

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 23

CS107/2018

In the matter between

JEAN PAUL BARALLON

1st Plaintiff

MARIE-CELICE BARALLON

2nd Plaintiff

(rep. by Lucie Pool)

and

JENNY POMEROY

1st Defendant

(rep. by Alexandra Benoiton)

Neutral Citation: *Barallon & Anor v Pomeroy* (CS 107/2018) [2021] SCSC 23 (11 February 2021).

Before: Carolus J

Summary: Claim for loss and damages resulting from breach of agreement for payment of commission for negotiating sale of hotel – Illegality of objet of contract in breach of Regulations.

Heard: 28 and 29 March 2019

Delivered: 11 February 2021

ORDER

The Court finds (1) that there was an agreement between the parties in terms of which the 1st plaintiff would negotiate the sale of La Reserve Hotel on behalf of the defendant in consideration of a commission of a percentage of the sale price; and (2) that the agreement is null and void, the object of such agreement being in contravention of the Licences (Miscellaneous Services) Regulations 2011, in that the 1st plaintiff not being a licensed commission agent, was not entitled to receive a commission on the sale price of the said hotel. The plaint is dismissed. The parties shall bear their own costs.

JUDGMENT

CAROLUS J

[1] This judgment arises out of a claim for breach of an agreement allegedly entered into by the 1st plaintiff and the defendant.

Pleadings

[2] The plaintiffs aver that the 1st plaintiff and the defendant had entered into an agreement in writing in the years 2013/2014 in terms of which the 1st plaintiff would negotiate the sale of La Reserve Hotel on behalf of the defendant. The agreement is averred to be contained in an exchange of emails, payment advices and other communications between the years 2013/2014 to the date of filing of the plaint. The plaintiffs aver that it was a term of the agreement that the 1st plaintiff would receive a 1% commission of the sale price of US\$ 225,000.00 calculated at the prevailing exchange rate of SCR 11.5 amounting to SCR 2,587,500.00. The defendant paid the sum of SCR1,000,000.00 immediately after the sale and thereafter agreed to pay the balance of R1,587,500.00 in three instalments. The defendant paid two instalments amounting to SCR500,000.00 in May 2014, and a further SCR500,000.00 in February 2015, leaving an outstanding balance of SCR587,500.00. The plaintiffs aver that in breach of their agreement, the defendant has failed to pay the outstanding balance of SCR587,500.00 despite a letter dated 28th August 2017 demanding that she pay the same, and repeated requests, emails and phone calls. They aver that they have suffered loss and damage as a result of the continued breach and claim SCR587,500.00 as unpaid outstanding balance and SCR50,000.00 as moral damage for distress and inconvenience. They pray for judgment in the total sum of SCR637,500.00 with interest and costs.

[3] The Defendant has filed a statement of defence contesting the claim. She denies that there was ever any agreement as claimed by the plaintiffs and avers that as the plaintiffs are her relatives, there was never any intention to create legal relations between them.

[4] She further avers that she would not and could not have entered into any agreement with 1st plaintiff which would have resulted in payment of a commission as the 1st plaintiff is not licensed. In that regard she avers that a person engaging in or carrying on any activity of a commission agent must be licensed, that neither of the plaintiffs are so licensed and

that they are therefore not entitled to operate as commission agents or to claim any commission arising from operating as commission agents.

- [5] The defendant avers that the 2nd plaintiff discloses no cause of action against the defendant.
- [6] The defendant admits that she sent money to the plaintiffs but denies that these were payments of instalments of sums due to them, or that there was an agreement to pay any balance in further instalments. She avers that any payments made were part of her extremely generous nature towards the plaintiffs who were her relatives, and that she has a long history of being very generous to the plaintiffs to the point of hosting their son's wedding at no cost.
- [7] The defendant denies any breach of agreement, admits that the plaintiffs wrote to her demanding that she pay them the outstanding balance of SCR587,500.00, but denies that repeated requests, emails and phone calls were made by them for that purpose. She further denies owing them any outstanding sums or that there even were such outstanding sums.
- [8] The defendant denies that the plaintiffs suffered any loss and/or damages as stated or otherwise and puts them to strict proof thereof, but in the alternative avers that if they did suffer any loss and/or damages, the sums claimed therefor are manifestly excessive and grossly exaggerated.
- [9] She prays the Court to dismiss the plaintiffs' claim with costs or to award them minimal damages.

Preliminary point - Admissibility of Documents

- [10] After pleadings were closed and prior to the hearing of the case, discovery of documents to be relied upon by the parties at the hearing of the case was effected. As per the list of documents annexed to the plaint, the plaintiff intended to produce emails, payment advice, bank statements, correspondence between parties and receipts.

- [11] In line with Practice Direction 3/2017, 15(a), in terms of which disputes regarding the authenticity or admissibility of documents are to be ruled upon at the pre-trial review, prior to the hearing, counsel for the defendant objected to the production of the following documents by the plaintiffs as being inadmissible: (1) email (No.1) on the ground that it did not have a header unless a copy of the email with a header was provided; and (2) Bank advices dated 5th May 2014 and 23rd February 2015 (No.2) and plaintiffs' statement of account from ANZ Bank (No.4) unless the representatives from the respective agencies were called to give evidence and the plaintiff given the opportunity to cross-examine them. She filed written objections dated 6th March 2019.
- [12] Counsel for the Plaintiff filed an answer to the objections dated 12th March 2019 claiming that no valid objections had been raised and praying the Court to rule in the plaintiffs' favour. She stated that all emails intended to be produced contain the heading normally contained in all emails, and that in any event those emails could be retrieved from the plaintiffs' computer at the hearing if necessary. She relied on the case of Anissa Payet v Alex Monthly (CS56/2017) [2018] SCSC512 (01 June 2018) in support of the admissibility of the emails. With regards to the bank receipts and advices she stated that the 1st plaintiff to whom they were addressed would be available for cross-examination thereon. She added that some of the bank transfers to 1st plaintiff's account were made by the defendant from her bank account in Seychelles and bear her name and address, that the 1st plaintiff has admitted receiving the previous instalments and the date of receipt and is only claiming the final one, that he has no reason to lie and is in a better position than anyone else to enlighten the Court on the matter. She further drew attention to costs for a bank manager to travel from Australia to Seychelles to produce a bank statement addressed to the plaintiff.
- [13] The Court ruled that the emails would be admissible provided that they contained proper headings clearly indicating the dates and sender and recipients of the emails, and invited written submissions from counsels on the issue of admissibility of the bank documents.
- [14] Counsel for Defendant filed written submissions dated 14th March 2019 regarding admissibility of letters to the plaintiffs from the Australian National Bank and pages of

bank statements from the same bank, maintaining that under the Electronic Transactions Act, bank documents should be produced by representatives of the bank from which the payments originate or the receiving bank and not by the plaintiffs. It was further submitted that, in terms of the Evidence (Bankers Books) Act, Cap 75 and relying on the case of Natalie Weller v Sarah Walsh (Civil Appeal SCA03/2015) [2017] SCCA47 (7 December 2017), bank statements being statements of banking transactions recorded in a banker's book, the Court, before admitting such statements in evidence, has to be satisfied as to the authenticity of such transactions and that any such statements correctly reflect the entries relating to such transactions in the banker's book, which must be done by oral or affidavit evidence of an officer of the bank.

[15] By way of further answer to defendant's objections filed on 26th March 2019, counsel for the plaintiffs submitted that the bank is the originator and the plaintiffs the addressees of the bank documents in terms of the Electronic Transactions Act; and that the Evidence (Banker's Book) enacted in 1968 was not applicable to electronic information and data and that there was no need to go through a bank officer to produce a document which could be accessed by the plaintiffs online. She also drew the courts attention to admissions of the defendant in his statement of defence that she had sent money to the plaintiffs.

[16] On 28th March 2017, this Court ruled that the bank documents were admissible reserving reasons to be given in the judgment at the conclusion of the case. I now give these reasons.

[17] The defendant objects to the production by the plaintiffs of two credit advices dated 5th May 2014 and 23rd February 2015 respectively. Both of those documents are addressed to Jean-Paul Barallon and Marie-Celice Barallon, the 1st and 2nd plaintiffs respectively, and are from Australia and New Zealand Banking Group Limited (ANZ) advising them that funds have been received in their favour from National Australia Bank Limited and were credited to their account number 013280351790315. The credit advice dated 5th May 2014 states the "Ordering Customer" as "La Reserve Hotel, Anse Petit Cours, Praslin Island, Seychelles". Details of payment are stated as "Trf B/O La Reserve Hotel". The

amount received and credited are stated to be AUD 43,389.22. The credit advice dated 23rd February 2015 states the “Ordering Customer” as “La Reserve (Proprietary) Ltd, Baie Ste Anne, Praslin Island, Seychelles”. Details of payment are stated as “PMT B/O Jenny Pomeroy of La Reserve (Pty) Ltd”. The amount received and credited are stated to be AUD 50,000.00

[18] The defendant also objects to the production of 3 pages from bank statements of bank account number 3517-90315 held by Jean-Paul Barallon and Marie-Celice Barallon with Australia and New Zealand Banking Group Limited (ANZ). The branch number of the bank is stated as 013-280. I note from the branch number and bank account number that these statements relate to the same bank account as the credit advices. The first document is page 1 of a document comprising 4 pages and contains details of transactions in 2013. Transaction details of 15th August 2013 show that a sum of AUD 44,783.28 was deposited in the account by way of “Transfer Reference 815024125. The second document is page 1 of a document comprising 5 pages and contains details of transactions in 2014. Transaction details of 5th May 2014 show that a sum of AUD 43,389.22 was deposited in the account by way of “Transfer Reference 505019902”. The third document is page 5 of a document comprising 5 pages and contains no indication as to which year the statement relates to. Transaction details of 23rd February show that a sum of AUD 50,000.00 was deposited in the account by way of “Transfer Reference 815024125.

