

C.C 46/10      2010      C. NO.6

**IN THE HIGH COURT OF SIERRA LEONE**  
**( CIVIL DIVISION )**

BETWEEN: -

CAPE OIL LIMITED - PLAINTIFF

AND

PRECIOUS MINERALS MARKETING - 1<sup>ST</sup> DEFENDANT  
CO. (S.L.) LTD

AND

NATIONAL PETROLEUM - 2<sup>ND</sup> DEFENDANT  
(S.L) LTD.**G. K. Tholley Esq. for the Plaintiff****M. P. Fofanah Esq. for the 1<sup>st</sup> Defendant****P. Lambert Esq. for the 2<sup>nd</sup> Defendant.****JUDGMENT****RULING DELIVERED THE 20<sup>th</sup> DAY OF May 2011**

The Plaintiff herein is by Notice of Motion dated 8<sup>th</sup> December 2010 seeking the disposal of the matter herein on questions of law pursuant to Order 17 of the High Court Rules 2007. The Defendants do not oppose the application.

The questions are as follows

- (a) Whether the Deed of Debenture and Loan Agreement dated the 23<sup>rd</sup> day of May 1986 made between the 1<sup>st</sup> Defendant/Respondent herein and Fimpex Ltd, registered as No. 166 at page 7 in Volume 40 of the book of Miscellaneous Instruments kept at the office of the Registrar-General, Freetown is valid.

- (b) Whether the equitable mortgage by way of deposit of the original share certificates in respect of 80, 000 "B" shares of the 2<sup>nd</sup> Defendant/Respondent herein of the shares owned by the 1<sup>st</sup> Defendant/Respondent on or about the 23<sup>rd</sup> day of May 1986 to secure a loan of the sum of US\$9,000,000/00 (Nine Million US Dollars), registered as No. C/F/96/1986 in the Register of Charges kept at the office of the Registrar-General, Freetown is valid.
- (c) Whether the Deed of Assignment dated the 25<sup>th</sup> day of May 1986 made between Fimpex Ltd and Fidelity Bank N. A. registered as No. 74 in Volume 79 of the book of Miscellaneous Instrument kept at the Office of the Registrar-General, Freetown is valid.
- (d) Whether the Deed of Assignment dated the 4<sup>th</sup> day of January 1995 made between Fidelity Bank N. A. and the Plaintiff/Applicant herein registered as No. 143/67073/95 in Volume 55 at page 45 of the record book of Miscellaneous Instruments kept at the Office of the Registrar-General, Freetown is valid.

- (e) Whether the Plaintiff/Applicant is the owner of 80, 000 'B' shares of the 2<sup>nd</sup> Defendant/Respondent's shares pursuant to the above transactions;
- (f) Whether the Plaintiff/Applicant is a shareholder of the 2<sup>nd</sup> Defendant/Respondent company as the owner and assignee/mortgagee of 80,000 'B' shares of the 2<sup>nd</sup> Defendant/Respondent pursuant to the above transactions;
- (g) Whether the 2<sup>nd</sup> Defendant/Respondent can effectively avoid the above transactions on the nebulous grounds that (i) it was never a party thereto notwithstanding that the transactions were entered into for its own benefit (to wit: to raise capital on its issued shares)? (ii) its memorandum and articles of association did not permit the same;
- (h) Whether the Plaintiff/Applicant's claim is statute-barred under the Limitations Act, 1961.

In support of the application is the affidavit of Agibola E. Manly Spain, solicitor for the Plaintiff sworn to on 8<sup>th</sup> December 2010. The said affidavit gives the facts leading to the application which are as follows: By a resolution dated 15<sup>th</sup> October 1984 passed by the Board of Directors of the 1<sup>st</sup> Defendants its Managing Director was authorised to, inter alia, acquire the shares of SLST London and to raise a loan overseas up to the sum of US \$ 10 million. By a Deed of Debenture and Loan Agreement dated 23<sup>rd</sup> May 1986 ( hereinafter called the Debenture) made between the 1<sup>st</sup> Defendant of the one part and Fimpex Ltd of the other part the 1<sup>st</sup> Defendant borrowed the sum of US \$ 9 million from the said Fimpex Ltd to finance the purchase of 12 million shares of SLST, 80, 000 shares of British Petroleum (SL) Ltd now trading as National Petroleum (SL) Ltd, certain freehold properties at Spur Road Freetown and oil debts of US \$ 16, 206,375. 31 from consolidated African Selection Trust Ltd. By clause 6 of the said Deed of Debenture and Loan Agreement the 1<sup>st</sup> Defendant agreed to repay the said loan in equal instalment payments of US \$ 500, 000 together with interest payable on the 1st January and on 1<sup>st</sup> June every year to a nominated account at the Fidelity Bank, Bishops gate London or to such account as the said Fimpex Ltd may nominate. By clauses 7 and 8 of the said Debenture the 1<sup>st</sup> Defendant created a fixed first charge on all its freehold and leasehold properties as set out in the schedule to the said Deed and a floating charge on all its future freehold and leasehold properties, all its books debts now and from time to time owing to it and all its goods, its undertakings and assets and so on.



