IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A) , M. Twomey (J.A), F. Robinson (J.A) .

Civil Appeal SCA 36/2016

(Appeal from Supreme Court Decision CS 35/2012)

Civil Construction Company Limited	Appellant
Versus	
Frederick Leon	1st Respondent
Celine Accouche	2nd Respondent
Sedrick Leon	3rd Respondent
Sebastien Leon	4th Respondent
Reuben Leon	5th Respondent
Leroy Leon	6th Respondent

Heard: 07 December 2018

Counsel: Ms. Edith Wong and Mr. Francis Chang Sam for Appellant

Mr.Anthony Derjacques for Respondent

Delivered: 14 December 2018

JUDGMENT

M. Twomey (J.A)

Background to the Appeal

[1] The Appellant, a company registered in Seychelles, was engaged in quarry works at Cap Samy, Praslin and the Respondents were at the time a family of two adults and four minor children living in close proximity to the quarry. The Respondents entered a plaint in which they claimed that they were inhabitants of a house and property owned by the 1st Respondent and that as a result of the Appellant's quarrying works suffered loss and damage. We

reproduce at length some of the pleadings in the Plaint filed in the court *a quo* as they are relevant in our consideration of this present appeal .

[2] The Respondents averred that the acts of the Appellant, "through its employees, servants, and agents constitute a *faute* in law for which the Appellant was vicariously liable" to the Respondent. They particularised the Appellant's *faute* as follows:

1. *Failing to carry out an Environmental Impact Assessment Plan prior to the commencement of the quarry project.*
2. *Failing to consult the community in any meaningful manner.*
3. *Blasting the terrain and granite surface areas in proximity to the Plaintiff's properties and residence.*
4. *Extracting and crushing granite boulders in proximity to the said properties.*
5. *Causing dust and noise pollution on Respondents' property.*
6. *Causing pollution through activity including personal, transportation and habitation (sic).*
7. *Causing fright and alarm upon use of explosives.*
8. *Causing pollution through fuel and heavy machinery emissions.*
9. *Causing shock waves and vibrations upon the usage of explosives, heavy equipment and machinery.*
10. *Causing cracks to the Plaintiff's houses.*

[3] They further averred that they had been put to loss and damage for which the Appellant was liable in law to them. The damages were particularised as follows:

1. *Repairs, labour and materials to repair cracked walls (house)* *SR277,500.00*
2. *Repairs, labour and material to House 2* *SR 1,055,000.00*

3. *Loss of value to property* *SR 6, 023,800.00*

4. *Moral damages for stress, inconvenience, anxiety, psychological harm, distress, fright for a. 1st Plaintiff* *SR50,000*

b. 2nd Plaintiff *SR 50,000*

c. 3rd Plaintiff *SR 50,000*

d. 4th Plaintiff *SR 50,000*

e. 5th Plaintiff *SR 50,000*

f. 6th Plaintiff *SR 50,000*

5. *Special damages for constant colds, flues (sic) coughs and ill health of Plaintiffs* *SR 100,000*

They therefore prayed for a total of SR 7,7 706.300 and a mandatory injunction ordering the Defendants to immediately cease their works.

The Evidence at Trial

[4] At the trial, the first two Respondents and the Sixth Respondent testified. The First Respondent stated that he purchased land in 1989 and built two houses thereon; the first of which was completed in 1990. There is no evidence as to when the second house was built but the First Respondent testified that it took five years to complete and there is documentary evidence that planning approval was given for the house in July 1999.

[5] The First Respondent, a pastry chef by profession, admitted that no engineers were involved in the construction of either house. The first was built by a licensed mason, the second by a mason with his help. The quarry became fully operational in 2009 with rock blasting, extraction and rock crushing for aggregate and dust. Lorries travelled back and forth to the quarry to transport the materials. This caused dust, noise pollution and vibrations from the quarry. He testified that all this caused the walls and floors of his two houses to suffer cracks.

[6] The Second Respondent lives with the First Respondent. She stated that the house they occupy is about 150 meters from the quarry. She testified that since 2006 she would hear explosions and the breaking of boulders from the quarry. This caused cracks to the house they occupied and created dust which affected her health and that of her children. She had to bring them to the doctor and they had to use nebulisers. The dust affected the furniture in the house. She stated that she first noticed the cracks in 2007 and they were repaired but then occurred again in 2008. She stated that from the time the second house was being built until 2004 she was living with her children at her mother's house at Anse Boudin.

