurisClasseur Procédure civile** on the *"identité materielle de la chose reclamée"* —

> *"§ 158 La jurisprudence a rappelé à plusieurs reprises que l'exception de chose jugée ne peut être accueillie lorsque l'objet de la demande n'est pas matériellement identique (V. notamment, Cass. 1re civ., 6 mai 1964 : Bull. civ. I, n° 235 . - Cass. 1re civ., 19 avr. 1977 : Bull. civ. I, n° 168 . - Cass. 2e civ., 15 oct. 1981 : JCP G 1982, IV, 3 . - Cass. com., 27 mai 1997, n° 96-18.443 : JurisData n° 1997-002501).*
>
> *§ 159 **Par exemple**, une action en indemnité pour perte de la chose louée n'a pas le même objet que l'action en paiement du prix de location (Cass. 1re civ., 4 juill. 1960 : Bull. civ. I, n° 361) ; une décision rendue en matière d'indemnité journalière n'a pas autorité de la chose jugée à l'égard d'une demande de rente pour incapacité*

permanente partielle (Cass. soc., 5 nov. 1960 : Bull. civ. IV, n° 960), l'objet d'une décision admettant le solde non contesté d'une créance est étranger à la question de la validité des acomptes versés antérieurement (Cass. com., 20 mars 1968 : Bull. civ. IV, n° 118).... "
Fasc. 900-30 : AUTORITÉ DE LA CHOSE JUGÉE. – Autorité de la chose jugée au civil sur le civil JurisClasseur Procédure civile, JurisClasseur Procédure civile, Première publication : 16 août 2022 Dernière mise à jour : 25 avril 2023 Mélina Douchy-Oudot Professeur à l'université du SudToulon-Var, Membre du Centre de droit et de politique comparés (UMR 73-18 DICE))

56. I now consider whether there is *"identité materielle de la chose reclamée"***.** I consider the Appellant's submission that the plaint filed in the Present Action concerned a second pontoon, specifically a vertical one, constructed directly in front of the Appellant's leased property after the cases CS112/2011 and SCA26/2014 had been disposed of. According to Counsel for the Appellant, the case CS112/2011 dealt with a different pontoon, a horizontal one, constructed in front of its property. However, Counsel for all the Respondents refuted these claims.

57. I read from **JurisClasseur Procédure civile** —

*"**Mais, dès lors qu'un fait nouveau s'est produit, on ne peut plus considérer qu'il y a identité parfaite entre les deux choses demandées et l'autorité de la chose jugée par la première décision n'interdit pas la mise en oeuvre d'une instance tendant à obtenir un jugement sur le fait nouveau** (Cass. civ., 8 févr. 1926 : DP 1927, 1, p. 191. - Cass. req., 11 févr. 1935 : DH 1935, p. 177). Le caractère nouveau de l'événement permettant d'écarter la fin de non-recevoir tirée de l'autorité de chose jugée ne peut résulter de ce que la partie qui l'invoque avait négligé d'accomplir une diligence en temps utile (Cass. 2e civ., 25 juin 2015, n° 14-17.504 : JurisData n° 2015-015399). "Une offre de preuve nouvelle ne constitue pas un fait ou un événement modifiant la situation antérieurement reconnue en justice qui aurait pour effet d'exclure l'autorité de chose jugée ", tel un certificat de nationalité française délivré alors qu'un jugement a définitivement constaté l'extranéité d'une personne (Cass. 1re civ., 2 sept. 2020, n° 19-13.483, F-P+B : JurisData n° 2020-012683).*

Mais l'autorité de la chose jugée peut être opposée lorsque des événements postérieurs sont venus modifier la situation antérieurement reconnue en justice, ainsi de la décision ayant déclaré la demande d'un syndicat de copropriétaires irrecevable en raison du

