Privy Council Appeal No 77 of 2007

George Nicholas, Chairman of Mora Oil Ventures Limited *Appellant*

v.

(1) Magistrate Rajendra Rambachan
(2) Krishna Persad *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 12th January 2009

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Present at the hearing:-

Lord Phillips of Worth Matravers
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Mance

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*[Delivered by **Lord Phillips of Worth Matravers**]*

Introduction

The appellant ("Mr Nicholas") is the Chairman of Mora Oil Ventures Limited ("Mora Oil"). In 2002 the second respondent ("Dr Persad") was a director of Mora Oil, which had a licence from the Government of Trinidad and Tobago to exploit the Mora Oil Field. On 20 June 2002 Dr Persad drew two cheques on Mora Oil's accounts at Scotia Bank, Port of

Spain, in favour of a company that he controlled called Krishna Persad & Associates Limited ("KPA"). KPA operated the Mora Oil Field on behalf of Mora Oil. Dr Persad contends that he drew the cheques in order to discharge Mora Oil's indebtedness to KPA. Mr Nicholas contends that Dr Persad drew the cheques without authority and fraudulently. Mr Nicholas reported the matter to the police. After a lengthy investigation they decided to take no action. Mr Nicholas then commenced a private prosecution and Magistrate Rajendra Rambachan, the first respondent ("the Magistrate"), carried out a preliminary enquiry. At the end of this he discharged Dr Persad on the ground that no prima facie case had been made out against him. On Mr Nicholas' application to the High Court for judicial review Narine J ruled that the Magistrate had erred in law and remitted the case to him for further consideration. Dr Persad appealed to the Court of Appeal (Hamel-Smith, Kangaloo and Archie JJA). They allowed his appeal. Mr Nicholas appealed to the Board against their decision with the leave of the Court of Appeal.

The facts

There is no dispute about the primary facts. Mora Oil was formed in 1994 as a private company by Dr Persad and a Mr MacHarris to exploit the Mora Oil Field. In 1994 it entered into an operating agreement with KPA. In 1997 a public company, Mora Ven Holdings Company ("Mora Holdings") was formed, which acquired all the shares in Mora Oil. Dr Persad was the chief executive officer of all three companies and, up to May 2002, was in overall control of the operation of the Mora Oil Field. Under the operating agreement KPA undertook to pay all the expenses of the operation, including royalties and taxes, and Mora Oil undertook to indemnify KPA in respect of such payments.

In 1997 an Acquisition and Shareholders Agreement ("the Shareholders Agreement") was agreed between Mora Holdings, Mora Oil and a third company, Vista Oil, which acquired a 10% holding in Mora Oil. Under clause 9.3 Vista Oil was entitled to appoint one director of Mora Oil and Mora Holdings was entitled to appoint two directors. Clause 11 of the agreement identified a large number of matters in respect of which action could not be taken without the agreement of all the shareholders of Mora Oil. These included "any material change in the undertakings or operations" of Mora Oil and "any material change to the contracts or business arrangements respecting the Project". KPA subsequently acquired Vista Oil's 10% shareholding in Mora Oil and inherited Vista Oil's rights under this agreement.

Thus, at the beginning of May 2002, Mora Holdings owned 90% of the shares in Mora Oil and KPA owned 10%. Dr Persad had been assisted in the operations of Mora Oil by Mr MacHarris, who was a director of

Mora Holdings and a director, appointed by Mora Holdings, of Mora Oil. Up to March 2002 he was also an employee of the latter company. Mr MacHarris was called to give evidence for the prosecution at the preliminary enquiry. He explained how payments were made under the operating agreement. At the beginning of the year a budget for work to be done and expenses likely to be incurred was agreed. Thereafter KPA submitted a monthly account, or 'cash call' for the expenses incurred which Mora Oil then reimbursed.

Mora Oil's cheques required two signatures. Up until the 24 May 2002 three persons had a mandate to sign cheques on behalf of Mora Oil, two of whom were Dr Persad and Mr MacHarris. In March Mr MacHarris went abroad. Before he did so, in accordance with his usual practice, he signed a number of cheques in blank with the intention that these should be used, if necessary, in his absence.