An equitable mortgage was created in favour of the said Fimpex Ltd by the 1<sup>st</sup> Defendant in respect of 80,000 shares issued by the said 1<sup>st</sup> Defendant by way of deposit of its original share certificates. The said equitable mortgage was duly registered as a charge in the Office of the Registrar-General Freetown on 21<sup>st</sup> September 1995. By a Deed of Assignment dated 25<sup>th</sup> May 1986 made between Fimpex Ltd of the one part and Fidelity Bank N. A., Fimpex Ltd assigned all its interest under the Deed and Documents set out in the schedule to the said Deed one of which document is the Debenture. By a further Deed of Assignment dated 4<sup>th</sup> January 1995 the said Fidelity Bank NA assigned its interest in the Debenture to the Plaintiff herein. By an Order of Court dated 8<sup>th</sup> September 1995, the Plaintiff was granted an extension of time within which to register the Deed of Debenture and Loan Agreement and the Equitable Mortgage.

The 1<sup>st</sup> Defendant then issued a writ of summons dated 17<sup>th</sup> November 1995 against Fimpex Ltd. Fidelity Bank and the Plaintiff challenging the validity of the above-mentioned documents but discontinued the said action by filing a Notice of Discontinuance dated 6<sup>th</sup> December 1995. By a writ of summons dated 12<sup>th</sup> December 1995 the 1<sup>st</sup> Defendant instituted the same proceedings against the same parties claiming the same reliefs. The 1<sup>st</sup> Defendant was ordered to give security for costs in the sum of Le50 million Leones, by Order of Court dated 10<sup>th</sup> May 1996. The 1<sup>st</sup> Defendant through its solicitors initiated negotiations for an out of court settlement and several correspondences between the solicitors are exhibited to the said affidavit.

The said negotiations broke down and the Plaintiff consequently instituted the present proceedings claiming the several reliefs contained in the writ of summons Exh "AEMS23". After the exchange of pleadings in the said matter, the Plaintiff filed the present Notice of Motion praying for the disposal of the matter on the points of law raised herein.

*The first question raised is as follows:*

*Whether the Deed of Debenture and Loan Agreement dated 23<sup>rd</sup> May 1986 made between the 1<sup>st</sup> Defendant/Respondent herein and Fimpex Ltd registered as No. 166 at page 7 in Volume 40 of the book of Miscellaneous Instruments in the office of the Registrar-general is valid.*

Counsel for the Plaintiff submitted that the said Deed of Debenture and Loan Agreement incorporates a valid contract for a loan of US \$9,000,000 from Fimpex Ltd to be utilized for the purposes set out in the said Debenture and already mentioned above. He submitted that in determining whether there is a valid agreement between the parties the court ought to look at the said document as a whole and at the conduct of the parties to establish whether the parties have come to an agreement on the essentials and he relied on the case of **Gibson vs. Manchester City Council** {1979} 1 WLR 294. He maintained that the said Debenture disclosed a firm, incontrovertible and valid agreement between Fimpex Ltd, the Plaintiff's predecessor-in-title of the one part and Precious Minerals Marketing Company (PMMC) the 1<sup>st</sup> Defendant herein on the

other part for a loan of the sum of US \$9, 000,000. He submitted that the said Debenture does not only serve as a memorandum of the amount of money loaned but also embodies the essential terms of the said agreement and furthermore the deposit by the 1<sup>st</sup> Defendant of two share certificates by way of equitable mortgage to secure the said loan is clear and equitable evidence by way of conduct from which it can be conclusively inferred that there was a valid agreement between the said Fimpex Ltd and the 1<sup>st</sup> Defendant for which valuable consideration was provided. Counsel relied on **Currie vs. Misa** {1875} L. R. 10 Ex. at 162.

Counsel for the Plaintiff went on to submit that the terms of the Deed represent a clear intention on both parties thereto to create a legal relation thereunder in addition to the fact that the signatories to the said Debenture had legal capacity to enter into the said contract. He relied on s. 35 of the Companies Act 2009 relating to the capacity and powers of a company. Counsel stressed that the signatories to the said Debenture had the authority to bind the bodies they represented.

The court was referred to the subscribers of the Memorandum and Articles of Association of the 1<sup>st</sup> Defendant and the Board Members who signed the Resolution dated 15<sup>th</sup> October 1984 authorising the transaction embodied in the Debenture and counsel submitted that from the said Resolution of the Board the signatories thereto being its Managing Director **MR. J. S. MOHAMED**, Director **MR. JOE AMARA BANGALI** and Company Secretary **MR. J. A. THOMAS**



acted as its agents in procuring the loan and signing the Debenture. He went on to submit that a close look at Articles 3 (17) to (20) of the 1<sup>st</sup> Defendant's Memorandum of Association regarding the objects of the said Company and the express provisions of Ss 51 (1) (3), 53 and 54 of the Companies Act 2009 disclose the 1<sup>st</sup> Defendant's and/or its officer's capacity to enter into the said transaction. He therefore concluded that the object of the contract as embodied in the Debenture is lawful and he relied on the Statutory presumption of regularity enshrined on Ss 56 (a),(b) (c) and (d) of the Companies Act 2009.

In response to these submissions, counsel for the 1<sup>st</sup> Defendant submitted that whilst the Deed of Debenture appears to have been regularly obtained and registered as a valid instrument in Sierra Leone, serious questions arise as to whether it was authorized by the 1<sup>st</sup> Defendant in accordance with both its Articles of Association Exh "MPF1" as well as that of the 2<sup>nd</sup> Defendant. Counsel referred to the Board's Resolution Exh AEMS1 and submitted that it firstly specifically authorised its Managing Director, **MR. J. S. MOHAMED** only to raise a Loan abroad up to the tune of 10 (ten) million US \$ to finance the acquisition of SLST London. He stated that no other Director was authorised to serve in that capacity and he relied on Article 87 of the said 1<sup>st</sup> Defendant's Articles of Association. He therefore contended that it is unacceptable that another Director, namely **MR. JOE AMARA BANGALI** and the Company Secretary signed the said Debenture.



