

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS339/2010

[2017] SCSC 183

GASTON MORIN
Of St Louis, Mahe

PLAINTIFF

Versus

JOHN POOL
Of Les Mamelles, Mahe

FIRST DEFENDANT

And

LIUDMILLA ETIENNE
Of Les Mamelles, Mahe

SECOND DEFENDANT

Heard: 23 January 2017

Counsel: Mr Basil Hoareau, Mrs Priscile Chetty & Mr Elvis Chetty for petitioner
Mr Anthony Derjacques for respondents

Delivered: 2 March 2017

JUDGMENT

McKee J

[1] The Plaintiff was lodged with the Registry of the Supreme Court of Seychelles on 24th November 2010. The facts as averred are that by contract of sale and transfer document each dated 25th October 2007 the Plaintiff sold and transferred the two parcels of land,

numbered C948 and C949 which adjoin each other [hereinafter referred to as “the property”] to the Defendants for the total sum of Seychelles Rupees [SR] 1,245,000. This price included all immovables therein and thereon the property.

- [2] The thrust of the plaint is found in the fifth averment. The Plaintiff avers that, on the date of the sale the sale price of SR1,245,000 was [a] less than half the true value of the property or [b] in the alternative, this sale price along with immovables attached was less than half the true value of the property including the immovables.
- [3] The Plaintiff sought the following Orders, [a] the contract of sale with immovables and/or the transfer should be rescinded on the ground of lesion and [b] the Land Register should be amended by removing the Defendants as co-proprietors of the property and by registering the Plaintiff as the sole proprietor.
- [4] The Defendants agreed that the details of the property and the sale price was as stated subject to the rider that the movables were transferred by agreement. The Defendants averred that they had paid the correct market value of the property and, furthermore, additional sums in excess of the sale price recorded were also paid over. In that the Plaintiff still remained in possession of the property he should be ordered to vacate the property.
- [5] On 24th May 2012 an Order was made by a Judge of the Supreme Court appointing three persons, Mr Roy Cadence, Mr Sebastien Yumba and Ms Veronique Bonnelame as experts to survey the property with immovables thereon and state the market value thereof as at 25th October 2007. It would appear that the Joint Report became available to the Court on 1st March 2013. It would also appear that there was some attempt at settlement of the issues but without success. I took carriage of the matter and trial commenced on 18th September 2014.
- [6] On 18th September 2014 the Plaintiff, Joseph Gaston Morin gave evidence. Thereafter Ms Veronique Bommelame and Mr Roy Cadence, two of the valuers, gave evidence. Subject to production of documents the Plaintiff closed his case.

[7] For and on behalf of the Defendants, firstly, Mrs Wendy Pierre Registrar General, gave evidence followed by Miss Cecile Bastille, a Quantity Surveyor. Mr Michel Leong, a land surveyor, also gave evidence followed by Mr David Morel, an accountant. The First Defendant gave evidence followed by Dr Shelton Jolicoeur, a Notary. The final witness was Mrs Lioudmilla Etienne who is the Second Defendant and wife of the First Defendant.

[8] EVIDENCE FOR THE PLAINTIFF.

[9] The Plaintiff, Joseph Gaston Morin, in his evidence in chief confirmed that he had sold the two parcels of land C948 and C949 [hereinafter referred to as “the property”] to the Defendants for the sum of Rs 1,245,000 as evidenced by the transfer document dated 27th October 2007, which was produced as an exhibit. This document was executed before notary, Doctor Shelton Jolicoeur. He confirmed that he brought this case before the Court on the ground of **lesion** averring that this sale price was less than half the market value of the property or alternatively half the value of the property with the immovable property thereon. He stated that this evidence is supported by the unanimous findings of the three valuers as contained in their report. He sought cancellation of the sale, the re-conveyance of the property back into his own name and expressed his willingness to return the sale proceeds to the Defendants. He had included in the sale price his farming equipment and the house erected on plot C948.

