TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2007/001

BETWEEN:

ELENA COLLONGUES

Appellant

and

[1] ANDREW LYCH
[2] OLGA MIRIMSKAYA

Respondents

[1] COFFEE COMMODITIES LTD.
[2] ICAZA, GONZALEZ-RUIZ & ALEMAN (BVI) LIMITED

Defendants

Before:

The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal
The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag.]

Appearances:

Mrs. Tana'ania Small-Davis of Farara Kerins for the Appellant
Mr. Terrence Neale of MCW Todman & Co. for the Respondents

2007: September 25;
2008: July 14.

Civil Appeal – Company Law – findings of fact – incorporation - ownership of company and bearer shares – agency – credibility of witnesses – whether the burden of proof was discharged by the respondents – no case submission and shifting of tactical burden to appellant

The appellant was appointed by ICAZA (a BVI company providing registered agent services for the formation of International Business Companies), as the sole director and officer of Coffee Commodities Ltd. The dispute surrounded the ownership of Coffee Commodities and the two bearer share certificates. The respondents argued that the appellant acted as their agent and that the incorporation of Coffee Commodities was on their instructions and that the appellant held the

two bearer share certificates on trust for them knowing that they were the beneficial owners. The appellant denied that she acted as an agent for the respondents and contends that she is the beneficial and legal owner of Coffee Commodities and the bearer shares. At the trial after the respondents had adduced their evidence and closed their case the appellant for want of a Russian or French Interpreter opted to make a no case submission while electing to call no evidence. There was unchallenged documentary evidence in which the appellant had previously admitted that she acted as agent for the second respondent and her husband in the incorporation and dealings with Coffee Commodities. The trial judge found that the appellant acted as agent of the respondent for the incorporation of Coffee Commodities and its transactions; that the appellant held the bearer share certificates in trust for the respondents and should return them to the respondents within 14 days. On appeal the appellant challenged the trial judge's findings of fact concerning the appellant's role in the incorporation of and dealings with Coffee Commodities; and the credibility of the respondents and their witness who gave conflicting evidence. The appellant further contended in grounds (b) and (c) that the trial judge's statements (b) that the appellant did not produce any compelling evidence to support her claim; and (c) that the appellant chose not to give evidence on her own behalf; demonstrated that the trial judge had wrongly shifted the burden of proof to the appellant.

Held: dismissing the appeal and awarding costs to the respondents in the sum of $9,333.00 being two thirds of the costs below pursuant to the CPR 65 (13) (b).

1. The fact that a witness has made previous inconsistent statements and given conflicting evidence on oath does not warrant the rejection of the evidence and the trial judge as a judge of the fact had to decide whether the witness had been discredited and to what extent.

2. The facts revealed by the appellant in the tendered documentary evidence tend to render more probable the truth of the respondents' testimony on the material points in the case though they may have given inconsistent evidence; and the learned judge's findings based on the credibility of the witness were also supported by cogent incontrovertible documentary evidence which cannot be overlooked.

3. The trial judge was entitled to comment on the appellant's failure to adduce evidence in circumstances where she opted to make a no case submission and elected to call no evidence, and the reason for the appellant's election would have no possible relevance. The repeated statements of the judge in grounds (b) and (c) were not a shifting of the burden of proof but recognition that the tactical burden had not been satisfied by the appellant who had opted to run the risk of having the respondents' evidence accepted by the court.

Benham Limited v Kythira Investments Ltd. [2003] EWCA Civ. 1794 applied.
R v Teale (1809) 11 East 307 at p. 311 applied.
R v Harris (1927) 20 Cr. App. R. 144 cited.

JUDGMENT

[1] **EDWARDS, J.A. [Ag.]:** Coffee Commodities Ltd. (Coffee Commodities) was incorporated in the British Virgin Islands (BVI) under the **International Business Companies Act 1984 (Cap 291) (I.B.C Act)** on the 2nd September 1999. The incorporation was done by ICAZA, Gonzalez-Ruiz & Aleman (BVI) Limited (ICAZA) on the indirect instructions of the appellant Ms Elena Collongues. ICAZA is a company based in the BVI, and is licensed to provide registered agent services including but not limited to the formation of International Business Companies.

[2] The appellant was appointed by ICAZA (in its capacity as subscriber to the Memorandum and Articles of Association) as the sole director and officer of Coffee Commodities on the 13th September 1999. Coffee Commodities has an authorised share capital of US $50,000 divided into 50,000 shares of $1.00 each. The relevant fees for the incorporation were paid and on the 15th September 1999 the appellant issued and held the bearer share certificates Nos. 1 and 2. Each certificate represents 25,000 shares in Coffee Commodities and together they are all of Coffee Commodities' authorized and issued shares.

[3] Article 11 of **The I. B.C. Act** Articles of Association of Coffee Commodities Ltd. (the Articles) states that:

> "Bearer share certificates shall be under the Seal [of the Company] and shall state that the bearer is entitled to the shares therein specified..."

Article 16 states:

> "The bearer of a bearer share certificate shall for all purposes be deemed to be the owner of the shares comprised in such certificate and in no circumstances shall the Company or the Chairman of any meeting or members or the Company's registrar or any director or officer of the Company or any authorised person be obliged to inquire into the circumstances whereby a bearer share certificate came into the hands of the bearer thereof, or to question the validity or authenticity of any action taken by the bearer of a bearer share certificate whose signature has been authenticated as provided herein."

[4] Article 88 of the Articles states that:

> "If the company shall have only one director...such sole director shall have full power to represent and act for the Company in all matters as are not by the Act (Cap 291) or the Memorandum or these Articles required to be exercised by the

members of the company and in lieu of minutes of a meeting shall record in writing and sign a note or memorandum of all matters requiring a resolution of directors. Such a note or memorandum shall constitute sufficient evidence of such resolution for all purposes."

A member of the company is defined by Article 1 to mean:

"A person who holds shares in the company."

[5] The ownership of Coffee Commodities and the 2 bearer share certificates is at the centre of the dispute between the parties to the present appeal. The two respondents Mr. Andrey Lych and Ms. Olga Mirimskaya were the claimants in the action below which was commenced in early 2004. They contended that at all material times the appellant/second defendant acted as their agent, that Coffee Commodities was incorporated on their instructions, that the 2 bearer share certificates were issued upon their instructions, and that the appellant holds these bearer share certificates on trust for the respondents knowing that the respondents are the beneficial owners. There was no written agreement between the appellant and the respondents that establishes any trust, agency or employer/employee relationship.

[6] The appellant denied that she incorporated Coffee Commodities as agent for the respondents. She pleaded that she is the beneficial and legal owner of Coffee Commodities and the bearer shares and put the respondents to strict proof.

[7] At the trial lasting 3 days, three witnesses testified for the respondent's case through a Russian interpreter Mr. Dolberg who had been previously appointed by the court on an application by the claimants/respondents. The order was for Mr. Dolberg to interpret for the respondents and their witnesses at the trial, and for the respondents to pay Mr. Dolberg. Apparently through some misunderstanding, the appellant and her counsel omitted to make similar arrangements for the appellant who spoke Russian and French, but very little English.

[8] On the second day of trial, the respondents and their counsel agreed with counsel for the

appellant that the appellant could use and remunerate Mr. Dolberg to interpret the appellant's testimony.

[9] Proverbially, the rug was pulled from under the appellant's feet on the final day of trial when the respondents withdrew this approval. After the case for ICAZA was presented, as a result of her inability to find an interpreter at the last minute, or to give her testimony in English, the respondents' counsel indicated that they were amenable to any application for adjournment that the appellant's counsel might have been contemplating. The appellant's counsel informed the court of their dilemma, opted to make a no case submission and elected to call no evidence.

