[Delivered by Lord Hoffmann]
1. The Gujadhur family is well known in Mauritius, particularly in business and on the turf. The founders of its fortune were three brothers, Ackbar, Radhamohun and Gunness Gujadhur. For twenty years or so [2007] UKPC 54they traded as a family, holding their assets in undivided shares. In 1967 they decided to partition the assets and appointed Mr Harold Glover as arbitrator to allocate a fair share to each of the two surviving brothers and the three sons of Ackbar, who had died in 1956. The mechanism adopted by Mr Glover in his award was to vest the assets in suitable proportions in three existing companies and direct that each should thereafter be a vehicle for exclusive ownership. The three companies were Ackbar Gujadhur Ltd, which held the assets allocated to Ackbar's children; Radhamohun Gujadhur Ltd, which held the assets allocated to Radhamohun (afterwards Sir Radhamohun) and Luxmi & Ganesh Ltd which held the assets allocated to Gunness.
2. Luxmi & Ganesh Ltd ("the company") had been formed in 1961 as a family company. Its shares were therefore registered in the names of Radhamohun, Gunness and the three sons of Ackbar. To give effect to Mr Glover's award, on 16 October 1967 Radhamohun and the three sons of Ackbar signed a "contre-lettre" in the following terms:
"We, Radhamohun Gujadhur, Madun Mohun Gujadhur, Khemraj Gujadhur, Moorli Manohar Gujadhur, hereby declare that although 1 share appears on each of our names in the Share Register Book of the company Luxmi & Ganesh Ltd, those 4 shares in truth and in fact belong to Mr Gunness Gujadhur in terms of our agreement."
3. In 1967 there was an issue of 40 new shares. 37 were allotted to Gunness and one each to three sons of Radhamohun, namely Ghaneshwar, Lajpati and Ramapatee Gujadhur. In 1982 there was a further share issue of 20 shares each to the three younger sons of Sir Radhamohun, namely Rajkumar, Sheokumar and Vijay Kumar Gujadhur, and another 19 shares each to the three elder sons to whom single shares had been allotted in 1967. The result was that each of the sons of Sir Radhamohun became the registered owner of 20 shares. Contemporaneously with the allotment, each signed a contre-lettre in French in identical terms:
"Je soussigné ....déclare et reconnais pour rendre hommage à la vérité que toutes actions détenue par moi dans la compagnie 'Luxmi & Ganesh Ltd' appartiennent en fait à Monsieur Gunness Gujadhur.
En consequence je m'engage et m'oblige sur la première requisition du dit Monsieur Gunness Gujadhur à lui [2007] UKPC 54transférer ou à transférer à toute personne, société ou compagnie qu'il m'indiquera les dites actions."
4. One may ask why, if Gunness Gujadhur wanted his shares held by a nominee rather than in his own name, he did not use the services of a bank, or at any rate one member of his family, rather than carefully distributing them on terms of equality among his brother's children? If the children were, as the contre-lettres make clear, to be mere nominees, what did it matter whether they held them in equal shares or not? The answer appears to be that Gunness Gujadhur and his wife had no children

of their own and that the share allotments looked forward to some possible future gift, testamentary or inter vivos, of the beneficial interests. In 1982, however, the contre-lettres show that Gunness clearly intended to retain the full beneficial interests in all the shares.

5. In 1984 there was a further issue of new shares to the six sons of Sir Radhamohun. By this time two grandsons had attained full age and some shares were allotted to them as well. In 1988, after the death of Sir Radhamohun, there was a transfer to his sons and grandsons of 300 shares which had previously been issued to Gunness himself. Again, however, Gunness made it clear that no beneficial interests were yet being transferred. Each of the sons and grandsons was party to a joint contre-lettre dated 14 September 1988 drafted by Lajpati, one of the elder sons, who was himself a lawyer:

"To Mr and Mrs Gunness Gujadhur...

