

IN THE SUPREME COURT OF SEYCHELLES

Frederick August Lesperance

Of Baie Ste. Anne, Praslin

Plaintiff

VS

Seychelles Petroleum Company Limited (SEPEC)

Represented by its Director Mr Guy Adam  
Of New Port, Victoria, Mahé

Defendant

Franky Leon  
Intervener

**(Side No: 223 of 2003)**

&

Franky Leon

Intervener/

Plaintiff

VS

SEPEC

Defendant

Frederick August Lesperance  
the above address  
(Side No: 108 of 2004)

Co-defendant of

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Mr A. Derjacque for the plaintiff

Mr F. Bonte for the Intervener/Plaintiff

Mr F. Chang-Sam for the defendant

D. KARUNAKARAN

JUDGMENT

In suit - Civil Side No: 223 of 2003, hereinafter referred to as the "first-suit" the plaintiff - Frederick August Lesperance- by a plaint dated 4<sup>th</sup> August 2003 - prayed this court for a judgment against the defendant - Seychelles Petroleum Company Limited (SEPEC) - seeking in essence, the following remedies: -

*i) A declaration that the agreement dated 14<sup>th</sup> April 1998 between Mr. Lesperance and SEPEC - hereinafter called the "first-agreement" for the operation of the Petrol Service Station hereinafter called the "suit-premises" at Baie St. Anne, Praslin, subsists and exists in law; and*

*ii) the SEPEC should not eject Mr. Lesperance from the suit-premises unless and until the Court makes an order accordingly.*

When this "first-suit" - was pending in court for determination, one Mr. Franky Leon - hereinafter called the "intervener" - with the leave of the Court intervened in the proceedings. He filed a statement of demand dated 15<sup>th</sup> July 2004, wherein he claimed damages in the total sum of Rs735, 105/- from the defendant - SEPEC - alleging that SEPEC was in breach of an agreement dated 1<sup>st</sup> September 2003 hereinafter called the "Second Agreement", as it failed to handover to him the vacant possession of the suit-premises as agreed upon.

The defendant in the "first-suit" filed a statement of defence dated 10<sup>th</sup> October 2003

denying liability. In fact, in its defence, the defendant has not only denied the claims of the plaintiff and that of the intervener but also has made a counterclaim against the plaintiff alleging that Mr. Lesperance has been in illegal occupation of the suit-premises since the 20<sup>th</sup> April 2003, despite expiry of the contract-period. Therefore, the defendant seeks a judgment in its favour (i) ordering dismissal of the plaint (ii) ordering the plaintiff to vacate the suit-premises: and (iii) ordering the plaintiff to pay damages in the sum of Rs20, 000/- to the defendant SEPEC.

Besides his intervention in the first-suit, Mr. Franky Leon also entered a separate suit in Civil Side No: 108 of 2004 - hereinafter called the "Second Suit" -against SEPEC, claiming loss and damages in the sum of Rs 735,105/- alleging that SEPEC was in breach of the said "Second Agreement". For, SEPEC had failed to handover the vacant possession of the suit-premises to him as agreed upon on the 1<sup>st</sup> September 2003. In its defence, the defendant SEPEC having denied the entire claim of Mr. Leon contends that the said "Second Agreement" was subject to a condition-precedent that Mr. Leon would obtain a bank guarantee for the sum of Rs250, 000/-. However, according to SEPEC, Mr. Leon was in breach of that condition in that, he withdrew the guarantee unilaterally, which he had secured from the Seychelles Savings Bank, without SEPEC's knowledge. Consequently, the second agreement was *void ab initio and nor*ight could arise therefrom for Mr. Leon to claim any relief under such agreement. In any event, it is the contention of SEPEC that it could not hand over the vacant possession of the suit-premises to Mr. Leon due to "*physical impossibility*" as Mr. Lesperance had refused to deliver possession of the premises back to SEPEC; *a fortiori* the issue of possession was *sub judice* as the first-suit was pending before the court.