[7] Two "expert" witnesses were called by the Respondents. Cecile Bastille, a quantity surveyor valued the damage to "House No 1" at SR227, 500 and to "House No. 2" at SR1, 055, 00. Her report considered that the presence of the quarry had depreciated the market value of the property. She valued the property at SR2, 997,000. She also stated in her report that in the absence of the quarry, the market value of the property would be SR 9,020,800. The evidence given was confused and unsubstantiated. When pressed about the basis used for her calculations she said she was not going to provide a reply.

[8] Mr. David Port Louis, a civil engineer, visited the houses and reported on their structural state. He found cracks in the houses as he did in other houses in the area. He explained that he used the British standard guide lines for ground borne vibrations. He admitted, however, that he did not measure the vibration from the blasts and took his client's word regarding the severity of the blasts. In his conclusion he states "the blasting is more probably contributing to the cracks that occurred on the residential houses" (sic). He also opined that "ground borne vibrations cause indirect effect on the comfort of living of the local residence" (sic) and that "human are also affected by vibrations" (sic). In his testimony he accepted that he did not know how often blasting took place and did not check buildings in the quarry site for cracks. He did not know the type of blasting in operation and the number of charges used.

[9] The Sixth Respondent, aged 16 at the time he testified in 2013, stated that the blasting and machinery disturbed the peace they used to enjoy. He said the blasting which he sometimes heard "made his heart stop." He admitted that could not state how often the explosions occurred but could hear them once or twice a day even." He stated that he had sinus problems

because of the dust but admitted that there was not so much dust of late. He also admitted sneaking into the quarry site with his friend.

[10] The Appellant called Mr. Sunny Khan, its managing director. The Appellant obtained a lease from the Government in 2000 to operate a quarry at Cap Samy. In the beginning, the company operated with a small machine excavating rocks. They subsequently cleared the site and relocated two families who were in the vicinity of the quarry proper. An Environmental Impact Assessment was carried out in 2009 by Mr. Louis Barbé. Meetings about the impact of the quarry were held with local residents. The house vacated by one of the families which was relocated was still there and used as an office. Evidence was brought that this house had no cracks. Nor were there any cracks in the abattoir which was also situated in the quarry. Mr. Marie operated a chicken farm situated closer to the quarry than the Respondents' house. He had no complaints. Mr. Khan stated that the measurements taken indicated that vibrations were kept low, as were noise and dust. The machine for testing vibrations only became operational in 2012.

[11] Mr. Nigel Valentin, a quantity surveyor, also prepared a valuation report. He found major cracks on the older, smaller house. He stated that he noticed that part of that house was built on a *glacis* (a rock outcrop) and the other part on back-fill retained by a wall. He stated that the material used in construction were blocks made with gravel. He found more cracking on the side of the house built on softer soil. In his report, he concluded that it would not be economical to perform remedial works on the older house and valued the house at its current market value of SR 538, 713.09. He estimated that the newer house could have its minor defects repaired at the cost of SR39, 675.00.

[12] Mr. Louis Barbé performed the Environmental Impact Assessment of the quarry in 2009. As part of the scoping exercise a public meeting was held. The Respondents did not attend the meeting. Mitigation measures including the suppression of dust and noise and hard surfacing the road which he proposed were implemented. He also monitored the vibrations at all the Appellant's quarries. He demonstrated the operation of a seismograph which was calibrated in Canada annually. A measurement was done at Mr. Leon's house in his presence and the vibration recorded was 1.02 mm per second. He stated that blasting at the quarry only took

place once every two or three months. He stated that the Respondents' house was about 400 metres from the blast site.

[13] Mr. Anel Marie, a chicken farmer operating next to the quarry also testified. He had built his house before the quarry was operational. His house was closer to the quarry than that of the Respondents. He stated that he always got prior warnings of blasts. He had no problem with dust. He stated that there was no blasting at all in 2009. His chickens were not affected by the quarry's operations.

[14] Mr. Martin Lewis, an employee of CCCL testified that the office on site only had "wear and tear" cracks. A water tower situated in the quarry site had no cracks. The office at the quarry gate also had no cracks although it was built in 2010. He described all the mechanisms in operation to suppress dust and noise from the quarry.

[15] Mr. Thomas Marie, the master blaster also testified. Although there was no instrument to measure vibrations until 2012, the standard and type of blasting was the same. He stated that blasting takes place every two to three months.

