SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT NO: 424 OF 1993

BETWEEN:

Michel Dufour
Martin Pedro Toussaint
Samuel Mason
Camille Dufour

Claimants

vs.

Helenair Corporation Limited
Joaquin Willie
Arthur Neptune
Mario Reyes

Defendants

Appearances

Mr. Andie George for the Claimants

Ms. Lorraine Williams for the Defendants

2001: October 5, 9, 15, 22,
2002: June 7; August 2

JUDGMENT

[1] Saunders J: Helenair was started in 1987 by a group of St. Lucian pilots. The airline began operations as a chartered service but progressed in due course to a scheduled one. At one stage it operated as many as seven aircraft. It was described, perhaps accurately, as an engine of tourism growth in the southern part of the Eastern Caribbean. In its early years Helenair earned substantial revenues, grossing well over ECC$1 million on some occasions. The recipient of major national awards, Helenair was once the pride of St. Lucia. Not anymore. The airline has folded and the company that spawned it, Helenair

Corporation Limited ("the defendant company"), is wracked by internal dissension and legal disputes.

[2] The evidence in this case disclosed the spectacular rise and abysmal decline of both the airline and the defendant company. The claimants, Messrs. Michel and Camille Dufour, Samuel Mason and Martin Pedro Toussaint, are all shareholders of the defendant company. Samuel Mason, one of the claimants, filed no witness statement in these proceedings and did not appear at the trial. A letter was submitted from him in which he expressed a desire to withdraw from the proceedings. In his absence I granted him leave to withdraw.

[3] The defendants are the company itself and Messrs. Joaquin Willie, Mario Reyes and Arthur Neptune. The latter three constitute the current board of directors. This suit was filed in 1993 but much has happened since then. If the claimants succeed here against the defendant company and are awarded damages, theirs may well be a pyrrhic victory as the company now sits precariously on the precipice of bankruptcy.

[4] As I listened to the unraveling of the case, I got the sense that both sets of parties desperately needed to avail themselves of the opportunity, before an impartial tribunal, of venting long stored up complaints and grievances. Much of the evidence had little to do with the issues at stake on the pleadings. Hearing it gave the court valuable insights into the motives of the principal players but, in this judgment, I shall not unduly detain myself adjudicating or commenting upon bygone injustices that are unrelated to the essential matters pleaded. Instead I shall serially address the pleaded issues in dispute and in determining them endeavour to describe the context in which each arose.

[5] From the filed Statements of Case (as amended), the issues that arise for determination are the following:

a) Whether Mrs. Camille Dufour is entitled to any relief for the forfeiture and subsequent re-allotment to her of shares in the defendant company;
b) Whether the decision of the defendant directors to allot 100,000 shares each to themselves was valid and lawful;

c) Whether the directors of the defendant company should render an account in relation to an entity named Helenair (Grenada) Limited;
d) What is the true nature of the relationship between the defendant company and yet another corporation named Helenair Caribbean Limited;
e) Whether the court should order the defendants to provide audited accounts of the defendant company; and
f) Whether the claimants are entitled to damages from the defendants for allegedly wrongful conduct.

Much time was spent on the issue of whether Mr. Toussaint was wrongly deprived of the opportunity to benefit from the defendant company's land policy. I will therefore address this issue as well.

[6] *Mrs. Dufour's shares*

In order to understand Mrs. Dufour's claim we have to go back to the formative stages of the airline. Mrs. Dufour's husband was the oldest of the founding members of the defendant company. He was by far the most experienced of them, both as a pilot and as an airline administrator. He is a man of impressive aviation credentials. When the brilliant idea of establishing Helenair was conceived substantial capital was required to acquire the first plane. Commercial banks and other lending agencies did not consider the airline business to be a good risk. Even after the shareholders had subscribed their shares, the company still required a further US$60,000.00 to purchase the first aircraft. Despite exhaustive inquiries, the members could not find this money.

[7] Mr. Dufour decided to make a loan to the defendant company. He raised the funds by mortgaging his family home in Martinique. In return for his taking this risk, in addition to taking a debenture on the company's assets, 50,000 fully paid-up shares were allotted to him. He placed those shares in his wife's name. A share certificate was issued to Mrs. Dufour in October, 1987.