With the consent of all parties concerned, the Court consolidated both suits for the purpose of hearing and adjudication. The undisputed facts of the case as transpire from the evidence on record are briefly as follows:-

The SEPEC was at all material times, the owner of the "suit-premises" namely, Baie St. Anne Petrol Station including the business, all superstructures, equipment, installation, plant and other machinery situated thereon at Baie Ste Anne, Praslin; whereas Mr. Lesperance was a businessperson and a resident of Praslin. It is not in dispute that by an agreement dated 14<sup>th</sup> April 1998 in exhibit P1, SEPEC granted the permit/license to operate the business of the said petrol station to Mr. Lesperance for a period of five years commencing from the 20<sup>th</sup> April 1998. Indeed, Clause 3 of the said agreement (first-agreement) inter alia, reads thus:

"This agreement shall be deemed to have commenced on the 20<sup>th</sup> day of April of One thousand nine hundred and ninety eight and shall remain in force for a period of five years or until terminated by either party giving to the other one calendar month's notice in

*writing in that behalf expiring on any day of the calendar month, whichever is the earlier”*

Clause 5 thereof reads thus:

“Upon the termination of this Agreement the operator shall promptly vacate the Station and yield up the Company possession thereof and of the equipment, together with all locks, keys, fixtures and fastenings complete. The Operator shall also comply with all the requirements of the Employment Act and pay whatever compensation and benefits are due to his/her employees as specified in the Act for termination of employment”

Clause 7 thereof reads thus:

“Nothing herein contained shall be deemed to constitute a partnership between the parties hereto or to constitute the Operator as a tenant of the Station”

Be that as it may, the license-period of five years agreed upon by the parties under the first-agreement was to expire on the 20<sup>th</sup> April 2003. Obviously, ten days before the expiry date, the SEPEC by a letter dated 11<sup>th</sup> April 2003 in exhibit P4, reminded Mr. Lesperance of the expiry of the licence and informed him that SEPEC would be calling for tenders from the public for the operatorship of the petrol station in a new building constructed on the same premises, which would most likely take effect on the 2<sup>nd</sup> June 2003. SEPEC, in the same letter (exhibit P4) informed Mr. Lesperance that should he be interested in submitting his best offer, he might do so by latest the 30<sup>th</sup> April 2003.

Accordingly, SEPEC on the 22<sup>nd</sup> April 2003 invited tender-applications from the public by publishing a notice in the newspapers vide exhibit P5, wherein stipulated a condition that those applications must be accompanied by references and proof of investment capability of around SR250, 000 as working capital into this business. A number of applicants had submitted their tenders to SEPEC. Among them were the plaintiff Mr. Lesperance and the intervener Mr. Franky Leon. Following the opening of the tender and the decision of the Board of Seychelles Petroleum Company, the bidder Franky Leon was the one successful and he was awarded the contract for the operatorship of the Station whereas Mr. Lesperance, who was then operating the station, could not secure the contract. SEPEC accordingly, informed both parties of the outcome of their respective biddings. In fact, SEPEC in its letter dated 25<sup>th</sup> July 2003, in exhibit D wrote Mr. Leon the following:

*Dear Mr. Leon,*

*TENDER FOR OPERATORSHIP OF BAIE STE ANNE PETROL STATION*

*We refer to our tender invitation for the operatorship of the above petrol station and your tender letter dated 23 April, 2003.*

*Following the opening of the tender, and the decision of the Board of Seychelles Petroleum Company, we are pleased to inform you that your tender has been accepted. Kindly therefore contact our Commercial Manager to finalize the Operatorship Agreement by latest 14th August, 2003.*

*Please note that your appointment as Operator of Baie Ste Anne Petrol Station will take effect as from 1<sup>st</sup> September, 2003.*

*As you mentioned in your tender Seychelles Petroleum Company expects that you will provide quality service to your customers and the public of Baie Ste Anne at large. We take this opportunity to wish you all the very best in this new venture and assure you of our best services at all times.*

*Yours truly,*

*(SD) D. Camille*  
**CORPORATE MANAGER**

Simultaneously, SEPEC by a letter even date vide exhibit P6, also requested Mr.

