

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: Civil Suit No. 49 of 2011

[2013]SCSC

LATITUTES CONSULTING S A
Plaintiff

Versus

JFA HOLDINGS LTD
First Defendant

JOSEPH ALBERT
Second defendant

EDDY MANCIENNE
Third Defendant

Heard: 26- 28 June and 10-11 July 2013

Counsel: Frank Ally and Basil Hoareau for the plaintiff
Phillipe Boulle for the first and second defendants
Karen Domingue for the third defendant

Delivered: 23 September 2013

JUDGMENT

Egonda-Ntende CJ

[1] This case concerns the role of the plaintiff, a Mauritius-registered international company in the 2010 sale of a 50% shareholding in United Resorts and Hotels Ltd (hereinafter referred to as URHL) from first defendant to Qatari Diar. URHL owns the Maia Resort at Anse Louis.

[2] JFA Holdings Ltd (hereinafter referred to as JFA), the first defendant, is a Seychelles company that sold the shares. The second defendant, Mr Albert, is the majority

shareholder and a director of JFA and the founding majority shareholder of URHL. The third defendant, Mr Mancienne, is the nominal minority shareholder of JFA and was a director of JFA at the relevant time.

[3] The plaintiff company, Latitudes Consulting SA (hereinafter referred to as Latitudes), claims that JFA agreed to pay it €1.25 million for providing “consultancy and advisory services” to facilitate the transaction, including by introducing the transaction to the ultimate buyer, Qatari Diar Real Estate Investment Co (herein after referred to as Qatari Diar). The alleged agreement, known as the “service fee agreement”, is evidenced in writing. However the defendants claim that the agreement is invalid, never became effective and was in any event repudiated. No payment has been made.

[4] Latitudes was represented throughout this proceeding by Mr Mitchell Barrett, a director resident in Mauritius. Notably absent was Mr Eric Series, described by Latitudes as its “director and/or representative”, who was the individual at the heart of the relevant transactions. Mr Series, who is Mauritian, is described by Latitudes as acting as its agent throughout, providing services to JFA. However, it appears to be undisputed that Mr Series was also a director of both Qatari Diar and of an associated company, Voyager Partners Ltd (herein after referred to as Voyager), which was originally identified as the prospective buyer. URHL’s share register confirms that Mr Series was appointed as a director of URHL after the share purchase was finalised in 2010.

[5] The decision of Latitudes not to call Mr Series was not explained to the Court.

Procedural history

[6] The proceeding was originally filed against JFA and Mr Albert. Provisional attachment was sought and granted as against JFA by ruling dated 13 May 2011, but could not be effected as the relevant bank account of JFA had been closed. Latitudes then sought leave to amend its plaint to include a claim that Mr Albert and/or Mr Mancienne had used JFA as a “device for illegal or improper purpose” in fraudulently dissipating the share sale proceeds, from which it said Latitudes should have been paid, by transferring them into a personal account of Mr Albert.

- [7] The first defence and counterclaim was filed by Mr Pardiwalla on 17 June 2011. The defendants admitted the existence of the service fee agreement but claimed it had been repudiated by JFA. Latitudes had fraudulently concealed its close association with the prospective purchasers and entered the service fee agreement “fraudulently with the intention of giving unfair and illegitimate advantages to Voyager and Qatari Diar and extracting an illegitimate consultancy fee”. The counterclaim by JFA sought €1.5 million in damages for an alleged reduction in the sale price that JFA would have been able to obtain if not for Latitudes’ connivance with Qatari Diar, plus moral damages.
- [8] In a ruling dated 19 September 2011, I ordered Latitudes, as a non-resident company, to pay a total of approximately €170,000 into Court as security for costs and damages. After security had been furnished by Latitudes, the defendants indicated that they wished to oppose the amendment of the plaint and the joinder of Mr Mancienne. I heard detailed arguments on those issues on 5 March 2012 and delivered an oral ruling allowing the application for amendment. The amended plaint was filed on 8 March 2012.
- [9] An amended defence and counterclaim was eventually filed by Mr Boule, who had taken over the case for the first and second defendants, on 4 June 2012. I allowed this amendment, with Mr Hoareau’s consent, notwithstanding Mr Boule’s acknowledgment that the defence case had extensively developed (well beyond the matters raised in the amendment to the plaint).
- [10] The claim of “fraudulent concealment” of the association between Latitudes and Qatari Diar was dropped. On the contrary, it was now pleaded that Mr Series had informed Mr Albert that he “represented Qatari Diar and ... was mandated to conclude the deal”. The service fee agreement was now said to be “null and void” because JFA had entered it under duress and in circumstances in which the actions of Latitudes and Mr Series were “tainted with fraud”, and also because Latitudes was not properly licensed or registered as a taxpayer in Seychelles, rendering the object of the agreement illegal and contrary to public policy. In the alternative, Latitudes had breached implied terms in the agreement by failing to disclose a serious conflict of interest (an apparent return to the “fraudulent concealment” idea) and otherwise failing to act in good faith. Finally, the

agreement was conditioned on a sale by JFA to Voyager or “nominee”, and Qatari Diar was not a “nominee” of Voyager. Latitudes had also failed to provide any advisory services whatsoever to JFA. In those circumstances the agreement was “not fulfilled” and did not give rise to any payment obligation on the part of JFA. Latitudes’ claim regarding fraudulent dissipation of the share sale proceeds was flatly denied as “unfounded and frivolous”.

[11] At this point Mr Boule applied to join Qatari Diar as a defendant so that the question of its “nominee” status could be resolved. Mr Hoareau responded by distinguishing the need for joinder from the potential need to call a particular witness to prove the claim as pleaded. He could not however point to any prejudice to Latitudes if joinder was allowed. Mr Boule undertook to bear the costs of service. On this basis, having accepted that the “nominee” issue could prove essential, I allowed the joinder in an oral ruling delivered on 11 June 2012. Latitudes immediately filed an application for leave to appeal that ruling. That application was heard but subsequently withdrawn, and Latitudes proceeded to file a second amended plaint including Qatari Diar as a fourth defendant. Service out of the jurisdiction on Qatari Diar was ordered by consent on 24 September 2012, but Mr Boule subsequently advised that the defendants had not been able to effect service in Qatar. On 14 January 2013 Qatari Diar was struck off as a defendant. The parties agreed to proceed on the basis of the first amended plaint, dated 8 March 2012, and the defence to that plaint filed on 4 June 2012.

[12] Latitudes’ defence to the counterclaim was filed on 12 February 2013. Two weeks later the third defendant, Mr Mancienne, filed his own (very late) defence to the amended plaint. Mr Mancienne’s position was that he had only ever acted as a “nominee Director and shareholder” for JFA, had never acted in his personal capacity, was unaware of the existence of the service fee agreement until after it had been signed, and was not even a signatory on the JFA bank account.

