[2012] UKPC 22
Privy Council Appeal No 0011 of 2011

JUDGMENT

Rooplall Beerjeraz, Société Bergio and Société Maido (Appellants) *v* Mrs Moonesh Amrita Dabee (Respondent)

From the Supreme Court of Mauritius

before

Lord Hope
Lord Brown
Lord Mance
Lord Dyson
Lord Sumption

JUDGMENT DELIVERED BY LORD MANCE ON

28 May 2012

Heard on 28 March 2012

Appellant
Mr Bala Padiachy
Aroughen Aran

(Instructed by Rangasamy Chambers)

Respondent
Sanjay Bhuckory S.C
Vimalen Reddi

(Instructed by Raj Law Solicitors)

LORD MANCE

Introduction

1. Who has priority when the owner contracts to sell a piece of real property to two successive buyers? The basic rule is that contracts bind as between the parties but that title depends upon transcription at the Transcription and Mortgages Offices. An exception exists in case of fraud. Both courts below held this exception to apply in this case. The primary issue before the Board is whether they were right to do so. To address this issue it will be necessary to consider the nature and scope of the exception.

The facts

2. The property in issue (Lot 391) consists of 114 toises (about 433 sq metres) in Black River. Its owner at the relevant time was Mr Prem Beerjeraz, now deceased. He contracted to sell firstly to the respondent, Mrs Amrita Dabee, and secondly to his own son, Mr Rooplall Beerjeraz, the first appellant. The first appellant later arranged for the property to be passed as a capital contribution first to Société Bergio, the second appellant, and then to Société Maido, the third appellant.

3. The contract for sale to Mrs Dabee was made on 5th December 1989. The price was 134,00 rupees. 35, 000 rupees were paid at once, and it was agreed that Mrs Dabee would pay the balance in one instalment on 5th December 1993, with interest at the rate of 12% p.a. from 5th December 1989 to 5th December 1993, payable every three months. Transfer of ownership was only to take place on signing of the authentic deed to be drawn up by a notary, Mr Joseph Joson. This no doubt was only to take place after payment of the price in full. It was further provided that in default of payment of the price or interest for eight days after a mise en demeure, the vendor could treat the contract as null, require the purchaser "to quit, leave and forfeit" the premises upon an order of the Judge in Chambers and retain all the money actually paid as indemnity. During this period, she could register the contract, and she did this on 27th July 1992. But she had no title which she could transcribe in the register kept at the Transcription and Mortgages Offices under the Transcription and Mortgage Act. The judge, Peroo J, accepted that Mrs Dabee continued to pay the required interest instalments during this period.

4. The second contract was made on 31st August 1992. On that date, Mr Prem Beerjeraz appeared with the first appellant before the same notary, Mr Joseph Joson, who had been mentioned in the contract for sale to Mrs Dabee. He contracted to sell the property, lot 391, to his son for 19,950 rupees. This was a sum which the contract recorded that Mr Prem Beerjeraz "acknowledges having received and cashed from the purchaser before this presence and in the absence of the notary" and that both parties "declare … represents the real and actual value of the said land". On 10th September 1992 M. Joson had this contract transcribed at the Transcription and Mortgages Office.

5. In ignorance of these events, Mrs Dabee went on 3rd May 1993 to see Mr Prem Beerjeraz with a view to early completion of her purchase by having the authentic deed signed. Mr Prem Beerjeraz was not there, but the first appellant, his son, was. The first appellant said nothing of his purported purchase. Instead, he complained that Mrs Dabee's registration of her contract would give him problems and that it should be cancelled. This she refused. She went at once to Mr Joson asking him to arrange signature of the authentic deed of sale. She caused a mise en demeure to be served on Mr Prem Beerjeraz. It was served on the first appellant on behalf of his father by a Supreme Court usher who explained the nature and effect of the document. It required Mr Prem Beerjeraz to appear before Mr Joson on 18th May. When Mrs Dabee attended on that day, she was told by Mr Joson that Mr Prem Beerjeraz was unwell, and was asked to return on 19th May. On 19th May Mr Joson told her that Mr Peejeeraz was still unwell. On 24th May Mrs Dabee applied through lawyers for an interlocutory injunction restraining any disposition of the property. On the hearing of the application an attorney for Mr Prem Beerjeraz appeared and said that "there is no objection to the present application". An injunction was granted accordingly on 31st May 1993.

