

Joubert v Suleman

(2010) SLR 248

Frank ALLY for the plaintiffs
Philippe BOULLE for the 1st defendant
Keiran SHAH for the 2nd defendant
Conrad LABLACHE for the 3rd defendant

Judgment delivered on 20 September 2010 by

KARUNAKARAN J: The plaintiffs in this suit are co-owners and occupiers of an immovable property, parcel H3594 with a dwelling-house thereon, situated close to a valley on the slope at the bottom of a mountain at North East Point, Mahe. The defendants are and were at all material times, the owners and occupiers of their respective parcels of land situated on top of the mountain above the plaintiffs' property.

It is averred in the plaint that the plaintiffs had been residing on their property for about 12 years prior to the defendants' occupation of their respective properties in the mid-1990s. According to the plaintiffs, on dates unknown before January 1997 all three defendants started developments and constructed their respective houses and facilities on the slope of the terrace above the plaintiffs' property. According to the plaintiffs, due to these developments carried out by the defendants on their properties, torrential rainwater in 1997 changed its course and flowed heavily onto the plaintiffs' land. It flooded the area, bringing down debris and residual materials which damaged the plaintiffs' house and properties, ultimately causing loss, and material and moral damage to them. The plaintiffs further aver that before the development of the said properties by the defendants, they had never been troubled or affected by rainwater or the washing down of residual materials. Furthermore, the plaintiffs aver that the loss and damage caused to their property was due to and occasioned by the defendants' negligence and fault in the care and construction of their buildings and developments of their respective properties. According to the plaintiffs, the following are the particulars of fault which the defendants committed causing loss and damage to the plaintiffs:

- (a) The defendants failed to properly or at all take effective or any measure to control the flow of rainwater and/or residual materials from their properties unto that of the plaintiffs;
- (b) The defendants failed to construct proper drainage or at all so as to prevent the flow of rainwater or residual material from their properties unto that of the plaintiffs;
- (c) The defendants failed to ensure that diversion of rainwater and residual materials originating from their constructions and developments did not affect the plaintiffs;
- (d) The defendants failed to put in place or erect satisfactorily

measures to ensure that the diversion of rainwater onto plaintiffs' property was properly controlled; and

- (e) The defendants failed to take necessary steps to prevent any adverse effects to the plaintiffs' property and failed to take into account the fact that their development and construction would affect the plaintiffs adversely.

The plaintiffs thus claim that they suffered loss, damage and inconvenience as a result of the fault of the defendants - vide amended plaint dated 2 February 2002. The particulars of the loss, damage and expenses allegedly incurred by the plaintiffs, as per the amended plaint, are as follows:

(a) Damage to furniture, materials and clothes	R 46,000
(b) Damage to terraces and land	R 18,500
(c) Loss of aesthetic value	R 35,500
(d) Moral damages	R 100,000
TOTAL	<u>R 200,000</u>

The plaintiffs further aver that despite repeated requests the defendants refused or neglected to make good the said loss and damage. The plaintiffs therefore pray the Court to enter judgment in their favour and against the defendants jointly and severally in the sum of R 200,000 with interest on the sum as from the date of plaint and with costs of this action.

On the other side, all three defendants in their respective statements of defence, having completely denied the plaintiffs' claim aver that they did not commit any fault and are not liable to the plaintiffs for any damages whatsoever. The first defendant has admitted in his defence that he is the owner and occupier of a parcel of land at North East Point, but denies each and every allegation made by the plaintiffs in relation to the construction and development of his property and the particulars of fault and the damages allegedly suffered by the plaintiffs. The second defendant also in his defence denies liability stating that although he is a co-owner of a plot of land at North East Point on which he owns a house and has been living therein since September 1999, the said house was constructed by a licensed building contractor and the construction and development on his property were carried out in accordance with planning law and approval by relevant authorities. Further the second defendant has averred in his defence that since he has built his house within an approved housing estate and not a sole developer, all infrastructures were built by the estate promoters, the Government of Seychelles. Moreover, the second defendant has averred that he is bound to receive rainwater flowing down his land from land of higher elevation. He therefore cannot be responsible for water flowing down from his land or through his land to the land of lower elevation. He did nothing to increase the burden of land on lower level. He has built adequate storm water drains and gutters to control the flow and channel the water flow. Further, in the

alternative, if at all the court finds him liable, it should apportion his responsibility in proportion to his development of the estate.

The third defendant, a company, although it admits in its defence that it is the occupier of a piece of land at North East Point since 1996, denies its alleged ownership. It also denies all the allegations made by the plaintiffs in relation to its construction and development of the property and the alleged fault and the damages suffered by the plaintiffs. The third defendant also denies liability stating that although it is using that plot of land to put up certain structures and maintain them for telecommunication purposes, it did not commit any fault causing damage whatsoever to the plaintiffs' property or to that of anyone in the neighbourhood. Hence, the third defendant also totally denies the plaintiffs' claim. In the circumstances, all three defendants thus deny liability and seek dismissal of this action.