> *défaut d'habilitation du syndic à agir en justice et dont un arrêt retient, à tort, pour déclarer la nouvelle demande de ce syndicat irrecevable, que l'habilitation du syndic postérieurement à ce jugement ne constitue pas un fait juridique nouveau justifiant une nouvelle saisine du tribunal* (*Cass. 2e civ., 6 mai 2010, n° 09-14.737 : JurisData n° 2010-005399 ; Procédures 2010, comm. 283, obs. J. Junillon. - Cass. 1re civ., 16 avr. 2015, n° 14-13.280 :* JurisData n° 2015-008316)." **(Fasc. 900-30 : AUTORITÉ DE LA CHOSE JUGÉE. – Autorité de la chose jugée au civil sur le civil JurisClasseur Procédure civile, JurisClasseur Procédure civile, Première publication : 16 août 2022 Dernière mise à jour : 25 avril 2023 Mélina Douchy-Oudot Professeur à l'université du SudToulon-Var, Membre du Centre de droit et de politique comparés (UMR 73-18 DICE))**. [Emphasis is mine]

58. According to **JurisClasseur Procédure civile**, once a *"fait nouveau"* (i.e., a new fact) has arisen, it can no longer be considered that there is a perfect identity between the two subject-matter in question and the authority of res judicata by the first decision will not prevent legal proceedings from being instituted in order to obtain a judgment on the new fact **(Cass. civ., 8 Feb. 1926: DP 1927, 1, p. 191. - Cass. req., 11 Feb. 1935: DH 1935, p. 177)**.

59. After carefully considering all the averments made in both plaints and the judgments, in the light of the legal principles set out in **JurisClasseur Procédure civile**, I accept the submission made by all Counsel for the Respondents that the claims in both cases relate to the construction of the same pontoon. There is no indication on the plaint filed in the Present Action that it deals with a different pontoon, a vertical one, constructed in front of the Appellant's leased property.

60. At paragraph [4] of the plaint in the Present Action, it is averred that *:"*[…]*on a date unknown to the Plaintiff, the 1st defendant entered into an agreement with the 2nd Defendant whereby the 2nd Defendant was allowed to build a marina with floating pontoons, moorings, berths and quays in front of, and adjacent to, parcel V12708*[…]*"*. [Emphasis is mine]

61. It is observed that paragraph [5] of the plaint in the case CS112/2011 averred that: *"on a date unknown to the Plaintiff the Defendants purportedly entered*

into an agreement whereby the 1st Defendant allowed the 2nd Defendant, inter alia, the use, occupation and exploitation of certain facilities of Eden Island and the seas surrounding it and the use, occupation and exploitation of facilities contained in the Leased Premises".

62. The subject-matter of the judgments in the cases CS112/2011 and SCA26/2014 was a pontoon built by the First Respondent in front of the Appellant's leased property. The core issue for the Appellant before the Supreme Court in CS112/2011 and the Court of Appeal in SCA26/2014 was whether the pontoon links the marina to parcel V12708 in such a manner as to constitute an attachment as per the *"Demise Clause"*. According to the findings of the Court of Appeal in the case SCA26/2014, it was concluded that the Appellant has no rights over the pontoon, or over the water on which the pontoon has been erected, other than the exercise of an easement of access to the marina. In the light of the findings of the Court of Appeal in the case SCA26/2014, I agree with all Counsel for the Respondents that the two cases involve the same pontoon constructed in front of the Appellant's property. Hence, I accept the submission of all Counsel for the Respondents that any additional facts presented by the Appellant in the plaint in the Present Action do not have the characteristic of new facts.

63. It is useful to bear in mind the object of pleadings as laid down in **ODGERS ON HIGH COURT PLEADING AND PRACTICE Twenty-Third Edition D. B. CASSON**, **at page 124 —**

> ***"The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree and thus to arrive at certain clear issues on which both parties desire a judicial decision*** *[and see Lord Radcliffe's speech in Esso Petroleum Co. Ltd. v. Southport Corporation [1956] A.C. 218, 241. For a reaffirmation of the essential function of pleadings in civil actions, see the remarks of Lord Edmund-Davies in Farell v. Secretary of State For Defence [1980] 1 W.L.R. 172, 180]. In order to attain its object, it is necessary that the pleadings interchanged between the parties should be conducted according to certain fixed rules,… The main purpose of these rules is to compel each party to state clearly and intelligibly the material facts on which he relies, omitting*