6. In March 1994 Mr Prem Beerjeraz was served with a notice to appear before Mr Joson on 5th April 1994 to sign the authentic deed. He failed to appear. Mr Joson drew up a notarial deed recording the non-appearance. On 14th May 1994 Mr Prem Beerjeraz was served with proceedings claiming completion of the sale. His pleaded defence on 7th November 1994 admitted the grant of the injunction on 31st May 1993, but denied awareness of most of the steps taken by Mrs Dabee to try to achieve completion on and after 18th May 1993. It made no mention of any sale to the first appellant. Its only positive allegation was to "strongly den[y]" that Mrs Dabee had been paying interest regularly every three months, without any suggestion that Mr Prem Beerjeraz had terminated the contract or taken any proceedings on that account. In the event, Peroo J held that interest had been paid punctually. It may be (the documents before the Board do not show one way or the other) that interest at 12% p.a. was, understandably, withheld after Mr Prem Beerjeeraz's default on 18th May 1993, but, if so, that is not a matter to which any significance has been attached in subsequent proceedings or attaches now. In 1996 Mr Prem Beerjeraz died.

7. Mrs Dabee and her husband, Dr Dabee, spent four and a half years from 25th May 1993 working in Rodrigues and the proceedings continued slowly. On 13th March 2001, the claim was amended to substitute for Mr Prem Beerjeraz the curator of his estate. The first appellant and Mr Joson were added as further defendants, the contract dated 31st August 1992 and its transcription having by now evidently come to light. It was pleaded that Mr Prem Beerjeraz, his son and Mr Joson had all acted in bad faith, in connivance with each other and with the deliberate aim of defrauding Mrs Dabee, and it was prayed that the contract of 31st August 1992 and its transcription should be cancelled and annulled accordingly. On 25th March 2002 the first appellant filed a defence alleging simply that he had bought in good faith "and is now the lawful owner of the said portion of land and 'a juste titre'".

8. On 3rd September 2003 the case came on for trial before Matadeen J. Only then did the first appellant state through counsel that he had purportedly sold lot 391 to Société Bergio on 28th February 1997. Searches by the respondent's legal representatives revealed that the first appellant had with a Mr Sundanum formed Société Bergio, that he had contributed lot 391 to its capital, and that in October 2001 the two of them with Société Bergio had formed a further company Société Maido, and caused Société Bergio to contribute lot 391 to its capital. The claim was amended on 26th February 1994 to join Société Bergio, Société Maido and Mr Sundanum with the further allegation that all the defendants had been acting in bad faith throughout. The amended claim also included for the first time reference to the meeting between Mrs Dabee and the first appellant on 3rd May 1993. In an amended defence dated 15th July 1994, the first appellant alleged that Mrs Dabee had made this meeting up.

The decisions below

9. The case came on finally for trial on 15th November 2007 before Peroo J, who delivered judgment on 9th May 2008. At the trial, the first appellant through his attorney represented not only himself, but also Société Bergio, Société Maido and Mr Sundanum. During the trial, Peroo J heard evidence from Mrs Dabee and the first appellant. Mrs Dabee gave evidence of her meeting of 3rd May 1993 with the first appellant. She was challenged about this. In re-examination a document, which her husband had prepared and which they had given to her attorney at the time, was produced to confirm the fact that she had informed her attorney in 1993 about the meeting of 3rd May 1993, and not made it up subsequently. The first appellant in response maintained his good faith in the purchase of lot 391. He said that he had bought hundreds of plots from his father, and that, when he made and transcribed his contract to buy lot 391 he knew nothing of any prior contract relating to that lot or of any payments being made by Mrs Dabee. He also said that he had never had any dealings with her or her husband at any time and that he knew nothing of any proceedings or injunction against his father until 2001. He at

first said that he did not remember being served with the mis en demeure served in May 1993, but then asserted that he had passed it to his father without reading it. He admitted that he had been looking after his father's properties, but then qualified that to exclude lot 391, which he asserted had been looked after by his sister. His answer to questions why he did not disclose until 2003 that lot 391 had been contributed as capital to Société Bergio was that this could be found out by inspecting the register, and that he did not see why it was important.

