

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2004/008

BETWEEN

ANDREY LYCH

First Claimant

OLGA MIRIMSKAYA

Second Claimant

-and-

COFFEE COMMODITIES LTD

First Defendant

ELENA COLLONGUES

Second Defendant

ICAZA, GONZALEZ-RUIZ & ALEMAN (BVI) LIMITED

Third Defendant

Appearances:

Mr. Terrance Neale and Mrs. Thalicia Blair of McW Todman & Co. for the Claimants
Mrs. Tana'ania Small-Davis of Farara Kerins for the First and Second Defendants
Mr. Paul Dennis and Mr. Malcolm Arthurs of O'Neal Webster for the Third Defendant

2006: July 17,18,19
2006: November 28

JUDGMENT

[1] **HARIPRASHAD-CHARLES J:** The First Claimant, Andrey Lych ("Mr. Lych") and the Second Claimant, Olga Mirimskaya ("Mrs. Mirimskaya") [collectively "the Claimants"] applied to the Court for the following relief:

1. a declaration that the Claimants are the current directors of the First Defendant, Coffee Commodities Ltd ("Coffee Commodities");
2. a declaration that the resolution of the Second Defendant, Elena Collongues ("Ms. Collongues") dated 6 December 2001; purporting to remove the Claimants and Mr. Alexey Khomyakov as directors is null and void;
3. a declaration that Ms. Collongues held the bearer share certificates No. 1 and 2 on trust for the Claimants;
4. a declaration that the Certificate of Incumbency issued by the Third Defendant, ICAZA, Gonzalez-Ruiz & Aleman (BVI) Limited ("ICAZA") on 7 February 2003 naming Ms. Collongues as the sole director is void and of no effect;
5. an injunction restraining Ms. Collongues from holding herself out as a director of Coffee Commodities;
6. an order that ICAZA rectify the register of the directors of Coffee Commodities to reflect that the Claimants are the current owners.
7. an order that ICAZA issue a new Certificate of Incumbency showing the Claimants as the current directors of Coffee Commodities;
8. an account of all assets of Coffee Commodities which is or may have come into its possession and
9. damages and costs.

The salient facts

- [2] Mr. Lych and Mrs. Mirimskaya are Russian nationals and were and are the majority owners and founders of OJSC Rusky Product ("Rusprod"). Rusprod is a leading supplier of coffee in Russia.
- [3] Coffee Commodities was incorporated in the British Virgin Islands ("BVI") under the International Business Companies Act ("IBC Act") on 2 September 1999 with an authorized share capital of US \$50,000.00 divided into 50,000 shares of \$1.00 each. It was incorporated by Ms. Collongues utilizing the registered agent services of ICAZA. ICAZA is a company based in the BVI. It is duly licensed to provide registered agent services including but not limited to the formation of International Business Companies ("IBC's").
- [4] On or about 13 September 1999, ICAZA in its capacity as subscriber to the Memorandum and Articles of Association, appointed Ms. Collongues as the sole director of Coffee Commodities. On 15 September 1999, Ms. Collongues, in her capacity as sole director, caused ICAZA to issue two bearer share certificates: Certificates Nos. 1 and 2. Each bearer share certificate represented 25, 000 shares.
- [5] On 11 September 2000, the details of Coffee Commodities' bank account at Banque Internationale de Commerce-BRED, Geneva, Switzerland, where its bank account was located was amended to reflect the fact that Mrs. Mirimskaya and not Ms. Collongues was the beneficial owner of Coffee Commodities.
- [6] By resolution dated 20 September 2000, Ms. Collongues, in her capacity as sole director, and pursuant to Article 69 of the Articles of Association, appointed Mr. Lych, Mrs. Mirimskaya and Mr. Alexey Khomyakov ("Mr. Khomyakov") the directors of Coffee Commodities. Ms. Collongues was appointed the secretary.
- [7] On 26 September 2000, ICAZA issued a Certificate of Incumbency confirming Mr. Lych, Mrs. Mirimskaya and Mr. Khomyakov as directors and Ms. Collongues as secretary of Coffee Commodities.

- [8] Thereafter, a dispute arose between Ms. Collongues on the one hand and Mr. Lych, Mrs. Mirinskaya and her husband, Mr. Alexey Golubovich ("Mr. Golubovich") on the other hand over certain tax liabilities which the French tax authorities had assessed Ms. Collongues as liable to pay as a result of her failure to declare her personal income as well as income earned through her company, Alliance Properties S.A. ("Alliance"). Ms. Collongues was of the view that as the owner of Alliance, she was merely an agent and employee of Mr. Lych, Mrs. Mirinskaya and Mr. Golubovich and as such they were the ones ultimately responsible for the payment of her tax liabilities. Mr. Lych, Mrs. Mirinskaya and Mr. Golubovich did not dispute that she was their employee, but disputed that they were responsible for the payment of her corporate and personal tax liabilities with the French tax authorities.
- [9] Subsequently, Ms. Collongues acting as sole shareholder, by way of a members' resolution dated 6 December 2001 removed Mr. Lych, Mrs. Mirinskaya and Mr. Golubovich as directors of Coffee Commodities and re-appointed herself as sole director. She also remained the Secretary of the Company. The original of this resolution was forwarded to ICAZA. Acting on this resolution, ICAZA amended the register of directors of the Company to reflect that Ms. Collongues is the sole director of Coffee Commodities.
- [10] Coffee Commodities was struck off the register in 2002 for non-payment of annual licence fees. On 28 November 2002, Ms. Collongues instructed ICAZA to restore it to the Register of Companies. ICAZA duly complied with the instructions and restored Coffee Commodities to the Register of Companies.
- [11] On 7 February 2003, at the request of Ms. Collongues attorney, ICAZA issued a Certificate of Incumbency naming Ms. Collongues as the sole director of Coffee Commodities.
- [12] In a nutshell, the Claimants' case is that at all material times, Ms. Collongues acted as their agent and that the incorporation by her of Coffee Commodities was upon their instructions. They next allege that the two bearer share certificates were issued upon their instructions and that they are the beneficial owners of same. Further, that Ms. Collongues

held these bearer share certificates on trust for them and was always conscious that they were the beneficial owners of those certificates.

[13] With respect to ICAZA, the Claimants claim damages in negligence on the basis that in acting upon the members' resolution of Ms. Collongues dated 6 December 2001, it failed to exercise such reasonable care and skill as is required of a registered agent. In particular, the Claimants allege that ICAZA breached:

- a. Articles 13 (b) and 14 of the Articles of Association of Coffee Commodities without first obtaining a certificate of authentication in respect of Ms. Collongues' purported exercise of her voting rights as the holder of the two bearer share certificates and;
- b. Articles 71, 72, 73 and 74 of the Articles of Association by wrongfully issuing a Certificate of Incumbency on 7 February 2003 naming Ms. Collongues as the sole director and secretary of Coffee Commodities notwithstanding the fact that there was no evidence that the Claimants and Mr. Khomyakov had resigned or had been removed from their position as directors by the members of Coffee Commodities and notwithstanding that ICAZA was aware of the conflicting claims regarding Coffee Commodities.

