

## GANGADOO v CABLE AND WIRELESS

(2011) SLR 253

S Rajasundaram for the plaintiff

D Sabino for the defendant

### **Judgment delivered on 25 July 2011 by**

**KARUNAKARAN J:** The plaintiff in this matter is presently the owner and occupier of a parcel of land C4755, extent 762 sq mts situated at Anse Boileau, Mahé. The defendant is a company engaged in the business of providing public telecommunication systems and services in Seychelles. The plaintiff has brought this action against the defendant on the ground of unjust enrichment alleging that the defendant has unjustly enriched itself causing thereby a corresponding and resultant detriment to the plaintiff. Admittedly, the plaintiff's cause of action is based on article 1381-1 of the Civil Code of Seychelles.

In fact, the plaintiff claims restitution to the tune of R1,400,000 for the detriment, which she allegedly suffered without lawful cause and to which sum the defendant was correspondingly enriched. According to the plaintiff, the alleged unjust enrichment arose from the defendant's act of "encroachment" onto the plaintiff's land, by having erected and maintained a junction-box to wit: a boxlike structure erected on a cement platform to centralize and connect all telephone lines from one end to the other for a given telephonic region. Hence, the plaintiff seeks a judgment inter alia, in the sum of R1,400,000 against the defendant with costs.

On the other side, the defendant in its statement of defence, has not only denied the plaintiff's claim for restitution but also has averred that the defendant never encroached on the plaintiff's land nor did it cause any detriment to the plaintiff. In any event, according to the defendant, the said junction-box was erected several decades ago, lawfully with the consent of the predecessor-in-title namely, the owner of the land at the time of erection. According to the defendant, the successors-in-title of the land, such as the plaintiff, are therefore bound in law by the previous owners' dealings in respect of the land. The defendant is therefore not liable in law to pay any compensation to the plaintiff as there is no unjust enrichment by the defendant for any reason whatsoever. Hence, the defendant seeks dismissal of the plaintiff's claim.

The facts of the case that transpire from the evidence on record are as follows.

Since time unknown, the Government of Seychelles had been the owner of a large extent of land (the State land) at Anse Boileau, Mahé. In or around 2002, the Government subdivided the State land at Anse Boileau into several parcels and sold them to individuals. One among those parcels, namely C4755, was sold to the plaintiff on 15 November 2002 (vide exhibit P1), on conditions that (i) the plaintiff shall not transfer the property to any other person within five years of the transfer; and (ii) the plaintiff shall grant a usufructuary interest on the property to one Mrs M APetrousse and Mr M C Petrousse. Undisputedly, the plaintiff's parcel of land is located alongside the main road. On this parcel there is a junction-box located on a

cement structure facing the road at a distance of approximately two metres from the main road on a plinth area of about 6 square metres with underground cable connections. Between the plaintiff's house and the junction box, there is an electricity pole. Mr Fock-Tave, the Director of Legal and Regulatory Affairs of the defendant company, who has been working for the company for more than 36 years stated that the defendant company erected the junction box on the State land even before it was sub-divided into several parcels. This was erected with the permission of the then owner, the Government of Seychelles. Such permission had been granted since the time the defendant company started its operation in Seychelles several decades ago. Evidently, by virtue of an agreement dated 21 July 1973 (vide exhibit D1 at page 11) the Government of Seychelles had originally granted general permission for the defendant company to use the sites for the purpose of, inter alia, constructing and maintaining junction-boxes on the State land to facilitate its operations. Thus, the permission granted by the Government in this respect was renewed by virtue of subsequent agreements between the parties dated 9 August 1984 and the one dated 21 March 1990 (vide exhibit D1). Be that as it may. In 2004, the plaintiff wanted to sub-divide her land in order to rent out the front part of her property. Hence, she approached the planning authority for sub-division. Only at that time, according to her, she saw that the junction box was on her property. Therefore, she instructed her attorney to write to the defendant a letter of demand (exhibit P3), in which she claimed rent from the defendant for the use of her land, failing which to remove the structure from her land or enter into an agreement for compensation. However, despite some negotiation between the parties, nothing materialised. It is the case of the plaintiff that the defendant has been unjustly enriched since the defendant company has been making profits in the sum of Rs281 million in 2003, R338 million in 2004, R194 million in 2008, R254 million in 2009, contributorily due to use of the junction box on her property. Hence, the plaintiff claims that she is entitled to be compensated for the detriment she suffered in the sum of R1,400,000 inclusive of moral damages. In addition, the plaintiff claims the sum of R20,000 per month from the defendant until the structures are removed from her property. Also in the same breath, the plaintiff seeks an order directing the defendant to remove the said structure from her property.

