

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram: A. Fernando (J.A) F. Robinson (J.A), S. Andre (J)]**

## **Civil Appeal SCA 22/2017**

**(Appeal from Supreme Court Decision CS 184/2011)**

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Dorothy Hall

Appellant

Versus

Maria Morel

1st Respondent

Sonny Sophola

2nd Respondent

Charlemagne Mellon

3rd Respondent

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Heard: 13 August 2019

Counsel: Mr. F. Elizabeth for the Appellant  
Maria Morel – absent & unrepresented  
Mr. D. Sabino for the second Respondent  
Mr. N. Gabriel for the third Respondent

Delivered: 23 August 2019

## **JUDGMENT**

### **F. Robinson (J.A)**

[1] This is an appeal from the judgment of a learned trial Judge of the Supreme Court finding *inter alia* that:

- (a) the "*sale transactions*" which were concluded in the law chambers of Mr. Joel Camille, an Attorney-at-Law, gave "*good title in law*" to the land comprised in title number V12077 (hereinafter referred to as the "*Property of the estate*") to the second respondent and his wife, Mrs Hugette Sophola;

- (b) *"the 1<sup>st</sup> Defendant [the executrix] has the legal capacity to transfer good title despite not having the consent of all the heirs."*
- (c) *"[o]btaining the written consent of all the heirs before selling the co-owned property to the 2<sup>nd</sup> Defendant would be ideal but is not fatal to the performance of her functions as Executrix in transferring the property in the circumstances";*
- (d) *"[t]he transfer of Title V12077 to the 2<sup>nd</sup> Defendant and his wife, by the Executrix Mrs. Marie Amina Morel, is valid in law and is not vitiated by lack of consent";*
- (e) the second respondent (the second plaintiff then) was a *bona fide* purchaser.

[2] In the light of his findings, the learned trial Judge dismissed the plaintiffs' case with costs and made the following orders, at para [103]:

*"[103] This hereby discharged any inhibition order in respect of Title V12077 and the Land Registrar is at liberty to register the Transfer deed dated 2<sup>nd</sup> November, 2010, between 2<sup>nd</sup> Defendant Sonny John Sophola and his wife Hugette Fabiola Sophola as Transferees thereof. Subject to the 1<sup>st</sup> Defendant Marie Amina Morel obtaining a rectification order of the said Transfer Deed as to the correct "Transferor" and "Transferee", the land Registrar is at Liberty to register Title V11933 in the name of Marie Amina Morel as the Executrix of the estate of the deceased France Morel."*  
(verbatim)

[3] The appellant (the second plaintiff then), being dissatisfied with the judgment, has lodged the present appeal on nine grounds. I have not reproduced the grounds of appeal. Having considered the nine grounds of appeal with care, specifically grounds 5, 6 and 9, I am satisfied that the issues for consideration are as follows:

- (a) whether or not the first respondent (for ease of reference, the first respondent shall be referred to in this judgment as *"the executrix"*), in her capacity as the fiduciary should have sought the written consent of all the heirs before selling and transferring the Property of the estate;

- (b) whether or not the second respondent was a *bona fide* purchaser of the Property of the estate;
- (c) whether or not the failure to put parties into cause was fatal to the plaint.

### **ISSUES (a) AND (b) OF PARA 3 HEREOF**

#### **The facts**

- [4] The facts can be briefly stated as follows.

#### *The case for the appellant*

#### The evidence of Dorothy Hall

- [5] The appellant is the first respondent's daughter. The first respondent is the executrix of the succession and estate of her late husband, Mr. France Morel, who died on the 18 September 1984.
- [6] It was not disputed at the trial that the heirs in the estate of the late Mr. France Morel are the executrix, the appellant, Mr. Justin Morel, Mr. Michael Morel, Mrs Pamela Constance (born Morel) and Mr. Simon Mark Alcindor. The father of Mr. Simon Mark Alcindor is not the late Mr. France Morel.
- [7] The appellant knew the second respondent "*when he entered [her] mother's house*". The third respondent (the third plaintiff then) was her brother in law and remained her brother in law at the time of filing of the plaint on the 23 September 2011.
- [8] The Property of the estate was sold to the second respondent on a date unknown to the appellant. The executrix transferred ownership of the Property of the estate for the ownership of the second respondent's land comprised in title number V11933 and in consideration of 150,000/- rupees. The appellant was adamant that she had not given consent to the sale of the Property of the estate. She did not know whether or not her siblings had given consent to the sale of the Property of the estate. The appellant came to know of the sale when she visited the office of the Land Registrar, after having witnessed

the demolition of the inside of the house situated on the Property of the estate. According to her finding at the office of the Land Registrar, they were in the process of registering the transfer of ownership of the Property of the estate.

[9] The appellant did not know about the second respondent's land comprised in title number V11933. She also did not know whether or not the second respondent had registered the transfer of ownership of his land in the name of the executrix. The second respondent, his wife and children are occupying the Property of the estate. The executrix occupied the Property of the estate before its sale.

[10] The appellant testified that the executrix did not have the legal authority to sell the Property of the estate. On the 25 May 2011, Mr. Frank Elizabeth wrote to the second respondent, exhibit P7, concerning the sale of the land comprised in title number V8902<sup>1</sup>. The said letter informed the second respondent *inter alia* that the executrix did not have the capacity under the law to execute the transfer of ownership of the said land at the time of the transfer. The said letter requested the second respondent to transfer ownership of the land comprised in title number V8902 to the estate of the late Mr. France Morel.

[11] Mr. Joel Camille, an Attorney-at-Law, provided Mr. Frank Elizabeth with a written response on the 23 June 2011. It read, in relevant part, as follows:

***"[...] Consent for the said transfer above referred was granted by Miss Hillary Pamela Morel and Mr. Michael Tommy Morel, who was as per the instructions of Mrs. Amina Morel were the sole heirs to the estate of the late France Morel."*** (Emphasis supplied)

[12] The appellant asked the court *inter alia* to declare the sale null for lack of consent from all the heirs of the late Mr. France Morel and order the Land Registrar to rectify the land register by registering the Property of the estate in the name of the estate of the late Mr. France Morel.

[13] Counsel for the first respondent did not cross-examine the appellant.

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<sup>1</sup> It was undisputed that the Property of the estate had been excised from the land comprised in title number V8902.