Lesperance to return the "suit-premises" to SEPEC before the 1<sup>st</sup> September, 2003 obviously, with the intention of delivering possession of the suit-premises to the new contractor Mr. Leon. This letter in exhibits P6 addressed to Mr. Lesperance reads thus:

"25 July 2003

*Mr. Frederick Lesperance*

*Baie Ste Anne*

*Praslin*

*Dear Mr. Lesperance,*

*OPERATORSHIP FOR BAIE STE ANNE PETROL STATION*

*We refer to our letter SE.PE.C.0725 dated 11<sup>th</sup> April 2003, informing you of that your Operator's Agreement will end on 20th April 2003 as per Article 3 of the said agreement.*

*Following your unsuccessful tender bid, we regret to inform you that your operatorship of the station will now cease effective 1 September, 2003.*

*Arrangements will be made soon for the handing over of the station to the Company.*

*We thank you for your past services and wish you all the very best in your future endeavors.*

*Yours truly,*

*(SD) Bernard Elizabeth  
Commercial Manager"*

SEPEC started taking steps to finalise the new contract awarded to Mr. Leon by

executing the said "Second Agreement" with Mr. Leon vide exhibit D1 whereby SEPEC undertook to grant Mr. Leon the right to operate the station for a period of three years commencing on the 1<sup>st</sup> September, 2003. With these background facts, all three parties involved in the said two suits make claims and counterclaims against one another seeking different remedies alleging breach of contract.

In a nutshell, Mr. Lesperance testified that he has been operating the said petrol station for the past six years having obtained possession of the suit-premises by virtue of the "first agreement" mentioned hereinbefore. According to Mr. Lesperance, when he first took over the business the petrol pump and the store were in a bad state. He cleaned them up and put them in good order and standard. Now SEPEC has built a new station in the suit-premises and has installed new pumps and new storage facilities. The station also consists of a small shop, where he has put his fridge, freezer, chillers and other objects required for the business. When he took over the "suit-premises, the shop was empty. He had to spend money to buy those items. He is now running the business very well providing good customer care and service to the public. Moreover, Mr. Lesperance testified that despite his good maintenance and service to the public, SEPEC did not award the contract for him to continue operate the business. It did not give any reason why he should not be allowed to continue the business in the suit-premises. SEPEC also did not give reason why he was not successful in his bidding. According to Mr. Lesperance, Mr. Leon, to whom the new contract has been awarded, has no experience in the field as he never operated a business of any petrol service station. He had never even visited the suit-premises, nor did he visit the shop area to check on the list of item

such as freezer, fridge etc required to operate the business nor did he take measurement of the areas required to accommodate them before he decided to purchase those items. As regards Mr. Leon's claim against SEPEC for breach of contract, Mr. Lesperance testified that if Mr. Leon had already purchased various items for Rs250,000/- hoping that he might takeover the business, he could very well sell those items and recover the sum spent on them. In that case, he would not make any loss. In any event, Mr. Lesperance testified that he is not liable to compensate Mr. Leon for any loss or damage as the former had no contract of any nature whatsoever with the latter. Besides, Mr. Lesperance stated that he does not have any other business for his livelihood, apart from the one in dispute. Having thus deponed Mr. Lesperance admitted in cross-examination that he knew that (i) his contract with SEPEC was coming to an end on 20<sup>th</sup> April 2003 (ii) his tender for second term was not successful (iii) SEPEC had given notice to vacate upon the expiry on the contract period (iv) he had no leasehold right over the suit-property and (v) the new contract had already been awarded to Mr. Leon. However, despite his knowledge of those critical facts, he maintained his position that he has the right to stay in the suit-property and continue the business until the court makes an order accordingly. In these circumstances, he urged the court to make an order allowing him to continue staying in the suit-premises and operate the business without interruption by SEPEC. Further, he prayed the court to dismiss the damage claim made against him by SEPEC and not to award damages against him in favour of either SEPEC or Mr. Leon.

