THE SEYCHELLES LAW REPORTS

DECISIONS OF THE SUPREME COURT, CONSTITUTIONAL COURT AND COURT OF APPEAL

2017

PART 1

(Pp *i-xii,* 1-268)

Published by Authority of the Chief Justice

CITATION

These reports are cited thus:
(2017) SLR

Printed by

THE SEYCHELLES JUDICIARY

THE COURT OF APPEAL

Hon F MacGregor, President
Hon S Domah
Hon A Fernando
Hon J Msoffe
Hon M Twomey

THE SUPREME COURT
(AND CONSTITUTIONAL COURT)

Hon M Twomey,Chief Justice
Hon D Karunakaran
Hon B Renaud
Hon M Burhan
Hon G Dodin
Hon F Robinson
Hon E De Silva
Hon C McKee
Hon D Akiiki-Kiiza
Hon R Govinden
Hon S Govinden
Hon S Nunkoo
Hon M Vidot
Hon L Pillay
Master E Carolus

CONTENTS

DIGEST OF CASES

PROPERTY

SUCCESSION

TREATY ACCESSION AND RATIFICATION

FINANCIAL INTELLIGENCE UNIT v CONTACT LENSES LTD & ORS

M Twomey CJ
19 January 2017 MA 102/2016 (MC 40/2015); [2017] SCSC 19

Civil procedure –evidence by video link

The applicant sought an interlocutory order prohibiting the respondents from disposing of their assets and a receivership order. During the preliminary hearing, the second respondent applied to give evidence through live video link.

JUDGMENT Application dismissed.

HELD

1 The court may exercise its discretion to grant the application for live video link evidence where –
   (a) it is not reasonable for the person to be brought before the court,
   (b) it is desirable and practicable that evidence be given this way, and
   (c) such an arrangement would not prejudice a party to the proceedings.
2 (a) The general rule is that evidence is adduced by the hearing of oral evidence in court.
   (b) Evidence by live television link is therefore of an exceptional nature.
3 When the court allows live television evidence, logistical issues have to be explored and put in place, for example:
   (a) The contact details of the place of hearing and remote site have to be exchanged;
   (b) The details have to include ISDN numbers for the live television link, fax numbers, telephone numbers and email addresses and court staff at either location would have to identify if documents need to be sent by fax or scanned and sent by email to the other location;
   (c) Court staff have to check that all documents held at the place of hearing and the remote site are complete. The technical staff at both locations have to test the equipment by initiating a test link and on the day when the evidence is to be adduced and be responsible for remedying any problem.

Legislation
Code of Civil Procedure, s 169
Evidence Act, ss 11, 11C
Proceeds of Crime (Civil Confiscation) Act, ss 4, 8
Proceeds of Crime Rules, r 9(5)

Cases
Chetty v Chetty (1936) SLR 1

Foreign Cases
AG of Zambia v Meer [2006] 1 CLC 436
Asic v Rich [2004] NSWSC 567
Bank of Credit and Commerce International SA v Rahim [2005] EWHC 3550 (Ch)

Ithaca (Custodians) Ltd v Perry Corporation [2003] 2 NZLR 216
King v Rail Corporation New South Wales [2012] NSWSC 832
Maryland v Craig 497 US 836 (1990)
McGlinn v Waltham Contractors Limited [2006] EWHC 2322 (TCC)
Polanski v Conde Nast Publications [2005] UKHL 10

Foreign Legislation
Criminal Justice Act (United Kingdom), s 32

Counsel B Galvin for applicant
R Durup for respondents

M TWOMEY CJ

[1] For the purpose of these consolidated cases the parties in this decision are referred to as follows: the Financial Intelligence Unit (FIU) as the applicant and Contact Lenses Ltd as the 1st respondent, John Dreyer as the 2nd respondent, Donna Dreyer as the 3rd respondent and Maple Limited as the 4th respondent.

[2] The applicant is seeking an interlocutory order pursuant to s 4 of the Proceeds of Crime (Civil Confiscation) Act 2008 ("POCA") prohibiting the respondents or any person who has notice of the order from disposing of or dealing with or diminishing in value the sums of money, hereinafter referred to as specified property. It is also seeking a receivership order pursuant to s 8 of POCA.

[3] The specified property referred to is the following: USD 37,997.94 held in USD account number 038 8992964, GBP 313,032.17 held in GBP account number 038 7601732, EUR 49,961.34 held in EUR account numbers 038 8992972 and 038 7620591 by the 1st respondent with Barclays Bank (Seychelles) Ltd, a Sunseeker Motor Yacht, "MOJO" owned by the 2nd respondent and Apartment P28 A15 at Eden Island, Seychelles registered in the name of the 4th respondent with beneficial interests therein by the 2nd and 3rd respondents.

[4] The applicant is a statutory body and its application is brought by way of notice of motion and supported by an affidavit sworn by Mr Finbarr O'Leary, Deputy Director of the applicant. The 1st respondent is a Seychelles International Business Company incorporated on 21 December 2005. The 2nd respondent is a business man with an address in Vancouver, British Colombia, Canada. The 3rd respondent is the wife of the 2nd respondent and the 4th respondent is a Seychellois company, number 86348-1 with a registered address at Room 306, Victoria House, Victoria, Mahe, Seychelles.

[5] A motion was then filed by the respondents praying for the dismissal of the applicants' application supported by affidavit of the 2nd respondent in which he deponed that his statements were sworn in his own personal capacity and as the representative of the 1st respondent and 4th respondents in his capacity as their directors. The 3rd respondent also filed a reply affidavit in which she adopted the 2nd respondent's statements and averments made in his affidavit.

[6] At the preliminary hearing of the s 4 application two further applications were made by the parties namely:

1. An application by the applicant for an order directing the attendance for cross-examination of the 2nd respondent and Mr Bobby Brantley; and
2. An application by the respondents for the evidence of the 2nd respondent to be heard by way of rogation through live video link.

[7] The application for the cross-examination is made pursuant to r 9(5) of the POCA Rules but also in terms of s 169 of the Seychelles Code of Civil Procedure. This application is in order and granted.

[8] The application for rogation is made pursuant to s 11 of the Evidence Act which provides in relevant terms:

> The Supreme Court may in any civil cause or matter, *when a party or witness cannot attend before the court through illness or other lawful impediment and where it shall appear necessary for the purposes of justice,* make an order for the examination on personal answers or upon oath or solemn affirmation before any person appointed to be examiner; and at any place, of any witness or person, and may make such order as may seem proper as to notices to be given to interested parties and as to the mode in which such examination is to be conducted, and may order any deposition so taken to be filed in the registry of the court, and the court may, at the hearing of such cause or matter, empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court may direct. [Emphasis added]

[9] Section 11C (2) also provides that the court has discretion to permit the cross examination of a witness by live television link in circumstances where:

> (a) a person other than the accused is outside Seychelles; or
> (b) it is not reasonably practicable for a person, other than the accused, to be brought before the court in person; and
> (c) the court is of the opinion that it is desirable and practicable that the person give evidence before the court under this section; and
> (d) the arrangement would not unfairly prejudice a party to the proceedings,
>
> …

[10] The 2nd respondent has not filed any supporting documentation as to the availability or preparedness of the courts of British Columbia to hear his evidence or how the applicant would be facilitated in this process. It would appear that despite applying for rogation of his evidence, the 2nd respondent's application seems to be based almost entirely on a request to be cross-examined in Canada over live television link with Seychelles.

[11] He has deponed that he is now settled in Canada and is in the process of selling his house in Seychelles. He avers that travelling to Seychelles would involve considerable stress and involve jet lag and that he would need to be in Seychelles for

a minimum of one week before the case to be in a fit state to stand trial. He also avers that the process would involve considerable cost for travel and accommodation; that he is diabetic and the journey would tire and stress him increasing his blood sugar to the detriment of his overall health. Finally, he depones that the total time involved for the trial would mean an absence of two to three weeks from his business which would have a significant impact on its operation.

[12] The applicant has countered these averments by submitting that as the credibility of the 2nd respondent is at stake in these proceedings, the observation of his demeanour and body language at first hand and not remotely are crucial for the assessment of his credibility.

[13] It has also highlighted logistical difficulties in the process proposed by the 2nd respondent. First of all, it submits, the cross-examination of the 2nd respondent is bound to be lengthy and complex given the nature of the proceedings and the fact that the 2nd respondent's evidence is centrally important to the case. Secondly, cross-examination would be curtailed as no spontaneity would be possible, for example in presenting new documents to the 2nd respondent and questioning him on them. It submits that this would unfairly prejudice its case. Thirdly, the 12 hour time difference between British Columbia where the 2nd respondent is currently resident and Seychelles would create difficulties for the court. Fourthly, it would be impractical to effectively cross-examine the 2nd respondent by referring him to documents in the large bundle of exhibits when there are real possibilities of the witness being unable to find the relevant pages or documents.

[14] The applicant has also submitted that there has been no information or clarity given by the 2nd respondent of the proposed location from which the evidence is to be heard and what safeguards if any would be put in place to ensure that he would be alone, not coached, unable to discuss evidence or the case during breaks and whether a secure link would be available to ensure the observation of the witness at all times. Moreover, it submitted, there would be concerns over the procedure in the event of technological problems including a time-lag or audio difficulties.

[15] The applicant has also submitted that the 2nd respondent has himself averred that he recently took a long flight to the UK to attend a wedding which indicates that he is fit and willing to fly long distances.

[16] I take into account the reasons provided by the 2nd respondent in his inability or the impracticality of his physically attending the court in Seychelles for cross-examination and the applicant's reasons for opposing the application.

[17] The provisions of s 11C have never been tested in Seychelles and there are no authorities on which this court can rely. The case of *Chetty v Chetty* (1936) SLR 1 in which the court refused an application for a Rogatory Commission to hear evidence in India relied on by Mr Durup does not help his case and relates specifically to s 11 of the Evidence Act.

[18] There is in any case a world of difference between travel facilities in 1936 and 2017 both in terms of time and monetary constraints. *Chetty* established that a strong case has to be made for evidence to be held by rogation and that it must be in the interest of both parties and must not prejudice the court in assessing the credibility of the evidence.

[19] The present matter case concerns the taking of evidence by live television link. Mr Galvin for the applicant has provided some modern authorities from Commonwealth countries. In *Ithaca (Custodians) Ltd v Perry Corporation* [2003] 2NZLR 216 the trial judge refused such an application on the grounds that where the witnesses' evidence "relates to evidence that goes to the very heart of the proceedings, and the credibility and reliability of the witness are crucial to the determination the court must make, there is no substitute for that witness giving evidence in person."

[20] In *Asic v Rich* [2004] NSWSC 567, the Supreme Court of New South Wales dismissed an application for the taking of evidence by audio visual link of an expert witness. The court stated that although in some cases it is possible to judge the credibility of a witness, there were:

> exceptional cases where the audio visual procedure [would] put the cross-examiner and the court at a real disadvantage in dealing with credit. They [would] include cases … where the witness's evidence [was] centrally important and the cross-examination [was] likely to be long and complex, and the issue of credit [was] likely to depend upon the witness's responses to questions based on documents shown to him by the cross-examiner….

[21] The court also found that the management of documents in cross-examination and the technological difficulties involved would create the inordinate lengthening of the cross-examination. In the event, the evidence was allowed to be taken by a trial judge in England. However the letter of request for such a procedure and the acceptance of the English Master of the Royal Courts of Justice was produced in evidence.

[22] The court also allowed evidence by audio visual link in respect of an expert in *King v Rail Corporation New South Wales* [2012] NSWSC 832 where it decided that the process would not be unfair to the plaintiff; the evidence was of a limited compass and not central to the issues to be decided; the examination would not be lengthy; and the balance of costs and convenience strongly favoured the making of an order.

[23] In general it must be noted that s 32 of the Criminal Justice Act 1988 (UK) allows evidence to be given by a witness (other than the accused) by way of "live television link." The landmark case in the UK is *Polanski v Conde Nast Publications* [2005] UKHL 10 which is relied on by Mr Durup. On the issue of whether Mr Polanski's evidence could be allowed by video link from France, the House of Lords held on a majority of three to two that the evidence would be allowed as the respondent would suffer no prejudice from the evidence being given by video conference and that Mr Polanski

would continue to be a fugitive from justice irrespective of whether the video link order was made. A refusal would only deprive him of his right to vindicate his civil rights in the courts of England and Wales. *Polanski* was in the event decided on whether the application for video link evidence was reasonable.

[24] Since the *Polanski* case, other considerations have been taken into account in allowing or refusing the use of video link evidence. In *AG of Zambia v Meer* [2006] 1 CLC 436, the court refused such an application after taking into consideration the fact that additional costs would have to be incurred in order to use an audio link given the less developed infrastructure in Zambia. In *Bank of Credit and Commerce International SA v Rahim* [2005] EWHC 3550 (Ch), the Chancery Division of the High Court of England held that if a witness is not a party to the case, the Courts are more likely to allow the use of video link evidence. In *McGlinn v Waltham Contractors Limited* [2006] EWHC 2322 (TCC) the High Court considered whether the weight of the witness' evidence was of crucial importance or only ancillary. Where the evidence was only ancillary, it would be less important that the person appear in person and, therefore, the Court would be more likely to allow video link evidence. Second, the Court also asked whether there was a real, as opposed to fanciful reason why video link evidence was being sought. If the request was only fanciful, the Court would clearly be less inclined to grant it. In the end the court made the order for video link evidence as it concluded that the order would not cause significant prejudice to the defendants who could still cross-examine the claimant effectively by video link and the claimant's evidence would not be of critical importance at the trial.

[25] In the United States it is very difficult in light of the strength of the confrontation clause of the American constitution to have a witness testify via video-link (see *Maryland v Craig* 497 US 836 (1990).

[26] The comparative study above allows the court a frame of reference in applying the provisions of the law as they exist in Seychelles. In examining these provisions, I bear in mind that the following considerations have to be taken into account when I exercise my discretion in whether or not to grant the application for live television evidence by the 2nd respondent:

1. The general rule is that evidence is adduced by the hearing of oral evidence in court.
2. Evidence by live television link is therefore of an exceptional nature.
3. An order for giving evidence by live television link is discretionary.
4. In exercising its discretion, the court may allow such a procedure where it is not reasonable for the person to be brought before the court *and* that it is desirable and practicable that evidence be given this way *and* that such an arrangement would not prejudice a party to the proceedings. [Emphasis added]

[27] I have also applied my mind to the fact that were I to allow such a process for the evidence to be taken certain logistics would have to be explored and put in place, for example:

1. The contact details of the place of hearing and remote site would have to be exchanged.

2. The details would have to include ISDN numbers for the live television link, fax numbers, telephone numbers and email addresses and court staff at either location would have to identify if documents would need to be sent by fax or scanned and sent by email to the other location.
3. Court staff would have to check that all documents held at the place of hearing and the remote site were complete. The technical staff at both locations would have to test the equipment by initiating a test link and again on the day when the evidence is to be adduced at that location and be responsible for remedying the problem.

[28] None of these practicalities have been addressed or resolved by the 2nd respondent prior to his application and the court given its limited means is not in a position to assist with these burdensome and expensive duties.

[29] I have also taken cognisance of the voluminous bundle of documents related to this case and the cross-referencing involved in terms of the affidavits already attached and the s 4 application (POCA) and other supporting documentation. The complexity of referring a witness to these documents over a screen far removed from court does not seem to be practicable.

[30] I am also conscious having read the pleadings that the 2nd respondent is a party to the proceedings and that his testimony will be centrally and crucially important and will go to the heart of these proceedings.

[31] There is also no evidence of an illness on the part of the 2nd respondent which would amount to a lawful impediment to his travel to Seychelles. Type 2 diabetes is a manageable condition suffered by about 8% of the world population. There has been no evidence adduced by the 2nd respondent to show that travel is contra-indicated for his condition. I read from https://www.diabetes.org.uk/travel that "People with both Type 1 and Type 2 diabetes can travel all over the world – diabetes is no barrier". The fact is in any case that the 2nd respondent travelled to England for a wedding recently.

[32] There is also no evidence that the 2nd respondent will suffer any undue expense for attendance in Seychelles for cross-examination given the fact that he owns a villa and a yacht in Seychelles and he has residency status in this jurisdiction.

[33] I come to the conclusion that there is no valid reason why the 2nd respondent cannot attend court. It is also neither desirable nor practicable that evidence be given this way and in any event much prejudice may be suffered by the applicant in this case should the 2nd respondent be cross-examined by live television link.

[34] In the light of all these considerations I exercise my discretion to refuse the 2nd respondent's application to have his cross-examination conducted by live television link. I am not in a position to consider the conduct of the cross-examination out of the jurisdiction by a judge in British Columbia as no evidence was adduced as to the practicalities of such a process.

[35] I therefore order the 2nd respondent to attend the Supreme Court of Seychelles for cross-examination in relation to the ss 4 and 8 applications under POCA.

[36] Costs of these applications will abide the event.

LCP DEVELOPMENT v ISLAND DEVELOPMENT & GOVERNMENT OF SEYCHELLES

M Twomey CJ
30 January 2017 CS 199/2011; [2017] SCSC 65

Contract – land lease – breach of contract – contract interpretation – l'exception d'inexécution

The 1st defendant was granted a lease of Poivre Island for 99 years. In 2003, it sub-leased part of Poivre Island to the plaintiff so that the plaintiff could construct and operate a hotel on the island. As the plaintiff repeatedly failed to comply with the deadlines to construct the hotel, the 1st defendant terminated the contract in 2008 and organised bidding for the hotel construction. The plaintiff argued that (i) the 1st defendant failed to support it in obtaining planning permits and (ii) its attempts to inject the capital in the project were frustrated by the 2nd defendant. Therefore, the plaintiff sought a court order to reinstate it as lessee of the land, declare the contract still in force and suspend the bidding for the hotel construction.

JUDGMENT For defendants.

HELD

1 If a party does not execute one of its essential obligations, the principle of *l'exception d'inexécution* can be invoked by the other party as a means of pressuring the party at fault or as a defence with a view to exonerating itself from the execution of its contractual obligations or to constrain the other party to execute its own obligations. Although the exception is granted in very specific cases under the Civil Code, jurisprudence has extended the exception to all synallagmatic contracts.
2 The exception can only be raised in good faith and not as a dilatory measure.
3 The breach of the obligations must not bear on secondary or subordinate matters but must be sufficiently grave in itself to justify non-execution.

Legislation
Civil Code, arts 1134, 1156, 1612, 1651, 1704, 1948
Environment Protection (Standards) Regulations, reg 3
Immovable Property (Transfer Restrictions) Act

Cases
Hoareau v A2B (2014) SLR 163
Jumeau v Sinon (1977) SLR 78
Peters v Bazen (1975) SLR 175

Counsel D Sabino for plaintiff
F Chang-Sam and G Robert for the 1st defendant
B Vipin for the 2nd defendant

M TWOMEY CJ

The Undisputed Facts

[1] The 1st defendant is a development company for Seychelles' outer islands and was granted a 99 year lease of Poivre Island by the 2nd defendant.

[2] On 5 May 2003, the 1st defendant by agreement executed by a notarial deed, sublet to the plaintiff 16.5 hectares of land on Poivre, for a period of 60 years commencing on 1 December 2003 for a payment of USD 20,000 per annum reviewable every five years.

[3] The purpose of the sub-lease was for the plaintiff, at its own expense, to construct, develop operate, maintain a hotel and to perform other associated works with the said development.

[4] The hotel and other associated works did not materialise and by letter dated 13 August 2008, the 1st defendant issued a formal notice of termination of the sub-lease to the plaintiff.

[5] Following protracted discussions between the parties, a new agreement was prepared by the plaintiff with the 2nd defendant setting 11 October 2010 as deadline for the signature of a new sub-lease on the surrender of the original sub-lease.

[6] The 1st defendant by letter dated 22 July 2008 put the plaintiff on notice that it was continuously breaching the agreement by failure to complete the construction of the hotel within the time specified.

[7] On 13 August 2008 the 1st defendant by letter to the plaintiff terminated the sub-lease on the grounds that the breach complained of had not been remedied.

[8] Following protracted discussions between the parties, a new agreement was prepared by the 2nd defendant for the plaintiff setting 11 October 2010 as deadline for the surrender of the original sub-lease and the signature of a new sub-lease.

[9] The deadline was not met and the 2nd defendant informed the plaintiff that it would proceed to tender the development to other bidders.

The Plaintiff's Claim

[10] It is the plaintiff case that the sub-lease dated 5 May 2003 has not been terminated and is still in force and that it has a right of ownership and possession of the sub-leased land on Poivre. It claims that its endeavours to inject more capital into the company by the sale of shares to an investment company, Birchley Investment Holdings Ltd ("Birchley"), was frustrated by the 2nd defendant's stringent sanction conditions which in any event were *ultra vires* the Immoveable Property (Transfer Restrictions) Act (hereinafter IPTRA). It prays the Court to issue an injunction to order the defendants to reinstate it as lessee of the land at Poivre, to refrain from asking for tenders for the development of Poivre and to declare the sub-lease dated 5 May 2003 still in force.

The Defendants' Defence

[11] The 1st defendant has averred that the date of completion of the hotel was 20 March 2007 but following the issuance of the sanction letter dated 27 March 2007 by the 2nd defendant and/or its agents, the completion date was effectively extended to 1 June 2008. It states that the sub-lease agreement was legally terminated on 13 August 2008 and no injunction arises.

[12] It is the 2nd defendant's case that the sanction conditions in relation to the sale of shares by the plaintiff's shareholder to Birchley were not *ultra vires* IPTRA and in any case were not objected to. Since the share transaction was proceeded with, it is deemed acceptance of the terms of the sanction and for which the plaintiff is estopped from now challenging. Further, since the sanction conditions were not met and no new lease signed, the original lease continued in operation and was effectively terminated by the 1st defendant on 13 August 2008.

The Evidence

[13] The matter was heard in fits and starts before Karunakaran J and at the end of the evidence being adduced, with the trial judge not in a position to hear submissions or deliver a judgment the carriage of the case was taken over by me. Parties unanimously opted for the adoption by this Court of the evidence adduced before Karunakaran J.

[14] I have proceeded to examine the transcripts of evidence adduced in this matter and find that the only issues to be decided by this Court are whether there was a breach of contract by either party and what consequences flow from such breaches.

Breaches of the Sub-Lease

[15] It is contended by the plaintiff that several warranties of the sub-lease were breached by the 1st defendant, namely: (1) that it did not permit the plaintiff vacant possession and quiet enjoyment of the sub-leased property and full charge and responsibility for the construction and development of the hotel as per cl 8 of the agreement; (2) that the 1st defendant did not assist it to procure the relevant government approvals or authorisations for the development as per cl 12 (b) of the agreement; and (3) that the 1st defendant did not abide by the condition that no other agreement with regard to the hotel with a third party would be entered into which might affect the plaintiff's rights and interest as per cl 19(r) of the agreement.

[16] The plaintiff also contends that the 2nd defendant imposed conditions that were so rigorous as to make the performance of the contract impossible.

[17] On these issues, the managing director of the plaintiff company, Mr Leighton Curd, testified that although the requisite government sanction was obtained by the plaintiff before the signature of the lease agreement with the 1st defendant, the plaintiff was opposed by the 1st defendant through the course of the project resulting in its slowdown and eventual halt.

[18] The documentary evidence produced confirms that planning approval for the hotel development was granted on 27 May 2003. The certificate of approval had the following conditions:

1. Standard conditions (relating to *inter alia* landscaping, colour scheme, sullage, water storage);
2. Environmental authorisation with conditions;
3. Chief Fire Officer's comments;
4. Structural design to be submitted within 28 days prior to commencement of the works.

The Sullage Works

[19] The plaintiff testified that some of these conditions, namely sullage were never met because of resistance from the 1st defendant. He was supported in this position by the plaintiff's project manager, Mr David Reese and the company's financial director, Mr Brijesh Jivan. It was both their testimony that the sullage system being proposed was far superior to the one the 1st defendant required.

[20] Mr Glenny Savy, the Chief Executive Officer of the 1st defendant also testified. His evidence was that he had not obstructed the plaintiff's plans but rather that the plaintiff had failed to submit the plans as recommended. He added that he had advised the plaintiff that its proposed plans, for example in respect of a vacuum sewage system would not be granted planning approval given the requirements of the public utilities company and the proposed vacuum system's incompatibility with the proved and tested conventional pump sewage system in operation on the islands of Seychelles. He testified that he was also particularly nervous about a system that might pollute the limited water reserves of Poivre's aquifer.

[21] It is not in dispute that environmental authorisation in terms of the environment impact assessment report was granted on 14 March 2003 from the Ministry of the Environment two months before the sub-lease was executed. I shall return to this later.

***T*he Share Transfer to Birchley**

[22] The plaintiff has contended that the 1st defendant also breached cl 14 of the sub-lease agreement. In this respect Mr Curd testified that in an effort to finance the development, the plaintiff sought investment by way of a share transfer from a third party, Birchley. He stated that cl 14 of the sub-lease allowed the plaintiff to make such a transfer and the 1st defendant was bound not to unreasonably refuse it. In his opinion, the sanction conditions issued by the 2nd defendant in respect of the share transfer also amounted to an unreasonable refusal.

[23] It must be noted that cl 14 of the contract provides in relevant part that:

> The Sublessee may during the Sub lease Period, subject to the Sublessor's prior consent but which consent the Sublessor shall not unreasonably refuse or withhold, further sub lease the hotel to any third party or grant any or all right, interest and possession under this Sub lease to any third party by way of sale, assignment or transfer...

[24] Mr Curd's testimony is to the effect that the sanction conditions imposed by the 2nd defendant to permit the transfer of shares were so stringent that they paralysed further work by the plaintiff.

[25] The sanction conditions imposed were contained in a letter from the Principal Secretary of the Ministry of Land Use and Habitat, Mr Patrick Lablache dated 19 March 2007 and can be summarised as follows:

1. Money for the purchase price and stamp duty was to be brought into Seychelles through the Central Bank in a convertible foreign currency and exchanged into Seychelles Rupees.
2. The plaintiff was to apply for sanction each time it changed beneficial ownership of Birchley.
3. The airfield had to be completed and hard surfaced to the 1st defendant's specifications on or before 30 September 2007.
4. Dredging works had to be completed by 30 June 2007.
5. An irrevocable bank guarantee from a local bank had to be provided in respect of the airfield and the dredging works and each guaranteed in the sum of USD 400, 000 in favour of the 1st defendant.
6. The hotel had to be completed, operational and licensed by the latest 1 June 2008 failing which a penalty of USD 100,000 would be payable per month of delay or part thereof, to the 1st defendant and notwithstanding the consideration or forfeiture of the sub-lease beyond a delay of 3 months after 1 June 2008.
7. No residential development project would be considered until the first project was completed and operational.
8. Issues pertaining to utilities, airfield, marina and essential services to be agreed with the 1st defendant.

Dredging of Channel to Poivre

[26] Insofar as other infrastructure is concerned it was also Mr Curd's testimony as supported by Mr Rees, Mr Jivan and Mr Barley that the plaintiff was again obstructed in carrying out the work because of the unreasonable behaviour of Mr Savy. In respect of the dredging works, the main contention was that staffing issues were encountered because of the lack of support of the 1st defendant in obtaining necessary authorisations and hindering staff movement to the island. The plaintiff raised the issue of the logistics of reaching Poivre and their dependence on the 1st defendant in facilitating the movement of staff and goods and machinery from Mahé to Desroches (the island nearest Poivre in terms of air transport) and on to Poivre.

[27] Mr Savy refuted these allegations. In his view, he assisted the plaintiff's operations but difficulties arose over the plaintiff not paying its sub-contractors and service providers, namely Mr Luc Grandcourt, the owner of the vessels Praslin Hero and Praslin Wave for transportation of equipment (supported by Exhibit D14) but also the contractor for the dredging works, Southern Ocean Engineering. In this regard, Alan Klaassen the owner of Southern Ocean Engineering testified that he had been contracted by the plaintiff through another of its companies, Whale Host, to do dredging works and excavations at Poivre. He stated that he worked on the main basin

near the island but did not dredge the entrance channel. In terms of percentage of the total dredging done, he stated that about 40% of the works had been completed. This estimate was supported by Mr Patrick Lablache who visited the island for an assessment.
Mr Klaassen stated that the dredging works he carried out were worth South African Rand 2.5 million but he received payment totalling 500,000 Rand in dribs and drabs from the plaintiff. Finally all dredging work was suspended in 2004 and the dredger was mothballed in situ but in any case eventually sank. Mr Klasssen admitted that he then caused the plaintiff to be blacklisted in South Africa.

Construction of Airfield

[28] The construction of the airfield was also a big bone of contention between the parties. The plaintiff accepted that the definition of hotel in the sub-lease agreement namely "buildings, installations, facilities…used for or associated with the extent of the operation and management of the hotel" would include the airstrip. Mr Curd and Mr Jivan testified that the plaintiff was hindered in meeting its contractual obligation in this respect as Mr Savy for the 1st defendant had not obtained the requisite permits from the Seychelles Civil Aviation Authority (SCAA).

[29] Refuting these allegations, Mr Savy stated that the airstrip had been started by the plaintiff who was unable to further undertake and complete the work. He was then approached to have the work subcontracted to the 1st defendant. In this respect, he engaged a subcontractor, Patrick Rogan, to complete the clearing of the terrain and to undertake its levelling and compacting to permit planes to land. It soon became apparent that a grass airfield would not be viable as the fine sand in Poivre could not sustain the growth of grass. Although an islander aircraft did eventually attempt a successful landing there it confirmed his fears that the ground was too soft.

[30] On the issue of certificates from the SCAA, Mr Savy testified that no certification was necessary for a private airfield. It was only when commercially paying passengers would be flown to the island that the airfield would have to be licensed by the SCAA. The only requisite permission at the initial stage was that from the Planning Department which he obtained on 22 December 2004 (see Exhibit D36).

[31] He stated that the airfield as completed by Mr Rogan would have not have been licensed by the SCAA purely on compaction strength. Mr Rogan also testified and corroborated much of the evidence of Mr Savy in respect of the work carried out on the airfield.

[32] Mr Savy further stated that the plaintiff, having subcontracted the work for the airfield to the 1st defendant, had no duty or right to contact the SCAA in respect of the certification of the same. It was the obligation of the 1st defendant to meet the standards when the time arose.

[33] As the grass airfield was no longer viable it was agreed that the plaintiff would provide the paving blocks for a concrete runway and the construction would be done by the 1st defendant. The price of the blocks was negotiated by the 2nd defendant with

United Concrete Products Seychelles and at the last hour, the plaintiff refused to pay for them and insisted that a written contract would have to be but in place between itself and the 1st defendant.

The Hotel Construction

[34] Both Mr Curd and Mr Jivan testified that the plaintiff was thwarted in its efforts to construct the hotel because it never obtained planning approval, did not have sufficient support from the 1st defendant and because of its lack of funds compounded by the stringent sanction conditions which in its view was dictated to the 2nd defendant by the 1st defendant.

[35] In this regard, it produced a letter from the Secretary of the Planning Authority granting approval for the construction of the hotel chalets, health spa and community centre subject to meeting the environmental authorisation conditions.

[36] It called Mr Gerard Hoareau, at one point the Chief Executive Officer of the Planning Authority, who confirmed that no structural details were ever submitted by the plaintiff. He explained that conditional planning permission does not allow structures to be constructed until a certificate of approval is issued. He stated that where permission is given subject to conditions, these conditions have to be fulfilled before the certificate of approval is issued. Where there is a registered lease, the lessee may apply for planning and the lessor's authorisation is not sought by the Planning Department. No commencement notice was ever received by the Planning Department in respect of the hotel.

[37] Mr Savy testified that in the end no hotel chalets were ever built. He stated that the contractors for the build kept changing: first it was to be a South African company, VG Shop Fitters, then a Turkish company, and finally a Bali company but no hotel ever materialised.

The Staff Accommodation

[38] The only construction that took place was in terms of three sample chalets for staff accommodation and a canteen. These were erected by a Turkish firm who complained about not being paid and did not complete the chalets. The chalets were not roofed and very quickly crumbled as they were exposed to the elements.

The Communal Facilities for Poivre Village

[39] One of the sanction conditions was the payment of USD 400,000 by the plaintiff to the 1st defendant. It was the plaintiff's contention that the payment was also unreasonable and that it was not used for communal facilities. Mr Savy stated that that condition was one reasonably imposed by the 2nd defendant and that in any case the money was not paid in one go. The plaintiff had to be requested on several occasions to meet that condition. He accepted that it had not rebuilt the village as the 1st defendant had instead been engaged in building the runway on behalf of the plaintiff. There was in any case no formal contract in terms of what the money was to be used for. Some of it was used for a desalination plant for the island.

The Residential Villa Project

[40] It was also the plaintiff's case that it became quickly aware that the hotel development on its own would not be viable and that it also needed to build private villas for sale on the island. It was its case that after floating the idea, it was appropriated by Mr Savy for the use of the 1st defendant and that subsequently all efforts to get permissions for the construction of the villas were undermined by the 1st defendant.

[41] Mr Savy testified that the idea for private villas for Poivre was not an innovation of the plaintiff. The first experiment was at Desroches after the 1st defendant got the idea from the Eden Island Development. A residential villa development was also conceived by the 1st defendant for other islands such as Alphonse, Providence and Farquhar.

[42] Mr Savy rejected the idea it would have been a breach of the sub-lease agreement for the 1st plaintiff to build villas. These would not qualify as being hospitality business in competition with the hotel. In any case, it was felt that since the plaintiff could not even build the hotel it would have been premature and unwise to consider allowing it a second phase project such as the residential villas which in Mr Savy's opinion was an attempt to source capital for the building of the hotel.

Sabotaging of Investment Opportunities

[43] It was also the case for the plaintiff that the 1st defendant by communicating with its existing and potential funders sabotaged its investment opportunities, thus causing the funding for the hotel construction to dry up. They supported this by evidence that Mr Savy had contacted Ms Martin Alter, Lancaster Company Ltd and Mr Artur Shtroserer, all potential funders who had subsequently pulled out of the funding of the plaintiff's project. Mr Savy stated that the contact to the 1st defendant had been made by the funders themselves and that he told them the facts as they were.

The Application of the Law and Discussion of the Evidence

[44] The disagreement between the parties is largely over the interpretation of cl 16 of the sub-lease which provides:

> The Sublessee shall: (a) start and complete the construction of the hotel in accordance with approved plan thereof within 24 months after the grant of the planning permission by the Planning Authority or 30 months after the Commencement Date whichever occurs last.

[45] In terms of the termination of the contract, the law to be examined relates to the interpretation of contacts. Article 1156 of the Civil Code of Seychelles provides that:

> In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words.
> However, in the absence of clear evidence, the Court shall be entitled to assume that the parties have used the words in the sense in which they are reasonably understood.

[46] The first part of art 1156 is of no assistance whatsoever in the present matter. The plaintiff and the 1st defendant have very little common ground insofar as the interpretation of cl 16 of the sub-lease is concerned. I have therefore construed the sub-lease agreement in the most objective way as is reasonably possible.

[47] Whilst the parties may not agree as to whether the plaintiff was or was not supported or should have been supported by the 1st defendant in its endeavours to obtain planning permission, cl 16 gives the latest date of completion of the hotel as 30 months after the Commencement Date. The Commencement Date is defined in the agreement as the "the date that this sub-lease shall commence, namely on the 1st day of December 2003." This would have meant that the hotel would have had to be completed on or before 1 June 2006.

[48] This breach by the plaintiff was forgiven as the completion date was modified by the new sanction conditions granted on 27 March 2007 which permitted Birchley to purchase 99 shares in the plaintiff company. The letter of sanction at para 5 states in relevant part:

> The hotel must be completed, operational and licensed by the latest 1 June 2008….

[49] This gave the plaintiff an extra two years to meet its contractual obligations. The plaintiff has submitted however, that first of all, the sanction letter was issued to Birchley and not the plaintiff and therefore was not binding on the latter. Secondly, conditional planning permission was only granted to the plaintiff on 25 July 2007 and in line with clause 16(a) of the contract, the deadline to complete the hotel would have been in July 2009. Hence the termination letter issued by the 1st defendant in August 2008 was premature.

[50] The first part of this submission cannot be sustained. Birchley became a shareholder of the plaintiff and therefore became part and parcel of the plaintiff company. The plaintiff therefore cannot be viewed as a third party to the sanction condition imposed by the 2nd defendant on Birchley.

[51] The second part of the argument is ingenious but fails to take into account the fact that the planning approval granted in 2007 relates to supplementary drawings and not planning permission for the hotel which had been granted since 29 April 2005. It was the plaintiff's own tardy submission of detailed plans in relation to many aspects of its project which necessitated further intervention and slowed down the work on the hotel.

[52] I have throughout the examination of the evidence tried to understand the case being made in terms of the alleged breaches of contract by the defendants. Although not expressed in so many words it appears that the plaintiff is pleading *exceptio non adimpleti contractus*, more commonly known in France and Seychelles as *l'exception d'inexécution*.

[53] The articulation of this concept begins in art 1134 of the Civil Code of Seychelles which provides that:

> Agreements lawfully concluded shall have the force of law for those who have entered into them.
> They shall not be revoked except by mutual consent or for causes which the law authorises.
> They shall be performed in good faith.

[54] In a synallagmatic contract, parties are bound to each other by their interdependent, contractual and reciprocal obligations at the point of execution of the contract. Hence, as it has been expressed, "No performance is due to one who has not himself performed" (K W Ryan *An Introduction to The Civil Law* (The Law Book Co of Australasia, Brisbane, 1962) at pp 82-83. If one of the parties does not execute one of its essential obligations, the principle of *l'exception d'inexécution* can be invoked by the other party as a means of pressuring the party at fault or as a defence with a view of exonerating itself from the execution of its contractual obligations or to constrain the other party to execute its own obligations. Although the exception is granted in very specific cases in the Civil Code, namely in delivery of goods (arts 1612 and 1651), in contracts of exchange (art 1704) and in contracts relating to deposits (art 1948) jurisprudence has extended the exception to all synallagmatic contracts (see Soc mai 156, Bull civ IV, no 503, p 37).

[55] In the present case, all the parties had concurrent duties – the plaintiff had to pay the sum of USD 20, 000 dollars annually and to construct, develop and operate a hotel. The 1st defendant's duties expressed negatively in the sub-lease were: not to carry out hospitality developments which would unreasonably and adversely affect the use of the hotel by the plaintiff and not to take any action that might hinder the plaintiff from obtaining approvals and licences for the hotel. It was also under an obligation to assist the plaintiff in procuring these approvals and licences. It is also the plaintiff's submission that outside the lease agreement but allied to it, the 2nd defendant was under an obligation to grant sanction reasonably for any transfers in the leasehold or interest in the leasehold.

[56] The plaintiff's case is that since the defendants did not meet their obligations it could not execute the contract.

[57] However it must be noted that *l'exception d'inexécution* is permitted in very limited circumstances. In *Jumeau v Sinon* (1977) SLR 78 a case which also involved a lease agreement where rent had not been paid by the defendant on the grounds that the plaintiff had illegally interfered with his peaceful use and enjoyment of the property and that the plaintiff had resumed possession of the leased premise, Sauzier J stated, first, the exception can only be raised in good faith and not as a mere dilatory measure. Second, the breaches by the lessor of his obligations must not bear on secondary or subordinate matters but must be sufficiently grave to justify non-execution.

[58] In *Peters v Bazen* (1975) SLR 175, Sauzier J stated that a contracting party may refuse to perform his part of the agreement if the other party has failed to fulfil a substantial part of the agreement. In *Hoareau v A2B* (2014) SLR 163 Domah J stated that:

> [L'exception d'inexécution] is not available for every kind of breach. In general in such cases the Courts try to strike a balance between the competing obligations of parties bearing in mind the essential obligation in the agreement.

[59] In order for the plaintiff's breach of the sub-lease conditions to be excepted it must be able to show that the defendants' breaches were substantial and essential to the object of the sub-lease.

[60] I have previously referred to the environmental impact conditions granted on 14 March 2003 (Exhibit P 18), that is, nearly two months before the sub-lease was executed. There has been no attempt by the plaintiff to explain why these were never met apart from its referral to the lack of support by Mr Savy in supporting a vacuum sewage system. I note that in that letter the attention of the plaintiff was already drawn to the type of sewerage treatment process acceptable in Seychelles. The letter states in relevant part:

> [R]eference is made to the South African standards which does not relate to the standards set by the Seychelles authorities. As such the information should be revised to reflect the established standards for the usual parameters as set out by the Seychelles Environment Protection (Standards) Regulation 1995.

[61] These regulations specify that the standard utilised by Seychelles for sampling is in accordance with British Standards 6068 (see s 3 of the Regulations). I cannot accept that Mr Savy was being obstructive in this regard.

[62] The submissions of the plaintiff on what it sees as the unreasonable and stringent conditions of the sanction given by the 2nd defendant in 2007 to permit the share transfer is also not tenable. Government does not have to grant sanction for any purchase of interest in immoveable property in Seychelles. When it does grant permission it can impose any conditions it wishes. The applicant can walk away from those conditions if it so wishes and not effect the purchase. That cannot be viewed by the Court as a breach of the sub-lease, substantial or otherwise.

[63] The sanction conditions imposed were in any case accepted by the plaintiff in a letter dated 29 March 2007 (see Exhibit D1) in which it thanked the government for the grant of sanction and expressed its intention to "complet[e] the Poivre project successfully". The sanction conditions in any case had no bearing on the plaintiff's duties under the sub-lease. It undertook to construct the hotel. If it had underestimated the money and work involved for the realisation of such a project, especially on a remote island, the fault lay entirely at its feet. If anything the defendants tried to facilitate it in obtaining requisite funds so as to complete the project which was at this stage in any cases way behind schedule.

[64] I am also not able to accept the suggestion that the 1st defendant unreasonably withheld its support for any part of the work relating to the dredging, the construction of the airport and the hotel. The evidence adduced by the plaintiff even on a balance of probability does not pass muster. It is quite incomprehensible that a project which was first granted permission in 2003 did not materialise in even one hotel chalet getting off the ground when the lease was terminated eventually in 2008.

[65] In the present case, I am unable to conclude on the evidence that the defendants failed in any way to perform essential or substantial obligations under the agreement. As was rightly pointed out by the 1st defendant it was not the agent of the plaintiff. There was no onus contractually placed on the 1st defendant to obtain approvals or licences for the plaintiff. This is in fact expressly stated in cl 31of the sub-lease agreement.

[66] It appears that the plaintiff's *laches* in fulfilling his obligations under the contract is being projected onto the defendants. This is clearly not maintainable in the light of the evidence adduced by the plaintiff which falls woefully short of proving its case. Similarly, the attempts to show that the refusal of the 2nd defendant to grant permission for the construction of villas and of the alleged sabotage by the 1st defendant of the funding opportunities of the plaintiff resulting in the breach of the plaintiff's obligations does not come up to standard.

[67] I am also not convinced that the reason for the non-performance of the plaintiff's obligations is raised in good faith and does not amount to delay tactics. I say this based on the extensions given to the plaintiff for completion of the work. For these reasons, the exception cannot be set up to excuse the non-performance of the plaintiff's obligations.

Decision

[68] I find in the circumstances that the termination of the lease by the defendants was lawful and in accordance with the terms of the sub-lease agreement.

[69] I therefore order that the plaintiff's case be dismissed with costs.

[70] I have to add that none of the parties is to blame for the delay in the conduct of this case. I am aware that the plaintiff's prayers were, *inter alia* for an injunction, which is a remedy that must be granted swiftly. In the event this case took nearly six years to complete. For this I tender the Court's unreserved apology. No other prayers were made and no amendments to the pleadings were sought and I have therefore limited my decision to the pleadings and prayers before me.

R v ROSE

M Burhan J
31 January 2017 CO 58/2016; [2017] SCSC 57

Criminal procedure – infectious disease – public health risk – remand

The accused absconded from Seychelles Hospital while undergoing treatment for pulmonary tuberculosis. He was therefore detained according to a court order from 2016. In 2017, the accused responded well to the treatment and was no longer infectious. His doctor still requested a court order so that the accused would remain on remand until he completed his treatment.

JUDGMENT The accused be kept in remand and treated by a prison doctor.

Legislation
Public Health, s 35(3)

Counsel J Chinnasamy for the Republic

M BURHAN J

[1] The accused in this case Laurence Rose has been charged under s 35(1) & (3) of the Public Health Act. According to the particulars of the offence, the accused who is suffering from an infectious disease namely pulmonary tuberculosis absconded from the Seychelles Hospital while undergoing treatment resulting in him failing to take precautions to guard himself directly or indirectly from spreading the infectious disease.

[2] An application was made to court based on the affidavit of Dr Meggy Louange that the accused be detained in the Seychelles Hospital for treatment as he is a public risk and by court order dated 8.11.2016 the accused was detained accordingly.

[3] In the latest affidavit dated 30.01.2017 Dr Meggy Louange while stating that the accused has responded to the treatment and is no more infectious requests an order from court considering the history of absconding of the accused that the accused be kept in remand custody until he completes his treatment. The doctor has further stated that if he fails to take his treatment, he would once again become infectious and a public health risk.

[4] Considering the history of the accused of absconding from treatment and the nature of the charge, I am of the view that if the accused is released he would abscond, thereby being a health risk not only to the public but to himself and his family. Considering the serious nature and the gravity of the charge and the dangerous consequences of the accused absconding from treatment and thereby once again becoming a public health risk, I order that the accused be remanded for a period of two weeks and he be treated by the prison doctor.

[5] The prison authorities are free to produce or keep the accused under guard in hospital at any required time for treatment purposes. Considering the nature of the case, the accused could even be detained in any police station instead of Montagne Posse prison at the discretion of the Police Commissioner or Superintendent of Prisons in order to facilitate his treatment.

HEDGE FUNDS INVESTMENT MANAGEMENT LTD v HEDGEINTRO INTERNATIONAL LTD

M Twomey CJ
6 February 2017 CC 04/2012; [2017] SCSC 88

Contract – private international law – choice of law and jurisdiction – expert witness

The plaintiff is a company regulated by the Financial Services Authority in the United Kingdom. The defendant is an international business company established in Seychelles. Raminder Panesar (the 1st intervener) was both a director of the plaintiff and a shareholder of the defendant. Following negotiation between Panesar and Aspect Investment Partners, the defendant entered into an introducer agreement with Aspect under which Aspect would pay the defendant commissions for introduction services. Subsequently, the defendant, the plaintiff and Aspect entered into a sub-introducer agreement that provided for the defendant to pay the plaintiff commissions for introduction services. By October 2010, Aspect had paid the defendant USD 664,353. Aspect suspended further payments after discovering the defendant had distributed the commissions to other third parties without its knowledge. The plaintiff therefore claimed against the defendant for the payment of commissions in accordance with the agreement. The defendant challenged the claim on the basis that the sub-introducer agreement was incomplete, invalid and unenforceable.

JUDGMENT For the plaintiff.

HELD
A person is not precluded from acting as an expert witness simply because of a pre-existing relationship with one of the parties to the action. However, where such a relationship exists, it would clearly have an effect on the weight to be accorded to such an expert's testimony.

Legislation
Civil Code, arts 1315, 1316, 1341-1348, 1356, 1382, 1715
Code of Civil Procedure, ss 71, 75
Evidence Act, s 17

Cases
Allisop v FIU (2016) SCAA 1
Beitsma v Dingjan (No 1) (1974) SLR 292
Intelvision Network Ltd v Multichoice Africa Ltd (2015) SLR 299
Morgan v Morgan (1972) SLR 79
Pillay v Pillay (1973) SLR 307
Pillay v Pillay (1978) SLR 217
Rose v Mondon (1964) SLR 134

Foreign cases
Armchair Passenger Transport Ltd v Helical Bar Plc [2003] EWHC 367
Cass com 15 mai 2012: Pourvoi 11-10278*Factortame (No 8)* [2002] 3 WLR 1104
Hillas & Co v Arcos Ltd [1932] All ER *494*

Liverpool Roman Catholic Archdiocesan Trust v David Goldberg QC [2011] EWHC Ch 396; [2001] 1 WLR 2337
Proton Energy Group SA v Orlen Lietuva [2013] All ER (D) 206
The Queen v Bonython (1984) 38 SASR 45
Toth v Jarman [2006] All ER (D) 271
Whitehouse v Jordan [1981] 1 WLR 246

Foreign legislation
Civil Procedure Rules (England and Wales), Part 35
Financial Services and Markets Act (United Kingdom)
Financial Services and Markets Act (Regulated Activities) Order (United Kingdom)

Counsel S Rouillon and B Georges for plaintiff
J Renaud for defendant and 1st intervener
A Derjacques for defendant and 2nd intervener

M TWOMEY CJ

Unusual Procedure and Pleadings

[1] This case has followed an unusual course which has in the main not been in keeping with the Seychelles Code of Civil Procedure. Be that as it may, I note that it is a commercial matter that has taken nearly five years to complete in breach of protocols in place that clearly indicate that commercial actions should be completed within six months. Let this be the last case of its kind.

[2] A further complication is the manner in which pleadings have been filed and the nature of the pleadings themselves. Section 71(d) of the Seychelles Code of Civil Procedure provides that a plaint must contain:

> a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action.

[3] Similarly s 75 of the Code provides in respect of a statement of defence that it:

> must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim….

[4] As it is the plaint runs to 8 pages, the statement of demand of Mr Raminder Panesar runs to 26 pages and that of Mr Ashley French to 11 pages. Not to be outdone the plaintiff then files a reply to the counterclaim with an attachment of a list of documents spanning another 15 pages. Later a statement of defence (to which I shall shortly return) running to another 10 pages is filed. The pleadings in this case are therefore anything but plain and concise. They are given to rambling, unnecessary and unclear averments. They are filled with opinions and submissions of evidence. They should

have been struck out for obfuscating the issues to be decided in the suit. I am once more reminded of Blaise Pascal, the French mathematician and philosopher who had the following to say on long windedness:

> Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte.

[5] Admonishment of those responsible is now too late. It cannot repair the damage caused by this case both in terms of time wastage and the image of the Judiciary and the Bar on these islands but the Court cannot stay silent so that others may remain comfortable. Such reprehensible actions will have to be sanctioned.

[6] Let this therefore be the final warning – such pleadings before this Court will no longer be acceptable as they clearly run counter to the rules of civil procedure and are an obstacle to the smooth case management and court administration of the Supreme Court. Costs will be imposed on counsel who continue to defy established rules of procedure and waste the precious time of the court. In *Allisop v FIU* (2016) SCAA 1 the Court of Appeal imposed such costs on counsel. This Court will not hesitate to do the same.

[7] As for the evidence adduced it is yet another unpleasant aspect of the case which I shall address later.

[8] Yet another complication is the fact that the case was begun before Judge Burhan who permitted Raminder Panesar and Ashley French, shareholders of the defendant company to appear as interveners in the case (see ruling of 15 March 2013). On 12 June 2013 after the case was taken up before Judge Karunakaran, for reasons that are unclear these two individuals were permitted to file a joint defence on behalf of the defendant company. They were shareholders but not directors of the company. It has not been demonstrated that they were in a position to represent the defendant company. They were also not of one mind as is clear from their pleadings and oral evidence.

[9] The statements of demand were never withdrawn or struck out. They remain on file and the averments they contain are sometimes at variance with the averments in the joint statement of defence.

[10] On 28 October 2014 at 1.54 pm there was an exchange in court as to who represented which party and how many parties were involved in the matter. Nothing conclusive was achieved and all pleadings remained on file. It transpires from subsequent submissions that both Mr Renaud and Mr Derjacques then represented the defendant. Subsequently, no submissions were filed by the interveners, only a joint submission Mr Renaud and Mr Derjacques for the defendant.

[11] In October 2016, I took over carriage of the case. The parties unanimously agreed that I adopt the evidence adduced and deliver a judgment. This, I proceed to do.

The Facts of the Case

[12] The facts of this case are simple: the plaintiff is an English company authorised by the Financial Services Authority (now named the Financial Conduct Authority) of the UK to carry out specific activities, *inter alia*, to advise on investments and deal with investments as agent. At the time of the matters complained of, Tushar Patel and Raminder Panesar were the directors of the company.

[13] After a meeting between Raminder Panesar and Ashley French, an employee of Barclays Corporate Bank and his wife Jun Deng, Raminder Panesar caused prospectuses drawn up by the plaintiff to be forwarded to Jun Deng who was to send these to a contact who would pass them on to an investor.

[14] This investor was China Investment Corporation ("CIC"), a sovereign wealth fund responsible for managing part of the People's Republic of China's foreign exchange reserves. As it turned out, the plaintiff's products did not match the investor's requirements and it was agreed that Raminder Panesar would approach other investment firms regarding an introduction with the investor.

[15] Subsequently the terms of such an introduction were negotiated between Aspect Investment Partners and Raminder Panesar with these negotiations being subject to a non-disclosure agreement signed on 19 December 2008.

[16] On 20 February 2009, an Introducer Agreement was signed by Aspect and the defendant company, Hedgeintro International Ltd, an international business company incorporated on 2 February 2009 in Seychelles under the International Business Companies Act. The Introducer Agreement contains a non-exclusive jurisdiction clause in favour of the courts of England and Wales. It also contained clauses relating to the payment of commission to the defendant by Aspect for the introduction services.

[17] On 25 February 2009, a Sub-Introducer Agreement was also entered into between the plaintiff, the defendant and Aspect which agreement also contained a non-exclusive jurisdiction clause in favour of the courts of England and Wales and clauses relating to the payment of commission to the plaintiff by the defendant "in respect of the shares, bonds or other units in the Investment Products at the rates, within the specified times and in the manner set out in a side-letter".

[18] In accordance with the agreements, Aspect paid the sum of US$ 664,353 between September 2009 and October 2010 to the defendant.

[19] In mid-2010 a dispute arose between Raminder Panesar and Ashley French regarding the fee sharing arrangements for the fees paid by Aspect. Subsequently, Aspect suspended payments to the defendant on the basis that the defendant had made payments of commission to third parties in breach of the agreements.

[20] The dispute concerns the distribution of the commissions paid by Aspect to the defendant and it must be settled by construing and interpreting the provisions of the Sub-Introducer Agreement.

[21] As I have stated, a substantial amount of evidence was adduced in this case and much of it is totally irrelevant. In a nutshell, once a clear construction of the provisions of the Sub-Introducer Agreement is made, the Court will have to decide whether these provisions were breached and what consequences follow including the payment of compensation and the quantum of such compensation.

Authority to Bring Suit

[22] At the outset, I have to consider whether the plaintiff through its director had authority to bring the present action. The defendant has submitted that there was no authorisation from the shareholders of either the plaintiff company or its holding company, Alternative Investments Strategies (AIS), was secured in order to bring the present suit. I am of the view that the Articles of Association of the plaintiff company clearly mandated the director or directors to engage in litigation on behalf of the company (see art 4 and Table A of the Articles of Association, Exhibit P44). The suit was therefore properly brought.

Jurisdiction and Choice of Law

[23] Before I venture into the construction of the Sub-Introducer Agreement I must consider the effect of one of its clauses, namely cl 14. This clause is also contained in the Introducer Agreement. It provides:

> Governing Law and Jurisdiction
>
> 14.1 This Agreement shall be governed by and construed in accordance with the laws of England and Wales.
>
> 14.2 The parties to this Agreement irrevocably agree that the Courts of England shall have non-exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes which arise out of or in connection with this Agreement.

[24] Both the choice of law and jurisdictional clauses were ruled upon by the trial judge who concluded that the contractual choice of law provision was clear and that the contract had been entered into by the parties with their eyes wide open and should therefore be given effect. Similarly with the jurisdiction clause. In the circumstances, the Supreme Court of Seychelles is not therefore prevented from hearing litigation arising from the agreement.

[25] In terms of the applicable substantive law, that is, the law of England and Wales, any reference or reliance on the Indian law of contract is therefore inappropriate and authorities cited in this context will be disregarded.

[26] Further, although the substantive law to be applied in this case is that of England and Wales, the choice of law clause is silent on the procedural law and rules of evidence to be applied. Seychelles jurisprudence is rich with authorities regarding proper law. In *Intelvision Network Ltd v Multichoice Africa Ltd* (2015) SLR 299 following the authorities of *Rose v Mondon* (1964) SLR 134, *Morgan v Morgan* (1972) SLR 79, *Pillay v Pillay* (1973) SLR 307 and *Pillay v Pillay* (1978) SLR 217), the Court of Appeal stated that it is the procedural law of the forum which is seized by the plaintiff that is applicable. Hence, it is Seychellois procedural law that applies to this case.

Applicable Seychellois Procedural Law

[27] In this context, it must be noted that the procedural rules of our civilist tradition, namely the rules of evidence are subject to a hierarchy insofar as their weight in deciding a case is concerned. Article 1316 *et seq* of our Civil Code provides for rules of evidence in respect of "written evidence, oral evidence, presumptions, admissions…". Articles 1341 to 1348 and 1715 of the Code forbid oral testimony in certain circumstances. Further, civil evidence gives priority to documentary evidence over oral evidence (see the Civil Code). Distilled from these rules together with jurisprudence is the presumption that documentary evidence is superior to oral evidence. Implicit in those rules is the belief that documents are more reliable and truthful than the memory of witnesses.

[28] The Court therefore in the present matter places greater reliance on the written evidence than on the oral testimony of parties.

[29] Moreover, it must also be noted that there is a risk in any civil claim. This principle (*actori incumbit probatio*) is set out at art 1315. The article provides:

> A person who demands the performance of an obligation shall be bound to prove it.
> Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation.

[30] Hence, whenever a party makes an allegation, he supports the risk of evidence; in other words, the risk to lose the case if he cannot prove that such allegation is grounded.

The Proof of Foreign Law and Expert Evidence

[31] With these cautions in mind I now turn to some evidential issues. It is already settled that the law to be applied to the agreements is that of England and Wales. Given that this is the case, it was incumbent on the plaintiff to prove the foreign law in this case. (See *Intelvision Network Ltd & Ors v Multichoice Africa Ltd*, *Pillay v Pillay* (1973) and *Beitsma v Dingjan (No 1)* (1974) SLR 292.)

[32] In this respect, the plaintiff called Mr Nick Brocklesby to testify and produce a legal opinion jointly prepared by the legal firm of King & Wood Malleson LLP (since taken over by Reed Smith LLP) and Tom Smith, a barrister of South Square Chambers, London. This was tendered as expert opinion on the law of England and Wales as the plaintiff was relying on that law to interpret the agreements. Although this evidence was admitted it is not the end of the matter.

[33] At this juncture it is necessary to consider who can be regarded as an expert. *Stroud's Judicial Dictionary* defines an expert as:

> One who has made the subject upon which he speaks a matter of practical study, practice, or observation; and he must have a particular and special knowledge of the subject (2nd Ed, 670, citing *Dole v Johnson* 50 N Hamp 454).

[34] *Black's Law Dictionary* defines an expert as:

> A person, who through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder (9th Ed, 661).

[35] It can be inferred from these definitions that expert evidence is opinion evidence.

[36] Section 17 of the Evidence Act provides in relevant part:

> (1) In any trial a statement, whether of fact or opinion or both, contained in an expert report made by a person, whether called as a witness or not, shall, subject to this section, be admissible as evidence of the matter stated in the report of which direct oral evidence by the person at the trial would be admissible.
>
> ….
>
> (3) Nothing in this section affects the admissibility of an expert report under any other written law or otherwise than for the purpose of proving the matter stated in the expert report.
>
> (4) In this section "expert report" means a written report by a person dealing wholly or mainly with matters on which the person is or would, if living, be qualified to give expert evidence.

[37] It was in reliance on the provisions above that the trial judge admitted the expert evidence report from the Bar without the need for the expert to be called. He however reserved for himself the assessment of the truth of the contents of the report and the weight to be given to it.

[38] This expert opinion is challenged by the defendant. It submitted its own views on the legal principles applicable to this case. It also stated that the legal opinion was "frivolous and vexatious and an attempt to mislead the Court on facts". Notwithstanding the fact that the report has already been admitted it has submitted that "the opinions of witnesses are not generally admissible, except in cases where the Court lacks the witnesses competent (sic) to form an opinion on particular issues that may arise". It submitted that this was not the case in this instance.

[39] In citing Part 35 of the Civil Procedure Rules of England and Wales, the defendant pointed out that expert evidence was limited to what was reasonably required to resolve proceedings and that experts should be independent. In its submission, the expert was a motivated and interested witness.

[40] In his testimony, Mr Panesar stated that Nick Brocklesby who was a partner of SJ Berwin LLP in 2013 had previously acted for the plaintiff and had sent a letter and several emails to him (Exhibit D 42). Subsequently he had met Mr Brocklesby in an attempt to resolve the issues between himself and the plaintiff. There was a clear

lawyer-client relationship between the plaintiff and Mr Brocklesby and the letter indicates that the firm Berwin LLP was retained on the basis of a conditional fee arrangement. It was Mr Panesar's submission that on this basis Nick Brocklesby's expert evidence is tainted with bias and cannot be accepted by the Court.

[41] The letter from Mr Brocklesby (Exhibit D 42) is a letter before claim and informs Mr Panesar of his breach of fiduciary and /or other duties owed to the plaintiff. There is very little doubt that Mr Brocklesby is acting for the plaintiff in respect of matters in London related to the present case.

[42] There is very little relevant authority on the issue of when expert evidence should be excluded on the grounds of bias in Seychelles. I have therefore looked at English authorities. In *Whitehouse v Jordan* [1981] 1 WLR 246 Lord Wilberforce stated that:

> Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.

[43] In *Liverpool Roman Catholic Archdiocesan Trust v David Goldberg QC* [2001] Lloyd's Rep 823, the defendant's expert witness was a friend for 28 years, working from the same chambers. The Court disallowed his evidence, since the risk of his evidence being coloured by this relationship was incompatible with the need for justice to be seen to be done. The bias in this case was apparent.

[44] However, the Court of Appeal deprecated this "apparent bias" approach in *Factortame (No 8)* [2002] 3 WLR 1104 in which it stated that:

> Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a pre-condition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the Court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules (Paragraph 70).

[45] In *Toth v Jarman* [2006] All ER (D) 271, the Court stated that the presence of a conflict of interest would not automatically disqualify an expert. In that case the expert had an undisclosed conflict of interest in that he was a member of the Cases Committee of the Medical Defence Union who acted for the GP against whom the claim had been made. The Court specified that the key question to be answered was whether the expert's opinion was independent of the parties and the pressures of the litigation. The Court found that in the particular circumstances there was a potential conflict of interest and the information should have been disclosed. However, since

the Cases Committee had the practice of excluding any member who was an expert on a case from deliberations on that same case and the expert was not serving on the Committee at the time of the case, the conflict of interest, even if it had been of itself a disqualifying interest, had become immaterial.

[46] In *Armchair Passenger Transport Ltd v Helical Bar Plc* [2003] EWHC 367 Justice Nelson stated:

> It is not the existence of an interest or connection with the litigation or a party thereto, but the nature and extent of that interest or connection which determines whether an expert witness should be precluded from giving evidence.

[47] Mr Panesar has also stated and supported his statement by the letter dated 30 April 2013 (Exhibit D 42) that Mr Brocklesby had been retained by the plaintiff on a conditional fee arrangement to pursue litigation against him. He is therefore, if I understand him correctly, accusing Mr Brocklesby of champerty. Although this medieval concept has never been converted in our jurisdiction into either a criminal offence or a delict (although arguable it could under art 1382 of the Civil Code of Seychelles), I still have to consider this accusation in the context of whether it would add to further bias on the part of Mr Brocklesby so as to disqualify his evidence.

[48] I note first of all, in the context of the authorities above, namely *Factortame,* that Mr Brocklesby has from the outset disclosed his interest in the case. In a letter to the Supreme Court dated 16 October 2014, that is two weeks before the expert opinion was admitted by the Court, he states *inter alia*:

> I confirm that I was previously a Partner of King & Wood Mallesons LLP and, pursuant to paragraph 1.3 of the Legal Opinion, I had overall responsibility for the preparation of the Legal Opinion….
>
> I further confirm that:
>
> a. King & Wood Mallesons LLP is no longer instructed in this matter. Since I moved to Reed Smith LLP in May 2014, Reed Smith LLP is instructed by Hedge Funds Management Limited ("HFIM") in this action, and other related matters.
> b. As a Partner at King & Wood Mallesons LLP, I instructed Tom Smith to assist in the preparation of the Legal Opinion. Tom Smith is now a Queen's Counsel at the Bar of England and Wales….

[49] The legal opinion is signed by both Mr Brocklesby and Mr Smith. In its Introduction, the following statement is also made:

> This is a joint legal opinion of the London office of King & Wood Mallesons LLP, a multinational law firm, and Tom Smith of South Square Chambers…

[50] Further, the plaintiff has also submitted that no contingency fee arrangement is in place in respect of the case in Seychelles.

[51] I have sought to weigh all the relevant factors outlined by the parties in the light of the authorities above. It is clear from UK case law that a person is not precluded from acting as an expert witness simply due to the fact that he has a pre-existing relationship with one of the parties to the action. However where such a relationship exists, it will clearly have an effect on the weight to be accorded to such an expert's testimony.

[52] While it might be inferred that given the client-lawyer relationship between the plaintiff and Mr Brocklesby, the impartiality of the latter might be clouded, Mr Brocklesby did disclose this fact in the report. Further, the opinion is a joint one produced with Tom Smith QC who has not been impugned in any way. I am not in the circumstances persuaded that Mr Brocklesby's relationship with the plaintiff colours the opinion with bias.

[53] Moreover, the opinion is a guide to the court solely on the principles of the law of England and Wales applicable to the agreements. This Court will in any case be the judge of fact in this suit.

[54] There has been in any case no attempt to challenge the correctness and accuracy of the legal principles expounded in the opinion. It was open to the defendant to adduce expert evidence to contradict that of the plaintiff. It has chosen not to do so. I am therefore of the view that the opinion evidence admitted in respect of the law applicable in this case should be relied on by this Court in its assessment of the evidence and in determining whether there was a breach of the Sub-Introducer Agreement.

[55] The plaintiff's legal experts in the executive summary of their report state that the report of Ian Morley is central to their analysis. Mr Morley is a senior consultant at Wentworth Hall Consultancy Ltd, a firm of research consultants. He states that he was founding Chairman of Alternative Investment Management Association (AIMA). He has advised central banks, international regulators, the EU, OECD and many others on matters relating to hedge funds and regulation.

[56] Mr Morley testified before this Court and produced his report in the course of his examination-in-chief. He stated that he was involved in the hedge fund industry in many capacities and that his specialty is expertise in hedge funds investments. There was no objection by either counsel for the defendant, Mr Panesar or Mr French on this aspect of his expertise. Mr Morley disclosed that he had no known actual or potential conflict of interest with either of the parties of the suit.

[57] He was however vigorously cross-examined as to his relationship with Mr Tushar Patel but maintained that he had only known him as a member of AIMA and as a colleague in the industry. In his evidence Mr Panesar stated that Mr Morley's report lacked the quality expected of an expert, was full of holes, and was inaccurate, incorrect and misleading. In this respect he held himself out as an expert and testified as to the normal practices of the industry. His contempt and disrespect for Mr Morley is apparent when he states that the witness does not even use good English and uses a "marvellous sentence" on p 9 of his report (See p 25 of the transcript of proceedings of 15 October 2015 of 9 am). However this does not discredit the opinion evidence of Mr Morley.

[58] In *The Queen v Bonython* (1984) 38 SASR 45, King CJ in the context of admitting the opinion of a witness into evidence stated that:

> …the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts:
>
> (a) whether the subject matter of the opinion is such that a person without instructions or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing specialised knowledge or experience in the area; and
>
> (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.

[59] No evidence has been adduced by the defendant in terms of another expert witness to challenge the evidence of Mr Morley. I am satisfied from the evidence adduced by the plaintiff that Mr Morley fits the criteria set out in *Bonython* (supra). However, the defendant's objection to the reliance of the Court on the expert evidence of Mr Morley is contained in further written submissions. It objects to his evidence on market practice, on his definition of regulated activity, on his opinion whether the defendant could have carried out the introduction activity or whether Aspect would have shared its funding information, due diligence documents without the involvement of the plaintiff, on the side letter which was never executed, and on the remuneration of the plaintiff and the defendant and other interested parties as guesswork.

[60] It is correct that Mr Morley opines on several matters allied to but not directly about the hedge fund industry. But that is the whole purpose of opinion evidence. This fact seems to be lost on the defendant. In *Proton Energy Group SA v Orlen Lietuva* [2013] All ER (D) 206, the Court found that although experts cannot deal with issues of law, which remain the province of the judge, contractual construction is carried out by placing emphasis on all the background facts. It will interpret what the parties have said and done against that backdrop. This means that the expert, where appropriate, has to opine on the relevant background and the context of the issues. This can be particularly useful to the Court when the relevant background is not straightforward, and where as in the present case there are difficult commercial and technical issues that form part of the context, for example, as to what the market practice would be as regards introducer agreements or rates of commission payable in the absence of a side letter to that effect being executed. The expert in this area assists the judge to understand the technical issues at hand.

[61] It was again open to the defendant to impugn Mr Morley's evidence by calling its own expert. This, it also failed to do. It relied instead on the expertise of Mr Panesar. As the representative of the defendant his evidence on these issues can only be viewed as self-serving and not independent. I will therefore be guided by Mr Morley's expert evidence on matters involving the hedge fund industry and its practices.

Issues to be Decided

[62] I have earlier referred to the fact that an enormous amount of evidence was adduced in this case. Most of it was completely unnecessary and a complete and utter waste of time and money. And yet so much ink need not have been spilt. I am able to distil the issues of the case from the evidence and the reports of the two experts down into the following four matters:

1. Was the Sub-Introducer Agreement validly executed?
2. Was the Sub-Introducer Agreement breached?
3. If so, is compensation payable?
4. If so, what is the quantum of such compensation?

1. Was the Sub-Introducer Agreement Validly Executed?

[63] It is the plaintiff's case that the Sub-Introducer Agreement is binding despite the absence of the side-letter between the parties relating to commissions to be paid. It relied on the expert opinion on this issue to which I shall return.

[64] I have earlier referred to the difficulty in Mr Panesar and Mr French first appearing as intervenors and then both acting for the defendant company. As I have stated the statements of demand from the Intervenors were not withdrawn nor the statement of defence substituted for them. I have therefore had to take all pleadings into account in my deliberations. There is therefore a plethora of pleadings which are at odds with each other. This undermines a clear defence.

[65] In the statement of defence, the case for the defendant is that the Sub-Introducer Agreement is an incomplete contract and therefore unenforceable.

[66] In contrast, in Mr French's statement of demand it is stated that "[t]he Defendant, Plaintiff and the Fund Management Company entered into a Sub-Introducer Agreement (see para 18).

[67] Mr Panesar's statement of demand on that point is anything but clear. Paragraph 3 states in relevant part:

> That the said Sub-Introducer Agreement was (apparently and allegedly) executed between the Plaintiff company and Defendant company…And till the time no specific activities were undertaken under or in pursuance of the said agreement , the said Sub-Introducer Agreement would remain static and inert… As a matter of fact notwithstanding anything and without prejudice to rights and intentions of the answering Defendant, the said Sub-Introducer Agreement has never been given effect to …

[68] I am frankly perplexed as to what is being said in the statement above. First, it is not proper to plead without prejudice rights in pleadings to be considered by the court. Without prejudice refers to the privilege attaching to written or verbal statements made by a party to a dispute in a genuine attempt to settle that dispute outside court. They are generally not admissible in court. The use of without prejudice in court pleadings is therefore not only confusing but entirely meaningless. Secondly, para 3 is also equivocal in that it pleads execution of the contract and non-execution of the contract. This is problematic in terms of civil procedural rules as I have already stated but also in terms of what may have amounted to a judicial admission under the provisions of art 1356 of the Civil Code of Seychelles that there was indeed a contract.

[69] As I have stated, much documentary evidence was adduced by both the plaintiff and defendant but little of it goes to the heart of the matter of whether the Sub Introducer Agreement was validly formed and enforceable. The oral evidence adduced does not help very much either.

[70] Mr French in a question put by the Court stated that the Introducer Agreement was put in place so that the defendant would receive money and the Sub-Introducer Agreement was so that Aspect would not object to the money going to the plaintiff (p 26 of Transcript of Proceedings dated 8 June 2015 at 1.45pm).

[71] Mr Panesar in his testimony stated that much more work needed to be done "to complete the Sub-Introducer Agreement." He refers to several letters, namely the letter of 22 December 2010 from Aspect Capital to the plaintiff (Exhibit 23) and his email dated 5 January 2011 to Mr French (Exhibit 24) to support this submission (Transcript of Proceedings dated 15 October 2015 at 9 am).

[72] As the oral evidence and documentary evidence produced by the defendant obfuscates the issue, the only option left for the court is to examine the Sub-Introducer Agreement itself. As regards the first issue, I find the oft-quoted dictum of Lord Tomlin in *Hillas & Co v Arcos Ltd* [1932] All ER 494 very appropriate. In a claim for a breach of contract for the supply of timber, the respondent contended that the agreement was incomplete because it left some essential terms still to be agreed. The House of Lords held that the uncertainties did not prevent there being a concluded contract. Lord Tomlin stated:

> The problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may, as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.