Obviously, the plaintiff's action in this matter is based on "unjust enrichment." I believe it is necessary herein that I should revisit the principles on this subject and restate what I have stated in *Desita Ah-Kong v Robert Labiche* Civil Appeal 2003 judgment delivered on 30 September 2009. The principles of law applicable to this case are those found under article 1381-1 of the Civil Code of Seychelles. This article reads thus:

If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; provided also that detriment has not been caused by the fault of the person suffering it.

In fact, there had been no express provision relating to "unjust enrichment" in the French Civil Code (Code Napoleon), which had been in force in Seychelles until 1975, when it was repealed and replaced by the present Civil Code of Seychelles.

However, the concept of “unjust enrichment” had all along been a well-established principle in the French school of jurisprudence, though it may appear to be unknown in the English legal system and to common law practitioners. Under our Civil Code, “unjust enrichment” springs from the category of legal obligations, which arise without agreement, evidently tracing its origin from the French soil. On the other side of the Continent, in the English legal system, the principle of unjust enrichment had historically been unknown to the body of common law principles. The English courts have repeatedly denied for more than two centuries what Lord Mansfield had pleaded for, namely a general enrichment action for restitution based on 'natural justice and equity'. Instead, English law made use of quasi or implied contract to justify an enrichment claim. In fact, this concept has changed over the last 50 years in the English school of jurisprudence much by the evolution of anthropomorphic concept of justice nurtured by Lord Denning starting from *High Trees*[1947] 1 KB 130, wherein he fused law with equity. While still in 1978, Lord Diplock had held that 'there is no general doctrine of unjust enrichment recognized in English law', in 1999, it had become possible for Lord Steyn to hold the opposite: 'Unjust enrichment ranks next to contract and tort as part of the law of obligations as an independent source of rights and obligations'. The height of this development in English law was reached when Peter Birks, in his famous textbook on *Restitution*, treated unjustified enrichment almost entirely separate from quasi-contract in the same way AG Chloros - the author of *Codification in a mixed jurisdiction* - incorporated into our Civil Code. The main reason for the coming about of this separate restitution category was that it was found to be a fictitious exercise to qualify as a “contract” what is actually “not a contract” but a restitution based liability. Whichever road we take, whether English or French, what eventually matters to us is the destination - the destination of restitution for the ends of justice. No one should be allowed to suffer a detriment without lawful cause resulting from an unjust enrichment of another. As is stated in the noble *Qur'an* –

Do not consume your property wrongfully, nor use it to bribe judges, intending sinfully and knowingly to consume parts of other people's property  
vide part 2 - Sûrah 2 - Al-Baqarah verse 188.

The one who suffered should be able to recover from the unjustly enriched what is due to the former. This is rooted in 'natural justice and equity' and this is the pith and substance of the principle enshrined in article 1381-1 of the Civil Code of Seychelles. In fact, in English law, at present, “contract” and “unjust enrichment” are regarded as separate sources of obligations. This is what we as a pioneer, have already formulated and codified way back in 1975 in our Civil Code drawing a clear demarcation between “obligations arising from contract” and “obligations arising without agreement”. Be that as it may.

In our jurisdiction, as rightly formulated by Justice E E Seaton CJ (as he then was) in *Antonio Fostel v Magdalena Ah-Tave and another* (1985) SLR 113, the action for unjust enrichment or *actio de in rem verso* as it evolved in France ought to satisfy five conditions and all of them are included in article 1381-1 of our Civil Code quoted supra. They are namely: (i) an enrichment, (ii) an impoverishment, (iii) a connection between the enrichment and impoverishment, (iv) an absence of lawful cause or justification and (v) an absence of another remedy, which the French jurists refer to as the “*caractères subsidiaire*”.