We, the undersigned sons and grandsons of the late Sir Radhamohun Gujadhur, hereby write to inform and confirm that all the shares of the company Luxmi & Ganesh Ltd registered in our respective names in truth and in fact belong to you both during your lifetimes and you both have absolute proprietary rights over such shares for as long as you live and we undertake to do anything with such shares according to your wishes and instructions."

6. The inclusion of Mrs Gujadhur as a beneficiary of the contre-lettre and the references to "during your lifetimes" and "for as long as you live" indicate the quasi-testamentary nature of the arrangement. Their Lordships express no view on the effect which this document would have had upon the deaths of the survivors of Mr and Mrs Gunness Gujadhur if the shares had then remained vested in the sons and grandsons but there can be no doubt that during their lifetimes Mr and Mrs Gunness Gujadhur [2007] UKPC 54were intended to retain complete beneficial ownership and the right to dispose of the shares as they wished.

7. In 1999 Mr Gunness Gujadhur appears to have been involved in arrangements to partition the assets of Sir Radhamohun and his company among his issue. The details of the proposals, concerning which he wrote to the sons and grandsons, are not material but his letter dated 7 May 1999 ended by saying:

"As far as the company Luxmi & Ganesh Ltd is concerned, I circulate copy of ... [the contre-lettre of 14 September 1988] whereby it is acknowledged that the shares although registered in your respective names belong in truth and in fact to me and my wife. I do not propose to proceed to any distribution of the shares owned by that company."

8. There was no reaction to this part of the letter. But despite the insistence of Mr Gunness Gujadhur on his beneficial ownership of the shares, there is no doubt that he allowed his nephews and great-nephews to receive benefits from the company. For example, the company had interests in land at Poste Lafayette and Curepipe which was leased to the nephews and great-nephews, but subject to a usufruct in favour of Mr Gunness Gujadhur and his wife. The company declared dividends in specie of shares in two other companies (Mauritius Commercial Bank Ltd and New Mauritius Hotels Ltd) which the nephews and great-nephews received and retained. Mr Gunness Gujadhur said that this was for the

purpose of enabling them to build their own houses. Some payments were made to them in cash, described in the books of the company as loans but with no provision for repayment. But by far the bulk of the company's income was drawn by Mr Gunness Gujadhur and his wife for their living expenses and the upkeep of the racing stable which was their main interest in life.

9. In about 2003 there was regrettably a falling-out among the sons of Sir Radhamohun, who divided into two equal factions. This made the management of the company, in which they had up till then participated as directors, very difficult. Until then, any one director and the secretary had authority to sign on the company's bank account. But the quarrel meant that neither faction was willing to trust the members of the other with signing authority. Mr Gunness Gujadhur tried to keep the peace and eventually it was agreed that the company would adopt a new constitution which produced deadlock between the two factions and required the signature of Mr Gunness Gujadhur as well as one nephew from each
[2007] UKPC 54faction on any cheque. The casting vote of the chairman of the board was removed, which meant that after the death of Mr Gunness Gujadhur neither faction would be able to outvote the other.

10. Shortly afterwards, the faction consisting of Ghaneshwar, Lajpati, Rajkumar and the sons of the two first-named, who are the appellants before the Board, quarrelled with Mr Gunness Gujadhur over the management of the racing stable. They formed the view that he was spending too much of the company's money on the stable and started to refuse to sign cheques. Mr Gunness Gujadhur demanded, pursuant to the 1988 contre-lettre, that they transfer their shares into his name. The reaction of the appellants was to assert beneficial ownership in the shares. They did not deny the authenticity of the contre-lettre but said that it was spent (caduque) or that the right to rely upon it was statute-barred.

11. Mr Gunness Gujadhur and his wife, who are the respondents to the appeal, commenced proceedings by a "proecipe" claiming relief under "article 806 of the Code of Civil Procedure and section 73 of the Courts Act". Section 73 is in terms familiar to an English lawyer. It provides that a judge may "grant an injunction, subject to a motion to the court to set aside the injunction..." Article 806 is part of the French heritage of Mauritian law, forming part of a group of articles headed "Des référés". It is based on provisions of the Code Napoléon and can be traced back to the 17 th century if not to an earlier Roman origin:

"806. Dans tous les cas d'urgence...il sera procédé ainsi qu'il va être réglé ci-après.

