

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) ,A.Fernando (J.A) ,J. Msoffe (J.A)]

Civil Appeal SCA 26/2014 (Appeal from Supreme Court Decision CS 112/2011)

Commercial House One (Seychelles) Ltd

Appellant

Versus

Eden Island Development Company
(Seychelles) Ltd

Respondent No. 1

Superyacht Services (Seychelles) Ltd

Respondent No. 2

Heard: 11 April 2017

Counsel: Mr. Serge Rouillon for Appellant
Mr. Kieran Shah for 1st Respondent
Mr. Conrad Lablache for 2nd Respondent

Delivered: 21 April 2017

JUDGMENT

S. Domah (J.A)

[1] This is an appeal from the decision of the learned Judge of the Supreme Court who dismissed an action of permanent injunction and damages by the lessee company (“the appellant”) of a parcel in Eden Island which sought orders for the exclusive use of some adjoining facilities comprised in a marina stated to be attached to his lease and for stopping the owners of the marina from trespassing on his rights. The claim was based on a clause in the contract which provided that to the property of the appellant was attached existing and future constructions, including floating pontoons, moorings, berths, and quays and marinas.

The learned judge who heard the hotly disputed matter also relied on a *locus in quo* to decide that the floating pontoon, the moorings, berths, quays and marinas were not physically attached to the land of the appellant and he dismissed the action.

THE FACTS

- [2] The facts as may be gleaned from the documents produced and the judgment are as follows. Around the year 2005, Government decided to develop an area of land, parcel V12514, belonging to Government later to be referred to and called as Eden Island. Respondent No.1 was the one who negotiated the terms and conditions. The development took place in phases so that at each time, the contract had to be added on: First Addendum in February 2005 and Second Addendum September 2005. With the agreement of Government, parcel V12514 was subdivided into 4 parcels: V12707, V12708, V12709, V12710 meant to be leased to potential lease-holders. It is Respondent No. 1 who took the lease of all the four plots and, in course of time, transferred V12708 to the Appellant. The date of the conclusion of the contract is February 2007. It is between the Government of Seychelles and the Appellant. At that time, no marina had been constructed. There was only the rock revetment retaining V12708. The boardwalk and the moorings were constructed to link the marina which came later to the parcels in Eden Island.
- [3] The drawings and the plans show that the development concept was one of an integrated, self-contained, purpose-built, up-market commercial-cum-residential complex. The parcel leased to the Appellant by the Government is V12708 of a surface area of 1238m². The parties at the time apart from the commercial component intended to include a marina as a component of the complex. Use of same could only be done with accessories such as floating pontoons, moorings, berths, and quays which in turn had to be fixed to the sea-bed. Accordingly, the parcels remain mutually interdependent both as regards use of the private spaces and public spaces. Indeed, parcel V12708 accommodates a Utilities Board which serves the marina.
- [4] The Lease Agreement between the appellant company and the Government of the Republic of Seychelles contains a Clause (“Demise Clause”), the relevant part of which for our purposes reads as follows:

“... the Republic of Seychelles hereby leases to the Lessee land comprised in the above mentioned title ... together with any existing or future erections, buildings, structures or works situated thereon or attached thereto including all floating pontoons, moorings, berths, quays or marina(s), if any, .. for a term of ninety-nine (99) years ..”

- [5] The marina which today comprises floating pontoons, moorings, berths, and quays had been planned by the Respondent no. 1 as original negotiator and developer of Eden Island Project and was completed only phase by phase with resources neither from Government nor from the Appellant.

THE DISPUTE BEFORE THE TRIAL COURT

- [6] The case of the Appellant company before the Court below was that he has exclusive right to use the marina comprising the floating pontoons, moorings, berths, and quays and marinas. The case of Respondent no. 1 was that the marina with its paraphernalia was never meant to be part of parcel V12708 to the exclusion of others. It had entered into a separate agreement with the Government to construct and exploit the marina with its water related facilities. Its stand is that, since the facilities had not been built by Government, they cannot inure to the benefit of the Appellant under a contract which was between Government and Appellant. That also is the case of Respondent No. 2 which is the company that is exploiting the marina under a separate agreement between itself and Respondent No. 1.
- [7] The core issue on the merits of the claim of the Appellant was the interpretation to be given to the term: “attached thereto.” In other words, if the Court held that “the floating pontoons, moorings, berths, and quays and marinas” were attached to Parcel V12708, the appellant was to succeed in its claim that the floating pontoons, moorings, berths, and quays and marinas were actually meant for his use and exploitation. On the other hand, if the Court held that it was not attached from Parcel V12708, then the case would have gone in favour of the Respondents.
- [8] Both parties decided that the intervention of a court-appointed surveyor with a specific mandate was necessary to undertake a visit and report back. Surveyor Alain Savy appointed to that effect did repair to the spot and produce a report. His view was that the

