IN THE COURT OF APPEAL OF SEYCHELLES

NATHALIE LEFEVRE

APPELLANT

vs

JOE CHUNG-FAYE

RESPONDENT

AND

SCA 33 of 2011

BEAU VALLON PROPERTIES

APPELLANT

vs

JOE CHUNG-FAYE

RESPONDENT

SCA 36 of 2011

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Counsel: Mr P. Pardiwalla/ Mr Bonte for the 1st Appellant
Mr W. Herminie for the 2nd Appellant
Mr F. Ally for the Respondent

JUDGMENT

DOMAH, S.,

[1] This is an appeal from a decision of the Supreme Court over a dispute arising between the two appellants, on the one hand, and the respondent, on the other, relating to the genuineness or otherwise of a transaction of shares. The learned judge decided that the purported agreement was fraudulent and void. He ordered that the appellant in SCA 33 of 2011 pays to the respondent damages for prejudice caused to him in the sum of SR150,000. He also issued a permanent injunction prohibiting the appellant in SCA 36 of 2011 from acting upon the said document and further ordered that this appellant should register the respondent – who is one and the same in both SCA 33 of 2011 and SCA 36 of 2011 in its Register of Shares as the holder of 213,280 shares effective from 22 August 2005.

[2] Both appellants have lodged separate appeals against the decision. The grounds of appeal are as reproduced hereunder. The 1st Appellant referred to below is the Appellant in SCA 33 of 2011 and the 2nd Appellant referred to is the Appellant in SCA 36 of 2011.

[3] *With respect to the 1st Appellant, the grounds are:*

1. *The learned Judge's finding that the Plaintiff/Defendant was the beneficial owner of the 21380 shares because Mr Hans J. Langer "never challenged Mr Chung Faye that he was not a shareholder" is erroneous and is not proof of beneficial ownership of the shares by the that the Plaintiff/Respondent as the non challenge, if relevant, is also capable of explanation on some other reasonable hypothesis.*
2. *The learned Judge's finding that Mr Langer "could not have taken and indeed did not take any such action against the Plaintiff, Mr Joe Chung Faye, simply because Mr Langer knew that the Plaintiff was still the holder of 213280 shares in the Company as at that date" is erroneous and does not take into account the other evidence in the case which point to a different conclusion.*
3. *The learned Judge's finding that the beneficial owner of the shares was the Plaintiff/Respondent based on the fact that Mr Langer did not sue or intervene is erroneous and not proof of ownership. The evidence in this case, wrongly ignored by the Learned Judge, supports Mr Langer's version of the events.*
4. *The learned Judge's finding that the evidence of Mr Chang Sam is confirmation of ownership is erroneous and cannot be proof of the beneficial ownership of the shares.*
5. *The learned Judge's finding that the Plaintiff/Respondent was the beneficial owner of the 213280 shares is erroneous and goes against the weight of the evidence.*
6. *The learned Judge erred in his analysis of Exhibit 10 and in finding it null and void in that without the benefit of expert evidence, he engaged in an amateurish exercise of forensic science and speculates about certain writings and notes a matter not even raised by the parties.*
7. *The learned Judge's finding that "the transfer was a fraudulent transaction between the 1st Defendant and Mr Langer, instituted by the latter to rob the Plaintiff/Respondent of his shares" is erroneous and not supported by the evidence in the case.*
8. *In coming to his erroneous conclusion that the Agreement Exhibit 10 was fraudulent, the learned Judge indulges in assumptions and speculations and, therefore, came to a wrong conclusion. Had he evaluated the evidence in a balanced manner, he would have come to the conclusion that this was a valid blank share certificate to be executed by Mr Langer wherever and however he wished.*

9. *The learned Judge's finding that the 1st Defendant was a conspirator and aware of the alleged fraud, is erroneous and not supported by the evidence in this case.*
10. *The learned Judge's evaluation of the evidence where it conflicts is erroneous and biased in favour of the Plaintiff/Respondent.*
11. *The learned Judge's order that the 2nd Defendant register the Shareholders is ultra petita.*