He continued to state that the said Debenture was prepared and executed ultra vires the powers of the 1<sup>st</sup> Defendant's officials and the officials such conduct is contrary to Article 95 of its Articles of Association in the sense that the execution of the Debenture was not done bona fide and in the best interest of the Company.

Secondly he submitted that the object for which the loan was to be acquired was clear and specific and no reference was made for a loan raised for the purposes set out in the said Debenture. He contended that the Board ought to have met again to alter its specific resolution in accordance with articles 89 and 97 of the said 1<sup>st</sup> Defendant's Articles of Association. Furthermore he argued there are no minutes of the meetings of its Board authorising the transaction reflected in the Debenture.

Counsel thirdly referred the court to the reference number of the Certificate of Registration of the charge created (equitable Mortgage, Exh "AEMS5" which is "No. C/F/96/1984" and queried whether the said Debenture dated 23<sup>rd</sup> May 1986 could have created an Equitable Mortgage referable to the period "1984" which clearly predates the Debenture.

Counsel also pointed out that there was nothing to show the place, and mode of payment employed by the Plaintiff to prove payment of the sum of US \$ 9 million to the 1<sup>st</sup> Defendant and that the Board was aware of it. Further counsel submitted that there is nothing on the face of the share certificate of BP (Sierra Leone) Exh "AMES4" to show that it was the 1<sup>st</sup> Defendant

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that deposited same abroad in order to secure the loan. He submitted that the certificate is dated 25<sup>th</sup> January 1984 long before the Board Resolution of 15<sup>th</sup> October 1984 coupled with the fact that it shows that the 1<sup>st</sup> Defendant had already acquired 80,000 B. Shares in the 2<sup>nd</sup> Defendant's Company by 25<sup>th</sup> January 1984 and therefore the transaction smacks of irregularity and fraud as claimed in the particulars of claim of the 1<sup>st</sup> Defendant's writ of summons Exh "AEMS 12". Counsel went on to distinguish the case **Harrold vs. Plenty** {1901} 2 Ch. D. 314 relied upon by counsel for the Plaintiff and submitted that in this case the 1<sup>st</sup> Defendant has denied the existence of any debt owing by it to the Plaintiff.

In addition counsel for the 1<sup>st</sup> Defendant contended that the Debenture failed to secure the approval of the Bank of Sierra Leone as required by the law and regulations of the Bank and he relied on the provisions of S. 10 (1) of the Exchange Control Act Cap 265 of the Laws of Sierra Leone. He contended further that the company Fimpex Ltd with which the 1<sup>st</sup> Defendant entered into the Debenture was at the material time incorporated in New Jersey, USA though the address of its principal office was in London, England and no evidence of Fimpex's residency in England or in any of the scheduled territories listed ~~out~~ in the 1st schedule to the Exchange Control Act at the time of the Agreement. For these reasons counsel submitted that the said Debenture was illegally or fraudulently obtained.

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Counsel for the 2<sup>nd</sup> Defendant with regard to the first question posed submitted that there is nothing on the face of the Debenture or any evidence before the court that the 2<sup>nd</sup> Defendant is a party to the Debenture or it was intended that the said 2<sup>nd</sup> Defendant should receive any benefit from the transaction or that it did in fact receive some benefit from the transaction.

Let me at this stage deal with the submissions relating to the first question raised. Counsel for the 1<sup>st</sup> Defendant has contended that the authority given in the Board's Resolution Exh "AEMS1" is specifically directed to its Managing Director **J. S. MOHAMED** to raise a loan abroad. The said Resolution was made pursuant to Article 97 of the Company's Articles which states as follows:

"A resolution in writing signed by all the Directors for the time being entitled to receive notice of a meeting of the Directors shall be as effective for all purposes as a resolution convened held and constituted".

The issue is whether the Debenture is ultra vires the authorization contained in the Resolution as canvassed by counsel for the 1<sup>st</sup> Defendant. It is clear from the Debenture that it was the Plaintiff's predecessor in title who entered into the loan agreement with the 1<sup>st</sup> Defendant and I am of the view that the said Debenture was regularly obtained and registered as a valid instrument in Sierra Leone.



The question is whether the said transaction was authorised by the 1<sup>st</sup> Defendant. Counsel for the Plaintiff has submitted that its Managing Director acted as its agents in procuring the loan and signing the Debenture. It is my view that the Resolution must be viewed within the context of raising funds abroad which is the acquisition of shares see Articles 3 (17) to (20) of its Articles of Association. In that light I agree with counsel for the Plaintiff that the 1<sup>st</sup> Defendant could not have authorised the then Managing Director to raise a loan abroad to the tune of up to 10 million US \$ to finance the acquisition of shares and then turn around and accuse him of causing the said Debenture to be prepared and executed without the prior approval knowledge and consent of the Board of Directors.

Counsel for the Plaintiff has referred to Articles 95 and 98 of the Articles of Association of the 1<sup>st</sup> Defendant and they are applicable here and confirm that the acts of its Managing Director are bona fide and binding on the 1<sup>st</sup> Defendant.

There is also reference to Article 98 of the said Articles relating to the seal and which provides for the presence of at least one Director and Secretary whenever its seal is required to be affixed to any instrument and more particularly that such Director and the Secretary shall sign every instrument to which the seal shall be affixed. It is my view that there has been compliance with the said Article here.