[8] The defendant company faithfully repaid the loan from Mr. Dufour, month after month. However, the defendant directors were never satisfied with Mr. Dufour's calculation that the repayment of a US$60,000.00 loan, at a rate of interest of 13.5% per annum, spread over a period of 36 months, could require monthly repayments of ECC$7,144.00 for three years. Deep suspicion surrounded this issue. Mr. Dufour did not help matters by

repeatedly failing to produce to the defendants, when requested, documentary evidence to substantiate the *bona fides* of the transaction.

[9] The matter rankled with the defendants. For this and other reasons, their relations with Mr. Dufour steadily deteriorated. In January, 1991 Mr. Dufour resigned his position as Chairman of the Board of Directors of the defendant company. A few months later the new Board passed a resolution forfeiting Mrs. Dufour's shares. It is of some significance to note that the directors also purported to forfeit the shares of another shareholder, Mr. John Velox. He too had been awarded shares in the defendant company without having paid a monetary sum for such shares. That latter forfeiture was challenged in the courts and in 1997 the Court of Appeal found the forfeiture to have been invalid. See: *Velox vs. Helenair Corporation, Saint Lucia Civil Appeal No. 10 of 1996.*

[10] Mrs. Dufour's shares were re-issued to her on the 9th March, 2001 when the defendant company was a shadow of its former self. The issue before the court now is whether Mrs. Dufour is entitled to any damages for being deprived of her ownership of these shares for some ten years. She did not herself give any evidence at the trial. Although she was represented throughout by Mr. Martin Pedro Toussaint, who holds a Power of Attorney from her and who himself testified, no positive evidence was given as to how she was affected by the forfeiture of her shares. During the time she was a member she attended no meetings of the defendant company and no dividends were declared during the period of forfeiture. The defendants contend that in these circumstances she is not entitled to any damages.

[11] I do not agree. At the time when these shares were forfeited the defendant company was a very profitable undertaking. A Statement of Income and Retained Earnings for the period ended 31st July, 1991 was put into evidence. It discloses that for the previous 12 months the defendant company had registered a gross profit of $867,169.00. Its revenue for that period was over $1.9million. Retained earnings were $629,898.00. Mrs. Dufour's shares were worth something then. Today they are worth nothing. She has lost all the benefit ownership of those shares would have yielded during the period for which they were

forfeited. She has been deprived of the opportunity to deal with those shares as she wished while the defendant company was still profitable. She may have wished to sell or pledge her shares in 1991 when the going was good. Or she may have wanted to start attending company meetings and making her presence felt. Or she may have been interested in the defendant company's land policy of which more will be said later. I don't think it matters that no positive evidence was given of any of this. On the face of it, without more, she was deprived of the opportunity to entertain any such desires. If the defendant company is not sanctioned by a money judgment against it, then what is to deter directors from similar acts in the future? Should directors be at liberty, without penalty, to forfeit paid-up shares when a company is very profitable only to return those shares a decade later when the company is on the verge of bankruptcy? I think not. In my judgment Mrs. Dufour should be compensated for the loss of opportunity and benefit suffered by her. I will award her damages.

[12] On the matter of the quantum of damages, the only authority presented to me was *Lyric Theatres Ltd. vs. Boucher (1983) 32 W.I.R. 216.* That was also a case of forfeiture of shares but in that case the wrongly forfeited shares were never returned. They were sold by the company. The court treated the forfeiture as a conversion of the shares and the aggrieved party was awarded their value at the time they were sold with interest on the sum so found down to the date of the judgment. Here, the shares were returned some ten years after their forfeiture. Significantly, they were not re-allotted after the Court of Appeal judgment in the Velox matter. Mr. Neptune in his testimony acknowledged that, "Camille Dufour's forfeiture was based on the same principles as Velox's." Similarly, Mr. Reyes stated, "…..Velox's shares and Camille Dufour's shares were forfeited on the same basis". The directors therefore ought to have been aware, from the reasoning in the Velox judgment, that the Dufour forfeiture was likely also to be ruled invalid. The re-allotment of Mrs. Dufour's shares was not accompanied by any offer of apology. It was done almost surreptitiously. The only reasonable inference I can draw is that the shares were returned to Mrs. Dufour not because the defendant company appreciated it had done something wrong to her and genuinely wished to make amends but rather because the shares had

become practically worthless. This demonstrated a measure of cynicism on the part of the directors that does not put them in a good light.