[13] The case was heard over five days in June and July 2013. Latitudes called Mr Barrett and a representative of MCB Seychelles Ltd (who testified only as to the state of JFA’s bank accounts). All three directors of JFA at the relevant time gave evidence for the defence:

Mr Albert, Mr Mancienne, and Mr Cyril Bonnelame. The first and second defendants also called a representative of the Ministry of Land Use and Housing to produce the application for sanction for the purchase of shares by Qatari Diar. This application appears to have been signed by Mr Series as “Director”.

The service fee agreement

[14] The core provisions of the service fee agreement can be reproduced in full:

‘Service Fee

We [JFA] 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 (the “Sale”) provided:

- (i) the agreement for the Sale (the “Sale Agreement”) is concluded by 29 October 2009 and the Sale is successfully completed in accordance with the Sale Agreement; and
- (ii) payment of the entire purchase price of EURO 13 Million (the “Purchase Price”) is irrevocably made by VPL or its nominee and received by us pursuant to the Sale Agreement.’

[15] The agreement is contained in a letter from Mr Albert, as chairman of JFA, to the directors of Latitudes, dated 28 October 2009. It is signed by Mr Bonnelame on Mr Albert’s behalf and countersigned by Mr Barrett on behalf of Latitudes.

[16] It was agreed at the commencement of the trial that:

- a. Latitudes and JFA entered into the service fee agreement.
- b. JFA and Qatari Diar entered into the share sale agreement.
- c. The purchase price was received by JFA in accordance with the share sale agreement.¹

¹ Whether or not the late payment of the purchase price (in February 2010) meant that it had not been received in accordance with the share sale agreement, so that one of the condition precedents of the service fee agreement was not fulfilled, was a potential issue in the case. Despite not objecting when Mr Ally submitted in opening that this was a fact not in dispute, and expressly conceding during trial that the share purchase agreement had been extended by mutual agreement, Mr Boule attempted to develop the condition precedent argument in closing submissions. Mr Hoareau correctly submitted that it had not been pleaded. In those circumstances I decline to consider it.

[17] Latitudes had pleaded in the alternative that it entered into an oral agreement with JFA in materially the same terms prior to 28 October 2009 which was confirmed in writing by the letter of that date. However, it did not lead any direct contemporaneous evidence of this alleged agreement, relying on two instances of the word “confirm” (in the agreement and a contemporaneous email from Mr Barrett) and on inferences to be drawn from the testimony of Mr Barrett and Mr Mancienne, both of whom disclaimed any involvement in the making of the agreement. Latitudes also relied on an email sent by Mr Barrett months later, after the payment dispute had arisen with JFA, recording that “Eric and Joe [Albert] agreed in Seychelles and you sent us the undertaking some weeks later. I sense a deliberate smudging of issues here. We had an agreement”.

[18] While I consider it likely that an oral agreement was indeed reached between Mr Series and Mr Albert and/or Mr Bonnelame at some point prior to 28 October, I am not satisfied that its existence has been proven to the civil standard. Such an agreement would certainly have undermined JFA’s arguments about being “surprised” by the presentation of the draft written agreement on the day before a crucial deadline in the transaction, but it is not necessary to Latitudes’ case. JFA accepts that it signed the written agreement which is before the Court.

Submissions of the parties

[19] Latitudes’ claim was framed as a simple action on a contract, complicated only by the addition of a fraud claim and by the presumably strategic decision not to call Mr Eric Series. However, the multiple attacks launched on the contract by the defendants meant that the submissions made by Latitudes were principally defensive. For that reason I set out the defendants’ position first.

Case for the defence

[20] The position of JFA and Mr Albert evolved throughout the proceeding. By the end of closing argument, several of the claims in the amended defence were abandoned. The counterclaim (seeking damages from Latitudes for an alleged reduction in the share purchase price) was also abandoned, save for a general claim for moral damages by

Mr Albert which was not developed in closing submissions. The claims which survived are as follows.

- [21] First, JFA maintained that its consent to the agreement is negated by “duress and fraud”. JFA relied on articles 1111 to 1113 of the Civil Code to support the submission that Latitudes’ conduct in relation to the draft service fee agreement placed JFA (or rather its directors) in reasonably grounded fear of substantial harm to its property, that is, its financial interest, and that this fear induced it to sign the agreement.
- [22] It is common ground that JFA’s co-shareholder in URHL, Southern Sun Africa Ltd (Southern Sun), had agreed to waive its right of pre-emption in relation to the sale of JFA’s shareholding, and that this waiver was due to expire on 29 October 2013. JFA pleaded that on 28 October 2013, the day before the deadline, “Mr Eric Series² presented [JFA] with a letter addressed to Latitudes Consulting SA and threatened to have the sale to Qatari Diar cancelled if the letter which gave Latitudes Consulting SA a fee of €1.25 million was not signed the same day”. Mr Boule submitted that the legal training and business experience of Mr Barrett, who handled most of the relevant correspondence on Latitudes’ side, made it “totally unexplainable” why an advisory fee, if genuinely payable, would not have been secured “long before”. The demand was timed to ensure that JFA could not “go back to Qatari Diar to mend this situation”.
- [23] The submissions ultimately made on “fraud” (article 1116 of the Civil Code) as a distinct head of claim from duress were tentative at best. Mr Series and Mr Barrett were said to have contrived to induce JFA to enter the service fee agreement by “invent[ing] the existence, throw[ing] in the existence of a company which had nothing to do with the transaction, Latitudes, and creat[ing] duress.” No allegation of fraudulent non-disclosure of the association between Latitudes/Mr Series and Qatari Diar/Voyager was pursued.
- [24] Next, JFA claimed that there was a “total absence of object” of the agreement from Latitudes’ perspective, in terms of articles 1126 to 1130 of the Civil Code. Mr Boule submitted that Latitudes was “naturally” obliged, and totally failed, to prove, that it was

² Mr Boule submitted in closing argument that this reference to Mr Series can properly be read as a reference to “Latitudes, Mr Barrett, Mr Series” interchangeably, as Mr Barrett’s own evidence shows that they were really “one and the same”. He did not however seek to amend the relevant pleading.

actually engaged by JFA to provide advisory services, or that any advisory services were ever provided to JFA. In his submission, Mr Series and by implication Mr Barrett were “fairly and squarely ... on the side acting for Qatari”. Latitudes itself only came into the picture as the vehicle for extracting the so-called service fee. The supposed object (“advisory services” from Latitudes to JFA) simply did not exist. This was said by Mr Boule to lend “immense weight” to the duress argument.

[25] The alleged failure of Latitudes to provide advisory services to JFA was also put forward as evidence of “non-fulfilment” by Latitudes, meaning that the agreement never gave rise to any obligation of payment by JFA. In closing argument I understood Mr Boule to be attempting to characterise the obligation to be performed by Latitudes (the provision of advisory services) as a condition precedent of the agreement. A more understandable submission would have been that JFA became entitled to repudiate the agreement for breach (non-performance). This was not however pleaded. The breaches that JFA did plead, based on implied terms of good faith and fair dealing, were abandoned.