- [14] When cross-examined by Counsel for the second respondent, the appellant testified that she did not know whether or not the executrix had sold the Property of the estate to the second respondent. The appellant, upon the request of Counsel for the second respondent, read the following words contained in the instrument of transfer, (exhibit D2), into the record: *"all the heirs have consented to the said transfer"*. I find it appropriate to reproduce the instrument of transfer (exhibit D2), *in toto*:

*"THE LAND REGISTRATION ACT*

*TRANSFER OF LAND*

*TITLE NO : V 12077*

*I, Marie Amina Morel of N.I.N 993-02-1-0-34 of Beau Vallon, Mahe, Seychelles, acting as the executrix of the late Mr. France Morel, and hereinafter referred to as the "Transferor", in consideration of the TRANSFEREES transferring their land at Plaisance, Mahe, Seychelles known as parcel V11933, to the TRANSFEROR, hereby transfer to Sonny John Sofola (N.I.N 966-0016-3-1-68) and Huguette Fabiola Sofola (N.I.N 973-0731-1-0-53) both of Anse Louis, Mahe, Seychelles, hereinafter referred to as the "TRANSFEREES", the said land comprised in the above mentioned Title V12077 situated at Beau Vallon, Mahe, Seychelles, and on the further condition that a consideration sum of Rs 150,000 shall be further paid by the transferor to the transferees, for said parcel V11933...*

*Dated this 2<sup>nd</sup> day of November 2010*

*Transferor*

*Transferees*

*Signed by the said Marie Amina Morel, Sonny John Sofola and Hugette Fabiola Sofola who are known to me in my presence*

*The Transferees are not-non Seychellois.*

***The Transferor hereby declares and certifies that all heirs have consented to the said transfer.***

*Immovable Property (Transfer Restrictions) Act*

*Attorney-at- Law". (Emphasis supplied)*

- [15] The appellant did not know whether or not the transfer of the land comprised in title number V11933 was signed by the second respondent and his wife and the executrix. The appellant did not know the second respondent and his family until they had moved in the house. After the sale of the Property of the estate, an argument ensued between the appellant and the executrix when she tried to extract information from the executrix regarding the sale.
- [16] When cross-examined by Counsel for the third respondent, the appellant stated that she had no claim against the third respondent.
- [17] The appellant did not call any witnesses.

**The case for the first respondent**

- [18] The executrix did not give evidence or call any witnesses.

**The case for the second respondent**

The evidence of Mr. Joel Camille

- [19] Mr. Joel Camille is an Attorney-at-Law and a Notary Public. Mr. Joel Camille prepared the instrument of transfer, (exhibit D2), see para [14] hereof. The instrument of transfer, (exhibit D2), was executed by the executrix and the second respondent and his wife, Mrs Hugette Sophola.
- [20] Mr. Joel Camille met with the executrix, Mrs Pamela Constance (who was Miss Pamela Morel at the time of the transfer of the Property of the estate), Mr. Michael Morel, the second respondent and his wife and the third respondent on three occasions, when he informed them that all the heirs in the estate of the late Mr. France Morel had to give consent to the sale and transfer of the Property of the estate. He did not recall having had sight of the order of the Supreme Court, appointing the first respondent as the executrix of the estate and succession of the late Mr. France Morel. Mr. Joel Camille testified that the executrix had informed him that Mrs Pamela Constance and Mr. Michael Morel were the only two surviving heirs of the late Mr. France Morel.

- [21] Mr. Joel Camille did the *"paper works"* in his law chambers, in the presence of Mrs Pamela Constance and Mr. Michael Morel. Mr. Joel Camille prepared two *"deeds of consent"* containing the consent of Mrs Pamela Constance and Mr. Michael Morel. He added that all documents were sent to the office of the Land Registrar, but to date they had not been registered because of a court order prohibiting their registration.
- [22] When cross-examined by Counsel for the second respondent, he stated that, based on information from the executrix, he was satisfied that there were only two heirs in the estate and succession of the late Mr. France Morel namely, Mr. Michael Morel and Mrs Pamela Constance, who both came to his law chambers at the material time. He added that he did not have the appointment document at the time of transfer of ownership of the Property of the estate. Mr. Joel Camille was at the material time being instructed by the second respondent.
- [23] When cross-examined by counsel for the executrix, Mr. Joel Camille stated that he should have taken the consent of all the heirs having taken the written consent of two of the heirs.

The evidence of Mr. Sonny Sophola

- [24] The second respondent is an architectural draftsman and a contractor. He lives at Beau Vallon. He was informed by a man that there was land and house for sale at Beau Vallon. He visited the land and house. He spoke to his wife about the land and house which they both agreed to buy.
- [25] The second respondent explained that a person named Michael, also known as *"Micky"*, took him to a *"take away"* business where the third respondent was working at the time. *"Micky"* and the third respondent told him that: *"if [he] was able to make a deposit immediately, they can make transaction for that place"*. He visited the land and house on a Saturday and the following Monday, the 17 May 2010, *"Micky"* told him that he will bring his mother to start the procedures.
- [26] Later in the proceedings, he stated that when they met on Monday the 17 May 2010, *"they"* asked him for a first payment of 75,000/- rupees, which he paid by cheque on the said date. On the 17 May 2010, they agreed verbally that he will make further payments by

instalments. At the time he had not seen Mr. Joel Camille, an Attorney-at-Law. On the 17 May 2010, the second respondent paid the sum of 75,000/- rupees at the law chambers of Mr. Serge Rouillon.

- [27] On the 21 November 2016, at 9:30 a.m., following change of Counsel representing the second respondent, the testimony of the second respondent started anew. The second respondent stated that, on the 12 May 2010, a man informed him that there was land for sale at Beau Vallon. The man told the second respondent to accompany him so that he could show him the land. When asked to identify the man, he stated that it was a man who had information about land for sale. When they were visiting the land, the man told him how to contact the person who was selling the land.
- [28] On the 14 May 2010, the second respondent contacted Mr. Michael Morel, also known as "*Mickey*". Mr. Michael Morel gave him an appointment to meet at the "*Mix Take Away*" on Saturday the 15 May 2010. At the time the "*Mix Take Away*" was being run by the third respondent. "*Mickey*" worked at the "*Mix Take Away*". On the same day they visited the land (the Property of the estate). It was the first time that he saw Mr. Michael Morel. He did not visit the inside of the house because Mr. Michael Morel had told him that the key was with the executrix. After the visit, he and Mr. Michael Morel went back to the "*Mix Take Away*" where Mr. Michael Morel and the third respondent told him to make a first payment if he wanted to buy the Property of the estate.
- [29] He did not make any deposit though they insisted that he should make it. He told them to allow him and his wife to make up their minds. He testified that they kept phoning him asking for a deposit, and that he told them that he would get back to them on Monday the 17 May 2010.
- [30] On that Monday he received a phone call telling him to come to the "*Mix Take Away*" to meet the owner of the Property of the estate, the executrix. On arriving at the "*Mix Take Away*", he met the executrix who confirmed that she was the owner of the Property of the estate. The second respondent stated that they negotiated. He proposed the transfer of ownership of his land comprised in title number V11933 located at Plaisance and the consideration of 150,000/- rupees for the transfer of ownership of the Property of the estate.