10. Peroo J regarded the first appellant's evidence as evasive, untruthful and as indicative of his utter bad faith in the whole process, and rejected it as untrue. She found that he was aware of the interest which Mrs Dabee was paying in respect of the land and of the proceedings that she brought, and that he, and through him also Société Bergio and Société Maido, acted in bad faith in arranging for lot 391 to be contributed as capital to these companies. She also found that the notary, Mr Joson, failed to act responsibly as a notary, knew that Mr Prem Beerjeraz was not going to sign the authentic deed with Mrs Dabee and yet kept Mrs Dabee in the dark. She relied in this connection on Mr Joson's conduct both in witnessing (and transcribing) the transfer to the first appellant when as notary it was his duty to verify title and Mrs Dabee's contract had been registered, and in drawing up the notarial deed recording Mr Prem Beerjeraz's non-appearance on 5th April 1994. In the result Peroo J annulled the contracts under which the property was sold or contributed as capital to the first, second and third appellants and their transcription, and declared Mrs Dabee to the lawful owner of lot 391. She also awarded damages of 200,000 rupees against the estate of Mr Prem Beerjeraz, against the first, second and third appellants and against Mr Joson.

11. The first, second and third appellants appealed to the Court of Civil Appeal of the Supreme Court on grounds argued under four main headings, viz that Peroo J had been (1) wrong to have accepted Mrs Dabee's version, (2) wrong to have found that the first appellant was not of good faith, (3) wrong not to have allowed the appellants to call Mrs Dabee's attorney as witness (in relation to the question whether Mrs Dabee had met the first appellant on 3rd May 1993 and (4) wrong to have reached the conclusion she did in the absence of any evidence of collusion or connivance between the first appellant and the notary Mr Joson. The matter was heard before K.P. Matadeen SPJ and Angoh J, who on 21st January 2010 dismissed the appeal. They reviewed the judge's findings in the light of the evidence, concluded that she was entitled to make them and rejected the first two grounds. They also rejected the third ground for reasons which the Board need not review, since it has been abandoned before the Board. As to the fourth ground, they held that the evidence regarding the notary's inconsistent conduct gave rise to an "irresistible" inference that there was "connivance or collusion between the first appellant and the notary". In the light of these conclusions, they held that Peroo J was right to make the orders she did. They cited in support passages from Dalloz, Droit Civil Vo Transcription Immobilière referred to in *Mahadeo v Ragoobeer*

(2009) SCJ 29, to which the Board will return later in this judgment. Finally, the court noted and drew to the attention of the Attorney-General that Mr Joson's conduct had been found wanting in another case decided that very day as well as in further cases referred to in it. Discipinary proceedings were in fact pursued against Mr Joson, but he died before their completion.

The appeal to the Board

12. The appeal to the Board is brought as of right pursuant to formal leave given by the Chief Justice of 8th March 2010. Five grounds were advanced, but the appellants' case records the abandonment of the first (the third before the Court of Civil Appeal), and the second was also abandoned at the hearing. That leaves grounds (c) to (e), repeating the first, second and fourth grounds argued before the Court of Civil Appeal. But before the Board submissions were also made on the nature of any fraud which might constitute an exception to the general rule that transcription gives title. The appellants in particular submitted that events subsequent to a second sale and transcription could not be relevant.

13. Like the Court of Civil Appeal, the Board sees no basis on which it could or should interfere with the judge's findings of primary fact. The matter is moreover now the subject of concurrent findings of fact in two courts below. Such criticisms as have been made of these findings are wholly insufficient to justify any interference or further re-examination. The fact that Dr Dabee, Mrs Dabee's husband, was not called, and was said to be even more conversant with the transactions than she was, adds no real weight to their force.

14. Nevertheless, it is necessary to consider the nature and scope of the exception which needed to be satisfied if Mrs Dabee was to displace the prima facie title resulting from the first appellant's first transcription of his purchase. This is the critical question. It was, rightly, not suggested before the Board (any more than it appears to have been in the courts below) that Société Bergio or Société Maido could be in any different or better position than that of the first appellant.

