

SAINT LUCIA



**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Suit No. 521 of 1993

Between:

**JOHN VELOX (Deceased) represented
by CORNELIA VELOX and LISA ANNE VELOX**

Administratrices

Plaintiffs

and

1. HELENAIR CORPORATION LTD
2. JOAQUIN WILLIE
3. ARTHUR NEPTUNE
4. MARIO REYES

Defendants

Mr. K. Monplaisir Q.C. and Miss C. Hinkson for Plaintiffs
Mr. Mario Michel and Mr. Alvin St. Clair for Defendants

1996. May 6, 7, and 20
October 30

JUDGMENT

d'Auvergne J

On the 19th of August, 1993 the Plaintiffs filed a Writ of Summons indorsed with Statement of Claim asking for the following:

1. (1) A Declaration that the forfeiture of the 10,000 Shares numbering 189177 to 199176 in the Company belonging to the Plaintiffs in accordance with Share Certificate No. 0008 issued by the Company is void or voidable.
- (2) A Declaration that the Deceased and or his Estate is the Sole Owner of 10,000 Shares numbering 189177 to 199176 in the Company in accordance with Share Certificate No. 0008

issued by the Company.

2. That the Court do Order a Financial Account of the Company since the purported forfeiture of the aforesaid shares.
3. Damages against the Defendants jointly and or separately.
4. That the Court Order the payment to the Plaintiffs of any dividends declared.
5. Further or other Relief.
6. The Costs hereof.

The Defendants entered an appearance and a Defence on the 24th day of September, 1993. The gist of the defence is that John Velox was the holder of 10,000 Shares in the First Named Defendant, but denies that the Shares were fully paid up and that the forfeiture of the said Shares were wrongful.

The matter came to trial on the 6th May, 1996. At the trial Cornelia Velox and Pedro Toussaint gave evidence on behalf of the Plaintiffs while only Joaquin Willie gave evidence on behalf of the Defendants.

Cornelia Velox said that she is the wife of deceased John Velox and exhibited their Marriage Certificate and the death Certificate of John Velox. She further exhibited Letters of Administration of the estate of John Velox and identified a copy of a Share Certificate No. 0008 of Helen Air Corporation Limited which certifies "that John Velox is registered as the holder of 10,000 Shares of 1.00 each fully paid and numbered from 189177 to 199176."

She exhibited two (2) letters from Helen Air Corporation Ltd. The first, a letter dated 1st February, 1991 which in essence states that John Velox was the holder of 10,000 unpaid Shares in Helen Air

Corporation Ltd and that she was required to pay the sum of \$10,000.00 to the Secretary of the Board on or before the 1st day of March 1991 failing which the shares would become liable for forfeiture and to this was attached a Resolution of the Board of Directors dated 29th January, 1991.

The second, dated 20th March, 1991, was from Barrister Mario Michel on behalf of the Defendants informing her that "in accordance with Article 37 of the Articles of Association of the Company the Shares held by your late husband in Helen Air Corporation Limited have been forfeited by the Board of Directors for non-payment of the call made on your late husband's Shares."

To this letter was attached a Resolution of the Board of Directors of the said Helen Air which I have reproduced in its entirety.

" COMPANIES

NAME OF COMPANY : HELENAIR CORPORATION LIMITED
NUMBER OF COMPANY : No. 66 of 1987

RESOLUTION OF BOARD OF DIRECTORS

- WHEREAS: (1) The Board of Directors resolved at a meeting of the Board held on the 29th day of January 1991 to call up all amounts due on the shares allotted to members of the Company.
- (2) Notice of the call and request for payment of the amounts due on the shares were served on all members of the company who held unpaid shares by letter dated February 1st, 1991.
- (3) Only one member, to wit: ALVA LYNCH responded to the call on the shares and paid in full all amounts outstanding on his shares.

(4) The period of notice given for payment of the shares has expired.

BE IT RESOLVED: (1) That the shares in the company held by CAMILLE DUFOUR and JOHN VELOX are hereby forfeited.