[26] The other aspect of JFA’s “non-fulfilment” claim was the pleading that Qatari Diar, the ultimate purchaser, was not a nominee of Voyager. The service fee agreement stated that the fee would only become payable in the event of a sale to Voyager or its nominee. As Mr Boule put it, “[m]aybe Voyager Partners ... was nominated by Qatari to make an offer so that the right of pre-emption [would be waived by Southern Sun] but certainly not the reverse ... Qatari Diar was never a nominee, it was known at all times to be the buyer.”

[27] Finally, JFA pleaded that the object of the agreement was “illegal and infringed public policy”, rendering it invalid under article 1108 of the Code (read with articles 1126 and 1133). This claim was not premised on an argument that the agreement was a corrupt or secret commission. Rather, Mr Boule submitted that the agreement should be viewed as a scheme to defeat business tax. The basis for this submission is that, after the agreement was signed, Latitudes sought to have its fee paid to the account of a different company, Avenport Investment Corporation, which is registered as an international business

company in Seychelles but does not pay tax here. Latitudes was also said to have breached the Business Tax Act by failing to register itself as a taxpayer in Seychelles.

[28] As to Latitudes' claim that the defendants had fraudulently dissipated the share sale proceeds, Mr Boule pointed out that there was (a) no relevant term in the service fee agreement regarding payment and (b), at the relevant time, no proven or acknowledged debt owing from JFA to Latitudes.

[29] Ms Domingue made brief submissions on behalf of Mr Mancienne, the third defendant. However, as set out below, the claim against Mr Mancienne personally has been abandoned. Ms Domingue's submissions do not accordingly require separate consideration.

Case for the plaintiff

[30] Mr Hoareau submitted that this was "a well written agreement which protects JFA Holding to the maximum" and that it had clearly not been presented by Mr Series for JFA's signature (as JFA pleaded). This mismatch between pleadings and evidence was in Mr Hoareau's view fatal to the whole duress argument. The agreement was in fact clearly drafted "for and on behalf of JFA", and could not plausibly have been so drafted under duress. In this regard Mr Hoareau emphasised the subjective elements of article 1112 of the Civil Code and the character and experience of the defendants in this case. Citing examples collected in Dalloz (*Code Civil*, 102e ed 2003), Mr Hoareau described the directors of JFA as "well-experienced and seasoned businessmen" with their own team of experienced advisors, and Mr Albert in particular as "not a man who can easily be bullied or pushed". Having reviewed the chain of correspondence around the time of the execution of the agreement, Mr Hoareau submitted that there was neither a relevant threat made by Latitudes nor any contemporaneous protest by JFA, either internally or externally. He emphasised that the issue of duress was first raised in an email sent by Mr Mancienne in February 2010, almost four months after the service fee agreement was signed. Even then, the email referred to the prospect of "considering" payment of the fee if certain other projects in Seychelles materialised. This language was

not consistent with a claim that the fee had only been agreed to in the first place out of fear.

[31] Even if the agreement was signed by JFA under duress (which was denied), Latitudes submitted that it was subsequently approved by JFA as contemplated by article 1115 of the Civil Code. Receipt of the share purchase price by JFA had been made a condition precedent of the service fee agreement. This, in Mr Hoareau's submission, placed Latitudes under an obligation to ensure that payment was effected. In directing requests for payment to representatives of Latitudes (instead of to Qatari Diar), JFA was tacitly approving the existence of this obligation, and thus the agreement as a whole.

[32] As to the claim that the actions of Latitudes' representatives in procuring the agreement were "tainted by fraud", Latitudes' position was that it was open to JFA to seek advice from its Seychelles lawyers before signing the service fee agreement and that JFA had been "negligent" not to do so. In those circumstances any fraud (if proven) could not be said to have induced entry into the contract. In any event, Mr Hoareau submitted that "everyone knew from the word go who was going to buy the shares", so there could be no relevant "mistake" on the part of JFA's directors. Mr Hoareau, like Mr Boulle, chose to make no submissions on the nature of the relationship between Latitudes/Mr Series and Qatari Diar/Voyager.

[33] As to Latitudes' performance of the agreement, Mr Hoareau submitted rather vaguely that the "bulk" of the advisory services had been rendered before the agreement was signed:

Latitudes Consulting SA was negotiating for the price to be agreed between the Qatari Diar and the 1st defendant. Latitudes Consulting SA were the ones taking the share purchase agreement to Qatari Diar to be signed to ensure it was signed on the 29th, they were the ones liaising ... advisory services encompasses several works, not technical advice but advice as to how deal with the Qatari Diar because they were Arabs ... how to approach them and to ensure that the deal was concluded smoothly.

[34] He attempted to bolster this submission by invoking the doctrine of estoppel by statement/representation: in choosing to sign the service fee agreement at a time when

JFA knew that advisory services had already been provided, JFA was representing that it would not subsequently deny that those services had in fact been provided.

[35] Mr Hoareau pointed to Latitudes' dealings with Southern Sun in relation to the waiver of rights of pre-emption that JFA required to proceed with the sale. He asked why these dealings would have been necessary if Latitudes was working "only for the Qatari". He also submitted that Latitudes' efforts to fulfil the conditions precedent of the service fee agreement constituted further advisory services for the benefit of JFA. In this respect Mr Hoareau again sought assistance from principles of equity, submitting that JFA became estopped from alleging fraud or duress by its conduct in continuing to "liaise" with Latitudes' representatives (to secure payment of the share purchase price by Qatari Diar) after the service fee agreement was signed.

[36] In any event, Mr Hoareau emphasised the need to differentiate between the existence of an object (going to validity of the contract) and the failure to deliver that object (going to performance). The objects of this service fee agreement were clear. Any submission about Latitudes' non-provision of advisory services could only have been made in the context of a claim of breach.

[37] On the issue of public policy and the Business Tax Act, Mr Hoareau drew a distinction between a contract which was itself a scheme to evade tax (in which JFA would be equally implicated, and which would indeed raise public policy concerns) and a decision by an individual party to a contract not to pay tax on money received under that contract (which might be of concern to the Revenue Commission but would not invalidate the contract). If there was any concern from a tax perspective about Latitudes' conduct in this case (which was denied) it would fall in the latter category. Mr Hoareau also submitted that the statutory obligation to register for business tax purposes was not imposed until 1 December 2009, after the service fee agreement had been signed.

[38] Latitudes pleaded that it was an implied term of the agreement that the service fee would be paid directly from the bank account into which the share sale proceeds were received by JFA. This was the basis for its claim that all three defendants had acted fraudulently in transferring funds so as to make JFA "incapable" of paying, thereby rendering

Mr Albert and Mr Mancienne personally liable for JFA's breach of contract. Mr Hoareau responsibly conceded in closing argument that this claim had no prospect of success against Mr Mancienne. However he declined to abandon the claim as against Mr Albert, arguing that Mr Albert knew that he was stripping JFA of its only significant asset (the sale proceeds) at a time when it was obliged to effect payment to Latitudes within 14 working days of receipt of those proceeds. Mr Hoareau urged the Court to "lift the corporate veil" and find that JFA, while not a sham at formation, was ultimately used by Mr Albert for an illegal or improper purpose.