> *everything immaterial, and then to insist on his opponent frankly admitting or explicitly denying every material matter alleged against him. By this method they must speedily arrive at an issue. Neither party need disclose in his pleading the evidence by which he proposes to establish his case at trial. But each must give his opponent a sufficient outline of his case." [*Emphasis is mine]

64. In the case of **Farrel v Secretary of State [1980] 1 All ER 166 HL at page 173**, Lord Edmund Davies made the following observation —

> *"It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury.* ***To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it****."* [Emphasis is mine]

65. In the case of **Gallante v Hoareau [1988] SLR 122**, the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

> *"…****the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this reason that section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action****".* [Emphasis is mine]

66. I state that Counsel for the Appellant did not sufficiently adhere to this basic requirement concerning the functions of pleadings. Hence, I accept the submission of Counsel for the Respondents that the Appellant should not be allowed to pursue this line of argument in this case. **Finesse v Cesar SCA**

47/2019 (29 April 2022), **Putz v De Souza – Jahnel SCA4/2020** (19 August 2022), and **Civil Construction Ltd v Leon & Ors SCA36/2016** (13 December 2018) are authorities for the proposition that the Court itself is bound by the pleadings of the parties as they are themselves. In **Blay v Pollard and Morris (1930), 1 KB 628**, Scrutton, LJ remarked that: *"*[c]*ases must be decided on the issues on record, and if it is desired to raise other issues they must be placed on record by amendment."*

67. In the second part of my analysis on the question of whether there is identity of subject-matter, I address the proposition put forth by all Counsel for the Respondents that although the two cases involve the same pontoon constructed in front of the Appellant's property, the principle of res judicata cannot be applied because the Appellant did not seek "***le même droit sur la même chose***…". Counsel for the First Respondent referred to this extract from **Dalloz Encyclopédie Juridique 2º Édition at Note 138** in support of the aforesaid proposition —

> *"§2. L'identité des droits réclamés*
>
> *138.* ***Pour que l'exception de chose jugée puisse être accueillie il ne suffit pas, que la même chose matérielle soit en litige ; il faut que le demandeur réclame le même droit sur la même chose***…." [Emphasis is mine]

68. A careful reading of the plaint in the cases CS112/2011 and SCA26/2014 shows that the Appellant's claim was for the exclusive use of the pontoon, and it sought an injunction against the Respondents to stop them from using it. Additionally, the Appellant sought damages for the loss of use of the marina. Whereas, in the Present Action, the Appellant claimed the sole right to build in the sea next to its leased property and argued that the Respondents had no right or authority to build the marina. The Appellant is seeking damages for the loss of use of the sea frontage area and the interference with the peaceful enjoyment of its leased property. The Appellant is also seeking an injunction to have the pontoons removed. On the authority of **Dalloz Encyclopédie Juridique**, I agree with the submission of all Counsel for the Respondents

that although the same pontoon is involved in both cases, the claims against it are different.

69. In the present case, it is unnecessary to consider the requirement of identity of cause of action as the identity of the subject-matter is absent.

70. I have already made the finding that the trial Court erred in applying the repealed article 1351.1 of the Civil Code of Seychelles. Furthermore, I conclude that even if the trial Court had applied article 1351 (1) and (2) of the Civil Code 2020, its conclusion would still have been wrong, as it concluded that the subject-matter was the same in the Present Action and in the cases CS112/2011 and SCA26/2014. Hence, I quash the finding of the trial Court at paragraph [21] of the judgment that the case is res judicata under article 1351.1 of the repealed Civil Code of Seychelles.

71. I conclude that the judgments delivered by the Supreme Court in CS112/2011 and the Court of Appeal in SCA26/2014 are not res judicata in relation to the Present Action under article 1351 (1) and (2) of the Civil Code 2020.

72. For the reasons given above, I allow ground one of the grounds of appeal.

Ground two of the grounds of appeal

73. The second ground of appeal challenged the trial Court's finding that the Present Action was an abuse of the process of the Court. Counsel for the Appellant repeated the submissions made under the first ground of appeal in support of the second ground.