Whether under French or Seychelles civil law, the root principle of an unjust enrichment is that an economic benefit is added to one patrimony (condition 1) to the economic detriment of another (condition 2), without a corresponding transfer of compensation intended to be adequate. The manner in which the conditions prescribed may limit operation of the action *de in rem verso* has been illustrated in the case of *Dingwall v Weldsmith* (1967) SLR 47. The plaintiff in that case sued the defendant for remuneration for services rendered during the period they lived together in concubinage. Souyave J (as he then was) ,in holding that the plaintiff could not succeed because she had suffered no “appauvrissement” of her own “patrimoine”, cited from *Encyclopédie Dalloz, Droit Civil, Vol II, verbo Enrichissement sans cause para 90* as follows:

.....Elle (l'action de in verso) doit, d'autre part, satisfaire aux exigences particulière que comporte le recours en matière d'enrichissement sans cause ; le prétendu créancier doit, en conséquence, justifier à l'encontre de son débiteur de l'existence d'un enrichissement à lui procuré par le fait d'un appauvrissement survenu de telle conditions qu'aucune voie de recours autre celle qui est mise en mouvement, ne soit susceptible de les réparer.

In the case of *Hoareau v Hermick* (1972) SLR 167 also the Court has reiterated the conditions required to be satisfied in the action *de in rem verso*. Apart from the first three conditions defined above, I believe, it is important to examine the fourth and the fifth conditions, which are explained in *Encyclopédie Dalloz*, paragraph 71 as follows:

La constatation de l'enrichissement d'un autre ne suffit pas pour permettre à l'appauvri d'agir, de in rem verso. Il faut encore, adjoute la Cour la Cassation, l'absence de cause légitime et l'absence de toute autre action...

The French jurisprudence does not provide any clear-cut and complete definition of the terms emphasised in the above quotation. As I see it, this action could not however, be relied upon in a case, where the claimant suffered economic detriment because of his /her own fault or blame. For example, (a) one's own failure to comply with the legal requirements or to draw up a contract when the law so requires in order to hold the other party liable for the detriment, (b) one's voluntary assumption of risks or detriment and the like situations, may in my considered view, constitute a legitimate cause to justify the detriment of the one and the alleged corresponding enrichment of the other. In such cases, the impoverished cannot claim restitution invoking article 1381-1. This explains the fourth condition namely, *l'absence de cause légitime*.

I would now turn to the fifth condition namely, *l'absence de toute autre action*. This condition is, in fact, common to and required in both English and French schools of jurisprudence. Under common law, one of the preconditions to invoke an equitable remedy for restitution is that the claimant should not have any other legal remedy provided by law, vide section 6 of the Courts Act. The same condition is required to be satisfied under article 1381-1 of the Civil Code of Seychelles, to uphold an unjust enrichment claim. This is evident from the clause used therein, which reads: “unjust

enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict”.

I will now revert to the case on hand and consider whether the five conditions defined supra, have been fulfilled to uphold the claim of the plaintiff in this action.

### **Condition No 1**

On the question of the alleged enrichment of the defendant, upon the evidence on record, I am satisfied that the defendant is a profit-making company. I also take judicial notice of the fact that the defendant has been engaged in public telecommunication business in Seychelles for the past 110 years. In pursuance of its business operations in Seychelles obviously the defendant has been and is still utilising a number of sites on State land for the purpose of erecting and maintaining several telecommunication related structures including junction-boxes, on Mahé and on other islands. Undoubtedly, these structures should have directly and indirectly contributed to and have enabled the defendant to operate its business for making profits. Consequently, I find that economic benefit was eventually added to the patrimony of the defendant by the utilization of those sites that belonged to the Government of Seychelles including the parcel of land that was sold to the plaintiff in 2004. In other words, the defendant did gain enrichment consequent upon the utilization of those sites. Therefore, I conclude that condition no 1 as to enrichment is satisfied in the present case.

### **Condition No 2**

On the question of “impoverishment”, the plaintiff stated that she had a plan to subdivide her land and rent out the portion, where the junction box is located to a third party and make a profit therefrom in the sum of R20,000 per month. However, she could not do so because of the junction-box on that portion. Therefore, according to her, she suffered “impoverishment” in the sum of R1.3 million.