[10] The learned trial judge Hariprashad-Charles J in her judgment delivered on the 28th November 2006 found among other things that the current directors of Coffee Commodities are the respondents; that the appellant acted as agent of the respondents and held the bearer share certificates in trust for them; and that the appellant must return these bearer share certificates to the respondents within 14 days.

[11] The appellant has appealed against this decision. The appellant has challenged the learned judge's findings of fact relating to the nature of the appellant's role in the incorporation of and dealings with Coffee Commodities; and findings of law that the appellant was the agent of the respondents, and holds the bearer share certificates on trust for the respondents. There are 11 grounds of appeal. Some of these grounds criticize the learned judge's approach to the resolution of conflicts in the evidence, her assessment evaluation and interpretation of the respondents' testimony and documentary evidence, and her comments on the appellant's failure to testify. Other grounds urge that the trial judge took into account irrelevant documentary evidence and wrongly shifted the burden of proof to the appellant.

Appeal on Findings of Fact

[12] Considering that this appeal is essentially an appeal on findings of fact, it is useful to

review the approach to be adopted when an appellate court is asked to reverse a finding of fact. Counsel for the appellant relied on several cases including**: Industrial Chemical Co (Jamaica) Ltd. v Ellis; Texaco Trinidad v Oilfield Workers T.U.**; **McLaren v Caldwell's Paper Mill Company Limited**; **Shoucair v Reid**; **Weekes v Advocate Co Ltd**; **Jagan v Ganpat and Others**; while counsel for the respondents relied on **Quillen and Others v Harney, Westwood & Riegels (No.2)**; and **Watt or Thomas v Thomas.**

[13] Section 31(1)(b) of the **West Indies Associated States Supreme Court (Virgin Islands) Act Cap 80** prescribes that on the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have the power to draw inferences of fact. These authorities referred to by counsel discuss the principles on which the court will exercise this power.

[14] In the well known case of **Watt** which is referred to in most of the other cases cited, Lord Thankerton stated that:

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. II. The appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."[1]

[15] In the same case Lord Macmillan summed it up in the following way:

> "The appellate court has before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case. But it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion, but it is not available to the

1 At pages 487 to 488

> appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, ...then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."[2]

[16] The importance of the part played by the advantages which the trial judge derives from seeing and hearing the witnesses:

> "...varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."[3]

[17] Where the trial judge's decision on an issue of fact was an inference drawn from primary facts and depended on the evidentiary value that the judge gave to witnesses' evidence and not on their credibility and demeanour, the appellate court is just as well placed as the trial judge to determine the proper inference to be drawn and is entitled to form its own opinion.[4]

[18] It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witnesses, particularly when the judge has referred favourably to the demeanour of the witness concerned.[5]

[19] The essential question therefore which the Court of Appeal should consider is

> "whether there was evidence before the trial judge from which ...[she] could properly have reached the conclusion that ...[she] did or whether, on evidence the reliability of which it was for ...[her] to assess, ...[she] was plainly wrong."[6]

A close scrutiny of the evidence which informed the learned judge's judgment must be

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2 Per Lord Macmillan at pages 490 to 491 in **Watt v Thomas** supra
3 **Whitehouse v Jordan** [1981] 1 All E.R. 269: Per Lord Harwich at page 286
4 Per Lord Wilberforce at page 272 para h to page 273 para j: **Whitehouse v Jordan** supra
5 Per Lord Milligen in **McLaren v Caldwell** supra at footnote 3: page 163

carried out in these circumstances.

The Weight of the Evidence

[20] Ground (a) contends that the learned judge erred in certain findings particularised at paragraph 2 in the notice of appeal, and that these findings are against the weight of the evidence and wholly insupportable when one looks at the evidence elicited from the respondents' witnesses in cross-examination. These witnesses were Ms. Mirimskaya, Mr. Lych and Ms. Natalia Vlassova. Before considering the impugned findings of the learned trial judge it is convenient to first consider the circumstances surrounding the incorporation of the company, particularly the evidence disclosing the nature of the parties' relationship and the positions of the appellant and the respondents with regard to each other, at the time when the agency relationship was allegedly created and existing.

The Evidence

[21] Ms. Mirimskaya deposed in her witness statement that she is founder of OJSC Rusky Product (**Rusprod**) in Moscow, Russia and that Mr. Andrew Lych and she co-own Rusprod which is a leading supplier of coffee in Russia. The Bond Prospectus for **Russian Product Open Joint Stock Company** dated 12th March 2003 which was put in evidence by the appellant disclosed that the total number of shareholders in this company was 2,064; and Russian Investors Open Joint Stock Company was the nominee shareholder with 83.6577% of the voting shares. Ms. Mirimskaya is described as the "Chair of the Board of Directors" and Mr. Lych as the "General Director" in this document. Under cross-examination Ms. Mirimskaya insisted that she owned the majority of the shares in Rusprod although the bond prospectus did not confirm this. Rusprod imports most of its coffee beans from various suppliers overseas and processes the coffee beans at its production facilities in Moscow. She stated in her evidence that she first met the appellant socially in 1995 at the country house of a French entrepreneur who is a business partner of Ms. Mirimskaya's wealthy husband Mr. Alexey Golubovich. Ms. Mirimskaya subsequently met the appellant 6 months later in Paris, and learnt from talking

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6 Per Lord Oliver of Aylmerton in **Industrial Chemicals v Ellis** supra at page 310

to the appellant that the appellant's financial position was quite precarious.

[22] In sympathy, Ms. Mirimskaya convinced her husband to employ the appellant as a nominal director of companies in which he had an interest. There was a written employment agreement between the appellant and Mr. Golubovich's company Sequential Holdings Russian Investors Ltd. (**Sequential**). In her defence filed on 6th May, 2005 the appellant pleaded that this employment agreement was a fictitious and invalid document. At the trial this employment agreement was ruled to be irrelevant and inadmissible by the court. However the appellant herself in several other court proceedings in other jurisdictions revealed some of the terms of this employment agreement. The 5 judgments of the court in those proceedings which were admitted in evidence by Hariprashad-Charles J, provide significant facts about this employment agreement, which the appellant herself avowed, and which was said to have begun on the 23rd December 1996 and expired on the 23rd December 2001. These 5 judgments also disclose other revelations from the appellant which are relevant to the issues in the present case.

[23] The appellant owned a company registered as Alliance Properties S.A. (**Alliance)** in Panama. Documentary evidence disclosed that Alliance was a dormant company at the time the appellant met Ms. Mirimskaya. The appellant re-activated Alliance upon gaining employment with Sequential, and she carried on her business activities from her apartment in Paris where she lived. Prior to the incorporation of Coffee Commodities, the respondents had used Alliance for an undisclosed period to import coffee beans for Rusprod's coffee production facilities. Ms. Mirimskaya testified that Alliance services were utilised by Rusprod only once, which may have involved several different transactions. Through the appellant's company Alliance, the appellant acted as agent of Rusprod, performing administrative and secretarial tasks for the respondents' coffee business including the making of contracts with world coffee traders at prices fixed by Rusprod, warehousing, and arranging for the transport of coffee purchased from suppliers worldwide. The income derived from selling coffee through Alliance was held in trust in Alliance's bank account for Rusprod's group of companies. The appellant was

remunerated for her services in accordance with the terms of her employment agreement with Sequential. Under cross-examination Ms. Mirimskaya said that there was no written agency or employment agreement between Alliance and Rusporod, or Alliance and herself, or the appellant and herself, but what they have is the fact that the appellant drew a monthly salary which was agreed on with Rusprod's financial director.