[13] *The decision of the defendants to allot 100,000 shares to themselves*

The internal problems experienced by the members of the defendant company ultimately led to the creation of two factions. The defendant directors represented one grouping. The claimants constituted the other. By mid 1993 the differences between the two factions had reached boiling point. This suit was filed in July, 1993. On 25th August of that year, solicitors on behalf of the claimants wrote to the secretary of the defendant company informing him that the claimants would not be attending the Fifth Annual General Meeting scheduled for that very day. The letter stated that they would be treating all decisions and resolutions of the said meeting as invalid.

[14] The defendants went ahead with the AGM nonetheless. The minutes of the meeting were placed in evidence. During the meeting it was noted that the defendant company needed an inflow of funds so as to take advantage of a business opportunity. The Board of directors therefore decided to obtain these funds from the sale of a further 300,000 shares at $1.00 per share. Existing shareholders were to be invited to subscribe for the new shares being offered and to do so within a two-week period in order to ensure that the business opportunity was not lost. Ultimately, the defendants each purchased 100,000 additional shares.

[15] The issue before the court is whether the acquisition of these new shares by the defendants was lawfully made. Counsel for the claimants argued that his clients were never afforded the opportunity to take up any of these shares. Indeed, Mr. Toussaint's evidence is that he was never invited to any meeting specifically to consider the allotment of any further shares. The Notice to members advising of the holding of the Annual General Meeting was put into evidence. It did not state that the meeting was going to address the further allotment of shares. When that Notice was sent out there were apparently certain attachments that went with it but the court was never made aware of

what was contained in those attachments. Mr. Toussaint testified that he became aware of the further allotment to the defendants by checking at the Registry.

[16] Mr. Neptune, the only defendant to allude to this matter, stated

> "…It is possible that after the meeting the absent members were invited to subscribe to the new shares. I can't be sure on that. The information inviting to subscribe may have been contained in the missing attachments to this notice."

[17] Article 6 of the defendant company's Articles of Association authorises the directors to allot shares to such persons as the directors think proper. This article is however subject to Article 45 which states that all shares to be allotted shall be offered to the members in proportion to the existing shares held by them. Article 45 also stipulates that the offer should remain open for a period of time "being not less than 21 days".

[18] On the state of the evidence I prefer Mr. Toussaint's positive evidence to Mr. Neptune's uncertainty. I find therefore that Mr. Toussaint was not given the opportunity to take up any of these shares being offered for sale. The directors acted inappropriately in this matter. Notwithstanding the fact that the claimants had elected to boycott the meeting, the directors were still under an obligation to comply with the company's Articles of Association. Counsel for the claimants submitted that the defendants' conduct was motivated by a desire to entrench their voting majority. The case of *Howard Smith Ltd. vs. Ampol Petroleum (1974) A.C.* was cited as an authority for the view that in such circumstances the share allotment should be invalidated by the court. This submission calls for the court carefully to consider the evidence given on this matter.

[19] Mr. Toussaint in his witness statement alleged that the directors allocated the 100,000 shares each to themselves in order to strengthen their position with the company. He referred to a conversation with Mr. Reyes, some time after the allocation, when Mr. Reyes had told him that "even if the forfeiture of Camille Dufour's shares were held to be null and void by the courts, the Directors have more shares anyway and the rest of the shareholders would not be able to vote them out". Significantly, Mr. Reyes did not respond to these allegations either in his witness statement or in his oral testimony. Mr. Toussaint

also stated in his witness statement that, in a conversation with Mr. Willie, the latter had boasted that the three defendants were "directors for life". This too went unanswered by Mr. Willie.

[20] Mr. Neptune, in his examination in chief, squarely denied the suggestion that the directors were motivated by self interest. He emphasised that the only purpose in allotting the shares was to take advantage of the business opportunity that had presented itself. According to him, "It was not intended to boost our shares in the Helenair Corporation. The intention was only to get on the Directorship of C.A.E." The business opportunity in question concerned an investment in a company called C.A.E.

[21] If the claimants wished to convince the court on this point it was important for Counsel to pursue this line of attack in the cross-examination of the defendants. This was done in relation to Mr. Willie who was cross-examined at some length as to the *bona fides* of the investment opportunity. This is what Mr. Willie said:

> "The CAE Investment was brought up at an Annual General Meeting. They did not come. They were told that there were shares for sale after the Meeting. I am suggesting that there are documents in the registry showing that the Claimants were so informed. I was the Managing Director at the time. There was written communication from CAE about buying shares into CAE which ultimately would have been LIAT. We had oral communication with the people at CAE. The company, Helenair Corporation may have been shown written communication between CAE and Helenair. The CAE thing only came up at one Annual General Meeting. At the Annual General Meeting the investing into CAE was discussed but later during that year the venture collapsed. There was no CAE to buy shares into".

