IN THE SUPREME COURT OF SEYCHELLES

EMMANUEL LAPORTE

Vs

NICKS AND CO. BUILDERS PTY LTD
S. H. D. C.

Civil Side No: 62 of 2003
==========
Ms. Pool for the plaintiff
Mr. Chang Sam for the 1st defendant
Mr. W. Lucas for the 2nd defendant

JUDGMENT

The Plaint

By a Plaint originally entered on 11th March, 2003, the Plaintiff prayed for an order that the Defendant, Nick Builders (Pty) Ltd, pay him the total sum of **SR356,680.00** with interest and costs as particularized in his Plaint. A judgment was entered which was appealed against. On 29th November, 2006 the Seychelles Court of Appeal in case SCA 11 of 2005 ordered a re-hearing.

The Defendant applied for and was granted leave to join another co-Defendant namely Seychelles Housing Development Corporation (hereinafter SHDC) citing it as the 2nd Defendant and the original Defendant as the 1st Defendant.

It is the case of the Plaintiff that on the 27th February, 2001 he submitted an architectural plan for the construction of a three-stepped house on land Title No.H4865. That plan was approved by the Planning Authority on 5th April, 2001.

On 31st August, 2001 the Plaintiff discovered that there had been an excavation and an encroachment on his land by the 1st Defendant, its agents or workers. That was done without his consent or knowledge. According to him the encroachment and excavation had the effect of preventing him from carrying out his planned construction.

The 1st Defendant agreed to remove the topsoil from the land to see if the site would be feasible for the Plaintiff to carry out his project. The 1st Defendant carried out the removal works on the land, however, the said removal of topsoil failed to remedy the damage caused to the land. The Plaintiff now claims that he is forced to build his house on a lower level and add additional material to raise the house foundation.

As a result of the 1st Defendant's excavation and encroachment, the Plaintiff's alleged that his planned project for the land was delayed, he incurred extra costs and suffered damages and he now has to pay a considerable amount to rectify the damage to the land.

The Plaintiff particularized the loss and damage as follows:

Rectification works costs	– SR	225,000.00
Transport costs for the site visits		
including work time lost	– SR	6,500.00
Environment damages to calice du pape trees	– SR	8,000.00
Fee paid for lawyers' advices and letters	- SR	280.00
Cost for correspondence since		
September 2001 – till March 2002	– SR	1,400.00
Quantity Surveyor Fees	– SR	3,500.00
Moral damages	– SR	100,000.00
Total	–	**SR 356,680.00**

Defence of 1st Defendant

The 1st Defendant by its amended Statement of Defence entered on 30th July, 2004 denied all the material allegations of the Plaintiff and averred that any excavation referred to in paragraph 3 of the Plaint was made by or on the order of

the 2nd Defendant SHDC, for whom it was acting, with full knowledge and consent of the Plaintiff.

The 1st Defendant averred that if it did remove the topsoil on the land (which it denied) it was at the request of the Plaintiff or the 2nd Defendant SHDC, which was acting with the full knowledge and consent of the Plaintiff.

The 1st Defendant further averred that it is not responsible or liable in any way whatsoever for the Plaintiff having to build on a lower level and adding material to raise the house foundation as claimed by the Plaintiff or at all.

To any extent that the averments of the Plaintiff in paragraph 6 of the Plaint are true, (but which is denied by the 1st Defendant) the 1st Defendant stated that it is not responsible or liable for the alleged delay, damages or amount spent. The 1st Defendant further averred that the Plaintiff was fully compensated by the 2nd Defendant SHDC, for any works he carried out on his property or alternatively that the works were carried out and paid for by the 2nd Defendant SHDC.

The 1st Defendant also averred that to the extent that any liability to the Plaintiff is established, the 2nd Defendant is solely and entirely liable to the Plaintiff as the 1st Defendant was at all times acting on the instructions of and for the 2nd Defendant.

The 1st Defendant prayed this Court to dismiss the Plaint with costs against it, or, in the event that it is found to be jointly liable with the 2nd Defendant to the Plaintiff, apportion the damages between the 1st and 2nd Defendant, all with costs to the 1st Defendant.

Defence of 2nd Defendant

The 2nd Defendant entered its Statement of Defence dated 29th February, 2008 which included pleas *in limine litis* reproduced hereunder as follows:

(i) The Procedure for joiner under Section 115 has not been followed which amount to a total disregard to the directive of the Seychelles Court of Appeal judgment of 26th day of November, 2006, which is amount to an abuse of process whereby, the Court should not entertain such request.