[10] The Plaintiff was extensively cross-examined by Mr Derjacques. The Plaintiff, age 60, gave evidence of his education level and work experience. He had successfully farmed on a commercial basis on the property from 1977 to 2007. While he confirmed that he bought the property from a Mr D’Offay for Rs 42,000 he did not disclose the date of this purchase. However he could confirm that he took out a mortgage of Rs 100,000 on the property in 1999 to assist him in making improvements to the farm. He had employed a numbers of notaries and lawyers over the years.

[11] In respect of the present transaction he confirmed that he went to Notary Dr Jolicoeur to sign the transfer document. He stated he did not go alone. While he signed the document it was his evidence that he was not confident about the real value of the land. Counsel for

the Plaintiff, at this stage, confirmed to the court that consent or lack of consent was not in issue.

[12] The Plaintiff then confirmed to the court that he did consent to the transfer although he was unaware of the market value. He stated that negotiations between parties had continued for some four months. They talked about the property and discussed price but the First Plaintiff decided on the amount of money. Defence Counsel suggested that a further payment of US Dollars 200,000 over and above the price of Rs 1,245,000 was made to the step- daughter and son-in-law of the Plaintiff, then resident in Australia. Plaintiff's Counsel objected to the admissibility of this line of questioning. The thrust of the objection was that the Defendants were precluded from bringing this factor into the evidence in the light of Article 1321 of the Civil Code of Seychelles. Counsel for the Defendants argued that the matter of an extra payment had been included in his written defences, related to credibility and struck at the heart of the matter. This topic was fully argued and I found in favour of the Defendants and allowed cross-examination on this issue to continue. The Plaintiff could offer no explanation to the suggestion by Defence Counsel that his step-daughter had received US Dollars 200,000 from Dr Jolicoeur, the notary, or the reasons therefore. The Plaintiff confirmed the receipt by him of the sum of Rs 1,245,000. Defence Counsel further suggested to the Plaintiff that a further payment of Rs1,500,000 was paid into his bank account by Dr. Jolicoeur. The Plaintiff stated that this payment had been a mistake, did not go into his bank account and had been "cancelled" between Dr Jolicoeur and Barclays Bank. The Plaintiff stated that he signed the transfer document after he had been paid the sale price. The Plaintiff also denied that he had sought further payments over and above the stated price for farm equipment, a shed and other structures on the property and the water supply. The Plaintiff was asked why he did not vacate the property and give vacant possession on receipt of the sale price. The Plaintiff explained that he had been allowed to stay on by the Defendants until he found alternative accommodation or within three months of a date given by Dr Jolicoeur. In any event the Plaintiff did not hand over possession of the property to the Defendants. An attempt by the Defendants to obtain a court order for the Plaintiff to vacate the property in 2009 did not meet with success.

- [13]** On or around 2009 the present counsel for the Plaintiff took carriage of this matter and expressed a concern that the sale price did not reflect the true market value of the property. It was further suggested that the Defendants had taken unfair advantage of the ignorance of the Plaintiff in this respect. Defence Counsel further explored this issue. The Plaintiff agreed that he had been involved in property transactions in 1980 and 1998 but maintained that he had no knowledge of up-to-date property market values during the present negotiations.
- [14]** Defence Counsel then turned to the topic of the valuation of the property of RS12,125,000 as set out in the Valuation Report dated 25th August 2012. This valuation was a joint report by valuers appointed by Order of the Court. The Report gave a value for the property as at 25th October 2007. The Plaintiff denied that he had connived with the valuers to set the valuation at the amount of RS12,125,000. The Plaintiff denied that the actual sum received by him from the Defendants was around RS 5,000,000. He denied that the valuation figure had been set at more than twice the sum of RS 5,000,000 to comply with the requirements of an action based on lesion.
- [15]** In Re-examination the Plaintiff stated that while the payment of Rs1,500,000 had been made by Dr Jolicoeur into his account this was in error and Barclays Bank had transferred this sum back into the account of Dr Jolicoeur. The Plaintiff stated that he purchased the property from a Mr D'Offay in 1980. The Plaintiff denied that he also conducted the business of land transactions. This series of questions completed the evidence of the Plaintiff.
- [16]** Miss Veronique Bonnelame then gave evidence. She is an experienced land valuer and land economist. A major part of her work is land valuation for investment purposes. She confirmed that she, along with Mr Roy Cadence and Mr Sabastien Yumbu, was appointed by Order of the Supreme Court in August 2012 to produce a valuation report on the property, namely, the two parcels of ground C948 and C949 said valuation to reflect the value of the property as at 25th August 2007. The Valuation Report was submitted on 25th August 2012 and is produced as an exhibit. She described the property and all the factors which were taken into account in coming to the valuation figure. On inspection in 2012