For the sake of completeness I must say that the "documents in the registry showing that the Claimants were so informed" were never produced at the trial.

[22] The cross-examination of Mr. Neptune proceeded along the lines that the impugned shares were never actually paid for and that the other members were not given an opportunity to participate in the new allotment. But it was never specifically put either to him or to Mr. Reyes that the purpose in making the allotment was for the directors to entrench their voting position in the company.

[23] In determining the real motive or purpose of the directors, I have to consider the factual background. At the time of the making of this allotment the factions were at war with each other. The claimants had already filed this suit claiming, inter alia, an annulment of the forfeiture of Camille Dufour's shares. The shareholding in the company was such that the defendants' stranglehold on the company would have been severely threatened if the court pronounced in favour of Mrs. Dufour.

[24] As against all of this, very little evidence was placed before me to substantiate the cogency of the C.A.E. investment opportunity. I therefore feel compelled, on the state of the material before me, to draw the inference that this share allotment was made in order to entrench the position of the directors. This was an improper and unconstitutional exercise by the directors of their powers. See: *Howard Smith.* The allotment is therefore invalidated and the share register of the company is accordingly rectified so as to reflect the invalidity.

[25] *Helenair (Grenada) Limited*

Mr. Willie acknowledged that it was Mr. Dufour who conceived the idea of forming an airline company in Grenada. There were apparently several obvious business advantages to so doing. In January 1991, the defendants incorporated Helenair (Grenada) Limited. The new entity was incorporated with funds of the defendant company and the shares were initially placed in the personal names of the defendants. Just over a year later, on the 25th May, 1992, the defendants transferred their shares to the defendant company. Then in 1994, in their capacity as directors of the defendant company, the defendants transferred the shares in Helenair Grenada to Mr. Reyes and his wife. Ultimately however, no one seriously disputes that Helenair Grenada is a subsidiary of the defendant company and no attempt was made by the defendants to pretend otherwise. Mr. Neptune, for example, described Helenair Grenada in this fashion,

> "There was a lucrative business opportunity in Grenada. The profits made by Helenair Grenada were disclosed. They would be in the 1993 Financial Statements or before that. We decided to cut our losses in Grenada. We shut the base down and I can't say that we shut the company down. It is still in existence. It has not operated since then. Helenair Corporation owns that company".

Mr. Reyes in his evidence stated that, "Helenair Grenada is being kept in safe keeping by myself and my wife". I understood him to mean that he and his wife hold the shares in that company in trust for the defendant company. Finally, documents were tendered in evidence in which the defendant company referred to Helenair (Grenada) Limited as its subsidiary.

[26] In reviewing all the evidence I have to agree with the claimants that the manner in which the directors went about forming and operating Helenair (Grenada) Limited left much to be desired. Between the time of its formation and the time of the transfer of the shares in it to the defendant company, the individual defendants held their shares in the Grenada company in trust for the defendant company. Mr. Reyes testified:

> "I don't know if profits were made between the time of incorporation and the time the shares were transferred to Helenair Corporation. The Financial Statements have it included in a consolidated statement as to what profits if any were made that year".

[27] Mr. Reyes also stated that during the first year Helenair Grenada only had some expenses, that flights were operated out of Grenada by the defendant company and that the expenses and the revenue were for the defendant company. A Consolidated Financial Statement of "Helenair Corporation Limited and its subsidiary Helenair Grenada Limited" dated 31st July, 1993 was produced in evidence but this was in respect of "the year then ended".

[28] In my judgment the individual defendants stood in a fiduciary relationship to the defendant company during that first year. In such circumstances they are under a duty to account. See: *Regal Hastings Ltd. vs. Gulliver and ors. (1942) 1 A.E.R. 378.* In the Privy Council decision of *Cook vs. Deeks (1916) A.C. 554 @ 563,* the court emphasised that:

> "…… men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent."

There is no basis upon which I can find that there was any diversion of funds or business in favour of the directors personally. However I feel obliged to order, as I now do, that the individual defendants must render an account of any sums of money made by themselves as shareholders of Helenair (Grenada) Limited during the period between incorporation of that company and 25th May, 1992. This account should be rendered within four months of the date hereof.