74. Counsel for the Respondents contended that the trial Court was correct in finding that the Present Action constitutes an abuse of process of the Court. Counsel for the Respondents relied on various authorities, including **Gomme**; **Henderson v Henderson (1843) 3 Hare 100; Bradford & Bingley Building Society v Seddon (Hancock and others t/a Hancocks (a firm), third**

parties [199] 4 All ER 217, and **Hunter v. Chief Constable of West Midlands Police [1982] AC 529**.

75. It is well established in Seychelles' jurisprudence that the Superior Court has an inherent jurisdiction to prevent abuse of its process. In **Hunter**, Lord Diplock remarked at paragraph [29] that: *"*[t]*he Court has the inherent power to prevent misuse of its procedure where the process would be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people."* See also the authority of **Reichel v Magrath (1889) 14 App. Cas. 665 1889**.

76. I refer to **[0.18/19/9] R.S.C 1965**, which states that the term *"an abuse of the process of the Court"* connotes that the process of the Court must be used *bona fide* and properly and must not be abused.

77. **Hunter** states that: *"**where there is abuse, the court has a duty, not a discretion, to prevent it.**"* [Emphasis supplied]

78. I consider the claim for abuse of process of the Court after finding that there is no res judicata under article 1351 (1) and (2) of the Civil Code 2020. In **Gomme**, the Court of Appeal referred to what Auld LJ had to say in **Bradford & Bingley Building Society**, on the difference between the two rules (i.e., res judicata and abuse of process not qualifying as res judicata) —

> *"In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum. The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also, save in "special cases" or "special circumstances": see Thoday v Thoday [1964] P. 181, 197-198, per Diplock L.J and Arnold v National Westminster Bank Plc. [1991] 2 A.C. 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter."*

79. In **Gomme**, the Court of Appeal emphasised that res judicata is a subset of abuse of process —

> *"The rationale behind the rule of res judicata and its strict application is 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. Because of the imaginative use that has been made to go round the rule, courts have developed the rule of abuse of process. The rule of abuse of process encompasses more situations than the three requirements of res judicata. Courts cannot stay unconcerned where their own processes are abused by parties and litigants. There is a time when they have to decide that enough is enough where the lawyers have not advised their clients. Abuse of process will also apply where it is manifest on the facts before the court that advisers are indulging in various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as of harassing parties against whom they have brought actions or others who may not be parties. Courts have a duty to intervene to put a stop to such abuses of legal and judicial process: see Bradford & Bingley Building Society v Seddon Hancock & Ors [1999] 1 WLR 1482, House of Spring Gardens Ltd & Ors v Waite and Others [1990] 2 All ER 990, and In Re Morris [2001] 1 WLR 1338."*

80. A review of the power to control abuse of process of the Court was given by Simon LJ in **Michael Wilson & Partners Ltd v Sinclair [2017] 1 WLR 246 at paragraph [48]** —

> *"(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see* ****2658*** *Lord Diplock in Hunter's case [1982] AC 529 , Lord Hoffmann in the Arthur J S Hall case [2002] 1 AC 615 and Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1 . These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter's case. Both or either interest may be engaged.*

(2) *An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse: see Bragg v Oceanus [1982] 2 Lloyd's Rep 132 ; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur J S Hall case.*

(3) *To determine whether proceedings are abusive the court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in Johnson v Gore Wood & Co and Buxton LJ in Laing v Taylor Walton [2008] PNLR 11 .*

(4) *In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the Arthur J S Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case [2004] Ch 1 ; or, as Lord Hobhouse put it in the Arthur J S Hall case, if there is an element of vexation in the use of litigation for an improper purpose.*

(5) *It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris . To which one further point may be added.*

(6) *An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2014] AC 160 , para 17 as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of discretion. Nevertheless, in reviewing the decision, the Court of Appeal will give considerable weight to the views of the*

judge, see Buxton LJ in the Laing v Taylor Walton case, para 13."