[73] In the opinion of the expert, Mr Brocklesby and Mr Smith QC, the defendant cannot cast doubt on the formation and validity of the Sub-Introducer Agreement. I reproduce their opinion on the matter in relevant part (noting that Raminder Panesar is referred to as RP, Ashley French as AF, the plaintiff as HFIM and the defendant as HIL) :

> 4.3 The Sub-Introducer Agreement contains the key elements of an enforceable contract under English law; offer, acceptance, consideration and intention to create legal relations:

It contains the entire understanding of the parties and any other documents relevant to the bargain are incorporated by reference, namely the side letter.
The Sub-Introducer Agreement provides that "in consideration" of HFIM acting as Sub-Introducer for the "Investment Products" to the Investor on an "exclusive basis for a period of 24 months from the date of the Initial Investment" HIL agrees to pay HFIM commission. The mutual promises in the Sub-Introducer Agreement constitute good consideration under English law.
The Sub-Introducer Agreement was plainly intended to give rise to binding legal relations.

4.4… the terms of the Sub-Introducer Agreement largely mirror those of the Introducer Agreement, save for that the "commission in respect of the shares, bonds or other units in the Investment Products at the rates, within the specified times and in the manner set out in a side letter between [HIL] and [HFIM]. We understand that HFIM and HIL did not enter into any such side letter and that HIL is seeking to rely upon this fact to demonstrate that the Sub-Introducer Agreement was not validly entered into and/or that HFIM cannot claim damages since there are no terms upon which those damages can be calculated.

4.5 We do not consider that the absence of the side letter has any effect on the validity of the Sub-Introducer Agreement. The position under English law is that "even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding settlement."

4.6 The words and conduct of HIL objectively demonstrate that HFIM, HIL and Aspect did not intend the entry into the side letter to be a pre-condition to a legally binding Sub-Introducer Agreement. Indeed, the Sub-Introducer Agreement was integral to the overall arrangement. Aspect confirmed that it was not willing to agree that all commissions should be paid through HIL instead of directly to HFIM, unless it was party to the ultimate Sub-Introducer Agreement between HIL and HFIM.

4.7 All parties were aware that the Sub-Introducer Agreement had to be entered into and, therefore, HFIM and HIL must have intended to be bound by it at the outset, regardless of whether the side letter was in place. The onus was upon RP to draw up the side letter at a later date. His failure to do so does not invalidate the Sub-Introducer Agreement.

4.8 In circumstances where the parties intend to be bound straight away, even though there are further terms still be agreed or some further formality to be fulfilled, and the parties fail to reach agreement on such further terms, then the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

> 4.9 In this regard, as a matter of English law, an agreement will not be incomplete merely because it requires some further agreement to be reached between the parties. Accordingly, once the parties have reached agreement, it is not fatal that some points (even important ones) remain to be settled by further agreement. As the leading textbook states, "commercial agreements are often intended to be binding in principle even though the parties are not at the time able or willing to settle all the details" (Chitty on Contracts 31st ed., 2-130, 2-114-115).
>
> 4.10 In such circumstances, absent agreement of the outstanding points, the court will complete the missing parts of the agreement by applying the standard of reasonableness. Accordingly, in the present case, the failure to agree the terms of the side letter does not render the Sub-Introducer Agreement, as a whole unworkable or void for uncertainty as the Court will supply the missing details by applying a standard of reasonableness.
>
> 4.11 Finally, we have considered whether there could be any argument that the Sub-Introducer Agreement was unenforceable for reasons of lack of authority. Taking each entity in turn:
> RP, as the signatory for HFIM, had the requisite authority under English common law and statute to enter into the Sub-Introducer Agreement. Section 43(1)(b) of the Companies Act 2006 provides that a contract may be made on behalf of a company by any person acting under its authority, whether express or implied. RP entered into the Sub-Introducer Agreement in his capacity as a director of HFIM. HFIM has not stated that it was entered into without authority, or that it wishes to set the contract aside.
> We understand from Seychelles Counsel that RP and AF, as the signatories for HIL under a Power of Attorney, had the requisite authority under Seychelles law to enter into the Sub-Introducer Agreement. Seychelles IBC Act 1994 contains similar statutory provision allowing contracts to be made on behalf of a Seychelles company by a "person acting under the express or implied authority of the company". We understand that HIL has not sought to set aside the Sub-Introducer Agreement for lack of authority, not it would appear that it would have any basis on which to do so.
>
> 4.12 As such, there is no basis on which to suggest that the Sub-Introducer Agreement is unenforceable for lack of authority for either HIL or HFIM.

[74] I endorse these findings and find therefore that the Sub-Introducer Agreement was a validly executed contract which is enforceable.

2. Was the Sub-Introducer Agreement Breached?

[75] Mr Panesar was at pains to point out that the Introducer Agreement permitted the defendant to introduce Aspect's products to CIC whereas the Sub-Introducer Agreement permitted the plaintiff to introduce Aspect's products to CIC. The evidence of Mr Panesar, Ms Deng and Mr French are to the effect that the plaintiff, in the event did not do any introduction work under the agreement to merit payment of commission by Aspect. They support these submissions by Aspect's letter of 26 November 2010 (Exhibit P4) and the plaintiff's letter of 15 December 2010 (Exhibit P45).

[76] Mr French and Ms Deng testified to the work they did together with Ms Deng's brother, Daqing Deng, in terms of introducing Aspects' investment products to CIC.

[77] Further, Mr Panesar has in his evidence endeavoured to show that it was his individual involvement and not that of the plaintiff that won the introduction work with Aspect. He has also attempted to show that introduction work is not a regulated activity which should only have been performed by a regulated firm such as the plaintiff and for which therefore no authorisation was necessary from the Financial Services Authority (FSA now FCA) of the UK under the Financial Services and Markets Act 2000 (FMSA).

[78] He has also stated that in any case there was an agreement concluded in 2008 between himself and Dr Nick Dhandsa, the director of AIS (the holding company of the plaintiff) that business opportunities advanced and pursued by him personally even in the name of the plaintiff would be solely for his own profit. This has however been denied by Dr Dhandsa (see transcript of proceedings of 16 October 2015).

[79] Mr Brocklesby and Mr Smith have commented that:

> 5.12 In any event, neither of these alleged agreements affect the terms of the Sub-Introducer Agreement since they are expressly excluded by the entire agreement clause, which states that the Sub-Introducer Agreement constitutes the "whole and only agreement between the parties relating to the provision of services by the Sub-Introducer and, save to the extent repeated in [the Sub-Introducer Agreement], supersedes and extinguishes any prior drafts, agreements, undertakings, representations, warranties and arrangements of any nature whatsoever, whether or not in writing, relating thereto.
>
> 5.13 In addition, any agreement allegedly reached after the execution of the Sub-Introducer Agreement cannot and will not vary the terms of the Sub-Introducer Agreement, since all variations must be in writing and signed by each of the parties.

[80] In regard to whether the introduction work was excepted work under the FMSA, Mr Panesar has relied on the fact that the introduction work was performed outside the UK by the Dengs and by persons outside the UK (again the Dengs) which would make them exempted persons in terms of the provisions of the FSMA and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). In his view the activities as performed by the Dengs transform them from regulated activities into unregulated ones.

[81] None of the defendant's witnesses have however been able to explain the relationship between the Introducer Agreement and the Sub-Introducer Agreement in respect of the commission to be paid for the introduction work with CIC relating to Aspect's products and why it was necessary to have them in place with the plaintiff as a party if it was to play no part whatsoever in the work.

[82] Nor have they been able to convincingly explain to the Court the following: why a non-disclosure agreement was signed in which it is clearly stated that the parties were contemplating entering into an arrangement whereby the plaintiff would introduce new business to Aspect; why Ms Deng was a card carrier of the plaintiff and had the company's email address assigned to her without being an employee; why in correspondence the e-mail address or letter head of the plaintiff was used; why the plaintiff's Evolution Fund Prospectus was forwarded to Ms Deng to pass on to CIC; why meetings were arranged in the plaintiff's office; why in his capacity as Managing Director of the plaintiff, Mr Panesar tried to source other investment options including that with Aspect for CIC, why the due diligence work on Aspect was carried out demonstrably by the plaintiff.

[83] The subterfuge (of using the plaintiff's name, regulated status and goodwill for the introduction work and of wooing CIC) by Mr Panesar is for example revealed in the e-mail of 6 February 2009 (Exhibit 21) to John Wareham of Aspect and Jun Deng:

> Finally, just to reiterate what we agreed in the conference call, neither Aspect nor HFIM will be the first to raise the question of our relationship, but if specifically asked by any of our guests about our relationship, we will only say that: "the two companies have known each other for a long time and on matters of important client relationships we are used to cooperating together."

[84] Finally, I am unable to see any evidence from the defendant to indicate that Aspect would have agreed to any of the three individuals, namely Mr Panesar, Mr French and Ms Deng or Mr Deng's company (Global Time Investment Limited) or any unregulated company, that is, the defendant, carrying out the introduction work. The letter of distress and email sent by Aspect when it discovered that commissions paid under the agreements had been diverted to third parties confirm that it would not have entered into such a relationship (see Exhibit P 23).

[85] The defendant has also submitted that since no side-letter was ever executed, there was no commission arising and therefore no breach of the agreement. Both experts disagree with him on the issue of the introduction activities and the side-letter.

[86] Ian Morley explains in his report and evidence that:

> The field of financial services in the UK are strictly and high regulated and come under various UK and EU laws and Directives. It appears (and the relevant emails indicate the same) that HFIM, as an FSA regulated entity, was negotiating the arrangement, through RP. This is because all such activities would be strictly required to take place as "Regulated Activities" under the Financial Services and Markets Act (FSMA), 2000 and FSMA (Regulated Activities) Order, 2001.
> The general prohibition regarding Regulated Activities under Section 19 of FSMA, 2000 states "No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is (A) an authorized person; or (B) an exempt person.

[87] He emphasises that the plaintiff was a regulated entity but the defendant was not. As to whether introduction activities were regulated, he is categorical on that point. He states:

> It should also be noted that under Article 29 of FSMA (Regulated Activities) Order, 2001 which deals with exclusions for Regulated Activity, an exception to such exclusions is given in Article 29 (b). It clearly states (such) exclusions do not apply if A receives from any person other than the client (CIC) any pecuniary reward or advantage for which he does not account to the client (CIC), arising out of his making the arrangements."
> Therefore, if a person receives pecuniary reward (commissions), such person could not carry out a Regulated Activity without being an authorised or exempt person.

[88] He goes on to state that in any event, from the documentation produced there is nothing to show that the introduction activities carried out by the defendant or other third parties was performed in any capacity other than under the guise of employees of the plaintiff.

[89] He then goes on to state:

> In my experience it would be most unusual and irregular for a regulated Hedge fund firm to agree to enter into formal due diligence, provide documentation and agree to make commission payments unless the other parties were regulated. And where they were not regulated, that any other parties receiving payments were transparently identified to allow normal Anti Money Laundering ("AML") investigations to take place so that the regulated entities, Aspect and HFIM, were comfortable that any and all other parties were fit and proper to receive such payments…
> From the documents I have seen and the sequence of events that have occurred that RP at all times until he entered into a signed agreement with Aspect (the Introducer Agreement and Sub-Introducer Agreement), held himself out to be a regulated Director of HFIM. It also seems clear that the good offices, name, personnel, experience and regulated nature of the services undertaken when sourcing potential fund for client investment were all undertaken under the HFIM umbrella and status as a regulated entity. There is also email evidence to clearly indicate that HFIM because of its knowledge and position within the Hedge Fund industry and as a regulated firm had brought to the attention of the client the names of other potential Hedge Fund Investment firms and funds.
> It does not appear from the information that I have seen that either RP or AF or HIL (which did not formally exist at the time!) nor their associated parties have the necessary financial competence, regulatory standing or experience to undertake investment due diligence alone and without the use and name of a FSA regulated firm like HFIM. As stated previously, I would be most surprised and even shocked to find a regulated and high profile investment firm agreeing to provide confidential information to an unregulated and unknown party or parties.

[90] I am not persuaded by the evidence of Mr Panesar, Mr French or Ms Deng on this issue. I adopt the findings and opinion of the experts on this matter and conclude that the Sub-Introducer Agreement was breached.

3 and 4. Is compensation payable for the breach of the Sub-Introducer Agreement and if so what is the quantum of compensation to be awarded?

[91] The plaintiff has prayed for US $498,264, being 75% of the fees and commissions together with other fees due from the introduction but suspended by Aspect and interest at the commercial rate from the dates the fees became payable. It has also claimed its costs including the costs incurred from travelling to Seychelles from the UK to prosecute the suit.

[92] In his statement of demand Mr Panesar has prayed for US $5,000 for himself and US $5,000 for Mr French in moral (sic). In his statement of demand Mr French has prayed for the sum of US $10,000 in moral (sic).

[93] In its statement of defence and counter-claim the defendant has prayed for the sum of US $10,000 in moral damages, for the costs of the suit or alternatively costs and interest at the commercial rate of 10% per annum.

[94] While it is accepted that moral damages may be claimed by a company (see Cass com 15 mai 2012: Pourvoi 11-10278), I am not of the view that even if the interveners had been successful in their demands, either of them would have been successful in their claims as they have led no evidence of the moral damage they are claiming.

[95] I have found that the Sub-Introducer Agreement was breached by the defendant. The plaintiff has submitted that its compensation relates to the sums it should have received for the introduction business according to normal commercial industry terms. It has claimed that it has lost other income which would have been payable on a continuing basis had the terms of the agreements with Aspect been respected by the defendant.

[96] The expert opinion of Mr Brocklesby and Mr Smith is to the following effect:

> 5.6 The general rule for breach of contract, under English law, is for the Court to place the claimant in the same positon as if the contract had been performed (Robinson v Harman (1848) 1 EX 850).
>
> 5.7 The terms of the side letter were not in fact ever drafted or finalised. However as explained above, the Court will complete such missing terms by applying the standard of reasonableness.
>
> 5.8 Applying the standard of reasonableness, if the side letter had been drafted by RP and entered into by both HFIM and HL, and based upon HFIM's standard distribution and introducer agreements, HFIM's general practice and/or industry practice, HFIM would be entitled to "75% of all Management fees and 100% performance fees due from Aspect, plus any loss and damages". HFIM would typically charge a "fee of 20% of all management and performance fees… in line with industry practice within a

> regulated firm... [and HFIM] would typically compensate firms like [HIL] with 25% of the management fees received from the hedge fund manager for potential Client/Investor introduction, if it is successful, and it is normal practice to be set out in the introduction agreement".
> …
> 5.16 There are no rigid rules for the quantification of damages in contract; it is essentially a question of fact. As explained at paragraph 4.9 above, we consider that the Court will supply the missing terms which should have been contained in the side letter by applying a standard of reasonableness and will not permit the individual who failed to draft the side letter from relying on that failure to his own advantage. ..
>
> 5.17 We have read the Report of Ian Morley dated 14th February 2014. It is his conclusion that a manager such as Aspect would ordinarily agree to pay HFIM in the region of 20% of both the Management Fees and Performance Fees. He states that it would be normal practice for HFIM to retain 75% of the Management Fees and 100% of the Performance Fees paid to it and to pay onto the other parties demonstrably involved in the introduction, such as HIL, "up to 25% of the Management Fees". This supports HFIM's position, as set out in the Plaint.
>
> 5.18 Ultimately, it is for the Seychelles Court to decide the level of damages, taking into account all relevant factors, however, we consider that an English Court would view the position taken by Mr. Morley and HFIM to be fair and reasonable.

[97] I have no reason to disregard this evidence, which I find compelling, in the absence of its impugnment by the defendant.

[98] I am guided by this evidence. I note that the commission payable would have been outlined in the side-letter which was never executed. Nothing indicates that the side-letter would not have been drafted along the proposals discussed with Aspect. I am guided in this respect by the contents of the e-mail of John Wareham of Aspect on 23 December 2008 to Raminder Panesar (page 2 of Exhibit P9) in which he states:

> I have prepared the following indicative scenarios which may be helpful in demonstrating the range of potential payments:
>
> $100mio investment into the Aspect Diversified Fund, which pays 2% Management Fee and 20% Performance Fee
> Total commission payable to HFIM at 20% of all fees = $4.2 mil.
> Total commission payable to HFIM at 40% of Management Fee = $3.6mio

[99] I also am guided by the evidence of Mr Morley on this issue. He testified that it would be in the range of normal practice for the plaintiff to retain 75% of the management fees and 100% of the performance fees and pay on approximately 25% of the management fee received to other parties demonstrably involved in the introduction.

[100] I endorse Mr Morley's opinion and make a finding accordingly in terms of the management and performance fees received from Aspect. It is not denied that Aspect paid $664.353 to the defendant altogether. As regards, payments to Mr French or to Mr Panesar personally, Mr Morley stated:

> The question arises as to whether any of the other related parties, in particular Jung Deng and her husband Ashley French were involved in the deal, as intermediaries and if so how much, if anything, should they be compensated as Introducers of the client CIC?
> From my experience the normal payments to such third party introducers who have acted as conduits but not regulated investment management houses capable of finding suitable investment candidates and carrying out the required level of due diligence would be up to 25% of the Fees only (exceptions can be above or below), receivable by, in this case HFIM the main and transparent company involved in this transaction.
> …
> In my Expert Opinion based on the evidence that I have seen and the experience I have of such transactions the normal rules of transparent honesty were not applied by HIL and therefore from a commercial stand point I would not agree if I were the Plaintiff for them to share in any of the proceeds and commission trail generated. This is because it's normal practice that the main introducer, arranger or distributor to agree with the third parties the terms of payments to be made to them for the work done but in the instant case, the fee arrangements were diverted from HFIM.
> Therefore that in my considered and expert opinion I conclude that since Aspect has only been dealing with HFIM, as a regulated entity during the process of introduction, arrangement or distribution, the whole of the commission in question and any outstanding commissions payable in respect of this transaction should be paid to HFIM. This should include all amounts accrued and paid to date, all amounts accrued but suspended to date, all amounts accruing to date and all amounts to accrue in future.

[101] Mr Brocklesby and Mr Smith agree with Mr Morley. They state that "…an English court would view the position taken by Mr. Morley and HFIM to be fair". At the beginning of my decision I referred to arts 1315 and 1316 of the Civil Code. After reviewing the evidence, I am of the view that the plaintiff has proved its case through the clear and overwhelming contents of its documentary evidence. The actions of Mr Panesar, who at the time of the introduction services was a director of the plaintiff are reprehensible to say the least and should not be rewarded. For the same reasons I do not find that any of the fees paid or due from Aspect should be paid to the defendants or any other third party. However in its prayer the plaintiff has only claimed 75% of the fees so far paid which he has quantified at $498,264.00. The Court cannot make the case for the plaintiff in this respect and can only grant the maximum of what it claimed.

[102] In the circumstances I make the following orders:

> I order the defendant to pay the plaintiff the whole sum received as commission from Aspect, that is, the sum of US$498,264.00.

I also order that any further fees due from the introduction and payable by Aspect but suspended should be paid to the plaintiff.

The whole with interest at the commercial rate from the date of payment .

Costs are awarded to the plaintiff including travel to Seychelles.

HALL v PARCOU

M Twomey CJ
7 February 2017 CS 353/2009; [2017] SCSC 92

Succession – disguised donation – back-letter

The plaintiff, the defendant and the intervenor are heirs of a deceased land owner. Before his death the deceased transferred his three land parcels to the defendant. The plaintiff, supported by the intervenor, argued that the transfer was a disguised donation on the basis of the low or nominal transfer prices. The defendant contended that the plaintiff and the intervenor had acquiesced in the transfers and the transfer prices were bona fide and reasonable.

JUDGMENT For the plaintiff.

HELD
1 If a defendant can prove that the plaintiff has acquiesced in the transfer of the estate from the deceased to the defendant, an action for *rapport à la masse* is futile.
2 Looking after an elderly parent whilst residing with the parent in the family home cannot be viewed as a duty requiring compensation.

Legislation
Civil Code, arts 913, 914, 918, 1321

Cases
Clothilde v Clothilde (1976) SLR 245
Contoret v Contoret (1971*) SLR 257*
Guy v Sedgwick (2014) SLR 147
Reddy v Ramkalawan (2016) SLR 13

Foreign cases
Gya v Gya (1970) MR 91

Counsel T Micock and C Lablache for plaintiff
M Vidot and C Lablache for intervenor
C Lucas for defendant

M TWOMEY CJ

[1] No excuse can be offered for the failings of the judiciary which resulted in this matter taking eight years to complete. I therefore begin this judgment by tendering an unreserved apology to the parties for the delay in the completion of this case.

[2] On 29 December 2009, the plaintiff filed a plaint in the Supreme Court stating that together with Marina Allen (née Parcou) and Hedrick Philip Parcou, they were the heirs of Julien Jean Baptiste Parcou (the Deceased) who died intestate on 22 April 2009.

[3] Prior to his death the Deceased owned land, namely titles V6652, V6650 and V6647 at Pascal Village, Beau Vallon. He transferred to the defendant Title V 6650 on 17 November 2004 for SR60, 000, V6652 on 24 January 2008 for SR1, and V6647 on 4 June 2008 for SR1 but reserved for himself the usufructuary interests in the latter two parcels.

[4] It is the plaintiff's case that the transfer of these properties resulted in the Deceased transferring property over and above the disposable portion he was lawfully entitled to and that he thereby unlawfully disinherited her from her rightful share of the estate.

[5] She prayed the Court to declare the transfers made by the Deceased as disguised donations to the defendant and to order the defendant to bring back the donations into the hotchpot of the succession of the Deceased or in the alternative to order a reduction of the donation together with costs or any other order deemed fit in the circumstances.

[6] The defendant filed a statement of defence in reply on 17 October 2011 in which he stated that the transfers did indeed take place but insofar as Parcel V6652 was concerned, sufficient price of R 100,000 was paid; for V6647 a sufficient price of R 50,000 was paid and the defendant also took over the debt of his brother worth South African Rands 80,000.

[7] He further stated that the transfers were made with the knowledge and acquiescence of the heirs who had agreed that the defendant would continue to provide care and maintenance of their elderly father and that the family home on Parcel V6652 would be open to all the heirs when they visited.

[8] He prayed for a dismissal of the suit claiming that the plaintiff had abandoned her share in the properties by agreeing to the transfers and was therefore estopped from claiming any share by way of reduction.

[9] On 3 May 2012 Marina Josephine Allen (née Parcou) intervened in the suit and filed a statement of demand in which she joined cause with the plaintiff, stating that she never agreed to the transfers and that the dispositions of property as effected were contrary to law.

[10] In her evidence, the plaintiff maintained that it was after the death of the *de cujus* that she came to know of the transfers of property from her father to the defendant. She refuted the defendant's claim that there was an agreement with the heirs that the house on Parcel V6652 would be an open house for members of the family living overseas when they visited Seychelles or that the defendant would keep the house as his own. Nor had she ever been invited to live in the house when she visited Seychelles.

[11] In his testimony, the defendant explained that the price for the property transfers was either nominal or low because of the fact that he looked after his father and tended to his needs. He explained that he owned a car hire business, Norman's Car Hire, and sums had been transferred from that company to the Deceased in respect of two of the transfers of land over and above what was stated on the registered documents.

[12] In respect of Parcel V6652, although the transfer price on the notarial deed was R 1, he actually transferred the sum of R 100,000 to his father's account. An objection to this evidence being adduced was rightly taken by Mr Vidot for the intervenor under art 1321(2) of the Civil Code but this was overruled by the trial Judge for reasons that are unclear.

[13] Ms Maria Monthy from Barclays Bank supported the defendant's account on this score. She produced a letter to the bank from the defendant (Exhibit D1 A) in which the defendant asked the bank to transfer R100,000 in favour of the Deceased for the purchase of Parcel V6652 on 8 August 2007. The letter from the Bank dated 23 September 2011 (Exhibit D 6) also confirms that R 100,000 was transferred from Norman's Car Hire to the Deceased's account on 13 November 2007.

[14] The defendant also stated that he had guaranteed a bank loan from Barclays Bank on behalf to his brother Hedrick Philip Parcou. The bank had enforced the repayment of the loan against him. In this respect, the Deceased recognised the fact that it was the defendant who had paid his brother's bank debt and the transfer of Parcel V6650 was effected to the defendant for R60,000.

[15] As regards Parcel V6647 he explained that the land was to be sold to his brother Hedrick Philip, and the Deceased had sought a waiver of the stamp duty owed on the transfer. In the event, none was ever granted and his brother died before the transfer was ever made. Consequently, the defendant took over his brother's debt (money owed to his father for the purchase and importation of ice cream powder) and his father transferred the land to him instead. He explained that the sum of R 1 was stated as the price in the transfer document but that he actually paid his father R 50,000 for it together with the repayment of his brother's debt. Ms Maria Monthy, an employee of Barclays Bank produced a letter in which the bank confirmed that on 21 April 2008 the sum of R 50,000 was drawn by Norman's Car Hire and deposited into the Deceased's account.

[16] In cross-examination, the defendant stated, contrary to his pleadings, that his sisters, the plaintiff and the intervenor had not agreed to the transfers. Nor had they agreed that in return for Parcel V6652 being transferred to him, they could stay in the family home whenever they visited Seychelles. He stated that his sisters always stayed in hotels when they visited (See page 60 of the court transcript dated 30 July 2015).

[17] The defendant has submitted that the plaintiff's and intervenor's cause of action cannot be maintained as the law relating to a *donation déguisée* does not extend to bona fide sales for value. He has maintained that not only did he look after his father with the agreement of his siblings to secure his pre-emption rights but that he paid good and valuable consideration including the payment of his brother's debts for the transfer of the properties.

[18] The plaintiff and the intervenor have submitted that the evidence against and beyond the notarial (authentic) documents cannot be admitted under art 1321 (3) of the Civil Code. It has been stated in several judgments, most recently in *Guy v Sedgwick* (2014) SLR 147 that evidence cannot be adduced against an authentic document.

[19] The legal presumption of challenging the veracity of proof contained in such a document lays a burden on the party who impugns the document to prove its falsity. Such proof is subject to the rules of evidence as contained in the provisions of the Code. These provisions include those relating to back-letters. Back-letters can only nullify an authentic document when they have been registered in accordance with art 1321(4).

[20] I cannot sit in judgment on the trial judge in regard to his admitting the evidence of the back-letters. However, although the rebutting evidence in relation to the deeds of transfer has been admitted, I am perfectly able to consider whether it can trump the authentic documents. As the evidence of the back-letters referred to by the defendant has not been reduced in writing and registered pursuant to art 1321(4), I find that the authentic documents in relation to Parcels V6652, V6650 and V6647 continue to have validity and full effect.

[21] In the circumstances I have to consider whether the transfers of the properties as they appear in the authentic documents amount to a *donation deguisée*.

[22] In *Reddy v Ramkalawan* (2016) SLR 13, the Supreme Court stated:

> An owner of property is not precluded by law from selling his land or giving it away. A disguised sale is also valid if the sale respects the conditions of form, the rules of contract and public policy (see Article 931, Civil Code of Seychelles). Similarly the de cujus can sell or make a gift to an heir - as long as that sale or the gift does not so diminish the estate that the reserved rights of the heirs are not satisfied.

[23] *Reddy* followed the *jurisprudence constante* of *Contoret v Contoret* (1971) SLR 257 and *Clothilde v Clothilde* (1976) SLR 245 which authorities relied on the Mauritian case of *Gya v Gya* (1970) MR 91. In *Clothilde,* Sauzier J stated that even a *réserve d'usufruit* was a donation and should not exceed the *quotité disponible.*

[24] There are instances where the alienation of the *réserve* is permitted. Article 918 of the Civil Code provides that:

> The value of full ownership of the property alienated, whether subject to a life annuity or absolutely or subject to a usufruct in favour of one of the persons entitled to take under the succession in the direct line, shall be set against the disposable portion; the excess, if any, shall be returned to the estate. This calculation and return shall not be demanded by other persons entitled to take under the succession in the direct line *who have agreed to the alienation*, and in no circumstances by those entitled in the collateral line. [Emphasis added]

[25] Had the defendant been able to prove that the plaintiff and intervenor had acquiesced to the transfers, his submission that their action for a *rapport à la masse* was futile would have succeeded. However, his submission is not supported by

evidence. They were both emphatic that they were not told about the transfers. Their evidence was that they did not enjoy good relations with their brother, so much so that the plaintiff had revoked a power of attorney in his favour in 2004.

[26] Mr Lucas for the defendant has further submitted that it was not the object of the defendant to deprive the heirs of their share of the inheritance. Good faith is however not apparent when the price for the transfer was of nominal or low value or when the defendant's pleadings are at variance with his evidence relating to why the transfers took place.

[27] Even if the authentic documents had stated the sums of R 100,000 and R 50,000 for the two transfers, they would still have reflected a low value for the properties in question even in 2008 since it must be also noted that some of these parcels of land had buildings thereon. How could those sums in the mind of any objective person represent real consideration? I also cannot see what benefit was conferred on the remaining heirs by the said transfers to the defendant. Looking after one's elderly father whilst residing with him in the family home cannot be viewed as a duty requiring compensation and thence the reduction of the shares of other family members in the patrimony.

[28] In any case, whether the defendant cared for his father or not or whether he undertook his brother's debts is of no effect. The fact remains that the sales were *donations deguisées* as far as the remaining heirs are concerned.

[29] In the circumstances, as has been pointed out by Mr Lablache for the plaintiff and the intervenor, there is no rebuttal of the irrefragable presumption contained in art 918.

[30] The transfers made to the defendant by the Deceased must not diminish the estate in terms of the reserved rights of the heirs. From the evidence adduced it would appear that the Deceased had four children. Article 913 in relevant part provides:

> Gifts inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by Article 915-1.

[31] The transfers of property to the defendant should therefore not have exceeded one quarter of the Deceased's estate. The evidence before the court is that outside of the three properties transferred to the defendant there is no other property left to distribute among the heirs. Hence, the entire estate has been transferred unlawfully to the defendant. The three quarters share of the estate transferred in excess has to be brought back into hotchpot for redistribution into four equal shares. It must be emphasised that art 918 refers to the value of the property and not the property itself being returned to hotchpot.

[32] The value of the estate comprising the three alienated properties has not been established. In the absence of such value being established, I am only in a position to make limited orders.

[33] In accordance with arts 913, 914 and 918 of the Civil Code, I therefore order that the market value of Parcels V6652, V6650 and V6647 be valued at the point in time that they were transferred and returned to hotchpot. After the deduction of one quarter of the value of the estate to the defendant, the remainder of the value of three quarters of the property should be distributed into four equal parts to the plaintiff, the intervenor, the heirs of Hedrick Parcou and the defendant.

[34] I also grant the costs of this suit to the plaintiff and the intervenor.

RE MATHIOT

M Vidot J
10 February 2017 XP 188/2016; [2017] SCSC 113

Family law – adoption – dispensing with parental agreement

The applicants applied for the adoption of a child who was being fostered by them. The child's biological parents objected to the adoption. The child's mother was neglecting the child when he was in her custody. The child's father was on remand due to allegations of causing grievous harm to his daughter. The parents also had been taken to the Family Tribunal for maintenance for the children.

JUDGMENT Application granted.

HELD
Parental consent to an adoption will be dispensed with where it is withheld unreasonably and against the interest of the child.

Legislation
Adoption Rules, rr 18, 33
Children Act, ss 40, 64

Counsel Unrepresented

M VIDOT J

[1] This is an application for adoption in terms with s 33(1)(b) and the Adoption Rules of the Children Act. Mr Roland Imier Alcindor and his wife Veronique Bonnelame-Alcindor have lodged application for the adoption of Jahid Mathiot, born on 15 March 2014. He is the son of Mr Jerry Laurence Mathiot and Ms Vanessa Barra.

[2] Jahid Mathiot (the "child") has been living with the applicants since 6 April 2015. The applicants have been fostering the child because he had been removed from the mother by Social Services. The father of the child Mr Jerry Mathiot is being remanded at the Montagne Posee prison whilst according to Social Services Department, the mother, in whose custody the child was had been neglecting her children. The Social Service had obtained legal recourse to remove her children from her custody and they were placed in homes. Unfortunately, the children had been separated.

[3] Mr Roland Alcindor is a programme officer working with the United Nations Development Programme. He testified that he and his wife had been trying to have children and when it did not happen, they approached the Social Services Department to register their intention to adopt. In April 2015, they were contacted and informed about the child whom they have been fostering since. Both he and his wife have adapted and bonded well with the child and vice versa. He describes Jahid as being a great child, full of energy and who calls him "Daddy" and Mrs Bonnelame-Alcindor' "Manman". They have all bonded together as a family unit. He believes that the child will be psychologically affected if he was to be removed from their care and custody,

[4] Mrs Bonnelame-Alcindor, who works as a consultant, gave evidence and supported her husband's testimony. She noted that with the support of the Social Services Department, the child has settled in well with them. Jahid has also been well received by the wider families where he plays with nephews of similar age. She noted that the applicants have made an effort to ensure that the child has contact and nurture a relationship with his brother and sisters. Actually they have initiated contact with them and the applicants were even invited to Aisha's (the eldest sister) Holy Communion. They have encouraged the children to meet at least once every school holiday.

[5] Mrs Ally, a senior social worker, deponed that she has worked with the applicants from the time they approached the Social Services Department expressing their desire to adopt a child. They conducted a thorough investigation into the applicants' background; such as criminal records, medical fitness and financial status, which all turned out positive. They were confirmed as credible candidates to adopt a child. They have also been following the progress of the child since he has been in the foster care of the applicants and they concluded that the child has been doing well and are satisfied that the applicants are good parents.

[6] The senior social worker also worked with the child's mother who has signed a consent form to the adoption. However, it is believed that after she had had contact with the father who is being remanded, she seems to have changed her position a bit. When at the beginning of 2016, the applicants wanted to travel with the child, the mother was contacted and agreed to sign the passport application form to allow the child to travel.

[7] The applicants are financially stable with Mr Alcindor earning Mauritian rupees 134,000 per month and Mrs Bonnelame-Alcindor earning R 30,000. According to the Social Services report, (Exhibit P2), they have a "spacious home in a pleasant environment". The house is secure, well furnished and conducive to the upbringing of the child. The applicants are said to have a solid relationship. Medical reports attached to the application certify that they are both fit. The Social Services recommended in favour of the application.

[8] Mr Jerry Mathiot was called before court to testify so that his views regarding the application could be ascertained. He gave evidence and I will place on record that I found him to be arrogant and of unfavourable character. He alleged that he was completely unaware of the application. He was adamant that he was against the application because according to him he "made the child for" himself and "not to give away to people". Yet he has not been maintaining his children and he even acknowledged that he had been taken to the Family Tribunal on the issue of maintenance and that he is on remand on allegation of causing grievous harm to his daughter Aisha. Mr Mathiot had during the time that he has been on remand since 2014 made no attempt to find out about his children despite the fact that he was seen at the prison by a social worker. I am aware that the social services make regular visits to the prison. I found that Mr Mathiot did not hold the interest of his children at heart and did not assume the responsibility expected of a parent.

[9] As already mentioned, the mother, Ms Vanessa Barra, signed a consent form for the adoption. This court nonetheless found it necessary to issue a summons to her so as to hear her. Ms Barra stated that she does not wish to have the child adopted. She

alleges that the Social Services tricked her into believing that she was signing a document that would allow Jahid to be fostered by the applicants. She testified that she had been waiting for Social Services to get in contact with her to update her about the child. She has never set an appointment to meet with them. None of her children is in her custody and all have been taken away from her by the Social Services Department. She had to be taken to the Family Tribunal in order to get her to pay maintenance for her children. She confirmed that Mr Mathiot is being remanded for causing harm to Aisha.

[10] After hearing from the applicants and Jahid's biological parents, it is clear that this court has to evaluate all the depositions against an assessment of what would be in the best interest of Jahid. The applicants have come across to me as "parents" who want the best for Jahid. It is obvious that they have an abundance of love and affection for him and have his best interest at heart. They have proven themselves to be competent parents that have provided the child with a conducive environment for a safe upbringing. They are very much involved in the welfare of the child.

[11] Both parents have expressed their opposition to the adoption. I note that s 40(1) of the Children Act requires that parental agreement is obtained before adoption may be allowed. Nonetheless, s 40(2) provides certain derogations whereby parental agreement may be dispensed with. It was clear from the demeanour of Mr Mathiot whilst giving evidence that he was merely being arrogant and did not consider the best interest of the child at all. He is already facing a charge of causing grievous harm to his own child Aisha. Ms Barra was showing a change of heart and I am of the view that there was external pressure and influence for such a change and it will not surprise me if this was coming from Mr Mathiot. That is the opinion of Mrs Ally as well.

[12] Ms Barra was confronted with the consent form she signed. She identified her signature. The following is clearly stated in bold at the head of the form (Exhibit P1); "STATEMENT OF CONSENT FOR ADOPTION". I do not believe her when she alleges that she was deceived by Social Services that she was signing for her child to be fostered. Both parents have shown a complete lack of interest in Jahid and their other children. They claim that the Social Services did not approach them with information regarding their children. I strongly believe that any responsible parent, interested in the welfare of his or her child would explore every possible avenue to be informed about his or her child's wellbeing. Mrs Ally testified that Social Services went to the prison to seek Mr Mathiot's consent. Apart from refusing it, it does not appear that he sought more information about his children. I do not believe Ms Barra that she went to the Social Services Department and there was no one around. Yet she never booked an appointment. She was contacted by Social Services for her to sign the child's passport application which she did. That should have provided her with an opportunity to query about Jahid. Mrs Ally deponed that Ms Barra has proven that she cannot protect her children. She had to be taken to the Family Tribunal in order for her to pay maintenance for the other 4 children, who as above mentioned are all in care.

[13] I find that in terms with s 40(2)(b), the biological parents withholding of the agreement is unreasonable. Furthermore, in terms with s 40(2)(c) and (d) that they have persistently failed without reasonable cause to discharge duties to the child and have neglected the child. That is the reason why the Social Services Department had to intervene and initiate proceedings before the Family Tribunal to have the children

moved to places of safety. Therefore, in terms with s 40(1) I dispense with the consent of the biological parents and allow the application which this court most strenuously believes will be in the best interest of Jahid.

[14] The applicants have also applied that the child's name be changed from Jahid Mathiot to Samuel Jahid Alcindor. The application is allowed and the Department of Civil Status is hereby ordered to make the necessary amendments to the child's birth certificate.

[15] By further order, I direct the Registrar of the Supreme Court to serve a copy of this Oder on the Chief Officer of the Civil Status within 7 days hereof in terms with s 18 of the Adoption Rules of the Children Act. In terms with s 64(2) of the Children Act, I direct the Chief Officer of Civil Status to make the prescribed entry of this order in the Adopted Children Register.

EASTERN EUROPEAN ENGINEERING LTD v SJ (SEYCHELLES)

F Robinson J
15 February 2017 [2017] SCSC 138

Arbitration – payment certificate – contract debt – interpretation

The contract between the parties provided that "any dispute, controversy or claim" was a matter for arbitration. The respondent argued that the sum certified by an Interim Payment Certificate was not subject to the arbitration clause.

JUDGMENT For the applicant.

HELD
The words "any dispute, controversy or claim" suggest an intention to embrace all disputes, controversy or claim arising out of the breach of the contract.

Legislation
Civil Code arts 1315, 1334

Cases
Beitsma v Dingjam (No 1) (1974) SLR 292
Emerald Cove v Intour SRL (2000-2001) SCAR 83
Wartsila NSD Finland v United Concrete Products (2004-2005) SCAR 223

Counsel P Pardiwalla for applicant
B Georges for respondent

F ROBINSON J

Background

[1] The applicant is Eastern European Engineering Limited. The applicant is the defendant in CC38/2014, the head suit. The respondent is SJ (Seychelles) Limited. The respondent is the plaintiff in the head suit.

[2] The background to the application is as follows. It is common ground between counsel for the applicant and the respondent that the respondent entered into a written agreement on 22 November 2012, amended by a supplementary agreement of the same date (the "Agreement") with the applicant to carry out engineering work on Savoy Resort and Spa; that the Agreement contains an arbitration clause; and that the arbitration clause is valid and subsisting. The plaint alleges a cause of action for breach of the Agreement with regards to the issue of an interim payment certificate stating the amount due and payable to the respondent and the consequent entitlement of the respondent to payment. The plaint claims the sum of USD 662,898.96 due and payable to the plaintiff.

[3] The defendant applies to stay proceedings in the head suit pending arbitration. The defendant seeks to enforce the arbitration clause before delivering any pleadings. The application is supported by an affidavit and a "Directors Resolution" exhibited

thereto sworn by Vadim Zaslonov, a director of the applicant. The respondent opposes the application. The respondent files "Answer to Application to stay Proceedings" (the "Answer"). The respondent contends that its action does not fall within the arbitration clause in the Agreement.

[4] The court has to decide whether to enforce the arbitration clause in the Agreement.

Case for Applicant and Respondent

[5] Briefly the case for the applicant is as follows. The plaint avers that the defendant engaged the plaintiff to conduct engineering works on Savoy Resort and Spa pursuant to the Agreement.

[6] A dispute arose between the plaintiff and the defendant evidenced by the plaint. The plaintiff contends that a sum of USD 662,898.96 is due to it.

[7] Vadim Zaslonov states the following at paragraphs 4, 5, 6, 7 and 8 of his affidavit in support of the defendant's application for a stay order –

> (4) The parties have by virtue of clause 20.2 of the Agreement undertaken to refer any matter of dispute between them to arbitration. In conformity with this clause the Applicant has always been ready and willing to submit to arbitration and to do all things necessary for the proper conduct of the arbitration.
>
> (5) There have been several attempts to settle this matter amicably but if has however proven impossible to do so.
>
> (6) I am advised and verily believe that the Arbitration clause contained in the Contract between the parties is valid under Seychelles Law, the Governing Law of the contract. That being so, the court, faced with an arbitration clause of this nature, (which clause is valid under Seychelles Law, and there being nothing in the contract or in Seychelles Law which prevented the Agreement being given its full effect) should decline to exercise jurisdiction and order a stay of proceedings.
>
> (7) The Applicant is and has always been willing to submit to arbitration according to the contract.
>
> (8) I therefore pray this honourable court to decline jurisdiction and order a stay of this present proceedings and let the parties proceed with arbitration as per the contract.

[8] On the other hand, counsel for the respondent denies that the plaintiff’s action is one which is contemplated by the arbitration clause. In his opinion, the plaintiff's action does not concern a dispute or controversy, but concerns the enforcement of a liquidated obligation for payment under the Agreement in terms of cl 14.4 of which the defendant is obliged to pay the sum it has itself certified as being due to plaintiff. Counsel for the respondent contends that the court has jurisdiction to force the defendant to pay the liquidated sum which is uncontrovertibly due.

Submission of Counsel for Applicant and Respondent

Does the plaintiff's claim fall within the ambit of the arbitration clause in the agreement?

[9] The submissions of the applicant in this case is broadly as follows.

[10] The applicant, through counsel, states that it is ready and willing for the dispute to be referred to arbitration and asked that the action be stayed: see *Wartsila NSD Finland v United Concrete Products* (2004-2005) SCAR 223; *Beitsma v Dingjam (No 1)* (1974) SLR 292; *Emerald Cove v Intour SRL* (2000-2001) SCAR 83. There is no dispute on this point.

[11] Counsel for the applicant emphasises that whether the present claim is within the arbitration clause in the Agreement is essentially one of construction of that arbitration clause. The exercise which has to be done is to determine whether on its proper construction the arbitration clause does or does not cover the respondent's claim in issue. Clause 20.2 of the Agreement provides for "any dispute, controversy or claim". On this question of the construction of the arbitration clause, counsel contends that the words of the plaint must be held to be a "claim". In his opinion, para 2 of the Answer tactically omits the word "claim".

[12] Further, counsel argues against the finality of a certified interim payment certificate. He submits that the Agreement contains no express wording preventing the applicant from raising a defence against sums certified for interim payment. On the question of the finality of a certified interim payment certificate, counsel refers the court to other relevant clauses of the Agreement, as follows –

> (a) in terms of the Agreement, the arbitrator shall have full power to open up. review and revise any certificate, determination, instruction, opinion or valuation of the Employer relevant to the dispute, (clause 20.2 of the Agreement. so far as relevant to the submission of the applicant);
> (b) it is a claim for money and not for money due - the Agreement provides for defences which the applicant may raise to the claim, namely, fraud, mistake, invalidity of the claim and so forth; all matters in dispute in the head suit;
> (c) the "Employer" may make any correction or modification in any "Payment Certificate". A "Payment Certificate" shall not be deemed to indicate the Employer's acceptance, approval, consent or satisfaction. (Clause 20.2 of the Agreement so far as relevant to the submissions of the applicant);
> (d) the defence that the "Performance Certificate" shall be signed by five directors of the Employer".

[13] On the other hand, counsel for the respondent contends that the plaintiff's claim is one for money due under art 1315 of the Civil Code. In terms of cl 14.5 of the Agreement, the sums certified in an interim payment certificate become due and payable within 10 business days after the issuance of it. In other words the sums certified in an interim payment certificate are binding on the applicant. Under art 1315

of the Civil Code, the only defence available to the defendant is that it has paid the sum due to the plaintiff. In his submission, the court has jurisdiction to hear and determine the issues which have arisen in the plaint.

[14] A second point arises for the consideration of the court in relation to the question of notice of a dispute under cl 20 and cl 20.2 of the Agreement. Counsel emphasises that cl 20.2 of the Agreement should be construed in light of cl 20.1 of it. There is no dispute on this point. He states that it is inappropriate for the applicant to make application for a stay of proceedings in the head suit. In his opinion the applicant should have complied with cl 20.1 of the Agreement notifying the respondent of a dispute, which has arisen with regards to a certified interim payment certificate which the applicant had issued in terms of the Agreement because an interim payment certificate is to be looked upon as binding on the applicant so as to stop it from raising any defence and so enabling the respondent to immediate judgment under art 1315 of the Civil Code. In other words, the applicant must pay whatever has been certified, being left to recuperate with regards to any defence etc, in subsequent litigation or arbitration. In support of the submission, counsel relies on the following passage obiter from the *Emerald Cove* case –

> It is to be observed in passing, although no argument has been pressed on us in that regard on this appeal, that summary procedure afforded by the writ for the eviction of a person, claimed by the owner of the property to be in wrongful occupation of his immovable property in Seychelles, could be hardly be a subject of arbitration or a matter over which an arbitrator could exercise powers. We venture to suggest that where the party who claims to be the innocent party has rescinded the agreement by operation of law and relying on the rescission has taken steps to evict the other party by resort to the writ *habere facias possessionem*, it is for the aggrieved party to submit the question of the validity of the rescission to arbitration if there is an agreement to arbitrate disputes and differences arising from the contract. This he can still do notwithstanding his eviction from the property which he claims to hold by virtue of the contract.

[15] For the above reasons, counsel contends that there is no dispute to arbitrate.

Analysis of the Contentions of Applicant and Respondent

[16] Should this suit be stayed? The court finds the questions raised for its consideration far from easy and has come to a determination unassisted by any authorities.

In light of the submissions of counsel for the applicant and the respondent, the court reads arts 1134 and 1315 of the Civil Code and the relevant clauses of the Agreement.

> Article 1134
> Agreements lawfully concluded shall have the force of law for those who have entered into them.
> They shall not be revoked except by mutual consent or for causes which the law authorises.
> They shall be performed in good faith.

Article 1315
A person who demands the performance of an obligation shall be bound to prove it.
Conversely, a person who claims to have been released shall be bound to prove payment or the performance which has extinguished his obligations.

Clause 14.4 Execution of Interim Payment Certificates
The Employer may make any correction or modification in any Payment Certificate that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Employer's acceptance, approval, consent or satisfaction.

Clause 14.5 Payment
The Employer shall pay to the Contractor
…
(b) the amount certified in the Interim Payment Certificate _within ten (10) business days after issuance of the Interim Payment Certificate by the Employer, subject to accepted statement by the Employer.

Clause 20.1 Amicable Settlement
Should any dispute arise between the parties under or out of this Contract, or out of the execution and completion of the works, or out of the remedying of defects and flaws, including disputes on any certificate, determination, instruction, opinion or valuation of the Employer, each Party shall notify another party of such dispute, and both parties shall try to settle such dispute amicably before any arbitration starts.
However, unless otherwise agreed between the Parties, the arbitration shall not start before expiration of a 2-week period starting on the day of the notice of a dispute, even though attempts may not be made to settle the dispute amicably.

Clause 20.2 Arbitration
Provided that the procedure described in Sub-Clause 20.1 of the Contract has been followed, any dispute controversy or claim arising out of or in connection with this Contract, or the breach, termination or invalidity thereof shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the International Chamber of Commerce.
The arbitrator shall have power to open up, review and revise any certificate, determination, instruction opinion or valuation of the Employer relevant to the dispute. Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties shall not be altered by reason of any arbitration being conducted during the progress of the works. .

[17] Counsel for the respondent states that cl 14.5(b) of the Agreement refers to a liquidated and ascertained sum which is established as being due; and that the respondent ought to be paid leaving the applicant to recuperate with regards to any defence etc, in subsequent arbitration. The court admits that the approach of the respondent is compelling. However, the court is convinced that the right view depends on the terms of the Agreement. The court agrees with the applicant, through counsel

that the issue turns on the proper construction of the Agreement. The correct approach is to ask whether on its proper construction, that is to say on the ordinary meaning of the words used, the arbitration clause does or does not cover the "dispute, controversy or claim" in issue. In other words, is the certified interim payment certificate binding on the applicant? It is not clear to the court the matters on which arbitration will be sought.

[18] The court turns to consider the arbitration clause, the certification clauses and other relevant clauses in the Agreement as urged by counsel for the applicant in his submissions. Thus are referred to arbitration: (i) "any dispute controversy or claim arising out of or in connection with this contract"; (ii) "any dispute controversy or claim arising out of or in connection with the breach, termination or invalidity thereof". The plaint alleges a breach of the Agreement. Paragraph 6 of the plaint alleges that – "Upon a revised application made on 13 February 2014 by the Plaintiff for an interim payment (number 7), the Defendant, in accordance with the said provisions of the said agreement, issued Interim Payment Certificate No. 7 on 1 March 2014 in the sum of USD 662,898.96". Paragraph 7 of the plaint alleges that – "in breach of the said provisions of the said agreement, the Defendant failed to pay Plaintiff the said sum certified within the period of 10 business days or at all". Under heads (i) and (ii) above "[c]ontract means the Articles of Agreement, these conditions, the Specification, the Drawings, the Schedules, and the Appendices to the Contract" (cl 1.1.1 of the Agreement), of which, in the court's opinion, the issues which have arisen in the plaint with regards to interim payment and the interim payment certificate form part. Simply as a matter of the words used, which are of the widest import, the court can see no reason why the plaintiff's alleged claim for money due to it should not be as to "any dispute, controversy or claim arising out of the … breach thereof [of the contract]".

[19] The meaning which the court has given to these words as a matter of first impression is supported by the approach to the arbitration clause which the court has adopted, namely, that the words "any dispute, controversy or claim" suggest an intention to embrace all disputes, controversy or claim "arising out of the … breach thereof [of the contract]". Clearly this provides for the reference to arbitration of all "disputes, controversy or claim arising out of the … breach thereof [of the contract]". Further, there is in the court's opinion nothing in the Agreement which suggests that the arbitrator does not have jurisdiction to hear and determine the issues which have arisen in the plaint; and that the arbitrator does not have the power to grant all the reliefs sought in the plaint. Put shortly, as correctly suggested by counsel for the applicant, the Agreement needs clear wording before the certification clauses will prevent the raising of a defence or cross-claims in terms of the Agreement against the sums certified for payment in an interim payment certificate.

[20] With regards to the question of notice under cl 20.1 of the Agreement, the court respectfully disagrees with the position of the respondent. In the court's interpretation of cl 20.1 of the Agreement, it gives "either party" the right to give notice of "any dispute" which may have arisen "between the parties under or out of [the] Contract … including disputes on any certificate" and contemplates that "both parties may thereafter "try to settle such dispute amicably before any arbitration starts". Consequently, the court is convinced that cl 20.1 of the Agreement contemplates that either party gives notice of "any dispute" to the other party; and that in the present case either the applicant or the respondent may have given notice of a dispute which

had arisen between them. Further, counsel states that the court should apply the principle upon which the Seychelles Court of Appeal has decided in the *Emerald Cove* case. The court states that it is fundamental and necessary to consider the role of precedent in the present case, in which a question of construction of the Agreement is the important question between the applicant and the respondent. Counsel states that the principle upon which the Seychelles Court of Appeal has so decided in the *Emerald Cove* case binds the court, a lower court and requires it to follow and adopt it because it is relevant to the decision in the present case before the court. The court has given serious consideration to the principle upon which the Seychelles Court of Appeal has so decided. Thus in the present case in light of the *Emerald Cove* case learned counsel states in short that the interim payment certificate is binding on the applicant; and that the respondent ought to be paid leaving the applicant to recuperate with regards to any defence in subsequent arbitration. On the other hand, the court is of the opinion that the scope of an arbitrator's powers in any given case depends fundamentally upon the terms of the arbitration agreement; that is to say upon its proper construction in all the circumstances.

Decision

[21] For the reasons stated above, it is the court’s view that the clear language of the Agreement should prevail and that the matter should be referred to arbitration. The court exercises its discretion and stays proceedings in the head suit with costs.

PORTLOUIS v MINISTRY OF EDUCATION & ORS

F Robinson J
15 February 2017 CA 6/2014; [2017] SCSC 137

Delict – libel – plea in limine litis – innuendo

The appellant was suspended by the first respondent due to an allegation of sexual harassment. The appellant subsequently claimed damages from the defendants for the publication of an article headed "Teacher suspended after sexual assault charges surface". The content of the article was however not disclosed.

JUDGMENT Appeal dismissed.

HELD
In a libel action, the material facts on which a plaintiff relies will include those facts and matters from which it is to be inferred that the words were published of the plaintiff.

Legislation
Civil Code, art 1383
Seychelles Code of Civil Procedure, s 92

Cases
Bessin v Attorney-General (1951) SLR 37
Cesar v Scully (2012) SLR 190
Francis Biscornet v Eugene Honore (1982) SLR 451
Loveday Hoareau v United Concret Products (Seychelles) Limited (1979) SLR 155
Rideau v Elizabeth (1979) SLR 81
Seychelles Broadcasting Corporation v Beaufond (2015) SLR 271

Foreign cases
Bruce v Odhams Press Ltd [1936] 1 All ER 287
Hall v Geiger (1929) 41 Br Col Rep 481
Wright v Clements (1820) 3 B & Ald 503; 106 ER 746

Counsel N Gabriel for appellant
V Benjamin and B Georges for respondents

F ROBINSON J

The Background

[1] The appellant (then plaintiff) filed an amended plaint against the Ministry of Education, 1st defendant therein, herein 1st respondent; the Attorney-General, 2nd defendant therein, herein 2nd respondent; Le Seychellois Hebdo (Proprietary) Limited, a newspaper, 3rd defendant therein, herein 3rd respondent; and Xpress Printing, the publisher of Le Seychellois Hebdo (Proprietary) Limited, 4th defendant therein, herein 4th respondent.

[2] It appears that the plaint in its amended form claimed damages against all defendants for libel contained in an article headed "Teacher suspended after sexual assault charges surface" of the issue of the newspaper dated 25 November 2011. The 1st and 2nd defendants applied that the plaint be struck out on the grounds that it disclosed no reasonable cause of action under s 92 of the Seychelles Code of Civil Procedure (the "SCCP"). The plea *in limine litis* was adopted by the 3rd and 4th defendants, through counsel. The plea *in limine litis* reads thus –

> 1. The Plaintiff's Plaint does not disclose any cause of actions against the 1st and 2nd defendants.
> 2. Therefore, as no cause of action has been disclosed by Plaintiff against the 1st and 2nd defendants, the 1st and 2nd defendants pray to this Honourable Court pursuant to section 39 of the Magistrate Court (Civil Procedure) Rules to strike out the Plaintiff's pleadings and to dismiss this Plaint against the 1st and 2nd defendants with Costs.

[3] The trial Senior Magistrate accepted the plea *in limine litis* and dismissed the plaint in its amended form in a ruling dated 27 January 2014.

The Present Proceeding

[4] The appellant seeks to appeal the ruling on the following grounds –

> i) The learned trial Senior Magistrate erred in law in not properly considering and weighing the objection raised by the Appellant on the plea *in limine litis*.
> ii) The learned [Senior Magistrate] was wrong to uphold the plea *in limine litis* raised by the Respondents without hearing the whole of the evidence prior to making such ruling.
> iii) The finding of the learned Senior Magistrate was unsafe and unsatisfactory.

[5] The appellant seeks the following reliefs from the court –

> a) A judgment reversing and overruling the decision of the Learned Senior Magistrate in the Court below;
> b) To give judgment in favour of the appellant as per the grounds of appeal pleaded above.

Submissions of Counsel

[6] Mr Gabriel for the appellant. The appellant has a cause of action for the following reasons –

> (a) that it was the 1st respondent who informed the appellant by letter dated 23 November 2011 that the appellant will be suspended from his post;
> (b) that the letter provided for his suspension for one month and stated that the department was treating the allegation of sexual harassment seriously;

(c) that two days after the appellant had received the letter, an article appeared in the newspaper "published" by the 3rd and 4th respondents, wherein the case of sexual harassment at the school was mentioned;
(d) that as a material fact, the director of the "SAHTC", Georgie Belmont, filed a comprehensive report on the incident and named the appellant on page 1. It was this report that prompted the decision of the 1st respondent to suspend the appellant, causing him unnecessary trauma, hardship and so forth.

There is authority for the position of the appellant: *Bessin v Attorney-General* (1951) SLR 37 and *Rideau v Elizabeth* (1979) SLR 81.

[7] Mr Benjamin for the 1st and 2nd respondents: There is no allegation of wrongdoing against the 1st and 2nd respondents for the following reasons –

(a) The appellant has failed to show that the 1st and 2nd respondents caused the said publication by the 3rd and 4th respondents;
(b) there is no nexus between the suspension of the appellant from his duties and the publication. The authority in support of the submission *Loveday Hoareau v United Concrete Products (Seychelles) Limited* (1979) SLR J55;
(c) the plaint failed to set out the words complained of *verbatim.* The authority in support of the submission *Francis Biscornet* v *Eugene Honore* (1982) SLR 451;
(d) the article makes no reference to the appellant by name or reference.

[8] Mr Georges for the 3rd and 4th respondents: *Bullen and Leake and Jacob's*, *Precedents of Pleadings in the Queen's Bench Division of the High Court of Justice* (12th ed) at page 626, clearly states that in drafting a claim for "Damages/or Libel in a newspaper alleging reference to the Plaintiff", as in the present case, the words complained of must be set out *verbatim,* and the facts must be fully set out and show reference to the appellant. It is submitted that the plaint –

a. failed to set out the words complained of verbatim, and
b. in so doing further failed to plead material facts to show that the words published showed a clear reference to the plaintiff.

There are clear authorities in support of the submissions *Seychelles Broadcasting Corporation* v *Beaufond* (2015) SLR 271 at paras [12] and [14], *Francis Biscornet v Eugene Honore*, *Bessin v Attorney- General, Cesar* v *Scully* (2012) SLR 190, *Wright v Clements* (1820) 3 B & Ald 503, 106 ER 746 and *Bruce v Odhams Press Ltd* [1936] 1 All ER 287.

Analysis of the Contentions of Appellant and Respondents

[9] It is submitted by Mr Georges that the appellant has sought to couch his claim within a tortious claim, specifically that of defamation and notably libel under art 1383 *alinéa* 3 of the Civil Code of Seychelles Act (the "Code"). This position is shared by the 1st and 2nd respondents, through counsel. The trial Senior Magistrate

considered the claim of the appellant against all respondents based on the allegation of libel. On appeal the appellant insists that he has a cause of action. The court has tried to understand the position of the appellant against the 1st and 2nd respondents. The appellant had been suspended from his duties pending an investigation on 23 November 2011. The appellant's suspension was lifted on 20 December 2011. It appears that the appellant's amended plaint, against the 1st and 2nd respondents, confines his claim to an allegation of "suspension" from his duties; and that the prayer in the plaint is confined to damages and other relief arising from that single allegation of "suspension" from his duties. The court could say more about the manner in which this case is pleaded in its original and amended form, but it does not intend to dwell on the point. It is, in the court's view, among other things, that a claim based simply on an allegation of "suspension" is not a cause of action. Rightly so, the court is left with the allegation of libel against all respondents.

[10] It is trite law that English law governs the civil law of defamation. *Biscornet* states that –

> In cases of defamation ... it is the English law in force at the lime when the Civil Code of Seychelles Act 1975 was enacted which applies. That means not only to the substantive law of defamation but also to the procedural rules of the law of defamation.

[11] About the procedural rules of the law of defamation, *Biscornet* makes the following statement of the law –

> In Paragraph 2 of Chapter 1 of Gatley on Libel and Slander, Sixth Edition it is stated –
>
> > The procedural rules of the law of defamation are of high importance in affecting the substantive law.

[12] The above principles will direct the court's approach to the resolution of the matter before it.

Right of Action against 1st and 2nd Respondents – Publication

[13] The plaint in its amended form does not reveal that the 1st and 2nd respondents have published a libel concerning the appellant in the suspension letter dated 23 November 2011. *Ex facie* the plaint the suspension letter dated 23 November 2013 was not made known to some person other than the appellant. A plaint which does not allege publication to some third person discloses no cause of action. That was the finding of the trial Senior Magistrate. The procedure under s 192 of the SCCP as the court understands it is only intended to apply to cases where it is plain and obvious that the appellant has no case and in the present case the court is satisfied that the appellant has no case against the 1st and 2nd respondents: see *Hall* v *Geiger* (1929) 41 Br Col Rep 481.

Right of Action against 3rd and 4th Respondents – the "Very" Words of the Libel to be Set Out and Reference to Appellant

[14] In this case the pleadings do not disclose the article published by the 3rd and 4th respondents other than the pleadings referring to an article headed: "Teacher suspended after sexual assault charges surface", which heading made no mention of the appellant by name.

[15] The main contention of counsel for the 3rd and 4th respondents is that the appellant has not complied with the procedural rules of the law of defamation. The 3rd and 4th respondents state that the very words of the libel must be set out. In the case of *Seychelles Broadcasting Corporation,* the Seychelles Court of Appeal applied the opinion of Abbott CJ in the *Wright* case –

> I am of opinion, that in this case the objection must prevail, and that the judgment must be arrested In actions for libel, the law requires the very words of the libel to be set out in the declaration, in order that the court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading ....

The court also considered the opinion of Bayley J in the *Wright* case –

> I am of the same opinion. A defendant, in a case like this, has a right to expect that the plaintiff, in his declaration, will set out the very words of the libel used, or so much of them as he means to rely upon ....

[16] Additionally, the appellant's difficulty is that he is not named or indicated in the heading of the article. The position of the 3rd and 4th respondents is that they are entitled to have such knowledge of the case against them as to enable them to decide how they should plead. In *Bruce* it was held that in a libel action the material facts on which a plaintiff relies will include those facts and matters from which it is to be inferred that the words were published of the plaintiff.

> In such a case as the present, the plaintiff, not being actually named in the libel, will have to prove an innuendo identifying her in the minds of some people reasonably reading the libel with the person defamed, for there is no cause of action unless the plaintiff can prove a publication of and concerning her of the libellous matter; see per A. L. Smith M.R., in *Sadgrove v Hole* [1901] 2
> KB l, 4.
>
> (see per Sesser LJ at p 708).

So in the *Bruce* case, under rules of court a statement (either in a pleading or in particulars) is necessary of the material facts on which the party pleading relies: see also the *Biscornet* case. The court notes that the appellant had not pleaded by innuendo that the heading of the article referred to him as associated with the "sexual assault charges". Moreover, as rightly pointed out by counsel for the 3rd and 4th respondents, even if the plaint had so pleaded by innuendo, in failing to include

the words published *verbatim,* it is difficult to see how the innuendo would have been made out at all. In the *Cesar* case the date of publication was not pleaded, the article was not attached, and the innuendo connecting the statement to the plaintiff was not spelt out. Egonda-Ntende CJ, applied the *Bruce* case and concluded that –

> The weight of authority in this matter leads me inevitably to only one conclusion. The plaint fails to disclose a cause of action against the first defendant as no innuendo is set out to connect the plaintiff with the article allegedly published in the Nation Newspaper. There is no allegation of wrongdoing made against the second defendant. There is no cause of action against the second defendant on the amended or original plaint.

[23] In light of the above, the court holds that the appellant has failed to make out a cause of action by failing to plead material facts on which his claim was relying and further failed to set out and establish the requirement of innuendo.

[24] In the result, the court upholds the decision of the trial Senior Magistrate and dismisses the appeal against all respondents with costs.

AMESBURY v PRESIDENT OF SEYCHELLES & CONSTITUTIONAL APPOINTMENTS AUTHORITY

C McKee J
17 February 2017 MC 38/2014; [2017] SCSC 147

Constitution – appointment of judge – judicial review – locus standi

Mr Burhan, a non-Seychellois citizen, was appointed to be a puisne judge from 2008. At the expiration of his contract in 2013, there was a recommendation to re-appoint Mr Burhan on the ground of exceptional circumstances but it was rejected by the Constitutional Appointments Authority (CAA). Later in 2013, Burhan J successfully acquired Seychellois citizenship. The CAA, after advertising for a puisne judge, appointed Mr Burhan as a puisne judge. The petitioner sought a judicial review of the process under which the CAA reached the decision to appoint Mr Burhan.

JUDGMENT petition dismissed.

HELD
A recommendation by the CAA to the President expressed as that of the majority of the CAA is a valid recommendation.

Legislation
Constitution, art 131(4)
Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules

Cases
Dubois v President of Seychelles (2016) SLR 553
Michel v Dhanjee (2012) SLR 251

Counsel Petitioner for herself
A Subramanian and F Chang-Sam for respondents

C MCKEE J

[1] This is an application by the petitioner under the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules. The adjudicating authority whose decision has been brought into question is the 2nd respondent, the Constitutional Appointments Authority (the "CAA").

[2] In essence this is a judicial review of its decision to recommend to the first respondent, the President of the Republic of Seychelles, that Mohan Niranjit Burhan ("Mr Burhan") be appointed as a puisne judge of the Supreme Court of Seychelles.

[3] I have considered all the documents lodged by all three parties: The Constitutional Appointments Authority, the Attorney-General and Mr Burhan. I have considered the findings and judgment in the Constitutional Court dated 25 October 2016 in the case of *Dubois v President of the Republic* (2016) SLR 553.

[4] I am particularly indebted to the petitioner (who is an Attorney of Seychelles but pursues this matter in her individual capacity) and the two counsel representing the respondents. In my view all the salient points for consideration are enumerated in the three submissions and I do not intend to repeat them at length here. Mr Chang-Sam in his submission at paras 1(a) to (r) sets out a time table and sequence of events in this matter, which I adopt as correct.

[5] Mr Burhan had been appointed as a puisne judge to the Supreme Court of Seychelles on 21 October 2008 on contractual terms. Some six months prior to the end of the contract, ie in April 2013, the then Chief Justice wrote to the Chairman of the CAA requesting that the contract of Mr Burhan, then a non-Seychellois, be renewed in terms of art 131(4) of the Constitution of the Republic of Seychelles on the grounds of exceptional circumstances, namely that he, Mr Burhan, was the Head of the Criminal Division and that there was a backlog of criminal cases which required attention. The CAA refused the application. There was a renewal of the application by the Chief Justice, supported by the Secretary of State for the Cabinet, but again this further application was refused by the CAA. Mr Burhan was so advised on 15 November 2013. Mr Burhan was however granted an extension of his existing contract for a period of three months to allow him to complete any partly heard cases.

[6] Meanwhile on or around the same time, Mr Burhan had made a formal application for citizenship of Seychelles and was formally granted a certificate of registration of citizenship by the Citizenship Officer of Seychelles dated 26 November 2013 thus enabling Mr Burhan to be registered as a citizen of Seychelles. This effectively changed his status from non-Seychellois to Seychellois citizen while he continued to complete the extension to his contract. The extension of contract came to an end on or around 20 January 2014.

[7] The Supreme Court was thus to be without the services of one full-time judge and the CAA sought to remedy this by placing an advertisement for the post of puisne judge in *The Nation* newspaper on 26 and 27 January 2014. On 27 January 2014 Mr Burhan made formal application for the post attaching his curriculum vitae and a copy of his citizenship certificate. On the same day the Secretary of the CAA made a file note that up to that date only one application had been received. As a result further advertisements were lodged in the *Today* newspaper on 28 and 29 January 2014 with a closing date for applications, according to information provided by the petitioner, being 3 February 2014. I am also informed that a Seychellois citizen and Attorney, Mr Melchior Vidot made application by letter and mailed his application on 30 January 2014. The CAA already had the application by Mr Burhan but there is no evidence that the application by Mr Vidot had reached the CAA on or before 3 February 2014. There was hence only the single application by Mr Burhan to consider. By 5 February 2014 the CAA was in a position to make a decision and wrote to the 1st respondent, the President of Seychelles, advising that "The majority of the members of the Constitutional Appointments Authority have no objection to Mr Burhan's appointment as puisne judge to the Supreme Court of Seychelles". On 12 February 2014 Mr Burhan was appointed by the 1st respondent, the President of the Republic of Seychelles, as a puisne judge.

[8] It is against this background of facts that the petitioner alleges impropriety on the part of the CAA in coming to the decision it did and hence seeks judicial review of the procedure adopted by the CAA in formulating its decision. A judicial review is the vital procedure which allows the court to look at the manner in which the CAA set about coming to its decision. Judicial review is not on the merits or justification of the decision-making but on the procedure adopted, the doctrine of natural justice and fairness.

[9] The respondents took the preliminary point that the petitioner had no *locus standi.* I accept that she had no personal interest in the matter. However, in my view, the petitioner was acting in the public interest and was entitled to ask the Court to enquire into the matter. While it is true that certain constitutional aspects were explored in the *Dubois* case, the actual decision-making aspect of the CAA in coming to its determination was not substantially explored in the Constitutional Court. This Court now has all the relevant details. In my opinion, it is in the public interest that any doubts regarding the appointment of a puisne judge should be adequately and substantially aired. This preserves the integrity of the Supreme Court and the judiciary as a whole. It also assures the public that other governmental decision-making departments and authorities have to be seen to be acting fairly. For these reasons I dismiss the preliminary plea.

[10] I now look at the various issues raised by parties but not in any particular order.

1. The interest of the petitioner. She has an interest as a member of the Seychellois public. She has no personal interest in this application. Her interest in the post of puisne judge was expressed in 2003. It is unreasonable to find that an interest expressed some thirteen years ago should be continued to the present application.

2. Any possible interest of the then counsel and attorney, Mr Melchior Vidot. There is absolutely no evidence to show that he endorsed the application by the petitioner where certain averments were made in his name or on his behalf. On that ground alone the argument involving any involvement by Mr Vidot fails. However I go on. It was suggested by the petitioner that the declared interest by Mr Vidot in a judicial post in the year of 2012 should continue on to include the present application and be included in the recommendation to the 1st respondent by the CAA. I disagree. Mr Vidot clearly was not of a similar view to that expressed by the petitioner. He submitted a fresh application when the present post was advertised. If he considered his earlier application was still extant he would simply have said so in his application. Mr Vidot submitted his fresh application by post on 30 January 2014. The petitioner agrees that the closing date for applications was 3 February 2014. I have looked at the calendar for the year 2014. 30 January is a Thursday. 3 February is the following Monday, with a weekend intervening. I feel that with hindsight it might have been considered slightly unwise to choose this method of delivery when a hand-delivered application to the CAA either on Thursday 30 January, Friday 31 January or even Monday 3 February might have been more reliable. In any event, I find no substance in this ground.

3. *Grant of Seychellois citizenship to Mr Burhan*
I find that Mr Burhan submitted an application for citizenship in the latter part of 2013. As can be seen from the newspapers, numerous similar applications are made throughout any one year. Mr Burhan was granted citizenship on 26 November 2013. I accept that the Citizenship Officer would have followed established procedures in considering the application and making the grant. I find that the CAA is entitled to take the certificate of citizenship at face value and need not look further into the application.

