Bossy (heirs) v Chow
(2005) SLR 100

Philippe BOULLE for the Plaintiff
Serge ROUILLON for the Defendant

Judgment delivered on 4 March 2005 by:

KARUNAKARAN J: The Plaintiffs - heirs Josselin Bossy - are presently the owners of an immovable property registered as Title Nos. H1839, H1845, and H1854 situated at Mare Anglaise, Mahe - hereinafter collectively referred to as the "suit-property". In a plaint dated 30 April 2001, the Plaintiffs seek in this Court a judgment:

(i) declaring that the lease agreement dated 29 August 1996, in favour of the Defendant in respect of the suit-property, registered in the Land Registry on 19 September 1996 is rescinded and cancelled;

(ii) ordering the Defendant to vacate the suit-property and that the Plaintiffs' fiduciary be placed in possession thereof, and

(iii) ordering the Defendant to pay to the Plaintiffs the sum of R434,000 with interest and costs.

It is not in dispute that the Plaintiffs are the owners of the suit-property for having inherited the same from the estate of one late Josselin Bossy - hereinafter called "the deceased" - who died intestate in Seychelles on 7 December 1999. Following the death of the deceased, one Mr Hooper Hoareau - PW1- was appointed as the executor of the estate, by virtue of an order of the Supreme Court dated 4 September 2000, vide exhibit P1. In the present action, the Plaintiffs are duly represented by the said executor. Be that as it may. Admittedly, the Defendant is the lessee of the suit-property by virtue of a lease agreement dated 29 August 1996 - exhibit P2 - which the deceased, during his life, had entered into, with the Defendant. The lease agreement is for a term of 90 years, at a rental of R 9,000 per month. The lease was granted for the express purpose of development of the suit-property by the lessee.

As per the plaint, the case of the Plaintiffs is that the Defendant failed to pay rent in accordance with the terms of the lease agreement, and moreover, has failed to use the suit-property for the purpose it was leased out. And the Defendant is now indebted to the Plaintiff for arrears of rent, in the sum of R434,000. As a result of the breach of contract - the lease terms - by the Defendant, the Plaintiffs claim that the lease agreement has been rescinded by operation of law or in the alternative the Plaintiff has a right to rescind the contract by an order of the Court. The Plaintiff is therefore, entitled to repossess the property. It is further averred in the plaint that despite a letter of demand dated 26 April 2001, the Defendant has also failed to pay the arrears of rent. In the circumstances, the Plaintiffs have now come before this Court seeking a judgment

for a declaration and orders first-above mentioned.

On the other hand, the Defendant, in his statement of defence, has denied the entire claim of the Plaintiffs. According to the Defendant, since the lease was drawn up, signed and registered, the Plaintiffs namely, the lessor never surrendered the possession of the two houses, situated on the suit-property to the Defendant. From the inception of the lease until now, the Plaintiffs' agents or assigns have been collecting and enjoying the rents. Moreover, they controlled the properties to the exclusion of the Defendant, in breach of the express terms of the lease. It is further, averred in the statement of defence that the arrears of rent payable by the Defendant were almost covered by the rents paid to the Plaintiff by the tenants of the said two houses, whose rental income amounted to R8,000 per month. In the event of any shortfall of rent, the Defendant had always been ready and willing to pay that difference to the Plaintiff. The Defendant therefore, claims that he was not in breach of the lease agreement as to payment of rent. Moreover, since the Defendant was prevented by the Plaintiff from developing the property for greater gain, the Defendant alleged that he could not pay any shortfall of rent due to the Plaintiff. Hence, according to the Defendant, the Plaintiffs are not entitled to rescind the lease or repossess the suit-property.

