

IN THE SUPREME COURT OF SEYCHELLES

**CAPRIASCA S.A. OF TAPIA & ASOCIADOS
VERSUS
FRANCOISE MICHEL**

PLAINTIFF

DEFENDANT

Civil Side No 213 of 2001

Mr. S. Rouillon for the plaintiff
Mr. P. Pardiwalla for the defendant

JUDGMENT

B. Renaud

This is a matter of trespass to property that was entered by the Plaintiff on 4th July 2001.

It is the case of the Plaintiff that it is the owner of a portion of land at Beau Vallon, Mahe, morefully known as Title H2652 and the Defendant was the Lessee thereof by virtue of a Lease Agreement dated 15th November, 1990 with the Plaintiff's predecessors in Title, that is, the Government of Seychelles. The said lease was for a portion of land on which the Defendant was to construct "*Buvette Hibiscus Project*". The Defendant built a building and surrounding wall on the said Title H2652. Those constructions were built without the participation, consent or authority of the Plaintiff, contrary to the express terms of the Lease Agreement. The Plaintiff avers that the Defendant has now encroached and trespassed on its adjoining property Title H5337 and has done so in bad faith. As a result of the Defendant's trespass and faute, the Plaintiff has suffered loss and damages for which the Defendant is liable to compensate the Plaintiff in the sum of SR32,500 particularised as follows:

<i>Trespass on Land Title No. H5337</i>	- SR30,000
<i>Survey Fess</i>	- <u>SR 2,500</u>
	- <u>SR32,500</u>

The Plaintiff prays this Court for a judgment ordering the Defendant to:

- (a) *Remove her building and wall from the Plaintiffs land Title No. H5337 and at her own expense and to cease her acts of trespass and damage forthwith;*
- (b) *Pay the Plaintiff SR32,500.00 as damages and*

The whole with interest and costs.

The Defendant was living outside this jurisdiction and upon application of the Plaintiff this Court, granted leave to serve the Defendant overseas. That did not take place as the Defendant appeared by Counsel who filed a Statement of Defence on 20th May, 2002.

The Defendant admits that the Plaintiff is indeed the owner of Title H2652 and that it was the Lessee thereof by virtue of a Lease Agreement dated 15th November, 1990 entered into with the Plaintiff's predecessor in title, namely the Government of Seychelles. The Lease was for a portion of land Title H2652 on which the Defendant was to construct "*Buvette Hibiscus Project*" which includes the construction of a building and surrounding wall thereon. The Defendant, however, denies that those constructions encroached on the Plaintiff's property, hence putting the Plaintiff to strict proof. The Defendant further denies all the other averments of the Plaintiff, including the damages claimed.

The matter was set for hearing on 21st November, 2002. There is no record on this case file as to what happened on that day, but the record shows that the matter was mentioned on 13th February, 2003 and by agreement of Counsel. On that date, the matter further postponed to 27th March, 2003. The matter was further postponed at the request of both Counsels to 21st May, 2003. At the request of the parties who indicated to Court that settlement was being worked out, the matter was mentioned on 7th July, 2003 for settlement. On that day, a further mentioned date was sought and the matter was adjourned to 6th October, 2003 when it was again adjourned to 21st November, 2003 to be further adjourned to 12th December, 2003 when it was fixed for hearing on 19th July, 2004. On that date the hearing started with the recording the evidences of Surveyor D.G Lebon and one Mr. Gunther after which the Plaintiff closed its case. At that point the matter

was adjourned at the request of the parties to 30th July 2004 for them to try again to negotiate an amicable settlement. There being no settlement between the parties, the matter was set for continuation on 11th November 2004. On that day, Learned Counsel for the Defendant informed Court that his client, who was studying overseas, could not be present to testify. Learned Counsel for the Plaintiff objected to the adjournment in view of the matter having been outstanding for a very long time before the Court. The Court, however, adjourned the matter to 24th November 2004 and granted leave to the Defendant to file an affidavit or grant a power of attorney to someone to testify on her behalf. The Defendant neither filed her evidence by affidavit nor granted anyone a power of attorney to testify on her behalf, when the matter came up on 24th November, 2004. The 13th January, 2005 was then fixed for the continuation of the hearing. On that day, Learned Counsel for the Defendant informed the Court that he would not be tendering any evidence but would instead be addressing the Court. Learned Counsel for the Defendant addressed the Court followed by the Learned Counsel for the Plaintiff. Their respective addresses are on record.