81. The recent Hong Kong case of **Lo Kai Shui v HSBC International Trustee Limited & Ors [2021] HKCFI 1539**, an authority on English law res judicata, also reproduces the foregoing principles into a coherent list —

> *"110. Abuse of process (sometimes called the Henderson v Henderson abuse, or res judicata in the wider sense) may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue. See Chiang Lily v Secretary for Justice [2009] 6 HKC 234 at §§57-62 (Ma CJHC as he then was).*
>
> *111. As described by Ma CJ in Ko Hon Yue v Chiu Pik Yuk (2012) 15 HKCFAR 72 at §82, the essence of the doctrine of abuse of process is that "a party ought generally not be permitted to raise in subsequent proceedings matters which that party could and should have raised in earlier proceedings."*
>
> *112. A pleading or part of a pleading may also be struck out where the pleaded claims constitute an abuse of process, in that they could and should have been raised in earlier proceedings: Ko Hon Yue at §§83-84 (Ma CJ), Yifung Properties v Smith [2019] 1 HKLRD 36 at §16 (Lam VP).*
>
> *113. The onus is on the party alleging abuse to establish that the subsequent litigation is an abuse. The abuse can take a number of forms, including (a) oppression, vexation or unjust harassment of that party or his privy, (b) the administration of justice being brought into disrepute, and (c) manifest unfairness to that party or his privy: Ko Hon Yue at §83(3)-(4), Yifung at §§17-18.*
>
> *114. It is not necessary, for the purposes of establishing an abuse of process, to show that the parties to the two sets of proceedings were the same or were privies: King's City Holdings Ltd v De Monsa Investments Ltd [2013] 4 HKC 450 at §39 (Fok JA as he then was), China North at §52.*

> *115. Once an abuse in the aforementioned forms is established, there is no need to demonstrate any other special circumstances: King's City at §44.*
>
> *116.* ***The issue of whether there is an abuse is a fact-sensitive one which calls for a broad, merits-based assessment in which the court is concerned with balancing the interests not just of the litigants before it, but also other interests involved in the administration of justice****: Ko Hon Yue at §83(5), Yifung at §14."* [Emphasis supplied]

82. All the foregoing must be seen in the context of the principle enunciated by Lord Wilberforce in the Privy Council case of **Brisbane City Council v Attorney-General for Queensland [1979] AC 411, 425**. In **Brisbane City Council**, the Board stated that the prohibition against re-litigation on decided issues "*ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation*."

83. After careful consideration of the proceedings in the Present Action, the submissions of all Counsel and the judgments in CS112/2011 and SCA26/2014, I conclude that the Present action constitutes an abuse of the process of the Court. I also conclude that the submission made by Counsel for the Appellant is misconceived as an abuse of the process of the Court may arise where there has been no earlier decision capable of amounting to res judicata under article 1351 (1) and (2) of the Civil Code 2020.

84. It is undisputed that both cases are based on delict. I have concluded that the Present Action and the cases CS112/2011 and SCA26/2014 involve the same pontoon constructed in front of the Appellant's property and that any additional facts presented by the Appellant in the Present Action would not have the characteristic of new facts. It is also remarked that the factual matrix of the Present Action is identical to the case CS112/2011.

85. This matter has been the subject of a final determination by the Supreme Court and the Court of Appeal (the findings of the Court of Appeal are

repeated in part at paragraph [13] hereof). As stated at paragraph [62] hereof, the sum of the findings of the Court of Appeal in SCA26/2014 was that the Appellant has no rights over the pontoon, or over the water on which the pontoon has been erected, other than the exercise of an easement of access to the marina.

86. The Appellant cannot, now, in new proceedings before the Supreme Court, having failed in the first case to secure the sole and exclusive right to the pontoon in front of its leased property try to re-litigate a matter which has already been adjudicated upon by the Supreme Court and the Court of Appeal, and attempt to get the pontoon removed and damages for the delict of nuisance.