They (the executrix, the third respondent, he (the second respondent) and Mrs Pamela Constance)) agreed orally for him to pay 150,000/- rupees within three months.

- [31] He made a cheque out to Mrs Pamela Constance for 75,000/- rupees after the executrix had asked him to make a first payment on the 17 May 2010. On the 17 May 2010, he gave the cheque to Mrs Pamela Constance at the law chambers of Mr. Serge Rouillon.
- [32] On the 19 May 2010, he proceeded to visit the land again in the company of the executrix, Mr. Michael Morel, Mrs Pamela Constance, Mrs Hugette Sophola and the third respondent. The executrix and the third respondent did not accompany him to the house. They remained in the car which was parked "*lower*". On the 19 May 2010, he saw the inside of the house for the first time. After the visit they returned to the car. Mr. Michael Morel informed the executrix that they had viewed the house and asked the executrix whether or not he should give them the key, to which she said yes.
- [33] On Thursday the 20 May 2010, the executrix told him by phone to make another payment. On that date he made a cheque out to Mrs Pamela Constance for 20,000/- rupees. He gave the cheque to Mrs Pamela Constance at the law chambers of Mr. Serge Rouillon.
- [34] On Friday the 21 May 2010, the executrix signed a letter at the Public Utilities Corporation giving consent for water and electricity to be transferred to his name and that of his wife. On the 21 May 2010, they (the executrix, Mr. Michael Morel, Mrs Pamela Constance, the third respondent and he (the second respondent)) visited his land comprised in title number V11933. They were all happy with the land (V11933). After they had visited the land, the executrix asked him for more money. He gave her a cheque for 7,000/- rupees.
- [35] On the 28 May 2010, the executrix told him by phone to make a cheque out to the Development Bank of Seychelles (to the benefit of the third respondent). He made a cheque for the sum of 13,840/- rupees. On the 7 June 2010, he was told by the executrix by phone to make a cheque out to the third respondent, which he did for the sum of 5,000/- rupees. On the 10 June 2010, the executrix told him to make another payment. He gave the executrix the sum of 10,000/- rupees. On the 14 June 2010, the executrix told him by phone

to make another payment to the third respondent. He made a cheque for the sum of 10,000/- rupees. In less than a month he had paid the sum of 140,840/- rupees.

- [36] He stated that, in relation to the remaining sum of 9,160/- rupees, the executrix told him to keep it as it was to be used in payment of her legal fees to her Attorney-at-Law, Mr. Joel Camille.
- [37] On the 2 November 2010, the first respondent signed the instrument of transfer, (exhibit D2). He paid Mr. Joel Camille 6,000/- rupees in legal fees, which was deducted from the sum of 9,000/- rupees that he had been told to keep.
- [38] The instrument of transfer, exhibit D2, stated that all the heirs had given consent to the transfer of ownership of the Property of the estate. At the time of the transfer of ownership of the Property of the estate, he knew that Mrs Pamela Constance and Mr. Michael Morel were the heirs in the estate of the late Mr. France Morel. He never doubted the statement contained in the instrument of transfer, exhibit D2, because the executrix, Mr. Michael Morel and Mrs Pamela Constance were "*total strangers to him*". He did not know how many heirs there were in the estate of the late Mr. France Morel. He had acted in good faith.
- [39] He had been occupying the Property of the estate from June 2010, to the 27 April 2011. During that period, there were no complaints from the appellant. He stated that an argument of a political nature started between him and the appellant eleven months after the sale, after which he started having problems with the appellant. On the 25 May 2011, he received a letter from the Victoria Law Firm.
- [40] When cross-examined by Counsel for the appellant, the second respondent stated that the executrix had told him that all the heirs had given consent to the transfer of the Property of the estate. He saw two "*consent deeds*" that Miss Pamela Morel had signed.
- [41] When asked whether or not he needed to ensure that the two other heirs, namely Mr. Justin Morel and the appellant, had given consent, he stated that it was up to Counsel to request for their consent rather than for him. He accepted that the Property of the estate had not been registered at the time of the hearing.

- [42] The third respondent did not cross-examine the second respondent.

The evidence of Mrs Pamela Constance

- [43] She testified that the executrix is her mother, and that the appellant is her sister. In 2010, she was the concubine of the third respondent. She knew that the second respondent wanted to purchase the Property of the estate. She did not recall going to the law chambers of Mr. Serge Rouillon to sign a receipt in May 2010. She did not recall visiting the Property of the estate on the 21 May 2010, in the company of the executrix, Mr. Michael Morel and the second and third respondents. She recalled receiving a cheque for 75,000/- rupees in relation to the transaction. She did not remember signing a consent form in relation to the transfer of the Property of the estate in the presence of Mr. Joel Camille. Mrs Pamela Constance was not cross-examined.

**The case for the third respondent**

The evidence of Mr. Charlemagne Mellon

- [44] The third respondent testified that, at the material time, the executrix was his mother-in-law, Miss Pamela Morel was his girlfriend and Mr. Michael Morel was his brother-in-law. He had *"never interfered with Dorothy and Justin."* He was aware of the transaction. He mentioned that cheques made out to his name were given to him by the executrix to pay for his debt. At the material time the appellant and the executrix *"were in a big fight and all the people in Canada, Beau Vallon know about that."* At the material time the executrix was living with him. He was not there when the transaction concerning the transfer of the Property of the estate was concluded. He stated that the executrix signed the instrument of transfer.

**Discussion**

- [45] I have considered the grounds of appeal, the skeleton Heads of Arguments submitted on behalf of the appellant, the second respondent and the third respondent and the oral submissions of all Counsel in this appeal.

