

**Atkinson & Or v Seychelles Government & Ors
(2002) SLR 39**

Philippe BOULLE for the Petitioners
Lucy POOL for the first Defendant
Kieran SHAH for the second Defendant
Jacques HODOUL for the third Defendant

Judgment delivered on 30 October 2002:

JUDDOO J: The 1st Plaintiff (John Henry Atkinson) and his current wife (Beulah Atkinson) claim for loss and damages as a result of the "faute" of the first, second and third Defendants. The claim is resisted on behalf of all three Defendants.

There is no denial that an "agreement to transfer" and an instrument of transfer were signed on 29 May 1981 between the company Northolme Limited (represented by the first Plaintiff) and the Seychelles Government pertaining to the acquisition of two plots of land and a hotel complex known as Northolme Hotel. The agreement was produced as exhibit P2 and the instrument of transfer of the two plots of land (parcels H202 & H344) was produced as exhibit D1.

Under the agreement, exhibit P2, the first Defendant agreed as follows:

NOW THEREFORE the parties of this agreement have agreed as follows:

...5. The government undertakes for itself, or any person or body corporate to which the ownership, possession or management of the hotel may be, transferred or assigned that Mr John Henry Atkinson and his wife shall at all times during their natural lives be entitled to:-

- a. to keep their own personal belongings, but not including any material or thing of a combustible or other nature likely to be detrimental to the hotel in their existing private premises next to the suite named Curieuse and to have sole access and use of the said premises for this purpose,
- b. upon giving reasonable notice in writing to the Hotel to use the bedroom-suite named "Curieuse" for their own use free of charge,
- c. a discount of 15% on the normal prices of food, drink, boutique or other goods or services consumed or acquired at the hotel,
- d. to use without charge a motor vehicle and boat from the hotel provided the hotel has one reasonably available at the time.

Provided that the facilities aforesaid are to be utilised solely by Mr and Mrs John Henry Atkinson in person during any visit they make to Seychelles.

Thereafter, by a deed dated 11 May 1982, exhibit P4 (registered on 12 May 1982, the Seychelles Government transferred parcels H202 and H344 to COSPROH (the second Defendant). By deed dated 31 December 1990, exhibit D4 (registered 8 March 1991) COSPROH transferred the parcels of land to Northolme Hotels Limited. Thereafter, under a lease dated 17 January 1992, exhibit P1, Northolme Hotels Limited leased the hotel premises on plots H202 and H344 with all facilities and amenities to the Compagnie l'Habitation des Iles the (third Defendant) for a period of ten years starting from 1 February 1992.

On behalf of the Plaintiffs, it is averred that "they have been unable to exercise their rights ... as the Defendants have refused to recognize their rights and the third Defendant is unlawfully occupying and using the premises mentioned ... since February 1992." It is further averred that "the second Defendant, during the time it owned and managed the hotel, removed the following (listed) personal belongings of the Plaintiff from the premises mentioned ... and appropriated same..."

On behalf of the first Defendant, it is pleaded that "No usufructuary interest or any other rights or interest were granted or created in favour of the Plaintiffs". It is averred that the first Defendant purchased Northolme Hotel by virtue of a deed of transfer dated 29 May 1981 and registered on 1 September 1981.

On behalf of the second Defendant, it is denied that "The Plaintiffs have any rights in Northolme Hotel as alleged or at all. The second Defendant avers that the deed of transfer between Northolme Ltd (as transferor) and the Government of Seychelles (as transferee) is silent as to any alleged rights, whether real or personal to the Plaintiffs". It is further contended that the second Defendant is not privy to any alleged agreement creating or granting any alleged rights to the Plaintiffs in or about Northolme Hotel. It is further averred that the second Defendant did not manage Northolme Hotel as alleged or at all and that it sold title H202 and H344 by a deed of transfer dated 31 December 1990 and that Northolme Hotel was managed by Seychelles Hotels Ltd. during the time that it owned the hotel.

The third Defendant admits having been the lessee of the hotel until 31 January 2002. It is averred that the third Defendant is not privy to any alleged agreement and is not bound by any term thereof creating any alleged right in favour of the Plaintiffs. It is added that the third Defendant lawfully occupied the totality of the premises of the hotel under a lease agreement without any reservation and had, thereunder, no obligation to the Plaintiffs.