she found the property was used for agricultural purposes but was in a run-down state. The nature of development in the immediately surrounding area was also taken into consideration. In 2012, ie some 5 years after the year of assessment, she stated that prospects for tourism development were uncertain.

[17] She advised that the procedure adopted to arrive at a 2007 valuation was for each valuer to consider what would be his personal assessment of value followed by further discussion and thereafter a joint valuation figure would be fixed which was acceptable to all. She also advised that during the years of 2007 and 2008 there had been a particular investor who had purchased a number of properties and this had led generally to an artificial increase in land valuation figures. There was discussion between the valuers before the final joint report was signed by all three valuers. Miss Bonnelame was taken through the Report. She described the physical aspects of the area, its use in 2007 and possible future uses including tourism development. Her evidence was that, after discussion, it was agreed by all valuers that the appropriate valuation figure for the property as at October 2007 was Rs 12,125,000.

[18] In cross-examination it was established that the Court Order of 2012 required a valuation of the two parcels of land comprising the property based on market value as at 25th October 2007. According to Miss Bonnelame one considered the general population and the presumptuous market value between a buyer and willing seller. She agreed that her fee in connection with the preparation of the valuation report was met by Counsel for the Plaintiff. She agreed that, for comparison purposes on value, she considered the purchase prices on some five or six other properties which had been bought by the avid purchaser referred to in the preceding paragraph although she played down the significance of that exercise. Counsel for the Defendants submitted that his clients had purchased comparable properties at prices must less than the joint valuation figure. She suggested that on these occasions the Defendants had been lucky or had a talent for finding cheap land in Seychelles. She volunteered the information that a practice had evolved in Seychelles that on occasions the actual price paid for land was not accurately stated in the conveyancing document. It was put to her that the valuation of the property for stamp duty purposes was RS1,400,000 and that her valuation was excessive; she disagreed. She stated that

potential development would be a factor to be considered in coming to her final valuation figure although the success or otherwise of a change of use application would also have to be considered. She was unaware of any “extra” payments” which may have been made by the Defendants to the Plaintiff.

[19] In re-examination she denied that she had been unduly influenced to artificially inflate the valuation of the property. She again agreed that the 2007 valuation was based on the property being used as a productive farm but she had also factored or added in a financial consideration to take account of possible future development, not necessarily restricted to tourist development. She disagreed with the valuation placed on the property by Surveyor Leong.

[20] The next witness was Mr Roy Cadence, another member of the valuation panel. He holds a university degree relating to land matters including valuation of property but his recent working experience seldom focuses on valuation of property. This was the first time that he had given technical evidence before a court in respect of property matters and valuation. He visited the property, which he fully described to the court, only once with Ms Bonnelame. He spent about one hour or so there, as he put it, “*to have a look around* “. All three valuers signed the final joint report, again as he put it “*after having discussed our differing views.*” The third valuer was unavailable to give evidence since he had returned to Kenya. Mr Cadence confirmed that they visited the property in 2012 to produce a valuation as at 2007. He confirmed that the collective or joint opinion was that the appropriate valuation of the property was Rs 12, 125,000. He stated that the valuers considered the then activity conducted on the property in 2007 and also possibilities for future development on the area. He drew the attention of the Court to the Maia Resort which was situated in the same area, but stressed that development on the property beyond current use would be dependent on planning approval. He considered that the property in question had development potential for tourism or commercial development. He described the mathematical calculations that could be made in respect of each topographical aspect of the property. He was referred to a further valuation report which set the 2007 market valuation of the property at the lesser figure of RS 3,000,000. It was his opinion that the figure of Rs 3,000,000 was well below the market value of the

property as at 2007. Finally he was asked to give his interpretation of the phrase “market value”. He was of the opinion that market value would be reflected in a purchase price as between a willing buyer and a willing seller. This figure could be affected by an immediate need for money on the part of the seller. Market value would also take account of prices paid for comparable properties in the immediate vicinity of a property being sold.