[19] It is the defendant’s contention that all these documents should be produced by the bank. Counsel for the plaintiffs states at paragraph 3 of her answer to defendant’s objections:

3. *Who will bear the cost to bring a bank manager all the way from Australia to Seychelles to produce a Bank statement addressed to the Plaintiff. All the transactions are contained on my client’s laptop and as stated above he will retrieve the documents if need be. Emphasis added*

[20] The defendant takes this to be a suggestion from the 1st plaintiff that he “access his online banking in court for the court to examine”. Obviously this will be with a view to establish that the transactions in question occurred (i.e. transfers of the aforementioned sums from the defendant’s bank to the plaintiff’s bank). The defendant relies on section 4 of the Electronic Transactions Act 2001, which reads as follows:

Legal recognition of electronic records

4. *Where any law provides that information or any other matter shall be in writing then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is -
(a) rendered or made available in an electronic form; and
(b) accessible so as to be usable for a subsequent reference. Emphasis added*

[21] Records of banking transactions accessed on an online banking system fall within the definition of information rendered or made available in an electronic form envisaged by the aforementioned provision. In section 2 of the Electronic Transactions Act “information” and “electronic form” are defined respectively as:

“information” includes data, text, images, sound, codes, and databases;

“electronic form” with reference to information means any information generated, sent, received or stored in any computer storage media such as magnetic, optical, computer memory or other similar devices;

[22] The defendant contends that only the originator or the addressee of the online banking software information may produce such evidence or information. Under section 2 of the Act:

“addressee” means a person who is intended by the originator to receive the electronic record but does not include any intermediary;

“intermediary”, with respect to any particular electronic message, means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message;

“originator” means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;

[23] According to the defendant, the plaintiffs are neither the originator or the addressee of the information, and as per her submissions -

5. ... the beneficiary [bank] and the paying bank[s] are the originators and recipients of the funds. By the Plaintiff's own statement, they were advised of alleged payments by their bank. Therefore the Australian National Bank constituted an intermediary in the transaction.

[24] It is clear that the plaintiffs are not the *originators* of the information in question. The paying Bank in Seychelles which transferred the money on behalf of the defendant is. The payment having been done via the National Australia Bank it constitutes an *intermediary* in the transaction. The plaintiff's bank ANZ which is the beneficiary bank appears to be the *addressee* of the electronic information recorded on the online banking system in terms of the definition of that word under section 2. It would appear therefore that representatives of the originator and addressee banks would be the proper persons to produce such evidence in their electronic form, as submitted by the defendant.

[25] The plaintiffs complain about the costs of bringing an officer of the bank from Australia to produce the bank documents. Counsel for the defendant submits that the documents could be admitted pursuant to the provisions of the Evidence (Banker's Books) Act Cap 75 on the strength of a banker's affidavit. That Act finds its application for admission of entries in banker's books as evidence "of such entry, and of the matters, transactions and accounts therein recorded" in legal proceedings. I note that under that Act, "bank" or "banker" means any person carrying on the business of banking in Seychelles ...". Therefore I find that the provisions of that Act does not apply to documents emanating from a foreign bank.

[26] The plaintiffs wish to produce the two credit advices and the pages from bank statements in their documentary form. The Evidence Act, Cap 74, governs the admission of documentary evidence: section 14 of that Act deals with "evidence from documentary records" while section 15 deals with "documentary evidence from computer records".

[27] The relevant provisions of section 14 provide:

14. (1). *Subject to this section, a statement contained in a document shall be admissible in any trial as evidence of any fact stated therein of which direct oral evidence would be admissible if –*

(a) the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person, whether acting under a duty or not, who had, or may reasonably supposed to have had, personal knowledge of the matters dealt with in that information; and

(b) the person who supplied the information –

[...]

(ii) is outside the Republic and it is not reasonably practicable to secure his attendance ;

[...]

(vi) having regard to all the circumstances of the case, cannot be called as a witness without his being so called being likely to cause undue delay or expense.

(2) Subsection (1) applies

(a) whether the information contained in the document was supplied directly or indirectly, but if it was supplied indirectly, only if each person through whom it was supplied was acting under a duty ; and

(b) whether or not the person compiling the record is himself the person by whom the information is supplied.

(10) This section does not apply to a document to which section 15 applies.

[28] It would appear that the credit advices and statements would have been admissible under section 14(1)(b)(ii) and (vi) but for subsection (10) of that section which precludes its application in the case of documentary evidence derived from computer records in which case section 15 becomes applicable. It can be reasonably be assumed that the information in the documents sought to be admitted in evidence are computerised information. The relevant provisions of section 15 provide:

15. (1) In any trial, a statement contained in a document produced by a computer shall be admitted as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that –

(a) the computer was used to store, process or retrieve information for the purposes of any activities carried on by any body or person;

(b) the information contained in the statement reproduces or is derived from information supplied to the computer in the course of these activities; and

(c) while the computer was so used in the course of those activities

(i) appropriate measures were in force for preventing unauthorized interference with the computer; and

(ii) the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation, was not such as to affect the production of the document or the accuracy of its contents.

(2). Notwithstanding subsection (1) ... a statement contained in a document produced by a computer used over any period to store, process or retrieve information for the purposes of any activities (hereinafter referred to as the "relevant activities") carried on over that period shall be admitted in any trial as evidence of any fact stated therein of which direct oral evidence would be admissible if –

(a) it is shown that no person ... who occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities:

(i) can be found; or

(ii) if found, is willing or able to give evidence relating to the operation of the computer during that period;

(b) the document was so produced under the direction of the person having practical knowledge of and experience in the use of computers as a means of storing, processing or retrieving information ; and

(c) at the time that the document was so produced the computer was operating properly or, if not, any respect in which it was not operating properly or was out of operation, was not such as to affect the production of the document or the accuracy of its contents.

[...]

(5) Subject to subsection (6), in any trial where it is desired to give a statement in evidence under this section, a certificate –

(a) identifying the document containing the statement and describing the manner in which it was produced, and explaining, so far as may be relevant in the trial, the nature and contents of the document;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in subsection (1)(a) to (c) relate; and

(d) purporting to be signed by the person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be,

shall, on its production without further proof, be admitted in the trial as evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(6) Unless the court otherwise orders, a certificate shall not be admitted in evidence under subsection (5) unless 14 days' notice in writing of the intention to tender the certificate in evidence, together with a copy thereof and of the statement to which it relates, has been served –

(a) in a civil trial, by the party tendering such certificate on any other party thereto who is likely to be adversely affected in the trial by the statement if admitted in evidence under this section ;

(b) ...

but nothing in the subsection shall affect the admissibility of a certificate in respect of which notice has not been served in accordance with this subsection if no person entitled to be so served objects to its being so admitted.

(7) Notwithstanding subsection (5), a court may, except where subsection (2) applies, require oral evidence to be given of any matter mentioned in subsection (5).

[29] The requirements for production of documentary evidence under section 15 by the plaintiffs not having been complied with, they are precluded from producing such evidence under that section. However in terms of subsection (7) of that section a representative of the ANZ bank from which the documents emanated could produce those documents but the plaintiffs complain about the cost that this would entail. This difficulty could be overcome by application of Section 28 of the Evidence Act which allows the admission of documents from foreign countries provided they are properly authenticated or apostilled if they are from a “Convention State”, i.e. the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents 1961. The documents sought to be produced could be accompanied by an affidavit of an officer of ANZ bank, all duly authenticated or apostilled. In the present case this has not been done.

