

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS93 /2015

[2018] SCSC198

SARA NOELLA JUPITER

Plaintiff

versus

JUNE MONETTE TREGARTHEN

1st Defendant

CLIFFORD ANDRE

2nd Defendant

LAND REGISTRAR

3rd Defendant

ATTORNEY GENERAL

4th Defendant

SUZANNE JEAN-LOUIS

5th Defendant

Heard: 13 January 2017, 27 March 2017, 8 November 2017, Submissions 15 November 2017

Counsel: Mr. Nichol Gabriel for plaintiff
Ms Alexandra Benoiton for first, defendant
Mr. Joel Camille for second defendant
Mr. Jayaraj Chinnasamy for third and fourth defendants
Fifth defendant unrepresented and absent

Delivered: 1 March 2018

JUDGMENT

M. TWOMEY, CJ

- [1] In an amended plaint dated 27 October 2016, the Plaintiff, Sara Jupiter represented by her mother, Frida Jupiter, claimed that she was the purchaser of land, namely Parcel S214 at Turtle Bay, Anse Aux Pins, Mahe, from the purported owner of the land, June Tregarthen (the First Defendant).
- [2] It is her claim that the First Defendant was acting at all times through her agent, Suzanne Jean-Louis, the Fifth Defendant (joined to the suit by the Court pursuant to section 112 of the Seychelles Code of Civil Procedure on 23 May 2017).
- [3] The transfer between the Plaintiff and the First Defendant was signed on 2 April 2012 in a document notarised by the Second Defendant, Clifford André, to whom the Plaintiff duly paid SR One Million, Nine Hundred Thousand. Simultaneously, the usufructuary interest in the land was transferred to Frida Jupiter.
- [4] The transfer was never registered at the Land Registry.
- [5] Subsequent to these events, the First Defendant revoked the agency of the Fifth Defendant and caused a restriction to be entered against the said parcel of land.
- [6] It is the Plaintiff's case that the Second Defendant in his capacity as a notary, failed to ensure that Parcel S214 was free from all encumbrances before executing the land transfer documents and accepted payment for the transfer which has resulted in loss and damage to her as she still neither has title deeds nor possession of the property or the purchase price refunded. She prays for damages against all the defendants jointly and severally in the sum of SR300, 000, the return of the purchase price of the property from the First Defendant paid through the Second Defendant or the cancellation of the restriction placed on the land to enable the registration of her title.
- [7] In her defence, the First Defendant claims that the case is wrongly brought against her, since it was the Fifth Defendant and not herself who transacted the sale in issue.
- [8] She also claims that since the land in issue was co-owned by herself with a share of two-thirds; the Fifth Defendant with one sixth share and the Fifth Defendant's minor daughter

also with one sixth share therein; a fiduciary and not her agent should have executed the sale. Further, since one of the co-owners was a minor, the provisions relating to the approval of the court for such sales contained in Article 457 of the Civil Code should have been complied with.

- [9]** It is also her defence that she did not in any case give authority to the Fifth Defendant to transact the sale and that she had not received any payment for the transfer of the property.
- [10]** The Second Defendant claims that the plaint discloses no cause of action against him. He admits the co-ownership of the land at issue. He avers that he acted on the instructions of the Fifth Defendant and one Walter Alcindor and complied with their instructions to prepare the transfer document with a transfer price of the land for six hundred thousand rupees less than what it was actually purchased for so as to avoid the payment of stamp duty. He further avers that if the Plaintiff suffered any loss or damage, which is denied, the same could not be attributed to him.
- [11]** The Third and Fourth Defendants, the Land Registrar and Attorney General respectively, aver that they have no knowledge of the events surrounding the sale but admit that a restriction was entered against land Title S214 in good faith. They deny committing any fault.
- [12]** The Fifth Defendant was duly served with the pleadings by alternative service under the civil procedure rules but neither filed a defence nor made a court appearance. The case therefore proceeded ex-parte against her.
- [13]** The Plaintiff's representative in her testimony described how she had divorced and had retired to Seychelles to find a house to purchase. She was informed of a house for sale and was met at Anse aux Pins, in the company of a friend, by someone named Walter from the Second Defendant's chambers. The next day, she visited the Second Defendant's office and was told by a lady there that the Second Defendant was looking for SR 1 Million Six Hundred Thousand for the property. On her next visit to the office with her sister, Lira Jupiter, the Second Defendant told her that he wanted SR1 Million Nine Hundred Thousand for the property.
- [14]** She found the price excessive but subsequently received several phone calls from the Second Defendant who urged her to come to a decision: "Come on, come on I have other