All three Defendants raised the issue that the Plaintiffs' claims are prescribed. Whilst it is submitted on behalf of all Defendants that the prescription raised is under Article 2271 of the Civil Code of Seychelles (5 years), it is additionally submitted on behalf of the first Defendant that the Plaintiffs' claims against the Government of Seychelles are

statutorily barred under the Public Officers (Protection) Act (Cap 192).

The first Plaintiff gave evidence that Northolme Ltd purchased the land and hotel in about 1970. The said property was thereafter acquired by the Government of Seychelles in 1981 following the agreement reached between the parties, exhibit P2. The hotel constituted of about 7 luxury suites. Attached to one of the suites "Curieuse suite" there was an attached 'combined etude, salon and storeroom' which the first Plaintiff had been using. The witness adds that it was agreed that he would be allowed to keep his personal belongings in the 'attachment' and would be allowed the use and occupation thereof together with "Curieuse suite" during his visits to Seychelles with the other facilities mentioned in the agreement.

The witness explained that he had no difficulties with enjoyment of the above mentioned privileges for a number of years after Northolme Limited had sold the property to the Government of Seychelles. In his own words "The Government honoured its side of the bargain and I did not abuse". Until one day:

I arrived with only my hand luggage and I discovered that somebody had broken the lock in the etude room and to the storage area and the doors were open and the dehumidifying machine and fax (were interfered with), the fan was running but the compressor had burnt out. Most of my things were gone. I called the manager and I was shocked and devastated as I had only my hand luggage and nothing else. I called the manager and he told me he had broken in because I was finished. ... I was in a state of shock. I could not stay. I went to Mombassa immediately. I am not sure I spent the night or not....

This incident happened on 10 March 1991. The Plaintiffs did not make any further use of the private premises which was eventually converted into an extra room for hotel guests.

Under cross-examination, the first Plaintiff agreed that in 1997 he informed the second Defendant that he had potential investors who were interested to purchase the 'hotel'. However, he denied that the arrangements the second Defendant had made to pay for his hotel accommodation in 1997 and 1998 were pursuant to the investment prospects of perspective buyers. The first Plaintiff added that after April 1998, the second Defendant refused to settle his accommodation bills at the hotel. As for the vehicle and boat the witness added that:

the clauses of the car states subject to availability'. When Cosproh took over they said it was not acceptable because they no longer provided the vehicle or the boat because the management had their own vehicles. I agreed and I never asked them to pay anything. In fact I never used the boat. I never had the time ... Northolme did not have vehicles and I accepted that I would not expect Cosproh to provide a car. They did pay one time and without comments...

Mrs Beulah Atkinson, the second Plaintiff, gave evidence that she married the first Plaintiff on third January 1994, as per exhibit P6. She had accompanied her husband to Seychelles and stayed at the hotel during her visit.

Basil Soundy gave evidence on behalf of the Plaintiff. He represented the first Plaintiff when the latter was away Seychelles and made arrangements for his visits to Seychelles. He gave a detailed description of the "Curieuse from Suite" at the hotel, the private room adjoined thereto and the content thereof. During the first Plaintiff's absence from the Seychelles, the witness added that he "used to regularly visit the hotel to ensure that the machinery i.e. dehumidifier air-conditioning etc continued to operate." At one time he had made arrangements for the first Plaintiff and his wife to stay at the hotel whilst it was managed by one Mr Dagostini. In his own words:

I had made arrangements with the manager of the hotel for Mr and Mrs Atkinson to occupy the suite which arrangement was fulfilled. And on his arrival I obviously took him from the airport to the hotel and his wife, on the arrival, of course they immediately went to the suite and opened the communicating door to the private area and to his horrors and to my horror because I was questioned about this, there was nothing there, none of his personal belongings were there. He immediately contacted the management of the hotel demanding where are his personal possessions, why has the lock on the door been removed and what has happened to the kitchen, where is the stove, the fridge and where are the cooker and other items? Where are my clothes, where is my typewriter, where is my filing cabinet, where are my papers? And the manager was apparently unable to offer an adequate explanation...