Mr. Leon testified in essence, that SEPEC, in breach of the terms of the second agreement- exhibit D1 - failed to deliver him the vacant possession of the suit-premises



so as to enable him operate the business as from the 1<sup>st</sup> September 2003. Relying on this agreement and in the hope that he would obtain possession of the premises on the 1<sup>st</sup> September 2003, he took two loans from the Seychelles Savings Bank amounting Rs304, 000/- and made expenses therefrom for the provisions of purchasing freezers, insurance payments, labour, billing machines, licensing fees, stationeries, travelling from Praslin to Mahe, etc. As a result of SEPEC's failure to carryout its contractual obligation under the "Second Agreement" Mr. Leon testified that he suffered loss and damages as follows:

**1.** Repayment of loan from Seychelles Savings Bank

at the rate of Rs8, 500/- per month as from 30<sup>th</sup> April 2003

to 31<sup>st</sup> March 2004 Rs93,000/-

**2.** Loss of revenue from 1<sup>st</sup> September 2003 to 31<sup>st</sup> March 2004 Rs241,605/-

Moral damages for breach of contract Rs400,000/-

Total Rs735, 105/-

Hence, Mr. Leon seeks this court for a judgment in the sum of Rs735, 105/- against SEPEC with interest and costs.

Mr. Bernard Elizabeth, Commercial Manager of SEPEC testified in substance that before the expiry of the "first Agreement", SEPEC wrote to Mr. Lesperance and informed him

that the agreement was coming to an end on 20<sup>th</sup> April 2003 and SEPEC would be putting the station to tender vide exhibit D4. Accordingly, SEPEC invited tender applications. The successful bidder was Mr. Leon, who was awarded the contract. Mr. Lesperance was not successful. Hence, SEPEC granted time until 1<sup>st</sup> September 2003, for Mr. Lesperance to hand over possession. However, Mr. Lesperance unlawfully refused to handover and came before this Court by instituting the “first suit” against SEPEC and therein - by way of an inter locutory application - sought an interim injunction to prevent SEPEC from ejecting him from the suit-premises, pending the final determination of the case. Since, the business in dispute involved an “essential public service” (supply of oil and petrol), SEPEC also did not resist the application and consented for *status quo* to be maintained until the final adjudication of the suit. SEPEC in its letter dated 23<sup>rd</sup> September, 2003 addressed to Mr. Lesperance clarified its position in this regard. This letter marked as exhibit P7, reads thus:

“Mr Frederick Lesperance

Baie Ste Anne

Praslin

*Dear Mr Lesperance,*

*BAIE STE ANNE SERVICE STATION*

*I write further to my letter of 25th July, 2003.*

*Following your refusal to vacate and hand over possession of the Baie Ste Anne Service Station in accordance with the Agreement dated 14<sup>th</sup> April, 1998 pursuant to which you were granted the right to operate the Service Station and in view that you have filed a case against Seychelles Petroleum Company Limited, Seychelles Petroleum Company Limited has had no other alternative but to continue to supply you with petroleum products for sale at the Service Station.*

*Seychelles Petroleum Company Limited would like to inform you and for you to note (1) that it considers your action to remain in occupation of the Baie Ste Anne Service Station without its consent an act of trespass and therefore as illegal and has accordingly applied to the Supreme Court to have you evicted and for damages against you and (2) that the delivery of petroleum products to you at the Station is not intended in any way to condone your act of trespass and illegality nor must it be interpreted in anyway whatsoever that Seychelles Petroleum Company Limited has consented or is consenting to your continued trespass of its premises.*

*Rather, Seychelles Petroleum Company Limited is continuing to supply petroleum products to the Baie Ste Anne Service Station under legal reserves of all its rights including the right to vacant and get possession of the Station and because it is mindful that the Baie Ste Anne Praslin Petrol Station provides an invaluable service to the community, businesses and tourists at Baie Ste Anne Praslin and Praslin generally and that to discontinue the supply of petroleum products would badly disrupt the economic and social life of Baie Ste Anne.*

*It would be in your interest and that of the Baie Ste Anne community in which you live, if you were to peacefully vacate the Baie Ste Anne Petrol Station forthwith.  
We look forward to your cooperation  
yours sincerely,*

*(SD) Bernard Elizabeth*

*For and on behalf of*

*SEYCHELLES PETROLEUM COMPANY LIMITED”*

Since, Mr. Lesperance thus continued in possession of the premises in view of the interim order the Court made to maintain *status quo*. In the circumstances, Mr. Elizabeth testified that SEPEC could not handover possession of the station to Mr. Leon. According to SEPEC, if at all Mr. Leon had incurred any loss or damage, it was solely due to the unlawful refusal of Mr. Lesperance to vacate and return the suit-property back to SEPEC. Hence, Mr. Elizabeth testified that Mr. Lesperance is responsible for such loss and damages if any, and not SEPEC. At the same time, SEPEC suffered inconvenience, loss

and damages as a result of Mr. Lesperance's unlawful refusal to vacate, that too, in breach of the terms of the "first agreement" he had signed with SEPEC. Hence, SEPEC claims the sum of RS20, 000/- from Mr. Lesperance as compensation and also seeks an order dismissing his plaint and an order to eject him from the suit-premises.

