

# SUPREME COURT OF SEYCHELLES

---

## **Reportable**

[2021] SCSC 227

CS 79/2020

In the matter between:

### **THE ESTATE OF THE LATE ANDRE DELHOMME**

herein represented by its Executor Veronique Marie Hilda

Huguette Maryan Green-Delhomme represented by

Allen Andre Joseph Hoareau

(rep. by F. Elizabeth)

Plaintiff

and

### **THE ATTORNEY GENERAL**

(rep. by Stefan R. Knights)

Defendant

---

**Neutral Citation:** *Estate of the late Andre Delhomme v AG* (CS 79/2020) [2021] SCSC 227 (18 May 2021).

**Before:** Carolus J

**Summary:** Action for breach of contract of sale of Immovable Property – Part payment of price – Prescription – Time when prescription starts running - Conditional Obligations – Condition precedent and Condition Subsequent.

**Delivered:** 18 May 2021

---

## **ORDER**

The action is prescribed. The plaint is dismissed. Each Party shall bear their own costs.

---

## **JUDGMENT**

---

### **Carolus J**

#### **Background**

[1] The plaintiff is the estate of the late André Delhomme. It is represented in these proceedings by Veronique Marie Hilda Huguette Maryan Green-Delhomme the executrix of the estate, appointed by a court order dated 14<sup>th</sup> September 2000 (Exhibit P1). The

executrix is in turn represented by Allen André Joseph Hoareau by virtue of a power of attorney dated 2<sup>nd</sup> March 2020 and registered on 5<sup>th</sup> June 2020 (Exhibit P2). The plaintiff is suing the Attorney General in its capacity as representative of the Government of Seychelles.

[2] Veronique Marie Hilda Huguette Maryan Green-Delhomme and Helene Marie Amelie Gabrielle Delhomme are the daughters of the late André Delhomme and his wife Doctor Hilda Stevenson Delhomme. All three of them survived him when he passed away on 15<sup>th</sup> August 2000 in France.

[3] The undisputed facts of the case are that the late André Delhomme (“the deceased”), before his death, had absolute ownership of  $\frac{3}{4}$  and bare ownership of  $\frac{1}{4}$  of Coetivy Island (“the property”), Madeleine Hery having been granted usufructuary interest of  $\frac{1}{4}$  of the property. They obtained their rights in the property from Mariam Helen Delhomme nee Hadee in terms of her will transcribed in Vol.39/97. By deed of sale dated 13<sup>th</sup> December 1979 and transcribed in Vol 64 No.157, and registered in Register B30 No.3641 on 18<sup>th</sup> December 1979, the vendors (Andre Delhomme and Madeleine Hery) agreed to sell and the Government of Seychelles to take the property at the price of Rupees Four Million (R4,000,000.00). According to the deed of sale the vendors acknowledged receipt of Rupees Two Million Five Hundred Thousand (R2,500,000.00), and the Government undertook to pay the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) as follows:

- I) Rupees Three Hundred Thousand (R300,000.00) by 15<sup>th</sup> January 1980*
- II) Rupees Three Hundred Thousand (R300,000.00) by 15<sup>th</sup> February 1980*
- III) Rupees Three Hundred Thousand (R300,000.00) by 15<sup>th</sup> March 1980*
- IV) Rupees Three Hundred Thousand (R300,000.00) by 15<sup>th</sup> April 1980*
- V) Rupees Three Hundred Thousand (R300,000.00) by 31<sup>st</sup> May 1980.*

[4] It was further agreed that in the event of the Government failing to make any two consecutive payments, the outstanding sum or part thereof remaining unpaid would immediately become due and payable. The Government also granted the vendors a seller’s privilege under Article 2103 of the Civil Code to secure payment of the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000.00). It was

also a term of the agreement that the Government would pay all fees and duties of the sale.

[5] The plaintiff avers that in breach of the agreement, the defendant has failed, refused or neglected to pay the plaintiff the sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) as agreed, and that consequently the agreement has become frustrated, null and void. The plaintiff prays for a declaration to that effect. Plaintiff further prays for rescission of the contract of sale, cancellation of the registration of Coetivy Island in the name of the Government of Seychelles, and for an order directing the Land Registrar to rectify the Land Register by cancelling, deleting and replacing the name of the Government of Seychelles as the registered owner of the island and replacing it with the name of the plaintiff. Further and in the alternative the Plaintiff seeks an order for the defendant to pay the plaintiff the sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) together with interest at the commercial rate of 12% from the date of the said contract of sale namely 13<sup>th</sup> December 1979 until the date of judgment.

[6] The defendant, has raised a preliminary plea of prescription claiming that the plaintiff is time barred from bringing the cause of action. On the merits it denies that it has failed to pay the plaintiff the sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) and puts the plaintiff to strict proof that the payments stipulated in the deed of sale were not paid. It avers that the defendant has never acknowledged any debt owing to the plaintiff nor is there any evidence of the plaintiff making a demand or claim against the defendant at any time within the period of five years from the date that an instalment became due and payable for any debt owed by the defendant to the plaintiff in respect of the sale. Defendant further denies that the agreement has become frustrated, null and void and contends that it has never asserted or pleaded frustration of contract in any dealings with the plaintiff and that in any event frustration of contract is a defence to a breach of contract which is up to the defendant to raise and prove. It denies being liable to the plaintiff in any sum and avers that the plaintiff is not entitled to the relief prayed for. The defendant prays for dismissal of the plaint with costs.

## **The Evidence**

- [7] Allen André Joseph Hoareau a semi-retired marine engineer of 60 years of age, testified on behalf of the plaintiff. He stated that he was raised by Mr. and Mrs. Delhomme since the age of three and therefore considers their daughter Veronique Marie Hilda Huguette Maryan Green-Delhomme, executrix of the estate of Mr. Delhomme, as his sister. Throughout his testimony he referred to Mr. Delhomme as his father.
- [8] He confirmed that Mr. Delhomme transferred Coetivy Island to the Government of Seychelles for the sum of Rupees Four Million (R4,000,000.00) and in support produced collectively a covering letter dated 8<sup>th</sup> January 1980, together with a transcription of the deed of sale dated 13<sup>th</sup> December 1979 and transcribed in Vol 64 No.157, and registered in Register B30 No.3641 on 18<sup>th</sup> December 1979 (Exhibit P3). He confirmed that according to the document, there was an outstanding amount of Rupees One Million Five Hundred Thousand (R1,500,000.00) remaining unpaid which was to be paid as stated at paragraph 3 above. He also confirmed that there was a charge registered against the property for the debt owed by the Government to the deceased. Mr. Hoareau stated that he could not truthfully say whether or not the outstanding balance of Rupees One Million Five Hundred Thousand (R1,500,000.00) had been paid but said that according to what is stated in the transcript it has never been paid.
- [9] With regards to the plaintiff's plea of prescription, Mr. Hoareau stated that he only had knowledge that the estate of Mr. Delhomme had a claim against the Government when he returned to Seychelles five years ago and had sight of the transcription of the deed of sale and realised that the Government had not fully paid the deceased. He also stated that the charge over the property in the sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) still subsists.
- [10] In cross examination he stated that in 1979 he was 19 years old and was living with Mr. and Mrs. Delhomme and although he was not fully aware of all the details of the agreement between Mr. Delhomme and the Government, he knew that that the Government was taking away their land. He only saw the agreement two years ago. He got to know about the agreement when he was about to leave France for Seychelles in

2014, and told Veronique that after he had settled in he will start finding out what happened to the land owned by Mr. and Mrs. Delhomme. In response to whether Veronique knew about the agreement before, he stated that she must have as she is the executrix but that the children of the deceased would not get involved in matters relating to Seychelles as they live in Europe.