[39] Finally I note that Latitudes did plead that Qatari Diar was a "nominee of Voyager Partners Limited". Latitudes did not however lead any specific evidence in support of this pleading, and Mr Hoareau did not cite any relevant authorities. Mr Hoareau actually agreed with Mr Boule that "already way back a long time everybody knew, it was out in the open, there was no hiding, no surprise that Qatari Diar was going to purchase the shares. But yet in the document Voyager Partners is used when everyone knew that the ultimate buyer/ultimate purchaser is Qatari Diar". Mr Hoareau described this evidence as supporting, not undermining, the conclusion that Qatari Diar was a nominee of Voyager.

Review of the evidence

[40] I have concluded that Latitudes' claim must fail because Qatari Diar was not a nominee of Voyager and, accordingly, a condition precedent of the service fee agreement was not fulfilled. In view of this conclusion it is not strictly necessary to review the detailed evidence adduced on other aspects of the case. I have done so below in view of the possibility of an appeal.

The identity of the purchaser

[41] As noted above, JFA agreed to pay Latitudes a service fee "in relation to the sale of our equity interests in ... URHL ... to Voyager ... or its nominee". The shares were not sold to Voyager, but to Qatari Diar. So Latitudes must prove that Qatari Diar bought the shares as nominee of Voyager to sustain any claim to a fee under the agreement.

- [42] The defining characteristic of a nominee is that it is nominated to act on behalf of a principal, usually in a limited way. “Nominee” is often used interchangeably with “agent” or “trustee” in this regard: see for example *Zalazina v Zoobert Ltd* [2013] SCCA 10 (5 March 2013) at [16]. A nominee purchaser, by definition, acquires property on behalf of its principal. The 2nd online edition of Black’s Law Dictionary goes so far as to define a nominee as “a middle party hired to keep a transaction anonymous”. While the use of a nominee is not necessarily driven by a desire for secrecy, it does result in a divergence between appearance and reality to the extent that the principal, and not the nominee, remains the “real” party to the transaction.
- [43] The earliest documentary evidence of the proposed sale in this case is a non-binding letter of intent sent by the CEO of Qatari Diar (not Voyager) to URHL on 15 September 2008, proposing the purchase of the entire Maia Resort. That letter referred to a meeting of the same date in Doha with “a representative of your group”. Mr Bonnelame testified that this meeting took place between the three directors of JFA, the CEO of Qatari Diar, and Mr Series. Mr Albert explained that this meeting followed an earlier meeting between himself and Mr Series in Seychelles, during which Mr Series had informed him that he represented Qatari Diar. Mr Albert insisted that he was already aware of the Qataris’ interest in purchasing the Maia Resort when he agreed to meet with Mr Series.
- [44] A written offer by Voyager to purchase shares in URHL was made more than nine months later, in July 2009, with correspondence at that time flowing between the directors of JFA, Mr Series, and Mr Mark Broadley. Mr Broadley signed the offer documents as a “partner” in Voyager (it is common ground that he was also a director and promoter), and used a Voyager email address. Mr Series on the other hand appears to have used private email addresses like gmail.com at all relevant times.
- [45] By the end of July 2009, Voyager’s offer had been reframed as an offer to purchase JFA’s 50% stake in URHL. Following some negotiations over price, the offer appears to have been presented to Southern Sun on 1 September 2009 with a view to obtaining a waiver of pre-emption. This waiver was not immediately forthcoming, with Mr Von Aulock of Southern Sun expressing various concerns, including about Voyager’s

willingness to assume the considerable burden of JFA's loan account. It is, however, also common ground that the waiver was eventually granted and was due to expire on 29 October 2009.

[46] On 21 October 2009, Mr Series "informed" Mr Mancienne by email that Qatari Diar, not Voyager, would sign the share purchase agreement. Until this point the defendants appear to have been under the impression that Voyager would sign. An email sent directly by Mr Von Aulock to Mr Barrett on 21 October confirms that Southern Sun shared that impression.

[47] Six days later, and only two days before the waiver of pre-emption by SSA was due to expire, Mr Bonnelame advised Mr Series that

'Since it is Qatari Diar Hotel (QDH) acquiring the business instead of VPL, we had to seek SSA's views as they had clearly stated that the final beneficiary had to be VPL and that they had to give their final consent if it was another entity.

They have agreed as long as it could be confirmed to them that both VPL & QDH are owned by the same beneficial owner.

It would be very much appreciated if you we [sic] could have this confirmation.'

[48] On the following day, 28 October, Mr Bonnelame made a further request for this confirmation at 12:12 pm. Mr Barrett replied immediately stating that "Shareholder will be Qatari Diar" and asking "what further details do you require?". Mr Bonnelame replied at 1:01 pm, copying the wording of the "request" from an unnamed representative of SSA:

'As far as another party acquiring the business instead of VPL, I will in principle agree to this subject to the same conditions that the ultimate beneficial holding is proven to us. This is on the basis that out [sic] understanding that both VPL and Qatar Dinar [sic] are ultimately both owned by the Qatar sovereign wealth funds owned by the Qatar government.'

[49] Mr Barrett replied at 2:17 pm, stating that "Marcel" (Von Aulock) had agreed "that QD can be acquirer in place of VPL" and that this would be confirmed in a letter which

would also extend the waiver of pre-emption by “a few days”. In the early morning of 29 October Mr Bonnelame advised that he had not yet received this letter. Later that afternoon, Mr Series emailed Mr Bonnelame (addressing his message to “Mister Albert”) stating that “we are trying to reach Mr Van Aulok from Southern Sun without success”. Mr Bonnelame’s reply, just over an hour later, was strongly worded:

‘What I fail to understand is why you left it to the last day, and so late in the day, for you to send the comments to SSA, knowing that we had a deadline of today and without confirmation of acceptance of an extension of the deadline from SSA.’