I carefully perused the pleadings, evidence oral and documentary and the submissions made by all three counsel representing their respective parties in both suits. On a cogent consideration and meticulous examination of the facts intertwined in both cases, to my mind, the following are the questions that arise for determination in this consolidated matter:-

- 1.** *Does Mr. Lesperance have any legal right to remain and continue to remain in possession of the suit-premises and operate the business therein, under the "first-agreement" or otherwise in law?*

*Was Mr. Lesperance's refusal to vacate after the expiry of the "first-agreement" unlawful?*

*Was he then in breach of the terms of that agreement?*

*If so, is SEPEC entitled to claim damages from Mr. Lesperance for such breach? If so, is the claim of Rs20, 000/- reasonable?*

*Is the "Second Agreement" between SEPEC and Mr. Leon void ab initio for breach of any condition-precedent by Mr. Leon?*

- 2.** *Was SEPEC in breach of the "second agreement", as it failed to handover the possession of the suit-premises to Mr. Leon on the 1<sup>st</sup> September 2003?*

- 3.** *If so, is Mr. Leon entitled to claim damages from SEPEC for that breach?*

*If yes, what is the quantum of damages payable to him?*

*Is Mr. Lesperance liable to pay those damages to Mr. Leon? and*

*If not, is SEPEC liable to pay those damages to Mr. Leon?*

Obviously, the case of the Plaintiff ( Mr. Lesperance ) is that although the "first-agreement", which he entered into with SEPEC on the 14th, 1998 "lapsed" on 20<sup>th</sup>,

2003 (vide Clause 3 supra) still it continues to subsist even after it lapsed. As a result Mr. Lesperance claims that he is entitled to remain in possession of the Service Station and that SEPEC is in breach of that agreement by wanting and seeking to have him ejected from the Petrol Station. He therefore, asks the court to *confirm* subsistence of the agreement and *for an order* the Defendant (SEPEC) from removing him from the Service Station.

First of all, on the face of it, the claim made Mr. Lesperance in this respect appears to be a cynical disregard for law and contractual obligations he undertook to perform by entering into the first-agreement. It is clearly untenable in law. Indeed, "*All agreements lawfully concluded shall have the force of law for those who have entered into them. ....They shall be performed in good faith*"vide Article 1134 of the Civil Code. Undoubtedly, the time, namely the "operational period" of "five years" agreed upon by the contracting parties is the essence of the "first-agreement. This clearly provides for Mr. Lesperance to "operate" the Service Station only for five years. It is not a lease in form and substances. As rightly submitted by Mr. Chang-Sam, it does not comply with article 1718-2 of the Civil Code with regard to form. Neither there is any provision for payment of rent nor the parties are referred to as lessor and lessee and, as expressly provided in clause 7 (rehearsed supra), it does not create a tenant/landlord relationship between the contracting parties. Mr. Lesperance himself makes no claim in his Complaint that he is a tenant of the suit-premises nor does he claims that the Control of Rent and Tenancy Agreement Act (Cap 47) applies. Hence, Mr. Lesperance does not have any proprietary claim or right either in law or contract to remain or continue to remain in the suit-premises. He is not a statutory tenant in terms of the aforementioned Act, as he was not

a tenant in the first place. In the circumstances, it goes without saying that Mr. Lesperance does not have any legal right to continue possession of the suit-premises and operate the business therein, under the “first-agreement” or otherwise. He is therefore, in illegal possession and occupation of the suit-premises since the first-agreement had lapsed on the 20<sup>th</sup> April 2003 and so I find. Hence, it follows that Mr. Lesperance’s refusal to vacate after the expiry of the “first-agreement” is certainly unlawful and thus he has been in breach of the terms of the first-agreement.