[24] Ms. Mirimskaya explained under cross-examination that when the volumes of Rusprod's coffee production started to grow, it became necessary to do business with western companies and finance these larger volumes. After the 1998 crisis the western companies refused to give credit to Russia. This was the reason why she decided to incorporate Coffee Commodities she said, with the idea that this Company would assist in Rusprod's trading and importation of coffee from different parts of the world. Coffee Commodities would act as intermediary between Rusprod and its coffee suppliers from outside of Russia. This would reduce costs and permit the respondents to better structure their coffee business operations.

[25] Ms. Mirimskaya testified and documentary evidence shows that in October 1998 the French authorities commenced tax evasion investigations against the appellant in Paris; and during a search and seizure procedure carried out at her residence, the tax authorities seized various documents relating to the appellant's business activities. As a result, the fiscal obligations of Alliance in France and other companies that the appellant had worked for (including Rusprod) came under the tax authority's scrutiny.

[26] While the fiscal investigations were ongoing in France, Ms. Mirimskaya said that in late 1999 Mr. Lych and herself instructed the appellant to incorporate Coffee Commodities. She said under cross-examination that she did not have lawyers at the time of incorporating Coffee Commodities. She also said that she probably gave the instructions for the incorporation through her lawyers, and she also had a telephone conversation with the appellant about it. She later stated that she did not discuss the incorporation with her lawyers; she simply informed them of the company's incorporation. Ms. Mirimskaya deposed in her witness statement that the invoice from Fidepar S.A dated 22nd November 1999 for the incorporation of Coffee Commodities and other companies were sent for

payment to Mr. Oustiougov and duly paid. Fidepar S.A. is a company based in Geneva, Switzerland which specializes in offshore incorporation services, and the appellant used the services of Fidepar for the incorporation of Coffee Commodities. Mr. Oustiougou was the chief legal adviser for her husband's company Russian Investor's Group (**RIG**). Ms. Mirimskaya admitted that she never paid anything for Coffee Commodities incorporation or corporate maintenance fees. Neither did she give instructions about payment. She deposed that Coffee Commodities was but one of a number of companies which the respondents and Mr. Alexey Golubovich instructed the appellant to incorporate on their behalf at the time.

[27] It turned out at the trial that Mr. Lych knew nothing about the instructions for the incorporation and business operation of Coffee Commodities. Mr. Lych contradicted the evidence in his witness statement which was similar to Ms. Mirimskaya's. In cross-examination he denied giving instructions to the appellant to incorporate Coffee Commodities. He did not recall ever having any conversation with the appellant about the incorporation. He did not know the difference between bearer shares and registered shares, what are bearer shares, or who decided that bearer shares were to be issued.

[28] Ms. Mirimskaya testified that she had other companies that issued bearer shares. She did not know who took the decision for Coffee Commodities to issue bearer shares. She said that she was aware of the importance of keeping bearer share certificates safe.

[29] Upon incorporating Coffee Commodities with the services of Fidepar and ICAZA, the appellant kept the 2 bearer share certificates. In her witness statement Ms. Mirimskaya said that the appellant was accountable to Rusprod for the trading and other business activities of Coffee Commodities. Contracts between Rusprod and Coffee Commodities were made at Rusprod's office. The appellant kept Rusprod's commercial department informed, particularly Rusprod's manager, Mr. Khomyakov, and Ms. Natalie Vlassova who was at the material times prior to December 2003 the specialist of Rusprod's department for financial planning, budgeting and payments processing. Ms. Vlassova maintained contact with the financial and credit institutions concerning the financial position of

Rusprod and other entities under common management including Coffee Commodities.

[30] The appellant was required to submit written financial reports of the financial affairs of Coffee Commodities to Ms. Vlassova which she did for the period 12th December 1999 to the 29th March 2001. Copies of some of these reports, advisories, and relevant faxed correspondence were put in evidence. Ms. Vlassova explained that one of the documents shows that a monthly salary of $4,000.00 on three occasions was withdrawn directly from the Coffee Commodities bank account by the appellant. Ms. Mirimskaya said under cross-examination that the appellant was first employed by Sequential, and then she was employed by Coffee Commodities. She also said that there was no need for the respondents to make any additional employment agreement with the appellant since the appellant was appointed to the jobs with Coffee Commodities as director and company secretary, and was drawing a salary.

[31] A curious feature of the relationship between Coffee Commodities and Rusprod was highlighted by learned counsel Mrs. Small-Davis who cross-examined Ms. Mirimskaya and Ms. Vlassova about paragraph 8 in the terms of contract between Coffee Commodities and Rusprod dated 29th May 2000. In this contract Rusprod is referred to as the Buyers and Coffee Commodities as the Sellers of green coffee beans. Paragraph 8 states the liability of the parties to be as follows:

> "In case of the inferior quality of the delivered goods to the sample, the Buyers are entitled to reject low-grade goods with complete compensation of their cost by the Sellers or demand them to reduce the price, besides this the Seller is to pay the Buyer 10% penalty of the price of the delivered goods of the inferior quality."

[32] Despite this liability clause Ms. Mirimskaya said under cross examination:

> "Coffee Commodities had no assets. It would not be liable for anything, so we always had the supplier guarantee, and that supplier guarantee was addressed to Coffee Commodities."

As the evidence unfolded, it turned out that Coffee Commodities had assets over $4 million in its bank account to lend to another company.

[33] Another startling bit of evidence for Mrs. Small-Davis, was the length of time that it took Ms. Mirimskaya to claim the US$1 million that was sitting in the bank account of Alliance (which Ms. Mirimskaya stated was her personal money and then she later said that it belonged to Rusprod) while the tax evasion investigations were going on in France. Ms. Mirimskaya's answers under probing cross-examination were that the transfer of the US$1 million to Coffee Commodities account took place in September 1999; then she said it was about 2 weeks after Coffee Commodities was registered; then she changed this and said it was 9 to 10 months from the time that Alliance was in tax problems; and finally she said the money remained in Alliance account perhaps no more than 3 days. The documentary evidence disclosed that the $1million was transferred from the Alliance account on the 13th December, 1999.

[34] It was suggested to Ms. Mirimskaya that her evidence that she kept $1 million in Alliance's account whilst Elena Collongues and Alliance, among others including Rusprod, were being investigated is beyond belief. Ms. Mirimskaya answered: "It's difficult...all the documents showed that this was how it was and we had very good reasons to arrange things in that way...If one follows this logic and if one believes that that million dollars, in fact, belonged to Madame Collongues, then she should have transferred that money to French authorities rather than to the Coffee Commodities."

[35] The excerpt from the minutes of the Paris Court Registry for the proceedings in Minister Public vs. Popova (the appellant's maiden name is Popova) for the offence of fraudulent omission to submit and pay taxes by concealment of monies - tax evasion, incorrect or fictitious accounting entries, before the Paris Tribunal de Grande Instance 11th Chamber, Case No. 0212392517: Decision of May 30, 2003 was admitted in evidence. This document discloses that Elena Collongues nee Popova stated in a fax dated February 15, 2000 that the company Alliance Properties had no activity in France and that she was not the representative of this company. During the month of March 2000 the appellant appeared before the tax inspector with her counsel without accounting documents. The unpaid corporation tax was assessed for 1997 as 231,219 euros and for 1998 as 141,225

euros and Alliance was notified about the assessment on the 21st April 2000. The appellant's counsel in May 2000 disputed this assessment on the ground that the appellant was not Alliance's legal representative in France.