[21] Cross-examination

[22] Mr Cadence agreed that his work with his current employer, Barclays Bank, did not call for regular valuation work. He agreed that the document of sale between parties had attracted a rate of stamp duty based on a valuation figure of Rs1,400,000, which valuation figure was set in January 2008. He conceded that this figure of Rs1,400,000 would be the market value of the property as considered by the stamp duty authorities. He agreed that the ultimate valuation took into account future development prospects. He stated that the valuation of the property in question was based on the comparable method although he was unable to say what other properties he had taken into consideration. He had to concede finally that the valuers could not find comparable properties to which reference was made. He found that the direct road access to the property referred to in the Court of Appeal judgment of 2003 had still not been built when he inspected the property in 2012. He conceded that the panel of valuers, in considering potential tourism development, had looked positively at the large hotel complex, the Maia Resort in the area, but took little account of any possible negative influence brought about by the a low cost housing development immediately adjacent to the property. He acknowledged that around 2007, while there had been a general economic slump, there had been also some buoyancy in property sales brought on by the purchases of the enthusiastic buyer referred to above.

[23] In re-examination his evidence was that, while their valuation would consider potential development of a commercial or a touristic type, the panel had not included any factor which could be considered speculative. He suggested that the purchases by the enthusiastic buyer referred to above could perhaps be considered speculative.

[24] The formal qualifications of Mr Cadence were also produced to the Court.

[25] This last witness concluded the evidence for the Plaintiff.

[26] THE DEFENDANTS'S CASE

[27] The first witness was Mrs Wendy Pierre, Registrar General and Stamp Duty Commissioner. She has held this post since August 2014. She identified the transfer document or conveyance from the Plaintiff to the Defendants relating to the property, that is, parcels of ground numbered C948 and C949. There was a stamp duty adjudication on the value of the land transferred. The property was valued at Rs 1,400,000 as at 14th January 2008 with ad-valorum duty imposed at the rate of 5% of the value. She advised that land valuation for stamp duty is made by valuation officers in the employ of Government. This valuation had been agreed by Dr Jolicoeur, Notary, in this transaction. Mrs Pierre would not go so far as to say that the value of this property for stamp duty purposes would accurately reflect the true market value of the property.

[28] The second witness for the Defence was Miss Cecile Bastille, a quantity surveyor with experience in the valuation of property and buildings. She produced a report on the property in March 2011 setting out, in her opinion, its value in the year 2007. She considered all aspects of the property and placed a value on the property of Rs 1,442,000. She considered that this was the market value of the property in the year 2007 between a buyer and a seller. She was asked her opinion on the valuation figure in the Valuation Report instructed by the Court. She felt that this type of valuation was only appropriate where there was strong touristic or commercial potential. In her opinion the agricultural zoning, the marshlands in the property, other topographical features, the absence in 2007 of vehicular access and the proximity of a low cost housing area and chicken farm all militated against this high valuation. She was also of the opinion that any potential development factor for the property could not be assumed simply from the proximity of the nearby Maia Resort. She remained firm under cross-examination.

[29] The third witness was Mr Michael Leong, a land surveyor, of some forty seven years experience in Seychelles. In 2014 he also carried out a valuation of the property and produced a report based on his opinion of value in the year 2007. He prepared his report based on the comparison method, the fact that the property was zoned agricultural, and

gave examples of other property valuations which he had considered. He also described the property, gave detailed evidence on the factors he took into account and placed a valuation on it of Rs 1,550,720. He gave no opinion on any potential tourism value since no such application had been made to the Planning Department. He indicated that where ground is wet or soggy [as he put it] the costs incurred in building would increase and this would be a material factor to be taken into account. He was of the opinion that in assessing market value little account should be taken of development potential. In cross-examination he agreed with the suggestion that around 2007 a practice had evolved that the purchase price in a transfer document could be included at an artificially low figure generally but also to lessen the amount of stamp duty that the document would attract. He agreed that the prices in the property documents in the present transaction could also have followed this practice. He maintained that his valuation was correct since it had taken into account all relevant factors.