- [46] In relation to the issues for consideration, the learned trial Judge found at para 48 of the judgment that: *"obtaining the written consent of all the heirs before the selling of co-owned property to the 2<sup>nd</sup> defendant would be ideal but is not fatal to the performance of her functions as Executrix in transferring the property in the circumstances"*, and that the second respondent *"is indeed a purchaser in good faith"*.
- [47] The assessment of the credibility and reliability of the appellant, the second and third respondents and the witnesses called by the second and third respondents in support of their respective case played a role in the learned trial Judge's judgment.
- [48] He found the executrix, (a nurse) and Mrs Pamela Constance, who according to him had both testified on behalf of the *"plaintiffs"* in the court below, to be untruthful. I remark that the executrix and Mrs Pamela Constance had not testified on behalf of the *"plaintiffs"* in the court below, and that the testimony of the executrix at the *voire-dire*, was limited to money payments.
- [49] I also observe that the learned trial Judge believed the testimony of the appellant that she had not given **consent in writing** or **given consent** to the sale of the Property of the estate - the learned trial Judge stated at para 48 of the judgment: *"[48] [...]. This Court finds that the 1<sup>st</sup> Defendant has legal capacity to transfer good title despite not having the consent of all the heirs"*. It appears that the learned trial Judge was also convinced that Mr. Justin Morel had not given consent to the sale and transfer of the Property of the estate.
- [50] I also observe that the learned trial Judge found the second respondent who *"meticulously testified as to how all the transactions took place"*, to be a truthful witness and believed his evidence.
- [51] I have to consider whether or not it was permissible for the learned trial Judge to make the findings of fact which he did in the face of the evidence as a whole, which is relevant to the issues which arise for consideration.
- [52] It is important to recall the role of an appellate court in an appeal against findings of fact by a trial Judge. *Searles v Pothin Civil Appeal SCA Civil Appeal No. 07/2014* (21 April 2017), which referred to the formulation of the Court of Appeal in *Akbar v The Republic*

*Criminal Appeal SCA5/1998* (3 December 1998), observed that the role of an appellate court in an appeal against findings of facts by a trial court is not to "*rehear the case. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial judge's findings of credibility are perverse*". See also, for example, *Roy Beeharry v The Republic Criminal Appeal SCA28/2009* (13 April, 2012), which illustrates the same proposition.

- [53] The above referenced authorities find support in the decision of the Privy Council in *Beacon Insurance Co. Ltd v Maharaj Bookstore Ltd.* [2015] 1 LRC 232, where when dealing with an appeal from Trinidad and Tobago on the principle regarding an appeal based on findings of facts, the Board stated —

*"[12] In Watt (or Thomas) v Thomas [1947] 1 All ER 582 at 587, [1947] AC 484 at 487-488, to which the Court of Appeal referred in its judgment, Lord Thankerton stated:*

*'I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witness could not be sufficient to explain or justify the trial judge's conclusion.*

*II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to a satisfactory conclusion on the printed evidence.*

*III. the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it mistakenly so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'*

*In that case, Viscount Simon and Lord du Parc ([1947] 1 All ER 582 at 584 and 591, [1947] AC 484 at 486 and 493 respectively) both cited with approval the dictum of Lord Greene MR in Yuill v Yuill [1945] 1 All ER 183 at 188, [1945] para 15 at p. 19:*

*'It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion.'*

[...]

[13] More recently, in In re B (a child)(care order: criterion for review)[2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911(at 53), Lord Neuberger explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated:

*'[T]his is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it [...].'*

[...]

[15] There are further grounds for appellate caution. In McGraddie v McGraddie [2013] UKSC 58, [2013] 1 WLR 2477 (at [4]), Lord Reed cited observations adopted by the majority of the Canadian Supreme Court in Housen v Nikolaisen [2002] 2 SCR 23, (at para 14):

*'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence ... The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged [...].'*

[...]

[17] Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have

*to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. In Re B (a child) (above) Lord Neuberger (at [60]) acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary facts and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in Whitehouse v Jordan [1981] 1 All ER 267 at 286, [1981] 1 WLR 246 at 269–270:*

*'[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'*

*See also Lord Fraser of Tullybelton ([1981] 1 All ER 267 at 281, [1981] 1 WLR 246 at 263); Saunders v Adderley [1998] 4 LRC 485 at 49 (Sir John Balcombe); and Assicurazioni Generali SpA v Arab Insurance Group [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] 1 WLR 577 (at [12]–[17] per Clarke LJ). Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."*

- [54] In this appeal, the learned trial Judge had the instrument of transfer, (the questioned document), and other relevant documents. However, his assessment of the facts and circumstances surrounding the sale and transfer of the Property of the estate depended fundamentally on an evaluation of the oral testimony of the second and third respondents and the witnesses called in support of their respective case, whom he saw and heard. Therefore, his assessment of the presence or absence of good faith on the part of the second respondent, which issue is inseparably linked with the issue of heirs consent to the sale, should be displaced only on clearest grounds.

### **Directions in writing**

- [55] I have identified the first issue as whether or not the executrix in her capacity as the fiduciary should have sought the written consent of all the heirs before selling and transferring the Property of the estate, which I shall address first before turning to the assessment of the evidence by the learned trial Judge. This issue involves a consideration of whether or not the learned trial Judge was correct to find that: *"the 1<sup>st</sup> Defendant has legal capacity to transfer good title despite not having the consent of all the heirs."*
- [56] The Court of Appeal of Seychelles has pronounced on this issue. I have examined the pronouncement of the Court of Appeal in the light of the relevant provisions of the Civil Code of Seychelles (the *"Civil Code"*). I have also considered decisions of the Supreme Court in relation to this issue, as they are of interest.
- [57] Article 711 of the Civil Code provides that: *"[t]he ownership of property is acquired and transferred by succession, by gift inter vivos or by will and by the effect of obligations"*.
- [58] In the *Matter of: Section 94 of the Land Registration Act (CAP 97)*, [1994] SLR 88, the learned Judge considered the role and place of an executor in the light of the provisions of *inter alia* Articles 724 and 819 of the Civil Code which provide:

*"Article 724*

- 1. If the deceased leaves no immovable property, the property, rights and actions of the deceased vest as of right in the legitimate heirs, the natural children and the surviving spouse subject to the obligation of discharging all the debts of the succession.*
- 2. The Republic shall be granted possession by the Court according to the forms hereafter provided.*
- 3. When there are no legitimate heirs, the other persons mentioned in paragraph 1 who are entitled to succeed shall do so as of right.*
- 4. If any part of the succession consists of immovable property, the property shall not vest as of right in any of his heirs but in an executor who shall act as fiduciary. In respect of such fiduciary the rules laid down in Chapter VI of Title I, and Chapter V Section VII of Title II, of Book III of this Code shall have application.*

and

*"Article 819*

*In the case of immovable property held in co-ownership, unless all the co-owners agree to postpone the sale, such property shall be sold. If the co-owners do not agree to a private sale, or if one of them is subject to an incapacity such as minority or interdiction or is absent from Seychelles and is not represented therein by a duly appointed agent, the property shall be sold at a public auction. In this respect, articles 1686, 1687 and 1688 of this Code relating to licitation shall have application.*

*Nevertheless, even if one or more of the co-owners is subject to an incapacity as aforesaid, or is absent from Seychelles, the property may be sold otherwise than by a public auction with the permission of the Court."*

[59] The learned Judge was of the opinion that the executor's place and role may be understood in the light of the concept of "*seisin*" - i.e., possession of the estate of the deceased by operation of law. In the opinion of the learned Judge, the executor is simply vested with the possession of the estate to administer it until the said property is passed over to the heirs pursuant to the law. Hence the learned Judge was of the opinion that: "[n]o change of title to the property can be effected without consent of all heirs."