[36] The documentary evidence also reveals that at subsequent interviews with the police and during the hearings the appellant declared the following:

(a) She had created the Company Alliance Properties, a company that she had purchased in 1991...from a trust company in Geneva, and the registered office of the company being in Panama.

(b) The company's initial activity was the decoration of apartments and offices, an activity that took place mainly in Russia, then after a period of inactivity between 1992 and 1996, Alliance started up again after meeting with a couple called Golouvitch-Milimska, who offered to find suppliers of raw materials in the food sector for their company located in Russia. This was how she decided to domicile her company with SOFRADOM in France. She held all the share capital as Alliance had never been sold to the couple Golouvitch-Milimska.

(c) She did not deny having been the manager and only person responsible for Alliance, whilst asserting at the same time that she acted under the orders of her principals, the couple Golouvitch-Milimska both for the signature of contracts, for finding purchasers and for banking transactions. She was working for them as an employee according to the terms of contract of employment dated December 23, 1996 between herself and a company called Sequential Holdings Investors Limited, for a salary of $3000, in addition to $4500 expense allowance. She stated that the couple Golouvitch - Milimska was responsible for the accounts of Alliance.

(d) Most of the trading operations were conducted outside of France, that everything was prepared in Russia, and that Alliance was no more than an intermediary

between the buyer and the seller, and as such, not liable to tax in France.

[37] Ms. Mirimskaya deposed further that in September 2000 Mr. Lych and herself decided that the management structure of Coffee Commodities should reflect the true state of its corporate affairs since the company was now beginning to do significant amounts of trading. The respondents therefore instructed the appellant to resign as sole director of Coffee Commodities, appoint the respondents along with Mr. Alexei Khomyakov as directors in her place, remove herself as signatory and add the 3 directors as signatories to Coffee Commodities' bank account and other corporate records. The appellant complied with their instructions and the appropriate resolution dated 20th September 2000 reflected the change. The appellant was also appointed corporate secretary of Coffee Commodities. Ms. Mirimskaya admitted that she never signed a cheque, wrote a letter or gave a signed guarantee on behalf of Coffee Commodities. Under cross-examination the witness contradicted herself, by saying that she did not know who gave instructions to the appellant to resign as director in 2000.

[38] It was put to Ms. Mirimskaya that the appellant appointed her as director of Coffee Commodities because the appellant trusted her as a friend, and allowed her to hold the directorship in Coffee Commodities which was the appellant's company so as to avoid some of the tax investigation that was continuing against the appellant. The witness retorted:

> "The fact that we had a good relationship would not have made for this, because two other people were involved in this appointment ... as ...showed here in this document, and her relations with these people *were bad, so that good relations could not have been a reason..."*

Ms. Mirimskaya deposed that the respondents had authorised the appellant to incorporate Coffee Commodities as their agent since she had been acting in a similar capacity for them and Mr. Golobovich for the previous years, and they never anticipated any problems with that arrangement. It was a convenient arrangement for them since the appellant was based in France, and in a much better position than them to perform corporate actions, such as the opening of the bank account in Switzerland and the execution of various

agreements and documents relating to the purchase of coffee.

[39] No instructions were given to the appellant to hand over the 2 bearer share certificates. Ms. Mirimskaya described this as an omission on their part. Under cross-examination Ms Mirimskaya said that she had seen the bearer share certificates probably in late 1999 while visiting the appellant in Paris at her home. The appellant said then that she would feel more confident if the lawyers kept these certificates, and the appellant and herself agreed that the appellant was to hand over the bearer share certificates to Mr. Oustigov the lawyer in Moscow. The witness explained that she never took the certificates from the appellant because she was leaving Paris for somewhere other than Moscow and she did not want to be carrying them around. She said she never checked later to see whether Mr. Oustigov had got the certificates. It was only when she was subsequently preparing for a hearing in Switzerland (concerning Coffee Commodities) in 2003 that she discovered that the certificates could not be located . When confronted with a documentary exhibit from Fidepar S.A. in which it was stated that Ms. Mirimskaya's lawyer had written to Fidepar saying that Ms. Mirimskaya had the share certificates in her possession, the witness vacillated and eventually recalled saying that she is the beneficial owner of the company, and did not recall what exactly if anything she had said about the bearer share certificates to her lawyer.

[40] Upon the restructuring of the management and corporate affairs of Coffee Commodities, ICAZA issued a certificate of incumbency dated 19th December 2000 reflecting the changes. The respondents and the other new director of Coffee Commodities decided to reinvest some of Coffee Commodities profits in Rusprod, and based on fiscal advice, they decided that the loans would not be direct, but would be made through Russian Investors Group Limited (**RIG),** a company registered in the Bahamas and beneficially owned by Mr. Alexey Golubovitch husband of Ms. Mirimskaya.

[41] There were four such loans that Coffee Commodities made to RIG for Rusprod: US $400,000 on the 14th November 2000; US$1,200,000 on the 26th January 2001; US

$600,000 on the 7th February 2001; and US$1,990,000 on the 29th March 2001.

[42] Following French tax authorities investigations and assessment of the appellant's unpaid corporate taxes, the assessed amounts which were due for collection on the 31st March 2001 were not paid by the appellant. Ms. Mirimskaya testified that the appellant took the position that Mr. Golubovich and herself were responsible for her tax problems and the appellant 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.

[43] The appellant on the 16th July, 2001 made an application to the Tribunal of First Instance in Geneva, Switzerland where the assets and bank accounts of Mr. Golubovich and his offshore companies were. This application requested that the President of the Tribunal order the attachment/sequestration for an amount up to CHF 8,000,000, plus interest at 5% from the 16th July 2001 to the benefit of the appellant of all the assets, cash, stock and shares, financial instruments, bank accounts, precious metal, jewels or any other object of value, letters of credit, present or future receivables and any other assets of any given nature sitting on accounts, deposits, or vaults belonging to Mr. Alexei Golubovich deposited in his name, or aliases, under numbered accounts or contractual pseudonyms in the name of Alexey Golubovich or in the name of 19 named Companies including Alliance Properties (Panama) and Coffee Commodities Ltd. (BVI) but in reality belonging to the named**,** in the hands of the following banks: Bank LEU Geneva; Banque International de Commerce (BRED) Geneva; Banque Lombard Odier & Cie, Geneva.

[44] In this application the appellant through Maitre Vincent Solari her lawyer alleged the following as facts:

(a) Mr. Golubovich asked the appellant to appear as director of numerous offshore companies and she had various administrative tasks dedicated to her for the account of Mr. Golbovich who has his assets in Switzerland held through the shelter of offshore companies that he totally controls. The appellant ensured the

administrative follow-up of the companies with the support of Fidepar S.A. Geneva.

(b) The use of those companies is not justified by consideration linked to an economical activity but solely to allow Mr. Golubovich not to appear as the direct bearer of the accounts considered further.

(c) The mandate given to the appellant is thus extremely wide. The appellant was to appear as the director of the companies, receive the Swiss bank documents of Mr Golubovich, and organise certain payments; besides, the appellant had to perform all sorts of purchases for the account of the married couple Golubovich, plane tickets, hotel reservations, purchases of clothes and of jewels etc.

(d) The appellant implemented part of her activities from Switzerland where the married couple often stayed, and Mrs. Golubovich went to the Swiss banks where the assets of her husband were deposited.