At or about the beginning of May 2002 Mr Nicholas and a Mr Nahous purchased the majority of the shares in Mora Holdings. On 10 May they held a shareholders meeting. They voted to remove Dr Persad and his fellow directors of Mora Holdings and appointed in their place Mr Nicholas, Mr Nahous and a Mr Carr. On 16 May Mr Nicholas was appointed as chairman of Mora Holdings. The directors of that company then exercised their right under the Shareholders' Agreement to remove two directors of Mora Oil, Mr MacHarris and one other. They replaced them with Mr Nicholas and Mr Nahous. Dr Persad, as KPA's nominee, remained a director of Mora Oil.

On 24 May 2002 there was a meeting of the Directors of Mora Oil at which Dr Persad was present. By a majority they appointed Mr Nicholas as their Chairman. They then, by the same majority, resolved to withdraw the mandate of the current signatories of Mora Oil's cheques and to grant instead a mandate to Mr Nicholas and Mr Nahous. They failed, however, to give a notification of the change of mandate to Scotia Bank.

The minutes of the meeting evidence a profound mistrust on the part of the new directors of the way in which Dr Persad and KPA had been managing the affairs of Mora Oil. They record that "the meeting proceeded with the intention of acquiring as much information as possible on current operations and an attempt to attain much needed information to determine the extent to which [Mora Holdings] was subsidising unnecessary and exorbitant expenditures". They further record an allegation by Mr Nicholas that people were being paid by Mora Oil who were not working for that company. A sub-committee of Mr Nicholas and Mr Nahous was formed to "examine all records

pertaining to payments, agreement etc. to determine if there may have been any appearance of or actual improprieties committed in the course of the company's history".

On 27 May Dr Persad wrote, on behalf of Mora Oil to Mr Nahous and Mr Nicholas, referring to the resolution to change the signatories of Mora Oil's bank accounts. He stated that no phone or fax numbers had been given for the new signatories and pointed out that this "could lead to difficulties in the management and operation of the Mora Project by the Operator, particularly with regard to the timely receipt of funds by the Operator to meet expenses relating to the Mora Project and the handling of possible emergency situations". He added that this could lead to the shutting of the field to ensure the safety of the operations and the personnel. A copy of this letter was sent to, among others, the Permanent Secretary, Ministry of Energy and Energy Industries.

On 10 June 2002 the Chief Financial Officer of KPA wrote to Mr Nicholas making a cash call for June in the sum of US$1,061,849, with a break-down of why this was needed. It stated that the cash call had to be paid by 20 June in order to enable KPA to make payments on Mora Oil's behalf in due time. There was no reply to this letter until 25 June when Mr Nicholas wrote asking for further particulars of the payments to which the cash call related and stating that until these were provided it would be impossible for Mora Oil to accede to the "unsubstantiated request for a cash call". By this time, however, Dr Persad had taken matters into his own hands.

Two cheques had been drawn in favour of KPA on Mora Oil's accounts at Scotia Bank. These bore the date of 20 June 2002 and the signatures of Mr MacHarris and Dr Persad. One was in the sum of TT $1,456,000 and the other in the sum of US$ 827,000. Each was credited to KPA's account at the Republic Bank. The latter cheque was specially cleared. The former was converted into US$ 235,890.55.

On 26 June 2003 Mrs Persad, as a director and on behalf of KPA wrote to Mora Oil in reply to the letter sent the previous day by Mr Nicholas. She stated in relation to the June cash call:

> "Because of the urgent need to obtain funds to pay wages, taxes, Royalties Operating Expenses, VAT and loans, the Operator made an appeal to Dr. Persad, Mora's Chief Executive Officer for action regarding the June Cash Call …who exercised his discretion in this matter and satisfied the June Cash Call to ensure production could continue

without interruption, and payments made on time."

In answer to the request for further information Mrs Persad pointed out that a Mr Woodcock was examining, on behalf of Mora Holdings, all the payments made by KPA. She promised, however, that detailed documentation would be sent relating to the expenditure for which the June cash call had been made.

The charges

On 19 May 2003, at the instigation of Mr Nicholas, Dr Persad was charged with the following offences in respect of each cheque:

i) fraudulently taking the sum in respect of which the cheque was drawn from Mora Oil contrary to section 21(1)(b) of the Larceny Act (fraudulent conversion);

ii) uttering a forged cheque, contrary to section 9(1) of the Forgery Act;

iii) forging a cheque, contrary to section 4(2) of the Forgery Act.