[11] In reply to whether he knew whether the Government had paid any money to the deceased for Coetivy Island, he stated that according to the deed of sale only Rupees Two Million Five Hundred Thousand (R2,500,000.00) was paid, and that this sum was presumably paid into a bank account. He stated that he did not know where the bank statements of the deceased's bank accounts were and admitted that he did not have any papers where Mr. and Mrs. Delhomme are concerned. He stated that he has not had time to try to get the bank statements from the bank but now that he has a power of attorney he can try. In addition, the Notary who dealt with the affairs of the late Mr. Delhomme no longer has any documents regarding Mr. and Mrs. Delhomme.

[12] Mr Hoareau admitted that he had no letter from Mr. Delhomme demanding payment from the Government of the Rupees Two Million Five Hundred Thousand (R2,500,000.00) owing to him. He explained that payment of the last instalment under the deed of sale was due in May 1980, and just after that in June 1980 Government acquired another piece of Mr. Delhomme's land. Mr. and Mrs Delhomme were therefore afraid to go and ask Government for anything. He admitted that he had no letter from Government acknowledging any debt due to the deceased but maintained that according to the "official Government papers" the outstanding debt of R1.5 million had not been paid to Mr. Delhomme.

[13] Mr. Hoareau was unable to show any charge or mortgage on the deed of sale. As for the seller's privilege granted to the vendors he stated that Mr and Mrs. Delhomme never acted on it because they were scared to go the Government for anything. After 1993, they left the country because Mr. Delhomme was very ill and they were unable to do anything.

[14] In re-examination, Mr. Hoareau explained Mr. Delhomme's fear of the Government. According to him Mrs. Delhomme had been involved in politics until 1974, and belonged

to the political party Parti Seychellois. Being in charge of the Victoria District Council, she was the next important person after the Governor. In order of importance she ranked first, former President Mancham ranked as number 2 and former president Rene ranked as number 3. Mr. Rene was against her for many reasons including that he considered them as “grands blancs” and because they owned islands and other properties.

[15] He stated that Mr and Mrs. Delhomme left Seychelles in 1993 or 1994 because of poor health since they had been beaten up three times. He clarified that their property that was compulsorily acquired by Government in June 1980 consisted of two plots situated on both sides of the road at St. Louis. He stated that both Mr. and Mrs. Delhomme died in France and never came back to Seychelles. Mr. Delhomme died soon after leaving for France and Mrs. Delhomme’s death followed two to three years later. Mr. Hoareau was living in Spain but went to see them two to three times a year. They never discussed the issue of payment of land whether in relation to Coetivy Island or other land as Mr. and Mrs. Delhomme were not in a state to talk about Seychelles.

[16] The defendant’s sole witness was Mr. Patrick Lablache, a 63 year old consultant with the Ministry of Habitat, Infrastructure, Land and Transport. He testified that in 1979 Government bought Coetivy Island from Mr. Delhomme after negotiations between the two. Mr. Lablache recalls going to the island with Mr. Delhomme’s representative who at the time was Mlle Marie-Therese Desaubin to make an inventory of the shop on the island and proceed with employment of the people working there. The purchase of the island was on a walk-in walk-out basis meaning that Government walked in and took possession of the island and Mr. Delhomme walked out leaving everything on the island including the personnel.

[17] As to the reason why the island was sold to Government, he explained that in 1979 Government had a policy of returning ownership of most of the privately owned outer islands to itself, so that they became state owned. Coetivy was the first island that Government attempted to buy. At the time, Mr. Delhomme had also been trying to undertake some sort of project on the island which did not materialise. He pointed out

that in 1979 the copra industry had basically failed and most of the outer islands relying on it as a source of income were facing financial difficulties.

- [18] He stated that as far as he could remember, Mr. Delhomme negotiated the sale of the island personally and not through a representative. The representative only went to the island. He recalled that the negotiations were conducted in a civilised manner and that Mr. Delhomme was very pleasant. They exchanged letters and Mr. Delhomme started off with a very high price which was eventually reduced to Rupees Four million after various communications between himself and Government which he agreed to.
- [19] He confirmed that Rupees Two Million Five Hundred Thousand was paid and that Government effects payment directly to bank accounts and never in cash. He stated that he does not know to which bank the payment was made as payments are made by the Treasury Department.
- [20] Mr. Lablache stated that after the agreement was entered into he would occasionally talk to Mr. Delhomme as the Government had other dealings with him after that. He remembers that Government subsequently bought the St. Louis property from him although he does not recall if it was in the same year that Coetivy was purchased. He emphasised that the St. Louis property was purchased and not acquired. After the purchase of the St. Louis property he states that he probably bumped into Mr. Delhomme, greeted him and chatted casually to him although he could not recall exactly when, but that was as far as it went.
- [21] He agreed with defendant's counsel that if Government owed a person money for the purchase of a plot of land and missed one payment, the person would make a demand for such payment. However he himself had never come across a case where Government had defaulted on such payments although he could not confirm that this had never happened. Moreover he was unaware of any default in payment in regards to Coetivy Island and had never seen any demand for payment.
- [22] In cross-examination Mr. Lablache stated that in 1979 he was 23 years old and was working as Lands Officer for the Government, and in that capacity negotiated the

purchase of Coetivy with Mr. Delhomme on behalf of the Government. He subsequently also went to the island. At the time he had only been six months in the job. The price for the island was arrived at following negotiations based on correspondence between the parties and his recollection was that he finally made an offer of Rupees Four Million on behalf of Government which was accepted by Mr. Delhomme who sent an acceptance to Mr. Lablache. It was put to him that he had no communication or letters to prove all this, to which he replied that there was a file concerning the transaction which had been given to the defendant's counsel.

[23] He confirmed that payment of money owed by the Government is dealt with by the Treasury and not the Lands Department. He explained that the Ministry responsible for land is allocated a budget for acquisition of land but that it is the Ministry of Finance which actually holds that budget. Whenever there was a need for payment from that budget the Lands Department would make a request to the Ministry of Finance for payment which would then effect the payment through Treasury.

[24] He stated that he was never present when agreements for sale of land to Government were signed, and that at the time of the sale it was the President of the Republic who signed on behalf of the Government before the Attorney General as Notary. He was therefore not present when the deed for the sale of Coetivy was signed by Mr. Delhomme.