Having thus denied the claim of the Plaintiffs, the Defendant has also made a counterclaim in his statement of defence against the Plaintiffs. In view of the facts stated in the statement of defence, the Defendant claims for the return of control of the two houses situated on the suit-property so that he could collect the rents therefrom *and develop the property as per the terms of the lease. Furthermore, the Defendant claims* from the Plaintiffs all rents, which the Plaintiffs had collected and/or collectable from the said tenants, which sums remain due from the inception of the lease at the rate of R8,000 per month, until November 2002. This amounts to a total due at R576, 000. Hence, the Defendant prays this Court for a judgment:

(i) dismissing the plaint;

(ii) ordering the Plaintiffs' executor, heirs, or agents to vacate the said house on the suit-property and the Defendant should be allowed to take full control of the same;

(iii) ordering the Plaintiffs to pay the Defendant R 576,000 with interest at the legal rate as from September 1996, and;

(iv) ordering the Plaintiff to pay the costs of this suit.

The facts adduced by the Plaintiffs are these.

One Mr Hooper Hoareau - PW1 - the executor of the estate of the deceased testified for the Plaintiffs. According to his testimony, the suit-property was originally leased out to the Defendant by the deceased under the lease agreement- exhibit P2 - dated 29 August 1996, hereinafter called the "contract of lease", for a term of 90 years at a rental

of R9,000 per month. The terms of the lease, inter alia, read as follows:

1. The Lessor hereby lets and the lessee takes the "Premises" for a period of 90 years, with effect from the date of signature of this lease, yielding rent at the rate of R9000 per month, for the development of the property. In the event that there is a new building development on the property the Lessee shall pay to the Lessor 10% of the total cost of the new buildings development, subject to a maximum of R200,000 on any single new development.

2. The parties hereby agree as follows:

   (a) The Lessee shall be free to develop the land for Residential purposes and shall be free to assign, sub-let or charge any one or all the above mentioned titles for any purpose.

   (b) On the expiry of the lease and subject to the Lessor not exercising the right to extent this lease for an additional period of 90 years under the same terms of this lease, the Lessor shall regain the rights to full title over the land abovementioned in this agreement.

   (c) The Lessee shall be responsible to pay all charges and or taxes that are payable to the Government and or local authorities under any law in force in Seychelles arising out of the use or possession of the land.

   (d) It is expressly agreed that if the rent or any part thereof, whether formally demanded or not shall be unpaid for 30 days after the day on which it is payable and such remaining eight days after a notice in writing from the Lessor may at any time thereafter, sequester any income derivable from the land and existing building for the settlement of the arrears.

Mr Hoareau further testified that there are three houses on the suit-property, one is occupied by the Defendant himself, whereas the other two houses, hereinafter referred to as "house No.1 and house No. 2" respectively, are occupied by other tenants. According to Mr Hoareau, since his appointment as executor of the estate, in June 2000, he has never received any rent from the Defendant in respect of the suit-property, although he received monthly rentals from the tenants, who were occupying the other two houses situated on the suit-property. During the period between June 2000 and July 2003, he received rentals totalling R75, 000 from the tenant one Mr Karl Pool- vide exhibit P3 - in respect of house No. 1, and a further sum of R87,000 vide exhibit P4 - as rental income in respect of house No. 2. He also testified that after adjusting the rentals received from the other tenants, as at October 2003the Defendant was still in arrears of rent at R190,000 in respect of the suit-property, vide exhibit P5. In the year 2000, the house No. 1 was in a bad state of repair. One Mr Guy Bossy, a brother of the deceased

who was then in charge of the estate, repaired the house and put Mr Karl Pool as a tenant thereof. Since Mr Hoareau was appointed as executor, he has been collecting rents from the tenants who were occupying the houses on the suit-property. Even though the Defendant was occupying one of the houses, he never paid any rent to the executor Mr Hoareau, either for the house he occupied or for the suit-property in terms of the said lease agreement. Hence, on 26 April 2001, Mr Hoareau through his counsel Mr Boulle issued a letter of demand - exhibit P6- to the Defendant, which inter alia, reads as follows:

> ... You are indebted, to my client for arrears of rent in the sum of R9,000 per month, which amounts to R434,000 to date.
>
> Within one month hereof, please, vacate the properties, pay to my client the arrears of rent abovementioned and call at my chambers to execute a cancellation of lease in default of which my client will have no option but to take legal proceedings to recover the properties and rental.