[29] *Helenair Caribbean Limited*

After this case was filed in 1993, the feuding between the factions worsened. On 29th September, 1997 Helenair Caribbean Limited was incorporated by the defendants. The business it was to engage in was the same as that of the defendant company. The address was the same. The directors were the same. The registered office was the same. The memorandum of Incorporation outlined the same objects as those of the defendant company. No attempt was made to apprise the claimants about the formation far less the details surrounding the creation and purpose of Helenair Caribbean Limited. Yet, each of the defendant directors testified that the new company was formed as "a marketing tool" for the defendant company.

[30] I found most intriguing the evidence as to the true role, purpose and ownership of Helenair Caribbean Limited. For this reason I believe I should set out at length the crux of that evidence. Before doing so I should point out that on 13th January, 2000 the court issued an order restraining the defendants "from removing from St. Lucia or in any way disposing of or dealing with or diminishing the value of any of its assets which are in St. Lucia …….. up to the value of $200,000.00". This was naturally a crippling blow to the defendant company and I mention it here because I believe it might help to place in some perspective certain developments with respect to Helenair Caribbean Limited.

[31] Mr. Toussaint said that he had flown as a passenger with Helenair Caribbean and had been issued a ticket by that company. In his view Helenair Caribbean was an airline competing with the defendant company, operating out of the offices of the defendant company and utilising the staff and aircraft of the defendant company. Under cross-

examination he was compelled to moderate this view. He agreed that his ticket was really issued by the defendant company although he maintained that he flew on a plane marked "Helenair Caribbean". He also produced a flyer or jacket in which he states his ticket was enclosed. This flyer advertised "Helenair Caribbean" along with flight schedules that appeared to relate to the defendant company's business.

[32] Mr. Neptune protested that Mr. Toussaint was trying to deceive the court. The jacket was merely a promotional flyer and Helenair Caribbean was a paper company used for monitoring purposes, he said. The route rights and the planes belonged to Helenair Corporation i.e. the defendant company. Mr. Neptune testified:

> "Helenair Corporation flew up to five destinations. That was the number of destinations when we flew the schedule. From inception we had a plan. Helenair Caribbean was formed as a Marketing tool. It was the idea that the number of destinations would be increased. The …[flyer]….reflected what we were doing and what we intended to do. About five destinations are shown that we flew. Our business plan was to fly up to 15. We never flew more than the 5 on schedule. The ticket was issued by Helenair Corporation…….The planes were leased by Helenair Corporation but they had Helenair Caribbean written on them. This was a pure marketing tool".

I pause here to note that when Mr. Neptune referred to "we" I understood him to mean the defendant company.

[33] Mr. Neptune distanced himself from any intimate knowledge as to the current ownership of Helenair Caribbean Limited. He testified:

> "Helenair Caribbean is owned by a company called M & N. You will have to ask the shareholders who own it. I heard your suggestion that M & N means Mario and Nannette. At the time Helenair Caribbean was incorporated it was owned by Helenair Corporation, Reyes, Willie and me. The company was capitalised by M & N. I still have my share. If they were incorporators Helenair Corporation and likewise Willie and Reyes will all still have their shares. The majority shareholder is M & N. I don't know anything about M & N Investments. I don't know about their business with Helenair Caribbean. Helenair Caribbean is not being wound up at this point. I'm not sure if it is earning any money. It is not operating".

[34] Mr. Willie's testimony as to the conception of Helenair Caribbean Limited began in similar vein to Mr. Neptune's. He said

> "The reason for the formation of Helenair Caribbean was to serve as a Marketing tool for Helenair Corporation ...[which].... was moving into a scheduled service in several islands of the Caribbean. We wanted to give the whole service a Caribbean flavour so Helenair Caribbean was used. Prior to the introduction of the scheduled service, Helenair Corporation was viewed as a small charter company so we wanted to change that image. Everything regarding the operation of the scheduled service belonged to Helenair Corporation Ltd. For example, the AOC, the route rights, the aircraft leases, the OECS 145 Maintenance requirements……"

[35] Mr. Willie was more forthcoming in relation to the ownership. He said:

> "Helenair Corporation was a shareholder of Helenair Caribbean. It incorporated it but it was not a shareholder. Helenair Caribbean was capitalised in 2000. M & N Company bought 600,000 shares. That is a holding company. There was a reason for that. There was a Mareva Injunction on Helenair Corporation put in place in 1999. It prevented the Company from attracting investors. The Company's hands were basically tied. But we wanted to continue operations basically because we would not have been looked upon favourably knowing we had this court case pending. So the opportunity came along to capitalise Helenair Caribbean and we accepted it hoping to keep the whole operation going. M & N is Mario and Nannette Reyes. Helenair Corporation had a lot of debts and because of the Mareva we took the opportunity to capitalise Helenair Caribbean. In 1997 up to 2000 [Helenair] Caribbean was a mere marketing tool. Nothing happened with it. In 2000 when it was capitalised by M & N Investment we did not think that the Plaintiff would have been interested in any further business arrangement with us since over the years we had a very difficult relationship to say the least. For example the police were called in on us, we were taken down for questioning for alleged fraud. Inland Revenue conducted three consecutive audits of our company all instigated at the behest of the Plaintiff. Mr. Toussaint and other Plaintiffs at every instance spoke negatively about the company in the print and electronic media. Added to this was the Mareva injunction which not only affected our company assets but also our personal assets. Additionally they refused to come to meetings. They said they were not coming to Annual General Meetings so we really did not see how we could continue a business relationship with them".

[36] In cross-examination Mr. Willie stated:

> "As far as I know Reyes, Neptune and I were the incorporators of Helenair Caribbean. We were not shareholders. [Is shown MPT 31] This states that we were shareholders. This is how Mr. St. Clair did it. He was the Secretary of Helenair Caribbean Ltd. Helenair Caribbean was set up as a marketing tool for Helenair Corporation Ltd. Everything for conducting flight operations was owned by Helenair Corporation. You could view it as a subsidiary. ……

> The planes that were used in the scheduled services had Helenair Caribbean written on them. We had planes with Helenair Corporation written on them. We had all types of planes doing scheduled flights. It is not true that since the inception of Helenair Caribbean all the planes had Helenair Caribbean on them. About four planes had. The marketing expenses of Helenair Caribbean were paid by Helenair Corporation…….
>
> I was aware when 600,000 shares were capitalised. I have seen evidence that monies were received in exchange for those shares. Monies do not have to be physically received. Shares could be purchased by way of expenditure to get things going. There is evidence by the fact that the company operated. I have seen written evidence. That will have to come from the owners of the company. As far as, I know M & N are the present owners. I no longer have a share in the company Helenair.."

[37] Mr. Reyes' evidence was that

> "We formed Helenair Caribbean as a marketing name to be used for the scheduling service. It was incorporated just to secure that name so that we could put Helenair Caribbean on anything we pleased and no one could stop us. When Helenair Corporation received scheduled route rights on certain routes, from a marketing perspective, it was ascertained that our market perceived Helenair to be a small aircraft, a little company, not the image of a scheduled carrier. Helenair Corporation was also perceived as being synonymous with St. Lucia. Our new markets we had projected were Guyana, Tortola, Cuba, Barbados and Trinidad. So, to give the Carrier a new perspective, we branded it Helenair Caribbean.
>
> That company was only capitalised in the year 2000. It had to be capitalised because of the kind of gesture by the Plaintiffs. A Mareva Injunction on Helenair Corporation was placed by them which effectively prevented Helenair Corporation from continuing to grow…….
>
> At this point in time I would need to see the Annual Returns to confirm who are the shareholders or the majority shareholders. M & N Investments hold 600,000 shares therein if the Annual Return says so. I am a shareholder and Director of M & N Investments Ltd. When Helenair Caribbean was capitalised M & N Investments purchased 600,000 shares in Helenair Caribbean. The price per share was $1.00 per share. It was paid in cash. If you will, it was paid by cheque. It was not free shares. I have no evidence of that. It was done in the year 2000. I cannot divulge any information about that at this time. Article 83. I stand by the answer that I cannot divulge any information about that. I cannot produce a copy of the cheque paid to Helenair Caribbean. Helenair Caribbean was not really a subsidiary of Helenair Corporation because it was not then capitalised. [Is shown document] This was the business plan of Helenair

> Caribbean. The placing of the Mareva Injunction prevented Helenair Corporation from growing because of the legal limitations placed on it so we decided to capitalise Helenair Caribbean…….
>
> Helenair Caribbean was originally formed as a marketing tool. The reality was that it was a company and could have been used and capitalised if it was necessary. Helenair Corporation has its own financial difficulties and with pending lawsuits, injunctions etc. the company needed to continue operating. So in order to ensure its survival and the employment of the people involved, Management made the necessary steps to ensure its survival by (1) finding alliance partners – BWIA and others. That was in 2000".