The law

15. Title to immovable property depends upon transcription in the Register kept at the Transcription and Mortgages Office. Section 5(1) of the Transcription and Mortgage Act 1873 provides, with one presently immaterial exception, that:

> "no right to immovable property under a deed or judgment shall be maintained against a third party whose rights are secured by law over the immovable property to which the deed or judgment applies, unless the deed or judgment has been transcribed".

16. Accordingly, where an owner of property contracts to sell it to two successive buyers, it is prima facie the first buyer to complete his purchase and to have this transcribed in the Register who will acquire title. The position in Mauritius equated in this regard with the position established in France by law of 23 May 1855 up to 1955. Articles 1 and 3 of the law of 23 May 1855 required all acts transferring real property to be transcribed in the local office of hypothecs and provided that, until such transcription, rights resulting from such acts could not be maintained against third parties with rights over the property which they had secured in accordance with the law. It contrasts with the position at common law, whereby a contract for the sale of real property passes an equitable interest binding on a subsequent purchaser of the legal title who acquires with notice of the prior equitable interest, although it has much greater affinities with the more modern position established in England as a result of the Land Charges Act 1925 and 1952 and the Land Registration Act 2002.

17. The effect of the French law was considered by the Cour de cassation in a decision of 7 December 1925 (Bulletin des Arrêts de la Cour de cassation rendus en matiére civile, Tome CXXVII, 1925; Dalloz, Jurisprudence Generale 1926, 185). In that case, the Court of Civil Appeal of Poitiers had granted priority to a second buyer who had bought and transcribed his purchase in the knowledge of a prior untranscribed oral sale. In granting cassation of the Court of Civil Appeal's decision, the Cour de cassation stated the general principle that the buyer who transcribes first has priority, recognising only one exception to the ability of a buyer with a contract second in time to leapfrog in this way a buyer whose contract was first in time, but holding that the exception did not apply on the facts before it.

18. The Cour de cassation defined the exception as follows:

> "Qu'il n'est fait exception à cette règle qu'il est établi que la seconde vente a été le résultat d'un concert frauduleux caractérisé par des manoeuvres dolosives ayant pour but de dépouiller le premier acquéreur".

It explained why the exception did not apply to the case before it as follows:

> "…..celui qui achète un immeuble qu'il savait vendu antérieurement à un tiers et qui fait transcrire son titre le premier ne commet aucun fraude en profitant d'un avantage offert par la loi elle-même à l'acquéreur le plus diligent."

A critical commentary by Professor R. Savatier of Poitiers University in 1926 (Dalloz, Jurisprudence Generale, p.185) summarised the position thus established as being that "la simple connaissance" by the second buyer of a prior sale was insufficient to vitiate his title once transcribed.

19. The French law of 23 May 1855 was superseded by decree No. 55-22 of 4 January 1955. Article 28(1)(a) of that law requires publication in the local office of hypothecs of all acts, even those accompanied by a suspensive condition, and all judicial decisions effecting or recording the transfer or creation between living persons of rights over real property, other than privileges and hypothecs which were to be secured in the manner provided in the Code civil. Article 30(1) of the decree of 4 January 1955 further provides:

> "Les actes et décisions judiciaires soumis à publicité par application du 1° de l'article 28 sont, s'ils n'ont pas été publiés, inopposables aux tiers qui, sur le même immeuble, ont acquis, du même auteur, des droits concurrents en vertu d'actes ou de décisions soumis à la même obligation de publicité et publiés, ou ont fait inscrire des privilèges ou des hypothèques. Ils sont également inopposables, s'ils ont été publiés, lorsque les actes, décisions, privilèges ou hypothèques, invoqués par ces tiers, ont été antérieurement publiés.
>
> Ne peuvent toutefois se prévaloir de cette disposition les tiers qui étaient eux-mêmes chargés de faire publier les droits concurrents, ou leurs ayants cause à titre universel. ….."

20. The Board has not heard argument as to what if any differences there may be between transcription of deeds under the law of 1855 and publicity of acts, including those accompanied by a suspensive condition, under the decree of 1955. Counsel for Mrs Dabee have suggested in written submissions that, under French law Mrs Dabee might by reason of the registration of her contract in the office of hypothecs on 27th July 1992 be able to satisfy the requirement of publicity under the decree of 1955. Be that as it may be, and the Board is of course concerned not with French law but with the law of Mauritius, the subsequent French jurisprudence remains of some interest. In circumstances where there has been no publicity in the office of hypothecs, the Cour de cassation has had under the decree

of 1955 to consider similar issues to that addressed by it in its decision of 7 December 1925. The jurisprudence has undergone two considerable changes.

