

SUPREME COURT OF SEYCHELLES HELD AT ILE DU PORT

Reportable
CS 13/2019
[2020] SCSC 182

In the matter between:

1. GEORGE PAYET

1ST Plaintiff

2. EDDY PAYET

2nd Plaintiff

(rep. by Kieran Shah and Kelly D’Offay)

and

JEFFREY PAYET

Defendant

(rep. by Nichol Gabriel)

Neutral Citation: *Payet & Anor v Payet* (CS 13/2019) [2020] SCSC 182 (9 March 2020)

Before: Twomey CJ

Summary: droit de superficie, acquisition of, transmissibility and duration - registered lease, Article 595 of Civil Code, damages for ejectment without eviction order

Heard: 10 July 2018, valuation of property 25 October 2019, submissions 10 December 2019

Delivered: 9 March 2020

ORDER

1. The Defendant shall pay the Second Plaintiff the sum of SR 1,290,000 for alternative accommodation. Alternatively, a lump sum of SR 405,000 for damages actually incurred to date (27 months x SR15, 000) and to provide either SR 15,000 monthly or suitable accommodation for the remaining months of the lease until 9 February 2025.
2. The Defendant shall pay the First Plaintiff SR 100,000 for the cost of replacement furniture.
3. The Defendant shall pay the Second Plaintiff the sum of SR 10,000 for his personal belongings and SR 30,000 for moral damages.
4. An injunction is issued prohibiting the Defendant from interfering with the house on Parcel H2519.

JUDGMENT

TWOMEY CJ

The Pleadings

- [1] This case concerns a bitter family dispute over property. The First Plaintiff is the Executor of the Estate of the late Leonne Payet (hereinafter the Deceased) who passed away on 17 June 2017 and is the brother of the Second Plaintiff and the Defendant.
- [2] The Deceased had a usufructuary interest in Title Nos H2519 and H2520 and the Defendant has the bare ownership.
- [3] In relation to Title No H2519, it is the Plaintiffs' case that their late brother, José Payet, another son of the Deceased, in good faith and with the permission of the Defendant constructed a two-bedroom house on Title H2519 while the Deceased was alive, thereby acquiring a *droit de superficie*. Upon his death, the house devolved by will to the Deceased and following her death devolved onto all her six children including the Plaintiffs and the Defendant.
- [4] In relation to Title No H2520, the Plaintiffs submit that, by an agreement dated 12 February 1998, the Deceased granted a nine years lease to the Second Plaintiff renewable for two terms of nine years which lease was registered. The current lease is valid to complete the term of tenancy of nine years on 12 February 2025.
- [5] On 12 December 2017, the Defendant forcibly removed the Second Plaintiff together with his carer from the said dwelling house with only his clothes on him. The Second Plaintiff is a physically handicapped, deaf and blind man who was born and had lived in the dwelling house on Parcel H2520 for a period exceeding sixty-eight years. The house was then demolished without an order of the court despite the fact that an application for an injunction to prevent the same had been sought from the court and awaited hearing.

The furniture in the house together with the belongings of the Second Plaintiff and his carer were thrown outside.

- [6] The Plaintiffs also aver that the Defendant is seeking the eviction of one Daniel Mancienne, the tenant of the house on Title H2519 which belongs to the estate of the Deceased. It is the Plaintiffs' belief that the Defendant intends to also demolish the house on Parcel H2519 and deprive the Plaintiffs the rent money, which has been used for the upkeep and maintenance of the Second Plaintiff with the agreement of the heirs of the Estate, bar the Defendant.
- [7] In this regard, the Plaintiffs seek a declaration that the house on Title Number H2519 has devolved onto the succession of the Deceased and further that the court grant a perpetual injunction prohibiting the Defendant from interfering with the leasehold right over Parcel H2519, further, to pay the cost of alternative accommodation for the Second Plaintiff for the remainder of the term of the lease, to pay the cost of replacement furniture, to pay moral damages in the sum of SR 700,000 and the costs of the suit.
- [8] In his Statement of Defence and Counter Claim, the Defendant has claimed that the matter involving the ownership of the properties at issue is *res judicata*. He also avers that José Payet never acquired a *droit de superficie* over the house on Parcel H2519 and that there was neither planning permission for its construction, nor his permission to build the same. Hence he avers, José Payet could not have bequeathed the house by will to his mother (the Deceased) and then onto her successors.
- [9] The Defendant also avers that the purported lease by Leonne Payet and the Second Plaintiff is null and void as it is contrary to law, namely Article 595 of the Civil Code, and that any lease signed in 1998 is deemed to have been terminated *ipso facto* on her death.
- [10] The Defendant further avers that he gave the Second Plaintiff and his carer, through his guardian the First Plaintiff, sufficient time to vacate the property, which was in a dilapidated state. He had been advised by a structural engineer to demolish the house and

had offered an alternative place of abode, namely the Home for the Elderly at North East Point, to the Second Plaintiff which offer was turned down.

[11] Furthermore, the Defendant avers that since no order at the time had issued from the Court prohibiting the demolition of the house, he was therefore not barred from proceeding with the same.

[12] With regard to the house on Parcel H2519 presently leased to Daniel Mancienne, the Defendant avers that he has no intention of demolishing the same.

The Evidence

The Plaintiffs' case – Evidence of the First Plaintiff.