[30] But the matter does not end here. In her “Further Answer to Defendant’s Objections” at paragraph 5 thereof, counsel for the plaintiff refers the Court to paragraphs 5 and 8 of the defendant’s statement of defence and states “In her defence, the defendant clearly admits that she sent money to the plaintiffs”. The said paragraphs 5 and 8 read as follows:

5. *In paragraphs 4 and 5 of the Plaintiff, save that it is admitted that the Defendant sent money to the Plaintiffs it is denied that the payments were instalments or that there was an agreement to pay any balance in further instalments. The Defendant avers that any payments made were part of her extremely generous nature towards the Plaintiffs who were her relatives ...*
[...]
6. *Other than it is admitted that the defendant has not paid any further sums, the remainder of paragraph 8 is denied ...*

[31] I agree with the counsel for the plaintiffs that the above constitute admissions to the fact that “the Defendant paid the sum of R1,000,000” (paragraph 4 of the plaintiff) and “the Defendant paid ... R500,000/- in May 2014 and a further R500,000 in February 2015 ...” (paragraph 5 of the plaintiff). The defendant does not deny that the abovementioned sums were paid but is denying that they were paid pursuant to an agreement between the parties. The documentary evidence sought to be produced is evidence that such sums were paid and not evidence of the purpose for which they were paid. That purpose -

which the plaintiffs claim was in fulfilment of their agreement and which the defendant claims was out of her generosity - has to be proved by other evidence. As rightly stated by the Court of Appeal in the case of in *Jose Pool v H. Savy Insurance Company (Civil Appeal SCA 15/2016) [2018] SCCA 21 (31 August 2018)* “It is well known that a case is made or unmade by the pleadings. Both parties to a suit are bound by their pleadings. It is also trite that whatever is not denied in a plaint is deemed to be the truth.” All the more so, when an admission has been made in the statement of defence itself.

[32] The purpose of producing evidence is to prove or disprove a fact in issue or a disputed. In the present case, the purpose of producing the bank documents is to prove that payments were made by the defendant. The defendant is not disputing that fact as shown by his admission of it in his pleadings. There is therefore no valid reason to refuse the admission of such evidence, The Court therefore finds that the bank documents are admissible.

On the Merits

[33] Having dealt with this preliminary point I now proceed to deal with the matter on the merits. Only the plaintiffs and defendant testified at the hearing.

Testimony of the 1st Plaintiff

[34] Mr. Jean-Paul Barallon the 1st plaintiff testified that he is Seychellois but has settled and now resides in Australia where he works as a hotel manager. He has worked in the hotel industry since he left school and worked with a few hotels in Seychelles before migrating to Australia. The last hotel he worked at prior to moving to Australia is La Reserve Hotel situated on Praslin. He managed the hotel for its current owner Mr. Joe Albert.

[35] Prior to Mr. Albert acquiring the hotel it was owned by the defendant Mrs Pomeroy. In late 2012, Mr. Albert approached the 1st plaintiff to discuss acquisition of another hotel - Praslin Beach Hotel. He wanted to find out from the 1st plaintiff who had managed the hotel for a year, whether it was a viable project and the 1st plaintiff advised him against it. Defendant had been wanting to sell La Reserve Hotel for a while and he advised Mr. Albert that he would be better off purchasing La Reserve. He told him that he would talk to the defendant about it when he went to see her in December to organise his son’s wedding which was to be held at La Reserve.

[36] The 1st plaintiff duly informed the defendant of a potential buyer for the hotel without initially disclosing the identity of the said buyer, and she expressed her wish to sell the hotel. The 1st plaintiff then advised Mr. Albert of the same but the latter stated that the price at which he had heard the defendant wanted to sell the hotel was too high. Thereafter, with the intervention of the 1st plaintiff, defendant reduced the price to one which Mr. Albert found acceptable, namely UD\$ 20.5 million. The 1st defendant described his involvement in the process as “*just facilitating a process between two colleagues being in the industry*”. He further stated that he did not physically introduce the parties to each other but that Seychelles being a very small place, after his initial intervention they made contact with each other.

[37] The 1st plaintiff stated that although there was no proposal to pay him a commission as such, the defendant did promise that if he found a buyer for the hotel she would pay him 5% of the sale price which was later reduced to 1%. He emphasized that this was not a commission because he is not a broker but that the defendant stated that she would “give” him the money if he sold the hotel. He accepted the reduction of the sum to 1% because of the costs that the defendant explained that she had to bear. He further stated that at the time the defendant’s son was overseas negotiating the sale of the hotel to another entity at a lower price than that accepted by Mr. Albert and a higher broker’s fee.

[38] The sum of 1% of the sale price of the hotel the defendant agreed to pay to the 1st plaintiff amounted to US\$ 225,000 which translated roughly into Rupees 2.5 million. They agreed that this would be paid by instalments. The first two instalments of AUD 44,783.28 and AUD 43,389.22 amounting to Rupees 1 million was paid on 15th August 2013 and 5th May 2014 respectively, before 1st plaintiff left Seychelles for Australia at the end of May 2014. In support, the 1st plaintiff produced the following as exhibits:

- **Exhibit P1** - page 1 of a bank statement (stated to be page 1 of 4) of bank account number 3517-90315 held by Jean-Paul Barallon and Marie-Celice Barallon with Australia and New Zealand Banking Group Limited (ANZ), for the period 26/04/2013 to 25/10/2013. Transaction details of 15th August 2013 show that a

sum of AUD 44,783.28 was deposited in the account by way of “Transfer Reference 815024125”.

- **Exhibit P2** - page 1 of a bank statement (stated to be page 1 of 5) of the same bank account for the period 24/04/2014 to 26/06/2014. Transaction details of 5th May 2014 show a deposit of a sum of AUD 43,389.22 in the account by way of “Transfer Reference 505019902”.

[39] 1st plaintiff explained that the exhibits were part of bank statements of the Access Advantage Account held jointly by the two plaintiffs with their bank in Australia and showed the sums transferred to their account by the defendant.

[40] Defendant’s counsel objected to the admissibility of the documents on the ground that they were incomplete as they consisted of only one page of two bank statements comprising of more pages. To be more specific only page 1 of 4 pages comprising Exhibit 1 and page 1 of 5 pages comprising Exhibit 2 were produced. The 1st plaintiff admitted that the bank statements comprised more pages but stated that only the pages produced as exhibits contained relevant information pertaining to the payments made by the defendant to the plaintiffs. The other pages contained other personal transactions having no relevance to the present case. Counsel for the defendant submitted that it is not for the plaintiff but for the court to decide what is relevant to his case and that the whole statements should have been produced.

[41] I note that the admissibility of these same documents were objected to on the grounds that they should be produced by representatives of the bank from which h they emanated so that they could be cross examined, which objections were dealt with prior to the hearing and reasons given in the first part of this judgment. No objections were then preferred on the ground that the entire bank statements had not been produced. The same reasoning applies namely that the defendant having admitted in her statement of defence that she had sent money to the plaintiffs, there is no reason to refuse admission of evidence showing that such payments were made. See paragraphs 30, 31 and 32 of this judgment.

[42] The 1st plaintiff also produced as **Exhibit P3** a credit advice dated 5th May 2014 from Australia and New Zealand Banking Group Limited (ANZ) advising plaintiffs that the sum of AUD 43,389.22 had been credited to account number 013280351790315. The contents of the bank advice are described at paragraph 17 of this judgment. He explained that such advice is a document sent by a bank to an account holder when any money is transferred to their account from overseas.

[43] The 1st plaintiff testified that after he had received Rupees 1 million from the defendant there remained a balance of Rupees 1,587,500 outstanding. He stated that before leaving Seychelles for Australia at the end of May 2014, the plaintiffs met with the defendant and her accountant one Sudipto at her office at the Pension Fund building at Grand Anse Praslin to establish how the remaining balance was to be paid. It was agreed that the balance would be paid in three instalments in August 2014, December 2014 and April 2015 respectively. The 1st plaintiff reconfirmed this arrangement with the defendant on his arrival in Australia by an email to Sudipto who managed all defendant's funds. He produced an email dated 29th May 2014 sent from himself at 7:59 a.m. addressed to Sudipto - **Exhibit P4** - which reads in relevant part as follows:

*... I take this opportunity to confirm below the details of the funding arrangements that we agreed before we left for Australia.
One percent (1%) of sale is US\$225,000 @ 11.5 equals to SCR 2,587,500.
We have already received SCR. 1,000,000. This leaves an outstanding balance if SCR 1,587,500.
As discussed and agreed, the remaining balance will be disbursed in three instalments as follows:
SCR. 500,000 in August 2014, SCR 500,000 in December 2014 and the remaining SCR. 587,500 in April 2015.
Grateful if we could keep to this schedule because I am linking my mortgage borrowing to it ...*

[44] Mr. Sudipto Banerjee replied to the email on the same date at 3.56 p.m. His email, **Exhibit P5** stated:

... we will definitely follow the payment schedule as offered and as above. Not to worry. Next transfer of SR 500,000.00 will be in early August.