Needless to say, the extent of the plaintiff’s land is relatively small and there is already a house on it. The usufructuary interest thereon had also been granted to third parties, the Petrousses. In fact, the plaintiff had purchased the land - area 762 sq mts - simply bare-ownership thereof in 2004 for R65,000 whereas she now claims that 6 sq mts therein (where the junction box is located) would have yielded her an income of R1.3 million. In any event, the plaintiff did not adduce any direct evidence to substantiate her speculative claim of economic detriment (the rental income) in the sum of R1.3 million resulting from the loss of use of that area where the junction box is located. On a preponderance of probabilities and considering the entire circumstances of the case, I find that the plaintiff’s claim in this respect is exaggerated, unreasonable, too remote and unrealistically speculative. In my judgment she did not suffer any “appauvrissement” of her own “patrimoine”. In the circumstances, I conclude that the plaintiff did not sustain any economic loss or detriment that resulted in unjust enrichment in favour of the defendant. Hence, it is evident that the second element of impoverishment is not present in the instant case to satisfy condition No 2 supra and so I find.

### **Condition No 3**

To establish a “nexus” in a claim of unjust enrichment, it is essential that both elements namely, (i) the enrichment and (ii) the corresponding impoverishment should be present or coexist. However, in the case on hand, as found supra, the element of “impoverishment” is not at all present. Therefore, it goes without saying that the “nexus or connection” does not exist in the absence of “impoverishment” and so condition no 3 is also not satisfied in the instant case.

#### **Condition No 4**

An absence of lawful cause or justification is the fourth condition, which has to be verified by the Court on its objective assessment of the entire circumstances surrounding the case on hand. First of all, on the question of enrichment, it is evident that the defendant had duly obtained the necessary permission (licence) from the then owner of the land (Government of Seychelles) to put up its structures or installations on the land. The plaintiff has purchased the land with all the structures or encumbrances thereon. Hence, in my view, the allegation of encroachment is misconceived. Mere change of ownership of the land cannot automatically invalidate a licence granted to the licensee or render him an encroacher as he has been and is lawfully using the land by virtue of that licence. On the other hand, the new owner, namely, the purchaser cannot subsequently claim in law, that he/she was not aware of those structures. Caveat emptor! I do not find anything wrong on the part of the defendant, the licensee in keeping the structures thereon until the licence is revoked in accordance with law. Hence, the plaintiff in my view did not suffer any economic loss and the defendant’s enrichment is lawful and justified. Therefore, I find condition no 4, is also not satisfied in the present case.

#### **Condition No 5**

Admittedly, the defendant has erected the structures on the land in question. And the plaintiff, the owner of land wants the structures to be removed. If so, there is a legal remedy available to the plaintiff under article 555 of the Civil Code, which clearly states thus: “When ....structures are erected.....by third parties, the owner of land ....shall be empowered ... to compel the third party to remove them”.

However, the Court cannot and should not formulate a new case for the plaintiff based on a cause of action, different from the one pleaded in the plaint, and moreso in the absence of any evidence on record. Unfortunately, the plaintiff has chosen a wrong provision of law based on unjust enrichment to prosecute her claim in this matter. Obviously, the plaintiff could have availed herself of another action in law. Hence, in my judgment there are other legal remedies available for the plaintiff. This clearly indicates that the fifth condition “*caractère subsidiaire*” discussed supra is also not satisfied in the instant case. As rightly pointed out by the Chief Justice Egonde–Ntende in the recent case of *Chez Deenu v Seychelles Breweries Ltd* – Civil side No 169 of 2008 judgment delivered on 31 March 2011, that it is a fundamental error to bring an action for unjust enrichment coupled with an action in contract or quasi-contract, where the cause of action can only lie in contract, or a quasi-contract or delict vide *Robert Labiche v Desita Ah-Kong SCA* 33 of 2009 and *Macdonald Isaac v Andre Kilindo SCA* No 25 of 2009.

In the final analysis, I find that the plaintiff did not suffer any economic detriment because of the location of the defendant's junction-box on the roadside of her land at Anse Boileau. In other words, the defendant did not gain any unjust enrichment consequent upon any impoverishment suffered by the plaintiff. As I see it, the plaintiff's claim is misconstrued in law. For these reasons, the suit is dismissed with costs.