floating pontoons, moorings, berths, and quays and marinas could not be said to be physically attached to Parcel 12708.

- [9] The learned Judge after hearing the evidence from both sides, examining the relevant documents produced, mostly irrelevant to the real issue but relating to the history of the relationship between the parties, and having effected a visit to the locus in quo, came to the conclusion that “the pontoon is clearly situated outside the boundaries of the land leased” to the Appellant. He, therefore, declined the order prayed for by the Appellant for a permanent injunction preventing Respondent No. 1 and Respondent No. 2 trespassing on what Appellant regarded as intended for his exclusive use.

GROUND OF APPEAL

- [10] The appellant company raised the following grounds of appeal against the judgment of the trial judge.

1. *The Learned Trial Judge erred in his finding that the pontoon was not attached to the Appellant’s land (V12708) in that, in doing so:*
 - a. *He failed to consider the clear evidence of the expert witness Martin that the concrete beams and other works to which the ramp was fixed was partly constructed (on the basis of the first Respondent’s own drawing) on the said parcel and this includes ‘existing or future erections, buildings structures or works situated thereon or attached hereto’;*
 - b. *He failed to consider the positioning of the structures or works situated thereon r attached thereto and that the entrance to the ramp was directly in front of and partly built on the said parcel, and contented herself with the fallacious notion that the pontoon was only secured by a pile in the sea;*
 - c. *He failed to consider the evidence of the witness Heeger and the communication form the lawyers representing the first Respondent that the floating pontoon was ‘attached’ to the said parcel;*
 - d. *He failed to give sufficient weight to the fact that part of the marina was an orphan from the rest of the integrated marina and that this therefore raised a presumption that par of the marina was not to be treated as the rest and in consequence could evidence the intention of the parties that it should form part of the lease of the sad parcel V12708;*
 - e. *He failed to take note of the fact that the floating pontoon in dispute is depicted on all the drawings and concepts of the total development, hence investing it with the nature and intention of a more permanent fixture evidencing the original parties’ respective intentions according to the lease.*
2. *The Learned Trial Judge erred in never attempting to consider, if the pontoon was not part of the Appellant’s parcel V12708, whey the lease of the said parcel would*

have contained reference to ‘existing or future erections, buildings structures or works situated thereon or attached thereto including floating pontoons, moorings, berths, quays or marinas’.

3. *The Learned Trial Judge erred in not considering that the first Respondent, when transferring parcel V12708, had made no reservation of the pontoon despite the clear description of ‘demised premises’ therein to include pontoons, and the Appellant points to that lack of reservation as evidence of the intention of the then parties to the lease to transfer the parcel including ‘floating pontoons, moorings, berths, quays or marinas’.*
4. *The Learned Trial Judge erred in failing to distinguish between ownership of the pontoon (which may have remained in the second Respondent and/or the Government) and possession thereof (which could have been vested in the Appellant by virtue of the lease).*
5. *The Learned judge erred in failing to discern between the complete evidence regarding the full meaning of the lease conditions, namely to include the agreed terms of looking at existing or future erections, buildings structures of works situated thereon or attached thereto including floating pontoons, moorings, berths, quays or marinas, and chose to limit himself to the simple idea of the connecting ramp.*
6. *In his finding at paragraph 36 of the judgment that the installing on parcel V12708 of the utilities supplying the pontoon did not amount to an attachment of this to the parcel, the Learned Trial Judge failed to consider (i) that the utilities supplied were not through a grant of easement and (ii) that the distribution board for utilities supplying the pontoon is firmly located on the parcel.*

[11] It is worth noting that this appeal is basically a challenge on the facts, even if some issues of mixed law and facts have been raised. Parties have made exhaustive submissions.