people interested”. Eventually she was able to transfer a first tranche of SR1 Million of the purchase price from her account in the UK to Seychelles to the Second Defendant’s account. She produced a receipt to that effect from the Second Defendant’s chambers dated 8 February 2012 (Exhibit P2).

- [15] Subsequently, the Second Defendant again phoned her sister asking her to hurry with the second tranche of money as the Fifth Defendant wanted to leave the country and he had to get the payment to her. She then transferred the second tranche of SR Nine Hundred Thousand into his account, which was duly receipted on 29 February 2012 (Exhibit P3).
- [16] She never met the Fifth Defendant but was called to the Second Defendant’s office to sign the transfer document, which had already been signed by the Fifth Defendant. She was asked to pay a further SR4, 000 for documentation by the Second Defendant, which she refused to do until she had received her title deed. The transfer document in which the property was transferred to the Plaintiff for SR1 million was dated 2 April 2012 (Exhibit P4). The transfer of the usufructuary interest to the Plaintiff’s mother and witness in this case is dated 22 April 2012.
- [17] She waited in vain during several months for the transfers to be registered and eventually after being told once again by the Second Defendant’s secretary that the delay in registering the documents was due to the failings of the Registrar of Lands, she presented herself to their office in 2013 to be told that the transfer documents which had been submitted for registration had been returned to the Second Defendant since June of that year as it contained several irregularities.
- [18] The Registrar explained that since a minor had a share in the land being transferred, court approval was necessary for the transfer to be effected. Armed with this piece of information she confronted the Second Defendant’s secretary who denied that that was the problem. She asked to see the Second Defendant but was told he was not in. She nevertheless pushed her way into his office and confronted him. He denied the allegations and instead accused her of causing trouble at the Registrar’s office.
- [19] Subsequently, she learnt of the First Defendant’s revocation of the power of attorney in favour of the Fifth Defendant. She asked the Second Defendant what he was going to do about it and he said he would file a court case. She attended some of the hearings before Judge de Silva in this context and eventually wrote to the then Chief Justice Egonda-Ntende to complain about the actions of the Second Defendant. She produced the court

transcript of the order made by Judge de Silva in which the Second Defendant was directed to calculate the minor's monetary share in the property and to deposit the same in the Supreme Court Registry and in which the Second Defendant was referred to the then Chief Justice for disciplinary action.

- [20] Eventually, after the departure of Chief Justice Egonda-Ntende, the Acting Chief Justice, Judge Karunakaran asked the Second Defendant to surrender all the transfer documents to her which she brought to the Land Registry. She was hopeful that the documents would then be registered but then discovered that the First Defendant, another co-owner in the land had entered a restriction against the same. Registration of the documents could not therefore proceed.
- [21] In cross-examination, she explained that the authorisation of the court for the sale of the land in which the Fifth Defendant's minor daughter, Ashley Jean-Louis had an interest was applied for retrospectively to the transfer documents being signed and the purchase price paid.
- [22] The Second Defendant also testified. He stated that he had been practicing as an attorney and notary since 2006 and that he was an elected member of Anse aux Pins in the National Assembly. Walter Alcindor with whom he shared an office, and who was engaged in the real estate business introduced him to the Plaintiff. He had on occasion notarised transfers of realty transacted by Mr. Alcindor.
- [23] He stated that he took the Plaintiff in his Tucson 18200 around the north of Mahe to look at property and got to know her for the first time. On the second occasion, Mr. Alcindor told him that she had identified a property, which he had for sale. His secretary conducted a search on the property and concluded that there were no encumbrances recorded against it. He obtained the authorisation of the co-owner, the First Defendant, to sell the property through her agent the Fifth Defendant. He prepared the requisite specific powers of attorney necessary for the conveyance himself.
- [24] The property was not in his hands to sell but rather in those of Mr. Alcindor. At a meeting with the Plaintiff, he was told that she would pay the purchase price in two tranches. He never contacted the First Defendant. In examination-in-chief, he categorically stated that it was not his duty to negotiate the purchase between the parties.