21. First, from the 1960s onward the Cour de cassation appears to have moved to an acceptance of knowledge by the second buyer of the first sale as precluding the second buyer from taking advantage of prior publication: Cass. 3e civ., 22 mars 1968 (RTD civ. 1968, 564) and Cass. 3e, 30 janv, 1974 (Bull. Civ. 1974, III, no 2). In the first case, the Cour de cassation held that:

> "La connaissance par le second acquéreur de la première vente constitue une faute au sens de l'article 1382 du Code civil privant son auteur de la possibilité d'invoquer à son profit les règles de la publicité foncière".

Article 1382 of the Code civil provides:

> "Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celue par la faute duquel il est arrive a la réparer".

In the second case, the Cour de cassation granted cassation of a Court of Civil Appeal decision which had declared that "il n'y a pas lieu, en l'absence de manoeuvres dolosives, de s'arrêter à un simple question de bonne ou de mauvaise foi" and that a second buyer who had bought and transcribed the property in the knowledge of a prior sale had committed no fault. The Court de cassation held that:

> "l'acquisition d'un immeuble en connaissance de sa précédente cession à un tiers est constitutive d'une faute qui ne permet pas au second acquéreur d'invoquer à son profit les règles de la publicité foncière".

These decisions are referred to in notes by Sébastien Pimont of the University of Savoy in Revue des contrats, July 2010, p895, Professor Grimaldi of Paris 13 University in Répertoire du notariat Defrénois, 15 mars 2011 no 5, p.479 and Beatrice Parance in Revue Lamy Droit Civil – 101183, Chronique Droit des biens (Jan-April 2011).

22. Two recent decisions of the third civil chamber have however taken a very different line with regard to "simple connaissance". In the first case, no. 188 of 10 February 2010, the Cour de cassation's decision granting cassation rested on the short point, that the Court of Civil Appeal had erred in holding that a second buyer who had published his title in the office of hypothecs could not resist the title of a

prior buyer whose title had not been published because he had "partfaitement connaissance" of the prior sale. In the second case, no. 10-10.667 of 12 January 2011, the first buyer had actually begun proceedings on 27 February 2003 against the seller for "la réiteration de l'acte authentique prevue au plus tard le 30 septembre 2002", whereupon the seller sold the same property to the second buyers by contract of 13th March 2003 which was then published in the office of hypothecs on 18th March 2003. The Cour de cassation held that it was irrelevant whether the second buyers were, when they contracted to buy, perfectly aware of the prior sale or of the legal proceedings brought by the first buyer. Their title had been first published, and that was all what mattered. Any relevance of article 1382 is by these decisions relegated to the relationship between the seller and first buyer, without bearing on the title which may be acquired by a knowing second buyer.

23. The two recent decisions have aroused different reactions. Addressing the first, Sébastien Pimont notes the apparent break with the previous jurisprudence, suggests an alternative analysis on the facts (for which the Board finds no support in the decision itself), but also observes pertinently that the decision does not sanction for the future any concert frauduleux in the sense mentioned by the Cour de cassation on 7 December 1925. Beatrice Parance greets the solution adopted in the second decision as being "d'une grande clarté", as breaking definitively with the previous position and as welcome juridical orthodoxy in a time of financial crisis which recalls the virtues of a regime where title to real property is secured by publicity. Professor Grimaldi is less exuberant. He too notes that the position could be different in case of fraud, referring to the Cour de cassation decision of 7 December 1925 and the general principle that fraud unravels all. He adds, picking up a point made by Professor Savatier in 1926, that the distinction between bad faith and fraud is tenuous (ténue). He further observes that the first buyer who loses priority through not having published his title can still claim damages (under article 1382) from the *seller* for the seller's bad faith. That is not however relevant on the present appeal.