Further counsel has relied on the provisions of S.56 (a),(b),(c) and (d) of the Companies Act 2009 relating to the presumption of regularity which is applicable here.

- b) *Whether the equitable mortgage by way of deposit of the original share certificates in respect of 80, 000 "B" shares of the 2<sup>nd</sup> Defendant herein of the shares owned by the 1<sup>st</sup> Defendant on or about the 23<sup>rd</sup> May 1986 to secure a loan of the sum of US \$ 9 million registered as No. C. /F/96 1984 in the Register of Charges kept at the office of the Registrar General, Freetown is valid.*

The above is the second question raised in this matter. Counsel for the Plaintiff submitted that an equitable mortgage of shares is a specifically enforceable contract in respect of those shares. In this case the mortgage takes the form of a deposit of shares certificates. Counsel has relied on the case of **Harrold v Plenty** {1901} 2 Ch. 314 and **Swiss Bank Corporation v. Lloyds Bank Ltd.** {1982} A. C. 584. Counsel stated that in the Harrold case the defendant deposited with the Plaintiff a certificate of shares as security for the repayment of a debt and interest without a transfer. He submitted that the mere deposit of the original share certificates demands a convincing explanation which the Defendants have avoided to give. He therefore maintained that it goes without saying that on the 23<sup>rd</sup> May 1986 the 1<sup>st</sup> Defendant created a valid equitable mortgage in respect of 80, 000 "B" shares held at BP (Sierra Leone) now trading as the 2<sup>nd</sup> Defendant in favour of the Fimpex Ltd, the Plaintiff's predecessor in title.

The said equitable mortgage is now registered as a charge.

Counsel for the 1<sup>st</sup> Defendant relied on his submissions made in respect of the first question posed and stressed that the said Debenture dated 23<sup>rd</sup> May 1986 could not have created an equitable mortgage or charge that is referable to "1984" shown in the registration charge number. He maintained that in view of the fact that the 1<sup>st</sup> Defendant alleged irregularity, fraud and illegality in the manner in which the purported loan transaction was conducted, it could not be valid. He relied on the **Swiss Bank Corporation** case (supra) where the House of Lords held that any inference on whether a transaction creates an equitable charge is to be garnered from the intention of the parties which is to be ascertained from the existing or surrounding circumstances of the case.

Now from the evidence it is clear that the Equitable Mortgage was duly registered. Counsel for the 1<sup>st</sup> Defendant has queried the number 1984 appearing on the registration number of the certificate of registration. I agree with counsel for the Plaintiff that this submission should be disregarded as the date of registration on the certificate is clearly 21<sup>st</sup> September 1995. There is no evidence of the significance of the number 1984 in the registration of the said charge. There is evidence of an application being made which was granted for the extension of time within which to register the said equitable mortgage.

See Exh "AEMS8". Counsel for the 1<sup>st</sup> Defendant has sought to allege irregularity, fraud and illegality in the manner in which the transaction relating to the loan was conducted. There has been reference to the writs of summons issued on behalf of the 1<sup>st</sup> Defendant against Fimpex, Fidelity Bank and the Plaintiff in November 1995 and December 1995. Both actions were not proceeded with and attempts were made at an out of court settlement. The question therefore arises that if the said 1<sup>st</sup> Defendant had such strong feelings about the integrity of the transaction why did it not pursue the court action?

- c) *Whether the Deed of Assignment dated 25<sup>th</sup> May 1986 made between Fimpex Ltd and Fidelity Bank N. A. registered as No. 74 in Volume 79 of the Book of Miscellaneous Instruments in the office of the Registrar General is valid.*
- d) *Whether the Deed of Assignment dated 4<sup>th</sup> January 1995 made between fidelity Bank N.A. and the Plaintiff herein registered as No. 143/67073/95 in Volume 55 at page 45 of the Books of Miscellaneous Instrument in the office of the Registrar General is valid.*

Both counsel for the Plaintiff and the 1<sup>st</sup> Defendant rely on their submissions made in respect of the earlier deeds. Counsel for the Plaintiff has relied heavily on the due registration of the said Deeds and as he stated he has sought refuge under the common law presumption that a regularly registered document is presumed valid until it is proven otherwise.



- e) *Whether the Plaintiff is the owner of 80, 000 "B" shares of the 2<sup>nd</sup> Defendant's shares pursuant to the above transactions and*
- f) *Whether the Plaintiff is a shareholder of the 2<sup>nd</sup> Defendant company as the owner and assignee/mortgage of the said 80, 000 "B" Shares.*

Counsel for the Plaintiff has referred the court to the Debenture and stated that the loan of US \$ 9 million was required and was used to buy 80, 000 "B" shares issued to BP and Kenilworth Oil Co. Ltd and that an equitable mortgage has been created by the deposit of the share certificates. Counsel relied on **Halsbury's Laws of England** 4<sup>th</sup> ed (reissue) at para 449 where it states that

"Where a share certificate is deposited without any memorandum, the lender's remedy is an order for transfer and foreclosure. This remedy may be available even though the personal remedy against the mortgage is statute barred".

Counsel also relied on the cases of **Harrold v. Plenty** (supra) and **London and Midland Bank v. Mitchell** {1899} 2 Ch.161 cited in the **Halsbury's Laws of England** (supra). He submitted that when Fimpex Ltd received the said original share certificates No. 7 and 8 in respect of 80, 000 "B" shares issued by BP (SL) now trading as National Petroleum (SL) Ltd it did so as the Plaintiff's agent. He therefore concluded that the Plaintiff is the beneficial owner of 80, 000 shares of



the 2<sup>nd</sup> Defendant shares issued to BP (Africa) Ltd and Kenilworth Oil Co. Ltd, then re-issued and/or transferred to the 1<sup>st</sup> Defendant who mortgaged same to the Plaintiff pursuant to the transactions in 1986.