The essential facts which transpire from the evidence adduced by the parties are these:

It is not in dispute that the first plaintiff, Mrs Marie-Therese Joubert is the owner of the property parcel H3594 at Carana, Mahe and has been living there with her family for the past 14 years. The first defendant, Mr Ebrahim Suleman owns and lives on an adjacent property lying on a higher terrace above the plaintiffs' property. The second defendant, Mr Franky Adeline also owns and lives in another property adjoining and above the first defendant's property, whereas the third defendant, Cable & Wireless (Seychelles) Ltd, is using another plot of land on top of the mountain lying just above the second defendant's property. It is also not in dispute that the third defendant has installed and is using a telecommunication tower on that plot of land.

The plaintiff testified that in December 1997 during the torrential rain that admittedly caused heavy flooding all over Mahe, the rainwater from the higher grounds of land above her property gushed into, flooded and destroyed her property. Since she came to live on her property, the rainwater from higher terrain had never run down onto her property causing such deluge and destruction. It was an abnormal and unprecedented incident. Hence, she went up the mountain to find out where the rainwater was coming from and why. As she reached the higher terraces, she noticed the first defendant having flattened the terrain, was building his house on his property and the construction work was in progress. She went further up to check and observed the second defendant was also in the process of developing his property and the third defendant had already developed the land, and had its telecommunication tower installed on the property. The first plaintiff further testified that each time it rained the water came down, flooded and eroded her property. The rainwater that was coming down from the third and second defendants' land had created some sort of gutter on the sloping terrain and the water flowed through it and directly reached her property. This problem continued until the Seychelles Housing Development Corporation constructed a gutter to control the water. According to the plaintiffs, the problem due to diversion of the watercourse occurred only after the defendants started developments on their properties and the plaintiffs had never experienced that problem before.

During the torrential rain that lashed Mahe in 1997, the rainwater from the defendants' properties that gushed out brought down lots of soil, debris and other material onto the plaintiffs' land and destroyed her house, swept away her bed, furniture and other household objects. The superstructure of the house was extensively damaged. Consequently, the SHDC pulled down the entire damaged structure of the house and had to build a new one at the cost of R142,000 to house the plaintiffs' family on higher ground on the same property. According to the first plaintiff's observation and logic, the rainwater gushed out and took a destructive course because of the defendants' fault, in that the defendants while developing their respective properties and building their houses, failed or neglected to build a proper gutter to control and regulate the course of rainwater that overflowed from their properties. As a result, the rainwater gushed down, flooded and destroyed her house and other movable objects kept inside the house. She also produced a photo album containing 33 photographs showing the location of her house, the terraces, the course taken by rainwater, the debris brought down by the rainwater, the extensive damage caused to the house etc. According to her estimate, the cost of the wall and other structures that were damaged by the rainwater would be around R 150,000; the damage to her furniture, materials and clothes R46,000; the damage to her land and terraces R18,500; and for the loss of aesthetic value of her land R35,500. Furthermore she testified that she and the second plaintiff also suffered morally, underwent mental anguish and inconvenience as a result of that incident and hence claims moral damages in the sum of R100,000. Moreover, the first plaintiff testified that now the situation has been remedied since SHDC has constructed a new house on higher ground and a retaining wall to control the flow of the rainwater at the cost of R 166,965. This wall had to be built to prevent the soil from coming down further from the upper terraces due to the flow of rainwater.

In cross-examination, the first plaintiff reiterated that she never cut the terrace nor built her house on the valley obstructing the natural and original course of the rainwater coming down from the terraces of the defendants. She also stated that she did not commit any fault in cutting the terrace or in building her house on the watercourse passing through the valley. She denied that she was responsible for damage to her house and property. According to her, she had built the house a long time before the occurrence of the catastrophe and it had never been the case before the defendants had started developments on their land. The testimony of the first plaintiff in cross-examination reads thus:

I did not cut the terrace. It was the Government that built the gutter. The Government acquired part of my land to build a gutter and now when the water comes down it no longer affects me. They built the gutter after I had been affected. Had they built the gutter I would not have been affected since I have been living there for all my life and I have never been affected ... I do not know whether the Government or Planning is guilty but the water has affected me. Government (through) SHDC sold me the land and the house. I had finished paying my loan for the land and the house collapsed and I had not yet finished paying SHDC and they had to give me another house.

Mr Pierre Rose (PW2), the husband of the first Plaintiff (PW1), also testified, corroborating the evidence given by PW1 on all material particulars and relevant

facts. He also identified the photographs and described the location of their house, the terraces, the watercourse, the debris brought down by the rainwater, the damage caused to the house etc.