4. *The procedure adopted by the CAA*
By the end of December 2013 the post of puisne judge was vacant and it was clear that the CAA had to take steps to fill the vacancy. It initiated the procedure by advertising in *The Nation* newspaper on 25 January 2014 inviting applications. This resulted in a response from only one candidate, Mr Burhan, applying using his new status as a citizen of Seychelles. This application was recorded by a Ms Pragassen of CAA on 27 January. Great emphasis has been placed on this entry by the petitioner alleging that from that early date the CAA had already decided that there was only one candidate, and that was Mr Burhan.. However the record shows that on 28 and 29 January further advertisements were placed in the *Today* newspaper. I infer from this fact that rather than making an early decision well before the closing date as alleged, the CAA were concerned that only one application had been received and re-advertised in the hope that further interest would be formally expressed. Accordingly, I find that there is no substance to this complaint by the petitioner. I have already dealt with any possible interest of Mr Vidot. By the end of the closing date there was only one application received, that of Mr Burhan. The CAA considered his application under his new status as a Seychellois citizen, his legal experience and knowledge of Seychelles and made its determination, which was relayed to the President. The President acted upon the recommendation and Mr Burhan was duly appointed. In the light of the above I can find no impropriety in the procedure adopted by the CAA.

Before leaving this aspect I will deal with the allegation, even if expressed generally, of bias on the part of the CAA in respect of Mr Burhan's application following his change of status. It is difficult to substantiate this allegation of bias since, when the opportunity was given to the CAA earlier to re-appoint Mr Burhan for a further contractual term on the invitation by the Chief Justice and a senior member of Government, the CAA declined and refused to apply the doctrine of exceptional circumstances. I reject any allegation of bias on the part of the CAA. I reject any suggestion of deception or bad faith.

5. The petitioner seeks to deem material the wording of the letter emanating from the CAA to the President regarding the appointment and whether the term "the opinion of the majority of the CAA" or "the recommendation of the majority" is appropriate. She submits that doubt should be resolved in her favour with the result that the appointment is void *ab initio*. This is

answered by the 2nd respondent. Counsel refers to the case of *Michel v Dhanjee* (2012) SLR 251 and in particular the judgment of Twomey JA who states that the Court should not construe wording in a restrictive, literal or pedantic sense. I adopt this authority and find that there is nothing improper in the wording of the letter, which can be taken as a recommendation that Mr Burhan be appointed to the post of puisne judge. The 1st respondent puts it in a simple way and that the Court should interpret the meaning on a plain reading of its terms. There is nothing in this line of argument by the petitioner.

6. The petitioner invites the Court to place a sinister connotation on the early meetings held by the Chief Justice regarding the possibility of a re-appointment of Mr Burhan to the Supreme Court. Again, this topic has been explored in the case which is referred to by the 1st respondent as "the Justice Domah case by the Court of Appeal". There is nothing untoward about this since the meeting was in furtherance of the proper administration of justice. In any event this meeting referred to the possible re-appointment of Mr Burhan as a contractual officer. This application for judicial review relates to consideration of his application for a new appointment based on his status as a Seychellois citizen. There is nothing in this ground of objection.

7. There seems to be some confusion as to the basis of the decision of the CAA to recommend the appointment of Mr Burhan following his application dated 27 January 2014. The petitioner suggests that the appointment creates a "hybrid category of judges which was not provided for in the Constitution". I consider that the expression" hybrid judge" is cursory and misleading and should be desisted from in the future. In coming to its conclusion there was no need for the CAA to look for "exceptional circumstances". The Constitution envisages only two classes of potential appointees, namely, citizens of Seychelles and persons who are not citizens but employed on contractual terms. Mr Burhan's "first" application or declaration of interest was for re-appointment" on contractual terms, the second application was based on his Seychelles citizenship. This is not contrary to the provisions of the Constitution.

8. At this stage I remind myself that this judicial review is to consider the procedure adopted and fairness of the CAA in coming to its decision to recommend the appointment of Mr Burhan as a puisne judge, which recommendation was acted upon by the President of the Republic of Seychelles. As far as the propriety of the procedure is concerned, I refer to my findings above. I have considered all the other contentious matters raised in the hearing and whether, in coming to its decision, the CAA has acted in a fair and equitable manner. I am reminded that the grounds of challenge in matters of judicial review may be divided basically into three categories, namely illegality, irrationality or unreasonableness and procedural impropriety. I have fully considered the submissions by all three counsel relating thereto. I refer to my specific findings as stated above.

[11] I find that there was no procedural impropriety. I find that, in coming to its decision, the CAA acted legally, in good faith, rationally, reasonably, impartially and with fairness. The petitioner's application fails.

[12] Accordingly, I dismiss the petition with costs.

DUFFETS v LAPOURIELLE

S Govinden J
1 March 2017 CA 24/2016; [2017] SCSC 196

Private international law – Constitution – applicability of Hague Convention – child relocation – habitual residence – Family Tribunal's jurisdiction

The appellant brought her two-year-old sons from France to Seychelles without their father's consent. Afterwards she applied for custody of the children to the Family Tribunal in Seychelles. The application was rejected on the ground that the children were habitual residents of France and the Tribunal therefore did not have the jurisdiction to hear the case. The appellant appealed against that ruling.

JUDGMENT Appeal allowed. The Family Tribunal ordered to hear the application for custody of the children on its merits.

HELD

1 Judicial notice is not to render the international instrument directly enforceable as Seychelles national law but to take cognisance of the international obligations of Seychelles as a signatory State in line with art 2 of the Hague Convention.
2 In determining a child's habitual residence, the appropriate approach is to look at all the circumstances of the case in order to see where the child's centre of interests is. In doing so, the courts recognise as one factor the relevance of the intention of those holding parental responsibility.
3 The parental intention to settle with the child in a new state if manifested by some tangible evidence should only be seen as a piece of evidence indicative of where the child is habitually resident.
4 The test for the habitual residence of a child is the place which reflects some degree of integration by the child in a social and family environment. In particular, duration, regularity, conditions and reasons for the stay on the territory of the Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state should all be taken into consideration as appropriate to the child's age.

Legislation
Constitution, arts 1, 5, 25, 32, 48, 64, 68
Children Act, s 78
Civil Code, arts 102
Evidence Act

Cases
Pragassen v Pragassen [2015] SCSC 626

Foreign cases
Attorney-General v Mutana and Others [2013] ZMSC 38
Fletcher v Fletcher (1948) (1) SA 130 (A)
Maunsell v Olins [1975] AC 373
Paquete Habana 175 US 677 (1900)

Foreign legislation
Hague Convention on the Civil Aspect of International Child Abduction, arts 2, 4, 12, 13, 20, 21

Counsel L Boniface for appellant
A Benoiton for respondent

S GOVINDEN J

[1] This is an appeal from a ruling of the Family Tribunal in Case No 141 of 2016 delivered on 19 October 2016 (the "Tribunal's Ruling").

[2] At this juncture, it is also opportune to note that the "execution" of the Tribunal's Ruling has been stayed by this Court pending the final determination of this appeal by way of ruling delivered on 27 December 2016 in MA 315 of 2016.

[3] The Tribunal's Ruling arose as a result of an application for custody filed by the appellant in respect of minor twins Melodie and Raphael Lapourielle Duffets (the "Minors") of 3 May 2016.

[4] It followed that by way of a reply of 7 September 2016, the respondent being the father of the Minors raised a preliminary objection on a point of law to the effect that the Family Tribunal did not have jurisdiction to hear and determine the matter as filed namely the issue of custody for the minors who were habitual residents of France and therefore subject to the jurisdiction of the French courts. It was further argued that the appellant had breached the Hague Convention on the Civil Aspect of International Child Abduction (the "Hague Convention") by removing the Minors from France where they resided since birth.

[5] The Tribunal after having heard the parties by way of written submissions decided as follows:

> Page 4 paragraph 2: …The minors had resided in France since their birth on 18th October, 2014 and had never travelled to Seychelles prior to 8th April 2016. At the time of the filing of the present application the minors had been in Seychelles for less than a month and were already the subject of a custody and access order before the French Tribunal. *The fact that the minors have recently moved to Seychelles and that the Applicant wishes to reside in Seychelles does not make the minors habitual residents of Seychelles. The Applicant's contention is not only not supported by law but also by commonsense. The underlying principle of custody jurisdiction law is that the child's home jurisdiction is the primary in determining child's custody jurisdiction.*
>
> Page 4 paragraph 3: Custody jurisdiction law essentially makes sure that a person cannot move children to another state in order to get favourable custody order in the new state's court or tribunal to evade an existing order. In the case of *'Gonthier v/s Carbognin case No. 322/11', this very Tribunal held that where there is already a custody or access order in place and one*

> *wants the order to be varied, that person needs to go to the court of the state that originally issued or granted the order unless neither parent resides in that state anymore.* This principle was upheld in the case of 'Pragassen v/s Pragassen', Civil Appeal No. 20/2015. In view of the foregoing, this Tribunal finds that the minor twins Melodie and Raphael Lapourielle Duffets are habitual residents of France and not that of Seychelles.
>
> Page 6 paragraph 3: Seychelles acceded to the Hague Convention on the Civil Aspect of International Child Abduction in April 2008 and since then, we have seen its application in a number of cases before this Tribunal. Any uncertainty as to the legality and the effect of the Hague Convention in our jurisdiction was laid to rest in the case of Pragassen (supra) where the Learned Chief Justice held that "the convention imposes a duty on the authorities in Seychelles including the courts to facilitate the return of the child to the jurisdiction in which the child has residence".
>
> Page 6 paragraph 4: For the reasons given above, this Tribunal finds that the minors Melodie and Raphael Lapourielle Duffets are habitual residents of France and that this Tribunal does not have the jurisdiction to hear this matter. The application for custody dated 3rd May 2016 is therefore dismissed.
>
> [Emphasis added]

[6] The appellant's grounds of appeal are clearly set out in the Memorandum of Appeal of 19 December 2016 to the following effect:

(i) That the Family Tribunal erred in deciding that the minor twins Melodie and Raphaël Lapourielle Duffets as habitual residents of France and not that of Seychelles;
(ii) That the Family Tribunal erred in determining that the parents of Melodie and Raphaël Duffets shared joint parental custody of the minors;
(iii) That the Family Tribunal erred in stating that the father "enjoyed visitation rights" which were affected when the minors were removed from France;
(iv) That the Family Tribunal erred in finding that the minors removal from France without the consent of the father was a violation of Articles 3 and 5 of the Hague Convention; and
(v) That the Family Tribunal failed to consider factors which would not be in favour of the minors before being returned to France.

[7] The appellant hence moves as a result for the reversal of the Tribunal's Ruling.

[8] The respondent on his part through his counsel Ms Alexandra Benoiton vehemently objects to the appeal as per the grounds as cited.

[9] Both counsel were invited to submit written submissions in this appeal to expedite the matter in view of its nature and counsel were further invited by the Court to submit a statement of agreed facts for the purpose of this appeal which was promptly acceded

to so as to enable this Court to properly adjudicate over all the issues encompassed in this matter and more particularly to be enlightened on the issue of the residential status of the minors' parents and the minors themselves both in France and in Seychelles.

[10] Now, as per the statement of agreed facts the parties have agreed as follows, that:

(1) The Minors were born in France and up until April 2016 lived exclusively in France;
(2) The Minors' parents shared custody of the Minors by virtue of a judgement of the 'Tribunal de Grande Instance de Nanterre' dated 29 April 2015;
(3) The appellant later moved the Minors to the South of France at which point the respondent applied for variation of access in order to have more time with the Minors and the restriction of jurisdiction removal was removed on 15 January 2016;
(4) On or around 8 April 2016, the appellant left France with the Minors without informing the respondent where she was going. The appellant wrote a letter to her lawyer on 8 April 2016 saying that she was going to Seychelles for a few weeks;
(5) Within three weeks of arriving in Seychelles, the appellant applied to the Family Tribunal for custody of the Minors;
(6) The appellant was residing in France for many years prior to coming to Seychelles. The children were born and grew in France and up until the time that the appellant decided to come to Seychelles in April they had never visited Seychelles;
(7) The respondent, his family and friends of the Minors are currently in France;
(8) The appellant is a Seychellois by birth and obtained French nationality only because of her father being a French national.

[11] Further the Court noting the supporting documents to the Memorandum of Appeal which documents were duly served on the counsel for the respondent and which remain uncontested to date, both Minors have Seychellois nationality and hold Seychellois passports issued by the Seychelles Immigration Authorities.

[12] After having carefully considered the thorough written submissions of both counsel as submitted to this Court (for which they are commended), as well as having carefully scrutinised the Tribunal's Ruling in the light of the proceedings before it and submitted to the Court for the purpose of this appeal, this Court is being called upon to decide on a very specific legal issue of the "Jurisdiction of the Family Tribunal vis-à-vis the Application for custody as filed by the Appellant before the Family Tribunal by virtue of Section 78(1)(a) of the Children Act, 1982 (as amended) and (the "Act") in pursuance to the Tribunal's exercise of its statutory Jurisdiction to hear and determine an application for custody with regards to the minors".

[13] The most relevant question to be asked and answered by this Court with direct reference to the above issue is "What is the enforceability status in Seychelles of the Hague Convention as acceded to by Seychelles by its instrument of accession to the depository at the Hague on 10 September 2008 and entering into force for the Republic on 1 December 2008?".

[14] First and foremost, it is important to state that the extent to which a treaty is enforceable in a State party either by way of ratification and or accession which terms are two different ways for the States to become party. The fact of being a party then conveys the same obligations under the treaty, and in this case the Hague Convention, depends entirely on the law and legal system of the State and in this case Seychelles as read with the applicable doctrine of accession to international conventions, which can be either "monism" or "dualism". These terms are used to describe two different theories of the relationship between international law and national law. Many States, perhaps most, are partly monist and partly dualist in their actual application of international law in their national systems.

[15] Perhaps at this stage it is only reasonable that the specificities of those two different theories are briefly explained in the search as to which one is either "singly" and or "dually" applicable in Seychelles for the purpose of enforcement of treaties at the national law level.

[16] Monists accept that the internal and international legal systems form a unity. Both national legal rules and international rules that a State has accepted, for example by way of a treaty, determine whether actions are legal or illegal. In a pure monist State, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates the law into national law. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. In that light, in its pure sense, a judge can declare a national rule invalid if it contradicts international rules because, in some states, the latter have priority.

[17] Just by way of illustration the principle of monism in action, in some States, like in Germany, treaties have the same effect as legislation, and by the principle of *lex posterior*, only take precedence over national legislation enacted prior to their ratification. In its most pure form, monism dictates that national law that contradicts international law is null and void, even if it predates international law, and even if it is in the Constitution.

[18] On the other hand, the theory of dualism simply separates national law and international law as two independent/different systems thence the name dualism.

[19] Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. If therefore, a State accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. But one cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it.

National laws that contradict it remain in force. According to dualists, national judges never apply international law, only international law that has been translated into national law.

[20] It follows, therefore, under the dualist theory that international law as such can confer no rights cognisable in the municipal courts. It is only insofar as the rules of international law are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations.

[21] Now, if international law is not directly applicable, as is the case in dualist systems, then it must be translated into national law and existing national law that contradicts international law must be "translated away".

[22] On the other hand a third category of "mixed" monist-dualist system also exists in states like the United States latter by way of example whereby international law applies directly in the US courts in some instances but not in others. The US Constitution, at its art VI for example, does indeed say that treaties are part of the Supreme Law of the land. However, there are instances of recent status where the Supreme Court has stated that some treaties are not "self-executory". Such treaties must be implemented by statute before their provisions may be given effect by national and subnational courts. Similarly, with regards to customary international law, the US Supreme Court stated, in the case of *Pacquete Habana* (1900) 175 US 677, that "international law is part of our law". However, it also stated that international law would not be applied if there is a controlling legislative, executive, or judicial act to the contrary.

[23] After having explored to my mind with reasonable certainty, the theoretical definitions and practical implications of the implementation of the above-mentioned international law principles by signatory States to treaties, it brings me back to the specific circumstances of this case with direct reference to the Seychelles with respect to the Hague Convention.

[24] What is the approach adopted in Seychelles? In order to answer that question, I refer to the supreme law of the land which is no other than our Constitution at its art 1 as read with arts 5, 48 and 64 thereof. For the sake of clarity:

> Article 1:
> Seychelles is a sovereign democratic State;
>
> Article 5:
> This Constitution is the Supreme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void;
>
> Article 48 (Consistency with international obligations of Seychelles):
> This Chapter shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles in relation to human rights and freedoms and a *court shall, when interpreting the provision of this chapter, take judicial notice of –*
>
> *(a) the international instruments containing these obligations ....*

> Article 64 (Diplomatic representation and execution of treaties):
> (3) The President may execute or cause to be executed treaties, agreements or conventions in the name of the Republic.
> *(4) A treaty, agreement or convention in respect of international relations which is to be or is executed by or under the authority of the President shall not bind the Republic unless it is ratified by –*
> *(a) An Act; or*
> *(b) A resolution passed by the votes of a majority of the members of the National Assembly.*
>
> [Emphasis added]

[25] A careful scrutiny of the above-cited constitutional provisions, which to my mind are relevant with regards to the international obligations of Seychelles in relation to execution of treaties, calls for the legal interpretation of the Constitution in its legal context which is totally dependent on the nature of the legal context and incorporated in this system of the recognition of the uniqueness of our legal context.

[26] Now in adapting the above highlighted approach as Lord Simon explained in the case of *Maunsell v Olins* [1975 AC 373,"The first task of a court of construction is to put itself in the shoes of the draftsman to consider what knowledge he had and, importantly, what statutory objective he had…being thus placed… the court proceeds to ascertain the meaning of the statutory language".

[27] Further in the case of *Attorney-General v Mutuna and Ors* [2013] ZMSC 38, the following was said:

> The primary rule of interpretation applicable in construing the Constitution is that the words should be given the ordinary grammatical and natural meaning and that it is only where there is ambiguity in the natural meaning of the words used that the court may resort to purposive interpretation of the constitution.

[28] It is therefore, common cause that many courts have applied the literal rule of interpretation to constitutional texts. So applying this literal meaning in this context, it simply means that treaties, conventions and agreements in respect of international relations executed by or under the authority of the President (as is the case for the Hague Convention), shall not bind the Republic unless they are ratified by an Act; or a resolution passed by the votes of majority of the members of the National Assembly.

[29] Further extending that literal interpretation to the provisions of art 48 of the Constitution with direct reference to the courts, it is also clear that legislators intended to lay a guideline and the procedure as to how the courts should approach and interpret national laws including the Constitution with respect to the provisions of international instruments and this by way of "judicial notice"; to my mind judicial notice in that context is to be read in the light of the provisions in this case with art 2 of the Hague Convention which states that: "Contracting states shall take all appropriate measures to secure within their territories the implementation of the objects of the convention. For this purpose they shall use the most expeditious procedures

available". Why I make reference to art 2 in line with the interpretation of art 48 in relation to our courts is simply because 'the legislation whereby Seychelles would implement the Hague Convention has still not been incorporated in national law as per the provisions of art 64 of the Constitution.

[30] Judicial notice is thus not to render the international instrument's provisions directly enforceable into Seychelles national law but to take cognisance of the international obligations of Seychelles as a signatory State in line with the provisions of art 2 of the Hague Convention. This approach is to my mind the best approach to be adopted in this case and will further reinforce the "moral obligation of Seychelles" vis-à-vis the legal enforceability of the Hague Convention provisions in its national law.

[31] Now, having laid down the foundation for ascertaining which theory is adopted by Seychelles with regards to implementation of the Hague Convention subject to the qualifications as explained above in para [30] with reference to courts, I hold the view that the provisions of art 68 of the Constitution are unambiguous and clear as to Seychelles' status *à l'égard* to the Hague Convention namely in that unless enacted in national law by way of an Act and/or majority votes of the members of the Assembly, it is not legally enforceable at the national level. It is my opinion therefore, that this should be the case so as to guard jealously the sanctity of our Constitution hence not giving constitutional provisions a meaning that may impeach the explicit, implicit and clear language hence construing the provisions of arts 48 and 68 in their ordinary sense.

[32] To that end, I find that although Seychelles acceded to the Hague Convention, its elevation to the status of national law by the Family Tribunal and taking precedence over the Children Act which is the sole national legislation with respect to custody applications in force in Seychelles and applicable in this case is grossly erroneous in law and reliance on the cited case law of *Pragassen v Pragassen* [2015] SCSC 626, was not interpreted in context. The courts are to be a facilitator in terms of its obligation to take judicial notice of international treaties but not to enforce nationally the non-domesticated international instrument.

[33] In the specific circumstances of this case and in order to give a wholesome judgment with regards to all issues raised in this appeal other than the national enforceability status of the Hague Convention in Seychelles which to my mind goes to the crux of this appeal and treated at para [32] above, I deem it crucial to also consider the other scenario should the Hague Convention have been directly enforceable under our national law taking note of the specific facts of this case as endorsed by the statement of agreed facts and proceedings before the Family Tribunal and taken into consideration in its impugned ruling.

[34] I thus in furtherance to the first ground of appeal refer to the provisions of art 4 of the Hague Convention which provides for the Convention's applicability in cases of a child who was habitually resident in a contracting state immediately before any breach of custody or access rights. Right of custody is defined as "rights relating to the care of the person of the child and in particular, the right to determine the child's place of residence" and access rights is defined in turn as "including the right to take a child for a limited period of time to a place other than the child's habitual residence".

[35] The Family Tribunal in its impugned ruling considered that the habitual residence of the minors as being France based on its analysis of the period the time the minors remained in France since birth and the time they spent in Seychelles prior to the application before the Family Tribunal leading to their conclusion at p 4 of its ruling that:

> …The minors had resided in France since their birth on 18th October, 2014 and had never travelled to Seychelles prior to 8th April 2016. At the time of the filing of the present application the minors had been in Seychelles for less than a month and were already the subject of a custody and access order before the French Tribunal. *The fact that the minors have recently moved to Seychelles and that the Applicant wishes to reside in Seychelles does not make the minors habitual residents of Seychelles. The Applicant's contention is not only not supported by law but also by common sense. The underlying principle of custody jurisdiction law is that the child's home jurisdiction is the primary consideration in determining child's custody jurisdiction.*
>
> [Emphasis added]

[36] Now, based on the recent developments on the meaning of habitual residence in alleged child abduction cases, Paul Beaumont and Jayne Holliday at the conference on "Private International law in the Jurisprudence of European Court Family at Focus" held in Osijek, Croatia, June 2014 stated that –

> A popular choice of connecting factor with the Hague Conference since the 1960s, the concept of habitual residence of the child has clearly changed since it was chosen as the sole connecting factor within the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The view held at the time of drafting, that a person's habitual residence was simply a question of fact and therefore a formal definition was of no practical use proved not as simple to apply in relation to the habitual residence of the child as first thought, with the issue of where the child is habitually resident often being contentious. The child's habitual residence for the purpose of the Convention looks to the habitual residence immediately prior to the child's wrongful removal or retention. Without the identification of the habitual residence at the time of the wrongful act it is not possible to work out whether the child's removal or retention was lawful or not.
>
> Children may acquire a new habitual residence in the country they have been abducted to or retained due to the passing of time or more speedily if their relocation there was lawful at the time they moved there. In other situations a child may be found to have more than one habitual residence or none at all. Indeed a question that pushes the concept of habitual residence to its limits … [is] whether a very young child (a newborn child) can be habitually resident in a country that the child has never been to, arguing that it makes sense that the newborn acquires the habitual residence of the custodial parent(s).

> The use of the connecting factor of the child's habitual residence within the Abduction Convention was originally designed to protect children from harm in cases of wrongful removal or retention by securing their prompt return of the children to the State with which they had the strongest connection. The idea being that, the child's habitual residence immediately prior to the abduction would provide the most appropriate forum for a custody hearing.
>
> In order to determine the child's habitual residence, the courts were to give the concept of habitual residence an autonomous definition. With the absence of a formal definition, differences in how it should be interpreted have become apparent.
>
> The differences in approach can be attributed to the lack of agreement on the weight to be given to the intentions of the custodial parent(s) in determining the habitual residence of their children. Overall, three main approaches have been identified. The first favours the intention of the person exercising parental responsibility to determine the child's habitual residence. The second approach values the child as an "autonomous individual" and uses the child's connection with the country to determine the habitual residence. *The third and the most recent approach, which is the approach taken by the CJEU [Court of Justice of the European Union], is a combined method, which looks at all the circumstances of the case in order to see where the child's centre of interests are but recognizes as one factor in doing so the relevance of the intention of those holding parental responsibility for the purpose of ascertaining where the child is habitually resident.*
>
> [Emphasis added]

[37] In determining the latest approach in the context of jurisdiction for parental responsibility cases, it has been the view of the CJEU that "the parental intention to settle with the child in a new State if manifested by some tangible evidence … should only be seen as a piece of evidence indicative of where the child is habitually resident. That that evidence should be weighed by the court alongside all the circumstances of the case to see which residence of the child reflects 'some degree of integration in a social and family environment.' Hence the resulting test developed being 'the place which reflects some degree of integration by the child in a social and family environment. In particular duration, regularity, conditions and reasons for the stay on the territory of the Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State should all be taken into consideration obviously appropriate to the child's age'."

[38] Now, "with regards to the aspect concerning family and social relationships, the CJEU considered that the relationships to be considered vary according to the child's age. If the child was very young and was dependent on the custodial parent(s) then the court needed to consider the social and family relationships of the parent(s) with the lawful custody in order to determine the habitual residence of the child".

[39] It is important to note at this juncture that prior to the latest current test for the habitual residence of a child, "the definition that was initially used by UK Supreme Courts for determining habitual residence for the purpose of the Abduction Convention followed the parental intention approach … equated the concept of habitual residence with that of ordinary residence, placing emphasis on the residence having a settled purpose".

[40] Now, it is the opinion of this Court that the most suitable and appropriate approach which encompasses all the intertwined elements of the definition of habitual residence of a child for the purpose of the Convention is the third and the most recent approach, which is the approach taken by the CJEU, "being a combined method, which looks at all the circumstances of the case in order to see where the child's centre of interests are but recognizes as one factor in doing so the relevance of the intention of those holding parental responsibility for the purpose of ascertaining where the child is habitually resident".

[41] Now, applying the facts of this case to the adopted test, it is obvious that the Tribunal accepted in its impugned ruling at p 2 thereof, as background of the case that:

> The parties are the minors' parents born on the 18th October 2014 in Paris, France. The Appellant is a Seychellois and French national who studied in France and was residing in France at the time of the birth of the minors. The Respondent is a French national. Following the birth of the minors the parties separated and a battle for custody of the minors ensued before the French Tribunals. On the 29th April 2015, the "Tribunal de Grande Instance De Nanterre" gave a summary judgment granting inter alia joint custody to the parents. The summary judgment further specified that the habitual residence of the minors was to be with their mother and their father, the Respondent to the present application was to have visitation rights to the minors on Wednesdays and Saturdays as well as Mondays and Thursdays on the second weeks of July and August 2015. Asocial inquiry report was also ordered and the minors were not to leave jurisdiction of France without prior consent of both parents.
> That on the 15th January 2016, the same Tribunal gave its final judgement confirming joint parental custody to the parents and extended the father's visitation rights to two week-ends per month and 6 consecutive days per month on top of half school holidays access. By virtue of the same Judgement the non-removal order forbidding the removal of the minors from the jurisdiction of France was lifted. Following the said Judgement the minors were removed from the jurisdiction of France and brought to Seychelles by their mother on the 8th April 2016, without the consent of their father who at the time share joint parental custody of the minors.
> On the 28th April 2016 the Respondent to the present application filed a fresh application for sole custody before the Tribunal de Grande Instance de Valence" and same was heard ex-parte and on the 16th June 2016 the said Tribunal gave its judgement declaring the minors to be habitual residents of France and granted sole parental custody of the minors to their father, the Respondent. That following the delivery of the afore-mentioned judgement the Seychelles Social Services Department received information from the

> central authority of France that the Respondent, had lodged an application for the return of the minors to France under the Hague Convention. This was brought to the attention of the Tribunal by way of letter dated 31st August 2016 from the Social Services.

[42] The basis of the facts of the case leading to the Tribunal's Ruling as to habitual residence of the Minors is an *ex parte* order of a Tribunal in France which in effect was not properly produced in evidence for it did not follow the strict guidelines of the Evidence Act to the relevant effect hence reliance upon it is being questioned by this Court and the same applies to a letter sent to the Tribunal by the Social Services of Seychelles from allegedly French authorities based on the Hague Convention's enforceability in Seychelles in respect of child abduction cases. Noting the age of the minors and the consequences on their wellbeing and welfare and best interest, the Family Tribunal with respect ought to have been more professional in handling evidence in accordance to law in this matter but in my opinion grossly disregarded the same for reasons better known to the Family Tribunal.

[43] Further, it is clear that the 'Tribunal de Grande Instance de Nanterre' more particularly "Sur la demande relative à l'interdiction de sortie du territoire français" and I quote "En l'espèce, les parents s'accordent pour demander la main levée de l'interdiction de sortie du territoire des enfants. Il convient dès lors d'ordonner cette main levée" and further with regards to "la résidence des enfants: En l'espèce, conformément à l'accord des parties, à la situation actuelle des enfants en considération de leur intérêt, la résidence habituelle de Melodie et Raphael est fixée au domicile de la mère".

[44] It follows that the fact that the appellant being the mother of the minors travelled to Seychelles with the minors could not in the light of the reproduction of the extracts of the French Tribunal de Grande Instance de Nanterre's judgment, be said to have flouted the order by abducting the minors from French territory.

[45] It is undisputed that the appellant and her minor children are Seychellois nationals and all have Seychellois passports and are legally in Seychelles by virtue of their nationality and they all enjoy freedom of movement within Seychelles territory, the right to reside in any part of Seychelles, the right to leave and not to be expelled from Seychelles in line with the provisions enshrined in art 25 of our Constitution excepted as provided in the exceptions thereto namely being relevant to this case to my mind being more particularly, for the prevention of a crime or compliance with an order of a court.

[46] I reiterate as far as prevention of a crime under the Hague Convention is concerned in relation to the abduction of the Minors and breach of the Hague Convention, these aspects with respect have not been proven to the required standard before the Family Tribunal (for it endorsed a non-executory foreign judgment in our courts) and un-authenticated judgment for all intents and purposes.

[47] Further, as to the habitual residence of the Minors, it is clear that the Family Tribunal to my mind was guided by a very narrow interpretation of the definition of the term "habitual residence" of the Minors given the specific circumstances of this case

namely their nationality and that of the appellant being their natural mother and having a right of protection of her family as a fundamental element of society as enshrined in art 32 of our Constitution.

[48] The Family Tribunal by adopting a narrow interpretation of the habitual residence definition disregarded and omitted to give due regard to the age of the Minors, their upbringing by the appellant with the assistance of her mother who is also in Seychelles with her, and the domicile of the appellant being her country Seychelles. It did transpire in the proceedings before the Family Tribunal and remains undisputed that the appellant and respondent separated after the Minors were only three months old and in their best interests the Tribunal de Grande Instance de Nanterre, albeit granting joint custody to both parents, decided that the habitual residence of the Minors would be that of "le domicile de la mère".

[49] The appellant being in Seychelles as a Seychelloise with her Seychellois Minors and indicating to the Family Tribunal her intention to remain in her own country with proof of appurtenance and work-related duties (latter cut short only due to the intervention of the respondent) and in her own social and family environment together with her children upon arriving in Seychelles after a month of her arrival and the conditions for her stay on the territory, the Family Tribunal in the opinion of this Court ought to have considered the best interests of the children first in view of their age and their dependence on the appellant, as recognised by the Tribunal in France at first instance, prior to ruling simply on the issue of residency as it did.

[50] Further even our local case law has further reinforced the current habitual residency test as upheld by the CJEU, in the matter of *Air Seychelles Limited v Richard Grice* (Civil Side No 254 of 1993), (albeit the facts were different to the current matter but the principle remains), that the Court ruled citing Dicey and Morris *Conflict of Laws* (11th Edition) as to the meaning of the word residence as follows:

> The word 'Residence' has different meanings in different branches of law. It is clear that it must be distinguished from mere presence, the state of being found in a country, but the nature of the distinction and the factors which should be taken into account will vary with the subject matter.

Article 102 (1) of the Civil Code states that:

> The residence of a person shall be the place in which he resides in fact and shall not depend upon his legal right to reside in a country.

Article 102 (2) is as follows:

> In determining whether a person is habitually resident in a place, account shall be taken of the duration and continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence.

[51] It is thus the humble opinion of this Court that based on the illustration of the current latest approach to the definition of the "habitual residence" for the purpose of the Hague Convention (subject to this Court's ruling on its enforceability in

Seychelles), I find that the Family Tribunal erred in coming to the conclusion that the minors were not habitual residents in Seychelles given the specificities of this case upon the filing of the custody application before it.

[52] Having dealt with the grounds of appeal in direct reference to the "enforceability of the Hague Convention in Seychelles" more particularly ground of appeal No 4, and which was I should say the basis for the Family Tribunal surrendering its jurisdiction to the French courts and the "habitual residency" of the Minors specific to the first ground of appeal (should the Hague Convention have been applicable in any effect), the Court will move to consider grounds 2, 3 and 5 of the grounds of appeal which are mostly based on the interpretation of the orders of the Tribunal de Grande Instance de Nanterre.

[53] As to the second ground of appeal that the Family Tribunal erred in determining that the parents of the Minors held joint custody, it is clear and needs not to over-dwelt on by this Court that this ground is unsupported by the facts as admitted by the parties before the Family Tribunal. The judgment of the Tribunal de Grande Instance de Nanterre clearly states that and I quote "L'exercise de l'autorité parentale: s'agissant de l'autorité parentale…. En conséquence, l'autorité parentale est exercée en commun par les deux parents."

[54] A clear and literal interpretation of the said judgment cannot be faulted in that both parents shared joint custody hence the Family Tribunal cannot be faulted on that ground.

[55] As to the third ground of appeal that the Family Tribunal erred in finding that the father "enjoyed visitation rights" which were affected when the Minors were removed from France", it is subject to the Ruling on the applicability of the Hague Convention in Seychelles. The humble opinion of this Court that the Family Tribunal based on the judgment of the Tribunal de Grande Instance de Nanterre also rightly ruled as to the "visitation rights of the Respondent as prescribed in that judgment" and as per "le droit d'accueil du père" as enumerated at p 3 of the said judgment. However, as to whether such rights were affected when the Minors were removed from France, it is the opinion of this Court, on appeal, that the Family Tribunal exercising its jurisdiction under s 78 of the Children Act as far as the custody application is concerned ought to have taken into account the conditions as set out for "visitation rights" in the French courts prior to the move of the Minors to Seychelles and in doing that ensuring that both parties are protected to enjoy their right to their family and consider the impact on the best interests of the Minors which would also be ensured provided the Family Tribunal looked into the merits of the case before it (which it chose not to do at first instance hence this appeal).

[56] With regards to the last and fifth ground of appeal that the Family Tribunal failed to consider factors which would not be in favour of the Minors before being returned to France, I believe this Court cannot be but clearer as far as the interests of the Minors are concerned. The whole basis of our Children Act and the relevant provisions vis-à-vis custody applications are geared towards judicial decisions and judgments being delivered in the best interests of the child. Best interests of the child is to be decided

on the facts of each case individually and the Family Tribunal in this case, again subject to the ruling as far as to the applicability of the Hague Convention is concerned, should have also had sight of the very provisions of the Hague Convention in that respect, namely art 13 which provides that –

> notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that … there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. … In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child.

[57] I further wish to stress that art 20 of the Hague Convention further states that the return of a child under the provisions of art 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms whilst safeguarding arrangements for organising effective exercise of access in the same way as an application for the return of a child. As to the latter, art 21 of the Hague Convention refers.

[58] What is to be derived from those articles of the Hague Convention is that, even international law protects the family unit believing that if the family unit is protected then all the family members will be protected within it. Further, interests of the child is a concept of evolving capacities of the child which reflects children's different rates of development. Hence the pace of a child's development must be taken into account not in a way that deprives children of their rights but in a dynamic creative manner which enhances their rights; and what better way to describe interests of the child.

[59] Did the Family Tribunal fail to consider factors which would not be in the favour of the Minors being returned to France? The answer based on the above analysis of principles is in the affirmative. Why? There was evidence before the Family Tribunal through pleadings of the incidents leading to the judgment of the Tribunal de Grande Instance de Nanterre, namely the character of the respondent towards the appellant, their accommodation conditions in France and I should say temporary status in France in view of the status of the appellant in France and her mother's medical condition (which latter evidence was before the Tribunal at the time of the hearing of the plea *in limine litis* as to jurisdiction). This led to the fears of the appellant as stated before the Family Tribunal about her minor children being returned to France.

[60] Noting the peculiar social background as was displayed by the pleadings before the Family Tribunal and all the circumstances of this matter as illustrated above and ruled upon, I humbly find on appeal, that noting the background of the parties and the Minors in this matter prior to their being moved to Seychelles 'especially in view of their very minor age', it would not have been in the best interests of the children to be returned to France where they lived with the appellant "as a student", as ruled by the Family Tribunal.

[61] In further reinforcing the decision of this Court on this appeal, I find support in the ratio of the leading case in Africa which set the pace for determining the custody of a child; in the celebrated case of *Fletcher v Fletcher* (1948) (1) SA 130 (A) the Appellate Division confirmed that "the most important factor to be considered in issues such as custody and access is the best interests of the children and not the rights of parents".

[62] Having considered all the grounds of appeal, I find that the appeal succeeds on the basis of non-applicability of the un-domesticated provisions of the Hague Convention in Seychelles as analysed and that the Family Tribunal as a result should not have abdicated its jurisdiction to that of the French courts in the circumstances of this case with reference to the appellant's custody application.

[63] I further find however, that Seychelles being a state party to the Hague Convention, the Hague Convention itself at its art 13 does not preclude the courts of a party State's national jurisdiction from ordering the non-return of a child under the Hague Convention on the basis of the best interests of the child and I so further find that based on the best interests of the child subject to the ruling on the non-applicability of the Hague Convention, that it would not be in the best interests of the Minors to be returned to France as ordered by the Family Tribunal.

[64] This appeal therefore succeeds and the Family Tribunal is hereby ordered to hear the application for custody as filed under the Children Act on its merits and the status quo of the Minors custody as per the stay order of 27 December 2016 remains unchanged subject to access rights to be determined by the Family Tribunal to the benefit of the respondent.

[69] All the above said, the appeal is allowed and the Department of Social Services, the Police and Immigration Authorities are to be informed accordingly and the Family Tribunal is hereby ordered to give effect to this judgment with immediate effect.

MOREL v NDEA, GOVERNMENT OF SEYCHELLES & ATTORNEY-GENERAL

G Dodin, D Akiiki-Kiiza, F Robinson JJ
16 March 2017 [2017] SCCC 2; CP 11/2014

Constitution – arrest – compensation for detention

The petitioner was arrested in August 2013 and held on remand till September 2014 when he was released on a finding of no case to answer. He then claimed compensation on the grounds that the finding of no case to answer meant his arrest and detention were unlawful.

JUDGMENT Petition dismissed.

HELD

1 The Constitutional Court is not the proper court to determine whether an arrest and/or detention is unlawful.
2 The fact of an acquittal on a successful submission of no case to answer does not render the arrest and detention of the petitioner unlawful per se.

Legislation

Constitution, art 18
Criminal Procedure Code, ss 18, 24, 100, 101, 105, 179, 342

Counsel A Amesbury for petitioner
A Madeleine for respondents

G DODIN J

[1] The petitioner was arrested on 1 August 2013 and subsequently charged with one count of importation of a controlled drug and one count of trafficking in a controlled drug. He was held on remand in custody pending trial. The trial concluded on 16 September 2014 when the Court ruled that the petitioner, then accused, had no case to answer and he was acquitted of all charges.

[2] The petitioner now contends that since he was acquitted on a ruling of no case to answer due to lack of evidence to establish a prima facie case against him, his arrest and continued detention were therefore unlawful and a contravention of art 18(10) of the Constitution.

[3] The petitioner prays for compensation in the total sum of R 12,159,500 being R 11,600,000 for unlawful arrest and detention, deprivation of liberty and enjoyment of life and family life; R 181,500 and continuing at R 11,900 per month for loss of earnings from 1 August 2013 until he secures alternative employment; R 88,000 for loss of compensation; and R 290,000 for loss of reputation and stigma of being seen as a drug dealer.

[4] Counsel for the petitioner submitted that art 18(10) of the Constitution stipulates that –

> A person who has been unlawfully arrested or detained has a right to receive compensation from the person who unlawfully arrested or detained that person or from any other person or authority, including the state, on whose behalf or in the course of whose employment the unlawful arrest or detention was made or from both of them.

On the facts and circumstances of this case the Court is being asked to determine whether the petitioner's initial arrest and continued detention by the respondents was lawful and whether the acts of the respondent entitles him to compensation under art 18(10).

[5] Counsel submitted that save for the provision of art 18(7) of the Constitution which says that"a person who is produced before a Court shall be released either unconditionally or upon reasonable conditions forappearance at a later date for trial….", there are no other substantive or procedural provision in regards to bail for an accused person.

[6] Counsel submitted that whilst ss 101(1) to (10) of the Criminal Procedure Code extensively lays down the legal procedure to be followed in regards to the granting of bail for a suspect (at pre-trial stage) and s 342 of the same Code makes procedural provisions for bail pending appeal for a convict, the law is silent in regards to bail for an accused person, save for the limited provisions contained in s 179 of the Criminal Procedure Code where the question of bail of an accused person is left entirely to the mercy of the court and the discretion of the presiding judge.

[7] Counsel submitted that in the absence of any specific provision for bail of an accused person, one must, as a matter of necessity, rely upon s 101 of the Criminal Procedure Code, taken together with art 18(7) of the Constitution which is in the same words as s 101(5) of the Criminal Procedure Code.

[8] Counsel submitted that s 101(7) is the only piece of legislation that provides for the "extension of remand". If the Court is to extend remand, then it cannot do so in isolation of the concomitant provisions of s 101 (7) which also provides that "the Court shall not grant an extension unless, having regard to the circumstances specified in sub-section (5), the Court determines that it is necessary to grant the extension."

[9] Counsel maintained that s 101(7) places a burden upon the respondent to satisfy the Court that there has been no change in the circumstances of the case thereby justifying the extension of remand sought. If the respondent cannot discharge that burden to the satisfaction of the Court, again, s 101(7) is clear and unambiguous in that it provides that: "… the Court shall not grant an extension unless, having regard to the circumstances specified in sub-section (5), the Court determines that it is necessary to grant the extension."

[10] Counsel submitted that furthermore, the "circumstances" referred to in s 101(7) and as are found at s 101(5) all relate to the circumstances of the case and not the personal circumstances of the accused persons. Counsel submitted that in the judge's

ruling, the reasons advanced for the denial of bail are that the offences charged are of a serious nature. Secondly that there is some material by way of affidavit to implicate the applicant in the offences alleged to have been committed and thirdly "there is strong likelihood of the Applicant failing to appear for the hearing of this case or otherwise obstructing the course of justice if he is remanded to bail". And this, despite the fact that out of a 23 paragraph affidavit in support of remand dated 13 August 2013 relied upon by the respondents there is only a brief mention of the petitioner in para 18 which stated that "the driver of the van spoke to Erick Muriuki Njgue". Then "the driver remained in the van".

[11] Counsel submitted that then in para 19 the petitioner is mentioned by name, was searched and nothing incriminating was found in the van or on his person, and he stated that he had come to pick up a girl whose name and telephone number he did not possess. This being the totality of the evidence against him, and sworn to by the respondent. There is not even a prima facie case against the petitioner that would justify his arrest and/or his detention for 13 and half months, if the applicable standard for determining whether his arrest and detention was in "accordance with fair procedures established by law".

[12] Counsel submitted that the Constitution as the supreme law dictates that any procedures and or law that is not in accordance with it, is null and void and since neither the Penal Code nor the Misuse of Drugs Act contain an offence called "being in the right place at the wrong time" there was insufficient evidence even on a prima facie to arrest, charge and detain the petitioner for 13 and half months and having done so the respondents are liable under art 18(10) of the Constitution to compensate the petitioner in the terms prayed for.

[13] Counsel for the respondents submitted that petitioner's arrest on 1 August 2013, detention at the Beau Vallon Police Station upon the order of the Magistrates' Court following his production before the same Magistrates' Court from 2 August 2013 until 14 August 2013 and his detention at the Mont Posee Prison upon the order of the Supreme Court following his formal charge before the Supreme Court on 14 August 2013 until 16 September 2014 were lawful and in accordance with fair procedures established by law as prescribed under art 18(2)(b) and 18(7)(b) and (c) of the Constitution and ss 18(a), 101(5)(b) and 179 of the Criminal Procedure Code.

[14] Counsel submitted that art 18(1) of the Constitution provides for payment of compensation to a person who has been unlawfully arrested and detained. Damages under the said art 18(1) of the Constitution are awarded for the constitutional hurt suffered by the person as a result of his unlawful arrest and detention.

[15] Counsel submitted that the petitioner did not suffer constitutional hurt neither by reason of his arrest on 1 August 2013 nor by his subsequent detention fortnightly after 2 August 2013 until 16 September 2014 when he was acquitted by the Supreme Court upon successful submission of no case to answer because there was reasonable and probable cause of his arrest, detention and prosecution. Hence he is not entitled to compensation or damages under art 18(10) of the Constitution.

[16] Counsel submitted that the petitioner's arrest and detention by the agents of the 1st respondent on 1 August 2013 was on reasonable suspicion of him having committed the offences of trafficking in a controlled drugs and conspiracy to traffic in a controlled drug, together with one Eric Muruiki Njue who had himself been arrested on 31 July 2013 on reasonable suspicion of having committed the offence on importation of a controlled drug. The petitioner's arrest was for the purposes of investigation and of producing him, if necessary, before Court in accordance with s 18(a) and 24 of the Criminal Procedure Code.

[17] Counsel submitted that within twenty-four hours of his arrest and detention, on 2 August 2013, in accordance with the fair procedures established under art 18(5) of the Constitution read with s 100(1)(a) of the Criminal Procedure Code, the petitioner together with Eric Edward Muruiki Njue were produced before the Magistrates' Court. Pursuant to an application by agents of the 1st respondent for further holding of the petitioner the Magistrate determined that the petitioner together with Eric Muruiki Njue should be remanded in custody at the Beau Vallon Police Station until 14 August 2014. This was consistent with art 18(7) of the Constitution as read with s 101 of the Criminal Procedure Code.

[18] Counsel submitted that on 14 August 2014, the petitioner was formally charged before the Supreme Court together with the said Eric Edward Muruiki Njue on two counts in criminal case CR 46/2013 for the offences of trafficking in a controlled drug and conspiracy to traffic in a controlled drug and was remanded in custody at the Montagne Posee Prison pursuant to an application by the state counsel representing the 2nd respondent under s 179 of the Criminal Procedure Code read with art 18(7) of the Constitution. The remand of the petitioner was made following his formal charge.

[19] Counsel submitted that at the time, the 2nd respondent had reasonable and probable cause for the prosecution of the petitioner in that it acted in the honest belief of the guilt of the accused based upon a full conviction, founded upon a reasonable grounds, of the existence of a state of circumstances as made out in paragraphs 4 to 20 of the affidavit in support which assuming them to be true,would reasonably lead any ordinarily prudent and cautious person to the conclusion that the person charged was probably guilty of the crime imputed.

[20] Counsel maintained that from 14 August 2013 until 16 September 2014, following fortnightly applications by the State Counsel representing the 2nd respondent, the petitioner was remanded into custody at the Mont Posee Prison. On 16 September 2014, the petitioner was acquitted by the Supreme Court following a successful submission of no case to answer made on his behalf. During the periods of pre-trial detention and detention during trial, the petitioner made applications to the Supreme Court to be released on bail and upon hearing the bail applications, the Supreme Court refused bail.

[21] Counsel submitted that in refusing bail, the Supreme Court acted judiciously in finding that the charge was of a serious nature, there was material by way of affidavit evidence implicating the petitioner in the offences which he was alleged to have committed and sufficient material to suggest that if remanded to bail the applicant will not avail himself to trial or would otherwise obstruct the course of justice.

[22] Counsel submitted that the subsequent acquittal of the petitioner on 16 September 2014 was on the ground that there was insufficient evidence led by the prosecution at the trial to support a prima face case against the petitioner.

[23] Counsel concluded that the petitioner's arrest and detention was fair and legal and did not constitute an infringement of his right to liberty as the acts of the 1st and 2nd respondents were consistent with the Seychellois Charter of Fundamental Human Rights and Freedoms. No damages are payable to the petitioner on account of his dismissal from his employment with the Seychelles Bureau of Standards which was on account of his failure to report for duty on 27 August 2013 and failing to inform the organization as to the reasons for not reporting for duty. No damages are payable to the petitioner on account of not seeing his children during the 13 ½ months of detention as he was not denied the opportunity of seeing them.

[24] Counsel submitted that alternatively, that if the Court finds that damages are due to the petitioner, the damages claimed by the petitioner are manifestly harsh and excessive in all circumstances consideration of the alleged contravention of the charter (which is not admitted).

[25] Counsel hence moved the Court to dismiss the petition.

[26] It is evident that any decision regarding whether or not compensation ought to be paid would depend on whether this Court is satisfied that the arrest, detention and continued detention of the petitioner in the criminal case was unlawful and a contravention of the relevant article of the Constitution, namely art 18.

[27] Article 18 of the Constitution states:

> (1) Every person has a right to liberty and security of the person.
> (2) The restriction, in accordance with fair procedures established by law, of the right under clause (1) in the following cases shall not be treated as an infringement of clause (1) –
> (a) the arrest or detention in execution of a sentence or other lawful order of a court;
> (b) the arrest or detention on reasonable suspicion of having committed or of being about to commit an offence for the purposes of investigation or preventing the commission of the offence and of producing, if necessary, the offender before a competent court;
> (c) the arrest or detention to prevent the spread of infectious or contagious diseases which constitute a serious threat to public health;
> (d) the arrest or detention for the treatment and rehabilitation of a person who is, or reasonably suspected to be, of unsound mind or addicted to drugs to prevent harm to that person or to the community;
> (e) the arrest or detention for the purpose of preventing the unauthorised entry into Seychelles of a person, not being a citizen of Seychelles, or for the purpose of deportation or extradition of that person;

(f) the detention for the rehabilitation and welfare of a minor with the consent of the parent or guardian or of the Attorney-General where such detention is ordered by a competent court.

(3) A person who is arrested or detained has a right to be informed at the time of the arrest or detention or as soon as is reasonably practicable thereafter in, as far as is practicable, a language that the person understands of the reason for the arrest or detention, a right to remain silent, a right to be defended by a legal practitioner of the person's choice and, in the case of a minor, a right to communicate with the parent or guardian.

(4) A person who is arrested or detained shall be informed at the time of the arrest or detention or as soon as is reasonably practicable thereafter of the rights under clause (3).

(5) A person who is arrested or detained, if not released, shall be produced before a court within twenty-four hours of the arrest or detention or, having regard to the distance from the place of arrest or detention to the nearest court or the non-availability of a judge or magistrate, or force majeure, as soon as is reasonably practicable after the arrest or detention.

(6) A person charged with an offence has a right to be tried within a reasonable time.

(7) A person who is produced before a court shall be released, either unconditionally or upon reasonable conditions, for appearance at a later date for trial or for proceedings preliminary to a trial except where the court, having regard to the following circumstances, determines otherwise –

(a) where the court is a magistrates' court, the offence is one of treason or murder;

(b) the seriousness of the offence;

(c) there are substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses or will otherwise obstruct the course of justice or will commit an offence while on release;

(d) there is a necessity to keep the suspect in custody for the suspect's protection or where the suspect is a minor, for the minor's own welfare;

(e) the suspect is serving a custodial sentence;

(f) the suspect has been arrested pursuant to a previous breach of the conditions of release for the same offence.

(8) A person who is detained has the right to take proceedings before the Supreme Court in order that the Court may decide on the lawfulness of the detention and order the release of the person if the detention is not lawful.

(9) Proceedings under clause (8) shall be dealt with as a matter of urgency by the Supreme Court and shall take priority over the proceedings of the Court listed for hearing on that day.

(10) A person who has been unlawfully arrested or detained has a right to receive compensation from the person who unlawfully arrested or detained that person or from any other person or authority, including the State, on whose behalf or in the course of whose employment the unlawful arrest or detention was made or from both of them.
(11) A person who has not been convicted of an offence, if kept or confined in a prison or place of detention, shall not be treated as a convicted person and shall be kept away from any convicted person.
(12) An offender or a suspect who is a minor and who is kept in lawful custody or detention shall be kept separately from any adult offender or suspect.
(13) A female offender or suspect who is kept in lawful custody or detention shall be kept separately from any male offender or suspect.
(14) Where a person is convicted of any offence, any period which the person has spent in custody in respect of the offence shall be taken into account by the court in imposing any sentence of imprisonment for the offence.
(15) A person shall not be imprisoned merely on the ground of the inability to fulfil a contractual obligation.
(16) Clause (15) shall not limit the powers of a court under any law in enforcing its orders.

[28] The operative requirement for a person to have recourse to art 18(10) is that the person must have been "unlawfully arrested or detained". Article 18(8) provides the procedures by which a detention can be determined to be unlawful by the Supreme Court. "A person who is detained has the right to take proceedings before the Supreme Court in order that the Court may decide on the lawfulness of the detention and order the release of the person if the detention is not lawful." Counsel for the petitioner seems to be arguing that it is the fact that the petitioner was acquitted on a submission of no case to answer which automatically and retrospectively makes the arrest and detention unlawful. This cannot be the case as art 10(8) makes obvious that it not up to the petitioner to determine that his arrest and/or detention were unlawful by reason of his acquittal.

[29] Indeed, it is obvious from the pleadings and the respective submissions of the parties that the applications for remand made before the Magistrates' Court and the Supreme Court were granted and the applications for bail made at pre-trial and during the trial were rejected by the Supreme Court. There is no claim or imputation of irregularity or impropriety by the arresting officers or the courts in their determinations.

[30] Furthermore, there is no provision giving the Constitutional Court the power to determine whether an arrest of an accused person by lawfully authorised officers of the law or continued detention of an accused person by order of the Supreme Court or Magistrates' Court is unlawful. That determination must come from the Supreme Court as per art 18(8). The Constitutional Court cannot assume that the arrest and/or detention were unlawful by reason of the acquittal of the petitioner by the trial court. There must first be a finding that the arrest and/or detention of the petitioner were unlawful in line with art 18(8).

[31] In fact, counsel for the petitioner recognises that there must be such determination of unlawful arrest and/or unlawful detention as stated in her submission at the 2nd para;

> On the facts and circumstances of this case the Court is being asked to determine whether the Petitioner's initial arrest and continued detention by the Respondents was lawful and whether the acts of the Respondent entitles him to compensation under Article 18 (10).

[32] Admittedly, if there had been a finding by the Supreme Court that the arrest and/or detention of the petitioner were unlawful, the Constitutional Court could have been petitioned to determine whether the right to compensation of the petitioner under art 18(10) has been violated if such compensation has not been forthcoming after such a finding. However, the Constitutional Court cannot determine "whether the Petitioner's initial arrest and continued detention by the Respondents was lawful".

[33] I note en passant but I do not make any finding thereon, that from our consideration of the pleadings, noting the agreed facts of the case as it proceeded before the Magistrates' Court and the Supreme Court, until the ruling on the submission of no case to answer in favour of the petitioner, all normal and lawful procedures set out by the Criminal Procedure Code and the Constitution appear to have been adhered to by the arresting officers, the prosecution and the courts and no successful challenge was ever made before the Supreme Court regarding the adopted procedures.

[34] Consequently, I find that there is to date no declaration by the Supreme Court on the lawfulness of the arrest and/or detention of the petitioner. I also find that the Constitutional Court is not the proper court to determine whether the arrest and/or detention of the petitioner were unlawful. I further find that the fact that the petitioner was acquitted on a successful submission of no case to answer does not render the arrest and detention of the petitioner unlawful per se.

[35] I therefore find that this petition is not properly grounded and as it stands, it lacks merit. Consequently, I am satisfied that there is no basis for payment of compensation under art 18(10) of the Constitution.

[36] This petition is therefore dismissed accordingly.

[37] I make no order for costs.

D AKIIKI-KIIZA J

[1] I have had occasion to read the draft judgment of my brother Justice Dodin. I generally agree with his judgment and reasons advanced therein. I therefore concur with the judgment and orders he has made.

[2] Order accordingly.

F ROBINSON J

[1] The petitioner brings a constitutional petition alleging that he was unlawfully arrested and detained and has a right under art 18(10) of the Constitution, to claim compensation from the persons who unlawfully arrested or detained him. The petitioner claims compensation from the National Drugs Enforcement Agency, 1st respondent; the Attorney-General representing the Government of Seychelles, 2nd respondent; and the Attorney-General, 3rd respondent. The respondents deny the claim of the petitioner. I have had the advantage of reading the judgment (in draft) of Dodin J in this constitutional case. For the sake of brevity, I adopt the facts of the case and the written submissions of counsel, which are read as part of this judgment.

[2] The petitioner exhibits a certified copy of the ruling in CO46/2013, as exhibit AM1 (the "Ruling"). In the Ruling, which is dated 25 September 2014, Mckee J ruled that —

> I find that there is insufficient evidence to support a prima facie case against the Accused. I uphold the No Case to Answer submission by the Defence. I find the Accused, Anthony Eugene Morel, Not Guilty and Acquit him of both charges against him, namely trafficking in a controlled drug of Class A and Conspiracy to traffic in a controlled drug of Class A.

[3] In the main, the petitioner contends that because he was acquitted on a ruling of no case to answer, it is proof that he was the victim of an unlawful arrest and detention, and he is entitled to be compensated, by the 1st and 2nd respondents, according to law. The respondents rely on art 18(2)(b), 18(7)(c) and 18(10) of the Constitution and ss 18(a), 101(5)(b), 105(5)(c) and 179 of the Criminal Procedure Code in support of their common position that there has not been a contravention or risk of contravention of the Constitution.

[4] In light of the above, the following issue is framed —

> Whether the evidence that the petitioner was acquitted on a ruling of no case to answer is proof that he was unlawfully arrested and detained and is entitled to be compensated by the 1st and 2nd respondents?

[5] I read the following articles of the Constitution, so far as relevant —

> 18 (2) The restriction, in accordance with fair procedures established by law, of the right under clause (1) in the following cases shall not be treated as an infringement of clause (1) —
>
> …
>
> (b) the arrest or detention on reasonable suspicion of having committed or of being about to commit an offence for the purposes of investigation or preventing the commission of the offence and of producing, if necessary, the offender before a competent court;
>
> …

(7) A person who is produced before a court shall be released, either unconditionally or upon reasonable conditions, for appearance at a later date for trial or for proceedings preliminary to a trial except where the court, having regard to the following circumstances, determines otherwise —

…

(c) there are substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses or will otherwise obstruct the course of justice or will commit an offence while on release;

…

(10) A person who has been unlawfully arrested or detained has a right to receive compensation from the person who unlawfully arrested or detained that person or from any other person or authority, including the State, on whose behalf or in the course of whose employment the unlawful arrest or detention was made or from both of them.

[6] I read paras 7, 8, 9, 10 and 11 of the constitutional petition —

7. The Petitioner avers that on the 1st August 2013, he was wrongfully arrested by the agents of the 1st Respondent whilst in the course of their employment with the 2nd Respondent and underwent 13½ (thirteen and a half) months in remand before being acquitted.

8. The Petitioner avers that every fortnight throughout the 13 and half months of pre-trial detention and periods of detention during the trial the 2nd Respondent requested and obtained ″his further remand″, without a proper evaluation of the facts and circumstances of his case.

9. On the 16th September 2014 the trial court acquitted him after he had served 13 ½ (thirteen and a half) months in custody on a no case to answer submission, finding that ″there is insufficient evidence to support a prima facie case against the Accused.

10. The Petitioner avers that under article 18 (10) of the Constitution he is a person who was unlawfully arrested and detained and has a right to receive compensation from the persons as averred above including the State, on whose behalf and in the course of whose employment the agents of the 1st and 2nd respondents were acting during the unlawful arrest and subsequent illegal detention.

11. The Petitioner avers that his subsequent acquittal by the trial court on the 16th September 2014, shows that he was the victim of an unlawful arrest and detention, and he is entitled to be compensated by the 1st and 2nd Respondents according to law.

[7] The petitioner avers that he was ″wrongfully arrested by the agents of the 1st Respondent″; that ″his further remand″ was applied for and granted ″without a proper evaluation of the facts and circumstances of his case″; and that "his subsequent acquittal by the trial court on the 16th September 2014, shows that he was the victim of an unlawful arrest and detention". It is to be noted that the record of proceedings was not produced in this constitutional case. Other than making those allegations, the constitutional petition makes no complaints about the alleged unlawful arrest and detention of the petitioner.

[8] The respondents' position is that the petitioner did not suffer constitutional hurt neither by reason of his arrest on 1 August 2013, nor by his subsequent detention every fortnight after 2 August 2013, until 16 September 2014, when he was acquitted, by the Supreme Court on a ruling of no case to answer because there was reasonable and probable cause for his arrest, detention and prosecution. Hence, the petitioner is not entitled to be compensated under art 18 (10) of the Constitution.

[9] I have considered the arrest and detention of the petitioner in light of the said provisions of the Constitution and the Criminal Procedure Code. In the circumstances I am satisfied that the respondents have proved that the arrest and detention of the petitioner was lawful and as for the evidence that the petitioner was acquitted on a ruling of no case to answer, I am of the opinion that it is not evidence that there was no reasonable and probable cause for his arrest and detention.

[10] For the reasons given above, I am satisfied that the petitioner is not entitled to be compensated under art 18(10) of the Constitution. Consequently, I dismiss the constitutional petition.

[11] I make no order as to costs.

MORIN & ORS v BARBIER

C McKee J
24 March 2017 CS 28/2014; [2017] SCSC 270

Property – right of way – compulsory acquisition of land – alternative access

The plaintiffs and the defendants were owners of property in Fairview Estate. The plaintiffs had been using a roadway over the defendant's land to access their property since the 1970s. Following the court proceedings initiated by the defendant, the government compulsorily acquired the defendant's land to secure the access to the plaintiffs' property pending the construction of an alternative route. After the alternative route had been built, the plaintiffs refused to use it due to safety concerns and kept using the original roadway over the defendant's land. The plaintiffs therefore sought a court order to formally grant them the right of way over the defendant's property and restrict the defendant from blocking the roadway.

JUDGMENT For the plaintiffs.

HELD
If an alternative way does not meet the regulatory safety requirements while the roadway over someone's private property is proven to be safer, more suitable and more practical, the right of way over that property would be granted.

Legislation
Civil Code, arts 682, 683

Cases
Azemia v Ciseau (1965) SLR 199
Clarisse v Gomme SSC 19 September 2002
Delorie v Alcindor (1981) SCAR 28
Delpech v Soomery (1980) SLR 135
Denise v Sullivan (2003) SLR 127
Georges v Basset (1983) SLR 177
Kate v Payet (1980) SLR 90
Laurette v Sullivan (2004) SLR 65
Mirabeau v Camille (1974) SLR 158
Norah v Otar (1983) SLR 55
Payet v Labrosse (1978) SLR 222
Potter v Cable & Wireless (1971) SLR 334
Rose v Monnaie (1997) SLR 177
Umbricht v Lesperance (2007) SLR 221
Uzice v Serret (1988) SLR 128
Vadivelo v Otar (1979) SLR 216

Counsel J Camille for plaintiffs
F Ally for defendant

C MCKEE J

[1] The plaintiffs and the defendant are owners of property in the residential area known as Fairview Estate, La Misere, Mahe. The parties have produced documents of title in support. The plaintiffs averred that they have a prescriptive right of way over a portion of the property belonging to the defendant, which portion is more particularly described as land parcel V10414. Each plaintiff seeks an order of this Court formally granting them a right of way over the property of the defendant. In addition the plaintiffs sought an order against the defendant restraining him from interfering or blocking the access roadway over land parcel V10414. The plaint was filed in the Registry of the Supreme Court on 19 March 2014.

[2] An interim injunction was granted on 21 March 2014 ordering the defendant not to interfere with the plaintiffs' use of the road over land parcel V10414 and to remove any obstruction thereon pending determination of the main suit. The defendant has complied with this order. Defences and counterclaim were lodged by the defendant on 30 July 2014. The plaint was amended on 27 October 2016 adding a further averment that the properties of the plaintiffs were within an enclaved area and that the only practical access to the public road was over land parcel V10414. In amended defences it was averred that the lands were not enclaved and that there was an adequate access by the road recently built by Government. Furthermore the defendant denied that the plaintiffs have any legal or prescriptive right of easement or access over land parcel V10414 and that any intrusion is unlawful.

[3] A number of photographs have been admitted into evidence and I will take these into account to assist me. However I have also taken the opportunity to visit the locus and walk the roads and routes referred and I will rely on my conclusions from the site visit

[4] I am advised that the main Fairview Estate was constructed to accommodate expatriate personnel of Costain Limited, international builders, the main contractor of the Mahe International Airport which was completed around 1971.

[5] Access to Fairview Estate is gained from La Misere Road which is the trans-island road connecting the west coast of Mahe with Victoria the capital. It was against this general background that the original tenants or "blockers" took up occupation of their "blocks" or plots of land on the upper reaches of Fairview Estate by arrangement with the Government of Seychelles. The present plaintiffs are either descendants of the blockers or purchasers of plots in the area. The original "blocks" were used for farming and agricultural purposes. With the passage of time the "blockers" established residences on the "blocks" and normal family life commenced there. The plaintiffs who are descendants of the original "blockers", spoke of leaving home on foot walking through the land parcel V10414 to the main road to catch transport for school.

General area of Fairview Estate and access thereto

[6] Access to Fairview Estate Road is from La Misere Road by either of two entrances. The lower entrance has been referred to as "the Chung Fai entrance" while the higher entrance was referred to as "the Lousteau Lalande entrance". The distance between the entrances is only a few hundred yards.

[7] Attending the *locus in quo* I entered by car at the Chung Fai entrance. The road goes uphill and then turns left, follows the contours of the hill but by a fairly level route before it then descends to the Lousteau Lalande entrance. Dwelling houses are built along this road. This is the Fairview Estate Road. The whole area of land in the ownership of the defendant which includes the dwelling house erected thereon and land parcel V10414 abuts the Fairview Estate Road.

[8] At present there is a motorable access road to the properties of the plaintiffs over land parcel V10414. This access roadway leads to the rear boundary of the defendant's plot of ground and then continues further on to the various plots of land occupied by the plaintiffs. I would estimate that the distance from Fairview Estate road to the rear boundary line of the defendant's property is some 50 yards.

Parcels of land in the ownership and occupation by the plaintiffs

[9] While at the locus I walked across land parcel V10414 on the existing roadway to view the properties of the plaintiffs. This led to the large area of ground where the properties of the plaintiffs are situated. At a fork in the road I followed the road to the left. This road took me past residences until I reached the property of the 1st plaintiff and his family. If I had taken the right fork I would have reached the residential properties belonging to the other plaintiffs. The location of the properties is shown on plans admitted into evidence. The 1st plaintiff and his family have residential accommodation on his plot of land from where he also conducts a commercial business. The evidence indicated that the remaining plaintiffs use their properties for residential purposes only. I then continued through the property of the 1st plaintiff, crossed a bridge and came to a junction in the road. I turned left and went downhill. This roadway, which is the alternative roadway built by Government, leads to Fairview Estate Road. I will call this the "alternative roadway".

THE EVIDENCE

[10] The 1st plaintiff, Cherubin Morin, who I considered to be the principal plaintiff, was the first to give evidence. He is aged 66 years of age. He described himself as a farmer rearing livestock such as pigs and chickens and also as a market gardener growing vegetables. He has been in business since 1974, a period now of some forty two years. His place of residence has been on this property since 1974. His property comprises three separate plots which were disponed in two documents of title produced as exhibits to the court.

[11] He knows the defendant and the property owned and occupied by him. He further stated that when he, Mr Morin, came to live in his property the property of the defendant was owned by a Mr Abhaye. Mr Morin stated that his property is not immediately adjacent to that of the defendant. The intervening property is the property belonging to the family Dogley who are represented by the 10th plaintiff, Mr Jemmy Dogley. I can find from my visit to the *locus* that the whole property of the defendant has a boundary with Fairview Estate Road, which is a public road. I also find from my visit that the property of the 1st plaintiff does not have a boundary with this public road and is located further up the hill. The 1st plaintiff stated that since 1974 he has used land parcel V10414 as his access to Fairview Estate Road. There was no alternative

access. He stated that this access was used by four "blockers" or farmers, including himself, who had been allocated plots of land for farming. The government assisted in the construction of a roadway through land parcel V10414 to allow the farmers access to and egress from their plots to bring materials in, produce out and to assist in their businesses. He gave the names of the other three farmers as Dogley, Cedras and another of Christian name "Will". At first this access was an earth footpath but as time progressed a footpath was insufficient and, following an approach by the 1st plaintiff, Government upgraded the access by paving and concreting. These improvements were carried out over a period of years between 1976 and 1986. It was the 1st plaintiff's evidence that he and the other plaintiffs' families have used land parcel V10414 as an access to the main road since 1974.

[12] The 1st plaintiff stated that he did not recall any court action against him by either Mr Abhaye or the defendant. He estimated that the defendant had moved into his property around fifteen to twenty years ago. He stated that on a number of occasions the roadway on land parcel V10414 had been blocked by the defendant thus preventing the plaintiffs and other residents access to their properties. There had been a number of verbal interchanges and police involvement. It was after a similar incident in 2014 that the present action was raised. The 1st plaintiff agreed that Government had provided an alternative roadway for him to gain access to his property but this alternative road was unsuitable for vehicular traffic including his own pick-up vehicle. It was also unsuitable for emergency vehicles. He confirmed that his property extended to seven or eight hectares, which included his residence, ground used for his commercial business of rearing livestock and growing vegetables. There were also a number of cold storage units. He had placed the business in the hands of his son, the 3rd plaintiff. He stated that trucks, in the course of this business, used the access roadway through land parcel V10414 since this is the only suitable access. Despite objection I allowed this evidence as it was relevant to the overall issue.

[13] In cross-examination defence counsel took the 1st plaintiff through the early history of his occupancy of his property. He was unsure of the precise year when the defendant took occupation of his property. He confirmed that the access provided over land parcel V10414 gave access to the dwelling house of the defendant and the previous occupier. Other neighbours in the upper hill area also used land parcel V10414 as access to their properties and continued to do so as it progressed from being a footpath to a road providing vehicular access. The 1st plaintiff was granted title to his first plot in 1980 and title to the remaining two plots in 1991. He explained that the problems of access over land parcel V10414 had existed for some twenty years after a period of calm immediately after the defendant's entry to his property. The 1st plaintiff stated that the defendant prevented tourists crossing land parcel V10414 when they sought to explore the upper areas. The 1st plaintiff stated that government vehicles also used land parcel V10414 to gain access to upper areas when drainage or water problems arose. The 1st plaintiff was reticent when referred to a similar case in 2002. The 1st plaintiff found the alternative roadway to be an unsafe stretch of roadway. The steepness of the gradient rendered it unsuitable for heavily laden delivery vehicles used in the course of his business.

[14] The 1st plaintiff was cross-examined. He recalled receiving a "lawyer's letter" intimating that he had no right to use the road crossing land parcel V10414. He recalled that the defendant had erected a notice that it was private property and that he was

denied access but agreed that he continued to cross land parcel V10414 since he had no alternative access. He knew that the defendant had been reinstated as owner of land parcel V10414 following the revocation of a prior compulsory purchase order in favour of Government. The 1st plaintiff had moved to this property shortly after his marriage and his family grew up there.

[15] The 1st plaintiff repeated that he had always used the access roadway over land parcel V10414 despite attempts by the defendant to block this route. Occupiers of the upper plots and also sightseeing tourists, military and local authority personnel also used land parcel V10414 to cross into upper areas. There had been repeated attempts by the defendant to block this access with rocks, and fallen trees. He agreed that heavy lorries either belonging to him or on his instructions used the access over land parcel V10414 in the normal course of his business, for example, for the delivery of meat. Large vehicles used in construction had also used this road access when he was carrying out improvements to his property.

[16] In re-examination, he confirmed that Mr Abhaye had not objected to his using the access over land parcel V10414; in fact, Mr Abhaye had benefitted since Government assisted in the improvement and development of the access roadway. In answer to questions from the Court the 1st plaintiff confirmed that he had started his cold storage business for meat some five years ago and that he now had five cold storage units and six containers in this aspect of his business. He advised that members of the Dogley family (namely, the 5th to the 12th plaintiffs) used the access over land parcel V10414.

[17] The 2nd plaintiff is the wife of the 1st plaintiff and the mother of the 3rd and 4th plaintiffs who reside near to her. She adopted the evidence in chief and cross-examination of her husband.

[18] The 3rd plaintiff is the son of the 1st plaintiff. He has had his own property since 2011. He resides close to the family property. He is a businessman with his father, trades under the name of Rosebelle Pty Limited and is involved in the breeding of pigs and chickens, market gardening and in the importation, storage and sale of meat, vegetables and flowers. He has trucks and tractors at the business premises.