809. Les ordonnances sur référés ne feront aucun préjudice au principal; elles seront exécutoires par provision, sans caution, si le juge n'a pas ordonné qu'il en serait fourni une."

12. The référé procedure resembles the summary judgment procedure of English law in being summary. But, as Neerunjun CJ explained in Gujadhur v Reunion Ltd [1960] MR 208, the great difference in the two procedures is that an English summary judgment is, subject to appeal, final, whereas an order under article 806 is provisional in the sense that it can be displaced by an order in the principal proceedings. As the English summary judgment is final, the court will not shut out a defence unless there is clearly no issue to be tried. Under article 806, on the other hand, the summary remedy will be granted if an owner of property can show

urgency and a clear title and the respondent cannot show a bona fide and serious defence. It is mainly used by owners of land to obtain a writ of
[2007] UKPC 54possession but the grant of the order and the entry into possession by the applicant does not prevent the defendant from commencing a “principal case” claiming that he has a better title.

13.The relief sought by Mr and Mrs Gunness Gujadhur under article 806 and section 73 was, in summary, —

(a) An interim ex parte order to restrain the defendants from dealing with the shares;

(b) A summons calling upon the defendants to show cause why such ex parte order should not be continued pending determination of the claim for mandatory relief;

(c) An order “in the nature of a mandatory injunction” requiring the defendant to take all necessary steps to transfer the shares.

14. Matadeen J granted the ex parte order and authorized the issue of the summons, which came before Yeung Sik Yuen SPJ for inter partes hearing. He dealt with the application under article 806. Having found that there was urgency (since the applicants were old and their access to funds had been cut off), the contre-lettre showed a clear beneficial title to the shares and the allegations of caducité and limitation did not raise a bona fide and serious defence, he granted the order. His judgment was affirmed by Pillay CJ and P Lam Shang Leen J in the Supreme Court. The appellants now appeal to the Privy Council.

15. Mr Guthrie QC, who appeared for the appellants, submitted that in the absence of a principal action commenced by way of plaint with summons under rule 2 of the Supreme Court Rules 2000 (or an undertaking to issue such proceedings), the judge had no jurisdiction to make an order “in the nature of a mandatory injunction”. Under the English procedure which applies equally to section 73 of the Courts Act, the court cannot grant an interlocutory or final injunction unless there are or will be principal proceedings in existence: see Rajabally v Seegobin [1938] MR 99; Ramessur v Daby [1962] MR 100; Industrial Distributors (1946) v Senior [1975] MR 13. Mr Guthrie said that since the judgment of Glover SPJ in Rameshwarnath Temple Association v Mauritius Sanatan Dharma Temples Federation [1986] MR 100, there had been a view in Mauritius that this rule did not apply to mandatory injunctions. It was said that because they were not expressed to be “until trial or further order” but required an act to be done, there was no point in having a principal action to go to trial. Mr Guthrie said that this doctrine may have influenced the judge but it was mistaken. Even in the case of a mandatory injunction, a principal action was still necessary. The applicant had to give a cross-undertaking in damages and a trial might be needed to determine whether
[2007] UKPC 54it had been wrong to grant the mandatory injunction and whether the applicant should be liable upon his undertaking.

16. Their Lordships are inclined to think that Mr Guthrie is right on this point and that a mandatory injunction should not be granted in interlocutory proceedings unless the applicant has commenced a principal action or undertakes to commence one. It should be remembered that the grant of an interlocutory injunction, whether prohibitory or mandatory, depends on what is sometimes called the balance of convenience but is more accurately an assessment of whether granting or withholding the injunction at that stage is more likely in the end to produce a just result:

see Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670, 680. It does not necessarily require the judge to form the view that the applicant is likely to succeed at the trial and, even after the grant of a mandatory injunction, he may well fail. But this has no application to the référé procedure, which is an entirely freestanding instance and in which no order is made unless the judge considers that there is no serious and bona fide defence. It does not need the support of a principal action although either party is at liberty to commence one.

