

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , A.Fernando (J.A) , M. Twomey (J.A)]

Civil Appeal SCA 36/2016

(Appeal from Supreme Court Decision 49/2011)

Latitudes Consulting S.A.

Appellant

Versus

JFA Holdings Limited

1st Respondent

Joseph Albert

2nd Respondent

Heard: 13 April 2016

Counsel: Basil Hoareau and Frank Ally for the Appellant

Phillippe Boullé for the Respondents

Delivered: 22 April 2016

JUDGMENT

M. Twomey (J.A)

[1] The procedural history of this suit has been ably articulated by learned Egonda-Ntende CJ in the Court below but for the purposes of this Court the final pleadings of March 2012 and 4th June 2012 filed are adequate for determining and disposing of this appeal.

[2] The facts of this case have been hotly disputed and the appeal rests solely on the court's discernment of the more plausible explanation of events as it appears that parties in this case have been economical with the truth. We have therefore found it necessary to examine the pleadings and the evidence at length. We summarise each sides' pleadings and the evidence they have adduced below.

The Appellant's Pleadings

- [3] By a contract signed on 28th October 2009, the Appellant agreed to provide consultancy and advisory services to the 1st Respondent in relation to the sale of the 1st Respondent's shares in United Resort Hotel Limited (URHL) to Voyager Partners Limited (Voyager) or its nominee, in consideration of which the sum of € One million two hundred and fifty thousand would be paid by the 1st Respondent to the Appellant.
- [4] Alternatively, the Appellant claims that there was an oral agreement to this effect prior to the 28th October 2009 formalised by the written agreement and that the fee would be paid by the 1st Respondent on the 14th business day from the date that the purchase price for the shares would have been received by the 1st Respondent.
- [5] The sale was successfully completed to a nominee of Voyager, namely Qatari Diar Real Estate Investment Company (Qatari Diar), on 29th October 2009 and the purchase price paid into the 1st Respondent's account on 8th February 2010 but the 1st Respondent refused to pay the fee the Appellant for services rendered.
- [6] We do not trouble ourselves with the pleadings of Eddy Mancienne who was a defendant in the court below but against whom this appeal is not prosecuted. In any case we do not see them as relevant to the determining the issues on appeal.

The Respondents' Pleadings

- [7] The Respondents aver that in 2008 the 1st Respondent was desirous of selling its shares in URHL and entered into negotiations with Qatari Diar for the sale of the same. The interest of the latter was confirmed by letter dated 15 September 2008. In subsequent meetings one Eric Series informed the 2nd Respondent that he was the representative of Qatari Diar and he was mandated to complete the sale on behalf of Qatari Diar.
- [8] Eric Series informed the 2nd Respondent that in order to overcome the right of pre-emption of Southern Sun, the other shareholder in UHRL, Qatari Diar would make an offer for the purchase of the 1st Respondent's shares by a company under his control, namely Voyager. As a result of this offer, Southern Sun waived its right of pre-emption provided that the sale of the 1st Respondent's shares to a third party was completed by 29th October 2009.
- [9] A day before the waiver from Southern Sun expired, Mr. Series threatened to have the sale withdrawn unless the 1st Respondent signed a letter accepting to pay a fee of € One million two hundred and fifty thousand to the Appellant.

[10] The 1st Respondent avers that it signed the service fee agreement for fear of the sale agreement falling through. It added that the agreement had no object, was signed under duress and that in any case the object of the agreement was unlawful and infringed public policy. Alternatively it claimed that the agreement was breached by the Appellant as it failed to provide services in the interest of the 1st Respondent and did not fulfil the agreement in that it failed to provide advisory services of the 1st Respondent.

[11] The Respondents counterclaimed for loss arising out of fraud and duress on the part of the Appellant amounting to € One million five hundred and thirty thousand.

The Evidence for the Appellant

Eddy Mancienne

[12] The Appellant called Eddy Mancienne, the financial adviser of the Respondents on his personal answers. We note that this evidence was unsworn but in any case this evidence was not in any way substantially different from his subsequent sworn testimony. He stated that he had been involved in the negotiations between the 1st Respondent and “the buyers which was (sic) previously Voyager and then Qatari Diar.” (p. 93 of the transcript of proceedings).

[13] He stated that he had been involved in the share purchase agreement but not the service agreement. He had not drafted the service agreement, in fact he had had not known about it.

Mitchell Barrett

[14] The Appellant’s only substantial witness was Mitchell Barrett, attorney by profession and a director of the Appellant company. He explained the relationship between the various parties as follows:

“First of all it was not actually me negotiating the sale, the negotiations had been between Voyager Partners, Eric Series and Mr. Joe Albert, etc, what we did was we facilitated the transaction” (p. 125 of the transcript of proceedings).