[19] He has used the access over land parcel V10414 since he was a child when it was only a path paved with rocks. He stated that his family, the Dogley family, the Cedras family and Dr Ferrari all used this route as an access to Fairview Estate Road. He had used only this route for thirty six years originally as a pedestrian access and thereafter in the course of his business. He said that he never received a formal written notice instructing him not to use the access roadway over land parcel V10414. He was not aware of the reconveyance of the land parcel from Government to the defendant following revocation of the compulsory purchase order. He has not made use of the alternative access roadway provided by Government. He recalled the incident in the year 2014 when the defendant blocked the roadway leading over land parcel V10414.

[20] He was cross-examined and conceded that he had been shown a letter advising his father of the said reconveyance. He recalled that the road over land parcel V10414 had been paved with rocks and properly surfaced at a later date. He recalled ill-feeling between his father and the defendant. He could not give a date when the alternative

roadway had been built but he had only seen small cars using it, and then only rarely. He was unaware whether accidents had occurred on it. He denied that his continued use of the roadway over land parcel V10414 was to annoy the defendant or to bolster the plaintiffs' case that the alternative road was hazardous and dangerous.

[21] The next witness was Mr Peter Andrew Guy Sinon who has served Government in a number of capacities. As Minister for Agriculture between 2010 and 2014 he knew the farming community on the upper reaches of Fairview Estate, which he referred to as "Rosebelle Estate". He considered the 1st plaintiff to be the biggest farmer in the region. He knows the roadway crossing land parcel V10414, which he estimated to have been in existence for some forty-nine years, and in fact he still uses this roadway today. He recalled the incident in 2014 giving rise to this case. It was his understanding that in 2014 this access roadway was still "open". He was aware that large vehicles used the roadway across land parcel V10414 and understood this to be because there was no alternative access. He knew the full nature of the businesses conducted by the 1st plaintiff.

[22] In cross-examination he advised that he knew of government discussion concerning what had become a problem. He had driven over the alternative roadway but was not satisfied that it was suitable for the 1st plaintiff or other residents in the upper area. It was his opinion that the roadway over land parcel V10414 should remain open. In re-examination he expressed the view that the alternative roadway was unsuitable for the purposes intended and would be a dangerous route for drivers of lorries. Mr Sinon further explained his concerns. He had driven up the alternative roadway and found the road to be steep in certain parts which he felt could become slippery following rain. He felt that the driver of a lorry may lose traction in a climb. There would be danger to life if a vehicle left the road bearing in mind that there were dwelling houses situated below the roadway. He confirmed that Government had compulsorily acquired land parcel V10414 to ensure access to the upper area for the owners and occupiers of property situated there.

[23] The next witness was the 4th plaintiff, and a daughter of the 1st plaintiff. She is a self- employed with her own accounting and auditing business. She resides in a dwelling house on the property belonging to her father. She spent her early years living with her family before going overseas to study and work for the period from 1989 to 2012. She supported the evidence already led. She has always used the roadway over land parcel V10414 as an access to her property both as a young person and also following her return to Seychelles. She had never been told not to use this access but was aware of the general air of disagreement between her father and the defendant. It was her opinion that the alternative roadway was dangerous and unsafe for use. She found this road to be very narrow and very steep with a "huge curve" where vision was restricted. There was little room for manoeuvring safely if two vehicles met on the hill. She spoke of inadequate barriers and no barrier at a spot where there is a steep drop off the road.

[24] The next series of witnesses were the plaintiffs who were the direct descendants of Mr and Mrs Dogley, original blockers or farmers on this upper area. Their properties lay between the properties of the 1st plaintiff and the defendant. The 1st plaintiff had to cross Dogley land to reach land parcel V10414.The 6th, 7th, 8th, 9th and 10th plaintiffs gave similar evidence. Each plaintiff stated that his father had reared livestock and

grown vegetables. Each spoke of walking over land parcel V10414 during childhood and continuing to use this access during adulthood either on foot or by vehicle. They spoke to the transformation of the access from footpath to cemented roadway. They were aware that the defendant also used this roadway access to reach his own property. They were all aware of the 2014 incident when the defendant blocked the road. They were aware of the alternative roadway and considered it unsuitable for its proposed purpose.

[25] Robin Dogley resided in a property immediately adjacent to the property of the defendant. He said that Mr Abhaye had no objection to the farmers using land parcel V10414 as an access to the upper lands. He considered that the alternative roadway was a “small” road, non-motorable, dangerous and steep and would be unable to accommodate the volume of traffic brought about by the residents of the upper area. It was unsuitable for heavy trucks. The access over land parcel V10414 provided a shorter route than the alternative roadway to Fairview Estate Road.

[26] The 7th plaintiff Mr Will Dogley is fifty three years of age and has had his own property in the upper area since 1992 but prior to that he stayed with his parents. He returned from overseas in 2008 where he had studied and worked. He had always used the land parcel V10414 to reach his residence. He considered that the alternative roadway was very steep, dangerous when it rained and too narrow. He confirmed that the only access to his property was either over land parcel V10414 or the alternative roadway. The shortest route from his house to Fairview Estate road was over land parcel V10414. He had had no personal disagreements with the defendant between 2008 and 2014. He said the residents of the upper area had used land parcel V10414 for some forty years. He accepted that his neighbours, Lewis Victor, Francois Belmont and a Doctor Georges, travelled by the alternative roadway. He has only driven this road on occasions. He stated that Mr Victor, when driving a bus, would not use the alternative road during a rainy period. He found the alternative road was dangerous especially at the bend. There were no “passing areas” for vehicles. Vehicles of the Public Utilities Corporation used the route over land parcel V10414. There were approximately twenty-five residents in the upper area and those with cars drove over land parcel V10414

[27] The 10th plaintiff, Jemmy Dogley, the eldest son, gave similar evidence to that recorded above concerning the history of access over land parcel V10414 which he still used when visiting family. He knows the alternative roadway. He finds it difficult to negotiate and he is worried about a dangerous curve and blind corner.

[28] Ms Cecile Dogley, the 6th plaintiff, is a senior medical officer at Victoria Hospital. She owns a property on the upper estate. She continues to use the access roadway over land parcel V10414. She also walks down the alternative roadway on occasions but will not do so after dark. As normal in her profession she works irregular hours. She recalled an occasion in the late evening when a hospital staff bus could not negotiate the alternative roadway due to the wet road surface; the driver had to use the road over land parcel V10414.She further stated that the shortest route from her home to Fairview Estate road was by land parcel V10414. She conceded that she had seen vehicles use the alternative roadway.

[29] The 5th plaintiff, Mr Norbert Dogley, also gave evidence. He has stayed on the family property all his life as a child and later as an adult and family man. He has always used and continues to use the access roadway over land parcel V10414 to reach his home. He has not been told by the defendant not to cross land parcel V10414. He has not used the alternative road since he considers it dangerous. He acknowledged that on the Fairview Estate and also in Seychelles there were roads of varying gradients where care is required when driving.

[30] The 9th plaintiff, Simon Dogley, was the final witness from the Dogley family. He is a tour guide. He is aged forty-three and has always lived on the family property. He has always used the access over land parcel V10414 since childhood. Prior to the incident in 2014 he had never been told by the defendant not to use this access at land parcel V10414. He has walked the alternative roadway and driven it on rare occasions. He noted that there is a "blind spot" and vehicles coming from opposite directions would not have prior sight of each other. He also drew attention to a "precipice" at a particular stretch of this road. He also knew of the 2014 incident. He has seen some people drive on the alternative roadway out with his immediate family and the Morin family. He confirmed that a short stretch of road was built to connect the property of the 1st plaintiff to the alternative roadway.

[31] The next witness was Mr Rolly Sinon, the 15th plaintiff. He is also an owner of property in the upper area holding title in joint names with his father, Mr Rodace Cedras as fiduciary to the land. He is fifty years of age and has lived on the same property all his life. Since childhood he has always used as his means of access the roadway over land parcel V10414 despite the later availability of the alternative roadway. He, like others, knew the history surrounding this matter. He described the alternative road as "dangerous" and used it only on foot. He pointed out that there were now quite a number of people living in the upper area and access by the alternative roadway only would present a problem. This witness had also worked occasionally for the defendant.

[32] Mr France Sangoire, the 16th plaintiff, and his wife, Mrs Gerina Sangoire, the 17th plaintiff, gave evidence; she adopted the evidence of her husband. They acquired their plot of land in the upper area in 1994, built their house and have lived there for the past twenty years. Mr Sangoire retired from the police force in 2008. He stays with his wife, has three children, one of whom a daughter, also known as Franciska Etienne, resides nearby in her own house. She is the 14th plaintiff. She is separated from her husband, Jemmie Etienne, who is the 13th plaintiff.

[33] Mr Sangoire stated that he has also used the roadway over land parcel V10414. He recalled receiving a court document relating to this access in 2002 and appeared, represented in court, but could not recall the outcome. In any event he and his wife continue to use the road over land parcel V10414. He was present at the 2014 incident. He received no official notification of the construction of the alternative roadway. He stated that he had travelled this road by car when the weather is sunny but expressed the view that it would not be possible "in a transport". He recalled an occasion as a passenger in his car that it could not negotiate the road and his wife had to resort to the access over land parcel V10414. In cross-examination he stated that he had never owned a car and used the alternative roadway on foot. He saw the alternative road being built and thereafter made use of it after he saw other people using it. He agreed

with the suggestion that there was a “movement” amongst neighbours not to use the alternative road in an effort to persuade Government to call on the defendant to grant a right of way. He admitted that he knew of the reconveyance of land parcel V10414 back to the defendant and the latter’s request that the residents of the upper ground desist from using this plot as an access roadway.

[34] The court heard evidence from Mr Jean Francois Ferrari, a member of the House of Assembly and his father, Doctor Desire Jean Maxime Ferrari, a medical practitioner and former Government Minister between 1975 to 1984. Doctor Ferrari was Minister responsible for Land Acquisition and also held the portfolio for Planning, Development and Housing between 1978 and 1982. He was a proprietor of land at La Misere and had sold it to the 1st plaintiff. Mr Jean Ferrari had stayed at his father’s property and used the access roadway over land parcel V10414 with all other nearby residents. He also knew the history of this matter and came to hear of the alternative roadway. Doctor Ferrari confirmed that he bought a property, a former “block” occupied by one Rodace, during 1991 to 1992 and subsequently this land was formally transferred to the 1st plaintiff in 2011. During his period of residence he relied on the access over land parcel V10414 without objection from the defendant.

[35] Ms Vivienne Moustache, wife of the 15th plaintiff, also gave evidence. She has resided in the upper area for some seven years. She has used the access roadway over land parcel V10414 and also the alternative roadway. She will use the alternative access on foot when the day is sunny and dry but not when it is rainy weather as the road is slippery. She would not use the alternative access in a vehicle since there is a “blind bend” and if vehicles meet one vehicle needs to reverse to allow the other vehicle to progress. She advised the court that her husband suffers from epilepsy and an attack of epilepsy at home requires the services of an ambulance to carry him to hospital. She recalled that on two occasions the ambulance was unable to gain access to her property due to wet and slippery conditions on the alternative roadway and hence, despite the “Private Property” sign on the defendant’s property the ambulance had to cross land parcel V10414 to reach her property. She did explain that her husband and son used the family car and they would use of the roadway at land parcel V10414. She has never seen an accident on the alternative roadway.

[36] The final witness for the plaintiffs was Mr Yvon Foster. He is a fully qualified and licensed land surveyor of twenty years’ experience now in private practice. He previously held the position of Director of Surveys and other similar senior posts with the Government of Seychelles. He is fully involved in cadastral and topographical surveys and engineering projects. Topographical surveys involve examination of terrain in Seychelles. He was instructed by the plaintiffs in this matter to carry out a survey of the alternative roadway constructed by Government. He did so and produced a report which is admitted into evidence. He gave *viva voce* evidence in relation to his findings. All parties to this action, their counsel and I are familiar with this stretch of roadway and have “walked” the route. This roadway starts at Fairview Estate Road and runs in an upward direction before meeting an upper road which is known as “Rosebelle Road”. The survey also refers to the length of Rosebelle Road leading from the upper junction to where a bridge is situated and thereafter to the property of the 1st plaintiff.

[37] Mr Fostel gave his findings in respect of the gradient of the section of alternative roadway leading from Fairview Estate Road leading up to Rosebelle Road. He found that the gradient on this road leading to the upper junction was 1:4.4. The length of Rosebelle road leading from the upper junction to the aforementioned bridge had a gradient of 1:22, that is, this stretch of road was almost level. He described the roadway leading upwards as “steep”.

[38] Having dealt with gradient, Mr Fostel gave his opinion on the adequacy of the width of the roadway as it went in its upward direction. He gave the width of the roadway as varying between 3.5 metres and 5.00 metres. He explained that this stretch of roadway did not have a constant width but varied between the 3.5 metres and 5.00 metres. A width of 5.00 metres had been recorded at the bend in the middle section of the roadway.

[39] Mr Fostel was knowledgeable of government planning and control guidelines. One guideline stipulates that where a roadway is serving ten dwelling houses or less the acceptable gradient is 1:4. Where a roadway provides access to more than ten dwelling houses the acceptable gradient is 1:5. Mr Fostel advised at the end of his testimony that a 1:4 gradient is steeper than a 1:5 gradient. He had not personally counted the number of dwelling houses served by the alternative roadway but from the cadastral plan of the area and related photographs he estimated that there were more than ten dwelling houses in the upper area.

[40] There was also a relevant guideline in respect of the width of an access road leading to houses in an upper area. Again the number of dwelling houses was a relevant factor. Mr Fostel told the Court that the minimum width of the road when it serves one dwelling house is 3.5 metres; if there are ten dwelling houses or less the required width is 4.5 metres, and for more than ten dwelling houses the required width is 5.5 metres.

[41] Mr Fostel’s evidence extended to observations made while on site. He referred particularly to a bend in the middle section of the roadway. He stated that the bend was “very sharp”. He found that the width of the roadway did not conform to government guidelines. He found that there was a “blind bend” on the roadway which would mean that, if a driver had entered the “bend”, he would not be able to see another vehicle approaching from the other direction. He had also noted a “blind spot” near to the top junction where the roadway meets Rosebelle Road. He was of the opinion that the driver of a vehicle travelling up and close to the upper junction would be unable to see a vehicle about to enter the downwards stretch of the roadway.

[42] Finally, by reference to his calculations in respect of gradient and his measurements in respect of width it was the opinion of Mr Fostel that the alternative roadway between the Fairview Estate Road and Rosebelle Road did not comply with the government guidelines.

[43] Mr Fostel was subject to cross-examination. He explained the method of calculation to determine gradient and its significance for the upward stretch of roadway. While he had not carried out a detailed examination he agreed with defence counsel that there were stretches of the Fairview Estate Road which did not appear to comply with the guidelines on gradient and road-width. He was of the view that other

existing roads on Mahe may also not meet these guidelines. He had visited the locus for a total period of four to five hours over a two-day period. He had observed only one vehicle coming down the steep part of the road. He expressed the opinion that a roadway only 3.5 metres wide would be suitable for one-way traffic only. He found that the roadway was 3.5 metres wide in most parts but widened to five metres at the bend. He agreed that if two vehicles met head-on at either the upper or lower junction, one vehicle would have to reverse to allow the other to proceed. He was of the view that if the roadway was improved to comply with the government guidelines this would be acceptable. He agreed that other roads in use on Mahe had similar deficiencies but they were unsafe, safety being the criterion.

[44] This concluded the evidence for the plaintiffs.

[45] The defendant proceeded to give his evidence. I have referred to him as "Mr Barbier". Having listened to the evidence of the plaintiffs I now have a fair idea of the general situation as it has developed from around 1970 until the present time. Mr Barbier purchased his property, with dwelling house thereon, from Mr Cyril Abhaye in January 1979 and has been in continual occupation since that date. His property document was produced to the Court. He explained that the property transferred to him was contained in parcels of ground V2328 and V2329. Later parcel V2328 was sub-divided into plots V10414 and V10413. The dwelling house is erected on parcel V10413. Parcel V10414 is unbuilt-on and is the remaining area of ground. It is the area compulsorily acquired by Government and later reconveyed to Mr Barbier. The area of ground which is the subject of dispute is land parcel V10414; it is also used by Mr Barbier as driveway leading to his dwelling house. In 1979 this driveway consisted of two strips of concrete with grass in the middle. Mr Barbier stated that prior to his purchase Mr Abhaye had not advised him that the occupiers of land and houses in the upper area also used land parcel V10414 as an access to their properties, although he later found this to be the case. Mr Barbier confirmed that he knew all the plaintiffs.

[46] The upper area had been developed and a road system built which led to the driveway on land parcel V10414. The occupiers of plots in the upper area then considered that they had a motorable access from their properties over land parcel V10414 to the Fairview Estate Road and used it as such. Mr Barbier tried to negotiate with Government to bring this arrangement to an end, but without success. There was further correspondence with Government and the occupiers of the higher lands but the occupiers of the upper lands continued to use the access over land parcel V10414. Mr Barbier threatened to physically block the access advising that he wished the practice to end. It would seem that this running argument continued over a number of years without any solution being reached. The position became polarized with Government threatening to compulsorily acquire land parcel V10414. The position further deteriorated when the 1st plaintiff used land parcel V10414 to bring in heavy building material by heavy lorry with excavation equipment as he further developed his business. By May 2002 the position had become confrontational and police had been called to the site to ensure good order on more than one occasion.

[47] Finally proceedings were commenced in the Supreme Court in 2002 to bring some finality to the situation. By this time the majority, if not all the occupiers, in the upper area were involved. The court action came to a premature end when Government compulsorily acquired land parcel V10414. This decision to acquire was challenged

unsuccessfully in the Constitutional Court by Mr Barbier who then sought to challenge the decision in the Court of Appeal. Argument was heard in the Court of Appeal and the matter was adjourned for judgment. Throughout the court proceedings discussions and negotiations had continued between Government and Mr Barbier. As a result of the negotiations being successful the Court of Appeal did not proceed to judgment.

[48] The substance of the successful negotiation was as follows:

(1) Government would reconvey to Mr Barbier the land compulsorily acquired, namely, land parcel V10414,
(2) Government would make a compensatory payment to Mr Barbier,
(3) it would repair and rebuild the driveway on land parcel V10414 which, it was alleged, had been substantially damaged by the movements of the heavy machinery and lorries, and finally,
(4) Government would build an alternative access roadway for the use of the occupiers in the upper area, which it did, completing the work in 2011.

During this whole period the occupiers of the upper lands, which included the present plaintiffs, had use of land parcel V10414 as a direct result of the compulsory acquisition. The formal document of re-conveyance transferring ownership of land parcel V10414 to Mr Barbier was finalised, according to the Registrar General, in 2013.

[49] By 2013 Mr Barbier would have felt confident that he had then sole use of land parcel V10414 and to reinforce this erected a "No Access" Notice at its entrance from Fairview Estate Road. The 1st plaintiff was formally advised by letter of the position.

[50] Mr Barbier stated that he had driven the alternative roadway and experienced no difficulty in doing so. He estimated that the number of the tenants on the upper area to be ten to twelve, most of whom had their own transport. He stated that the occupiers of the upper area regularly drove up and down this alternative roadway using their personal vehicles. Goods trucks and delivery trucks also made use of this road.

[51] Mr Barbier stated that the business undertaken by the 1st plaintiff had originally been agriculture but had expanded into cold storage and plant hire businesses. He explained that the original "blockers" had crossed his land on foot and he had tolerated that practice although he had been particularly unhappy with the 1st plaintiff using this access and that they had never been on good terms. In these early times, the "blockers" would bring goods by vehicle to the Fairview Estate Road and then carry them up through land parcel V10414 to their property.

[52] Mr Barbier held the opinion that the plots of land were not enclaved since Government had provided access by the new alternative roadway. There was no right of way over his driveway, that is, over land parcel V10414. Mr Barbier confirmed that the plaintiffs and other proprietors of plots in the upper area, even now, are continuing to use the access roadway over land parcel V10414; but agreed that this was permitted in terms of the interim injunction granted at the commencement of this case. The main users of land parcel V10414 are members of the Dogley family and the 1st plaintiff. The members of the Dogley family use their own personal transport, but the 1st plaintiff uses this access in connection with his business. Hence the access is used by lorries, refrigerated trucks and other vehicles leased in connection with the plant hire

business. The heavy vehicles cause damage to the roadway at land parcel V10414. The passage of all the vehicles caused hardship, suffering and inconvenience to him and his family who cannot fully enjoy their property. He had plans to redevelop land parcel V10414.He wished the Court to order that the plaintiffs are not entitled to use land parcel V10414 as an access roadway to their properties. Furthermore he also sought a declaration that the plaintiffs did not have a right of way over land parcel V10414 since they had been provided with a suitable access by the alternative roadway constructed by Government.

[53] In cross-examination Mr Barbier confirmed that the some of the plaintiffs, principally the Morin and Dogley families were already resident at La Misere when he bought the property. Others persons took up residence at a later date. At the time of his purchase the "blockers" were farming the land. Later they were allowed to purchase their plots. Originally land parcel V10414 had two strips of concrete with grass in the middle and at first the " blockers" used this area as a pedestrian access. Later, around 1983, the "blockers" started to use land parcel V10414 as a vehicular access. This access, *inter alia,* led to the property of the 1st plaintiff through the network of roads in the upper area. He denied the plaintiffs then in residence used land parcel V10414 as a motorable access prior to 1979. He denied that Mr Abhaye had told him that land parcel V10414 was used as an access to the upper properties. He denied that his title deed gave a right of access to the plaintiffs over land parcel V10414.

[54] Mr Barbier said that he tolerated the plaintiffs crossing over his property and since 1983, when an improved roadway system was completed in the upper area, he had still not given express permission to the plaintiffs to cross his land. He entered into negotiation with Government in 1983 to seek a resolution to the problem but there was no definitive result despite continuing discussions.

[55] In 2002 Mr Barbier felt confident enough to file a case in the Supreme Court following the issue of formal letters of complaint but no final judgment was reached. Around 2004, land parcel V10414 was compulsorily acquired by Government who allowed the plaintiffs to use land parcel V10414 as an access to their properties. It was this acquisition by Government that led to the case in the Constitutional Court which, in turn, led to a settlement of issues, one of which was the construction of the alternative roadway which was intended to allow the plaintiffs vehicular access to their properties. After completion prior to 2013 the reconveyance of land parcel V10414 to Mr Barbier was completed.

[56] After completion of the reconveyance there was the disturbance between the parties when Mr Barbier blocked the access road over land parcel V10414. This led to police intervention and, in turn, this court action. Mr Barbier was unsure of the number of dwelling houses in the upper area but he estimated that there could be around ten to twelve. It was suggested there were about twenty houses in the area. He was uncertain on this point but did mention that one or two houses were in the course of being constructed. Mr Barbour conceded that some of the trucks crossing land parcel V10414 were related to the new construction but most heavy vehicles were in connection with the 1st plaintiff's business. It was suggested to Mr Barbier that the 1st plaintiff brought his heavy loaded vehicles and refrigerated trucks over land parcel V10414 since it was the most practicable route to reach his property. Mr Barbier suggested that the 1st plaintiff should now use the new alternative roadway. It was

further suggested to Mr Barbier that the 1st plaintiff could not use the alternative roadway since it was not practicable due to its topography and the gradient of the road. Mr Barbier disagreed stating that during its construction asphalting lorries reversed up the road and trucks carrying construction materials drove up and down the alternative roadway. Mr Barbier held the view that the 1st plaintiff continued to use land parcel V10414 only to harass and annoy him.

[57] There were witnesses called by the defence. Mrs Jeannine Lepathy, the Assistant Registrar of the Supreme Court, produced the records of the three court cases already mentioned. Mr Fred Hoareau, Deputy Registrar General gave evidence as to the deduction of title relating to Mr Barbier's property and that the reconveyance by Government to Mr Barbier of land parcel V10414 was dated 13 November 2013. Mr Chang Tave, Director for Development and Controller at Seychelles Planning Authority could confirm that the planning application relating to the alternative roadway was submitted on 14 June 2004 by Government and approval was granted on 22 August 2006. He stated that the Planning Authority received a Commencement Notice on 7 May 2007.

[58] I confirm that I have made only one site visit.

[59] This concluded all the evidence and counsel elected to place their final submissions in writing before the court, which they did.

FINDINGS

[60] This is a civil case and hence the burden of proof is on the balance of probabilities and not on the more onerous burden of beyond reasonable doubt.

[61] I have considered all the evidence, the exhibits, photographs and the closing submissions. I also conducted a *locus in quo* and hence I am conversant with the whole area of land and road systems. I intend during this judgment also to rely on my own conclusions as a result of my site visit. I have also considered the judgments referred in the annexure to this judgment and which can be also be seen in the *Seychelles Digest* 2014 Edition at pp 438 to 446 under the general heading of "Rights of Way".

[62] I have set out in the initial part of this judgment the evidence given by all parties who wished to take the opportunity to address the Court. Since this matter had been the cause of much dispute and ill-feeling over the years it was important that all who wished to be heard should be heard.

[63] Despite the length of this case and the previous proceedings of 2002, followed by a compulsory acquisition order and reconveyance of land parcel V10414, the point in issue is narrow. Put simply, are the plaintiffs entitled to have a right of way over land parcel V10414 to gain access to their individual properties from Fairview Estate, Road?

[64] At the present time and after the reconveyance of land parcel V10414 by Government to the defendant in 2013 there are now two access roadways available to the plaintiffs, that is, the roadway over land parcel V10414 and the other which I have called the "alternative roadway".

[65] During the *locus in quo* I walked on to land parcel V10414, which is a concreted roadway, directly from Fairview Estate Road. After some fifty yards or so I emerged from the rear of the property of the defendant. This portion of the roadway from Fairview Estate Road has a slight gradient. After a further short distance this roadway continues and then forks left and right. I was not asked to proceed to the right but it is apparent from plans produced that a number of plaintiffs have their residences in that area. I proceeded by the left fork and after a short distance came to the large commercial premises and residences of the first four plaintiffs. I continued on for some distance on a fairly level plane until a further junction is reached. I was told that that section of the road is now known as Rosebelle Road. This is the junction where Rosebelle Road meets the alternative roadway coming up from Fairview Estate Road. I walked down the alternative road until it met Fairview Estate Road.

[66] I find from the evidence that the original blockers or tenants of the upper lands, from whom the Morin family and Dogley family and other plaintiffs are descendants, used land parcel V10414 firstly as a pedestrian access and later as a vehicular access with the full approval and consent of the then owner, Cyril Abhaye. Mr Abhaye sold his whole property to the defendant in 1979 (which included land parcel V10414) although the defendant's evidence was that he had not been expressly advised by Mr Abhaye that the blockers used land parcel V10414 to gain access to their properties. Be that as it may, the defendant over the years tolerated the continuing use of this access by the plaintiffs and the road was regularly improved to cope with the passage of vehicles, which vehicles gradually increased in size and numbers. I think it is fair to say that the 1st plaintiff and the defendant have never been on the best of terms. Larger and heavier vehicles came to use this access and most were under the direction of the 1st plaintiff as he extended his business and business premises. By 2002 the defendant's patience had come to an end and he instituted court proceedings to resolve the issue. There was no final court determination but an arrangement was reached. Government compulsorily acquired land parcel V10414 thus ensuring that for a while the plaintiffs had access by that route but also agreed to construct the alternative roadway, which it did. By 2013 land parcel V10414 was reconveyed into the ownership of the defendant and the alternative roadway had been completed for the use of the plaintiffs. All should have been well. However the plaintiffs found the alternative roadway unsuitable and continued to use the roadway over land parcel V10414. This inevitably led to dispute and this case. An interim injunction was granted in March 2014 to allow the plaintiffs continued access over land parcel V10414 until final determination of this present matter.

[67] The plaintiffs have filed this suit against the defendant claiming a right of access over his property and in particular over that portion known as land parcel V10414 to the public road, Fairview Estate Road. The defendant resisted their claim arguing that an alternative adequate and suitable access now exists following the construction of the alternative roadway.

[68] I find that none of the individual properties of the plaintiffs has an immediate and direct access to the public road known as Fairview Estate Road and hence I find that the properties of each plaintiff is an enclaved plot.

[69] Accordingly the plaintiffs' claims fall to be decided under arts 682(1) and 683 of the Civil Code of Seychelles which read as follows:

> 682 (1) The owner whose property is enclosed on all sides and has no access or inadequate access on to the public highway either for the private use or for business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause.
>
> 683 A passage shall generally be obtained from the side of the property from which the access to the public road is nearest. However, account shall also be taken of the need to reduce any damage to the neighbouring property as far as possible.

[70] In my opinion this matter hinges on particular wording within the body of art 682(1) namely, where the owner of enclaved property "has no access or *inadequate* access on to the public highway either for *the private or for the business use of his property* ……etc". [Emphasis added]

[71] Hence, firstly, in respect of each and every plaintiff I look to see if adequate access is there at all or whether the access, if present, is adequate or inadequate.

[72] Secondly, if there is adequate access, and again in respect of each plaintiff, is it adequate for his private use, or, if he is in business, is it adequate for his business use.

[73] I take the second point first. I find that the 1st, 2nd and 3rd plaintiffs claim principally in respect of the business use of their property. The remaining plaintiffs claim in respect of the private use of their properties.

[74] As at the present date there are two roadways available to the plaintiffs, (a) the access roadway over land parcel V10414 and (b) the roadway named "the alternative roadway".

[75] I consider the merits of each access roadway.

Roadway over land parcel V10414

[76] I find that this means of access has been in use for a period commencing prior to 1979, when the defendant purchased his property, until the present time. Consent was given expressly by Mr Abhaye, grudgingly by the defendant, by Government following their compulsory acquisition of land parcel V10414 and finally under the interim injunction order of the court.

[77] I find that this access roadway links Fairview Estate Road with the general area in which the properties of the plaintiffs are situated. The distance from the rear boundary to Fairview Estate Road is only some fifty yards or so. The distances from this rear boundary to the individual properties of each plaintiff is, again, a short distance. The access roadway over land parcel V10414 is a cemented roadway leading upwards at a gentle gradient from the main road.

[78] The 1st and 3rd plaintiffs submitted that, in the normal course of business, it was necessary that heavy transport vans and other vehicles have access to their business and commercial premises. They say that the existing roadway over land parcel V10414 provides suitable and adequate motorable access for vehicles used in the course of business, personal vehicles and also pedestrian access. The remaining plaintiffs also submitted that the roadway over land parcel V10414 provided them with convenient and suitable vehicular and pedestrian access to the main road. All plaintiffs wish the *status quo* to remain and this access to be confirmed as a formal right of way.

The Alternative Roadway

[79] The defendant submitted that this was the alternative route to be used. All plaintiffs hence are required to use it and not the access roadway over land parcel V10414. He had plans to develop land parcel V10414.

[80] The collective evidence of the plaintiffs was that the alternative roadway was further from their properties than land parcel V10414. The alternative roadway from Fairview Estate Road was steep, narrow, had no recognized 'passing places' and was unsafe. There was a tight bend at the mid-way point with a vertical drop on one side with no safety barriers or fences despite the fact that there were dwelling houses immediately below. Mrs Vivienne Moustache, wife of the 15th plaintiff, recalled that an ambulance trying to reach her home due to a late medical emergency could not negotiate the alternative roadway due to wet road conditions. Ms Cecile Dogley, a senior medical officer, could recall a similar difficulty in the hours of darkness when a hospital staff bus delivering her to her home could not drive up the alternative roadway due to wet road conditions. In each case the driver of the vehicle had to use the access at land parcel V10414.

Conclusion

[81] I have had the opportunity to walk down the alternative roadway during my site visit. I keep in view that if the plaint was to be dismissed it is more likely than not that the defendant would physically block off land parcel V10414 thus denying all access to the plaintiffs and all of their vehicles, commercial or personal. Land parcel V10414 would not be available for emergency vehicles such as ambulances and fire appliances to access the properties of the plaintiffs. The alternative roadway would be the sole means of pedestrian and motorable access available to the plaintiffs. Heavy commercial vehicles would have no alternative other than use the alternative roadway to access the business premises of the 1st and 3rd plaintiffs. Private cars would only use this route. Pedestrians again could only reach the main road by the alternative roadway. From my site visit I can find that land parcel V10414 provides a shorter access to Fairview Estate Road than the alternative roadway.

[82] Having observed the whole area and walked down the alternative roadway it is my opinion that the concerns of all the plaintiffs are well-founded. I look for independent evidence supporting or tending to support this view. I find it from the testimony of Mr Yvon Fostel, an experienced land surveyor and final witness for the plaintiff who, in my view, gave credible evidence on which I can rely. He was of the opinion that the alternative roadway was steep as it went from Fairview Estate Road to Rosebelle Road. He had measured the gradient and width of this road at intervals. He compared the actual site measurements to government regulations on the premise that there were more than ten dwelling-houses in the upper area, with which I agree. The regulatory gradient requirement of a road serving more than ten dwelling houses is 1:5. The actual gradient of the alternative roadway was found to be 1:4.4. This measurement of 1:4.4 is a steeper gradient than 1:5, and hence the alternative roadway did not comply with government regulations. He measured the width of the road at various intervals and also based his finding on the basis of ten dwelling-houses being located in the upper area. He found that the width of the road varied between 3.5 metres and 5.00 metres. The regulatory minimum requirement for this volume of housing is 5.5 metres. Again the alternative roadway did not comply with regulations in respect of width. He emphasized his view by stating that the width requirement for a roadway providing only “one way” traffic is 3.5 metres. The conclusion can then be reached that the alternative roadway does not comply with government regulations. The regulations were in force to ensure the safety of road users. Moving away from this technical aspect, he was of the view that the upper point where the alternative roadway met Rosebelle Road was a blind spot and there was always a danger of collision.

[83] The defendant cannot provide a detailed or technical argument in reply simply stating that this roadway provides an adequate alternative access.

[84] The property of the 1st plaintiff is used for a busy commercial and agricultural business. In support, I observed from my inspection of this property that commercial goods vehicles, including refrigerated vehicles, were parked on site. A motorable access capable of taking heavy goods traffic is required for the business interests of the 1st, 2nd and 3rd plaintiffs. The remaining plaintiffs, generally speaking, use their properties for residential purposes although some may have small agricultural businesses. They require motorable access for personal vehicles and small commercial vehicles such as pickups.

[85] I keep in view that with only the alternative roadway available vehicles of all types, commercial and personal, would require to use it on a daily basis. It is more likely than not with the passage of time that the volume of traffic would increase. With increasing regularity vehicles would come face to face on this stretch of road. In these circumstances, bearing in mind the gradient and width of the road, the blind spots, the tight turn at the mid-way point with the vertical drop, it is more likely than not that there will be an increasing danger of accident, collision and injury. In my view heavily laden commercial vehicles will encounter increasing difficulties in negotiating this length of roadway especially when the road surface is wet. Similar difficulties will be encountered by emergency vehicles.

[86] I have also considered whether the 4th plaintiff to the 17th plaintiff are merely supporting the 1st plaintiff out of a sense of misplaced loyalty but I reject this. The alternative roadway is equally unsafe for personal vehicles bearing in mind that it is more likely than not that the volume of traffic will increase.

[87] The defendant has not persuaded me to find in his favour in respect of this matter.

[88] I find that the roadway over land parcel V10414 provides a suitable, adequate and practical access from the enclaved plots of the plaintiffs to the main road, Fairview Estate Road.

[89] I find that the alternative roadway does not provide an adequate and practical access route from the enclaved properties, namely the properties it has to serve, to the main road, Fairview Estate Road. I find that the alternative roadway does not provide a viable, adequate, suitable and practical alternative to the access roadway provided by land parcel V10414. The access over land parcel V10414 provides the shortest route from the enclaved lands of the plaintiffs to the public road. The alternative roadway does not offer a satisfactory and safe route which the route over land parcel V10414 does.

[90] Consequently, I enter judgment for each of the plaintiffs as follows:

[91]
(a) I hereby declare that each of the plaintiffs has a right of way in favour of their enclaved properties over the defendant's land parcel V10414 along the existing motorable access road leading to the public road, Fairview Estate Road,
(b) I grant a perpetual injunction restraining the defendant from interfering with the plaintiffs' use of the said right of way, from obstructing the said right of way or causing any damage to it,
(c) I dismiss the counterclaim of the defendant,
(d) I order that the defendant shall pay the costs of the plaintiffs.

[92] For the avoidance of doubt, the interim injunction of 21 March 2014 shall at present remain in full force and effect pending any final disposal of this case.

UMARJI AND SONS (PTY) LTD v GOVERNMENT OF SEYCHELLES

F Robinson, C Mckee, D Akiiki-Kiiza JJ
30 March 2017 [2017] SCCC 3

Constitution – land acquisition – legal profession – Attorney-General's role – legal practitioner ethics

The petitioner was the owner of land that had been compulsorily acquired by the Government in 1984. The building had been converted into a museum. The petitioner claimed return of the land on the basis that it had not been developed.

JUDGMENT For the petitioner.

HELD
1 To "use" property is not to "develop" it.
2 The key question for "development" is what is in the public interest that can be undertaken only by the Government.
3 Development always involves goals that must have been met for the benefit of the community or a targeted group.

Legislation
Constitution, Schedule 7
Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, r 3(3)
Lands Acquisition Act 1977
Legal Practitioners (Professional Conduct) Rules 2013
Political Parties (Registration and Regulation) Act

Cases
John Atkinson v Government of Seychelles (2006-2007) SCAR 119
Josephine Claude Marise Berlouis & ors v Lise Morel du Boil Constitutional Appeal SCA CP 03 & 04/2015
Moulinie v Government of Seychelles (2012) SLR 116
Charles Alfred Moulinie v Government of Seychelles and Attorney-General SCA40/2013

Counsel F Ally for the petitioner
G Thachett for the 1st respondent and the 3rd respondent
F Bonte for the 2nd respondent

JUDGMENT OF THE COURT

[1] Umarji & Sons (Proprietary) Limited is the petitioner. The petitioner is a company incorporated under the Companies Act 1972 of Seychelles, and is represented in these proceedings by Imtiaz Umarji, a director of the petitioner.

[2] The 1st respondent is the Government of Seychelles represented by the Attorney-General. The 2nd respondent is Parti Lepep. The 2nd respondent is a body corporate registered under the Political Parties (Registration and Regulation) Act. The 3rd

respondent is the Attorney-General. The 3rd respondent is joined in these proceedings pursuant to rule 3 (3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules.

[3] The petitioner has filed a constitutional petition accompanied by an affidavit, which constitutional petition was amended on 29 July 2016, with the leave of the court.

[4] The petitioner is seeking constitutional redress under paragraph 14 of Part III, Schedule 7 of the Transitional provisions of the 1993 Constitution, for among other prayers, the return of the land comprised in title number V4908 on the ground that in July 1993 the 1st respondent had not developed the land comprised in title number V4908 or had any plans to develop it. The land comprised in title number V4908 is hereinafter referred to as "the property".

[5] It is to be noted that it is improper for Mr Bonte, counsel for the 2nd respondent, to appear as counsel on behalf of the 2nd respondent when he was counsel who conducted business on behalf of the petitioner in relation to the property. Mr Bonte did not disclose to the court the potential conflict of interest. That is a clear breach of the Legal Practitioner's (Professional Conduct) Rules 2013, which provides that —

> 4 (1) A legal practitioner has an overriding duty as an officer of the court, to uphold the rule of law and facilitate the administration of justice.
>
> (2) A legal practitioner shall act honestly, fairly, diligently and competently in providing legal services to his or her client.

and rule 11 (1) provides that —

> A legal practitioner has a continuing responsibility to avoid conflicts of interests with or between his or her clients and shall ensure that all potential conflicts of interest are promptly identified, disclosed and addressed.

It is to be noted that the respondents have filed the same defence and adopted the same objections. Therefore, it is our considered opinion that the issue of the conflict of interest does not have any relevance in this case.

[6] Further, we are convinced that the position of the 3rd respondent under rule 3 (3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules is that of an amicus curiae. However, as the principal legal adviser to the Government of Seychelles he has the right to defend the Government of Seychelles when there is no conflict of interest between the position he will be taking up as amicus curiae and in relation to the defence he will be raising for the Government. It is to be noted that the respondents (with the 3rd respondent joining in this objection) has objected to the petitioner's petition on the grounds that there are no

substantial or real issues to be tried in this case and that there is no cause of action. For that reason, we have decided to treat this case as one made by the petitioner and the Government of Seychelles as the 1st respondent and Parti Lepep as the 2nd respondent.

The admitted facts

[7] The following facts are not in dispute among the petitioner and the respondents —

(a) the petitioner was at the material time the owner of the land comprised in title number V232 with a building standing thereon situated at Francis Rachel Street, Victoria, Mahe, Seychelles; and
(b) the land comprised in title number V232 was subsequently surveyed and from which the property (on which stood a building) was subtracted from it.

The case for the Petitioner

[8] Save for the admitted facts, this is the case for the petitioner. Mr Umarji Ebrahim was the owner of the property on which stood a building. The ground floor of the said building was converted into two commercial units whilst the first floor was used as accommodation for Mr Umarji Ebrahim and his family. Mr Umarji Ebrahim rented out one of the commercial ground floor units to Mr France Albert Rene, a legal practitioner at the time for use as an office for his law practice and which the said Mr France Albert Rene also used as the headquarters of the Seychelles People's United Party, a political party that the said Mr France Albert Rene had formed, whilst the other ground floor unit in the said building was rented out to one Henri Pool for use as a craft and curio shop.

[9] On 5 June 1977 Mr France Albert Rene became the President of Seychelles following a coup d'état.

[10] Upon the demise of Mr Umarji Ebrahim in 1980, the land comprised in title number V232 was transferred to the petitioner for R 195,750.

[11] In 1984, the 1st respondent carried out a survey of the land comprised in title number V232 and subdivided it into parcel numbers V4908 (the property) and V4909. The property is the part of the land comprised in title number V232 on which stood the said building.

[12] By a certificate dated 1 February 1984, the 1st respondent compulsorily acquired the property in the "national interest" under the Lands Acquisition Act 1977, and the Ebrahim family occupying the part of the building was compelled and forced to leave their home in the building and had to find alternative accommodation and as a result lost their family home and substantial rental income.

[13] Consequently, the 1st respondent became the proprietor of the property.

[14] However, for reasons stated in the petitioner's affidavit in support, the petitioner accepted monetary compensation in the form of 20 year Government bond of R 123,735 bearing interest at the rate of 4% per annum.

[15] In 1985, the 1st respondent used the said building to house a museum of *"SPUP/SPPF"* that was the sole political party in Seychelles at the material time until December 1991.

[16] Upon the coming into force of the Constitution, the petitioner and the 1st respondent continued negotiations for the petitioner to be compensated (including the return of the property) for the compulsory acquisition of the property under the provisions of Part III, Schedule 7 of the Transitional provisions of the Constitution and by letter dated 3 September 1997 addressed to the petitioner, the 1st respondent offered the petitioner R 180,000 as compensation less the sum already paid ie R 123,750, which offer the petitioner rejected for the reasons averred in the petitioner's affidavit in support of its petition.

[17] In October 2013 when the 2nd respondent was about to demolish and rebuild the said building, the petitioner discovered from a search that it carried out at the Land Registry that the 1st respondent had sold and transferred the property on 31 Janurary1997.

[18] The petitioner prays the Constitutional Court as follows —

(1) To declare that the transfer of Parcel V4908 by the 1st Respondent to the 2nd Respondent a contravention of the 1st Respondent's powers and obligations under Part III of Schedule 7 to the Constitution and the Constitutional right of the Petitioner to property;

(2) To rescind, cancel, annul or revoke the said transfer of Parcel V 4908 by the 1st Respondent to the 2nd Respondent and order the Land Registrar to act accordingly;

(3) To declare that Parcel V4908 be returned and/or transferred to the Petitioner for the reasons that the 1st Respondent had not developed Parcel V4908 and had no plans to develop Parcel V4908 on the coming into force of the Constitution;

(4) To issue a writ of mandamus ordering the 1st Respondent to return Parcel V4908 to the Petitioner and/or the 2nd Respondent to return Parcel V4908 to the 1st Respondent for it to return Parcel V4908 to the Petitioner;

(5) Order the Land Registrar to rectify the land register of Parcel V4908 accordingly;

(6) In the alternative to prayers (3), (4) and (5) above, to issue a writ of mandamus ordering and/or order the 1st Respondent as follows—

(i) to compensate the Petitioner by transferring to the Petitioner a corresponding parcel of land to parcel V4908 with a building similar to the Building thereon and located in the heart of Victoria; or

(ii) to pay the Petitioner full monetary compensation for Parcel V4908 and appoint at least three (3) independent appraisers of repute to value the Parcel V4908 as to its value on the date of the judgment or the valuation and or order the 1st Respondent to pay to the Petitioner compensation for it as per the said valuation;

(7) Make any other order that this Honourable Court shall deem fit in the circumstances of the case.

The whole with cost.

The Case for the Respondents

[19] Save for the admitted facts, the respondents denied the claims of the petitioner. In reply, the respondents contended that, in 1981, the 1st respondent requested, from the petitioner, the building and the premises for the purposes of turning the building and the premises into a museum. They added, further, that the petitioner was willing to give away the building and the premises, subject to certain conditions. It is the case for the 1st respondent that, due to the ″great historical importance″ of the building and the premises, the 1st respondent decided to compulsorily acquire the building and the premises and intimated its decision to the petitioner. The 1st respondent also intimated to the petitioner its intention to survey the land comprised in title number V232. Accordingly, the land comprised in title number V232 was surveyed and subdivided into two plots for the purposes of the compulsory acquisition. Subsequently, in 1984, the property was acquired, in the ″national interest″, by the 1st respondent, under the Lands Acquisition Act.

[20] The respondents contended that the petitioner willingly accepted the monetary compensation offered by the 1st respondent. They, further, alleged that the monetary compensation was justifiable in the circumstances of the case, commensurate with the value of the property acquired.

[21] It is the case for the respondents that the 1st respondent and the petitioner did not continue to negotiate for the return of the property, as alleged. Then the respondents alleged that the 1st respondent and the petitioner had at no point in time negotiated for the return of the property as the property had already been developed at the time of the coming into force of the 1993 Constitution. The respondents contended, further, that the property, compulsorily acquired in 1984, was developed into a museum, at considerable costs and declared as a national monument prior to the coming into force of the 1993 Constitution.

[22] The respondents stated that the property was valued in 1993, and on 3 September 1997, the 1st respondent, acting in good faith, offered to the petitioner R 180,000 less R 120, 000, which had already been awarded to the petitioner, as total compensation for the property, in accordance with the provisions of the Constitution. The offer was rejected by the petitioner through its counsel on the 5 August 1998, and on 3 December 1998, the petitioner, through its counsel, informed the 1st respondent that it expected to be offered a minimum value of R 1,500,000. Since the petitioner rejected the offer of the 1st respondent, there were no further negotiations from either side and the 1st respondent did not pursue the matter.

[23] The respondents claimed that the 1st respondent acted *bona fide* in transferring the property to the 2nd respondent (the Seychelles Progressive People's Front) for valuable consideration in furtherance of the development of the property. It is their position that the transfer of the property does not in any way affect the right of the petitioner to be compensated with respect to the property. Further, the respondents claimed that since the property was already developed at the time of the coming into force of the 1993 Constitution, the petitioner was limited only to monetary compensation.

[24] In relation to the transfer of the property to the 2nd respondent by the 1st respondent, the respondents alleged that there was no collusion or connivance between them to commit or perpetuate fraud on, or to deprive the petitioner of any of its alleged rights under the Constitution, and that the 1st respondent acted in good faith in transferring the property to the 2nd respondent.

[25] In light of all the above, the respondents contended that the petitioner is only entitled to monetary compensation, but not at the current market value of the property as appraised by 3 independent appraisers; and that the transfer of the property by the 1st respondent to the 2nd respondent should not be rescinded, cancelled and/or revoked as alleged.

The Petitioner's Principal Claim

[26] The petitioner claimed that in view of the fact that upon the coming into force of the 1993 Constitution, the property had not been developed and the 1st respondent had not adduced any cogent evidence of a plan to develop it prior to July 1993, the property ought to be returned to it.

[27] The petitioner claimed that the sale of the property by the 1st respondent to the 2nd respondent amounts to the breach of the 1st respondent's constitutional obligations towards the petitioner. For the submission counsel relied on the decision of the Court of Appeal of Seychelles *Josephine Claude Marise Berlouis & ors v Lise Morel du Boil* Constitutional Appeal SCA CP 03 & 04/2015 Appeal from the Constitutional Court Decision CP 10/2011, judgment delivered on 12 August 2015.

[28] The petitioner stated that in this case, the 1st respondent sold the property to the 2nd respondent, the ruling political party at the material time, prior to the settlement of the petitioner's claim. In view of the fact that the 1st respondent and the petitioner were negotiating for compensation and the 1st respondent was under an obligation to negotiate with it in good faith, until the petitioner's claim is settled, the petitioner has a right to be returned the property (which is compensation under Part III, Schedule 7 of the Transitional provisions of the Constitution) or to accept other form of compensation.

[29] The respondent claims that the petitioner had waived its right to be returned the property by rejecting the offer of R 180,000 and informing the 1st respondent that it would accept no less than R 1,500,000. The petitioner submitted that it was negotiating

for compensation and responding to an offer for monetary compensation. Its reply to the offer and counter offer during negotiations was not a waiver of its rights for the property to be returned to it and thus, it has all the rights to claim its return to him and the 1st respondent was wrong to deal with the property during its negotiation with the petitioner for compensation for the property.

[30] Thus the said sale further shows that the 1st respondent acted in bad faith, maliciously and, fraudulently to deny the petitioner of its right to recover ownership of the property under Part III, Schedule 7 of the Transitional provisions of the Constitution. The 2nd respondent being the ruling political party and the 1st respondent being the Government that the leader of the 2nd respondent is the head and the nature of the transaction clearly showed that the respondents acted in collusion, connivance and in cahoots to commit and/or perpetuate the fraud on the petitioner's rights to recover ownership and title to the property.

[31] On the above facts alone, the sale should be rescinded and annulled and the Property should be returned to the petitioner.

Petitioner's Alternative Claim

[32] The petitioner submitted that there is ample evidence before the court for it to be returned the property. However, if the court were to find otherwise it has the option to —

(a) compensate the petitioner by transferring a corresponding parcel of land (with a similar building thereon and located in the heart of Victoria) to the property to the petitioner; or
(b) compensate the petitioner monetarily for the said acquisition.

[33] In relation to the first option, the petitioner submitted that the 1st respondent has failed to make an offer in terms of that option to the petitioner during negotiations or in this matter. Furthermore, it has failed to adduce evidence as to whether there is a similar or corresponding property in Victoria that it can transfer to the petitioner as compensation. The petitioner submitted that having failed to exhaust that option, it shows a lack of good faith being exhibited by the 1st respondent towards the petitioner in this case.

[34] In relation to the second option, the position of the petitioner is that if it cannot be compensated in terms of the first option, the court can order that the petitioner be compensated monetarily for the said compulsory acquisition. The petitioner should be compensated at the current market value of the property and not at its value in July 1993, for the reasons stated in the petitioner's affidavit in support and written submissions. The Petitioner invited the court to adopt the same reasoning and mode of compensation as was adopted for monetary compensation in the case of *Charles Alfred Moulinie v Government of Seychelles and Attorney-General* SCA40/2013, Appeal from Supreme Court Decision 11/2010 delivered on 22 April 2016.

The Respondents' Defence

[35] The respondents claimed that at no point in time the 1st respondent negotiated on the restitution of the property as the property had already been developed into a museum spending considerable amounts as it was of national importance and it was declared a national monument prior to the coming into force of the 1993 Constitution, thus constituting development.

[36] According to the respondents, the sale of the property by the 1st respondent to the 2nd respondent was done in good faith for value and thus, should not be affected by the petitioner's claim for return.

[37] In reply, counsel for the petitioner submitted that, if this is so, then —

(a) only part of the ground floor of the building was rented out to Mr. France Albert Rene for his law practice;
(b) Mr. France Albert Rene unilaterally decided to use the part rented out to him for his law practice as the Headquarters of his political party;
(c) the rest of the said building was used for the other purpose, as a shop and as the residence of the Ebrahim family;
(d) Mr. France Albert Rene and his party are persons just like the Petitioner and equal under the law and they should not enjoy greater benefits than the Petitioner who has more rights to the Property than the Second Respondent;
(e) if it was a serious museum, then the First Respondent was wrong to sell and transfer it to the Second Respondent after the coming into force of the 1993 Constitution;
(f) the establishment of the museum in the building does not amount to development as envisaged by Schedule 7 of the Transitional provisions of the Constitution; and
(g) the sale, if for value, was definitely not *bona fide* by any stretch of imagination. If the court finds that it was a *bona fide* sale for valuable consideration, then it will still be affected as it was effected post July, 1993, whilst negotiations were still ongoing.

Assessment of the respective contentions in light of Part III, Schedule 7 of the Transitional provisions of the Constitution, the evidence and the written submissions of counsel

[38] We read Part III, Schedule 7 of the Transitional provisions of the Constitution —

> PART III
> COMPENSATION FOR PAST LAND ACQUISITIONS
> 14 (1) The State undertakes to continue to consider all applications made during the period of twelve months from the date of the coming into force of this Constitution by a person whose land was compulsorily acquired under the Land Acquisition Act, 1977

> during the period starting June, 1977 and ending on the date of coming into force of this Constitution and to negotiate in good faith with the person with a view to –
>
> a. where on the date of the receipt of the application the land has not been developed or there is no government plan to develop it, transferring back the land to the person;
>
> b. where there is a government plan to develop the land and the person from whom the land was acquired satisfies the government that the person will implement the plan or a similar plan, transferring back the land to the person;
>
> c. where the land cannot be transferred back under sub-sub-paragraphs (a) or sub-sub-paragraphs (b), -
>
> i. as full compensation for the land acquired, transferring to the person another parcel of land of corresponding value to the land acquired;
>
> ii. paying the person full monetary compensation for the land acquired; or
>
> iii. as full compensation for the land acquired, devising a scheme of compensation combining items (i) and (ii) up to the value of the land acquired.

[39] In the *Moulinie* case, *supra*, Domah JA delivering the judgment of the Court of Appeal of Seychelles with Fernando JA and Chief Justice Twomey JA concurring, stated that —

> [a]s may be seen, *two conditions apply for paragraph 14(1) to kick in so that the 1993 compensation would become payable. One is that, on the date of the receipt of the application, the land has been developed. The other is that on that date, there is already a government plan to develop it. In the absence of those conditions, government is under a constitutional duty to transfer back the land to the person from whom the property was acquired. A duty to transfer would occur even where there is a government plan to develop the land but the person from whom the land was acquired satisfies government that he will implement the plan or a similar plan.* Now, where the land cannot be transferred because the case falls outside those situations, there arises a duty to give full compensation in cash or in kind: either transferring to the person another parcel of land of corresponding value to the land acquired or paying the person full monetary compensation for the land acquired; or devising a scheme of compensation combining items (i) and (ii) up to the value of the land acquired.
>
> [Emphasis added]

[40] The above principles will direct the court's approach to the resolution of the case before it.

[41] The following issues have been framed for the determination of the court —

(A) was the property developed prior to the coming into force of the 1993 Constitution?
(B) whether the 1st respondent had a plan for the property?
(C) has the petitioner waived its right for restitution?
(D) is the sale of the property by the 1st respondent to the 2nd respondent in accordance with the Constitution?

Was the Property developed prior to the coming into force of the 1993 Constitution

[42] In order to answer the first question and in the light of the averments of the respondents in objecting to the petitioner's claim for the return of the property and the averments of the petitioner that the property had not been developed, the court has to consider whether the use of the building (the property) by the 1st respondent as a museum amounts to development in terms of and as envisaged by Part III, Schedule 7 of the Transitional provisions of the Constitution. The petitioner submitted that such use would not amount to development.

[43] With regards to the facts of the case, the Notice of Acquisition referred to compulsory acquisition being used in the "national interest". The respondents stated that the 1st respondent —

> acquired the Property in 1984 in the public interest to salvage the historically important building from a state of neglect and deterioration at the hands of the Petitioner and to turn the premises into a museum thus preserving its symbolic character. *The century old building was renovated extensively and converted into a Museum [The Seychelles People's United Party Museum] in 1984 constituting complete development.* The nature of the renovation works for the building included replacement of the exterior walls of the entire building …. Because of the historical importance, the architectural structure was retained. However, with the passage of time, for reasons beyond the control of the respondents, the structure required complete reconstruction in 2003.
>
> [Emphasis added]

The Seychelles People's United Party Museum was declared to be a national monument on 25 May 1987. The property was transferred by the 1st respondent to the 2nd respondent on 23 January 1997. Consequently, it is the position of the respondents that the property cannot be returned to the petitioner.

[44] In the case of *Moulinie v Government of Seychelles* (2012) SLR 116, Egonda Ntende CJ with whom Burhan J concurred, considered the term "development" referred to in the said para 14. Egonda Ntende CJ opined that —

> [27] … where land has not been developed between the date of compulsory acquisition and date of receipt of the application for return under section 14 (1) (a), such land must be returned to the former owner. Property V5318 was

> not developed between the date of compulsory acquisition and at the time of receipt of the application for return. It is available therefore for return to the former owner.
> [28] … No evidence has been adduced that this property has been developed or in any case was developed at the time of receipt of the application of the Petitioner.
> [29] Property V5320 was used as a multipurpose court for use by the community. Use is not one of the conditions for non-return. Development is the condition and clearly no evidence has been shown that there is any development of this property. Property V5320 remains available for return.

In the same case, Dodin J gave the word "development" the following meaning —

> [13] … the nature of development always involves a certain goal or several goals that must have been met for the benefit of the community or the targeted group.

[45] It is to be noted that the Court of Appeal of Seychelles to a large extent adopted such reasoning in the *Moulinie* case, *supra*, Domah JA stated —

> [18] … Holding on to property without doing anything extra to improve or change it would not amount to development. We endorse that view to the extent that it comes as near the true meaning of development in the law of compulsory acquisition of property demands.

at para 19, of the judgment, the Justice of Appeal elaborated further —

> [19] The meaning is inherent in section 14 (1) (a) and (b): a development which only the government can undertake in the public interest for public purposes and one which any private developer would not wish to undertake for its lack of business viability.

and at para 20, of the judgment, the Justice of Appeal opined, further, that —

> Development should be understood in that sense. … The key question is what is the public interest which can only be undertaken by government and not the private sector. That is the concept in the Constitution …. If land is scarce, it is in the interest of government not to hold on to land and thereby inhibit development. It is in its interest to return it and encourage its exploitation.

In the said judgment the Justice of Appeal stated that the term "acquire in the public interest", in relation to land, is defined —

> [23] … as the acquisition or taking possession of land for its development or utilisation to promote the public welfare or benefit or for public defence, safety, order, morality or health or for town and country planning. *The overriding criterion of whether there has been development or not is the concept of public interest.*
>
> [Emphasis added]

[46] Further, in light of the above principles we find that the compulsory acquisition of the property by the 1st respondent to transform it into or use it as a museum [The Seychelles People's United Party Museum] fell short of satisfying the criterion of public interest. On the facts and circumstances of the case, we are of the view that the compulsory acquisition of the property by the 1st respondent was done in the interest of the Seychelles People's United Party/SPUP, the 2nd respondent, being the sole ruling party embodying the State from June 1977 till December 1991.

[47] In the context of the present case, the Court also finds that, on balance, use or change of use would not amount to development and would not be a ground or condition for non-return, acquisition in the public interest being the criterion. Moreover, the Court agrees with counsel for the petitioner that any such renovation and maintenance of the said building (the property) would not amount to development as envisaged by the Constitution. As stated by the Court of Appeal of Seychelles in the case of *John Atkinson v Government of Seychelles* (2006-2007) SCAR 119 in relation to a similar case for compensation for land compulsorily acquired and subject to return under the Constitution —

> it is a canon of interpretation that where the text is plain, full effect should be given to the intention of the legislator. The clear and plain language of paragraph 14 (1) (a) did not lead to any absurdity and required no judicial acrobatics but its simple application.

[48] For the reasons stated above, the court finds that the 1st respondent has shown no evidence that there has been any development of the property between the date of compulsory acquisition and at the time of receipt of the application.

Whether the First Respondent had a plan for the Property

[49] The next linked question is – was there any government plan at the time of the application to develop the property? According to the *Atkinson* case —

> if any plans exist, it should be concrete and serious. It is all too easy to say that someone has a plan when it does not have.

Having come to the above finding, we have no hesitation to hold that there was no concrete and serious government plan at the time of the application to develop the property. The property [the Seychelles People's United Party Museum] was declared to be a national Monument on 25 May 1987.

Waiver of right for restitution

[50] The point made by the respondents is that the petitioner had waived its right for restitution in that in one of its correspondence with the 1st respondent it requested R 1,500,000 as monetary compensation. It is the considered opinion of the Court that it should be guided only by Part III, Schedule 7 of the Transitional provisions of the

Constitution in arriving at a just determination in this case. Further, it is also the considered opinion of the Court that there is nothing improper in the petitioner on the one hand negotiating for the return of the property and on the other hand exploring the possibility that a financial settlement could be a suitable outcome.

The dispute about the sale of the Property by the First Respondent to the Second Respondent – is the sale constitutional

[51] The other question that will have to be considered in light of the evidence adduced in this case is whether the sale of the property is constitutional. The 1st respondent transferred title and ownership of the property to the 2nd respondent on the 23 January 1997. It is common ground between the petitioner and the respondents that the property had been transferred to the 2nd respondent after the commencement of negotiations between the petitioner and the 1st respondent.

[52] The petitioner invited the court to consider the following facts in order to consider the point in issue: that the 2nd respondent was the ruling political party; that the President and Head of State from 5 June 1977 till to date has been the leader of the 2nd respondent; that the 2nd respondent controls the machinery of the State and the 1st respondent; that the sale of the property by the 1st respondent to the 2nd respondent is a conflict, a breach of good practices and in contravention of the written laws of Seychelles; that the sale of the property was effected whilst negotiations between the 1st respondent and the petitioner were still ongoing; that the said negotiations had not resulted in a settlement; and that the 1st respondent has a constitutional obligation to negotiate in good faith with the petitioner for compensation. The respondents claim that it was a *bona fide* transaction for valuable consideration; and that the property cannot now be transferred back.

[53] We have given serious consideration to the facts and circumstances of the case. We find that the 1st respondent had transferred the property to the 2nd respondent in violation of its own obligations under para 14 of Part III, Schedule 7 of the Transitional provisions of the Constitution to ″negotiate in good faith″ with the petitioner in relation to its application for the return of the property until a decision was reached under para 14. Further, the action of the 1st respondent was also in clear violation of the rights of the petitioner under para 14 and its right to be returned the property under art 26 of the Constitution (See the *Berlouis* case, *supra*). We hold that it was not a *bona fide* transaction between two independent parties; and that the transfer of the property by the 1st respondent to the 2nd respondent was more fictional than real.

[54] The respondents submitted that the constitutional obligation of the 1st respondent under para 14 of Part III, Schedule 7 of the Transitional provisions of the Constitution is to return land which is, in its possession, and relies on the wording in para 14(1)(c) which makes reference to ″where the land cannot be transferred back″ to strengthen their argument, and state that the remedy in such a situation is compensation. In the *Berlouis* case, *supra*, Fernando JA with whom Domah JA and Msoffe JA concurred, stated the following on that point —

> To transfer land to a third person, while negotiations are ongoing with the original owner for the return of such land, and then to take up the position that the land cannot now be transferred back is to make a mockery of the

> Constitutional provision under paragraph 14 of Part III of Schedule 7 of the Constitution. We therefore dismiss the second ground of appeal raised by both appellants.

[55] For the reasons stated above, we, therefore, hold that the sale should be cancelled and the land register of V 4908 (the property) be rectified as per the petitioner's prayer.

Decision

[56] For all the reasons stated above, we enter judgment for the petitioner as follows —

(1) we declare that the transfer of Parcel V4908 [the property] by the 1st respondent to the 2nd respondent a contravention of the 1st respondent's powers and obligations under Part III of Schedule 7 of the Transitional provisions of the Constitution and the constitutional right of the petitioner to property;

(2) we rescind, cancel, annul or revoke the said transfer of Parcel V4908 [the property] by the 1st respondent to the 2nd respondent and order the Land Registrar to act accordingly;

(3) we declare that Parcel V4908 [the property] be returned and/or transferred to the petitioner for the reasons that the 1st respondent had not developed Parcel V4908 [the property] and had no plans to develop Parcel V4908 [the property] on the coming into force of the 1993 Constitution;

(4) we order the Land Registrar to rectify the land register of Parcel V4908 [the property] by registering the property in the name of the petitioner.

[57] We make no order as to costs.

EDMOND & ORS v CHETTY & GOVERNMENT OF SEYCHELLES

M Twomey CJ
31 March 2017 CS 228/2011; [2017] SCSC 302

Property – co-ownership – change in right of way – abuse of right

The plaintiffs and the first defendant are co-owners of land where a private right of way gives access to their properties. The plaintiffs claimed that the existing right of way was unsafe and causing disturbance to them. The first defendant, while also enjoying the right of way, was not adversely affected. The plaintiff proposed an alternative motorable access to the existing way, but the first defendant withheld his consent unless the 2nd defendant designated the alternative way to be private. The 2nd defendant refused to do so as it was not a government policy to designate access reserves as private.

JUDGMENT For the plaintiffs.

HELD

1 A person's right to property must not be exercised to the detriment of others' right to enjoy property.
2 The proprietors of a servient and a dominant tenement may demand a variation in the position of a right of way in circumstances when the existing position of the right of way becomes too inconvenient for the servient tenement. The existing right of way can be displaced or shifted to other property. This principle is limited by art 685 of the Civil Code which prescribes the extinction of the position and the form of a right of way after twenty years.
3 The creation of an alternative right of way which results in a property not being enclavé results in the original right of way being extinguished even if the limitation period has expired.

Legislation
Constitution, art 26(1)
Civil Code, arts 545, 682, 685, 2224

Cases
Mancienne v Ah-Time (2013) SLR 165
Nanon v Thyroomoody (2011) SLR 92
Tall v Lefevre (1980) SLR 199

Counsel J Camille for plaintiffs
K Domingue for 1st defendant
G Thachett for 2nd defendant

M TWOMEY CJ

[1] The plaintiffs and 1st defendant are adjoining land owners at Anse Aux Pins, Mahé, with their respective properties being adjacent to Chetty Flats.

[2] They are also co-owners of Parcel S71 on which there is a private right of way giving access to all their respective properties.

[3] The 2nd defendant is joined as it has granted a separate right of way to the plaintiffs and the 2nd defendant's properties from the main road at Anse Aux Pins.

[4] The plaintiffs claim that the existing right of way being literally on their doorstep (the north wall of the 4th plaintiff's house is actually situated astride the right of way – see Exhibit P5) is unsafe and causes disturbance to them daily and nightly and is often accessed by public vehicles. The 1st defendant's house at the end of the *cul de sac* is not so inconvenienced.

[5] The plaintiffs have approached the 2nd defendant for the grant of an alternative motorable access and it has proposed and made available an access reserve to the north of the existing right of way (on Parcel S4986) for substitution for the right of way on Parcel S71.

[6] The 1st defendant despite repeated requests and the intervention of a mediator appointed by the Court has refused to entertain the alternative motorable right of way to the parties' properties.

[7] He has after a question from the court stated that he would be prepared to accept the proposed alternative right of way only if the 2nd defendant was to designate the same as private.

[8] The 2nd defendant has stated that it cannot accede to the 1st defendant's request as it is not government policy to designate access reserves as private access.

[9] Counsel for the plaintiffs, Mr Camille has submitted that the 1st plaintiff's refusal is *male fides* and amounts to an *abus de droit.* He has relied on the authorities of *Mancienne v Ah-Time* (2013) SLR 165 and *Nanon v Thyroomoody* (2011) SLR 92 for this proposition.

[10] Mrs Karen Domingue, counsel for the 1st defendant has submitted that the right to property is sacrosanct both because of the provisions of art 26(1) of the Constitution and art 545 of the Civil Code, save where the exceptions laid down under art 26(2) of the Constitution are made out. It is her view that these exceptions are not met in the present case and that the existing right of way should be maintained.

[11] Counsel for the 2nd defendant, Mr Tachet has submitted that although the Government is willing to grant the right of way as requested by the plaintiffs, it is one of the conditions of the grant that the parties must all consent to it. Since the 1st defendant withholds such consent he submits that the application by the plaintiffs cannot therefore be sustained. It is also his submission that if the right of way as prayed for by the plaintiffs was granted, it would only result in an enlargement of the present right of way of way as it is adjacent to the proposed alternative and therefore the 1st defendant could not be prevented from continuing using the present right of way.

[12] The Court has gained much insight in the issues raised by visiting the *locus in quo*. It is obvious that the existing right of way is impractical and dangerous given the fact that it is a motorable access and one of the plaintiffs' houses is positioned astride it, others abut it or are sited closely to it.

[13] It is also obvious that the new right of way proposed, although running parallel to the existing one and adjacent to it would give some added security and safety to the inhabitants of the plaintiffs' houses.

[14] It is also clear despite the 1st defendant's protests that he will be inconvenienced very slightly, if at all, in that only some small adjustment would have to be made to the entrance of his property. It is also plainly obvious that the 1st defendant is uncooperative. At the *locus* he was unreasonable and became irascible when propositions were made to him, promising to emigrate if any change to the right of way was made.

[15] Admittedly a right of way is a property right. As all rights, it is subject to limitations. The 1st defendant's right to property must not be exercised to the detriment of the plaintiffs' right to enjoy property. In the circumstances I am of the view that there is a clear abuse by the 1st defendant of his property right and that the authorities of *Mancienne* and *Nanon* are applicable to this case.

[16] This case is unusual in the sense that all the parties concerned with the right of way over Parcel S71 are also the owners of the dominant tenement and servient tenement simultaneously since they all co-own Parcel S71.

[17] A change in a right of way is permitted by French jurisprudence. The authors Terré and Simler state:

> L'assiette et les modalités du passage peuvent etre modifiées, à la demande d'un changement de la destination de l'exploitation de ce fonds. Les besoins de l'exploitation qui motivent le droit de passage s'apprécient au moment où la prétention à la modification est émise. La servitude peut être lors non seulement modifié, mais deplacée et transportée d'un fonds sur un autre.
>
> Le changement peut aussi être décidé à la demande du propriétaire du fonds servant, à condition que le passage primitive soit devenu pour lui incommode… (Francois Térré et Philippe Simler, Droit civil – Les biens, 8e edn, Dalloz p. 256).

[18] The authority above is to the effect that both the proprietors of a servient and a dominant tenement may demand a variation in the position of a right of way in circumstances when the existing position of right of way becomes too inconvenient for the servient tenement. The existing right of way can be displaced or transported to other property.

[19] This principle however is limited by the provisions of art 685 (1) which prescribe the extinction of the position and the form of a right of way after twenty years. However, as no one has raised the issue of prescription and since the court cannot on

its own take judicial notice of prescription the issue does not arise (*viz* art 2224 of the Civil Code of Seychelles).

[20] Further, what must be borne in mind is the *raison d'être* of the right of way in the first place. Rights of ways are created to permit access to enclaved land. Article 682 provides in relevant part that:

> The owner whose property is enclosed on all sides and has no access or inadequate access onto the public highway shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property….

[21] The plaintiffs' and defendant's properties are not enclaved and have not been for some time given the grant by the 2nd defendant of the alternative access. Terré and Simler state that a right of way can be extinguished when land is no longer enclaved and such extinction can be declared by the court:

> La creation d'une nouvelle voie publique directement accessible ou l'acquisition par le titulaire de la servitude légale, ou encore, à l'inverse l'acquisition du fonds enclavé par le propriétaire du fonds servant, sont des événements qui suppriment l'état d'enclave…
> …si celui dont le fonds a cessé, par une autre voie, d'être enclavée, n'accepte pas à l'amiable l'extinction de la servitude de passage née de l'état d'enclave qui n'existe plus, celui qui subit la servitude pourra s'adresser au tribunal d'instance même si le passage acquis par suite d'enclave a fait l'objet de [vingt] ans d'usage. (Terré et Simler (supra) p. 257-258).

[22] Hence the creation of an alternative right of way which results in the property not being enclaved results in the original right of way being extinguished even if the limitation period has expired. There is Seychellois authority to that effect as well. *Tall v Lefevre* (1980) SLR 199 decided that where land is not enclaved and there is no necessity for a right of way as claimed, the owner is not entitled to it. Further, as the French authorities point out, where the owner of the servient tenement does not acquiesce to the extinction of the right of way, a court can make such a declaration.

[23] I am of the view that given the evidence in this case and the circumstances surrounding the grant of an alternative right of way by the 2nd defendant, the danger posed to the plaintiffs and their properties, that the existing right of way on Parcel S71 should be extinguished and I so order.