[12] The Appellant in his Skeleton Heads of Argument has raised 86 points of law and facts. At the hearing, he invited the Court to consider the case of **Elitestone Ltd v Morris & Anor [1997] 1 WLR 687** which distinguishes the case of **Webb v Frank Bevis Ltd [1940] 1 A.E.R 247** relied on by the learned judge in his judgment. Respondent no. 1, for his part, has made 125 points in support of the judgment of the learned Judge. Respondent No. 2 has submitted on the Grounds of the Appeal in the order in which they have been raised. We need not recite them. We had rather proceed to deal with the real issue between the parties with some essential comments on the related points as raised in the Grounds as and when necessary.

THE APPELLANT'S CASE

- [13] The core issue in this appeal is whether the pontoon links the marina to V12708 in such a manner as to constitute an attachment as per the Demise Clause. The appellant relies on the evidence of the expert witness Martin that the concrete beams and other works to which the ramp was fixed was partly constructed, on the basis of the first Respondent's own drawing, on the said parcel. In appellant's view, there is no running away from the fact that the Demise Clause states so plainly that V12708 includes 'existing or future erections, buildings structures or works situated thereon or attached hereto.' The appellant refers to the positioning of the structures or works situated thereon which are attached to V12708. It refers to the entrance to the ramp which is directly in front of, and partly built on, the said parcel. It relies on the evidence of the witness Heeger and the communication from the lawyers representing the Respondent No. 1 that the floating pontoon was 'attached' to the said parcel. It argues that part of the marina is an orphan from the rest of the integrated marina which goes on to show that that part of the marina was not to be treated as the rest but as evidence that it should form part of the lease of the said parcel V12708. It further refers to all the drawings and concepts of the total development which shows the attachment of the pontoon as an intended permanent fixture of the leased property.
- [14] The appellant recites the history of the relationship between the parties which according to him, show the bad faith of the Respondent No. 1. On the central issue of attachment, it is its case that the extensive concrete and metal structure extending deep under the leased premises for the support of the marina and pontoons as shown in the Engineering drawings and the photographs demonstrate the homogeneous permanent nature of the whole marina. The pontoon is anchored to V12708. The appellant also argues that the concrete structure supporting the ramp including the supports for the pontoon was moved several metres away from the demised premises while the matter was *sub judice*.
- [15] The appellant challenges the independence of the Report of Surveyor Savy in that the Report in that it had gone beyond its mandate. It was meant to show the boundaries of V12708, any building or construction on it, the position of the boardwalks and pillars, the pontoons, the rock armouring and the wall. But it had gone beyond. The Appellant questioned even witness Savy's impartiality in that he had previously worked for

Respondent No. 1. He even suspected a collusion between him and Respondents evidenced by the timing at which the pontoon was moved beyond its original position. Learned counsel for the Appellant submitted additionally that the Report chose to focus on whether the ramp leading down to the pontoon is attached to the demised premises or not, when that was not the purpose.

- [16] Learned counsel further submitted that the learned Judge had relied on the old authority of **Webb v Frank Bevis Ltd [1940] 1 A.E.R 247** but that the later case of **Elitestone Ltd v Morris & Anor [1997] 1 WLR 687** was more apposite. In his view, the marina has become the property of the Government presently leased out to the Appellant. The appellant further questions as to what could have been the reason for which Appellant's parcel V12708 contained reference to 'existing or future erections, buildings structures or works situated thereon or attached thereto including floating pontoons, moorings, berths, quays or marinas when no one intended it to be so attached. It further pointed out that in the transfer effected by Respondent No. 1, the latter had made no reservation with regard to the content of this Clause.

THE CASE OF RESPONDENT NO. 1

- [17] Respondent No. 1 has submitted that the findings of the learned Judge may not be disturbed in the light of the fact that he had visited the site, heard the testimonies of witnesses and relied on the report of the court-appointed Surveyor. The learned Judge had found as a matter of fact that the pontoon was situated outside the boundaries of the land leased to the appellant. There is clear evidence that the ramp is outside the property of Appellant and the pylons are not attached. That determination was sufficient, in the submission of Respondent No.1 to dispose the case in its entirety. However, he went further and gave additional reasons for same. Learned counsel for Respondent no. 1 identifies those additional reasons and adds his own. In the submission of learned counsel, the appellant had not shown possession of the marina before claiming trespass thereon, had not shown his right to exclusive use of the marina, had not constructed the marina, had grounded his action of injunction devoid of the necessary elements that go with such an action, has been guilty of laches in claiming his alleged right. Had it constructed the

marina, its action may have been well grounded but neither it nor the government from which it holds the lease constructed the marina nor owns it.