- [45] 1st plaintiff testified that a third payment of AUD 40,694.08 was made by the defendant to the plaintiffs' bank account on 28th August 2014. He produced as **Exhibit P6** page 1 of a bank statement (stated to be page 1 of 7) of bank account number 3517-90315 held by Jean-Paul Barallon and Marie-Celice Barallon with Australia and New Zealand Banking Group Limited (ANZ), for the period 26/08/2014 to 24/10/2014. Transaction details of 28th August 2014 show deposit of a sum of AUD 40,694.08 in the account by way of "Transfer Reference 828010606".
- [46] After payment of the third instalment was effected the 1st plaintiff tried to obtain payment of the fourth instalment due in December 2014 from defendant. He produced a series of emails between himself and the defendant dated 23rd December 2014 (**Exhibit P7**), 16th and 30th January 2015 (**Exhibit P8**), and 31st January, 4th February and 12th February 2015 (**Exhibit P9**). 1st plaintiff deponed that following this exchange of emails, payment of the fourth instalment in the sum of AUD50,000 was made in the plaintiffs' bank account on 23rd February 2015. He produced collectively as **Exhibit P10** page 5 of a bank statement as well as a credit advice. The page of the bank statement (stated to be page 5 of 5) showed transactions relating to bank account number 3517-90315 held with Australia and New Zealand Banking Group Limited (ANZ) from 23rd February to 26th February 2015. Transaction details of 23rd February 2015 show that a sum of AUD 50,000.00 was deposited in the account by way of "Transfer Reference 223027768". The credit advice dated 23rd February 2015 from the bank and addressed to the plaintiffs advises that funds have been received in their favour from National Australia Bank and were credited to their account number 013280351790315. It states the "Ordering Customer" as "La Reserve (Proprietary) Ltd, Baie Ste Anne, Praslin Island, Seychelles". Details of payment are stated as "PMT B/O Jenny Pomeroy of La Reserve (Pty) Ltd". The amount received and credited is stated to be AUD 50,000.00.
- [47] On 6th May 2015, the 1st plaintiff emailed the defendant to inform her that payment of the 5th instalment was now due. The relevant part of the email (**Exhibit 11**) reads: "... *This short note is a small reminder that the last instalment is now due and would be grateful if you could organise the transfer as soon as possible*". In the defendant's email in reply dated 8th May 2015 she states "*With regards to the last instalment unfortunately it won't*

be possible until May next year when Mr. Albert pay (sic) me as business is a bit slow at the moment + I also have other expenses outstanding for my bakery equipment". In a further email to the defendant dated 27th May 2015 (**Exhibit 12**) 1st plaintiff enquires into the possibility of splitting the payment into smaller amounts and paying it by instalments every few months. This, he says, will keep plaintiffs' bank happy and not jeopardise their mortgage commitments. The defendant's email in reply of the same date reads in relevant part as follows: "... unfortunately as advised previously I will only be able to pay you in May next year and not before. All the commissions I've paid you are through my personal account and not from the business accounts, so I'm very sorry but the last payment will be scheduled for May 2016. If in a way you feel let down it's not because of me but Joe Albert as I feel let down too."

[48] The 1st plaintiff testified that after one year had elapsed, he emailed the defendant on 26th July 2016 as follows: "*I have been trying to call you a few times but have had no response. Celice also sent you a text message and had no luck. This mail is to check on the status of our final instalment as we have committed ourselves with our bank to finalise our mortgage payment by 15th August. The final amount as per our agreement is Scr. 587,500.00. Please make contact and we look forward to hearing from you.*" At the same time he was trying to reach the defendant by phone with no success. He followed up with another email dated 7th August 2016 the relevant part of which reads "*Grateful if you could make contact with me as I do not want to spoil our friendship. I have made further calls to you and I am not getting any responses.*" Both emails were collectively admitted as **Exhibit 13**.

[49] The defendant responded by an email dated 26th August 2016 the relevant part of which reads "... *I've been so busy those past weeks. So further to your email, please note that the money received from Joe Albert this year was used to clear part of the loan for my business and therefore I will only be able to give you your final instalment in May next year when I get paid from Joe Albert. I am trying my very best to honour my word as NO formal contract was made to this agreement + I also have other commitments*". 1st plaintiff replied with a long email dated 30th August 2016 partly reproduced below. Both emails were collectively admitted as **Exhibit P14**.

... I do realise that there was NO formal contract between you and I. We had a gentleman's and friend agreement that I formalised to you in my email of 29th May 2014 where I broke down the instalment agreements. This to me is binding, especially bearing in mind that, what we were expecting, was the last of four instalments and the first three have already been paid.

The non payment of the fourth instalment, as per agreed by you in your mails of 8 and 27 May 2015, is going to place Celice and I into financial stress because we had also made plans and commitment, that payment was crucial in that plan. We made you aware of this prior to our departure from Seychelles and also in some of the mails I sent you.

Celice and I beg you to reconsider the delay in paying us or at least make some periodic payment so that we can pacify our bank here and relieve us from that stress that we do not need at this period of our live. Periodic payments will also make the final settlement smoother as you will not have to fork out a big amount of money in one go.

Jenny we do realise that you have financial commitments, but please put yourself in our shoes and consider our situation.

[50] The 1st plaintiff stated that receiving no response to his email dated 30th August 2016 he sent three further emails to the defendant dated 26th September 2016, 1st October 2016, 21st October 2016 respectively asking her to acknowledge receipt of his emails and to respond to them. Still receiving no reply he sent a further email dated 21st December 2016 informing the defendant that the plaintiffs had decided to travel to Seychelles towards the end of May 2017 and that they planned to meet her “to finalise all outstanding dues. He expressed his hope “to return to Australia with all sorted out”. He further stated that they “planned to travel at this time because you indicated that this is the time that Joe Albert will also settle what he owes you and that you will have the necessary funds to clear the final instalment ...”. These emails were admitted collectively as **Exhibit P15**.

[51] Having received no response from the defendant the plaintiffs travelled to Seychelles in July 2017, as they could not get annual leave in May as originally planned. Since the defendant had not been answering their phone calls and communication between them had broken down completely, they contacted the defendant's son Peter to see how they could get in touch with her. He informed them that she was overseas. After that the plaintiffs saw the defendant in the Eden Island parking lot. The 1st plaintiff, after unsuccessfully trying to catch her attention, caught up with her while she was hurrying up

the stairs. The defendant told her to call her. The 1st plaintiff testified that they interpreted the defendant's attempt to "escape" from them at Eden Island and then telling them to contact her on the phone when she never responded to their phone calls, as the defendant having no intention of meeting with them which led them to the decision to contact their counsel attorney-at-law Ms Lucie Pool to take legal action. Ms. Pool wrote a letter to the defendant dated 15th December 2017 (**Exhibit P16**) requesting that she pay the plaintiffs the outstanding balance of R587,500 as per her agreement to pay them 1% commission on the sale price of La Reserve Hotel for services rendered by the 1st plaintiff. Failure to effect such payment within 14 days of the letter would result in plaintiffs seeking redress from the courts. This was followed by a letter dated 16th January 2018 from Ms. Pool to defendant's counsel attorney-at-law Ms. Alexandra Benoiton (**Exhibit P17**) with copy of exhibit 16 enclosed inviting Ms. Benoiton and the defendant to negotiate a settlement. Ms Benoiton replied by letter dated 30th January 2018 (**Exhibit P18**), the relevant part of which reads as follows:

My client instructs me that she is not aware of any agreement she and your clients have or have ever had in respect of commission or any other payment of fees.

I am further instructed that my client and Mrs. Marie-Celice BARALLON are relatives and that any money given to your clients were solely a gift from my client with a view to helping out her family.

My client is surprised to be informed that your clients are claiming a 1% commission agreement for a sale that they had no part in and further, I am instructed that neither of your clients have any licenses or otherwise in which to engage the services they are alleging they provided.

My client finds it unfortunate that your clients are now claiming these sums against my client and my client does not wish to have familial ties broken by what may be a miscommunication or misunderstanding. As my client is unaware as to the alleged agreement supposedly contained in the emails or correspondences, kindly provide a copy of the correspondences you refer to.

[52] Ms Pool responded by letter dated 9th March 2018 addressed to Ms. Benoiton (**Exhibit P19**) enclosing email correspondence between the 1st plaintiff and the defendant and informing her that the plaintiffs were "still open to negotiations with a view to settle [the] matter amicably". This letter was followed by another dated 27th April 2018 from Ms Pool to Ms Benoiton (**Exhibit P20**) enquiring whether after viewing all the emails

between the 1st plaintiff and the defendant, her client still maintained her stance not to enter into negotiation with plaintiffs to reach an amicable settlement. She further stated that if within twenty-one days of the date of the letter no reply was forthcoming, she was instructed to commence legal proceedings against the defendant.

[53] When examined as to his relationship with the defendant, 1st plaintiff explained that the 2nd plaintiff's and the defendant's mothers are distant cousins and opined that this is a distant family relationship. He denied the defendant's claim that payments made to him by the defendant were due to her generous nature towards them as relatives and maintained that the payments were made pursuant to an agreement between them.