The witness added that the first Plaintiff accompanied by the second Plaintiff continued to travel to Seychelles for business purposes and used the accommodation provided by the hotel although "he no longer used the private area because all his possessions had gone..." Under cross-examination, Mr Soundy denied that it was against the background of the first Plaintiff bringing in investors that he was given accommodation and other facilities at the hotel.

Mr Dagostini gave evidence that he managed the hotel from first April 1989 until August 1991 on behalf of Seychelles Hotels Ltd. He remembered that Mr Soundy and the first Plaintiff and his wife had called to the hotel. He accompanied them to the Curieuse suite and to the private annex:

The first room I remember I went inside and Mr Atkinson went to open the curtains, I saw that there was a room that was a little bit dusty around ... On the right hand side I noticed there was a table, a manual typewriter and there was a chair. Then we went inside the other room and I remember Mr Atkinson saying "look there is something missing".

On behalf of the second Defendant, Mr Bible gave evidence in his capacity as General Manager. He explained that in 1990 COSPROH transferred the land parcels where the hotel is situated to Northolme Hotels Ltd. To his knowledge, the first Plaintiff was granted complimentary accommodation as he was the previous owner of the hotel on a first occasion and as he intended to bring investors to negotiate the purchase of the hotel on a second instance. The witness denied that any facility was granted to the first Plaintiff or second Plaintiff by virtue of the agreement exhibit P2. In essence, the witness added that the second Defendant is not bound by any of the terms of the said agreement.

Mr Bible added that it was only after the second Defendant had granted Mr Atkinson "free stay" during his first visit that he was made aware of the agreement between the first Plaintiff and the first Defendant. The witness agreed that 15% discount was given to the first Plaintiff on his consumption bills as per his request. The witness added that although the hotel was owned by Northolme Ltd and the premises leased to the third Defendant, the second Defendant, COSPROH, had control over its affairs.

As confirmed in the submissions made on behalf of the Plaintiffs - "the main issue before the Court is the issue of a usufructuary interest, which arises under the contract dated 29 May 1991 i.e. (exhibit P2)..." The said contract is a document under the private signatures of Northolme Limited and the first Defendant. No objection was raised to its production and by virtue of Article 1320 of the Civil Code of Seychelles, the document stands as proof between the parties.

A preliminary issue which arises is whether the term of the agreement includes the second wife of the first Plaintiff, Mrs Beulah Atkinson (second Plaintiff). The undertaking is that "Mr John Henry Atkinson and his wife shall at all times during their natural lives be entitled ... provided that the facilities aforesaid are to be utilised solely by Mr & Mrs John Henry Atkinson in person during any visit which they may make to Seychelles...". The former wife of Mr John Henry Atkinson passed away in 1991 and Mr Atkinson re-married the second Plaintiff in 1994. My reading of the clause is that the benefit, if any, has been granted jointly to Mr John Henry Atkinson "and his wife during their natural lives". No benefit was granted individually to the former Mrs Atkinson. As long as there is John Henry Atkinson he is to benefit and as long as John Henry Atkinson has a lawfully wedded wife, both are to benefit during "their" natural lives.

The first determination is whether the term of the agreement created a usufructuary interest in favour of both Plaintiffs. On behalf of the Defendant, it is submitted that "clause 5 of the agreement does not create a usufructuary interest ..." It is added that any such usufructuary interest is void under Section 40 of the Land Registration Act for lack of registration in the prescribed form (Form LR6) and would necessitate the requirement of sanction under the Immovable Property (Transfer Restrictions) Act as both Plaintiffs are foreign nationals.

On behalf of the Plaintiffs, whilst acknowledging that "the question is does this (the term of the agreement) create a usufructuary interest?" it is further submitted that the Plaintiff

had an overriding interest by being in possession and actual occupation under section 25(g) of the Land Registration Act. Furthermore, it is contended that the government being itself a party to the agreement is either taken to have granted sanction to the transaction or is estopped from raising the issue of lack of sanction.

