In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 361

IN THE MATTER OF THE COMPANIES ACT 1981
AND IN THE MATTER OF TOPAZ ENGINEERING LIMITED
AND IN THE MATTER OF NICO INTERNATIONAL LIMITED

BETWEEN:

CHALMERS HOLDINGS LIMITED

-and- **Plaintiff**

(1) TOPAZ ENGINEERING LIMITED
(2) NICO INTERNATIONAL LIMITED
(3) MR MOHAN KUMAR DURAI SWAMI
(4) MRS GANGA CHANDRAN
(5) MR SANDEEP UTHRAN

Defendants

Before: **Hon. Chief Justice**

Appearances: **Mr. John McSweeney of Appleby (Bermuda) Limited, for the Plaintiff**

Mr. Arthur Hodgson of Apex Law Group Ltd, for the 4th and 5th Defendants

Date of Hearing: **17 March 2021**

Date of Judgment **28 April 2021**

JUDGMENT

Application to set aside a regularly obtained summary judgment; test to be applied upon the setting aside of a summary judgment; application for rectification of the share registers of Bermuda registered companies

Hargun CJ

Introduction

1. These proceedings commenced by Chalmers Holdings Limited ("**CHL**" or "**the Company**" or "**the Plaintiff**") relate to rectification of the share registers of Topaz Engineering Limited ("**Topaz**" or "**the First Defendant**"), its wholly owned subsidiary, and Nico International Limited ("**Nico International**" or "**the Second Defendant**"), wholly owned subsidiary of Topaz. Topaz and Nico International are joined as parties to these proceedings in a nominal capacity so that they can be bound by any order made by this Court.

2. By Order dated 4 December 2020 the Court entered summary judgment against Topaz, Nico International, Mr Mohan Kumar Durai Swami ("**Mr** Swami" or "**the Third Defendant**"), Mrs. Ganga Chandran ("**Mrs. Chandran**" or "**the Fourth Defendant**") and Mr. Sandeep Uthran ("**Mr. Uthran**" or "**the Fifth Defendant**") and declared that the following transfer of shares ("**the Transfers**") be set aside:

    (1) the transfer of 1,300 ordinary shares held by CHL in Topaz by way of a purported share transfer dated 14 September 2018 to Mr. Swami, was invalid and of no effect and be set aside;

    (2) the transfer of 7,700 ordinary shares held by CHL in Topaz by way of purported share transfer dated 14 September 2018 to Mrs. Chandran, was invalid and of no effect and be set aside;

(3) the transfer of 1,000 ordinary shares held by CHL in Topaz by way of a purported share transfer dated 14 September 2018 to Mr. Uthran, was invalid and of no effect and be set aside;

(4) the transfer of 1,300 ordinary shares held by Topaz in Nico International by way of purported share transfer dated 1 August 2019 To Mr. Swami, was invalid and of no effect and be set aside;

(5) the transfer of 7,700 ordinary shares held by Topaz in Nico International by way of a purported share transfer dated 1 August 2019 two Mrs. Chandran, was invalid and of no effect and be set aside;

(6) the transfer of 1,000 ordinary shares held by Topaz in Nico International by way of a purported share transfer dated 1 August 2019 to Mr. Uthran, was invalid and of no effect and be set aside;

(7) the Register of Members of Topaz and Nico International be rectified pursuant to section 67 of the Companies Act 1981 to give effect to the above declarations.

3. By summons dated 4 January 2021, Mrs. Chandran and Mr. Uthran seek to set aside the summary judgment given by the Court on 4 December 2020. In relation to the application to set aside the parties rely upon the following affidavit evidence:

(1) First Affidavit of Stuart Allan MacDonald Chalmers sworn on 8 September 2019;

(2) First Affidavit of James Robert Alexander Chalmers filed with the Court with revenue stamps on 12 November 2020 in an unsworn but agreed form;

(3) Second Affidavit of Stuart Allan MacDonald Chalmers sworn on 14 November 2019;

(4) First Affidavit of Sandeep Uthran sworn on 28 January 2021; and

(5) Second Affidavit of James Roberts Alexander Chalmers sworn on 16 February 2021.