17. Mr Guthrie submitted that the référé procedure applied only to applications by owners of property (principally land) for writs of possession (habere facias possessionem) and not to applications for mandatory transfers of shares. Their Lordships can find nothing in the language of article 806 or the Mauritian or French jurisprudence to confine the application of the procedure in this way. In the present case, the applicants had (subject to the pleas of caducité and limitation) a clear beneficial title to the shares but were unable to enjoy the benefit of that title because the defendants were on the register, in the same way as an owner of land is unable to enjoy its benefit when someone else is in possession. The référé procedure is a most useful weapon in the armoury of the court for dealing with such a case.

18. The next question is whether the well established requirements for an order under the référé procedure – urgency, clear title and no serious defence – were established. Urgency is a question of fact and Mr Guthrie acknowledged that their Lordships would not be inclined to disturb the concurrent findings of the two lower courts that urgency existed. He likewise accepted that prima facie the contre-lettre established, as of 1988, a clear title. But he submitted that the judge and the Supreme Court had erred in law in not giving effect to the defences of caducité and limitation.

[2007] UKPC 5419. Caducité is a technical expression of French law which refers in general terms to a juridical act which has ceased to have effect by reason of some subsequent event. There appears to be no single English equivalent, but the frustration of a contract, the ademption of a legacy or the revocation of a will would be examples. As these illustrations show, the acts or events which will produce the caducité of the prior juridical act depend upon the nature of that act. In the case of a contre-lettre which acknowledges the existence of a state of affairs different from that evidenced by the public record, such as a beneficial ownership in shares which differs from what is shown on the register, caducité will require evidence that the parties intended that the beneficiary of the contre-lettre should relinquish his beneficial interest in favour of the registered holder. In the section Contrats et Obligations (Fasc. 138) by Professor Michel Storck in Juris-Classeur – 2002 V°, he describes a contre-lettre in his introduction to the discussion of article 1321 of the Code Civile as —

“1. ...un acte juridique secret, non révélé aux tiers, qui a pour objet de déroger en tout ou en partie aux composantes ou aux effets d’un acte juridique apparent, seul porté par les parties à la connaissance des tiers.”

20. In note 32 he discusses the circumstances in which a contre-lettre may become caduque:

“Lorsque, après avoir établi une contre-lettre, les parties conviennent de nouvelles dispositions incompatibles avec la

contre-lettre, celle-ci doit être considérée comme caduque et cesse de produire effet."

21. By way of example, the commentator cites a decision of the Court of Appeal of Paris (5 e ch., sect. C, 2 nov. 1990, Valence c/ Aubry: Juris-Data n o 1990-024221) in which a contre-lettre by which the managing director of a company acknowledged that certain shares registered in her name had been merely deposited with her was held to be caduque when the parties entered into an agreement in terms "totalement incompatibles" with the contre-lettre, acknowledging proprietary rights of the director over the shares.

22.It would appear from this explanation that, as one might expect, a contre-lettre ceases to have effect when the parties agree, either expressly or by necessary implication, that it should cease to have effect. This accords with what Professor Storck describes (in note 29) as "la règle de l'autonomie de la volonté" in the law of contract.

[2007] UKPC 5423.In this case, there is no evidence that Mr Gunness Gujadhur ever expressly agreed to give up his beneficial ownership of the shares in favour of his nephews and great-nephews. There is no allegation of any occasion on which he is alleged to have said anything to that effect. The entire defence is based upon the proposition that the benefits which the appellants (with the consent of Mr Gunness Gujadhur) derived from the company and the new constitution adopted for the company in 2003 were "totalement incompatibles" with the contre-lettre and therefore amounted by necessary implication to an agreement that it should cease to have effect.

24.Their Lordships do not consider it possible to draw such an inference. As the judge said —

"the alleged 'intervening' events are far from being incompatible with the terms of the contre-lettres."