- [25] He admitted that he notarised and registered the “Affidavit on Transmission by Death” of the Fifth Defendant in which she deponed that as the widow of Nigel Jean-Louis who co-owned Parcel S214, she was the only one entitled to his share therein.
- [26] He acted on the instructions of the Plaintiff to reduce the purchase price of the property on the transfer document to SR1 million. The Plaintiff paid him SR1.9 Million of which he paid SR1.6 Million to the Fifth Defendant, in two instalments: SR100, 00 on 1 March 2012 and SR1.5 million by cheque to one Jean Richard Vidot. He explained that the cheque to the third party was paid on instructions from the Fifth Defendant because she did not have an account in Seychelles.
- [27] After he had sent the documents for registration, he learnt that the Fifth Defendant had a minor daughter. He informed the Plaintiff that he would have to seek the authorisation of the court for the transfer. He initiated the suit but was away on “international duties” relating “to [his] personal business” and the matter was delayed in court and this upset the Plaintiff. Subsequently Mr. Ally’s law chambers acting for the First Defendant informed him that an application for a restriction to be placed on the property was being prepared. The First Defendant also contacted him directly to inform him that she had not received any money for the sale of the property. He attempted to contact the Fifth Defendant via Facebook as she was a friend on that platform but to no avail.
- [28] He took no further steps to rectify the mistakes but stated that he had acted correctly and had prepared the documents after carrying out due searches on the property.
- [29] In cross-examination, he denied that Mr. Alcindor was part of his property management office although he admitted that he did sit in his office. He was not forthcoming as to why the Affidavit on Transmission by Death did not originally show that the minor, Ashley Jean-Louis was entitled to a share of the property but it was later amended and initialled by him. He admitted, however, in contrast to what he had stated in his examination-in-chief, that as far back as 2011 he was aware of the existence of the minor.
- [30] He also admitted that although he paid the second tranche of the purchase price to a third party, Jean Vidot, he did not have written instructions about the transfer of the money to him. He stated that he had no knowledge of the restriction being placed on the land at the time that he was seeking court authorisation for the transfer of the property, although he admitted receiving a letter from the chambers of Mr. Ally to that effect in August 2014. He stated that he informed the Fifth Defendant of the contents of the court order, namely

that the share of the proceeds of sale belonging to the minor be deposited in the Registry of the Supreme Court.

- [31] The Third and Fourth Defendants called the Deputy Registrar General, Mr. Fred Hoareau who confirmed that the Fifth Defendant was informed of the application for a restriction to be placed on the land on 23 June 2014. In his view his office complied with the provisions of section 84 of the Land Registration Act relating to the placing of restrictions on property. He confirmed receipt of the court order by Judge de Silva date stamped by his office on 12 March 2015 but could not explain why his office had not registered it. He stated in answer to questions by the court that as per the information in the file in relation to Title S214 that as at the year 2012 the registered owners of the same were the First Defendant, the Fifth Defendant and Ashley Maria Jean-Louis.
- [32] In closing submissions, Counsel for the Plaintiff stated that this is a case involving the failure of a Notary or Counsel to perform his contractual duty towards a client. He details his failings as not including the minor who co-owned the land in the transfer document and not seeking court approval for the sale. He further submits that the Second Defendant failed to take prompt action to remedy the situation and that that has resulted in the Plaintiff parting with her money and never having received the enjoyment of the property purchased.
- [33] The Second Defendant has submitted instead that the Plaintiff as filed is manifestly defective and bad in law as it discloses no cause of action against him. He relies for this submission on section 71 of the Seychelles Code of Civil Procedure and the authorities of *Confait v Mathurin* SCA 38/94 and *Tirant v Banane* (1997) SLR 219.
- [34] With regard to the issue of damages, relying on *Slade v SEPEC* SCA 2005, he submits that when damages are claimed for tortious acts, the act and the resulting prejudice quantified in monetary terms must be claimed under a distinct head or will render the plaintiff defective. In his submission, the averment in the plaintiff that he failed to ensure that the property was free from all encumbrances was not sufficient, as it is not stated that this failure amounts to a *faute*. No submissions are made in respect of the merits of the suit.
- [35] I have had no other submissions from the other Defendants.
- [36] The first task that befalls this court is to enquire into the liability of each party sued in this action. In this respect, I have had regard to the Amended Plaintiff as filed. It certainly