[16] Mr. Andre Low Nam, a structural engineer with training in construction designed to withstand seismic activity, also testified. He measured the vibration from the test blast. The peak particle velocity (PPV) was 1.02 mm per second. He observed cracks to the Respondents' two houses. He stated that cracks could be formed for "various reasons and blasting [was] one of them." The vibration as measured would cause minimal cosmetic damage but not structural damage, which would only occur if the PPV reached 50mm per second. His report states that cosmetic damage would occur when PPV reaches 15mm per second. He visited other houses nearer the quarry where vibration would be higher and they had no cracks. He stated that one of the Respondents' houses was partly built on a *glacis* which is a very hard material and the other part on man-made material. If the latter was not compacted properly the house on it was bound to settle. The soft part would settle first after rain as opposed to the part of the house resting on the *glacis* and this would cause cracks. This happened when a house was not built on homogenous material. The second house had almost no cracks as it sat on homogeneous material. He admitted that he did not have records of measurements for blasts that had taken place prior to 2013.

[17] No medical or further evidence was brought by the Respondents regarding the injury to their health.

The Supreme Court Decision

[18] In a decision delivered on 30 November 2016, the learned trial judge found that the cracks could have been caused by multiple causes. He found that:

> *"ground vibrations arising from blasting, heavy traffic or the running of heavy machinery could cause or contribute to the cracks in the [Respondents'] house. But so could faulty workmanship, faulty or inferior materials, or ground conditions upon which the houses were built that could cause uneven settlement."*

[19] He then relied on English tort's "but for test" and the "efficient proximate cause test" in *Davies v Swan Motors Co (Swansea) Ltd* [1949] 2. C. B 291 and found that the vibrations materially increased the risk of the cracks appearing. The Respondents had built their houses at a time when it could not be foreseen that there would be quarry in the area. Hence, the Appellant's acts constituted the primary cause for the damage. He found that the necessary causal link had been established and that it was sufficiently proximate to the damage caused. He went further in finding a duty of care under Lord Atkins "neighbour principle" in *Donoghue v Stevenson* (1932) AC 562 by one's acts or omissions. He relied on another English authority, namely *Caparo Industries v Dickman* (1990) 2 AC 605 to find that the Respondents should have reasonably foreseen the effects of their works and since their negligence had been established, liability followed for all the consequences which were the direct outcome of it.

[20] He rejected the claim for 'special damage' as there was no proof to authenticate their claim for ill health. He also refused to grant the injunction.

[21] He found that the claim for moral damages (stress, inconvenience, anxiety, psychological harm, distress and fright) "remained unproven" and that the inconveniences they claimed to experience "were minimal if not none at all…their claim remains unproven". He nonetheless granted each Respondent "a nominal sum of SR 10, 000".

[22] As for the claim for loss of value to property he granted them SR 300, 000 being 10% of the estimated depreciation. In terms of the cost of repairs to the house, he took into account the age of the house and the fact that they would have had to be maintained in any case and awarded 50% of the sum claimed in the newer house, that is SR 113, 750 and 25% for the sum claimed in the older house, that is, SR 263,750.

The Appeal

[23] It is from this judgment that the Appellant has appealed on the following summarised grounds:

1. The learned trial judge erred in applying English law in finding that the Appellant owed the Respondents a duty of care and neglecting to take into consideration the evidence adduced to show that vibrations from the blasting could not have cause cracks in the houses.

2. The learned trial judge erred in law in finding the Appellant negligent in failing to carry out tests on the blasting site to ascertain how much shock the houses in the area could withstand.

3. The learned trial judge erred in law in his assessment of damages.

4. The learned trial judge erred in law in awarding the 3rd to 6th Plaintiffs damages as they had no standing to appear on their own as parties to the claim.

Ground 1- applicability of English law

[24] Learned Counsel for the Appellant, Ms. Wong has submitted that this Court has in *Nanon & Anor v Ministry of Health Services* [2015] SCCA 47 (17 December 2015) and the Supreme Court in *Octobre v Government of Seychelles* SCSC 941 (25 November 2016) reiterated that the Seychellois law of delict is based on French law and that English principles and authorities have no application. The learned trial judge therefore erred by relying on English tortious principles and authorities to find the Appellant liable.