[14] Essentially, the case for Ms. Collongues is that she is the beneficial as well as legal owner of Coffee Commodities. She puts the Claimants to strict proof of their allegations.

[15] The gist of ICAZA's case is that it acted upon the resolution of 6 December 2001 but denied that in so doing it either (i) acted in breach of the Articles of Association of Coffee Commodities or (ii) failed to exercise such reasonable care and skill as required of a registered agent.

The issues

[16] All parties are agreed that the following eight issues must be determined at the trial of this matter.

- (1) Who are the current directors of Coffee Commodities?
- (2) Is Ms. Collongues the beneficial owner of the shares of Coffee Commodities or does she hold these shares on trust for the Claimants?
- (3) Was Ms. Collongues in her dealings with Coffee Commodities acting on her own behalf or as agent of the Claimants?
- (4) Was the resolution passed on behalf of Ms. Collongues on 6 December 2001 removing the Claimants as Directors of Coffee Commodities a valid resolution?
- (5) Was the Certificate of Incumbency issued by ICAZA on 7 February 2003 naming Ms. Collongues as the sole director of Coffee Commodities an accurate representation of the corporate structure of Coffee Commodities at the relevant time?
- (6) Was ICAZA negligent in acting upon the 6 December 2001 resolution of Ms. Collongues without first ensuring that there had been compliance with the procedures laid down in the Memorandum and Articles of Association of Coffee Commodities?
- (7) Is Ms. Collongues liable to the Claimants in damages for breach of trust/contract?
- (8) Is ICAZA liable to the Claimants in damages for breach of their duty as registered agents?

[17] The parties are not agreed that the following disputed issue necessitates a determination by the Court namely: is Ms. Collongues liable to account to the Claimants for any assets of Coffee Commodities which may have come into her possession while she was acting as an officer of Coffee Commodities. The Claimants insist that it is an issue which warrants determination. Ms. Collongues is of a contrary view. ICAZA holds no view.

The evidence

[18] Nobody would say that the evidence in this case was jejune. It extends to three bundles including a generous bundle of agreed documents. The latter bundle proved to be wanting and had to be complemented by another bundle filed by the Claimants on 31 July 2006. Be that as it may, the credibility of evidence does not depend upon the number of kilograms achieved on either side; as the key issue which ultimately emerges for determination relates to the ownership of Coffee Commodities.

[19] Three witnesses testified on behalf of the Claimants namely Mrs. Olga Mirimskaya, Mr. Andrey Lych and Ms. Natalia Vlasova. The Second Defendant, Ms. Collongues, although present throughout the trial did not testify and consequently, her witness statement had to be expunged from the bundle and disregarded in accordance with the provisions of CPR 29.8. Ms. Yexadira Garcia was the sole witness to testify on behalf of the Third Defendant, ICAZA.

[20] Mrs. Mirimskaya was the first witness to give evidence on behalf of Claimants. Indeed, she was more au fait with Coffee Commodities than Mr. Lych, the First Claimant. She stated that she is the co-owner and founder of OJSC Rusky Product ("Rusprod"), one of the leading food suppliers in the Russian retail market with annual turnover of US\$120 million. She met Ms. Collongues, a Russian-born French Citizen socially sometime in 1995 at the country house of Bernard Loze, a well-known French entrepreneur and a business partner of her husband, Mr. Golubovich. She subsequently met Ms. Collongues six months later in Paris and after speaking with her, she realized that her financial situation was precarious. She felt sorry for her and convinced her husband to employ her as a nominal director of several companies in which he had an interest. For that reason, her husband did in fact

begin using Ms. Collongues in this as well as other administrative capacity which culminated in the formalizing of the relationship by the execution of an agreement between Ms. Collongues and Sequential Holdings Russian Investors Limited on 23 December 1996 (The employment agreement¹). The said agreement was amended on a number of subsequent occasions to include additional companies which Mr. Golubovich had an interest.¹ Ms. Collongues however alleges that the employment agreement was a fictitious and invalid document. The short point is that the agreement was inadmissible in evidence.

[21] Mrs. Mirimskaya said that in and around August 1999, Mr. Lych and herself decided to incorporate Coffee Commodities for the purpose of importing and supplying the coffee beans for Rusprod's coffee production facilities in Moscow. Prior to that, they imported coffee beans through Alliance Properties S.A. ("Alliance"), a Panama Company owned by Ms. Collongues. They decided to form their own company when Ms. Collongues ran into certain problems with the French tax authorities towards the end of 1998. These problems culminated in a search of Ms. Collongues' Parisian apartment/office and the confiscation of a number of documents including various documents relating to Alliance. At the time, Ms. Collongues confirmed that she was an employee of Rusprod.

[22] Mrs. Mirimskaya testified that Ms. Collongues through her company, Alliance, acted as the agent of Rusprod and ultimately Mr. Lych and herself, performing diverse administrative and secretarial tasks including the making of contracts with world coffee traders, warehousing and arranging transport of coffee purchased from suppliers in various parts of the world. Ms. Collongues was remunerated for her services in accordance with the employment agreement. Pursuant to their instructions, Ms. Collongues proceeded to incorporate Coffee Commodities on 2 September 1999. She said that it was one of the many companies which she and her husband instructed Ms. Collongues to incorporate on their behalf.

[23] Ms. Collongues incorporated Coffee Commodities using the services of Fidepar S.A., a company based in Geneva. Two bearer share certificates were delivered by Fidepar to Ms.

¹ See documents 24-31 of Claimants' documents.

Collongues on 12 September 1999 and she was appointed sole director of Coffee Commodities. It is the Claimants' case that Ms. Collongues held the bearer share certificates on trust for them. These corporate actions were duly authorized by the Claimants since Ms. Collongues had done so before. Mrs. Mirimskaya averred that such corporate actions were convenient to them as Ms. Collongues was based in France and was therefore in a better position to attend to those matters such as opening of a bank account in Switzerland on behalf of Coffee Commodities as well as the execution of various agreements and documents relating to the purchase of coffee. She noted that Ms. Collongues forwarded all relevant documents for their attention in Moscow hence the reason why they have some documents in their possession.