[60] In the case of *J. Kaven Parcou & Ors v Julien Parcou & Ors* (unreported) Civil Side No. 38 of 1994 (2 November 1994), the learned trial Judge considered the functions, duties and powers of an executor in the light of *inter alia* the provisions of Articles 724, 819 and 825 of the Civil Code. The applicants in that case had applied for licitation of the land comprised in title number V5553.

[61] Article 825 of the Civil Code provides:

*"Article 825*

*The functions of the fiduciary shall be to hold, manage and administer the property, honestly, diligently and in a business-like manner as if he were the sole owner of the property. He shall be bound to follow such instructions, directions and guidelines as are given to him in the document of appointment by the unanimous agreement, duly authenticated, of all the co-owners or by the Court.*

*He shall have full powers to sell the property as directed by all the co-owners, and if he receives no such directions, to sell in accordance with the provisions contained in articles 819, 1686 and 1687 of this Code and also in accordance with the Immovable Property (Judicial Sales) Act, Cap. 94 as amended from time to time."*

- [62] In *J. Kaven Parcou & Ors v Julien Parcou & Ors* (unreported) Civil Side No. 38 of 1994 (2 November 1994), learned Counsel for the respondents contended *inter alia* that: "*in intestate succession an executor can sell the immovable property [...] without the constraints of Articles 825 and 826 of the Code.*".
- [63] The learned trial Judge opined that: "*[i]t is an inescapable conclusion that an executor appointed by law is subject to provisions of law that regulates his conduct. The learned counsel for the defendant in his assertion - 'that the property shall not vest as of right in any of his heirs but in an executor who shall act as a fiduciary. (Article 724 (4) of the Code.'* The same Article prescribes the rules that will apply in his conduct as an executor. Article 724 (4) defines the said rules as found in Chapter VI of Title I and Chapter V section VII of Title II, of Book III of the Code."
- [64] The learned trial Judge went on to say that: "*[i]t is without dispute that the 1<sup>st</sup> defendant had no expressed authority from the petitioners or the court for such a sale of the property [...] owned by the said co-owners, and on such circumstance, the Articles 819, 1688 and 1687 only provide for a public auction or licitation as the case may be.*".
- [65] The learned trial Judge also identified the issue as whether or not an implied consent would suffice. He opined that:

*"[o]n the examination of the legal position whether such implied consent would be sufficient, it is seen that Article 825 envisages stringent measures even in respect of the fiduciaries functions to hold, manage and administer the estate of the deceased by requiring the directions, instructions and guidelines to be in writing duly authenticated. It should go without saying for the sale of property the requirement if not more stringent, it should be no less. Therefore directions in Article 825 and agreement in Article 819 should necessarily be in writing. In any event the 1<sup>st</sup> defendant has never claimed that he has been directed or there was an agreement among*

*the petitioners for the sale of their shares and a presumed knowledge is no substitute in the alternative."*

- [66] In the case of *Charlemagne Grandcourt & Ors v Christopher Gill* (SCA 7 of 2011) [2012] SCCA 31 (7 December 2012), the issue of heirs consent to the sale was raised. Counsel for the respondent argued at the appeal that there was "*no duty on an innocent purchaser to conduct research on whether or not the vendor as the executor of an estate has obtained the consent of the heirs to sell the property*". Counsel also argued that in any event the consent of the heirs did not have to be in writing. For the submissions Counsel relied on the Court of Appeal case of *Kaven Parcou & Ors v Julien Parcou & Ors Civil Appeal No. 14 of 1998*<sup>2</sup>.
- [67] The majority of the Court of Appeal accepted the submissions of Counsel for the respondent and the authority of *Kaven Parcou & Ors v Julien Parcou & Ors Civil Appeal No. 14 of 1998*, on the ground that they stated the correct legal position. The majority of the Court of Appeal in its deliberations also applied Article 819 of the Civil Code. The majority of the Court of Appeal stated: "[5] [...]. *The fiduciary is certainly given the power to sell land and where he receives no instructions to sell, he can still sell as long as he does so in accordance with the provisions of article 819 of the Civil Code*". I remark that the minority of the Court of Appeal adopted the findings of the majority of the Court of Appeal in relation to the aforementioned issues.
- [68] In the case of *Suzarra Jorre de St. Jorre & Ors v Narcisse Stevenson Civil Appeal SCA 5 & 6/2015 (Consolidated)* (unreported) (7 December 2017), the first appellant - Suzarra Jorre de St. Jorre, who is the niece of the respondent, transferred land belonging to or in which the respondent had an interest to herself, her children - the second to fourth appellants and to a third party - the fifth appellant.

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<sup>2</sup> *Kaven Parcou & Ors v Mr. Julien Parcou and Ors Civil Appeal No: 14 of 1998* ([...] 1999) considered only the issue as to whether or not the property was acquired in good faith or not by the purchaser.

[69] The Court of Appeal considered the duties, powers and functions of an executor of a succession in the light of the provisions of Articles 819, 825, 826, 1027 and 1028 of the Civil Code.

[70] Article 1027 of the Civil Code provides:

*"Article 1027*

*The duties of an executor shall be to make an inventory of the succession to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will, as the case may be.*

*[...]"*.

[71] Article 1028 of the Civil Code provides:

*"Article 1028*

*The executor, in his capacity as fiduciary of the succession, shall also be bound by all the rules laid down in this Code under Chapter VI of Title I of Book III relating to the functions and administration of fiduciaries, insofar as they may be applicable.*

*[...]"*.

[72] Article 826 of the Civil Code provides:

*"Article 826*

*Where a fiduciary wishes to proceed to the sale of property, he shall communicate to all those entitled a formal notice of the intended sale. The sale shall not take place until six months after such notice has been issued. However, the Court, upon application by a party may, on reasonable grounds, grant permission to sell the property earlier or the later than the period of six months or without notice."*

[73] In **Suzarra Jorre de St. Jorre & Ors** *supra*, the Court of Appeal was of the opinion that it was "**recommended**" that written consent of the heirs be sought before an executor sells co-owned land. This finding of the Court of Appeal was based on the authority of *J. Kaven Parcou & Ors v Julien Parcou & Ors* (unreported) Civil Side No. 38 of 1994 (2 November

1994). I observe that *J. Kaven Parcou & Ors v Julien Parcou & Ors* (unreported) Civil Side No. 38 of 1994 (2 November 1994) interpreted the law to mean that: "*directions in Article 825 [...] should necessarily be in writing*".