(2) That the Secretary of the company is hereby directed to serve notice on the persons concerned that the shares held in their respective names have been forfeited.

Dated this 19th day of March 1991.

This resolution was approved by the Board of Directors at a meeting of the said Board held on Tuesday the 19th day of March, 1991.

.....
CHAIRMAN OF THE BOARD

.....
SECRETARY OF THE BOARD "

This witness concluded her evidence in chief by repeating the requests in her prayer.

She was not Cross Examined.

Pedro Toussaint an employee in the Ministry of Civil Aviation told the Court that he is a Shareholder in the first named Defendant and has been so from its inception and had been a member of the Board of Directors from 1987 to 1989 and as such signed documents on behalf of the first named Defendant and tendered as exhibits firstly, a Resolution of Board of Directors dated 30th May 1988 and filed in the Registry on 31st May, 1988 which shows the names and allotment of Shares to the Shareholders. (The names of John Velox, Camille Dufour and Alva Lynch are noted).

The second document is an Annual Return dated 15th September, 1989 and filed in the Registrar's office on the 20th September, 1989 which also records the three names mentioned above.

His last exhibit was a copy of *Helen Air Corporation Limited Financial Statements 31st July, 1989 prepared by Stewart and Associates*. He concluded his evidence in chief by stating that he was aware that the Shares of two members of the company were forfeited.

Under cross Examination this witness admitted that by his first exhibit, Resolution of Board of Directors dated 30th May, 1988 and filed on the 31st May, 1988, Mr. Charles Daher was a Shareholder of the Company, but did not agree that the document Annual Return dated 30th May, 1988 and filed on 31st May, 1988 later exhibited by the second Defendant Joaquin Willie formed part of the same transaction, though he agreed that they carried the same dates and were filed at the same time.

He further admitted that during the period above mentioned, Mr. Nicholas John was the Secretary to the first named Defendant. He told the Court, "I do agree that, that the whole enterprise of Mr. Charles Daher coming into the Company was cancelled. I was a Signatory to the cancellation. After the cancellation of the transaction with Mr. Daher everything went back to normal, meaning Mr. Nicholas John was no longer Secretary to the Company. All documents prepared relative to that transaction were cancelled. I am not saying that after the resolution Share Certificates were issued to persons named in the resolution."

He insisted that the allotment of Shares as shown in his first exhibit was made before Mr. Daher became a shareholder in the Company.

Joaquin Willie, the present Manager of the first named Defendant,

a Pilot by profession, gave the Court a summary of the history of Helen Air Corporation Limited. He said, "after the demise of St. Lucia Airways a number of the pilots employed with St. Lucia Airways Company got together and decided to start a Company. The initial investment was for each Member to put in \$50,000 and as a result they would receive Shares. It was one share per \$1.00; \$50,000.00 for fifty thousand shares. The Company was formed in July 1987. A number of people showed interest, but the initial investors were: Arthur Neptune \$50,000.00.

Joaquin Willie \$39,176.00.

Samuel Mason \$3,001.00

Pedro Toussaint \$1,828.00

Mario Reyes and Michel Dufour each contributed \$50,000.00. These people got Shares in the Company in return and they got shares equivalent to the amount of monies they invested. All the members paid by way of cash except in the case of Mario Reyes and Michel Dufour, they paid by a mixture of cash and money expended on behalf of the Company. There were other people who were issued shares in Helen Air. After the formation of the Company, Michel Dufour who was then the Managing Director had an idea which he discussed with the Board, of issuing Shares to persons with whom he would like to be associated to the Company and these persons were: Mr. John Velox and Mr. Herald Wilson. After the discussion with the Board, Mr. Dufour produced Share Certificates for Mr. John Velox and Mr. Herald Wilson."

This witness told the Court that subsequently the then Managing Director allotted 10,000 each to John Velox, and to Herald Wilson (placed in the name of his brother Alva Lynch) and 50,000 shares in the name of his wife Camille Dufour, but those Shares "were not paid for."