[13] Much evidence was led at the trial. First, the First Plaintiff, the Deceased's son and an architect with extensive experience, testified that he was the executor of the Deceased's succession. During her lifetime the Deceased had executed a lease regarding the house on Parcel H2520 (Exhibit P4) in favour of his brother Eddy Payet, the Second Plaintiff, who was currently seventy years old. He, together with his siblings including the Second Plaintiff and the Defendant were born and grew up in the house. The Second Plaintiff is blind, deaf, and needs twenty-four-hour care. The house was before its demolition in a very liveable condition. It did require some maintenance and as a result of the tsunami there was an issue with cracks. However, these cracks settled and did not worsen. There was therefore never any danger of the house collapsing. As adults, his siblings and himself would live in the house on and off.

[14] The roof was redone in 1999 and the Second Plaintiff could have lived there without any danger until 2025.

[15] With regard to the house on Parcel H2519, in the past, his mother had had no income and so his step father proposed that they build a structure for a retail concern. His step father passed away after he had started building the house and it was completed by his brother José. He furnished the house and the rent from it was used for his mother's and the Second Plaintiff's upkeep. The house had planning permission and was built nearly forty years ago. The Defendant was aware of the house being built. He had some exchanges

with José whereby José paid him so that the land on which the house stood would belong to José but the transfer was never registered. The transaction was in the event set aside by the court. However, the house continued to be rented at SR14,000. and the income now went towards the rent for the Second Plaintiff's accommodation, his twenty-four care and his living expenses. All the siblings, bar the Defendant, had accepted that that was what the rental should be used for.

[16] On 12 December 2017, he had been notified of a commotion at the Second Plaintiff's place and had proceeded there with his lawyer and cousin. Arriving there, he saw that the windows of his mother's house had been smashed, the doors taken out and the furniture being thrown outside. There were two policemen there with the Defendant's wife and family. The Defendant then arrived and said he had been advised by his lawyer to demolish the house and take over the property.

[17] The Plaintiff applied to court the same afternoon for an injunction to stop the demolition but by then the house had been flattened. The furniture was all put outside under a small car port and partially covered by a tarpaulin. Some of that furniture were heirlooms made of rare wood, and very valuable. He estimated their value at SR 300,000.

[18] He eventually found the Second Plaintiff at his cousin's house. His cousin who lives about two doors from him in La Misère, had been told by neighbours that the Second Plaintiff was sitting outside his gate and had been injured. He was shaking and very traumatised. He was given something to eat and then taken to the doctor's who gave him medication to calm him down. He brought the Second Plaintiff back to his home but he found negotiating the stairs difficult and he was crying and shaking.

[19] He then brought the Second Plaintiff to his aunt's house at Anse Au Pins where he spent six weeks. Eventually he was brought to La Solitude Convent at la Misère where the Malagasy nuns and his carer were able to calm him down. Rent of SR1, 500 is being paid for his room as it is subsidised on a charitable basis but only on a temporary basis. It is a very small self-contained bed sitter. The Second Plaintiff does not know his surroundings and he has nowhere to go unlike the house he lived in at Mare Anglaise. Apart from listening to the radio there is little else he can do; it is like a prison cell. He is very

depressed and he cries a lot. When he comes to the First Plaintiff's home, he does not want to leave because of the loneliness he has to face on his return.

[20] The Second Plaintiff's clothes had been scattered everywhere on the day he was removed from his home and had not been retrieved and he also left without his medication.

[21] The house at Mare Anglaise previously occupied by the Second Plaintiff had required an occasional lick of paint from time to time but towards the end of his mother's life he had spent quite a bit of money renovating the house with new carpets, new beds to accommodate his mother's and the Second Plaintiff's disabilities and a new bed for the carer. He had also installed an accessible bathroom. The bathroom itself cost about SR30, 000 with new tiles, level deck shower, bar handles and grab rails. The Second Plaintiff does not have these facilities at the bed-sit. He was therefore claiming monthly rent at SR 15,000 to provide for suitable accommodation for the Second Plaintiff until the end of his lease. He was also asking the court for a declaration that the house on Parcel H2519 belonged to the heirs of the Deceased and for an injunction to stop the Defendant from interfering with the rental of the house.

[22] In cross examination, he admitted that there had been court cases relating to the two properties in issue and the Court of Appeal had finally ruled that the Defendant had bare ownership of the properties. He did not recall providing the Defendant with the lease agreements relating to his two properties (Exhibit 12). One sixth of the rent from Parcel H2519 is kept in the bank account for the Defendant. He did not agree with the opinion of Mr. Bernard Julie that the house needed demolition. As an architect himself he did not find it necessary; he had consulted an engineer who also did not think that the cracks were getting worse. He had also not been privy to letters written by the Defendant to health authorities in relation to his brother's living conditions prior to the demolition of the house.

[23] He denied that the house on Parcel H2519 was built by the Defendant's father and maintained that it was built by his brother José. He also maintained that the Second Plaintiff was very unhappy and depressed in the confined place he presently occupied and cried and shouted a lot and wanted to go back to his home at Mare Anglaise.

Evidence of the Second Plaintiff's carer

[24] The Second Plaintiff's carer, Ramnjahare Maeraorthye Hortancy *aka* Hortense, gave evidence that she had previously worked as a carer for the Deceased and on her death as a carer for the Second Plaintiff. Although the Second Plaintiff was blind and deaf he could walk quite well around the house at Mare Anglaise and could do certain things for himself. He was able to shower and he knew where his clothes were. He helped in the kitchen to wash pots and pans and he was able to walk around the house. It was not the same at La Solitude at La Misère. He was confined there, and every day he cried looking for his old home.