[18] With respect to the depositions, learned counsel's submission has been that the Respondent's witnesses were more knowledgeable about the facts than Appellant's witnesses some of them having lived through the phased development as it took place. Respondents' witnesses - Heeger, Captain Hoareau, Dijkstra and Savy - had probative weight as compared to those of Appellant's witnesses Donalson and Martin. Mr Donalson did not have personal knowledge of events and Mr Martin showed himself as an interested expert witness.

[19] With respect to the Demise Clause, learned counsel for Respondent No. 1 showed that the Demise Clause is common to the other four leases. The marina does not form part of the disputed properties but are part of the ocean-based facilities offered to the lessees of the various parcels.

[20] To the Respondents, there cannot be any sensible talk about the marina being attached to the land. The structure comprising the marina is independent V12708: the pylons are in the sea, the ramp is in the sea, the sea wall steadied by bolts runs outside the survey boundaries of the land parcel of Appellant. The point at which the jetty is fixed to the sea wall is 0,43m at its closet to the boundary line and the sea-wall with the pylons to which the floating pontoon are attached in no way attached to land as such.

[21] In his submission before us, Learned counsel for the Respondent No. 1 referred to the following cases: **Patel v WHSmith (Eziot) Ltd [1987] 2 All ER 569; Portlands Management Ltd v Harte & Others [1976] 1 All ER 225; Shburn v Whitlock (1865) L.R 1, Q.B. 1; Air Seychelles v Seychelles Avation Authority (SC Civ 220 of 2008; London Borough of Hounslow v Twickenham Garden Developments Ltd [1970] # All ER 326; Redland Bricks Ltd v Morris and Anor [1969] 2 All ER 576; Fowley Marine (Emsworth Ltd v Gafford [1968] 1 All ER 979; J.A Pye (Oxford) Ltd and Others v Graham and Another [2002] 3 All ER 865; Shaw and Another v Applegate [1978] 1 All ER 123; Habib Bank Ltd v Habib Bank AG Zurich [1981] 2 All ER 650; National Justice Compania Naviera SA v Prudential Assurance Co. Ltd [1993] 2 Lloyd's**

Report. To learned counsel for the Appellants, these cases stood good for the principles they laid down but their applicability to the case in hand was questionable. He produced a 3-page document where he had analyzed the relevance or otherwise of the cases referred to. We need not labour on this aspect of the applicable law. Their value lies in having refreshed us on the elementary principles in relation to respective contention of parties.

CASE OF RESPONDENT NO. 2

[22] Respondent No. 2, in its submission, relies, inter alia, on the evidence of Surveyor Savy. He argues privity of contract and cites the case of **Vijay Construction & Anor v Aluminium Steel SCA 2 of 2002** to submit that its company is not bound by the contract entered into between the Appellant and the Government. It also adds that the passing of the utilities easements through parcel V12708 arises by virtue of the Public Utilities Corporation (Miscellaneous) Regulations (S.I. 26 of 1986) as well as the lease agreement itself which reserves a number of easements such as conveyance of water and electricity through the parcel in favour of other parcels and the marina.

OUR EVALUATION OF THE APPEAL

[23] The outcome of this appeal, in our view, rests on three factors: (1) are we in a position to overturn, on the basis of A transcript, the findings of fact of the learned Judge who heard the witnesses in the case viva voce and proceeded to a locus visit to have a *de visu* appreciation of the evidence? This we may not do unless the appellant showed us that the conclusion of the learned Judge was unwarranted on the facts as he found them. The Judicial Committee of the Privy Council cautioned Appellate jurisdictions to reach conclusions based on facts. The Law Lords decided in the case of **Beacon Insurance Co. Ltd v Maharaj Bookstore Ltd [2014] UKPC 21** that the intervention of an Appellate Court in a judgment based on the findings of fact of a trial court should be limited even if not ousted. The Court of Appeal should consider “whether it had been permissible for the judge at first instance to have made the findings of fact which he had made in the face of the evidence as a whole.” Reversing a trial judge’s findings of primary facts would be rare but permissible only where the conclusion was one which there is no evidence to support,

or which was based on a misunderstanding of the evidence, or which no reasonable judge would have reached.