[24] Mrs. Mirimskaya stated that Ms. Collongues sent written reports detailing the various transactions to Rusprod in Moscow at regular intervals since she was fully conscious that she was acting as an agent for Rusprod. She further stated that in or about September 2000, Mr. Lych and herself decided that it was time to change the corporate structure of Coffee Commodities since the Company was beginning to do significant amounts of trading and they thought that it was necessary for the management structure of the Company to more accurately reflect the true state of its corporate affairs. They therefore instructed Ms. Collongues to resign as director and appoint them as well as Mr. Khomyakov as directors in her place. On 20 September 2002, Ms. Collongues passed a resolution resigning as director and appointing them as directors while she remained the corporate secretary. The Claimants allege that Ms. Collongues continued to hold the bearer share certificates because they honestly omitted to request them. They further instructed Ms. Collongues to add them as signatories to Coffee Commodities' bank account which she did. The Claimants and Mr. Khomyakov became the signatories to the corporate accounts.

[25] Mrs. Mirimskaya deposed that problems arose subsequent to the assessment of Ms. Collongues' outstanding tax by the French authorities wherein she took the stance that her husband (Mr. Golubovich) and her were responsible for her (Ms. Collongues) tax problems. She then set about orchestrating an illegal and fraudulent scheme to gain

control of their companies and assets in an attempt to compel them to either pay or otherwise offset her tax liability to the French tax authorities.

[26] She further testified that in July 2001, Ms. Collongues filed a Petition for Sequestration against her husband in the courts of Switzerland. In this petition, she listed several companies which she considered to be her husband's assets; one of those being Coffee Commodities. Up to this time, Ms. Collongues had asserted no proprietary claim over Coffee Commodities.

[27] On 6 December 2001, without their knowledge and consent, Ms. Collongues passed a resolution removing Mr. Lych, Mr. Khomyakov and Mrs. Mirinskaya as directors and signatories of Coffee Commodities' bank accounts and substituting herself in their place.

[28] Mrs. Mirinskaya alleged that Ms. Collongues' actions were wrongful since it lacked the requisite authorization of her principals, the beneficial owners of Coffee Commodities but also was not in accordance with the Memorandum and Articles of Association of Coffee Commodities, in particular, Articles 13 (b) of the Articles of Association. She said that ICAZA was put on notice by Fidepar S.A. that there was a dispute in relation to the bearer shares but nevertheless failed to take the necessary precautions which a reasonably prudent registered agent would have taken in the circumstances by making proper inquiries or at the very least, ensuring that the bearer shares were properly authenticated before acting upon them as required by the Articles of Association.

[29] At paragraph 34, she stated that Ms. Collongues' defence wherein she stated that Mr. Lych, Mr. Khomyakov and herself were appointed directors of Coffee Commodities "to help minimize her exposure to tax liabilities" is not only farcical but a gross distortion of the facts particularly when one considers the employment agreement in which she agreed to perform secretarial, administrative and directorship duties for consideration.

[30] Ms. Collongues has since instituted a couple of court actions in different jurisdictions. So too have Mrs. Mirinskaya and her husband.

[31] Mrs. Tana'ania Small-Davis appearing as Counsel for Coffee Commodities and Ms. Collongues trenchantly cross-examined Mrs. Mirimskaya for many hours. The transcript of trial proceedings occupied 148 pages. Certainly, she recognized that the credibility of the Claimants who assert the existence of the agency/trust relationship is key to the determination of whether the Claimants have proved their claim. It was therefore no surprise when Mrs. Small-Davis spent hours cross-examining the Claimants' witnesses particularly Mrs. Mirimskaya. She pinpointed many inconsistencies in Mrs. Mirimskaya's witness statement and her evidence under cross-examination.² Specifically, under cross-examination, Mrs. Mirimskaya deposed as follows: (a) there was no agency agreement between Ms. Collongues and Rusprod but a supply agreement; (b) there was no agreement between Alliance and Rusprod for Alliance to be Rusprod's agent but there was a supply agreement; (c) there was no agency agreement between Ms. Collongues and herself but Ms. Collongues drew a monthly salary which was agreed with the financial director; and (d) there was no employment agreement between Ms. Collongues and herself as she never employed her. It was the Company that employed her. First, it was Sequential and later, Coffee Commodities. There was no employment agreement between Ms. Collongues and Coffee Commodities because first, she was a director of the company and later, she became a secretary to Coffee Commodities.

[32] Mrs. Small-Davis submitted there are other inconsistencies with Mrs. Mirimskaya's witness statement and her cross-examination regarding the incorporation of Coffee Commodities. She said that Mrs. Mirimskaya denied that she and Mr. Lych decided to incorporate Coffee Commodities to import coffee beans for Rusprod because of Ms. Collongues' tax problems. However, the transcript showed that Mrs. Mirimskaya attested that the tax issue was one of the problems. It also appeared that the witness did not fully comprehend the question.³ Learned Counsel argued that curiously, although Mrs. Mirimskaya alleged that Ms. Collongues incorporated many other companies for her husband and herself, she could not recall any of those companies and also, she never paid anything for the incorporation of Coffee Commodities and she gave no instructions about payment.

² See pages 7 to 12 of Second Defendant's written submissions.

³ See lines 25 at page 80 of Transcript of Trial Proceedings , Monday, 17 July 2006.

- [33] With respect to the bearer share certificates, Mrs. Mirinskaya said that she did not know who made the decision that Coffee Commodities would issue such certificates and that she found out that Coffee Commodities had bearer share certificates in 2003 when her lawyers started preparing the case in Switzerland. Later on, Mrs. Mirinskaya changed her story and said that she saw the bearer share certificates in 1999 on a visit to Ms. Collongues' home in Paris and Ms. Collongues offered to send them to her (Mrs. Mirinskaya's) lawyers in Russia because she did not want to carry them around. She admitted that she had represented to Fidepar that she had the bearer share certificates in her possession.
- [34] Another fraction of her cross-examination which conflicts with her witness statement relates to the transfer of US\$1 million from Alliance to Coffee Commodities. At paragraph 21 of her witness statement, Mrs. Mirinskaya stated that Mr. Lych and herself gave the instructions to Ms. Collongues. Under intense cross-examination, she asserted that she could not recall who gave the instruction to transfer US\$1 million from Alliance's account to Coffee Commodities' account and she cannot remember when the transfer took place. The evidence established that the transfer took place on 13 December 1999.
- [35] Mrs. Mirinskaya did not hesitate to declare that she gave no instructions on Coffee Commodities operations except on really serious weighty matters. She did not recall giving instructions for Coffee Commodities to issue trade guarantees. She stated that Coffee Commodities had no assets but later acknowledged that it had four (4) cash loans totaling \$4 million. At paragraph 23 of her witness statement, she asserted that she and Mr. Lych decided to change the corporate structure of Coffee Commodities and they instructed Ms. Collongues to resign. Under cross-examination, she stated that she doesn't know who gave instructions to Ms. Collongues to resign as director in 2000.
- [36] Mrs. Small-Davis launched more attack at the veracity of Mrs. Mirinskaya's evidence and submitted there are many areas in which her credibility has been tarnished for example:

- Mrs. Mirinskaya's statement of her co-ownership of Rusprod with Mr. Lych, it has been established that Rusprod not only has at least 2,092 other shareholders, but also that it is a public company and that she herself has given the number of shareholders at 3,000. This was not disclosed by either Mrs. Mirinskaya or Mr. Lych and Mrs. Mirinskaya sought to downplay this by saying that she was the majority shareholder. Again, the Bond Offer showed that neither she or Mr. Lych personally own any share and the principal shareholder is Russian Investors OJSC, another publicly owned company in Russia.
- Mrs. Mirinskaya censured whether she met Ms. Collongues at a well-known businessman's house, saying in cross-examination that "as for whether he is a businessman, he may well be in certain circles" yet she herself referred to him as a well-known French entrepreneur. Frankly, I do not think much turns on this point.
- Mrs. Mirinskaya described Ms. Collongues' situation as "precarious" saying that when she met her, she was a prostitute who could not even purchase a sandwich and that she did not dismiss her as an employee when she decided to close down Coffee Commodities' operations because she did not want to leave her impecunious. Yet, she admitted that Ms. Collongues lived on Avenue Foch, one of the most prestigious neighbourhoods in Paris; she is married to a French Diplomat and she drove a Mercedes Benz. Learned Counsel intimated that if Ms. Collongues had been so financially hopeless, why was she assessed to pay US\$15 million in taxes based on yearly revenues of her company, Alliance of US\$8 million? To my mind, an answer to this question would be speculative.
- Mrs. Small-Davis submitted that Mrs. Mirinskaya's evidence on the level of business conducted by Coffee Commodities was strange given that she claimed it to be her company. In brief, Learned Counsel contended that Mrs. Mirinskaya did not know much about Coffee Commodities.

- She next asserted that Mrs. Mirinskaya held herself out as an experienced businesswoman. Yet, her knowledge and practice of the proper conduct of business seemed very casual and neglectful. There was no formal written documentation of her relationship with Ms. Collongues. Further, she stated that since Ms. Collongues and/or Alliance acted as agent for Rusprod, one would think that as director of such a large successful public company, she would ascertain that the relationship would be properly documented. As Mrs. Small-Davis rightly pointed out and to be fair to Mrs. Mirinskaya, she did say that it was not necessary for her to make employment agreements with Ms. Collongues because she was a director and she drew a monthly salary.
- As to the transfer of US\$1 million from Alliance's account to Coffee Commodities' account, she vacillated between saying that US\$1 million was her personal money and that it was money paid to Alliance by Rusprod for coffee supplied.

[37] In her written submissions, Mrs. Small-Davis alluded to many more inconsistencies in Mrs. Mirinskaya' evidence which have been examined by the Court.⁴ Learned Counsel invited the Court to be suspicious of Mrs. Mirinskaya's evidence as there might have been a possibly motive behind acquiring Coffee Commodities for herself. She submitted that Mrs. Mirinskaya admitted that prior to her collaboration with Ms. Collongues, they were only buying coffee beans from Poland and Russia and that they could not do any business with European coffee bean suppliers because of the fiscal policy in Russia. She also admitted that even to the extent that she had to use the services of Coffee Commodities who would buy the coffee beans from various suppliers, warehouse it in Switzerland and then ship it to Russia, their operations would have been impossible otherwise. This way she had access to coffee from different parts of the world including Africa, Brazil and Vietnam. She admitted at the time that Rusprod started trading in coffee, it was a small operation that grew with the trade between Alliance and Coffee Commodities.

⁴ See paragraphs 30 to 43 of Second Defendant's written submissions.

- [38] Mrs. Small-Davis suggested that it is reasonable to conclude that Mrs. Mirimskaya, observing the profits that Coffee Commodities was making with Rusprod, its main customer, decided that she would go after the business herself, hence the reason for the incorporation of Speyer Inc. in her sister's name. It may be that she wanted to take over Coffee Commodities for all the goodwill it had built up over the years with the major suppliers. Learned Counsel quickly interjected to say that all of this is highly speculative. She asserted that what is clear is that Mrs. Mirimskaya did not provide any proof in her claim that Ms. Collongues was her employee and her agent; that she acted on her instructions to incorporate Coffee Commodities and that she held the bearer share certificates on trust for her. Learned Counsel urged the Court to disbelieve Mrs. Mirimskaya's evidence.
- [39] Undoubtedly, there were many inconsistencies in the evidence of Mrs. Mirimskaya but at the end of the day, she did not strike me as an incredible witness. In fact, I thought she was candid and sincere in her evidence. I attributed some of the inconsistencies to be nuances which are so common when there is translation from one language to another. Furthermore, to my mind, the most telling documentary evidence was the letter from Ms. Collongues to Mr. Lych dated 28 May 2000 (months before Mr. Lych was appointed a director) detailing to him the status of Coffee Commodities Bank Account in BNP Geneva.⁵ There is and could be no explanation as to why Ms. Collongues would permit all and sundry to know the status of "her" Company particularly to Mr. Lych who declared that he had no personal relationship with Ms. Collongues.
- [40] The next witness to testify on behalf of the Claimants was Mr. Andrey Lych, the First Claimant. It was striking that Mr. Lych's witness statement was verbatim with Mrs. Mirimskaya's witness statement. In addition, it was discernible under cross-examination that Mr. Lych seemed not to know much about Coffee Commodities and Ms. Collongues. As he recounted, the only thing that he could recall is that Ms. Collongues was an employee of Coffee Commodities. He made it clear that as Director-General of a very large company such as Rusprod, he is not supposed to know how many transactions Rusprod

⁵ Tab 13 of the amended skeleton arguments of the Claimants.

- had with Coffee Commodities in 1999 or 2000 or 2001 because it was simply outside the realm of his portfolio. He stated that those questions are better suited for the Supplies Manager. Mr. Lych was a very frank and forthright witness who knew very little about Coffee Commodities except that Ms. Collongues was an employee of that Company.
- [41] The final witness for the Claimants was Ms. Natalia Vlasova who has been working with Rusprod since 1996. Since December 2003, she has held the position of Financial Director. Prior to that, she held the position of the specialist of Rusprod's department for financial planning, budgeting and payments processing. Her responsibilities included and still include contacts with financial and credit institutions and monitoring of the financial position of Rusprod as well as of the other entities under common management; one of which was Coffee Commodities.
- [42] Ms. Vlasova deposed that sometime in the middle of 2002, Mrs. Mirimskaya and Mr. Lych instructed her to monitor the financial activities of Coffee Commodities. Ms. Vlasova said that she was particularly interested in the cash flow of Coffee Commodities and the frequency of the settlement of invoices issued to the Company. She averred that as a manager of Coffee Commodities, Ms. Collongues was responsible for the purchasing of coffee on the world market and its transportation to Russia to the production facilities of Rusprod. Coffee Commodities was bound by the terms of the contracts for coffee supply signed with Rusprod. She stated that on a regular basis, Rusprod's managers forwarded instructions to Ms. Collongues concerning the prices, volumes and grades of coffee to be purchased by Coffee Commodities and later delivered to Rusprod.
- [43] Ms. Vlasova further testified that Ms. Collongues provided her with regular reports including but not limited to bank statements of the financial affairs of Coffee Commodities and on the basis of the information provided, she prepared a statement of the banking transactions of the Company for the period 12 December 1999 – 29 March 2001.⁶ Of course, these documents were challenged by Mrs. Small-Davis. She submitted that the 23-page document did not identify the name of the bank or the account number. When one scrutinizes Document C 11, one sees certain payments as being made to Ms. Collongues.