[25] On 12 December 2017, the Defendant came to the house and asked her to bring the Second Plaintiff to hospital. She was not allowed to call the First Plaintiff and the Defendant took her phone from her and also cut the house phone wire. Then, holding her arm very tight, the Defendant led her to the car. He also placed the things from the house outside. At the time, the Second Plaintiff was in the kitchen washing up. He was also placed in the car. The Defendant locked the car and drove them to the First Plaintiff's house at La Misère. She only got her phone back at La Misère when they were dropped off. She lost all her clothes, personal items and her salary which she had kept in a bag at the house.

Evidence of the Second Plaintiff's neighbour.

[26] Vilena Valmont, a housekeeper of one Mrs. Oliajee, a neighbour across the road from where the Second Plaintiff had lived, also gave evidence of the incident of 12 December 2017. She had known the parties since 1989. Their house was old and deteriorating but posed no danger to anyone living in it. She knew the Second Plaintiff really well. He was a very lively outgoing person. On the day in question, she heard screams from the house and ran over. She saw the carer outside the house crying and asked her what was going on. She asked her whether she had called the First Plaintiff and was told that the Defendant had taken away her phone. She went inside the house but the house phone was no longer there. She asked where the First Plaintiff was and was told he was in the kitchen. His tea was on the table and she told him to drink it up as he had to get going. He asked where to but she could not tell him. She hugged him and left. She called the First

Plaintiff's wife to inform her what was going on. Later she observed the house being bulldozed.

- [27] She has since visited the Second Plaintiff at La Misère. He is depressed and cries and asks her "How is my house, what happened to my dogs and everything else in the house." His place is very small and he cannot move around as he used to at Mare Anglaise.

Evidence of the Second Plaintiff

- [28] The Second Plaintiff, of seventy years of age, testified that he missed and loved his home at Mare Anglaise and that whilst there he had had a purposeful life as he worked every day. He had never wanted to leave. He described his chores in the kitchen. He explained that his home had been demolished and that his belongings had been destroyed. He was particularly attached to his statues including one of the Virgin Mary and that now "he had no statues to sleep with". He said his present abode was very tiny and that he just sat all day. He saw no one there and he could not sleep properly and gets seizures at night. He became very distressed at this juncture. He stated that he had injured his leg when his brother had left him at La Misère as he had got stuck in a pot hole. He had not had anything to eat and was just abandoned on the side of the road until he was picked up by one Alex Morel.

- [29] In cross-examination, he again described the events of 16 November 2017. He stated that he was in the kitchen eating breakfast and his brother had thrown him out and that he had almost fallen, as he was blind. His brother also took his phone and also threw out his carer, Hortense. He said he had to spend Christmas at his aunt's because he had no home. He still sometimes went to his aunt as he felt the need to get out of his present home often.

Evidence of the Plaintiffs' sister, Nadia Knowles.

- [30] Nadia Knowles was the Deceased's eldest child. She was six when the Second Plaintiff was born. He was born blind but also had hearing problems and now a heart problem. He had not attended school because of his medical condition.

- [31] She had lived in the house that had since been demolished by the Defendant until the age of 22 years when she emigrated to Australia. She however visited Seychelles often and the last time she saw her brother in the house was in 2014. When she returned on 10 January 2018, the house was gone.
- [32] Her brother, the Second Plaintiff, was very jovial and very funny when he had lived in the house. He kept himself busy washing saucepans and anything else he could lay his hands on in the kitchen even though they would have been washed already. He used to go to the beach swimming. The house had been built to suit his disabilities and he could orientate himself around it. He was also happy, and she would have fun with him dancing *kamtole*. He loved music.
- [33] When she met him in 2018 at La Misère, he was very depressed and tearful. He told her he would commit suicide. He would get an electrical cord, put water on it and push it into the wall. He had referred to his suicide on many occasions. She felt saddened by the turn of events. He kept asking to be brought back to Mare Anglaise. She had come over again for her brother's 70th birthday and she sees that he is getting worse. He misses his friends. He spends his day sitting in his chair listening to music as there is no place to move around. If he is taken out of the convent, he does not want to return.
- [34] With regard to José's house, her recollection was that it had been built sometimes in 1990 or 1993.
- [35] In cross-examination, she agreed that at times they all had had difficulties with the Deceased. She agreed that because of a court case the land at Mare Anglaise was subdivided and she got ownership of Parcel H2518 and her brother the Defendant Parcels H2519 and H2520. She had co-owned the property with the Defendant before its subdivision and had sold José ten square metres for the sum of SR 1,200 and the Defendant had sold him a few other meters for SR 30.000 or Aus. \$ dollars 3000 so that he could build his house there.
- [36] She also admitted that she had stayed in a guesthouse on some occasions as the Second Plaintiff wakes up in the night and walks around and her sleep was disturbed.

[37] She also admitted that when she had come to Seychelles for her mother's funeral she had talked to the Defendant as well as her sister Josette about the Second Plaintiff's welfare. She also admitted that after her brother's removal from his home she had phoned Mrs. Stravens at the Elderly Home and had told her off for suggesting that her brother should be taken out of his home because of a few cracks in the house. When shown photos of the house she said she did not recognise it as she the house had been done up and there were new beds and a new bathroom put in which were not shown in the photos. She was adamant that the house was liveable.