[25] Learned Counsel for the Respondents, Mr. Derjacques in response has submitted that the Seychellois legal system is a mixed jurisdiction composed of common law and civil law and that overlaps are therefore inevitable. In his words "the judge [has] a discretion to apply English and common law case law in reaching a decision in [any] given case." He relied on my own book on the matter as support for the matter.

[26] We believe that Learned Counsel for the Respondents, has misconstrued the source on which he seeks to rely. While Seychelles is a mixed jurisdiction, the mixing concerns the fact that our bodies of law stem from different sources – our public law except to the extent that it is amended by the Constitution and statute is based on the common law and our private law is based on French civil law. Our rules of procedure including evidence is largely based on English law. Our *legal system* is mixed in the sense that it contains aspects of both these sources. However, *individual areas of law* remain distinct from each other. To suggest that there is mixing within a particular field of our legal system would undermine the coherency of that area of law. For example, there can be no mixing of French law inquisitorial principles in the field of criminal law except through specific legislation. Nor would it be appropriate to introduce English principles of consent in contract into our interpretation of the Civil Code.

[27] Although it is trite, we are minded to repeat that our laws relating to delict are contained in five Articles of the Civil Code (Articles 1382-1386). That Civil Code is derived from and to a large extent translated directly from the French Civil Code. We have developed our own jurisprudence but often refer to authorities or doctrinal writings from other civilist traditions such as Mauritius or France when we lack local jurisprudence on a particular issues. These jurisdictions have almost identical Civil Codes and therefore the underlying doctrines are the same. They are therefore better persuasive sources than legal systems from countries that do not share the same underlying doctrines.

[28] The principles of delict in French law or tort in English law are starkly contrasted. In English law, liability for negligence generally depends on the existence of a duty of care, a breach of this duty, and causation. The *duty* is based on foreseeable damage, relational proximity and the fairness and reasonableness of imposing a duty to act as a reasonable man. This duty (the

neighbour principle) has evolved from Lord Atkins' observations in the landmark case of *Donoghue v Stevenson* (supra) in which he posed the question:

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question".*

[29] Furthermore, in English law there is a restriction placed on the type of breach of duty that is recognised as giving rise to a tort. These include trespass, negligence, nuisance.

[30] In contrast, French law makes no reference to the concept of a "duty" in order to establish liability. Unlike tort law, the law of delict is not hampered by the burden of proving a specific duty of care. This is because Articles 1382 and 1383 of our Civil Code do not contain any limitations as to the class of protected (proximate) persons. In other words, under our law, as in the French law of delict, there is no limitation which might arise from the necessity to prove the existence of a duty of care towards the plaintiff. Every plaintiff who can prove fault, damage and causation can claim compensation. Furthermore, there is no restriction in delict on the type of *faute* (fault) which may give rise to liability.

[31] From this point of view, we cannot emphasize enough that our delict law is very different from English tort law, in that it does not impose any limitations on the kind of action under which liability arises or on the group of persons that are protected and can benefit from compensation arising from injury caused by another person's fault.

[32] While the common law bases tortious liability on unlawfulness, negligence and fault, liability in French law is generally based on the single concept of fault. The classical theory of French law is that fault (*faute*) is a necessary condition of civil liability. Articles 1382 and 1383 set out the general causes in which fault may be attributed to the actor. The provisions of Article 1382 clearly state the three elements necessary to establish delictual liability: fault, damage and causality. Liability of a defendant under Article 1382 can however be absolved totally or partially. This is the case where there is an act exterior to the actions of the

defendant or by reason of the acts of the victim. It is in these circumstances that doctrinal writings have emerged on the two divergent theories submitted to us by Learned Counsel for the Appellant Ms Wong: *l'équivalence des conditions* or *la causalité adequate.* This discussion would have been relevant if the case had been brought under Article 1382.

[33] However, in the present case, it is not entirely clear to us whether the action was brought under Article 1382 or 1384 (3). The Appellant has submitted that it is brought under Article 1382. When the question was put to Learned Counsel for the Respondents Mr. Derjacques he said it was a mixture of Articles 1382 and 1384(3). That cannot be so. Our uncertainty arises from the fact that paragraph 7 of the Respondents' pleading, which we have reproduced at paragraph 2 above, avers quite clearly that the acts of the Appellant, "through its employees, servants, and agents constitute a *faute* in law for which the [Appellant] was *vicariously liable*" to the Respondent. (Emphasis added.)