[25] He agreed with plaintiff's counsel that if any payment had been made by Government to Mr. Delhomme, it would have been made by the Ministry of Finance and not the Lands Department and that such payment would have been made by cheque and not by cash payment but admitted that he did not actually see the payment being made. He stated that he never witnesses those transactions. With regards to whether payment was made to Mr. Delhomme he stated that the fact that he signed the transfer deed before the official Notary is an acknowledgement by him that he received the first part of the payment in the sum of Rupees Two million Five Hundred Thousand (R2,500,000). As to whether he had any evidence to show that the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000) agreed to be paid by instalments by end of May 1980, was



actually paid, he stated that he did some research on the matter and managed to find a letter giving instructions to the Chief Accountant and Treasury to effect these payments. He then went back to treasury to find out whether they had any record of the payments but was informed that they did not keep records extending that far back. He reiterated that the amount was paid as he cannot remember any cases of that nature where payment was not effected.

[26] In re-examination Mr. Lablache clarified that if there is a schedule of payments and the Lands Department has already notified the Ministry of Finance of such schedule with the dates for payment, the Ministry of Finance would execute the payments on the said dates without coming back to the Lands Department. With regards to the document giving instructions for payment, he was unable to obtain full records for such payment because he was informed by the Ministry of Finance that they only kept such records for up to ten years.

### **Analysis**

[27] Both counsels filed written submissions on the plea of prescription raised by the defendant and on the merits, which I have carefully examined, and in the light of which I now proceed to consider the issues arising for the Court's determination.

### *Prescription*

[28] Counsel for the defendant contends that the applicable prescriptive period for this action – a breach of contract - is five years as provided for in Article 2271 (1) of the Civil Code of Seychelles Act (“Civil Code”). Counsel for the defendant submits that prescription starts to run from May 1980 when the last instalment of the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000) became due. He also argues that there is no evidence of any acknowledgment by the Government of the alleged debt nor is there any demand by the plaintiff to the Government for payment of such debt which may have interrupted prescription. He contends therefore that the present action has been commenced out of time as it was filed some forty years after the cause of action arose.

[29] On the other hand, counsel for the plaintiff sets out three hypotheses to counter the plea of prescription in his submissions. Briefly these are: First, prescription starts to run when

the plaintiff has knowledge of all essential facts giving rise to a cause of action. Therefore prescription started to run from the date the executrix had knowledge of the cause of action or the facts giving rise thereto (two years after her appointment as executrix) and not from the date of non-payment of the last instalment; Second, the breach being a continuing breach only extinguishes once all instalment payments are made. As long as payment of any instalment is not made the breach remains actionable in law indefinitely. Thirdly but related to the second point, prescription is irrelevant as the breach is a continuing one dependant on payment of the last instalment of the purchase price.

[30] Article 2219 of the Code Civil makes a distinction between acquisitive and extinctive prescription. In its alinea 2 it provides that “[*Prescription*] is a means whereby, after a certain lapse of time, rights may be acquired (acquisitive prescription) or lost (extinctive prescription), subject to the conditions established by law”. It is extinctive prescription with which we are concerned.

#### Applicable prescriptive period

[31] The nature of an action will determine the applicable prescriptive period for commencing such action. It is not disputed that the present action arises from the alleged breach of a contract, the breach being non-payment by Government of part of the purchase price for Coetivy Island amounting to Rupees One Million Five Hundred Thousand (R1,500,000). The remedies sought by the plaintiff are the rescission of the contract for the sale of the land and the registration of the plaintiff as proprietor thereof, and in the alternative the recovery of the unpaid part of the purchase price for the land.

[32] The relevant legal provisions as to the applicable prescriptive period are Articles 2271, 2262 and 2265 of the Civil Code which are reproduced below.

#### *Article 2271*

1. *All rights of action shall be subject to prescription after a period of five years except as provided in articles 2262 and 2265 of this Code.*
2. *Provided that in the case of a judgment debt, the period of prescription shall be ten years.*

*Article 2262*

*All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.*

*Article 2265*

*If the party claiming the benefit of such prescription produces a title which has been acquired for value and in good faith, the period of prescription of article 2262 shall be reduced to ten years.*

Emphasis added

- [33] In light of the remedies sought by the plaintiff it is clear that the present action is a “*real action[s] in respect of rights of ownership of land or other interests therein*” and falls within the purview of either Article 2262 which provides for a 20 years prescription period for such actions, or Article 2265 which reduces the period to 10 years where the person raising a plea of prescription has “*a title which has been acquired for value and in good faith*”.
- [34] **In Gummery v Ernestine (SCA05/2014) [2016] SCCA 7 (21 April 2016)** the plaintiff had paid the price under a contract for the sale of immovable property but the defendant refused to execute the transfer of the property and register the immovable property in the plaintiff’s name. The plaintiff sued the defendant for specific performance of the contract of sale. The Court of appeal being of the view that the matter concerned an interest in property and that therefore Article 2262 applied held that the action was subject to a twenty-year prescription and not five years.
- [35] In the present case the defendant is in possession of a title but the plaintiff is claiming that part of the consideration for the transfer of the land was never paid, putting in question whether it was acquired for value as required for the application of the 10 years prescription period under Article 2265. In my view the longer prescription of twenty years would therefore apply.

[36] In any event, whether the 10 or 20 years prescription period applies in this case, in order to determine whether the action is prescribed, this Court has to ascertain when the prescriptive period starts running. In order to do so, I will first consider the arguments presented by counsel for the plaintiff.

Prescription starts running from the time plaintiff had knowledge of the cause of action

[37] According to his first argument, prescription started running when the executrix had knowledge of the cause of action or the facts giving rise thereto, two years after her appointment as executrix.

[38] At this stage I find it appropriate to point out that the parties to the contract of sale were Mr. Delhomme and Madeleine Hery (who had usufructuary interest in the land for her lifetime) as vendors and the Government as purchaser. The right to make a claim for non-payment of the purchase price therefore belonged to Mr. Delhomme during his lifetime and to his estate after his death, as long as the claim was made within the prescription period. This right could be exercised after Mr. Delhomme's death by the executrix on behalf of his estate and not on her own behalf because this right does not belong to the executrix in her own right. She is merely representing the estate in these proceedings. In that respect I note that the plaintiff is correctly cited in this suit as "*The Estate of the late Andre Delhomme herein represented by its Executor Veronique Marie Hilda Huguette Maryan Green-Delhomme*". I therefore find the argument of plaintiff's counsel that prescription started running when the *executrix* had knowledge of the cause of action misconceived. If the court were minded to accept the argument that prescription runs from the time that the person entitled to make the claim had knowledge of the facts giving rise to the cause of action as opposed to the time of accrual of the cause of action as contended by the defendant, it follows that such prescription would start running from the time that Mr. Delhomme himself had knowledge of the cause of action and not the time that the executrix acquired such knowledge. With this in mind, I proceed to consider plaintiff's argument.

[39] The case of **Attorney General v Voysey Civ App 12/1995 [01 March 1996]** relied upon by counsel for the plaintiff in support of his argument that prescription runs from the time

that the executrix had knowledge of the cause of action concerned a delictual claim. In that case the parents of a pilot who died in a crash while in the employment of the Government on 30<sup>th</sup> August 1987 sued the latter claiming that the Government was “*liable for the death of the deceased whether because the helicopter crashed because it was faulty ... or because the work of the deceased with the defendant was dangerous*”. They filed the suit on 24<sup>th</sup> June 1994, after the expiry of the five year prescription period for such claims. The reason for the delay in commencing the action was because they only received a report of the investigation into the death on 15<sup>th</sup> October 1993 despite having requested one since August 1990. The trial judge rejected the Government’s plea of prescription on the basis that the delay in producing the report could not be used by the Government to take advantage of the rules of prescription. The Court of Appeal allowed the Government’s appeal and dismissed the respondent’s/plaintiff’s claim on the ground that it was prescribed.