However, there was no response from the Defendant to this letter. Besides, Mr Hoareau testified that the Defendant did not make any improvement to the suit-property. He also stated that he never prevented the Defendant from developing the suit-property at any point of time. The Defendant never approached or communicated to Mr Hoareau about his intention to develop the property or on the allegation of him being prevented by the Plaintiffs from doing so. In the circumstances, the Plaintiffs allege that the Defendant has been in breach of the contract, in that the Defendant has neither made any development of the property nor has paid any rent in accordance with the terms of the lease agreement. Therefore, the Plaintiffs seek this Court for an order rescinding the lease and directing the Defendant to pay the arrears of rent as per the contract.

The Defendant, who was examined on personal answers, stated that at the beginning of the lease of the suit-property, the deceased did not deliver the vacant possession of the houses No. 1 & 2 thereon to the Defendant as they had then been rented to the Government and to a third party, respectively. There was a gentleman's agreement between the deceased and the Defendant that the deceased would continue to collect the rents from those tenants and would hand over the houses to the Defendant, as soon as they fall vacant. Further, it was a term of the said agreement that the deceased would collect the rents from the tenants and the Defendant would instead pay only the balance every month, after partly offsetting those monthly rentals received by the deceased against the sum R9,000 payable by the Defendant. However, the Defendant subsequently admitted on his personal answer that it was his mistake to accept such a gentleman's agreement, whose terms differed from that of the written lease. Further, the Defendant stated that when the Government vacated the house in 1997, the deceased rented it to another tenant and collected the rents through "Rent Board", which was acceptable to the Defendant that time. According to the Defendant, in January 2000 a tenant by name Suleman, while vacating one of the houses

refused to hand over the key to the former on instruction by the owners of the house. Hence, the Defendant broke into the house, in order to get possession and made arrangements to repair the house. However, the owners prevented him from effecting the repairs. Hence, according to the Defendant, he decided to leave the matter as it was.

Mr Guy Bossy - PW2 - brother of the deceased testified that even when the deceased was alive, the Defendant had defaulted payments and was in arrears of rent. Hence, the deceased during the evening of his life had filed a case against the Defendant in the Rent Board for its recovery. The Attorneys M/s Shaw and Valabhji were dealing with that case. Following the death of the deceased, the Defendant continued to be in arrears of rent. In January 2000, PW2 took over the control of the two houses on the suit-property. As they were in a bad state of repairs that time, he carried out the repairs at his own expense. He also put the tenants therein and appointed PW1, Mr Hooper as executor of the estate with instructions to collect the rents from the tenants. In view of all the above, Mr Guy Bossy testified that the Defendant had been in breach of the terms and hence sought cancellation of the lease agreement in this matter.

On the other side, the Defendant testified in essence, that there was a gentleman agreement that the deceased would continue to collect the rents from the tenants who were occupying the two houses and the Defendant would pay the difference in terms of the agreement. According to the Defendant the deceased was collecting a monthly rent of R4000 from each tenant. Besides, the Defendant also made some payments to one Mr Yves Bossy of the deceased's family and towards a loan repayment for a boat-engine that Bossy family had purchased. The Defendant made all these payments in consideration of rent payable to the deceased. The Defendant also produced in evidence a letter, exhibit D1, he received from the Attorney Mr Valabhji, which inter alia, reads as follows:

> Thank you for the cheque for R 58,373- which my client, Mr Josselin Bossy, accepts as part payment of the rents due from you... The lease was discharged as per my letter of the 28th February 1998, leaving a balance of R11, 627 still due which please, let me have at the earliest...
>
> The lease was discharged as per my letter of the 28th February 1998...

In an undated letter, exhibit D2 the Defendant admitted that he was in arrears of rent at R 43,627 and indicated his intention to retake control of the two houses. According to the Defendant, he did not come to Court for seeking possession of the houses because of the case that was pending against him in the Rent Board. *As* regards the intended development of the property, it is pertinent to quote the following excerpts from his testimony:

> Q: One of the aims was to develop the property. Why didn't you develop the property?