[4] With respect to the 2nd Appellant, the grounds are:

1. *The order of the learned Judge the 2nd Defendant/Respondent must register the Plaintiff/Respondent in its Register of Shareholders as the holder of 213, 280 (sic) effective from the 22nd August 2005 is ultra petita;*
2. *The point in limine litis raised by the 2nd Defendant/Respondent in its statement of defence was badly decided by the Learned Judge.*
3. *The conclusion of the Learned Judge that the Plaintiff/Respondent is entitled to claim cost from the 2nd Defendant was wrongly decided.*

[5] As is clear from the above, all the above grounds of appeal, except for the issues of *ultra petita* and costs, are based on the findings of fact of the learned judge and the conclusion that he has reached. We shall approach this case, for that reason, insofar as the findings of facts are concerned in the above stated grounds, looking at all the facts together rather than in terms of the grounds as numbered and cited at paragraphs 3 and 4 above.

[6] The key submission of Mr Padiwalla at the hearing has been that the learned judge went completely astray in focusing on Exhibit P10 dated 13 September to decide this case. Mr Frank Ally for the respondent supported the judgment of the learned judge arguing that the comments made by the learned judge on the document were warranted and the surrounding circumstances showed that there was a fraud perpetrated upon the respondent in the manner in which the document was used.

[7] The document in question, Exhibit P10 produced by the respondent or Exhibit Document D16 produced by the appellants at the hearing below, purports to be an Agreement for the transfer of 213280 shares from the respondent to appellant no. 1. The agreement is dated 13 September 2005. The registration date is 21 May 2007. The transferor's name is clearly written. He has signed the document and given his address as Machebee, The

name of the transferee is also given with her address at La Misère, Mahé. The witnesses mentioned in the document in both the sale and the sale transactions are the same: Hans-Jurgen Langer and Bahuholstrasse. The learned judge stated that a couple of the blanks in the form have been filled by different typing machines.

[8] The plaintiff's action was based on the averment that this document was "fraudulent and void." He had claimed damages against the 1st Appellant in the sum of SR1,500,000 and against the 2nd Appellant a permanent order to act and register the 1st Appellant in its Register of Shareholders. The learned judge after hearing the witnesses and examining the documents proceeded on the basis that "the golden thread throughout this case is that the Plaintiff purchased the shares of British Airways in the 2nd Defendant and never had the intention to transfer and never transferred those shares onto the 1st defendant or any person else for that matter." Accordingly, the learned Judge concluded that "the transaction whereby the Plaintiff is said to have transferred his shares in the 2nd Defendant onto the 1st Defendant was illegal and fraudulent, mounted, instigated and perpetrated by Mr Hans Jurgen Langer and the 1st of his shares in the 2nd Defendant."

[9] It is an established principle that a court of appeal will not interfere with the finding of facts of the trial court unless the conclusion reached by the trial court was one which was perverse in the sense that it is one which it could not logically reach; or that wrong inferences were drawn from the facts, of if the weight is so strongly against the trial Court findings that they must be erroneous: see **Government of Seychelles v Shell Company of the Islands SCA 11 of 1988.**

[10]The core issue on appeal is whether the conclusion of the learned judge was warranted on the facts. It would not take long for one examining the record of proceedings with the deposition of witnesses and the submissions made by the respective parties to come to the conclusion that the learned judge could not have reached the conclusion he reached on the facts. We state our reasons.

[11] To the credit of the learned judge, he pieced together and in considerable detail the respective stands of the parties with respect to the pleadings and the proceedings. It is obvious that he must have spent a considerable amount of time in doing so. His judgment spans over 25 pages. However, in the judicial appreciation of the trees, it is essential that the court does not ignore the forest. The learned judge focused unduly on one particular aspect of the evidence, missing the larger picture which would have given a completely different perspective to the case.