[40] In the *Voysey* case (supra), the Court of Appeal, after determining that the right of action in that case was a delictual one based on Article 1382(1) of the Civil Code, stated that -

14. ... *When a party claims a right of action under art 1382(1) the two elements of the cause of action are fault and damage which must have been caused by the fault alleged. It is thus clear that the earliest time that an action in delict can be maintained is that earliest point in time when fault and damage co-exist ...*

Emphasis added.

[41] As to the respondent’s/plaintiff’s contention in that case that “*ignorance by the plaintiff of the existence of nature of fault or even of the cause of the damage delays the accrual of a cause of action*” the Court of Appeal made a distinction between “*the effect of a delayed manifestation of damage on the accrual of a cause of action*” and delayed “*awareness of fault*”. In the former case - delayed manifestation of damage - damage is not immediately apparent and prescription only begins to run from the time that the plaintiff is conscious or aware of both the tort and damage. However the Court of Appeal found that the latter - delayed awareness of fault - is what was applicable to the case in hand. In that respect, it stated that while the cases of **Finnis v Chauvot (1862) MR 189** and **Receiver of Registration Dues v Aissa (1910) MR 73** cited in support of the

argument that knowledge of fault is essential to the accrual of a right of action, could be right in the particular circumstances of those cases, it felt great hesitation in using them as leading to a general proposition which would be applicable to the Voysey case. The Court explained its position as follows:

20. ... *The two authorities described prescription in terms of “penalty” and “guilt” of the plaintiff as if the conduct of the plaintiff is the determinant factor in applying prescription, whereas the reasons for prescription are to protect the defendant from the risk of stale demands of which he may be ignorant and which he may not be able to meet because of changed circumstances, and the handicap he may suffer, due to lapse of time in establishing a defence. In our view the statutory period of prescription, artificially fixed, conclusively presumes that a defendant is in need of protection. Such presumption does not permit of rebuttal.*

[42] It concluded:

21. *Normally, a right of action accrues when the essential facts exist and, barring statutory intervention, does not arise with the awareness, for instance, of the attributability of the injury to the fault of the other party unless there has been a fraudulent concealment of facts.*

[43] It is clear from the above that the Voysey case (supra) will be of limited assistance in determining the time that a cause of action accrues and consequently the time that prescription starts running in a case of breach of contract, as that case concerned a delictual claim. Contrary to a delictual claim where fault and damage must co-exist for the accrual of a cause of action, in a breach of contract the issues of fault and damage do not arise.

[44] Nevertheless this Court considers as pertinent to the case in hand, the observations of the Court of Appeal in the Voysey case (supra) at paragraph 21 of its judgement (reproduced at paragraph 36 above) that “*a right of action accrues when the essential facts exist ...*” and later at paragraph 23 thereof that:

23. *Existence of facts essential to the accrual of a right of action must be distinguished from evidence of such facts. It is evident that accrual of a right of action cannot be dependent on inability to obtain evidence of facts relating to the right of action. There is no statutory provision that confers power on the court in*

*this jurisdiction to postpone the accrual of a right of action by reason of ignorance of the plaintiff of material facts relating to the cause of action.*

[45] The above observations in the *Voysey* case (supra) contradict the plaintiff's argument that prescription runs from the time that the executrix had knowledge of the cause of action as opposed to the time of accrual of the cause of action which occurs when essential facts giving rise to such cause of action come into existence.

[46] According to *Voysey* (supra) prescription can only run from the time that the plaintiff has knowledge of the material facts giving rise to a cause of action *where the defendant has fraudulently concealed such facts or in cases where the law allows it*. I note that in the present case the plaintiff has brought no evidence of fraud, nor is this Court aware of any statutory provision allowing prescription to run from the time that a plaintiff has knowledge of material facts giving rise to a cause of action.

[47] In that respect, I note that in his submissions counsel for the plaintiff also appears to raise the argument that if there had been fraud by the defendant resulting in the plaintiff's claim being prescribed, presumably because such fraud prevented him from having knowledge of the facts giving rise to the cause of action, the prescription period would start to run from the date of discovery by the plaintiff of such fraud. I say that counsel appears to raise this argument, because other than reproducing the passage below from Hanbury on Modern Equity (8<sup>th</sup> Edition) in relation to the Statute of Limitations at page 307, he did not elaborate further.

*The doctrine of laches and acquiescence in the case of purely equitable claims, substituted by equity for the statutes of limitations as deterrents to the tardy assertion of rights, unless one of those statutes had expressly included equitable claims within its orbit. In the case of legal claims, or even of equitable claims which it would regard as analogous to legal claims, equity rigidly observed the observance of the statutory periods. But one important reservation equity permitted itself. If there had been fraud on the part of the defendant, and the plaintiff did not discover it, through no fault of his own, until the statutory period had elapsed, equity would consider that the period had not begun to run until the date of its discovery.*

[48] In relying on the above passage, counsel seems to have overlooked the fact that the present claim is not grounded in equity. It is a legal claim for breach of contract brought under the provisions of the Civil Code and seeking legal remedies provided therein. In terms of section 6 of the Courts Act the equitable jurisdiction of the Supreme Court may only be exercised in “cases where no sufficient legal remedy is provided by the law of Seychelles” which evidently is not the case here. Further, as I have stated, no evidence of fraudulent concealment of the essential facts giving rise to the cause of action on the part of the defendant which led to the present action being filed outside the prescription period, has been brought by the plaintiff.

[49] The position taken by French jurisprudence and doctrine is that prescription starts running from the time that the plaintiff could have filed his claim. **Dalloz, Encyclopedie Juridique, 2<sup>e</sup> Édition, Répertoire de Droit Civil, Tome IV, Vo. Prescription Civile**, states the following on the time that extinctive prescription starts running:

*SECT. 2. – Computation des délais (point de depart)*

*ART. 1<sup>er</sup>. – PRINCIPE*

*431. Les règles à suivre pour le calcul du délai de prescription sont les mêmes pour la prescription extinctive que la prescription acquisitive ...*

*432. Des particularités apparaissent en ce qui concerne le point de départ du délai. La prescription commence à courir au profit du débiteur au jour où le créancier a pu intenter son action en justice ... L'une est l'autre sont nécessairement liées ...*

Emphasis added.

[50] This accords with the view that prescription starts running from the time of accrual of the cause of action which occurs when essential facts giving rise to such cause of action come into existence because it is the earliest time at which the plaintiff could have filed his claim. In the present case the essential facts giving rise to the cause of action came into existence upon the non-payment of the debt by the defendant when it became due. It is worth noting that the time that prescription starts running may be deferred if the



obligation of one of the parties is subject to a condition precedent (*condition suspensive*) by virtue of Article 2257 of the Civil Code. This will be dealt with below in regards to the second argument by plaintiff's counsel.