Background

4. CHL is a company incorporated under the laws of the Isle of Man and is the parent company of the Chalmers group of companies ("**Chalmers Group**") which was founded by Mr. Stuart Chalmers in Dubai in 1977 as a small engineering company. The Chalmers Group is based in Dubai, United Arab Emirates, and now operates across the Arabian Gulf, and in other jurisdictions such as India and Korea. The Chalmers Group currently carries on business principally as providers of marine engineering and offshore outfitting services for the oil and gas industries. The Group currently has approximately 1,200 employees. Until the events in September/October 2018, Vallath Valeyundhran Chandran ("**Mr. Chandran**"), husband of the Fourth Defendant, was the Chief Executive Officer of CHL, Mr. Swami ("**Mr. Swami**") the Chief Financial Officer of CHL and Mr. John Thomas was the Chief Operating Officer of CHL. Mr. Chandran and Mr. Swami were also shareholders of CHL.

5. In his First Affidavit sworn on the 8 September 2019 Mr. Stuart Chalmers advised that that Mr. Chandran was at that time incarcerated in Dubai Central Prison in relation to financial crimes, which he understood related to certain bounced cheques (a serious matter under UAE law). Mrs. Chalmers states that he believes that Mr. Chandran would have been in prison on or about 14 September 2018 when the purported Transfers took place.

6. Topaz is incorporated under the laws of Bermuda as an exempted company and since 12 March 2015, and until the 27 September 2018, Topaz had been a wholly owned subsidiary of CHL. The total issued share capital of Topaz is 10,000 ordinary shares. Mr. Chandran and Mr. Swami act as the directors of Topaz.

7. CHL's holding in Topaz is one of its principal assets. Topaz is a holding company for its local operational branches in the Arabian Gulf, including Nico International Dubai Branch and Nico International Abu Dhabi (together: "**Nico**"). Nico is an industrial engineering company which has a number of high-value partnerships with the original equipment manufacturers within the engineering industry and, according to the First Affidavit of Stuart Chalmers, it is a profitable business and holds assets and contracts of value.

8. Following the Transfers, which form the subject of these proceedings, Topaz's shareholding comprised: Mr. Swami 1,300 shares; Mrs. Chandran 7,700 shares and Mr. Uthran 1000 shares.

9. Nico International is incorporated in Bermuda as an exempted company and is a wholly owned subsidiary of Topaz. The business known as Nico was purchased for US $18.5 million from Topaz Energy & Marine Ltd, a non-group company. Nico is one of the leading marine industrial engineering companies in the Gulf and has operated in the region for more than 46 years. HSBC Bank Middle East Limited provided Chalmers Group with funding for the purchase of Nico. By a loan facility dated July 2015, HSBC lent AED 55,087,500 to support the acquisition.

10. According to Mr. Stuart Chalmers, given the legal systems in the jurisdictions in which CHL conducts business, from time to time, it was necessary for the Company to grant a Power of Attorney to certain individuals who manage the Company on a daily basis in order to ensure the smooth and efficient running of the Company's operations. For instance, he advises, when doing business in the UAE, it is necessary for the agent of a company to show that they have the authority to enter into contracts. Other entities in the Chalmers Group also granted similar Powers of Attorneys to certain directors. Accordingly, on 14 December 2011, CHL granted a Power of Attorney to Mr. Chandran to act in this way.

11. It is Mr. Stuart Chalmers' evidence that unbeknown to him, on or around 12 September 2018, Mr. Chandran, in association with Mr. Swami, took steps to transfer all of CHL's 10,000 ordinary shares in Topaz to Mr. Swami, Mrs. Chandran, his wife, and Mr. Uthran,

his son-in-law. Mr. Chalmers signed the Transfers purportedly on behalf of CHL and Mr. Uthran's staff witnessed his signature. Mrs. Chandran and Mr. Uthran were never affiliated with nor did they ever hold an interest in CHL or any of its subsidiaries.

12. Mr. Stuart Chalmers contends that the above Transfers were made without first obtaining authorisation from CHL's Board of Directors. There was no Board resolution executed approving it. There was also no disclosure by Mr. Chandran of the clear and obvious conflict of interest that would arise from transferring such a substantial asset of CHL to his wife and son-in-law. Mr. Stuart Chalmers says that the entire transfer in this case was initiated and completed without his knowledge as a director of CHL. He says that he was not consulted as the largest shareholder of CHL with a 35.48% shareholding.