Mr Patrick Joubert (PW3), the son of the plaintiffs, also testified in support of the case for the plaintiffs. He stated that a couple of weeks after the alleged incident he filmed the location of the properties and the damage caused to the plaintiffs' property using his brother's video camera. As he testified, he played the tape on a VCR machine and showed the images to the Court. Indeed, the testimony of PW3 in this respect runs thus:

This film was taken after the rainfall. I am playing the tape in pause or slow motion. You can see the path where the rainwater passed to reach our house. You can see the top of the hill wherefrom the rainwater originated to reach our house. There are bushes and tall grass over which the rainwater passed. On the piece of land uphill, there was no wall before. At the top again you can see the house of one of the defendants. It was being built at the time of the incident. On Mr Adeline's piece of land, there was no wall, no building. There were only broken pieces of rocks and leaves. The Tower of Cable and Wireless has been erected on the red earth road. It is at the top. There are tall trees there. Somewhere near there is downhill where a strip of road built by Cable and Wireless and not finished. No gutter or branch for the water to pass.

In view of all the above the plaintiffs claim that they suffered loss and damage in the total sum of R 200,000 and so seek judgment in their favour jointly and severally against the defendants.

On the other side, the first defendant Mr Ebrahim Suleman testified in support of his defence. According to him, although he is and was at material times, the owner of the land title H3830 situated above the plaintiffs' property, he did not commit any fault by carrying out development or construction works on his property in such a way to cause damage to the plaintiffs' properties. The said works were indeed, carried out by an independent building contractor, Mr Herman Maria, whom he had retained for the construction of his house. He further testified that there was a heavy rainfall during the construction time and the first plaintiff approached him while he was in his shop and complained that the construction works carried out on his property was the cause of flooding and damage to her house. That time, by sheer coincidence, the building contractor Mr Herman Maria was also present in his shop. He told the first plaintiff that since her property lies on the valley, it is bound to get the rainwater from the higher grounds. However, the rainwater the plaintiff was complaining of did not come from the first defendant's property. Besides, Mr Suleman testified that since his property is located on a sloping terrace, his building contractors had to cut the terrace, build a retaining wall and do filling to level the ground on his property. In any event, according to the first defendant, the Government of Seychelles had already developed that area - "Carana Estate" - by putting up an estate road by cutting terrain and other infrastructure before the defendants started construction of their houses and other structures. Mr Herman Maria also testified in support of the case for the first defendant.

According to Mr Maria, he built the house on the first defendant's property according to drawings approved by the Department of Planning. He admitted that he had to cut the slope in order to put up a retaining wall and filled inside the wall. There is a valley behind the wall. Mr Ferdinand Berlouis, a building designer retained by Mr Suleman also testified that since the first defendant's property is located on a slope, they had to put up a retaining wall and fill the ground level. This was done by using shovels and spades, not machines with a view to minimising the damage to the terrace. In the circumstances, Mr Suleman contended that he did not commit any fault and is not responsible for the alleged flooding and damage to the plaintiffs' property.

Mr Brassel Adeline, who was then working as the Construction and Maintenance Manager with SHDC testified that in 1997, following a complaint from the plaintiffs he visited the house of the plaintiffs at North East Point. He observed a number of cracks in the foundation of the wall. Subsequently, he requested a technician of SHDC, Mr Mark Agripine, to examine the condition of the house. The technician reported that since the plaintiffs' house had been built in a valley, its foundation should have been stronger. It should have been built in concrete with steel bars. However, since they did not use concrete with steel bars, cracks had appeared in the foundation wall. According to him, the erosion and soil movement caused by the rainwater would have affected the foundation of the house and hence cracks would have appeared. In any event, SHDC pulled down the damaged house and built a new house for the plaintiffs on higher ground. Mr Steve Serret, who was then working as Senior Planning Officer with SHDC, also testified that he visited the plaintiffs' house on three occasions but did not see any damage. Ms Greta Simara, an ex-employee of SHDC, also testified in support of the defence case. She produced a report dated 12 November 1996 prepared by the technician, Mr Agripine, following a complaint made by the plaintiffs regarding the defects in the house.

In view of all of the above, the defendants contend that they are not liable in law either jointly or severally to compensate the plaintiff for the alleged loss and damage. Therefore, the defendants seek dismissal of the suit with costs.

I meticulously perused the pleadings and examined the evidence on record including the documents produced as exhibits in this matter. I also watched the visual presentation from a recorded video cassette played in open court by PW3 showing the geographical and topographical location of the suit-properties in issue with panoramic views filmed a couple of days after the alleged mishap. The Court also had the opportunity of visiting the *locus in quo* where it observed the location of the plaintiffs' house in relation to the defendants' properties and the valley in question. The Court also noted the constructions made on the defendants' properties including a long retaining wall on the first defendant's property, which has evidently been built cutting the terraces on the slope of the mountain. It also noted the developments and constructions made on the second defendant's property as well as a telecommunication tower erected on the leasehold land held in the third defendant's use and custody. The Court also noted the gradient of the valley going down from the defendants' properties towards the house of the plaintiffs.