[51] In the case of **Eden Island Development Company (Sey) Ltd v Kozhaev & Anor (CS20/2018) [2018] SCSC (7 February 2019)** Eden Island Development Company (EIDC) the owner of a parcel of land with a villa thereon, had entered into an agreement with Mr. Kozhaev on 13<sup>th</sup> November 2007 for the sale of the property for the sum of USD1,309,770. The agreement was registered in 2008. It was a term of the agreement that Mr. Kozhaev would pay EIDC the purchase price by instalments into EIDC's escrow account held with Barclays Bank. In a suit filed before the Supreme Court EIDC claimed that it had received all the instalment payments save for the sum of USD385,000. Mr. Kozhaev, on the other hand maintained that the whole of the purchase price had been transferred into EIDC's account. The trial judge found in favour of EIDC and gave its judgment accordingly. The Court of Appeal allowed Mr. Kozhaev's appeal finding that EIDC had failed to establish its case on the necessary balance of probabilities.

[52] In 2018 EIDC again filed a plaint in the Supreme Court against Mr. Kozhaev and Barclays Bank based on the same agreement invoking the equitable remedy of tracing to establish whether or not the money had been paid and where it was now located. It sought an order for Mr. Kozhaev to provide all necessary information to that effect as well as to pay the money to EIDC if it was found not to have reached the escrow account. Both Mr. Kozhaev and Barclays Bank raised pleas in *limine litis* that the suit was prescribed being centred around events occurring in 2008 and was therefore at least five years out of time in breach of Article 2271 of the Civil Code. To counter the arguments raised by the defendants EIDC relied on the argument that the legal basis of the suit arose in March 2013 during the Supreme Court proceedings when Mr. Kozhaev alleged that the sum of money was paid to Barclays Bank by a third party. Rejecting this argument Twomey then CJ stated:

25. *[Counsel for plaintiff's] submissions on prescription cannot succeed ... Prescription begins running when the debt becomes due. It may be interrupted by legal proceedings, but it does not commence from legal submissions made in*

*court. In the present matter, the debt is the unpaid instalment and not the explanation later proffered by First Defendant [Mr. Kozhaev].*

Emphasis added.

[53] For the above reasons, I find no merit in plaintiff's argument that prescription runs from the time that the executrix had knowledge of the breach. It is clear that in the present case, the cause of action accrued upon the non-payment of the debt (the unpaid instalments) by the defendant when such debt became due, which is when prescription started running.

Prescription does not start running as long as the Breach continues

[54] Counsel for the plaintiff presents an alternative argument that the breach of the defendant's contractual obligations is a continuing breach which only ends upon fulfilment of the obligation of the defendant to pay the last instalment. He is of the view that as long as payment of any of the instalments is not made, the breach continues and remains actionable in law indefinitely, rendering prescription irrelevant. Counsel gives two reasons for the breach being a continuing one: first that the charge on the property still subsists and that therefore the obligation of the defendant to pay the price continues. Second that the obligation of the defendant to make the instalment payments is a condition precedent to the sale and as long the condition is not fulfilled the obligation of the defendant continues.

[55] He relies on the following passage from the Supreme Court case of **Ernestine v Gummery (CS61/2009) [2014] SCSC 11 (21 January 2014)** in which Karunakaran J stated that the continuous breach of an agreement gives rise to a continuous cause of action:

22. *On the issue of prescription, I agree with the submission of the plaintiff's counsel that prescription becomes irrelevant as the Defendant testified that a condition has yet to be fulfilled. In my view, the continuous breach of an agreement gives rise to a continuous cause of action. The relevant part of the plaintiff's submission runs thus:*

*"She (the defendant) says there was a condition and until that condition is fulfilled the property would not be transferred. What does the law say? I refer to*

*the case which my learned friend has quoted and highlight the relevant parts. From the above, it can be gathered, that if there is such a condition as confirmed by the Defendant, then the dissolution of the Agreement must be claimed from the Court, and the Court may give the Plaintiff time to fulfil that obligation. I would invite your lordship to consider this, as this is what the Defendant is saying here. If this were to be considered, then prescription becomes irrelevant as the Defendant testifies that a condition has yet to be fulfilled. (i.e. payment in foreign currency in her Bank account) (See, Article 2357 Civil Code of Seychelles) on Prescription”*

[56] *Ernestine v Gummery* (supra) concerned an agreement for the sale of a plot of land by the defendant (Gummery) to the plaintiff (Ernestine). The purchase price of the property had been paid by the plaintiff to the defendant’s agent but the defendant refused to execute the transfer of the property to the plaintiff and effect registration thereof. The plaintiff sought an order for the defendant to discharge her obligation under the sale agreement and execute the necessary transfer of land in his favour. The defendant pleaded prescription claiming that plaintiff’s claim was time-barred in terms of Article 2271 of the Civil Code, as the suit had been filed 5 years after the cause of action arose. It was further the case of the defendant that the plaintiff was in breach of a condition precedent of the sale agreement, in that the plaintiff failed to make the payment of the purchase price into the defendant’s bank account in the UK in foreign currency which released her from discharging her obligation of transferring the property to the plaintiff. The plaintiff denied that there was such condition precedent in the sale agreement between the parties and claimed that he not been made aware of any such condition at any stage of the sale agreement either. The trial judge held that the defendant had failed to discharge the burden imposed on her by Article 1315 of the Civil Code of proving there was a condition precedent and that the plaintiff was in breach thereof. He held that “... *there wasn’t any condition-precedent agreed upon between the seller and the buyer that the buyer (the plaintiff) should make the payment of the purchase-price into the bank account of the seller (the defendant) in the UK in foreign currency*”.

[57] Nevertheless the trial judge also held that the action was not time-barred in terms of paragraph 1 of Article 2271 of the Civil Code because of the non-fulfillment of the condition which in his view amounted to a continuous breach of the agreement giving

rise to a continuous cause of action, thereby rendering prescription irrelevant, which is being relied upon by counsel for the plaintiff in the present case. Judgment was given for the plaintiff granting his prayer for specific performance and awarding him nominal damages.

[58] The defendant/appellant (Gummery) appealed on the grounds *inter alia* that the trial judge erred in not finding that the sale was subject to a condition that the purchase price should be paid into the defendant's bank account in the UK in foreign currency. On that issue the Court of Appeal stated:

*34. It is the contention of the Appellant that it was a condition of the Agreement that the purchase price be paid in pound sterling. Given her testimony that she lived in Liverpool at the time of the agreement and continues to do so we are of the view that the Appellant is being truthful. In the circumstances, she had specified a condition precedent to the contract of sale. She did not however accept that Mr. Georges was her agent and at trial he was not permitted to testify as to his agency.*

*35. The Court therefore remains in the dark as to whether this condition was ever communicated to the Respondent who cannot therefore be penalised for not having fulfilled it.*

[59] As can be seen from the above, although the Court of Appeal found that the appellant "*had specified a condition precedent to the contract of sale*" namely that the purchase price be paid in her account in foreign currency, it did not specifically address the issue arising in the present case: that is whether the payment of the purchase price itself may be considered as a condition precedent, the nonfulfillment of which gives rise to a continuous breach of the agreement resulting in a continuous cause of action, thereby rendering prescription irrelevant. It is to be noted that in *Ernestine v Gummery* (supra) the price had been paid by the buyer but had not been transferred in the appellant's account whereas in the present case it is alleged that part of the price has not been paid.