[24] The plaintiffs and the 2nd defendant are ordered to make the public motorable access granted usable within three months of this order and to substitute the same for the existing right of way. A permanent bollard is then to be placed at the entrance of Parcel S71 making it impassable to motor vehicles. The plaintiffs and the 1st defendant remain in ownership of Parcel S71 and their property rights therein are not otherwise affected.

[25] For the avoidance of doubt the costs of making the alternative access motorable is to be borne by the plaintiffs. The first defendant is at his own costs to demolish that part of his wall which would hinder access by him and his tenants to his property.

UGNICH v LAVRENTIEVA & LEGG

M Twomey CJ
3 April 2017 CS 125/2012; [2017] SCSC 326

Property – ownership of property – foreigners – fraud –public policy

The plaintiff and the 1st defendant were husband and wife until their divorce in 2012. Being a non-Seychellois citizen, the plaintiff could not own property in Seychelles. During their marriage, he bought property under the 1st defendant's name on the condition that she would transfer the property to him once he acquired Seychellois citizenship. After the commencement of the divorce procedure, the 1st defendant transferred the property to her mother (the 2nd defendant). The plaintiff therefore claimed that the transfer was fraudulent whose purpose was to alienate his rights and benefits to the property. The defendants contended that the plaintiff's retention of beneficial rights to the property was against public policy and null and void.

JUDGMENT Damages for the plaintiff and the title to the property returned to the 1st defendant.

HELD
Where fraud in a transaction is alleged, after the alleging party has provided evidence of the fraud, the burden shifts to the other party to show that they are purchasers in good faith and for value. Where fraud is established and not rebutted, the transaction will be declared null and void.

Legislation
Civil Code, arts 1116, 1321
Immovable Property (Transfer Restriction) Act, s 3(1)(a)

Cases
Aarti Investments Ltd v Padayachy and another (unreported) SC 5/2012
Adonis v Larue (2000-2001) SCAR 49
Guy v Sedgwick (2014) SLR 147
Labonté v Bason (2006-2007) SCAR 205
Ruddenklau v Botel (1996-1997) SCAR 85

Foreign cases
Reddaway v Banham [1896] AC 199

Counsel J Camille for plaintiff
A Derjacques for defendants

M TWOMEY CJ

[1] The parties were married in 1998. Their relationship bore them four children. They holidayed in Seychelles frequently and in 2005, the 1st defendant had a transfer of property at Les Cannelles, Mahé more fully known as Parcel C2914, executed into her name.

[2] It is the plaintiff's contention that as a non-Seychellois he was unable to acquire the property and had the same transferred to the 1st defendant who is a Seychellois, on the basis that when he acquired Seychellois nationality he would be able to have the property transferred back to him.

[3] The parties divorced in Russia in February 2012. It is a further contention of the plaintiff, that following the institution of divorce proceedings in Russia in 2011, the 1st defendant fraudulently transferred the property in which he had beneficial ownership, to the 2nd defendant, the mother of the 1st defendant to alienate his rights therein and deprive him of the benefit of his investment.

[4] The 1st and 2nd defendants have filed a joint Statement of Defence in which they deny any fraudulent act and state that any agreement for the plaintiff's retention of beneficial ownership in Parcel C2914 is illegal and against public policy and is therefore null and void.

[5] The matter was partly heard by my brother Karunakaran and given his inability to complete the case the parties opted for the evidence so far adduced to be adopted by this Court and also for the rest of the hearing to be completed by this Court.

[6] I took over the matter on 20 October 2016 and proceeded to hear the rest of the evidence on 26 January 2017.

[7] The evidence in this case was taken out of turn as the 1st defendant testified before the plaintiff, the reason being her availability to give evidence on 27 September 2013 while the plaintiff who had also travelled to Seychelles for the purpose of the trial had left Seychelles just before that date after being informed by another sitting judge that the case was going to be adjourned due to the absence of Judge Karunakaran.

[8] Be that as it may, the 1st defendant testified that after marrying the plaintiff she gave birth to their four children in the United States and that the children continue to live with the 2nd defendant, their guardian and custodian who was in the United States then and still resides there.

[9] It must be noted that in her statement of defence filed in January 2013, the 1st defendant did not admit that she was divorced from the plaintiff and put him to strict proof of the same. Yet, when she testified she herself produced the Certificate of Dissolution of Marriage (Exhibit D7) dated 30 January 2012. At that early stage this inconsistency affects the credibility of the 1st defendant, since the function of evidence voluntarily adduced during the trial is to corroborate the facts as set out by the party in his/her pleadings.

[10] The 1st defendant also produced a promise of sale in respect of Parcel C2914 dated 3 February 2005 between Harry and Margaret Savy and herself and the transfer deed in respect of the same dated 6 April 2005. She subsequently transferred the property to her mother, the 2nd defendant on 25 March 2011 for SR 1. The plaintiff's counsel moved to have a restriction placed against the property on 18 September 2012.

[11] The 1st defendant was adamant that the property in issue was gifted to her by the plaintiff and that the purchase price was from a joint account held with a Swiss Bank. However, she could not produce any details of the transfer of funds, nor could she remember by how many instalments and for how much the instalments were for. She also stated that although the work for a swimming pool and a veranda was through an agreement between the plaintiff and one Placide André, the contract price for the works was paid for from a joint account in Switzerland.

[12] She explained that the transfer of the property to her mother was by mutual agreement with the plaintiff for the purpose of providing some financial security to the 2nd defendant who was caring for their children.

[13] In his testimony, the plaintiff stated that after his marriage in Russia in 1998 to the 1st defendant he continued to visit Seychelles with the 1st defendant at least twice a year. In 2005 he decided that instead of staying in hotels it would be best to buy a house. He had an account in his sole name with the UBS Bank in Switzerland and transferred Euro 375,000 to the account of Mr Harry Savy and Euro 22,000 to the lawyer Serge Rouillon. He could not register the house in his name as he was still waiting for Seychellois citizenship so it was transferred in the name of his wife. He produced documentary evidence of the transfers of money.

[14] Counsel for the defendants objected to the oral evidence and documentary evidence of these transactions on the grounds that it breached the provisions of art 1321(4) of the Civil Code. I overruled the objection and reserved my reason for so doing. I provide it now: the provisions of art 1321(4) are not applicable to the oral evidence and documentary evidence produced as the registered agreement for sale being impugned in the present case is not one to which the plaintiff is party or privy to.

[15] Article 1321(4) provides:

> Any back-letter or other deed, other than a back-letter or deed as aforesaid, which purports to vary, amend or rescind any registered deed of or agreement for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease or charge of or on the immovable property to which it refers.

[16] Counsel for the defendants also relied on the authorities of *Guy v Sedwick* (2014) SLR 147 and *Adonis v Larue* (2000-2001) SCAR 49. In *Guy v Sedwick*, the Court of Appeal referred to the dicta of Ayoola J in *Ruddenklau v Botel* (1996-1997) SCAR 85 in which he stated:

> [I]t is pertinent to observe that it is difficult to fathom what useful purpose article 1321(4) which, as has been seen in this case, is capable of producing harsh and unexpected results, is designed to serve... The clear and unambiguous provisions of article 1321(4) are so sweeping that it will be a daring and unnecessary piece of judicial legislation to restrict the effect of

> the nullity they declare of back-letters which offend the provisions of article 1321(4) to third parties only while making them valid as between the parties.

[17] In *Guy v Sedwick* the Court of Appeal went on to state that:

> The addition of Article 1321(4) to our Civil Code therefore, further limits the admissibility of oral evidence under article 1341 insofar as contracts relating to immoveable property are concerned. In the light of the above, we hold that the following legal propositions should follow: 1. Back-letters are admissible against agreements (subject to certain conditions) except where these agreements concern deeds relating to immoveable property. 2. In such cases, a back-letter cannot be proved by oral testimony as it is a formal and not an evidentiary requirement. 3. Written back-letters are only admissible where they have been registered within 6 months of the making of the deed or agreement relating to immoveable property. The above falls in line with what is decided in the case of Hoareau v Hoareau [(unreported) SCA 38/1996]: It is only where the requirement of writing is only evidential that beginning of proof in writing and oral evidence can be accepted in substitution of writing.

[18] The authorities cited above continue to be good law until and unless the law is amended to temper the draconian provisions of the Civil Code but they can be distinguished from the present case. In the present case, the oral evidence being admitted is not against the transfer of sale to the 1st defendant. That deed is not being impugned. Indeed it was intended that the property be transferred to the 1st defendant and the deed of sale correctly and officially witnessed this transaction. The oral evidence being objected to concerns the second transfer from the 1st defendant to the 2nd defendant.

[19] Hence, as was the case in *Aarti Investments Ltd v Padayachy and another* (unreported) SC 5/2012, there is no question of a simulation between the plaintiff and the 1st defendant in parallel to the overt transfer and registered deed. What is being impugned is the registered deed from the 1st defendant to the 2nd defendant for SR1, when there was no such agreement between the plaintiff and the 1st defendant and by which it would seem that the matrimonial home, albeit a holiday home, was being alienated to the detriment of the plaintiff.

[20] In respect to that transfer to which the plaintiff was not party, the oral evidence of the plaintiff is admissible and was allowed.

[21] Counsel for the defendant has also submitted that it would be against public policy to accept the evidence of the plaintiff that there was an agreement between him and the 1st defendant that she should transfer the property to him once he had acquired Seychellois nationality. I am unable to accept this proposition. It is not shown how he tried to circumvent the law or public policy by agreeing that his wife have the property transferred into her sole name.

[22] The plaintiff has alleged that the transfer by the 1st defendant to the 2nd defendant of Parcel C2914 for SR1 is fraudulent. He has proved to the court that the transfer was by the 1st defendant made after divorce proceedings were instituted in Russia. The transfer is for a pepper corn rate.

[23] Article 1116 of the Civil Code provides:

> Fraud shall be a cause of nullity of the agreement when the contrivances practiced by one of the parties are such that it is evident that without these contrivances, the other party would not have entered into the contract. It must be intentional but need not emanate from the contracting party.
> It shall not be presumed it must be proved.

[24] In *Labonté v Bason* (2006-2007) SCAR 205, Domah J stated that in cases where fraud in a transaction is alleged, after the party alleging the fraud has provided evidence of the fraud, the burden shifts onto the other party to show that they were purchasers in good faith and for value. He added that where fraud is established and not rebutted, the transaction will be declared a nullity. So much for the procedure.

[25] I have to decide whether evidence of fraud was adduced. I have already referred to the fact that, an expensive villa (to all intents and purposes) with swimming pool and sea views valued at USD850, 000 (see Exhibit P2) was transferred for SR1. And that the transfer was while divorce proceedings were being conducted in Russia and matrimonial property being divided between the parties.

[26] The credibility of the 1st defendant was already at issue in her non-admittance of the divorce and then her own subsequent production of the divorce certificate at trial. Further, her ignorance of the details of the transfer of the monies and the mode of payment for the property, her refusal until cross-examination in accepting that she and her ex-husband had visited properties together before they settled on the one at Les Cannelles are all examples of her untruthfulness.

[27] She also states that the house was a gift from her husband while at the same time stating the money for its purchase was from a joint account she held with her husband.

[28] I also do not accept her version of the facts that she decided together with her ex-husband to sell the property to give her mother security. That statement is completely illogical. She admits that she is renting out the property and I do not see how her mother is less secure by that fact. Nor do I accept that she advertised the property for sale only to seek its value. A property valuer could have told her what the value was; in any case why did she want to know the value of the property if not to sell it.

[29] The 2nd defendant did not testify. On a question by the Court on this issue as to whether the 2nd defendant was adopting the evidence of the 1st defendant's counsel answered in the affirmative. This does not however amount to evidence capable of rebutting the allegation of fraud which has been alleged. There is clearly bad faith of both defendants.

[30] This case is on all fours both on facts and law with that of *Labonté*. On the facts Domah J in that case stated:

> She knew of the husband's equity in the property both by virtue of his total contribution for its purchase, by its status as a matrimonial home and the fact that it was being occupied by the respondent. She chose to dispose of it in

> complete disregard of those rights on the eve of her flight by night. She left default in the case below. Accordingly the learned Judge had unrebutted evidence of her "dol" involving her brother and sister-in-law to whom the property was sold not at the open market value (para 6).

[31] On the law, the appeal judge cited *Dalloz*:

> Dans les rapports entre les parties avec des tiers, la mauvaise foi du débiteur qui entre en collusion avec un tiers pour se soustraire à l'éxécution de ses obligations constitue une fraude qui entache son acte de nullité… (Encycl Dalloz, Vol I Bonne Foi, § 21).

[32] According to Lord MacNaghten in *Reddaway v Banham* [1896] AC 199:

> [F]raud is infinite in variety. Sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it.

[33] I have no difficulty in concluding that this audacious and unblushing act on the part of the 1st defendant in transferring the matrimonial property to the 2nd defendant is a fraud on the right of the plaintiff and I so find.

[34] In the circumstances I also find that the second transaction, that is the sale of Parcel C2914 by the 1st defendant to the 2nd defendant, is a nullity and I hereby issue such notice to the Land Registrar.

[35] The plaintiff has claimed for loss of the property, the villa and the swimming pool. Given my decision those particulars are not claimable. I do not grant him any damages for breach of agreement either given my final order below. I do however grant him damages in the sum of R 50,000 for inconvenience, anxiety and distress and the costs of this suit against the two defendants.

[36] I need to point out that the Court cannot at this stage grant the prayer of the plaintiff to transfer the property into his sole name. Essentially this is relief claimable under the Matrimonial Causes Rules. He will have to register his divorce in Seychelles and file a claim for ancillary relief as regards the matrimonial property in Seychelles. It is in those circumstances that he may then as a non-Seychellois attract the dispensation from government sanction for the transfer of the property under section 3(1)(a) of the Immoveable Property (Transfer Restriction) Act 1963 as amended.

[37] In the circumstances I make the following orders:

1. The Land Registrar is directed to transfer Parcel C2914 back into the name of Anna Andreevna Lavrentieva and to maintain the restriction on the said title until further order of this Court.
2. The defendants are jointly and severally ordered to pay the plaintiff SR 50,000 damages together with costs of this suit.

DELORIE v GOVERNMENT OF SEYCHELLES

B Renaud, D Akiiki-Kiiza, C McKee JJ
4 April 2017 [2017] SCCC 4

Constitution – National Assembly Members (Emoluments) Act – Pensions – Interpretation

An amendment to the National Assembly Members (Emoluments) Act provided for pensions. The petitioner claimed that those amendments were ultra vires because the Constitution provided only for "salaries, allowances and gratuity" to be charged to the Consolidated Fund.

JUDGMENT Petition granted.

HELD

1 The canon of statutory interpretation that where the "specific inclusion of one thing implies the exclusion of all other things" (known as the *expressio unius est exclusio alterius* rule) is a principle of common sense rather than a rule of construction, and it must at all times be applied with great caution.
2 The maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.
3 The rule of implied exception (*generalia specialibus non derogant)* is that when there are two legislative provisions which are in apparent conflict with each other, and one of them is more specifically dealing with the matter while the other is more general in application, the conflict is resolved by applying the specific provision to the exclusion of the general one.
4 Pensions are excluded from the payments which the National Assembly can authorize as withdrawals from the Consolidated Fund.

Legislation

Constitution of Seychelles arts 5, 46, 58, 66, 69, 76, 82, 84, 85, 90, 105, 115, 119, 130, 133, 142, 144, 150, 151, 152, 158
Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994 r4(1)(c)
National Assembly Members Emoluments Act

Cases

Delorie v Seychelles Government MA288/2014

Foreign Cases

Colquhoun v Brooks (1888) 21 QB 52 at 65
Davis v int Alliance etc Employees (1943) 60 Cal App 2d 713, 721 [141 P2d 486]
Estate of Banerjee 21 Cal 3d 527
National Director of Public Prosecutions v Mohamed NO and Others (CCT44/02) [2003] ZACC 4; 2003 (4) SA (CC) at [41]
Nicholson v Haldimand-Norfolk Regional Police Commissioners [1979] 1 SCR 311 at 322)
R v Greenwood [1992] 7 OR (3d) 1
R v Inhabitants of Sedgley (1831) 2 B & Ad 65

Counsel F Elizabeth and P Boulle for the petitioner
J Chinnasamy for the respondents

JUDGMENT OF THE COURT

Introduction

[1] This is a constitutional petition requesting that this Court grant an order declaring under art 5 of the Constitution that the National Assembly Members Emoluments Act ("the Act") as amended by the National Assembly Members Emoluments (Amendment) Act 2008 ("the 2008 Amendment") and the National Assembly Members Emoluments Amendment Act 2013 ("the 2013 Amendment") is a violation of art 105(1) of the Constitution and is therefore void. Simply put, the 2008 Amendment introduced a pension payable to the members of the National Assembly, including the Speaker and the Deputy Speaker, the Leader of the Opposition and the Leader of Government Business of the National Assembly.

[2] The petitioner also seeks a declaration that all pensions paid to the members of the National Assembly pursuant to the Act are unconstitutional and unlawful and that these are unconstitutional charges to the Consolidated Fund. In addition the petitioner requests an order that the National Assembly acted ultra vires in passing the Acts to the extent that it provides a pension for National Assembly Members.

[3] Article 5 of the Constitution provides that "This Constitution is the supreme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void". Although not specifically mentioned in the petition, the petitioner approaches this Court in terms of art 130(1) of the Constitution and the Court is empowered by art 130(4) to grant the remedy requested if it finds that there has indeed been such a contravention.

[4] Article 105(1) of the Constitution provides that the members of the National Assembly are entitled to the "salary, allowances and gratuity as may be provided by an Act" and that this may be a charge on the Consolidated Fund. The Act, initially passed in 1993, provided for payments to National Assembly members in the form of salary, allowances and gratuities. On 20 December 2007, Bill No 25 of 2007 was introduced by the Attorney-General which sought to "do away with allowances earlier paid [to the various members of the National Assembly]" and "to provide for a monthly pension upon ceasing to hold office" for the Speaker, Deputy Speaker, Leader of Opposition, the Leader of Government Business and the Members of the National Assembly. The petitioner is challenging the constitutionality of this amendment.

[5] In response to the petition, the respondents raised three pleas in limine litis: (1) That the petition was barred as being out of time under rule 4(1)(c) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules of 1994 as amended; (2) that the petitioner did not have locus standi to approach the Constitutional Court as he failed to show how and what/which Charter rights have been contravened or likely to be contravened in relation to him by the impugned Acts; and (3) that there was no prima facie case.

[6] The Court dismissed these points in limine, finding that the matter was filed in time and that the petitioner did have locus standi in an order in *Delorie v Seychelles Government* MA288/2014, dated 13 October 2015.

Case for the Petitioner

[7] On the main issue before this Court, the petitioner argued that the 2008 Amendment was ultra vires and a violation of the terms of the Constitution because it provided a pension for National Assembly Members as a payment against the Consolidated Fund when the Constitution in art 105 had authorised only "salary, allowances and gratuity". The petitioner placed emphasis on the fact that the Constitution makes provision for the payment of a pension to the President in the express wording of art 58 of the Constitution and is silent with regard to the National Assembly members. It was argued therefore that it was an apparent intention to limit the authorization of what could be drawn down from the Consolidated Fund, and this specifically excluded the payment of a pension by its deliberate omission.

[8] The petitioner argued further that the power of the National Assembly to determine the terms of their own benefits is 'exceptional' and should be interpreted very strictly and restrictively within the boundaries of the Constitution. Therefore, the Court was encouraged to adopt a narrow interpretation of the clear and specific wording of art 105(1) upon the basis that if the drafters of the Constitution had intended a pension to be provided, they should have included specific wording to that effect as is done with regard to the President. Therefore, the petitioner argued that the 2008 Amendment was in violation of the Constitution and that this violation continued with the 2013 Amendment (which increased the pension amount).

[9] In response to the additional submissions by the respondents, the petitioner clarified that it is not that the National Assembly member may not have a pension scheme, but rather that it is not to be a charge on the Consolidated Fund.

[10] In argument the petitioner drew the Court's attention to the unfairness created, where the National Assembly members will get a national pension along with all others under the Seychelles Pension Fund, and then they will get a second pension principally because they served on the National Assembly. This law gives special treatment to the class of persons who are National Assembly Members, and is not justified as National Assembly members sit for a limited period, which may be one, two or three terms, and will benefit for the rest of their lives after reaching the pensionable age.

[11] Therefore, the petitioner is requesting a declaration of unconstitutionality of the 2008 and 2013 Amendments, and a declaration that the pensions which have been paid were unconstitutionally paid out.

Case for the Respondents

[12] In response the respondents argued that art 105 must be interpreted in the light of the overall scheme and objectives of the Constitution. The provision of a pension to National Assembly Members is not prohibited by the Constitution and is therefore

lawful. The respondents argued that the intention of the Constitution could be given expression by an Act and not necessarily only by a constitutional amendment.

[13] Counsel for the respondents argued that any emolument in addition to salary, allowance and gratuity may be granted by a legislative Act and can also be a charge on the Consolidated Fund in terms of art 152 of the Constitution. Therefore the 2008 Amendment was neither a violation nor a contravention of art 105(2).

[14] Furthermore, counsel argued that the 2008 Amendment is neither ultra vires nor a violation of art 85 of the Constitution as the ability to enact legislation to create a pension fits within the scope of the authority given to the National Assembly.

[15] Counsel encouraged the Court to apply a presumption of constitutionality, which is that the Court should favour the interpretation of a statute which renders it constitutional, and that the petitioner must show a clear transgression of constitutional principles before the Court will come to a finding of unconstitutionality.

[16] Counsel stated that in assessing the constitutional validity of a statute, the Court must consider whether the law was passed within the scope of the power conferred on a legislature and if it is found that it violates no restrictions on that power, the law must be upheld, regardless of what the court may think of it. The respondents submit that the Constitution does not explicitly bar the provision of the pension to the members of the National Assembly and that an explicit bar would be required in order to grant the remedy to the petitioner. Counsel argues further that a restriction on the powers of the Parliament cannot be implied – any such restriction would be clearly specified.

[17] Moreover, counsel pointed out that the National Assembly members are also catered for a pension under the Constitutional Appointees Emoluments Act and so the invalidation of the Act would not do away with the provision of a pension to the Members.

[18] In oral submissions, the respondents' counsel accepted that the word 'pension' was not explicitly included in art 105, however, he stated that there is no explicit bar to give the pension. There is a silence in the Constitution, and the courts are to read it in order to uphold the constitutionality of the impugned provisions.

[19] On the topic of the importance of a pension, counsel expounded that a pension is paid in consideration of past services. Following the retirement from service of the employee, it is an important condition of employment which is earned by an employee by rendering required period of service and its receipt is one of the incidents of employment. Pensions are deferred wages paid at the time of retirement or thereafter. Pension should, therefore, be construed as part of one's earnings.

[20] Turning to the 2008 Amendment, the respondents' counsel pointed out that the amendment sought to replace the scheme of 'allowances' with 'pension' and this is clear by the renaming of the titles in the Act from "allowance" to "pension". Therefore, it was argued that a pension can be treated as an allowance. He argues therefore that under this Act what was formerly known as an allowance was substituted for by the

word “pension” – however, it is the same thing – what was known as an allowance in 1993 is amended to pension in 2008. There was an allowance of R 2000 m which is totally repealed and therefore, it was argued that the allowance became the pension and therefore there is no extra benefit given by the Legislature in 2008 by merely using the word ‘pension’.

[21] Respondents’ counsel did concede in argument that the nature of the payment was different: whereas the allowance subsisted during the person’s term as a member, the pension was paid after the expiry of their tenure.

[22] The question for this Court to decide, therefore, is whether the National Assembly was acting ultra vires in creating a pension for the National Assembly Members as a charge on the Consolidated Fund?

Analysis

[23] By the Constitution of the Republic of Seychelles, the powers of the state are divided into Legislative, Executive and Judicial. All legislative power is vested in the National Assembly (art 85); the executive power is vested in the President (art 66) and the judicial power is vested in the Judiciary (art 119). All of these power-holders are required to exercise their powers subject to the Constitution which is supreme over all (see the Preamble to the Constitution and art 5).

[24] The Constitution contains an enumeration of the powers specifically conferred upon the National Assembly and grants the National Assembly a general power to legislate under art 85 which is only subject to the Constitution. Part of this power includes the power to make Acts which authorize payments out of the Consolidated Fund or any other public fund (art 152).

[25] The legislative power is subject to constitutional limitation and it is the right and power of the Judiciary to declare and enforce constitutional limitations upon legislative action (art 46 and art 130).

[26] It is helpful to first look at the power of the National Assembly in order to determine the scope of those powers. Article 85 vests “[t]he legislative power of Seychelles … in the National Assembly” which power “shall be exercised subject to and in accordance with this Constitution”.

[27] This creates a regime where the only limitations on the powers of the National Assembly are those limitations laid down by the Constitution. This is the hallmark of a system of Constitutional Supremacy in contrast to the system of a Parliamentary Supremacy, where the legislature has unfettered discretion in the exercise of its legislative powers.

[28] Therefore, we look to the wording of the Constitution for any limitations on the scope of the power of the National Assembly with regard to making payments from the Consolidated Fund or with regard to the payments that may be authorised for various constitutional actors, including the National Assembly members themselves.

[29] Article 151 of the Constitution creates a Consolidated Fund, "into which shall be paid all revenues or other moneys raised or received for the purposes or on behalf of the Republic, not being revenues or other moneys that are payable by or under an Act for some specific purpose or into some other fund established under an Act for a specific purpose".

[30] Article 152 ensures that money shall not be withdrawn from the Consolidated Fund except where it is –

> (1) (a) to meet expenditure that is charged on the Fund by this Constitution or by an Act; or
> (b) where the issue of those moneys has been authorised -
> (i) by an Appropriation Act;
> (ii) by a supplementary estimate approved pursuant to article 154(7) by resolution of the National Assembly passed in that behalf of; or
> (iii) under article 155.

[31] Therefore, art 152(1)(a) vests a power with the National Assembly that it may pass an Act, with or without specific constitutional authorisation, which Act creates an expenditure which may be paid from the Consolidated Fund. This is a general, residual power granted to the National Assembly and must be exercised subject to certain procedural constraints, such as the requirements for the introduction of a Bill authorizing withdrawals from the Consolidated Fund under art 90.

[32] Article 152(1)(a) also makes provision for instances where the Constitution itself authorises certain withdrawals from the Consolidated Fund. Many of these specific authorisations have to do with emoluments payable to persons who have been appointed to perform constitutional functions. And this is where we come to the crux of the present matter before the Court.

[33] In these authorising provisions dealing with the emoluments for persons performing constitutional functions, the Constitution provides specifically for Acts to be passed to make pensions payable for three constitutional appointees: the President, the Auditor-General and the Attorney-General.

[34] With regard to the President, art 58 of the Constitution provides that:

> (1) The President shall receive such salary, allowances and gratuity as may be prescribed by an Act.
> (2) Where the person holding the office of President ceases to hold office otherwise than by being removed under article 54, the person shall receive such *pension*, gratuity or allowance as may be prescribed by an Act.
> (3) The salary, allowance, *pension* or gratuity, as the case may be, payable under this article to the President or a person who has ceased to be President *shall be a charge on the Consolidated Fund* and shall not be altered to the disadvantage of the President or the person who has ceased to be President. [Emphasis added]

[35] For the Attorney-General art 76 (12) provides that "[t]he salary, allowances, pension or gratuity payable to the Attorney-General shall be a charge on the Consolidated Fund".

[36] Further, with regard to the Auditor-General, art 158 (9) provides that "[t]he salary, allowances, gratuity or pension payable to the Auditor-General shall be provided for by or under an Act and shall be a charge on the Consolidated Fund".

[37] Whilst the wording for all three of these persons is different, the provisions all specifically provide that the provision of salary, allowances, gratuity and pension shall be a charge on the Consolidated Fund.

[38] However, for other persons appointed to constitutional positions, including National Assembly Members, the wording of the Constitution is limited to 'salary, allowances and gratuity' which may be provided by an Act and shall be a charge on the Consolidated Fund. For the sake of completeness, these provisions are laid out in full below.

> *Article 105*
> (1) An Act may provide for the salary, allowances and gratuity of members of the National Assembly.
> (2) The salary, allowances or gratuity payable to members of the National Assembly shall be a charge on the Consolidated Fund.
> *Article 66*
> (13) The Vice-President shall receive such salary, allowance and gratuity as may be prescribed by an Act and the salary, allowance or gratuity shall be a charge on the Consolidated Fund.
> *Article 69*
> (5) A Minister shall receive such salary, allowances and gratuity as may be prescribed by an Act.
> (6) The salary, allowances or gratuity payable under clause (5) shall be a charge on the Consolidated Fund.
> *Article 82*
> (6) An Act may provide for the salary, allowances and gratuity of the Speaker and Deputy Speaker.
> (7) The salary, allowances or gratuity payable to the Speaker and Deputy Speaker shall be a charge on the Consolidated Fund.
> *Article 84*
> (4) An Act may provide for the salary, allowances and gratuity of the Leader of the Opposition.
> (5) The salary, allowances or gratuity payable to the Leader of the Opposition shall be not less than those payable to a Minister and shall be a charge on the Consolidated Fund.
> *Article 115C*
> (4) The salary, allowances and gratuity payable to the Chairperson and Members of the Commission shall be prescribed by or under an Act and the salary, allowances or gratuity shall be a charge on the Consolidated Fund.

Article 133

(1) The salary, allowances and gratuity payable to a Justice of Appeal or Judge shall be prescribed by or under an Act and shall be a charge on the Consolidated Fund.

Article 142

(4) The salary, allowances and gratuity payable to a member of the Constitutional Appointments Authority shall be prescribed by or under an Act and the salary, allowances or gratuity shall be a charge on the Consolidated Fund.

Article 144

(4) The salary, allowances and gratuity payable to the Ombudsman shall be prescribed by or under an Act and the salary, allowances or gratuity so payable shall be a charge on the Consolidated Fund.

Article 150

(4) The salary, allowance and gratuity payable to a member of the Public Service Appeal Board shall be prescribed by or under an Act and the salary, allowances or gratuity so payable shall be a charge on the Consolidated Fund.

[39] There is no apparent reason why the Constitution drafters provided for a pension for three specific constitutional functions, and not for the other ten types of appointees, however, the language of the Constitution clearly distinguishes on this ground. It, therefore, becomes relevant whether this distinction has any impact on the residual power of the National Assembly to authorise withdrawals from the Consolidated Fund.

[40] The petitioner argues that the specific provision of a pension for the President but not for the members of National Assembly thereby excludes the possibility of an Act creating a pension for these members payable from the Consolidated Fund.

[41] The respondents argue in turn that there is no explicit restriction on the power of the National Assembly in this regard and that therefore the residual power to authorise withdrawals from the Fund under art 152 saves the 2008 Amendment.

[42] The petitioner's argument relies on a canon of statutory interpretation that where the "specific inclusion of one thing implies the exclusion of all other things" (known as the *expressio unius est exclusio alterius* rule). This has been part of the Common Law statutory interpretation since the 19th century. (See *R v Inhabitants of Sedgley* (1831) 2 B & Ad 65). This is a common sense rule that imputes an intentionality in the language choices made by the drafters of legislation.

[43] However, it is also a rule which should be approached with caution. Lopes LJ in *Colquhoun v Brooks* (1888) 21 QB 52 at 65 describes the rule as "a valuable servant, but a dangerous master". The American courts treat the maxim with caution, and state that it is "no magical incantation, nor does it refer to an immutable rule." (*Estate of Banerjee* 21 Cal 3d 527). Similarly, the South African courts state that "[i]t is not a rigid rule of statutory construction"; in fact it has on occasion been referred to as a 'principle of common sense' rather than a rule of construction, and 'it must at all times be applied with great caution'.[*National Director of Public Prosecutions v Mohamed NO and Others* (CCT44/02) [2003] ZACC 4; 2003 (4) SA 1 (CC) at [41]. Footnotes omitted.].

[44] In *Colquhoun v Brooks* Lopes LJ states that the maxim "ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice" (at 65). This dictum has also been cited with approval by the Canadian Supreme Court in *Nicholson v. Haldimand-Norfolk Regional Police Commissioners* [1979] 1 SCR 311 at 322.). Furthermore, when discussing this maxim, *Maxwell on the Interpretation of Statutes* cautions that the courts should take care to distinguish when the language choice reflects that the "legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution". [R Wilson and B Calpin *Maxwell on The Interpretation of Statutes* (11ed, Sweet & Maxwell, 1962) 306].

[45] In *Banerjee,* the Court finally holds that "[m]ore in point here, however, is the principle that such rules shall always 'be subordinated to the primary rule that the intent shall prevail over the letter.'" (Citing *Davis v Int Alliance etc Employees* (1943) 60 Cal App 2d 713, 721 [141 P2d 486]). *Bindra's Interpretation of Statutes* recommends that it "may be applied only when in the natural association of ideas, the contrast between what is provided and what is left out leads to an inference that the latter was intended to be excluded". (MN Rao and A Dhanda, *Bindra's Interpretation of Statutes* (10ed, LexisNexis Butterworths, 2007) 648.)

[46] We have looked at the introductory comments on the Bills introducing the 1993 National Assembly Members Emoluments Bill and the 2008 Amendment, and these, too, do not shed any light on the legislative choices to provide 'salary, allowances and gratuity' under the former, and to replace allowances with a pension under the latter. Nor does the latter Bill make any reference to the constitutional provisions which it seeks to enforce and its departure from the wording of the Constitution in those provisions.

[47] The drafting of a constitution is not the same as the drafting of ordinary legislation. We have to give extra credence to the language choices made in the drafting of the Constitution given the nature of the document being drafted; the specific environment created to enable negotiations and enhanced scrutiny; and the fact that the final document was adopted by the Constitutional Assembly before being put to the people of Seychelles who also adopted the Constitution by referendum. We cannot, therefore, assume that it was an unintended choice to provide for specific authorization for pensions for only three constitutional functionaries.

[48] Furthermore, shortly after the adoption of the Constitution the Acts providing for the emoluments payable to the President, the National Assembly members, the Judiciary and the other Constitutional Appointees were passed in close succession. At that point it would have been apparent to the National Assembly and the Attorney-General of any inadvertent oversight in the empowering provisions, and constitutional amendments could have been adopted to bring consistency between the various provisions. Therefore, it appears to us that the *expressio unius est exceptio alterius* maxim applies in this context and there was a clear intention to exclude pensions from the payments which the National Assembly could authorize as withdrawals from the Consolidated Fund.

[49] The question remains whether the 2008 Amendment may be saved by virtue of the general legislative powers to authorize withdrawals from the Consolidated Fund granted to the National Assembly under art 152(1)(a) read with art 85? In our opinion this cannot be so, as the rule of implied exception must apply. The rule of implied exception (or *generalia specialibus non derogant)* is that when there are two provisions of a statute, or statutes which are in apparent conflict with each other, and one of them is more specifically dealing with the matter while the other is more general in application, the conflict is resolved by applying the specific provision to the exclusion of the general one. (See Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4ed, Butterworths, 2002), 273; See also *R v Greenwood,* [1992] 7 OR (3d) 1.)

[50] In the present situation, arts 58, 76, 158, 105, 66, 69, 82, 84, 115C, 133, 142, 144, and 150 all specifically state what types of emoluments Acts the National Assembly may provide for the respective constitutional functionaries as withdrawals from the Consolidated Fund: Acts pursuant to arts 58, 76 and 158 may withdraw from the Consolidated Fund to provide salary, allowances, gratuity and pensions. Acts pursuant to arts 105, 66, 69, 82, 84, 115C, 133, 142, 144 and 150 may only draw from the Consolidated Fund to provide salary, allowance and gratuity. The word 'pension' would need to be present in this latter group of Articles in order for it to be authorised by the Constitution.

[51] To interpret art 152(1)(a) read with art 85 as further empowering the National Assembly to grant pensions or any other payment in addition to those specified in art 105 would render art 105(1) redundant and superfluous – there would be no need for that provision at all. It would also render all of those other provisions redundant. We cannot accept such an interpretation in the light of the additional respect we must give to constitutional drafting choices.

[52] Furthermore, para 8 of Schedule 2 to the Constitution lays out the "general principles of interpretation" that courts must apply, and specifies that "(a) the provisions of this Constitution shall be given their fair and liberal meaning; (b) this Constitution shall be read as a whole; and (c) this Constitution shall be treated as speaking from time to time". To adopt the approach taken by the respondents would be to rob these provisions of their meaning and would undermine the structure of the Constitution and is simply not fitting with a 'fair and liberal' reading of these provisions or the Constitution 'as a whole'.

Findings and Conclusion

[53] Therefore, we come to a finding that the 2008 Amendment was ultra vires the powers of the National Assembly and therefore falls to be declared unconstitutional and void.

[54] This is not to say that pensions cannot be paid to constitutional functionaries, but rather that the limitation is on the withdrawal of these monies from the Consolidated Fund.

[55] We have been called upon in this judgment to consider the constitutionality of the National Assembly Members Emoluments Act, as amended by the 2008 Amendment and the 2013 Amendment. We have found that the 2008 Amendment exceeded the powers of the National Assembly and therefore is unconstitutional. However, once the amendment was passed we need to consider those provisions in their place in the main Act, and not the amending Act per se. The provisions of the Act as amended will be unconstitutional. Therefore, where provision is made for pensions in the Act, those provisions are unconstitutional and void. These provisions are ss 2(1)(c), 2(2)(d), 3(1)(c), 3A(1)(d) and 4(d).

[56] This finding has significant implications for the constitutionality of this Act and the general structure of emoluments paid to constitutional functionaries under the Act, the Judiciary Act and the Constitutional Appointees Emoluments Act. We are mindful of the impact that such a finding may have on persons who are already receiving pensions under this Act.

[57] Under art 130(4), the Court may—

> (a) declare any act or omission which is the subject of the application to be a contravention of this Constitution;
> (b) declare any law or the provision of any law which contravenes this Constitution to be void;
> (c) grant any remedy available to the Supreme Court against any person or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court, as the Court considers appropriate.

[58] In the circumstances, we declare that the pensions provided to National Assembly Members under ss 2(1)(c), 2(2)(d), 3(1)(c), 3A(1)(d) and 4(d) of the National Assembly Members Emoluments Act are unconstitutional to the extent that they authorize the payment of a pension for National Assembly Members from the Consolidated Fund.

[59] We do not believe that it is just to grant this order retrospectively, and therefore will not declare that payments made prior to this order are void.

Order of the Court

[60] Therefore we make the following order:

a. Sections 2(1)(c), 2(2)(d), 3(1)(c), 3A(1)(d) and 4(d) of the National Assembly Members Emoluments Act are unconstitutional and void.
b. This order will have prospective effect. No order is made with regard to payments already made under the Act.
c. Notice of this finding of unconstitutionality is to be served on the President of the Republic of Seychelles and the Speaker of the National Assembly in terms of art 130(5) of the Constitution.

EASTERN EUROPEAN ENGINEERING LTD v VIJAY CONSTRUCTION (PTY) LTD

F Robinson J
18 April 2017 CC 33/2015; [2017] SCSC 375

Arbitration – private international law – recognition and enforcement of foreign arbitral awards – Supreme Court's jurisdiction – applicability of New York Convention

The plaintiff and the defendant entered into six contracts according to which the defendant carried out the construction for the plaintiff's hotel. After a dispute arose, the plaintiff initiated an arbitration procedure in accordance with the contracts. An arbitral award, mostly in favour of the appellant, was issued in Paris. The plaintiff sought to have the foreign arbitral award recognised and enforced in Seychelles.

JUDGMENT For the plaintiff.

HELD

1 The Supreme Court has all the power, authorities and jurisdiction of the High Court of England in addition to any other jurisdiction of the Supreme Court and that includes power to enforce a foreign arbitral award.
2 It is with respect to procedural laws that English laws can be imported into the local written laws only on the condition that the written law is silent.
3 Articles 146-150 of the Commercial Code have no effect until Seychelles is a signatory to the New York Convention.
4 Parties to litigation who have continued in that litigation with knowledge of an irregularity of which they may have availed themselves, are estopped from afterwards setting up that irregularity.
5 Where a foreign arbitral award has been obtained in proceedings that did not comply with the principles of natural justice, recognition and enforcement of that award will be denied.

Legislation

Constitution, art 125
Civil Code, arts 1139, 1146, 1152,1230
Code of Civil Procedure, ss 23, 226
Commercial Code Act, ss 5, 9
Commercial Code of Seychelles, arts 110, 111, 127, 134, 145-150
Courts Act, ss 4-6, 11, 17

Cases

Ablyazov v Outen (2015) SLR 279
Cable and Wireless Local Staff Union v Cable & Wireless Ltd (1976) SLR 160
Finesse v Banane (1981) SLR 103
Gallante v Hoareau (1988) SLR 122
Lepere v Coopoosamy (1975) SLR 156
Marie-Ange Pirame v Armano Peri SCA 16 of 2005
Morel v Crispin (No 2) (1975) SLR 262
Morris v Costain Civil Engineering Ltd (1976) SLR 178
Omisa Oil Management v Seychelles Petroleum Company Limited (2001) SLR 50
Privatbanken Aktieselskab v Bantele (1978) SLR 226

Foreign cases

Adams Cape Industries Plc [1990] Ch 433
Armagas Ltd v Mundogas SA (The Ocean Frost), [1985] 1 Lloyd's Rep. 1
Attorney-General of Seychelles v Armitage [1958] MR 55
Cukurova Holding SA v Sonera Holding BV [2014] UKPC 15
Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2009] EWCA Civ 755
Dalmia Cement Ltd v National Bank of Pakistan [1974] 3 All ER 189
Dardana Ltd v Yukos Oil Co [2002] EWCA Civ 543
Diag Human SE v The Czech Republic [2014] EWHC 1639
Home Secretary v AF [2008] EWCA Civ 1148
Jacobson v Frachon (1927) 138 LT 386 (CA)
John v Rees [1970] Ch 345
Kanoria v Guiness [2006] EWCA Civ 222
Minmetals Germany GMbH v Ferco Steel Ltd (1999) 1 All ER (Comm) 315
Onassis v Vergottis [1968] 2 Lloyds Rep 403
Pemberton v Hughes [1899] 1 Ch 781 CA
Shrager v Basil Dignton Limited and Others [1924] KB 274
Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others [2011] EWCA Civ. 61

Foreign legislation

Arbitration Act 1950 (replaced by Arbitration Act 1996) (England), ss 26, 35, 40(a), 103
Code of Civil Procedure Book IV Arbitration Decree No 2011-48 (France), arts 1134, 1464, 1466, 1504, 1510, 1514-1517
International Chamber of Commerce Rules, art 12(2)
New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958, art V
Rules of the Conflict of Laws (England), rr 190, 199, 201

Counsel B Hoareau for plaintiff
B Georges and L Siegfried Kuschke for defendant

F ROBINSON J

Background Facts

[1] EEEL is Eastern European Engineering Proprietary Limited (then claimant), a company incorporated under the written laws of Seychelles. Vijay is Vijay Construction Proprietary Limited (then respondent), a company incorporated under the written taws of Seychelles carrying on business of civil and building contractors. EEEL and Vijay are domiciled and resident in the Republic of Seychelles.

[2] It is common ground between EEEL and Vijay that –

(a) EEEL and Vijay entered into a series of six contracts by virtue of which EEEL hired Vijay to carry out construction work in respect of a hotel called "Savoy Resort and Spa" ("Six Contracts");
(b) the Six Contracts are as follows —

- Contract for the "construction of the site civil works, earthworks and the building substructure and building upper structure, for Guest Blocks I and 2 and the Watersports and Beach Bar (Part of the Main Contract works) for the Savoy Resort and Spa", dated 15 April 2011 ("Contract 1");
- Contract for the "construction of the civil works which includes earthworks and the building substructure and building upper structure, for Main Pool, Pool Bar & Restaurant, Engineering Building, Spa & Gym and Internal and External Block-work to Those Buildings (Part of the Main Contract works) for the Savoy Resort and Spa", dated 4 August 2011 ("Contract 2");
- Contract for the "execution of the earthworks and installation of the geogrid for the Main building of the Savoy Resort & Spa hotel", dated 30 August 2011 ("Contract 3");
- Contract for the "construction of the site civil works which includes the building substructure and building upper structure for the Main Building of the Savoy Resort and Spa hotel", dated 30 September 2011 ("Contract 4");
- Contract for the "installation of the roof steel structures for the Main Building, Guest blocks 1 and 2, SPA, Beach bar and security kiosk of the Savoy Resort & SPA hotels' dated 19 October 2011 ("Contract 5"); and
- Contract for the "execution of the civil, structural and finishing works, MEP-works, external development and hardscaping, manufacture and installation of fixed furniture for the Main building, Guest blocks 1 and 2, engineering building, Pool, Restaurant & Bar, SPA, Beach bar security kiosk of the Savoy Resort & SPA hotel", dated 23 December 2011 ("Contract 6")

(c) The Six Contracts have arbitration clauses ("Arbitration Clauses') similar in their intent, namely, Clause 20, in terms of which EEEL and Vijay agreed to refer disputes arising out of the Six Contracts to the International Chamber of Commerce ("ICC") arbitration under the ECC Rules. The Arbitration Clauses provide –

> 20 (i) any dispute, disagreement or claim arising under or from the contracts, including disputes on breach, termination and validity of the contracts shall be finally settled by arbitration under the rules of Arbitration of the International Chamber of Commerce;
>
> (ii) the arbitral tribunal would consist of a sole arbitrator; and
>
> (iii) the place of arbitration would be in Paris. .

[3] Disputes did arise and EEEL in terms of the Arbitration Clauses commenced arbitration proceedings against Vijay, by way of Request for Arbitration, dated 10 September 2012, to the ICC, in respect of the Six Contracts. The Request for Arbitration is before the COLIEI as exhibit P3.

[4] EEEL and Vijay were involved in the arbitration between 2012 and 2014. The arbitration was conducted in agreed steps, which were directed by Andrew Lotbiniete McDougall, (the "Sole Arbitrator") under Procedural Order No 1, dated 27 February,

2013, and a number of later procedural orders made by the Sole Arbitrator. The Procedural Order No 1 is before the court as exhibit D7.

[5] The award delivered on 14 November 2014 (the "Final Arbitral Award"), in favour of EEEL, was as follows –

(a) declaring that EEEL validly terminated the Contracts for cause under Clause 15.2 of the Contracts;

(b) ordering Vijay to pay EEEL €12,857,171.04/- under Contract 6 on account of damages for the reasonable costs that EEEL had incurred to finish the Savoy Resort Project, overpayments for work performed by Vijay, and the provision of reinforcement steel {0 Vijay;

(c) ordering Vijay to pay to EEEL € 150,000/- on account of damages for breach of Contract 6 's confidentially provision:

(d) ordering Vijay to pay EEEL €600,449.32/- under Contracts 1-5 on account of damages for delays and the provision of reinforcement steel;

(e) ordering Vijay to pay EEEL simple interest at the rate of 8% per annum as follows —

- as of 18 April, 2012, until the date of payment for the damages mentioned at paragraph (b) above;
- as of 27 April, 20] 2, until the date of payment for the damages mentioned a,' paragraph (c) above; and
- as of 23 July, 2012, until the date of payment for 'he damages mentioned at paragraph (d) above.

(f) ordering EEEL to pay to Vijay €905,849/- under contracts 1-5 on account of the value of works performed by Vijay and the Acceleration Fee payable for {he timely completion of work under Contract 4;

(g) ordering EEEL to pay Vijay €250, 000/- on account of damages for EEEL 's occupation of Vijay 's temporary buildings;

(h) ordering EEEL to pay to Vijay simple interest at the rate of 8% per annum on the damages in paragraphs (f) and (g) above;

(i) determining that Vijay shall bear its own costs of the arbitration and shall bear 80% of the EEEL 's cost of the arbitration. and thus ordering Vijay to pay EEEL €640,811.53 on account of EEEL 's reasonable legal and other costs;

(j) determining that the Defendant shall bear 80% of the Plaintiff's cost to the ICC, and thus ordering the Defendant to pay to Plaintiff US $ 126, 000 on account of the Plaintiff's costs to the ICC: and

(k) dismissing all other claims.

[6] The Final Arbitral Award is before the court as exhibit P1.

The Proceedings Between EEEL And Vijay

[7] These proceedings concerned the attempts by EEEL to have the Final Arbitral Award recognised by the court in the face of Vijay's challenge of the Final Arbitral Award on procedural and public policy grounds.

[8] Vijay also challenged an earlier partial award by the Sole Arbitrator dated 17 June 2013, in terms of which he held that he had jurisdiction to determine the

disputes, despite Vijay's preliminary objection that he did not have jurisdiction. The partial award is before the court as exhibit P2 (the "Partial Award").
[9] It is the case for EEEL that —

(a) the Final Arbitral Award could no longer be contested before the Sole Arbitrator;
(b) the principle of fair hearing/natural justice was adhered to at all times;
(c) the Final Arbitral Award was not obtained by fraud;
(d) the Final Arbitral Award is not against the public policy of Seychelles and it was not in respect of matters which are not capable of settlement by arbitration; and
(e) the Final Arbitral Award has been declared executory in France, by the French Court; and/or the criterion of reciprocity between Seychelles and France is satisfied in that an arbitral award made in Seychelles is capable of being enforced in France in accordance with. Article 146 of the Commercial Code Act.

[10] Vijay joined issues with EEEL. Vijay denied the claims of EEEL. Vijay asked the court to declare that the Final Arbitral Award is null and void and incapable of being enforced or executed in any jurisdiction. Vijay's grounds, for resisting the recognition and enforcement of the Final Arbitral Award, are the following –

(a) first, the Seychelles court has no power to enforce the Final Arbitral Award under statute or common law;
(b) second, the Sole Arbitrator did not have jurisdiction to hear the arbitration on the merits of the dispute;
(c) third, the Sole Arbitrator violated due process by accepting a third report by EEEL's expert, Mr Danny Large into evidence after the evidentiary hearing without prior permission of Vijay, against the evidential regime governing the arbitration and subject to a materially restricted opportunity to Vijay to respond to that report. The report, referred to as "Large Third", is exhibit P12 before the court;
(d) fourth, EEEL bribed, blackmailed and harassed a potentially material witness, Mr Sergei Egorov to change his truthful witness statement, from one favourable to Vijay into a false statement purporting to support EEEL's case, and to discourage Mr Egorov from attending the evidentiary hearing in the arbitration and sought to intimidate him so as to dissuade him from testifying in the trial in this court;
(e) fifth, the Sole Arbitrator failed completely to deal with an issue, arising from Vijay's submissions that under the governing written laws of Seychelles. Article 1230 of the Civil Code of Seychelles Act (the "Civil Code") requires notice before any damages could be claimed by EEEL in relation to the Savoy works.

The Case for EEEL and Vijay

[11] The court sets out in extenso the respective pleadings of EEEL and Vijay.

The Case for EEEL

[12] Save for the admitted facts, this is the case for EEEL.

[13] Paragraph 6 of the plaint averred that in terms of the Arbitration Clauses and in view that EEEL and Vijay failed to jointly nominate a sole arbitrator within thirty (30) days from the date Vijay received the Request for Arbitration, the [CC Court appointed the Sole Arbitrator pursuant to art 12(2) of the ICC Rules.

[14] In para 7 of the plaint, EEEL averred that Vijay, in addition to submitting its answer to the claim by EEEL, submitted a counterclaim as against EEEL as part of the arbitration.

[15] In para 8 of the Plaint, EEEL averred that, on 14 November 2014, the Sole Arbitrator delivered, in Paris France, his Final Arbitral Award, the orders. of which, are recited at paragraph [6] of the judgment.

[16] EEEL applied to the Supreme Court, by way of plaint, asking the court to –

(i) declare and make the Final Arbitral Award executory in the Seychelles:
(ii) declare and make the Final Arbitral Award enforceable in the Seychelles;
(iii) recognise the Final arbitral Award,'
(iv) grant leave to register the Final Arbitral Award and consequently enter judgment in terms of the Final Arbitral Award;
(v) order Vijay to pay the sum of Euro 17,042,086.36 and USD Dollar 126,000.00 to the EEEL plus the interest;
(vi) order Vijay to pay costs to EEEL; and/or
(vii) make any other order/s this court deems just and necessary in all circumstances of the case.

[17] In para 9 of the plaint, EEEL contended that –

(i) upon the delivery of the Final Arbitral Award, the Final Arbitral Award could no longer be contested before the Sole Arbitrator;
(ii) the principle of fair hearing and/or natural justice was adhered to at all times from the time EEEL submitted its Request for Arbitration to the time the Sole Arbitrator delivered his Final Arbitral Award, in that, among other things –
    - Vijay was duly notified of the Request for Arbitration;
    - Vijay was granted ample time and opportunity to submit and did submit, its answer and counterclaim;
    - Vijay was represented at all times before the arbitration by counsel of the highest calibre, Mr. Bernard Georges;
    - Vijay was granted appropriate and equal opportunity to present its case, similar to that of EEEL, including the calling of its witnesses;
    - Vijay presented its case to the arbitration without any illegal hindrance and/or interference;
    - Vijay was able to cross-examine the witnesses for EEEL and contest the case of EEEL, to the same extent that EEEL could contest Vijay's case;
(iii) The Final Arbitral Award was not obtained by fraud;
(iv) The Final Arbitral Award is not against the public policy of Seychelles and it was not in respect of matters which are not capable of settlement by arbitration;

(v) The Final Arbitral Award has been declared executory in France, by the French Court; and/or

(vi) The criterion of reciprocity between Seychelles and France is satisfied in that an arbitral award made in the Seychelles is capable of being enforced in France in accordance with Article 146 of the Commercial Code Act.

[18] In para 10 of the plaint, EEEL averred that in the premises the Final Arbitral Award ought to be rendered executory and/or enforceable in the Seychelles.

The Case for Viiay

[19] Subject to the admitted facts, this is the case for Vijay.

[20] Save to deny that the arbitration was commenced in accordance with the Arbitration Clauses in that EEEL failed to discharge its obligation to enter into good faith settlement negotiations before referring the disputes to arbitration, Vijay admitted para 6 of the plaint.

[21] Save to state that Vijay duly challenged, and continues to challenge, the jurisdiction of the Sole Arbitrator, Vijay admitted para 7 of the plaint.

[22] Save to plead that for the reasons set out below, the Final Arbitral Award is invalid, of no force and effect and/or unenforceable, para 8 of the plaint, is admitted.

[23] Vijay severally denied each and every allegation set out in para 9 of the plaint. In particular Vijay denied that —

(a) the principles of fair hearing and natural justice were adhered to at all times. Vijay averred that for the reasons set out below in paragraph 7 of the Defence, the arbitrator failed to give an opportunity to Vijay to present its case or to substantiate its claims fully, or that the rule of arbitral procedure that each party be given equal opportunity to present the case they felt needed to be presented was breached.

(b) the final arbitral award [Final Arbitral Award] is not contrary to public policy. Vijay averred that, .for the reasons set out below in paragraph 8, the award is contrary to public policy.

[24] Vijay averred that the Sole Arbitrator had no jurisdiction to hear the matters in dispute. The particulars of that contention are as follows –

(a) It contended that at the start of the arbitral process, the Defendant took a preliminary point, namely that the arbitration agreement in the contract between the parties provided for a three-step process before the arbitration was agreed, namely notification of dispute, attempt at amicable settlement of the dispute and a 2-month pause before initiating arbitration, and that EEEL had not followed that procedure.

(b) The arbitrator heard submissions from both parties on the issue and thereafter ruled that he had jurisdiction.

(c) Vijay averred that the arbitrator erred in his ruling that he had jurisdiction to arbitrate the dispute notwithstanding the failure of EEEL to comply with the arbitration agreement. Specifically, Vijay avers that the arbitrator —

(i) Erred in not concluding that the fact that EEEL had failed to give notice of dispute to Vijay prior to engaging the arbitral process vitiated the whole process thereafter

(ii) Erred in concluding that the dispute raised by Vijay and that referred to arbitration by EEEL were in effect the same

(iii) Erred therefore in concluding that there was no formal requirement to amicably attempt to resolve the dispute prior to engaging the arbitral process.

[25] Paragraph 7 of the defence averred that –

> … the defendant was not given an opportunity of presenting its case or of substantiating its claim fully, or that the rule of arbitral procedure that each party be given equal opportunities to present the case they felt needed to he presented was breached in [his case. Vijay avers that the procedural irregularity amounted to a serious violation of due process and had a direct influence on the arbitral award and caused substantial injustice to Vijay.
>
> (a) After the evidentiary hearing of the matter, the parties filed post-hearing briefs simultaneously on 18 July 2014. These briefs were in the form of final submissions or summations of the whole case before arbitration and were intended to summarise the respective parties cases to the arbitrator. The arbitrator would then deliver his award.
>
> (b) The Plaintiff, in clear breach of every procedural rule known, attached with its post-hearing briefs a document by one of its witnesses, Danny Large, entitled "Third Quantum Expert Report" prepared <u>after</u> the evidentiary hearing and clarifying a number of matters, including matters which the witness had been unable to satisfactorily explain during cross-examination within the evidentiary hearing.
>
> (c) Instead of rejecting the said report outright as being in breach of procedure, as Vijay asked the arbitrator to do, the arbitrator admitted it into evidence. In the face of the complaints by Vijay that that was irregular, the arbitrator attempted to give Vijay only
>
> (d) an opportunity to rebut the report, but rejected all requests by Defendant to be given the same opportunity to present a report of its choice instead of simply being asked to rebut a report filed irregularly.
>
> (e) Having denied Vijay an equal opportunity of presenting its case, in that respect the arbitrator relied substantially on the said Third Quantum Expert Report in his final award.
>
> (f) Vijay avers that the admission of the Third Quantum Expert Report and the reliance put on it by the arbitrator — not least in allowing a witness who had repeatedly been discredited in cross examination to reposition his evidence and explain his previous answers —fatally upset the rules of natural justice and equality of arms and caused substantial injustice to Vijay, such that the award cannot stand.

[26] With reference to para 8 of the defence, Vijay did not press sub-paras (b), (c), (d) and (f). Counsel for Vijay, with the leave of the court, amended para 8(e) of the defence, on 1 September 2015, in line 3 of para 8 (e), by deleting the word "Defendant" [Vijay] and substituting the word "Plaintiff' [EEEL].

[27] In para 8 of the defence, Vijay averred that the award is contrary to public policy. In support of that averment Vijay averred –

> (a) ... that the Plaintiff [EEEL] resorted and attempted to resort, to acts of corruption in ensuring that the award would be unfavourable to the Defendant [Vijay], by reason of which no jurisdiction should recognise it.
> (b) The Plaintiff [EEEL] exerted pressure on the Defendant's [Vijay's] witness Sergey Egorov, the most important witness for the Defendant [Vijay] in the arbitration, in that he had been at all material times the Plaintiff's representative on the site of the works, so that the said Sergey Egorov would not and in fact did not — testify before the arbitral tribunal. The lack of the testimony of the witness Egorov had a direct effect on material elements of the claims of the Defendant [Vijay], namely alleged delays in execution and defects in the works.

[28] In para 9 of the defence, Vijay averred that the Sole Arbitrator has omitted to make an award on one or more points of the dispute. The said points cannot be separated from the points in respect of which the award has been made.

> (a) The Defendant (Vijay), at even' step of the arbitration, raised a fundamental poi171 regarding notice, If was an overarching argument of the Defendant throughout the arbitration that notwithstanding any breaches of any of the contracts, as alleged by the Defendant [Vijay] or at all, and any other contractual requirements as to notices, the Defendant [Vijay] was obliged under Seychelles law — the law applicable to the arbitration — to have put the Defendant in mora of the alleged breaches, that the Defendant [Vijay] had failed to do so and that, in consequence, the Defendant's [Vijay's] claims of damages arising out of such alleged breaches were unrecoverable.
> (b) The arbitrator failed to consider this issue at all and nowhere in his award did he even allude to it. He focussed simply on the issue of the necessity for notices under the contracts and either failed to consider the issue regarding notices under article 1230 of the Civil Code, or deliberately chose to ignore it. Had he considered the issue, and found for the Defendant [Vijay] on that point, he would have been compelled to dismiss the claims of the Plaintiff[EEEL] in their entirety.

[29] Vijay averred in para 7 of the defence that in the circumstances para 10 of the plaint is denied.

[30] Vijay prayed the court –

> a. To dismiss the Plaintiff's action
> b. To declare that the arbitral award in ICC Case No. 18493/MCP/EMT between Eastern European Engineering Limited

and Vijay Construction (Proprietary) Limited, and delivered on 14 November 2014, is null and void

c. To declare that the award is incapable of enforcement or execution in any jurisdiction

d. To set aside the award in terms of the Commercial Code of Seychelles

e. To grant the defendant the costs of this suit.

The Evidence in the Case

[31] The court admitted the following miscellaneous documents as exhibits in the case upon the joint consent of EEEL and Vijay, through learned counsel –

- P1 through to P9
- P15 through to P18
- P21
- D1 through to D25.

[32] For EEEL the court heard orat evidence from the following witnesses –

(a) Mr Detlev Kuehner pp1 -25 of the proceeding of 24 August 2015, at 2 pm & pp1-41 of the proceeding of 25 August 2015, at 9 am & pp1 -40 of the proceeding of 25 August, 2015, at 1 pm.

(b) Mr Bertrand Detains ("Expert Witness") pp1-45 of the proceeding of 26 August 2015, at 9 am & pp1-9 of the proceeding of 26 August 2015, at 3 pm & pp1-4 of the proceeding of 27 August 2015, at 9 am.

[33] For Vijay the court heard oral evidence from the following witnesses –

(a) Mr Egorov pp4-34 of the proceeding of 27 August 2015, at 9 am & pp1-81 of the proceedings of 27 August 2015, at 1:45 pm

(b) Mr VJ Patel pp 1-34 of the proceedings of 2 September 2015, at 9:30 am.

The Evidence for EEEL

[34] The evidence of Mr Kuehner. Mr Kuehner resides in Paris. He is a lawyer. He was admitted to the French Bar in 2008 and the German Bar in 1997. He is a partner in BMHAvocats in Paris, France. He specialises in international arbitration with a particular focus on construction methods. He currently practices law in other jurisdictions with regards to matters of arbitration. BMHAvocats represented EEEL against Vijay in relation to the arbitration which took place before the ICC in Paris. Mr Kuehner was the lead counsel for EEEL.

[35] Mr Kuehner made the following points on behalf of EEEL. The arbitration was initiated by EEEL, through BMHAvocats, by a Request for Arbitration. The arbitration was considered as an international arbitration under French law. The essence of' the disputes, in respect of the merits of the arbitration, was "poor construction works and delays in construction works" by Vijay (proceedings of Monday 24 August 2015, p3 of 25).

[36] Jurisdiction of the Sole Arbitrator — The Partial Award. Vijay raised an objection with regards to the jurisdiction of the Sole Arbitrator. The Sole Arbitrator dismissed the objection in a Partial Award. The Sole Arbitrator ruled that he has jurisdiction to hear the arbitration.

[37] In the main, Vijay complained that EEEL had gone to arbitration without having raised a dispute. in relation to that point the Sole Arbitrator found that the agreement did not require the same party who had given a notice of dispute to invoke arbitration. Exhibit P4 is a notice of dispute which was sent by Vijay with respect to Contract I to 5, inclusive. Exhibit P 5 is a notice of dispute, with respect to Contract 6, sent by Vijay. The Sole Arbitrator found that exhibits P4 and P 5 were sufficient to be considered as notices of disputes under the Arbitration Clauses.

[38] Vijay also complained that the condition requiring attempts at amicable settlement resolving the dispute between EEEL and Vijay had not been complied Irvith by EEEL. The Sole Arbitrator found that the relevant Clause only slated that arbitration shall not start before expiration of a 2-month period.

[39] Allegation of bribery in relation to Mr Egorov. Allegations of bribery in relation to Mr Egorov were initially made by EEEL in terms of cl 15.2 (f) of the Six Contracts. The said cl 15.2 (f) provided that if Vijay engages in bribery EEEL may terminate the "Contracts" for cause. In relation to the allegations of bribery made by EEEL, the Sole Arbitrator ruled that EEEL do not meet the "highest standard of clear and convincing evidence in light of the seriousness of such allegations regardless of the applicable standard of proof".

[40] Mr Egorov was not called to present evidence as a witness. EEEL and Vijay agreed that it would not be necessary to call Mr Egorov to present evidence as a witness. Exhibit P 9, The Second Witness Statement, of Mr Egorov, dated 1 March 2014, was produced by EEEL before the Sole Arbitrator. Exhibit D23, Witness Statement, of Mr Egorov, dated 1 March 2013, was produced by Vijay before the Sole Arbitrator. The Sole Arbitrator was asked to give to Mr Egorov's written witness statements (exhibits P9 and D23) whatever weight he felt able to give. Mr Kuehner read para [59] of exhibit P1 and lines 17 through to 25, at page 109 of exhibit P1, and lines 1 through to 14, at page 110, of exhibit P1 , in support of the evidence (the court shall refer to the said exhibits lawr in the judgment). The Sole Arbitrator in coming to a final decision did not rely on the evidence of Mr Egorov (exhibit P1 at paras [193] to [195] inclusive).

[41] Mr Kuehner was not aware of EEEL placing any pressure on Mr Egorov that would have prevented him from attending the arbitration proceedings. Vijay did not raise such an issue during the arbitration proceedings. He noted that the period between the Post Hearing Briefs, which was supplied by the Sole Arbitrator to EEEL and Vijay on 18 July 2014, and the delivery of the Final Arbitral Award on 14 November 2014, provided ample time for Vijay to raise the issue of pressure being placed on Mr Egorov.

[42] Large Third. In light of the averments of Vijay in its defence in relation to Large Third, the court finds it necessary to set out a detailed account of the evidence of Mr Kuehner.

[43] EEEL submitted Large Third with its Post Hearing Brief. Mr Kuehner explained why Large Third was submitted as follows. On the fourth day of the evidentiary hearing, Vijay requested that one Mr Antoine du Toitmilan, a consultant who had previously advised Vijay in respect of certain aspects of its claims, be allowed to attend the evidentiary hearing to assist Mr Georges in the cross-examination of EEEL's expert witness, Mr Large. EEEL objected to the request. The Sole Arbitrator granted the request of Vijay on the condition that Mr Antoine du Toitmilan would not personally direct any questions to Mr Large or otherwise give evidence (paragraph [60] of exhibit P1). According to Mr Kuehner –

> A. … instead of sitting in the back of the room this gentlemen was sitting next to Mr. Georges and also prepared little notes and handed them over to Mr. Georges and Mr. Georges was then able to ask the questions I dared to say he would not have been able to ask himself he is not a learned QS – … I am getting there to explain to you as to why the circumstances had changed that is the cross-examination was conducted in a slightly different manner and questions were raised almost as if let 's say the QS of the other side would have been in the room but he wasn't and he was never appointed the other side did never appoint a QS in this arbitration and decided to do so and the point was that we Mr. Large had, had was asked a number of questions to which he also was not say prepared in the way he would have been prepared had he not been asked that questions by another QS he was not prepared to that. The questions were raised which was also of very high technical quality and this ultimately led also Mr. Large to review his own position and this made him believe and also in order to... further assist the arbitrator what he expressed at the very last day of the hearing we decided to submit that third expert report however we did so and had also announced as previously through our learned colleague who had objected to it since he didn't know he said at the time what exactly was in the report.
>
> (Proceedings of Monday 24 August 2015, 2 pm, p 16 of 25)

[44] Mr Kuehner and Mr Georges corresponded about the Post Hearing Briefs, and the following were in relation to the filing of Large Third. Mr Kuehner sent an email, dated 24 June 2014 at 12:10 (exhibit D8), to Mr Georges, wherein he explained that "we [EEEL] intend to submit a PHB ... as well as an update by Mr Large reflecting on the issues raised during cross-examination".

[45] Mr Georges replied, in an email dated 24 June at 15:39 (exhibit D8), to Mr Kuehner "… I accept he is an expert, but again if you give me an idea of what he will say I can decide. I accept that you will only be able to do this later, but think about it".

[46] In an email dated 24 June at 18:42, Mr Kuehner replied "...it is therefore a logical consequence that Mr Large has an opportunity to deal with these points even though we are at a rather late stage to do so. I dare to say that this is in both parties ' interest since you touched on points which may trigger a reconsideration of some figures and this would go towards lowering EEEL 's claims rather than augmenting them" (exhibit D8).

[47] The reply of Mr Georges, in an email dated 24 June 2014 at 17:16 (exhibit D9), was "[he] will keep an open mind about Danny Large until he [Mr. Kuehner] give him some details about the tenor of his rebuttal report".

[48] Mr Kuehner replied in an email dated 24 June 2014 at 19:28 (exhibit D9), stating "[he] will keep [Mr Georges] informed about Danny Large". There was no formal agreement between EEEL and Vijay for EEEL to submit Large Third with the Post Hearing brief.

[49] Mr Kuehner sent an email to the Sole Arbitrator on 18 July 2014 at 20:02 (exhibit D11), with attachment – EEEL Post Hearing Brief including a number of exhibits as follows –

> …Exhibit ER-3: Third Expert Report of Mr. Danny Large with Exhibits A, B, C, D, (Respondent was timely informed that Claimant would submit this Report together with its PHB; Respondent was also informed of the fact that this Report addresses the issues raised during cross-examination and results in a reduction of some of Claimant's claims)….
>
> At 7:24 (exhibit D 13) Mr Georges objected to the submission of new evidence by EEEL in the form of a further expert report (Large Third) by Mr Large attached to EEEL's Post Hearing Brief. The Sole Arbitrator invited EEEL and Vijay to make further submissions in relation to Large Third.

[50] In an email dated 25 July 2014 at 16:51 (exhibit D15), Mr Georges made further submissions on the evidence sought to be produced with the Post Hearing Brief. Mr Kuehner pointed out that Vijay had also produced some items of further evidence with its Post Hearing Brief (exhibit D15 at line 1). Vijay had annexed two emails from Mr Egorov mentioning offers made to him during the arbitration process, purportedly on behalf of EEEL, seeking his false testimony against Vijay. These documents were available during the evidentiary hearing but were not produced (exhibit D15 at para 3). According to Mr Kuehner there was no mention in the said para 3 that Mr Egorov had been prevented by EEEL from attending the arbitration proceedings.

[51] In the submissions (para 6 of exhibit D15), Vijay took a stance with respect to the Post Hearing Brief. The position of Vijay was that should the Sole Arbitrator allow the admission of further evidence it was incumbent upon him to similarly allow the other party to provide such further evidence as it may deem necessary to deal with the further evidence admitted. The email went on to say "[i]nsofar as the case has been re-opened, [he Claimant and Respondent would be entitled to the cross-examination of the relevant witnesses. Further submissions would then be made in argument at the end of that evidence. In short, the Sole arbitrator would be allowing a reopening of the case and further hearing on the matter".

[52] With reference to exhibit D16 Procedural Order No 10 (paras 9, 10, 11 and 12), the Sole Arbitrator allowed Large Third into evidence, and provided Vijay with a reasonable opportunity to present its case in response. Procedural Order No 10 stated the following –

at para 9 –

> The sole Arbitrator does not consider either of the two solutions ideal but on balance prefers the second solution, namely allowing the new expert report into evidence. This is because the Sole Arbitrator considers that the new expert report will be helpful for the Sole Arbitrator to better understand and decide upon EEEL's claims in the arbitration and that it is possible to provide Vijay with a reasonable opportunity to present its case in response.

at para 10 –

> Regarding a reasonable opportunity for the Respondent to present its case in response, the Sole Arbitrator considers that conducting a further in-person hearing with witness examination and argument would not be efficient or cost-effective in terms of case management and thus would not be reasonable when weighed against the benefit of doing so. The Sole Arbitrator considers, however, that providing the Respondent with a reasonable time frame to submit responsive evidence and argument in writing is necessary and indeed sufficient in the circumstances.

at para 11 –

> In this regard, and bearing in mind the length of the claimant's post hearing brief and the length of the claimant's new expert report, including appendices, the sole arbitrator considers that the respondent's written argument should be no longer than 10 pages and that the respondent 's evidence should be no longer than the claimant new expert report, including appendices. Moreover, the respondent’s written argument and evidence should be focused solely on responding to new evidence in the claimant new expert report. Furthermore, any new evidence from the respondent should be submitted by way of exhibits or by way of witness evidence in the form of witness statements or expert reports, provided that any witness evidence is from witnesses and experts who have already testified the hearing in this arbitration, i.e., no new respondent witnesses or experts are allowed.

and at para 12 –

> Accordingly, the parties new fact exhibits are allowed into evidence, and the Claimants ' new expert report is also allowed into evidence but on the basis that the Respondent is granted until 25 August 2014 to submit: (1) new documentary, fact witness, and expert evidence in writing with a combined length of no longer that the Claimant 's new expert report, including appendices, and (2) new written argument no longer than 10 pages; in both cases focused solely on responding to new evidence in the Claimant's new expert report.