[15] He testified that Mr. Eric Series was a director of both Latitudes and Voyager and that negotiations for the purchase of the 1st Respondent’s shareholding had started in 2008. He said that it was disclosed very early, although only later formalised, that Voyager would buy the hotel for its main investor Qatari Diar.

[16] He maintained throughout his evidence that there was a fee agreement between the

Appellant and the first respondent signed in October 2009. He also deposed that this agreement “must have been drafted by Mr. Roland d’Offay” an employee of the Respondent.

[17] Mr. Barrett produced numerous emails and letters exchanged between the parties and between the 1st Respondent and Messrs. Broadley, Series and himself.

[18] In one of the emails he was asked to confirm that both Voyager and Qatari Diar were owned by the same beneficial owner for the purpose of Southern Sun waiving its pre-emption right for the purchase of the 1st Respondent’s shares which he did.

[19] Another email was produced in which the Chief Executive Officer of the Respondent, Cyril Bonnelame, amended the service fee amount from 1.2 million to 1.25 million in the service agreement after the Appellant asked for confirmation of the ‘advisory fee’.

[20] Mr. Barrett also stated that he received an e-mail on 16th April 2010 to confirm that the money for the purchase of the shares by Qatari Diar had been lodged in the 1st Respondent’s account.

[21] When asked about what services the Appellant delivered to the 1st Respondent in consideration of the fee, he stated:

“It entailed a lot. Going back there were many documents, there were many agreements to sign, to look at, to understand, to process, to get them executed. There was ensuring that the payment of the fees took place, we advised them on how to deal with the Arabs in order to achieve this transaction because as I have said before dealing with them is not easy and due to our past experience with dealing with the Arabs we knew how to handle them so we advised accordingly so as to make the transaction work and actually take place.”

[22] Of Voyager’s role in the share purchase transaction he stated:

Voyage Partners was an investment fund that we advised that it be used (sic) and the reason being is that it helped the transaction go through...

[23] He stated that the nominee for Voyager Partners was Qatari Diar and that Eric Series acting for and on behalf of the Appellant company negotiated the share transfer.

[24] In cross examination, he conceded that:

Mr. Series, Latitudes Consulting did represent the Arabs to JFA Holdings and Mr. Series, Latitudes Consulting also represented JFA Holdings to the Arabs with both ways (sic) to

conclude the deal.

[25] He refused to accept that the Respondents had their own team in Seychelles transacting the share transfer stating that the Appellant's had particular expertise with Arabs.

[26] He admitted that he had no knowledge of an oral agreement prior to the written service agreement. He also admitted that Eric Series wore different hats, sometimes acting for Voyager, sometimes for Latitudes and that he could make offers on behalf of Voyager.

The Evidence for the Respondent

Cyril Bonnelame

[27] The Respondents called Cyril Bonnelame, the CEO of the Respondent company who testified that Eric Series was the negotiator for the purchase of the Respondent's company's shareholding. He stated that at the beginning of the negotiations he dealt with Mark Broadley and Eric Series of Voyager and then from October 2009 with the Appellant company.

[28] He stated that there had been oral offers by Qatari Diar for the share transfer, the first offer was for 14.5 million and the second for 13 million.

[29] He testified that he received a letter from Mr. Barrett, the day before the share transfer was signed stating that:

"... [W]e either sign that letter [of service fee] or we could not sign any other documents."

[30] He stated that Eric Series and Mitch Barrett were acting for the Appellant and Qatari Diar was their client. He was adamant that he had not been aware of a service fee although the same was confirmed after he talked to Mr. Series on the phone. He repeated that he had not negotiated such a fee at any time and that neither he nor the company, its lawyers or employees had drafted the service fee agreement.

[31] He explained that they were under extreme pressure to have the shareholding transferred on the 29th October as the waiver of presumption from Southern Sun, the other shareholder in UHRL was to expire the same day and it was on that basis alone that the agreement was signed.

Joseph Albert

[32] Mr. Albert stated that he was first approached by the Qataris for his shareholding in UHRL by an estate agent Michel Peril. He produced a letter of intent from a Mr. Ghanim

Bin Saad Al Saad of Qatari Diar in which is expressed their interest to purchase Maia Hotel (owned by UHRL). He instructed Mr. Peril to begin procedures and later received a phone call from Mr. Series on the matter. Mr. Series met him in Seychelles and stated that he represented Qatari Diar. He was then asked to a further meeting in Doha and produced a letter received from Qatari Diar “appreciating his efforts” in transacting the hotel deal.

[33] He also stated that he had very late dealings with the Appellant company and although he had been negotiating the share transfer for six months with Qatari Diar, it was only on the eve of the completion of the transfer that his team brought the service fee demand from the Appellant to his attention and that this was very much like “a gun pointing to his temple.” He said this was a complete surprise as he had only been dealing with the Appellant as representatives of Qatari Diary. He saw the Appellant as “a buyer ask[ing] for commission on their purchase.(sic)”

Eddy Mancienne

[34] Mr. Mancienne testified under oath but as we have stated before (paragraph 13 supra), his sworn evidence varied little from his personal answers and we need not comment further.