⁶ See Tab. 18 of Amended skeleton submissions of the Claimants filed on 31 July 2006.

Ms. Vlasova explained that the three payments of \$4,000 each represented the monthly salary of Ms. Collongues and the same was withdrawn directly by Ms. Collongues from Coffee Commodities' account.

[44] Ms. Vlasova also stated that as she supervised Coffee Commodities' activities and its banking operations, she received regular reports from Ms. Collongues which showed that all the payments made by her was from the account of Coffee Commodities. According to Ms. Vlasova, Ms. Collongues reported on all the funds which Coffee Commodities received from Rusprod. Further, Ms. Vlasova tendered into evidence copies of some of the bank statements faxed to her by Ms. Collongues on a regular basis in keeping with her mandate to keep her informed of the financial affairs of Coffee Commodities. A number of these statements bear the fax number of Ms. Collongues and in the absence of any contrary evidence, it must be presumed to have originated from Ms. Collongues.

[45] Ms. Vlasova explained that Documents C13 –C15 were typical of documents sent by Ms. Collongues to the Claimants to obtain approval for payment of various invoices from different suppliers.

[46] Learned Counsel for the Claimants, Mr. Terrance Neale explicated that documents 14 – 20 of the Agreed Bundle ⁷ are various debit advices and loan agreements between Coffee Commodities and Russian Investors Group Ltd for US\$1,990,000, US\$600,000, US\$1,200,000 and US\$400,000. He contended that Ms. Collongues was not a wealthy woman and was in no position to make such substantial unsecured loans. He argued that in light of Ms. Collongues' inability to settle her outstanding tax assessment with the French authorities, it would be nothing short of incredible for her to make such loans while facing penal sanctions for tax arrears. Mr. Neale submitted that certainly, if Ms. Collongues had such substantial sums of money at her disposal, she would use same to reduce her tax liability and the prospects of incarceration rather than to make unsecured loans which did not appear beneficial to her. The evidence of the Claimants is that these loans were made on the basis of inter-company loans between companies in the same group namely

⁷ See Tabs 20 to 25 of the Agreed Bundle.

companies owned and controlled by the Claimants and Mr. Golubovich. Learned Counsel implored the Court to find that this explanation is more plausible.

[47] Ms. Vlasova was thoroughly cross-examined by Mrs. Small-Davis. In my opinion, she remained firm and resolute. Learned Counsel said that much was said of Ms. Collongues being an employee. She submitted that it was quite strange that in all of the 16 months, there were only four payments to Ms. Collongues that were described as 'salary': transactions dated 22.02.2001, 16.03.2001 and 30.03.01 respectively. On closer scrutiny of these documents, on 11.01.2001, Ms. Collongues received \$16,000. Mrs. Small-Davis submitted that in any event, the fact that Ms. Collongues drew a salary from Coffee Commodities could not lead one to the conclusion that it was not her company. She was in fact employed to Coffee Commodities and she alone managed it and she was therefore entitled to a salary just as Mr. Lych and Mrs. Mirinskaya were entitled to be paid by their company.

Factual findings

[48] Mr. Neale has succinctly set out the law of agency in his written submissions. There is no dispute as to the law. The primary dispute is purely factual: was Ms. Collongues acting as an agent of the Claimants when she performed various functions relating to Coffee Commodities?

[49] In order to determine this issue, it is imperative to examine both oral and documentary evidence. As already stated, Ms. Collongues did not testify at the trial although she was present. The only oral evidence which was adduced came from the Claimants and Ms. Garcia for ICAZA. For the time being, I shall concentrate on the evidence of the Claimants vis-à-vis Ms. Collongues.

[50] First and foremost, this is a civil case wherein the burden of proof required of the Claimants is on a balance of probabilities. Mrs. Small-Davis submitted that the facts support that Ms. Collongues is the legal and beneficial owner of the shares in Coffee Commodities in the following ways:

- Ms. Collongues has been in possession of the two issued share certificates of Coffee Commodities since the date of its issuance in accordance with the resolution dated 15 September 1999. At some point in time, the Claimants had purported that they were in possession of the share certificates but that proved to be fallacious as Ms. Collongues had lodged the share certificates with her bankers in Geneva and then with her lawyers in Geneva after the issue became controversial.
- The correspondents, Fidepar S.A., Panama Advisory and Consultant Centre Corp, all in Geneva, Switzerland, have always recognized Ms. Collongues as the sole shareholder of Coffee Commodities and have taken their instructions from her. These companies' due diligence records reflect that Ms. Collongues is the person solely responsible for Coffee Commodities.⁸
- Ms. Collongues maintained and operated the bank accounts of Coffee Commodities and executed due diligence declarations required by Swiss law confirming that she is the sole legal and beneficial owner.⁹
- There is no existing documentation in support of the Claimants' assertion that Ms. Collongues held the shares in trust for them.
- There is no supporting evidence to establish that the Claimants or either of them had ever acted in the name of or in any way consistent with there being its owner, not even during the period when they were named as directors.

[51] The Claimants have elaborately set out their submissions on the evidence at paragraphs 35 to 76 of the amended skeleton submissions filed on 31 July 2006. Having found the witnesses for the Claimants to be credible witnesses, In addition to the above, I find the following:

⁸ See Agreed Bundle Tabs. 23, 38, 39 and 111.

⁹ See Agreed Bundle Tabs 44, 45, 46, 52, 56, 57.