87. The Appellant, in so doing, is clearly making an abuse of the process of the Court. In **Bragg v Oceanus [1982] 2 Lloyd's Rep 132**, Lord Justice Kerr held that —

> "*…it is clear that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process,...*"

88. I also quote from **Encyclopédie Dalloz, Droit Civil Vol III Vº Chose Jugée, at Note 144** —

> "*144. D'une manière plus générale, un courant jurisprudentiel important admet que si un point litigieux a déjà été affirmé ou nié, à l'occasion d'une précédente instance, il ne peut plus faire l'objet d'un nouveau débat, et ce même si le demandeur intente un nouveau procès afin d'en déduire des conséquences différentes de celles qui l'avaient conduit à former la première demande (Cass. civ. 29 juin 1948, D. 1948.469, note P. L.-P., JCP 1949.II. 4689, note A. Besson; Cass. com. 5 nov. 1952, Bull. civ. III, no 338; Cass. 1re civ. 10 févr. 1953, JCP 1953.II.7636, note R. Perrot; Cass. com. 16 nov. 1964, Gaz. Pal. 1965.1.147; Cass. soc. 8 janv. 1976, Bull. civ. V, no 9).*"

89. For the foregoing reasons, I am satisfied that the Appellant's initiation and prosecution of the Present Action constitute an abuse of the process of the Court. I agree with the finding of the trial Court at paragraph [26] of the

judgment that: *"this case demonstrates such abuse whereby litigation is being prosecuted in a different guise just because the Plaintiff does not accept the decision given in the previous case and as a matter of public policy such cannot be condoned. There is clearly a misuse of the court's procedure…."*

90. Hence, I uphold the finding of the trial Court that the Present Action (the case CS98/2022) constitutes an abuse of the process of the Court.

91. Consequently, I dismiss ground two of the grounds of appeal.

Ground three of the grounds of appeal

92. As it is understood, the third ground of appeal contended that the trial Court erred in hearing and disposing of the pleas in limine litis before hearing the Present Action on the merits on the basis that the same pleas disposed substantially of the entire case. In his skeleton heads of argument in support of the third ground, Counsel for the Appellant submitted that the trial Court erred in making a decision on the pleas in limine litis because the prior judgments and plaints were not tendered as evidence in the Present Action. During the hearing of the appeal, the Appellant addressed this point at length.

93. Both Counsel for the Second Respondent argued in their skeleton heads of argument that the Appellant's notice of appeal did not raise any objection to the admissibility of Court records by the trial Court. In the light of their submission, they claimed that the Appellant should not be allowed to argue this point on appeal. Counsel for the Second Respondent raised a preliminary objection in his skeleton heads of argument regarding this ground of appeal under The Rules 2023. This preliminary objection was based on the assertion that the third ground of appeal violated sub-rules 18 (3) and (7) of The Rules 2023 by being vague or general in terms and, hence, cannot be considered as a ground of appeal.

94. Sub-rules 18 (3) and (7) of The Rules 2003, stipulate —

> *"(3) Every appeal shall be brought by notice in writing (hereinafter called "the notice of appeal") by the appellant which shall be lodged with the Registrar of the Supreme Court within thirty days of the decision appealed against…*
>
> *(7) No ground of appeal which is vague or general in terms shall be entertained, such as, that the verdict is unsafe or that the decision is unreasonable or cannot be supported by the evidence."*

95. Rule 18 (8) of The Rules 2023 also applies with respect to this ground; it stipulates —

> *"(8) The appellant shall not without leave of the Court be permitted, on the hearing of that appeal, to rely on any grounds of appeal other than those set forth in the notice of appeal —*
>
> *Provided that nothing in this sub-rule shall restrict the power of the Court to make such order as the justice of the case may require."*

96. It is noted that The Rules 2023 have repealed The Seychelles Court of Appeal Rules 2005. Rules 18 (3), (7), and (8) have remained unchanged. Hence, cases decided under these sub-rules still apply.

97. In the case of **Petrescu v lllescu (SCA 22/2021)** (26 April 2023), the Court of Appeal quoted with approval the observation made by the Court of Appeal in England in **Ferguson v Whitbread & Co plc 1996 SLT 659**, where the following was said by Lord President Hope, at page 659L, concerning certain grounds of appeal —

> *"[10]* […] *the preparation of the grounds of appeal, which require to be lodged as a step in the process, should never be regarded as a mere formality. The purpose of the rule, which is a simple example of case management, is to give notice to the parties and the court of the points to be argued. Specification of the grounds enables the parties to direct their argument, and their preparation for it, to the points which are truly at issue. "*