The decision of the Supreme Court

[35] The learned Chief Justice after examining the evidence concluded that Qatari Diar was not a nominee of Voyager and that no service fee was valid or enforceable. He was of the view that the directors of Latitudes were working for and on behalf of the purchasers and that there was scant evidence of any services provided for the distinct benefit of JFA Holdings.

[36] He held however, that the service agreement had indeed been drafted by the 1st Appellant and that he did not find Mr. Albert credible as regards the duress or fraud alleged. He therefore dismissed the Respondents’ counterclaim.

[37] He considered the service fee agreement between the parties a vehicle for a secret commission payable to the agent of the purchaser of the shares. As the evidence before him was limited, he was not willing to find this agreement enforceable. In the circumstances he also dismissed the Appellant’s claim.

The Appeal before us.

[38] Both parties have appealed the decision of the learned Chief Justice.

[39] The Appellant has filed numerous grounds of appeal under head, sub heads and further sub heads which are if not otiose, at the very least confusing. The Respondents have filed two grounds of appeal.

In essence, the follow issues are raised for our decision: whether there was a nominee relationship between Voyager and Qatari Diar, whether there was an object to the service agreement and whether the Appellant acted fraudulently or whether it applied duress on the Respondents in obtaining the signature of the contract for the service fee.

Was Qatari Diar the nominee of Voyager

[40] It became of crucial importance to the Appellant that a finding was made that the transfer of the 1st Respondent's shares was effected to a nominee of Voyager to satisfy the condition of the service agreement. Without this finding, payment to them would not be due.

[41] Mr. Hoareau for the Appellants submitted that it was an error on the part of the learned Chief Justice to interpret the term *nominee* as he did but also in his omission to find evidence of the nominee relationship between Voyager and Qatari Diar.

[42] In terms of the definition of *nominee*, Mr. Hoareau has urged this Court to adopt a "more natural and common definition of nominee" and has stated that article 1135, 1166-1158 and 1162 and 1163 of the Civil Code should be taken into consideration. These provisions relate in particular to interpretation of contracts. Mr. Hoareau has also relied on authorities namely *Wilmot and ors v W & C French (Seychelles) Ltd and ors* (1972 SLR 144, *Chow v Bossy* (unreported) SCA 7/2005, *Cook v Lefevre* (1982) SLR 46 and *Dogley v Renaud* (1982) SLR 187.

[43] While the authorities cited may assist in determining whether there was a nominee relationship between the Appellant and Qatari Diar, they do not provide a definition of the word nominee. As the word is in fact not defined in Seychellois law, the Chief Justice adopted the ordinary dictionary meaning of the word to state that a nominee is nominated to act on behalf of the principal and a nominee purchaser acquires property on behalf of its principal. We cannot fault this definition and adopt it for a discussion of the evidence adduced.

[44] The Appellant has largely relied on two pieces of correspondence to assert the nomineeship of Qatari Diar, namely an email of the first of 21st October from Eric Series

to Cyril Bonnelame in which Mr. Series confirmed that it was Qatari Diar and not Voyager who would be signing the share transfer agreement (Exhibit P2) and the second of 28th October in which Mitch Barrett states that that Qatari Diar would be the acquirer in place of Voyager.

[45] On the other hand, the Respondents have submitted that as the Appellant's pleadings are to the effect that Qatari Diar was a nominee for Voyager, such evidence should have been brought by the Appellant at trial. However, the persons having knowledge of this nomineehip, namely Eric Series and Mark Broadley never testified.

[46] We agree with the Respondents' submission that it does not suffice to infer evidence of nomineehip especially in an agreement worth €13 million. Such inference in any case cannot be drawn when even the Appellant itself has led evidence that "everyone knew from the start that the buyer would be Qatari Diar". Moreover, there is evidence indicating that Voyager and Qatari Diar which although are different entities had the same beneficial owner.

[47] The Appellant also sought to establish their distance from Qatari Diar. Mr. Barrett testified that they had little contact with Qatari Diar. If anything this works against their assertion that the latter was indeed their nominee. In any case the uncontested evidence of the Respondents that initial contact was made by Qatari Diar to purchase the whole company or the shares of the company does not support the assertion of the Appellant.

[48] The authorities cited are to the effect that the real intention of the parties should be sought in a contract. In the present case, similarly to the Chief Justice we have not been able to find that the parties intended that Voyager was the principal and Qatari Diar its nominee to purchase the Respondent's shareholding. As we have stated it is not contested that for all intents and purposes everyone knew that the purchaser of the shares would be Qatari Diar. We therefore reject this ground of appeal by the Appellant.

