

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2023] SCSC 153  
CS 63/2019

In the matter between:

**JEAN-PAUL CALAIS & ORS**  
*(rep. by Mr. Elizabeth)*

**Plaintiffs**

**and**

**CERF & SURF PROPERTIES LIMITED**  
*(rep. by Mr. Georges)*

**Defendant**

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**Neutral Citation:** *Calais & Ors v Cerf & Surf Properties Limited* (CS 63/2019) [2023] SCSC 153

**Before:** Dodin J  
**Heard:** 11 January 2023  
**Delivered:** 24 February 2023

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**JUDGMENT**

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**DODIN J**

[1] The 3<sup>rd</sup> Plaintiff Debora Jane Bechard born Calais is the Fiduciary of the of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs Jean-Paul Calais and Catherine Calais, all of whom are co-owners of land parcel CA103 situated at Cerf Island. The Defendant is a company duly registered under the Companies Act and owner of land parcel CA 102 on which the Defendant has built a hotel known as The Cerf Island Resort. The Plaintiffs' and Defendant's properties share a common boundary demarcated by beacons LG 782, GN 205, LG 780 and GN 198.

[2] The Plaintiffs claim that the Defendant has encroached upon their land along the common boundary to the following extent:

- a) Part of a block wall, concrete buggy drive, concrete footpath, concrete tank – 145sqm;

- b) Corner of a Villa and part of its roof overhang – 2sqm;
- c) Corner of the roof overhang of a Villa – 1sqm; and
- d) Part of the tennis court – 27sqm

Total 175sqm

[3] The Plaintiffs aver that the said encroachments constitute a “faute” in law for which the Plaintiffs have suffered loss and damages which the Defendant is liable to make good to the Plaintiffs. The Plaintiffs claim the following as loss and damages from the Defendant:

- a) Moral damages for anxiety, emotional distress inconvenience and psychological stress at SCR50,000 per Plaintiff amounting to SCR150,000.00.
- b) Loss of opportunity of development or sale as result of the encroachment over CA103 for the period of 28.01.2015 to 31.12.2018 (1433 days) (area x estimated value per square meter x investment return – divide by 365 to get a cost per day)  
 $14,363\text{m}^2 \times \text{SCR } 1,299 \times 10\%/365 = \text{SCR } 5,111.00 \text{ per day}$   
 $\text{SCR } 5,111.00 \text{ per day} \times 1433 \text{ days amounting to SCR } 7,324,063.00.$
- c) Loss of use and enjoyment of property for which the Plaintiffs claim the sum of SCR500,000.00.

The total sum claimed is SCR 7,974,063.00.

[4] The Plaintiffs claim that by letter dated 17<sup>th</sup> April 2018 the Defendant was put on notice that he had encroached onto the Plaintiffs’ property and that such encroachments was to be removed within 14 days but the Defendant has failed, refused and/or neglected to remove the said encroachments.

[5] The Plaintiffs pray the Court to for the following remedies:

- a) Make a finding that the Defendant has encroached on the Plaintiffs’ property;
- b) Order the Defendant to remove all encroachments on the Plaintiffs’ property;
- c) Make an order of injunction against the Defendant preventing the Defendant from further encroaching onto the Plaintiffs’ property

- d) Order the Defendant to pay the Plaintiffs the sum of SCR 7,974,963.00 in damages with interest and costs; and
- e) To make any further and other order the Court deems just and necessary in all the circumstances of the case.

[6] The third Plaintiff testified that the encroachments at its worse covered a total 175 square meters of the Plaintiffs' property which has an area of 14,363 square meters. The encroachment lasted for a period of about 21 years until most were removed. She testified that when the Defendant was requested to remove the encroachments, the Defendant replied by offering to buy the encroached portions which the Plaintiffs refused. She admitted that some of the encroachments have now been removed. She testified that during that period she had approached some purchasers but the land was not sold because the potential purchasers did not want to inherit the legal problems of encroachments caused by the Defendant.

[7] Mr Michel Leong, land surveyor, testified that he conducted a survey of the land in question verifying the encroachments upon CA 103. In his report dated 18<sup>th</sup> May 2018, he determined the encroachments upon CA 103 by the Defendant as follows:

- i. *Part of the Cerf Island Resort Hotel structure encroaches on CA103. Part of a block wall, concrete buggy drive, concrete footpath and a concrete tank which is presumably for wastewater is also part of the encroachment on CA103. The encroachment covers an approximate area of 145 square metres.*
- ii. *The encroachment is the corner of a villa and part of its roof overhang. The encroachment area is approximately 2 square metres.*
- iii. *The encroachment is a part of the corner of the roof overhang of a villa. The encroachment area is approximately 1 square metre.*

- iv. *The encroachment is part of the tennis court. The encroachment area is approximately 27 square metres.*
- v. *The encroachment is part of a retaining wall. The encroachment area is approximately 41 square metres.”*

[8] In a follow-up report dated 4<sup>th</sup> February 2022, Mr Leong found as follows:

- i. *With reference to the attached site plan, the encroaching part of the roof of the chalet indicated in “Inset B” appears to have been overlooked. This is a minor matter as it can easily be undertaken by the hotel.*
- ii. *The main areas of structural encroachments at the main hotel building (next to the beach) and the tennis court (eastern end of CA102) have been removed. The service access at the rear of the hotel has been blocked by a block wall. There was no evidence of the tank on site.*
- iii. *Reference to the attached images of the area next to the main hotel building. Construction debris and materials have not been completely removed from the site of the “encroachment”.*
- iv. *At the tennis court, the natural vegetation has already taken over such that at first glance, the removal of the fence and part of the court were not immediately obvious.*

### **Conclusion**

*I believe that there is no necessity for additional works to “restore” the vacated encroached areas of CA103 to its “original form”. This observation is based on the overall shape of the “encroached areas” relative to the surrounding terrain.*

*The cut and fill at the southern end of the tennis court has not disfigured the eastern end of parcel CA103.*

*Except for the roof corner of a chalet, all the structural encroachments have been removed.*

*At the time of the assessment, there was still a significant amount of building materials and debris to be removed from the area adjacent to the main hotel as indicated in the annexed images. Then there was no sign of a contractor on site managing the removals and cleaning of the site.”*

[9] Mr Vishram Patel testified for the defence maintaining that the encroachments were not deliberate and he had not been aware of the same until he received a notice from the Plaintiffs. He admitted that the claims of encroachments were correct and offered to buy the encroached portions as detailed by My Leong. Since the Plaintiffs refused to sell, he directed the team on site to remedy the situation by removing the encroachments. He further testified that the Defendant wanted to settle the matter with payment of fair compensation but the Plaintiffs refused to agree to a reasonable sum. He admitted that at present there are only the two very small roof overhangs by the roof of two chalets to resolve. He also maintained that the other encroachments were removed about 3 years ago.

[10] Learned counsel for the Plaintiffs and the Defendant made extensive submissions in support of their respective case. Learned counsel for the Defendant made the following submission:

- 1. This matter concerns undisputed encroachment by the Defendant onto the land of the Plaintiffs.*
- 2. There is no disputing that the encroachment by one person over the land of another is both a breach of the provisions of Article 545 of the Civil Code and a breach of the corresponding constitutional right to the enjoyment of property by the owners of the property encroached upon.*

3. *Jurisprudence constant since the case of Nanon v Thyroomooldy SCA 41 of 2009 has clearly defined the rules relating to encroachment. These are:*
  - i. *The owner of property encroached upon can insist on demolition, and demolition remains the norm;*
  - ii. *The good faith of the encroacher is not a defence;*
  - iii. *In exceptional cases, where the proportion of the encroachment and the cost of demolition are unbalanced, the justice of demolition will be tempered with mercy;*
  - iv. *In those exceptional cases, the encroacher must show he or she acted in good faith and the demolition would cause hardship.*
  - v. *In these cases, damages would be awarded instead of an order to demolish;*
  - vi. *In those exceptional cases, the owner of the property encroached upon who insists on demolition commits an abuse of right, which can give rise to damages.*
  
4. *The foregoing jurisprudential pointers were consolidated into the following statement in Mancienne & Anor v Ah-Time and Anor SCA 9 of 2010:*

*‘[10] we reproduce the position of our law post-Nanon on encroachments, more particularly boundary encroachments as between neighbours:*

  - 1) *If one builds on someone else’s property a structure which entirely stands within the boundaries of that property, it will be art 555 of the Civil Code of Seychelles under which the fate of the structure and the indemnity, if any, to be paid will depend.*
  - 2) *However if one builds partly on one’s property and the structure goes over the neighbours boundary encroaching on his land, art 555 finds no application.*

- 3) *In such a case, the neighbour can insist on demolition of that part of the construction which goes over the boundary and the Court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment.*
- 4) *The fact that the encroachment was done in good faith or brought about by mistake as to the correctness of the boundary would have no effect on the Court's duty to order demolition: see Cour de Cassation, D1970.426 (Civ 3°, 21 no. 1969); "Grands Arrêts de la Jurisprudence Civile" by Henri Capitant for French law; Tulsidas & Cie v Cheekhooree 1976 Mr 121; Boodna vs Mrs R R Ramdewar 2001 MR 116; Lowtun vs Lowtun 2001 Int Court 1; Thumiah Naraindass v Thumiah Avinash Chandra 2009 Int Court 82, for Mauritian law; article 992 of the Civil Code of Quebec and Micheline Pinsonnault v Maurice Labrechque [1999] R.D.1 113 (C.S) cited in Boodhna vs Mrs R R Ramdewar (supra) for the law of Quebec.*
- 5) *But where grave injustice may result in certain exceptional cases: for instance, for a small area of land encroached upon, part of a huge building would have to be demolished causing damage out of proportion to the value of the land encroached upon, the justice of the demolition will have to be tempered with mercy.*
- 6) *In such a case, the encroacher would need to show additionally that he acted in good faith, within the rules of construction, did not otherwise break any law and the demolition would cause great hardship.*
- 7) *In such a case, the Court would not order demolition and would allow damages and compensation commensurate with the extent of the encroachment.*
- 8) *Where the owner of the land insists on a demolition order in such a case of grave injustice, the encroacher may plead abus de droit as against the owner*