(ii) It is improper to act on an amended statement of defence of which predated the Court of Appeal decision which declared such form of demand in term of pleading as incompetent and unknown to our Seychelles Code of Civil Procedure. The amended statement of Defence dated 27th July 2004 is *res judicata* for the 2nd Defendant to act upon.

(iii) The request and demand made by the 1st Defendant is out of proportion and failed to meet the standard of a proper third party proceeding to be found in the laws of England by virtue of Section 5 of our Courts Act CAP 52.

The pleas were considered by this Court which accordingly gave its considered ruling thereon. The suit then proceeded to be heard on its merits.

The 2nd Defendant admitted awarding a contract to the 1st Defendant with all details and Survey Plan of the site where the clearing and excavation was to be carried out and averred that it is the ultimate duty of the 1st Defendant to request for the whole area to be pegged out before any clearing of the site and excavation is carried out.

The 2nd Defendant denied any joint liability with the 1st Defendant as no such cause of action exists.

The 2nd Defendant prayed that the request of the 1st Defendant be dismissed and to exclude the 2nd Defendant as a party to pay any part of compensation due to the Plaintiff.

The issues

Arising out of the pleadings of the parties, the issues that this Court needs to resolve are summarized as follows:

(i) Was the property of the Plaintiff encroached upon and its topography altered as a result of unauthorized actions taken thereon by other parties.

(ii) Did the Plaintiff suffer any damage as a result of (i) above and if so how much.

(iii) If so, who is or are the party or parties which is or are responsible under (i) above.

Findings

The Plaintiff testified on his own behalf and adduced 13 documents in support of his case. A Quantity Surveyor also testified on behalf of the Plaintiff and produced a written report, Exhibit P13.

A representative of the 1st Defendant testified as well as a representative of the 2nd Defendant.

I meticulously analyzed and review all the evidences before the Court as well as all the documents adduced and made the findings which follow.

At all material times the Plaintiff was and is the owner of land **Title No.H4865** situated at La Retraite, Mahe, (hereinafter "the land") and the 1st Defendant is a Building Contractor. The 2nd Defendant is a parastatal Corporation.

On the 27th February, 2001 the Plaintiff submitted an architectural plan for the construction of a three-stepped house on land Title No.H4865. That plan was approved by the Planning Authority on 5th April, 2001.

On 31st August, 2001 the Plaintiff discovered that there had been an excavation and an encroachment on his land by the 1st Defendant, its agents or workers. That was done without his consent or knowledge. That encroachment and excavation had the effect of preventing him from carrying out the construction of his house as he had already planned.

It was at the request of the 2nd Defendant that the 1st Defendant removed topsoil from Plaintiff's land in an attempt to restore the land to a state that would allow the Plaintiff to carry out his project. However, the said removal of topsoil failed to remedy the damage caused to the land. The Plaintiff will now have to make

alteration to his original house in order to fit on the excavated land. That will entail the lowering the level of his house and the adding of additional material to raise the house foundation.

As a result of the 1st Defendant's excavation and encroachment, the Plaintiff's planned project on his land has and is being delayed. He will have now to incur extra costs. He now has to pay extra amount to rectify the damage to the land. The Plaintiff also suffered moral damages. I will revert to the questions of compensation and damages later on.

I find that the witness of the Defendants, when testifying, were somewhat evasive and they gave me the impression that they were trying to shift the blame on one another.

It is evident that the 1st Defendant is shifting the liability for the encroachment and damages onto the 2nd Defendant claiming that he did the excavation by or on the order of the 2nd Defendant SHDC, for whom it was acting. The Plaintiff had no knowledge of and was not a party to such arrangement. For sure, the Plaintiff did not instruct the 1st Defendant to carry any such work on his land.

As stated above, it was as a result of the excavation works on his land by the 1st Defendant that the Plaintiff has now to build his house on a lower level and has now to add material to raise the house foundation.

The encroachment and excavation by the 1st Defendant of the Plaintiff's land obviously caused delay for the Plaintiff to construct his house.
There is no evidence that the Plaintiff was fully compensated by the 2nd Defendant for any works the 1st Defendant carried out on his property or that the works were carried out and paid for by the 2nd Defendant SHDC.

Whether only one of the two Defendants is or whether both Defendants are singly or jointly responsible is an issue that this Court has to establish and if so required will have to accordingly apportion the damages and costs.

The Law

The Law applicable in the circumstances of this case are **Article 1382(1-5); Article 1383(1)** and **Article 1384(1)(3)** of the Civil Code of Seychelles.