In response to the above submissions, counsel for the 2<sup>nd</sup> Plaintiff submitted that the said submissions are not tenable and that the cases relied by counsel for the Plaintiff are not applicable in view of the peculiar circumstances of this case. He stated that in the **Harrold v. Plenty** case and **Swiss Bank** case (supra) the issue of preemption rights of the other share holder were not addressed. He referred the court to paragraphs 4-8 inclusive of the Amended Statement of Defence where it is averred that the 2<sup>nd</sup> Defendant is not a party to the Debenture or transactions relied upon herein and relied on the 2<sup>nd</sup> Defendant's Articles of Association. Further that the equitable mortgage cannot have the effect of making the Plaintiff a shareholder of the 2<sup>nd</sup> Defendant Company in contravention of the Company's Articles of Association and suggested that the Plaintiff's relief if any lies in a sale of the shares to realize the mortgage debt created by the equitable mortgage. It was further averred that no request was made by the Plaintiff for the shares of 1<sup>st</sup> Defendant to be transferred to the Plaintiff and even if such a request had been made the Directors of the Company are bound to decline a transfer of the 1<sup>st</sup> Defendant's shares to the Plaintiff which does not comply with Article 33 of the Company's Articles.

Counsel for the 2<sup>nd</sup> Defendant elaborated on these issues raised in the said Statement of Defence and relied on the provisions of s. 126 (1) of the Companies Act 2009 and Article 31 of the Articles of association of the 2<sup>nd</sup> Defendant. He submitted that no instrument of transfer was ever placed before the Directors for registration either by the 1<sup>st</sup> Defendant or the Plaintiff and therefore the 2<sup>nd</sup> Defendant cannot properly register the 1<sup>st</sup> Defendant as the owner of the said shares held in it by the 1<sup>st</sup> Defendant. He submitted that until this is done the Plaintiff cannot legally be a shareholder of the 2<sup>nd</sup> Defendant Company.

Counsel further argued that the contention of the Plaintiff is that as a result of the transaction set out in the Debenture the Plaintiff is the assignee of the Debenture and submitted that the Plaintiff who may well be a mortgagee of the said shares does not automatically become a shareholder of the 2<sup>nd</sup> Defendant company because of the fact of the equitable mortgage created by the Debenture. He relied on **Palmers Company Law** 24<sup>th</sup> ed Vol. 1 paragraph 40-41.

Counsel also contended that the 1<sup>st</sup> Defendant cannot avoid the rights of preemption as contained in Article 33 and 34 of the Articles of Association of the 2<sup>nd</sup> Defendant. He submitted that Leonoil (SL) Ltd was the other shareholder of the 2<sup>nd</sup> Defendant company and he referred to Article 33 (e) (ii) of the said Articles of Association and submitted that the 1<sup>st</sup> Defendant before transferring its 'B' shares is bound to offer the same to Leonoil (SL) Ltd the successor in title of the Government of Sierra Leone.

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He stressed that the Plaintiff now has to contend with the pre-emption rights contained in Article 33 and the prohibition placed on the Directors of the 2<sup>nd</sup> Defendant Company by Article 34. Counsel relied on the case of **Hunter vs. Hunter** {1936} A.C. 222 dealing with the rights of a mortgagee of shares in relation to the pre-emption rights of another share holder of the Company.

Counsel also relied on **Halsbury's Laws of England** 3<sup>rd</sup> ed Volume 27 paragraph 365 and submitted that the Plaintiff cannot have a better right to transfer than the 1<sup>st</sup> Defendant has in respect of the shares and that the transaction between the 1<sup>st</sup> Defendant and the Plaintiff cannot oust the conditions in Article 33 and 34. He concluded that for all the above reasons the 1<sup>st</sup> Defendant is legally the owner of the shares and the shareholder of the 2<sup>nd</sup> Defendant Company and not the Plaintiff.

I should mention at this stage that counsel for the 1<sup>st</sup> Defendant relied on the submissions of counsel for the 2<sup>nd</sup> Defendant relating to the above issue.

In response to those submissions counsel for the Plaintiff submitted that the judgment of **Cozens-Hardy, J in Harrold v. Plenty** (supra) is indeed applicable in this case notwithstanding the fact that the court arrived at its decision in an undefended motion for judgment. He submitted that it was held in that case that the deposit of the certificate by way of security for the debts amounts to an equitable mortgage or in other words to an agreement to execute a transfer of the shares by way of mortgage.



With regards the issue of the pre-emptive rights of the other shareholder of the 2<sup>nd</sup> Defendant Company, Leonoil (SL) Ltd, counsel relied on the cases of **Jin Sen Hong {1971} SDN BHD vs. Khinig {1988}** and also the case of **Chan vs. Chan {2005} Part 2 case 3 {FCM}**. In the **Jin Sen Hong** case the **Harrold** case was approved. He submitted that the cases he relied on namely the **London and Midland Bank** case, the **Swiss Bank Corporation** case were tenable in this case contrary to the submissions of counsel for the 2<sup>nd</sup> Defendant.

Having read the submissions of counsel in this matter and being of the view that the transactions pursuant to which the equitable mortgage was created are valid, it seem to me that the question of ownership of the said shares is based on those transactions. It is my view that the ratio in the **Harrold** case is applicable in this case.