*and insist on compensating him in compensatory damages for the encroachment.'*

5. *This was consolidated into statute by the addition of Article 556 in the Civil Code 2020. The Court is given wide powers under sub-article (2) to 'make such orders as it thinks fit to do justice in the circumstances of the case'. in exercising its powers, the Court may:*
  - i. *In the case of a good faith encroachment, require the encroacher to buy the land encroached upon or pay compensation for the encroachment;*
  - ii. *In the case of a bad faith encroachment, require the encroacher to pay damages and either remove the encroachment or buy the land encroached upon.*
6. *In addition to the foregoing rules, it appears that de minimis encroachment is a special category of encroachment. This was clearly stated by this Court in Pillay v Pillay [2016] SCSC 171, citing with approval at paragraph [20] the words of the Seychelles Court of Appeal in Mancienne:*

*'[17] Post-Nanon, the exception to the rule that demolition should be ordered in all neighbour boundary encroachments may be stated as follows:*

*Where the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, account taken of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher, the Court should, as an exception mitigate the consequences by an award of damages instead of a demolition. Nothing short of that would suffice. For the encroacher to escape the guillotine of article 545, he should show that, in refusing a compensation for the negligible encroachment and insisting on a demolition order in all the circumstances of the case, the owner is making an abus de droit.'*

7. *The facts here reveal that the Defendant and Plaintiff are neighbours on Cerf Island. The Defendant was the owner of Parcel CA20 on which a small hotel*



*comprising some chalets are built. Wanting to increase the size of the hotel, the Defendant acquired an adjoining strip, Parcel CA102, from the plaintiff's father. The remainder of the land, Parcel CA103, is now owned jointly by the Plaintiffs, following the death of their father. In constructing chalets and a pool area on Parcel CA102, the Defendant encroached onto Parcel CA103 in four places; along the pool area by a strip decking, by a corner of a tennis court and by two roof overhangs of two separate chalets (one of the overhangs possibly also containing a column supporting that corner of the chalet). In all, the encroachment was less than 200 sqm in extent. As soon as the encroachment was brought to the attention of the Defendant, it offered to purchase the encroached areas, or indeed the whole of Parcel CA103 but, when the Plaintiffs refused either, the encroachments at the pool and tennis court were removed and the ground made good. The two overhangs, amounting to 2 sqm and 1 sqm respectively, remain, as to remove them will require demolition of all or part of the respective chalets.*

8. *In accordance with the law set out hereinabove, three things fall to be determined:*

- *Was the encroachment here in good or bad faith?*
- *Is the remaining encroachment de minimis?*
- *What should be the remedy for the encroachment?*

9. *This will be considered in turn.*

*Was the encroachment here in good or bad faith?*

10. *In encroachment cases, good faith is essentially the absence of bad faith. One cannot set out to encroach onto another's property in good faith. Rather, one does it through inadvertence, mistake as to ownership of the land or as to the boundary line, or simple negligence. None of these constitutes bad faith per se. Rather, bad faith will be presumed from an examination of the facts. Good*

*faith is always presumed and one who alleges bad faith is required to prove it. Although this notion is directly applicable to the possession of land for prescription purposes and is to be found in Article 2262(2) of the Civil Code, it is equally a doctrine of universal application.*

*11. The plaintiff have tried to put the Defendant in a bad light in suggesting that their father was forced to part with Parcel CA102, but this position is, it is submitted, unsupported. Rather, the nature of all the encroachment reveals that this was along the boundary, revealing at most a lack of application as to the correct line of the boundary rather than a desire to use land which did not belong to the Defendant. The encroachments are in the nature of minor incursions along a common boundary line rather than any substantial building. It is submitted that this was nothing more than negligent or inadvertent building practice rather than a wilful desire to actually encroach because there was not sufficient available land on the correct side of the boundary on which to build. In fact, the removal of the encroachment at the pool and the tennis court has not led to the two facilities having to be demolished, which shows this to be the probable reason.*

*12. It cannot therefore be said that there was bad faith on the part of the Defendant in the encroachment. Rather, the position of the encroachment shows that the constructions were done in good faith by mistaking the true boundary line.*

*Is the remaining encroachment de minimis?*

*13. Res Ipsa Loquitur. Two overhangs amounting to a total onto a parcel of land 14,363 sqm in area cannot by any stretch be called anything but de minimis. In that context, on the basis of the law set out above, the Defendant should not be required to remove the encroachment but, if anything, be ordered to purchase the 3 sqm of land encroached upon. Should the Plaintiffs insist on removal of the encroachment, they should be ordered to pay damages for abuse of right.*