Section 21 of the Larceny Act 1919 provides as follows:

"(1) Any person who

…

(b) being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of the body corporate or public company;

…

is liable to imprisonment for seven years."

Section 2 of the Act defines property as follows:

""property" includes any description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has

been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by the conversion or exchange, whether immediately or otherwise;"

The Forgery Act 1925 provides as follows:

"3. (1) For the purposes of this Act, "forgery" is the making of a false document in order that it may be used as genuine, …and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided.

(2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, …is falsely stated therein …

4. (2) Any person who, with intent to defraud, commits forgery of any of the following documents is liable to imprisonment for fourteen years:

(a) any valuable security or assignment thereof or endorsement thereon or, where the valuable security is a bill of exchange, any acceptance thereof;

…

9.(1) Any person who utters any forged document, seal or die is guilty of an offence and liable to the same punishment as if he himself had forged the document, seal or die."

The proceedings below

The preliminary enquiry took place between 26 May and 27 October 2003. At the end of the hearing the duty imposed on the Magistrate by the Indictable Offences (Preliminary Enquiry) Act 1917 was as follows:

"23.(1) When all the witnesses on the part of the prosecutor and of the accused person, if any, have been heard, the Magistrate shall, if, upon the whole of the evidence, he is of

> opinion that no prima facie case of any indictable offence is made out, discharge him; and in such case any recognisance taken in respect of the charge becomes void.
>
> (2) If, upon the whole of the evidence, the Magistrate is of opinion that a prima facie case for any indictable offence (whether an offence with which the accused is charged or otherwise) is made out, he shall grant his warrant for the commitment of the accused person to prison, there to be detained until brought to trial upon any indictment which may be preferred against him, or until discharged in due course of law."

On 16 December 2003 the Magistrate delivered a reserved judgment. On the charges of fraudulent conversion he held that the reduction that the clearance of each cheque had effected in the amounts held to the credit of Mora Oil at Scotia Bank had not constituted the taking of 'property' of Mora Oil within the meaning of section 21(1)(b) of the Larceny Act, so that the offences charged were not made out. This conclusion was largely based on the decisions in *R v Preddy* [1996] AC 815 and *R v Davenport* [1954] 1 WLR 569.

In relation to the charges under the Forgery Act the Magistrate concluded that Dr Persad had acted lawfully having regard to the relevant provisions of the Shareholders Agreement and the operating agreement. Under the former the agreement of all the shareholders of Mora Oil was required if the removal of Dr Persad's authority to sign cheques was to be valid. In signing the cheques Dr Persad had been acting in accordance with the operating agreement. The Magistrate further expressed the view, if their Lordships correctly understand his reasoning, that in adding his signatures and dating cheques that Mr MacHarris had already signed in blank Dr Persad did not produce forged cheques. Finally, he commented that there was no evidence that Dr Persad had uttered the cheques.

Section 23(5) of the 1917 Act provides:

> "In every case in which a Magistrate discharges an accused person on a preliminary enquiry, he shall, if required to do so by the Director of Public Prosecutions, transmit forthwith to him the record of the proceedings, and if the Director of Public Prosecutions, on perusing and considering the evidence, is of opinion that the accused ought not to have been discharged, he may apply to a Judge

> of the High Court for a warrant for the arrest and committal for trial of the accused person."

On 18 December 2003 the Director was requested by Mr Nicholas to exercise his powers pursuant to this provision. The Director wrote to him on 3 March 2004 refusing this request. He said that he had read the evidence and concurred in the ruling of the Magistrate.

Narine J's judgment on Mr Nicholas' application for judicial review was delivered on 20 May 2005. He subjected the charges under the Larceny Act to a detailed analysis of the law. He concluded that the Magistrate had misapplied the decisions in *Preddy* and *Davenport*, having particular regard to the definition of 'property' in the Larceny Act, and that it would be open to a jury to convict on the offences as charged. He added, however, that it was open to the Magistrate to commit Dr Persad for any offence disclosed on the evidence and that, on the basis of the decision in *Davenport*, it had been open to the Magistrate to commit Dr Persad for fraudulent conversion of the cheques.