Evidence of the Court Service Processor, Tony Alcindor

[38] Tony Alcindor testified that he had been asked by the Registrar on 12 December 2017 to inform the Defendant to stop the demolition of the house in issue as the case was ongoing before the Court. When he arrived at the site he saw a lot of people but the building was already partly demolished. In cross-examination, he accepted that there had been no court order issued for this purpose.

The Defendant's case – Evidence of the First Defendant.

[39] Mr. Jeffrey Payet, the Defendant testified that he was seventy-four years old and lived in Melbourne, Australia. He stated that his father bought the land where the house had been for himself and his sister Nadia. The bare ownership was transferred to them and the usufruct to his mother, the Deceased. He left for Australia in 1965 but returned in 1972, 1980 and 1982. He had given his mother power of attorney in respect of the property.

[40] When he returned in 1997 he found out that his mother, using the power of attorney had sold the land to his half siblings, namely José, the First and Second Plaintiffs in undivided shares. He then revoked the power of attorney and filed a case for the return of the land which was completed in 2005 and in which he was successful. He therefore regained the bare ownership of the land, with his mother, the Deceased, keeping the usufruct. At the time, she was renting the house on Parcel H2519 to a third party so that she could make a living; and to which he had no objection.

- [41] He was not aware of the lease of the house on Parcel H2520 to his brother, the Second Plaintiff. He objected to it but as his mother was still alive then he could do nothing about it.
- [42] He visited his brother, the Second Plaintiff on every occasion he came to Seychelles and brought him gifts of clothes. He also brought gifts for his mother. His mother did not like his wife and he could not stay at the house but had to stay with friends, relatives of his wife's or strangers. His last two sons had never met their grandmother because she refused to see them.
- [43] He stated that the house on Parcel H2519 currently being rented out had been built by his mother about forty years ago and he had not objected to it. He had never given José permission to build the house because he had four children of his own to whom he would have wanted to pass it on to or kept it for himself to live in.
- [44] He had also not given permission to anyone to rent out the house to Daniel Mancienne. He had written to the tenant to ask him to leave and had taken the matter to the Rent Board. He had received no replies from anyone.
- [45] After his mother's funeral in 2017, he had spent time with his brother, the Second Plaintiff. He had seen him eating corn flakes with hot water and no milk. He then started buying some shopping from his brother's pension. He never saw the First Plaintiff there or anyone else at all. He then told himself that the house was not in good shape. It was not level and there were cracks everywhere. There was fungus in the cracks, the toilet smelled and outside there was a sewage leak.
- [46] He went to see Mrs. Stravens, the manageress of the Home for the Elderly and explained the situation. He drove her to the house and she took pictures. He sent letters to different agencies to help his brother. He wanted him in a better place and not in the "dirty rotten place" he was living in. The rest of his siblings rang the Manageress and abused her for having ventured into the house. Only his sister, Josette Operman, wrote a letter confirming that she was in favour of having her brother moved into safer accommodation.

- [47] He had sought the advice of Bernard Eugenie, a civil engineer and he had inspected the house on 17 September 2017 and reported on 19 September 2017 that the house needed demolition and rebuilding on deeper foundations.
- [48] As to the furniture removed from the house, he had taken it with care to the carport and covered it. He told the First Plaintiff at the site that he could collect the furniture at any time. He denied that the furniture was of the value as was testified by the First Plaintiff.
- [49] With regard to the demolition of the house, he had done it because as the owner of the land he did not want to have to bear the brunt of the consequences of something happening to his brother in the house. He had looked for solutions but was aware that he was about to leave the country two days later. On the day in question, when he got to the house his brother was having breakfast in the kitchen and he told him and the carer that he was going to repair the house and in the meantime he was going to take them somewhere. He had disconnected the water, electricity and the telephone the day before. He got two cars and placed all their belongings and statues with them. He brought his brother to the First Plaintiff's house and left him outside the gate. He never roughed up his brother. The carer took her phone out at La Misère and called the First Plaintiff's wife and told her they were at the gate.
- [50] He returned to the site, the bulldozer arrived about 12.30 pm, two persons removed the furniture from the house, and the bulldozer demolished the house. At some point the Court Process Server came and asked him to stop but could produce no court order to this effect. His lawyer, Mr. Frank Ally told him he could proceed with the demolition.
- [51] He had done his best despite opposition from his siblings to accommodate his brother. He was 74 years old and also needed his property for himself and his children.
- [52] On being shown photographs of the house in cross-examination, he insisted that the house was in bad condition or that the photographs must have been taken a long time ago. He was also adamant that it was his mother who built the house on Parcel H2519 and not José despite the entry on the land transfer of Parcel H2519 (Exhibit D7) that José had built the house. He admitted that there had been no order from the court to state that any

of the leases on the two parcels of land were invalid or that he could remove his brother from the house. He did not wait for the agencies he had written to provide a place for his brother because he was of the view that the First Plaintiff could provide a room for him.

Evidence of Don Lavigne, excavator operator

[53] Mr. Lavigne testified that he worked for Sullivan Company and he was asked by his employer on 12 December 2017 to demolish a house at Mare Anglaise. He took the excavator on site at around 1 pm and the demolition work started at 1.15 pm after he had ensured that the water and electricity inside the house had been disconnected.

[54] He had inspected the interior and exterior of the house and had noticed that it was cracked. He recognised the house from the photos shown to him in court and pointed out the cracks thereon. He finished the work at 2 pm and left. He had noticed that the furniture for the house had been placed outside and was covered with corrugated iron sheets and wood. In cross-examination, he stated that there was no built in furniture inside the house.