(e) The appellant was paid in Switzerland and in order to give a formal appearance to this mandate Mr. Golubovich had made up an employment agreement in favour of the appellant. This agreement was concluded with the Cyprus company Sequential Holding Russian Investors Ltd. controlled by Mr. Golubovich, acting itself on behalf of the 19 named offshore companies including Alliance Properties S.A.(Panama) and Coffee Commodities Ltd. (BVI) which is given as annex of the said employment agreement.

(f) The appellant became the subject of a fiscal French probe by the end of 1998, upon which the French Treasury seized all of the banking documents the appellant was holding in conformity with her mandate. A tax reassessment resulted and the appellant became subject to a personal back taxation for an amount of FFRS 2,414,730 for years 1997 and 1998, but those taxations were only based on the accounts managed by the appellant for Mr. Golubovich.

Moreover, the French Treasury considered that Mrs. Elena Collongues-Popova was jointly and severally responsible for the taxes owed by Alexey Golubovich's companies, mainly Preval Capital Management, Alliance Properties and Russky Product. It appears that the total amount of the back taxation comes up to over FFRS.98, 000,000.

(g) The French fiscal administration has considered that Mrs. Elena Collongues-Popova was the apparent agent of those companies and therefore could be jointly and severally responsible for the amount above mentioned.

[45] It was also stated as a fact in this application that the fiscal debts are immediately payable, and that the appellant has tried to obtain the help from her principal in order to fact the claims from the French Fiscal Administration of which she is not responsible. That Mr. Golubovich has not made good his obligations and as a result she is obligated to make the application for an attachment/sequestration to protect her rights. She has received a summons to put in place guarantees in excess of FF.39,000,000. Maitre Solari submitted that the offshore companies listed within the present application (**including Coffee Commodities**) are totally under the power of Mr. Golubovich who is the sole shareholder, the beneficial owner and that he manages them through his consecutive agents.

[46] On the basis that article 402 of the relevant law in Switzerland states that the principal is in principle responsible for the damages suffered by his agent within the implementation of his mandate and the contention that the appellant's employment agreement confirms that she cannot be responsible for such damages, Maitre Solari apparently equated the appellants tax liability to damages, and concluded that Mr. Golubovich is directly responsible for the damages suffered by the appellant. The Tribunal made the requested order of sequestration on the 18th July 2001 in favour of the appellant.

[47] It is immediately obvious that some of the facts revealed by the appellant to the police and before the French Tribunal in relation to her company Alliance and the respondents'

company Rusprod, do not accord with the facts stated about Alliance and Rusprod by the appellant in her application for the attachment/sequestrian order against the assets of Mr. Golubovich and his offshore companies in Geneva, Switzerland on the 16th July 2001. Ms. Mirimskaya deposed that the sequestration proceedings were closed and were no longer before the court in Geneva because the appellant failed to comply with the court order for the payment of security for costs and a deposit on court fees.

[48] Prior to the 11th September 2000, apart from the appellant holding the bearer share certificates, the only documentary evidence showing that the appellant was the beneficial owner of Coffee Commodities was a "Form A" document from Banque Internationale de Commerce in Geneva, where Coffee Commodities had its bank account. This document is dated 25th July 2000 (at page 335 of the record). It had established that the beneficial owner's identify of the assets in the bank account of Coffee Commodities was Elena Collongues. However another "Form A" dated 11th September 2000 from the said bank (at page 336 of the record) later disclosed that the beneficial owner of the said bank account was Ms. Olga Mirimskaya. What seems quite clear therefore is that up to the 16th July 2001 whilst the appellant was holding the 2 bearer share certificates, and the respondents were registered as directors of Coffee Commodities, and whilst Ms. Mirimskaya was recorded as the beneficial owner of the assets in the bank account of Coffee Commodities, the appellant was acknowledging to the court in Geneva that she was only an agent and not the beneficial owner of Coffee Commodities.

[49] On the 10th August 2001, while she was still corporate secretary and manager for Coffee Commodities, the appellant executed an assignment agreement for Coffee Commodities in which the 4 loan agreements with RIG were assigned to Speyer Inc. a BVI corporation beneficially owned by Ludmilla Dementieva, a sister of Ms. Mirimskaya. Then on the 24th October 2001 the appellant wrote a letter to Banque Internationale de Commerce in Geneva, informing them in relation to the Coffee Commodities account there that "since no final agreement has been reached Mrs. Elena Collongues remains the beneficial owner of our Company as per the "Form A" signed at the opening of the account on the 25th July 2000. Consider the "Form A" signed on the 11th September 2000 as null and

void."

[50] On the 6th December 2001 the appellant who was still holding the bearer share certificates, prepared and signed a resolution which removed the directors who were the respondents and Mr. Khomyakov from office, without their knowledge or consent. The resolution also re-instated the appellant as sole director of Coffee Commodities. ICAZA amended the register of Coffee Commodities to reflect the change of directors upon receiving the original resolution of the appellant. Article 72 of the Articles of Coffee Commodities states that "A director may be removed from office, without cause, by a resolution of members." Article 13 states that "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…"

[51] Ms. Vlassova deposed that sometime in mid 2002, Ms. Mirimskaya and Mr. Lych instructed her to monitor the financial activities of Coffee Commodities, particularly the cash flow of the company and the frequency of the settlement of invoices issued to the company. The appellant was then still manager of Coffee Commodities, and she was responsible for the purchase of coffee on the world market and its transportation to Russia to the production facilities of Rusprod. Ms. Vlassova confirmed that Rusprod's managers regularly forwarded instructions to the appellant concerning the prices, volumes and grades of coffee to be purchased by Coffee Commodities and that this coffee would be subsequently delivered to Rusprod. Despite this monitoring, without the knowledge or consent of the respondents or Rusprod the appellant was able to instruct lawyers in Geneva to represent Coffee Commodities and obtain an attachment order on the assets of RIG on the basis of the 4 loans that where made from the profits of Coffee Commodities to RIG for Rusprod during the period 14th November 2000 to 29th March, 2001. The attachment order was obtained on the 21st November 2002.

[52] On the 28th November 2002 the appellant instructed ICAZA to restore Coffee Commodities to the Register of Companies since it had been struck off in 2002 for non payment of annual licence fees; and the company was restored as instructed.

[53] The subsequent claim made by RIG on the 9th December 2002 in opposition to the attachment order was dismissed by the Tribunal on the 5th March 2003 on the basis that the appellant was in physical possession of the bearer share certificates. The certificate of incumbency issued by ICAZA dated 7th February 2003 confirmed that the appellant was the Director and Secretary of Coffee Commodities as to this date. Although the Tribunal's decision was confirmed by the Appeal Court of Justice on the 10th September 2003, the Swiss Federal Supreme Court on the 7th October, 2005 dismissed the appellant's application to attach the assets of RIG.

[54] On the 8th May, 2003 Speyer Inc. obtained an order for sequestration against Coffee Commodities in the Swiss Courts on the ground that the Coffee Commodities assignment agreement of the 4 loan agreements with RIG, that were executed by the appellant in favour of Speyer on the 10th August 2001, was executed by the appellant as agent of Coffee Commodities. The matter was finally determined by the Swiss Federal Supreme Court on the 7th October 2005 in a decision which granted Speyer's application for a sequestration order against the assets of RIG in the amount of US $4million on the basis of the assignment agreement.