The essence of the case of the parties in this matter is:

Undisputedly, the plaintiffs' house was constructed about 12 years prior to the defendants' development, construction, use and occupation of their respective properties. The major construction works on the properties of the defendants such as cutting of terraces, putting up retaining walls, leveling of the ground, construction of houses and installation of a telecommunication tower were all carried out in the mid-1990s. The plaintiffs basically allege that consequent upon the said developments and constructions made on top of the mountain, the rainwater accumulated there during heavy rains, diverted its original/natural course, poured down, flooded and damaged the plaintiffs' properties situated at the lower level on the slope of the mountain. According to the plaintiffs such flooding was unprecedented and abnormal, which resulted in material loss, damage and inconvenience to them. The plaintiffs therefore, sue all three defendants conjointly for damages based on a common cause of action. However, the defendants deny liability in toto stating in essence, that there was no *causal link* between their acts of development and construction on their properties *and* the damage allegedly suffered by the plaintiffs.

Be that as it may, as I understand the pleadings and the evidence on record, it appears to me that there are two limbs to the common cause of action relied upon by the plaintiffs in this matter. They are:

- (i) the defendants as owners and or occupiers of their respective parcels of land are responsible for their unlawful acts namely, *abuse of their rights of ownership*, which is a fault under article 1382 of the Civil Code and through those acts caused damage beyond the measure of the ordinary obligations of neighbourhood. The third defendant, Cable and Wireless, is also liable being a co-author of the fault of the first and the second defendants; and
- (ii) The defendants as custodians of their respective parcels of land with all its contents and accumulated flow of rainwater thereon, are liable for the damage it caused to the plaintiffs under article 1384-1 of the Civil Code of Seychelles.

In the light of the above dichotomy of cause of action, I carefully examined the submissions of counsel touching on the several questions of law and fact. I diligently analysed the contentious issues and the relevant provisions of law.

To my mind, the following are the fundamental questions that arise for determination in this suit:

1. Did the defendants as owners of their respective parcels of land or superstructures thereon, commit any fault under article 1382 by abusing their rights of ownership resulting in or causing damage to the plaintiffs' property exceeding the measure of the ordinary obligations of neighbourhood?

2. Did any third party, to wit: (i) the Government of Seychelles, which developed the "Carana Estate" or (ii) the building contractors who were engaged by the defendants to put up buildings or structures on their respective properties or both jointly, commit any 'fault' in terms of article 1382 of the Civil Code in the course of developing the estate or constructing the building on defendants' properties and in that, did they cause or contribute to the diversion of watercourse through the valley in such a way that is detrimental to the plaintiffs' property? If yes,
3. Are the defendants vicariously or otherwise liable for the damage caused to the plaintiffs' property by the fault of those third parties?
4. Was the damage caused by the properties the defendants had in their custody at the material time either as proprietors or custodians or otherwise? If yes,
5. Are the defendants liable for the damage caused to the plaintiffs by those properties held in their respective custody in terms of article 1384 (1) of the Civil Code?
6. Was the damage caused solely due to the fault of the defendants or third parties or partly due to contributory negligence on the part of the third parties including the plaintiffs' builders, who had constructed the plaintiffs' house on the valley? If so;
7. What is the extent or degree of contributory negligence, if any?
8. What is the legal impact of such contributory negligence on the quantum of damages awardable to the plaintiffs? And
9. What is the quantum of damages the plaintiffs are eventually entitled to, if any?

Before one proceeds to find answers to the above questions, it is important, first to ascertain the position of law relevant to the issues that arise for determination.

In fact, the first limb of the cause of action mentioned supra is based on the principle of fault under article 1382, the most famous of all the articles of the Civil Code. As A G Chloros has rightly observed in his book *Codification in a Mixed Jurisdiction*, in the Civil Code of Seychelles this principle has been expanded substantially beyond the brief statement of the principle of liability for fault. The original article found in the French Code is preserved in paragraph (1), but four other paragraphs have been added to it. The object was to incorporate in our Civil Code principles which require definition. Thus, it is evident that three elements are required in law in order to establish liability. They are - (i) damage (ii) a causal link and (iii) fault. In French law these principles were worked out by the jurisprudence; but, if the law was to be simplified, it was essential to reduce to the minimum the need to go beyond the Code and resort to the French principles and jurisprudence. Nevertheless, the expansion of article 1382 as Chloros has rightly observed in his book did not occur

arbitrarily but is based upon the French jurisprudence which it has sought to replace. Hence, in this matter, the court inevitably resorts to the French law and jurisprudence on this subject.

Having said that, paragraph 2 of article 1382 defines fault on the basis of principles adopted by the French doctrine. This paragraph stresses that fault may be the result of a positive act or of an omission. Paragraph 3 incorporates a definition of abuse of rights. This is implied in the French law of contract but in a long process of caselaw development supported by the doctrine, abuse of rights acquired the status of an independent tort.

Having thus identified the position of law on the abuse of rights, which is nothing but a fault under our Civil Code, I will now proceed to examine the evidence on record to find out whether all three elements (mentioned supra) are present in the instant case in order to establish liability against the defendants either under article 1382 or under article 1384-1 or simultaneously under both articles of the Civil Code of Seychelles.