Evidence of Bernard Charles Eugenie, civil engineer

[55] Mr. Eugenie testified that he had qualified in 1996 at the University of Brighton and after that had been employed with the Public Utilities Company and after eleven years went into private practice. He had designed structures of two storey buildings.

[56] He was asked by the Defendant to examine his house at Mare Anglaise on 7 September 2017. He found diagonal, vertical and horizontal cracks both inside and outside the house. He recommended the demolition of the house as in his view it was hazardous to health. There was also fungus in some places.

[57] In cross-examination, he admitted that fungus can be treated and removed. He also admitted that the cracks were only up to one centimetre wide. He had meant to state in his report that according to the landowner the cracks had continued widening. He had not personally carried out any measurement over a period of time to see if the cracks indeed had widened. He was alarmed by the cracks in the sea wall as it was close to the house and the tidal movements would cause the foundation underneath the house to deteriorate.

He was also satisfied that the cracks in the walls of the house did not make it stable for persons to reside in the house. He admitted that cracks can however be repaired. He had also observed cracks in the floors of the house up to one centimetre wide.

Evidence of the Plaintiffs engineer, Elvis Naya

- [58] The Plaintiffs in rebuttal of the Defendant's engineers' testimony called their own expert, Mr. Elvis Naya. He testified that he had qualified at the University of Manchester in 2006 and had worked as a development control engineer at the Planning Authority until 2008. He had then worked with an engineering firm, FND, for the Raffles project in Praslin and after that with WSP, Seychelles and presently with WNC, all civil engineering firms. He had worked on major projects including the Independence House Annexe, the Wharf Hotel, the Pangea Apartments and Desroches Hotel. He was also working on the condominium project at Perseverance and other projects at Four Seasons. He disclosed that he was also the god father to one of the First Plaintiff's granddaughters. He knew the Plaintiffs' family well and had visited the house both socially and professionally.
- [59] He stated that cracks are quite reparable. The house at Mare Anglaise was a single storey house with a lightweight roof. There were some cracks on the north west corner of the house. There were cracks in the floors of two bedrooms and along the walls joining them. The cracks in his opinion were not structural and significant enough to warrant any alarm and could have been repaired. He had been at the house for the last time in March or April 2017 for the Second Plaintiff's 70th birthday. He had not seen any deterioration in the cracks.
- [60] He did not think it was proper for Mr. Eugenie to recommend the demolition of a house without having monitored the cracks. A crack of one centimetre would be alarming if it continued widening. However, he had not personally observed the cracks widening and the house was not at all in any danger of collapsing.
- [61] In cross-examination he stated that he disagreed with Mr. Eugenie's report because it had been made after only one visual inspection in September 2017 whereas he had visited the house several times since 2011.

[62] With regard to the sea wall, he stated that the tidal movements would have been a problem if the house had been closer to the sea. As it was, the back of the house to the sea was about 3.5 meters and from the sea wall to the sea another 5 to 8 meters. It was therefore not an issue.

The issues to be determined by the court

[63] A plea in *limine litis* was raised in the Statement of Defence that the ownership of the properties at issue is *res judicata*. The Defendant has made no submission on this issue and for that matter no submissions at all.

[64] It is true that the Court of Appeal in the case of *Leonne Payet & Ors v Jeffrey Payet* (unreported) SCA 14/2004, 25 November 2005 (Exhibit 9) stated that the bare ownership of Parcels H2519 and H2520 belonged to the Defendant and their usufruct to the Deceased. Although this finding has a bearing on the present case, it did not address the issues currently raised. The plea is therefore set aside.

[65] On the merits, the parties have agreed that the following issues stand to be determined by the court:

1. Whether a *droit de superficie* exists for the house on Title Number H2519 and whether the successors of the Deceased own the house?
2. Whether the lease between the Deceased and the Second Plaintiff subsisted at the time of his forcible ejection from the house on Parcel H2520?
3. Whether the Defendant was liable for damages as a consequence of the Second Plaintiff's ejection from his home, the demolition of the house and the loss of his belongings and furniture?
4. If so, what was the quantum of damages payable?
5. Should a perpetual injunction be granted in respect of Parcel H2519?

Issue 1 in respect of Parcel H2519

Did José Payet have a droit de superficie?

[66] Before the court determines whether a *droit de superficie* can be passed on to one's successors after death, it has to determine first whether José Payet acquired a *droit de superficie* over the house on Parcel H2519.

[67] The present dispute partly arises from the fact that all the relevant witnesses, save for the Defendant, have stated that the house on Parcel H2519 was built by their brother José and belonged to him. In this regard, it is the Plaintiffs' submission that José had acquired a *droit de superficie* over that house and that he had by will bequeathed this right onto his mother. His mother, since deceased, has subsequently been succeeded in that right by her heirs, namely the parties to this case and their siblings.

[68] In particular, the witnesses' evidence before this court is that José built the house on the parent parcel before it was subdivided. Nadia Knowles stated how much she had been paid for the permission to build and stated that her brother, the Defendant, had also been paid SR 30,000 or Aus \$ 3000 for a few metres of land on the parent Parcel [H654] even before its subdivision into Parcels H2519 and H2520. The court's decision in *Leonne Payet* (supra) also contains the following statement about the history of the family dispute which has a bearing on the present case:

“[3] Upon reaching their majority, the bare owners [Jeffrey Payet and Nadia Knowles] migrated to Australia leaving their property under the control and management of [Leonne Payet, the Deceased in the present case]. [Leonne Payet and José Payet] built two houses from their own funds on the property which in or around 1975 was surveyed as parcel H654” (emphasis added).