A: First agreement to do so was in April 1999, soon after the Government put measures on foreign exchange that held me back. We had no money to start with. We needed to build condominiums for rent and subsequently to build chalets. This was put on hold because of the changing economic system...
If we had gone ahead with it we would have moved to have a Court order to repossess the two properties

The Defendant further testified that he was in arrears of rent at R78,000 and is prepared to pay this amount provided the issue of the lease is resolved and he is given possession of the entire suit-property.

I meticulously perused the entire evidence including a number of documents adduced by the parties. I gave diligent thought to the submissions made by counsel on both sides. Before going into the merits of the case I note, although a counterclaim has been pleaded in the statement of defence, there is no evidence on record to establish the claim of the Defendant in this respect. In any event, our law is not gentle enough to admit or accept the so called "gentleman's agreements" to contradict or vary the terms agreed upon in a written contract. Hence, I dismiss the Defendant's counterclaim in its entirety in this matter. Coming back to the case of the Plaintiff, the issues to be decided in this matter may be formulated thus:

1. Is the contract of lease - exhibit P2 - between the parties a commercial or a civil contract?

2. Was the Defendant in breach of the terms of the said contract of lease?

3. If so, are the Plaintiffs entitled to seek rescission of the said contract?

4. Has the contract of lease in this case, been rescinded by operation of law because of an alleged breach thereof by one party?

5. Are the Plaintiffs entitled to have a declaration in their favour that the contract of lease is rescinded or cancelled?

6. Is the Plaintiffs' fiduciary entitled to repossession of the suit-property?

7. On whom does the burden lie to prove the payment of rent?

8. Has the Defendant defaulted in the payment of rent or is he liable to pay any rent after the discharge of the lease and contractual obligation? If so, since when, and what is the quantum of arrears that now remains due and payable to the Plaintiffs? And

9. In case of rescission, is the Defendant liable to vacate the suit-property? If

so when?

I shall now deal with the above questions in the order in which they have been formulated.

Question No. 1

It is the submission of Mr Boulle, learned counsel for the Plaintiff that the contract of lease involved in the instant case is a commercial contract, whereas Mr Rouillon, learned counsel for the Defendant contents otherwise. I gave diligent thought to their submissions in this respect. I scrutinised the authorities relevant to the issue on this point. As I see it, to constitute a commercial contract there are two conditions required to be satisfied:

1. The principal transaction involved in the contract should be of commercial nature; and

2. The parties to the contract should be merchants or traders.

As regards the condition No. 1, obviously, the principal transaction, covered and governed by the contract in question, is nothing but an act of leasing out an immovable property for 90 years, by its owner to a tenant, on a monthly rental basis. Is this an act of commerce or of commercial nature? Indeed, the commercial act is defined in Larousse *Dictionnaire Usuel de Droit*, p. 232 thus:

> "Acte de Commerce" Est acte de commerce tout acte de spéculation, lorsque la pensée de spéculation (c'est a dire de réalisation d'un bénéfice) forme le but principal de la personne qui accomplit l'acte. Le Code de Commerce énumère, dans ses articles 632 (modifie par la loi du 7 juin 1894) et 635, les différents actes qui doivent titre réputes actes de commerce, savoir : achats de denrées et marchandise soft pour en louer l'usage ;entreprises manufacturées, de commission, de transport parterre ou par eau, de fournitures, de spectacles, de ventes a l' encan d'agences et bureaux d'affaires; opération de change, banque, Courtage; conventions entre commerçants, et, entre toute personnel, lettres de change; entreprises de constructions; achats ventes et reventes de navires et tout opérations concernant le commerce maritime (affrètement, contrat 6 la grosse, assurances maritimes, engagements de gens de mer, etc.

Therefore, I find that the principal transaction covered and governed by the contract of lease in this matter, is not a commercial act or of commercial nature and thus, condition No. 1 above, is not satisfied.

As regards condition No. 2 above, it is pertinent to note that Article 1 of the Commercial Code of Seychelles defines the term "Merchants" as follows:

1. Merchants are persons who, in the course of their business, habitually

perform acts with the main object being acquisition of gain.