[30] The next witness was Mr Ange David Morel, qualified accountant and managing director of International Law and Corporate Services, Victoria. As an accountant he looked after the financial affairs of a future witness, Dr Jolicoeur, who is an attorney-at-law and has a separate firm. He spoke to financial records and generally in respect of the transactions undertaken by Dr Jolicoeur in this matter. He confirmed that on 20 September 2007 Dr Jolicoeur issued a cheque made payable to the Plaintiff, Gaston Morin, for the sum of Rs 1,500,000. By reference to bank records he confirmed that this payment had been lodged into the account of the Plaintiff. He was also asked to coordinate a second payment by Dr Jolicoeur and this related to a transfer of the sum of US Dollars 200,000. These funds were to be transferred using the account of Takamaka Investment Company to the Plaintiff and this was the third and final payment to the Plaintiff for the transfer of the property. The First Defendant John Pool was to provide the details of the receiving account. He received his instructions from Dr Jolicoeur. Following these instructions on 16th October 2007 he transferred the euro equivalent of US Dollars 200,000, namely, Euros 145,274.93, to an account in Australia in name of Joseph Alain Mondon. Despite objections by the Plaintiff's Counsel, I admitted the bank statement and transfer document relating to this transaction. This evidence was admitted due to its relevancy.

Finally, Mr Morel stated that the rupees equivalent of US Dollars 200,000 US or Euros 145,274.93 was , at the time, Rs 2,600,000.

[31] In cross-examination Mr Morel was able to provide further information concerning the recipient of the funds transferred to Australia. The bank account was held by a bank in Melbourne Australia and was in the name of Joseph Alain Mondon and Doreen Tessa Mondon. Mr Morel advised that the bank details for this transfer came from Doreen Tessa Mondon.

[32] In re-examination Mr Morel confirmed that the instructions for the payment into the Australian bank account came from John Pool, the First Defendant.

[33] John Pool , the First Defendant, then gave evidence. He is married to the Second Defendant. He owns five properties in Seychelles including the property in this matter. He was approached through an intermediary to enquire whether he would be interested in buying this property. He later met with the Plaintiff. He visited the property some time later and according to his description it was “farm land” given over to agriculture, with a small residence. He inspected the whole property. He formed the impression that the Plaintiff was keen to sell the property. Further discussions in respect of price took place and in particular there were discussions concerning a foreign exchange payment. The Second Defendant was fully involved in these general and financial discussions.

[34] In discussing the ultimate price, the Plaintiff advised him that a sum of US Dollars 200,000 was to be sent to an account in Australia in name of his wife’s daughter, Doreen Mondon. There was a final discussion in respect of price and the figure of Rs 1,245, 000 was finally agreed as the figure in respect of the land. A further payment of US Dollars 200,000 was to be made in respect of the farm equipment, the existing business and compensation for the business. There was also to be a further sum of Rs 1,500,000 for all the fittings and irrigation system on the land. The First Defendant put his attorney, Dr Jolicoeur, in funds. He instructed Dr Jolicoeur to make payment of the sum of Rs 1,500,000 to the Plaintiff which payment was made on 20th September 2007. On the same day the sum of Rs 1,245,000 was paid to the Plaintiff. Finally, the third part of the full purchase price, namely the US Dollars 200,000 was paid in the manner described above.

Thereafter the First Defendant and the Plaintiff agreed that the full purchase price had been paid.

[35] In cross-examination Mr Pool denied the assertion of the Plaintiff that he had received back the payment of Rs 1,500,000. It had not been received back by his wife or Dr Jolicoeur. He confirmed that the payment to Doreen Mondon in Australia had been on the express instructions of the Plaintiff. Mr Pool stated that he could not enter the property since Mr Morin retained possession on the basis that he had not been paid the agreed price.