It is evident that Mr. Lesperance has not only breached the terms of the first-agreement by refusing to vacate the suit-premises by the due date, but also prevented SEPEC from fulfilling its contractual obligations to Mr. Leon by applying for an interim injunction - in the first-suit - in his favour, in order to continue his occupation after the expiry of his contract period. This, as I see it, has certainly prevented SEPEC from fulfilling its commitment of allotting the new contract to Mr. Leon. Consequently, SEPEC should have suffered hardship, inconvenience and the resulting damages therefrom. Hence, SEPEC is obviously, entitled to claim damages from Mr. Lesperance for such breach. In my judgment, the claim of RS20, 000/- made by SEPEC against Mr. Lesperance for moral damages in this respect, is reasonable and appropriate having regard to all the circumstances of the case. See, *Cable & Wireless Ltd v Michel [1966] SLR*. Accordingly, I award this sum to SEPEC.

I will now turn to the claim of Mr. Leon for damages against SEPEC for the alleged breach of contract i. e the “Second Agreement”. It is evident from the Invitation to tender (in exhibit P5) that all tender-applications must be accompanied inter alia, by references,

and proof of investment capability of around SR 250,000/- as working capital into the business. Undoubtedly, it is a condition precedent, which formed part of the conditions set out in the Invitation to Tender. In my view, the compliance of this condition by Mr. Leon is required not only for the purpose of securing the tender but also equally required to acquire and maintain the operatorship of the service station, after his successful bidding and formation of a proper contract in writing. Moreover, such investment capability provided in the nature of a guarantee cannot be revoked by and/or at the instance of one contracting party unilaterally, without the consent of the other. Above all, such guarantee shall continue during the subsistence of the contract and cannot be revoked by any party except by mutual consent. However, Mr. Leon, who had obtained such guarantee from the Seychelles Savings Bank admittedly, caused unilateral cancellation of the said guarantee by writing a letter dated 8<sup>th</sup> September 2003 to the Bank, vide exhibit D5. The Seychelles Saving Bank has also cancelled the guarantee during the subsistence of the "Second Agreement". In fact, such a cancellation is invalid in the eye of law if done without the consent and knowledge of the beneficiary namely, the SEPEC. Hence, I find that Mr. Leon has failed to provide the guarantee for the subsistence of the "Second Agreement". In other words he failed to comply with the condition-precedent that is required to give "force and life" to the continuance of the "Second Agreement". As the acceptance of the offer by SEPEC from Mr. Leon was subject to the said condition-precedent, it forms the substratum for the existence of the second agreement. Hence, non-fulfillment of the said condition would obviously, render the agreement null and void ab initio and so I uphold the submission of Mr. Chang-Sam in this respect. Hence, I find that the "Second Agreement" between SEPEC and Mr. Leon

is void ab initio for breach of the condition-precedent by Mr. Leon. In the circumstances, I conclude that Mr. Leon cannot in law, claim any damage from SEPEC based on a breach of the “second agreement” that is null and void for all legal intents and purposes.

Having said that even if one assumes for a moment that the said *second agreement* is not void ab initio for the reasons stated hereinbefore, still one has to examine whether was indeed, in breach of that agreement, as it failed to handover the vacant possession of the suit-premises to Mr. Leon as agreed upon, on the 1<sup>st</sup> September 2003. Undisputedly, SEPEC could not physically handover the premises to Mr Leon because Mr. Lesperance not only continued his refusal to leave the premises, but also he instituted a civil action in court and applied therein for an interim injunction, which indirectly prevented SEPEC from moving forward in finalising the new contract with Mr. Leon and the matter obviously, became *sub judice*. It is evident that when the “*second agreement*” was concluded SEPEC should have had a legitimate expectation that Mr. Lesperance would be vacating the suit premises in good time and would hand over the vacant possession to SEPEC at the latest on the 1<sup>st</sup> September 2003 and the suit-premises could then be given to Mr. Leon for his operation of the business. However, contrary to its legitimate expectations and owing to a complete change of circumstances and turn of events, which were out side the control of SEPEC, it could no longer fulfil its obligation and common intention of the parties. It could not honour its commitment to Mr. Leon and handover the possession to him as per the terms of the contract, though literal performance of which was possible. Obviously, SEPEC has all along been an innocent party. It has taken all possible and reasonable steps to get back the possession of the premises from Mr.



