EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0027

BETWEEN:

[1] SKY STREAM CORPORATION
[2] SERGEY LINKOV
[3] IRINA KAZANTSEVA

Appellants

and

ALEXANDER PLESHAKOV

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Clive Freedman, QC, with him, Mr. Brian Lacy for the 2nd Appellant
Ms. Barbara Dohmann, QC, with her, Ms. Arabella Di Iorio for the 3rd Appellant
Mr. Terence Mowschenson, QC, with him, Mr. Grant Carroll for the Respondent

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2015: May 20;
2018: November 1.

Commercial appeal – Whether Court should interfere with findings of fact of the trial judge – Whether trial judge erred in finding that there was a nominee agreement – Whether trial judge is entitled to change his mind during the hearing

Mr. Alexander Pleshakov ("Mr. Pleshakov") alleged that in or about 2005, he wished to substantially increase his shareholding in Transaero Airlines ("Transaero"), which is a company operating as a commercial airline in the Russian Federation and other parts of Eastern Europe. He alleged that this desire was communicated to Mr. Sergey Linkov ("Mr. Linkov") who, it is also alleged, was his legal advisor. Mr. Pleshakov claimed that during meetings held between them in Moscow in late 2005, Mr. Linkov advised him that; (1) if the percentage of his shares in Transaero after the acquisition exceeded 50 per cent, then, as a matter of Russian law, he would be obliged to buy out the remaining shares issued to Transaero's other shareholders; (2) this buyout requirement could be avoided if some of the shares were held on behalf of Mr. Pleshakov by an investment company which was also owned by Mr. Pleshakov but not so registered and; (3) that Mr. Linkov

would, if he was so instructed and on behalf of Mr. Pleshakov, arrange for the incorporation of the investment company in which he and Ms. Irina Kazantseva ("Ms. Kazantseva") would act as directors.

Mr. Pleshakov advanced that it was also agreed that he would pay the appellants the sum of €4,000.00 on a monthly basis, as compensation for them acting as nominee shareholders and directors of the company. He claimed that, on his instructions and pursuant to the agreement between them, Mr. Linkov was sent to the British Virgin Islands ("the BVI") to incorporate the investment company. Sky Stream was incorporated in the BVI on 14th December 2005. He says that he was provided with both the original Deed of Trust as well as the original share certificates, issued by Sky Stream, which showed the appellants to be equal shareholders in Sky Stream, holding 25,000 shares each.

Mr. Pleshakov alleged that in keeping with the nominee agreement between him and the appellants, he paid the respondents the agreed sum of €4,000.00 monthly. These amounts were allegedly paid either by Mr. Pleshakov or by Ms. Olga Simonova ("Ms. Simonova"), an employee of Mr. Pleshakov, on his instructions and were made over the period 2006 – 2013. Mr. Linkov is alleged to have requested payment in cash, which was done.

Mr. Pleshakov claimed that due to a breakdown in trust between him and Mr. Linkov, he wished to bring the nominee agreement to an end and gave instructions for the appellants to transfer their entire shareholding in Sky Stream to him absolutely. They refused to do so and Mr. Pleshakov initiated legal action in the BVI seeking an order that they be compelled to complete the transfer in accordance with the nominee agreement.

The appellants denied that there was ever any nominee agreement between them and Mr. Pleshakov and claimed that their refusal to transfer their total shareholding to him was in keeping with their rights as absolute shareholders of Sky Stream. They denied that Mr. Pleshakov was the beneficial owner of any shares in Sky Stream and urged the court to dismiss the claim.

The learned judge found that the evidence led by the parties confirmed that Mr. Linkov and Ms. Kazantseva acquired the Sky Stream shares as nominees for Mr. Pleshakov and that the attempts by the appellants to cast doubt on the existence of such an agreement had failed. The learned judge found that the parties' general course of conduct, post-incorporation, was consistent with this finding.

On appeal, the appellants argued that the learned judge came to erroneous conclusions, for which there was no support and which were contrary to the evidence in the case. Further, the case is based largely on evaluation by the trial judge, as demonstrated by the way in which he rejected large parts of the respondent's evidence relating to the alleged contract, yet he found an oral agreement in the absence of how, when and where it was made, and in the face of the respondent's abandonment of such an agreement. Moreover, the evaluation of the trial judge was wrong. They argued that in those circumstances the Court was entitled to interfere with and set aside the findings made by the trial judge. The

respondent argued that the trial judge's inferences and findings of fact were properly made and that there was no basis on which the Court ought to interfere.

Held: allowing the appeal and setting aside the orders of the learned judge and awarding costs to the appellant both in the court below and on the appeal to be assessed, if not agreed within 21 days, that:

1. An appellate court should not interfere with the factual findings of a trial judge on primary facts, the evaluation of facts and inferences to be drawn from facts, unless the trial judge was plainly wrong. The principles regarding appellate caution assume that the trial judge has taken proper advantage of having seen and heard the witnesses and has tested the evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities. The appellate court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his own conclusions. In this case, the judge's evaluation was wrong and the appellate court is free to carry out its own evaluation and arrive at its own conclusion. Having regard to the inherent probabilities of the case and the objective facts, the oral agreement has not been established.