[36] In re-examination the First Defendant denied that the sum of Rs 1,500,000 or a portion thereof was returned to him by the Plaintiff saying that the Plaintiff had indeed acknowledged receipt of the full amount due to him. He confirmed that the payment in US Dollars was agreed verbally between himself and the Plaintiff. The First Defendant stated that in his opinion the stamp duty assessment of the heritable property was fair. He denied that he had paid less than a fair price for this property.

[37] The next witness was Dr Shelton Jolicoeur, Attorney at law, who represented the Defendants. He was questioned strictly as to his knowledge of the transfer and payment of the sum of Rs 1,500,000 by him to the Plaintiff, which is the subject of dispute. He stated that he was put in funds for this amount by the Defendants and he placed it in his clients' account. Thereafter he gave a cheque for this similar amount to the Plaintiff. He stated that the money cleared from his firm's clients' account on the same day. This is supported by the relative bank statement.

[38] In cross-examination it was suggested by Counsel for the Plaintiff, while he had not been given express instructions on the point, that this sum may have been returned to him in cash. Dr Jolicoeur denied that the Plaintiff had returned this amount in cash to him and also denied that the Plaintiff had issued him with a fresh cheque for a similar amount. Dr Jolicoeur had come to the conclusion that these suggestions in respect of the return of this amount of money were false. The cross-examination was short. Dr Jolicoeur agreed that he would have had no knowledge and had no knowledge if the Plaintiff had made a return payment direct to the First Defendant but was of the view that, if it had occurred, Mr

Morel, as his accountant for some seven years, would have disclosed that such a return payment was made.

[39] The wife of the First Defendant, Mrs Lioudmilla Etienne, as Second Defendant, also gave short evidence. She confirmed the payment of Rs 1,500,000 into the account of Dr Jolicoeur and the second payment of Rs1,245,000 to the Plaintiff. She denied that the sum of Rs 1,500,000 had ever been returned to her and she had never heard of the payment of a similar amount direct to her husband. In cross-examination she again denied that this sum had been repaid to her husband.

[40] The evidence of the Second Defendant concluded the evidence for the Defendants.

[41] Counsel for the Defendants has presented his written submissions in conclusion. At the time of preparing this judgment I do not have any submission from Counsel for the Plaintiff. He has been continually requested to submit his submission but to date it has not been received by me. I proceed with my Findings.

[42] FINDINGS.

[43] This is a civil matter and hence proof is on the balance of probabilities rather than on the more onerous burden in criminal matters of beyond reasonable doubt. Notwithstanding the lesser burden it is still for the Plaintiff to prove his case to the required standard.

[44] It is not disputed that the two parcels of land, “the property”, sold by the Plaintiff to the Defendants were numbered C948 and C949 and situated at Anse Louise, Mahe.

[45] The two main matters in contention relate to [a] the valuation of the property as at the date of sale and [b] the actual price paid by the Defendants to the Plaintiff.

[46] The Joint Valuation Report was produced as an exhibit by the Plaintiff. The date of inspection is recorded as August 2012 and the two defendants are recorded as the registered owners. The total area amounted to slightly in excess of 16,000 square metres. The subjects are recorded formerly, ie before 2012, as a thriving agricultural business. It is recorded that a right of access is provided for in accordance with the 2003 Court of Appeal judgment. There is a CIS house on the property and evidence of a store and

smaller house but these buildings or remains were not considered for the purposes of this valuation. It was considered ideal for cultivation and/or construction at low cost. It was noted that comparable evidence was rare for this type of property but “ *it can recognized that the plot can be used for residential purposes*” and “ *this property would benefit from a change of use from agriculture to a higher yield such as tourism which would generally push the valuation towards the higher end of the scale*”. The valuers considered that the value of the property as at 25 October 2007 to be SR 12,125,000.

[47] PRICE.

[48] It was the evidence of the Plaintiff that a single payment of Rupees 1,245,000 was the full purchase price paid to him by the Defendants. This evidence was not corroborated or supported by other independent evidence.