[12] The dispute, as per the pleadings, was not confined to a determination under article 1382 of the civil code. This was the case of the respondent. It was not whether Hans-Jurgen Langer was a trickster or a fraudster and who, with the complicity of Appellant No. 1, committed a fault against the respondent by a fraudulent sale of his shares. The case went beyond the realm of article 1382 and embraced the field of company law and international trust law.

[13]What the learned judge had to determine – and which he missed - was whether, on the facts in evidence, the respondent had held the shares in his name on trust to dispose of it in a particular way as the trust law exacted that he should do so that by not having done so, he was in breach of trust. Accordingly, when the learned judge stated that "the golden thread throughout this case is that the Plaintiff purchased the shares of British Airways in the 2nd Defendant and never had the intention to transfer and never transferred those shares onto the 1st defendant or any person else for that matter," he was restricting his determination to the scope of article 1382 of the civil code with a reflex compatible with that article but overlooking the other dimensions which the case involved as per the pleadings which he had so anxiously and carefully elaborated upon.

[14] He proceeded to find faults in Exhibit P10 in terms of entries, fonts, dates etc to infer that the document was issued blank and used fraudulently from which he further inferred the culpability and complicity of the appellants and the persons involved. He overlooked the fact that in share sale transactions, it is normal and convenient practice to sign Share Certificates in blank so that the necessary particulars are filled up subsequently when the proper purchaser has shown up. As early as the close of the 19th century, in the evolution of company law and the law of trust, the practice of issuing blank transfers was recognized and given effect to. The House of Lords endorsed the commercial usage in

the case of **The Colonial Bank v John Charles Williams, The London Chartered Bank of Australia v John Cady and John Charles Williams (1890) 15 App. Cas. 267,** where it stated that "the evidence establishes a usage to that effect both in England and America."

[15] The Court further commented upon the rights of the respective parties to such a transaction:

> *"The indorsement on the certificate is in the form of a transfer for value received, blank in the names of the transferor and transferee, which is obviously meant to be executed by the person who is entered in the register of the company, and in the bdy of the certificate, as the owner of the shares. The system thus adopted has the merit of inseparably connecting the certificate with the transfer, and so preventing the dishonest creation of a legal right by transfer to one person, and a competing equitable right by deposit of the certificate with another."*

[16] On the facts and in law, therefore, Mr Langer was exercising an equitable right subject to the rightful owner being found, and indeed was found in the person of 1st Appellant, Nathalie Lefèvre. It is then that the equitable title resting on the blank transfer passed on to her as a legal title. That explains the registration date of 21 May 2007 which took place soon after the conclusion of the deal.

[17]Accordingly, it was not permissible to the learned judge to look at the transaction with the blinkers of article 1382 and, as rightly pointed out by Mr Pardiwala, embark on an analysis, without expert input for the purpose, that the document was a forgery. In the case of **Dhanjee v Dhanjee SCA 24 of 2009**, Fernando JA, with whom Macgregor PCA and Twomey JA agreed, sounded the necessary caution on the danger of judicial enthusiasm in embarking in an exercise for the determination of fraud or forgery unaided by expert assistance. The judgment comments: "Also, in our view, the learned judge was in error to have drawn his own unaided conclusion from a comparison of the signature found in the bank credit slips with the handwriting on P14 without the assistance of an expert," citing the cases of **R v Tilley (1961) 1 WLR 1309 (CCA); R v Harden (1963) 1 QB 8 (CCA); R v Sullivan (1969) 1 WLR 497 (CA); Paul Micahud and Lucia Cuinfrini, SCA 26 of 2005.**

[18] From the moment the mind of the learned judge was clouded by the fact that the document was a forgery, the natural consequence followed that Mr Hans-Jurgen Langer would be called names and 1st Appellant and the others involved accomplices. There was a serious misapprehension on the part of the learned judge on that aspect.