13. There is no share purchase agreement between the parties or similar document in CHL's records to evidence a *bona fide* sale.

14. Furthermore, Mr. Stuart Chalmers contends that, having instructed independent accountants to thoroughly review CHL's financial statements and records, CHL never received any consideration whatsoever for the Transfers. This was in respect of an asset purchased by CHL in 2015 for US $18 .5 million, and which was the most profitable part of the Chalmers Group in 2018; a Group that overall was financially struggling. Mr. Stuart Chalmers believes that Mr. Chandran and Mr. Swami acted in a fraudulent and deceitful manner to take control of the more profitable part of the Chalmers Group.

15. On or about 1 August 2019, Topaz's shares in Nico International were likewise reported to have been transferred to Mr. Swami (1,300 shares), Mr. Chandran's wife (7,700 shares) and Mr. Chandran's son-in-law (1,000 shares) ("**Nico Transfers**").

The Pleaded case

16. CHL served its Originating Summons on 11 September 2019. By Order of the Court dated 14 November 2019, it was ordered that the proceedings continue "*as if commenced by*

writ", pursuant to Order 28, rule 8. The Statement of Claim was served on 21 November 2019, and the Third to Fifth Defendants' Defence was served on 13 December 2019. The Plaintiff's Reply to Defence was served on 6 January 2020.

17. The Plaintiffs claim is for ratification of the register of members of Topaz and Nico International pursuant to section 67 of the Companies Act 1981. In essence, CHL seeks to unwind the share transfers orchestrated by Mr. Swami and Mr. Chandran and to reinstate the share position they were prior to 14 September 2018 (in the case of Topaz), and 1 August 2019 (in the case of Nico International).

18. In its Statement of Claim, CHL asserts that:

    (a) the Topaz Transfers were made without the authority of CHL and the Third to Fifth Defendants were on notice of this irregularity, and the transfers are therefore voidable and had been voided;

    (b) there was no agreement for sale and the transfers are not supported by consideration. The transferred shares are consequently held by the Third to Fifth Defendants as they are trustees for CHL on a resulting or constructive trust;

    (c) As the Topaz Transfers were not authorised by CHL as transferor, they are not "*proper instruments*" for the purposes of section 48 of the Companies Act 1981 as it was therefore unlawful for the transfers to be registered;

    (d) similarly, the Nico Transfers were also unauthorized and their registration would have been unlawful; and

    (e) the Topaz Resolution was required by Bye-Law 59 of Topaz's Bye-Laws to have been passed unanimously. This was not the case as the resolution had been signed by the two of the three directors of Topaz.

19. In relation to claims set out at (a) to (d) above, the Third to Fifth Defendants assert in their Defence, filed by Carey Olsen Bermuda Limited, attorneys acting for the Third to Fifth Defendants , on 13 December 2019 and in the Further and Better Particulars filed by the Third to Fifth Defendants on 22 January 2020 that:

(a) Sale of shares to the Third to Fifth Defendants was agreed orally with Mr. Stuart Chalmers at various meetings held on dates unknown in August and September 2018. These meetings were attended variously by Mr. Swami and Mr. Chandran, although the Defendants could not be specific as to who attended which meetings;

(b) It is admitted that there is no documentation supporting this agreement;

(c) It is pleaded in the Defence that the sale was supported by "*valid and effective consideration*." The Defence is silent on what the consideration actually was;

(d) In response to the Plaintiff's Request for Further and Better Particulars, the Third to Fifth Defendants stated that the consideration was the waiver of Mr. Swami of about 12 months' salary said to be owed to him. No figure or further details were provided;

(e) As a sale agreed with Mr. Stuart Chalmers and consideration received by CHL, it is argued that Mr. Chandran had the power under the Power of Attorney 2017 to execute the transfers without the approval of a Board resolution of CHL;

(f) Alternatively, CHL is estopped from denying the validity of the transfer; and

(g) The shareholdings in Nico International were amended to mirror the shareholdings in Topaz. Topaz was therefore removed as the parent company.