[60] In order to resolve this issue it is necessary to first consider the provisions relating to conditions to which contractual obligations may be subject.

[61] Article 1584 of the Civil Code provides for conditions to which a contract of sale may be subject. It provides:

**Article 1584**

*A sale may be concluded either purely and simply or subject to a condition precedent or subsequent.*

*It may also envisage two or more alternative things.*

*In all these cases, its effect shall be governed by the general principles of contract.*

[62] Rules applicable to conditional obligations generally are contained in Articles 1168 to 1184 of the same Code. Articles 1168, 1181, 1183 and 1184 elaborates on those conditions (precedent or subsequent) to which obligations may be subject. These Articles are reproduced below:

**Article 1168**

*The obligation is conditional when it is made to depend upon a future and uncertain event, either by suspending its effect until the event occurs (condition precedent) or by cancelling it when the event does or does not occur (condition subsequent).*

**Article 1181**

*The obligation which is subject to a condition precedent depends upon an event, future and uncertain, or upon an event which has in fact occurred but which is still unknown to the parties.*

*In the former case, the obligation may not be performed until after the event.*

*In the latter case, the obligation shall have effect as from the day when it was contracted.*

**Article 1183**

*A condition subsequent is the condition which, when fulfilled, rescinds the obligation and restores the things in the same state as they would have been if the obligation had never existed.*

*It does not suspend the performance of the obligation; it only binds the creditor to restore what he has received, if the event envisaged by the condition occurs.*

**Article 1184**

1. *A condition subsequent shall always be implied in bilateral contracts in case either of the parties does not perform his undertaking.*

*[...]*

*In that case, the contract shall not be rescinded by operation of law. The party towards whom the undertaking is not fulfilled may elect either to demand execution of the contract, if that is possible, or to apply for rescission and damages. If a contract is only partially performed, the Court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance. The Court shall be entitled to take into account any fraud or negligence of a contracting party.*

*Rescission must be obtained through proceedings but the defendant may be granted time according to the circumstances.*

*Rescission shall only be effected by operation of law if the parties have inserted a term in the contract providing for rescission. It shall operate only in favour of the party willing to perform.*

*[...]*

[63] In relation to prescription, Article 2257 further provides that:

**Article 2257**

*The prescription shall not run:*

*With regard to a claim which is subject to a condition, until that condition is fulfilled;*

*With regard to an action for warranty, until the eviction has been effected;*

*With regard to a claim maturing on a fixed date, until such date arrives.*

Emphasis added.

[64] Plaintiff's counsel submits that the obligation of the defendant to pay the price is a *condition precedent* and that the non-payment or partial payment of such price amounts to nonfulfillment of such condition. It is his view that as long as full payment is not effected this gives rise to a continuous breach of the agreement resulting in a continuous cause of action. The result is that as long as the breach continues prescription does not start running and the breach remains actionable in law indefinitely.

[65] In considering this argument it is important to distinguish between four things: (1) the price as one of the "*éléments constitutifs de la vente*"; (2) the obligation of the buyer to pay the price; (3) the execution of that obligation; and (4) the effect of a contract of sale and the condition to which it may be subject.

[66] The price is an essential element of a contract of sale as explained in **Dalloz, Encyclopedie Juridique, 2<sup>e</sup> Édition, Répertoire de Droit Civil, Tome IV, Civile Vo. Vente:**

*TIT. 2. – Éléments constitutifs de la vente.*

*133. Le code civil indique, en son article 1583, que trois éléments essentiels concourent à la formation de la vente, le consentement des parties, un prix et une chose; si l'un de ces éléments vient à manquer, un autre contrat a pu naître, mais il n'y a pas de vente quelle que soit la qualification donnée par les parties à la convention.*

[67] The principal obligation of the buyer is to pay the price. In that respect Article 1650 of the Civil Code provides that "*The principal obligation of the buyer shall be to pay the price on the day and at the place agreed upon by the sale*".

[68] As to the execution of the buyer's obligation to pay the price, **Dalloz, Encyclopedie Juridique, 2<sup>e</sup> Édition, Répertoire de Droit Civil, Tome III, Vo. Payement** states:

*1. Le payement est l'exécution de l'obligation, quelle qu'elle soit. Plus spécialement, et dans la pratique, ce mot s'applique au cas où la chose due, et qui fait l'objet de la prestation, est une somme d'argent.*

[69] As for conditions they are of two types: the condition precedent (known in French law as the “condition suspensive”) (Article 1181) and the condition subsequent (known as the “condition résolutoire”) (Article 1183). **Dalloz, Encyclopedie Juridique, 2<sup>e</sup> Édition, Repertoire de Droit Civil, Tome I, Vo. Condition** explains their nature and effect.

*GENERALITES*

[...]

2. *La véritable condition est une modalité de l’obligation. Elle vient s’ajouter comme clause accessoire à une obligation présentant déjà tous les éléments nécessaires à sa validité. Elle se caractérise par ses effets. Aux termes de l’Article 1168, “l’obligation est conditionnelle lorsqu’on la fait dépendre d’un événement future et incertain, soit en la suspendant jusqu’à ce que l’événement arrive, soit en la résiliant selon que l’événement arrivera ou n’arrivera pas”. – Dans l’obligation conditionnelle, le sort du rapport de droit qui unit les parties est subordonné à un événement qui aura pour résultat sa formation définitive ou, au contraire, sa disparition.*

3. *Il y a donc deux sortes de conditions qui se distinguent par leurs résultats. La condition résolutoire est celle dont la réalisation anéantira le rapport de droit antérieurement formé. La condition suspensive aura au contraire pour résultat, si elle se réalise, la consolidation de l’obligation. La condition résolutoire est, d’ailleurs, considérée souvent comme une condition suspensive inversée, l’acte étant au fond un acte pur et simple dont la résolution est subordonnée à une condition suspensive.*

4. *La condition doit être un événement future ...*

5. *La condition doit être encore un événement incertain ...*

[70] Neither the buyer’s obligation to pay the price nor the execution of such obligation can be considered as a condition precedent because, together with the consent of the parties and the thing subject matter of the sale, the price is one of the “*éléments constitutifs de la vente*” as explained in **Dalloz, Encyclopedie Juridique, 2<sup>e</sup> Édition, Repertoire de Droit Civil, Tome V, Vo. Vente**:

876. *Il est certain que l’obligation de payer le prix ne saurait valablement être qualifié de condition suspensive de la vente; le prix étant un élément nécessaire à*



*la formation du contrat ne peut en être une modalité, car une modalité ne peut pas avoir pour objet un élément essentiel du contrat.*

[...]