contains some infelicities. While it can be inferred from the plaint that this is an action in breach of contract, the Second Defendant seems to be under the impression that it is one in delict. The difficulty lies in the fact that although a breach of contract is implied in terms of the First, Second and Fifth Defendants, the same cause of action cannot be implied against the Third and Fourth Defendants as there are implications of fault on their part.

[37] In respect of the contents of pleadings generally, section 7 of the Seychelles Code of Civil Procedure provides in relevant part that:

“The plaint must contain the following particulars:

...

(d) a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action..”

[38] In the application of a similar provision of law in England, Leggatt J in *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) commented:

“Statements of case must be concise. They must plead only material facts, meaning facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial.”

[39] Similarly in *Tree Sword v Puciani and ors* [2016] SCCA 19, the Court of Appeal explored the application of these procedural rules in Seychelles which find their origin from England and stated:

“[16] Rule 13 of Order 18 of the Supreme Court Rules of England applicable at the time of Seychelles’ independence in 1976 provide that the every pleading must contain necessary

particulars of any claim. In explaining the function of the rule the following note is made:

‘The function of the particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs... This function has been stated in various ways as follows:

(a) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which the case is to be proved (per Lindley L. J. in Duke v Wisden (1897)77 L.T. 67, 68;... Aga Khan v Times Publishing Co. 91924) 1 KB 675, 679)

(b) to prevent the other side from being taken by surprise at the trial (per Cotton LJ in Spedding v Fitzpatrick (1888) 38 Ch. d. 410...)

(c) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial per Cotton LJ. ibid.)... (See Supreme Court Practice (Sweetband Maxwell 1991) 18/12/12, 299).’

[17] These authorities are supported in Seychelles. In Gallante v Hoareau (1988) SLR 122, G. G. D de Silva J stated:

‘The function of pleadings is to give fair notice of the case which has to be met and to define the issues upon which the court will have to adjudicate in order to determine the matters in dispute between the parties.’”

[40] In addition to these clearly enunciated principles of pleadings, there is also *jurisprudence constante* in Seychelles that a court will not formulate a case for parties and that their pleadings must disclose all the facts, which they intend to bring in evidence at trial. *Tirant v Banane* (supra) is authority that all facts to be relied on at trial have to be pleaded so that both parties and the Court are made fully aware of all issues between the parties. It was followed in *Sophola v Desaubin* SCA 13 of 1987; *Confait v Mathurin* SCA

39 of 1994; *Equator Hotel v Minister of Employment and Social Affairs* SCA 8 of 1997; *Verlacque v Government of Seychelles* SCA 8 of 2000; *Barbe v Hoareau* SCA 5 of 2001; *Gill v Gill* SCA 4 of 2004.

[41] In *Vandange Plant Hire Ltd v Camille* 2015 SCCA 17, the Court of Appeal reiterated that:

“In terms of procedure and pleadings, the rule bears no repetition that parties are bound by their pleadings and that they may not ask nor can the Court grant any relief which goes beyond the four corners of the plaint and the pleadings. Nor may it consider any issue any more than grant a remedy flowing from that issue when that issue was not joined by the parties in the first place.”