Mr. Swami's confession

20. On 10 September 2020 the Registrar of the Supreme Court received a letter from Mr. Swami, the Third Defendant, headed "*Truth alone Triumphs*" which, on the face of it, appears to repudiate the factual Defence filed by Mr. Swami, Mrs. Chandran and Mr. Uthran and the Answers given to the request for Further and Better Particulars of the Defence. In that letter Mr. Swami states:

    (a) The purpose of the transfers was "… *To separate the Nico business from Sam Chalmers*…"

    (b) He confirms that there was no agreement with Mr. Stuart Chalmers that the shares will be transferred. Mr. Chalmers was only told about it afterwards in October 2018;

    (c) There was no valid consideration in kind or otherwise paid to or received by CHL for the transfers;

    (d) The Defendants attempted to "*paper*" the Topaz Transfers by producing a fake sale and purchase agreement. He says that this agreement has not been disclosed in the proceedings and in practical terms (despite being a "*dummy sale and purchase agreement*") has not been complied with;

    (e) Mr. John Thomas, as one of Topaz's three directors, had his signature forged on the Topaz Resolution;

    (f) overall, the Topaz Transfer "*was not a legally valid share transfer*";

    (g) further, Mr. Chandran and Mr. Uthran are "*withdrawing money [from Nico] like it is nobody's business*" (he says approximately US $1 million have been stolen); and

    (h) He concludes by stating: "*I request the Hon. Court to consider this statement as my confession and reverse the share transfer of Topaz Engineering Ltd, Bermuda made*

in pursuant of Transfer all shares documents dated 14 September 2018 and Directors unanimous written resolution dated 13th September 2018. I also request the Hon. Court to forgive and pardon me."

Summary Judgment

21. At the hearing for an application for a summary judgment on 4 December 2020 the Court accepted the submission, made on behalf of CHL, that Mr. Swami's confession repudiates that there was an oral agreement with Mr. Stuart Chalmers and that repudiation is fatal to the integrity of the Defence, as Mr. Swami was the key figure in the pleadings who attended the alleged meetings in August and September 2018 and facilitated the transfers by arranging for instruments to be executed and the Topaz Resolution to be filed.

22. Leaving aside the confession by Mr. Swami, the Court found the substance of the Defence advanced by the Third to Fifth Defendants to be incredible. In that regard the Court noted and relied upon the following facts and circumstances:

    (a) The Defendants are unable to state when the alleged meetings were held, how many there were, to identify with any particularity where they were held or who was present each time, or at which meeting a final agreement was reached. The Defendants are also unable, or unwilling, despite being expressly requested to do so, to state the gist of the agreement allegedly reached.

    (b) The only documents in relation to the alleged transfers are those created by Mr. Swami and which are entirely self-serving; namely the share transfer instruments and the Thomas Resolution. There is no record anywhere of Mr. Stuart Chalmers' or CHL's agreement to the sale, where one would assume at the very least that there would be some form of documentation detailing hand over or settlement conditions.

    (c) There is no documentation whatsoever in relation to these share transfers in the corporate records of CHL despite CHL having a professional corporate secretary.

(d) The Defendants' assertion in the Answer to the request for Further and Better Particulars that the waiver by Mr. Swami of salary arrears (of an amount not particularised) was unconvincing having regard to (i) despite apparently providing 100% of the purchase consideration, Mr. Swami received just 13% of the shares; (ii) Mr. Swami was an employee of Chalmers Engineering Dubai LLC ("**Chalmers Dubai**") and any salary that might have been owed to him would have been payable by that partnership and not by CHL; (iii) CHL did not have an ownership stake in Chalmers Dubai, and the waiver of unpaid salary would not have benefited CHL; (iv) it is not disputed by the Defendants that Nico had been purchased for the US $18.5 million three years before and was the most successful part of the Chalmers Group and any payment of salary to Mr. Swami would have been *de minimis* next to this value.