However counsel for the 2<sup>nd</sup> Defendant has sought to canvass that the Plaintiff cannot be the owner of the shares held by the 1<sup>st</sup> Defendant as the provisions of the Articles of Association of the 2<sup>nd</sup> Defendant regarding the transfer of shares have not been complied with and further having regard to the rights of pre-emption of the other shareholder the said 2<sup>nd</sup> Defendant Company. He has relied on several cases in support of his contentions. With regard the issue of preemption rights of the other shareholder counsel for the Plaintiff has queried whether the said Leonoil the other shareholder was in existence in 1986.



He has submitted that the said Company was not a shareholder of the 2nd Defendant at the time. I must say that there is no evidence to substantiate the claim of the said Company's rights of preemption.

It seems to me that it is clear that an equitable mortgage has been created here and as counsel for the Plaintiff has maintained the said deposit of share certificates juxtaposed with the terms of the Deed of Debenture made between Fimpex Ltd, the Plaintiff's predecessor in title and the 1<sup>st</sup> Defendant on the same date raises a presumption of an agreement to execute a transfer of the shares by way of mortgage in favour of the Plaintiff's predecessor in title and its assignees. In the **Hawks vs. McArthur** case (supra) it was held that notwithstanding the complete failure to comply with the company's articles in regard to the procedure to be followed before shares could be transferred and the sale of shares took place before the judgment creditor obtained a charging order on the shares, it was held that the purchaser's equitable rights prevailed over those of the judgment creditor.

Counsel for the 2<sup>nd</sup> Defendant has sought to distinguish the **Hawks vs. Arthur** case but the question is whether the Plaintiff can compel the 2<sup>nd</sup> Defendant to register a transfer of the said shares of the 1st Defendant in the 2nd Defendant's company. In **Halsbury's Laws of England** 4<sup>th</sup> ed Vol. 7 para 130 it states as follows:

be it. "Articles restricting the transfer of a share are construed as restricting only a transfer of the legal title, and not as preventing the transfer of a beneficial interest. Accordingly a transfer for full consideration made in defiance of binding restrictive provisions will suffice to pass the equitable as distinct from the legal interest in the shares."

It is my view that the Plaintiff is the beneficial owner of the shares and from the authority of **Harrold v. Plenty, Hawks vs. McArthur, Jin Sen Hong and Chan** cases and **Halsbury's Laws of England** 4<sup>th</sup> ed (supra) the court can order the 2<sup>nd</sup> Defendant to effect the transfer in favour of the Plaintiff. Counsel for the 2<sup>nd</sup> Defendant himself has submitted that until this is done the Plaintiff cannot legally be a shareholder of the 2<sup>nd</sup> Defendant Company. The 1st Defendant therefore remains the legal owner of the shares and the Plaintiff as assignee holds a beneficial interest in the said shares.

(g) *Whether the 2<sup>nd</sup> Defendant can effectively avoid the above transactions on the nebulous grounds that (i) it was never a party thereto notwithstanding that the transactions were entered into for its benefits (ii) its memorandum and articles of association did not permit same.*

Counsel for the Plaintiff submitted that the 2<sup>nd</sup> Defendant cannot effectively avoid the above transactions and he relied on the case of **Re Bahia and San Francisco Rly Co.** {1868} LR 3 Q.B. 584 and the dictum of Lord Cockburn C. J. He submitted that in this case relying on the said dictum it is implicit that firstly

Fimpex Ltd, the Plaintiff's predecessor in title suffered a detriment (by paying US \$ 9 million to the 1<sup>st</sup> Defendant in 1986) in reliance on the liquidity of the 80, 000 "B" shares evidenced on the share certificates issued by the 2<sup>nd</sup> Defendant and which said certificates were deposited with the said Fimpex Ltd. Secondly that Fidelity Bank Ltd in turn suffered a detriment (by paying £5 to the said Fimpex in 1987 for the assignment of the loan in question) in reliance on the liquidity of the said 80, 000 shares and the Plaintiff in turn suffered a detriment (by paying £5 to the Fimpex Ltd in 1987 for the assignment of the loan in question) in reliance on the liquidity of the said shares. He contended that it is a fraud on the part of the 2<sup>nd</sup> Defendant to attempt even faintly to distance itself from those transactions with full knowledge of their existence.

With regard the issue of whether the 2<sup>nd</sup> Defendant can avoid the transaction on the ground that it offends the articles of associations of its company, counsel submitted that it cannot though he conceded that at common law the articles of association confer a discretion on its directors to refuse to register a transfer of shares. He however went on to rely on the case of **Howard Smith Ltd vs. Ampol Petroleum Ltd** ({1974} A. C. 821 where the Privy Council held that to enjoy the above privilege it must be shown that the directors acted in the best interests of the company and that their actions were bona fide. Where a court finds that an alleged refusal is procured mala fide or to cover the director's tracks a court of equity should interfere. Counsel alleged that in this case the director's actions came perilously close to being such.



In response to these submission, counsel for the 2<sup>nd</sup> Defendant was emphatic in submitting that the transaction herein was not made for the benefit of the 2<sup>nd</sup> Defendant. He stated that the evidence before the court is that the 1<sup>st</sup> Defendant took the loan to purchase the properties and things listed in the Debenture. It cannot be gainsayed that there is however evidence that the 1<sup>st</sup> Defendant was to acquire 80, 000 shares of BP (SL) Ltd amongst the items listed in the Debenture.