Element no (i): damage

It is not in dispute that the plaintiffs' house did sustain damage due to abnormal flooding and overflow of rainwater. I believe the plaintiffs in every aspect of their testimony pertaining to the devastation and the resultant damage caused to their properties. This is corroborated by the real evidence adduced through photographs and video recordings. The plaintiffs evidently had to relocate and construct a new house availing a fresh housing loan from the SHDC; the household items such as beds, sofas, chairs, etc were also swept away by the flood that came down from the properties of the defendants. Hence, I find on evidence that the plaintiffs did suffer material loss and damage due to flooding caused by the rainwater that came down from the defendants' properties. In the circumstances, I conclude that the first element of damage required for establishing liability is present in the instant case.

Element no (ii): a causal link

Now, the most important and the most contested issue in this matter is whether there has been a causal link between the development cum construction works carried out by the defendants on their properties and the damage that occurred to the plaintiffs' property. In other words, whether the development and construction works carried out by the defendants on their properties solely caused or contributory caused the overflowing of rainwater that damaged the plaintiffs' property. This alleged causal link is the crucial area at issue, the determination of which, in my humble view, requires the opinion of an expert in the field of land developments on mountainous terrain and the flood hazards to the low-lying areas. This subject obviously involves a specialised technical study to assess the effect of land development vis-a-vis its adverse impact on the environmental, geographical and climatic factors leading to flood hazards in the neighbourhood. In passing, it is pertinent to note that an expert's opinion on any subject is relied and acted upon by the Court only for the reason/s given by the expert in validation of his opinion, to the satisfaction of the Court. The Court presumably, has the power and wisdom to gauge the degree of accuracy and validity of the expert opinion on the touchstone of the reasons on which that opinion is based. Only upon such satisfaction, may the Court rely and act

upon that opinion. However, unfortunately, in the instant case, there is no expert's opinion available on this crucial issue save the views expressed by non-expert witnesses. In the circumstances, the Court inevitably has to form its own opinion, nevertheless based on valid reasons to adjudicate upon the issue. With this approach in mind, I diligently scrutinised the entire evidence on record so as to form an informed opinion based on valid reasons in order to resolve the issue of the alleged causal link, in this respect.

Firstly, I believe and accept the testimony of the first plaintiff, a percipient witness on her conclusion as to the alleged cause and effect of the entire flood episode. Evidently, her conclusion is based on her personal observation of facts and the chain of events that took place over a period of time, starting from the development of land on the mountaintop by the promoters, until it eventually culminated in the abnormal flooding and destruction of her property. Although she had been residing on her property in the low-lying area for about 12 years prior to the defendants' acts of development and construction on their properties, she had never before during torrential rain, observed or experienced or suffered such a devastating flow of rainwater from the higher ground where the defendants' properties are situated. Secondly, I note, all three defendants have leveled or flattened their respective terrain on top of the mountain, effectively changing its gradient and thereby increasing the area of flat surface for catchment of the rainfall. A flat mountain top would obviously, lead to more accumulation or floating volume of rainwater per squarefoot/per second than cliff-like sides and would cause overflow. Thirdly, none of the defendants have built any gutters on their properties or at any rate have not made adequate and effective provisions within the measure of the ordinary obligations of neighbourhood to regulate, control or distribute the flow of rainwater falling down from their respective properties. Fourthly, on a balance of probabilities, it seems to me, that the promoter, Government of Seychelles, which originally developed and sold the plots to the defendants, and the Planning Authority that granted approval for the constructions on the defendants' properties, did not foresee where they ought to have reasonably foreseen and assess the flood hazards posed to the low-lying terrain due to such land developments on a cliff-like mountaintop with high-angle slopes. They presumably did not develop any flood hazard map and the land development priority map for identifying the potential flood spots or make necessary and/or sufficient provisions reasonably to avert such hazards.

For these reasons, I am of the opinion that although the defendants' acts of development and construction on their properties do not constitute the sole and immediate cause for the damage to the plaintiffs' property, they obviously constituted the primary cause, not simply "a cause" amongst the bundle of the contributory causes such as negligence on the part of the promoters or Planning Authority or contractors or other third parties. Hence, I find on the evidence and conclude that there exists the necessary causal link and proximity between the acts of the defendants and the damage caused to the plaintiff's' property.

Element no (iii): fault

The defendants or their predecessor-in-title or the employees or préposé of the defendants, who carried out the alleged acts including the flattening of their respective land on the steep mountaintop, construction of buildings and retaining

walls thereon, failed to reasonably foresee the said flood hazard or at any rate, failed to make necessary provision for proper gutter/s to control or regulate or distribute the potential accumulation of rainwater so that its flow would not cause floods and devastation to the residents and properties in the neighbourhood, especially of the low-lying areas. In my judgment, the alleged acts of the defendants in this respect were the primary cause for the damage caused to the plaintiffs' property. The defendants in that process obviously failed to take necessary precaution and reasonable care in the use of their rights of ownership. They, in my view, exceeded the measure of "the ordinary obligations of neighbourhood" in this respect. As far as liability is concerned, I find that the acts of all three defendants in combination constituted the primary cause for the damage, albeit there are secondary causes contributed by the third parties. As owners of their respective parcels of land or superstructures thereon, the defendants abused their rights of ownership that resulted in loss and damage to the plaintiffs. Is it a fault in law?