23. Having regard to the above facts and circumstances the Court accepted that the core defence of the Defendants was incredible and hopeless. In particular, the Defendants' claim that Mr. Chandran used the Power of Attorney granted to him by CHL to transfer a multimillion-dollar business to his wife, son-in-law and subordinate, while he was languishing in a Dubai prison facing financial crime charges, for effectively *de minimis* consideration, on account of Mr. Swami's unpaid salary from another corporate entity, was, in the Court's view, incredible and hopeless. All the defences asserted in the Defence and in the Further and Better Particulars provided by the Defendants had been repudiated in their entirety by Mr. Swami, a Co-Defendant in these proceedings. In the circumstances, the Court granted the summary judgment and that made the order in terms of the Order dated 4 December 2020.

The application by Mrs. Chandran and Mr. Uthran to set aside the summary judgment

24. In support of the application to set aside the summary judgment Mr. Uthran has filed an affidavit sworn on 28 January 2021. In that affidavit he explains that he and Mrs. Chandran were unable to be represented at the hearing of the application for summary judgment as their then attorneys, Carey Olsen Bermuda Limited, had withdrawn as attorneys on account

of conflict of interest. He says that the Defendants found it difficult to instruct alternative counsel in Bermuda until December 2020 when Apex Law Group came on record to act on behalf of himself and Mrs. Chandran. Apex Law Group filed the Notice of Appointment of Attorney on 21 December 2020**.**

25. I accept that Mrs. Chandran and Mr. Uthran have a possible explanation as to why they could not appear at the hearing of the application for a summary judgment. In the circumstances it becomes necessary to consider the appropriate legal test for setting aside judgments regularly obtained.

26. The commentary to Order 14, rule 11 in the Supreme Court Practice 1999 explains at 14/11/1 that the principles for the exercise of the discretion to set aside a summary judgment are found in the commentary to Order 13, rule 9. Under this rule it is almost an inflexible rule that when a party seeking to set aside a judgment that is regular, must file an affidavit setting out facts showing a defence on the merits. The Court reviewed the relevant test in *Gibbons v DeSilva* [2020] SC (Bda) 43 Civ (6 October 2020) at [17]-[20]:

> *"17. In the Supreme Court Practice, 1999, the editors state the relevant principles at 13/9/18 in the following terms:*
>
> *"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the Court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle [1986] 2 Lloyd,s Rep. 221 at 223,CA,*

where the earlier cases are summarised. From that case the following propositions may be derived:

> *(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under O. 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.*
>
> *(b) If proceedings are deliberately ignored this conduct although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside"*

18. The editors of the Supreme Court Practice go on to state that the preferred view is that unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on fact no "real prospect of success" is shown and relief should be refused.

20. It follows that in order to succeed in setting aside a default judgment, the defendant has the burden of proof of establishing that he has a realistic prospect of success. A realistic prospect of success is one which carries some degree of conviction, and must be one more than merely arguable. That burden is ordinarily discharged by the defendant filing "credible affidavit evidence" demonstrating a real likelihood that he will succeed in his defence. In the circumstances where there is a dispute on the facts, the Court is not bound to accept everything said by a party in his affidavit in support of the application to set aside a default judgment. The Court is entitled to consider whether there is real substance in the assertions being made by the defendant."

27. Mr. Uthran's affidavit continues to assert that consideration for the transfer of the shares was to settle Mr. Swami's account. This is despite the fact that Mr. Swami himself has repudiated this assertion in his letter to the Registrar of the 10 September 2020.

Furthermore, no documentary evidence has been filed to substantiate that there was any money owed to Mr. Swami in this regard.

28. In relation to the issue of consideration Mr. Uthran goes further than what has been asserted in the Defence already filed and in the Answers given to the request for Further and Better Particulars. For the first time Mr. Uthran asserts under oath that part of the consideration was the alleged unpaid salary owed to Mr. Chandran. It is to be noted that there is no suggestion in the Defence already filed and the Answers already given to the Request for Further and Better Particulars that part of the consideration for the Transfers was the unpaid salary to Mr. Chandran. Mr. Uthran does not explain why this fact, assuming it was true, was not mentioned in the Defence filed on their behalf and why this was not mentioned in the Answers given to the request for Further and Better Particulars.

29. Furthermore, as was explained in the First Affidavit of Mr. James Chalmers, filed with the court on 20 November 2020, this argument does not assist the Defendants as Mr. Chandran was not an employee of CHL. He was, like Mr. Swami, employed by Chalmers Dubai. Any salary that might have been due to Mr. Swami and Mr. Chandran would have been payable by that partnership and not by CHL. CHL did not have any ownership stake in Chalmers Dubai, and the waiver of unpaid salary would not have benefited CHL.