*What should be the remedy for the encroachment?*

14. *That there was encroachment in the pool and tennis court areas until this was removed is not disputed. On the basis of the law set out above, compensation for the encroachment is due to the Plaintiffs. In assessing the compensation, regard will be had to:*
- i. *The fact that the encroachment has been substantially removed and the land made good;*
  - ii. *The fact that neither the Plaintiffs nor anybody else was making use of Parcel CA103 during the encroachment;*
  - iii. *That, although there was evidence of Mr Sol Kersner's organisation being offered Parcel CA103 for development, the encroachment did not prevent this and there was thus no proven loss to the Plaintiffs by way of the encroachment;*
  - iv. *That Parcel CA103 is admitted by all parties to be a jungle with no development of any type thereon and no use made of it.*
15. *In the circumstances of this matter, it is submitted that the sum claimed by the Plaintiffs for the encroachment is grossly exaggerated and any compensation (or damages, if the encroachment was felt to be in bad faith), should reflect the minor nature of the encroachment, the fact that it was removed, that the use of the land of the Plaintiffs was not affected, and the remaining encroachment is of a purely technical and de minimis nature."*

[11] Learned counsel for the Plaintiffs made the following submission:

1. *The Defendant has admitted liability for the encroachment and has submitted correctly on the law. The Plaintiffs respectfully submit that the defendant position on the law as submitted is correct. The only issue outstanding is quantum. The defendant has submitted that the Plaintiffs have failed to prove*

*the damages sought. The Plaintiffs, with respect, disagree with the defendant's submissions that the encroachment was done in good faith. The plaintiff further disagree with the defendant's submissions that the encroachment was de minimis. And finally the Plaintiff disagree with the defendant's submissions that compensation or damages should be de minimis.*

*Quantum of damages*

- 2. In their submissions, the defendant has submitted that where grave injustice may result, in certain exceptional cases: for instance, for a small area of land encroached upon, part of a huge building would have to be demolished causing damage out of proportion to the value of the land encroached upon, the justice of the demolition will have to be tempered with mercy. The plaintiffs submit that the total area encroached upon was 175m<sup>2</sup> but the encroachment affected the plaintiffs' decisions in respect of the whole parcel of land. The plaintiffs respectfully submit that the 175m<sup>2</sup> is valued at approximately USD300/m<sup>2</sup> which equates to over SCR 700,000 while the whole land is worth over SCR 34 million. (i.e cost of demolishing encroachments is not out of proportion to the value of the land affected)*
- 3. The defendant has submitted that in such a case, the encroacher would need to show additionally that he acted in good faith, within the rules of construction, did not otherwise break any law and the demolition would cause great hardship. The plaintiffs respectfully submit, that in any event the Defendant is a builder and can formulate the most cost effective way of remedying the encroachment, such works to be done at cost.*
- 4. The Plaintiffs respectfully submit, that the Defendant did not act within the rules of construction which requires building to remain 1.5m from the boundary. This clearly shows that the defendant acted in bad faith throughout. The defendant is familiar with building and planning regulation and it is not that difficult to locate beacons on the property to ensure that the*

*construction did not encroach on the neighbour's property. The plaintiffs respectfully submit that the defendant was reckless and negligent in its behaviour and did not show any diligence, carefulness and consideration to the plaintiff's property. This is clear evidence that the defendant acted in bad faith throughout.*

5. *The Plaintiffs respectfully submit that the defendant was motivated by greed and did not show any consideration to the plaintiffs. The plaintiffs respectfully submit that the Defendant has been using the encroached land for commercial gain for over 11 years (some rooms charge out at over USD1,000 per night), the revenue earned during this period of encroachment should more than offset the builder's cost of remedying the encroachments, in other words, no financial hardship has been caused to the Defendant at all by the demolition and removal of the encroachments.*
6. *In respect of the defendant's submissions on the issue of de minimis encroachment to the effect that where the facts reveal that as demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, account taken of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher, the Court should, as an exception mitigate the consequences by an award of damages instead of a demolition. The plaintiffs respectfully submit, that the two villas that have encroached upon the plaintiffs' land, have been hired out for commercial gain for over 11 years charging out some villas at USD1,000 per night.*
7. *The plaintiffs respectfully submit that a grave injustice has been caused to the plaintiffs by the defendant as the defendant has unlawfully exploited the plaintiffs' land for substantial financial gain whilst the plaintiffs who are the owners of the land have not been compensated for the use of their land for this long period of time.*