[55] On the 12th May 2003 the appellant on behalf of Coffee Commodities Limited filed a criminal complaint in the courts of Switzerland against Mr. Alexey Golubovich and the directors and shareholders of Speyer for forgery of documents and attempted fraud, alleging that the signature on the assignment agreement was forged to deceive the judicial authorities. The criminal complaint was tried and dismissed on the 24th October 2005.

Challenged Findings of facts

[56] The learned judge's statement at paragraph 5 of her judgment has been described in the notice of appeal as a finding of fact which is challenged. There the judge stated as a

salient fact that the details of the bank account of Coffee Commodities were amended on the 11th September 2000 to reflect the fact that Mrs. Mirimskaya and not Ms. Collongues was the beneficial owner of Coffee Commodities. Despite the witness statements of the respondents, the learned judge's statement at paragraph 5 is supported by the documentary evidence at page 336 of the record. This document is a Banque Internationale de Commerce "Form A" dated 11th September 2000, indicating that the beneficial owner of the Coffee Commodities' bank account is Mrs. Olga Mirimskaya.

[57] At paragraph 8 of the judgment the learned judge stated as a salient fact that "Ms. Collongues was of the view that as owner of Alliance, she was merely an agent and employee of Mr. Lych, Mrs. Mirimskaya and Mr. Golubovich." Also, at paragraph 52 the trial judge said that "Mrs. Collongues in her dealings with Coffee Commodities was acting on behalf of the Claimants." In connection with Mrs. Mirimskaya and Mr. Golubovich, the contention of Mrs. Small-Davis that this was an error in the factual findings is without merit in my view, having regard to what the appellant said about Mrs. Mirimskaya and Mr. Golubovich in her interviews with the police relating to the tax evasion proceedings, what she said during the court hearings in the said proceedings, and her assertions through her lawyer in her Application for Attachment/Sequestration against Mr. Golubovich. The documentary evidence relating to those proceedings do not disclose that the appellant stated that she was an agent or employee of Mr. Lych. It is therefore a matter of whether this finding is supported by other credible evidence.

[58] In assessing the credibility of the witnesses Hariprashad-Charles J found that although there were many inconsistencies in the evidence of Ms. Marimskaya, at the end of the day, she did not strike me as an incredible witness. In fact, she was candid and sincere in her evidence. Some of the inconsistencies are to be attributed to nuances which are so common when there is translation from one language to another. She also found Mr. Lych to be truthful, candid and a sincere witness, although his witness statement was verbatim to Ms. Mirimskaya's and he seemed not to know much about Coffee Commodities or Ms. Collongues. The trial judge stated at paragraph 52 that the appellant's counsel in her judgment had not discredited the respondent's evidence.

[59] The following findings of the learned judge have also been challenged as erroneous:

(a) that the appellant consulted the respondents on all weighty matters pertaining to Coffee Commodities;

(b) that the documentary evidence referred to by Ms. Vlassova, particularly the correspondence from and to the appellant seeking and approving authorization to settle suppliers' invoices, and correspondence about not receiving payment due to Coffee Commodities from Rusprod establish an agency agreement between the appellant and the respondents;

(c) that the respondents instructed the appellant to resign as director and appoint Mr. Khomyakoy and themselves as directors in her place having taken the decision to restructure their business affairs to assume greater control of Coffee Commodities;

(d) that the only plausible explanation for the appointment and recognition of the respondents as directors and beneficial owners of Coffee Commodities is because they were just that; the appellant 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;

(e) that apart from the bearer share certificates which the appellant possesses, she 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 for the company she was acting on her own behalf and not as the agent of the respondents;

(f) that the appellant chose not to put forward any evidence in the matter.

The Grounds of Appeal

[60] Ground (a) complains that the credibility of the respondent's witnesses was eroded by their answers in cross-examination, which were in large part completely antithetical to their evidence in chief. The learned judge did not gain or did not utilize the advantage of seeing the witnesses and assessing their demeanour, and in any event such advantage

was of minimal weight given the many inconsistencies and directly contradictory evidence recorded from the respondents, which could not be reasonably reconciled in their favour.

[61] Ground (d) urges: The learned judge also erred in coming to the conclusion that the inconsistencies in the respondents' witnesses' evidence was due to the nuance of translation from one language to another, in circumstances where the interpreter was appointed by the court having been satisfied of his credential, ability and experience to do so. Furthermore such concession was wholly without precedent or basis, as the respondents' witnesses at no time expressed any difficulty in communication in their own mother tongue of Russian, which the interpreter translated into English for the Court's benefit. The learned judge therefore must have decided, without basis, that the interpreter was incompetent.

[62] Ground (g) states that the learned judge erred in finding Mr. Lych a truthful, candid and sincere witness and failed to consider his answers in cross-examination which were diametrically opposed to his written prepared evidence which mirrored Ms. Mirimskaya's evidence.

[63] Ground (i) contends that the learned trial judge wrongly preferred the respondent's evidence even when it was not supported by the weight of all the evidence in the case.

[64] Ground (j) alleges that the learned judge erred in taking a wholesale acceptance of the respondents' witnesses' evidence even where there was documentary evidence and their own oral evidence that contradicted, discredited and or disproved their written prepared evidence. The wholesale acceptance of the respondent's evidence led the learned judge to come to conclusions of fact adverse to the appellant, which were unsupported by the weight of all the evidence and gave no value to the tool of cross examination which was effective in exposing the full value of the respondents' credibility.

[65] Ground (k) contends that in the absence of any written agreement establishing an agency

or trust relationship between the respondents and the appellant, the learned judge failed to consider the evidence of their conduct towards each other at the time when the relationship was alleged to have existed, and had she considered such evidence she could not have come to a conclusion that the appellant was acting as agent for the respondents and that she held the bearer shares in trust for them.

The Submissions

[66] Learned counsel, Mrs. Small-Davis focused on the numerous inconsistencies and discrepancies in the evidence for the respondents. She submitted that the credibility of the parties, particularly the respondents who were asserting the existence of the agency/trust relationship was critical, and the fulcrum upon which the trial judge ought to have based the determination of whether the respondents had proved their claim. That in light of the severe divergence of the respondents' pleadings, their witness statements and their answers under cross- examination the learned judge failed to analyse, evaluate or explain in her judgment how the inconsistencies were resolved Counsel argued that the learned judge did not demonstrate that she considered whether the contradictory evidence of the respondents affected their overall credibility; or reflect any discussion as to whether the respondents' evidence taken as a whole could reasonably satisfy the respondents' burden of proof. The learned judge simply recited the evidence and badly swept aside the inconsistencies, which amounted to misdirection as to the facts and an error of law, Mrs. Small-Davis argued. In her view, had the witnesses been properly assessed and evaluated, the respondents could not be accepted as witnesses worthy of belief and the learned trial judge ought to have dismissed the claim as not being made out.

[67] Counsel for the appellant referred to two cases in support of her proposition that a witness who gives contradictory statements on matters that are central to the issue to be determined by the judge ought not to be believed unless the witness give a satisfactory

explanation for the contradictory evidence. In **Shoucair v Reid**[7] in spite of the highly unsatisfactory evidence given by the two respondents on material points concerning their case that the appellant had made a collateral oral agreement with them and that they had entered into a sale agreement under the pressure of undue influence, the learned trial judge accepted their evidence. On appeal Duffus P (at page 319) described the evidence as being so patently unreliable that it ought not have been acted on. **Shoucair** is to be distinguished from the present case in my view. Unlike the factual matrix in the instant case, there was no probative documentary evidence in **Shoucair** which corroborated the respondents' impugned evidence.