Yes, it is. Indeed, an owner of land commits a fault under article 1382, known as an "abuse of his right of ownership", if he carries on an activity on his land which causes prejudice to a neighbour if such prejudice goes beyond the measure of the ordinary obligations of neighbourhood. Herein, it is relevant to note that in the case of *Desaubin v UCPS* (1977) SLR 164, the Court held, as summarised in the headnote:

Under the Seychelles Civil Code, although an attempt had been made in article 1382 to define and restrict the notion of "fault", the equivalent of "faute" in the French Civil Code, and the definition of "fault" in the Seychelles Code seemed to require an element of imprudence or negligence or an intention to cause harm, it appeared from paragraph 3 of article 1382, as well as from sect 5 (2) of the Seychelles Code, that there was nothing exclusive in such definition and that the concept of "fault" had not been curtailed within the narrow compass of the definition in the Seychelles Code. Hence the legal position had not been changed by the enactment of the new article 1382.

Under the French Civil Code, the principle evolved... is that the defendant is liable in tort only if the damage exceeds the measure of the ordinary obligations of neighbourhood.

Negligence or imprudence in not taking the necessary precautions to prevent a nuisance are not indispensable for liability which may exist even where the author of the nuisance has done all he could to prevent it, and the damage is the inevitable consequence of the exercise of the industry.

However, the defendants in the instant case though they appear to have acted in the exercise of their legitimate right of use and enjoyment of their respective properties, have indeed acted causing detriment to the owner of the property in the neighbourhood. By increasing the flat surface of catchment, triggering the accumulation and allowing the unregulated flow of rainwater from their properties, the defendants have exceeded the measure of "the ordinary obligations of neighbourhood" and have caused the damage to the plaintiffs. This is obviously a fault in terms of article 1382(3) as discussed supra. The third defendant is also the co-author of the fault of the first and second defendants in this respect. Therefore, I

find that all three defendants are jointly liable in terms of article 1382(1) of the Civil Code, which reads:

Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

Moreover, the first defendant also testified that he is not personally responsible for the fault, if any, committed by the independent building contractor, Mr Herman Marie, whom the former had engaged for services, that is, for the construction of his house. Mr Hermann Marie in turn testified to the effect that he is not personally responsible for the fault, if any, committed by the Planning Authority as Mr Marie carried out every detail of the construction as per the plan and design approved by the Planning Authority.

As I see it, whatever the degree of contributory negligence on the part of the building contractors or other third parties, the fact remains that the defendants are liable not only for the damage they caused by abuse of their rights of ownership but also for the damage caused by the act of negligence/fault of their employees/servants/préposés/agents for whom the defendants are vicariously responsible in terms of article 1384(1) of the Civil Code, which reads:

A person is liable not only for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody.

Although Mr Herman Marie was an independent contractor employed by the first defendant to construct the house according to the plans and drawings approved by the Planning Authority, still the first defendant is in law jointly and severally liable with the contractor for the prejudice suffered by the plaintiffs as co-author of the fault of the first defendant: vide D.1972. Somm 49, 3 Civ 8 juillet 1971.

In the circumstances, I find that the defendants are liable for the fault or negligence of any of their employees, workers, agents or servants that caused damage to the plaintiffs' property.

Having said that, I hold that a person is liable not only for the damage that person has caused by his or her own act but also for the damage caused by things in the persons custody. The owner of land is its custodian and also he or she is custodian of everything attached thereto or situated or accumulated or stored thereon including soil, debris, residual material, rainwater, etc, as he or she has and never loses the use, direction and control of the land, its contents or of the constructions and other operations thereon: vide (i) *de Commarmond* (1983-1987) 3 SCAR (Vol 1) 155; (ii) *Coopoosamy* (1964) SLR 82 at 86 and (iii) Trib Gr Inst de Toulouse, 17 mai 1971, D 1972 Somm 67.

In fact, liability under article 1384(1) is 'near absolute'. There is a presumption of liability raised against the person who has the custody of the thing by which the damage is caused. Such presumption may be rebutted in three cases only, that is, if the person against whom the presumption operates can prove that the damage was solely due: (1) to the act of the victim; or (2) to the act of a third party; or (3) to an act of God (force majeure) external to the thing itself, per *Sauzier and Goburdhun JJ* in

de Commarmond (aide supra). However, in the instant case, the defendants have not rebutted the presumption by adducing evidence or at any rate by any substantive evidence, to prove that the damage was solely due to any of the said three factors.

It is pertinent to note herein that the application of article 1384(1) of the Civil Code to cases of damage arising from land development and construction works on adjoining land is supported by other authorities vide: (i) *Lalou Traite de a Responsabilite Civile*, para 1205 and 1206; and (ii) *Ste Mobil Oil Française v Entreprise Garrkjue*, Tri gr inst, Bayonne, 14 décembre 1970 JCP 1971 16665.