[34] It is important to know under which provision a delictual action is brought because the burden of proof is different for each of these provisions. As we have stated, the wording of Article 1382 clearly shows that three elements are necessary to engage liability: a fault, a damage and a causal link between the two. The burden of proof of all these elements falls on the claimant.

[35] In contrast Article 1384 provides that:

> *"1. A person is liable not only for the damage he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible, or by things in his custody."*

[36] The Cour de Cassation held in its famous *Jand'heur v. Les Galeries Belfortaises*, judgment of 13 fevr. 1930, Cass. ch. reun.D.1930.1.57, that the first sentence of Article 1384 constitutes the legal basis of a general and autonomous strict liability for all things. *Jand'heur* was followed in Seychelles in the case of *Attorney General rep. Government of Seychelles v Jumaye* (1978-1982) SCAR 348. Lalouette JA in *Jumaye* stated that in France, liability under Article 1384 is not based on faute (fault) but on "objective liability independent of *faute".*

[37] Hence, in such cases the victim of the damage must allege and establish only the causal role of *la chose* (the thing) by which the damage has occurred. Otherwise he benefits from a *presumption of causality* (responsibility) by the custodian although the custodian of the thing may be exonerated fully or partially if he can show that there existed natural events (e.g. *vis major*), the intervening act of a third party or the act of the victim himself.

[38] It is clear, therefore, that the burden of proof in Article 1382 and Article 1384 is different. The claimant must only prove that the thing caused him damage or an injury under Article 1384. Under that Article the person who is the "custodian" of the "thing" is liable unless he can prove liability by an act exterior to the "thing" in his custody. "Custody" is defined by case law as "powers of use, control and management of the thing" (see Cass. Ch Reunies 2 December 1941).

[39] With regard to the present case the distinctions we have highlighted between a case grounded in Article 1382 and one on 1384 are stark. While a case under Article 1382 requires the proof of all three elements (fault, causation and damage) by the claimant, one brought under Article 1384 only requires the proof of the damage. The burden of proof would have shifted to the Appellants to show that the cracks and other damage suffered was not as result of the acts of things in their custody act but as a result of natural events (e.g. vis major), the intervening act of a third party or the act of the victim himself (see *Jumaye* (supra) See also Dalloz, *Encyclopédie de Droit Civil, Verbo Responsbilité du Fait des Choses Inanimés* (2nd edn, Paris 1951-1955)104, Henri Mazeaud, Louis Mazeaud and André Tunc, *Traité Théorique Et Pratique De La Responsabilité Civile Delictuelle Et Contractuelle, Tôme 1* (6th edn, Montchrestien 1965) 405-08).

[40] Further, Article 1384 (3) provides that masters and employers are strictly liable for the damage caused by their servants and employees acting in the scope of their employment. There is therefore a presumption of fault on the part of employers for the acts of their employees. However, in this case, the Respondents have failed to show at any point that there were any acts by the Appellants employees, servants or agents which would attract the strict liability of the Appellant. We therefore cannot see how this case as pleaded could be

brought under Article 1384(3). Furthermore, as the Appellant is a company, an action under Article 1382 would not have been appropriate.

[41] The Respondents' pleadings do not support an action under either article. The plaint and its particulars must clearly disclose whether direct or vicarious liability is being alleged.

[42] In the case of *Confait v Mathurin* (1995) SCAR 203, the Court of Appeal found that parties are bound by their pleadings, the purpose of which is to give notice of its case to the other party. The Court went on to state that:

> *"Where a party claims damages against another for damage caused him by an act, he must state in his pleading where the damage is caused by the act of the other person himself or by the act of a person for whom he responsible. By Article 1384 of the Civil Code a person is responsible for the damage which is caused by his own act or by the act of persons for whom he responsible. The cases in which one person must answer for the acts of another are specified…where a party avers that the liability is based on the act of the other party himself, he should not set up a case at the trial based on liability for the act of a person for whom he is responsible. Where the case of the plaintiff is that the defendant is sued for the act of a person for whom the defendant is responsible, the plaintiff must aver by his pleadings and prove the relationship which gives rise to such liability unless such is admitted."*

[43] Similarly to *Confait*, the learned trial judge in the present case imposed liability on the Appellant by its fault in operating the quarry. However, it is clear from the pleadings that the fault is attributed to acts of the Appellant, through its employees, servants and/or agents. The acts of these persons were never pleaded, established or proved and therefore the Appellant could not have been held liable. Ours being an adversarial system of civil justice it was not necessary for the court to explore the circumstances in which the Appellant was liable. This finding alone is sufficient to allow the appeal. Out of respect for Counsel the other submissions made in respect of grounds 3 and 4 are now also considered.

