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CONSEQUENCES OF ENCROACHING ON THE NEIGHBOUR'S LAND

By Mr Andre Sauzier

Mr Andre Sauzier was called to the Bar of England and Wales by the Honourable Society of Middle Temple. He has served as the Attorney General of Seychelles, Supreme Court Judge and Justice of the Court of Appeal.

If one builds on someone else's property a structure which entirely stands within the boundaries of that property, it will be Article 555 of the Civil Code of Seychelles under which the fate of the structure and the indemnify, if any, to be paid will depend.

However, if one builds partly on one's property and the structure goes over the neighbour's boundary encroaching on his land, Article 555 finds no application.

In such a case the neighbour can insist on demolition of that part of the construction which goes over the boundary and the Court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment.

The legal basis for such a stand is Article 545 which provides:-

"No one may be forced to part with his property except for a public purpose and in return for fair compensation."

If damages and compensation were allowed to be given instead of demolition, the principle of Article 545 would be breached as the neighbour would be forced to part with the strip of land encroached upon for a private and not for a public purpose.

The fact that the encroachment was done in good faith or brought about by a mistake as to the correctness of the boundary would have no effect on the Court's duty to order demolition.

The principle of strict application of Article 545 of the Civil Code was laid down in France by the *Cour de Cassation* in a case reported in *D1970.426 (Civ 3, 21 nov 1969)*. That case is reported and commented upon in the book "Grands Arrêts de la Jurisprudence Civile" by Henri Capitant. The commentary at pages 271 to 273

is most interesting.

In Mauritius the principle of strict application was followed in the case of *Tulsidas* MR 1976, p. 121.

This state of affairs may cause grave injustice in certain cases. For a small area of land encroached upon, part of a huge building would have to be demolished causing damage out of proportion to the value of the land encroached upon.

Naturally the Court has tried to find a way to temper the strictness of the principle with mercy and justice. In Belgium and in Mauritius, in cases where the encroacher has acted in good faith and within the rules of construction without breaking the law, and where demolition would cause great hardship, the insistence of the owner of the land to request demolition and refuse compensation is considered an *abus de droit*.

In such a case the Court would not order demolition and would allow damages and compensation commensurate to the encroachment.

In Mauritius *abus de droit* has been defined in Articles 16 and 17 of their Civil Code. Article 17 reads as follows:-

“Nul ne peut exercer un droit en vue de nuire à autrui ou de manière à causer un préjudice hors de proportion avec l’avantage qu’il peut en retirer.”

Although Seychelles has no corresponding provisions in its Civil Code, it would appear that our law and jurisprudence have adopted the same principles.

Article 1382-3 provides that a person would commit a fault in the exercise of a right if the purpose of so acting was to cause harm to someone else.

Under Article 54 of the Commercial Code the abuse of legal personality constitutes a fault under Article 1382-3 of the Civil Code.

The way in which a person is given to quit employment may constitute a fault even if under the contract, employment may be so determined. It amounts to an "*abus de droit*."

The notion of "*abus de droit*" is therefore not foreign to our law as the above examples show. However, it might be better if our Civil Code were amended to reproduce Articles 16 and 17 of the Mauritian Civil Code which were based on a Project de Code Civil du Québec."

Consideration should also be given to amend Article 545 by adding a proviso to deal with cases of "*abus de droit*" in cases of encroachments done in good faith or by mistake.

This is a real and pressing problem as I understand that survey errors may well arise in future. Nowadays many land surveys are carried out without reference to established base lines. We may well see Victoria House being brought down in part for a few inches of error on the boundary with Temooljee's complex. It is comforting to know that after 20 years all these errors are absolved with prescriptive acquisition.