Conclusions

The issue of *locus standi* has been brought by the 1st Defendant. That issue was not pleaded in the 1st Defendant's statement of defence and was equally not canvassed at the hearing. Neither the 1st Defendant nor the 2nd Defendant ever

cross-examined the Plaintiff on the issue of *locus standi*. It was never put to the Plaintiff or raised as a point *in limine litis* that the Plaintiff did not have *locus standi*. Admittedly, plea in *limine litis* can be raised at any time during the hearing vide Section 90 of Seychelles Code of Civil Procedure. It is my considered judgment that as the 1st Defendant had closed his case without raising this issue, is therefore now barred from raising a plea *in limine litis*. I also take note that all the co-owners of the property in issue are also fiduciaries for themselves and as such any one of them can sue. With respect I find no merit in this plea which is accordingly dismissed.

The contention of the 1st Defendant that the excavation carried out was made by or on the order of the 2nd Defendant SHDC, for whom it was acting, cannot stand in order to totally exonerate the 1st Defendant from all liability. If the 1st Defendant was indeed doing the excavation as stated, the work would have been done in accordance with the approved plan of the Plaintiff. The evidence shows that the works carried out by the 1st Defendant was in connection with the house plan of another client but mistakenly carried out on the property of the Plaintiff.

With respect, I reject the contention of the 1st Defendant that it was acting at the request of and upon the instructions and under the control of 2nd Defendant at the material time.

From the evidence it is not clear as to whether the 2nd Defendant did really give the 1st Defendant the cadastral or survey plan about the property to be excavated or whether it simply indicated visually where the property is, as contended by the 1st Defendant. The representative of the 1st Defendant appears to have **assumed** that what he was shown was indeed the correct plot to be excavated. It was incumbent upon the representative of the 1st Defendant to have verified this from the documents made available to him and if such documents had not been given to him he should have obtained it prior to starting the excavation works. However it is my judgment that the 2nd Defendant cannot avoid all liability as by its action and omission in supplying or not supplying the necessary relevant documents and/or indicating the correct boundary, somewhat led the 1st Defendant to let down its guard so to speak and to have possibly relied on the indications of the representative of the 2nd Defendant. In the circumstances I find that the 2nd Defendant is, to a certain extent, also liable to the Plaintiff for the loss and damage that he suffered.

For reasons stated above I conclude that the property of the Plaintiff was indeed encroached upon and its topography altered as a result of unauthorized actions taken thereon by parties other than the Plaintiff and these amounted to a fault in law which gives rise to damages which I find the Plaintiff indeed suffered.

Both Defendants tried to avoid liability by shifting the responsibility for the encroachment and interference with the property of the Plaintiff. The evidence

shows that it was the Excavator Operator employed by the 1st Plaintiff, in the course of his employment with the 1st Plaintiff, who excavated the land of the Plaintiff, cut an embankment and dug a house foundation thereon without the knowledge, consent and authority of the Plaintiff. It was incumbent upon the 1st Defendant to undertake any clarification from the 2nd Defendant with regard to beacon and boundaries etc. prior to instructing its employees to start the excavation. It is not an exaggeration to expect of a Building Contractor to at least be able to read a cadastral plan in order to locate a particular property upon which to carry out any work. As such I find the 1st Defendant vicariously liable for the act and or omission of its employee, the Excavator Operator, in committing the fault as found earlier above.

It is my judgment that both Defendants are equally liable for damages caused to the Plaintiff. In the circumstances, any damage awarded by this Court in favour of the Plaintiff shall be apportioned accordingly.

For reasons stated above I find that the Plaintiff has proved his case on the balance of probabilities and this Court gives judgment in his favour with interest and cost.

Damages

The Plaintiff claimed to have suffered loss and damages as a result in the total sum of SR 356,680.00. I will now analyze the Plaintiff's claim as particularized in the Plaint.

Article 1384(4) of the Civil Code states that – *"A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment".*

After the encroachment both Defendants tried to remedy the damage by removing the soil excavated but the work carried out was not to the satisfaction of the Plaintiff. The Plaintiff wanted the land to be restored to its original state. This is calling for the impossible as any land which has been tampered with as in the present case, is impossible to be restored to its original state.

Ms. Bastille the Quantity Surveyor stated that a 4 meter embankment had been cut and that the Plaintiff had to raise the foundation and build a retaining wall in order for the Plaintiff to now build his house.