- That the Claimants (specifically Mrs. Mirimskaya) reposed considerable trust and confidence in her friend, Ms. Collongues who had previously performed similar tasks of incorporating companies for her husband and herself. The Claimants had no reason to believe that Ms. Collongues would act in any other way other than their agent and in their best interest.
- Ms. Collongues consulted the Claimants on all weighty matters pertaining to Coffee Commodities. Some of the documents establishing the agency relationship are set out at paragraph 4 of the amended skeleton submissions. The cumulative effect leaves no doubt as to the capacity in which Ms. Collongues was acting when she conducted various transactions through Coffee Commodities.¹⁰
- The Claimants instructed Ms. Collongues to resign as director and to appoint Mr. Khomyakov and themselves as directors in her place having taken the decision to restructure their business affairs so as to assume greater control of Coffee Commodities. This she did.
- The Claimants instructed Ms. Collongues to substitute them as signatories of the bank account of Coffee Commodities. She complied.
- The only plausible explanation for the appointment and recognition of the Claimants as directors and beneficial owners of Coffee Commodities is because they were just that. Ms. Collongues recognized that and as a consequence, she did not hesitate to take certain corporate actions with a view to reflecting the true corporate structure of the Company
- Apart from the bearer share certificates which she possesses, Ms. Collongues has not produced any compelling evidence to support her claim that she is the beneficial owner of Coffee Commodities and that in carrying out the various transactions on

¹⁰ See also paragraphs 43, 44 , 45 and 46 of the amended skeleton submissions.

behalf of Coffee Commodities, she was acting on her own behalf and not as the agent of the Claimants.

- If Ms. Collongues owned Coffee Commodities, why would she in her application in the courts of Geneva, Switzerland, apply for a sequestration order on 16 July 2001 against her own company?

[52] In light of the above, I am of the considered opinion that Ms. Collongues in her dealings with Coffee Commodities was acting on behalf of the Claimants. Ms. Collongues chose not to put forward any evidence in the matter and as such, the only evidence before the Court is that of the Claimants. In my judgment, Mrs. Small-Davis has not discredited the Claimants' evidence. There has been no explanation from Ms. Collongues as to why would she be seeking instructions from the Claimants on various matters concerning suppliers and why would she be forwarding Coffee Commodities' financial statements to them. Worse yet, there has been no explanation from Ms. Collongues as to why she would wish anyone to know how much money Coffee Commodities has in its bank account.

[53] On a balance of probabilities, I believe the Claimants' evidence and I find that they are the current owners of Coffee Commodities and that Ms. Collongues acted on their instructions in incorporating the Company. She therefore holds the bearer share certificates on trust for the Claimants. She must deliver them to the Claimants within 14 days hereof.

Claim against the Third Defendant, ICAZA

[54] The Claimants claim damages in negligence against ICAZA on the basis that in acting upon the members' resolution of Ms. Collongues dated 6 December 2001, it failed to exercise such reasonable care and skill as is required of a registered agent. In particular, the Claimants allege that:

- a. ICAZA breached Articles 13 (b) and 14 of the Articles of Association of Coffee Commodities by not obtaining a certificate of authentication in respect of Ms.

Collongues' purported exercise of her voting rights as the holder of the two bearer share certificates and;

- b. ICAZA breached Articles 71, 72, 73 and 74 of the Articles of Association by wrongfully issuing a Certificate of Incumbency on 7 February 2003 naming Ms. Collongues as the sole director and secretary of Coffee Commodities notwithstanding the fact that there was no evidence that the Claimants and Mr. Khomyakov had resigned or had been removed from their position as directors by the members of Coffee Commodities and notwithstanding that ICAZA was aware of the conflicting claims regarding Coffee Commodities.

The alleged breach of Articles 13 (b) and 14

[55] Article 13 of the Articles of Association of the Company provides that:

“Subject to any specific provisions in these Articles, in order to exercise his rights as a member of the Company, the bearer of a bearer share certificate shall produce the bearer share certificate as evidence of his membership of the Company. Without prejudice to the generality of the foregoing, the following rights may be exercised in the following manner:

- (a)
- (b) for the purpose of exercising his vote on a resolution in writing, the bearer of a bearer share certificate shall cause his signature to any such resolution to be authenticated as hereinbefore set forth;
- (c)
- (d)

[56] Article 14 reads as follows:

“The signature of the bearer of a bearer share certificate shall be deemed to be duly authenticated if the bearer of the bearer share certificate shall produce such certificate to a notary public or a bank manager or a director or officer of the Company (hereinafter referred to as “an authorized person”) and if the authorized person shall endorse the document bearing such signature with a statement:

- (a) identifying the bearer share certificate produced to him by number and date and specifying the number of shares and the class of shares (if appropriate) comprised therein;
- (b) confirming that the signature of the bearer of the bearer share certificate was subscribed in his presence and that if the bearer is representing a company he has so acknowledged and has produced satisfactory evidence thereof; specifying the capacity in which he is qualified as an authorized person and if a notary public, affixing his seal thereto or, if a bank manager identifying the stamp of the bank for which he is manager."

[57] Mr. Neale submitted that ICAZA breached Articles 13 (b) and 14 of the Articles of Association of Coffee Commodities in that it acted upon the written resolution without having sight of the authenticated copies of the bearer share certificates duly authorized, legalized by apostille and certified against a Notary in Geneva.

[58] Learned Counsel for ICAZA, Mr. Paul Dennis was extremely comprehensive in his written submissions. He argued that the alleged breach by ICAZA of these Articles is predicated on the erroneous principle that the Articles of Association of a Company is capable of imposing obligations upon third parties. He relied on section 13 (3) of the IBC Act which provides that:

"The Articles, when registered, bind the company and its members from time to time to the same extent as if each member had subscribed his name and affixed his seal thereto and as if there were contained in the Articles, on the part of himself, his heirs, executors and administrators, a covenant to observe the provisions of the Articles, subject to this Act"

[59] Learned Counsel submitted that the Articles of Association constitute a contract between the Company and its members and between the members *inter se*. He referred to the case of **Welton v Saffery**¹¹ and specifically, to a dictum of Lord Herschell who in alluding to the equivalent English provision observed as follows:

"Sect. 16 of the Act of 1862 provides that the Articles of Association when registered *bind the company and the members thereof* to the same effect as if each member had signed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such articles, subject to the provisions of this Act. *The articles thus become a contract under seal by*

¹¹ [1897] A.C. 299 at page 315.

each member of the Company and regulate his rights. They cannot, of course diminish or affect any liability created by the express terms of the statute; but as I have said, the statute does not purport to settle the rights of the members *inter se*, it leaves these to be determined by the articles (or the articles and memorandum together), which are the social contract regulating those rights.”

[60] Mr. Dennis next submitted that the obligations created by the Memorandum and Articles of Association of a company are only binding as between the company and its members and as between the members *inter se*. Learned Counsel stressed that they impose no obligations – contractual or otherwise – on third parties. Accordingly, Articles 13(b) and 14 imposed no obligations upon ICAZA as registered agent of Coffee Commodities and as such, the Claimants’ assertion that it was bound by those Articles and acted in breach of them is wholly misconceived as a matter of law. I am in total agreement with this submission.

[61] He next argued that in any event, even assuming (which is not accepted by ICAZA) that ICAZA was bound by the Articles of Coffee Commodities, Articles 13 (b) and 14 provide no basis for the Claimants’ assertion that before the impugned resolution could be acted upon a certificate of authentication “in respect of Ms. Collongues’ exercise of her voting rights as holder of the two bearer share certificates” had to be obtained. These Articles impose no such requirement.