2. Generally merchants are those who engage in business or trade relating to the production, the distribution and the supply of services and those who, by the usages of trade, are recognised as merchants.

3. A body corporate is deemed to be engaged in commerce even if its object is non-commercial.

In the present case, obviously both parties to the contract of lease are not persons who in the course of their business habitually performing the act of leasing out or taking on lease of immovable properties with the main object being acquisition of gain nor engaged in business or trade relating to the production, the distribution and the supply of services nor are recognised as merchants by the usages of trade nor are they body corporate. At any rate, there is no evidence on record to show that the parties fall under any of the categories defined in Article 1 above. Therefore, I find that the parties to the contract in question are not merchants or traders in the eye of the law and thus, condition No. 2 above, is also not satisfied. Therefore, in answering Question No. 1 above, I hold that the contract of lease - exhibit P2 - between the parties is not a commercial contract. It is not subject to or governed by the provisions of the Commercial Code and so I conclude endorsing the submission of Mr Rouillon on this point.

Question No. 2

I will now move on to the alleged breach of contract by the Defendant. It is evident from clause 1 of the contract that the suit-property was leased out to the Defendant for primary purpose of its development. In fact, the Defendant himself has admitted in his testimony - quoted in verbatim supra - that he needed to build condominiums for rent and subsequently to build chalets on the suit-property. However, admittedly, he could not perform his part of his contractual obligation, because of the changing economic system and the measures the Government took against foreign exchange movements in the country. Here, it should be noted that although the Defendant entered into the contract about 8 years back, precisely in August 1996, he has not developed or taken any reasonably tangible steps so far, for the development of the property in accordance with the terms of the contract. It is truism that the contract does not stipulate any time limit on the Defendant to carry out the development as argued by Mr Rouillon. It is also correct to say that it contains no term and is silent as to time limit. However, as I see it, this silence should never be construed unfairly to mean that the Defendant had no time-limit at all for the performance of his obligation, implying that he has the right to choose his time limit even up to 90 years, that is, until the expiry of the contract. The consequence of such misconstruction would obviously, lead to injustice and defeat the very purpose of the contract itself. In such circumstances, what does fairness imply into the obligation of the Defendant? As I understand the law under Article 1135 of the Civil Code, fairness imply that the Defendant should have developed or at least should have taken reasonably tangible steps for developing the suit-property within a reasonable period. Article 1135 of the Civil Code reads thus:

> Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences, which fairness, practice or the law imply into the obligation in accordance with its nature.

To my mind, the Defendant as a prudent man should have started development or at least should have taken reasonable steps for the development of the suit-property within a period of 1 year from the effective date of the contract. Having regard to all the circumstances of the case including the nature of the contract and the presumed intention of the parties in entering into such a contract, this implied period of 1 year seems to be reasonable. Indeed, in considering reasonableness, as Lord Green said - in *Cumming v Jansen* [1942] 2 All ER 653 at 656 - the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing; that he must do so in a broad commonsense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight; others may be decisive but it is quiet wrong for him to exclude from his consideration matters which he ought to take into account. Having considered all, in the present case, I conclude that the Defendant in this matter has failed to develop the suit-property, within the said reasonable period. The change in the country's economic system and foreign exchange climate alleged by the Defendant, even if assumed to be factually correct, to my mind, such external factors cannot in law constitute a valid justification for breaking the terms of a contract between two individuals, unless the contract itself expressly provides for such contingency. In the absence of such terms in the contract, I find that the Defendant has been in breach of his obligation under clause 1 of the contract as to development of the suit-property. In fact, such a breach has defeated the very purpose of the lease namely, the development of the suit-property.

As regards the alleged default in the payment and arrears of rent, the Defendant himself has admitted clearly in his testimony that he was and is still in arrears of rent, which remains due and payable to the Plaintiff. Undisputedly, even prior to the death of the deceased, the Defendant had been in arrears of rent as evident from the proceedings before the Rent Board. The Defendant has admittedly, made a part payment towards the arrears of rent outstanding then. This is evident from exhibit D1 in which counsel for the Plaintiff has accepted part payment towards the arrears of rent outstanding then. Moreover, the Defendant though held the leasehold rights of the entire property, by his conduct allowed the Plaintiff to sequester the rental income derived from the existing building for the settlement of the arrears in terms of clause 2 (d) of the contract supra.