Suffice it to say what has been pleaded is the Plaintiffs' entitlement to a usufructuary interest under clause 5 of the agreement vis-à-vis the private premises annexed to curieuse suite and not any rights acquired by way of being in possession or actual occupation. Under Article 578 of the Civil Code of Seychelles, usufruct is defined as "the right to enjoy property which belongs to another, in the same manner as the owner himself, but subject to the obligation to preserve its substance." In *Dalloz Codes Annotes* Art 1-70, under title "De L'usufruit de l'usage et de l'habitation" Art. 578, it is stated:

1. D'après la définition qu'on donne à l'article 578, l'usufruit est le droit de jouir, or le mot jouir comprend ici l'usage et la jouissance, usus et fructus

...

6. Il se distingue des servitudes réelles en ce qu'il forme dans le patrimoine de l'usufruitier un bien particulier qui peut être vendu ou loué, etc –

...

9. l'usufruit étant, d'après la définition donnée par l'article 578, le droit de jouir des choses dont un autre a la propriété comme le propriétaire lui-même, les droits de l'usufruitier ne se bornent pas à la perception des fruits, mais ils s'étendent ... à tous les droits perçus comme inhérents à la jouissance de fonds.

10. Et aussi à tous les avantages matériels ou intellectuels qui peuvent résulter de la possession de la chose ..

In Amos and Walton second edition, p 119, it is observed that:

the general rules as to usufruct are expressed in Article 578 ... and article 582. The usufruct has the right to enjoy all manner of fruits, natural, industrial and civil which the object of which he has the usufructuary may produce...

The term of the agreement (clause 5) allowed the first Plaintiff and his wife to keep their own personal belongings in the existing private premises next to the suite named Curieuse and to have sole access and use of the said premises for this purpose provided that the facility is to be utilized solely by Mr & Mrs John Henry Atkinson in person during any visit which they may make to Seychelles. They were prohibited from keeping any material or thing of a combustible or other nature likely to be detrimental to the hotel in the said premises. I do not find therefrom that Mr John Atkinson and his wife had been granted a usufructuary interest in the premises but rather a limited use of

the premises in order to keep their own personal belongings and excluding all items of a combustible or other nature likely to be detrimental to the hotel and to have sole access and use of the premises for this limited purpose. This is in contrast with the case of *Malvina v Louise* C/S 47 of 1995 cited on behalf of the Plaintiff whereby the Plaintiff was by notarial deed expressly granted the right to live on a parcel of land "to enjoy it exclusively as if it were her own ... " which it was held amounted to a 'usufruct'.

Furthermore, it is evident that at the material time, the parties did not deem it fit to preserve any alleged usufructuary interest in favour of the first Plaintiff and his wife in the instrument of transfer, exhibit D1. Had the intention of the parties been to preserve such create a usufructuary interest, such a term would have been made part and parcel of the instrument of transfer and would necessarily have required the grant of the appropriate sanction beforehand.

Were it to be held otherwise and the clause 5 found to provide for a usufructuary interest, I will go further to examine the remaining submissions. I do agree with the submission of Learned Counsel for the Plaintiffs that the requirement of registration of a usufructuary interest in the subscribed form under the Land Registration Act does not prevent the Plaintiffs claiming for the recognition of their right by virtue of a determination of the Court on the issue and a judgment delivered which could then be registered. This procedure was averted to in *Hoareau v Gilleaux* (1978-82) SCAR 158 wherein pertaining to a transfer of land, the Court of Appeal as per Sir M. Hogan (at 168) stated that the requirement of registration in the prescribed form is not fatal as S46 (applicable to transfers) "is framed in enabling and not restrictive terms...". The reasoning is equally applicable to the requirement of registration of an interest in land under the Land Registration Act. However, a non-registered transaction is only binding on the parties thereto since it is only by way of registration in the prescribed form or registration of the judgment that provides notice to third parties. The delictual conduct of a third party is to be viewed in that light.