[53] With reference to para 6 of exhibit D15 and para 11 or exhibit D16, Mr Kuehner stated "[t]his seems to coincide very much in the sense that the arbitrator's proposal in paragraph 11 seems to meet effectively what was requested in paragraph 6, that is my understanding" (proceedings of 25 August 2015 at 9 am).

[54] Mr Kuehner stated that Vijay did not produce any expert report regarding any quantity surveyor as an expert witness during the entire arbitration. Vijay had the opportunity and the right to do so in terms of Procedural Order No 1. EEEL produced two expert reports before producing Large Third.

[55] Vijay did not file any report or adduce any evidence through counsel. In an email sent on 25 August, Vijay explained why the proposal was considered insufficient. In an email dated 25 August 2014, with attachment – Respondent's Response to Procedural Order No 10, exhibit D17, from Mr Georges, to the Sole Arbitrator and copied to EEEL (Mr Kuehner), Mr Georges explained the position of Vijay. The second paragraph or the email (exhibit D17), stated –

> [a]s you will note the Respondent has, after thorough and anxious assessment of its position faced with the unilateral submission of this report by the Claimant, concluded that it will not be in the interest of the Respondent to respond to the report within the confines of paragraph 11 of the Procedural Order.

Paragraph 3 of the Respondent's Response to Procedural Order No 10 stated –

> [t]he Respondent believes that it understands the reason which led the sole Arbitrator to rule as he did in admitting the report to evidence. In particular the argument that the new expert report can be of no assistance to the Sole Arbitrator in making the complex determinations on quantum he will have to make in this matter, is compelling.

and at paragraph 11 of Respondent's Response to Procedural Order No 10 the –

> [i]n an endeavour to salvage the arbitration and in order to ensure fairness to parties, the Respondent proposes that if the further expert report is to be retained, then the Respondent should be given the opportunity to decide what matters it wishes to address rather than be limited to the Claimant 's agenda. To that end the Respondent offers the following three alternative proposals to the Sole Arbitrator:
>
> a. That the Respondent be given an opportunity to prepare and submit a report on all issues it feels necessary to address, as Mr. Large has done in his further expert report, or
> b. that the sole arbitrator calls upon an independent expert to produce a report on the issues which the Sole Arbitrator (after discussion with the parties) feels need addressing or
> c. that the sole arbitrator issues a partial award restricted to the contractual issues in life and postpones consideration of damages and the evidence which will then be required including the preparation of further expert reports - to final award thereafter prior to which final award the current issue can be address if necessary.

[56] With reference to para 6 of exhibit D15 and paragraph 11 (a) of exhibit D17, when asked to compare the said, Mr Kuehner stated "1 am thinking also and not only in terms of an arbitrator who may if he is confronted with such far reaching request, well I have to think twice before admitting it, in any event. Not that I am leaving for one

second our particular case but given another opportunity to prepare and submit a report on all issues it feels necessary to address, this is very far reaching." (Proceedings of the 25 August 2015 at 9 am).

[57] In an email addressed to all parties to the arbitration proceedings dated 29 August 2014 at 16:56 (exhibit D18), Mr Kuehner responded to Mr Georges "Response to Procedural Order No. 10" –

> … instead of seizing the opportunity to submit a reply brief within the comfortable three week time-limit granted, all respondent has done is to criticize the content of Procedural Order No. 10. Respondent does so at the very last day of the time-limit granted by the sole arbitrator. To start with, respondent's request is a clear breach of article 23(5) of the ICC Rules. By that provision, the parties, when agreeing on ICC arbitration, have undertaken to comply with any order made by the arbitral tribunal. In addition, in case respondent decided not to comply with the sole arbitrator's Procedural Order, it was supposed to inform the sole arbitrator and the claimant hereof immediately instead of awaiting the last day of the three week lime limit. Also, out of precaution, respondent could have been expected to file comments in 'he alternative, since respondent cannot legitimately rely on a favourable decision of the sole arbitrator in the present circumstances. In reality, respondent's request is another attempt to be inter alia allowed to produce an expert report from an expert which has not participated at the evidentiary hearing. This request can obviously not be successful.

[58] Mr Kuehner testified that the request of Vijay was contrary to all rules and principles of law, and also contradicted the procedural timetable for how the proceedings should be conducted. At that point in time it was also too late for Vijay to produce a "full fledge QS report".

[59] The Sole Arbitrator dealt with the three proposals of Mr Georges in Procedural Order No 11, dated 2 September 2014 (exhibit DI 9) (by email).

[60] At paragraph 11 of exhibit D19 the Sole arbitrator stated –

> proposal b. for the appointment of an Independent Expert is something the Respondent suggested in an email dated 7 May 2014 but chose not to pursue; and.

[61] At para 15 of exhibit D19 the Sole Arbitrator stated –

> The only new thing that has arisen since PO10 is that the respondent has chosen not to avail itself of the opportunity provided to it in paragraph 12 of PO10, an opportunity that the sole arbitrator consider reasonable in the circumstances as set out in PO10.

[62] At para 16 of exhibit D19 the Sole Arbitrator stated –

> In light of the respondent's failure to do so, the sole arbitrator considers that the circumstances require for the proper conduct of the arbitration proceeding only that the deadline in paragraph 12 of PO10 be extended by a reasonable amount of time to allow the respondent additional time to avail itself of this reasonable opportunity.

[63] At para 17 of exhibit D19 the Sole Arbitrator stated –

> As the three-week time period was originally granted and the respondent chose to wait the full three week' before making the respondent 's submission, and as more than another week has now passed, the sole arbitrator considers that a reasonable extension of the deadline is approximately two weeks until September 15, 2014.

[64] By an email dated 14 September 2014 at 15:59 (exhibit D20), Mr Georges stated –

> Dear Mr. Arbitrator, the respondent confirms receipt of Procedural Order No. 11 issued pursuant to its submission dated August 25, 2014 in response to PO10. Through Procedural Order No. 11 the sole arbitrator maintained the directions given in Procedural No. 10, but extended the time to September 15, 2014 for the respondent to submit any response or additional expert evidence to the third expert report of Mr. Danny Large.

[65] By an email dated 21 September 2014 at 20:24 (exhibit D20), addressed to all parties in the arbitration proceedings, the Sole Arbitrator stated –

> Dear Counsel: This situation is regrettable. The Procedural Orders in this arbitration speaks for themselves, and the Sole Arbitrator does not agree that he 'has denied the Respondent a fair hearing and an opportunity to put its case fully and properly before the arbitrator ' as alleged by the Respondent. The Respondent has been given two opportunities to submit further evidence and written submission in response to Mr. Large's third expert report and the Claimant's corresponding written submissions and has chosen not to avail itself of these opportunities.
>
> The sole arbitrator is prepared to allow the Respondent a further opportunity: to cross examine the claimant's expert Mr. Large by telephone for up to 2 hours on his third expert report, with a transcript taken of {he cross examination, followed by Q written submission. The claimant would be allowed to conduct limited reexamination on any matters arising out of cross examination. Mr. Large would
> attend in person before the sole arbitrator at the sole arbitrator's office in Paris, and the stenographer would be present in person as well. The parties would attend by telephone only so that the parties are treated equally, unless the respondent wishes to incur the expense of attending in person, in which case the claimant would be allowed to attend in person as well. The parties would be allowed to submit simultaneous written submissions of up to 10 pages each within one week of the examination of Mr. Large, limited to matters raised in Mr. Large's third expert report and his additional examination. The parties are invited to comment on the above proposals by September 24th, 2014.

[66] Mr Georges by email, of 24 September 2014, sent at 20:30 hours, addressed to all parties to the arbitration proceedings, stated –

> Regrettably, the respondent must maintain its position, namely that the submission of the third expert report of Mr. Large by the claimant has caused a virtually incurable procedural problem which has the potential to jeopardise the whole arbitration. The last thing that the respondent wants at this stage, after the considerable among of work accomplished is for the process to be laid open to challenge.
>
> The respondent repeats that the only to ensure that 'his procedural problem is cured is to give the respondent the same opportunity as the claimant arrogated to itself, namely to produce a report on any issues it feels important for the advancement of its case.

[67] After having considered EEEL's and Vijay's submissions the Sole Arbitrator made Procedural Order No 12, dated 24 September 2014. The Sole Arbitrator stated that Vijay had declined to submit further evidence and written arguments in the arbitration although offered the opportunity to do so in accordance with Procedural Order No 10 and Procedural Order No 11. The Sole Arbitrator added –

> 4. The sole arbitrator considers that the parties have been treated fairly and impartially and have had a reasonable opportunity to present their case in accordance with Article 22 of the ICC Rules.
>
> 5. Accordingly, the sole arbitrator hereby declares these proceedings closed in accordance with Article 27 of the ICC Rules and shall proceed to inform the ICC secretariat and the parties of the date by which he expects to submit his draft final award to the ICC Court for approval pursuant to Article 33 of the ICC Rules.

[68] Miscellaneous matters in relation to the facts in issue. Mr Kuehner explained that in terms of the arbitration rules, it is improper for a party to communicate with the arbitrator except through their respective counsel. It is also improper for a party to request of the arbitrator to keep any communication confidential and not to divulge to the other party.

[69] He stated that the Final Arbitral Award is now executory in France.

[70] Mr Kuehner made the following points in cross-examination. Public policy issue. Learned counsel first put to Mr Kuehner his position on what he termed the public policy issue. According to counsel Mr Kuehner had suggested in chief that the public policy issue, in relation to the two witness statements, of Mr Egorov, should have been raised with the Sole Arbitrator before he delivered the Final Arbitral Award. Mr Kuehner explained that his point was that the alleged issue should have been raised timely before the Sole Arbitrator. The position of Vijay was that the issue was raised by letter, from Mr Patel, to the Sole Arbitrator; and that contrary to the request of Mr Patel, the Sole Arbitrator did not keep the contents of the letter confidential. Mr Kuehner retorted that he was shocked at the contents of the said letter. In the words of Mr Kuehner "[t]his is something which should not happen in international arbitration" (proceedings of 25 August 2015 at 9 am). Mr Kuehner requested that the said letter be struck off the record. Mr Kuehner explained that the position of EEEL was "Claimant [EEEL] trusts the Arbitral Tribunal 's assessment whereby these new elements do nor add anything new and do not change the situation at hand. Unless

this is not already the case, Claimant nevertheless prefers that the letter, including the annex, be formally struck off the record." (exhibit D25 – email 3 September 2014 at 19:26 at page 30 of 41). The matter was not formally struck off the record, it remained there.

[71] Large Third. The facts material to the exchange of the Post Hearing Briefs are set out in the following correspondence. At 15:56 on 15 July 2014 (exhibit D10), Mr Georges stated "I am particularly thinking about your proposal to gel supplementary comments from Danny Large. If this is so, I may need to have sight of them (or at least have a vague idea of what you are proposing) before submission and make any adjustments as are necessary to my submissions. Mr Kuehner admitted that Mr Georges at 17:49 on 15 July 2014 (exhibit D10), in relation to Mr Large new report (Large Third), had asked for a clarification about "how am I going to respond to that ok, I'll hold off comment until I see it" and that he [Mr Kuehner] replied "As I said, I think it is something which became necessary due to the rather unusual situation at the hearing, I do not necessarily expect you to agree on that but please understand that we will in any event produce the third report. I do not think that you need to reply on it in an additional submission since it burns down to taking into account some of the comments you made and reducing our claims" (exhibit D10 – email at 20:14 hours of 15 July 2014). Learned counsel put to Mr Kuehner that Mr Georges was under the clear impression that he was going to see Large Third before he submitted his Post Hearing Brief. Further, it was put to Mr Kuehner that, without any communication from him [Mr Kuehner], while Mr Georges was waiting for an advanced copy of Large Third, to adjust his Post Hearing Brief, he filed his Post Hearing Brief, the very last attachment being Large Third. Mr Kuehner explained that Mr Georges did not ask for an advanced copy of Large Third. Mr Kuehner accepted that Mr Georges was waiting to see Large Third before he would comment on it. Further, Mr Kuehner admitted that in his email, at 18:44 hours of 15 July, he did not forewarn Mr Georges that an entirely new topic of expert evidence, namely, the reasonableness of the cost of completion of Contract 6, was being introduced for the first time by Mr Large. He stated also that he did not need the consent of Mr Georges prior, and in relation, to submitting Large Third. He added that he had already indicated to Mr Georges that EEEL will in any event submit Large Third.

[72] With reference to the email at 20:02 hours (exhibit D11), Mr Kuehner stated – “Respondent was timely informed that claimant would submit this Report together with its PHB – Respondent was also informed of the fact that this report addresses the issues raised during cross-examination and results in a reduction of some of the claimant's claims).” In light of the email, counsel put to Mr Kuehner that he did not inform the Sole Arbitrator that he had not received the prior consent of Mr Georges to submit Large Third. Mr Kuehner reiterated that he had no obligation to do that. On the same issue, counsel put to Mr Kuehner that the Sole Arbitrator thought that Large Third had been given to Mr Georges before it was submitted. Procedural Order 11 (exhibit D19) at para 7 stated – "The claimant submissions notes further that Mr. Large's third expert report is not new to the respondent. The respondent having been informed of it prior to its submission and it being limited to questions raised by the respondent during cross examination". Mr Kuehner stated that this was his position rather than that of the Sole Arbitrator.

[73] Counsel then suggested that the materials, at pages 23 through to 28, at paragraph 4.0 and following ie the reasonableness of the cost of completion of project 6, were new materials and that Mr Large had been asked to "undertake an exercise which he had not been instructed to undertake ever before and which is not done until this juncture …" (proceedings of Tuesday 25 August 2015, 1:45 pm, p 8 of 40). The question was put as follows – "I recognize that the exercise that I was instructed to carry out has its limitation in particular", then he mentioned three. "It assumes that all of the expenditure incurred was reasonable, secondly assumes that the estimated expenditure will be actually and reasonably incurred". Thirdly, it "assumes that the period to complete the works that is by 1st February 2014 as a reasonable period." Over the page in 4.6, he says, "the first three bullet points above relate to the question of reasonableness of the expenditure, this is not a matter which I have previously been instructed to consider. This point has been raised by counsel for Vijay, and in respect of the estimated element of the costs, by the sole arbitrator. Since the evidentiary hearing I have received further instructions to consider the reasonableness of the actual and estimated costs. In the remainder of his section, I consider reasonableness" (proceedings of Tuesday 25 August 2015, 1:45 pm, at page 10 of 40). Mr. Kuehner stated that the reasonableness of the cost of completion of project 6 arose during cross-examination and in view of the fact that it was a big issue, the Sole Arbitrator wanted to hear something about it. He added that Vijay had the possibility to test the materials under "section 4" in cross-examination.

[74] Counsel put to Mr Kuehner that the Sole Arbitrator found it was new evidence and put the following to Mr Kuehner –

> Q. And I am directing your attention to paragraph 8 please on the second page. And I am sorry to burden the record but it is worth recording. "The claimant's new expert report however would unfairly prejudice the respondent if allowed into evidence without further opportunity for responsive evidence and argument from the respondent, the claimant new expert report contains substantial new evidence from the claimant's expert on the claims of both parties in this arbitration including in relation to his own testimony at the hearing. These leave two solutions…" and then follow the paragraph which your attention was directed to in your evidence in chief.
> A. Yes.
> Q. But the arbitrator plainly found that it was new evidence?
> A. It is if you so wish. It is new evidence in the sense that it revised the former reports. I am not contesting that.
> Q. Thank you. And then we go on paragraph 10, you 've already read, I am not going to repeat it, 11 you also read but I just would like to emphasise what we find at the end of paragraph 11 on the next page of exhibit D16, the last sentence which starts about 5 lines from the bottom of that paragraph. "Furthermore. any new evidence from the respondent should be submitted by way of exhibits or by way of witness evidence in the form of witness statements or expert reports, provided that any witness evidence is from witnesses and experts who have already testified at the hearing in this arbitration, i.e. no new respondent witnesses or experts are allowed". You see that?
> A. Yes.
> Q: So, no expert has testified for the Plaintiff at the hearing?
> A. Correct.

> Q. Which mean we were deprived of the opportunity of presenting expert evidence on the new point?
> A. Again you knew from your side –
> Q. Sorry, is your answer to my question yes?
> A. No it is not yes. It cannot be yes, I am sorry for that, it is more complicated than that. So, the point is I am making again, everybody knew that Mr. Large would be at that hearing and that he would be the only QS, that had been accepted by your side over more than one and half years. All of a sudden you change your view on that, there was a kind of a peer review as my esteem colleague then said and decided to change things that you cannot change at that stage, the whole arbitration process. If that were to be true honestly then every arbitration could be derailed by that kind of manoeuvres That is not possible, I am sorry.
> Q. Thank you for that, but I am talking after the event. I am talking of the response of the arbitrator to the request by my clients that it be permitted to put new responsive evidence in to .your client's new evidence – just try to forget for the moment about the reasons otherwise you will not make your plane –
> A. No, the point is everything is linked in this arbitration. You just cannot simply cut it and say, you would not consider the first 15 months. Is not as simple as that? Everything is linked and this was the particular system and I also explained it to my colleagues. So, the arbitrator also well understood what is was all about. And this is why he took that decision. Look also, he did not make his life very simple, he said clearly, he considered. I may still exclude it from evidence, he knew that this was exceptional. Yes, he admitted it. But then even knowing that he decided that for the reasons given here, that he could admit it … stage of the proceedings.
> Q. I am not asking you to comment on the fairness, I am just trying to establish for your ladyship benefit the facts.

(Proceedings of Tuesday 25 August 2015, 1 pm, pp 11 & 12 of 40)

[75] To the suggestion of learned counsel that Vijay did not have the opportunity to respond with an independent expert witness statement, Mr Kuehner stated that Vijay had the opportunity during the whole hearing but at a certain time during the proceedings it did not have.

[76] Mr Kuehner accepted that Mr Large had also reviewed some of the points in his previous reports, in Large Third. The passages between counsel and Mr Kuehner with regards to that point are pertinent –

> Q. "This also includes points arising out of the factual evidence heard at the hearing much of which from the respondent's witnesses that had not been set out in the witness statements." You give examples. "In fulfilling his duty to the sole arbitrator, Mr. Large correctly reviewed his opinions and made the necessary adjustment to his report." And then you again, "it should be noted that Mr. Large third expert report is by no means "new" to the respondent, not only has the claimant informed the respondent prior to the submission of Claimant's PHB of claimant's intention to also submit a revised expert report but the report is limited by questions raised by respondent during cross examination." We have been through that. Do you now agree it was new?
> A. You have seen what I put, inverted comers, 'new' to the respondent, yes

> new in the sense that yes there was new evidence, revise evidence.
> Q. And then you say, the revise evidence plus new evidence but let's not go over that again. And then the third last paragraph in that email also, respondent is by no means exempted from meaningfully replying to the issues raised in section 8, letters a, to e. Respondent can do so with all appropriate means. What are they? What are all appropriate means?
> A. The ones the arbitrator suggested?
> Q. Submissions without evidence.
> A. With evidence, have you not read what the arbitrator suggested.

(Proceedings of Tuesday 25 August, 2015, I p.m., pp 14 and 15 of 40)

Mr Kuehner stated that Vijay was not allowed at that point of the procedure to bring in a new quantity surveyor. He stated that he had urged the Sole Arbitrator not to allow Vijay additional new evidence. He added that the proposal of the Sole Arbitrator not to allow the new evidence, upheld in Procedural Order No 11 the only variation being an extension of time was "very generous and appropriate".

[77] Counsel emphasised that there was no fair basis to close out the potential recall of witnesses who had already testified, quite apart from the opportunity to call new witnesses being denied by the Sole Arbitrator. The following passages between counsel and Mr Kuehner with regards to that point are pertinent –

> Q. Exhibit D20, which starts with an email at the top 21st September 2014. This is the arbitrator's response. Mr. Georges had written lower one third of the page on the 14th September 2014. And the arbitrator then say this situation is regrettable but as he saw it, so that the parties are treated equally, there could be this cross examination session, either by telephone or otherwise somebody travelling to Paris to come and do it.
> A. Very far reaching, yes.
> Q. Very far reaching?
> A. Yes, indeed.
> Q. Again without the ability of the Plaintiff to draw in the assistance of an expert?
> A. Absolutely.
> Q. So, you have to cross examine an expert witness without the benefit of your own expert witness?
> A. This is what happened at the evidentiary hearing. This was the way it is, arbitration was shaped and you missed the right point in time to change that.
> Q. So, your attitude was that Mr. Georges always had to live under the constrains of not ever having the benefit –
> A. He had one and half years' time to do so, sorry.
> Q.Is your answer yes?
> A. Sorry.
> Q. Your attitude was, that once the hearing commence Mr. Georges was always to suffer the constraints of not having the benefit of expert evidence on the side of this line?
> A. Absolutely, these were the rules of the game. We have a Procedural Order POI and an international arbitration Procedure. Are you yourself active in international arbitration, I asked you that question.
> Q. We discussed that outside.
> A. Outside, wonderful. But let me tell you this is just a question, this Procedural

Order No. l. Is a Procedural Order which is to be respected by both sides. And it is important for both sides to know the rules of the game and to do things timely, that is to appoint witness experts and also all kind of experts timely.
Q. And if there are changes are there no rules for it?
A. It is complicated, I admit and what happened, but you cannot then and this is again we felt it was already unfair what happened at the evidentiary hearing then try to supplement the rules and try to bring a new person and all of that. Again the arbitrator admitted that then it was simply too late at some point in time. It would then have been unfair to us. It would have been unfair to us that the QS comes in or whatever is Bernard Georges requested at that moment in time, that he has the right to make any submission he wishes to. That would have been too far reaching and then we would have probably been in a position to say to the arbitrator this is not fair. The arbitrator had to weigh the evidence the two positions, he did that you have to be carefully.
Q. I was being careful at the outset to make it clear to you and clear to her ladyship. But I am not treating you as a witness of opinion, I am treating you as a witness of fact. Your last reply is a session of opinions.
A. I am sorry, this arbitration is so complicated that we cannot simply do it and deal with it in just answers of yes and no. So, the traditional style simply does not work here.
Q. I see. The traditional style –
A. I am sorry for that.
Q. Completely out of the extraordinary. You agree with me?
A. Sorry?
Q. Completely out of the extraordinary.
A. I do not think so.
Q. It is extraordinary. Evidence of an expert after the close of the hearing without the opportunity to answer it, it is completely extraordinary.
A. Absolutely not.

(Proceedings of Tuesday 25 August 2015, 1 pm, pp 16, 17 & 18 of 40)

[78] In light of the above, Vijay decided not to respond to the report within the confines of para 11 of the Procedural Order.

[79] In re-examination, with reference to exhibit D24, Mr Kuehner reiterated that the procedure followed by Mr Patel is absolutely unusual. He added that there was no application by Mr Patel for the Sole Arbitrator to look into the issue of Mr Egorov having been pressurised to not turn up for the hearing of the arbitration. He stated that Vijay did not react to the letter after the Sole Arbitrator had sent copies out to everyone by email of September at 15:14 hours. There was also a request for comments. There were no comments from Mr Georges. Further, Mr Georges did not seek to reintroduce any of the documents which were submitted by Mr Patel. In exhibit P1, at paras 73 and 74, the Sole Arbitrator commented "[b]y email dated 3rd [September], 2014, the Claimant requested that the letter and attachments be struck off the record. The Respondent did not comment". At para 75 "On September 7th, 2014 the sole arbitrator confirmed that the documents submitted directly by the respondent added nothing new to the debate based on the other evidence already on the record. The sole arbitrator invited the parties to submit any further observations by September 10th, 2014 and noted that, unless either of the parties sought a formal decision, no ruling on the documents would be made". At para 76 "[t]he respondent confirmed by email

of September 9th, 2014 that it did not seek a formal decision on the new documents, but claimant did not comment" (Proceedings of Tuesday 25 August 2015 at 1:45 pm, at page 31 of 40).

[80] He stated that Mr Georges did not seek the approval of the Sole Arbitrator before submitting two emails with regards to offers allegedly made to Mr Egorov during the arbitration. Mr Georges also did not inform him prior to submitting his Post Hearing Brief that he will be attaching the said two emails.

[81] Mr Kuehner stated that there was no specific provision in Procedural Order No 1 for counsel when cross-examining an expert witness to have the assistance of another expert. However, it was allowed by the Sole Arbitrator.

[82] With reference to exhibit D17, at paragraph 11, Mr Kuehner stated that the said exhibit did not contain any proposal emanating from Vijay that it should be allowed to call a new witness to produce a report.

[83] The court found Mr. Kuehner to be a truthful witness. The court also found Mr Kuehner not to be a biased witness.

[84] The evidence of Expert Witness. Expert Witness lives at 43 Rue D'Auteille, Paris. He is an Attorney-at-Law in Paris, and has been since 1999. He specialises in arbitration law in particular in international arbitration. He has 20 years' experience in international arbitration.

[85] It is to be noted that Vijay did not question the qualifications of Expert Witness. The court is satisfied that the qualifications, competence and experience of Expert Witness were unquestionable; and that Expert Witness had applied his mind to the real point of the law in issue. The court is bound to accept the uncontradicted evidence of Expert Witness.

[86] Expert Witness explained that he is aware that there are various constructions contracts. He did not read the contracts. He is aware that a dispute arose about alleged defects in the construction and delays in the work. An arbitration procedure started and an award was issued. Neither he nor his firm was involved in the arbitration procedure. He did not read the procedure act nor the award.

[87] Witness referred to art 1504 of the Code of Civil Procedure Book IV Arbitration Decree No 2011-48 of 13 January 2011, reforming the law governing arbitration (Translation), exhibit P7. The original "Textes" is before the court as exhibit P13. Article 1504 states – "An arbitration is international when international trade interests are at stake". Expert Witness opined that it was an international arbitration because international trade interest was at stake. An arbitration award made in Seychelles, whereby the arbitration proceedings took place in Seychelles, may be enforced in France. The arbitral award will be considered by French courts as an arbitral award tendered abroad. Article 1514 under Chapter III – Recognition and Enforcement of Arbitral Award Made Abroad or in International Arbitration states "an arbitral award shall be recognized or enforced in France if the party relying on if can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy" applies. The only criterion, under the said art 1514, will be that the arbitral award will be rendered abroad.

[88] Expert Witness stated that arts 1514, 1515, 1516 and 1517 of exhibits P7 and P13 would apply if one were to enforce an arbitral award rendered in Seychelles in France. The Final Arbitral Award "is enforceable in France" as from the date of it being rendered (proceedings of Wednesday 26 August 2015 at 9 am, p 17 of 45).

[89] Expert Witness stated that France is a party to the New York Convention since 1959. The United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards United Nations 1958, also known as the New York Convention is before the court as exhibit P8. The New York Convention is "binding … [b]ut … the enforcement in France, recognition and enforcement in France" of an arbitral award "will not be required directly on the basis of the convention [New York Convention] but rather on the basis of this decree" and art 1514 (proceedings of Wednesday 26 August 2015 at 9 am). On the same issue Expert Witness explained that France being a party to the New York Convention has to comply with the provisions of the New York Convention. France will recognise or enforce in France arbitral awards when required by the New York Convention. However, in relation to the Final Arbitral Award, the "textes" of the decree (exhibits P7 and P13) will allow for the recognition of the Final Arbitral Award. He referred to art V 1(e) of the New York Convention, which provides that "Article V 1. Recognition and enforcement of the award may be refused, al the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: ...(e) The award has not yet become binding on the parties, or has been set aside or suspended by the competent authority of the country in which, or under the law of which, that award was made". He stated that the said art V 1(e) does not appear in the "French Code" and, therefore, an arbitral award which has been "set aside in the country where it was rendered will nevertheless be recognised in France" (proceedings of Wednesday 26 August 2015 at 9 am at page 23 of 45). He opined that it is easier to enforce arbitral awards under the "Code of Civil Procedure of France" than under the provision of the New York Convention. He referred to Article VII 1 of the New York Convention which does not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law where such award is sought to be relied upon, if the law is more favourable than the conditions set out by art V of the said Convention.

[90] Expert Witness stated that he is familiar with ICC arbitration before the ICC and the ICC Rules. He was then questioned about the obligations of an arbitrator when presiding over an arbitration proceeding. Expert Witness stated that the main obligations of an arbitrator, found in art 22(1) of the ICC rules are to "conduct the arbitration with as much efficiency and quickness as possible, one and secondly but the two issues are the same level. And second to respect due process" (proceedings of Wednesday 26 August 2015 at 9 am at page 24 of 45). The said second obligation is also found in art 1510 of the "Code of Civil Procedure", which provides "[i]rrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process".

[91] Then examination-in-chief centred on the issue of due process. which Expert Witness stated "is essential". The following passages between learned counsel and Expert Witness are pertinent on that point –

Q. Tell us, I would put a hypothetical question to you. In your opinion is it a normal practice to have when an expert is being cross examined by the opposing party for the legal representative of the opposing party to have the assistance of an expert with him to cross examine the other expert. Is that a normal procedure in your opinion?
A. If the expert has been introduced in the procedure and has provided an expert report, it is usual that he is authorized to attend the full hearing to hear what the other expert says and usually he sits close from the counsel and may give him some –
Q. You said if he has been introduced, you said if he has given a report and if he has been introduce.
A. Exactly.
Q. Can you explain what do you mean when you said he has been introduced?
A. Usually each party provides expert report. Normally each party in the traditional procedure, there may be variations depending on the cases. But in a traditional procedure, each party is allowed one to two briefs. The claimant submits a first expert report with its first brief and the defendant submits its own expert report with its reply. And the idea is that each expert will have a discussion and quite often now in modern arbitration arbitrator likes to have a confrontation between both experts, which are ask to put question by the expert at the same time al hearing.
Q. Now, what if the expert who is assisting counsel to cross examine the other expert of the opposing party, has not produced a report before the arbitrator and has not been a witness before the arbitration proceeding, Is that the – would you consider that normal for such an expert to assist counsel?
A. That really an unfamiliar situation and I think it create some unfairness and unbalance because in the normal procedure, each expert knows the position of the other one. And he is ready for a dispute on their respective position. Here, there is an element of surprise.
Q. Unfairness to whom, to the expert who is being cross examined?
A. To the expert who is cross examined, obviously.
Q. If I may refer you to Article 1464, more specifically the third paragraph of 1464 and article 1466.
A. Yes.
Q. Can you read third paragraph of Article 1464.
Court: Of what?
Mr. Hoareau: Of P7.
Witness: First I should precise for the sake of completeness that those provisions are in a part of the decree which relates to domestic arbitration not to international arbitration. However, pursuant to article 1506, some provisions regarding domestic arbitration are applicable to international arbitration and an award made abroad this one was in Paris. But an award made abroad would be considered as international arbitration for the sake of the application of the award. And if you read to subparagraph 3 of article 1506, those provisions 1464(3) and 1466 are part of the dispositions which are applicable to international arbitration.
Q. So, article 1506 makes applicable certain provisions in the- which is applicable to the domestic arbitration to both international arbitration and arbitration made abroad?
A. Exactly.
Q. And so, paragraph 3 of article 1464 is applicable.

A. Yes.
Q. To international arbitration also?
A. Yes.
Q. And also article 1466?
A. 66. And you may see three stars at the beginning of the line. They were ordered by the editor but they mean that these provisions are applicable to international applicable to international arbitrations, which precise on the first page.
Q. Read the third paragraph of article 1464.
A. 'Both parties and arbitrators shall act diligently and in good faith in the conduct of the proceedings'.
Q. Read article 1466 please.
A. 'A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity'.
Q. Now, let me place a hypothetical question once more to you Mr. Derains. If a party before an arbitration proceedings is aware for instance that the opposing party according to that has interfered with the witness and as a result the witness has refused to attend the arbitration proceedings, to testify on behalf of that party and the party – first say the party is represented by legal counsel. That party on his own volition, he writes to the arbitrator, after proceedings have been closed, but before the final award is rendered. Are you following me?
A. Yes.
Q. He writes, according to him without his lawyer knowing. He writes directly to the arbitrator and tells the arbitration that there are certain things which have taken place according to him, regarding interference with that witness. But ask the arbitrator to keep it confidential and to actually, actually after reading that document to destroy it.
A. By saying to keep it confidential, do you mean that –
Q. Not to disclose it to the parties. Would that action on the part of that party come within article 1466?
A. Well, first it would be very clearly a breach of article 64. Of a very serious breach of article 64.
Q. Which provision when you say article 64?
A. 1464, excuse me. Both parties should act in good faith because – principle of good faith implies the respect of due process and most elementary rule of due process at least in the French conception is that a party would never – the party or his lawyer will never address itself ex parte to the sole arbitrator without –
Q. Will never –?
Court: Address.
Witness: Address itself ex parte without informing the other party to the Tribunal or the sole arbitrator. That puts the award at risk because that would be clearly, that will show clearly a lack of impartiality from the arbitrator which is one of the main grounds for setting aside an award. And if puts the arbitrator in a very difficult position. That is my first reaction independently from the fact that normally you should address the arbitrator through your lawyer and not directly. But for your second question, would this fall under article 44 – your main question sorry. Would it fall under article 1466? If it is asked to the arbitrator to keep the document, the information secret, I can see

> what he can do with it, especially if the other party is not informed but I presumed the arbitrator has informed the other party. So, no it cannot …, for that you have to object to something and to ask the arbitrator to do something. And if it is confidential, you do not ask him to do anything.
>
> Court to Witness
> Q. And if it is confidential you say?
> A. Excuse me?
> Q. Could you repeat?
> A. If you ask, if you speak directly to the arbitrator or the judge the same issue, but tell him, this is confidential, you cannot refer to it, he cannot do anything with it. So, you do not ask him to do anything with it.

(Proceedings of Wednesday 26 August 2015, 9 am, pp 25, 26, 27, 28 & 29 0/45) [Emphasis added]

[92] Expert Witness referred to the following passages from "Revue De L'arbitrage Comite Françáis De L'arbitrage 2007 – No 4 La Jurisprudence De La Cour De Cassation En I.L4tière D 'Arbitrage International Par Emmanuel Gáillárd Professeur à l'Université Paris XII, Associé, Shearman & Sterling LLP", which is before the coult as exhibit P14, on the issues of waiver of right and estoppel.

> So, vital of the paragraph is "l'interdiction de critiquer la sentence pour des griefs qui n'ont pas été soulevés, chaque fois que cela été possible, devant le tribunal arbitrale lui-même. And the paragraph states, la règle selon laquelle la sentence ne peut être critiquée devant les juridictions étatiques pour des griefs qui n'ont pas été soulevés, chaque fois que cela été possible, devant le Tribunal Arbitrale lui-même, et très fermement établie dans la jurisprudence de la cour de cassation. Seules les justifications variant. La cour de cassation avance parfois l'idée de renonciation ou celle d'estoppel. Et présente parfois la règle sans autre justification, comme un principe général du droit français de l'arbitrage. C'est ce qu'elle a fait le 31 janvier 2006 encore dans l'arrêt Intercafco. La formule est très claire : <tout grief invoqué a l'encontre d'une sentence au titre de l'article 1502 NCPC doit, pour être recevable devant le juge de l'annulation, avoir été soulevé, chaque fois que cela était possible devant le tribunal arbitral lui-même >. Il s's'agit d 'une exigence de loyauté procédurale, un plaideur ne pouvant se réserver un grief qui lwi permettrait de contester la validité de la sentence sans avoir mis le tribunal arbitral à même d'y remédier lorsqu'il était encore temps de le faire.

[93] With reference to the above article, Expert Witness explained that exhibit P14 was written in 2007, before the enactment of the present law. There is no reference in exhibit P14to the provisions of arts 1464 and 1466. He opined that "the idea is the same". You cannot retain a "grant" for annulment or denial of recognition of an award, and then chose to apply it on the basis of whether or not it is favourable to your cause. You have to "use the grant" immediately. That has been decided by the French jurisprudence, and for that it has referred to different principles of law. The first one which is the waiver of right. More recently, the Cour de Cassation has used the concept of estoppel, which is an English and US concept rather than a French concept. The Cour de Cassation has decided that it is a general principle of French Law. In his opinion probably based on international good faith, which in French Law

(contractual French law), is very important since pursuant to art 1134, parties have an obligation to execute contracts in good faith. And that type of attitude would be a breach of good faith in the execution of the convention to arbitrate.

[94] Expert Witness made the following points in cross-examination. With regards to the issue of fraud, the French court will set aside the award if the fraud has an incidence on the decision of the arbitrator that means if the decision of the arbitrator would have been different without the fraud. He explained, further, that in the case of fraud, a party can appeal after the expiry of the time limit for an appeal, if the party proves that the fraud occurred and that "this fraud had an impact on you, the decision, award or documents" but also that the decision would have been different without the fraud.

[95] With regards to the issue of procedure it would have been proper for the parties in this case to have expressly opted to adopt the procedural Rules of the ICC Court of Arbitration to guide the arbitral process. He added, further, that each time a party chooses to opt for the ICC, implicitly it refers to the ICC Rules.

[96] He, further, explained that an exequatur, in France, such as exist in this case, renders that award enforceable in France provided that a stay was not obtained from the Court of Appeal, in France.

[97] Learned counsel put to Expert Witness the following hypothetical questions with regards to a breach of due process –

> Q. If one party has an expert witness who has given an expert report and that expert witness is being examined. Where is the unfairness in the other party who has not put up an expert report, having next to him an expert to assist? Where is the unfairness?
> A. The unfairness is the fact that in the usual procedure the expert or the claimant, if I understand it is in that case, knows in advance the position of the expert of the other party, because he has read his report and usually each expert has the opportunity to reply to each other. So, there is a real imbalance between the situations of both expert.
> Here you arrive to the award, to the hearing, you are prepared to reply to be cross examined, you imagine the basis of what has been said in the brief That means without expert report, so mostly nothing. And you have in front of you, indirectly but in front of you another expert who obviously has a position that you do not know because it was another …
> Q. Yes, but where is the unfairness because the questions are put to you and you answered them.
> A. Because in arbitration, the position is that all documents or evidence or witness statement should be put in advance.
> Q. But not questions in cross examination should.
> A. Yes, but they are based on the basis of this.
> Q. Well, okay now tell us this. I am happy with your answer. Tell us this. What if instead having the person next to you, that person is outside the room and you have consulted with him the previous night and you have done your questions. Where is the unfairness there? Is that not a usual practice Mr. Derains?
> A. It is a usual practice. The difference is that you have someone who hear what you say and you can modify the questions that to be asked while you are

> discovering new position.
> Q. Now, is it not – is your answer not implicitly based on the fact that there was such assistance?
> A. I do not understand your question.
> Q. What if the person sits next to you but does not assist you. Where is the unfairness?
> A. If he does not assist you, there is no unfairness. If he does not say anything, there is no unfairness.
> Q. If he does not say anything. He never speaks.
> A. And if he does not speak with the other lawyer, counsellor?
> Q: So, you will agree with me that this scenario, your answer subject to proof that' there was actual assistance?
> A. I think I always said may.
> Q. Thank you very much. Now, is it in the power of the arbitrator to allow such a scenario?
> A. Yes. Whether it is on the power of the arbitrator to control the proceedings and then he may authorize such scenario but under the control of the court who will at the end will examine the award and eventually decide to set aside the award or to deny …
> <u>Court to Witness</u>
> Q. Mr. Derains, could you repeat those words.
> A. The arbitrator has all power to control the proceedings, so he may authorize such scenario and you have no recourse to a national court to control him at that stage. At the end during the set aside or enforcement proceedings, the court may be seized of this issue and say, this breach of due process so serious that it justify the annulment of the proceedings. I do not think that just this fact would justify any annulment but there is always a control by the court at the end in the line of the five grounds set by Article 1520.

(Proceedings of 26 August 2015, 9 am, pp 40, 41 & 42 of 45)

[98] Expert Witness opined that if it comes to the knowledge of the arbitrator that there is an issue which might give rise to a public policy issue, the duty of the arbitrator is to ask the parties about their position. He emphasised that one party communicating to the arbitrator without the disclosure to the other party would be more particularly a breach of due process.

[99] Concerning fresh evidence being introduced by one party without disclosure to the other party he opined that it would be a breach of due process.

[100] In terms of due process if one party knowing another party has a witness who has given a statement to the other party approaches the other party's witness with a view to obtaining a contradictory statement from that same witness, Expert Witness opined that it "would not be proper, it depends a little... But evidently if you are approaching for him to lie or to modify his witness statements, it is improper a breach of due process. Not the simple fact to do it … But the consequences could be a breach of due process" and of good faith. If a party do not approach the opponent's witness and obtain a contradictory statement from him but the party prevail upon him not to come to testify in the evidentiary hearing, of the arbitral process, Expert Witness opined that a witness should be present to be cross examined and if the opponent ensures that he is not present it is a breach of due process and of the injunction of good faith.

[101] Expert Witness made the following points in re-examination. In relation to the issue of fraud, Expert Witness added that a party is compelled to raise any issue regarding the regularity of the proceedings as soon as he is aware of it (arts 1464 and 1466). If he does not do it before the arbitral tribunal or the sole arbitrator, assuming that he is aware of it, he is prevented to do it, to raise it as an argument to seek the annulment of the award. He was further re-examined on that point –

> Q. Let's go a step further. What if the party discovers the fraud, the party unilaterally writes to the arbitrator basically informing the arbitrator in confidence that there is certain fraud, but asked the arbitrator no' to disclose it to the other party and to keep it confidential... and actually to destroy the letter which the party has written to the arbitrator. Would the party eventually be allowed to rely on that fraud to set aside the award?
> A. No, I do not think so because all the rational we are in this rule, is that you cannot wait to know whether or not you have won the case before to raise an argument, to set aside the award. You cannot wait to be sure that you have lost your case before to ask to come back in way on the procedure. That is absolutely contrary to … good faith … And in case you are imagining the party is asking the arbitral tribunal to take any decision on the basis of what is seen. Even too is not asking him even he is 'wing to preventing him from using it in the award because he cannot refer to it in the award Normally what the arbitrator should do, would be to make the letter public. I mean to communicate it to both parties and their lawyers and the only thing he can do is wait for the lawyer of the original party to do something, to ask him to investigate and to take decision on the basis of this fact. If he is not asked to do that…
> Q. When you say the arbitrator would wait for the lawyer of the original party. What do you mean the original party?
> A. The party who has issued this confidential letter.

(Proceedings of Wednesday 26 August 2015, 3 pm, p 1 of 9)

[102] He added that the imbalance would still exist even if the expert who is assisting the lawyer to cross examine the other expert does not himself cross examine the expert but he provides information to the lawyer to cross examine the other expert during the hearing.

[103] Counsel suggested to Expert Witness –

> Q. … again a hypothetical question, There is a piece of evidence and a report for instance which is going to be produced. A party has informed the other party that this is going to be produced, even and goes on to mention the name of the person who has produced the report. But the other party still object saying no, I will not consent at this point in time. But the other
> party insist even if there is no consent, I will provide this to the arbitrator but mention that this is going to be done. Is it a breach of due process, is that a bad faith on the part of a party who produces that report to the arbitrator. ?
> A. ...In a way it is … maybe, to ask authorisation to the arbitrator to produce the report and in that case there is no problem with it.
> Q. … before doing so, there is application to the arbitrator. But there is a communication between the two parties that one of the parties intends to provide that information. Is that a breach of due process?
> A. Well to inform the arbitrator that you have the intention to produce.

> Q. Not to – the other party not to the arbitrator.
> A. No, that is not a breach of due process, he is aware of it.
> Q. The other party is aware?
> A. The other party is aware of it. And if in any case, if there is a problem, it is cured by the fact that the arbitrator, if he has done it, communicated, if at the end the other party has the documents, any problem is cured.

(Proceedings of Wednesday 26 August, 2015, 3 p.m., pp 4 & 5 of 9)

[104] The evidence of Mr Egorov. Mr Egorov lives in Moscow, Russia. He is a hotelier. Mr Egorov is aware of EEEL, Vijay and the Savoy Hotel. At all material times, Mr Egorov was the project director for the Savoy Resort and Spa, the ultimate beneficiary of the construction works undertaken by Vijay, and a director of EEEL.

[105] Vijay a qualified contractor, tendered for the construction of the hotel. On the basis of the tender process, the Board of Directors of EEEL and the head office approved for Vijay to be employed as the main contractor. Mr Egorov testified that workers were shifted at the request of the Board of Directors of EEEL from the Savoy Resort and Spa construction site to an adjacent site at the Coral Strand Hotel (which was also being developed by EEEL). Mr Egorov was against this redeployment of workers. Mr Egorov would have testified on this issue.

[106] In April 2012, the heads of the company terminated Vijay's contract with EEEL. The letter terminating Contract 6 was given on 11 April 2012. Though Mr Egorov was involved in the decision to terminate the agreement with Vijay, he was against that decision because it negatively affected the project in terms of budget and delays in delivery. According to his evidence, the contract was "heavily negotiated" with strict construction conditions. With regards to the nature of previous works, as of April, or May 2012, Mr Egorov stated that five of the Six Contracts had been executed and the site work was progressing •well.

[107] Mr Egorov stated that members of the management team were displeased with the fact that he had openly expressed an opposing opinion. They thought that he was defending Vijay and were, therefore, of the view that he had a conflicting interest in the contract. Mr Egorov denied having any interest in the contract, stating that his only interest was to see the timely completion of the project.

[108] He then explained that his planned vacation, which had been delayed since January because Coral Strand Hotel had not been completed, was suddenly approved. He proceeded on vacation about 20 April 2012. On 15 May, three days before his return to Seychelles, he received a letter by mail, which stated that he was no longer a director of EEEL. The content of the letter shocked him and he complained that he had not received notice of his termination. He returned to Seychelles out of good will to complete a handing over of his duties. A day after arriving in Seychelles on 18 May he went to the EEEL office for handing over. Mr Egorov was informed that there was no need for him to hand over, and that he was no longer part of EEEL. Mr Egorov complained that he was never informed by EEEL about why his work agreement had been terminated.

[109] Mr Egorov returned to Moscow with his family. While in Moscow in February 2013, he got a call from the security department of the Guta Group. EEEL was affiliated to, or a part of, the Guta Group of companies. Mr Andrushkin and Mr Eian of the Guta Group contacted him. They wanted him to come for a meeting at the Guta Group or the Guta bank in Moscow. Mr Egorov went to the first meeting alone. At that meeting, he was questioned along the line of, "when he became corrupt by Vijay Construction", to which he expressed denial. They requested a statement from him stating that Vijay had offered money to him [Mr Egorov] in order to win the contract. He refused, stating that he did not discuss money issues with Vijay. Mr Egorov stated "it was a lot of intimidation il was a lot of blackmail they say they will do Ihat fo you after that you will sign any statement which we ask I said no I will not do it'.

[110] The Gula Group called him again. For the next meeting in Moscow, he was accompanied by his lawyer. There was no further mention of money at that meeting. He then stated that he was offered money by EEEL for him to make a statement that Vijay had offered him money and for other matters, namely for interrupting his work and coming back to Moscow. He stated that, although he needed the money, he refused to make the statement against Vijay. He did not try to contact EEEL- nor did they try to contact him.

[111] Mr Egorov made the statement, dated 1 March 2013, which is before the court as exhibit D23, and sent it to learned counsel, Mr Georges, at his office. The statement gave his perspective regarding what happened on site. Mr Egorov defended the veracity of his statement. He knew that the statement would be used in the arbitration proceedings. He confirmed that he would have testified at the arbitration proceedings had he been asked at the time of his statement. He made the statement in March, after the February meeting. He felt that he had to tell the truth about what had happened. After he had made the statement, he received a call from Mr Andruskin, who told him that he will try to "place a sanction or try to revoke [his] property here in Seychelles so they will make cases against me". He did not believe that the threats would be carried out because nothing had been done "here". He then heard that cases had been filed against him in Seychelles. He sought legal representation and discovered the subject of the cases. He produced exhibit D22 detailing private charges filed against him, in mid-2013, by EEEL. A money claim was also filed against him, by EEEL, in a Russian court, in relation to "overpayment" made by EEEL. The civil case started in November until March 2014.

[112] Mr Egorov sought the services of a local lawyer in Russia and in January 2014, after two court hearings in the Russian court, he was called for a meeting by Vladimir Vasilivich, a lawyer of the Gupta Group. They met in January at a restaurant in Moscow. At the meeting he was again asked to make a statement against Vijay to the effect that it had "violate[d] construction technology and work on site and he said you do not need to put that it was corruption and money involved because this is criminal…". Mr Egorov refused to make the statement, which he considered untrue as there were no violations in the construction works. There were minor defects on site, which the project management team identified and were fixed by the contractor upon request. When the defects were identified, EEEL "cut the money" until the defects were fixed. When Mr Egorov refused to make the statement, he was told that they had

"arrested" his property in Seychelles; and that they would do the same in relation to his property in Russia. Mr Egorov was told that if he made the statement, then they would drop the cases in Seychelles and Russia. Mr Egorov again refused to make the statement.

[113] Later on he received documents from the court regarding the "arrest" of his property in Russia. The trial continued in Russia. Outside of the court room, before a hearing on 11 March 2014, he was introduced to a lawyer for the Guta Group named Edward, whom he did not know previously though had seen during the proceedings. Mr Edward stated to him that they will like to offer him a deal, "no need to say that there was money involved … just what we are asking you do not come to Seychelles if they will call you for the hearing of arbitration don't come". The agreement was to the effect that they would stop all the cases in Russia and Seychelles; and that they would leave him alone. Mr Egorov testified further –

> It was a lot pressure it was a lot of abuse and a lot of humiliation was done to me I was absolutely depressed at the moment there was no work, I was cases in Russia and in Seychelles was a lot of pressure tremendously huge amount of pressure I said ok alright if you leave me alone if you close the cases here in Russia and Seychelles and don 't involve me in this case I am accepted I will not come I will not do anything and we shake hands and we signed a settlement agreement in ,from of the Court and lawyer can confess it and can confirm it as well the Russian lawyer and this agreement was set out.

[114] In consequence of the agreement –

> [he] stop [he] blocked any conversation, any connection in regards to Vijay arbitration hearing any emails any calls anything which come from Vijay or from the lawyer I totally ignore it I didn't reply because try to stick to the settlement which was agreed and in the fact I didn't come for arbitration hearing and…

[115] The Second Witness Statement (exhibit P9) was delivered to him by Edward. He did not prepare the statement. He signed the said statement. On the same day that he signed the statement, the court cases in Russia were settled. The information contained in the statement in relation to the Savoy Resort was incorrect. He signed the statement under pressure. He made the first statement (exhibit D23) voluntarily, without any pressure. He stated that the cases in Seychelles were not withdrawn. He kept on calling Edward, but the cases were not withdrawn.

[116] Edward arranged for him to meet with Mr Budykov in August, who, if he was not mistaken, is in charge of the legal department in the Guta Group. He met once with Mr Budykov and Edward. He met with them out of good will. According to his evidence, at the meeting they showed him a private correspondence, dated early January 2014, that pertained to his meeting with Mr Vladimir Vasilivich. In January, he had informed Mr Patel and Mr Bernard Georges that he had been asked to make a statement against Vijay, which he refused as it was incorrect. They offered him the same conditions, inter alia, they will give him money for his "job interruptions". They showed the emails to him and asked him why he had sent the emails because nobody had offered him a deal and he explained to them that it was information about what had happened to him. He mentioned to them that he was not aware that the emails will be

used in the arbitration proceedings and that he had not given his permission for the emails to be used. They asked him to make another statement "saying this is not true, it was not happen, nobody advise any deal to you because this your correspondence now go to arbitration and could affect the decision of Judge". He refused to make the statement. Mr Egorov produced two unsigned witness statements, dated 22 August 2014, as exhibit D26, collectively. He stated that he saw exhibit D26 on 22 August 2014 at the meeting, when he was told to choose which one to sign depending on his preference.

[117] In August 2014, Mr Egorov met with Mr Patel, who was in the centre of Moscow on vacation with his family. Mr Patel enquired as to why he did not answer his email or his phone, why he did not contact him [Mr Patel], and asked what had happened to him. Mr Egorov mentioned the agreement that he had signed in court, wherein EEEL had informed him that they would stop the cases against him, and that in return he would agree not to communicate with him [Mr Patel].

[118] After the meeting in August 2014, when he refused to sign the agreement, there was not much communication. He mentioned that he was served with documents in relation to the court cases filed against him in June 2013, in May, April, 2015, through the local police officer in Moscow. He instructed counsel to fix dates for his appearance in the cases in Seychelles to coincide with his appearance in this case. He contacted Mr Georges and expressed his will to come to Seychelles to clear his name. He arrived in Seychelles on the 22nd.

[119] Mr Egorov stated that EEEL went so far as intimidating him in an attempt to prevent him from giving evidence in the proceedings before the court. It is to be noted that the facts have arisen since the case was brought. The evidence is not supported by the pleadings. EEEL objected to the evidence being led. The court ought not to consider the evidence.

[120] Mr Egorov made the following points in cross-examination. He mainly has experience in development projects related to hotels. He explained that he graduated at a university specialising in hotels and that he worked in hotels. He started out as a waiter and has also worked in marketing, sales and management positions. He is not qualified in relation to construction defects but that he can read engineer reports. He is neither an engineer nor a qualified quantity surveyor.

[121] The main purpose of his travel to Seychelles was the criminal court cases, and he would not have come if there were no cases filed against him. He stated that, had he been invited by the party or the court, he would have attended this trial. He mentioned that he was not summoned to attend but that Mr Georges told him to come. He also mentioned that he spoke to Mr Patel and Mr Kaushal Patel.
[122] Mr Egorov stated that he came to Seychelles alone and is staying at Cerf Island Resort. He paid Euro 210 per night for his stay at Cerf Island Resort. He stayed there because of less interaction. He said that he earns United States Dollars 7000 monthly.

[123] It is not the first time that he had been at Cerf Island, having been there four years ago. The whole office was invited by Vijay's team for dinner at Cerf Island to celebrate the completion of a building. Mr Patel was also present. He spoke in general terms to Mr Patel on that day. He mentioned that, at the time, he was not aware that Cerf Island Resort belonged to Mr Patel. Mr Patel did not mention that to him.

[124] He was informed by Mr Georges at the beginning of the year that he would be needed for this case and was told about the dates about a month prior. He mentioned that he heard that this case would commence on 24 August. It was put to him by counsel that he knew about the dates of the 24th to 28th before he was told about the date of the 26th. He stated that he received one phone call informing him about the dates.

[125] Mr Patel was aware that he was coming to Seychelles for this case. It was his personal choice to stay at the Cerf Resort and he did not talk to Mr Patel about it prior to booking. It was after he had booked the Cerf Resort that he spoke to Mr Patel. He booked the Resort three weeks ago but informed Mr Patel that he would be staying at the hotel two weeks ago. He mainly discussed with Mr Georges and did not keep Mr Patel informed all the time.

[126] Counsel asked why Mr Egorov would seek the legal opinion of Mr Patel in a criminal case, which Mr Patel had nothing to do with, and he [Mr Egorov] was the only accused person. According to exhibit D27, Egorov cc Mr Patel. Mr Egorov stated that Mr Patel's company is involved. The point being made by counsel was that Mr Egorov would copy Mr Patel on a legal advice he was seeking from a lawyer, yet he did not tell Mr Patel that he was going to stay at the hotel he is connected with. Mr Egorov insisted that he informed Mr Patel about the fact that he was staying at the hotel only after he had booked. Counsel suggested to Mr Egorov that he is not telling the court that he had told Mr Patel that he was going to stay at the hotel because he was invited by Mr Patel to stay at his hotel. He insisted that he did it out of his own initiative. Counsel insisted that the reason why Mr Egorov was in Seychelles was about this case. Mr Egorov stated that his first priority was the criminal cases.
[127] Counsel put to Mr Egorov that, in the affidavit before the court, he had stated that he elected domicile at La Misere, Mahe. He stated that he thought that it was a mistake. It was then suggested to him by counsel that the reason he had stated that he elected domicile at La Misere was because he did not want to disclose the fact that he was staying at Cerf Resort. Mr Egorov denied the suggestion of counsel. Furthermore, it was suggested that inserting La Misere on the affidavit was deliberate because of the connection of one of the directors of the Resort. He stated that it was not the case.

[128] Mr Egorov stated that the contents of the Witness Statement, exhibit D23 is correct. With regards to the following statement "I have no hesitation in stating that at all times {he quality and progress of the works carried out by Vijay Construction (Pty) Ltd. On both sites were in conformity with the standards and delays expected. Whenever there were snags, these were rectified when notified to the contractor. Had the contracts not been terminated, I have no hesitation in stating that the works would have been delivered on time and of the standard expected." It was put to him that he was not qualified to report on the quality of the work. Mr Egorov stated that he made the report based on what he was informed by his engineering team and from his personal observation. He admitted that, as a person lacking an engineering background, he cannot verify if the standard of work is acceptable. It was pointed out to him that the report does not mention based on information he received.

[129] With reference to exhibit D23, counsel questioned Mr Egorov about the type of performance security given by Vijay. Mr Egorov stated that a bank guarantee was given by Vijay. It was then put to him that a bank guarantee was not provided by Vijay; rather, it was an insurance loan. Mr Egorov stated that this was the case. According to counsel, Contract 6 provided for Vijay to provide a bank guarantee, a clause which was not met as found by the Sole Arbitrator. He agreed. It was put to him that there was no agreement between EEEL and Vijay that Vijay could provide an insurance bond rather than a bank guarantee, and that no such evidence was led before the Sole Arbitrator. He stated that an addendum had been made to the agreement and that it was done around the time that the agreement was breached. He insisted that it was agreed by senior level management. Counsel then suggested to Mr Egorov that such an arrangement was made by him and Vijay and that is why he was hesitant when initially questioned about that part of his statement. He denied the allegation. He then stated that no agreement was signed between EEEL and Vijay, and he mentioned that lawyers worked on an agreement but he does not know if they signed it because by then he was out of EEEL's company. With reference to exhibit D23, counsel put to Mr Egorov that the Sole Arbitrator had found "It is admitted by both Parties that some defects occurred under each of the Contracts, including Contract 6. While the Respondent considers these defects to have been minor in nature and ordinary in the context of a construction project like the Savoy Resort, the evidence on the record shows that the defects in fact surpassed the level of what is normally encountered and easily remediable. And that this was contrary to what he had stated in exhibit D23." Mr Egorov was unaware of that finding.

[130] With reference to exhibit P9, Mr Egorov stated that he did not prepare the statement and only signed it.

[131] Mr Egorov produced exhibits P19A and P19B, which were put to him in order to contradict his earlier testimony that there was an agreement that the two criminal cases in Seychelles would be withdrawn against him. Mr Egorov explained that the Russian Court would not have accepted a settlement agreement that referred to a foreign court.

[132] Mr Egorov stated that he prepared the affidavit with a lawyer. Counsel referred to para 10 or the affidavit of Mr Egorov "on the 11th of March, 2014, during the cases in Russia I was approached bv Mr. Edward Gevorkyan another lawyer of the Guta group and offered a deal I was told that if I agreed to sign a statement to the effect that the defendant company had been in violation of the construction technology at the Savoy resort and if I did not come to the arbitral hearing as a witness for the defendant company then the cases against me in Russia and Seychelles would be withdrawn" and then you said "I signed an agreement prepared by the above mentioned lawyer Mr. Gevorkyan to that effect and accordingly did not present myself to the arbitration between EEEL and VCL to give my oral evidence". Mr Egorov stated that the contents of the affidavit were correct and mentioned that he was under pressure, adding that he spoke to the Judge and Edward about the cases but that the Judge did not agree. It was then put to Mr Egorov that the signed agreement only pertained to the cases in Russia. He added that he was assisted by a lawyer when he made the statement, and that the handwritten changes made to the settlement agreement were made at his insistence.

[133] Mr Egorov stated that when he signed exhibits P19B and P9 they said they "will continue the pressure". Mr Egorov mentioned that he and his family were not threatened with harm but that they stated that they would continue with the cases. His property in Russia was seized in accordance with the law, he challenged the seizure and the outcome was positive. Because of the settlement the seizure was waived.

[134] He cut off all communication with Mr Patel after he had signed the agreement. He then stated that, had the two criminal cases in Seychelles been withdrawn against him, he would not have continued communicating with Mr Patel. He denied that he exerted pressure on EEEL to withdraw the two criminal cases against him. He reiterated that the reason he came to testify ill these two cases is because of the pressure exerted by EEEL, who would have twisted the story and would have said that he was guilty if he did not come to testify. He added that he came to Seychelles because EEEL had breached the settlement agreement, and that there was no more trust and they continue to manipulate and exert pressure.

[135] Between March and June 2014, he could communicate with Mr Patel if he wanted. He was free to travel during that time. He could have come down to Seychelles in June 2014. Between March 2014, and June 2014, he was not kidnapped and was free to roam.
He stated that it was part of the agreement for him not to communicate with Mr Patel. Counsel then asked Mr Egorov why it was not in the agreement that he should not communicate with Mr Patel. He stated that it was not in the agreement because the court in Russia would not have accepted it – "They would not accept this for procedure so it was part of it was signed it was agreed by mutual agreement between the parties and I stick and try to respect that". He was assisted by counsel but that what prevented him from seeking a second agreement from EEEL out of court that he would not speak to Mr Patel "was a matter of trust because I am really believe that I will execute my part and will follow through the agreement and it was a matter of trust at the moment again which was broken". Mr Egorov was then questioned on how he could trust these people, who at that moment in time were making his life miserable and exerting pressure on him. He stated that he trusted them.

[136] Mr Egorov started communication with Mr Patel in August 2014. Mr Patel sent him an email stating that he will be travelling to Moscow. He replied to the email. He met with Mr Patel in August, when Mr Patel enquired as to what had happened to him, why he did not communicate with him, why he did not pick up the phone and why he did not reply to emails.

[137] He stated that the relationship with Mr Patel was "fair". Mr Patel and he [Mr Egorov] are not "close"; that he has never sought any favours from Mr Patel; that Mr Patel has never made any favours for him; that Mr Patel has never done any good deeds towards him; that Mr Patel has never assisted him in any way; and that he has never sought for any assistance from Mr Patel. Mr Egorov stated that he was aware that Mr Georges is representing Vijay in this case and that Mr Georges is also his counsel in this case. He had known Mr Georges since he was in Seychelles; that he got to know Mr Georges from a mutual friend; and that he got the email address of Mr Georges from that friend, which he used to contact Mr Georges by email.

[138] Then Mr Egorov was cross-examined in relation to the issue of Mr Patel or Vijay getting involved in his legal issues. Mr Egorov stated that he communicated directly with Mr Bernard Georges regarding his legal issues. There was nothing to do with Mr Patel. Then he was cross examined on an email D27, which according to counsel was an email about a legal issue seeking legal advice from Mr Georges that was copied to Mr Patel. Mr Egorov stated that it was an email about legal advice and it was correct that it was copied to Mr Patel. On being told that he was not being truthful to the court, Mr Egorov refuted the allegation and mentioned that it was only on this legal issue that he communicated with Mr Patel, whereas on the other issues he communicated only with Mr Georges. He denied that he had sought the legal services of Mr Georges through Mr Patel. Mr Egorov produced exhibit P20, an email, dated 19 July 2013 at 4:06 and 17 July 2013 at 8:32. The court reproduces the following passages from the email –

> Q. Take a look at this document Mr. Egorov this is an email 17th July, 2013?
> A. Yes.
> Q. The first email is dated the 17th July, 2013 correct it is from Vijay Patel to you correct?
> A. Yes
> Q. And the second email is from .you to Mr. Vijay Patel dated the 19th July, 2013?
> A. Yes.
> Witness. May I ask where did you take this? It is private communication, how did you get this?
> Q. Before we proceed to the email Mr. Egorov the only cases that have been filed against you in the Seychelles by the Plaintiff are the two criminal cases correct?
> A. I think so yes.
> Q. There is no civil case which has been filed against you by the Plaintiff in Seychelles?
> A. Yes.
> Q. Take a look at P20. There is the email from Mr. Vijay Patel dated the 17th July, 2013 sent to you al 08:32 am, correct?
> A. Yes correct.
> Q. And I am going to read that email you will tell me whether its content is correct. "I have spoken to our lawyer Bernard Georges. He is trying to get a copy of the Plaint filed EEEL. He cannot get this officially but is trying through his contacts. I will send you a copy when received. He can act as your lawyer and we will give all the necessary evidence". Correct this is Mr. Vijay proposing that Mr. Georges will act as vow lawyer correct in respect of the criminal cases?
> A. It was already ongoing communication.
> Q. Yes but he proposed he is the one proposing that Mr. Georges will act as your lawyer?
> A. He advised.
> Q. In respect of the criminal cases correct?
> A. Correct.
> Q: And now you reply. "Dear Mr. Vijay, thank you for reply. This ridiculous case is very offensive and demeaning to me. I work hard to build good future for me and my family and always try to stay away from any illegal actions. In my professional life I have never been involved to corruption. I always try to

work with dignity and respect other people. This situation is causing me a great pain. Please help me". Did you not request the help of Mr. Vijay in respect of the criminal cases?
A. Yes it is I ask assist me because there is no one who is help here in Seychelles.
Q But I thought earlier about 5 or 10 minutes ago I questioned you as to whether you had ever sought the assistance or the help of Mr. Vijay and you said, never.
A. It is a different thing.
Q. Mr. Egorov I put it to you, you are not being truthful to the Court. I put it to you the reason why you are not being truthful to the Court, why you did not want to tell the Court the whole truth that you have sought the assistance of Mr. Vijay, that Mr. Vijay has assisted you in seeking the service of Mr. Georges is because you don't want to show to the Court that in return you are doing also a favour for Mr. Vijay by coming to testify' in this case?
A. No there is no favor.
Q. Take a look at P9. If I may bring your attention to paragraph 2 which is the biggest paragraph. I will read aloud the last sentence of' that paragraph. And you said, "I had not identified those defects before the inspection of the professional committee specially organized by my Employer because I was not a specialist in construction works." It is correct that you are not a specialist in construction work correct?
A. Correct.
Q. So that part of the statement is correct? That you are not a specialist in construction work?
A. Yes.
Q. The specialist brought out and confirmed previously unknown defects that is also correct because this is also correct because that is eventually the finding of arbitrator. Is it not correct what you have slated there?
A. No comments.
Q. And you said I am reading the first sentence of that paragraph I have just read. "My point is that during the construction activities conducted by Vijay Construction PO' Ltd, workers, engineers and other employees of VCL made different defects including those of constructive character which could have lead to further violation of the operating rules after the opening of the hotel which I was informed later verbally. " That is also correct no because it was confirmed the arbitrator?
A. I didn't see the document from arbitrator.
Q. That could be correct what you have stated in there?
A. No comments.
Q. And in fact when you say in your first paragraph of this that "my primary witness statement is not entirely correct" that is the witness statement which you made on behalf of the defendant i.e. D23 you said it not entirely correct that is also correct this statement is not entirely correct is it not?
A. It is correct.
Q. I have pointed to you two instances whereby from your own testimony the statements you have made in these statements are not correct?
A. This is correct statement done by my free will.

(Proceedings of Thursday 27 August 2015, 1:45 pm, pp 64, 65, 66 & 67 0/81)

[139] The following issues were then put to Mr Egorov by counsel. Counsel put to him that he was not prevented from travelling to Seychelles in June 2014, to attend the arbitration proceedings, which he denied. He mentioned that he was not physically prevented but that it was a settlement agreement by mutual consent. He stated that he signed the settlement agreement under pressure, and at the time he tried to trust EEEL. He stated that Mr Patel, when coming to Moscow, contacted him to meet and talk "like who knows each other". In relation to the legal opinions it was put to him that they were not addressed to him. He admitted that the legal opinion from Mr Chetty was not addressed to "anyone"; that there was no cover page; and that the legal opinion from Mr William Herminie was addressed to the Eastern European directors. The legal opinions were sent to him by email.

[140] As mentioned the court ought not to consider the facts which have arisen after the pleadings and not supported by the pleadings.

[141] In re-examination Mr Egorov made the following points. Mr Egorov stated that he was not in court to do a favour to Mr Patel. He paid his airline ticket to come to Seychelles on his own by credit card. He arrived in Seychelles on the 22nd for his case on the 26th and not for this case. He had booked to leave Seychelles to go back to Moscow on the 27th (today) at 8:30 am. He is charged, *inter alia*, with stealing that while he was a director of EEEL he stole a series of things including a concrete mixer and batching machine all belonging to EEEL by fraudulently converting the properties to Vijay. Further, he testified that he was aware that in the Final Arbitral Award the Sole Arbitrator stated that the performance security that he had accepted was in standard form for the purpose of construction projects in Seychelles; and that had been testified to by Mr Marc D'Offay, whose testimony the Sole Arbitrator found persuasive in this regard.

[142] The court intervenes to state that the credibility of Mr Egorov is crucial in this case. The judicial statement on this is to be found in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 at p 431 –

> Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or through an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance

> more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

This is amplified by Lord Goff in *Armagas Ltd v Mundogas SA (The Ocean Frost),* [1985] 1 Lloyd's Rep. 1, p. 57:

> Speaking from my own experience, *I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities*. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the *objective facts and documents*, to the *witnesses' motives*, and to the *overall probabilities*, can be of very great assistance to a Judge in ascertaining the truth. [Emphases added]

The absence of evidence can be as significant as the presence of it. Arden LJ in *Wetton (as Liquidator of Mumtaz Properties) v Ahmed and others* [2011] EWCA Civ. 61 stated:

> 11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of 'he respondents to the proceedings.
> 12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression {hat a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or emails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.
> …
> 14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against

> it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

[143] Applying the above guidance to the present facts the court accepts the submissions of EEEL (the submissions are on file) that the cross-examination of Mr Egorov clearly established that Mr Egorov was not a credible witness. The court states that with regards to the testimony of Mr Egorov, there was no conflict of evidence. The court found Mr Egorov to be a biased, untrue and unreliable witness who was not able to deal firmly and fairly with the questions of detail put to him in this case. The evidence of Mr Patel further reinforces the opinion of the court. The court attaches no weight to the evidence of Mr Egorov.

[144] The evidence of Mr Patel. Mr Patel lives at Belle Vue, La Misere. He is the Managing Director of Vijay. Mr Patel testified on the reason why Mr Egorov, who had given statements, was not presented as a witness for Vijay during the arbitral hearing in June 2014. Mr Patel stated that a month or two before the hearing there was no response from Mr Egorov to their efforts to contact him. He was in contact with Mr Egorov when he [Mr Egorov] made the first witness statement. He tried to contact Mr Egorov by phone or by email. After the evidentiary hearing had concluded in June 2014, he was able to make contact with Mr Egorov by email. He had planned a holiday to Scandinavia and Russia a month or two after the evidentiary hearing. Before leaving for the holiday, he contacted Mr Egorov. There was a response from Mr Egorov. Mr Egorov stated that he would be able to meet with him. They met in July 2014. They spoke about the arbitration and the reasons why Mr Egorov had not come, and why he had not responded to earlier communications.

[145] He was compelled to write the letter, which is before the court as exhibit D24, because of the security of Mr Egorov. Mr Patel stated that he wrote the letter with the expectation that it would not be exposed to the extent that it would put Mr Egorov at risk. He added that he wanted the Sole Arbitrator to know about it and would do the needful. The contents of the letter were the truth. He stated that he was unhappy with the response of the Sole Arbitrator to his letter. He felt that the way the Sole Arbitrator had dealt with the letter exposed Mr Egorov to some risk.

[146] Mr Patel made the following points in cross-examination. Mr Patel stated that he is a director of Cerf and Cerf Properties Limited. Cerf and Cerf Properties Limited owns Cerf Island Resort. The other director of Cerf and Cerf Properties Limited is his daughter in law, Ms Foram Varsani. Mr Egorov, while he was in the employment of EEEL, had visited the Resort at his invitation. It was to celebrate an event. He is not aware if Mr Egorov knew that he had any connection with the Resort. He was also there at the party. Mr Egorov had visited the Resort only once.

[147] He explained how Mr Egorov had arranged his stay at the Resort. They contacted Mr Egorov and told him that they wanted him to come and give evidence in this case. Mr Egorov wanted to come. The dates for this case were arranged in such a way that two or three matters could be dealt with within the same week, which was achieved.

[148] Mr Egorov was to choose his own accommodation. Mr Egorov chose the Resort and asked Mr Patel if it was possible to stay at the Resort, to which Mr Patel replied in the affirmative. He did not invite Mr Egorov to stay at his Resort for free. Mr Egorov was given a favourable rate.

[149] On 22 August 2015, Mr Patel met with the representatives of EEEL at "Bravo". The purpose of the meeting was for EEEL to continue intimidating him. He refused to discuss an amicable settlement of the dispute on that day. In previous attempts to resolve the matter amicably, Mr Patel had refused to do so because, in his words, "how do you resolve a matter amicably which is complete nonsense" (proceedings of Wednesday 2 September 2015 at 9:30 am at p 10 of 39). He stated that the arbitration award is a result of "targeting, manipulation, intimidation, bribery, conspiracy" (proceedings of Wednesday 2 September 2015 at 9:30 am at p 11 of 39).