878. ... *Le paiement peut-il être la condition suspensive de la vente? Selon une opinion, une telle clause sera illicite, car on ne saurait qualifier de condition suspensive un événement qui constitue de la part d'un cocontractant, l'exécution de son obligation principal; en effet subordonner la formation du contrat au paiement du prix fait tomber dans une contradiction insoluble; la vente n'existant pas tant que le paiement du prix n'est pas effectué, l'obligation de l'acheteur ne peut pas être exécutée tant que le contrat est en suspens ...*

- [71] That the buyer's obligation to pay the price cannot be a condition precedent is also evident from the very definition and effect of a condition precedent in Article 1168, which defines it as an event the effect of which is to suspend the effect of an obligation until the occurrence of the condition. In light of that definition, it stands to reason that the condition must therefore be an event other than the execution of the obligation which is subject to such condition.
- [72] However the *effect* of a contract of sale may be made conditional to the *execution* of the buyer's obligation i.e the payment of the price. In other words the effect of the contract of sale may be delayed until payment of the price. In such a case the non- payment of the price will not operate as a condition precedent to suspend the formation of the contract of sale which in terms of Article 1583 occurs "*dès qu'on est convenu de la chose et du prix*" or to suspend the buyer's *obligation* to pay the price which arises upon formation of the contract, but to suspend the *effect* of the contract of sale.
- [73] Normally, the effect of a contract of sale is the immediate transfer of ownership to the buyer. In that regard Article 1583 alinea 1 provides that "*[a] sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid*".

[74] The following extract from **Dalloz, Encyclopedie Juridique, 2<sup>e</sup> Édition, Répertoire de Droit Civil, Tome V, Vo. Vente** shows that the immediate transfer of ownership may be subject to exceptions:

32. *Aux termes de l'article 1583 de code civil, la vente "est parfaite et la propriété acquise de droit à l'acheteur dès qu'on est convenu de la chose est du prix, quoique la chose n'ait pas été livrée, ni le prix payé". Ce texte ne fait qu'appliquer à la vente le principe du transfert instantané de la propriété par le seul échange des consentements qu'édicte l'article 1138 du code civil. Cette règle déroge à l'ancien Droit en supprimant la nécessité de la tradition réelle ou fictive pour que le transfert de propriété soit opéré. En general, et sauf exceptions, la propriété de la chose vendue est transmise à l'acquéreur par le seul effet de la convention ...*

33. *Dans la mesure où cette règle est la consequence des principes de l'autonomie de la volonté et du consensualisme, elle connaît aujourd'hui des exceptions croissants. D'une part, les conventions des parties peuvent detacher le transfert de propriété du contrat de vente; selon l'expression d'Aubry et Rau, si le transfert immédiat de la propriété de la chose vendue est de la nature de la vente, il n'est pas de son essence ...*

Emphasis added.

[75] Thus the transfer of ownership may be made conditional upon the payment of the price so that it is suspended until payment is made. In that respect it is stated that:

34. *La convention des parties peut modifier le moment normal du transfert de propriété, soit en assortissant la vente d'un terme, soit en subordonnant le transfert à une condition ...*

[...]

§ 2. – Stipulation d'une condition

40. *Les parties peuvent réserver la propriété au vendeur jusqu'au moment du paiement du prix. Une telle stipulation joue comme une sûreté car le vendeur pourrait revendiquer la chose au cas de défaut de paiement du prix ...*

41. *Dans une vente comprenant des immeubles, la transmission de la propriété peut être subordonnée à la condition qu'elle n'aura lieu que lors du*

*paiement du prix suivi de la transcription; mais une telle stipulation doit être claire et formelle; la clause par laquelle il est seulement stipulé que l'acheteur devra payer le prix avant d'entrer en possession n'a pu pour effet de suspendre la translation de propriété jusqu'au paiement.*

Emphasis added.

- [76] It would appear from the above that a condition which suspends the transfer of ownership of property until payment of the price must be expressly provided for in the contract of sale. An examination of the deed of sale in the present case shows that it did not expressly provide for any such condition. The stipulation in the deed of sale as to payment of the balance of the purchase price in instalments merely consists of the modality of payment, and in my view cannot be considered as such a condition either. In the same vein we are told in **Dalloz, Encyclopedie Juridique, 2<sup>e</sup> Édition, Répertoire de Droit Civil, Tome V, Vo. Vente** that:

*879. D'une façon générale, les clauses de résolution conventionnelle pour défaut de paiement du prix sont régies par les principes de la condition résolutoire. Une stipulation liant le transfert de propriété au paiement du prix n'est une condition suspensive que s'il résulte clairement soit de l'acte même, soit des circonstances que telle a été la volonté des parties...*

Emphasis added.

- [77] It is clear from the above that the plaintiff's argument that the payment of the outstanding instalments by the defendant was a condition precedent which had not been fulfilled and as long as it remained unfulfilled constituted a continuing breach continued so that prescription did not run, cannot stand. The obligation of the defendant to pay the price cannot be a condition precedent to a sale. Only the transfer of ownership of the property can be made conditional to the payment of the price but this was neither expressly stipulated in the deed of sale nor in my view can it be inferred from the circumstances that this was the intention of the parties in the present case.

- [78] Similarly in the Eden Island case (supra), in the tracing proceedings, to counter the defendant's plea of prescription, counsel for plaintiff relied on Article 2257 to submit that

the condition in that case was the payment of the sum of money into the plaintiff's escrow account which was not fulfilled, and that therefore prescription would not run, M. Twomey then CJ stated:

*27. There is also no merit to the claim that prescription cannot run against a claim subject to a condition until that condition is fulfilled, and the submission that “the condition in the instant case [was] that the plaintiff be paid USD 388,500” which condition was not fulfilled. The argument would seem to conflate a condition to a claim with a claim itself. If this argument were to be accepted it would mean that contractual debts could never prescribe. It cannot be underscored that the unpaid instalment is the claim. It is the cause of the action and not a condition to the claim ...”*

[79] In support of his argument that the contract of sale is subject to a condition precedent, which was the payment of the outstanding instalments which remain unpaid, plaintiff's counsel has also submitted that “[s]ince the charge on the property still subsists, it follows therefore, that the obligation to make payment which lies on the Defendant continues and can only be discharged or extinguished once the obligation to pay is fulfilled, which was a condition precedent, in the agreement”. I note that the plaintiff has not brought any evidence, documentary or otherwise, that a charge subsists on the property. Mr. Hoareau the sole witness for the plaintiff seems to be mistakenly labouring under the impression that clause 2 of the deed of sale which sets out Government's undertaking to pay the outstanding sum in monthly instalments to be a charge against the property as shown by his testimony as per the Court proceedings of the 6<sup>th</sup> November 2020 in examination in chief, at pages 6 and 7 -

Q: *Okay and according to the agreement the Government is still owing to pay 1.5 million rupees to the deceased.*

A: *Yes.*

Q: *And was there a charge registered against the property for this debt?*

A: *According to the transcript all the debts were paid by the Government so if they paid I have no knowledge.*

Q: *No I am talking about the charge. The mortgage. The mortgage of the (10.05.08 recording not clear) property.*

A: *According to this, yes. According to this the Government had a mortgage to pay.*

[...]

Q: *So I will repeat the question again you have to listen carefully. Do you know whether there was a charge like a mortgage registered against Coetivy Island reflecting the debt that was owed by the Government to the deceased? If you know you say yes. If you don't you say no.*

A: *Yes.*

And at page 10 –

Q: *Okay and it is your testimony that the charge against the property is still existing?*

A: *Yes*

Q: *Is it still there?*

A: *Yes*

Q: *For that 1.5 million rupees?*

A: *Uh-huh.*

And in cross-examination at page 14 –

Q: *I just want some clarification of this mortgage that was registered. You mentioned a mortgage.*

A: *Charge*

[...]