He said that on or about the year 1988 Mr. Dufour discussed with the Board of Directors of including Mr. Charles Daher as a Shareholder of the company who would invest money and transfer the

ownership of an aircraft he owned to the Company and in exchange would be given Shares in the Company. He told the Court that Mr. Daher became a Shareholder and brought into the Company his lawyer, Mr. Nicholas John as the Secretary; that the latter prepared a number of documents viz. Resolution of Board of Directors, an Annual Return and an Agreement between the Company, the first named Defendant and Mr. Charles Daher; that all three of those documents formed one transaction and were all dated 30th May and registered in the Registrar's Office on the 31st May, 1988 at 11.00 a.m. and bearing receipt number 215708.

He said that following that date, Mr. Daher actually controlled the first named Defendant so the other named Defendants fearful that they would loose their investments, sought legal advice and then informed Michel Dufour of their lack of confidence in his handling of the first named Defendant's affairs, that soon after Michel Dufour left the State and took up duties in France. He said, "*I had the responsibility for managing the Company.*" He told the Court that the first matter he dealt with "was the cancellation of the so called agreement with Mr. Daher" (a copy of the cancellation was exhibited).

He further said that the share standing in the first named Company reverted to what it was before Mr. Daher became a Shareholder and a new Board was constituted. Unhappy differences developed between the newly constituted Board of Directors and Michel Dufour resigned, requesting sale for his Shares and that of his wife Camille, whereupon the Board passed a Resolution for the payment of all unpaid Shares and wrote informing Mr. Alva Lynch, Mrs. Camille Dufour and Mrs. Cornelia Velox of the Resolution.

He then spoke of the first letter (exhibited) delivered personally by him to Cornelia Velox, the second letter a month later posted to her which he exhibited but to which she never replied. The Shares were forfeited and she was informed (letter of 20th March, 1991)

Alva Lynch paid for his shares while Camille Dufour and Cornelia Velox did not.

The witness exhibited minutes of an extraordinary General Meeting held on the 29th May, 1992. He asked the Court to note Page 2 line 21 which mentioned 70,000 unpaid Shares the exact amount owned by the three holders mentioned above viz Camille Dufour, Cornelia Velox and Alva Lynch.

Under Cross Examination this witness confirmed what he had said earlier and insisted that the three shareholders viz John Velox, Camille Dufour and Alva Lynch held unpaid shares though he said that when Stewart and Associates compiled the audited statement for year ending 31st July, 1989, the Auditor, Mr. Stewart, assumed that all shares were paid up Shares and that the latter clarified his assumed facts in his statement at the meeting held on 29th May, 1992 (exhibited).

This witness also said and I quote, "*Dividends have been paid twice 1989 and 1990. We paid Mrs. Camille Dufour dividends shortly after the dividends were declared before her Shares were forfeited in 1991.*" *Mr. Velox received dividends but did not collect them.*"

He insisted that there was never an understanding between them that those Shares would be paid up shares.

Submissions of Counsel

Learned Counsel for the Defendants in a well prepared document read out his submissions in defence of claims made.

He said that it was trite law that a Company can issue paid up Shares or unpaid Shares and in order for them to be regarded as paid Shares an amount of money must be paid for them, or expenses incurred on behalf of the Company, the only exception being bonus

Shares which can in certain situations be issued to existing Shareholders in lieu of dividend, but the persons to whom they are issued must be existing Shareholders.

He argued that the document tendered in evidence by Mrs. Velox is not a Share Certificate since it lacks the seal of the Company. Counsel cited **Article 83 of the Commercial Code of St. Lucia and Halsbury's Laws of England Third Edition Vol. 6 Paragraph 517.**

He contended that the alleged Share Certificate cannot create any kind of estoppel since Mrs. Velox would have to prove that John Velox believed the representation contained in the document that his Shares were fully paid up even though he knew he did not pay for them and that he acted on that belief to his detriment, **Halsbury's Laws of England Third Edition Paragraph 518 .**

He further argued that Mrs. Velox is not a bona fide purchaser of the shares for value without notice she is owner of the shares through transmission.