[150] In relation to the affidavit of Mr Egorov, Mr Patel stated that he was unaware of it. He wouldn't know if it was a coincidence for Mr Egorov to elect to domicile at La Misere or why Mr Egorov had also stayed at the Resort.

[151] He did not assist Mr Egorov in finding counsel with respect to the two criminal cases filed against him by EEEL. Mr Egorov had asked him if he could engage Mr Georges and he had said that it would be acceptable. He denied asking Mr Georges to represent Mr Egorov. He had discussed the two criminal cases filed against Mr Egorov with Mr Georges. Mr Georges had told him that he would act for Mr Egorov. Counsel put an email, dated 17 July 2013, to Mr. Patel (exhibit P20) which stated "that I have spoken to our lawyer Mr. Georges he is trying to get a copy of the Plaint filed by EEEL he cannot get this officially but he is trying through his contacts. I will send you a copy when received" establishing that Mr Patel had engaged Mr Georges to represent Mr Egorov. Mr Patel denied that this was the case and stated that, when he wrote the email, Mr Georges had already been engaged. Counsel put to Mr Patel that he was not being truthful to the court. This was clearly indicated by the fact that Mr Patel and his daughter had provided securities to secure the appearance of Mr Egorov for future calls of cases, and that he [Mr Patel] had attended court on 26 August 2016, at 1:30 pm, when the two criminal cases were called before the Magistrate's Court, in order to show support to Mr Egorov. Mr Patel denied the allegations stating "this is utter nonsense" (proceedings of Wednesday 2 September 2015 at 9:30 am at p 15 of 39).

[152] Mr Patel stated that he did not inform his legal team about exhibit D24 being sent to the Sole Arbitrator because he was concerned about the security of Mr Egorov. Then the cross-examination of Mr Patel centred on the contents of exhibit D24, which counsel put to Mr Patel as being incorrect and fabricated in order to try and prejudice the mind of the Sole Arbitrator. Mr Patel reiterated that everything contained in exhibit D24 was the truth and correct. In relation to the letter. Mr Patel stated that he wanted the Sole Arbitrator to destroy the letter but he felt strongly that any reasonable person reading the content would do something about it. He anticipated that the Sole Arbitrator would carry out an investigation into this. Mr Patel stated that, as of yet, no harm has come to Mr Egorov and his family.

[153] Mr. Patel admitted that the Sole Arbitrator invited the parties to comment on the letter. He stated that his legal team and he [Mr. Patel] did not offer any comments. He added that the Sole Arbitrator had shut the door to comments.

[154] Mr Patel denied the suggestion of learned counsel that the reason Vijay did not present Mr Egorov as a witness was because he was unsure that Mr Egorov would give a testimony in favour of Vijay. Mr Patel was adamant that, had Mr Egorov not been prevented from testifying, he would have told the truth.

[155] Mr Patel then stated that the decision of Vijay is not to pay the award which Vijay considers "a false award and now we [Vijay] are restricted from even telling the truth. So is the manipulation".

[156] Mr Patel stated that he felt that he had to do something for Mr Egorov, who had gone through so much trouble. He and Mr Egorov knew each other through business relations. They have no extra relations. They only have professional relations.

[157] In re-examination, Mr Patel stated that advances were made to him to negotiate a settlement of this case. Contrary to what had been put to him by counsel for EEEL, they made several attempts to find a solution to the problems.

The Issues Framed for the Determination of the Court

[158] In light of the evidence presented and the written submissions of both counsel, the following issues are framed for the determination of the court –

(1) Does the Seychelles court have the power to enforce the Final Arbitral Award under statute or at common law? The position of Vijay is that that there are no legal provisions enabling the execution or enforcement of the Final Arbitral Award in Seychelles; and that the court does not have the power to render executory or enforceable the Final Arbitral Award in Seychelles. As a secondary issue, Vijay has asked the court, if it is of the opinion that there is a provision which can allow the court to enforce the award, to decline to do so, and to set aside the award for the reasons canvassed hereafter.
(2) Did the Sole Arbitrator have jurisdiction to hear the arbitration on the merits of the dispute?
(3) Did the Sole Arbitrator violate due process in relation to matters pertaining to Mr Large, Large Third?
(4) Was Vijay precluded from presenting its case in the arbitration without illegal hindrance and/or interference?
(5) Did the Sole Arbitrator fail completely to deal with an issue, arising from Vijay's submission that under the governing written taws of Seychelles, Article 1230 of the Civil Code required notice before any damages could be claimed by EEEL in relation to the Savoy works?

Assessment of the Respective Contentions in Light of the Written Laws as Set Out, the Evidence and the Written Submissions of Counsel

[159] The written submissions and authorities provided by both counsel are voluminous. The court has not repeated, in the judgment, all of the written submissions, but has considered all of them.

Powers to Enforce under the New York Convention

[160] The following provisions have been cited by both counsel in relation to the question as to whether the New York Convention applies to the recognition and enforcement of foreign arbitral awards made in the territory of a State other than Seychelles and arising out of differences between persons, whether physical or legal.

> "*Foreign judgments*
> 227. Foreign judgments and deeds drawn up in foreign countries can only be enforced in the cases provided for by articles 2123 and 2128 of the Civil Code and agreeably with the provisions of the aforesaid articles. Arbitral awards under the New York Convention, as provided under articles 146 and 148 of the Commercial Code of Seychelles, shall be enforceable in accordance with the provisions of Book l, Title IX of the said Code." [Seychelles Code of Civil Procedure]
>
> "*Text to be deemed to be original version*
> The text of the Commercial Code of Seychelles, as in this Act contained, shall be deemed for all purpose to be an original text and shall not be construed or interpreted as a translated text." [Commercial Code Act, s5]
>
> "*Article 146*
> On the basis of reciprocity, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and the arbitral award within the meaning of the said Convention shall be binding. Such Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than Seychelles and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in Seychelles. [Commercial Code of Seychelles]
>
> *Article 147*
> l. Recognition under the said Convention shall extend to an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
> 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
> 3. The Supreme Court of Seychelles, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall al the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
> 4. At the request of a party to an arbitration agreement, or of any person claiming through or under him, the Court shall make an order to stay any proceedings already commenced before such Court and such other order as it thinks fit in the circumstances, subject to the rules which permit the Court to refuse to enforce an award under the Convention under article 150 of this Code." [Commercial Code of Seychelles]

> "*Construction*
> The Interpretation and General Provisions Act shall, subject to the provisions of this Act, apply in relation to the Interpretation of this Act, but shall not apply in relation to the Commercial Code of Seychelles, which shall be read and construed for all purposes in accordance with the rules of interpretation contained in the Civil Code of Seychelles." [Commercial Code Act, s9]

[161] Vijay submitted that arts 146 to 150 of the Commercial Code have no legal effect since Seychelles is not a signatory and party to the New York Convention. Vijay maintained that despite arts 146 to 150 having been enacted as part of the Commercial Code, they have no legal force and basis because Seychelles is not a signatory and party to the said Convention, as there is no reciprocity, in terms of the New York Convention, between Seychelles and the member States of the New York Convention. EEEL admitted that in order for arts 146 to 150 of the Commercial Code to be applicable, there must be reciprocity between the State (from which the arbitral award was made) and Seychelles. EEEL submitted that the said reciprocity is not based on the New York Convention. The written submissions of EEEL in relation to counsel's contentions (including the alternative arguments) are on record and have been considered by the court.

[162] The court has considered all the written submissions and accepts the approach of Vijay. The law as drafted appears clear. The provisions of arts 146 and 148 of the Commercial Code apply to the manner of enforcement of foreign arbitral awards. Had Seychelles been a signatory to the New York Convention, the enforcement of the Final Arbitral Award would be simple. Because France is a Convention party and Seychelles would also be one, the Final Arbitral Award would be a New York Convention award, there would be clear reciprocity between the two States, and the Final Arbitral Award made in France would be enforceable in Seychelles. The two articles make it clear that arbitral awards under the New York Convention would be recognised as binding and would be enforced in Seychelles in the same manner as Seychelles awards, without more. This was the conclusion of the court in *Omisa Oil Management v Seychelles Petroleum Company Limited* (2001) SLR 50 –

> The enactment of articles 146 to 150 of the Commercial Code Act as municipal law of Seychelles does not bind Switzerland [read France in our context] to any degree or extent. The obligation of Switzerland [France] under the Convention is only toward the Slate party to the said Convention...
> The condition of "reciprocity" is a prerequisite which allows the award made in a foreign country to be made binding on the recipient State albeit valid objections may be taken and determined to the enforcement thereof.

[163] For the reasons stated above, the court is satisfied that the Final Arbitration Award cannot be enforced and recognised in terms of the New York Convention.

Jurisdiction and Powers of the Supreme Court of Seychelles Stemming from England

[164] The question for the determination of the court is whether EEEL would be entitled to resort to English common law enabling enforcement of foreign arbitral awards if there are provisions of the written laws of Seychelles which exist. In other words are English powers, authorities and jurisdiction exercisable even if similar powers, authorities and jurisdiction exist in Seychelles.

[165] Vijay questioned whether Seychelles courts are empowered to look to common law remedies. Vijay submitted that there are two possible answers to this question: (1) On the one hand, it can be argued that the intent of the law is clear, namely that, other than domestic awards, only the New York Convention awards are capable of enforcement in Seychelles; (2) on the other hand, it may be argued that in the absence of an effective provision enabling a foreign award to be recognised and enforced in Seychelles, the courts should fill the gap somehow on the basis that it is inconceivable that a trading nation such as ours would unfairly protect its nationals from the consequences of their international obligations freely entered into. Such a submission would seek to invite the court to look to common law principles in order to fill the void.

[166] Vijay submitted that the first of the two alternatives should apply and that the court should give full effect to the clear legislative intent, namely that at this point Seychelles is not prepared to allow enforcement of foreign arbitral awards on its territory. Vijay submitted that in case this submission does not find favour. Vijay submitted that (i) the conditions for the court to resort to common law principles do not apply, and (ii) even if they do, the common law principles applicable would not assist EEEL in obtaining its prayers.

[167] Counsel have cited art 125(1) of the Constitution of the Republic of Seychelles and ss 4, 5, 6 and I I of the Courts Act in support of their respective contentions on the point in issue.

[168] Article 125 (1) of the Seychelles Constitution provides –

> Establishment and jurisdiction of Supreme Court
>
> There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have –
>
> (a) original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution;
>
> (b) original jurisdiction in civil and criminal matters:
>
> (c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction; and
>
> (d) such other original, appellate and other jurisdiction as may be conferred on it by or under an Act.

[169] Sections 4, 5, 6 and 11 of the Courts Act provide –

> General jurisdiction
>
> 4. The Supreme Court shall be a Superior Court of Record and, in addition to any other jurisdiction conferred by this Act or any other law, shall have and may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England.

> Jurisdiction in civil matters
> 5. The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles relating to wills and execution of wills, interdiction or appointment of a Curator, guardianship of minors, adoption, insolvency, bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters that may be the nature of such suits, actions, causes or matters, and, in exercising such jurisdiction, the Supreme Court shall have, and is hereby invested with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England.
>
> Equitable powers
> 6. The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.
>
> Extent of jurisdiction of the Supreme Court
> 11. The jurisdiction of the Supreme Court in all its functions shall extend throughout Seychelles.

[170] In terms of the provisions of the written laws set out above, the following can be discerned –

(a) Article 125(1)(d) of the Constitution of the Republic of Seychelles makes provisions for the Supreme Court to have such other original … jurisdiction as may be conferred on it by or under an Act, in addition to the jurisdictions specifically mentioned in art 125(1)(a), (b) and (c));
(b) The Act, which grants jurisdiction and powers to the Supreme Court, other than the Constitution of the Republic of Seychelles, is the Courts Act.
(c) In terms of s 4 of the Courts Act, the Supreme Court is vested with all the powers, authorities and jurisdiction, possessed and exercised by the High Court of Justice of England, in addition to any other jurisdiction that it has. Hence the powers. authorities and jurisdiction granted to the Supreme Court by the said s 4 is independent of any other jurisdiction the Supreme Court may have.

[171] Section 4 of the Courts Act has been interpreted by case law. In *Finesse v Banane* (1981) SLR 103, s 4 of the Courts Act (then s 3A of the Courts Act) was interpreted as enabling the Supreme Court to exercise all the powers, authorities and jurisdiction of the High Court in England as at 22 June 1976, the date of the enactment of s 4. Later common law powers would apply but later statute would not. The court in *Finesse* stated that: "Section 3A should be given its full meaning and thus should not be construed to apply only to the inherent powers and jurisdiction of the High Court stemming from the Common Law. Section 4 of the Courts Act (Chapter 43) is such referential legislation. There is therefore no reason to limit the meaning of the expressions 'powers' and 'jurisdiction' of the High Court in England".

[172] In relation to the same issue, Vijay argued that s 4 of the Courts Act is not applicable to the present case. In the opinion of Vijay, s 4 of the Courts Act is applicable solely in circumstances where our law is silent. Vijay relied on s 17 of the Courts Act, which provides that –

> In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, *the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable*. [Emphasis added]

[173] After a careful consideration of the written laws and authorities as set out, the court accepts the submissions of EEEL that s 11 of the Courts Act reinforces s 4, as it expressly provides that section 11 shall not be construed as diminishing any jurisdiction of the Supreme Court relating to person, being or to matters arising, outside of Seychelles. In the case of *Albyazoy v Outen* (2015) SLR 279 in respect of the enforcement of a receiving order, the Seychelles Court of Appeal held –

> This matter of the receivership, albeit issued in another country, concerns Seychelles by virtue of their registration in Seychelles and facts which show they may hold tainted assets. Our jurisdiction is seriously concerned — whether under the name of comity of nations, conflict of laws, competence-competence, parity or any other name — to recognise it in Seychelles, all the more so when the Supreme Court of Seychelles has the same powers as the High Court of England and Wales.

[174] Further, as rightly explained by FEEL, the wording of art 125(1)(d) of the Constitution and s 4 of the Courts Act can be compared to s17 of the Courts Act. It is only with respect to procedural laws that English laws can be imported into our local written laws on the condition that our written law is silent. On the other hand, the Supreme Court has all the powers, authorities and jurisdiction of the High Court of England in addition to (but not in the absence of), the jurisdiction of the Supreme Court. In addition, the powers, authorities and jurisdiction granted to the Supreme Court by s 4 of the Courts Act is in addition to and independent of, any other powers, authorities and jurisdiction that the Supreme Court may have. The court agrees. If accepted, Vijay's interpretation would be contrary to the clear and explicit wording of art 125(1)(d) of the Constitution of the Republic of Seychelles and s 4 of the Courts Act. The court agrees that even if it can be successfully argued that our written laws in respect of the enforcement of foreign arbitral award are not silent, s 4 of the Courts Act is still applicable.

The Principles and Procedures of English Law to be Applied

[175] The court has to determine the principles and procedures of English law to be applied. Vijay submitted that there are two methods of enforcing a foreign arbitral award in England (other than enforcement under the New York Convention to which the United Kingdom is a signatory) and both require court proceedings (See Morris, *Conflict of Laws*, (1971), at 447 in this respect).

[176] Vijay submitted that a party may choose to bring an action on an award in terms of s 40(a) of the Arbitration Act 1950 of England (now repealed and replaced by the Arbitration Act of 1996), ("ACT") or s 26 of the ACT. Counsel for Vijay suggested that the procedure under s 26 of the ACT is not the one used by EEEL. Indeed, EEEL

argued that the action may be brought on the Final Arbitral Award in terms of s 40(a) of the ACT, which is the law applicable in respect of the powers, authorities and jurisdiction of the Supreme Court as at June 1976. Section 40(a) of the ACT provides –

> Nothing in this Part of this Act shall – … (a) prejudice any rights which any person would have had of enforcing in England any award or of availing himself in England of any award if neither this Part of this Act nor Part 1 of the Arbitration (Foreign Awards) Act 1930, had been enacted.

EEEL went on to state that s 40(a) of the ACT was found in Part II of the ACT which contains specific provisions regarding the enforcement of certain foreign arbitral awards and allowed and preserved the enforcement of foreign arbitral awards, which were not specifically made enforceable in terms of Part thereof. Rule 199 of the English Rules of the Conflict of Laws (which presently is rule 66), which was the rule applicable as at June 1976, provides that –

> Subject to the Exception hereinafter mentioned and the effect of Rule 201, a foreign arbitration award will be enforced in England, or recognised as a Defence to an action, if the award is –
> (1) in accordance with an agreement to arbitrate which is valid by its proper law and
> (2) valid and final according to the law governing the arbitration proceedings. The award will be enforced by action or, by leave of the High Court, under the more summary procedure of section 26 of the Arbitration Act 1950.

[177] The court has considered the submissions of counsel with care and accepts the submissions of both counsel that in terms of s 40(a) of the ACT read with r 199, the High Court of England, as at June 1976, had the powers, authorities and jurisdiction, subject to sub rules (1) and (2) of r 199 being satisfied, to enforce and recognise a foreign arbitral award. Moreover, it is common ground between EEEL and Vijay that sub rules (1) and (2) of r 199 are satisfied in the present case. However, Vijay submitted that recognition and enforcement of a foreign arbitral award which meets the foregoing conditions may yet not be recognised or enforced if one or more of the factors set out in r 67 of the English Rules of the Conflict of Laws (previously r 201 of the English Rules of Conflict of Laws) are proved, namely –

> (1) Under the arbitration agreement and the law applicable thereto the arbitrators had no jurisdiction to make it; or
> (2) it was obtained by fraud; or
> (3) its recognition, or as the case may be enforcement, would be contrary to public policy; or
> (4) the proceedings in which it was obtained were opposed to natural justice.

Further, it is to be noted that art 150 of the Commercial Code lays down the statutory guideline in Seychelles which provides the grounds upon which the courts of Seychelles will refuse to recognise or enforce a foreign arbitral award. Article 150 is identical to s 103 of the UK Arbitration Act 1996. Both are drawn from the same source, namely art V of the New York Convention. In view of the similarities among the above mentioned provisions the court ought to apply art 150 of the Commercial Code to the present case.

The Agreement to Arbitrate is Valid by its Proper Law

[178] Both counsel submitted that the agreement to arbitrate was valid by its proper law. In short, counsel for EEEL explained that paras 3 and 4 of the plaint contained the averments in respect of the Arbitration Clauses in respect of the Six Contracts. In its defence, more specifically in para 1 thereof, Vijay admitted the averments contained in paras 3 and 4 of the plaint. As set out in para 16 of the Final Arbitral Award in each one of the Six Contracts, Clause 1.4 respectively provided "the contract shall be governed by the law of the Republic of Seychelles". EEEL explained that the proper law of the Six Contracts (ie, the written laws of Seychelles) was the law applicable to determine the validity of the Arbitration Clauses. Counsel submitted that the Arbitration Clauses, in respect of the Six Contracts. were valid under the written laws of Seychelles. It is to be noted that Vijay has not raised any objection regarding the validity of the Arbitration Clauses. For the reasons stated above, the court has no hesitation to hold that the Arbitration Clauses of the Six Contracts were in accordance with arts 110 and 111 of the Commercial Code.

The Final Arbitral Award is Valid and Final According to the Law Governing the Arbitration Proceedings

[179] Both counsel submitted that the Final Arbitral Award is valid and final according to the law governing the arbitration proceedings. The court agrees. To explain the point the court can do no better than to reproduce the submissions of EEEL. The court reads from Dicey and Morris *The Conflict of Laws* (Volume 2, 10th Edition, 1980) at page 1128 –

> It is, however, for the parties not only to choose the law which is to govern their agreement to arbitrate, but also the law which is to govern the arbitration proceedings. Normally the parties exercise this power by determining (expressly or by implication) the country in which the arbitration is to take place, i.e. normally the choice of the proper law of the contract, which includes the agreement to arbitrate, coincides with the choice of the law governing the arbitration proceedings. It cannot however be doubted that the courts would give effect to the choice of a law other than the proper law of the contact. Thus if the parties to an English contract provide for arbitration in Switzerland, English law would govern the validity, interpretation and effect of the arbitration clause as such (including the scope of the arbitrators ' jurisdiction), but the arbitration proceedings (including the extent to which they are subject to judicial control) would be governed by Swiss law.

[180] Further at p 1130 of Dicey and Morris *The Conflict of Laws*, the court reads –

> Validity of the Award. To be enforceable in England, the award must be valid by the law governing the arbitration proceedings, i.e. normally the law of the country in which the arbitration is held.

[181] At p 1131 of Dicey and Morris *The Conflict of Laws* more specifically the part dealing with "finality of the award", the court reads –

> However whereas under Part II of the Act an award is not deemed to be final "if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made, "it is far from clear whether the pendency of such proceedings prevents the enforcement of foreign award at common law. On the analogy of the enforcement of foreign judgments at common law, it is suggested that it would not.

[182] The reference to the enforcement of foreign judgments at common law is a reference to the proviso of r 190 of the English Rules on Conflict of Laws, which reads as follows –

> Subject to the Exception hereinafter mentioned and the effect of Rule 201, a foreign judgment in personam which is not impeachable under any of rules 186 to 189 may be enforced by an action or counterclaim for the amount due under it if the judgment is –
> (1) For a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
> (2) Final and conclusive, but not otherwise.
> Provided that foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.
> This Rule must be read subject to Rule 194.

[183] The court is satisfied that the Final Arbitral Award is valid and final according to French law, which is the law which governed the arbitration proceedings. The validity of the Final Arbitration Award, in terms of the French law, is confirmed by the fact that exhibit P1 has been rendered executory in France by the Tribunal de Grande Instance de Paris, as confirmed by the declaration on exhibit P1 to the effect that "en consequence la Republique Francaise mande et ordonne à tous metre ladite decision à execution". Furthermore, there is on the last page of exhibit P1, namely p 85, the declaration made by the vice President of the Tribunal de Grande Instance de Paris. All the above further confirmed the testimony of Expert Witness. Furthermore, in terms of the proviso to r 190 of the Rules of Conflict of Laws, which is applicable by analogy to arbitral awards, the Final Arbitration Award is final despite the fact that an appeal is pending in France against the Final Arbitral Award. It is also pertinent to note that in terms of art 1526 of exhibits P 7 and PI 3, the said appeal does not have the effect of suspending the Final Arbitral Award. This is confirmed by the testimony of Expert Witness.

[184] It is in the opinion of the court that it is unquestionable that the Final Arbitral Award is capable of being enforced and recognised by the High Court of England. Consequently on the basis of s 4 of the Courts Act, the Final Arbitration Award is capable of being enforced and recognised by the Supreme Court of Seychelles. The court holds that the Supreme Court has the jurisdiction to enforce the Final Arbitral Award.

Procedural law

[185] The next linked question is – what procedure is to be adopted to institute enforcement proceedings in respect of the Final Arbitral Award?

[186] Vijay submitted that in the present case the procedure adopted of bringing proceedings on the Final Arbitral Award by way of Plaint would be appropriate. The position is shared by EEEL. EEEL explained that the case of *Privatbanken Aktieselskab v Bantele* (1978) SLR 226 is relevant and pertinent in determining the procedure to be adopted to institute enforcement proceedings in respect of the Final Arbitral Award. It is to be noted that the said case concerned the enforcement of a foreign judgment. At p 231 of the *Privatbanken Aktieselskab* case, Sauzier J opined –

> In England the foreign judgment is sued upon in an ordinary action. That last procedure is the correct one to be followed in Seychelles on account of the provisions of Section 23 of the Seychelles Code of Civil Procedure (Cap. 50) or of section 15 of the Courts Act (Cap. 43) if section 23 is held not to be applicable to such a case.

Section 23 of the Seychelles Code of Civil Procedure provides –

> ...every suit shall be instituted by filing a Plaint in the registry.

[187] Having considered the submissions of counsel, the court is satisfied that s 23 of the Seychelles Code of Civil Procedure does not apply to the present case. The court agrees with EEEL that s 17 of the Courts Act (then s 15 at the time that the *Privatbanken Aktieselskab* case was delivered), finds application. In terms of s 17, the procedure followed in England in respect of the enforcement of foreign arbitral awards up to June 1976, would be applicable. EEEL has referred the court to r 199 of the English Rules of Conflict of Laws. In terms of r 199 a foreign arbitration award may be enforced by action or by leave of the High Court, under the more summary procedure of the ACT. In *Dalmia Cement Ltd v National Bank of Pakistan* [1974] 3 ALL ER 189, the Queen Bench Division presided by Kerr J held thus –

> Looking at the matter broadly I therefore consider that the position is as follows. No doubt the normal and by far the most frequently used method of enforcing 'non-convention awards' is by means of an action on the award.

The position of EEEL, therefore, is that in England the main procedure by which foreign arbitration awards are enforced is by way of plaint. The court finds the interpretation of
EEEL convincing on the following grounds. In order to place the *Dalmia Cement Ltd* case and the ACT into their context, it is pertinent to note the following –

(a) the ACT did not cover and contain provisions in respect of the enforcement and recognition of the New York Convention;
(b) Section 35 (l) of the ACT provided thus –

> This Part of this ACT applies to any award made after the twenty-eight day of July, nineteen hundred and twenty-four … pursuance of an agreement for arbitration to which the protocol set out in the First Schedule to this Act applies; and … between persons of whom one is subject to the jurisdiction of some one of such Powers as His Majesty, being satisfied that reciprocal provisions have been made, may by

> Order in Council declare to be parties to the convention set out in the Second Schedule to this Act, and of whom the other is subjected to the jurisdiction of some other of the Powers aforesaid; and in one of such territories as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be territories to which the said convention applies; and an award to which this part of this Act applies is in this Part of this Act referred to as "a foreign award".

(c) the first Schedule nor the second Schedule of the ACT refers to the New York Convention;

(d) Section 35(1) of the ACT, is referred to in the *Dalmia* case and is specifically set out at p 193 of the said judgment, more specifically from para (f) to (j) thereof;

(e) In the *Dalmia* judgment Kerr J used the term "non-convention award". The term "non-convention award" did not have any reference to the New York Convention. At p 198 of the said judgment, more specifically from para (t) to (j) Kerr J explained what he meant by the term "non-convention award". He stated thus: "Accordingly, to distinguish them from foreign awards stricto sensu, and also from English awards as defined above, I will refer to such awards for convenience as 'non-convention award' i.e awards made abroad and/or in arbitrations whose procedure is not governed by English law, but which are not "foreign awards" as defined by S 35 of the 1950 Act. This term therefore covers a very large class of awards which for one reason or another do not satisfy S 35";

(f) Section 40(2)(a) of the ACT, provides – "Nothing in this Part of this Act shall … (a) prejudice any rights which any person would have had of enforcing in England any award or of availing himself in England of any award if neither this Part of this Act nor Part I of the Arbitration (Foreign Awards) Act, 1930, had been enacted". This provision essentially preserves the rights to enforce foreign arbitration award in England, existing prior to the 1950 Act coming into force, the right to enforce a foreign arbitration award by action, i.e by plaint was preserved. Section 40(a) of the ACT was referred to at p 200 of the *Dalmia* judgment, more specifically at para (g) thereof;

(g) In terms of s 26 of the ACT, it is possible to enforce a foreign arbitration award by summary procedure.

Jurisdiction – Did the Sole Arbitrator Have Jurisdiction to Hear the Arbitration on the Merits of the Dispute?

[188] Vijay has raised a preliminary plea that the Sole Arbitrator had no jurisdiction to hear the matters in dispute in the arbitration for the reasons contained in Vijay's written submissions. This plea was dismissed in the Partial Award by the Sole Arbitrator. Vijay had sought a ruling that the Sole Arbitrator lacked jurisdiction to hear EEEL's claim on the merits for the failure to comply with the conditions precedent in Clause 20.1 of the Six Contracts. Alternatively, Vijay sought a stay of the proceedings pending compliance by EEEL with the provision of Clause 20.1 (see para 35 of Exhibit P2, the Partial Award).

[189] Vijay, therefore, submitted that the Sole Arbitrator erred in his finding in his Partial Award that he had jurisdiction to hear the matter. Vijay submitted that the court has jurisdiction to rule on this issue by virtue of the provision of art 127(3) of the Commercial Code, which reads in part –

> The ruling of the arbitral tribunal to the effect that it has jurisdiction may not be contested before the court except at the same time as the award on the main issue and by the same procedure.

[190] The Arbitration Clauses provide –

> Disputes and Arbitration
> 20.1 Amicable Settlement
>
> Should any dispute arises between the parties under or out of this Contract, or out of the execution and completion of the Works, or out of the remedying of defects and flaws, including disputes on any certificate, determination, instruction, opinion or valuation of the Employer, each Party shall notify another Party of the dispute, and both Parties shall try to settle such dispute amicably before any arbitration starts.
> However, unless otherwise agreed between the Parties, the arbitration shall not start before expiration of a 2-month period starting on the day of the notice of a dispute, even though attempts may not be made to settle the dispute amicably.
>
> 20.2 Arbitration
>
> Provided that the procedure described in Sub-Clause 20.1 of the Contract has been followed, any dispute, disagreement or claim arising wider or from this Contract, including disputes on breach, termination and validity of the Contract shall be finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce.
> The arbitral tribunal shall include a sole arbitrator.
> (a) The place of the arbitration shall be Paris.
> (b) The arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [law and Language].
> The arbitrator shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Employer relevant to the dispute.
> Arbitration may be commenced prior to or after completion of the Works. The obligation of the parties shall not be altered by reason of any arbitration being conducted during the progress of the Works. .

[191] It is to be noted that EEEL raised a plea to the effect that Vijay has wrongly raised, before the court, the issue of the Sole Arbitrator lacking jurisdiction under art 127(3) of the Commercial Code. Alternatively, EEEL submitted that the court cannot refuse to recognize or enforce the Final Arbitral Award on the ground that the Sole Arbitrator lacked jurisdiction.

[192] First, the court addresses the plea raised by EEEL that Vijay has wrongly raised, before the court, the issue of the Sole Arbitrator lacking jurisdiction under art 127(3) of the Commercial Code. The court accepts the submissions of EEEL that art 127(3) of the Commercial Code does not apply to foreign arbitral awards, but rather solely to local arbitral awards for the following reasons –

(a) Article 150 of the Commercial Code sets out the grounds upon which the enforcement of the Final Arbitral Award can be refused and it does not contain any provisions which permit the Supreme Court to refuse the enforcement of the Final Arbitral Award on the basis that the Sole Arbitrator did not have jurisdiction;
(b) from a reading of arts 110 to 145 of the Commercial Code, the provisions apply solely to local arbitral awards;
(c) Article 127(3) is clearly intended to prohibit the institution of proceedings before the Supreme Court, on the sole basis that the Arbitral Tribunal did not have jurisdiction. The said prohibition cannot apply to foreign arbitral proceedings as such proceedings would be governed by the laws of the country where the arbitral proceedings take place. In any event, the Supreme Court would not have had jurisdiction to make a determination on the issue of jurisdiction in respect of a foreign arbitral proceeding, which is taking place in a foreign jurisdiction. It is clear that the prohibition imposed by art 127(3) in respect of challenging the jurisdiction of an arbitral tribunal, is solely in respect of local arbitral proceedings;
(d) furthermore, a close reading of art 127(3) clearly indicates that it allows for the issue of jurisdiction to be contested "solely at the same time as the award on the main issue and by the same procedure". It is only in respect of a local arbitral award that an application may be instituted to set aside such arbitral award. Such an application is provided for by art 134 of the Commercial Code;
(e) on the other hand, there is no provision to institute an application to set aside a foreign arbitral award but rather such Award may merely be refused to be enforced on the basis of art 50, upon an application to enforce such a foreign arbitral award;
(t) it is clear that arts 134 and 150 refer to different types of arbitral awards as the said articles have some common grounds.

[193] Second, the court addresses the plea of Vijay and the alternative contention of EEEL. The submissions of Vijay before the Sole Arbitrator were these –

(a) that the raising of a dispute was a condition precedent to a submission to arbitration:
(b) that EEEL had gone to arbitration without first having raised a dispute and notifying Vijay of it;
(c) that it was Vijay which had raised a dispute, and consequently the reference of EEEL to arbitration was premature;
(d) that a second condition precedent requiring attempts at amicably resolving the dispute had not been complied with by EEEL prior to invoking the arbitral process, and;

(e) that a two-month standstill required by Clause 20.I, after the raising of a dispute had, in consequence of its failure to raise a dispute, not been complied with by EEEL.

[194] Conversely, EEEL had argued that –

(a) there are no conditions precedent to a reference to arbitration as submitted by Vijay;
(b) so long as one party had raised a dispute, the other party was able to make a reference to arbitration, and that party did not necessarily have to raise a dispute of its own;
(c) the amicable resolution condition was not mandatory;
(d) that consequently there had been no breach of Clause 20.1 in its reference to arbitration notwithstanding that it had not raised a dispute; and
(e) in any event the dispute raised by Vijay and that referred to arbitration by EEEL were similar.

[195] The Sole Arbitrator concluded that –

(a) the agreement did not requite the same person who had given a notice of dispute to invoke arbitration;
(b) the only formal requirement was the two-month standstill before invoking arbitration; and
(c) the dispute referred to arbitration by EEEL was in effect the same as that which had been raised by Vijay.

[196] According to Vijay, Clause 20 of the Six Contracts provided a series of steps to be taken before a matter can be arbitrated. These steps are the following –

(a) a dispute must arise between the parties to the contract;
(b) the dispute must be notified by one party to the other party;
(c) the parties must try and settle the dispute amicably;
(d) a two-month cooling off period starting with the notification of the dispute must be observed (event though no amicable settlement may have been attempted);
(e) the dispute can then be referred to arbitration.

[197] On the basis of the forgoing, Vijay submitted that there are at least two conditions precedent to the reference to arbitration, namely (i) notification of a dispute by one party to the other, and (ii) observation of a two-month period during which an attempt may be made to settle the dispute amicably. The words "provided that …" at the beginning of Clause 20.2 of the Six Contracts can be interpreted only to mean that the steps set out in Clause 20.1 must have first been observed before the matter can be to arbitration.

[198] Further, on the basis of the foregoing, Vijay submitted that the dispute raised by Vijay was for non-payment of money, whilst the claim of FEEL as referred to arbitration emanates from alleged contractual breaches related to quality and performance of works (see paras [12], [13], [14] and [24] of exhibit D1). Counsel argued that by no stretch of the imagination can it be argued that there is not a vast difference between

the two types of dispute. It is in his submission that no proper construction of Clause 20 can contemplate that service of a notice of a dispute concerning non-payment of liquidated sums by one party can have given rise to the other party referring a dispute concerning alleged defects and delays in works to arbitration.

[199] The court has considered with care the evidence in light of the submissions of both counsel. The Sole Arbitrator stated that the answer to the issue of jurisdiction "lies in the words of the arbitration Agreement itself which the sole Arbitrator finds sufficiently clear" (Refer to para 55 of exhibit P2). In the opinion of the court, the Sole Arbitrator was correct. The court explains.

[200] The notices which were sent by Vijay are referred to in para 31 of the Partial Award –

> On 9 July 2012, the Respondent [Vijay] submitted two notices of a dispute to the Claimant concerning, first, the non-settlement of accounts together with other losses resulting from the termination of Contract 6 and, second, the non-settlement of sums outstanding following the Claimant's [EEEL 's] instruction to suspend all works under Contracts 1-5. The Respondent [Vijay] contended that the Claimant [EEEL] cannot rely on these notices of a dispute to fulfil the notification requirement in Clause 20.1.

[201] The Sole Arbitrator stated the following at paras 57 and 58 of exhibit P 2 –

> 57. Second, the Sole Arbitrator also agrees with the Claimant that the language of the arbitration agreement in Clause 20.1 makes it sufficiently clear that the only formal requirement for the commencement of arbitration is that the two month waiting period be observed following one of the Parties sending "the" notice to the other Party of "a" dispute. The plain meaning of the first paragraph of Clause 20.1 is that either Party ("each Party") shall notify the other Party ("another Party") of a dispute "before any arbitration starts" (emphasis added). The plain meaning of the second paragraph of Clause 20.1 is that the two-month waiting period starts on the day of "the notice of a dispute ". In other words, Clause 20.1 does not specify that only the notifying Party may commence arbitration after its notice of a dispute has been given and the waiting period has expired. It does not restrict the right to commence arbitration to the Party that issues the notice of a dispute. Rather, *Clause 20.1 leaves it open for either Party to commence "any" arbitration once either Party has issued "the" notice of "a" dispute and the two-month waiting period has passed. This is more logical, common sense reading of Clause 20.1 taken as a whole based on the plain meaning of the words;*
> 58. Third, the Sole Arbitrator agrees with the Claimant that the dispute that is the subject of the present arbitration is in effect the same dispute that was the subject of the notices of a dispute. *This arbitration is not regarding a dispute that is substantively or substantially different from the dispute referred to in the notices of a dispute. Moreover, language in clause 20.1 such as "the notice of a dispute" and "any arbitration" referred to above makes it sufficiently clear that Clause 20.1 is not restrictive in this regard based on a plain reading of its words (although the commonality between the dispute raised in the notices of a dispute and the dispute raised in this arbitration makes this determination irrelevant here.*
>
> [Emphasis added]

[202] Further, the Sole Arbitrator came to the conclusion that Clause 20.1 makes it clear that it was not mandatory for the parties to attempt to settle any dispute arising between them. The Sole Arbitrator correctly stated at para 56 of the Partial Award –

> 56. First, the Sole Arbitrator agrees with the Claimant that the language of the arbitration agreement in Clause 20.1 makes it sufficiently clear that no attempts to settle the dispute amicably are required prior to commencing arbitration. The second paragraph of Clause 20.1 states that "arbitration shall not start before expiration of a 2-month period starting on the day of the notice of a dispute, even though attempts may not be made to settle the dispute amicably". The plain meaning of this is that arbitration can only start after a waiting period of two months (otherwise known as a "cooling off period") and that this is the case "*even though attempts map not be made* to settle the dispute amicably". In other words, there is no requirement that the parties attempt to settle any disputes amicably prior to commencing arbitration; the Parties may do so, but it is not mandatory under this arbitration agreement and is therefore not a condition precedent to arbitration. Clause 20.1 simply provides that two month waiting period must be observed and foresees the possibility that "attempts may not be made to settle the dispute amicably", making it sufficiently clear that no attempts at settling the dispute are actually required. This is the only logical meaning of the words at the end of the second paragraph of Clause 20.1. The Claimant's reference in paragraph 26 of its first memorial on jurisdiction to the arbitral award in ICC Case No. 8073 is apposite in this regard. [Emphasis added]

[203] It is clear that a reading of Clause 20.1 as a whole conveyed a clear and unambiguous meaning that it was not mandatory for the parties to attempt to settle any dispute arising between them, prior to commencing arbitration proceedings.

Due Process

[204] Vijay submitted that the Sole Arbitrator committed a procedural irregularity and in the process breached natural justice and denied Vijay a fair hearing thereby violating due process. Vijay submitted that this irregularity relates to Procedural Order No. 10, made by the Sole Arbitrator on 4 August 2014.

[205] In this regard EEEL has now pleaded and assumed the burden to prove the following –

(a) Vijay was granted appropriate and equal opportunity to present its case, similar to that of EEEL, including the calling of its witnesses;
(b) Vijay presented its case to the arbitration without any illegal hindrance and/or interference;
(c) Vijay was able to cross-examine the witnesses for EEEL and contest the case of EEEL, to the same extent that EEEL could contest Vijay's case;
(d) the Final Arbitral Award was not obtained by fraud;
(e) the Final Arbitral Award is not against public policy of the Seychelles and it was not in respect of matters which are not capable of settlement by arbitration.

[206] The first question is which law needs to be applied by the court to assess whether the Final Arbitral Award suffers a lack of structural integrity due to a failure of natural justice or due process, and whether the court should refuse to recognise the Final Arbitral Award on the grounds of public policy. It is not in dispute that the question must be considered as a matter of the written laws of Seychelles as the law of the domestic court. The court agrees.

The Dispute about Large Third— Was Vijay Able to Present its Case?

[207] Article 150(1)(c) provides, inter alia, that "enforcement of an arbitral award shall be refused if the person against whom it is invoked proves … that he …. was otherwise unable to present his case". Section 150(c) is in the same terms as r 201(4) and s 103(2)(c) of the United Kingdom Arbitration Act 1996. Rule 201(4) provides, inter alia, "a foreign arbitration award which complies with 199 will be not recognised or enforced in England (in the present case in Seychelles) if the proceedings in which it was obtained were opposed to natural justice". Section 103(2)(c) of the United Kingdom Arbitration Act 1996, provides – "Recognition or enforcement of the award may be refused if the person against whom it is invoked proves (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". The court accepts Vijay's proposition that English authorities on r 201 (4) and s 103(2)(c) of the Arbitration Act 1996, are thus appropriate on this issue.

[208] A number of decisions were cited to the court in the context of the natural justice issue – *Privatbanken Aktieselskab*; *Pemberton v Hughes* [1899] I Ch 781, CA; *Cukurova Holding SA v Sonera Holding BV* [2014] UKPC 15 (13 May 2014); *Adams Cape Industries Plc* [1990] Ch 433; *Morel v Crispin* (No 2) (1975) SLR 262 at page 264; *Cable and Wireless Local Staff Union v Cable & Wireless Ltd* (1976) SLR 160; *John v Rees* [1970] Ch 345 at 402; *Home Secretary v AF* [2008] EWCA Civ 1148; *Diag Human SE v The Czech Republic* [2014] EWHC 1639; and *Jacobson v Frachon* (1927) 138 LT 386 (CA).

[209] In *Morel* the Seychelles court held that it has jurisdiction to grant a declaration that a domestic award of an arbitrator is null and void on grounds of irregularities committed by the arbitrator in the arbitration proceedings. Sauzier J held that in exercising its jurisdiction the court would be guided by English authorities and the principles evolved therefrom.

[210] Dicey, Morris and Collins *The Conflict Of Laws* (14th Edition Volume I) states under r 60 p 761 "[there cannot] be any doubt that the rule that the foreign judgment may be denied recognition or enforcement because the proceedings in which it was obtained were opposed to natural justice also applies to foreign awards". The court agrees with counsel for Vijay that this approach is commendable and ought to be followed by the Seychelles Supreme Court. In short, this court must apply its own concept of natural justice and public policy.

[211] Dicey, Morris and Collins *The Conflict Of Laws* at r 45, 14R-151 at 14-152, 14-153, 152 states –

> 14-152 In a celebrated passage in his judgment in Pemberton v Hughes (a case on the recognition of a foreign divorce decree), Lord Lindley observed: "If a

> judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice". This passage refers to irregularity in the proceedings, for it is clear that a foreign judgment, which is manifestly wrong on the merits or has misapplied English law or foreign law, is not impeachable on that ground. Nor is it impeachable because the court admitted evidence which is inadmissible in England or did not admit evidence which is admissible in England or otherwise followed a practice different from English law. In *Jacobson v Frachon* Atkin L.J., after referring to the use of the expression "principles of natural justice", said that: "Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him an opportunity of substantially presenting his case before the court.
>
> 14-143 Adams v Cape Industries Plc appears to have been the first English case in which the Defence of breach of natural justice was established in relation to a judgment in personam. The Court of Appeal held that the Defence of breach of natural justice was not limited to the requirements of due notice of the hearing to a litigant and opportunity to put a case to the foreign court. It confirmed that the basis question was that stated in *Pemberton v Hughes*, namely, whether there a procedural defect which constituted a breach of the English's court view of substantial justice, which would depend on the nature of the proceedings under consideration.
> [Emphasis added]

[212] Vijay's dispute about Large Third is about a breach of natural justice within the category of opportunity to be heard. Paragraph 7 of Vijay's Defence avers that – In its defence, Vijay denied that the principles of a fair hearing and natural justice were adhered to at all times (defence para 2). Vijay further avers (defence para 4) that it was not given an opportunity of presenting its case or of substantiating its claims fully, or that the rule of arbitral procedure that each party be given equal opportunities to present the case they felt needed to be presented was breached in its case. This procedural irregularity amounted to a serious violation of due process. It also had a direct influence on the Foreign Arbitral Award and caused substantial injustice to Vijay.

[213]Vijay submitted that the evidence presented by EEEL at the trial in the proceedings before this court failed to establish procedural fairness. Vijay submitted that the evidence as a whole shows a spectacular failure of due process substantially in accordance with what is pleaded in court on Vijay's behalf at defence para 4.

[214] In that regard, in *Minmetals Germany GMbH v Ferco Steel Ltd* (1999) 1 All ER (Comm) 315, 316 it was held –

> (1) An enforcee could not rely on s 103(2)(c) if; for reasons within its control, it had failed to take advantage of an opportunity to present its case. That provision contemplated that the enforcee had been prevented from presenting its case by matters outside its control, and would normally cover cases where the arbitration procedure had operated in a matter contrary to the rules of natural justice…

> (2) Where a party contended that enforcement of a foreign judgment or foreign arbitration award would lead to substantial injustice and would therefore be contrary to English public policy, the court had to consider not only the core procedural defect but also the other material circumstances…
>
> [Emphasis added]

[215] In *Kanoria v Guinness* [2006] EWCA Civ 222, Lord Philips CJ held in the Court of Appeal that, on the ordinary meaning of s 103(2)(c), a party to arbitration is unable to present his case if he is never informed of the case he is called upon to meet. He referred to the statements in *Minemetals* referred to above with approval.

[216] As mentioned above, in applying these principles to the present case, the court must apply its own concept of natural justice.

See also the cases of *Kanoria v Guiness*; *Dardana Ltd v Yukos Oil Co* [2002] EWCA (Civ) 543; and *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [20091 EWCA (Civ) 755, affirmed [2010] UKSC 45.

Admittance of Large Third into Evidence

[217] Procedural Order No 1 was made by the Sole Arbitrator on 23 February 2013, in Paris, France. The Sole Arbitrator made Procedural Order No 1 after having considered the parties' submissions. Starting at para 5 entitled "Witnesses", exhibit D7 provides –

> 5. Witnesses
>
> 5.1 Any person may present evidence as a witness, including a Party or a Party's officer, employee, or other representative.
> 5.2 For each witness, a written and signed witness statement shall be submitted to the Sole Arbitrator by a Party at the same time as the written submissions to which the witness evidence related.
>
> ...
> 5.5 Each Party shall be responsible for summoning its own witnesses to the hearing, except when the other party has waived cross-examination of a witness and the Sole Arbitrator does not direct his appearance.
>
> …
> 5.7 At a date prior to the hearing and to be determined by the Sole Arbitrator, each Party shall notify the other Party and the Sole Arbitrator which witnesses it wishes to cross examine.
>
> …
> 5.12 At the hearing, the examination of each witness shall proceed as follows:
> (a) the Party summoning the witness may briefly examine the witness;
> (b) the adverse Party may then cross-examine the witness. The cross examination shall not be limited to the scope of the witness statement, subject to the control of the Sole Arbitrator referred to in Section 5.13 below;

(c) the Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination, with re-cross examination in the discretion of the Sole Arbitrator; and

(d) the Sole Arbitrator may examine the witness at any time, either before, during or after examination by one of the parties.

6. Experts

6.1 Each Party may retain and produce evidence of one or more experts.

…

6.3 The rules set forth in Section 5 above shall apply by analogy to the evidence of Party and Sole Arbitrator experts.

6.4 Any expert retained by a Party shall include in his or her written report a clear statement of his or her expertise and of the matters or questions upon which he or she is opining. It is expected that any expert retained

6.5 by a Party will confirm the accuracy and completeness of his or her opinion and give evidence in accordance with overriding duty to assist the Sole Arbitrator.

…

10. Status Order

10.1 Any procedural Order of the Sole Arbitrator may, at the request of a Party' or at the Sole Arbitrator's own initiative, be varied if the circumstances so require for the proper conduct of the arbitration proceeding.

[218] It is appropriate for the court to reproduce paras 8, 9, 10, 11 and 12 of Procedural Order No 10 –

8. The Claimant's new expert report, however, would unfairly prejudice the Respondent if allowed into evidence without further opportunity for responsive evidence and arguments from the Respondent. The Claimant's new expert report contains substantial new evidence from the Claimant's expert on the claims of both Parties in this arbitration, including in relation to his own testimony at the hearing. This leaves two solutions: (1) excluding it from evidence, or (2) allowing it into evidence with a reasonable opportunity for the Respondent to present its case in response.

9. The Sole Arbitrator does not consider either of the above two solutions ideal but on balance prefers the second solution, namely the new expert report into evidence. This is because the Sole Arbitrator considers that the new expert report will be helpful for the Sole Arbitrator to better understand and decide upon the Claimant's claims in this arbitration and that it is possible to provide the Respondent with a reasonable opportunity to present its case in response.

10. Regarding a reasonable opportunity for the Respondent to present its case in response, the Sole Arbitrator considers that conducting a further in person hearing with witness examination and argument would not be efficient or cost-effective in terms of case management and thus would

not be reasonable when weighed against the benefit of doing so. The Sole Arbitrator considers, however, that providing the Respondent with a reasonable time frame to submit responsive evidence and argument in writing is necessary and indeed sufficient in the circumstances.

11. In this regard, and bearing in mind the length of the Claimant's Post Hearing Brief and the length of the Claimant's new expert report, including appendices, the Sole Arbitrator considers that the Respondent 's written argument should be no longer than 10 pages and that the Respondent's evidence should be no longer than the Claimant's new expert report. including appendices. Moreover, the Respondent's written argument and evidence should be focused solely on responding to new evidence in the Claimant's new expert report. Furthermore, any new evidence from the Respondent should be submitted by way of exhibits or by way of witness evidence in the form of witness statements or expert reports, provided that any witness evidence is from witnesses and experts who have already testified al the hearing in this arbitration, i.e no new Respondent witnesses or experts are allowed.

12. Accordingly, the Parties new fact exhibits are allowed into evidence, and the Claimant 's new expert report is also allowed into evidence but on the basis that the Respondent is granted until 25 August 2014 to submit: (l) new documentary, fact witness, and expert evidence in writing with a combined length no longer that the Claimant's new expert report, including appendices, and (2) new written argument no longer than 10 pages; in both cases focused solely on responding to new evidence in the Claimant 's new evidence in the Claimant 's new expert report.

[219] Further, the Sole Arbitrator, at paras 62 to 72, of exhibit P1, addressed the issues concerning Large Third. The court reproduces the following paragraphs –

65 On 4 August 2014, the Sole Arbitrator issued Procedural Order No 10, admitting the new evidence into the record. To give the Respondent a reasonable opportunity to present its case in response to Mr Large's third expert report, the Sole Arbitrator allowed the Respondent until 25 August 2014 to submit (1) new documentary, fact witness, and expert evidence in writing with a combined length no longer than the Claimant's new expert, including appendices, and (2) new written argument no longer than 10 pages; in both cases focused solely on responding to new evidence in the Claimant's new expert report.

66. On 25 August, the Respondent declined to submit further evidence and written argument in accordance with Procedural Order No. 10, stating that it "is unable to an dis precluded from responding meaningfully to the further expert report of Mr. Large within the confines set by the Sole Arbitrator in Procedural Order No. 10". The Respondent instead proposed that (a) it would "prepare and submit a report on all issues it feels necessary to address" (b) "the Sole Arbitrator calls upon an Independent Expert to produce a report", or (c) "the Sole Arbitrator issues a partial award restricted to the contractual issues in lite and postpones consideration of damages … to a final award thereafter". Upon the Sole Arbitrator's invitation, the Claimant responded to the Respondent's statements by e-mail dated 29 August 2014 and submitted that, among other things, the Respondent 's three proposals should be rejected.

67. In Procedural Order No. 11 dated 2 September 2014, the Sole Arbitrator concluded that no new circumstances had arisen since Procedural Order No. 10 and therefore rejected the Respondent's three proposals. The Sole Arbitrator noted that all three proposals had already been considered in one or another during the arbitration or not pursued previously when they could have been over the one and a half-year time period since the signing of the Terms of Reference and the issuance of procedural Order No. 1 in February 2013. The Sole Arbitrator decided to extend the deadline for the Respondent's reply to Mr. Large third expert report in accordance with Procedural Order No. 10 from 25 August 2014 to 15 September 2014.

68. On 14 September 2014, the Respondent again declined to submit further evidence and written argument in response to Mr. Large's third expert report. The Respondent stated that the limits set by procedural Order No. 10 (confirmed in procedural Order No. 11) "denied the Respondent a fair hearing and an opportunity to put its case fully before the arbitrator".

69. By email dated 21 September 2014, the Sole Arbitrator noted his disagreement with the Respondent's statement that it has been denied a fair hearing and an opportunity to put its case filly and properly before the arbitrator. In addition to the previous two opportunities to submit written pleadings, the Sole Arbitrator offered the Respondent an opportunity to cross-examine Mr. large by telephone for up to two hours on his third expert report, with a transcript taken of the cross-examination, followed by a written submission. The Claimant would be allowed to conduct limited re-examination on any matters arising out of cross-examination. Mr. Large would attend in person before the Sole Arbitrator at the Sole Arbitrator's office in Paris. The parties were invited to comment by 24 September 2014.

70. The Claimant responded on 23 September 2014 that the Hearing Transcript and the Procedural Orders show that the Respondent was not been denied a fair hearing and that the Respondent had an opportunity to put its case fully and properly before the Sole Arbitrator. The Claimant submitted that the proceedings should be closed pursuant to Article 27 of the ICC Rules.

71. By e-mail dated 24 September 2014, the Respondent maintained its position that the submission of Mr. Large third expert report "has caused a virtually incurable procedural problem which has the potential to jeopardise the whole arbitration". The Respondent submitted that "the only way to ensure that this procedural problem is cured is to give the Respondent … opportunity … to produce a report on any issues it feels important for the advancement of the case. Thus the Respondent decided not to avail itself of the opportunity to cross-examine Mr. Large and submit written pleadings following the cross-examination.

72. On 24 September 2014, the Sole Arbitrator issued Procedural Order NO. 12. The Sole Arbitrator noted, among other things, that he considered that the Parties have been treated fairly and impartially and would have had a reasonable opportunity to present their case in accordance with Article 22 of the ICC Rules. As noted below, the Sole Arbitrator closed the proceedings on that date.

[220] The court interposes to state that it is undisputed that Vijay did not retain and produce the evidence of an expert. At the hearing Vijay was given the permission to procure the attendance of a Mr du Toitmilan to assist Vijay's lawyer in the cross-examination of Mr Large. The Sole Arbitrator granted the request of Vijay on the condition that Mr du Toitmilan would not personally direct any questions to the expert witness of EEEL or otherwise give evidence. It is noteworthy that Mr Kuener had objected to the presence of Mr du Toitmilan. The Sole Arbitrator rejected that objection. Counsel for Vijay submitted that Mr du Toitmilan was merely an observer at the hearing who gave instructions to Vijay's lawyers as guidance for cross-examination on expert matters. Vijay admitted that Mr du Toitmilan is an expert but contended that he was not a witness at any stage. The court accepts that Mr du Toitmilan was not a witness at any stage. However, the court does not accept the argument of Vijay that Mr du Toitmilan was a mere observer. The court accepts the submission of EEEL to the effect that the uncontroverted evidence of Mr Kuehner is clearly that Mr du Toitmilan assisted Mr Georges in his cross-examination of Mr Large.

[221] Expert Witness unquestionably explained that it was indeed unusual to have an expert assist counsel when cross-examining another expert witness. He opined that it creates some unfairness to the expert who is being cross-examined because in the normal procedure, each expert knows the position of the other one. He added that the imbalance still exists, even if the expert who is assisting the lawyer to cross-examine the other expert does not himself cross-examine the expert but he provides information to the lawyer to cross-examine the other expert. Considering the above, the court states that there are no grounds for saying that Vijay did not know of Procedural Order No l , which was rendered by the Sole Arbitrator after having considered the submissions of counsel; nor that Vijay did not have time to retain and procure the attendance of an expert; nor that Vijay did not have the opportunity to defend itself. It is desirable to state that Vijay considered the attendance and assistance of an expert fundamental to its case at the time of the evidentiary hearing. The court is also convinced that for reasons known to Vijay and for which it was clearly responsible, Vijay did not retain and produce the evidence of an expert. On a careful consideration of the facts, the court is convinced that Large Third was necessitated by the unusual request by Vijay and the granting by the Sole Arbitrator, of the right of Mr du Toitmilan to assist Mr Georges with cross-examination.

[222] Further, it is to be noted that para 7(b) of the defence avers that "The Plaintiff in clear breach of every procedural rule known, attached with its post-hearing briefs a document by one of its witnesses, Danny Large, entitled "Third Quantum Expert Report" prepared <u>after</u> the evidentiary hearing and clarifying a number of matters, including matters which the witness had been unable to satisfactorily explain during cross-examination within the evidentiary hearing". Vijay in its response to Procedural Order No 10 (exhibit D17) at para 3 stated "it understands the reasons which led the Sole Arbitrator to rule as it did in admitting the report to evidence. In particular, the argument that the new expert report can be of assistance to the Sole Arbitrator in making the complex determination on quantum he will have to make in this matter, is compelling". The court agrees with EEEL that Vijay acknowledged that "it understands the reasons which led the Sole Arbitrator to rule as it did in admitting the report to evidence" and is, therefore, estopped, from contesting the fact that the Sole Arbitrator admitted Large Third into evidence.

[223] Moreover, it is clear to the court that the emails in the case established that Mr Kuehner had informed Mr Georges of his intention to produce Large Third. Mr Kuehner had informed Mr Georges that "in any event EEEL will produce Large Third". Expert Witness unquestionably stated that if one party informs the other party of its intentions to produce a document to the arbitrator, then this is proper. In the words of Expert Witness: "[t]he other party is aware of it. And if in any case, if there is a problem, it is cured by the fact that the arbitrator, if he done it, communicated, if at the end the other party has the documents, any problem is cured".

The dispute about Vijay being denied the opportunity to present a report of its choice

[224] EEEL submitted that evidence led before the court but not supported by the pleadings has to be disregarded by the court. For the submissions, EEEL relied on the cases of *Gallante v Hoareau* [1988] SLR 122 and *Marie-Ange Pirame v Armano Peri* SCA 16 of 2005. *Marie-Ange Pirame* enunciates that "evidence outside the pleadings although not objected to and the relief not pleaded for, cannot and does not have the effect of translating the said issues into the pleadings or evidence. Indeed we should reiterate here that the above quoted views of this Court are still remain to be good law".

[225] EEEL submitted that the second limb on which Vijay is arguing that the principle of natural justice was not respected by the Sole Arbitrator is that it was not "given the same opportunity to present a report of its choice instead of simply being asked to rebut a report filed irregularly". In respect of this issue the court is being invited to note the following pertinent matters –

(a) Vijay did not plead that the opportunity granted to it to submit a report of its own to rebut Large Third, breached the principle of natural justice;
(b) there are no material facts pleaded to the effect that Vijay had not previously called any Quantity Surveyor as its witness nor that Vijay did not submit any witness statement from a Quantity Surveyor as part of its witness statements; and
(c) the only material particulars pleaded are that the breach of natural justice was based on the fact that Vijay was not granted the opportunity to present a report of its choice.

[226] Having carefully considered the pleadings in this case, the court is satisfied that it has to determine in the context and circumstances of the case whether the principle of natural justice was breached in relation to Vijay by the fact that it was not granted an opportunity to present a report of its choice.

[227] It is Vijay's contention that in view of the admittance of Large Third, Vijay should have been granted the opportunity to prepare and submit a report on all issues it feels necessary to address. In other words, it is the case of Vijay that the Sole Arbitrator ought to have allowed it to submit a report dealing with issues beyond that of Large Third (para 11(a), of the respondent's response to Procedural Order No 10 which is part of exhibit DI 7). Mr Kheuner stated in examination-in-chief that the request of Vijay was a wide-ranging request leaving it open to Vijay to reopen its case regarding Contract 6.

[228] With reference to the pleadings and the evidence presented in the case, the court accepts the submissions of EEEL that natural justice did not demand that Vijay be allowed to submit a report on all issues it felt necessary to address but rather that Vijay be granted the opportunity to rebut Large Third. It is to be noted that this was initially the request made by Vijay. Upon the Sole Arbitrator inviting both parties to make submissions, in respect of matters arising from the Party's Post-hearing Briefs, Vijay submitted a written submission. At para 6 of the written submissions of Vijay, the following is stated –

> Should the Sole Arbitrator allow the admission of further evidence, it is incumbent upon him to similarly allow the other party to provide such further evidence as it may deem necessary to deal with the further evidence admitted. Insofar as the case has been reopened, the Claimant [EEEL] and Respondent [Vijay] would be entitled to the cross-examination of the relevant witnesses. Further submission would then be made in argument at the end of that evidence. In short, the Sole Arbitrator would be allowing a reopening of the case and further hearing on the matter.

It is clear that Vijay was merely requesting that it be allowed to rebut the evidence, namely Large Third. Consequently, the Sole Arbitrator issued Procedural Order No 10 (exhibit P16), in which the Sole Arbitrator actually granted Vijay the opportunity to submit responsive written argument and evidence in respect of Large Third (paras 10 and 11 of exhibit D16). It is to be noted that in response to Procedural Order No 10 Vijay issued exhibit DI7, whereby Vijay changed its initial position and made another demand, including that it be granted the opportunity to prepare and submit a report on all issues it feels necessary to address on. At para 152 of its written submission, Vijay argued –

> It was para 11 of Procedural Order No 10 (not the Response document) which was at the focus of Vijay's complaint. Vijay thought (correctly) that it was unfair to confine any new evidence to that of a witness who had already testified for Vijay in the arbitration hearing. This effectively meant that Vijay could not submit evidence by an appropriately qualified expert, namely, a quantity surveyor. This remains a Vijay complaint. But its significance evidently escaped Mr Kuehner at the lime. And before this Court he stubbornly defended EEEL's position, but wrongly so.

[229] The court has considered the submissions of Vijay and EEEL on the point and accepts the submissions of EEEL. The court accepts that Vijay is clearly taking issue with the conditions set out in para 11 of Procedural Order No 10 (exhibit D16). EEEL has invited the court to reject the arguments advanced in the said para 152 of Vijay's written submissions – the court agrees for the following reasons –

(a) in light of the pleadings, Vijay has not pleaded any material facts to the effect that it had not previously called a quantity surveyor as a witness. Further, Vijay has not pleaded the material facts to the effect that the conditions imposed to the effect that the report must be produced by a witness who has already testified, breached the principal of natural justice. As submitted above the only material fact pleaded by the Vijay is to the effect that it was denied the opportunity to present a report of its choice.

(b) alternatively, there is no evidence adduced before the court to the effect that the witnesses called before the Sole Arbitrator was not capable of producing a report in respect of matters addressed by Large Third. Hence it was necessary for Vijay to have led evidence before the court to the effect that none of its previous witnesses had the necessary expertise whether by qualifications or experience in the field of quantity surveyor;

(c) further, Vijay failed to communicate to the Sole Arbitrator that it could not comply with paragraph 11 of Procedural Order No 10, as none of its previous witnesses had the necessary qualifications to respond to Large Third. Vijay failed to raise the issue to the Sole Arbitrator in exhibits DI7 and D20. Having failed to raise that specific issue to the Sole Arbitrator, Vijay is estopped from raising it before the court. As matter of fact, in terms of art 1466 of the French Procedural Code (exhibits P7 and P13), which Article applies to the arbitration proceedings, Vijay is taken to have waived its right to avail itself of any such irregularities, if they exist; or

(d) the condition that the report should be produced by a witness who had testified was not unreasonable in view that Large Third was a report produced by a witness who had testified at the arbitration hearing.

[230] Further, the Sole Arbitrator issued Procedural Order No 11 (exhibit D19) extending the deadline in Procedural Order No 10 (exhibit D16) to 15 September 2014, to allow Vijay to comply with Procedural Order No 10. Despite the said extension, Vijay failed to comply with Procedural Order No 10.

[231] By email dated 21 September 2014 (which email forms part of exhibit D20), the Sole Arbitrator granted Vijay a further opportunity "to cross-examine the Claimant's expert Mr Large by telephone for up to two hours on his third expert report, with a transcript taken of the cross-examination, followed by a written submission". Vijay turned down the opportunity to cross-examine Mr Large in respect of Large Third. This was confirmed by Mr Georges in his email, dated 24 September 2014, sent at 20:30 (part of exhibit D20). The court agrees with EEEL that Vijay was unreasonable in its demands that it be allowed to "produce a report on any issues it feels important for the advancement of its case". It is clear that Vijay was attempting to reopen its case altogether rather than focusing on the issue raised in Large Third. Tt is to be noted that Vijay without notifying EEEL had annexed two emails, from Mr Egorov, to its Post-Hearing Brief. This was confirmed by Mr Georges at para 3 of exhibit D15. The Sole Arbitrator admitted the two emails into evidence.

[232] Further, it is to be noted that *Morel* and *Cable and Wireless* relied upon by Vijay in its argument relating to Large Third do not apply to the facts of the present case for the following reasons: (i) Vijay has relied on these cases to support its contention that the court would be guided by English authorities: (ii) a close reading of both cases, reveal that both cases were concerned with the exercise of supervisory jurisdiction by the court over inferior tribunals. In other words, the two cases were decided within the ambit of administrative law and not in respect of purely private arbitration agreement in terms of the Commercial Code. The arbitrators in the said two cases were exercising their powers as statutory tribunals. See *Lepere v Coopoosamy* (1975) SLR 156). Moreover, D23 was submitted to the Sole Arbitrator with Vijay's statement of defence in the arbitration dated 3 January 2014. In exhibit D23, Mr Egorov stated –

(i) EEEL was "as a whole" satisfied with "quality and progress of the works carried out by [Vijay] were in conformity with the standards and delays expected I have no hesitation in stating that the works would have been delivered on time and of the standard expected";
(ii) the works were being executed in good time and EEEL had every expectation that the works would be executed on time and that the quality would be good;
(iii) EEEL's superiors from its holding company regularly visited the site, noticed the quality of work and their good progress, and never mentioned verbally or in writing that there was anything wrong;
(iv) EEEL ordered him to get Vijay to move some workers to the Coral Strand site and that any delays to the Savoy works would be adjusted;
(v) He was surprised at the termination of the contracts with Vijay;
(vi) I have no hesitation in stating that at all times the quality and progress of the works carried out by Vijay Construction Pty Ltd. on both sites were in conformity with the standards and delays expected. Whenever there were snags, these were rectified when notified to the contractor. Had the contracts not been terminated, I have no hesitation in stating that the works would have been delivered on time and of the standard expected.

[233] When EEEL furnished its reply to the statement of defence and counterclaim in March 2014, it included with it a short statement from Mr Egorov, dated 1 March 2014 (exhibit P9) to the effect that his previous statement was not correct and he had failed to identify construction defects by Vijay. Mr Egorov stated –

> [P]rimary Witness Statement is not entirely Correct", that the Respondent had during the works "made different defects" which could have led to a further violation of operating rules after the opening of the hotel which I was informed later verbally. I had not identified those defects before the inspection of the professional committee specially organized by my Employer because I was not a specialist in construction works.

[234] In light of the above, the position of Vijay is that it became apparent to Vijay's representatives that Mr Egorov had been reached by EEEL and pressure put on him not

Large Third did not introduce matters which had not been previously addressed in the first two reports of Mr Large.

[235] In light of the above, the court dismisses the defence of Vijay contained in para 7 of the Defence.

Public policy issue with regards to Sergey Egorov

The failure of Vijay to call Mr Egorov as a witness before the sole arbitrator

[236] Article 150(2) provides, inter alia, that "enforcement of an arbitral award may also be refused if it would be contrary to public policy to enforce the award". Rule 201(2) provides *inter alia* that "a foreign arbitration award which complies with Rule

199 will not be recognized or enforced in England (the present case Seychelles) if … (2) if it was obtained by fraud or (3) its recognition, or as the case may be enforcement, would be contrary to public policy".

[237] The court states that it has considered the evidence in light of the pleadings only.

[238] It is submitted by Vijay that it is contrary to public policy for an arbitral award which has been obtained by or influenced through acts of blackmail and bribery to be recognized by any court. To allow a party to obtain a benefit through such a process is to undermine the very sanctity of the law, the fairness of the judicial system and the rule of law itself. By the same token the final award was obtained by fraud.

[239] Counsel for EEEL submitted in reply that the allegation that Mr Egorov was pressured by Vijay not to testify at the arbitration hearing is without any merits. EEEL submitted that Mr Egorov was not a credible witness and in any event Vijay is estopped from raising such a defence before the court.

[240] Mr Egorov gave two witness statements to be used before the arbitration proceedings, namely exhibit D23, dated 1 March 2013, and exhibit P9 dated 11 March 2014. Exhibit to testify in favour of Vijay in the arbitration. Because of this, Vijay's lawyers advised that Vijay could not call Mr Egorov as a witness.

[241] At the evidentiary hearing in June 2004, the arbitrator was informed that Mr Egorov would not testify and asked to give Mr Egorov's statement whatever weight he felt able to give (see the Final Arbitral Award para 59 Exhibit P1).

[242] The court has considered the evidence of Mr Kuehner to the effect that EEEL and Vijay agreed that it would not be necessary to call Mr Egorov as a witness; and that the Sole Arbitrator will give to Mr Egorov's statements whatever weight he felt able to give.
Exhibit P1 states the following –

> On the first day of the Evidentiary Hearing, the parties informed the sole Arbitrator that they did not intend to call Sergey Egorov, EEEL 'S former project director for the Savoy Resort, as a witness. The Respondent had submitted a witness statement by Egorov dated 1st March, 2014.

Mr Detlev Kuehner read line 17 on page 109 of exhibit P6.

Mr Bernard Georges stated the following line 17 of page 109 in exhibit P6 –

> MR. GEORGES: My colleague for the claimant and I *had a quick chat about this yesterday at your behest and we have come to the following agreement and we wish to propose this to the arbitral tribunal. Mr. Egorov will not be called by either party as a witness but we will allow both of his witness statement to remain on the record and leave it entirely up to you as arbitrator to give them whatever weight you wish at the end of the day.*
> THE ARBITRATOR: *Is that in agreement with the Claimant?*
> MR KÜHNER: *Yes, that is perfectly reproduced.*
> THE ARBITRATOR: *I thank you for your co-operation. That is noted and is fine with the Tribunal.* [Emphasis added]

[243] Vijay is of the opinion that on the issues of both quality of the works and their timely execution, on which the arbitrator had ruled against Vijay, there is little doubt that had Mr Egorov testified, the outcome of the arbitration on these two important issues would have been radically different. According to Vijay, Mr Egorov was the key to the alleged delays, the arrangements addressing the non-performance reports and the alleged defective workmanship on site, all of which, Vijay alleged fell within his personal knowledge and expertise. The absence of Mr Egorov from the evidentiary hearing put Vijay at a considerable disadvantage in the hearing and provided EEEL with a considerable corresponding advantage. Mr Egorov was a witness of truth would have put paid to the testimony of EEEL that there had been material defects in the works and inexcusable delays in their execution. Mr Egorov's testimony would have counterbalanced the testimony of Mr Large. This must have been known to EEEL, which is why they went to such lengths to ensure that Mr Egorov did not testify. Therefore, when it became apparent to Vijay's representatives that Mr Egorov had been reached by EEEL and pressure put on him not to testify in favour of Vijay in the arbitration, that a decision was taken by counsel not to call him as a witness. In the event, the Sole Arbitrator ignored Mr Egorov's statement entirely and made no reference to it in his findings in his Final Arbitral Award.

[244] The court finds the explanation of Vijay incredible, unsubstantiated and vague. It is to be noted that Vijay took the decision not to call Mr. Egorov as a witness. Vijay also took the decision not to raise the issue of "bribery" during the arbitration proceedings. Mr Kuehner testified that the counsel for Vijay did not raise the issue. He referred to the post-hearing briefs which were supplied to the Sole Arbitrator by EEEL and Vijay, on 18 July 2014, and the time during the post-hearing briefs and 14 November 2014, delivery of the Foreign Arbitral Award, that it was possible for Vijay to raise the issue of the alleged pressure which had been exercised on Mr Egorov before the delivery of the Final Arbitral Award. It is the considered opinion of the court that the alleged issue of pressure of Mr Egorov was not dealt with any seriousness by Vijay's counsel before the Sole Arbitrator. Why it deserved only a "quick chat" between Mr Georges and Mr Kuehner even in the face of the bribery allegation made by EEEL is not clear to the court. It is to be noted that Vijay strongly denied the allegations of collusion between it and Mr Egorov. For instance, in its statement of defence (Exhibit D4) in the arbitration, the following was pleaded, *inter alia*, at para 46 of page 10 –

> 46. These issues are internal to the Claimant and do not have any bearing on the claim, in the absence of clear and proven instances – instead of mere 'suspicion' as set out in paragraph 41 – of any collusion between Mr. Egorov and the Respondent to the advantage of the Respondent. The Respondent vehemently objects to the device used by the Claimant in these paragraphs to colour the Respondent with claims of impropriety which are neither defined nor proven.