8. *The Defendant claimed to the Seller (Plaintiff's father) that the reason for purchasing the land from him was to 'build an access road'. The plaintiffs respectfully submit that this was a misrepresentation of the underlying intention, which clearly was to expand the hotel as now mentioned in the Defendant's submissions.*
9. *The defendant has submitted that in constructing chalets and a pool area on Parcel CA101, the Defendant encroached onto Parcel CA103 in four places: along the pool area by a strip of decking, by a corner of a tennis court and by two roof overhangs of two separate chalets (one of the overhangs possibly containing a column supporting that corner of the chalet.) In all, the encroachment was approximately 150 sqm in extent. The plaintiffs respectfully submit that this is factually incorrect as according to Michel Leong's survey report dated 18<sup>th</sup> May 2018, the encroachment A (pool) is 145m<sup>2</sup>, B 2m<sup>2</sup>, C 1m<sup>2</sup>, and D (tennis court) 27m<sup>2</sup>. The total area encroached is therefore 175m<sup>2</sup> which the defendant exploited for financial gain for eleven years.*
10. *The defendant has submitted that as soon as the encroachment was brought to the attention of the Defendant, it offered to purchase the encroached areas, or indeed the whole of Parcel CA103 but, when the Plaintiffs refused either, the encroachments at the pool and tennis court were removed and the ground made good. The plaintiffs respectfully submit, that the evidence shows the contrary; that the encroachments were not immediately removed, as per the initial request of the plaintiffs. The defendant intentionally ignored the plaintiff's request to remove encroachments. In fact, the encroachments were only removed after the scheduled court hearing on the 23<sup>rd</sup> March 2020, which was subsequently delayed due to Covid when the plaintiffs were en route to the Seychelles. i.e it is only after the plaintiffs continued with their legal action that the defendant responded by doing something about two of the encroachments only.*

11. *The Defendant has also submitted that the encroachment was in good faith. The defendant also submitted that rather, bad faith will be presumed from an examination of the facts. The plaintiffs respectfully submit, that the tennis court concrete surface that was encroaching 27m<sup>2</sup> has not been broken up and removed and thus not made good. Only the tennis court fence has been removed.*
12. *The plaintiffs respectfully submit that the Defendant is a major, experienced, long-established building Contractor in the Seychelles, who is bound to conform with building regulations, i.e. build up to 1.5m from the boundary. It is unconceivable that such an experienced builder could have made a mistake four times by building on the plaintiffs' property and encroaching not once but four times. The Defendant even made a 'last minute' attempt to purchase additional land from the plaintiffs' father, most likely realising that its expansion plans could not be realised on the additional land purchased. In other words, the defendant was well aware of the impending encroachments, which ended up being intentional. The plaintiffs respectfully submit that the Defendant had previously encroached on CA102 in eight different areas (see Lebon Survey's report 24 April 2003) which had resulted in the initial sale of CA102 in what the plaintiff's father felt was a situation he was forced into. This subsequent encroachment (building completed in 2011) was a repeat of the initial practice from 2003, i.e. repeated offender and habitual tactics deployed again showing clear evidence of bad faith.*
13. *The defendant had submitted that the removal of the encroachment at the pool and the tennis court has not led to the two facilities having to be demolished. The plaintiffs respectfully submit that this is factually incorrect. The tennis court encroachment was over a large part of the tennis court (see photographic evidence). The entire tennis court fence has been removed and the tennis court is no longer in a usable state. For the tennis court to be useable it would have to be relocated entirely onto the Defendant's property.*

14. *The defendant submits that the defendant has sought an order of the Court to compel the plaintiffs to sell the 3 sqm of land encroached upon. The plaintiffs respectfully submit that they do not want a situation where the boundary line juts out in two places. This would inhibit the use of that land along that boundary and also negatively affect the value of any potential sale of that section of the land. The plaintiffs submit that a 2m section along the entire boundary covers approximately 900m<sup>2</sup>.*
15. *The defendant has submitted that the encroachment has been substantially removed and the land made good. The plaintiffs urges the court to refer to the survey report from 4<sup>th</sup> February 2022. At the time of the assessment, there was still a significant amount of building materials and debris to be removed from the area adjacent to the main hotel as indicated in the images. Then there was no sign of a contractor on site managing the removals and cleaning of the site.*
16. *The defendant has also submitted that although there was evidence of Mr Sol Kersner's organisation being offered Parcel CA103 for development, the encroachment did not prevent this and there were thus no proven loss to the Plaintiffs by way of the encroachment. The plaintiffs respectfully submit, that the encroachment inhibited the potential sale of the property as it was encumbered and no buyer (particularly overseas based buyers) would be interested in inheriting a legal problem. The plaintiffs further submit that because of the encroachments the joint owners of the land have not been able to divide the land equally and deal with it as they wish due to the encroachments.*
17. *The defendant has submitted that any compensation (or damages, if the encroachment was felt to be in bad faith), should be de minimis. The plaintiffs respectfully submit that when considering damages, the court needs to take into consideration the costs of the plaintiff for taking the legal action bearing in mind that the defendant ignored the plaintiffs' request to remove*



*the encroachment forcing the plaintiffs to commence legal action against the defendant and it was only after the plaintiffs initiated legal action, and after the initial hearing date and countless mentions in court that the defendant removed some encroachments. Furthermore, the defendant was using the plaintiffs' property for commercial and financial gain to the detriment of the plaintiffs for eleven years depriving the plaintiffs of the exclusive use and enjoyment of their property to the exclusion of all others as is provided for in article 26 of the Seychelles Constitution.*