Lesperance but all in vain. In such circumstances, *“Is it just and reasonable to expect an innocent party to perform a contractual obligation, which is impossible to perform?”*

“Can such innocent party be penalised, for technically being in breach of the contract?

*What does justice demand in such situations?* The answer simply and clearly lies in article 1148 (2) of our Civil Code, which runs thus:

“If the literal performance of a contract is possible but, owing to a complete change of circumstances which could not have been anticipated when the agreement was concluded and which is outside the control of the parties, it no longer fulfils the common design of the parties, the contract shall be rescinded. However, the person who stands to lose from the rescission may apply to the Court for the appointment of an arbitrator who shall be at liberty to modify the terms of the contract. If the parties agree to nominate an arbitrator, it shall not be necessary for the Court to make the appointment. This paragraph shall not apply to any contracts for the sale of specific goods which perish, whether or not the risk passed to the buyer before the date of perishing, or to any charter party except a time charter party or a charter party by way of demise, or to any contract for the carriage of goods which, according to commercial practice, is normally covered by insurance”

It is not uncommon that parties to an executory contract are often faced, in the course of carrying it out, with a *turn* events, which they did not at all anticipate or foresee at the time of the formation of the contract. Those turn of events might include a complete destruction of the subject matter of the contract, a wholly abnormal rise or fall in prices, a sudden depreciation or devaluation of currency, an unexpected obstacle to execution due to intervention of third parties or other authorities. Some could be natural phenomena

and others be manmade but as long as those intervening factors or circumstances are beyond the control of the parties which could render the performance of their obligations impossible. Yet this does not in itself affect the contract or the bargain they have made. In such cases, it is the duty of the court as well as the parties to give "business efficacy" as far as possible, to the contracts they have entered into, in good faith as ordinary humans. They cannot be expected to have the prophetic foreknowledge and foresight of the future turn of events and provide for them in the contract. Obviously, this is the reason why Article 1148 (2) above provides for arbitration *to modify the terms of the contract, when a party stands to lose from the rescission. On an objective assessment* of the terms of the contract, in the light of the entire circumstances that existed when the contract was made, if the Court finds that the parties would not have agreed to be bound in a fundamentally different situation, which has now unexpectedly emerged, the contract then ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation, which the parties never thought of, at the time of making the contract. In such circumstances, the Court ought to reach a conclusion which is "just and reasonable" as Lord Wright propounded in *Constantine's* 1942 A. C or one "which justice demands" as Lord Sumner recommended in *Hirji Mulji v Cheong Yue Steamship Co Ltd* 1926 A. C p 497. , in the present case if SEPEC or even Mr. Leon for that matter, had known beforehand or had anticipated at the time they concluded the second contract, that Mr. Lesperance, a third party would refuse to return the suit-premises and defeat or delay his contractual obligation by filing a suit in Court, the parties would have certainly provided for that unexpected situation that has now arisen. If they had provided

for it, then the contract must govern. There cannot be any rescission or frustration. However, the parties did not provide for it, in the instant case. , in my judgment the “second agreement” hereinbefore mentioned shall be in terms of Article 1148 (2) above or frustrated by operation of law. In the circumstances, I find that SEPEC was not in breach of any contractual obligation under the “second agreement”, for having failed to handover the possession of the suit-premises to Mr. Leon on the 1<sup>st</sup> September 2003. , I hold that Mr. Leon is not entitled to claim any damages from SEPEC for breach of a contract that is rescinded or frustrated, though it is subject to arbitration as provided under article 1148 (2) of Civil Code, rehearsed supra. Obviously, the question no: 7 above regarding the quantum of damages in the circumstances, becomes irrelevant for consideration.