30. In regard to the salary of Mr. Chandran, Mr. Uthran's Affidavit fails to disclose the statement of salary account ("**Salary Account**") signed by Mr. Chandran, and prepared by the auditors of the Chalmers Group, Puthran Charted Accountants. A copy of the Salary Account appears at page 29 of "**JAC2**" to the Second Affidavit of Mr. James Chalmers which shows that on the 31 May 2018, Mr. Chandran in fact owed Chalmers Dubai a substantial sum of approximately US $826,404. Mr. James Chalmers' Second Affidavit was filed with this Court on 16 February 2021, a period of four weeks before the hearing of the application to set aside the judgment and it is noteworthy that Mr. Uthran has made no attempt to respond to the assertion that not only no monies are owed to Mr. Chandran by Chalmers Dubai but that Mr. Chandran is in fact heavily indebted to that partnership.

31. In addition, Mr. Uthran's Affidavit also appears to suggest (at paragraph 14) that it was somehow in the best interests of CHL for the most significant asset of the Company to be transferred to Mr. Chandran and his associates for apparently nil consideration. At paragraph 14 Mr. Uthran states:

> "*... The shareholder and director of Topaz and Nico Bermuda had a meeting in Dubai and at that meeting it was agreed to transfer the Topaz and Nico Bermuda entities to the Third and Fifth Defendants. The purpose of the transfer was so that the liability of Nico Bermuda (which held the bank guarantees to HSBC and CBD) did not impact CGC and vice versa. This was done with the consensus of SAM Chalmers who wanted to protect himself from any huge liabilities as at that time he realised that Nico Bermuda and Topaz have become worthless companies because then, they were deep in debt as all of Nico Bermuda's funds had been drained by CGC and its subsidiaries*."

32. This contention that the shares of CHL in Topaz and Nico International were transferred away from CHL and the Chalmers Group in order to protect CHL and the Chalmers Group from any claims arising out of the indebtedness of Topaz and Nico to third-party lenders, finds no mention in the Defence filed by Mrs. Chandran, Mr Uthran and Mr. Swami on 13 December 2019, nor in the Answers given by Mrs. Chandran, Mr Uthran and Mr. Swami in response to the request for Further and Better Particulars. In any event this contention appears to make little commercial sense. If CHL and all the Chalmers Group have a contractual liability in relation to the indebtedness of Topaz and Nico (for example, as guarantors) then the transfer of shares of CHL to Mrs. Chandran and Mr. Uthran can have no effect on that contractual liability. Conversely, if CHL and the Chalmers Group have no contractual liability in relation to the indebtedness of Topaz and Nico to third parties, CHL and the Chalmers Group do not incur any additional liability merely by continuing to own the shares in Topaz and Nico International.

33. In the Court's view, the facts and circumstances which supported the grant of summary judgment on 4 December 2020 remain entirely unaffected. Those facts and circumstances

are set out at paragraphs 4 to 15 above. Indeed, by reasons of the matters set out in the Affidavit of Mr. Uthran and as discussed at paragraphs 24 to 32 above there are additional reasons for concluding that the defence put forward by Mrs. Chandran and Mr. Uthran is not credible and certainly does not disclose that there is a real prospect of success. At all events, the Court is satisfied that Mrs. Chandran and Mr. Uthran have not discharged the burden of proof which is upon them to file an affidavit which is credible and which discloses that there is a realistic prospect of success. Accordingly, the Court declines to set aside the judgment given by this Court on or before December 2020.

34. I do not consider that there is any other good reason why summary judgment should not be given in this action and it must proceed to a trial. I certainly do not consider that there are material disagreements in relation to the relevant facts which can only be determined at a full trial. In my view the legal dispute between the parties in relation to the transfer of the shares can be resolved by reference to the narrow ambit of facts outlined above.