24. The Mauritian court has had occasion to consider a similar issue under the 1873 Act. In a recent decision, *Mahadeo v Ragoobeer* (2009) SCJ 29, Caunhye J was concerned with competition between a court seizure by memorandum dated 19 May 2001 followed by a purported sale by the debtors (the first and second defendants) to their daughter and son-in-law (the third and fourth defendants) on 30 May and 15 June 2001. The memorandum of seizure was transcribed on 22nd June 2001 and the sale was transcribed on 25 June 2001. Accordingly, the court seizure had on any view priority. But the judge nevertheless also went on to cite discussions in Dalloz, Répertoire Pratique Vo Transcription Hypothécaire (1955) and Encyclopaedia Dalloz Droit Civil Vo Transcription Immobilière. These drew the distinction between situations of "simple connaissance" and the situation of "concert frauduleux" or fraud, to which the Cour de cassation in its decision of 7

December 1925 and Professors Savatier and Grimaldi in their commentaries had drawn attention. Caunhye J found on the facts before him that the sale "had all the characteristics of an '*acte de complaisance'*, dishonestly concocted by the defendants in order to retain the ownership of the property following its seizure thereby defrauding the plaintiff of his rights as a seizing creditor ….". He drew attention to, inter alia, evidence throwing doubt on whether the third and fourth defendants had paid any price or covered the registration fees.

25. The present appeal has been presented on both sides on the basis that the principles stated in the Cour de cassation decision of 7 December 1925 are reflected precisely in the law of Mauritius. Caunhye J in *Mahadeo v Ragoobeer* proceeded on the same basis. In other words, under the law of Mauritius, simple connaissance by the second buyer of the existence of a previous valid (but as yet not transcribed) contract for sale will not prevent the second buyer transcribing the second contract and gaining priority over the prior contract. In view of the way the case has been presented, the Board will proceed on the same basis without further examination. In particular, it will not speculate whether there may be any conceivable qualification of such principles in circumstances where the second contract is made and transcribed in the knowledge that transcription of the first contract has by agreement between the seller and first buyer been postponed and the first buyer is offered no opportunity of earlier completion and transcription. Assuming that known postponement by agreement of the completion and transcription of the sale to the first buyer is not by itself sufficient to prevent the application of the general rule that prior transcription prevails, it must be relevant when considering whether the circumstances as a whole involved "un concert frauduleux"

26. The critical question is what is meant by a "concert frauduleux". The Cour de cassation in its decision of 7 December 1925 explained that it had in mind conduct "caractérisé par des manoeuvres dolosives ayant pour but de dépouiller le premier acquéreur". But it did not illustrate such manoeuvres further. The Board would venture these observations. First, the primary focus must be on the nature and terms of and the circumstances surrounding the making and transcription of the second contract. Once transcription is complete, title is prima facie obtained. However, subsequent conduct may speak eloquently about the nature, terms and circumstances of the prior contract and its transcription. Second, the reference to "manoeuvres dolosives" cannot mean that a concert frauduleux must involve some form of deceitful contact with or communication to the first buyer at the time of the second contract of its transcription. On the contrary, any concert frauduleux is very likely to involve keeping the first buyer in deliberate ignorance of the second contract until after it has been both made and transcribed – as happened here. Third, it is clear that the manoeuvres contemplated by the French caselaw and commentators refer to conduct of the seller and second buyer designed to oust or defeat the first buyer's interest. This still leaves for consideration what sort of

conduct - what sort of contract, terms and circumstances - may be regarded as amounting to a "concert frauduleux caractérisé par des manoeuvres dolosives ayant pour but de dépouiller le premier acquéreur".

27. The commentators have in this connection emphasised the difficult distinction required to be drawn between bad faith and fraud. Professor Savatier in 1926 went so far as to suggest that the line between them disappeared when one started to apply it. Professor Grimaldi called it ténue. Dalloz in Transcription Hypothécaire (1955), para 324, described it as "délicate à tracer", noting that it was all the more so, since it was for each judge of fact to decide whether in all the circumstances there had been a concert frauduleux.

28. In current Mauritian caselaw the only authority drawn to the Board's attention is *Mahadeo v Ragoobeer*. It provides a useful starting point to any discussion of the fine line between simple connaissance and concert frauduleux. In that case, a second contract with close relatives which they were not really expected to perform in accordance with its terms and the sole purpose of which was to defeat a court seizure was not surprisingly regarded as falling within the exception.