As far as the requirement of sanction is concerned, under Section 2 of the Immovable Property (Transfer Restriction) Act land is defined as including any interest in land or immovable property. Under Section 4 thereof, a non-Seychellois may not directly or indirectly acquire rights in immovable property without the prior sanction of the Minister. It is admitted, in the submissions made, that no Minister's sanction was granted to any term of an agreement whereby the first Plaintiff and his wife were to benefit of an interest in immovable property. Accordingly, the lack of sanction would prevent the creation of any real right in immovable property in favour of the first Plaintiff and his wife. The grant of sanction under the Act is the prerogative of the Minister subject to the requirements set under the Act. Accordingly, I do not find the issue of estoppel to arise as against the first Defendant.

With the above in mind, I shall now consider the prescription issues raised. It is submitted that the Plaintiffs' claim are prescribed under the 6 months limitation period under Section 3 Public Officers Protection Act.

It has not been contended that the above limitation period does not cover the first Defendant. Indeed as found in *Labrosse v Allisop and Government of Seychelles* C/S285 of 1996 - Ruling 3/9/97, *Contoret v Government of Seychelles & Anor* C/S 101 of 1992 Ruling 17/3/93 and *Contoret v Government of Seychelles* Civil Appeal 2 of 1993 (Judgment 31 March 1994), the limitation period of 6 months is applicable to tort suits brought against the Government of Seychelles. Accordingly, any of the Plaintiffs' claim is time barred against the first Defendant where the plaint is lodged after 6 months from the date upon which the claim arose.

The status of the second Defendant (COSPROH) was elaborated upon in *Port Glaud Development Co Ltd v A-G and Port Glaud* CA20/94 (Judgment delivered on 6 June 1995) wherein it was held:

It is evident that by no stretch of the imagination can COSPROH or Port Glaud Hotels be described as public authorities or bodies or departments of the State charged with any public duty or possessing any special power. They exercise no power over and above what companies exercise in the management of their affairs ... By their respective memorandum of association, they were purely trading concerns subject to company law and the Companies Act both in regard to their existence and dissolution and to their activities, rights and obligations. These two companies were merely companies in which the State has interest as shareholder...

Accordingly the statutory limitation period of six months is not applicable as regards the second Defendant, COSPROH. A similar finding pertaining to SHDC was reached in *Auguste v Hoareau* CA 1 of 1995 - reasons judgment delivered on 1 March 1996 - wherein the Court of Appeal held that the time limit under Section 3 could not have been successfully raised by SHDC. The statutory limitation period is not applicable to the third Defendant which is not involved in any public office, either directly or indirectly.

It has been found earlier that Clause 5 of the agreement did not create any usufruct in favour of the Defendant but rather a limited right of use of the private premises. Alternatively, it has been found that the agreement between Northolme Limited and the first Defendant could not create any real rights in immovable property in favour of the first Plaintiff and his wife, for lack of appropriate sanction. In either instances (where the claim is for an alleged "faute" on behalf of each Defendant) the 5 year prescription period under Article 2271 of the Civil Code is applicable to the claims brought by the Plaintiffs against all the Defendants.

The next determination is application of the statutory limitation and the period of extinctive prescription of 5 years under Article 2271 to the Plaintiffs' claim. It has been shown earlier that the Plaintiffs' claims rest upon the fault of the first, second and third Defendant and that the cause of action is grounded in delict. In *Simon Emmanuel & A-G v Joubert* CA 49 of 1996 - Judgment delivered on 28 November 1998 - the Court of Appeal (per Ayoola JA) stated:

The three elements which therefore make a claim arise in respect of a delictual act are fault, injury or damage and the causal link. The claim arises at the earliest when these three co-exist and it is from that time that it is open to the aggrieved person to bring an action to enforce the claim that has thus arisen. Put otherwise, the 'claim arises' when facts exist which give rise to the liability of the Defendant ... The coming into existence of liability to make good a loss is not normally dependent on but precedes the assessment of the quantum of loss. Liability must exist before question of proof of quantum of loss would arise...

A claim in respect of an act or omission arises when facts on which liability can be founded exists. The coming into being of such claim cannot be delayed to await the ascertainment of quantum of loss. Where loss is the essence of liability as in claims under Article 1382 all that is required for a claim to rise is that loss has been caused by fault of the other party...

In the light of the above, each of the Plaintiffs' claim must be distinctively considered.