Ground 3 – the assessment and award of damages.

[44] Our Civil Code contains provisions specifying the type of damage recoverable in delict namely, damages for injury, loss of rights to personality, pain and suffering, aesthetic loss and the loss of any of the amenities of life (see Article 1149 (2). Jurisprudence has classified these damages under material damages and moral damages. In *Barbé v Laurence* (unreported) CS 118/2013, the Court explained that there are in effect three types of damages in cases of delictual harm: corporal damage, material damage and moral damage. In explaining the differences between those three different heads of damages the court stated:

> *"The corporal damage or injury is the bodily injury caused to the victim… In some cases it can be the death of a person. These damages are meant to compensate for the diminution in the enjoyment of life of the victim. It includes the physical pain and suffering of the victim.*
>
> *The material damage can be the destruction of things caused by the delict but also economic damage brought about by the inability of the victim to work or make a living.*
>
> *The moral damage reflects the moral and/or psychological suffering, pain, trauma and anguish suffered by the victim as a result of the delict."*

[45] It is therefore necessary to claim damages under these heads exclusively. The learned trial judge did not find any proof of corporal damage, that is what the Respondents called special damages for colds, flus etc.

[46] The material damage would have been the cost of the repair of the houses if liability would have been proven under either Article. In the present case the Learned Judge appeared to take for granted that there was liability and proceeded to a discussion of quantum. However, for the reasons given above we are not of the view that liability was proven under either of the available provisions of the Civil Code. Despite the technical difficulties of the pleadings, the evidence adduced was in any case not sufficient to prove liability.

[47] With regard to the moral damage, which comprises all types of psychological pain granted under one head only, the Learned Judge, having found that their claim was not proven, grants each of the respondents "a nominal sum of SR10,000". No justification for this finding was given. The concept of nominal damages is simply not part of our law of delict and does not

arise. The learned Judge was incorrect to develop our law in this way without any justification. No damages could be granted given the fact that liability had not been proven.

Ground 4 – standing of minors

[48] Respondents 3 to 6 were minors at the time the suit was filed. They had no capacity to sue in their own right given the provisions of Article 450 (1) of the Civil Code. As in the case of *Rose and others vs Civil Construction Company Limited* [2014] SCCA 2 (11 April 2014), there was no representative action taken on their behalf. Either of the parents of the minor children would be entitled to sue in a representative capacity as the guardians of the children under section 73 of the Seychelles Civil Procedure Code. However, the plaint should have stated that representative status, and it did not.

[49] In *In Re Tottenham v. Tottenham*. [1896] 1 Ch. 628A, in a case where a creditor sued a testatrix stating in the last paragraph of his pleadings that he was suing on behalf of all the other creditors of the deceased, the court found that this fact ought to appear in the title of the statement of claim, and not merely in the body thereof, otherwise it would be of no use to show the representative capacity in which he sued. The rule followed by the court in that case (Order 6 and rule 3 of the UK Supreme Court Rules) is akin to section 73 of the Seychelles Code of Civil Procedure.

[50] In the present case, the plaint was therefore wrongly brought on behalf of the minor children, the Third to Sixth Respondents. We therefore uphold this ground of appeal

[51] The cases referred to by Mr. Derjacques with regard to the court condoning mistakes in procedures to achieve the ends of justice can be distinguished from the present suit. The oft quoted statement by Domah JA that *"…procedure is the hand-maid of justice and should not be made to become the mistress"* in *Ablyazov v Outen & Ors* [2015] SCCA 23 concerned a suit started by petition instead of by plaint. Similarly for the cases of *Mary Quilindo and Ors v Sandra Moncherry and Anor* (unreported) SCA 29 of 2009 and *Toomany and Anor v Veerasamy* [2012] UKPC 13). They have no bearing on the present appeal.

[52] There must be a limit as to how far the court in the name of justice should make a case for the plaintiff. Ours is an adversarial legal system and judges are not advocates for the parties. We cannot engage in this exercise.

[53] We therefore allow the appeal.

M. Twomey (J.A)

I concur:. ..... F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 14 December 2018