He strenuously argued that the resolution tendered in evidence by Mr. Toussaint was one of three documents prepared and filed by Mr. Charles Daher's lawyer with a view to facilitating the objectives of his client which were all later cancelled and the status quo was restored; John Velox, Alva Lynch and Camille Dufour all holding unpaid Shares.

The Articles of Association of the company were complied with and calls were made to the holders of all unpaid Shares of which only the Shares standing in the name of Alva Lynch were paid for, the other shares became liable to forfeiture for non-payment and were eventually forfeited.

He cited the English case of **The Ooregum Gold Mining Company of India Ltd. House of Lords reported on March 14th (1892) Appeal**

Cases Page 125. which held that a Company had no power to issue Shares as it felt like. In that case the Company being in want of money and the original shares being at a great discount, the Directors in accordance with resolutions duly issued Preference Shares of L1 pound each with 15s, credited as paid, leaving a liability of only 5s per share. The contract was registered and the transaction was bona fide and for the benefit of the Company. An action by an ordinary shareholder to test the validity of the issue was filed. Both the Court of Appeal and the House of Lords held that the issue was not within the power of the Company to issue shares as it felt like.

Learned Counsel concluded his arguments by stating that Mrs. Velox was not entitled to dividends despite evidence given by Mr. Joaquin Willie since Articles 36 of the Articles of Association of the Company (exhibited) reads. *"..... a forfeiture of shares shall include all dividends in respect of the Shares not actually paid before the forfeiture notwithstanding that they shall have been declared."*

Learned Counsel for the Plaintiff commenced his argument by insisting that Counsel must stick to his pleadings and said that Charles Daher's transaction with the first named Defendant was an arrangement outside of the issues in the case.

He contended that there was a contract between the first Defendant and John Velox and therefore obligations arose between them.

He cited **Halsbury's Laws of England 4th Edition Page 199 Paragraph 362 and Article 917, 918 and 923 of the Civil Code of St. Lucia** and the case of **Joseph St. Rose vs Brice Lafitte St. Lucia Civil Appeal No. 1B of 1990** and quoted from **Louisanna Civil Code Articles 1644 - 1900** and in particular **Article 1894** which states that *"an agreement is not the less valid, though the cause be not expressed."*

He argued that from the nature and consideration of the case, consideration should be implied and gave the following reasons:

That there was a resolution by the Board of Directors for issue of shares fully paid-up; the issuing of share by a share Certificate in consequence of that resolution, the filing of the documents in accordance with the Company's Act for the return of the allotment of shares and to the persons named therein and the audited statements which was submitted in evidence.

He said that there was no evidence that the Plaintiff, John Velox had not paid-up for the shares and that payment was not received.

He urged the Court to note and apply **Article 917 A (b) of the Civil Code** which states that "**consideration may be either onerous or gratuitous**". He said that in this case it was gratuitous and that the statement by the witness for the defence should be used as fortifying the argument. "Names on the register of the company looked good."

He also urged the Court to note that the same witness said that "*Camille Dufour sent a letter to the effect that the shares given to John Velox Lynch and herself were free and therefore they did not have to pay.*"

He quoted **Articles 945 and 951 of the Civil Code.**

Learned Counsel's further contended that the Doctrine of Promissory Estoppel or Estoppel by Mutual Assurance applied and quoted the case of **Castaways Hotel Ltd v University of Dominica (School of Medicine and Health Sciences) Ltd 1992 43 WIR Page 180 (e)** which reads as follows:

"When the parties to a transaction proceed on the basis of an underlying assumption (either of facts or law) and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither

of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the Court demands."

He further quoted the case of Jennifer Remy vs Frederick Prospere St Lucia Civil Appeal No. 2 of 1990 in support of that argument.

He argued that the conduct of the parties was based on the premise that the Company would give 10,000 fully paid up shares to the Plaintiff John Velox, therefore the first Defendant is estopped from denying that the shares were fully paid up or that they are liable to forfeiture.

He then mentioned six reasons why the Plaintiffs insist that the shares were fully paid up and that they should succeed in their claims.