The Plaintiff's claims rest upon "the fault of the first, second and third Defendant..." Accordingly, the cause of action is grounded in delict. In delict the claim for remedy is directed towards an act or omission or an error of conduct of the Defendant which forms the basis of the claim.

From the plaint, the act, omission or error of conduct alleged by the Plaintiff is namely that:

- i) the Defendants have refused to recognise the Plaintiffs' rights (as alleged) namely:
 - (a) to keep their own personal belongings in their existing private premises next to the suite named 'Curieuse' and to have sole access and use of the said premises for this purpose;
 - (b) upon giving reasonable notice in writing to use the bedroom suite named Curieuse for their own use free of charge;
 - (c) a discount of 15% on the normal prices of food, drink, boutique or other goods consumed or acquired at the hotel;
 - (d) to use without charge a motor vehicle and boat from the hotel provided the hotel has one reasonably available at the time.
- ii) the second Defendant, during the time that it owed and managed the hotel removed the personal belongings of the Plaintiffs from the premises and for which both the first and second Defendants are

claimed to be liable for the loss of their personal belongings.

- iii) the third Defendant has unlawfully occupied and used premises (of which the Plaintiffs were allegedly entitled) from 1.2.92. and for which all Defendants are jointly liable.

Each Plaintiff claim moral damages against all three Defendants jointly pertaining to loss of enjoyment of their rights as alleged in the sum of R60,000 per Plaintiff. Both Plaintiffs claim damages against all three Defendants jointly for the unlawful occupation of the private premises at a rental value of R2,500 per month from first December 1992. The first Plaintiff claims against the first and second Defendant damages in the sum of R142,700 for the removal and appropriation of personal belongings and R9,348.35 as financial loss pertaining to "refund of accommodation."

With regard to the use without charge of a motor vehicle and boat from the hotel, the first Plaintiff gave evidence that when the second Defendant - COSPROH - "took over they said it was not acceptable because they no longer provided the vehicle or the boat because the management had their own vehicle. I agreed and I never ask them to pay for anything..." Accordingly, the first Plaintiff would have relinquished their claim which in any event would have arisen at the time the second Defendant "took over". Relying on the date of registration of transfer of the parcels in the name of the second Defendant (first May 1982) as being the date when the second Defendant took over, any claim thereupon against the first Defendant has been time barred after a period of six months therefrom. Any claim thereupon pertaining to the refusal to recognize the Plaintiffs' rights as against all three Defendants is prescribed, the claim having been lodged more than 5 years after the claim arose.

With regard to "the right to keep their own personal belongings in their existing private premises next to the suite named "Curieuse" and to have sole access and use of the said premises for this purpose", the testimony of the first Plaintiff confirms that the Plaintiffs have been denied the said right since the incident of 10 March 1991. On that date upon their arrival to Seychelles, the Plaintiffs found that the 'private premises' had been broken into and most of the things therein had disappeared. The Plaintiffs were not able to enjoy the use of the private premises since then and it was eventually converted into a hotel room. Accordingly, the Plaintiffs' claim under "faute" pertaining to the said 'private premises' would arise as from 10 March 1991 and any suit against the first Defendant is time barred after the expiry of six months therefrom. Any claim jointly against all three Defendants for the refusal to recognize the Plaintiffs' rights is prescribed as the claim is lodged more than five years after the claim arose.

The Plaintiffs' claim that the second Defendant during the time that it "owned and managed" the hotel removed the personal belongings of the Plaintiffs from the premises and for which both the first and second Defendants are claimed to be liable for the loss. The said alleged act of removal and appropriation came to the first Plaintiff's knowledge on 10 March 1991, date when the first Plaintiff arrived at the hotel and found the items missing. Accordingly, the Plaintiffs' claim in that respect arose on 10 March 1991 and is

time barred after the expiry of six months therefrom against the first Defendant. The Plaintiffs claim in that respect against the first and second Defendant are prescribed after the expiry of 5 years therefrom.

Additionally, the evidence on record falls short of establishing the averment that the second Defendant "managed" the hotel during the relevant period. Mr Dagostini testified that the hotel was managed by Seychelles Hotels Limited from first April 1989 until August 1991. The testimony of the first Plaintiff confirms that it was "Mr Dagostini himself who stood before me and said he broke the door because I was finished ...". Accordingly, the breaking into the private premises and disappearance of personal items would have occurred during Mr Dagostini's management under the Seychelles Hotels Limited, a different entity.