[54] He admitted that his son got married at La Reserve but vehemently denied that this was at no cost to the plaintiffs as averred in defendant's statement of defence. He explained that plaintiffs provided most of the food and all the drinks for the wedding and paid Rupees 400 per head for the guests of which there were quite a number. The money was paid in cash directly to the defendant as it was a few days before the sale of the hotel and she did not want the money to go into the system but wanted to pocket it. Furthermore some of the wedding guests who came from overseas also stayed at the hotel at their own cost.

[55] The 1st plaintiff Rupees stated that he was claiming the outstanding balance of Rupees five hundred and eighty seven thousand five hundred (SCR587,500.00) remaining unpaid by the defendant in breach of their agreement. He further claimed moral damages in the sum of Rupees Fifty Thousand (SCR50,000.00) for distress and inconvenience. He explained that the plaintiffs had made a commitment to their bank to make mortgage repayments and were relying on the money they were expecting from the defendant to do so. When this was not forthcoming it caused major embarrassment and stress between them and their bank. It also caused them a lot of stress because in Australia when a person defaults on bank payments it causes them a lot of problems. They therefore had to find other ways of making the repayments which was hard. The 1st plaintiff claimed a total of Rupees six hundred and thirty seven thousand five hundred (SCR637,500.00) as loss and damages and prayed for judgment in his favour in that sum with interests and costs. in the sum

- [56] In cross examination 1st plaintiff stated that from 2013 to 2014 during the year prior to his departure for Australia in May 2014, he worked as General Manager of La Reserve Hotel, by then in the ownership of Mr. Albert. Before Mr. Albert acquired the hotel, the 1st plaintiff was employed by Mrs. Kathy Mason in the hospitality section of her business Masons Travel, for two and a half years.
- [57] The plaintiffs' son got married in May 2014 while ownership of La Reserve Hotel was still in the defendant's hands and before the 1st plaintiff started working for Mr. Albert. The 1st plaintiff does not know whether at that time any agreement had been reached between Mr. Albert and the defendant for the sale of the hotel but states that they were negotiating.
- [58] He reiterated that his role in the acquisition of the hotel was to facilitate the process of the sale meaning that he led the seller (defendant) and purchaser (Mr. Albert) to each other. He explained that he made the Mr. Albert aware that the hotel was for sale and at what price and made known to the defendant that Mr. Albert wanted to buy the hotel.
- [59] The 1st plaintiff stated that the conversation that he had with Mr. Albert regarding his acquisition of La Reserve Hotel took place while he was still working for Mrs. Mason. He had gone to see Mr. Albert at the latter's request. When they met Mr. Albert sought his advice and guidance on whether he should purchase Praslin Beach Hotel in view that he had previously managed that hotel and because of his experience as a professional hotelier and 1st plaintiff advised him against it. At that time everyone in the hotel industry was aware and it was common knowledge that the defendant wanted to sell La Reserve Hotel. Mr Albert was also aware that La Reserve was for sale but was not prepared to pay the price that the defendant was asking for it and gave an indication of the price he was willing to pay. The 1st plaintiff offered to ascertain the defendant's exact position on the matter when he saw her regarding his son's wedding. He duly informed the defendant that someone was interested in buying the property and the proposed price without revealing the identity of the prospective buyer, whereupon the defendant informed him of the price which she was prepared to accept which he conveyed to Mr. Albert who was satisfied with the new price. After that the 1st plaintiff did not take part in any further

negotiations between Mr. Albert and the defendant. They got in touch with each other and finalised the deal themselves.

[60] The 1st plaintiff reiterated that the defendant told him that if she sold the hotel she would give him 5% of the purchase price which was later reduced to 1% but does not recall exactly when she made that offer.

[61] A great part of the cross examination of the 1st defendant focused on whether the sum agreed to be paid by the defendant to the 1st plaintiff was a commission. It was pointed out to him that he had mentioned the word “commission” no less than 10 times in his testimony, and that the word was used in his emails and in his counsel’s letters to the defendant. He replied that he did not know who first used the word but stated that the defendant stated that she would give him 5% and did not say that it was a commission. It was put to him that he could not carry out the work of a Commission Agent without a licence and he denied being one. When asked why he is claiming what is supposedly left of his commission if he is not a Commission Agent, he stated that he never mentioned the word “commission” in any of his emails but claimed¹ that it was the defendant who did so.

[62] He explained that if defendant’s son had sold the hotel overseas through a broker, the latter would have charged a commission of 8% of the purchase price. The defendant therefore wanted to give 1st plaintiff a gift if she managed to sell the hotel without having to pay such a high commission. The 1st plaintiff insisted that he is not and never was a broker and has never promoted himself as such, and is only seeking payment of what the defendant promised to give him.

[63] Asked to clarify whether the money offered to him by the defendant was a gift or a commission, 1st plaintiff maintained that the defendant had offered to give her 5% which was reduced to 1% of the sale price if he sells the hotel, and stated that he does not know whether it is a gift or a commission but that there was arrangement between them for him to be paid 1%.

- [64] It was further put to the 1st plaintiff that not being a Commission Agent he is not legally entitled to request payment of a commission. He opined that payment of the sum the defendant offered him is a different matter from a commission paid to a Commission Agent. He did not officially request a commission from the defendant and is not a Commission Agent or a broker.
- [65] The 1st plaintiff agreed with counsel that the agreement between the defendant and himself was for the payment of a percentage of the sale price of the hotel for facilitating the transaction between the defendant and the purchaser – which counsel stated is the very definition of a commission agent. He reiterated that he never asked for a commission, that it was the defendant who offered it and that maybe it became a commission afterwards. The 1st plaintiff stated that the term “commission” had been used loosely for want of another word but it was not a commission in the sense of a percentage of the sale price that is paid to a broker for negotiating the sale. He explained that the money was basically a gift that was termed a commission because that was the term used in the industry but insisted that it was not a commission, that he was not a Commission Agent and that he was not asking for a commission.
- [66] 1st plaintiff’s attention was drawn to exhibits produced by him in which the word “commission” was used, namely Exhibit P7 (email dated 3rd December 2014 from 1st plaintiff to the defendant) and Exhibit P16 (Ms Pool’s letter dated 15th December 2017 addressed to the defendant), as well as paragraph 2 of the plaint which reads as follows: *“It was the terms of the agreement between the Plaintiff and the Defendant that the 1st Plaintiff would receive a 1% commission”*.
- [67] As to his relationship to the defendant, the 1st plaintiff stated that he was not related to her but they have been friends since 1981 when he managed other hotels on Praslin and that plaintiffs have even stayed at defendant’s house a few times although the friendship has now soured a bit. He described the agreement between the parties as more of a personal one between friends than a business agreement, as at the time they were close friends.
- [68] He confirmed that he was not employed by the defendant, but in the transaction in question she was the principal/seller and the terms of the agreement was that he would

obtain money from her which he did, in part. Had the sale not gone through he would not have received any money.

[69] 1st plaintiff maintained that the defendant did not host his son's wedding for free although he admitted that she is a generous person. He maintained that plaintiffs paid for the wedding but admitted that he had no proof of such payments which were made in cash.

[70] 1st plaintiff confirmed his testimony in chief regarding the damages claimed to have been suffered by the plaintiffs. It was put to the 1st plaintiff that any stress he suffered was as a result of his arrangement with his bank which he could not fulfil and not related to any agreement between the parties. He maintained that he was unable to fulfil his obligations to the bank because the defendant had not fulfilled her's towards him.

[71] The 1st plaintiff stated that in addition to costs claimed, travelling costs from Australia to Seychelles, loss of earnings, accommodation, food and transport costs during the time he is in Seychelles for the case should be included in his costs, although he could not provide a figure therefor. He stated that the sum of SCR50,000 he had claimed as damages would have to be revised.

[72] In re-examination the 1st plaintiff stated that he understood the word "commission" in the defendant's email to him to mean the money she agreed to pay him for facilitating the process but denied that it was a commission. He further stated that the defendant did not use the word "commission" at the time but merely said that she would give him 5% and later 1% and that the word "commission" was only used for want of a better word. He emphasised that the word "commission" was not used in relation to him as a Commission Agent but to describe the money promised to him by the defendant.

Testimony of the 2nd Plaintiff

[73] Marie-Celice Barallon, the 2nd plaintiff resides in Australia and is the wife of the 1st plaintiff whose testimony she adopted. She stated that she was the one who made most of the phone calls to the defendant and spoke to her. In the beginning the defendant answered her calls and made a lot of promises but towards the end no one could get through to her on the phone.