[42] This principle has to be contrasted with the rule that pleadings do not need to be particularly specific about the legal effects of the facts pleaded, as these are not themselves material facts. In *Carolus v Scully and ors* [2017] SCCA 45, for example, the Court of Appeal stated that if specific elements of the cause of action are not pleaded in the plaint, but are contained by implication in the pleadings and the parties are clearly aware of the issues raised to sufficiently allow them to defend the action, then hair splitting exercises based on form should not defeat the substantive issues to be addressed in the case. The Court stated with approval the following passage from the Constitutional Bench of the Supreme Court of India in *Bhagwati Prasad vs. Shri Chandramaul* AIR 1966 SC 735:

"If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, though indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to

consider [...] is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it?"

- [43] It is obvious from the authorities cited above that what is sought in pleadings are the material facts which comprise the cause of action but not evidence or principles of law. When pleadings are well drafted the facts of the case and the legal principles that relate to the cause of action are clear to the parties and the court.
- [44] However, in addition to these rules of procedure, in cases involving contract and delict, it must be further noted that although it is not necessary for a party to expressly state the relevant law in issue in the case, Article 1370(2) of the Civil Code of Seychelles prohibits duplicitous actions and obliges an aggrieved party to opt for only one cause of action to pursue when it can be founded either in contract or delict.
- [45] As regards the First, Second and Fifth Defendants it is clear that the cause of action as averred or implied in the plaint is one founded on contract. As for the Third and Fourth Defendants the only action that can be implied in the pleadings against them is one founded in delict, in that the allegation is that the Third Defendant entered a restriction against land title S214 without notification to the Plaintiff. There are different causes of action in the same suit but no two causes of action are made against any same defendant. It is my view therefore that the plaint as drafted has neither breached procedural rules nor the provisions of the Civil Code.
- [46] I shall now deal with what essentially this case is about for most of the parties, that is, an action for breach of a contract of sale - the Plaintiff contracted with the Fifth Defendant both in her personal capacity and as the agent of the First Defendant to sell Parcel S214 for SR1.9 million.
- [47] The transfer documents as evidenced in Exhibits P4 (transfer of land from the Fifth Defendant to the Plaintiff dated 2 April 2012), D2 (8) (transfer of usufructuary interest from the Plaintiff to Frida Jupiter dated 22 April 2012) were executed and signed by the Second Defendant in his capacity as Notary Public.
- [48] The specific power of attorney relating to Title S214 executed in South Africa by the First Defendant and registered in Seychelles meant that the First Defendant authorised the Fifth Defendant to act as her agent in the sale of her undivided two-thirds share in the land. The allegation that the instrument evidencing this agency was defective is not

convincing and that the First Defendant revoked this special power of attorney on 17 March 2013 (Exhibit P 5) is immaterial. At the time the sale was concluded, that is on the 2 April 2012, the Fifth Defendant ostensibly had power to sell at least five sixths undivided share in the property.

[49] With regard to the one-sixth share in the property belonging to the minor Ashley Jean-Louis, the Supreme Court by orders made on 14 March 2014, 17 September 2014 and 5 February 2015 authorised its transfer (see *Ex Parte Suzanne Jean-Louis* XP 128/2014).

[50] It is true that the transfer of Parcel S214 between the First Defendant and the Fifth Defendant to the Plaintiff was never registered.

[51] In this regard *Article 1583(1) of the Civil Code* provides that:

“A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid.”

[52] In contrast, section 20 (a) of the Land Registration Act states that:

“the registration of a person as the proprietor of land with an absolute title shall vest in him the absolute ownership of that land, together with all rights, privileges and appurtenances belonging or appurtenant thereto;”

[53] Section 46 of the Act also provides:

“(1) A proprietor may transfer his land, lease or charge with or without consideration, by an instrument in the prescribed form:

...

(2) The transfer shall be completed by registration of the transferee as proprietor of land, lease or charge and filing the instrument.”