[69] While the ultimate decision in that case involved the setting aside of the transfer of the bare ownership of Parcel H2519 from the present Defendant to José, there was no decision taken on the ownership of the house erected on the Defendant's land.

[70] It is also noted that in his will dated 18 September 2000 (Exhibit P7), José declares in relevant part as follows:

“I give and bequeath my immovable property in Seychelles, and all my moveables including moneys where ever situated to my mother Leone Edwige Miriam Payet.”

[71] The evidence is that José owned no other property in Seychelles other than the house on Parcel H2519. Clearly he was also of the belief that he owned the house he built with permission and which he bequeathed to his mother. The Defendant was the only person who stated over the overwhelming evidence to the contrary that it was his mother who built the house. Given the amount and preponderance of evidence supporting the Plaintiffs’ claim on this issue, the court finds that it was José Payet who built the house on Parcel H2519 and did so with the acquiescence of the Defendant and Nadia Knowles who at that time were the bare owners.

[72] I found the evidence of the Plaintiffs and his witnesses credible. On the evidence specifically of the First Plaintiff, that of Nadia Knowles and the finding in the Court of Appeal submitted by the Defendant himself I find that José Payet acquired a *droit de superficie* in respect of the land on which he built his house, which now forms part of Parcel H519.

[73] The next issue that has to be resolved is whether in our jurisprudence a *droit de superficie* can be transmitted on death to one’s heirs.

[74] Article 553 of the Civil Code provides in relevant part:

“All buildings, plantations and works on land or under the ground shall be presumed to have been made by the owner at his own cost and to belong to him unless there is evidence to the contrary; ...”

[75] In *Cable and Wireless (Seychelles) Ltd v Innocente Gangadoo* (Civil Appeal SCA 14/2015) [2018] SCCA 29 (31 August 2018), the Court of Appeal held that:

“The presumption arising from Article 553 is that buildings on land are presumed to be that of the landowner unless he permits another to build on the land. In consequence of this provision it is clear that rights in constructions or

superficiary erections or plantations can be distinct from those rights attaching to the soil or the land. A droit de superficie is distinct from the rights of the owner of the land.

In De Silva v Baccarie (SCAR 1978-82) 45, Lalouette JA expressed the view that a droit de superficie is a real right severed from the right of ownership of land and, conferred on a party, other than the owner of the land, to enjoy and dispose of the things rising above the surface of the land, such as constructions, plantation and works. Perera J in Adrienne v Pillay (2003) SLR 68 expressed the view that a droit de superficie would be "an overriding interest" as envisaged in Section 25 of the Land Registration Act (Cap 107) where a person is in possession or actual occupation of the land...

In Adonis v Celeste, CS 124/2012 the Supreme Court relying on Malbrook v Barra (1978) SLR 196 and Youpa v Marie (1992) SLR 249 found that:

"[A]lthough such a right is personal to the grantee, a purchaser of land that is subject to a droit de superficie takes the land subject to the droit de superficie."

Hence a droit de superficie persists with the transfer of property from the owner of the land to his successor in title."

[76] In citing Dalloz Encyclopédie Droit Civil 2e. Ed. Verbo Superficie, §2. — Légalité — on the same principle, Robinson JA added:

"As can be gathered from the above doctrinal writings and jurisprudence, the "droit de superficie" is the right which a person (the "superficiare") has on immovable property found on or under land belonging to another person (the "tréfoncier") who owns the land or under which the immovable property of the superficiare is found. Therefore, a person who has a "droit de superficie" on a property is the owner thereof without being the owner of the land on or under which the immovable property is situated."

[77] In *Ministry of Land Use and Housing v Stravens* (Civil Appeal SCA 24/2014) [2017] SCCA 13 (21 April 2017), the Court of Appeal stated that:

*“[36] There is in any case two schools of thought in France regarding the droit de superficie; one which considers the right to be temporary and personal and one which considers it to be perpetual and real. The majority view both in terms of la doctrine and la jurisprudence is for the latter. In contrast the jurisprudence constante in Seychelles has erred on the side of caution finding in most cases that the droit de superficie is temporary and personal. We are prepared to state that unless expressly stated or inferred otherwise from the intention of the parties, a droit de superficie may well be perpetual. We are fortified in our view by the dicta of Sauzier J in *Albest v Stravens* (1976) (No. 2) SLR 254 in which he continued the citation from *Aubry and Rau* not completed by *Lalouette JA in Tailapathy*, namely the following excerpt:*

“le droit de superficie est un droit de propriété portant sur les constructions, arbres, plantes, adhérant à la surface d’un fonds (édifices et superficies) dont le dessous (tréfonds) appartient à un autre propriétaire..

Le droit de superficie est intégral ou partiel, suivant qu’il s’applique à tous les objets qui se trouvent à la surface du sol, ou qu’il est restreint à quelques uns d’entre eux, par exemple, soit aux constructions, soit aux plantes et aux arbres, ou même seulement à certaines arbres.

Le droit de superficie constitue une véritable propriété corporelle, immobilière. Il en résulte qu’à l’instar du droit de propriété, à la différence des servitudes, il ne se perd par le non usage...

Il peut s’établir par conventions ou disposition, et le cas échéant, quoique plus rarement, par prescription... (Aubry and Rau, Droit Civil Français 4th Ed. Vol 2 para. 223, pp 438-439).”