So far as the offences of forgery were concerned, he held that the Magistrate had erred in law in concluding that, under the Shareholders Agreement the agreement of all the shareholders was required to remove Dr Persad's mandate to sign cheques on behalf of Mora Oil. The Magistrate had further erred in concluding that there was no evidence upon which the jury could conclude that Dr Persad had uttered the cheques.

In the Court of Appeal Hamel-Smith JA gave a judgment, with which the other two members of the court agreed. He also carried out a detailed analysis of the authorities, but concluded that there had been no error of law on the part of the Magistrate in relation to the charges under the Larceny Act. The Magistrate had rightly concluded that there had been no taking by Dr Persad of 'property' belonging to Mora Oil. He commented:

> "37. Persad was charged with fraudulently taking <u>money</u> belonging to Mora Oil and converting it to a use other than that of the company. He was not charged with converting the <u>cheques</u>. I think that this is the error into which the judge fell when he relied on what Lord Goddard had said in *Davenport* to arrive at his decision that the magistrate had made an error of law in finding that there could be no taking of *property* for the purposes of the charge under section 21(1)(b)."

Earlier in his judgment Hamel-Smith JA made a point that had not featured in the judgments below:

> "23. On evidence I would be prepared to accept that the prosecution had established that the cheques were drawn on the account of Mora Oil and that Persad had no authority to sign the cheques on behalf of Mora Oil. That however is not sufficient to establish the case. The concern I have, apart from the issue as to whether 'property' was taken, is whether the prosecution has been able to show that the property taken was converted to a use other than that of Mora Oil.
>
> 24. In the very letter from which the inference can be drawn that Persad signed the cheques, an equally credible inference is that the cheques were issued for the purpose of discharging Mora Oil's obligation under the operations agreement. I cannot say with any certainty that the cheques were used for that purpose. It might be inferred but the prosecution had the opportunity to give that evidence and did not. If the cheques were used for a purpose other than that of Mora Oil's, this has not been shown on the evidence so that the prosecution has not established a main ingredient of the charge."

This observation proved to be the foundation of Hamel-Smith JA's conclusion that the Magistrate had reached a correct result in ruling that no prima facie case had been made out in relation to the forgery charges. He did not consider that the question of whether or not Dr Persad's mandate to sign cheques had been validly withdrawn was the critical issue. He advanced and endorsed what he considered to lie at the heart of the Magistrate's reasoning:

> "43. … what the magistrate had in mind was that any intent to defraud was overtaken by the agreement that Persad's intention was to ensure the continuance of the project even if it meant breaching the terms of the resolution and not in any way to defraud the company. This is consistent with the fact that there is no suggestion that the funds were used other than for the benefit of Mora Oil under the operations agreement.

> 44. However, it is difficult to imagine a properly instructed jury, looking at the prosecution evidence as a whole, finding that there was a dishonest intent on the part of Persad. A key ingredient of the offence would have been absent. The evidence in the letter which serves to negative any dishonest intent arises on the prosecution case and there is no onus on Persad to provide any further explanation."

Conclusions

It has not been necessary for the Board to embark on the deep waters traversed by each of the courts below in relation to whether the evidence received by the Magistrate was capable of establishing the *actus reus* of the two charges under the Larceny Act. This is because of the concession realistically made by Mr Knox QC on behalf of Dr Persad that, regardless of the answer to that question, the evidence was capable of establishing the '*actus reus'* of the offence of fraudulently converting the cheques which Dr Persad had signed. Equally, he accepted that it would be open to the jury to find that the evidence established the *actus reus* both of forging the cheques and of uttering them. He did not seek to support the Magistrate's finding that the removal of Dr Persad's mandate to sign cheques had been invalid. Mr Knox rightly focussed on the essential issue in this case and addressed it with his customary command of detail. He submitted that Hamel-Smith JA had been right to hold that there was one vital element of a prima facie case that the prosecution had failed to establish. That was the dishonesty that was an essential ingredient of all the offences charged.

Mr Knox took us, chronologically, through each stage of the story. He drew attention to the concern expressed by Dr Persad that the June cash call should be met by the 20th June in order to ensure that operations could continue, to the fact that there was a delay of 15 days before any reply was sent in respect of that call and to the fact that Mrs Persad had volunteered the information that Dr Persad had met the cash calls and had promised to give particulars of the manner in which the funds transferred to KPA in relation to the June cash calls had been disbursed. He submitted that it was to be inferred from this evidence that the funds drawn by Dr Persad had been used for the purposes of Mora Oil and not dishonestly misappropriated by Dr Persad. Had the funds been misapplied, Mr Nicholas must have been in a position to adduce evidence to that effect at the preliminary enquiry. The fact that he had not done so added weight to the inference that the funds had been properly employed.