[68] In **Texaco Trinidad, Inc. v Oilfield Workers Trade Union**[8] Georges J.A. observed that it did not appear that the court below had applied well known rules of evidence in assessing the value to be placed on the testimony of Figuero who had been dismissed by the appellant for unauthorized possession of company property. The events which had led to the dismissal of Figuero were the subject matter of two judicial enquiries, one by the magistrate in Arima District Court where Figuero was charged with larceny and the other by the Industrial Court arising from Figuero's dismissal. The evidence of Figuero in each hearing differed, and the extracts of his evidence in the Magistrate's Court showed that he had made contradictory statements on oath. Georges J.A. (at page 462) stated:

> "It is fair to state that these extracts establish that Figuero had made contradictory statements on oath. In these circumstances to describe his evidence as merely containing "blemishes and inconsistencies" is to fail to assess his testimony properly. A witness who makes contradictory statements on oath on an issue which is the kernel of the case ought not to be believed unless he is able to give a satisfactory explanation for his having done this."

[69] Learned counsel, Mr. Neale cont ended that some of the inconsistencies identified by Mrs. Small-Davis were perceived inconsistencies to be expected from the cross-examination of Ms. Mirimskaya for one and a half days. He commended the approach of the trial judge and correctly urged us not to sanction the piece meal approach to the evidence as

7 (1967) 10 W.I.R. 310
8 (1972) 20 W.I.R. 456

advocated by counsel for the appellant since the findings of the trial judge must be viewed on the basis of the evidence as a whole, and not merely because of the many inconsistencies which the judge readily considered. Mr. Neale agreed with the trial judge's description of Ms. Valassova as a witness who remained firm and resolute. Her evidence remained in tact after giving damning and probative testimony, even though she was subjected to 3 hours of grueling cross-examination. Counsel submitted that Mr. Lych's evidence did not have much bearing on the decision of the judge since she clearly assessed and appreciated its limitations, and relied on the evidence of the other two witnesses. Mr. Neale identified one of the examples of a nuance of translation which the judge mentioned at paragraph 32 of her judgment. Indeed I noticed several others in the transcript of the evidence including a glaring one at page 656 of the record. Counsel contended further that the complaint in ground (d) was an inaccurate representation of the learned judge's observations, which failed to acknowledge the many instances in the trail where the appellant's lawyer accused Mr. Dolberg of not being accurate in his translation. On occasions, Mr. Dolberg was forced to explain that there was no Russian equivalent of a particular word or phrase. As for ground (i), Mr. Neale submitted that the court showed no preference for the respondents' evidence, since the appellant gave no evidence, the court believed the respondents' evidence and the documentary evidence that was admitted.

[70] Learned counsel, Mr. Neale referred to the weight of the full evidence, particularly the unchallenged compelling documentary evidence which he argued, established beyond any doubt that the respondents were the owners of Coffee Commodities and that the appellant was acting as their agent in dealing with the company. Mr. Neale referred to the revelations of the appellant in the judgment of the Parish Tribunal, and the case for the appellant in her application for the sequestration order against the several companies of Mr. Golubovich including Coffee Commodities. The question which begs itself is why the appellant would apply for a sequestration order against Coffee Commodities her own company, he asked.

[71] The significance of this question is not reduced, as counsel, Mrs. Small-Davis suggest, by

the fact that the appellant also included her own company Alliance in the sequestration application. The business operations of Alliance was the basis of the appellant's tax liability and it would seem that the appellant declared that Alliance was Mr. Golubovich's company so as to create the nexus between the tax court's decision and Mr. Golubovich's assets. The same thing cannot be said for Coffee Commodities.

Was the Trial Judge Plainly Wrong

[72] Although Hariprashad-Charles J, did not specifically refer to the revelations of the appellant in the Judgment of the Paris Tribunal and the contents of her Application for the attachment/sequestration order in Geneva, the learned judge's mention of examining both the oral and documentary evidence (at paragraph 49, of her judgment) indicates that she would have taken this evidence into account in her determination of the issues. The facts revealed by the appellant in this documentary evidence tend to render more probable the truth of the respondents' testimony on the material points in the case though they may have given inconsistent evidence. Any doubts that a court may have harbored concerning the inexplicable vacillations and credibility of Ms. Mirimskaya and Mr. Lych would probably be dispelled by this prior acknowledgment of the appellant that she was agent and not the beneficial owner of coffee Commodities in my view.

[73] In **Cross on Evidence**[9] it is stated that "Language is sometimes used which suggests that the jury is bound to disregard the entirety of the testimony of a witness who has previously made a contradictory statement, unless he can give a satisfactory explanation of his conduct, but it is doubtful whether this can be treated as a rule of law because everything depends upon the circumstances of the case."[10]

9 3rd edition at page 209

10 See the comments on **R v Harris** (1972) 20 Cr. App. R. 144 in **Deacon v R** [1947] D.L.R. 772 in which earlier authorities are cited.

[74] In the Court of Appeal of Trinidad and Tobago more than once it has been stated that the much abused **R v Harris**[11] is no authority for the contention that the trial judge as a matter of law should direct the jury to reject not only the evidence of the witness in relation to which an alleged contradiction existed, but the whole of the witness's testimony in connection with the matter directly in issue where a witness make two conflicting statements on oath – each statement on oath – diametrically opposed to the other, unless you get a satisfactory explanation of the contradiction. **Harris** simply provides guidance to a judge as to the nature of the direction which he ought justly to give to a jury in the circumstances previously mentioned.[12]

[75] As long ago as 1809 the effect of proving that a witness has made previous inconsistent statements was stated by Lord Ellenborough C.J, in **R v Teale**[13] as follows:

> ",,,But though a person may be proved on his own showing, or by other evidence, to have foresworn himself as to a particular fact; it does not follow that he can never afterwards feel the obligation of an oath; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether". But still that would not warrant the rejection of the evidence by the judge, it only goes to the credit of the witness, on which the jury are to decide."

[76] In my view the position in the present case is as stated in **Teale.** Haripradshad-Charles J as the judge of facts had to decide whether the witnesses had been discredited and to what extent. She had the advantage of seeing and hearing the witnesses and the larger picture must be focused in this case. Her impression of the demeanour of the witnesses when tested against the whole of the evidence does not leave the evidence of Ms. Mirimskaya, Mr. Lych and Ms. Vlassova unacceptable. There is no doubt on a fair reading the judgment of the trial judge, that she maintained a careful eye on a large number of relevant matters and considered the evidence of the conduct of the parties towards each other at the time of the alleged creation of the agency and trust relationship.

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11 See footnote 10 above

12 See **Mills and Gomes v R** (1963) 6 W.I.R. 418 at 420: Per Wooding C.J; **Slinger v R** (1965) 9 W.I.R. 271 at p. 276: Per Phillips J.A

Although the judgment did not reflect the process of analysis and evaluation of the evidence advocated by Mrs. Small-Davis it must be assumed that the learned judge properly directed herself on how inconsistencies in the evidence of Ms. Mirimskaya and Mr. Lych should be regarded and resolved. I am satisfied from perusing the

judgment, the transcript of the evidence, and the documentary exhibits that the learned judge's findings based on the credibility of the witnesses for the respondent were also supported by cogent incontrovertible documentary evidence which obviously cannot be overlooked. The grounds of the appeal (a), (d), (g), (i), (j) and (k) have not affected the foundation on which the learned judge's findings are based in my view.