98. In the case of **Petrescu**, the Court of Appeal reiterated that sub-rule 18 (7) of The Seychelles Court of Appeal Rules 2005 requires the appellant to formulate grounds of appeal in a concise, clear and felicitous manner. A ground of appeal that only sets out the findings of fact and conclusions of law to which an appellant is objecting would be a vague ground of appeal. According to the Court of Appeal, a ground of appeal should also set forth precisely the basis on which the appellant is objecting. This is because the purpose of sub-rule 18 (7) is to give fair notice to both the respondent and Court of Appeal of the points that would be raised in the appeal. See also **Cedric Petit v Marguita Bonte SCA No. 11/2003** (20 May 2005) and **Chetty v Esther SCA44/2020** (13 May 2021).

99. Applying the authorities presented above, after thorough consideration of the third ground of appeal, I agree with the argument presented by both Counsel for the Second Respondent that the Appellant's notice of appeal did not raise any objection to the admissibility of Court records by the trial Court. It is noted that the admissibility of Court records was a matter that was raised in the submissions of the Appellant in the trial Court. The third ground of appeal appeared to set out the finding to which the Appellant is objecting, but it does not set forth precisely the basis on which it is objecting. Hence, the third ground ran afoul of sub-rules 18 (3) and (7) of The Rules 2023.

100. It is interesting to note that the vague nature of the third ground of appeal misled Counsel for the First Respondent. Counsel for the First Respondent, in his skeleton heads of argument concerning the third ground, addressed it as if it was challenging the trial Court's decision under sections 90 and 91 of the Seychelles Code of Civil Procedure. The trial Court correctly explained at paragraphs [13] and [14] of the ruling that these sections provide for parties to consent to pleas in limine litis being taken and disposed of at the start of the hearing. In the Present Action, the parties did consent to this procedure upon an application made by Counsel for the First Respondent. Counsel for the Appellant also agreed to the procedure. The trial Court referred to this at paragraph [13] of the judgment. However, as mentioned above, the Appellant

expressed concern in his skeleton heads of argument regarding the admissibility of Court records.

101. It is observed that the Appellant was not left without a course of action. The Appellant could have sought leave of the Court of Appeal under sub-rule 18 (8) of The Rules 2023 to rely on any ground not set forth in the notice of appeal. It appears that sub-rule 18 (9) of The Rules 2023 also applies here. However, since the Appellant did not seek leave, it is not proposed to consider rule 18 (9) of The Rules 2023. Rule 18 (8) of The Rules 2023 stipulates —

> *"(8) The appellant* ***shall not without leave of the Court*** *be permitted, on the hearing of that appeal, to rely on any grounds of appeal other than those set forth in the notice of appeal — Provided that nothing in this sub-rule shall restrict the power of the Court to make such order as the justice of the case may require."* [Emphasis is mine]

102. For the reasons stated above, I accept the contention of both Counsel for the Second Respondent that the third ground of appeal is vague or general in terms and, hence, is not a ground of appeal.

103. It follows, therefore, that Counsel for the Appellant cannot be permitted to rely on any ground of appeal other than those set forth in the notice of appeal without leave of the Court of Appeal and the proper procedures being followed as per sub-rule 18 (8) of The Rules 2023.

104. As the Appellant has failed to comply with rule 18 (3), (7) and (8) of The Rules 2023, I am duty bound to strike out ground three in the notice of appeal. Hence, ground three stands dismissed.

Ground four of the grounds of appeal

105. Ground four challenged the finding of the trial Court that the Present Action constitutes an *abus de droit*. It is enough to state that as can be seen from the

heading before paragraph [22] of its judgment, **t**he Court treated *abus de droit* together with abuse of process and made no specific finding on the former.

106. Hence, ground four stands dismissed.

ORDERS

107. The plaint is struck out and the action in the case CS98/2022 is dismissed on the basis that the Appellant's initiation and prosecution of the case CS98/2022 constitute an abuse of the process of the Court.

108. The appeal is dismissed.

109. With costs in favour of the First and Second Respondents.

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F. Robinson JA

I concur:

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Dr. M. Twomey-Woods JA

I concur:

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K. Gunesh-Balaghee JA

Signed, dated and delivered at Ile du Port on 3 May 2024.