[38] This body of evidence does present a murky and at times contradictory account but, along with the relevant exhibits that were tendered, it constitutes the material on which I must base my findings. On a balance of probability I find that before M & N became involved in Helenair Caribbean Limited, that latter company's shares were owned by the defendant directors as trustees for or agents of the defendant company. Mr. Willie, the most forthcoming of the defendants on this issue, stated in relation to Helenair Caribbean at its formative stage, that "you could view it as a subsidiary" of the defendant company. The evidence suggests to me that the new company was essentially an attempt by the defendants to continue carrying on the business of the defendant company without being encumbered by a) the implications of this law suit and b) their corporate responsibilities to the claimants who were making life very difficult for the defendants. I have no sufficient evidence to establish however that prior to 2000, this attempt was actually realised. I accept that during this period the new company did not operate an airline outside of what was being operated by the defendant company.

[39] I also find that the defendants were not forthright with the court in relation to the sale, transference or other disposition of the 600,000 shares to a company of which Mr. Reyes is a director. Mr. Neptune feigned ignorance as to who constituted M & N Investments and what its relationship with Helenair Caribbean was. Mr. Willie was unusually vague as to the manner in which M & N obtained those shares:

> "I have seen evidence that monies were received in exchange for those shares. Monies do not have to be physically received. Shares could be purchased by way of expenditure to get things going…"

Mr. Reyes was similarly evasive:

> "The price per share was $1.00 per share. It was paid in cash. If you will, it was paid by cheque. It was not free shares. I have no evidence of that. It was done in the year 2000. I cannot divulge any information about that at this time. Article 83. I stand by the answer that I cannot divulge any information about that. I cannot produce a copy of the cheque paid to Helenair Caribbean".

[40] In my judgment, Mr. Reyes' reliance on Article 83 of the Articles of Association of the defendant company is misplaced. This Article permits a director to become a director of another entity promoted by the company and further provides that "no such director shall be accountable to the company for any remuneration or other benefits received by him as a director or officer……unless the company otherwise directs". My view is that a director cannot seek shelter under Article 83 when he/she acts as a trustee or agent of the primary company. In such a case, the director must continue to be fully accountable to the primary company. If, as I have found, Messrs. Reyes, Neptune and Willie held their shares in Helenair Caribbean Limited as agents or trustees of the defendant company then they would, in that capacity, be under an obligation to render an account to the defendant company. As with the case of Helenair (Grenada) Limited, the defendant directors should render an account for any sums of money made by themselves as shareholders of Helenair Caribbean Limited during the period between incorporation of that company and 2000 when M & N Investments purchased the shares in the company. I so order. This account should be rendered within four months of the date hereof.

[41] The claimants have asked the court to declare that Helenair Caribbean Limited is a subsidiary of the defendant company. The defendants resist this claim. It strikes me that neither M & N Investments nor Helenair Caribbean Limited is a party to these proceedings and as such I ought not to consider the making of any such order. Moreover, if indeed M & N Investments paid $600,000.00 for all the shares in Helenair Caribbean Limited then how can it be said to be a subsidiary of the defendant company?

[42] *The duty to provide audited accounts*

The claimants are aggrieved by the fact that the directors have not furnished them with annual audited accounts of the defendant company for the years 1991 to date. They claim

an order from the court directing the defendants so to do. Ironically, when Mr. Dufour was Chairman of the Board the accounts were not audited.

[43] The Articles of Association of the company that impinge on this issue are Articles 111 – 115 (inclusive). I will attempt to paraphrase each of them. Article 111 mandates the directors to keep books of account in accordance with the provisions of "the statutes". The last mentioned term refers to the Commercial Code and every other act for the time being in force affecting the company. Article 112 makes it clear that no ordinary member has a right to inspect the books. The matter is within the discretion of the directors save where the statutes confer any such rights upon members. Article 113 obliges the directors, in accordance with the statutes, to lay before the company in General Meeting such accounts as are required by the Statutes. Article 114 stipulates that certain documents are to be sent to members not less than 21 days before each General Meeting. These include the balance sheet and other documents stipulated by law to be annexed thereto; the report of the directors as to the state of the company's affairs; and the Auditor's report. Article 115 provides that at least once per year the accounting books of the company should be examined and ascertained by properly qualified Auditors.