With regard to the claim that the third Defendant has unlawfully occupied the premises to which the Plaintiffs were entitled and for which all Defendants are claimed to be liable. The plaintiff dates the resulting loss to start as from first February 1992. Any claim thereupon against the first Plaintiff is statute barred after six months from the date averred and any claim against the first, second and third Defendants, are prescribed after a period of five years from date against all three Defendants. Accordingly, the Plaintiffs' claim is statute barred against the first Defendant and prescribed against all three Defendants.

In addition, as disclosed by the evidence on record, the third Defendant had occupied the premises under a duly executed lease (exhibit PI) for a period of 10 years. Where, as in such instance, the use and occupation is carried forth by the third Defendant under a legitimate interest, the third Defendant's conduct would only be actionable if its dominant purpose is to cause harm - vide: *Hoareau v Government of Seychelles*, supra. No such evidence has been adduced before this Court against the third Defendant.

The remaining claims by the Plaintiffs relate to the refusal by the Defendants to recognize the Plaintiffs' rights to be allowed the bedroom suite named "Curieuse" for their own use free of charge and to enjoy a discount of 15% on goods consumed or purchased at the hotel. The first Plaintiff's version is that after the incident of 10th March 1991, he continued to visit Seychelles. In his own words:

Q: After that did you come back to Seychelles?

A: Yes, I did. For necessary company meetings and I brought in everything with me each time. For a long time the premises were not being used by the hotel and it stayed just as it was but it was not good to me. Everything was gone. There was a chest and a drawer which remained but the contents had gone.

Q: You said they continued to honour which part of the agreement?

A: The Government continued to give me accommodation without payment

and 15% discount on food and beverage until 2 years ago...

The first Plaintiff explained that two years back he was informed that the hotel would be put up for sale. He was an interested party and, in addition, had informed the second Defendant that should the hotel be sold to a third party, the latter should be informed about his rights. As per the first Plaintiff "they immediately refused to honour everything." On the other hand, the version of the second Defendant is that there had been no grant of accommodation or 15% discount on consumption to the first Plaintiff under the terms of the agreement, exhibit P2. Any such grant was merely 'complimentary' as per the testimony of Mr Bibile.

A few letters of correspondence were adduced in evidence on behalf of the Plaintiff, exhibit P5. Objection was raised to the first two letters dated 29 January 1987 (exhibit P5(a)) and 10 November 1987 (exhibit P5(b)). Given that these letters were addressed to parties other than the Defendants, the Plaintiff will not strictly be able to rely on the content of these letters as against the Defendants. There was no objection to the remaining correspondence.

In April 1997, a request is addressed to Northolme Hotel on behalf of the first Plaintiff to seek a reservation of the "Curieuse Suite" for 29 and 30 April 1997 on free of charge accommodation basis and 15% discount on food and beverages (Exhibit P5(c)). By letter of 31 March 1997, a letter is addressed to COSPROH (Exhibit P5(d)) claiming the right to use "Curieuse" free of charge and discount of 15% on all food and beverage. Reference is made in the letter to the agreement between Northolme Ltd. and the first Defendant. It is admitted in evidence that the first Plaintiff was subsequently allowed to stay in the Curieuse Suite on free of charge basis and granted a 15% discount on food and beverages.

In 1998, a request was made once again on behalf of the Plaintiff to be granted accommodation on free of charge basis and 15% discount on food and beverage by letter dated 24th March 1998 (Exhibit P5(g)). The second Defendant by letter (Exhibit P5(h)) instruct Northolme Hotel to bill them for the accommodation and to grant the requested 15% discount. It is true that at that time there were negotiations going on between the first Plaintiff and the second Defendant pertaining to the eventual sale of the hotel (Exhibit P5(j)). However the evidence disclose that an 'option to purchase' given to the first Plaintiff did not materialise and second Defendant made clear its intention in the letter of 7 May 1998 (Exhibit P5(r)) whereby, it was expressed that "In any event it has been decided that neither COSPROH nor Northolme Limited should bear any of the expenses related to clause 5 of the agreement from now on ...". There is also evidence (as per Exhibit P5(j) and P5(k) that Northolme Hotels Limited was 'wholly owned' by COSPROH, the second Defendant, referred to as the holding company. In addition, it is admitted by Mr Bibile that COSPROH had control over Northolme Limited.