*18. The plaintiffs will rely on the case of Laporte v Chetty Anor (CS 54/2016) [2019] SCSC 251 (27 March 2019); where the defendant was ordered to remove the encroachments (included a swimming pool) within 3 months, restore the property including retaining wall and pay damages with costs to the plaintiff. Judge Nunkoo held as follows:-*

*“In the circumstances, the claim has not prescribed. Since the Plaintiff has sought damages, damages ought to be awarded”*

*I therefore make the following orders:*

- a) The Defendant to remove all the encroachment that is the boundary wall and the swimming pool within three months as from the date of this judgment.*
- b) To restore plaintiff's land in good state by removing all debris after removing the encroachments.*
- c) To build a retaining wall along the boundary between her plot and plaintiff's plot.*
- d) In case the Defendant fails to take the above steps within three months the Plaintiff is hereby authorised to carry out all the above works, that is the removal of the encroachments and all incidental works mentioned above and the Plaintiff shall claim the costs duly certified by a quantity surveyor and the Defendant shall within one month settle the claim.*

e) *I order Defendant to pay SR 50,000.00 as damages.*

f) *With costs.*”

19. *The plaintiffs will also rely on the case of Fred v Prospere & Anor (CS06/2013) [2016] SCSC 931 where Justice Fiona Robinson held as follows:-*

*“Second, should the court order the demolition of the encroachment? The court states the principles applicable to this case, (see the cases of Danielle Mancienne and others vs. Yola Ah-Time and others SCA09/2010 and Nanon v Thyroomoody SCA 41/2009, where the Court of appeal set out the position of our law, on encroachments, particularly boundary encroachments as between neighbours*

*“1. If one builds on someone else’s property a structure which entirely stands within the boundaries of that property, it will be article 555 of the Civil Code of Seychelles under which the fate of the structure and indemnity, if any, to be paid will depend.*

*2. However, if one builds partly on one’s property and the structure goes over the neighbour’s boundary encroaching on his land, Article 555 finds no application.*

*3. In such a case the neighbour can assist on demolition of that part of the construction which goes over the boundary and the court must accede to such request and cannot force the neighbour to accept damages or compensation for encroachment.*

*4. The fact that the encroachment was done in good faith or brought about by mistake as to the correctness of the boundary would have no effect on the Court’s duty to order demolition. See Cour de Cassation, D1970. 426 (Civ 3?, no.) “Grands Arrêts de la jurisprudence civile” by Henri Capitant for French Law. *Tulsidas & Cie v. Cheekooree* 1976...*

5. *But where grave injustice may result in certain exceptional cases: for instance, for a small area of land encroached upon, part of a huge building would have to be demolished causing damage out of proportion to the value of the land encroached upon, the justice of the demolition will have to be tempered with mercy.*

6. *In such a case, the encroacher would need to show additionally that he acted in good faith, within the rules of construction, did not otherwise break any law and the demolition would cause great hardship.*

7. *In such a case, the Court would not order demolition and would allow damages and compensation commensurate with the extent of the encroachment.*

8. *Where the owner of the land insists on a demolition order in such a case of grave injustice, the encroacher may plead abus de droit as against the owner and insist on compensating him in compensatory damages for the encroachment.*

Nanon states that the neighbour can insist on demolition of that part of the construction which over the boundary and the court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment. In the present case Plaintiff wants the court to order demolition of the part of the house which is encroaching on Plaintiff's property. It is clear from Nanon that the court may decline a request for demolition only if –

(a) *Grave injustice may result in certain exceptional cases; and*

(b) *The encroacher has acted in good faith, within the rules of construction, did not otherwise break any law and the demolition would cause great hardship.” (see paragraph 59 of the judgment)*

20. *Justice Robinson went on to rule as follows:-*

*“For the above reasons, the court gives judgment ordering the First and Second Defendants to demolish the part of the house that has been illegally constructed on Plaintiff’s Property. The court has considered the nature and extent of prejudice suffered by Plaintiff. Based on the facts and circumstances of the case the court orders First and Second Defendants jointly and in solido to pay Plaintiff the sum of Seychelles rupees 1/- as damages. With costs.”*

21. *In respect of the issue of good faith, the plaintiffs submit that the defendant has a history of prior encroachments, a habitual tactic which it employs to force a sale of land. The plaintiffs submit that it is clearly not a one-off mistake. In 2003 the defendant encroached onto CA102 in 8 areas. The defendant misrepresented its intention to purchase CA102. Stated intention of the Defendant in purchasing CA102 was to build an access road. However, the defendant ended up doubling the size of Cerf Island resort by building 12 more villas, swimming pool and tennis court and water tanks. The defendant tried to purchase more land than CA102 realising that the building would go over the boundary. The plaintiffs submit that the defendant has a history of bad faith in other dealings. Vijay did not always pay rent when due when leasing land for building activities. He tried to renege at last minute during negotiations to purchase CA102. Refer to correspondence 4 May 2006 “you have not been frank and honest with me, as it is not easy to negotiate without frankness between parties.” Vijay failed to respect neighbour’s property. He used neighbour’s property (without permissions) as a staging ground during construction. He used CA103 as a dumping ground. Significant amount of building material and debris remain on plaintiff’s property according to Leong’s report. Vijay failed to act within the rules of construction by building up to 1.5m or more from the boundary.*