- [50] While no further emails from 29 October were produced, it is undisputed that JFA and Qatari Diar did receive all necessary approvals to complete the share purchase agreement on that date. The agreement as signed does not include any reference to Voyager or to any “ultimate” owner of Qatari Diar. The only potential evidence of Voyager’s continuing involvement in the investment is the appointment of Mr Broadley (together with Mr Series) as a director of URHL after the purchase was finalised. Latitudes did not, however, seek to rely on this tenuous possibility. It is of course possible that Mr Broadley was (like Mr Series) also a director of Qatari Diar.
- [51] The absence of evidence from representatives of Qatari Diar and/or Voyager, including of course Mr Series, makes it impossible to draw any firm conclusion about the reality of this transaction from the perspective of the purchaser. It is ironic in this regard that Latitudes strenuously resisted JFA’s attempts to join Qatari Diar as a party.
- [52] I have not overlooked the fact that Mr Mancienne, the third defendant, was content to accept that Qatari Diar “came in as a nominee of Voyager”. Mr Barrett’s position on behalf of Latitudes was, of course, the same. However Mr Barrett’s own testimony undercuts that position. He testified that “everyone knew from the beginning that it was Qatari Diar the ultimate purchaser”, but that it was likely that the purchase would be effected “either through Voyager Partners or through another company” for “legal structuring” reasons. “Everybody knew that the ... money that was going to flow to JFA holdings for this transaction was ultimately going to come from the pockets of Qatari Diar.” The only reason for Voyager’s involvement was that “we felt that if Southern

Sun had dealt with Arabs directly that it could have been a problem, so we thought it would be best that we put this through Voyager Partners Ltd which is an investment fund so as not to scare them”. When asked to explain why the service fee agreement was worded to refer to Voyager “or its nominee”, Mr Barrett emphasised that the agreement was drafted by JFA. He had no objection to this description of the purchaser because “Qatari Diar was the nominee of Voyager Partners and it could have been either one of them”; they were “keeping the option open”: “ultimately the decision comes from Qatari Diar whether they want to invest directly or whether they would prefer to hold through an investment fund such as Voyager”. While no company records were produced for either Voyager or Qatari Diar, Mr Barrett testified that Qatari Diar controlled “80 or 90%” of Voyager’s shareholding. He did assert that Voyager (that is, Mr Series and Mr Broadley) had “elected and chose and nominated Qatari Diar to be the transacting party”. But he ultimately conceded that he knew “very little” about the internal operations of either company.

[53] In the circumstances I am unable to conclude that Qatari Diar was acting as a nominee of Voyager. If anything, as Mr Boule submits, the reverse may have been true. Qatari Diar, not Voyager, made the initial approach to URHL. The emails exchanged around the time of the purchase suggest that the individuals involved may have regarded Qatari Diar and Voyager as effectively interchangeable because of their ultimate common ownership. However, common ownership (which I note was not proven by Latitudes) does not make two companies “nominees” of one another, as Mr Barrett and indeed Mr Hoareau appeared to assume.

[54] Shared ownership aside, there is no evidence that Voyager authorised Qatari Diar to acquire the shares on its behalf. On the contrary, it appears to have been understood by all concerned that Qatari Diar would be acquiring beneficial ownership in its own right. Mr Bonnelame’s evidence was that “in all the dealings that I have been doing with Eric Series, with VPL, with Latitudes [sic]. All these guys are Qatari Diar to me.” Mr Albert’s evidence was even more unambiguous: “We were dealing with Qatari Diar all along. Only Qatari Diar. All the other subsequent companies that came to us were Qatari Diar.”

- [55] The drafting of this aspect of the service fee agreement may have been unfortunate but it is clear. There is no claim of mistake. Mr Barrett, who reviewed the draft on behalf of Latitudes, is legally trained. He and Mr Series are experienced businessmen. Mr Series was a director of both Qatari Diar and Voyager and must have understood their relationship to one another. If that relationship was (despite appearances) one of nominee and principal, Latitudes has failed to prove that fact.
- [56] In the words of Planiol as translated by the Louisiana State Law Institute (*Treatise on the Civil Law*, 11 ed 1939, trans. 2005 at [1268]), as long as a condition precedent is pending, “the contract does not yet exist”. And once the condition fails, “nothing is produced and nothing will ever be produced, the contract remains entirely and definitely void and useless”. The relevant condition precedent in this case failed when the sale was effected to another purchaser. The agreement was, accordingly, never formed. There is nothing for Latitudes to enforce.

Validity of the agreement

- [57] If I had concluded that Qatari Diar was a nominee of Voyager then it would have been necessary to consider whether the service fee agreement was otherwise valid and enforceable.
- [58] I am satisfied that there is no merit in the points raised by JFA under article 1108 of the Civil Code (essential conditions for validity of contracts). Dealing first with the alleged want of a definite object, I accept Mr Hoareau’s submission that the objects of the service fee agreement are clearly enough stated: Latitudes would provide advisory services and JFA would pay for those services. Whether or not the parties actually intended that Latitudes would provide any such services (and whether they were in fact provided) is an entirely different question. JFA has not pleaded that the contract was a sham. Nor has it pleaded that Latitudes’ failure to provide advisory services constituted a breach of the agreement (as distinct from the non-fulfilment of an alleged condition precedent).
- [59] Had either of those issues been squarely raised, they would have required engagement with what I regard as the fundamental question underpinning this case: was the service

fee agreement simply the vehicle for a corrupt secret commission, payable by JFA to an agent of Qatari Diar to sweeten the deal?

[60] I briefly considered whether an affirmative answer to this question would have required invalidating the agreement on the grounds of public policy. The acceptance of secret commissions, and other corrupt practices, is a criminal offence under Seychelles law when the recipient is a public actor: see Chapter XXXVIII of the Penal Code. The exchange of secret commissions between private persons is however neither illegal nor necessarily contrary to public policy. The common law of England provides for the voidability of a transaction procured by secret commission at the instance of the principal whose agent received (or arranged to receive) the commission: see for example *Wilson v Hurstanger Ltd* [2007] EWCA Civ 299, [2007] 1 WLR 2351, and the legal opinion by Lord Mustill cited in *World Duty Free Co Ltd v Republic of Kenya*, ICSID CASE NO. ARB/00/7, 4 October 2006 from [163]. In the circumstances of this case, that principle might possibly have availed Qatari Diar in seeking to unwind the share purchase transaction. However, the status of that transaction has never been placed in issue. The parties' only concern is with the separate service fee agreement, which would have to be characterised as the secret commission itself. At common law, proof of a secret commission is not regarded as automatically invalidating the transaction to which it relates. The principal can elect to enforce a transaction notwithstanding that it was procured by secret commission. The principal can also (and does regularly) seek the assistance of the courts in recovering the proceeds of the commission from the guilty agent: see for example *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm) and *FHR European Ventures LLP & Ors v Mankarious & Ors* [2013] EWCA Civ 17, [2013] 3 WLR 466. On that logic it would seem that the contract constituting the secret commission is not itself regarded as automatically invalid on public policy grounds.