35. For reasons best known to Mrs. Chandran and that of Mr. Uthran and their attorneys, Apex Law Group Ltd., they have elected to exhibit to Mr. Uthran's affidavit communications from their previous attorneys, Carey Olsen, which would ordinarily be subject to legal professional privilege. In the exhibited email to Mr. Uthran from Carey Olsen dated 8 December 2020, Carey Olsen express their views as to the prospects of setting aside this summary judgment and conclude:

> "*We have now considered the matter pending and have come to the view that there is no realistic prospect of successfully applying to set aside the order for summary judgment as against you and Mrs. Chandran. And on that basis we regret that we must decline the opportunity to act in this matter.*
>
> *Now that the summary judgment has been entered, in order to persuade the Court to set aside or vary that order you would have to show (i) that there are justifiable reasons for not contesting the Plaintiff's application for summary judgment in the first place (which, as you will recall, was filed and served on 4 November); and*

more importantly (ii) that there is a reasonable probability in all the circumstances of you having a real or bona fide defence to the claim that or to proceed to trial.

In light of all the facts and circumstances we consider that it is very likely that the Court will regard to your/Mrs. Chandran's Defence as lacking "bona fides."

36. I would also note that Mr. Hodgson, who appeared for Mrs. Chandran and Mr. Uthran, submitted that it was wrong for the Court to grant summary judgment on 4 December 2020 given that the First Affidavit of Mr. James Chalmers whilst filed with the court on 12 November 2020 with the revenue stamps, was not signed until 9 December 2020 and only provided to the Court on 16 March 2021. Mr. Hodgson says this is a fundamental defect and that the Court is bound to set aside the summary judgment.

37. I am unable to accept Mr. Hodgson's submission in relation to the reliance by the Court upon an unsigned affidavit. The facts are that the unsigned affidavit was accompanied by a letter from Appleby, attorneys for CHL, to the Registrar dated 12 November 2020. In that letter Appleby explained that:

"*Mr. Chalmers is in the United Kingdom and unable to swear the affidavit due to the COVID-19 restrictions presently in place. The affidavit has been agreed and form and content and we undertake to file the sworn affidavit as soon as we are in receipt of the same.*

In terms of listing of the summons, please note that this is an urgent matter for the reasons set out below."

38. Accordingly, the position was that the affidavit had been agreed upon by the deponent, Mr. Chalmers, but he was unable to swear it due to the COVID-19 restrictions then prevailing in the United Kingdom. Given the urgency of the matter Appleby requested the Court to rely upon the terms of the affidavit upon their undertaking that they will file a signed affidavit as soon as possible. This Court frequently relies upon unsigned affidavits of

foreign deponents in urgent matters upon the assurance by local attorneys that the affidavit has been agreed to by the deponent and upon their undertaking that a copy of the affidavit would be filed in due course. What happened in this case was nothing out of the ordinary and there is no reason in principle why summary judgment should be set aside on the basis that one of the affidavits relied upon was unsworn on that date. It is to be noted that the affidavit was in fact sworn by Mr. Chalmers on 9 December 2020. Any delay on the part of Appleby in not filing the signed affidavit as soon as possible does not, it seems to me, warrant setting aside the summary judgment. Furthermore at the time of the hearing of the summary judgment on 4 December 2020 the Court had the benefit of a signed copy of the First Affidavit of Mr. Stuart Chalmers which was sworn on 8 September 2019 and filed at that time. It is to be noted that the affidavit of Mr. Stuart Chalmers essentially covers the same ground as the First Affidavit of Mr. James Chalmers.

39. Finally, I must refer to an aspect of this case which Mr. Hodgson repeated a number of times in his submissions to the Court. Mr. Hodgson opened his application by advising the Court that "*a number of people*" have remarked to him that they were surprised that I had decided this application given an affiliated company with the law firm of Conyers Dill & Pearman Limited ("**Conyers**") had provided corporate and secretarial services to Topaz and Nico International. He said that this state of affairs did not reflect well upon Bermuda as an international financial centre.

40. As is well known to local practitioners who appear in the Bermuda Courts, I was until 31 March 2018, a Director of Conyers and the legal issue raised by Mr. Hodgson is whether my past association gives rise to an appearance of bias such that I should have recused from dealing with this matter. Given that this issue has been raised by Mr. Hodgson, it is appropriate that I should deal with it.