It is not in dispute that the Plaintiff is the owner of a portion of land situate at Beau Vallon, Mahe, morefully known as Title H2652 and the Defendant was the Lessee thereof by virtue of a Lease Agreement dated 15th November, 1990 with the Plaintiff's predecessors in Title, namely the Government of Seychelles. The said Lease was for a portion of land on which the Defendant was to construct "*Buvette Hibiscus Project*" which includes the construction building and surrounding wall on the said Title H2652. The contentious issues between the parties are:

1. *Do the building and wall built by the Defendant encroach on the Plaintiff's adjoining property Title H5337?*

*Are there any other encroachments by the Defendant on Plaintiff's property Title H5337?
If so, did the Defendant encroach on the property with or without the participation, consent or authority of the Plaintiff?*

2. *If the Defendant has indeed encroached on the Plaintiff's property, is the Defendant liable to pay damages to the Plaintiff, and if so, how much?*

It is the evidence of PW1 Surveyor D.G. Lebon, that in May 2001, on the instruction of one Mr. Schnitzenbaumer that he surveyed the boundary of parcel H5337 situate at Beau Vallon. He did not verify if Title H5337 is registered in the name of the Plaintiff. He noticed that all the beacons

were missing and these were destroyed by the construction of the new building on parcel H2652. He caused the beacons to be replaced and he then discovered that certain encroachment by the new wall and septic tank that have been built at that time. On the southeast corner of the property there has been secondary encroachment to the area where the garbage bins are. He drew a plan depicting those encroachments. The plan and a report dated 4th June 2001 were admitted without objection and marked as exhibit P1(A) and P1(B). Recently, he went to the same site and found that there was further encroachment in between the old road and the western boundary. This however is not depicted on the Plan (Exhibit P1(B)). It is between beacons RL70 and RL79. That area which may be termed a 'buffer zone' measuring 5 metres has been converted to an open space terrace, which now forms part of the Defendant's Restaurant building.

Learned Counsel for the Defendant objected to that latter evidence as this is not pleaded in the Plaint. Learned Counsel for the Defendant argued that this is pleaded at paragraph 4 of the Plaint. I reserved a final ruling on that point which I will now give. Upon a careful reading of paragraph 4 of the Plaint, more particularly the following – “... *the Plaintiff avers that the Defendant has now encroached and trespassed on its adjoining property Title No.H5337 and has done so in bad faith*” – I am satisfied that the pleading in paragraph 4 of the Plaint of the Plaintiff includes any encroachment by the Defendant on any part of Title H5337. If the evidence of the witness means that the portion of land “*between the old road and the western boundary*” forms part of Title H5337 then I rule that his evidence is admissible and is not ultra petita.

Mr. Lebon further testified that the land between the old road and the western boundary do indeed forms part of parcel H5337. That piece of evidence was not contradicted.

The next witness for the Plaintiff, one Mr, Gunther, testified that he represents the Plaintiff by virtue of a Power of Attorney dated 6th July 2004 (Exhibit P5) and is aware of the Lease Agreement dated 30th November, 1999, held by the Defendant. Copy of the Lease was admitted without objection and marked as Exhibit P2. A transfer Deed dated 30th November, 1997 was admitted without objection and marked as Exhibit P3. That Deed dated 22nd June, 1998 shows a transfer of Title H2652 from Hotel des Seychelles to Capriasca, the Plaintiff. It is Capriasca which owns Title H5337 which surrounds Title H2652. He has been instructed to ask the

Defendant to remove all the encroachments on Title H5337 which belongs to Capriasca. He caused the Defendant to be informed by letter regarding the removal of the encroachment. The witness produced a letter written by his Counsel dated 28th July 1999 to the Defendant which was admitted and marked as Exhibit P6. He is claiming SR30,000.00 as damages for the encroachment and SR2,500.00 as survey fees from the Defendant in addition to the Defendant ceasing all her encroachments on Title H5337, i.e. the wall; septic tank and the terrace, as well as an order to stop the Defendant from trespassing on the Plaintiff's property.

From the evidence as found by this Court I will now answer the questions raised above in order to adjudicate on the contentious issues.

It is my finding that part of the surrounding wall built by the Defendant, a septic tank and the portion of land between the south east boundary and the old road where the Defendant has built an "open space terrace" as part of the Restaurant, indeed encroach on the Plaintiff's adjoining property Title H5337 as shown on Exhibit P1(A) and P1(B). I further find that the Defendant encroached on the property of the Plaintiff, that is, Title H5337, without the participation, consent or authority of the Plaintiff. The encroachment was not in good faith in view of the fact that beacons were removed when the encroached wall was built. In the circumstances, I find that the Defendant is also liable to pay damages to the Plaintiff for such trespass, which this Court assess at SR.10,000.00. I also find that the Defendant is liable to pay the survey fees of SR2,500.00 for replacing the removed beacons. The Plaintiff is further entitled to the orders of this Court as prayed.

I accordingly enter judgment in favour of the Plaintiff as against the Defendant as follows:

- 1. I order the Defendant to remove any building, surrounding wall, septic tank, and "open space terrace" from the Plaintiff's land Title No. H5337, all at her own expense;*
- 2. I order the Defendant to cease all her acts of encroachment, trespass and damage within 6 (six) months of this order.*

3. *I order the Defendant to pay the Plaintiff the sum of SR10,000.00 as damages for trespass and SR2,500.00 as survey fees, the whole sum of SR12,500.00 with interest.*

4. *I award costs to the Plaintiff.*

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B.RENAUD
JUDGE

Dated this 31st day of March 2005