The above decision of 7 May 1998 is a denial of the privilege of the Plaintiffs during their visit to Seychelles to enjoy free accommodation at "Curieuse" and 15% discount on food

and beverages. The act by the second Defendant, in its capacity as assignee of the first Defendant, binds the first Defendant through the undertaking given in the agreement Exhibit P2. However, the conduct of the second Defendant is independent of and does not bind the third Defendant. In that respect the claim against the first and second Defendant is said to arise on 7 May 1998. The instant claim was filed on 8 April 1999. Being a tortious claim filed against the first Defendant, any such claim is time barred after the expiry of 6 months from the date the claim arose against the first Defendant. Accordingly, the claim for denial of rights pertaining to the free accommodation in "Curieuse" and 15 % discount on food and beverage is statute barred against the first Defendant. The period of 5 years prescription as against the second Defendant has not run out and the Plaintiff's claim in that respect against the second Defendant is to be further considered.

The Plaintiff's claim is that the second Defendant as an assignee of the first Defendant, through its conduct, denied them of their rights to enjoy the "Curieuse Suite" free of charge and 15% discount on food and beverage during their visit to Seychelles. Although the issue of "contract or privity of contract" has been raised, no objection has been formally made to the fact that the claim was not maintainable in delict. Generally,

contracts entered into by parties do not have any absolute effect and do not have obligatory force *erga omnes* although they may in certain cases confer rights on a third parties (vide *Amos & Walton*, 2 ed, 173).

The evidence on record disclose that the second Defendant was apprised of the existence of the contract, Exhibit P2, during the visit of the Plaintiff's to the hotel in 1997 although, the second Defendant was not privy to the said contract. The second Defendant paid for the accommodation expenses of the Plaintiff in 1997 and enabled the Plaintiffs to enjoy a 15% discount on their food and beverages at a time when on behalf of the Plaintiffs reliance on the agreement had been sought, Exhibit P5(d)). Subsequently, the stand and conduct of the second Defendant is that it will not abide by the terms of the agreement between Northolme Limited and the first Defendant as confirmed in Exhibit P5(r).

Taking into account that a contract may create rights in favour of third parties, before a Plaintiff can recover damages in tort it must be shown that he suffered damages and that the damage was caused by the act or omission for which the Defendant was responsible. In *Amos & Walton* supra at 208 it is observed:

The damage must consist of a prejudice to a legitimate interest protected by the law.

The contract between Northolme limited not having been rescinded, the third party was primarily entitled to enjoy the benefits therefrom. Accordingly, the conduct of the second Defendant, as assignee of the first Defendant, in preventing the enjoyment of such rights constitute a "faute" for which they are liable. This claim is not prescribed by

the 5 years prescription period and succeeds against the second Defendant.

With regard to the above claim, the Plaintiffs have claimed moral damages for loss of the enjoyment of their rights and financial loss. The actual loss is the amount paid in accommodation costs and moral damages is to reflect the inconvenience and trouble suffered. In that respect I award, R9,348.35 to the first Plaintiff (as per the claim under amended plaint).

From the interpretation given to the term “Mr John Henry Atkinson and his wife”, I find the claim for moral damages to be joint and I grant to both Plaintiffs R10,000 as moral damages against the second Defendant. In the end result, I enter judgment against the second Defendant in the sum of R9,348.35 in favour of the first Plaintiff and R10,000 in favour of both Plaintiffs with costs.

The claims against the first Defendant are statutorily barred and prescribed except for the last considered claim which is merely statutorily barred. Accordingly, the plaint against the first Defendant is dismissed with costs.

The claims against the third Defendant are prescribed and in respect of the last considered claim, there has been no “faute” on behalf of the third Defendant. The plaint against the third Defendant is dismissed with costs.

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