Was there an object (*objet*) in order to fulfil the formation of a contract

[49] The contention of the Respondents is that on the date the service fee agreement was signed, that is on the eve of the share transfer agreement being signed, there was no object to the agreement and hence the agreement was void. Put simply, Mr. Boullé's submission is that the share negotiations had taken place a year prior to the service fee agreement and between the signing of the fee agreement on 28th August and the share transfer agreement on the 29th August 2009 there were absolutely no services to be rendered by the Appellant for the benefit of the Respondents.

[50] Article 1108 of the Civil Code provides that :

*Four conditions are essential for the validity of an agreement –
The consent of the party who binds himself,
His capacity to enter into a contract,
A definite object which forms the subject-matter of the undertaking,
that it should not be against the law or against public policy.(Emphasis ours)*

[51] In addition, Article 1126 states:

Every obligation shall have as its object something which one party binds himself to deliver or perform or fail to perform.

[52] The service fee agreement signed by the parties is examined with respect to these two provisions. It provides:

We confirm our agreement to pay to you the sum of EURO 1.25 million (the "Consultancy Fee") for your advisory services in relation to the sale of our equity interests in United Resorts & Hotels Ltd ("URHL") to Voyager Partners Limited ("VPL") or its nominee...

- [53] It was submitted by the Appellant that the services had been performed long before the agreement was signed and that the contract simply formalised the agreement of the parties. He also submitted that the learned Chief Justice erred in his appreciation of the consequences of a condition precedent in a contract.
- [54] In terms of conditions precedent (*condition suspensive*), the learned Chief Justice was of the view that the condition had not been performed and hence the contract was invalidated. We agree that that is not the correct assessment of the provisions of the Civil Code. The non-performance of a contract suspends but does not discharge the other's party duty to perform; only the court can terminate the contract and discharge the obligation. However, the present case does not concern suspensive conditions but it is rather a case concerning an uncertain or impossible object in an obligation.
- [55] Whether the object of the service fee agreement was satisfied has been much debated. Mr. Hoareau for the Appellant has relied on the authority of *Jacobs v Devoud* (1978) SLR 164 for his submission that preliminary services in terms of the advisory role played by the Appellants fulfilled the object of the service agreement. However, although *Jacobs* is authority for many things it certainly does not establish that an agreement for a fee for services rendered can be reduced in writing to bind a party in the future for a service that has not been rendered.

[56] The conflation of object, cause and consideration has caused complications not only in Seychellois contract law but also in French law. The imprecise terminology in the Code Civil on the one hand referring to the object of the contract and on the other, the object of the obligation is also unhelpful to say the least. Terré, Simler and Lequette express the concept as follows:

...les expressions “objet du contrat” (art 1129 et 1130) et “objet de l’obligation” [désignent] la meme réalité: la prestation qu’un contractant s’engage à fournir à l’autre. Une langue juridique exacte voudrait qu’on pose que le contrat a pour effet de créer une ou plusieurs obligations, lesquelles on pour l’objet une certain prestation. (Droit Civil, Les Obligations 10e ed 265)

[57] The benefit (*prestation*) to one party is matched by the obligation of the other party towards him. Or the performance by one party of his obligation is matched by the obligation of the other to do something. In the present case the benefit to the Respondents would have been the services of the Appellant in getting the share transfer agreement concluded. In return the fee of € One million and two hundred and fifty would have been payable to the Appellant.

[58] Or, it may be helpful in this context to substitute the word *subject matter* for *object*. The subject matter of the contract was the advisory services of the Appellant. However as we have pointed out, it is clear from the evidence that the contract was to ensure that the Appellant received a commission for the transfer of the 1st Respondent’s share. Mr. Barrett for the Appellant called the fee a lubricant. The learned Chief Justice called it a sweetener.

[59] It is our view that although the contract ostensibly stipulated that the obligation of the Appellant was to provide advisory services and correspondingly the 1st Respondent to pay a fee, we are not convinced that such services were provided. That being the case, it cannot be said that the alleged subject matter – the advisory service - was certain or even possible, in which case the contract runs afoul the provisions of Articles 1108, 1126, 1129 and 1172. The contract was thus void for lack of an object.

[60] Having found that the contract was void the questions relating to the contract being against public policy or fraud on the part of the Respondents and duress on the part of the Appellant are moot. We do not propose to consider them.

[61] The Appellant’s appeal is dismissed. The Respondents cross appeal is partly allowed. However, they have not prayed for any remedy in their cross appeal and it is not the Court’s function to formulate one for them.

[62] In the circumstances the decision of the learned Chief Justice is maintained. The Respondents are granted costs of this appeal and cross appeal.

M. Twomey (J.A)

I concur:.	S. Domah (J.A)
I concur:.	A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on [Click here to enter a date.](#)