[54] We have on various occasions explained the relationship between the Land Registration Act and the provisions of the Civil Code as concerns the sale of land. A sale is complete

between the buyer and the seller once the contract of sale is signed by them and bestows on the buyer a right *in personam*. Registration completes the sale between the buyer and third parties bestowing on the buyer a right *in rem* (See *Hoareau v Gilleaux* (1982) SCAR 158, *Charlemagne Grandcourt and others v Christopher Gill* [2012] SCCA 31 (Twomey JA)).

[55] In the present case, the transfers dated 2 April 2012 and 22 April 2012 were never registered and the documents therefore only amount to a sale insofar as the parties are concerned but it is an effective sale nevertheless. The revocation of the power of attorney to the Fifth Defendant by the First Defendant on the 17 March 2013 has no retrospective effect insofar as the sale to the Plaintiff is concerned. While the First Defendant might have a claim against the Second and Fifth Defendants, the provisions of the Civil Code grants the Plaintiff ownership of Title S214. The First Defendant had not however counterclaimed or brought a suit against the Second and Fifth Defendants.

[56] With regard to the Plaintiff's claim for damages, it is not stated what these are in respect of. It would seem from the evidence adduced that they relate to the stress, pain and suffering and for the lack of enjoyment of the property she purchased in 2012 and is still not occupying in 2018. The Plaintiff however is brought in the name of Sara Jupiter (the owner of the bare interest) represented by her mother (the owner of the usufruct). Sara Jupiter did not testify. Only her mother, Frida Jupiter, her representative testified. The latter did not bring the plaint in her own name and therefore cannot claim anything on her own behalf. She could have given evidence of her daughter's loss but didn't. The evidence she gave only concerned her own moral damage but she is not a party in her own right in the suit brought. I cannot therefore grant the damages claimed in this case.

[57] It remains for the Court to deal with the serious breaches by the Second Defendant in his capacity as notary. I have recently stated in the case of *Georges v Benoit* and ors CS 95/2016 that the liability of a notary may arise, tortuously, contractually or statutorily. In the present circumstances they arise both contractually and statutorily (viz the Plaintiff's plaint).

[58] It must be noted first of all that section 3 of the Notaries Act provides that a notary "is a public official" (emphasis mine).

[59] At the outset, it is important to distinguish between the French civil law '*notaire public*' and the English common law notion of 'notary'. Though their appellation suggests a

certain interchangeability, the role of a *notaire* in the civil law tradition is substantively different from that of a notary under common law. There are two fundamental distinctions between a *notaire* and a notary, which primarily result from: (i) the French *notaire*'s power to render documents enforceable and (ii) differences in the evidentiary standards of proof required in the respective legal systems from which they hail.¹ Indeed, the French *notaire* has greater responsibilities than his counterpart, the English notary.

[60] In the French civil law tradition, a notaire is a public official who acts as witness to the transfer of documents and once he executes and records transactions presented to him, any “acte notarié” is self-proving and is conclusive evidence of both its contents and the underlying acts if subjected to the personal verification of the notaire.”² The “status accorded a notaire implies that in the performance of his duties, he acts for both parties, effectuating the intentions of each.”³ This double representation in the French legal system does not give rise to a conflict of interest “because the notaire is truly acting for both parties; they agree before he acts to have him embody their agreement in an acte notaire.”⁴

[61] In Seychelles, the role of a public notary traces its origins to the French civil law notion of a ‘*notaire public*’, as section 3(b)(ii) of the Notaries Act provides that a notary’s duties shall be to “furnish executory or authenticated copies of documents...”