[61] This conclusion is consistent with the discussion of "simulation" in Planiol at [1185]-[1208]. The learned author there emphasises that notwithstanding the fraudulent character of any "secret agreement" which modifies an apparent contract, the secret agreement is, if proven, enforceable "in conformity with its true nature", at least between

the parties. See in this respect article 1321 of the Civil Code in respect of “back-letters”. So in this case, if the real nature of the relationship between JFA and Latitudes was proven to be deliberately (and consensually) misrepresented in the service fee agreement, that misrepresentation would not in itself render the agreement invalid. The “injury” done through secret commissions is regarded as being to the deceived principal. In cases involving bribery or corruption of public officers, of course, that principal is the body politic – hence the intervention of the criminal law. The context of a private contractual dispute is different.³

- [62] It is in any event clear from both *Planiol* and the English cases that the law’s distaste for secret commissions cannot be relied on by the party which agreed to pay the commission (which in this case would be JFA) as a basis for avoiding that agreement. This may explain why neither Mr Pardiwalla nor Mr Boule sought to take the point.
- [63] Notwithstanding that the evidence made available for the purposes of this case was limited and obviously incomplete, I would if necessary have been prepared to conclude that the service fee agreement reflected a (apparently secret) commission for services rendered by Mr Series and Mr Barrett in their capacity as representatives of Qatari Diar. I would not go so far as to describe the agreement as a sham, but there is no doubt from the evidence before me that the directors of Latitudes were working for and on behalf of the purchasers, and there is, I must say, scant evidence of any services provided for the distinct benefit of JFA.
- [64] As regards the relationship of Mr Series (and Latitudes/Mr Barrett) with Voyager and Qatari Diar, the consistent pattern in emails from all relevant parties (including Southern Sun) was to refer to Mr Series and/or Mr Barrett as if they were representatives of the prospective purchasers. A telling example of such an email was sent by Mr Series to Mr Bonnelame early in the negotiations, copied to Mr Broadley, and reads in full (uncorrected) as follows:

³ While this proceeding is between private parties, it could be seen as having a public element, to the extent that Qatari Diar is ultimately owned by Qatar sovereign wealth funds so that, as Mr Barrett put it, “it is government money that they were dealing with”. However, in view of Qatari Diar’s non-involvement in this proceeding it would not be appropriate to consider this point further.

'Dear Cyril,

thanks for your email.

Unfortunately, i wont be able to match your 15,5 Millions euros. As you know, we are looking at a long term partnership with Mr Albert on the various projects we have in Seychelles and it doesn't reflect in your proposal.

If you think, Mr Albert could reconsider our offer, please let me know.

Kind regards,

Eric'

- [65] Another email in the same chain, sent by Mr Bonnelame to Mr Mancienne, actually refers to "Eric's offer". This follows an email sent by Mr Broadley (copied to Mr Series) which uses the first person plural repeatedly and invites the JFA directors to "contact either myself or Eric". It is reflected in another email from Mr Bonnelame several weeks later, which directly asks Mr Series to resubmit "your offer letter".
- [66] That pattern did not alter after the service fee agreement and share purchase agreement was signed. To take one example, an email from Mr Mancienne to Mr Series dated 28 January 2010 refers to "you" (Mr Series) having now obtained the sanction approval and requests that "you" effect payment of the full purchase price to an account in Mr Albert's name. It will be recalled that Mr Series had signed the application for sanction as "Director". Mr Series responded to Mr Mancienne's email by requesting details of JFA's company account as "we will not be able to proceed [sic] a payment to a personal account".
- [67] Mr Hoareau submitted that emails of this kind constitute proof of efforts by Latitudes on JFA's behalf to secure payment of the share purchase price by Qatari Diar. This is a somewhat convoluted characterisation of what looks like a straightforward series of interactions between vendor and purchaser's agent. As Mr Boulle pointed out, while communications from JFA to Qatari Diar were without exception addressed to Mr Series or Mr Barrett, communications from Qatari Diar to JFA were addressed directly to Mr Albert.

- [68] Mr Hoareau’s attempted reliance on the interactions between Latitudes and Southern Sun as proof of independent action on JFA’s behalf is not borne out by the evidence. For example, an email from Mr Von Aulock to Mr Series and Mr Barrett, dated 21 October 2009, repeats the pattern of references to “your offer” while referring to JFA as “them”. An email earlier on the same day, from Mr Series to Mr Mancienne, states that Mr Series is still waiting for documents from SSA and that “[a]s you [ie JFA] have requested to be the link between SSA and [sic] us, I can only suggest that you ask them to speed up the process”.
- [69] Mr Barrett’s own testimony confirms that Qatari Diar was Latitudes’ major client at the relevant time and that Latitudes “did do business to them” in introducing this share sale transaction. He also freely admitted that Latitudes continued to deal with representatives of Qatari Diar throughout the transaction. Although Mr Barrett insisted generally that these dealings were conducted “on behalf of JFA”, he conceded in cross-examination that Mr Series had worn “different hats”, and that several key emails had been sent by Mr Series to JFA in his capacity as a director and promoter of Voyager. This admission makes it very difficult to identify the “hat” which Mr Series was wearing at other times. For example, it appears that a letter originally drafted in June 2009, from the CEO of Qatari Diar to Mr Albert, was amended in August at Mr Series’ request to refer more positively to a future partnership with Mr Albert’s “companies” for development at Anse La Mouche. That amended letter was sent by an unidentified “Dr Karim” to Mr Series “as per your request” and then forwarded to Mr Bonnelame “as promised”. This email chain could be interpreted in several ways, but having elected not to call Mr Series, I do not see why Latitudes should receive the benefit of any doubt.
- [70] I see no reason to disbelieve Mr Mancienne’s evidence that he (at least) understood Mr Series and Mr Barrett to be acting throughout “in their capacities as agents to purchase the shares”, and that he regarded Mr Series as “the principal negotiator” on behalf of Voyager and then Qatari Diar. I also accept the evidence of Mr Mancienne and Mr Bonnelame that they did not hear the name of Latitudes Consulting in connection with the share sale transaction until 21 October 2009. Mr Barrett explained in cross-examination that he joined Latitudes only in mid-2009 and was not immediately

given access to a Latitudes email account. While Mr Barrett did (eventually) regularly use one or other of two Latitudes email addresses, Mr Series did not, and the JFA directors themselves used a variety of private and other business addresses.

[71] As for the advisory services supposedly provided by Latitudes to JFA, Mr Barrett's evidence was somewhat elusive. That is to some extent understandable given that his role was very much secondary to that of Mr Series. He was, however, both a director of Latitudes and a trained attorney (although not practicing in Mauritius) who was closely involved in the "paperwork" throughout the deal. As such he might have been expected to provide more precise descriptions than "easing and smoothing and providing a lubricant to [JFA] in order to facilitate and conclude this transaction". Mr Barrett ultimately conceded in cross-examination that only Mr Series could be said to have provided advice directly to representatives of JFA.

[72] While I found Mr Mancienne to be the most credible of the director witnesses in this case, I record that I do not consider that any of them was completely forthcoming about the nature of the service fee agreement or the role that it played in the share sale transaction as a whole. What Mr Series would have said about it all remains unknown, but his absence may speak louder than words. Suffice it to say that the evidence as presented to me does not reflect well on either side.