- [74] **Suzarra Jorre de St. Jorre & Ors** *supra*, also adopted the observations of the Court of Appeal in *Rajasundaram & Ors v Romesh Pillay Civil Appeal SCA09/2013* (17 April 2015), in which the Court of Appeal interpreted the law to mean that: "*fiduciaries had powers to sell or alienate property. That is subject of course to the caveats in the provisions of the Civil Code (supra) including the fact that the consent of the heirs must be obtained and failing that an order of the court must be sought*". In **Suzarra Jorre de St. Jorre & Ors** *supra*, the Court of Appeal did not find evidence that such consent was sought from the respondent apart from the self-serving evidence of the first appellant.
- [75] The Court of Appeal has interpreted the provisions of the law to mean that a fiduciary is empowered to sell property, subject to the consent of all the heirs and the "*caveats in the provisions of the Civil Code*". **Suzarra Jorre de St. Jorre & Ors** *supra*, has "*recommended*" that written consent of all the heirs be sought before an executor sells co-owned land. With respect, I opine that the basis for the holdings of the Court of Appeal, is not clear. Having considered the holdings of the Court of Appeal, I am satisfied that it has misinterpreted the provisions of the law.
- [76] I hold that it is the duty of the fiduciary to obtain the **written consent** of all the heirs before proceeding to sell co-owned property. Where the fiduciary does not obtain the written consent of all the heirs, the relevant provisions of the Civil Code apply. I give reasons.
- [77] Article 724 of the Civil Code is set out under Book III, Chapter I of Title I, which deals with the opening of the succession and the *seisin* of heirs. It is clear that, under Article 724 of the Civil Code, when a person dies, the right of ownership to his estate vests as of right in his heirs and, in default thereof, in the State. If the estate and succession comprise of immovable property, the *seisin*, i.e., the possession of the entire estate shall vest in an executor who shall act as fiduciary. When there are several heirs, the executor is the fiduciary for the co-ownership which has come into existence by the death of the person

who has left the estate. In default of heirs, the State will have to be granted possession by the court in accordance with Article 769 of the Civil Code.

- [78] Article 724 of the Civil Code makes it clear that in respect of such fiduciary the rules laid down under Book III, Chapter VI of Title I<sup>3</sup> of the Civil Code and Chapter V Section VII of Title II, of Book III<sup>4</sup> of the Civil Code, shall apply. I am reminded of Article 818 of the Civil Code which provides that if the property subject to co-ownership is immovable, **the rights of the co-ownership shall be held on their behalf by a fiduciary through whom only they may act.** Under Article 1028 of the Civil Code, an executor in his capacity as fiduciary of the succession, shall also be bound by all the rules laid down in the Civil Code under Book III, Chapter VI of Title I, relating to the functions and administration of fiduciaries, in so far as they may be applicable.
- [79] Article 825 of the Civil Code stipulates the functions of a fiduciary which shall be to hold, manage and administer the property, honestly, diligently and in a business-like manner as if he were the sole owner of the property. That Article also gives the fiduciary through whom only the co-owners may act, full powers to sell co-owned property as directed by the co-owners.
- [80] Article 825 of the Civil Code expressly provides that, in the performance of his functions, the fiduciary shall be bound to follow such instructions, directions and guidelines as are given to him in the document of appointment by the unanimous agreement, duly authenticated of all the co-owners or by the court. In relation to the fiduciary's power to sell co-owned property, the fundamental factors that need to be taken into account are that he may exercise such power to sell **as directed by all co-owners, and if he receives no such directions, to sell in accordance with the provisions contained in Articles 819, 1686 and 1687 of the Civil Code and also in accordance with the Immovable Property (Judicial Sales) Act.**
- [81] The word "*direction*" is an ordinary English word. The relevant dictionary definition of "*direction*" in the Oxford English Dictionary (online edition) is the action or function: "*of*

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<sup>3</sup> Articles 815 through to Article 892 deal with the powers, functions and administration of fiduciaries

<sup>4</sup> Articles 1025 through to 1034 deal with executors

*instructing how to proceed or act aright, authoritative guidance, instruction".* The Concise Oxford Dictionary defined the word "*direction*" as: "*1. The act or process of directing; supervision. 2. (usu. In pl.) an order or instruction*".

- [82] The combination of the weight of the provisions of Article 825, 819 and the other provisions of the Civil Code *supra*, and the dictionary definitions lead me to the conclusion that something more than the mere consent of all the heirs is required. What is required is the **written consent** of all the heirs. Accordingly, I hold that a fiduciary, in the exercise of his powers to sell co-owned land, should be directed in writing by all the co-owners before he can act. In that regard I adopt the observations by the learned trial Judge in *J. Kaven Parcou & Ors v Julien Parcou & Ors* (unreported) Civil Side No. 38 of 1998, which are repeated in paras [63], [64] and [65] hereof.
- [83] I am further convinced by the validity of this approach, after having also considered the weight of Article 826 of the Civil Code which expressly provides that where a fiduciary wishes to proceed to the sale of property, he **shall communicate to all those entitled a formal notice of the intended sale**. That Article goes on to stipulate that the sale shall not take place until six months after such notice has been issued. Therefore, the question arises as to whether or not the legislator intended that the words "*as directed by all the co-owners*" under Article 825 of the Civil Code should be interpreted to mean directions that are given to a fiduciary in writing, comparable to Article 826 of the Civil Code that stipulates for the stringent requirement of a **formal notice** where a fiduciary wishes to proceed to the sale of co-owned property. After having considered both Articles with care and the other provisions of the Civil Code *supra*, it is plain that "*as directed by all the co-owners*" should be interpreted to mean directions that are given to a fiduciary in writing by all the co-owners.
- [84] As mentioned above, one of the methods of acquiring the ownership of property is by succession (Article 711 of the Civil Code). As mentioned above, when a person dies, the right of ownership to his estate vests as of right in his heirs and, in default thereof, in the State (Article 724 of the Civil Code). Notes 942 and 944 from *Encyclopédie Dalloz. Code Civil. V. Succession* are of interest:

"942. Il est certain que la saisine ne concerne pas la transmission de la propriété et des autres droits du défunt. Les droits se transmettent aujourd'hui, aussi bien à cause de mort qu'entre vifs, sans qu'il soit besoin d'aucune mise en possession et en quelque sorte abstraitement. A cet égard, les droits du défunt, et d'ailleurs aussi ses obligations, passent de plein droit au successible par le seul fait du décès. Et il n'y a aucune distinction à faire entre les héritiers saisis et l'Etat, successeur irrégulier.