- [74] In 2017, she and the 1st plaintiff came to Seychelles. She had spoken to the defendant about their trip but they could not come in May as they originally intended and came in July instead. When they arrived they tried to call the defendant but she did not answer the phone. Eventually the 1st plaintiff got hold of defendant's son Peter who told her that his mother was overseas.
- [75] When the plaintiffs saw the defendant at Eden Island, 2nd plaintiff does not know whether she had just arrived from overseas or had been in Seychelles all along.
- [76] She confirmed the 1st plaintiff's testimony that they had paid for and organised their son's wedding and had bought three types of wine, beer, spirits, a goat, smoked fish and a few other things. In addition, they were charged SCR400 per person amounting to SCR40,000 to SCR 47,000 which 2nd plaintiff paid herself in cash. The defendant had requested cash payment as the hotel was about to be sold.
- [77] She further confirmed that the bank statements produced as exhibits by the 1st defendant were statements of a bank account in the joint names of the plaintiffs.
- [78] In cross examination 1st plaintiff stated that she is also a hotel manager and worked at a few places while she was living in Seychelles. While her husband was working for Mrs. Mason she worked for a South African lady whose name she does not recall, at La Misere.
- [79] With regards to the unpaid outstanding balance of SCR587,500 claimed as loss and damages, the 2nd plaintiff admitted that she had done nothing and stated that it was her husband who had done everything. She never entered into any agreement with the defendant to facilitate the sale of the hotel for a percentage of the sale price but it was her husband who did. She was claiming the money as the wife of the 1st plaintiff as they are married, have a joint bank account and whatever he earns is also hers.
- [80] As to the proportion of the SCR50,000 claimed as moral damages for inconvenience and distress, 2nd plaintiff stated that the plaintiffs were each entitled to half of that amount.

Testimony of the Defendant

- [81] The defendant Jenny Isabelle Pomeroy, residing at Pointe Cabri, Praslin testified that when she decided to sell her hotel, she got in touch with an Arab in Dubai whom her son Peter went to see. However, preferring to sell the hotel to a Seychellois, she also got in touch with Mr. Joe Albert to see whether he wanted to buy the hotel. Mr. Albert was in France at the time and told her he would contact her when he returned to Seychelles.
- [82] At around that time the 1st plaintiff paid her a visit and the defendant told him that Peter was negotiating the sale in Dubai and that she had also contacted Mr. Albert. 1st plaintiff told her not to worry, that Mr. Albert is his cousin and that he would talk to Mr. Albert and let him know defendant was selling the hotel.
- [83] The defendant testified that after her conversation with 1st plaintiff, Mr. Albert contacted her and told her he had spoken with 1st plaintiff and that he would buy her hotel. 1st plaintiff came back to her and told her that Mr. Albert was prepared to buy the hotel because the price was cheaper than what she had originally asked for it. She does not know what 1st plaintiff told Mr. Albert but maintains that she spoke to Mr. Albert first.
- [84] The defendant stated that there was no agreement between herself and 1st plaintiff but that she had told him “I will give you something”, because she knows the plaintiffs and she is normally very generous. Defendant stated that she has known plaintiffs for years: she and 2nd defendant grew up together and went to the same school and she used to go and have lunch at 2nd plaintiff’s parents’ house at Anse Forbans. The plaintiffs stayed with her on Praslin when they just came in from Denis Island and after that on many occasions when they came to Praslin. She further stated that if someone helps her, she helps them too.
- [85] She confirmed that the plaintiffs never asked her for any money but did ask her to “help” them in return for getting Mr. Albert to buy their property. Their daughter was pregnant with twins and they needed help to buy a house in Australia. She helped them because she has a good heart and likes to help people. Defendant’s understanding of their request to help them was that she would give them something in return for speaking to Mr. Albert and convincing him to buy the property. As to the amount of money that the defendant was to pay the 1st plaintiff, she stated that she just gave him some money after which he

started pestering her for more and she again gave more money because she was kind hearted.

[86] When asked to clarify whether she paid the money out of generosity or because she had entered into an agreement with the 1st plaintiff to help her sell her property, she stated that she never signed any contract but that she was under the impression that in return for assisting her in the sale of the hotel she would have to pay him money.

[87] The defendant testified that she does not know why the word “commission” was used by the parties in their correspondence, that it was first used by the 1st plaintiff and she followed suit. She gave him the money but did not think of whether or not it was a commission. When she was further asked whether her understanding that the payments were in fact commission, she admitted that they were.

[88] She stated that she was never informed whether 1st plaintiff had a licence to practice as an agent, and that when she received legal notices from him requesting payment of his commission, she was never informed of the basis for his requests. After she had made the payments to the defendant she was advised that a Commission Agent needed to be licensed and that she should not have entered into a commission agreement with an unlicensed person. She then understood that the payments made to the 1st plaintiff was not entirely in line with the law which is why she stopped the payments.

[89] In cross-examination defendant stated that she was the owner of La Reserve Hotel from 1972 up to the time of its sale to Mr. Albert. She maintained that it was not 1st plaintiff who put her in contact with Mr. Albert but that when 1st plaintiff offered to talk to Mr. Albert about purchasing the hotel, she had already spoken to him while he was in France in 2012 or 2013 – she did not recall exactly when. She had indicated a price to Mr. Albert which she has now forgotten and he had expressed interest in buying the hotel and told her he would get in touch with her upon his return. Mr. Albert never told her that price was too high, but it was 1st plaintiff who told her that he had said so. The price that she had originally quoted to Mr. Albert was higher than the price at which the hotel was sold but she explains that it is normal to start at a higher price and bring it down after negotiations.

- [90] When defendant first discussed the matter with 1st plaintiff, the former had come to Praslin for a visit and during the course of their conversation she told him about Peter being in Dubai to negotiate the sale of the hotel. 1st plaintiff told her not to worry, that Mr. Albert is his cousin and he would talk to him. After Mr. Albert returned from France, 1st plaintiff spoke to him. He then went back to the defendant and told her that Mr. Albert had said that he did not know the price was so reasonable – the defendant had reduced the price from what it was originally – and that he was willing to buy the hotel at that price.
- [91] Defendant denied promising the 1st plaintiff 5% of the purchase price for the hotel but admitted saying that whoever sells the hotel would ask for 5%. She explained that it is common knowledge that whoever sells property on behalf of another gets 5%. Under further cross examination she agreed with counsel that she had said that she would pay 5% to whoever is selling the hotel. She stated that this is because that is the normal price.
- [92] Defendant denied that she had agreed to pay 1st plaintiff SCR 1million for his services but stated that he had only assisted the plaintiffs because they needed help. She denied that the SCR 1million that she had paid 1st plaintiff while he was still in Seychelles was pursuant to any agreement between them to help her sell her hotel but stated that it was because of her generosity. She stated that the 1st plaintiff did not help her sell her hotel and that she did it herself with her son's help – 1st plaintiff was only there to support her as a friend. Defendant denied promising to pay 1st plaintiff 1% of the purchase price for his support. Defendant further denied paying any commission to the 1st plaintiff as remuneration for what he did for her but reiterated that she helped them out of good will. She insisted that she paid Rupees 2 million to the 1st plaintiff without him having done anything for her.
- [93] It was put to her that she herself had referred to a commission in one of her emails to the 1st plaintiff and she explained that she had only done so after the 1st plaintiff had used that term. She stated that when she used the word “commission” she meant the money that she had given plaintiffs. As for Commission Agent she stated that she did not know what that was, had never dealt with one, and that it was a lawyer friend who had mentioned it to her. He told her that she should not have given her money away to a person who was

not a Commission Agent and asked her whether she had signed any contract with the person to which she replied in the negative.

[94] Defendant admitted that there was exchange of emails between her and the 1st plaintiff but then stated that she did not even know how to send an email and had asked the person who works with her to do it for her. Under further cross-examination she admitted that some of the emails were exchanged between her and the 1st plaintiff but said that for others she was not even there when they were sent. She gave the example of the emails sent when 1st plaintiff was liaising with Sudipto, financial controller of the hotel who handled all her finances, and said that at the time Sudipto was in India and she was in England but that Sudipto would call her. She stated that the email in reply to 1st plaintiff's email setting out the details of the funding arrangement was sent by Sudipto after discussion with her. At the time he was in India and was not working for her having gone away for a year after the hotel was sold. Defendant stated that she was aware that the outstanding balance of SCR1,587,500 after the first SCR1 million had been paid was to be paid by three instalments and that she did not pay the final instalment after she was told that she should not do so because 1st plaintiff was not a licensed Commission Agent.

[95] Defendant was asked why she did not ask 1st plaintiff to return the money already paid to him when she was advised that she should not have paid him. She replied that she had thought of doing so many times but had not done so, even if her lawyer had advised her to because she knew the plaintiffs and did not have the heart to ask them to return the money. She did not instruct her lawyer to write to the plaintiffs either because she is not like them – they were the ones suing her and asking for money. It was put to her that plaintiffs were only claiming the last instalment due to them and she said that she did not owe them anything and had never promised them anything and moreover there was nothing from her in writing to that effect. She stated that even if she did not owe them anything she still paid them SCR2 million because she was of good faith. She maintained that she had paid out of good faith even when it was put to her that she had paid because there was a contract evidenced by the emails and other documents exhibited.