For Mr Nicholas, Mr Mitchell QC submitted that a sufficient inference

of dishonesty could be drawn from Dr Persad's conduct in drawing cheques on Mora Oil when he knew that his authority to do this had been withdrawn and paying those cheques to his own company without telling Mr Nicholas what he was doing. Dr Persad was well aware that the propriety of the way that Mora Oil's funds had been spent under his management was under challenge. The special clearance of the dollar cheque showed that he was anxious to complete the transfer to KPA before his actions were discovered.

We consider that the facts put in evidence at the preliminary enquiry are capable of evidencing two very different scenarios. Under the first Dr Persad and KPA had been properly and honestly managing Mora Oil for some eight years. Mr Nicholas and Mr Nahous then bought a controlling interest in Mora Oil's parent, made unjustified allegations that Mora Oil's funds had been used for improper purposes and took action by withdrawing Dr Persad's authority to pay cheques that threatened to paralyse Mora Oil. In desperation Dr Persad took advantage of the fact that Scotia Bank had not been informed of the withdrawal of his mandate to draw the cheques that were essential for the continued operation of Mora Oil. The cheques were properly used to discharge liabilities of Mora Oil.

The alternative scenario is that Dr Persad and KPA had, over the years, been milking the profits of Mora Oil. Mr Nicholas had suspected this, either before or immediately after acquiring, with Mr Nahous, a controlling interest in its parent company. Having done so he took immediate steps to staunch the outflow of Mora's funds by withdrawing Dr Persad's authority to sign cheques. Seeing the writing on the wall Dr Persad dishonestly took advantage of the fact that Scotia Bank had not been informed of the withdrawal of his mandate to transfer one further very substantial sum from Mora Oil into his own company.

These are extreme scenarios, and the truth may lie somewhere between them. We consider, however, that even if the first scenario is correct, it would be open to the jury to find that Dr Persad had the necessary *mens rea* to be guilty of the offences charged. The majority of the directors of Mora Oil, who represented the majority of the company's shareholders, had made it plain by withdrawing Dr Persad's mandate to sign cheques, that they did not wish the company's funds to be used to discharge liabilities alleged to be due to KPA without their express authority. In those circumstances it would be open to a jury to find that by drawing cheques and presenting them for the benefit of KPA Dr Persad had fraudulently converted the cheques. It may be that in those circumstances the jury would find the necessary dishonesty on the part of Dr Persad, but it would be open to them to find that he had not acted honestly and

had been guilty of both fraudulent conversion of the cheques and the forgery offences.

Were the jury to find that the latter scenario represented the true position, it would clearly be open to them to conclude that Dr Persad had fraudulently converted the cheques and been guilty of the forgery offences.

Mr Knox referred to civil proceedings that have been brought at Mr Nicholas' instigation against Dr Persad. These have to date occupied well over 100 hearing days. He submitted that a criminal prosecution would merely duplicate the trial of issues that were in the course of resolution in those proceedings and that Mr Nicholas was activated by malice in bringing a private prosecution. In these circumstances he urged the Board, as a matter of discretion, to decline to grant Mr Nicholas the remedies that he was seeking by judicial review. His correct course, Mr Knox submitted, would have been to seek judicial review of the decision taken by the Director of Public Prosecution to support the Magistrate's judgment. The Director was in a position to take over the prosecution and then, if so advised, to discontinue it. If judicial review had been sought against him this would have placed the desirability of the prosecution directly in issue.

If this is a prosecution that, for the reasons suggested by Mr Knox, should not be brought, it may well be open to the Director to bring it to an end in the manner suggested. That is not, however, a matter for us. The issue before us is whether the Magistrate erred in concluding at the end of the preliminary enquiry that there was not a prima facie case that any indictable offence had been committed. For the reasons given we have concluded that the Magistrate did indeed fall into error. Accordingly we allow this appeal, quash the Magistrate's decision and remit this matter to him so that he may deal with it in accordance with this judgment.