944. Qu'est-ce alors que la saisine? Il suffit, pour s'en rendre compte, de se référer à l'article 724<sup>5</sup>. Certains successeurs sont saisis un autre doit se faire envoyer en possession. La saisine n'est d'autre chose que la faculté de n'avoir pas à se faire envoyer en possession, c'est-à-dire de pouvoir se mettre en possession dès le décès et sans formalités. **Sans doute, loin d'être une faveur exceptionnelle, la saisine n'est alors que l'application du droit commun, qui veut qu'une personne puisse exercer librement les prérogatives dont elle est titulaire. Mais il n'y a là rien pour surprendre: l'envoi en possession est, en effet, bien une mesure de méfiance prise à l'égard de successeurs lointains dont on redoute qu'ils puissent dépouiller les successeurs plus proches.**" Emphasis supplied

[85] Likewise it could be said that directions that are given to a fiduciary in writing by all the co-owners, is "*une mesure de méfiance prise à l'égard*" of the fiduciary "*dont on redoute qu'ils puissent dépouiller*" the heirs. Accordingly, it is clear that an interpretation of the provisions which permits a fiduciary to dispose of property without obtaining the written consent of all the heirs, is tantamount to giving a *free-right* to a fiduciary to sell property. Such an interpretation will not be in the public interest under Article 26 of the Constitution. Under the law, persons are given the *free-right* to dispose of property which belongs to them, subject to the restrictions laid down by law.

[86] For the reasons stated above, I find that the learned trial Judge erred.

### ***Section 89 of the Land Registration Act: Bona fide purchaser***

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<sup>5</sup> "724. Les héritiers légitimes sont saisis de plein droit des biens, droits et actions du défunt, sous l'obligation d'acquitter toutes les charges de la succession: les enfants naturels, l'époux survivant et la République, doivent se faire envoyer en possession par justice dans les formes qui seront déterminées." Article 724 Code Napoléon

- [87] I now consider the issue as to whether or not the second respondent was a *bona fide* purchaser of the Property of the estate.
- [88] The second respondent averred in its statement of defence that as a *bona fide* purchaser, he is not required to return the land comprised in title number V12077.
- [89] Section 89 (1) of the Land Registration Act provides that the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.
- [90] Section 89 (2) of the Land Registration Act provides that the register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.
- [91] The learned trial Judge identified the issue as whether or not the second respondent was a purchaser in good faith. The learned trial Judge who attached considerable weight to the evidence he had seen given by the second respondent, expressed the view that:
- " [82] [...] there is no evidence before this Court to indicate that the 2<sup>nd</sup> Defendant coerced or tricked the 1<sup>st</sup> Defendant in any way. He did not act fraudulently in his transaction with the 2<sup>nd</sup> Defendant. The transaction was done openly before an attorney-at-law. The 2<sup>nd</sup> defendant cannot now insinuate that the 1<sup>st</sup> Defendant acted in bad faith. If there is bad faith involved, this Court has no hesitation in finding that there was bad faith, this must be laid on the 1<sup>st</sup> Defendant." Verbatim*
- [92] The learned trial Judge recorded the evidence of the executrix that she was well "*versed in such transactions*" in view of land transactions she had done prior to the sale of the Property of the estate.
- [93] The learned trial Judge found Mr. Joel Camille to be a truthful witness. Mr. Joel Camille who testified on behalf of the second respondent stated that he met with the executrix, Mrs Pamela Constance, Mr. Michael Morel and the second respondent and his wife on three occasions, when he informed them that all the heirs in the estate of the late Mr. France

Morel must give consent to the sale. Mr. Joel Camille testified that he was satisfied that there were only two heirs in the estate of the late Mr. France Morel. I remark that the second respondent and his wife signed the instrument of transfer, exhibit D2, containing the statement that: "[t]he Transferor hereby declares and certifies that all heirs have consented to the said transfer". The second respondent admitted that he had seen two "*deeds of consent*" in the law chambers of Mr. Joel Camille.

- [94] Having considered the circumstances surrounding the sale and transfer of the Property of the estate, I am satisfied that there is basis for concluding that the learned trial Judge had gone plainly wrong in his assessment of the evidence, specifically on the important question of whether or not the second respondent is a *bona fide* purchaser.
- [95] It is incredible that the executrix had parted with the Property of the estate without first having viewed the land comprised in title number V11933. It is incredible that the second respondent testified that he never doubted the statement contained in the instrument of transfer, exhibit D2, because the executrix, Mr. Michael Morel and Mrs Pamela Constance "*were total strangers to him*". The learned trial Judge knew of the instrument of transfer which showed that the transfer was executed six months after the verbal agreement was entered into by the parties. The evidence also showed that the second respondent and his family had been occupying the Property of the estate from June 2010. It was also undisputed that the Property of the estate is in the same area as the appellant's property.
- [96] Had the second respondent been a *bona fide* purchaser, he would have asked for the written consent of all the heirs of the Property of the estate, especially in the light of the statement contained in the instrument of transfer that: "[t]he Transferor hereby declares and certifies that all heirs have consented to the said transfer".
- [97] Thus, the irresistible inference which should have been drawn was that the executrix, Mrs Pamela Constance and the second and third respondents were all in cahoots.
- [98] For the reasons stated above, I find that it was not permissible for the learned trial Judge to have made the finding that the second respondent was a *bona fide* purchaser in the face of the evidence as a whole.

**ISSUE (c) of PARA 3 HEREOF: Section 112 of the Seychelles Code of Civil Procedure: Non-joinder of parties**

[99] I state *inter alia* that the way the appellant has constituted her plaint posed an obstacle to her. Ground 5 of the grounds of appeal contended that the learned trial Judge was wrong to hold that the non-joinder of Mrs Hugette Sophola was fatal to the case. The learned trial Judge observed that: "*it is against fair hearing principles for any of her rights to be affected by these proceedings without affording her the right to be heard.*" He observed that: "*Huguette Sophola should have been joined as a co-defendant in this suit if the Plaintiffs really wanted to pursue this particular prayer.*" I note that the learned trial Judge did not order the joinder of Mrs Hugette Sophola.

[100] Thus I have identified the issue as whether the plaint is bad in law by reason of the non-joinder of Mrs Hugette Sophola, who is the wife of the second respondent and an alleged co-owner of the land comprised in title number V12077. I have also identified the issue as whether or not the plaint is bad in law by reason of the non-joinder of the other heirs in the estate of the late Mr. France Morel namely, Mr. Michael Morel, Mr. Justin Morel and Mrs Pamela Constance.