[62] As I stated in *Georges* (supra) with respect to a notary’s duties, civil law doctrine recognizes that a *notaire* has two functions: a duty to advise regarding the content of documents (*mission de conseil qui se rapporte au contenu, “le negotium”*) and a duty to authenticate documents (*mission d’authentification qui se rapporte au contenant, “l’instrumentum”*).⁵ Thus, a *notaire* exercises a public function, but is also considered a “*profession liberale*.”⁶ The former is derived from his designation as a public official and

¹ C. Enkaoua, *Notary v Notaire: Le Choc des Culture*, Droit & Patrimoine, No. 219, Novembre 2012, p. 6, available at: <http://www.mbsols.com.au/uploads/pdf/Droit-et-Patrimoine-2012-no-219.pdf>. See also Gisela Shaw (2000): *Notaries in England and Wales: Modernising a profession frozen in time*, International Journal of the Legal Profession, 7:2, 141-155, at p. 143, available at: <http://letr.org.uk/references/storage/V47319GI/09695950020053719.pdf> (discussing distinction between civil and common law notary).

² D. Barlow Jr. Burke; Jefferson K. Fox, *Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution*, 50 Tul. L. Rev. 318, 322 (1975-1976) (citing J. Merryman, *The Civil Law Tradition* 113-15 (1969)).

³ *Id.*

⁴ *Id.*

⁵ R. Bestgen, *Les contours de l’obligation du notaire de preter son ministere en lien avec sa responsabilite professionnelle*, at pp. 10-11.

⁶ See *id.* at p. 7 (citing E. KRINGS, E. DECKERS, « Introduction générale », in P. VAN EN EYNDE, Cl. HOLLANDERS DE OUDERAN, P. BUISSERET, *La loi de ventôse rénovée, 2e partie, Manuel de l’organisation du Notariat*, Bruxelles, Larcier, 2005, p. 15) (« *L’authentification ne se conçoit pas sans*

his inability to refuse to perform his function when legally required; and the latter is derived from his independence or the absence of hierarchical constraints and the client's ability to choose his advisor/*notaire*.⁷

- [63] In the present case the Second Defendant acted for the Plaintiff and for the First and Fifth Defendants. He owed duties to them all. It would appear that he has ignored his duty to the Plaintiff. In not carrying out proper and diligent searches at the Land Registry and carrying out further enquires in respect of the ownership of Title S214 before its transfer he was in serious breach of his duties both to the transferors and transferees. He only relied on his secretary's skill to carry out a search of the title which were ineffective given the testimony of Mr. Fred Hoareau that as far back as 2012 it was evident on the records at the Land Registrar that the land was co-owned by three persons. The Second Defendant actually stated in evidence that it was not his duty to negotiate the purchase between the parties.
- [64] I find that he has breached his duty to advise the Plaintiff. He disregarded the fact that the property was not co owned by two persons but by three persons, including a minor. The alienation of the latter's right necessitated the order of the court. Once this fact became apparent, he tried to retrospectively apply for it but misled the court into thinking that the transfer had not yet taken place. When the court discovered this, a further order was made to have the minor's share of the proceeds of sale deposited in the court registry but this never materialised. His behaviour in this respect is reprehensible.
- [65] To make matters worse, he pocketed three hundred thousand rupees of the proceeds of sale, presumably for a job badly done. He has not established any evidence to show why he deducted this sum of money for his own use. If they were fees there is certainly no evidence to that effect. In any case no fees arise given the circumstances of the case. This money will have to be refunded.
- [66] He then proceeded to transfer the rest of the proceeds of sale to a third party, a Mr. Jean regardless of the fact that the money did not belong to that third party or the Fifth Defendant but was co-owned by three parties. The First Defendant has therefore lost out entirely and can still claim against him, as well as against the Fifth Defendant.

investiture conférée par l'Etat et le conseil est inopérant s'il n'y a pas de la part du public la confiance qui fait que le conseil porte. L'investiture est à la base de la fonction publique ; la confiance suppose que le client puisse choisir son conseiller, ce qui fonde le cadre de la profession libérale »).

⁷ See *id.* at pp. 7-13.

[67] There is another matter which is concerning. This is the fact that in his evidence the Second Defendant blatantly accepted that the transfer was for SR1. 9 million and that he inserted SR1 million as the consideration in the transfer document to be registered. He therefore has testified to deliberately aiding the evasion of the payment of stamp duty. As a public official, his act is reprehensible and amounts to a breach of the provisions of the Stamp Duty Act, namely section 16 which states that :

“All the facts and circumstances affecting the duty chargeable in respect of any instrument shall be fully and truly set out in the instrument.”