25.For example, the benefits conferred upon the appellants are, as Mr Gunness Gujadhur suggested, equally consistent with generosity on his part. The new constitution was adopted, as under company law it had to be, by the votes of the registered shareholders but this tells one nothing about the beneficial ownership of those shares or whether, if they had not consented, Mr Gunness Gujadhur could have required them to do so. Mr Guthrie objected that, as the question depended upon the intention of the parties, the judge was not entitled to decide the case upon affidavits without cross-examination. But intention does not mean secret intention. It means intention manifested by words or deeds. As there are no words upon which the appellants can rely, they are reduced to reliance upon deeds and if the evidence of deeds, taken at face value, does not support the inference of an intention to donate beneficial ownership in the shares, the appellants have failed to demonstrate that they have a serious defence. The notion that the appellants can claim that they should be allowed to establish their defence by cross-examining Mr Gunness Gujadhur with a view to showing that he had an undisclosed intention to give them the beneficial ownership in his shares only has to be stated to be rejected.

26.That leaves the question of limitation. The appellants submit that the claim of Mr Gunness Gujadhur is an "action personelle" within the meaning of article 2270 of the Mauritian civil code and that time ran from the date on which the contre-lettre was executed in 1988. This, as Mr Guthrie acknowledged, would be a remarkable state of affairs. It would

mean that the beneficiary of a contre-lettre who had no reason to think
[2007] UKPC 54that there was any dispute over his beneficial entitlement had to bring an action to enforce it within 10 years (or obtain a new one) or else lose his property. Their Lordships do not think that the law of Mauritius could possibly be so unreasonable.

27. The appellants say however that this result must follow from the remedy for enforcing a contre-lettre, which, they say, is an action en déclaration de simulation, a personal action in which time runs from the date of the simulation or pretended transaction. Thus in Sewruttun v Mahadewoosing [1982] MR 166 the heirs of the deceased owner of land claimed that a transaction in 1943 by which he purported to sell the land to his son for Rs 400 was a disguised donation intended to deprive them of their rights of succession. Lallah J held that this was an action en déclaration de simulation in which time ran from the date of the allegedly simulated disposition.

28. Article 2271 of the Mauritian Civil Code, which was adopted from the Code of Quebec by Act No 9 of 1983, provides that “le délai de prescription court à compter du jour où le droit d’action a pris naissance.” The question therefore is when the cause of action arose. Their Lordships would observe that the proceedings in Sewruttun v Mahadewoosing were brought by third parties to the alleged simulation, upon whom (if it was a simulation) it would not have been binding, with a view to setting it aside. In such a case, where the action is in effect an attack on the validity of a transaction, it is perhaps understandable that time should run from the impugned transaction. The transaction itself gives rise to the cause of action.

29.But the proceedings in this case are of an altogether different nature. They are to enforce the contractual obligation constituted by the contre-lettre. In the ordinary case of an action under a contract, the cause of action does not accrue when the contract is made but when one of the parties fails to perform it.

30. Mr Cox QC, who appeared for the respondents, submitted that the claim to enforce the contre-lettre was in substance a proprietary rather than contractual claim, an action en revendication to recover the shares. For such an action there is no period of limitation. But their Lordships prefer not to express a view on this point. French law does not know of trusts or equitable interests and the contre-lettre appears to operate as part of the law of obligations. Mr Cox said, in the alternative, that it operated as a mandat, constituting the holder an agent of Mr and Mrs Gunness Gujadhur. This would mean that time ran from the date on which the holder of the shares breached an obligation as a mandataire. Their
[2007] UKPC 54Lordships do not find it necessary to classify the contractual relationship. What matters is that it was contractual and that for the purposes of article 2271 of the Code, a cause of action arose when the appellants refused to perform the contract and not before. This did not happen until 2003.

31. Their Lordships therefore consider that the judge and the Supreme Court were right to hold that the requirements of the référé procedure were satisfied and that a mandatory order should be granted. They will dismiss the appeal.

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