[78] In *PTD Limited v Zialor* (SCA 32/2017 (Appeal from Supreme Court Decision CS 46/2013) [2019] SCCA 47 (17 December 2019), the Court of Appeal concurred with the

jurisprudence that a *droit de superficie* could be acquired by *disposition*. The court in that case cited an extract from the online version of JurisClasseur Construction – Urbanisme, Fasc. 251-30: Le Droit De Superficie, which defines the *droit de superficie* —

“La règle trouve sans doute son expression la plus marquée dans les articles 553 et suivants du Code civil. Aux termes de l'article 553, on peut acquérir par prescription, et à plus forte raison par convention ou disposition, la propriété d'une cave, d'une construction ou d'une plantation sur le sol d'autrui”(emphasis added).

[79] Hence, an owner of a *droit de superficie* has a proprietary right, a *real* right - which may, depending on the circumstances, be transferable. In the present case, José had acquired a *droit de superficie* during his life in respect of the house on Title No H2519. His will, which made reference to his immovable property, was registered and never opposed. His *droit de superficie* under that will passed onto his mother, the Deceased, whose right in turn passed onto her heirs at her death.

[80] The final issue concerns the duration of that right. While a *droit de superficie* may be perpetual and transferable, the extent to which it is depends on the particular circumstances of the case. The authors Aubry and Rau, are clear as to the duration of a *droit de superficie*:

Le droit de superficie est de sa nature perpétuel, comme tout autre droit de propriété; ce qui n'empêche pas qu'il ne puisse pas être concédé d'une manière révocable, ou pour un temps seulement Aubry and Rau Droit Civil Francais 4th Ed. Vol 2 para. 223, pp 438-439) (emphasis added).

[81] Similarly, in *Albest v Stravens* (No1) (1976) SLR 158, Sauzier J stated:

“The mere sale of a house as distinct from the land on which it stands does not ipso facto confer on the purchaser a “droit de superficie” unless the conferment of such right was expressly or impliedly intended by the parties to the contract of sale. However, the “droit du superficie” may be conferred into perpetuity or for a period of time according to the intention of the parties. It would appear therefore

that everything depends upon the intention of the parties at the time the contract was entered into”

[82] In this regard, it is the testimony of the First Plaintiff and his witnesses and the Defendant’s to some extent that the house was built with the sole purpose of providing an income for the Deceased and the Second Plaintiff. In this context, such being the intention of the parties, I find therefore that the *droit de superficie* will end on the Second Plaintiff’s death.

Issue 2 in respect of Parcel H2520

Was there a lease between the Deceased and the Second Plaintiff at the time of his forcible ejectment from the house on Parcel H2520.

[83] The evidence is that the Deceased executed a lease, which was registered and stamped in March 1998 with respect to Parcel H2520 in which she had the usufruct. The averment in the Defendant’s defence to the effect that the certificate of official search on Parcel H2520 makes no mention of a lease is therefore without any validity.

[84] The lease was in favour of the Second Plaintiff for a term of 9 years from 12 February 1998. It was also a term of the lease that:

“The lessee [had] an automatic right of renewal of this lease (par tacit reconduction) for another two terms.”

[85] The last term would therefore have ended in February 2025. It is the Plaintiffs’ submission that pursuant to Article 595 of the Civil Code a tenant would only be entitled to complete the current tenancy of nine years where the lease exceeds nine years.

[86] Counsel for the Defendant has made no closing submission but in the Statement of Defence has averred at paragraph 4 that:

“The purported lease is contrary to law, namely Article 595 of the Civil Code of Seychelles. Any lease signed in 1998 is deemed to have been terminated ipso facto. In any case Leonne Payet passed away in 2017 and her last Will does not

contain any mention of the said leasehold interest nor does the certificate of official search at the Land Registry contain an entry to that effect.”

[87] In this context it is important to bring Article 595 to light. It provides in relevant form:

“1. The usufructuary may enjoy his right on his own account ... or even sell or assign his right gratuitously. If he grants a tenancy he shall be bound, insofar as its periods of renewal and duration are concerned, by the rules in paragraph 2.

2. Tenancies exceeding nine years shall be binding upon the owner and his heirs for the time which remains to run out of the first period of nine years, if that period has not elapsed, or out of the second period, and so on, so that the tenant shall only be entitled to complete the time of a current tenancy of nine years. Tenancies of nine years or less granted... before the expiry of the usufruct` ... less than two years in the case of a house, shall be void.”

[88] Learned Counsel for the Plaintiffs has submitted, correctly in this court’s view, that since the usufructuary died on 17 June 2017 during the third period of nine years, the Second Plaintiff had the right to remain in occupation until 12 February 2025 as the lease had been granted more than two years before the expiry of the usufruct pursuant to the provisions of Article 595(2) above. The second question raised is therefore answered in the affirmative.

Issue 3 in respect of Parcel H2520

Whether the Defendant was liable for damages as a consequence of the Second Plaintiff’s ejectment from his home, the demolition of the house and the loss of his belongings and furniture?

[89] Learned Counsel for the Plaintiffs has submitted that on the authority of *Van Hecke v La Goelette (Proprietary) Limited* 3 SCAR (Vol II) 332, a tenant cannot be evicted without an order of the Rent Board, as a registered lease under the Land Registration Act is an authentic lease conferring real rights on the lessee. He has referred in this regard to sections 2 and 10 of the Control of Rent and Tenancy Agreement.