[49] It was the evidence for the Defendants, as supported by the evidence of Mr Ange David Morel and Dr Shelton Jolicoeur that **three** separate payments were made to the Plaintiff in satisfaction of the full purchase price. These payments were RS 1,245,000 and RS 1,500,000 and RS 2,600,000,[which is the rupees equivalent of the payment of Euros 145,274.93] to Doreen Tessa Mondon. Hence the total purchase price was RS 5,345,000. In other words, the Plaintiff had, in fact, received additional funds over and above the payment of Rs 1,245,000. I have considered the demeanour of all parties and all evidence and exhibits before me. I prefer the evidence of the Defendants and their supporting witnesses and find that the total amount paid to the Plaintiff in exchange for the conveyance of the property was RS 5,345,000.

[50] VALUATION OF THE PROPERTY.

[51] There is again contrasting evidence on this.

[52] In the joint valuation report the three valuers place a value on the property of RS 12,125,000. They emphasise that this value pertains to the land only as contained within the boundaries and excludes consideration of any buildings, other heritable property, appurtenances or moveable property thereon.

- [53] Defence witness Michael Leong placed a value on the property of RS 1,550,720. Defence witness Ms Cecile Bastille placed a value on the property of RS 1,442,000. Defence witness Ms Wendy Pierre, as Stamp Duty Commissioner, assessed the value of the property, after due investigation by technical personnel, as RS 1,400,000. The final figure to be considered is the purchase price as declared in the deed of conveyance of RS1,245,000. It is difficult to come to any other conclusion, and I so find, that the declared purchase price falls within the range of values given by the two defence witnesses, Bastille and Leong, and the stamp duty assessor
- [54] I look for any possible reason to account for the wide variation. I find that in 2007 the property was agricultural land. I find from the evidence of Ms Bonnelame and Mr Cadence that, in considering value in 2007, considerable emphasis was placed on the potential for future commercial development especially in the area of tourism. Ms Bastille took a less optimistic view on the possibility of development and tourist potential. She kept in view that the property was in an agricultural zone and a successful application for change of use would be required, the marshland could militate against development and as at 2007 there was no access for vehicular traffic. There was also the low cost housing area and chicken farm located nearby. Mr Leong shared the worries. He had concerns regarding the marsh areas. In his report [exhibit D2] he referred to a nearby property with water or drainage problems where planning permission was refused for development. His valuation of RS 1,550,720 was calculated on the different rupee rate for marshy land, flat agricultural land and sloping and steep land which characteristics were all found in the property in question. I have also looked at the location plan attached to the joint valuation report. It shows the property within boundaries coloured blue surrounded by other buildings without access to a side-road leading to the main road. It is a considerable distance from the beach and sea.
- [55] In my opinion the valuers, in preparing the joint valuation report, placed considerable emphasis on commercial or tourist development potential and this was reflected in their valuation of RS 12,125,000. It is difficult to assess what percentage of the overall valuation was based on this factor. Even on the evidence of Mr Cadence the valuers did not look for or could not find comparable properties to balance their values against that of

the property under discussion. The joint valuation report and the report of Mr Leong each stress that the valuation is for the land only.

[56] In contrast to that approach I find that Ms Bastille and Mr Leong took a more balanced approach in coming to a final figure for value and their valuations are supported by the valuation of the Stamp Duty Commissioner.

[57] I look to Article 1675 and Article 1677 of the Civil Code of Seychelles which I repeat below;

[58] Article 1675.

[59] In order to establish whether there is lesion of more than one half, the value of the property shall be calculated *according to its condition at the time of sale* [my italics], and

[60] Article 1677.

[61] To establish whether lesion occurred the Court shall take into account *the condition and value of the property at the time of sale* [my italics].

[62] I give both phrases in italics their ordinary meaning. For the purposes of an application for rescission on the ground of lesion, a court looks at the condition and value of the property at the time of sale. These provisions are not at variance with the Court Order dated 24 May 2012 which requested a valuation based on *market value* as at 2007. I find support for this finding from the paragraph on MARKET VALUE at page 1628 of Stroud's Judicial Dictionary [4th Edition]. I refer to paragraphs [1] and [5] of the paragraph. I quote " [1]The market value of property means what it would fetch in the market under the state of things for the time being existing" and later at paragraph [5] The "market value" [Crown Proceedings Act 1947 (c.44) s.9 (2)(b) means the price at which what was lost could be expected to be bought and sold between a willing buyer and willing seller, even although there may be only one seller and one buyer, and even though one or both may be hypothetical rather than real". Hence, the term "Market Value" is synonymous with the term "willing buyer and willing seller". It follows, in my

opinion, that in determining a value for lesion, a future value based on possible tourist or commercial development potential is to be disregarded.