[19] It is the submission of Mr Frank Ally that the fraud was not with respect to the transfer of the shares in British Airways; his client had signed for his shares in another company Island Trader Hospitality. The short answer to it is that particulars of an allegation of fraud may not come too late in the day. They have to be specifically pleaded: see **Hornal v. Nenbayer Products Ltd (1957) 1 QB 247; General Insurance Company of Seychelles Limited v. SayBake (Seychelles) Limited, 3 SCAR (Vol. 1) 1983-1987 p. 250.** If it is averred in general terms – as in this particular case, the result is unfairness inasmuch as the complainant then obtains a free rein in the course of the hearing which permits him to travel well outside the four corners of his plaint and the pleadings with imaginative stories to the prejudice of the other party, thus compromising a fair trial. In the particulars of the fraud as given in the plaint which the respondent was under a legal duty to do, this material fact was not mentioned. Also, his belated stories and his explanations are anything but straightforward even in transcript as to what was the specific fraudulent action.

[20] Did the learned judge consider the version of the appellants which found its justification in company law and international trust law? Hardly. The task the court had in hand was to choose between two competing contentions: namely, whether the document was fraudulent and void or whether it represented a trust transaction where the respondent was in himself in breach.

[21]The respondent's case was that he had signed the document in blank with regard to the transfer of the shares in the company. If he had done so, and he had no doubt about the nature of the transaction that this blank document represented, he could not now come up and plead "Non est factum." The learned judge stated that the insertions were by different machines. It is perfectly plausible to expect that a document meant to be

completed at two different times should show two different types of muscular or mechanical writing.

[22] Learned counsel for the respondent, on being asked whether his client accepted the fact that he had signed a blank document, conceded that he had. Interestingly, in evidence, the respondent's position is compromisingly shifty.

[23]At the end of the day, the facts are consistent with the version given by the appellants that the shares were offered by British Airways to Hans J Langer for the purchase at the price of Rs1m Seychelles rupees; that Hans J Langer, who was a non Seychellois, found in the respondent, a Seychellois, a convenient device for the deal; that both reached an agreement to deal in it through a nominee bank in Bermuda; that, in the transaction, the respondent was no more than a shareholder in name only of the 213,280 shares which he held on behalf of Mr Hans J Langer; that a total sum of Euros 262,729.65 had been transferred to the personal account of the Respondent between January 2004 and November 2004 for the purpose of buying the shares in British Airways; that these were the funds which were used by the respondent for the payment of the shares; that instead of making the transfer to the Bermuda nominee company, the respondent made the transfer in his own name; when the breach of trust came to light, Mr Hans J. Langer negotiated the return of the said shares which was effected by the blank Agreement signed by the respondent which left the name of the transferee and the date of the transfer. This was consummated on 13 September 2005 and registered on 21 May 2007; and that the transaction was one of trust and breach of trust and not one of fraudulent dealing in share transfers. The respondent may have an action in damages for services rendered as a trustee but certainly not in tort for damages for any illegality.

[24] On a proper appreciation of facts in evidence, one may not reach the conclusion that the share transfer transaction was fraudulent any more than that Hans J Langer was a trickster and Nathalie Lefèvre, a purchaser for value, in complicity with him. If the learned judge reached such a conclusion, it was based on an inference reached from an inference. Judicial determination is a process of reaching inference from relevant facts as found from the material in evidence.

[25]Who tried to trick whom in this matter of trust is just anybody's guess but it is not anybody's guess that the document cannot be taken to be fraudulent, still less void.

[26] For the reasons given above, we allow the appeal. We find no need, in the circumstances, to deal with the remaining grounds raised at paragraphs 3 and 4.

[27] In the result, we reverse the decision of the learned Judge and quash the orders he made, including the quashing of orders of damages against 1st Appellant, injunction against 2nd Appellant with respect to the use of Exhibit P10 and the order registering the respondent as the holder of the 213280 shares. With costs.

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S. B. DOMAH	**A. FERNANDO**	**J. MSOFFE**
JUSTICE OF APPEAL	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated this 11th April 2014, Ile du Port, Seychelles.