[101] Section 107 of the Seychelles Code of Civil Procedure deals with the joinder of plaintiffs in a suit:

*"Who may be joined as plaintiffs*

*107. All persons may be joined in one suit as plaintiffs in whom the right to any relief claimed is alleged, whether jointly, severally or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found entitled to relief, for such relief as they or he may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the court in disposing of the costs of the suit otherwise direct."*

[102] Section 109 of the Seychelles Code of Civil Procedure deals with the joinder of defendants in a suit

***"Who may be joined as defendants***

*109. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."*

- [103] Section 112 of the Seychelles Code of Civil Procedure stands in relation to parties as section 146 of the Seychelles Code of Civil Procedure stands in relation to the amendments of pleadings. Sections 112 and 113 of the Seychelles Code of Civil Procedure address amendments that contemplate adding a party to the suit as follows —

***"Misjoinder, adding of parties, etc***

*112. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

*The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any persons improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.*

*113. No person shall be added as a plaintiff without his consent in writing thereto."*

- [104] Sections 112 and 113 of the Seychelles Code of Civil Procedure replicate most of the provisions of R. S. C. 1965 O. 15, r. 6, paras (1) and (2), which had been taken from R. S. C. (Rev.), 1962, O. 15, r. 6, which had been taken as to paras (1) and (2) from the former O. 16, rr. 2, 5, 8, 11 and 39, the provisions of which have been knit together but without any material change in substance; para (3) was new but embodied the same practice. The material provisions of R. S. C. 1965 O. 15, r. 6 read as follows—

*"6. — (1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*

*(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —*

*(a) order any party who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*

*(b) order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon be added as a party;*

*but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.*

*(3) [...]..".*

[105] The object of R. S. C. 1965, O. 15, r. 6 is to bring all parties to disputes, with respect to one subject-matter, before the court at the same time so that the disputes may be determined without the delay, inconvenience and expense of separate suits; (see *Montgomery v. Fay*, [1895] 2 Q. B. 321; *McCheane v. Gyles* (No. 2), [1902] 1 Ch. 911; *Bentley Motors v. Lagonda* (1945), 114 L. J. Ch. 208).

[106] I have considered the issue of the non-joinder of Mrs Hugette Sophola and the said heirs on the basis of section 112 of the Seychelles Code of Civil Procedure.

[107] The averments in the plaint made reference to Mrs Hugette Sophola as follows:

*"5. The Plaintiffs aver that on a date unknown to [...] the 1<sup>st</sup> Defendant sold the land title no. V12077 to the 2<sup>nd</sup> Defendant.*

*[...]*

*7. The Plaintiffs aver that the consideration for the said sale was an exchange between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant whereby the 2<sup>nd</sup>*

*Defendant and his wife Huguette Sophola allegedly transferred title no. V11933 situated at Plaisance, Mahe to the 1<sup>st</sup> Defendant and agreed to pay the 1<sup>st</sup> Defendant a sum of Rs.150, 000.00 which sum, the plaintiffs have been duly informed was never paid to the 1<sup>st</sup> Defendant.*

*[...]*

*11. Further the Plaintiffs aver that since no consideration was paid for the said property the sale is void ab initio.*

*12. Further the Plaintiffs aver that the said sale is null and void for mistake in that the 1<sup>st</sup> Defendant mistakenly believed at the time of the said sale that she could pass on title to the said property to the 2<sup>nd</sup> Defendant in law.*

*[...]*

**WHEREFORE** the Plaintiffs pray this Honourable Court to make the following orders:-

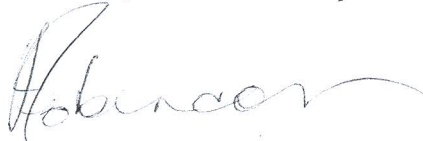
- (i) Declare the sale between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant null and void for mistake and for lack of consent of all the heirs of the late France Morel or in the alternative.*
- (ii) Declare the sale null and void for lack of consideration or in the alternative*
- (iii) Order the Land Registrar to rectify the land register and to register the said property namely V12077 in the name of the estate of the late France Morel or in the alternative.*
- (iv) Order Rescission of the said sale and [...]"*

[108] *Ex-facie* the plaint, Mrs Huguette Sophola is an alleged co-owner of the land comprised in title number V12077 and the land comprised in title number V11933 and allegedly paid part of the consideration in relation to the transfer of the land comprised in title number V12077. According to the instrument of transfer, (D2), (para 14 hereof), Mrs Huguette Sophola is a co-owner of the land comprised in title number V12077 and the land comprised in title number V11933. After having considered the plaint, I am satisfied that the whole tenor and contents of it reveal that Mrs Huguette Sophola has interests in this case. However, I note with dismay that the plaint proceeded as if the second respondent is the alleged exclusive owner of the land comprised in title number V12077.

- [109] I do not agree with the view of the appellant that I can proceed to determine the interests of the parties present, in as much as any decision on the issues in this case, will not only affect the interests of the second respondent but will also affect those of Mrs Hugette Sophola. In my view Mrs Hugette Sophola is an interested party whose presence may be necessary in order to adjudicate upon and settle all questions involved in the case.
- [110] I observe that the plaint made reference to all the heirs in the estate of the late Mr. France Morel. The plaint averred *inter alia* that: "6. [...] *at the time of the said sale the 1<sup>st</sup> Defendant did not have the consent of all the heirs of the late France Morel to dispose of the said property.*" I also observe that the remedies claimed by the appellant are remedies to which all the heirs are entitled. Since the appellant is praying for a judgment declaring *inter alia* that the sale of the Property to the estate by the executrix was null on account of "lack of consent from all the heirs", I am of the view that the said heirs are also interested parties whose presence may be necessary in order to adjudicate upon and settle all questions involved in the case.
- [111] In the circumstances, I hold the view that the failure to put both Mrs Hugette Sophola and the said heirs into cause was fatal to the plaint. I find that the learned trial Judge did not err.
- [112] I bear in mind that the dismissal of a plaint under section 112 of the Seychelles Code of Civil Procedure would be an extreme measure which, in my opinion, is not contemplated by the said section.
- [113] In the written submissions offered on behalf of the appellant, the appellant contended in essence that there was no need to put Mrs Hugette Sophola into cause on the ground that she should have intervened in the proceedings, under section 117 of the Seychelles Code of Civil Procedure. I have to mention that I fail to understand the contention offered on behalf of the appellant. It is clear that the appellant was not in doubt as to the persons from whom she was entitled to remedy, and that she had claimed remedies against Mrs Hugette Sophola. It appears that the appellant deliberately chose not to put Mrs Hugette Sophola into cause.

[114] In the circumstances, after anxious consideration, I am of the opinion that I ought to dismiss the plaint.

[115] For the reasons given, I uphold the decision of the learned trial Judge that the appeal should be dismissed but for the reason that the failure to put both Mrs Hugette Sophola and the said heirs into cause, was fatal to the plaint.

A handwritten signature in cursive script, appearing to read 'F. Robinson', written in dark ink.

**F. Robinson Justice of Appeal**

Signed, dated and delivered at Palais de Justice, Ile du Port on 23 August 2019