On the question of ascertaining the liability, Mr. Chang-Sam submitted that if any damages are required to be paid to Mr. Leon - which SEPEC denies – those damages should be *made* by Mr. Lesperance as they arise out of his deliberate and unlawful act of occupation. I quite agree with this submission in this respect. However, as I see it, there is no privity of contract between Mr. Leon and Mr. Lesperance to allege any breach of contract by the former against the latter in order to give rise to a cause of action in the suit Civil Side No: 108 of 2004. Besides, there is also no pleading on record to show at the least that a cause of action arose against Mr. Lesperance in tort or contract in order to point liability for the alleged loss and damages suffered by Mr. Leon. On the other hand, even if one argues that Mr. Leon suffered loss because of Mr. Lesperance’s breach of contract with SEPEC, still I find that the said loss is too remote as Mr. Lesperance at the time of the breach of his contract with SEPEC, could not reasonably have contemplated as a serious possibility that Mr. Leon would take a bank-loan to purchase those items even before obtaining the possession of the premises and would suffer loss as a consequence thereof. For remoteness of damage or loss see, *Lamb v London Borough of Camden*[1981] QB 625. any event, as rightly submitted by Mr. Chang-Sam in Civil Side No: 180 of 2003, the plaintiff Mr Leon has failed to adduce evidence to substantiate and prove, as it is required by law, the loss particularised in paragraph 7 of his plaint, namely, (i) the loan taken from the Savings Bank in connection with the operation of the petrol station and the repayments made thereof, and (ii) the loss of revenue and the consequential damages. Obviously, when Mr. Leon testified he was not able to give a clear account of what he did with the loan he apparently, took from the

bank. He could not or at the least did not produce any receipt to prove the alleged purchase of those items. Even if he had purchased those items such as fridge, freezer etc. they were not brought to the suit-property or used in the shop. Being brand new items, they could be resold in any event to recover the cost substantially, albeit difference in resale value. Having said that, I find on evidence that Mr. Leon has failed to discharge his burden of proving his case in Civil Side No: 183 of 2003, to the required degree. In the circumstances, I dismiss the entire claim of Mr. Leon made against SEPEC and Mr. Lesperance in this matter.

In the final analysis and for the reasons stated hereinbefore, I hereby enter judgment in both suits as follows:

- i)** *I dismiss the plaint in Civil Side No. 223 of 2003 instituted by the plaintiff Frederick August Lesperance against the defendant Seychelles Petroleum Company Limited (SEPEC) in this matter.*

*I also dismiss the claim made by the Intervener Mr. Franky Leon against SEPEC in the same suit.*

*I allow the counterclaim made by SEPEC against Mr. Lesperance in the same suit namely, Civil Side No. 223 of 2003 in its entirety. Consequently,*

- (a)** *I order Frederick August Lesperance to vacate the "suit premises" namely, the Baie St. Anne Petrol Service Station, which includes the shop, store, machines, equipment, and other fixtures and fittings attached thereto or situated thereon and handover the vacant possession of the same with those items therein to SEPEC within two weeks from the date of the judgment hereof. For avoidance of doubt, I direct that such handover should be effected upon making a due inventory of those items including all stock in trade such as petrol, diesel, kerosene, gas etc, with the assistance of police if necessary.*

*Incidentally, I direct the officer in charge of the Baie St. Anne Police Station, Praslin to do the needful in this respect.*

Further, I order Mr. Lesperance to pay SEPEC the sum of Rs20, 000/- towards damages.

**(b)** Besides, I order Mr. Frederick August Lesperance to account for and pay to SEPEC, all revenue and profit, which he has earned from his occupation and operation of the Baie St. Anne Petrol Service Station from the 1<sup>st</sup> September 2003, until such time he delivers vacant possession of the said Station to SEPEC, in pursuance of the judgment given hereof.

ii) I hereby dismiss the plaint entered by Mr. Franky Leon against SEPEC in Civil Side No. 108 of 2004 in its entirety; and

iii) In respect of Civil Side No. 223 of 2003, I award costs in favour of the defendant SEPEC and against the plaintiff Mr. Lesperance. As regards Civil Side No. 108 of 2004, I award costs again in favour of the defendant SEPEC and against the plaintiff therein namely, Mr. Franky Leon.

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D. Karunakaran

Judge

Dated this 31<sup>st</sup> day of March 2008