It is also the case of the defendants that any loss or damage occasioned to the plaintiffs' property arose through the plaintiffs' own fault or those of their agents, préposés, employees or contractors in the construction of their house on the valley obstructing the watercourse. In this respect, it is true that in 1996, that was, about a year before the flood episode, the plaintiffs made a complaint to the SHDC regarding some cracks found on the walls of their house. Following that complaint Mr Mark Agripine, a technician, from the SHDC inspected the plaintiffs' house and submitted a report dated 12 November 1996 to SHDC stating that those cracks had appeared due to structural defects in that, the builder who originally constructed the plaintiffs' house did not use strong foundations, though such foundation was reasonably necessary since the house was located on the valley close to the watercourse. In the circumstances, I find that the plaintiffs also through the negligence of their builders/contractors have certainly added to the contributory causes that resulted in the damage to their house.

I gave careful thought to the line of defence raised by the defendants attributing or imputing fault on the part of third parties such as the promoters of the estate, independent contractors etc. As I see it, the defendants may have a remedy against those third parties but such defence cannot in law exonerate the defendants from liability towards the plaintiffs as this is not a defence under article 1384(1). Although the defendants were at liberty to join the independent contractors in guarantee as co-defendants in this suit, they did not choose that course of action for reasons best known to them. See D 1973 Somm 148 Colmar, 1er ch 12 Decembre 1972.

As stated above, the first limb of the cause of action is based on article 1382(3) and the second rests on the application of article 1384(1) of the Civil Code. The only defence open in this case for the defendants to dispute liability with regard to both limbs is proof by the defendants that the damage was caused solely either -

- (i) by the act of the plaintiff, or
- (ii) by the act of a third party for whom the defendants were in law not responsible, or
- (iii) act of God (force majeure).

Upon the evidence, I find the defendants have not established any such defence. However, it is necessary to analyse in some detail the "contributory negligence" raised by the defendants and its legal effect on the plaintiffs' claim for damages.

Contributory negligence

For the reasons stated hereinbefore, I find that (i) the Promoter of Carana Estate, (ii) the Planning Authority, (iii) the building contractors of the defendants, and (iv) the building contractor who constructed the plaintiffs' house on the valley close to the watercourse, all hereinafter collectively referred to as the third parties, have directly or indirectly through their imprudence, put in their respective share of the contributory causes, de hors the primary cause for the damage caused to the plaintiffs. In the circumstances, I hold that the defendants are jointly liable but only to the extent of their share of responsibility to the damage caused by the primary cause. Therefore, I find there is divided responsibility (responsabilité partagée) as propounded by Sir Campbell Wylie CJ (as was he then) in *Chariot v Gobine* SSC no 5 of 1965. Hence, the plaintiffs would lose their right to damages to the extent of the contributory negligence of their own contractor and that of the third parties who have put in their respective share of the contributory causes leading to the damage and so I find.

Although the English law of tort recognises contributory negligence on the part of the plaintiff or any third party as a valid defence against tortious liability, our law of delict under article 1382 or 1384 of the Civil Code does not seem to have expressly recognised the concept of contributory negligence as a defence against liability. Is then, contributory negligence available under article 1384(1)? The French commentators and the jurisprudence have answered that question in a positive way. It does exist under article 1384(1) and by the same token it should also in my considered view, exist under article 1382 (1) to (4).

In support of this proposition, we find for instance, in *Dalloz Encyclopedie de Droit Civil* 2nd ed Tome VI, Verbo Responsabilité du Fait des choses inanimées, note 573, which provides that -

573. Alors que le fait d'un tiers ne peut normalement entraîner qu'une exonération totale de la responsabilité du gardien, à l'exclusion d'une exonération partielle, le fait ou la faute de la victime pourra entraîner aussi bien une exonération partielle qu'une exonération totale de la responsabilité, le problème ne se présentant pas de la même façon que pour le fait d'un tiers.

This refers to article 1384(1). This is what the commentators have said and again in Mazeaud *Traité Theorique et Pratique de la Responsabilité Civile*, Tome II, note 1527 at page 637:

Aujourd'hui les arrêts affirment que le gardien doit être exonéré partiellement, dans une mesure qu'il appartient aux juges du fond d'apprécier souverainement, si le fait relève à l'encontre de la victime, quoique non imprévisible ni irrésistible, a cependant contribué à la production du dommage.

This being so, since contributory negligence may be pleaded in a claim founded on article 1384(1) from which our article 1383(2) has been inspired, then that defence may also be pleaded in a claim based on article 1383(2) because, as I have stated supra, that article in our Code Civil has been borrowed from article 1384(1) of the French Civil Code.