- [90] The Court of Appeal in *Van Hecke* was unanimous on the point that the landlord was not entitled to repossess premises without an order of the Rent Board. If a landlord does so, he commits a trespass and can be liable for damages either for breach of contract or for tort towards the lessee.
- [91] Similarly, in *Kimkoon v Roman Catholic Church* (1996) SLR 135, the Supreme Court stated that no ejection may be resorted to unless an application is first made to the Rent Board and an ejection order obtained. More to the point in *Brice v Bronze* (No 2) 1969 SLR 256, even when the premises were required for demolition and reconstruction the Board had to satisfy itself that the application of the landlord was genuine and more importantly that the Board had to satisfy itself that the order was reasonable having regard to all the relevant circumstances.
- [92] Our jurisdiction does not permit self-help even in breaches of contract. More importantly this court cannot accept the doctrine that might makes right. I therefore do not see the need to consider whether the cracks rendered the house inhabitable. These were matters which would have been considered in an application for ejection before a proper forum. And while the Defendant sought to prove to the court that the cracks in the house put his disabled brother at risk, that he attempted to rehouse him and, that he had deep concerns for his wellbeing; all this rings hollow in the light of his maverick actions. Physically and forcibly ejecting his disabled brother without a court order and leaving him outside the First Plaintiff's gate without making any proper arrangements to enquire if there was a suitable place for him cannot be said to be acts done in good faith and in the interests of the Second Plaintiff.
- [93] The Defendant's motive appears even more insincere and equivocal especially when he stated in court that he wanted his property for his own use or for the use of his children. While these were indeed valid reasons to submit to the Rent Board on proper application for consideration, they certainly did not justify him bulldozing the house. Of even more concern is the fact that his brother was extremely vulnerable, an elderly deaf and blind man with other medical issues who only knew one house: the one in which he had been born and lived in his entire life, the house to which surroundings he was accustomed to

and in which by most accounts he enjoyed a relatively good quality of life. The evidence about his isolation in a confined place at a convent far from the familiar surroundings of the seaside where he had enjoyed friendships and acquaintances close to sounds and smells he was used to is to say the least heart-breaking. The distress and trauma caused to the Second Plaintiff was evident to this court.

[94] Disposing of the Plaintiffs' belongings and furniture was also detrimental to their intrinsic value and to the sentimental value they had for the Plaintiffs. The Second Plaintiff spoke in an agitated manner about his attachment to his statues, his clothes and shoes and their loss. These will have to be replaced.

[95] This Court therefore finds that the Defendant is liable for damages as a consequence of the Second Plaintiff's ejection from his home, the demolition of the house and the loss of his belongings and the furniture.

Issue 4

What was the quantum of damages payable?

[96] It is not contested that the Second Plaintiff currently lives in inappropriate lodgings far away from his home. He is entitled to be rehoused in suitable accommodation. The value of the accommodation in the region of SR15, 000 monthly was not contested. I grant such an amount as a monthly rate as damages from the date of the Second Plaintiff's forcible ejection until the expiry of the subsisting lease. In other words, the sum of SR 15,000 monthly from the 17 December 2017 to 19 February 2025 payable as a lump sum of SR1,290,000 (7 years and 2 months' x SR15,000) or a lump sum of SR 405,000 for damages actually incurred to date (27 months' x SR15,000) and to provide either SR 15,000 monthly or suitable accommodation for the remaining months of the lease until 9 February 2025.

[97] For the Second Plaintiff's belongings and the furniture in the house, I have no evidence of their cost apart from the estimate for the furniture given by the First Plaintiff. I have no supporting evidence of the cost of each item. In the absence of such evidence, I can only make an arbitrary award bearing in mind that if accommodation was built for the Second Plaintiff or if he rented premises he would have to buy replacement items. I therefore

award SR 10,000 for the Second Plaintiff's belongings and the sum of SR100, 000 for the furniture to the First Plaintiff representing the estate of the Deceased.

[98] I have already alluded to the trauma and distress of the Second Plaintiff which I found proven. The evidence of the Plaintiffs' witnesses is that he cries every day and that he was injured on the day and needed medication for his nerves. He is entitled to moral damages which I grant in the sum of SR 30,000. I have not awarded anything for physical injury as this is not supported by medical evidence.

Issue 5

Should a perpetual injunction be granted in respect of Parcel H2519?

[99] This Court finds that given the previous actions of the Defendant in that he is inclined to take things into his own hand without resorting to court, it would be just and equitable to grant the injunctive relief sought to prevent him from interfering with the rights of the Plaintiffs in respect of the house on Parcel H2519. The house is to be managed during the life of the Second Plaintiff specifically for his upkeep and maintenance without interference from the Defendant. The *droit de superficie* thereon will be extinguished on the death of the Second Plaintiff and revert to the Defendant.

Orders of the Court

[100] I therefore make the following orders:

1. The Defendant shall pay the Second Plaintiff the sum of SR 1,290,000 for alternative accommodation. Alternatively, a lump sum of SR 405,000 for damages actually incurred to date (27 months x SR15, 000) and to provide either SR 15,000 monthly or suitable accommodation for the remaining months of the lease until 9 February 2025.
2. The Defendant shall pay the First Plaintiff SR 100,000 for the cost of replacement furniture.
3. The Defendant shall pay the Second Plaintiff the sum of SR 10,000 for his personal belongings and SR 30,000 for moral damages.

4. An injunction is issued prohibiting the Defendant from interfering with the house on Parcel H2519.

Signed, dated and delivered at Ile du Port on 9 March 2020.

Twomey CJ