[62] Articles 13 (b) and 14 dictate that the resolution passed by the bearer of a bearer share certificate must be authenticated and they prescribe how it is to be authenticated. The Articles do not state that if the signature on the resolution is not authenticated, then it is invalid and of no effect. I therefore agree with Mr. Dennis’ submission that Articles 13 (b) and 14 provide no basis for the assertion that the signature had to be authenticated before the registered agent could act upon it.

[63] In my respectful opinion, Mr. Neale has misconceived the meaning of Article 13. This is plain when one examines his cross-examination of Ms. Garcia. When dealing with Article 13, he focused on getting information from Ms. Garcia as to when she received the

authenticated bearer share certificate and not whether Ms. Collongues' signature on the resolution itself was authenticated as required by article 13 (b).

[64] As Mr. Dennis correctly pointed out, Article 13 (b) does no more than to provide a mechanism for verifying the identity and signature of a bearer shareholder who votes on a resolution in writing. According to him, the identity and signature of Ms. Collongues was never in issue when she presented the resolution to ICAZA and therefore, the question of authentication of her signature simply does not arise. He argued that what was in issue was whether Ms. Collongues was the beneficial ownership of the bearer shares and that issue has nothing to do with whether or not her identity and the authenticity of her signature were verified when she presented the signed resolution to ICAZA.

[65] Mr. Dennis further submitted that even if authentication of the signature on the resolution were required before it could be acted upon, Article 14 specifically provides that authentication may be provided by, *inter alia*, a director or officer of Coffee Commodities. Since at all material times Ms. Collongues was an officer of the company and therefore an authorized person within the meaning of Article 14, a certificate of authentication authenticating her signature would therefore have taken the matter no further.

[66] It cannot be that a person can authenticate her own signature. This submission is far-fetched. Article 14 specifies the persons who are authorized to authenticate the signature of a bearer shareholder on a resolution. These include a notary public, bank manager, director or officers of the company. Ms. Collongues' signature could have been authenticated by either a notary public or a bank manager.

[67] As the registered agent, ICAZA is the repository of Court fees and processes for Coffee Commodities. The written resolutions for Coffee Commodities are sent to ICAZA for implementation. Ms. Garcia stated that on receiving the instructions, they checked with their professional client of record, Panama Advisory to ascertain whether the resolution dated 6 December 2001 could be acted upon. ICAZA subsequently requested confirmation from Panama Advisory that Ms. Collongues was indeed the sole shareholder. Panama

Advisory replied confirming that, according to its records, Ms. Collongues was the sole shareholder of Coffee Commodities.

[68] Some guidance as to the duties of a registered agent in these circumstances can be gleaned from the Anti-Money Laundering Code and Practice, 1999 and its Guidance Notes as well as the Code of Conduct of BVI Association of Registered Agents (which is in line with current international requirements for members of the industry). It should be noted that the Code of Conduct and the Guidance Notes are not mandatory. From these documents, it appears that the practice is that the registered agent, before acting on a resolution, must ensure that it is signed by a member or a director of the company. To do that, they can rely on their professional service client. Ms. Garcia deposed:

"We are the registered agents of the Company. We receive copies of writing [sic] resolutions and the writing [sic] resolutions have to be signed by the directors or the members of the company. When we saw our document, we confirmed according to our records with the person signing." ¹²

[69] Accordingly, I am of the view that in light of the fact that ICAZA made checks to ensure that the resolution was in fact signed by the member and also since the resolution is not invalidated by the lack of a certificate of authentication, ICAZA did not breach any duties by acting on the resolution. In my considered opinion, it acted as a prudent and reasonable registered agent would have acted.

No evidence of the removal of directors

[70] Mr. Neale submitted that ICAZA is in breach of Articles 71, 72, 73 and 74 of the Articles of Association by issuing the Certificate of Incumbency naming Ms. Collongues as sole director, notwithstanding the fact that there was no evidence that the previous directors had resigned or had been removed. In his closing submissions, he did not address this issue.

¹² See page 66 – 67 of transcript of trial proceedings dated 19 July 2006

[71] In response to this submission, Mr. Dennis referred to Ms. Garcia's witness statement. In her witness statement, she disclosed that before the Certificate of Incumbency was issued ICAZA had the benefit of the following resolutions:

1. the original resolution dated December 6, 2001, removing the Claimants and Mr. Alexey Khomyakov as directors of the Company and re-appointing Ms. Collongues as sole director;
2. correspondence from its professional service client of record (by whom it had been instructed to incorporate the Company in the first place, and on whose instructions it had also appointed Ms. Collongues as its first director) confirming that Ms. Collongues was indeed the sole shareholder of the Company; and
3. most importantly, legalized and apostilled copies of the relevant bearer share certificates, provided to it by the Attorney of the bearer, acting on her behalf.

[72] Articles 71, 72, 73 and 74 state:

1. Each director shall hold office for the term, if any, fixed by resolution of the members or until his earlier death, resignation or removal.
2. A director may be removed from office, with or without cause, by a resolution of members.
3. A director may resign his office by giving written notice of his resignation to the Company and the resignation shall have effect from the date the notice is received by the Company or from such later date as may be specified in the notice.
4. A vacancy in the Board of Directors may be filled by a resolution of members or a resolution of a majority of the remaining directors.

[73] It is clear from the articles that a director can be removed from office by resolution of the members of the Company. Two bearer share certificates were issued in respect of Coffee Commodities. They were issued to Ms. Collongues. The bearer(s) of those certificates could by resolution remove the directors as he/ they would be the only shareholder(s). Ms. Collongues was confirmed to be the bearer of the two bearer share certificates and therefore, from the information ICAZA had at the time, the only shareholder of the company (ICAZA was not aware of the Claimants' claim that Ms. Collongues had the bearer shares in trust for them).¹³ The resolution dated 6 December 2001 clearly removed the Claimants and Mr. Khomyakov as directors before appointing Ms. Collongues as director. In light of the foregoing, the argument advanced by Mr. Neale is wholly untenable.

Knowledge of the dispute

[74] Mr. Neale submitted that the evidence clearly establishes that ICAZA made no enquiries of the parties to the dispute, neither did they follow up with their client of record to obtain particulars of the dispute although they were of the view that this was important to do in order to ensure that the implementation of the resolution was not inconsistent with the dispute. According to Mr. Neale, the implementation of the resolution was actually inconsistent with the dispute, since the dispute was about control and ownership of Coffee Commodities. He next submitted that both the documentary and oral evidence of Ms. Garcia establish clearly that ICAZA was aware of the dispute. He further argued that once this is accepted then how ICAZA became aware of the dispute is of no consequence. What is important is the action of ICAZA upon becoming aware of the dispute.