[245] Again in Vijay's Rejoinder in the arbitration (exhibit D5), the following was pleaded on Vijay's behalf at para 32, page 10 –

> 32. It is grossly unfair and malicious again for the Respondent to raise a suspicion of bribery between the Respondent and Mr. Egorov, this time over the purchase of land, yet again without a shred of evidence to support the

> suggestion. The Respondent denies any involvement with Mr. Egorov's purchase of land and denies that anything improper had occurred between the company and Mr Egorov at any time.

[246] At the hearing, EEEL called no evidence to support this bribery allegation. EEEL relied solely on circumstantial evidence, but the Sole Arbitrator rejected EEEL's case in this respect: see the Final Arbitral Award paras [191] to [195], exhibit P1. If anything, the evidence pointed away from EEEL's unsubstantiated bribery allegation.

[247] Further, as noted by counsel for EEEL, Mr Patel actually mentioned a different version, namely that Vijay wanted to call Mr Egorov but could not get in contact with him. The court finds this explanation incredible for the following reasons –

(a) as stated above;

(b) if the reason that Vijay was not calling Mr Egorov, was due to the fact that Mr Egorov could not be contacted, one would have expected that Vijay would have made mention of that to the Sole Arbitrator. It is clear to the court that the real reason why Mr Egorov was not called by Vijay's counsel is because they were not sure that his testimony would be in their favour in view of the two contradictory statements made by Mr Egorov. This is confirmed from the following passages of the court's proceedings in respect of Mr Patel's cross-examination –

> Q. Mr. Patel if I may refer you page 109 top left hand side corner of the page. These are proceedings which took place before the arbitration on the 3rd of June 2014 and on Tuesday the 3rd June 2014 at 9:00 a.m., Mr. Georges addresses the Court and I am going to read what Mr. Georges said to the arbitrator.
> MR. GEORGES: My colleague for the Claimant and I had a quick chat about this yesterday at your behest and we have come to the following agreement and we wish to propose this to the Arbitral Tribunal. Mr. Egorov will not be called by either party as a witness but we will allow both of his witness statements to remain on the record and leave it entirely up to you, as Arbitrator, to give them whatever weight you wish at the end of the day. And the Arbitrator then says.
> THE ARBITRATOR: Is that in agreement with the Claimant...
> MR. KUEHNER: Yes, that is perfectly reproduced. And then the arbitrator went on to say.
> ARBITRATOR: I thank you for your co-operation. That is noted and is fine with the Tribunal.
> Q. Mr. Patel if the issue was you could not call Mr. Egorov because you were not getting into contact with him why was that not disclosed to the arbitrator?
> A. We were not sure as to the state of mind of Mr. Egorov because we were shown the contrary statement that was given by him. It was very short and it was actually vague and we reading it cannot make out the state of the mind of Mr. Egorov.

Proceedings of 2 September, 2015, at 9:30 a.m., pp 25 & 26 of 39)

[248] The court accepts the evidence of EEEL that Vijay cannot be heard to say that, on 3 June 2014, it took the decision not to call Mr Egorov because he had been reached and pressured by EEEL or that it could not get in contact with Mr Egorov. The position of EEEL is that Vijay is estopped from doing so. The court will now consider the question of estoppel raised by counsel for EEEL.

Viiay is estopped from arguing that pressure was exerted on Mr Egorov by EEEL

[249] The court is satisfied that Vijay is estopped from arguing that pressure was exerted on Mr Egorov for the reasons set out in the submissions of EEEL.

[250] By a letter dated 27 August, 2014, Mr Patel wrote to the Sole Arbitrator. In the letter, Mr Patel made several but unfounded allegations concerning the fact that EEEL had applied pressure on Mr Egorov and on which basis Mr Egorov did not attend the arbitration hearing and gave the second witness statement (Exhibit P9). The letter written by Mr Patel to the Sole Arbitrator forms part of exhibit D24. In the said letter, Mr Patel also requested the following from the Sole Arbitrator – "I humbly urge that you read my letter and further urge that you keep it confidential and grateful if you destroy this letter after reading".

[251] Hence it was the intention of Mr Patel that the Sole Arbitrator ought not to disclose the letter to EEEL. In response to Mr Patel's letter, the Sole Arbitrator sent an email dated September 2015, to Mr Georges and Mr Kheuner. In the said email (which is also part of exhibit D24), the Sole Arbitrator stated thus –

> I do not think it appropriate that I keep the attached documents confidential as requested and think that they should be shown to counsel as am doing now.

[252] The Sole Arbitrator also invited EEEL and Vijay to make any comments in respect of the letter from Mr Patel. There were no comments forthcoming from Vijay, whilst Mr Kheuner on behalf of EEEL protested against the action of Mr Patel. These comments are contained in exhibit D25, being an email dated 3 September 2014, from Mr Kheuner sent to the Sole Arbitrator and copied, among others, to Mr Bernard Georges. On the basis of all the above, it is clear that Vijay is estopped from objecting to the enforcement or recognition of the Final Arbitral Award, on the basis that EEEL applied pressure on Mr Egorov for the following reasons –

(a) it is clear from the letter of Mr Patel, dated 27 August 2014, that Vijay did not intend the Sole Arbitrator to act upon the allegations contained in the said letter. In other words, Vijay did not wish for the Sole Arbitrator to enquire and make a determination regarding the allegation contained in the letter;

(b) despite the fact that the Sole Arbitrator had disclosed Mr Patel's letter to all the parties concerned. Vijay failed to make any comments whatsoever. The failure to make any comments was a clear sign that Vijay did not wish the Sole Arbitrator to act upon the allegations contained in Mr Patel's letter. As a matter of fact, by email dated 9 September 2014, Vijay confirmed that it was not seeking a formal decision in respect of the letter from Mr Patel (see paragraph 76 of exhibit P1); and

(c) since Vijay had come to know about these allegations regarding Mr Egorov before the close of the arbitration proceedings but had clearly indicated that it did not wish the Sole Arbitrator to act upon and make a determination regarding the allegations, Vijay cannot now rely on the same allegations to object to the enforcement of the Final Arbitral Award.

[253] The Sole Arbitrator addressed the issue regarding the letter from Mr Patel, in paras 73 to 76 of the Final Arbitral Award (exhibit P1). Indeed at para 76, of exhibit P1, it is stated thus –

> the Respondent confirmed, by email of 9 September, 2014, that it did not seek a formal decision on the new documents.

It has been clearly established that –

> … parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are estopped from afterwards setting it up.

(Refer to *Halsbury Laws* (Volume 16) at para 1609).

[254] In the case of *Shrager v Basil Dignton Limited and others* [1924] 1 KB 274, the Court of Appeal held that since the appellant, in the course of the hearing, became aware of an irregularity, but allowed the case to proceed, the appellant bad waived his right to rely on the irregularity. For instance, in the said judgment Bankes LJ held –

> It is impossible to take the latter view, and I accept Mr. Perry's positive statement in preference to Mr. Weir's recollection, which on this point must have failed him. Having arrived al this conclusion it necessarily follows that, having had the opportunity of taking objection to the irregularity, and having abstained from doing so, the present objection to the order of the Divisional Court which is founded on the irregularity fails … On February 22 Mr. Weir's clerk saw the entries in the Referees ' Book and took a note of them. Even at this late date the hearing was not concluded, and in my opinion if objection to a hearing by Sir Edward Pollock was ever to be made, it ought to have been made immediately after the irregularity came to the knowledge of the Plaintiff's advisers. The objection to the Divisional Court came much late to be of any avail.

It is submitted that the principles of law enunciated at para [253] above and the *Shrager* case are apt to the present case.

[255] The court also applies arts 1464 and 1466 of the French Code of Civil Procedure to the present case. It is clear from the testimony of Expert Witness and more specifically his examination-in-chief and cross-examination that: (i) the action of Vijay, through its Managing Director, of writing to the Sole Arbitrator about the alleged interference with Mr Egorov and asking the Sole Arbitrator to keep the letter confidential is a breach of art 1466 of the Civil Procedure Code; and (ii) the failure to request that the Sole

Arbitrator enquire into the said allegations, means that art 1466 of the Civil Procedure Code became applicable regarding such allegations. The following passages from court proceedings support the argument advanced above –

> Q. Mr. Derains, this morning you were cross examined about there was a hypothetical question put to you regarding if there is a fraud which a party has discovered- actually the question was whether a fraud will affect, can be relied upon to set aside an arbitral award? Now, what will happen if a fraud is discovered by a party but that party does not disclosed the fraud to the arbitrator, would the party be allowed to rely on that fraud to have the arbitral award set aside in France?
> A. No, certainly not. I think what we discussed this morning without the principle of loyalty or good faith or now the true provisions that we have seen this morning, article 1464 and article 1466. A party is compelled to raise any issue regarding the regularity of the proceedings as soon as if is aware of it. As in any case, if it does nor do it before the arbitral tribunal, assuming evidently that he is aware of it. If he does not do it before the arbitral tribunal or sole arbitrator, he is prevented to do it, to raise it as an argument to seek the annulment or … execution of the award.
> Q. Let's go a step further. What if the party discovers the fraud, the party unilaterally writes to the arbitrator basically informing the arbitrator in confidence that there is certain fraud, but asked the arbitrator not to disclose it to the other parry and to keep it confidential. Not to disclose it to the other party and to keep confidential and actually to destroy the letter which the party has written to the arbitrator. Would the party eventually be allowed to rely on that fraud to set aside the award?
> A. No, I do not think so because all the rational we are in this rule, is that you cannot wait to know whether or not you have win the case before to raise an argument to set aside the award. You cannot wait to be sure that you have lost your case before you ask to come back in way on the procedure. That is absolutely contrary to bad faith and in the case you are –
> Q. Contrary to?
> A. It contrary to good faith, excuse me. And in the case you are imagining, the party is not asking the arbitral tribunal to take any decision on the basis of what is seen. Even too is not asking him and even he is trying to preventing him from using it is the award because he cannot refer to it in the award. So, I do not think that –

[256] In light of the above the court dismisses the defence of Vijay contained in para 8 of its defence.

The Sole Arbitrator Omitting to Make an Award on One or More Points of the Dispute

[257] As part of its defence to EEEL's action, Vijay raised a plea that the Sole Arbitrator omitted to make an award on one or more points of the dispute and that this cannot be separated from other points in respect of which the award was made.

[258] The points were as follows. EEEL's failure to give notice of the alleged breaches by Vijay prior to the termination of the "contracts" was fatal to EEEL's claim for damages by reason of the provisions of art 1230 of the Civil Code. Vijay claimed that

the point was a fundamental one as it arched over the whole claims of EEEL. The claims stood to be dismissed in their entirety – even if they had been made out on the merits if the point was proved and accepted as being a statement of the written laws of Seychelles, which was the law of the Six Contracts agreed by EEEL and Vijay. According to Vijay the point comprised two elements, both of which are contained within the passages from the Terms of Reference above –

(a) restriction of damages to a sum provided for in the contract, and
(b) inability to claim damages in the absence of notice putting the contractual debtor in mora.

[259] Vijay based this defence on art 134(2)(e) of the Commercial Code. Article 134(1) and 134(2)(e) of the Commercial Code provide –

> (1) An arbitral award may be attacked before a court only by way of an application to set aside and may be set aside only in the cases mentioned in this article.
> (2) An arbitral award may be set aside
> …
> (e) if the arbitral tribunal has omitted to make an award in respect of one or more points of the dispute and if the points omitted cannot be separated from the points in respect of which an award has been made.

[260] EEEL raised a plea that art 134(2) of the Commercial Code applies solely to domestic tribunals, but not to a foreign arbitral award. In light of the submissions of counsel, the court opines that a defence on the ground of omission, by the arbitral tribunal, to make an award on one or more points of the dispute cannot be separated from other points in respect of which an award has been made is excluded by art 150 of the Commercial Code and, therefore, cannot be pleaded in the suit. The court adds in passing that such a defence is also not open to a party under art V of the New York Convention or the other provisions referred to by the court. For the above reasons, the court holds that art 134(2)(e) of the Commercial Code is not applicable to the present case and consequently the defence raised in para 9 of Vijay's defence cannot be entertained by the court.

[261] Because this is an appealable case, the court considers the points raised by EEEL and Vijay.

[262] The court accepts the submissions of EEEL that no pleadings were raised in relation to the restriction of damages to those provided for in the contract arising from identical Clauses 8.6 of Contracts 1-5, which provides for a cap on damages at 10 % of the contract price. Accordingly, the court does not deal with that point. It appears desirable to add that Vijay is not seriously disputing the Sole Arbitrator's interpretation of Clauses 8.6 of Contracts 1-5. Vijay submitted at paras 229 and 230 of the Vijay's written submissions –

> 229. In the Final Award, the arbitrator never alluded to the case of *Morris* and contended himself with a general comment at paragraph 240 that Clause 8.6 of the Contracts only limited delay damages to 10% of the Contract price but that the Clause was silent as to other types of damages. For the reasons given hereinbefore at paragraph 226, Vijay submits that the arbitrator erred in his

> restrictive interpretation of that clause. Notwithstanding the foregoing, Vijay submits that it is the second element of the point which the arbitrator ignored entirely, and which forms the thrust of the submission under this ground.

[263] The court considers the second element of the point – inability to claim damages in the absence of notice putting the contractual debtor in mora. Vijay contended that the claims of EEEL in the arbitration were in the nature of claims for delays and defective works, and consequential loses. The contracts of Vijay were terminated and EEEL continued the works by itself (see para 242 of the Final Arbitral Award, Exhibit P1). Any alleged non-performance by Vijay was thus not permanent. It follows according to Vijay that this was a case of "dommages-intérêts moratoires" and EEEL's damages were restricted to 10% of the contract prices. The submissions made by Vijay in paras 184-186 of the statement of defence (exhibit D4) filed in the arbitration explained the position of Vijay in relation to that point. This is what it said there –

> 184. It is a requirement of the law that notice (a "mise en demeure") must be given to the party against which a claim is to be made in order for the claim to succeed: Article 1146 of the Civil Code. However, article 109-2 of the Commercial Code of Seychelles provides that in commercial matters damages are due from the moment of the breach without the necessity for notice. The article reads "In commercial transactions damages shall be due by operation of law from the moment that the breach occurs without the necessity for a previous notification as provided for ordinary contracts under article 1146 of the Civil Code." It is not in dispute that the matter at issue is a commercial matter and consequently damages would arise for payment without the necessity for a prior "mise en demeure".
>
> 185. However, the situation is different when there is a penalty clause governing damages. Notice is required to be given, even in commercial matters, before damages can be successfully claimed where a penalty clause exists, as here. This is because of the provisions of article 1230 of the Civil Code of Seychelles. This article, which is to be found in Section VI, the heading of which reads "Obligations with Penal Clauses" reads,
>
> Article 1230
>
> Whether the original obligations contains a time-limit which it must be executed or not, the penalty is only incurred when the person bound to deliver or to take or to do something is under notice to perform. (Exhibit R-27).
>
> The case of *Bougault v Ming-Kan* [1982] MR 33 makes that principle clear (Exhibit R-28).
>
> 185. No mise en demeure, or other written notice was given under any of the Contracts by the Claimant to the effect that the Respondent was likely to incur penalties for un-remedied breaches or delays.

[264] Vijay added that art 1230 refers to a special category of contract one with a time limit for its execution. According to Vijay, the Six Contracts were of that category. In such contracts, notice to perform is obligatory in terms of the imperative words of Article 1230: "…the penalty is only incurred when the person … is under notice to perform".

[265] According to Vijay, the Sole Arbitrator appeared to have conflated the legal requirement for a "mise en demeure" with the contractual requirement for notice under Clauses 15.1 of the Contracts.

[266] EEEL disputed the points raised by Vijay. EEEL contended that among all the damages awarded to EEEL, as per the Final Arbitral Award, the only delay damages were part or the damages, awarded at sub para 321(5) of exhibit Pl. The part of the damages at sub para 321(5) of exhibit P1 which amounted to delay damages were the damages referred at para 264 of P1 as follows –

> 264. As noted above, the Respondent incurred 97 days of delay under Contract 1; 108 days under Contract 2; and 100 days under Contract 5. Applying the rate of 0.1% of the Contract Price to each day of delay, the delay damages under Clause 8.6 amount to:
>
> - € 149,380 under Contract] ; and
> - € 169, 175.13 under Contract 2 (capped at 10% of the Contract Price as per the terms of Clause 8.6, i.e, €40, 000: and
> - €40, 000 under Contract 5 (capped at 10 % of the Contract price as per the terms of Clause 8.6, i.e., €.40, 000).
>
> Paragraph 265: Accordingly, the Claimant is awarded a total of € 346,023.64 in delay under Contract l, 2 and 5.

[267] EEEL contended that all other damages awarded to EEEL against Vijay were damages of a permanent nature. The damages awarded at para 321(2) of exhibit P1, were permanent damages as they were damages arising from the fact that the non-performance of the obligation being permanent, in view that the contract had been validly terminated and consequently the obligation would no longer be performed. Furthermore, the damage awarded in terms of sub para 321(3), was also a damage permanent in nature, arising directly from a breach of Contract 6's confidentiality provision. By breaching Contract 6's confidentiality provision, this essentially means that "l'obligafion reste définitivement inexécutée". Likewise, the damages regarding the provision of reinforcement steel (sub para 321 (4) of Pl), was also a permanent damage (refer to paras 257 to 258 of P1). In sum, EEEL contended that in respect of all the damages awarded to EEEL there was no necessity for the Plaintiff to place Vijay under notice. EEEL added that this would also be the applicable, despite such damages being "dommages-intérêts moratoires".

[268] The following issue is framed for the determination of the court. Whether on the facts of the present case, in the case of "dommages-intérêts moratoires" a "mise en demeure" is a condition precedent to their being claimed. In other words, is EEEL bound by art 1230 of the Civil Code as suggested by Vijay? The court has considered the relevant Clauses of Contracts 1-5, the following provisions of the written laws as set out and the evidence presented in light of the submissions of both counsel.

[269] Clauses 8.6 of Contracts 1-5 provide –

> Delay Damages
>
> If the Contractor fails to perform or performs improperly the obligations of this contract he shall pay delay damages to the Employer amounting to 0.1% of the Contract price per day of delay and for failing to perform improper performance of its obligations hereunder, but not exceeding 10% of the Contract Price.
>
> Contract 6 had a different Clause 8.6. The penalty there was capped at Euro 200, 000.

[270] Article 1139 of the Civil Code provides –

> Article 1139
>
> A debtor shall be placed under notice of default by a summons or other equivalent legal act or by a term of the agreement providing that the debtor shall be in default without the need of a summons and at the mere expiry of the period for delivery.

[271] Article 1146 of the Civil Code provides –

> Article 1146
>
> Damages are only due when the debtor is under notice to fulfil his obligation; provided, nevertheless, that the thing which the debtor had bound himself to give or to do could only be given or done within a fixed time which he has allowed to elapse.

[272] Article 1152 of the Civil Code provides –

> Article 1152
>
> With regard to the obligations which merely involve the payment of a certain sum, the damages arising from delayed performance shall only amount to the payment of interest fixed by law or by commercial practice; however, if the parties have their own rate of interest, that agreement shall be binding.
> These damages shall be recoverable without any proof of loss by the creditor. They are due from the day of the demand, except in cases in which they become due by operation of the law.
> However, the creditor who sustains special damage caused by a debtor in bad faith and not merely by reason of delay, may obtain damages in addition to those for delayed performance.

[273] In the case of *Attorney-General of Seychelles v Armitage* [1958] MR 55, the court quoted with approval the following passages from Planioi et Ripert *Droit Civil* para 821 of Volume 7 –

> … Il y a deux sortes de dommages-intérêts. Tantôt ils sont dues parce que l'obligation reste définitivement inexécutée et ils remplacent alors l'exécution que le créancier aurait du obtenir; tantôl ils supposent que le débiteur a finalement éxécute son obligation, de lui-même ou par contrainte, mais après un retard ou moins long et dommageable au créancier; ils représentent alors la réparation du préjudice causé par le retard. Au premier cas, les dommages-interêts sont dits compensatoires; au second cas, on les appelles moratoires….

In *Attorney-General of Seychelles v Armitage* the court added –

> In the case of dommages-intérêts moratoires the unanimous opinion of text book writers and of courts of law is that a mise en demeure is a condition precedent to their being claimed; in the case of dommages-interêts compensatoires the question of the necessity of a mise en demuere appears not to have been definitely settled.

[274] In the case of *Morris v Costain Civil Engineering Ltd* [1976] SLR 178, Sauzier J held at pages 181-182 of the judgment –

> There are two kinds of damages which result from a breach of an obligation, merely, damages arising by reason of the *failure of the debtor to perform* the obligation and damages arising by reason of the *debtor's delay in the performance of his obligation* (Vide Article 1147 of the Civil Code and of the Civil Code of Seychelles). In the first case the damages are known in French as "dommages-interêts compensatoires" and in the second case as "dommages-intéréts moratoires". The first class of damages only arises if the non-performance of the obligation is permanent as when the debtor refuses to perform his obligation or when the obligation can no more be performed.
>
> [Emphasis added]

[275] The court has considered Clauses 8.6 with care. The court ought not to accept the submission of Vijay that although the Clauses speak of "delay damages", their scope was much wider as can be seen from the use of the words "performs improperly the obligations of the contract…. It is to be noted that Clauses 8.6 stated, in part, that "[i]f the Contractor fails to perform or performs improperly the obligations of this contract he shall pay delay damages". To avoid any misconception it is desirable that the court reproduces Clause 8.6 of Contract 1 which contained, in the words of the Sole Arbitrator, "some slight differences in language": "If the Contractor fails to perform or performs improperly its obligations this [sic] Contract, he shall pay delay damages to the Employer amounting to 0.1 % of the Contract Price each day of delay and for fail [sic] to perform or improper performance of its obligations hereunder, but not exceeding 10% of the Contract Price" (see footnote 39 of exhibit P1). It is clear to the court that the common intention of EEEL and Vijay were that Clauses 8.6 shall apply solely to "delay damages". The court, therefore, accepts the determination of the Sole Arbitrator that –

> [s]imilarly, damages recoverable for breaches of contract other than delays are not limited, as the Respondent contends, by Clause 8.6 of the Contracts. Clause 8.6 of Contracts 1-5 (but not Contract 6) limits delay damages to 10% of the Contract price but is silent as to other types of damages.

[276] Further, on a careful reading of all the submissions of both counsel the court accepts the submissions of EEEL that in respect of all the damages awarded to EEEL there was no necessity for the EEEL to place Vijay under notice and this would also be applicable, despite such damages being "dommages-intérêts moratoires".

[277] The court gives reasons.

[278] The Sole Arbitrator rightly held that Clause 8.6 is applicable solely to delay damages. Hence art 1230 could have potentially applied only to delay damages and this to the damages mentioned in para [266], above. This was confirmed in *Morris*, as Sauzier J held –

> When a penal clause has been stipulated to operate in case there is delay in the performance of the contract such penal clauses operate only in that case and does not operate in the case when the non-performance is permanent and the contract is rescinded on grounds of non-performance. In the last mentioned case the Court is not bound by the penal clause and may award damages in accordance with the ordinary principles of law (vide Dalloz Nouveau Code Civil Vo. II, Art. 1152, paras. 23 and 24, D.P 1859. 1. 259 and D. P 1874.1 56). However by virtue of Article 1152, the Court will in the case when there is delay in the performance of the contract, be bound to award damages only in terms of the penal clause.

[278] It is Vijay's contention that art 109(2) is not applicable to the present case (and thus not applicable in respect of the damages mentioned at paragraph 227 above), since the requirement of notice in the present case does not arise from art 1146 but from art 1230 of the Civil Code. According to Vijay –

> Article 109-2 of the Commercial Code makes reference to Article 1146 of the Civil Code only, and does not state a general proposition. Had it intended to do so, the reference to Article 1146 would have been omitted, or a more general form of words used.

The court is satisfied that the position of Vijay is incorrect. The court agrees with EEEL that art 109(2) is also applicable to art 1230 by implication. In *Encyclopedie Dalloz*: Droit Civil A-C (Clause Pénal) it is stated –

> L'indemnité prevue par la clause pénale tìent lieu en réalite de dommages-intérêts et ne peut être accordée que s'il y a eu mise en demeure du débiteur. L'article 1230 applique la régle de l'article 1146 (req. 2 déc 1879, D.P 80.1. 266, Cons d'Et. 5 Mars 1926, D.H. 1926. 239). Mais il y a lieu d'appliquer les habituelles dispenses de la mise en demeure, par example celle qui est prevue par article 1146, alinéa 2, quand le débiteur était tenu d'exécuter son obligation dans un certain temps qu'il a laissé passer.

In light of the above the court is satisfied that art 1230 applies the principle of art 1146. Therefore, in the present case, since all the contracts were commercial in nature, art 109(2) of the Commercial Code is applicable and the damages in terms of Clause 8.6 of the Contracts were due by operation of law from the moment the breach occurred without the necessity of a previous notification.

[279] In light of the above the court dismisses the defence of Vijay contained in para 9 of its defence.

DECISION

[280] For the reasons stated above, the court enters judgment for EEEL as against Vijay. The court –

(a) declares and make the Final Arbitral Award executory in the Seychelles;
(b) declares and make the Final Arbitral Award enforceable in the Seychelles;
(c) recognises the Final arbitral Award;
(d) grants leave to register the Final Arbitral Award and consequently enter judgment in terms of the Final Arbitral Award;
(e) orders Vijay to pay the sum of Euro 17,042,086.36 and USD Dollar 126,000.00 to EEEL plus the interest;
(f) orders Vijay to pay costs to EEEL.

RE DINE et al

F MacGregor (PCA), S Domah, J Msoffe JJA
21 April 2017 SCA 05/2016

Election law – "illegal practice"

The appellants were found by the Constitutional Court to have engaged in illegal electoral practices. They appealed.

JUDGMENT Appeal allowed for appellant 3; dismissed for appellant 4.

HELD

1 Expressions of opinions on the capabilities of candidates for a public office are not negative comment. It is healthy in a democratic election for people to challenge the candidates on their perceived weaknesses and their ability to eventually deliver.

2 There is a civic duty on everyone to encourage a democratic process, to ensure a free and fair election, to encourage people to make informed choices through proper public debates and discussions before they take their decision to express their votes for who is going to govern them for the next electoral mandate. There arises a complementary civic duty to ensure that the democratic exercise is not corrupted by those who use demagoguery and stratagems, frauds and lies, dishonesty and disorderliness.

Legislation

Elections Act ss 44, 45(4) (7), 47(1), 51(3)

Foreign Cases

Ellis v National Union of Conservatives and Constitutional Associations, Middleton and Ringadoo v Jugnauth [2008] UKPC 50
Southall (1900) 44 Sol Jo 750
State v AR Khoyratty [2008] MR 210
Sunderland Borough Case (1896) 5 0'M & H 53

Counsel E Chetty for appellants

S DOMAH JA

[1] In an election petition brought before the Constitutional Court sitting as the Election Court under s 44 of the Elections Act, the Court found that the four appellants had committed illegal practices contrary to s 51(3) of the Elections Act. In the exercise of their powers under s 47(1) of the Act, the Judges proceeded to mete out the sanction that flows from such an act: namely, reporting the illegality to the Electoral Commission for the removal of their names from the Register of Electors for a period of 5 years. This is an appeal against the finding of illegal practice as well as against the sanction.

[2] Even if the findings of fact by the Constitutional Court have been different with respect to each one of the appellants, this appeal has been made jointly by all four of them with grounds common to all. The appeal with respect to Grounds 1, 2 and 3 follows the same grievance in law that the trial judges erred in law and on the evidence in holding that the appellants committed an illegal practice, with regard to appellants 1, 2 and 3 contrary to s 51(3)(j) of the Elections Act; and, with regard to appellant 4, contrary to s 51(3)(h) of the Elections Act.

[3] They all seek the protection of s 45(4) of the Elections Act which relates to the statutory mitigation of sanction so that they may be spared the consequences that flow under the Elections Act from their impugned acts or omissions. We shall deal with the case of each in its own right.

Major Simon Dine

[4] Major Simon Dine was at the material time the Coast Guard Commander. The Constitutional Court had made a finding to the effect that he had committed an illegal practice in breach of s 51(3)(h) of the Elections Act in the following circumstances. He was party to the political statement made by a candidate that –

> if change happens and the opposition comes to power may be there will be instability in the small country of Seychelles. It will no longer be stable ... when a government comes to power after there is a change, the new government will have to dissolve the National Assembly.... Where will it get the money to go to the Election Commission to organize new elections? the country will know total darkness and with change we will be like Africa if we are not careful ... We have achieved a lot and what [the President] has promised he has delivered. There is more to come, but because of certain difficulties this will take time. . I believe we need to honour our loyalty for the force, for our lives, for the system that is in place so that we can continue to give all our ability.

[5] The defence of Commander Dine has been that, in his address to his men, he was only reminding them of their professional duties and what was required of them during the election period; that he was only giving the soldiers a better picture of the situation before them; that all through his intention was to remain neutral in advising the soldiers on their duties; that it was never his intention to induce or force anybody into voting or not voting for any party in particular; that as a superior, it was his duty to provide the soldiers with support, advice and guidance; that at no point in time during the meeting did he intend to create fear of any kind or intend to coax anybody to do anything they did not want to do; that his reflection was on the sincere development of his department and on what they had achieved in the preceding few years; that he wanted to remind the soldiers that their loyalty was to their country, their duty to the people and the need to perform their task diligently; and that he did not intend to cause anyone any prejudice by his discourse. He also expressed his sincere apology if his activities may have crossed the line.

[6] The Judges of the Constitutional Court decided that his address violated s 51(3)(j) of the Act in that it comprised threats of temporary loss in the form of instability, violence and political uncertainty and that the only feasible intention behind these threats could be to induce the soldiers to vote or refrain from voting in a particular way.

[7] We agree with the conclusion of the Judges that there was a breach of s 51(3)(j) in the circumstances. The scary picture made would still have passed as freedom of expression had it not been for the fact that it was made not as a general apprehension genuinely held but as a partisan speech. What was innocence did not turn out to be so innocent when he was echoing the President: "We have achieved a lot and what [the President] has promised, he has delivered." At that point in time, he had doffed his political neutrality as a military officer. His genuine concern for possible chaos after a change at the head was vitiated when he specifically brought the President into his equation.

[8] In terms of finding of culpability, therefore, we would not disturb the findings of the Constitutional Court as regards Major Simon Dine.

Colonel Clifford Roseline

[9] As regards Colonel Clifford Roseline, he was at the material time the Chief Military Adviser of Government. The Constitutional Court had made a finding that he had committed an illegal practice in breach of s 51 of the Elections Act.

[10] To come to that conclusion, the Constitutional Court had examined and considered the following material. In an address to his men he stated that the only objective that

> they [Linyon Sanzman] have is to remove James Michel from power. That 's all — remove James Michel from power. . [The Opposition] drive by, they see people, they look at them and they say 'on the 19th we are coming to get you to hang you.' If ever these people come to power next week, they will never be able to work with this assembly. They will need to dissolve the assembly. ... From where will you get your salary? ... If Lepep comes to power, the budget is there .... With change there will be no stability and peace. Seychelles will sink, it will be finished. ... we have to give Mr Michel his mandate.

[11] The explanation of Colonel Roseline was that he had merely appraised them of the current state of affairs during the elections period and to remind them of their professional duty as soldiers; that he had tried only to give the soldiers a better picture of the situation prevailing; that it was never his intention to guide them but only to advise them nor to dictate to them nor to order them in what particular way they had to exercise their democratic right other than as they wished; that he felt he had an obligation to assist them in making an informed choice on the matter; that it was not his intention to tell them for whom they should or should not vote and that the choice was theirs alone; that what he stated did not amount to threat of temporal loss or amount to election interference; that it was his responsibility to advise and assist all military personnel; that part of his role was to make sure they have sound judgment

and that in the process his personal opinion may have come out but it that was not meant to interfere with their right to vote. At the end of the day, he expressed his regret and sincerely apologized, if his intentions had been misapprehended.

The Constitutional Court did not accept his explanations and found him culpable of violation of s 51 (3)(j) of the Act. We take the view that, on those facts, the conclusion is unassailable. His explanation does not hold. His partisan address was patent.

Beryl Botsoie

[12] As regards Beryl Botsoie, the latter was at the material time the Head Teacher of the La Rosiere School. The Constitutional Court found that she had committed an illegal practice in breach of s 51(3)(j) of the Elections Act.

[13] The case against her was as follows. In a meeting with the colleagues at school, she stated that:

> We are seeing someone [Wavel Ramkalawan] who is proposing himself as a President with arrogance .... I can never see him becoming a good President … he makes a lot of noise and attack. Is that really what we want as President for Seychelles? Is this what you really want in future? With a new government there will be no salaries since there isn 't any budget. And when there is no salary, whoever comes in power will not have a minister offinance to provide control and they will go to the Central Bank and do whatever they want. I am friends with you all whether you wear the green colour, or yellow or in blue, I will always wave hello to you, when I see you wearing the red colour, I will shout in joy, the decision is yours ... ”

[14] Beryl Botsoie gave her version of facts in her affidavit evidence. She explained: that in one of the innocent discussions she had with some of her colleagues, she only expressed her personal views on the candidates; that at no point in time did she attempt to induce, prevent or threaten anyone to vote or refrain from voting; that, in fact, she concluded the discussion by stating that there would be 'no enmity' amongst any of her colleagues regardless of which party they affiliated with; that she was for a fruitful and academic discussion and her colleagues were free to correct her and voice their own opinions; that the points she had raised were not intended for garnering support for a particular candidate; and that she did clearly state 'vote for who you want'. She finally added that she cared for her country and wanted to convey the message that despite all we must look after Seychelles. She denied she was acting as an agent for the 2nd respondent. She, finally, expressed her sincere apology in case her intentions were misunderstood.

[15] The Constitutional Court found that she was culpable of illegal practice and was in violation of s 51 of the Act. The reason for such a finding was stated to be: "the threat of temporary loss should one vote for the Opposition". That seems to us to be a timid reason, timidly expressed. The case of this defendant should have fallen in the category of cases where the Constitutional Court had found that no illegal practice had been committed: David Savy, Louis Agathine. The only reason for which we think

the balance tilted on the side of a culpability in the case of Beryl Botsoie was because Beryl Botsoie had been a little too subjective in her personal comments on the complainant himself.

[16] Be that as it may, that finding of culpability of Beryl Botsoie is unsafe. The threat which s 51(3)(j) speaks of is the threat emanating from the defendant and not any threat extraneous or unrelated to the defendant. What Mrs Botsoie was referring to in this case is the apprehension, in her thinking, that there would be no salaries for the payment of staff in the eventuality of a power change. Such uncertainty of the unknown is not unknown to electors, the more so in a likely regime change which follows an election. That was her opinion and the expression of a personal opinion even if mistakenly held cannot be considered to be unlawful: see *Ellis v National Union of Conservatives and Constitutional Associations, Middleton and Southall* (1900) 44 Sol Jo 750. Nor are unlawful mere argumentative statements of one's idea of a public man: see *Sunderland Borough Case* (1896) 5 0'M & H 53. Expressions of opinions on capabilities of candidates for a public office is in no way a negative comment. It is healthy in a democratic election for people to challenge the candidates on their perceived weaknesses and their ability to eventually deliver. It permits the candidates to make timely amends or refute them.

[17] In a democratic election campaign, people's views matter. As Lord Steyn stated in the Judicial Committee decision of *State v AR Khoyratty* [2008] MR 210:

> The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary.

[18] A democratic election is an exercise where the two concepts merge. People have to decide who should govern them. For people to usefully decide, there has to be freedom of expression for free flowing discussions, debates, exchanges and information sharing. We are here involved with giving effect to two of the three fundamental foundations of a democracy. In this case, Beryl Botsoie concluded her qualms by the words: "I am friends with you all whether you wear the green colour, or yellow or in blue, I will always wave hello to you, when I see you wearing the red colour, I will shout in joy, the decision is yours. That should not amount to an illegal practice.

[19] To muzzle persons of influence from expressing their views in an election campaign is to allow too much space to the candidates to deal in demagoguery and stratagems. Within guarded circles, officials have a right to speak out their fears without losing their neutrality. They have a right to have strong likes and dislikes, to put to good use their experience of life and society. Canvassed amongst colleagues, persuasive expressions do not stop being democratic expressions of one's likes and dislikes. In our view, in the case of Beryl Botsoie, there is no offence under s 51(3)(j) of the Act.

[20] Accordingly, we take the view that the case of Beryl Botsoie falls short of a finding of culpability under s 51(3)(j) of the Elections Act. We, for our part, refuse to think that the complainant in this matter was seeking to settle a personal score with the

defendant on account of the personal comment she had made against him. But other people may think otherwise. We allow the appeal in her case and quash the order of the Judges to report to the Electoral Commission.

James Lesperance

[21] Now as regards, James Lesperance, the latter is a business man by profession. The allegation against him has been that he had bought identification cards ("ID cards") so as to prevent the card holders from voting. He refutes this allegation stating it is an electoral vendetta.

[22] The conclusion of the Constitutional Court was reached on solid evidence against him. Some persons had reported him to the complainant and the latter had, in turn, reported the matter to the Police as a result of which the ID cards had been returned. Two witnesses testified to the fact that their ID Cards were taken against payment of money just a couple of days prior to the elections. Another witness testified that she found him with several ID cards in his pocket. Lesperance was a Parti Lepep political activist.

[23] In his affidavit sworn to refute the allegation, Lesperance explains that he had his preferred candidate in the December 2015 elections but that he never tried to or did purchase identity cards to influence the election one way or the other. His version is that the nature of his business is such that he has to employ casual labourers on a daily basis. Since he pays them at the end of every two to three days, his company collects their identity cards, notes their national identity number and the amount of hours worked as an essential task for record keeping, tax purposes stemming from an overall good business practice. It then returns them to the holders. He explains that the company does not have the same people working every day as is the practice when large companies hire stevedores. That is the only reason he was seen in the possession of identity cards of some of the workers. He begged for excuse for any inconvenience and prejudice caused to anyone in the process.

[24] The Constitutional Court did not accept his explanations but found difficulty in linking the taking of the ID Cards with the elections. The Court found him culpable of giving money, food and drinks to the workers in order to influence them to refrain from voting at the election. We endorse that finding which constitutes a violation of s 51(3)(h) of the Act.

[25] As a statutory sanction, the Constitutional Court reported the matter to the Electoral Commission under s 45(4) of the Act where the reporting is mandatory on a finding of illegal practice.

[26] The Constitutional Court correctly saw that there was a need to draw a line in the sand as to what, in an electoral campaign, is permissible as freedom of expression and what is impermissible amounting to an illegal practice in terms of s 51 of the Elections Act. We fully endorse that view. We also understand their expressed qualms that none of the defendants pleaded for mitigation to enable the Court to exercise its discretion under s 45(4)(b). This section provides:

> (4) Where it appears to the Constitutional Court on an election petition –
>
> (a) that an act or omission of a candidate or the agent of a candidate or any other person, which, but for this section, would be an illegal practice under this Act, has been done or made in good faith through inadvertence or accidental miscalculation or some other reasonable cause of a like nature; or
>
> (b) that upon taking into account all the relevant circumstances it would be just that the candidate, agent of the candidate or the other person should not be subject to any of the consequences under this Act for such act or omission,
>
> the Court may make an order allowing the act or omission, which would otherwise be an illegal practice under this Act, to be an exception to this Act and the candidate, agent or other person shall not be subject to the consequences under this Act in respect of the act or omission and the result obtained by the candidate shall not, by reason only of that act or omission, be declared to be void.

[27] The defendants pleaded, through their affidavits, to be excused. The Constitutional Court was forthcoming. The Bench looked at the context in which they had acted in the light of the benefit which the section afforded them for non-reporting. The key question was whether they had acted in good faith. To the Judges, they had not. They were all in positions of authority. They had attempted to exert influence over the electors under their employ, command or supervision, during working hours. That was an aggravating factor.

[28] It is said that conviction is an easy matter. It is like falling off a log. But sentencing is like getting back your balance on the log after the fall. Sanctioning in electoral offences is no different. There arises a civic duty on every one of us to encourage a democratic process, to ensure a free and fair election, to encourage people to make informed choices through proper public debates and discussions before they take their decision to express their votes for who is going to govern them for the next electoral mandate. There arises a complementary civic duty that the stream of a primordial democratic exercise by the people of the people for the people is not corrupted by those who use demagoguery and stratagems, frauds and lies, dishonesty and disorderliness. The Constitutional Court underscores this concern.

[29] In their consideration of the sanction to be meted out, the Judges properly balanced themselves on the log. They took into account that the Court of Appeal had in a previous case where the complainant himself had been found to have been culpable of illegal practice had been spared the extreme sanction of reporting. In that case, the Constitutional Court had felt constrained by the law to report the matter to the Electoral Commission but it had not done so pending its appeal to this Court. Ultimately, this Court had decided that a report should not ensue, considering the

facts and circumstances of the acts complained of. The Constitutional Court duly commented upon the outcome in that case in its consideration of the sanction for this case as follows:

> If a potential leader of a country advised by senior counsel commits an illegal practice through "inadvertence or misapprehension of the law", who is to say that lesser mortals may not have done the same?

Law is blind to status: it treats the prince and the pauper alike.

[30] We are of the view that Dine and Roseline are entitled to benefit from the same final outcome of no reporting as had been the case of the complainant. What is sauce for the goose is sauce for the gander. However, the case of Lesperance is different. The illegal practice in the case of the former were by words committed through inadvertence or misapprehension of the law. In the case of the latter it was by physical acts and committed with deliberate intention to corrupt a democratic process. As was stated in the case of *Ringadoo v Jugnauth* [supra]:

> A candidate does not fall foul of our electoral law against bribery where he is selling so to speak government performance or electoral programme or party manifesto to attract votes. That is normal electoral campaigning. ... He will fall foul of the law when he is involved in buying votes: i.e. exchange vote for money or any other valuable considerations instead of using cogent arguments to influence the voters. There must be an element of bargaining and the corrupt motive will stand out so obviously from the facts.

[31] We take the view that while in the case of Major Dine and Colonel Clifford Roseline it would not be fair to report the illegal practice to the Electoral Commission for the purposes of removal of their names from the Register of Electors, the same indulgence could not apply to Lesperance. Such indulgences, however, should not apply to subsequent breaches.

[32] In the circumstances, we quash the finding of culpability in the case of Beryl Botsoie as well as the sanction imposed on her under s 45(7)(b) of the Elections Act. We uphold the finding of illegal practice under s 51(3)(j) of the Elections Act against Major Simon Dine and Colonel Clifford Roseline and quash the orders made under s 45(7)(b) in both their cases for reporting to the Electoral Commission. We uphold the finding of culpability and the sanction imposed under s 45(7)(b) of the Elections Act in the case of James Lesperance for reporting to the Electoral Commission.

[33] The appeal is otherwise dismissed with costs.

FANCHETTE v ESTICO

S Domah, A Fernando, J Msoffe JJA
21 April 2017 SCA 30/2014

Evidence – illegal search – aviation law

In *Estio v Fanchette* (2014) SLR 453 the respondents were awarded damages against the appellants for an illegal search. The appellants appealed.

JUDGMENT Appeal dismissed.

HELD
1 Consent to being searched does not exonerate officers of liability for the illegality of the search.
2 A citizen does not become a suspect by merely questioning the right of the police to do or not to do certain things where there is no other factor to arouse that suspicion.
3 Mere admissibility of some inadmissible evidence does not of itself make a decision partial.

Legislation
Constitution
Misuse of Drugs Act ss 17, 22

Foreign Cases
Beacon Insurance Company Ltd v Maharaj Bookstore Ltd [2015] UKPC 21
Shabaan bin Hussein v Chong Fook Kam [1970] AC 942 at 948
Sheriff v District Magistrate of Port Louis (1989) MR 260
Terry v Ohio 392 US 1 27 (1968)

S DOMAH JA

[1] In a civil claim lodged by the captain of an aircraft against drug enforcement officers and the Government of Seychelles which concerned the search of his residence, the Judge found that the search by the National Enforcement Agency ("the NDEA") was "a malicious act carried out in retaliation", not based on "reasonable/probable cause or reasonable suspicion". He accordingly, found for the respondent and ordered the 4 appellants jointly and *in solido* to pay R 325,000 in damages as follows: R 100,000 for unlawful entry and search; R 75,000 for breach of privacy; and R 150,000 as moral damages. This is an appeal against that finding of liability against the appellants.

[2] The appellants are respectively: Nichol Fanchette, a Senior NDEA Officer, who led the alleged illegal search; the National Drugs Enforcement Agency entrusted with the duty of enforcing drugs law; the Commissioner of Police which is the office and person responsible for law and order; and the Government of Seychelles.

[3] They have raised 11 grounds of appeal as follows:

1. The Learned Judge erred and failed to consider Section 22 and Section 17 of the Misuse of Drugs Act which gives power to the NDEA Agents to stop, board and search a vessel, aircraft, and/or search any person on vessel, aircraft or vehicle but went on the basis that there were no protocols, standing orders, or any other special instructions from the Air Seychelles Management or Civil Aviation Authority or Airport Security notifying or authorizing the Plaintiff to allow such searches inside the aircraft.
2. The Learned Judge wrongly inferred and based his finding that DWI has lost in translation to his superior about the fact that the dog was refused entry to the aircraft by the Plaintiff and that DWI found the refusal insulting.
3. The Learned Judge ignored and failed to consider and appreciate on the whole that the evidence of the Plaintiff and that of Mr Jose Benoiton DWI & Andy Cesar D W2, that the Plaintiff refused entry of the NDEA Agent with the dog, who is also an Agent, in the aircraft, that Plaintiff refused to permit checking of himself and his luggage at the customs, together with the backdrop of the letter dated 25th November 2011 would constitute reasonable suspicion. Whether the above conduct of the Plaintiff is of a prudent man and in such special circumstances the action of the Appellant to have decided at the NDEA office collectively to enter and search the Plaintiffs premises would constitute a malicious act.
4. The Learned Judge erred and failed to appreciate the evidence of the Plaintiff wherein he clearly stated that he consented to the NDEA agents enter his house and search the premises. In such an event whether such entry and search would constitute a fault, illegal, breach of privacy and the Appellant be liable for moral damages.
5. The Learned Judge completely ignored and failed to appreciate that the Plaintiff has failed to discharge the evidential burden of maliciousness from the evidence at hand.
6. The Learned Judge was biased in its appreciation of the evidence against the Appellant and further admitted the Newspaper article of Le Hebdo which the Plaintiff failed to prove that the report was released by the Appellants and that the Plaintiff was never identified in the said article.
7. The Learned Judge was completely in contradiction in his appreciation of the evidence stating that if the NDEA really had an suspicion on the Plaintiff they had sufficient time and earliest opportunity to search on the Plaintiff soon after he left the airport on his way back home but held against the Appellant and made the Appellant liable when the said search was done at his residence that vey afternoon, a little later, with the consent of the Plaintiff.
8. The Learned Judge was biased and failed to appreciate from the evidence on the whole that the dominant purpose of the Appellants was to not to cause any harm or intimidate, but to act in accordance with the law and on reasonable suspicion based on the conduct and actions of the Plaintiff

9. The Learned Judge completely misinterpreted and misconstrued the evidence of DWI stating the self provoked anger of DWI in being refused entry into the aircraft clouded his ability to see the genuineness and reasoning of the Plaintiff's refusal. Further the Learned Judge erred in arriving at a finding and also without any basis that the search was retaliation to the stance the Plaintiff took in denying access to the aircraft.
10. The Learned Judge erred and misconstrued the two grounds mentioned in paragraph 42 of the judgment with respect to the facts and circumstances of the present case as unreasonable inferences drawn from guesswork, non specific facts and equivocal circumstances.
11 The Learned Judge erred and totally failed to appreciate and apply the said relevant factors mentioned in paragraph 44 of judgement to the present facts and circumstances to carry out warrantless search, in any event entry & search was done with consent of Plaintiff.

[4] The respondent resists the appeal and supports the judgment of the Judge. Counsel for the respondent, in his written submission and before us, has subsumed Grounds 2, 3, 5, 7 and 9. On the other hand, counsel for the appellants has submitted on the grounds in the order raised. We take the view that this appeal would be conveniently dealt in the order raised by counsel for the respondent. We shall accordingly answer each of Grounds 1, 4, 6, 8, 10 and 11 in its own right; and Grounds 2, 3, 5, 7 and 9 together.

GROUND 1

[5] The appellant's contention under Ground 1 is that: (1) the Judge erred and failed in not considering that ss 22 and 17 of the Misuse of Drugs Act do give power to the NDEA agents to stop, board and search a vessel, aircraft, and/or search any person on vessel, aircraft or vehicle; and (2) the decision went on the basis that the appellants should have had some protocol, standing order, or any other special instruction from the Air Seychelles Management or Civil Aviation Authority or Airport Security for the purpose; and that since they did not have any, they were to blame.

[6] Our answer to the two arguments is as follows. As regards the power conferred by law of NDEA, this case is not about their power to enforce the laws of this country. It is about the manner in which it was exercised on the particular facts of the case. The respondent never challenged the NDEA as regards their power. He questioned them and stopped them when they paid scant regard to the rights of others when they purported to exercise their power.

[7] There cannot be any dispute about what prompted the afternoon search of the NDEA of the residence of respondent which formed the basis of the action. It had its origin in an incident in the morning at the airport when Air Seychelles arrived from South Africa. The NDEA chose to detail an officer to proceed to effect a random search of an aircraft with a sniffer dog at a time when the passengers were still disembarking. The captain was still in command. There was no "feu en la demeure". It was, for all intents and purposes, a random search. It was without warrant. It was then not based on any suspicion. The captain questioned the NDEA officer about the

timing when his passengers and crew had not fully disembarked. The NDEA officer traced back his steps with his dog. As it is, the NDEA had two logical options. The first was to time their entry with the dog until after the last passenger had stepped out of a plane and the captain had lost his jurisdiction over the aircraft. The second was to appraise the captain of their intended random search reconciling the powers of the Captain with those of the NDEA. The NDEA chose to do neither but opted for the illogical one.

[8] It is in this that the NDEA officers blundered in a case where it was not based on any reasonable suspicion. For the meaning of what is "reasonable suspicion", see below. For the present it suffices to know that it is not mere suspicion. The suspicion has to be reasonable. Reasonability should be based on facts and not on hunches: see *Shabaan Bin Hussein v Chong Fook Kam* [1970] AC 942 at 948.

[9] As regards the reference to protocols alluded to by the Judge, it is incorrect to say that his decision was taken on the basis that there was no protocol, standing order, or any
other special instruction from the Air Seychelles Management or Civil Aviation Authority or Airport Security. The Judge gave ten reasons for which he accepted the contention of the respondent, among which the absence of such prior arrangement between the key players was just one of them. The other reasons were: the captain on board is in command for the safety and security of passengers and the crew; the NDEA officer with the dog was walking up the steps while the passengers were alighting; the captain came to the door and told the officer that he is not supposed to do that; it was not a search on reasonable suspicion but one of the random searches agreed upon by some of the authorities where the respondent was not a party; the respondent had cleared the customs through the red channel; the NDEA did not raise any issue with the Head of Aviation Security on the matter; the respondent had been allowed to go home. Ground 1 is, accordingly, without substance and is dismissed.

GROUNDS 2, 3, 5, 7 AND 9

[10] Grounds 2, 3, 5, 7 and 9 relate again to the facts of the case and question the inference drawn from the facts by the Judge. Counsel for the respondent submits before us that the Judge wrongly inferred that the afternoon raid was a reprisal by the NDEA for the denied search entry into the aircraft by the respondent. These grounds argue that that conduct of the respondent together with his refusal to submit himself to the search of his bag amounted to a reasonable suspicion to justify the raid at his residence; that there was no maliciousness in the conduct of the NDEA officers, and that, in any case, the search at the residence had been effected with the consent of the respondent.

[11] This submission assumes that between the version of the respondent and that of the NDEA officers, it is the NDEA officers who have been, and are to be, believed. Counsel for the appellants relied on the words of the NDEA officers. The Judge relied, and rightly so, on the evidence given by the respondent which runs as follows:

> I gave instructions to deplane the aircraft and the passengers were disembarking. I was sitting in my sit (sic) in the cockpit. Looking on the left through the window, I could see the steps and I saw personnel in

> uniform with a dog walking up the steps. I told the 1st officer this is not something ... not supposed to happen. I left my seat and stood at the door and I asked the gentleman and told him he was not supposed to be boarding the aircraft with a dog whilst personnel are still on board and passengers are deplaning. He stood there before me. He told me he was coming to search the plane. I told him he could do his search but only after all the passengers have left the place but not at this stage.

[12] As against the above, we have the version of the NDEA Officer Jose Benoiton who was the witness directly implicated in the very source of the trouble. He was the dog handler who had been detailed to enter the aircraft with the dog. It was a random search. On the primary fact as to whether passengers were alighting or had already alighted, whether the respondent had refused him or simply questioned his timing, whether he correctly understood the legal situation between the rights of an aircraft captain and the authorities, his evidence was anything but credible. He was a classical confabulator as is evident from his deposition. A confabulator is a witness who keeps improving his story every time with lit-bits. After accepting that he had shown up at a time when the passengers were alighting, he began to add to that version. The reason for the refusal was no longer that the captain prevented him from carrying out the search but that he had stated that his dogs smell. Further pressed, he added another spice to his menu: that the dogs smell and spread fur in the place. That was not all. We have it in evidence that the report to Senior Officer Fanchette was that the reason for refusal was that it was a matter of a "dirty or filthy dog!". The question is what exactly was reported to Senior Officer Fanchette by Officer Benoiton? Did Senior Officer Fanchette query Officer Benoiton before accepting the latter's word for what happened between the latter and the captain? Obviously not.

[13] When Officer Benoiton explained his aborted search to his superiors, his version had been that he was encountering trouble. In the result, he did not resume his search further even after the passengers and crew had all alighted. So it is on the basis of such dubious hearsay of officer Jose Benoiton with some other innocuous events that the NDEA team of officers met to discuss and decide that the reasonable suspicion requirement of the law was satisfied.

[14] Searches in law are not done on the basis of mere allegations made, mere reports, mere information received, or questionable hearsay. They are made on credible information received. Even then the credible information should pass the test of reasonability. Clearly, when the NDEA officers met to discuss the matter before deciding to raid the residence of the captain, they relied on information that was anything but credible. At the same time, the suspicion was anything but reasonable.

[15] The evidence of the next witness, Officer Andy Cesar, was equally compromising of the case of NDEA. He was the leader of the search team. His evidence is characterized by convenient amnesia. He distinctly recalls all the elements which go to build the NDEA case against the respondent but does not recall any which goes to support the case for the respondent. The number of instances he says he does not recall facts is 14 times in cross-examination yet his examination in chief is parrot-like. He saw the respondent entering the airport terminal, going through the Red Channel but does not remember whether the captain had already been searched by the Customs. He recalled that the passport of the respondent was in his hand when it

came out in evidence that pilots do not use passports but a customized captain's travel document. Yet one answer he gave said it all: "the reason for us to conduct a search on Captain Estico was because he prevented our agent from doing his duty before". It was the appellants' witness who explained the link between the 1st incident at the airport and the third incident of the house search.

[16] The Head of Aviation Security, Officer Savory Khann, was quite clear that as long as passengers and crew are on the aircraft, the captain is the person in control. Any entry may only be done with his approbation. There are guidelines for cases such as hijacking, terrorist attack or security concerns when the captain, once put in the picture, just hands over the control to the authorities concerned. However, with respect to random searches for drugs, there is no such arrangement. That may only be effected on reasonable suspicion or with the captain's approbation when he is in charge.

[17] The nail in the coffin for the appellants' case was the evidence of Senior Officer Nichol Fanchette, responsible for general operations. To him, once the law has given the power to his officers to effect an entry, a search and seizure, that is it. There is nothing that stops them doing it. They do not need a search warrant. In evidence, we read the astounding attitude in the following statement of his:

> This happens to anybody. We do not get to choose houses, cars, vessels or anything for us to search. We do not have special time or special date to search anything. It all depends on the NDEA and nobody gets to tell us when to search or not to search.

While we can agree that, with such an attitude, the act of NDEA may not amount to maliciousness, the fact remains that it is plain abuse of powers and sheer reckless exercise of power flying in the case of the constitutional guarantees enshrined in the Constitution reducing all the fundamental freedoms and liberties to a mere black letter in a text. It is no answer that the dominant purpose of the search was not to cause any harm or intimidate but to act in accordance with the law. Plainly, they may have acted in accordance with the law but in defiance of the fundamental guarantees enshrined in the Constitution.

[18] The reason for the search of the residence of the respondent had no justifiable reason in law and stemmed from a misapprehension of the powers of the NDEA officers and the manner in which they should exercise their powers. There is no evidence that the search of the aircraft had revealed anything at all. The search of the bag of the respondent by the Customs had revealed nothing. The NDEA officers had come up with no other fact to support a case of reasonable suspicion that the respondent was implicated in a drugs affair. The credibility of the officers who had reported the 1st incident in the morning had not been subjected to proper scrutiny before the decision was taken to carry out the house raid. If the search of the aircraft was a random search, never ever completed, what was the reason behind the raid of the residence? There is no answer to this.

[19] The evidence clearly showed that the objection of the respondent was not with regard to the NDEA Officers embarking. It was the timing of the raid. As we stated earlier, the captain was correct in his attitude as captain to ensure the security of his

passengers who were still alighting. To embark into the aircraft with a dog at this time was mistimed strategy. Short of reasonable suspicion, the NDEA officers should reconcile their rights with those of the others in the context in which they operate. The NDEA officers were wrong in not having reconciled the power of the captain with their own powers before undertaking the random search and equating the captain's use of his authority with a refusal by him to co-operate in the entry and search. The conduct of the raid of the residence of the respondent was done on a clear misapprehension of the extent of their powers and a reliance on unchecked hearsay of officers. Whoever took the decision to call off the search midway must have realized the illegality and the senselessness in it.

[20] The appellants have raised the status of the dog to being an agent of the NDEA. That is a flight of fancy. The least said about it the best. Grounds 2, 3, 5, 7 and 9 have no merits.

GROUND 4

[21] The next question is whether the consent of the appellant to the NDEA agents entering his house and searching the premises would constitute a fault, illegal, breach of privacy rendering the appellants liable for moral damages.

[22] First, this was a case of continuing illegality. It started well before the arrival at the residence when the captain's consent was given at gun-point so to speak. The illegal raid was an extension of the earlier untimely search of the aircraft with a sniffer doo while the passengers were still disembarking. The extended illegality started when the NDEA Officers decided to conduct the raid on the residence of the respondent on an earlier discredited suspicion. If all the suspicions had been dispelled at the time the respondent left the airport, a decision to search the residence which was never in the original plan lacked a legal basis. The fact that he gave consent to his house being searched does not exonerate the NDEA Officers from liability. The respondent had no choice. Consent to being searched does not exonerate the officers of their liability for their illegality.

[23] Was the raid malicious? We may go as far as saying that it may well be that there was overzealousness instead of maliciousness from the NDEA officers who had just received a briefing for undertaking a robust strategy in the enforcement of drugs law. But it was illegal, not based on reasonable suspicion but on lack of it. From the moment the suspicion of the NDEA officers has been discredited with respect to the aircraft of which the respondent was the captain, the search of the residence made no sense in the absence of more information regarding his involvement. That the NDEA was malicious is a conclusion that could be reasonably reached, even if some may regard it as a pure excés de zèle by the NDEA officers rather than malice. But we are ill-placed as an appellate court relying on a mere transcript to decide otherwise when the Judge who heard the case and saw the witnesses deposing with the tone of their answers and attitudes to the questions was in a privileged position to detect maliciousness or lack of it. We may here refer to the case of *Beacon Insurance Company Ltd v Maharaj Bookstore Ltd* [2015] UKPC 21 which considers that such matters of impressions are best left to the trial judge. "The boundary between an

incompetent mistake and a lie may be a matter of impression which is usually best left to the trial judge who sees the witness give evidence". If that is so with mistakes and lies, that will be so *a fortiori* with maliciousness. The evidence of abusive use of power was all too evident.

[24] Did the Judge contradict himself in his appreciation of the evidence when he stated that if the NDEA really had a suspicion about the respondent, they had sufficient time and earlier opportunity to search the respondent soon after he left the airport on his way back home?

[25] The short answer to this ground is that the Judge was only being conditional. As such, he was not contradictory. He was making a point that if there was any suspicion on the respondent at all, they would not have allowed him to go unsearched. There is no contradiction in the finding but plain common sense. A citizen does not become a suspect by merely questioning the right of the police to do or not to do certain things and there is no other factor to arouse that suspicion. Where the NDEA cannot make him a suspect in such circumstances it is using its powers under the law abusively which should lead to liability of the NDEA.

[26] Counsel for the respondent referred us to the Mauritian case of *Sheriff v District Magistrate of Port Louis* (1989) MR 260. The following proposition becomes apt in the present case:

> … the basis of the involvement of the suspect must reveal more than a mere hunch on the part of the Police, and this whether the arresting officer of his own volition harbours suspicion towards the suspect or whether it is provoked by a witness or an informant. Were it otherwise, any citizen of this country might run the risk of falling a prey to blackmailers or those who can be made to level charges against anybody according to their whims and caprices.

[27] We would expand on that to state where reasonable suspicion is aroused by information reported, the information should be tested for its credibility. Reasonable suspicion cannot be based on mere incredulous information but on facts. That is the reason for which police officers look for a warrant of search from a judicial officer so that the judicial officers may look at the credibility of the information before he or she issues a warrant. The decision to arrest someone or to search his residence, if based on information given whether by agents themselves or members public and if done without (hat judicial screening of a warrant, should be subjected to proper scrutiny by Senior Officers before the police act on it. In this case, the words of officers Benoiton and Cesar on which the decision was made by the team to carry out the raid was accepted without up-front in-house scrutiny. To bolster their case, the NDEA officers misrepresented the respondent as an arrogant captain who had dared challenge NDEA Officers in the exercise of their duties. The NDEA Officers had to build up a case to justify themselves. But bad coins do not cease ringing false, wherever and whenever they fall.

[28] In this case, the NDEA regarded the respondent as a suspect simply because he was exercising his rights under the law. If Mr Fanchette seems to think that they did not need a search warrant to search the house and the power given by ss 22 and 17

was sufficient warrant under the law, then we are seriously concerned as to the manner in which the NDEA administers law in our jurisdiction. Reasonable suspicion is more than an "inchoate and unparticularised suspicion or 'hunch'". It must be based on "specific and articulable facts" "taken together with rational inferences from those facts" (see *Terry v Ohio* 392 US 1 27 (1968) and the suspicion must be associated with the specific individual and not with any extraneous societal climate prevailing at any one time. Balance between the rights of citizens and the power of the police is essential for a free and civilized society, and one aspect of this balance is the requirement that the police have a genuine reason to look before conducting a search of a person or place. We lay emphasis on the word "genuine".

[29] In *Hussein v Chong Fook Kam* [1970] AC 942, Lord Devlin observed:

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end" [at 948]. And reasonable suspicion is the intermediate stage between.

[30] From the practical point of view, we found the following excerpt from the Manual of the Nottingham Police helpful:

> Searching a person must never be used as a control measure. You must have an honestly-held belief that you WILL find evidence of a specific offence.

GROUND 6

[31] It is the case appellants under Ground 6 that the Judge was biased in his appreciation of evidence. However, the alleged bias remains unsubstantiated. The only fact put forward in the alleged partiality is that he admitted an inadmissible item of evidence: namely, Le Hebdo which did not make any reference to the respondent. Nor was it shown that the raids were disseminated by the appellants.

[32] The appellants needed to do more than just adumbrate that the Judge was biased. On the question of admissibility of the newspaper report, the Judge did not rely on that report to make any finding. Mere admissibility of something inadmissible does not of itself make a decision partial. The appellants needed to show how the admissibility was related to the partiality. This ground lacks merit equally. It is dismissed.

GROUND 8

[33] Under Ground 8, the appellants submit that the Judge was biased and failed to appreciate from the evidence on the whole that the dominant purpose of the appellants was to not to cause any harm or intimidate, but to act in accordance with the law and on reasonable suspicion based on the conduct and actions of the plaintiff.

[34] It may well be that the Judge went too far in seeing malice and failing to appreciate that the appellants were only involved in doing their duties under the law. But the fact remains that: (1) they were entering the aircraft with a sniffer dog at a time when the passengers were disembarking; (2) they raided the residence of the respondent as an afterthought and, by that token, without any factual basis which could have justified the legal requirement of justifiable cause. The conduct and actions of the respondent could not have formed the basis of a suspicion which was reasonable but unreasonable. As captain still in charge of the aircraft, the respondent had the right to question the unannounced entry into his aircraft of the NDEA officer with a sniffer dog.

GROUND 10

[35] Under Ground 10, the appellants submit that the Judge erred and misconstrued the two grounds mentioned in para 42 of the judgment with respect to the facts and circumstances present case as unreasonable inferences drawn from guesswork, non-specific facts and equivocal circumstances.

[36] True it is that in a judgment, any conclusion reached by a court of law should be based on findings of facts ascertained by admissible evidence. No conclusion may be arrived at from guesswork, non-specific facts and equivocal circumstances. The question in this case is whether the conclusion of illegality in this case was reached by guesswork, non-specific facts and equivocal circumstances. We would not say so. The entry into the aircraft at an untimely moment was a fact. The negative result of the search of the captain was a fact. The ill-advised decision to search the house was a fact. The misapprehension of, and misreporting by, Officer Benoiton was a fact. For none of these actions, was it at all shown that either the aircraft was under suspicion of carrying drugs or the captain was; the same for his residence. The abuse of power was based on facts in evidence. The suspicion lacked real factual basis to amount to reasonable suspicion for a raid to be done without a judicial warrant.

GROUND 11

[37] Ground 11 argues the case of the NDEA officers that the house search was done with the consent of the respondent. It also questions the trial court's application of its own reasoning to the facts of this case.

[38] The short answer to this ground is that consent to illegality does not negate illegality: see *Sheriff v District Magistrate of Port Louis* [supra]. As regards the applicability of the 4 reasons set down in paragraph 44, the most important reason has been missed out by the learned Judge. It is credibility of the information on which police should act. Police are not the stooges of informers. The information of NDEA officer Benoiton was relied on by the Senior Officers without a check on its reliability or credibility. NDEA is not a pocket in the democratic society of the Republic of Seychelles. It is part of that society. Ground 11 is dismissed.

CONCLUSION

[39] All the grounds having failed, we dismiss the appeal with costs. We note that there has been no appeal on the quantum. Accordingly, we shall not interfere with the damages as awarded by the Judge.

[40] We would recommend the proper training for Authorities not so much on their powers which are self-evident but on the manner in which these powers need to be exercised, with regard to the rights of others. A policeman is by original definition no more than a citizen in uniform. Police lose respect when they do not respect others. Disrespect breeds arrogance and arrogance in the exercise of power is counter-productive. This case is a clear example of such a counter-productive result. It is not contradictory to state that police powers are to be used with regard to the rights of the others in a context. The exercise of one's rights with due regard to the rights of others is a constitutional imperative in a democratic society such as ours. Any mind-set other than that is insidious.

[41] Our valuable officers need that change in mind-set. Their strategy of robust, visible and vigilant measures to combat drug trafficking and drug proliferation in Seychelles is to be enhanced to a higher level of action: intervention with due regard to the fundamental rights and freedoms of the individual. Police, and NDEA officers for that matter, have a difficult job to do but it would be more difficult if their actions focus on the exercise of their power without due regard to the rights of others in any context. Unbridled power is synonymous with autocracy in a democracy.

FREGATE ISLAND PRIVATE LTD v DF PROJECT PROPERTIES

F MacGregor (PCA), S Domah, M Twomey JJA
21 April 2017 CC 29/2014; SCA MA 4/2016

Private international law – enforcement of foreign judgment – provisional seizure and attachment – interlocutory ruling – special leave to appeal

The respondent sought a declaration that the orders of the Regional High Court of Düsseldorf, Germany regarding an arbitral award against the applicant were enforceable in Seychelles. The respondent was subsequently granted an order for provisional seizure and attachment of the applicant's moveable assets in Seychelles. The applicant applied for leave to appeal against that interlocutory order but was refused.

JUDGMENT Special leave to appeal granted.

HELD
The reasons for granting an appeal from an interlocutory order must be such that not to grant the order would offend the principle of a fair hearing under the Constitution.

Legislation
Courts Act, s 12

Cases
EME Management Services Ltd v Islands Development Co Ltd (2008-2009) SCAR 183
Gangadoo v Cable and Wireless (2013) SLR 317

Counsel D Sabino for applicant
B Hoareau for respondent

M TWOMEY JA

[1] The respondent filed a plaint in the Supreme Court in which it seeks a declaration that certain orders of the Regional High Court of Düsseldorf, Germany enforcing an arbitral award in Germany against the applicant is enforceable and executory in Seychelles.

[2] Subsequent to the filing of this suit in Seychelles, the respondent applied for and was granted an order for provisional seizure and attachment of the applicant's movable assets namely attachment of funds belonging to the applicant in bank accounts at Barclays Bank, Seychelles Ltd, Seychelles International Mercantile Banking Corporation and the Mauritian Commercial Bank and other movable assets including sea vessels on 6 November 2015.

[3] The case before the Supreme Court of Seychelles awaits completion with closing submissions of the parties due in June 2017.

[4] This matter being interlocutory, the applicant sought leave from the trial judge,

Robinson J, to appeal against the said decision which application was refused.

[5] The applicant by virtue of the provisions of s 12 of the Courts Act now applies to this Court for leave to appeal against the interlocutory ruling given by Robinson J.

[6] Section 12 provides in relevant part:

> 2. (1) Subject as otherwise provided in this Act or in any other law, the Court of Appeal shall, in civil matters, have jurisdiction to hear and determine appeals from any judgement or order of the Supreme Court given or made in its original or appellate jurisdiction.
>
> (2) (a) In civil matters no appeal shall lie as of right –
>
> (i) from any interlocutory judgment or order of the Supreme Court.
>
> …
>
> (b) In any such cases as aforesaid the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.
>
> (c) Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.

[7] The leading authority on special leave to appeal before the Court of Appeal is the case of *EME Management Services Ltd v Islands Development Co Ltd* (2008-2009) SCAR 183, in which it was decided that before special leave to appeal was granted, the Court had to be satisfied that the interlocutory judgment disposed so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision; and there were grounds for treating the case as an exceptional one. The Court also added that to treat a case as exceptional, the applicant had to show that the interlocutory order was manifestly wrong and irreparable loss would be caused to it if the case proper were to proceed without the interlocutory order being corrected.

[8] Further, in *Gangadoo v Cable and Wireless* (2013) SLR 3 17, this Court after a survey of cases involving applications for special leave to appeal interlocutory orders and stated –

> The words "special leave" have been used with a purpose, namely in this situation the Court of Appeal is being called upon to exercise its jurisdiction in a matter where no appeal lies as of right but also interferes with the exercise of discretion by the Supreme Court in refusing to grant leave to appeal... "special leave" should therefore be granted only where there are exceptional reasons for doing so, or in view of reasons which may not have been in the knowledge of the applicant at the time leave to appeal was sought from the Supreme Court or for reasons that supervened after the refusal to grant leave by the Supreme Court. The reasons before the Court should be such that the non-granting of "special leave" by this Court is likely to offend the principle of fair hearing enunciated in the Constitution. In this regard it is to be noted that an appeal against an

> interlocutory judgment or order has a tendency to delay the main action and contravene the rights of a person to a fair hearing within a reasonable time as stipulated by art 19(7) of the Constitution.

[9] It is clear that for this Court to exercise its discretion the applicant must show exceptional reason that leave should be granted. The appellant has supported his application with an affidavit and attached draft grounds of appeal. In his averments he depones that the judge erred in both law and fact and believes that the intended appeal discloses important issues relating inter alia to the law concerning provisional seizures in which the court would be invited to consider the draconian effects of such orders and pronounce on them to the advantage of the public.

[10] The draft grounds of appeal disclose the said draconian measures referred to, namely the fact that the attachment of all the applicant's movable assets hamper the applicant's hotel operation and could lead to its closure.

[11] In the course of the hearing of the application we expressed the view that the effects of the order did indeed seem harsh and we indicated that it might be proper to impose other means of security for the respondent. The respondent stated that it would accept a banker's guarantee. The applicant indicated that this would not be acceptable. That is regrettable as it may at this juncture have concluded matters on this issue.

[12] We have also indicated that were we to grant leave, this matter would still not be expeditiously concluded given the fact that the appeal was still not before the court and that the session for hearings before this court would be next August after the judge had disposed of the entire case.

[13] We note with further dismay that, despite a practice direction by the Chief Justice indicating that commercial cases should be completed within six months, this matter begun on 26 September 2014 is still not completed while all the applicant's movable assets including all its accounts have been seized, no doubt crippling its operations.

[14] Given all the above circumstances and the authorities on special leave, we exceptionally grant special leave to appeal the decision of the judge regarding provisional seizure.