[63] In the present case different values have been given. All valuers have had to form a view on the condition of the property some five years before the later inspection. They have assumed that it was working agricultural land but there is evidence that its condition had deteriorated by 2012.

[64] Articles 1675 and 1677 provide that value is calculated on the condition of the property and the use to which it is put at the time of sale [namely agricultural], in 2007. In my opinion this expressly excludes other considerations such as future development potential.

[65] I find that the valuation of RS12,125,000 is calculated on a formula which is in breach of the provisions of Articles 1675 and 1677 since it contains a financial element to take into account future development potential. In the light of the paucity on information in the Joint Valuation Report it is not open to me even to consider whether a figure somewhat less than the valuation of RS 12,125,000 could be appropriate. In my view this valuation does not assist the Court and, on the balance of probabilities, is grossly excessive. Consequently I disregard this valuation in my determination as to whether the basic elements of lesion in respect of the heritable subjects have been proved.

[66] Consequently I look to the valuations of Ms Bastille, Mr Leong and the Stamp Duty Commissioner to determine whether the price paid by the purchaser is less than one half of the value of the land bought.

[67] I find that the purchase price recorded in the conveyance transferring the heritable property from the Plaintiff to the Defendants falls within the accepted range of valuations for this type of heritable property and is certainly not less than half of its value.

[68] The Plaintiff seeks to prove lesion by looking at the value of the heritable property “*along with the immovables attached*” to use his words in the Plaint. By that I expect that he meant any buildings or other erections thereon together with any other items which on balance could be considered immovable rather than moveable. It is recorded at the

paragraph headed “*IMPROVEMENTS*” in the joint valuation report that none of the buildings erected on the property were considered for the purposes of the valuation. I do not know whether part of the valuation took into account growing trees or the two spring wells. Mr Leong also touched upon the vegetation on the property which he recorded as coconut palms , some fruit trees and other endemic tree types. He referred to a structure as a temporary type of building with two smaller outbuildings in a dilapidated state. In my view this second arm of argument does nothing to enhance the Plaintiff’s assertion that he has proved the basic element of lesion.

[69] I look for any other evidence which is available to the Court that may assist the claims of the Plaintiff. In my view the Plaintiff stands before the court as a party who has been discredited in respect of the actual price paid for the property. He cannot offer any explanation about the extra payment made to him and to the daughter of his wife in Australia. It is worthy of note that the total funds paid over amounted to RS 5,345, 000. The price in respect of the land only was RS1,245,000. It follows that the sum of RS 4,100,000 was, according to the First Defendant, paid in respect of the irrigation system, unspecified farm equipment, buildings of little value, the business and compensation, again each unsubstantiated by accounts.

[70] On the balance of probabilities I find that the Plaintiff and Defendants agreed a price for the heritable subjects, that is, the land, at RS 1,245,000. This fell within the normal range. I find that an extra payment was agreed to be remitted in Seychelles Rupees and in US Dollars as aforesaid and was done. This extra payment plus the payment for the land was the price agreed between a willing buyer and a willing seller for the whole subjects. I rule that the findings in this and the preceding paragraph do not assist the Plaintiff in his claims before the Court. I reject each application by the Plaintiff in his Plaint. I find that the First and Second Defendants are correctly registered as the co-proprietors of parcels of land C948 and C949 in the Land register.

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

[72] I ORDER the Plaintiff to vacate the property on or before 15th May 2017, failing which I direct the Registrar of the Supreme Court to issue a writ habere facias possessionem to evict the Plaintiff from the property.

[73] And with costs to the Defendants calculated from 24th May 2010, the date that the Plaintiff was lodged with the Registry of the Supreme Court.

Signed, dated and delivered at Ile du Port on 2 March 2017

C McKee
Judge of the Supreme Court