[68] Further, section 19 of the same Act provides that:

“Where any instrument chargeable with stamp duty is not duly stamped, the person or persons respectively responsible for stamping such instrument by virtue of section 13 shall be liable or, as the case may be, jointly and severally liable under this act for the payment of such duty.

[69] These breaches are grave and amount to serious misconduct. They are encapsulated in the provisions of the Notaries Act. Section 14(1)(d) of the Notaries Act entitled “Acts which a notary may not perform” provides *inter alia* that a notary shall not:

“make use at any time or for any period of any sum of money, or of any security which may have been entrusted to him for any purpose whatsoever, other than the purpose for which the sum of money or security was originally entrusted to him;”

[70] Section 11(a) of the Notaries Act provides that:

“The Supreme Court may, subject to this section –

(a) suspend or remove from office a notary –

(i) who is guilty of any malpractice or misconduct;

(ii) who consistently fails to comply with the provisions of this Act relating to his archives or to any record he is required to keep under this Act;

- (iii) who has committed any offence under a written law which, in the opinion of the Court, makes him unfit to continue to practise as a notary;*
- (vi) who fails to perform his functions as a notary; or*
- (v) where the Court believes that he has ceased to be a fit and proper person to perform the functions of a notary;*

[71] Given the evidence adduced and the statutory provisions above, I find that the Second Defendant has breached his duties as notary as set out above and ought to be suspended. Section 11(6) provides that :

“Before suspending or removing a notary from office under this section the Supreme Court shall inform the notary of the charge or complaint against him and give the notary an opportunity to be heard in person or by counsel as the notary thinks fit.”

[72] This provision has to be adhered to notwithstanding the evidence already adduced.

[73] I do not find any liability on the part of the Third and Fourth Defendants and dismiss the claim against them.

[74] I am however gravely concerned by the serious breaches by a notary in this case. This is the second case of its kind in which I have had to deliver a decision in the space of a week. Public confidence must be restored in the legal profession. The good name of honest and diligent notaries and other legal practitioners is tarnished by such unscrupulous and unprofessional acts as shown by the notary in this case and in the case of *Georges v Benoit, Charles Lucas and the Land Registrar CS 95/2016*. In this regard and in addition to my orders below, I intend to bring these matters to the attention of the Attorney General in view of the provisions of section 37(4) of the Notaries Act which provides in relevant part:

“... a notary who contravenes this Act is, without prejudice to any action against him under section 11 or to any claim in a civil suit by a party prejudiced, guilty of an offence and liable to a fine of R.25, 000 and to imprisonment for 5 years.

[75] I therefore make the following Orders:

1. I Order the Second Defendant to pay the sum of SR300, 000 in the Supreme Court Deposit Account held under the Government of Seychelles, and parties with an interest may make a claim on the sum. Unless claimed, this sum shall remain in escrow for a period of one year from the date of this judgment, at which point it shall be forfeited to the Government of Seychelles.
2. I Order that the restriction entered on Parcel S214 be removed forthwith and the transfer of Parcel S214 in the name of Sara Jupiter as the bare interest owner and Frida Jupiter as the usufructuary be registered with this Order to be served on the Land Registrar for compliance.
3. I Order that this Judgment be served on the Judicial Committee on Legal Practitioners set up by the Office of the Chief Justice and consisting of three judges of the Supreme Court, and who shall at their next convention notify the Second Defendant of a hearing of the matters complained of regarding his notarial duties and obligations. He will be given an opportunity to be heard. The Committee shall after the hearing recommend to the Chief Justice any measures if any, to be taken against the Second Defendant.
4. The whole with costs against the Second and Fifth Defendants, jointly and severally.

Signed, dated and delivered at Ile du Port on 1 March 2018,

M. TWOMEY
Chief Justice