Q: *You mentioned a charge Sir. Can you just explain what you mean?*

A: *Well I presume that when you take a mortgage out there are charges and this has not been paid. Has not been registered so -*

Q: *And what evidence do you have of this?*

A: *Well it is written in there.*

Q: *I am not seeing -*

A: *The outstanding sum of (10.18.58 recording not clear) there are remaining unpaid.*

[80] I therefore find no merit in this argument either.

Article 2257 - Prescription does not run with regard to a claim which is subject to a condition, until that condition is fulfilled.

- [81] So much for the condition precedent. I now turn to Article 1184 alinea 1 which provides that “[a] condition subsequent shall always be implied in bilateral contracts in case either of the parties does not perform his undertaking”. A condition subsequent (“condition resolutoire”) is defined in Article 1168 as a future and uncertain event the occurrence or non-occurrence of which cancels the obligation which is subject to such condition.
- [82] The plaintiff claims that the defendant has failed to pay the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) due under the deed of sale. In terms of Article 1184 alinea 1, the non-performance by the defendant of its obligation to pay the price amounts to a condition subsequent. The non-payment of the price by the defendant is the event which gives rise to the cancellation of the defendant’s obligation in terms of Article 1168.
- [83] According to Article 1183 the effect of the fulfilment of the condition subsequent (i.e. the non-payment of the price by the defendant) is the rescission of the obligation and restoration of things in the same state as they would have been if the obligation had never existed. It does not suspend the performance of the obligation but only binds the creditor to restore what he has received, if the event envisaged by the condition occurs.
- [84] Article 2257 alinea 1 further provides that prescription shall not run with regard to a claim which is subject to a condition, until that condition is fulfilled. Relying on that provision, the plaintiff contends that until the outstanding part of the price is paid and the condition subsequent fulfilled, prescription cannot start running.
- [85] This argument is misconceived. The condition subsequent envisaged by Article 1184 is the non-payment of the price by the buyer. As soon as payment becomes due and the buyer fails to effect payment, the condition is fulfilled and prescription starts running. This is made clear in **Dalloz, Encyclopedie Juridique, 2<sup>e</sup> Édition, Répertoire de Droit Civil, Tome IV, Vo. Prescription Civile:**

442. *A l'égard des créances sous conditions suspensives, la prescription ne court pas jusqu'à l'arrivée de l'évènement (art. 2257, al. 1<sup>er</sup>) ... Par application de cette règle, le même texte (al. 2) décide que, à l'égard de l'action en garantie, la prescription ne court pas jusqu'à ce que l'éviction ait lieu. L'éviction joue en effet le rôle de condition, donnant ouverture au recours exercé contre le garant ...*

443. *L'action en résolution de l'article 1184 constitue un cas analogue, car elle est soumise à une condition suspensive, qui est l'inexécution de ses engagements par une des parties au contrat synallagmatique.*

Emphasis added.

- [86] Furthermore the deed of sale provided for a time frame within which the payment of the outstanding instalments were to be effected. In that regard Article 1176 of the Civil Code provides that:

*Article 1176*

*When the obligation is agreed upon subject to the condition that an event will occur within a fixed period, that condition shall be deemed to have failed if the time has expired without the event having occurred. If no fixed period has been agreed upon, the condition may always be fulfilled; and it shall only be deemed to have failed when it is certain that the event will not occur.*

- [87] The time frame for the payment of the outstanding instalments having elapsed, the condition is deemed to have failed. It cannot be said therefore that the condition is yet to be fulfilled. I therefore find that Article 2257 is not applicable to the present case.

- [88] Having found thus, I now have to determine whether the action was commenced within the applicable prescription period or not.

When did the debt become due and prescription start running

- [89] I have found at paragraph 53 above that the cause of action accrued upon the non-payment of the debt by the defendant to the plaintiff when such debt became due, which is when prescription started running. I now have to ascertain when the debt owed by the Government became due so that the date that prescription starts running can be determined.

[90] Clauses 2 and 3 of the deed of sale stipulate that:

2. *The Government undertakes to pay to the Vendors the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000) in the following manner:-*
  - (i) *Rupees Three Hundred Thousand (R300,000) by 15<sup>th</sup> January 1980*
  - (ii) *Rupees Three Hundred Thousand (R300,000) by 15<sup>th</sup> February 1980*
  - (iii) *Rupees Three Hundred Thousand (R300,000) by 15<sup>th</sup> March 1980*
  - (iv) *Rupees Three Hundred Thousand (R300,000) by 15<sup>th</sup> April 1980*
  - (v) *Rupees Three Hundred Thousand (R300,000) by 31<sup>st</sup> May 1980.*
3. *It is further agreed that in the event of Government failing to make any two consecutive payments as stipulated in Clause 2 hereof the outstanding sum or any part thereof remaining unpaid shall become immediately due and payable”.*

[91] The plaintiff claims that the defendant did not pay any of the instalments. In terms of clause 3 therefore the whole sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) became due and payable when the second instalment of Rupees Three Hundred Thousand (R300,000) became due and payable on 15<sup>th</sup> February 1980. This is when the debt became due and the date on which prescription should start running, and not on 31<sup>st</sup> May 1980, the date agreed upon for payment of the last instalment.

### **Decision**

[92] The cause of action in the present case accrued on 15<sup>th</sup> February 1980 and proceedings commenced with the filing of the plaint on 24<sup>th</sup> August 2020. Forty years have elapsed between the accrual of the cause of action and filing of the plaint. No evidence has been brought by the plaintiff of the occurrence of any event which may have interrupted prescription which in any event was not raised by the plaintiff. In fact in his testimony Mr. Hoareau the sole witness for the plaintiff admitted that he had no evidence either that Mr. Delhomme made any demand to the Government for payment of the outstanding sum, or that the Government had acknowledged any debt due by it to Mr. Delhomme (see paragraph 12 above). I therefore find that the present action, having been filed more than 20 years after the accrual of the cause of action, is prescribed.



[93] Having found that the action is prescribed, I decline to consider the matter on the merits as to do so would be purely an academic exercise in the circumstances.

[94] In that regard I wish to put on record that the additional written submissions of counsel for the plaintiff dated 16<sup>th</sup> May 2021 which I received one day prior to delivery of this judgment were not taken into account due to the late hour of the submissions and as the submissions related more to the merits of the case and not to the issue of prescription as such. The submissions were to the effect that the case of Mary Henry (born Choppy) acting as Fiduciary for the co-ownership between Mercia Choppy (born Bibi) and Ors v Societe Marianne (Seychelles) Ltd CS273/1994, which concerned an action for rescission of a contract of sale of immovable property for failure to pay the full purchase price is authority that in such actions the Court may order the cancellation and rescission of the contract of sale for failure to pay the purchase price by the agreed date. In that case a judgment by consent was entered into by the parties in terms of which failure of the defendant to pay the plaintiff as per its undertaking would result in the contract of sale being rescinded and cancelled by operation of law. It was submitted that this Court should make such an order in the present case.

[95] Accordingly I dismiss the plaint. Each party shall bear their own costs.

Signed, dated and delivered at Ile du Port on 18<sup>th</sup> May 2021.

---

Carolus J