41. The test for appearance of bias, as it relates to judicial officers, was considered by the Court in *Athene* [2019] SC (Bda) 20 Com (15 March 2019) at [43]- *Holdings Limited v Imran Siddique and others:*

"43. In considering this application I remind myself of the test of apparent bias, which I take from the recent judgment of Turner J. in Charles Thomas Miley v Friends Life Limited [2017] EWHC 1583, [21-22]:

> *"21. The law relating to apparent bias is uncontroversial and is set out in the defendant's submissions: "The test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude there was a "real possibility" that the judge was biased" (Porter v Magill [2002] 2 AC 357)… In Helow v Secretary of State for the Home Department [2008] 1 WLR, Lord Hope described the attributes of the 'fair-minded and informed observer' at paragraphs 1 to 3 of the speeches. These paragraphs include the following extracts:*
>
> *"The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious … Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done … may make it difficult for them to judge the case before them impartially."*
>
> *"22. At the risk of stating the obvious, any judge who is invited to recuse himself on the ground of apparent bias must be very careful not to allow any personal considerations whatsoever to contaminate his conclusions. Nevertheless, this should not preclude such a judge from acting with the same level of robustness and proportionate scepticism, where this is*

necessary, as he would approach any other application. To proceed otherwise would be unfairly to prejudice the other side out of an undue sensitivity to the perception that such robustness may be wrongly attributed to the personal feelings of *the judge as opposed to the legitimate demands of firm management with the aim of applying the overriding objective."*

44. In Locabail (UK) Ltd, v Bayfield Propertis Ltd *[2000] QB 451, the Court of Appeal found:*

"force in observations of the Constitutional Court of South Africa in President of the Republic of South Africa & Others v. South African Rugby Football Union & Others *1999 (7) BCLR (CC) 725 at 753, even though these observations were directed to the reasonable suspicion test:*

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are

reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

42. Potential conflict on the part of the Supreme Court Judges on account of their previous association with the law firms is governed by paragraph 73 of the *Guidelines for Judicial Conduct for the Judges of the Supreme Court of Bermuda and the Magistracy* and provides that: "*Judges should disqualify themselves if they served as a legal adviser in respect of the controversy in issue when in practice, or if their firm was concerned with the matter while the Judge was in practice*." There can be no basis for suggesting that paragraph 73 is in any way engaged given that the present controversy did not exist prior to 31 March 2018 and Conyers was not instructed in relation to this controversy at that time.

43. I should also note that prior to the engagement of Mr. Hodgson and/or his firm, Apex Law Group Ltd., Mrs. Chandran and Mr. Uthran were represented by Carey Olsen in Bermuda. Carey Olsen appeared before me on behalf of Mrs. Chandran and Mr. Uthran on a number of times and in particular on 14 November 2019 and 10 January 2020. At all material times Topaz and Nico International have been represented by Conyers in the proceedings. At no stage was there any suggestion or representation by the Bermuda attorneys instructed on behalf of Mrs. Chandran and Mr. Uthran that I should consider recusing myself from considering any application in these proceedings on the basis that a reasonable and fair-minded informed observer, having considered the facts, could reasonably conclude that there was a real possibility that I was biased.

44. Having reflected on the matter I consider that there is no plausible basis for suggesting that a reasonable and fair-minded informed observer, having considered the facts, could reasonably conclude that there was a real possibility of bias. A fair-minded and informed observer is likely to take into account that prior to dealing with this action in Court, to the best of my recollection, I had not heard of or had any dealings with CHL, Topaz, Nico International, Mr. Swami, Mr. and Mrs. Chandran, and Mr. Uthran. Accordingly, had Mr. Hodgson formally taken this point, I would not have recused myself from determining the application for summary judgment in this matter.

Conclusion

45. In the circumstances, the Court dismisses the application by Mrs. Chandran and Mr. Uthran to set aside the summary judgment given in favour of the Plaintiff and as reflected in the Orders of this Court of 4 December 2020 and 10 December 2020.

46. In relation to the issue of costs, my provisional view is that the Plaintiff should have the costs of this application. However, if Mrs. Chandran and Mr. Uthran consider that some other order should be made, they should make the necessary application to the Registrar within the next 21 days.

Dated this 28th day of April 2021

NARINDER K HARGUN
CHIEF JUSTICE