29. Dalloz in Transcription Hypothécaire (1955) also sought in para 325 to derive some examples of indicia and circumstances revelatory of fraud from prior decisions of the Cour de cassation rejecting challenges to first instance decisions on the point, recording that:

> "La plupart du temps, les juges du fond retiennent pour caractériser la fraude: la précipitation avec laquelle le second acquéreur a fait transcrire son titre, l'absence d'intérét présenté pour lui par l'acquisition, les sur-offres auxquelles il s'est livré pour decider le vendeur".

30. Dalloz's third suggested indication of a concert frauduleux consists simply in making the seller an offer he cannot refuse, in order to overbid and so to persuade the seller to dishonour his bargain with (or, to use an English term, gazump) a buyer with a prior claim. If this is a relevant indication, it suggests that not very much more than simple connaissance may be required to constitute a manoeuvre dolosive. The second, the absence of any obvious interest in the purchase, suggests that the second buyer is in reality doing no more than assisting the seller to evade his prior commitment, though it may perhaps be focused on the type of case where the supposed second buyer is in reality nothing or little more than a nominee of the first buyer. The first indication is less easy to grasp, since hasty transcription is what one might expect of a second buyer conscious of the

existence of a prior contract, and the law, according to the decision of 7 December 1925, is that there is no fraud in profiting by an advantage offered by the law to the more diligent buyer ("aucun fraude en profitant d'un avantage offert par la loi elle-même à l'acquéreur le plus diligent"). So far as it has significance, it seems to the Board to suggest that relevance may attach to behaviour which is not merely ordinarily diligent, but unusually precipitate and only sensibly attributable to a desire to defeat the prior buyer's claim.

31. Clearly, however, these factors, based on caselaw up to 1955, are at most only some potentially relevant factors or indications. Drawing in particular on the dicta in *Mahadeo v Ragoobeer* and the first and second factors mentioned by Dalloz, the Board considers that, where the second contract is in its nature, terms and/or circumstances (including the way in which it is, whatever its strict terms, really going to be performed) artificial or uncommercial for reasons connected with a common plan by the seller and second buyer to defeat the first contract and it is entered into without giving the first buyer any prior opportunity to transcribe, the conclusion is likely to be that it involved a concert frauduleux. Further, once it is concluded that it was the seller's and second buyer's common aim in making the second contract to defeat the first contract and the first buyer was given no opportunity to transcribe, those facts alone must mean that close scrutiny is required of the nature, terms and circumstances of and the performance really intended under the second contract.

Application to the present case

32. In the present case, the circumstances throughout speak of a concerted plan by father and son from August 1992 onwards to defeat Mrs Dabee's prior contractual claim to the property. Their plan was also characterised by deceptive manoeuvres vis-à-vis Mrs Dabee: the first appellant's attempt on 3rd May 1993 to persuade her to cancel the registration of her contract on grounds related to the problems that its registration might give him, without disclosing that he had already himself contracted to buy the property and had had his title transcribed; Mr Prem Beerjeraz's failure to refer to or disclose the sale to the son in the legal proceedings over the many years between 1993 and 2001; his statement through an attorney in May 1993 that there was no objection to the injunction; his wrongful allegation that Mrs Dabee had not been paying the interest due; the first appellant's subsequent failure to disclose the transfer and transcription of the property to the two companies as contribution to capital; and the first appellant's lying and evasive evidence before Peroo J. There is no doubt about the existence of deceptive manoeuvres by Mr Prem Beerjeraz and the first appellant.

33. Two points are however made by the appellants. The first is that these manoeuvres took place after the contract for sale to and its transcription by the first

appellant. It is argued that all that can be said of the position as at the date of the second contract and its transcription is that there was "simple connaissance" of Mrs Dabee's prior contract on the part of the father and son. But the Board considers that the father and son's conduct, or "manoeuvres" after the second contract and its transcription speak volumes as to its nature throughout. The contract was clearly made and transcribed with the aim of defeating Mrs Dabee's right to the property without her knowing, and its nature, terms and circumstances call for careful scrutiny on that basis alone.