[24] An appellate jurisdiction needs to be mindful of the caution and the temptation to decide a case relying on a two-dimensional black and white transcript when the trial judge has heard it in real life and in a third dimension: see **Beacon Insurance Co. Ltd.** We are unable to see how the decision of the learned Judge in this case may be reversed. If at all the evidence of the court-appointed witness on the primary facts of the case had flaws, the fact remains that the learned Judge relied also on his *de visu* appraisal through a locus visit. He relied on the evidence of witnesses Heeger, Hoareau, Dijkstra and Savy who carried more probative weight than witness Donalson and Martin. Witness Donalson did not have personal knowledge of events and witness Martin was questionably an impartial expert witness.

[25] That leaves us with the questions of law. There is merit in the submission of the Respondents that we are here concerned with the interpretation to be given to a lease granted by the Government of the Republic to the Appellant. Whether or not the Respondents in their various capacities were concerned with the conclusion of the Lease Agreement, one fact is undeniable. It is Government which is a party to the Agreement which contains the Demise Clause. An elementary rule of procedure required that Government should have been made a party to the case. Government then could have explained whether the Demise Clause was meant for the exclusive use of the plot of V12708 or was meant to be of shared use with the lessees of the other parcels. In the absence of the real party to the Agreement, the version of the Appellant stands but on his word, apart from the fact that it does not represent the reality at the grass-roots. The facts show that the Demise Clause was no more than the grant of an easement.

[26] Indeed, the case has been fought on the basis of the literal meaning of attachment of property V12708 to the other infrastructure such as floating pontoons, moorings, berths, quays or marinas. The totality of the evidence suggests that the word “attach” in the Demise Clause was used in the legal sense. We are not speaking here to moveable properties where one movable is attached or annexed to the other such as a yacht attached to its mooring or a document attached or annexed to another. We here concerned with

immovable properties where the word “attach” carries the technical legal meaning obtaining in easements. Where a dominant tenement is served by a servient tenement, we say that the easement is attached to the dominant tenement. That is the manner in which the word “attach” and the term “attached thereto” in the Demise Clause should be read in the contract.

[27] Accordingly, all the evidence with regard to the physical “attachment” of the marina to plot 12708 is, on the face of it, tangential. They may be relevant in terms of considering whether they are movables or immovables, who constructed them, with what purpose and whose funds were involved. But not for the purposes of determining the legal relationship between plot 12708 and the rest of the integrated scheme.

[28] In this regard, the evidence of the two expert witnesses – Martin and Heeger – the positioning of the structures including the ramp, the fact that part of the marina is an orphan and part of it is not, go only to show that they are movables owned and built to serve Parcel 12708 but not on the exclusive basis.

[29] It should be noted that the concept is a total concept as depicted in all the drawings, plans and pictures. To extricate one aspect of that total concept, whether of the pontoon, individual constructions, erections, items or services, which were meant to exist as permanent arrangements would be tantamount to deconstructing the integrated project.

[30] In fact, the objective as revealed by the legal documents, the drawings and the plans as well as the history of the project show that the project was meant to be an integrated, self contained commercial-cum-residential complex. The term “attached thereto” cannot have meant physically attached thereto but “attached thereto” in the legal sense which obtains when we referring to dominant tenements and servient tenements. In this integrated scheme, each parcel has individual rights but to be able to enjoy those individual rights, each owes an obligation to observe the individual rights of the others. The parcels have mutual rights and obligations to one another. In this regard, the property of the appellant is the dominant tenement where all the adjoining properties, including that on which Respondent No. 1 operates is the servient tenement.

[31] The appellant may not seek from the adjoining owner an exclusive right to use the infrastructure, the services or the facilities the marina comprises. It may only seek rights to use the services subject to the rights of the respondents and others.