[73] Returning to the case as pleaded, JFA's public policy claim rests on the argument that the object of the agreement was "an unlawful scheme to evade taxes in Seychelles". Here again I accept Mr Hoareau's submission that JFA is conflating two issues: the nature of the agreement (and its object), and the actions taken or not taken by a party in reliance on the existence of that agreement. There is nothing in the agreement itself which is suggestive of a tax evasion scheme and no evidence of any conversations or correspondence which could plausibly support that interpretation. It bears emphasis here that a contract "has no object distinct from the object of the obligations which it engenders": Planiol at [997]. Mr Boulle was unable to point to any obligation created by this agreement which could be said in any way to have tax evasion as its object.

[74] Latitudes did indeed request payment into the account of a different company, Avenport Investment Corporation (Avenport), several months after the agreement was signed. Mr Barrett testified that Avenport is incorporated as an international business company in Seychelles, that it owns 100% of the shares in Latitudes, and that it functions as “the central treasury of our organisation”. He suggested that he might have nominated Avenport to receive payment on Latitudes’ behalf because Latitudes did not have a euro account. Mr Boule correctly pointed out that the email in question requested payment to an account in Mauritius, not Seychelles. This was however a woefully insufficient foundation for Mr Boule to attack the proposed payment as “money laundering”. Mr Barrett flatly denied any obligation for Latitudes to register for business tax in Seychelles and stated that Latitudes had every intention of accounting for tax on the service fee when it was received in Mauritius. None of the defence witnesses challenged this evidence. Nor did the defence produce any company records for Avenport (or for Latitudes). Mr Boule’s aggressive cross-examination of Mr Barrett did not succeed in persuading me that Latitudes was deliberately seeking to evade tax. Even if I had been so persuaded, the issue would remain one of subsequent conduct by a party, which is simply not relevant to the validity of the underlying agreement.

Fraud and duress

[75] Turning to the conduct of Latitudes and its representatives at the time of entry into the service fee agreement, it may be apparent from the above discussion that I do not regard the consent of JFA’s directors as vitiated by fear or deception. While it has not been proved that Mr Albert and Mr Series agreed on the service fee months in advance, nor has it been proved that JFA’s directors were ambushed and effectively blackmailed into signing the agreement, as JFA now claims.

[76] The imminent expiry of Southern Sun’s waiver of pre-emption must have caused some stress for everyone concerned. There was however at least a prospect of extending that deadline, which may not have been pursued by JFA as vigorously as it could have been. The late substitution of a different purchaser would have contributed to the pressure on JFA, particularly in relation to dealings with Southern Sun, which were generally

described as “difficult”. But the evidence does not suggest that Mr Series or Mr Barrett was deliberately delaying the completion of the agreement to bring it “down to the wire” and create an opportunity for blackmail.

[77] JFA’s duress claim rests on the pleading that the service fee agreement was drafted and presented for signature by Mr Series (who Mr Boule submitted that I should regard as “one and the same” as Mr Barrett for this purpose). Latitudes claims that the agreement was drafted by JFA. Latitudes’ version of events is supported by the documentary evidence and I regard it as much more likely to be true.

[78] The email which Mr Boule characterised as the “gun” to JFA’s corporate head was sent by Mr Barrett to Mr Bonnelame at 11:28 am on 28 October. It was sent as a reply to the email which requested confirmation of the common beneficial ownership of Voyager and Qatari Diar, and reads as follows:

‘Dear Cyril

Please send confirmation of E1.25m advisory fee payable to Latitudes Consulting S.A. at the address below.

It can be addressed to Directors.

Please note that this must be done before signing deed of adherence [sic – ie Qatari Diar’s commitment to adhere to the terms of the URHL shareholders’ agreement].

Will revert on other matter. [ie the common ownership of Voyager and Qatari Diar]

Thanks’

[79] Mr Bonnelame replied less than an hour later:

‘Hi Mitch

You will get the letter today.

As requested please provide the details ref VPL & Qatari Diar Hotel

Rgds’

[80] There is no further reference to the “letter” described by Mr Bonnelame in that chain of emails. However, one of Mr Bonnelame’s staff sent an email on his behalf to Mr Barrett at 7:08 pm the same evening attaching a “document for your attention”. That document was in the form of a letter containing the service fee agreement, providing for a fee of €1.2 million, which had been signed by Mr Bonnelame on Mr Albert’s behalf. Mr Barrett replied late in the afternoon of the next day, 29 October 2009, recording his “understand[ing] that the amount should be E1,250,000” and requesting that the letter be amended and sent back. Mr Bonnelame replied directly, 12 minutes later, saying “Correct will do”.

[81] Mr Bonnelame testified that he called Mr Series before sending this response to Mr Barrett, “to make sure the [€1.25 million] figure was correct”, because “I was never party to any discussion of service fee”. There is no record of this alleged call. Mr Bonnelame was unable to explain the source of the initial figure of €1.2 million except to assert that the original draft had come from Mr Series by email with that figure on it. Mr Bonnelame was not able to explain why that alleged email had not been produced for the purposes of this case. He said that he “could not recollect” whether he had consulted his Seychelles lawyer on the wording proposed by Mr Series, but that all his staff had done was to put the draft on JFA letterhead. I did not find Mr Bonnelame’s testimony either helpful or convincing on this essential aspect of the case.

[82] Another hour later, Mr Mancienne sent another email to Mr Barrett with a revised attachment, described as “update of fee on behalf of Cyril”, and again signed by Mr Bonnelame. This is the letter that was counter-signed by Mr Barrett. Mr Mancienne testified that he had not been aware of the existence of the draft agreement until it was given to him by Mr Bonnelame that day. He said that when he questioned Mr Bonnelame about it he was told that Mr Series had asked for him not to be present when the agreement was negotiated. This statement is of course inconsistent with Mr Bonnelame’s denial that he ever discussed a fee with Mr Series. However, I note that it is also hearsay and was not put directly to Mr Bonnelame for response.

[83] Save for the timing of Mr Barrett’s initial email, on the day before an important deadline in the transaction, there is no support whatsoever in the documentary evidence for a narrative of duress. As to timing it is striking, as Mr Hoareau submitted, that the JFA directors made no protest of any kind when the fee “confirmation” was requested on 28 October. Indeed, Mr Bonnelame’s reply was more positive than might have been expected, containing an undertaking to provide a letter instead of providing a simple “yes” by email. This apparent acquiescence can be contrasted with Mr Bonnelame’s strong reaction to Mr Series’ email a day later, advising that “we” were still having difficulties liaising with Southern Sun:

What I fail to understand is why you left it to the last day, and so late in the day, for you to send the comments to SSA, knowing that we had a deadline of today and without confirmation of acceptance of an extension of the deadline from SSA.

[84] Mr Barrett’s explanation of the timing of the fee “confirmation” request was that, while Mr Series had expressed “complete trust and faith in Mr Joe Albert” and their existing oral agreement, Mr Barrett as a trained attorney ultimately “insisted” on a written agreement “on file”. This explanation is plausible, if convenient.