- [96] Defendant stated that she did not pay the final instalment to the 1st plaintiff not only because she was advised not to do so but also because she also had expenses. She worked hard for what she had and could not just throw it away. She had helped them but she also has to look out for herself. Further she had not entered into any agreement with them.
- [97] Defendant accepted that she was friends with the plaintiffs but denied that she was related to the 1st plaintiff. She confirmed that 2nd plaintiff's mother and defendant's mother are cousins and said that she and 1st plaintiff grew up together and were close.
- [98] Defendant accepted that plaintiffs provided food and drinks for their son's wedding but stated that the food was cooked by her chef in the hotel's kitchen. She denied receiving any money from the plaintiffs and stated that she had not charged them for the venue.
- [99] Defendant denied having any agreement with the plaintiffs or owing them any money. She denied that 1st plaintiff had provided any services to her and claimed that she has known Mr. Albert for years and did not need anyone to introduce her to him.
- [100] She also stated that she did not enquire whether 1st plaintiff had a license when she started making payments to him because it was only when he started pestering her for money that she sought legal advice and was told that she should not have paid him because he was not licensed. She said that she did not ask for her money back because once she has helped someone she does not regret it and go back on it.
- [101] In re-examination defendant clarified that people who are licensed to sell property on behalf of others charge 5% of the sale price. She stated that in the plaintiffs' case she gave them the equivalent of 1% of the sale price because of her relationship with them.
- [102] She reiterated that the 1st plaintiff never asked her to pay him in return of his services. She was the one who told him that "ok it is 5% on the market but at the end I will give you some money". There was no agreement between them as to the percentage she would pay them and in particular that it would be 1%. She just gave them some money out of good faith and this was done in instalments because Mr. Albert paid her in instalments and she herself did not have that amount of money.

[103] She reiterated that she did not ask the plaintiffs to return her money when she found out that the 1st plaintiff was unlicensed because when you give something to someone you do not ask for it back. The money was to pay for a mortgage on a house they were going to buy for their daughter who was expecting twins. She just considered it as lost money.

Submissions

[104] Counsels for both parties were invited to file written submissions. Only counsel for the plaintiffs did. Her submissions will be considered as relevant in the court's analysis below.

Analysis

[105] The questions arising for the Court's determination in light of the pleadings, are:

- (1) Whether the pleadings disclose a cause of action against the defendant insofar as it concerns the 2nd plaintiff.
- (2) Whether there was an agreement between the parties; and
- (3) If yes, whether the defendant breached that agreement.

Is there a cause of action against defendant as regards 2nd plaintiff

[106] Subsections (d) and (e) of section 71 of the Seychelles Code of Civil Procedure ("the Civil Procedure Code") respectively provide that a plaint must contain "*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*" and "*a demand of the relief which the plaintiff claims*".

[107] Section 107 the Civil Procedure Code which makes provision as to who may be joined as plaintiffs in part provides that "*All persons may be joined in one suit as plaintiffs in whom the right to any relief claimed is alleged, whether jointly, severally or in the alternative, in respect of the same cause of action ...*". Emphasis added. Section 109 of the same Code in part provides that "*All persons may be joined as defendants against*

whom the right to any relief is alleged to exist whether jointly, severally or in the alternative ...”

[108] According to the above provisions the plaint must disclose a cause of action in that, it must not only disclose the plaintiff’s right to any relief claimed but must also disclose that the right to such relief exists against the defendant, that is, the defendant’s liability for such relief. All of this must be apparent from the plaint.

[109] An examination of the plaint reveals that the names of both 1st and 2nd plaintiffs appear in the caption thereof. However it is only the 1st plaintiff who is alleged to have entered into an agreement with the defendant (paragraph 1 of plaint). It is further averred in paragraph 2 of the plaint that “ *It was a term of the Agreement between the Plaintiff and the Defendant that the 1st Plaintiff would receive 1% commission of the sale price amounting to US\$ 225,000 payable at the prevailing exchange rate of R 11.5, equivalent to SR2,587,500/-*” Emphasis added. It is only thereafter that reference is made to “*the plaintiffs*” but only in terms of what they aver in the plaint and in the prayer for relief. There is nothing pleaded showing that the 2nd plaintiff was entitled to the relief claimed or that the defendant was liable to her for such relief.

[110] I also take note of 2nd defendant’s admission in her testimony before this Court that she never entered into any agreement with the plaintiff and took no part in facilitating the sale of the hotel but that it was 1st plaintiff who did everything. According to her, the basis of her claim is that she is entitled to a share of whatever he has as his wife.

[111] It is clear from the above that the 2nd plaintiff has no claim against the defendant in that the plaint does not disclose nor has it been established that she has a right to any relief against the defendant or that the defendant was liable to her for any relief. Any agreement was between the 1st plaintiff and the defendant and did not create any obligations for the defendant vis-à-vis the 2nd plaintiff. I therefore find that no cause of action lies against the defendant insofar as it concerns the 2nd plaintiff whose name is accordingly struck out from these proceedings.

Was there an Agreement between the parties?

[112] The plaintiffs aver in paragraphs 1, 2 and 3 of the plaint that:

1. *In the years 2013/2014 the 1st Plaintiff entered into an agreement in writing with the Defendant to negotiate the sale of La Reserve Hotel on her behalf.*
2. *It was a term of the Agreement between the Plaintiff and the Defendant that the 1st Plaintiff would receive 1% commission of the sale price amounting to US\$ 225,000 payable at the prevailing exchange rate of R 11.5, equivalent to SR 2,587,500/-.*
3. *The Agreement between the parties is contained in an exchange of emails, payment advises and other communication between the years 2013/2014 to date.*

[113] It is further averred in the plaint that payments were effected to the plaintiffs by the defendant pursuant to their agreement in four instalments amounting to SCR 2 million but that the defendant defaulted on the final payment of SCR 587,500, which they are claiming in terms of this suit.

[114] The defendant on the other hand denies the existence of any such agreement and avers in her statement of defence that the communications between the parties were not intended to create any legal relations. While she admits that she sent money to the plaintiffs, she avers at paragraph 5 of her defence that “*any payments made were part of her extremely generous nature towards the plaintiffs who were her relatives*” and denies there was any outstanding balance payable.

[115] The evidence shows that there was no formal contract entered into by the parties. Article 1341 of the Civil Code of Seychelles Act (“the Civil Code”) prevents proof of agreements of more than Rupees 5000 by oral evidence. It provides:

Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.

[116] However Article 1347 of the Civil Code which is an exception to the rule laid out in Article 1341 allows oral evidence to prove a contract in excess of SCR5000/- where there exists initial proof in writing emanating from the party against whom it is invoked and which renders the facts alleged likely. Vide Weller v Walsh SCA 03/2015 (7 December 2017). Article 1347 provides:

The aforementioned rules shall not apply if there is writing providing initial proof.

This term describes every writing which emanates from a person against whom the claim is made, or from a person whom he represents, and which renders the facts alleged likely.

[117] The 1st plaintiff has produced as exhibits certain writings in the form of printouts of emails emanating from one Sudipto Banerjee formerly the financial controller of the defendant's business as well from the defendant, namely email dated 29th May 2014 (Exhibit P5), email dated 31st January 2015 (Exhibit P9), email dated 8th May 2015 (Exhibit P11), email of 27th May 2015 (Exhibit P12) and email dated 26th August 2016 (Exhibit P14) which in my view renders it likely that there was an agreement between the parties for the defendant to pay the sum of SR 2,587,500/- to the 1st plaintiff as a commission for negotiating the sale of La Reserve Hotel on her behalf as alleged by the 1st plaintiff, and that the sum of SCR 2,000,000/- was paid to the 1st plaintiff by the defendant leaving an outstanding sum of SCR587,500/- due to the 1st plaintiff.

[118] It is clear from her statements in cross examination that she was not only aware of Sudipto Banerjee's email to the 1st plaintiff but also approved of its contents as she admitted that it was sent after discussion with her. I also do not believe the defendant's initial assertion that she does not know how to send an email and that she got people who worked for her to do so especially in light of her admission after further cross examination that emails were exchanged between her and the 1st plaintiff.

[119] The defendant has pleaded at paragraph 5 of her defence that the money she sent to the plaintiffs was because of her generosity to them as relatives. She confirmed this at the

beginning of her testimony and stated that there was no agreement between her and 1st plaintiff and she had merely stated that she would give him “something” because of her relationship to the plaintiffs and because she was a generous person. However she then stated that if someone helps her she helps them too. She then went on to state that the payments were made pursuant to a request by the plaintiffs to “help” them as they needed financial assistance which she understood to be a request to give them something in return for helping her sell the property to Mr. Albert. While there are inconsistencies in the defendant’s testimony in chief as to the reason for the payments, it is clear that the payments she made to the 1st plaintiff were linked to the assistance rendered to her by the 1st plaintiff in selling the hotel. I find it hard to believe that the defendant made the payments to the 1st plaintiff out of the goodness of her heart although I have no doubt that at the time they were good friends. If indeed she had merely promised to give him “something” or to “help” him she would have felt no obligation to transfer further funds to him when she found herself in difficulty to do so as shown by her emails to the 1st plaintiff, particularly after having already transferred a sum of SCR 2,000,000 to him. In my view payment of such a sum would have been ample proof of her generosity to the plaintiffs. However the defendant in her emails of 8th May 2015 and 27th May 2015 and 26th August 2016 instead of communicating the same to the 1st plaintiff tried to defer payment of the outstanding sum of SCR587,500 to a future time when she would be in a better financial position to effect the payments. It is also significant that at no time did the defendant in her emails deny that there was an agreement between the parties although she stated in her last email to the 1st defendant dated 26th August 2016 that there was no formal contract between them. Her specific words were “I’m trying my very best to honour my word as NO formal contract was made to this agreement ...” Emphasis added. The implication is that she gave her word to the defendant and that there was an agreement between them albeit not in the form of a formal contract.