[44] What do the statutes say about the right of an ordinary member to inspect the books and the requirement to lay certain accounts before each General Meeting? There was some controversy as to which was the applicable statute. The suit was filed in 1993. The claim relates to accounts from 1991 to the present time. A new Companies Act was enacted by Parliament in 1996. The 1996 Act replaced Title IV of the old Commercial Code, Chapter 244 of the Laws of Saint Lucia. In my judgment the relevant statute would be the Commercial Code up to the date of its repeal but, it matters little which of the statutes is applicable.

[45] After perusing both the Commercial Code and the 1996 Companies Act, it is my view that the documents that should be laid before the company at General Meeting are those expressly mentioned in Article 114 of the defendant company's Articles of Association and the claimants had a right of access to those documents. The claimants are accordingly

entitled to audited financial statements for any years for which these have not been provided. I so order

[45] *The Land Policy*

The defendant company purchased some 22 acres of land at Monchy as an investment. Shortly after this the directors published a policy document in relation to these lands. Under the Land Policy members of the company were afforded the opportunity to purchase from the company portions of the land, not exceeding a half acre in area, at a price of cost plus 15%. The expense involved in surveying and dismembering the lot together with utility and infrastructure costs were to be borne by the purchaser. The Board of Directors reserved to itself the right, in its sole discretion, to determine whether any particular area of land would be sold to an interested member. Both Mr. Willie and Mr. Neptune availed themselves of this opportunity to purchase portions of the land.

[46] By letter dated 4th December, 1992, Mr. Toussaint indicated to the company's secretary that he had identified a portion of land that he wished to purchase and that he was ready to proceed with the survey of the said area. His letter ended, "I therefore await a response to my request". The Board never responded to Mr. Toussaint. Certainly not in writing.

[47] Mr. Willie said that the matter was discussed at Board level and that he had orally advised Mr. Toussaint to find a surveyor, identify the piece of land he was interested in and get back to him. Mr. Willie further alleges that Mr. Toussaint promised to do so but never communicated further.

[48] I prefer to accept Mr. Toussaint's version of events that his letter was ignored. In that letter he had stated that he had already identified the portion of land in which he was interested. What he was seeking was formal approval so that he could hire a surveyor and this was denied him thereby frustrating his desire to take advantage of the land policy. The defendants sought to play down the matter by suggesting that the land was still available; that on the Land Policy Document there was nothing to indicate that the Board should have responded in writing; and that Mr. Toussaint never established that he had the funds

to purchase the property. I consider these to be all lame and unacceptable excuses for conduct that was symptomatic of the friction that existed between the two factions. Counsel for Mr. Toussaint submitted that his client should be awarded damages for being deprived of the opportunity to purchase the land. This matter was however never pleaded and even though it was fully ventilated by both sides, it would not be right for me, without an amendment to the pleadings, to award any relief to Mr. Toussaint, if indeed the law afforded him any in these circumstances.

[49] *Conclusion*

I feel I need to make a few general observations. The tenor of this judgment might well give the impression that, in this saga of Helenair, acts of impropriety, spite or ill-will moved in only one direction. I have no wish to renege on my earlier promise to refrain from undue comment upon matters that are merely tangential to the fundamental issues pleaded. But I have to say that any such impression would be a mistaken one. Abundant evidence surfaced of movement in the other direction as well. What is truly tragic is that the factions managed to sacrifice the viability of a vibrant, profitable and well-regarded company in a reckless, inevitably futile effort to get at each other.

[50] I must now address the issue of costs on the various orders I have made. I bear in mind that at the outset of this case I had promised to penalyse Mr. Dufour in costs because of his delay in making a security for costs payment ordered by the court.

a) Taking into account all the circumstances of this case, in my discretion, I make no order as to costs against Mr. Mason on the dismissal of his case. I find that the defendants could not have sustained any additional costs by reason of his inclusion or dismissal as a claimant.
b) Regarding Mrs. Dufour's specific claim on which she has succeeded, I would award her, as against the defendant company, compensatory damages of $25,000.00 and costs in the sum of $7,500.00.
c) In relation to the issues of Helenair (Grenada) Limited and Helenair Caribbean Limited, the individual defendants shall be jointly and severally responsible for the payment of costs to the claimants in the total sum of $10,000.00.

d) Mr. Dufour shall be refunded one half only of the sum that was put up by him as security for costs.

e) I make no further orders for costs or damages.

Adrian Saunders
High Court Judge