In fact, the Defendant had been given a freehand to do the necessary for the proposed development of the property under clause 2(a) of the Contract supra. This obviously implies that the Defendant should have taken necessary steps - through a Court of law or otherwise - in order to obtain the vacant possession of the entire property so as to implement his development project if any he had then. Since the Defendant failed to take any steps in that direction, he is now estopped from attributing breach on the part of the Plaintiff. Hence, it goes without saying that the Defendant has been in breach of

the terms under clause 1 and 2 (a) of the contract.

Question Nos. 3 & 4

Before answering question No. 3 & 4 supra, one should examine the relevant law under Article 1184 of the Civil Code of Seychelles, which inter alia, reads thus:

> (1) The party towards whom the undertaking is not fulfilled may elect either to demand execution of the contract, if that is possible or to apply for rescission and damages. If the contract is only partially performed the Court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance. The Court shall be entitled to take into account any fraud or negligence of a contracting party. Rescissions must be obtained through proceedings but the Defendant may be granted time according to the circumstances. Rescissions shall only be effected by operation of law if the parties have inserted a term in the contract providing for rescission. It shall operate only in favour of the party willing to perform....
>
> (2) The Court may in relation to an action for rescission make such orders as it thinks fit, both in relation to the rights and duties of the contracting parties and in relation to the rights of their heir.
>
> (3) lf, before the performance is due, a party to a contract by an act or omission absolutely refuses to perform such contract or renders the fulfilment thereof impossible, the other party shall be entitled to treat the contract as discharged.

In this particular case, obviously, the Defendant has not fulfilled the undertaking towards the Plaintiff as to payment of rent and development of the suit-property in breach of the terms of the Contract as found supra. Therefore, the Plaintiffs have a choice either to demand execution of the contract or to apply for rescission in terms of Article 1184 quoted supra. Hence, I find the answer to question No.3 above in the affirmative thus:

> "Yes, the Plaintiffs are legally entitled to seek rescission of the said contract".

As regards question No.4, the law is very clear on the issue. Article 1184 supra states in no uncertain terms that "rescissions shall only be effected by operation of law if the parties have inserted a term in the contract providing for rescission". Obviously, the parties in this matter have not inserted any term in the contract providing for such rescission. Therefore, I hold that the contract of lease in this case cannot be and has not been rescinded by operation of law because of a breach thereof by one party. At the same time, I bear in mind that since the contract is partially performed, the Court may decide either to rescind or confirm and make such orders as it thinks fit in the given circumstances of the case.

Question Nos.5 & 6

In considering the question whether the Plaintiffs are entitled to have a declaration in their favour for rescission, the Court is evidently entitled in terms of Article 1184, to take into account the negligence of the Defendant and part performance of the obligations by the parties. Herein, the Defendant has been negligent not only in obtaining the possession of the two houses situated on the suit-property but also in procrastinating the development of the suit-property over an unreasonable period hereinbefore discussed supra. As a result of the said breach and negligence on the part of the Defendant, I find that the Plaintiffs are entitled to have a declaration in their favour that the said contract of lease is rescinded under Article 1184 of the Civil Code. In the circumstances, the Court finds that the Plaintiffs' fiduciary obviously is entitled to repossession of the suit-property.

Question Nos. 7 & 8

On the question as to burden of proof in respect of payment of rent, it is evident from Article 1315 of the Civil Code that the Defendant, who claims to have been released from the obligation of payment, shall be bound to prove the payment or performance which has extinguished his obligation. Hence, the evidential burden obviously, lies on the Defendant to prove the payments for the period he had been under the contractual obligation to pay the rent for the suit-property. However, it should be noted that under Article 1315, before shifting the burden onto the Defendant the Plaintiff is bound to prove the Defendant's contractual obligation to pay for the period over which the claim is made. Having said that, I note, it is obvious from exhibit D1 that the Plaintiffs have admittedly, decisively and unequivocally discharged the contract of lease as from 28 February 1998, which they are entitled to do by virtue of Article 1184 (3) above, notwithstanding the fact whether the contract contains any term or not, providing for rescission.