1. That the agreement to issue shares was initiated by the Board of Directors through resolutions.
2. That by Article 6 of the Articles of Association of the Company the Directors were empowered to issue shares to who they wished.
3. The resolution and the share Certificate were signed by the Chairman, Mr. Willie and by others who had authority to do so.
4. The returns filed with the Registrar showed the shares as fully paid up shares.
5. The Balance Sheet produced by Stewart and Associates for year ending 31st July, 1989 included the Shares of the Plaintiff John Velox as being fully paid-up and;

6. Finally, dividends were paid to Mrs. Dufour whose shares according to the evidence of the second Defendant were similar to that of the Plaintiff and which were also forfeited.

CONCLUSION:

One of the requirements of a valid Share Certificate is that it must be dated and (in the absence of Statutory Authority for issue under Signature of appropriate officials) be issued under Seal.

Article 83 of the Commercial Code of St. Lucia.

Halsbury's Laws of England 4th Edition Volume 7 paragraph 383.

The share Certificate identified by Mrs. Velox does not carry any Seal and therefore cannot be considered as a valid Share Certificate.

The Plaintiffs' case is that the shares are fully paid up and were therefore not liable to forfeiture.

It is trite law that he who asserts must prove. No evidence has been led to indicate that the shares have been paid for, rather evidence led by the defence indicates the contrary. Calls were made on the shares of John Velox, Camille Dufour and Alva Lynch. Mrs. Velox admits that she received the first letter but denies having received the second. It is also trite law that by the proper posting of that call the person to whom it was posted is deemed to have received it.

Based on the above, I find as a fact that Mrs. Velox was fully aware that the Company considered her husband's Shares as unpaid Shares and despite her knowledge of this did nothing about it, nor has she produced any evidence to show that the shares have been paid for. The evidence of Mr. Toussaint does not support her in that regard. I find that the calls made on Mrs. Velox were not satisfied and therefore the forfeiture of the shares was duly and

properly effected in accordance with the articles of Association of the first Defendant.

Learned Counsel for the Plaintiff^s has argued that the Company should be estopped from disputing that John Velox is the registered owner of 10,000 fully paid-up shares in that Company.

As I see it, Mrs. Velox can only rely on the Share Certificate (which the document identified in Court is not) if she could show that John Velox believed the representation contained in the document that his Shares were fully paid - even though he knew that he did not pay for them and that he acted on that belief to his detriment. This has not been established by the Plaintiffs. Halsbury's Laws of England 4th Edition Paragraph 389.

There is no dispute that Mrs. Velox is not a bona fide purchaser of the Shares for value without notice but that she came by the alleged shares through transmission (devolution by death) and as such cannot rely on estoppel in her own right.

Learned Counsel for the Plaintiffs referred to Article 6 of the Articles of Association which states that "The Directors, may, subject to Article 45 hereof allot, grant options over, or otherwise deal with or dispose of the shares of the Company to such persons and generally on such terms and conditions as the Directors think proper."

The case of ~~OoRegum~~^H Golding Mining Company of India v Roper ^{A.C.} ~~House~~
~~of Lords~~ (1892) at Page 125 clearly shows that the Directors of a Company cannot act with the shares of a Company as they feel like.

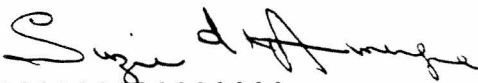
While it is true that under Cross Examination the witness for the defence said that despite the fact that Camille Dufour's shares were forfeited she received dividends for the year 1989 and 1990. It is to be noted that "payment of Dividends on Shares does not

estop the Company from denying the title of the payee to the shares."

Halsbury Laws of England 4th Edition Volume 7 Paragraph 389.

Moreover Article 36 of the "Articles of Association of the First Defendant (exhibited) provides "..... a forfeiture of shares shall include all dividends in respect of the Shares not actually paid before the forfeiture notwithstanding that they shall have been declared."

For reasons stated above this case is dismissed and I order the Plaintiffs to pay to the Defendants costs to be agreed or otherwise taxed.


.....
SUZIE d'AUVERGNE
PUISNE JUDGE