Grounds (b) and (c)

[77] Ground (b) contends that the learned judge erred in finding that the appellant did not produce any compelling evidence to support her claim that she is the beneficial owner of Coffee Commodities. In the first place the burden of proof was on the respondents/claimants to prove beyond a reasonable doubt that they were indeed the true beneficial owners of the company. The learned judge wrongly shifted the burden to the appellant and in so doing, she committed an error of law. Moreover the factual finding was without basis because in fact the appellant did produce documentation included in the agreed bundle of documents for use at trial that supported her defence. The appellant's documents in the agreed bundle which favoured the appellant's case are listed in this ground of appeal, which also alleges that the learned judge either gave no consideration or no fair and proper consideration to these documents.

[78] Ground (c) complains about the learned judge's repeated reference to the fact that the appellant chose not to give evidence on her own behalf, and the judge's failure to refer to the circumstances which caused the appellant not to testify. That the learned judge made no reference to the fact that the appellant had been ambushed by the respondents, and

13 (1809) 11 East 307, at p. 311

did not fairly weigh this in account and it appears that she harboured a prejudice against the appellant's inability to give evidence.

[79] Mrs. Small-Davis corrected herself as to the burden and standard of proof for the respondents in her submissions that the burden of proof was for the respondents to prove a balance of probability that they were the true beneficial owners of Coffee Commodities. Her submissions were essentially similar to the grounds, save for more detailed arguments concerning the documents favouring the appellant which the learned judge appeared not to consider. Mrs. Small-Davis contended that the lack of evidence establishing that the respondents had acted in a manner consistent with their being Coffee Commodities owners, even when they were named as directors favoured the appellant's case. Although in certain circumstances a defendant's election not to call evidence might warrant a judge drawing adverse inferences against him, there was no such circumstances in this case, since the circumstances were known to the judge, Mrs. Small-Davis argued. Counsel referred to the cases **Benham Limited v Kythira Investments Ltd and another**[14]**;** and **Michael John Miller (t/a Waterloo Plant) v Margaret Cawley**[15] for the burden of proof that should have been applied by the court, and her argument that the judge ought not have drawn adverse inferences.

[80] Mrs. Small-Davis identified the following statements in the judgment as confirmation that the learned judge wrongly drew adverse inferences. At paragraphs 39 of her judgment the learned judge said:

> "… Furthermore, to my mind, the most telling documentary evidence was the letter from Ms. Collongues to Mr. Lych dated 28th May 2000 (months before Mr. Lych was appointed a director) detailing to him the status of Coffee Commodities Bank Account BNP in Geneva. 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."

14 [2003] EWCA Civ. 1794
15 [2002] EWCA Civ. 1100

Also at paragraph 44 the learned judge referred to the documents that Ms. Vlassova tendered to establish that the appellant was answerable to Rusprod for the financial operations of Coffee Commodities. The judge then said that

> "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."

Then at paragraph 52 the learned judge stated:

> "In light of the above, [findings of fact] 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' 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 why she would wish anyone to know how much money Coffee Commodities has in its bank account."

[81] **Benham** (at paragraphs 20 and 30) establishes that "…once a defendant has elected to call no evidence… the only issue then becomes whether in the light of the evidence already adduced the claimant has made out his case on the balance of probabilities… But it must be recognised that he may have done so by establishing no more than a weak **prima facie** case which has been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the defendant's election. Such adverse inferences can in other words tip the balance of probability in the claimant's favour."

[82] **Benham** does not support the argument of counsel for the appellant that Hariprashad-Charles J should not have drawn adverse inferences from appellants no case submissions and her election not to call evidence. At paragraphs 25 and 26 in **Benham** Brooke L.J.'s crystallization of the relevant principles in **Wisniewski v Central Manchester Health Authority**[16] are stated in the following manner by Lord Justice Simon Brown:

16 [1987] PIQR P324; [1998] Lloyds Rep. Med 223

"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

[83] Learned counsel, Mr. Neale rejected the argument that the learned judge had shifted the burden of proof. At paragraph 50 of the judgment the trial judge stated that "First and foremost, this is a civil case wherein the burden of proof required of the claimants is on a balance of probabilities. She also stated at paragraph 53 that "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 the incorporating of the Company."

[84] The learned judge at paragraphs 50 and 53 addressed both the legal burden and standard of proof in civil cases. The submissions of counsel for the appellant have in my view failed to appreciate that though the legal burden of proof was on the claimants to prove on a balance of probability that the appellant was their agent and they were the beneficial owners of Coffee Commodities, after the claimants had adduced their evidence and closed their case, the tactical burden shifted to the appellant who then ran the risk of losing on the issues because she did not call her evidence.

[85] **Blackstone's Civil Practice 2002**[17] explains that:

"Judge sometimes refer to the shifting of a burden from a party to the party's opponent. In the case of the legal burden, this can only happen at common law

17 See para 47.30 at page 520

> on the operation of a rebuttable presumption of law of the persuasive variety: once the party relying on the presumption has proved the primary or basic facts giving rise to the presumption, the legal burden can by said to have shifted, in that the opponent will then bear the legal burden to disprove the fact that will be presumed… When reference is made to the shifting of the burden in other circumstances, it is merely to signify that at a given moment in the course of the trial the burden appear to have been satisfied by the party on whom it lies, but in so far as this place a burden on the opponent, it is a tactical burden, not a legal or evidential burden (see per Mustill LJ in Brady v Group Lotus Car Companies plc [1987] 3 All ER 1059): as already noted, whether a legal burden has been discharged is determined only once, at the end of the trial."

[86] In my judgment on the authority of **Benham**, the trial judge was entitled to comment on the appellant's failure to adduce evidence in circumstances where she opted to make a no case submission and elected to call no evidence, and the reason for the appellant's election would have no possible relevance. The learned judge's repeated statements in grounds (b) and (c) were not a shifting of the burden of proof but a recognition that the tactical burden had not been satisfied by the appellant who had opted to run the risk of having the respondents' evidence accepted by the court. Having regard to the learned judge's assessment of the oral and documentary evidence concerning the agreed issues raised by the parties, the contention that the learned judge failed to consider the documentary evidence favourable to the appellant cannot stand. Implicit in the findings of the trial judge was the rejection of such evidence, and on the totality of the evidence that was before the judge I do not consider that Hariprashad-Charles J erred.

Grounds (e) and (f)

[87] Ground (e) urges that the learned judge erred in finding that the cumulative effect of the documents C2 and C7 which were tendered by Ms. Vlassova establish the agency relationship between the appellant and the respondents, particularly in circumstances where the respondents admitted that there was no agency agreement or agency relationship between themselves and the appellant and that there was no documentation that could establish such an agency. The ground also fails in light of my conclusions for the other grounds.

[88] Ground (f) alleges that the learned judge erred in relying on, considering or taking into account the so-called "Employment Agreement" as she evidently did, as even though lip service was paid to the fact that the document was not admitted in evidence, the learned judge repeatedly referred to it in the judgment.

[89] The judgment of Hariprashad-Charles J discloses that the judge referred to the Employment Agreement twice in her judgment at paragraphs 20 and 22 but did not rely on it. Though it was not admitted in evidence the previous discussion at paragraphs 19, and other paragraphs above concerning the appellant's revelations about the employment agreement in other court proceedings elsewhere, and the impact of her revelations on the totality of the evidence are applicable to this ground also.

[90] I would dismiss the appeal with costs to the respondents in the sum of $9,333.00, being two thirds of the costs below pursuant to CPR 65.13 (b).

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur

Denys Barrow, SC
Justice of Appeal

I concur

Hugh A. Rawlins
Justice of Appeal