From my observation of the terrain at the time of the locus in quo, I believe that even if the Plaintiff was to construct his house according to his approved plan he would still have had to do certain excavation works on his property. However,

the Plaintiff in that case would obviously have done that excavation in such a way as to accommodate the 3 tiered house he had planned to build but not necessarily as had been done by the encroachment, excavation and digging of a foundation, which are not according to his specifications.

The Plaintiff, himself a Building Contractor by profession explained that he chose to build a three-stepped house in order not to excavate the land or if required as little as possible. The Plaintiff's drawing of a structural plan to build part of the house on pillars supports the fact that as far as possible he had not intended to do much excavation on his property.

Although Mr. Molle of SHDC spoke about certain proposition made to the Plaintiff, the evidence shows that there were no follow up on this by either the Plaintiff or the 2nd Defendant.

The Plaintiff is claiming SR225,000.00 as the sum required to rectify the damage caused to his property. In support of his claim the Plaintiff caused a Quantity Surveyor Ms. Bastille to make an evaluation report on the damaged site on parcel H4865. Ms. Bastille submitted a report dated 22nd January, 2003 which is now Exhibit P13. She stated in her report that –

> *"The property is located on the hillside at La Retraite. The vacant plot of land runs along the estate road stretching to the hillside. Therefore the*

site is slanting and the top section of the land is at a higher level than the two properties located at rear and front.

It is apparent that the terrace had been cut, therefore forming a platform at the top section and thus creating an embankment at approximately 4.0m high. Hence the site has been dropped to a lower level.

The house is to be constructed on three levels as at the original land formation so as not to block the ocean view enjoyed from the top section. Now that the land has been dropped to a lower level, the house constructed in front on Parcel H4866 blocked the ocean view enjoyed from Parcel H4865.

Also this cutting of the terrace will alter the foundation design of the house.

"Therefore to construct the house as at the original level the foundation has to be raised and the ground backfill. Retaining walls also have to be constructed. Reference is made to engineer drawing.

Rectification works is valued at a sum of Two Hundred and thirty-five thousand Seychelles Rupees (SR235,000)."

There is no contradictory evidence on record that lead me not to believe her evaluation which I accept. The Defendants have submitted that that head of claim is excessive. That could have possibly be so at the time the report was made in 2003 but with the passage of time and the devaluation of the Seychelles Rupee and the increase in cost of construction and related works, I do not believe

that the sum claimed by the Plaintiff is excessive at today's comparative cost. I bear in mind that the building of a retaining wall and backfilling it would constitute a benefit to the Plaintiff in the long run. In any event he would, in the normal circumstances, have to do some such works even the Defendants had not interfered with his land. In view of this I will award the Plaintiff 80% of his claim under that head. I award the Plaintiff the sum of **SR180,000.00** under that head.

The Plaintiff claimed SR6,500.00 as transport costs for the site visits including work time lost and also SR8,000.00 for environment damages to *calice du pape* trees. I believe that the Plaintiff incurred transport expenses in connection with the damage to his property and that he indeed foregoes his productive time as a self-employed building contractor in order to attend to this unplanned situation. The Plaintiff's evidence that there were *calice-du-pape* trees on his property prior to excavation and that he has lost all those trees in the process, stand uncontroverted. I award damage in total sum of **SR10,000.00** under these two heads, being SR4,500.00 for transport costs and SR5,500.00 for the *calice du pape* trees.

I believe that it is also fair and reasonable that the Plaintiff be allowed to recoup certain reasonable expenses that he incurred which directly relate to this situation. I award a total of **SR1,500.00** to cover for fee paid for lawyers' advices and cost for correspondence since September 2001 – till March 2002, and **SR3,500.00** Quantity Surveyor Fees.

The Plaintiff is claiming SR100,000.00 as moral damages. I accept that the situation that the Plaintiff went through in relation to his dream to build a three-tier house with ocean view in 2003 has been shattered by the act and/or omission of the Defendants. He has indeed morally suffered over the years that his dream having not materialized for reason not attributed to him. However, I believe that the amount claim is on the high side taking into consideration the circumstances of this case, including the offer of the Defendants to make certain amends. It is my judgment that a fair and reasonable sum as moral damage is SR30,000.00. I award the Plaint the sum of **SR30,000.00** as moral damages.

I accordingly enter judgment in favour of the Plaintiff as against the Defendants in the total sum of **SR223,500.00** with costs. This total award is made in the proportion of 50% against the 1st Defendant and 50% against the 2nd Defendant.
I also award interest at the legal rate.

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B. RENAUD

JUDGE

Dated this 9th November, 2012