At the same time, it is interesting to note that as Laloutte J observed in *Attorney-General v Jumaye*(1978-1982) SCAR 348, in article 1383(2) in relation to motor accident cases, an attempt has been made to solve by legislation one of the difficulties which had arisen in France in connection with collision with motor vehicles. According to his interpretation, that legislature has removed contributory negligence from being raised as a defence to liability under article 1383(2). Be that as it may, in the case of D 1982 25 *Mandin v Foubert*, Cour de cassation, the Court in view of article 1382 of the Code Civil held thus:

Given that a person whose fault, even if criminal, has caused damage is partially relieved of liability, if he proves that fault on the part of the victim contributed to the harm

Besides, it is a recognised principle in French jurisprudence that when a complainant, or any person for whom is responsible, is found to have contributed to the damage caused the courts are free to decide the extent to which each party is liable for the damage. Vide, Bull civ 1980 III no 206 Case *SCI Lacouture v Entreprises Caceres*. Indeed, in any action for damages that is founded upon the fault or negligence of the defendant, if such fault or negligence is found on the part of the plaintiff or third party that contributed to the damage, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. See, *Lanworks Inc v Thiara*(2007) CanLII 16449 (Ontario SC).

Having regard to all the circumstances surrounding the causal link discussed supra, in my judgment, the third parties are jointly 20% responsible for the damage on account of the contributory causes they authored through their imprudence, to the damage caused. Obviously, for the said 20% of the contributory causes, the defendants are not responsible. Hence, I hold them liable only to the extent of 80% of the actual damage caused to the plaintiffs. For these reasons, the consequential damages payable by the defendants should be reduced by 20% on the actual loss and damage sustained by the plaintiffs in this matter.

Having scrutinized the claims under different heads for loss and damage, I find the quantum claimed by the plaintiffs in the sum of R 100,000 for moral damages and R 35,500 for loss of aesthetic value are excessive, unreasonable and exaggerated. In my meticulous assessment, the quantum should be reduced to R50,000 and R20,500 respectively. Having said that, in the absence of any pleadings in the defence, *a fortiori* in the absence of any other evidence on record to the contrary, I hold that the plaintiffs did suffer actual loss and damage as follows:

(a) Damage to furniture, materials and clothes	R 46,000
(b) Damage to terraces and land	R 18,500
(c) Loss of aesthetic value	R 20,500
(d) Moral damages	R 50,000
TOTAL	<u>R135,000</u>

As found supra, the defendants are liable only to the extent of 80% of the actual damage caused to the plaintiffs. Hence, the defendants are jointly liable to pay only R 108,000 (ie 80% of R 135,000) to the plaintiffs towards loss and damage and I so

hold.

In the light of the reasons and findings given hereinbefore, I will now proceed to answer the fundamental questions in the same numerical order in which they stand formulated supra.

1. Yes; the defendants as owners of their respective parcels of land or superstructures thereon, committed a fault under article 1382 by abusing their rights of ownership causing damage to the plaintiffs' property having exceed the measure of the ordinary obligations of neighbourhood.
2. Yes; the third parties namely: (i) the Promoter, the Government of Seychelles, which developed the "Carana Estate", (ii) the Planning Authority, which gave approval for constructions on cliff-like mountaintop without necessary conditions or making provision for flood hazard, and (iii) the building contractors who were engaged by the defendants to put up buildings or structures on their respective properties, all committed a 'fault' in terms of article 1382 of the Civil Code in the course of developing the estate or constructing buildings on the defendants' properties and in that, they did cause and contribute to the diversion of the natural watercourse through the valley in such a way causing a "flood hazard" that was detrimental to the plaintiffs' property.
3. Yes; the defendants are vicariously liable for the damage caused to the plaintiffs' property by the fault of the building contractors who were engaged by them for the construction of buildings or structures on their respective properties. However, they are not liable for the contributory negligence of the other third parties such as the Government of Seychelles, Planning Authority, etc.
4. Yes; the damage was caused by the properties, which the defendants had in their custody at the material time either as proprietors or custodians or both.
5. Yes; the defendants are liable for the damage caused to the plaintiffs by the properties held in their respective custody in terms of article 1384(1) of the Civil Code.
6. The damage was caused not solely or totally due to the fault of the defendants or third parties, but partly due to contributory negligence on the part of the third parties including the plaintiffs' builders, who had imprudently constructed the plaintiffs' house on the valley close to the watercourse.
7. The extent or degree of such contributory negligence of those third parties, in my assessment reduces the defendants' tortious liability by 20%.
8. The legal impact of such contributory negligence of third parties accordingly, would reduce the claim or quantum of damages awardable to the plaintiff by 20%.

9. The plaintiffs are hence, entitled to damages only in the sum of R 108,000 payable by all three defendants jointly. This sum obviously constitutes 80% of the actual loss and damage the plaintiffs suffered, and the same is awarded in respect of all and every claim made by the plaintiffs against all three defendants in this matter.

In the final analysis, I therefore enter judgment for the plaintiff in the sum of R108,000 against all three defendants jointly, apportioning liability in equal proportion, with interest on the said sum at 4% per annum, the legal rate, as from the date of the original plaint and with costs of this action.

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