Counsel for the 2<sup>nd</sup> Defendant has submitted that there is evidence that at the time the Debenture loan was made the 80, 000 shares of the 1<sup>st</sup> Defendant in the 2<sup>nd</sup> Defendant was fully paid up and the Plaintiff has not produced any evidence to show that any part of the money was paid to the 2<sup>nd</sup> Defendant or that the 2<sup>nd</sup> Defendant benefited from the transaction. Counsel referred to the allegations in the pleadings and submitted that the Plaintiff had failed to prove those allegations to enable the court to rule in its favour.

It is quite apparent that there is nothing on the face of the Debenture that the 2<sup>nd</sup> Defendant is a party to the Debenture. However as I have already said there is the mention that one of the intentions of the transaction was for the 1<sup>st</sup> Defendant to acquire 80, 000 Shares in BP (SL) Ltd now National Petroleum (SL) Ltd, the 2<sup>nd</sup> Defendant Company. The 2<sup>nd</sup> Defendant Company cannot now be heard to say that it is ignorant of the said transaction or that it received no benefit from it. There is clear evidence of the equitable mortgage registered in the Register of Charges and the action taken by the Plaintiff's solicitor to bring the transaction to the notice of the 2<sup>nd</sup> Defendant and to take the requisite steps to acknowledge the Plaintiffs Shares.

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I do not believe it is conscionable for the 2<sup>nd</sup> Defendant and it must be against public policy for the 2<sup>nd</sup> Defendant to now avoid the transaction which is evidenced by a legally binding loan agreement.

(h) *Whether the Plaintiff's claim is statute-barred under the Limitation Act, 1961.*

Counsel for the Plaintiff has submitted that the Plaintiff's claim is not statute-barred under the said Limitation Act, 1961. He relies specially on the provisions<sup>file</sup> of s. 3 and s. 26 of the said Limitation Act. Counsel for the Plaintiff has conceded that the action herein is an action upon a specifically and that the provision of s. 3 (3) of the said Act applies which gives the limitation period as twelve years from the date on which the cause of action accrued. Counsel has also conceded that the cause of action accrued in 1995 when the 1<sup>st</sup> Defendant initiated proceedings against the Plaintiff and its predecessors in title challenging the validity of the transactions. However counsel has submitted that on a close scrutiny of the averments contained in paragraph 3 of the 1<sup>st</sup> Defendants Amended Statement of Defence and Counterclaim as well as paragraph 7 of the Plaintiff's amended Reply and Defence to the 1<sup>st</sup> Defendant's Defence and Counterclaim would reveal that the action is based on the fraud of the 1<sup>st</sup> Defendant or its agents. He also referred the court to Exh. "AEMS12" the particulars of claim in the writ of summons issued by the 1<sup>st</sup> Defendant against the Plaintiff and others and paragraph 19 of the affidavit in support herein.

Counsel further referred to the attempts of the 1<sup>st</sup> Defendant to have the matter resolved amicably. He submitted that the action could not be statute barred as the 1<sup>st</sup> Defendant was negotiating an out of court settlement with the Plaintiff while litigations were pending in court in respect of the said matter and referred to the several correspondence between solicitors in support of this contention. See Exh. "AEMS14" to Exh "AEMS18". Now both counsel for the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant have sought to canvass that these communications were made *without prejudice* and since they were made with a view to settlement of a dispute they are covered by privilege and not receivable in evidence. Counsel for 2<sup>nd</sup> Defendant relied on several authorities including **Halsbury's Laws of England** Vol. 15 paragraphs 727 to 729 and the case of **Waiker vs. Wisner** (1889) 23 Q. B. D. 335. He submitted that Exh "AEMS14" -AEMS18 were written with a view to settlement of the matter which is the same as is before the court and were therefore inadmissible.

Counsel for the Plaintiff in response to the above submission submitted that although *without prejudice* communications are as general rule inadmissible as privileged communications, however, the question of their admissibility is one for the court and he cited the case of **Re Daintrey, Ex parte Holt** {1891-94} All E. R. 209 and **Unilever v. Procter & Gamble** {2001} All E. R. 783.

In **Halsbury's Laws of England** Vol 15 para 528 cited by counsel for the 2<sup>nd</sup> Defendant it states the rule is strictly confined to cases where there is a dispute or negotiation and suggestions are made for the settlement thereof. I have looked at the correspondence Exh "AEMS 14-AEMS15 and they clearly refer to



The various attempts made at settlement but no terms or suggestions as to the actual settlement of the matter seem to be contained therein. They merely disclose that steps are being taken to negotiate. In **Halsbury's Laws** Vol. 15 at paragraph 729 "when communications with <sup>out</sup> prejudice are admissible" it states

"The court may look at a document written without prejudice for the purpose of deciding the question of its admissibility. The fact that such letters have been written (but not their contents) may be considered where a question of laches is raised, or in order to show that negotiations have taken place."

Also in the *Re Daintrey* (supra) per Vaughan Williams at page 211

"--- the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to me that the judge must necessarily be entitled to look at the document in order to determine whether the conditions under which alone the rule applies exist."

I believe the situation here is one where the correspondence is to show that negotiations did take place and further the question of Laches has been raised and so the correspondence is therefore admissible.

The question therefore remains whether the Plaintiff's claim is statute-barred. Both counsel for the Defendants have submitted that the Plaintiff's claim having accrued in 1995 when the 1<sup>st</sup> Defendant instituted action against it became statute-barred in 2007, 12 years after the cause of action accrued. Counsel for the Plaintiff has sought refuge under the provisions of s 26 of the Limitation Act 1961 and has sought to explain the fraud purported to have been perpetrated by the 1<sup>st</sup> Defendant. He has relied on the cases of **Beaman v. A.R.T.S. Ltd** {1949} 1 All E. ~~M~~, 465 and **Bulli Coal Mining Co. V. Osborne and Anor.** {1895} All E. R. Rep. 506.