### Conclusion

22. *The plaintiffs respectfully submit that the defendant has admitted liability and the issue is demolition and damages only. The defendant has partially demolished the structure built on the plaintiffs' property but some of the structures are still present according to Leong's report. Rubbish and construction debris are still on the plaintiffs' property. The concrete base for the tennis court is still present on the plaintiffs' property. The defendant clearly acted in bad faith, unlawfully using the plaintiffs' land for commercial and financial gains and refusing to comply with the plaintiffs' request to remove the encroachments, when it had an opportunity to do so, forcing the plaintiffs to incur legal fees and costs to bring this action against the defendant when the defendant knew all along that it had encroached on the plaintiffs' property.*
23. *The plaintiffs respectfully submit that the Court should order the defendant to cart off the rest of the rubbish and debris from the plaintiffs' property, to remove the concrete built for the tennis court on the plaintiffs' property and order the defendant to pay damages to the plaintiffs as prayed for. The whole with costs. The plaintiffs respectfully move this Honourable Court to accordingly accede to their prayers considering all the circumstances of the case, the facts and evidence presented by the plaintiffs, the admissions of the defendants, the prejudice and financial losses caused by the defendant to the plaintiffs, the fact that the plaintiffs were deprived of the exclusive use and enjoyment of their property for 11 years, the fact that the defendant acted in bad faith throughout, the fact that the defendant acted out of greed, unlawfully encroaching on the plaintiffs' property and exploiting it for financial and commercial gains for 11 years; ignoring the plaintiffs' request to remove the encroachments and forcing the plaintiffs to unnecessarily incur legal fees and costs to bring this action against the defendant. The court should take into consideration all these factors when considering the issues of damages and compensation as well as demolition and removal of the encroachments, rubbish and debris from the plaintiffs' property."*

[12] The general rule regarding ownership of property is that no person can be forced to part with his property except as allowed by law. Article 545 of the Civil Code of Seychelles Act which provides:

*“545.(1) No person may be forced to part with his or her property except in the public interest and for fair compensation.  
(2) The purposes of acquisition and the manner of compensation are determined by legislation.”*

[13] Article 556 of the Civil Code of Seychelles Act 2020 has more or less settled the law in respect of encroachment.

*556.(1) Encroachment refers to a structure or works on land owned by one person which extends, without authority of the owner, onto or over land owned by another.*

*(2) Where there is an encroachment, the court may make such orders as it thinks fit to do justice in the circumstances of the case.*

*(3) In exercising its discretion under paragraph (2), the court will be guided by the principles set out in paragraphs (4), (5), (6) and (7).*

*(4) Where a person has encroached on land in good faith the encroacher may be required —*

*(a) to buy the land encroached upon at current market value, or*

*(b) to compensate the owner of the land encroached upon.*

*(5) If the encroachment is made in bad faith, the encroacher shall be required to pay damages and either —*

*(a) remove the encroachment and restore the land to its former condition;*

*or*

*(b) buy the land encroached upon at current market value.*

*(6) Where the owner of land encroached upon had knowledge of the encroachment at the time of the encroachment, and took no action to*

*prevent it, the encroacher shall not be required to remove the encroachment.*

*(7) (a) Where the encroachment is on land in the domaine public the interests of the public shall be protected by the State which in any action under this article shall act as owner.*

*(b) In the case of such an encroachment, priority should be given to the principle that the encroachment be removed and the land restored to its former condition whether the encroachment is made in good faith or bad faith.”*

[14] Both learned counsel have given fair interpretation of the law as it currently stands and to that extent there is no disagreement. The disagreements between the parties are on the facts leading to whether there was good faith or bad faith and whether the encroachment should be demolished or whether the Court should order the Defendant to buy the portion encroached upon. There is also issue on the quantum of compensation and damages.

[15] The evidence adduced show that the encroachments which was initially upon a total of 175sqm at 4 portions along the boundary have now been reduced to two encroachments of 2sqm and 1sqm totalling 3sqm. According to Mr Leong, there are still some debris on some parts of the land where the tennis court was located but the fence has been moved back to the Defendant’s land. Although removal of debris has not been pleaded and prayed for, it is a legal requirement that when removing the encroachment, the land must be restored to its former condition. Hence if debris have been placed or left on the land, it is necessary for the encroacher to remove the same so that the land is left in its original state.