34. Turning directly to the actual nature, terms and circumstances of the contract and its transcription, the Board considers that these also speak powerfully of a concert frauduleux, designed to defeat Mrs Dabee by a transaction which was neither at arm's length nor on ordinary commercial terms, but was created with that purpose in mind. The fact that it was between father and son is not of course itself conclusive, though it is a fact to be borne in mind throughout. But the Board has particularly in mind the price of 19,950 rupees said to have been paid by the son under the second contract in August 1992. Mrs Dabee had already paid in December 1989 35,000 rupees and had contracted to pay a total of 134,000 rupees by December 1993. Yet the contract dated 31st August 1992 recited both parties' declaration that the price of 19,050 rupees represented "the real and actual value of the said land". This cannot have been true. If it were true, Mr Prem Beerjeraz's transfer to his son at a gross under-value seems inexplicable, in the face of the opportunity to make a sale to Mrs Dabee at seven times the market value. Certainly no explanation was forthcoming from the first appellant himself, who simply maintained that he had bought in good faith. If it were assumed (improbably) that the property was only worth 19,950 rupees and that Mr Prem Beerjeraz and the first appellant were so keen to defeat Mrs Dabee's interest that they were prepared to abandon further performance of her lucrative contract, the Board would, in the absence of any sensible explanation for such a transaction, regard this as just as indicative of a concert frauduleux as the second and third factors suggested by Dalloz (1955), para 325, considered in para 30 above. Here, to add insult to Mrs Dabee's injury, Mr Prem Beerjeraz had already received 35,000 rupees as long ago as 1989 and regular interest at 12% p.a., and neither he nor his son took any steps at all to repay any sum or even to disclose to Mrs Dabee the existence of the second contract or its transcription.

35. The overwhelming likelihood would seem to be that the declaration of value made by Mr Prem Beergeeraz and the first appellant in the second contract was inaccurate to the knowledge of both father and son. If both knew that the real value of the property was many times greater than the nominal contractual value of 19,050 rupees, and, if 19,050 rupees was really paid and was all that was paid, then this was either because neither of them saw the second contract as a real parting with title at all or because the father was prepared to make a large gift of value to the son; at all events, the property remained within the family, any transfer

between father and son occurred at an artificially low value, and there may even have been other advantages in having it in the first appellant's, rather than his more elderly father's, name. A further possibility is that the first appellant had on the side actually agreed to and did pay a higher price to his father. But that too would suggest that the second contract was entered into and transcribed not for legitimate reasons, but to defraud the local registration office, and to avoid having to fulfil Mrs Dabee's contract honestly and so having to pay the full registration fees due.

36. The Court of Civil Appeal opened up a yet further possibility by noting that, according to the contents of the document confirming that Mrs Dabee had in 1993 informed her attorney about the meeting of 3rd May 1993, the first appellant had on 3rd May 1993 accompanied his request that she cancel the registration of her contract, with a request that she sign a new bordereau bearing on its face a lower price, and had given the explanation that he would otherwise have to pay additional registration fees to the authorities on all his purchases from his father (all being by inference at least nominally at undervalues). The Court of Civil Appeal appears in this respect to have gone further than admissible, since the document was not - and Mr Buckory representing Mrs Dabee was at all stages very properly careful to point out that it was not - deployed at trial to prove its contents, but merely to displace an attack on Mrs Dabee's credibility.

37. On any analysis, however, there was and is in the Board's view ample basis on which to conclude that the making and transcription of the contract between Mr Prem Beerjeraz and the first appellant amounted to a concert frauduleux within the true meaning and proper scope of the exception recognised by the Cour de cassation and French commentators as well as by Caunhye J in *Mahadeo v Ragoobeer*.

38. The second point made by the appellants is that there was no sufficient evidence of collusion or connivance between the first appellant and the notary, Mr Joson. The first answer to this point is that it does not matter whether or not there was. The exception applies by virtue of the concerted fraud of Mr Prem Beerjeraz designed to oust Mrs Dabee from any interest in the property. It matters not whether or not they succeeded in involving a notary as an accomplice. But, secondly, even if that were not the legal position, the Board would not quarrel with the Court of Civil Appeal's assessment that the extraordinary role played on the face of it by Mr Joson points to a conclusion that he was indeed an accomplice. His estate has not appealed, or appeared on this appeal to argue the contrary.

39. In the result, the Board dismisses the appeal by the first, second and third appellants. Costs must on their face follow the event, unless good cause is shown to the contrary by submissions made within 14 days of handing down.