Counsel for the 1<sup>st</sup> Defendant drew the court's attention to the fact that the allegation of fraud against the 1<sup>st</sup> Defendant does not form part of the Plaintiff's pleadings as required by Order 21 rules 7,8, and 10 of the High Court Rules 2007 and in the absence of fraud being specifically pleaded should be disregarded under the provisions of rule 10 of the said Order 21.

Finally counsel for the Plaintiff submitted that the declarative reliefs prayed for by the Plaintiff are essentially equitable reliefs in aid of an equitable mortgage of personalty. In such a case the Limitation Act does not apply to any claim in respect of an equitable mortgage of personalty as is the case here. He relied on the **London and Midland** case (supra). For all these reasons he urged the court to grant the reliefs sought.

Counsel for the Plaintiff has referred the court to the facts deposed to in paragraphs 13-19 of the affidavit in support herein and submitted that unknown to the Plaintiff, the 1<sup>st</sup> Defendant never intended to honour its obligations under the Debenture and loan agreement notwithstanding the huge amount of money paid to it by the Plaintiff's predecessor-in-title. He went on to explain the fraud supposedly perpetrated by the 1<sup>st</sup> Defendant to warrant calling into use s. 26 of the said Limitation Act 1961. He concluded by submitting that the said 1<sup>st</sup> Defendant's conduct amounted to a breach of confidence in circumstances calculated to keep the Plaintiff in perpetual ignorance of what it did and that amounts to fraudulent concealment under s. 26(b) of the said Act. In **Beaman v. A. R. T. S. Ltd.** {1949} 1 All E. R. 466 the action was brought more than six years after the date of the conversion claimed by the Plaintiffs and the defence was that the cause of action accrued at the date of conversion and accordingly, the action was barred by the Limitation Act 1939. The Plaintiff claimed that the action was "barred upon the fraud" of the defendants or that the right of action was concealed by their fraud within the meaning of s 26 (a) and (b) of the Act, so that the period of limitation did not run until she discovered the fraud. The court held that there was no fraud within the meaning of s. 26 and that the action was barred. The Court of Appeal held that the Plaintiff's right of action was concealed by the fraud of the defendants within the meaning of s. 26 (b) and allowed the appeal.



The question now is, was the Plaintiff's right of action concealed by the fraudulent conduct of the 1<sup>st</sup> Defendant? The conduct of the 1<sup>st</sup> Defendant is set out in paragraphs 13-19 of the affidavit of Agibola Manly Spain herein. He deposed to the writ of summons issued by the 1<sup>st</sup> Defendant challenging the validity of the Debenture and loan agreement and the subsequent assignment made in respect thereof and also of the several correspondence between solicitors of the parties in which the 1<sup>st</sup> Defendant initiated negotiations for out of court settlement of the subject matter of these proceedings. He further deposed that during the said negotiations a representative of the 1<sup>st</sup> Defendant confronted the Plaintiff's representative with an unexecuted agreement whereby the 1<sup>st</sup> Defendant surreptitiously agreed with the Leonoil Company Ltd to sell the same 80,000 shares it held in the 2<sup>nd</sup> Defendant Company to the said Leonoil Co. Ltd. He deposed that he believed these attempts at negotiations were "shambolic and fraudulent time-waiting <sup>manoeuvres</sup> ~~manoeuvres~~".

I must say that those averments have not been controverted though counsel for the Defendants have made effort to challenge the admissibility of the correspondence relating to the negotiations which have been overruled. In **Bulli Coal Mining Co. v. Osborne** (supra) relied on by counsel for the Plaintiff, and was cited and approved in the Beaman case supra, **Lord James of Herford** stated at page 510 as follows:

"It has always been a principle of equity that no length of time is a bar to relief in the case of fraud in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud so long as the party remains in ignorance without any fault of his own. The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity."

Here, I agree that the conduct of the 1<sup>st</sup> Defendant and its agents in initiating negotiations which it had no intention to see through prevented the Plaintiff from pursuing its right of action and such conduct falls within the ambit of s.26(b) of the Limitation Act 1961. The Plaintiff's action is therefore not statute barred.

In sum the court holds that the transactions listed in questions 1(a) to (d) in the Notice of Motion herein are valid.

- 1(e) The Plaintiff is the beneficial owner of 80, 000 shares of the 2<sup>nd</sup> Defendant's shares.
- 1(f) The 2<sup>nd</sup> Defendant is hereby ordered to effect a transfer of the legal title of the 80, 000 "B" shares in the name of the Plaintiff Company.
- 1(g) Until the order is 1(f) is <sup>completed</sup> coupled with the 1<sup>st</sup> Defendant remains the shareholder of the 2<sup>nd</sup> Defendant Company.

2. The Plaintiff is entitled to the recovery of the sum of US\$ 9, 000,000 being the principal sum borrowed by the said 1<sup>st</sup> Defendant.
3. Recovery of interest on the said sum of US\$ 9, 000,000 pursuant to the terms of the Debenture and Loan Agreement.
4. Costs of the action to the Plaintiff to be taxed if not agreed upon.

A. Showers

SIGNED: - A. SHOWERS 20/5/2011  
JUSTICE OF COURT OF APPEAL