[16] The remaining encroachment being 3sqm consisting of roof overhangs cannot in my view be considered substantial encroachments. However, the issue is not whether they are substantial as argued by the Plaintiff or whether they are de minimis as argued by the Defendant but whether the remaining encroachment can be removed. The Court is required to apply the principles set out in article 556 (4) (5), (6) and (7). There is of

course the argument that the Court should apply the law as it was before coming into force of the Civil Code of Seychelles Act 2020 and consider the principle of de minimis as set out in case law and consider whether ordering the demolition of a substantial part of the building to remove very small encroachments would result in abus de droit of the encroacher by the Plaintiff as the costs and extent of the demolition would cause hardship to the encroacher. In my view the size of the encroachment is only one of the factors to be considered but in itself it is insufficient to permit the encroacher to benefit from his faute.

[17] In such case, the Plaintiff has to prove bad faith on the part of the Defendant and the Defendant has to satisfy the Court that there was good faith. Balancing the evidence of the Plaintiffs' witnesses and the Defendant, and considering that the Defendant is one experienced in the construction industry together with the several attempts by the Defendant to purchase additional parts or the whole of the Plaintiffs' land favours the Plaintiffs' argument that there was lack of good faith on the part of the Defendant. I am not convinced that the encroachments occurred "*through inadvertence, mistake as to ownership of the land or as to the boundary line, or simple negligence.*"

[18] The next step is whether the Defendant must remove the remaining encroachments or buy the same at current market value and pay damages. The Plaintiffs are adamant that they do not want to sell the land to the Defendant and insist on the removal of the encroachments. The Defendant contends that it should be allowed to buy the encroached areas which are a mere 3sqm and agree to pay reasonable compensation for the other encroachments now removed. The Plaintiffs maintain that the protruding roofs would require the land to be demarcated in an irregular boundary which would affect the value of the land should they wish to sell later or would affect future projects in respect of the development of the land.

[19] The core determination that would determine what happens to the remaining encroachments is not the hardship to be caused by the removal but whether there is sufficient and compellable reason to intrude on the right of ownership of the Plaintiffs in spite of article 545 of the Civil Code. There is no comparison of hardship to be suffered by the Defendant and the Plaintiff. The right of the Plaintiffs should prevail unless it is



virtually impossible and unconscionable to require the Defendant to remove the encroachment from the Plaintiffs' land.

[20] From the evidence, it would require the Defendant to demolish a pillar and possibly part of the walls of the two villas in order to move back the protruding roofs from the land of the Plaintiffs. I do not find this demand by the Plaintiff to be unreasonable and I do not consider if the same is ordered unbearable hardship would result causing an abuse of the right of the Defendant. I therefore conclude that the Defendant must do the needful at its own costs to remove the remaining encroachments.

[21] The Plaintiffs' claim for damages as detailed above are for the sum of SCR 50,000.00 each for moral damages for anxiety, emotional distress inconvenience and psychological stress at SCR50,000 amounting to SCR150,000.00. The Defendant did not specifically contest that sum but moved the Court to award a reasonable sum as the claims being made by the Plaintiffs are exorbitant. The third Plaintiff in her testimony testified to the stress and emotional stress and anxiety of herself and her siblings upon learning of the existing situation. Her testimony on that aspect was not contradicted. I therefore award the Plaintiffs the sum of SCR50,000 each as moral damage.

[22] The next claim for loss of opportunity of development or sale as result of the encroachment over CA103 for the period of 28.01.2015 to 31.12.2018 (1433 days) (area x estimated value per square meter x investment return – divide by 365 to get a cost per day)  $14,363\text{m}^2 \times \text{SCR } 1,299 \times 10\%/365 = \text{SCR } 5,111.00$  per day  $\text{SCR } 5,111.00$  per day x 1433 days amounting to SCR 7,324,063.00. The Plaintiffs however did not testify to any development plan except that there was interest by a developer who backed off in view of the legal dispute regarding the encroachments. The Plaintiff also did not testify that there was in existence any investment plan which would have brought them the equivalent of the amount being claimed. The evidence show that the land has not been developed at all and remains covered in vegetation to date. Furthermore, the encroachments at their greatest extent was 175sqm. It is not reasonable for the Plaintiffs to claim loss for the whole of parcel CA103. I therefore allow only 10% of that claim which amounts to the sum of SCR732,406.30.

[23] Loss of use and enjoyment of property for which the Plaintiffs claim the sum of SCR500,000.00. The evidence shows that the Plaintiffs have not lived on the property and do not seem to have had any plans to live there. However the fact that the portions encroached upon were in effect alienated from them, they are entitled to damages for loss of use. However considering the extent of the encroachments, I award the sum of SCR300,000 for the loss.

[24] I therefore enter judgment in favour of the Plaintiffs as follows:

- i. I find that the Defendant has encroached on the Plaintiffs' property;
- ii. I order the Defendant to remove the two remaining encroachments from the Plaintiffs' property;
- iii. I order the Defendant to remove the debris that are still on the Plaintiffs' property;
- iv. I order the Defendant to pay the Plaintiffs the total sum of SCR 1,182,404.30 cents in damages as determined in paragraphs 21, 22 and 23 above.

[25] I award costs to the Plaintiffs.

Signed, dated and delivered at Ile du Port on 24<sup>th</sup> February 2023.

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Dodin J

Judge of the Supreme Court