[85] Mr Albert was the only defence witness to describe the “trauma” he suffered on receiving Mr Barrett’s initial email regarding the fee, which he described as “this gun pointing to our temple”:

‘[W]e were shocked, we were dismayed, we felt cheated. It was something we never heard all along. To us we cannot see a buyer 24 hours to the end of closing the deal saying he wants a cut in the deal. ... I was traumatised and in fact when I went home that evening I have a very severe headache and my blood pressure did go up my lord and I had a very restless night. I did not sleep at all.’

[86] Mr Albert stated that he had been asked in Doha not to negotiate with other willing buyers, had refrained from doing so in the interests of securing the Qatari deal, and that in those circumstances he felt that JFA had “no options but to go ahead” with the service fee to ensure the deal went through by 29 October. He did, however, acknowledge in cross-examination that, had the waiver of pre-emption expired on 29 October, Southern Sun could not have exercised its right of pre-emption for less than Qatari Diar

had offered. If it had declined to pay that much the shares would have remained in JFA's hands until another buyer was found.

[87] Mr Albert was unable to explain why he had neither complained nor gone to his Seychelles lawyers to seek advice, even when it was squarely put to him that he was a man who "would have reacted" and cannot "be easily put under pressure". He repeated that "we only had 24 hours left", that "[t]ime was against us" and that the demand "came in the night". The last statement is clearly incorrect given that Mr Barrett's "gun" email was sent in the late morning of 28 October and responded to, on Mr Albert's instructions, shortly after noon.

[88] I regret to say that I did not find Mr Albert to be a credible witness on the issue of duress. Not only is his version of events unsupported by the documents but it is also at odds with his character and demeanour as I observed them in Court.

[89] In conclusion, I am satisfied that the service fee agreement was drafted by JFA, not Latitudes. I am not prepared to find that JFA's directors, and most especially Mr Albert, could have been completely surprised by Mr Barrett's email (particularly considering Mr Albert's assertion that he had never heard of Mr Barrett or Latitudes before) and yet been willing to draft, sign and present this agreement for execution within the space of eight hours, without seeking legal assistance or advice and without recording a word of protest or dismay in either internal or external correspondence. Latitudes may well have been little more than a vehicle for channelling payment of the service fee but, even if that is true, I do not consider that JFA's directors were materially deceived in that or any other regard. If the directors were taken by surprise at all then they concealed that surprise much too well to support the claims of "trauma" which they are now seeking to advance. Allegations of "duress and fraud" are serious and not to be raised lightly. I do not consider that the evidence made available to me comes close to substantiating those allegations in this case.

[90] I record for the avoidance of doubt that I have had due regard to the exchange of correspondence post-dating the agreement, both alleging and denying duress, and do not

consider that this material provides any assistance to the defendants. It is not necessary to go into that correspondence in detail.

[91] Also for the avoidance of doubt, had I concluded that duress or fraud had been established, I would not have been prepared to find that JFA's subsequent correspondence with Latitudes regarding payment of the share purchase price constituted "approval" of the agreement under article 1115 of the Civil Code. As noted above I found Mr Hoareau's submissions on this point to be rather convoluted. Receipt of payment by JFA from the purchaser was a condition precedent of the service fee agreement. It was clearly in the interests of Latitudes for that condition to be fulfilled but that does not in itself make Latitudes contractually responsible for its fulfilment. It was also clearly in JFA's interests to receive payment, for reasons unrelated to the existence of the service fee agreement. However badly Latitudes may have behaved towards JFA, it remained the intermediary between JFA and Qatari Diar and the logical channel of communication for the completion of the share purchase transaction. Proving the existence of communications to this end would not have estopped JFA from advancing a well-founded claim of duress.

Dissipation of the share sale proceeds

[92] Latitudes has persisted with the claim that Mr Albert acted fraudulently in effecting the transfer of the share sale proceeds out of JFA's corporate bank account, mostly into an account in his own name, before the service fee became due and payable to Latitudes. I reiterate that an allegation of fraud is a serious matter. Rule 17(3) of the recently promulgated Legal Practitioners (Professional Conduct) Rules now specifically prohibits an attorney from allowing such an allegation to be advanced unless he or she believes on reasonable grounds that the available factual material provides a prima facie case for that allegation.

[93] Mr Albert's explanation of this aspect of the transaction was simple: the account of JFA was a non-interest bearing current account and "the money could not stay there not earning interest. So I put it in a new account on my name and it was placed to obtain interest". Mr Albert, of course, owned 99% of JFA and was the sole signatory on its

account. He freely acknowledged that JFA had become a “dormant company” because its “one and only asset ... was no more ours it had gone to the Qataris”. However, he also insisted that it “did not even occur” to him that transferring the money into his own name might operate as a device to avoid the obligation to pay Latitudes.

[94] In the absence of any other evidence to this effect it is clearly not open to me to make a finding of fraud or dishonesty. As Mr Boule submitted, the service fee agreement did not include any term about the manner by which payment was to be effected. If Latitudes had drafted the agreement (as Mr Boule argued) then this omission might seem odd. If JFA drafted it (as I have found) then the omission does not call for explanation. It certainly does not warrant reading in an implied term about payment from the sale proceeds, as Latitudes pleaded. I note in this regard that an email from Mr Barrett dated 26 February 2010, which raises the issue for the first time, refers to Mr Series and Mr Bonnelame as having “discussed the possibility of us receiving the full purchase price and then sending the difference due to JFA. We sent the full amount in good faith though it appears that our faith was misplaced.” While the timing of this discussion is not identified, and Mr Barrett’s counsel did not invite him to explain further on the witness stand, his choice of wording in this email rather suggests that Latitudes chose not to insist on the inclusion of a relevant contractual term.

Decision

[95] I consider it likely that the “service fee” agreement reached between the parties to this case was little (if anything) more than the vehicle for a secret commission payable to an agent of the purchaser of the shares. However, the absence of any claim by the purchaser meant that this aspect of the case was never fully explored and I have accordingly made no specific findings in that regard.

[96] Latitudes’ claim for payment under the agreement fails for non-fulfilment of a condition precedent (sale to Voyager or its nominee) and is dismissed accordingly.

[97] On the limited evidence before the Court I would have found, had it been necessary to do so, that the agreement is otherwise valid and enforceable as between the parties and, specifically, that it is not voidable by JFA for fraud or duress.

[98] The claim against Mr Mancienne, the third defendant, was abandoned. He is entitled to costs from Latitudes, which shall once taxed be paid out of the existing security deposit before the balance is refunded.

[99] Mr Albert's claim for moral damages against Latitudes is dismissed.

[100] As between Latitudes, JFA and Mr Albert, given the dismissal of both the claim on the plaint and the counter claim, I direct that costs are to lie where they fall.

Signed, dated and delivered at Ile Du Port on 23rd day of September 2013

FMS Egonda-Ntende
Chief Justice