In passing, to my understanding of law, there appears to be a subtle difference between the two instances namely,

(i) the act of treating a contract discharged before the performance is due by a party and

(ii) the fact of rescission of the contract by operation of law.

In the former instance, a party is entitled to treat a contract discharged unilaterally, for reasons stated in paragraph (3) of Article 1184 supra. This discharge germinates from the determinative choice of a party to the contract. He may justify non-performance of his part of the contractual obligation and use such deemed discharge as a shield in the proceedings before a Court of law. The discharge of that kind would obviously arise only in cases, where there is no express term in the contract providing for rescission. However, in the latter instance, the contract is rescinded by operation of law. This rescission germinates from the contractual terms agreed upon by the parties. This happens only in cases where there is an express term in the contract providing for such rescission. Having said that, I find that the Plaintiffs in the present case are not entitled

to claim any rent from the Defendant as from 28 February 1998 since the Plaintiffs themselves had decisively discharged the contract of lease as from that date and duly put the Defendant under notice of such discharge. Hence, the Plaintiffs are now estopped from denying the discharge and from eschewing the legal consequences thereof. Therefore, the question of default in the payment of rent by the Defendant does not arise at all for any period after the discharge of the contract. At any rate, the Plaintiffs have not proved that the Defendant is liable to pay rent under the contract, for any period after the discharge. Further, it is evident from exhibit D1 that the Defendant owed only a balance of R11, 6271 as at 28 February 1998 toward arrears of rent. In the circumstances, I find the Plaintiffs are not entitled to make any legal claim under a discharged contract of lease. Consequently, the Defendant also under no contractual obligation to pay any rent for the period subsequent to the discharge except the balance of the arrears that had accrued prior to the said discharge. Hence, the claims, counterclaims and admissions made by a party against the other based on the contractual rights and liabilities, which allegedly arose subsequent to the said date of discharge are of no effect to legally bind the parties and so I find. In the circumstances, I conclude that in the eye of law, the Defendant is liable to pay rent and the arrears accrued thereof only for the period, when the contract was in subsistence. Hence, I find that he is liable to pay only R11,627 to the Plaintiffs, as he has not discharged the burden of proof as to payment in this respect.

Question No. 9

Since the Court has already found supra that the contract of lease in question is rescinded for breach of the terms by the Defendant, I find that he is liable to vacate the suit-premises. However, having regard to all the circumstances of the case including the balance of hardship, I believe the Defendant should be given a reasonable time to look for an alternative accommodation, as he is residing in one of the dwelling houses on the suit-property. In my judgment, a period of six months would be just and reasonable that should be granted for the Defendant to vacate the premises.

At this juncture, I remind myself of the wide discretion conferred on this Court in terms of Article 1184 (2) of the Civil Code to grant remedies as the Court thinks fit, which in my view, includes equitable ones. The Court may in relation to an action for rescission make such orders as it thinks fit, both in relation to the rights and duties of the contracting parties and in relation to the rights of their heir. At the same time I warn myself that the said discretion should be used judicially for the ends of justice. For the reasons above, in the end result I enter judgment as follows:

(i) I hereby declare that the lease agreement dated 29 August 1996 in favour of the Defendant in respect of the suit-property Title Nos. H1839, H1845 and H1854 registered in the Land Registry on 19 September 1996 remains rescinded retrospectively as from 28 February 1998.

(ii) I order the Defendant to vacate the suit-property including the dwelling house he is occupying thereon, on or before 4 September 2005 and hand over the vacant possession of the same to the Plaintiffs' fiduciary

Mr Hooper Hoareau thenceforth.

(iii) I further order the Defendant to pay to the said Fiduciary the sum of R11,627 with interest at 4% per annum, the legal rate as from 1 March 1998.

(iv) I make no order as to costs.

Record: Civil Side No 289 of 2001