[120] Furthermore the inconsistencies in defendant’s testimony makes her come across as an unreliable witness. In examination in chief she kept on changing her story as to the reason for the payments to the 1st plaintiff from having a kind heart and her relationship to the plaintiffs, to plaintiffs requesting her help and yet again to the payments being in return for the 1st plaintiff helping her with the sale of the hotel. In cross-examination she stated

that she had only assisted the plaintiffs out of good will because they needed help, that the 1st plaintiff did not help her sell her hotel and that she did it herself with her son's help, that 1st plaintiff was only there to support her as a friend that she paid SCR2,000,000 to the 1st plaintiff without him having done anything for her. In the circumstances, this Court finds itself unable to place great reliance on her testimony.

[121] This Court on the other hand finds the 1st plaintiff's testimony to be credible and believes that there was an agreement between the parties as pleaded and as set out in Exhibit P4 and finds accordingly.

[122] However this is not the end of the matter. The defendant in paragraphs 2 and 3 of his defence raised the following point:

2. *...Further the Defendant would not and could not have entered into an agreement with the 1st Plaintiff which would have resulted in a payment of a commission or otherwise as the 1st plaintiff is not a licensed*
3. *Further to the above a person engaging in or carrying on any activity of a commission agent must be licensed. The Defendant denies that either of the Plaintiffs have such license and therefore not entitled to operate as a commission agent and claim any commission arising therefrom.*

[123] Whether the payments made by the defendant to the 1st plaintiff were in the nature of a commission as averred in paragraph 2 of the plaint or not will have an effect on the validity of the agreement between the defendant and 1st plaintiff.

[124] It is averred in paragraph 2 of the plaint that: “[I]t was a term of the Agreement between the Plaintiff and the Defendant that the 1st Plaintiff would receive 1% commission of the sale price amounting to US\$ 225,000 payable at the prevailing exchange rate of R 11.5, equivalent to SR 2,587,500/-“. In his email to the defendant dated 23rd December 2014 (Exhibit P7) the 1st plaintiff also referred to the “commission payment schedule“. In defendant's email dated 27th May 2015 to 1st plaintiff (Exhibit P12) also made reference to “all the commissions” she had paid him. In Ms Pool's letter to the defendant dated 15th December 2017 (Exhibit P16) she stated “[I]t is my instruction that in 2014 you

agreed to pay my clients 1% commission on the sale price of La Reserve Hotel for services that Mr. Barallon rendered to you”.

[125] However the 1st plaintiff testified in chief that the defendant promised to pay her 1% of the sale price of the hotel if he found a buyer for the hotel as opposed proposing to pay him a commission as he was not a broker or a Commission Agent. This is presumably to counter defendant’s defence that he was not a licensed commission agent and therefore could not legally have received a commission. Although not pleaded the 1st plaintiff also stated under cross examination that the defendant promised to pay him 1% of the purchase price if he could find a buyer for the hotel and that the payment was in the nature of a gift. In cross examination he further stated that he is not a Commission Agent and does not hold a licence to operate as one. The 1st plaintiff vehemently denied throughout his testimony that the payments defendant had agreed to make to him were in the nature of a commission.

[126] If the payments were a gift from defendant to 1st plaintiff, would the promise of the defendant be binding? Article 1109-1 of the Civil Code provides that “An offer or an acceptance shall only have effect if it is seriously intended in the sense that the parties intended to create legal relations ...” The nature of a gift is such that there is no intention to create legal obligations between the giver and the recipient of the gift and to make it legally binding on the giver to give the gift to the receiver. If anything it would only amount to a moral obligation which cannot be legally enforced. In any event the parties are bound by their pleadings and the above not having been pleaded by the plaintiffs, it cannot be considered by the Court.

[127] As stated, a party is bound by its pleadings and the Court is confined to what is stated in the pleadings. Paragraph 2 of the plaint describes the payments as a commission. Furthermore I am of the view, despite the repeated denials of the 1st plaintiff, that the sum agreed to be paid by the defendant to him was in the nature of a commission, as it was a percentage of the sale price of the hotel in consideration for the 1st plaintiff’s contribution to the process of selling the hotel, whether such contribution was negotiating the sale of the hotel on defendant’s behalf as pleaded or facilitating the process.

[128] Article 1108 of the Civil Code of Seychelles Act lays down four essential conditions for the validity of an agreement which include “*a definite object which forms the subject matter of the undertaking and that it should not be against the law or public policy*”. According to the plaint the object of the agreement was the negotiation of the sale of the hotel by the 1st plaintiff on behalf of the defendant in consideration of which the defendant would pay him a commission.

[129] Section 3 of the Licences (Miscellaneous Services) Regulations 2011 made under the Licences Act 2010 prohibits anyone from receiving payment for providing services of a commission agent without a licence. It provides:

3. (1) *Notwithstanding any written law and subject to subregulation (2), a person shall not, without a licence under these Regulations, charge a fee or receive any other consideration in cash or in kind for providing services as –*

[...]

(g) commission agent;

(2) Subregulation (1) shall not apply to an individual –

(a) who is employed by the holder of a licence to provide any of the services referred to in subregulation (1) and who in the course of his employment with, and for and on behalf of, the holder of a licence is licensed under subregulation (1), or

(b) who is employed by another person to provide any of the services referred to in subregulation (1) and who in the course of his employment provides the service to his employer.

[130] The Regulations in section 2 defines “*commission agent*” as meaning “*any person who by way of business transacts or arranges business for any other person in consideration of a commission or other remuneration*”.

[131] It may be argued that the transaction between the 1st plaintiff and the defendant was a one-off transaction and that the 1st plaintiff did not operate as a commission agent “by way of business” as provided in the section 2 definition. In my view however, the legislators, in enacting the regulations cannot have intended to have two systems operating alongside each other with regards to commissions: one requiring that persons who ordinarily carry out the business of a commission agent as a business must have a

licence, and the other which allows a person who does the same thing but as a one-off transaction to do so without a license. It is my considered view that transacting or arranging business for another person in consideration of a commission or other remuneration, whether a person does this habitually as a business or as a one-off transaction, falls under the purview of the regulations which require that such a person must be licensed. Further, any person who transacts or arranges business for any other person in consideration of a commission or other remuneration whether habitually or as a one-off arrangement may be considered to do so as a business transaction.

[132] It is clear that the contribution of the 1st plaintiff to the process of the sale of La Reserve Hotel falls squarely within the work performed by a Commission Agent as defined above. It is also clear that that the object of the agreement between the 1st plaintiff and the defendant was unlawful inasmuch as it contravened the provisions of the Licences (Miscellaneous Services) Regulations 2011, in that the 1st plaintiff not being a licensed commission agent, was not entitled to receive a commission on the sale price of La Reserve Hotel in consideration of negotiating the sale of the hotel on the defendant's behalf, as provided for in the agreement. In consequence, one of the essential conditions for a valid contract is missing rendering the agreement null and void and under which no remedy can be claimed by the plaintiffs.

[133] In a similar case - *Avalon v Berlouis SCA 25/2002, LC236* - the Court of Appeal explained the consequence of entering into a contract as a commission agent and carrying out the business of such an agent without a licence as follows:

What then are the consequences of the respondent's illegal activity? Well, a general principle which is rooted in public policy is that any transaction which is tainted by illegality involving a party (or parties) thereto is beyond the pale of the law. Thus, no person can claim any right or remedy whatsoever under an illegal transaction in which he participated.

Ex turpi causa non oritur actio. In this regard, the remarks of Lord Mansfield in Holman v Johnson (1775), 1 Cowp. 341, at 343, are opportune:

“The objection that the contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill

in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: ex dolo malo non oritur action. No court will lend its aid to a man who founds his cause upon an immoral or an illegal act. If from the plaintiff's stating or otherwise, the cause of action appears to arise turpi causa, or the transgression of a positive law of this country, then the court says that he has [no]right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault portio est conditio defendantis."

Decision

[134] For the reasons stated above the suit is dismissed. The parties shall bear their own costs.

Signed, dated and delivered at Ile du Port 11 February 2021.

Carolus J