[32] Accordingly, we hold that the Demise Clause was not meant for the exclusive use of Parcel V12708 or any of the four parcels for that matter but as an easement with mutual burdens and benefits in accordance with article of the Seychelles Civil Code. This was not a case of grant of absolute right of use of an existing or future property beyond the absolute right over 1238m². This was not a case of vertical vindication of right of exclusive use under the rule of article 552. The case of **Elitestone Ltd v Morris & Anor [supra]** is a case of vertical construction and not a horizontal construction. Article 552 speaks of what ownership of an immovable property carries. This Article reads:

“Ownership of the soil carries with it the ownership of what is above and what is below it.

The owner may plant upon it any plants and may build any structures which he deems proper, with the exceptions established in the Title Easements or Real Rights over Land other than Ownership; subject also to any law relating to mines and to the security of Seychelles.

[33] Horizontal ownership and use may be claimed but within the terms of Article 556 which reads:

“The deposits of earth and accretions, which gradually and imperceptibly, are added to land adjoining the river or a stream, are called alluvion.

Alluvion shall benefit the riparian owner.”

[34] This was plainly not a case falling under any of these Articles. It claimed trespass not over vertical structures but over horizontal structures which could only be in cases of alluvion. It is the case based on right to use things of another lying horizontally on an adjoining land built neither by the owner of the property of the adjoining owner. The only way use could be given is by way of easement. In this regard, Article 637 provides:

“An easement is a charge imposed over a tenement for the use and benefit of a tenement belonging to another owner.”

Article 638 provides:

“An easement does not establish any superiority of one tenement over another.”

Article 639 provides:

“An easement arises either from the natural position of land or from obligations imposed by law or from agreements amongst owners.”

- [35] Our answer with regard to the continuing existence of the Demise Clause and the absence of its reservation in the transfer has been explained by learned counsel for Respondent No. 1. It was a standard document originally prepared which compares with other such transfers. They contain the same Clause but the reality at the grass-root is different. They owe their existence to the fact that it constitutes an easement owed to V12708 as with other plots.
- [36] We agree that the Demise Clause has the status of an easements are transferred as a matter of course whether there is or there is no express agreement to that effect. The plans and the drawings showed that all the parcels in the integrated scheme mutually served one another. That stood good whether the property owner made the reservation or not. The rights was attachment to the land and not to the owner. However, the Demise Clause was not meant to be for the exclusive use of the Appellant.
- [37] That also addresses the distinction which learned counsel makes between ownership of the pontoon and possession thereof; and we may add, use thereof. In his submission ownership may have remained either in the Respondent No. 1 or the Government for that matter but possession thereof could have vested in the Appellant by virtue of the lease. In our view the only reasonable interpretation of the facts and circumstances of the case is that the Appellant is entitled to an easement over the marina through the connecting ramp to the pontoon but it is not entitled to the exclusive use thereof.
- [38] The floating pontoon is, for all intents and purposes, a movable structure. As such, “en fait de meuble la possession vaut titre.” If it has been constructed as it was by Respondent No. 1, it belongs to the entity that has constructed it with its own money and resources. The Republic is the owner of the immovable property on which the floating pontoon has been fixed by virtue of a separate agreement where Appellant is a third party. As a third party, Appellant may not obtain a right of exclusive use over the floating pontoon etc. Article 555 would apply to take into account the respective rights between the Republic and Respondent No. 1. However, as far as the rights of the Appellant are concerned, it is limited to the exercise of his easement over the marina. The connecting ramp was no more than the device to enable the Appellant as the owner of V12708 to exercise his right to

benefit from the easement. It may not be taken to be evidence of the fact that the marina had become part of V12708 by horizontal annexation.

[39] Finally, on the matter of the installation on parcel V12708 of the utilities is evidence of the mutual interdependence of the parcels in the integrated project. That it is the distribution board for utilities supplying the pontoon and is firmly located on the parcel should be understood in that sense. Likewise, the marina serves Parcel V12708 as Parcel V12798 serves the marina. It is a case of mutual interdependence whereby the whole is the sum of the parts.

[40] In the light of what we have stated, we are unable to find merit in this appeal. It is dismissed with costs.

S. Domah (J.A)

I concur:.	A.Fernando (J.A)
I concur:.	J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on [Click here to enter a date.](#)