[75] Mr. Dennis argued that based on the evidence, ICAZA cannot be said to have been aware of any dispute between Ms. Collongues and the Claimants regarding the ownership of the bearer shares of Coffee Commodities. No notice of any claim was supplied to it by anyone and no notice of any dispute concerning the ownership of the shares was given to it by its professional service client of record or by anyone else at all. According to Mr. Dennis, the opposite is true: the status of Ms. Collongues' as sole shareholder of Coffee Commodities

¹³ See paragraphs 74 to 83 of this judgment.

was unequivocally confirmed by Panama Advisory, ICAZA's professional service client of record, and only then and upon production of the legalized and apostilled copies of the certificates by Ms. Collongues, did ICAZA proceed to act upon her instructions and give effect to the resolution.

[76] It is accepted that ICAZA was aware that Coffee Commodities was involved in litigation but was not aware of the nature of the litigation. I agree with Mr. Neale that once ICAZA was aware of the litigation, it is irrelevant how they became aware of it. What is important is the action of ICAZA after receiving the information. Did ICAZA act as a prudent registered agent would have acted?

[77] It is not disputed that ICAZA made enquiries of Panama Advisory about the nature of the dispute. The response from Panama Advisory was:

"Instructions from FIDEPAR did not say not to proceed (annexed fax in French) only as mentioned in my fax of 3 January."

[78] Subsequently, ICAZA sent an email to Panama Advisory asking for confirmation that Ms. Collongues is sole shareholder and information on the nature of the litigation. Panama Advisory responded, it confirmed that Ms. Collongues was the sole shareholder of Coffee Commodities but gave no further information as to the nature of the litigation. On 8 January 2002, Panama Advisory instructed ICAZA to proceed with Ms. Collongues' instructions.

[79] It is accepted that the registered agent of an IBC has a duty to ensure that there is no litigation in regards to the ownership of the shares before they act on any resolution of the company. ICAZA recognized this duty and as such made enquiries about the nature of the litigation from Panama Advisory. Under cross-examination, Ms. Garcia said:

"Panama Advisory is their professional service client. ICAZA relies on Panama Advisory for instructions, for the purposes of due diligence that they need to comply with anti-money laundering practice. She also said that Panama Advisory

is the one that made the contract and has on record who is the beneficial owner(s) of the Company".¹⁴

[80] In answers to questions posed by Mrs. Small-Davis, Ms. Garcia stated that it is common practice for all registered agent to have professional service client. She said it is permitted by legislation specifically the Anti-money Laundering Code of Practice and the general guidelines that registered agent have to follow. She also stated that it is correct and acceptable for ICAZA to rely on their professional client's due diligence and that it is general practice for all registered agents to have professional service clients on whom they rely for due diligence. According to Ms. Garcia, Panama Advisory have their own due diligence and "know your client" procedures.¹⁵ Before I proceed any further, I categorically state that I accept the evidence of Ms. Garcia as truthful and a correct elucidation of the law. I also accept her evidence that registered agents are allowed to depend on their professional service clients for due diligence.

[81] Mr. Neale submitted that ICAZA was negligent. The Learned Author of Charlesworth on Negligence defines Negligence as:

"a breach of duty to take care, imposed by common or statute law" and

"the failure to use the requisite amount of care required by the law in the case where a duty to use care exists"

[82] Mr. Dennis submitted that ICAZA acted prudently, reasonably and with due care and skill, having regard to the instructions received from its professional service client of record. ICAZA received the confirmation that Ms. Collongues was the sole shareholder of Coffee Commodities and in another email, Panama Advisory instructed that they can act on the resolution. Therefore, ICAZA was entitled to proceed on the basis that if the litigation had any relevance to the question of ownership of shares, Panama Advisory – its professional service client of record - would have so advised.

¹⁴ See pages 65 and 66 of Transcript of Trial Proceedings dated 19 July 2006.

¹⁵ See *ibid* pages 89 – 90

[83] I agree with Mr. Dennis that ICAZA acted as a prudent and reasonable registered agent would have acted. ICAZA was told that Coffee Commodities was in litigation and it repeatedly requested from their professional service client as to the nature of the litigation. Its professional service client confirmed that Ms. Collongues was the sole shareholder and told ICAZA to go ahead. It appears that Panama Advisory may have been negligent because indeed, the litigation concerned the ownership of the bearer share certificates. However, ICAZA acted as a prudent and reasonable registered agent would have acted in the circumstances since its action depended on the due diligence of its professional service client.

Damages

[84] The Claimants claim damages against Ms. Collongues and ICAZA. Given my findings, the Claimants are entitled to damages against Ms. Collongues for breach of trust/contract. Damages will have to be assessed.

[85] In respect of ICAZA, this is now an irrelevant issue as I have found that ICAZA was not negligent in acting upon the 6 December 2001 resolution of Ms. Collongues. Further, ICAZA did not breach its duty as the registered agent.

Conclusion

[86] In the premises, this Court holds as follows:

1. The current directors of Coffee Commodities are the Claimants.
2. Ms. Collongues held the bearer share certificates in trust for the Claimants and consequently, she must return them within fourteen (14) days hereof.
3. Ms. Collongues, in her dealings with Coffee Commodities acted as an agent of the Claimants.
4. The resolution passed on behalf of Ms. Collongues on 6 December 2001 removing the Claimants as Directors of Coffee Commodities was not a valid resolution.

5. The Certificate of Incumbency issued by ICAZA on 7 February 2003 naming Ms. Collongues as the sole director of Coffee Commodities was not an accurate representation of the corporate structure of Coffee Commodities at the relevant time.
6. ICAZA was not negligent in acting upon the 6 December 2001 resolution and therefore, not liable in damages to the Claimants.

The Order

[87] The following Order flows from the conclusion I have arrived at:

1. Ms. Collongues shall return the two bearer share certificates, Nos. 1 and 2 to the Claimants within fourteen (14) days hereof.
2. An injunction is granted restraining Mrs. Collongues from holding herself out as a director or shareholder of Coffee Commodities.
3. ICAZA do rectify the Register of the Directors of Coffee Commodities to reflect that the Claimants are the current owners of the said Company.
4. ICAZA do issue a new Certificate of Incumbency to reflect that the Claimants are the current directors of Coffee Commodities.
5. Ms. Collongues is to provide an account to the Claimants of all assets which is or may have come into the possession of Coffee Commodities.
6. Ms. Collongues is liable in damages to the Claimants; such damages to be assessed.
7. Ms. Collongues do pay the costs of the action in the sum of \$14,000 to the Claimants.

8. The Claimants do pay costs to ICAZA in the sum of \$14,000. The sum of \$14,000 paid into court by the Claimants on 23 February 2006 by way of security for ICAZA's costs be paid out of court to ICAZA's solicitors for ICAZA's account.

Indra Hariprashad-Charles

High Court Judge