   Central Bank of Ecuador v Centicorp SA [2015] UKPC 11; **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21; **Watt (Or Thomas) v Thomas** [1947]1 All ER 582 applied.

2. The court had no material to find a nominee agreement and was plainly wrong in concluding that the appellants acquired the Sky Stream shares as nominees for Mr. Pleshakov. This was a case where an oral agreement had to be proved and Mr. Pleshakov had failed to do so. The pleaded case was not about the Transaero shares; the case was based on an oral agreement relating to the Sky Stream shares and this case failed. The rejection by the trial judge of Mr. Pleshakov's case as regards the time, place and existence of the oral agreement, the sending of the appellants, at his expense, to the British Virgin Islands and the ownership of the shares in Transaero showed that Mr. Pleshakov's case was so unsatisfactory and unreliable on these fundamental aspects, that his claim, as regards the existence of the oral agreement, was bound to fail. These points, coupled with the payment by the appellants of the sums for the incorporation of Sky Stream and for the acquisition by Sky Stream of the Transaero shares, were completely at odds with Mr. Pleshakov's case and his ability to prove his case. Any matters about subsequent conduct do not form the basis of an agreement where there is none established by the evidence of what happened at the time of the acquisition of the shares.

3. It has long been settled law that a judge is entitled to reverse his decision and has undoubted jurisdiction to change his mind, resile from comments made during the hearing of a matter and revisit his own decision at any time before his order is drawn up and perfected. His overriding objective must be to deal with the case justly. A relevant factor has been whether any party has acted upon the decision

to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up.

Re L and B (children) (care proceedings: power to revise judgment) [2013] UKSC 8 applied

JUDGMENT

[1] **BAPTISTE JA**: This appeal stems from the judgment and order of a judge in the Commercial Court wherein he found that Alexander Pleshakov ("Mr. Pleshakov"), the claimant in the court below and respondent to the appeal, was the beneficial owner of Sky Stream Corporation ("Sky Stream"), a company incorporated in the British Virgin Islands ("the BVI"). The learned judge also found that the evidence establishes that the defendants in the court below ("the appellants") acquired the Sky Stream Shares as nominees for Mr. Pleshakov, and that nothing that happened subsequent to that acquisition is inconsistent with that finding and fully harmonises with it. The learned judge accordingly granted the declarations sought by Mr. Pleshakov and ordered that the register of members of Sky Stream be rectified to delete the names of the appellants and to substitute therefore, Mr. Pleshakov's name. Sky Stream did not participate in this appeal.

[2] On appeal, the appellants contend, among other things, that Mr. Pleshakov's case was based entirely on an oral agreement between himself and the appellants, whereby they (the appellants) were to act as nominees for him in respect of a BVI company. The appellants submit that the pleaded case does not substantiate any such agreement and that Mr. Pleshakov had failed to prove any such agreement. The appellants further submit that learned judge rejected the evidence as to the oral agreement and that the learned judge should have rejected the claim of an oral agreement. On the other hand, Mr. Pleshakov submits that the judge's conclusion, that he is the beneficial owner of the shares, accords with the witness' evidence, the documentary evidence and the manner in which the company's affairs were conducted, and that the judge came to the right conclusion.

Background

[3] It would be useful to set out the case that the parties advanced before the learned trial judge. Mr. Pleshakov alleged that in or about 2005, he wished to substantially increase his shareholding in Transaero Airlines ("Transaero") which is a company operating as a commercial airline in the Russian Federation and other parts of Eastern Europe. He alleged that this desire was communicated to Mr. Linkov, who he said was his legal advisor. Mr. Pleshakov claimed that during meetings held between them in Moscow in late 2005, Mr. Linkov advised him that: (1) if the percentage of his shares in Transaero after the acquisition exceeded 50 per cent, then, as a matter of Russian law, he would be obliged to the buy out the remaining shares issued to Transaero's other shareholders; (2), this buy-out requirement could be avoided if some of the shares were held on behalf of Mr. Pleshakov by an investment company which was also owned by Mr. Pleshakov but not so registered; and (3) that Mr. Linkov would, if he was so instructed and on behalf of Mr. Pleshakov, arrange for the incorporation of the investment company in which he and Ms. Kazantseva would act as directors. Mr. Pleshakov advanced that it was also agreed that he would pay the appellants the sum of €4,000.00 on a monthly basis as compensation for them acting as nominee shareholders and directors of the company.

[4] Mr. Pleshakov claimed that, on his instructions and pursuant to the agreement between them, Mr. Linkov was sent to the BVI to incorporate the investment company. Sky Stream was incorporated in the BVI on 14th December 2005.

[5] A Deed of Trust was executed by the appellants on 28th December 2005 in favour of Mr. Pleshakov. The parties explain this document in very different ways. Mr. Pleshakov alleges that the Deed of Trust evidenced a trust over the shares of Sky Stream and was therefore consistent with the nominee agreement between him and the appellants. He notes that, to further confirm this, he was provided with both the original Deed of Trust as well as the original share certificates issued by Sky Stream and on the basis of which the appellants were shown to be equal shareholders in Sky Stream, holding 25,000 shares each.

[6] Mr. Pleshakov alleged that in keeping with the nominee agreement between him and the appellants, he paid the first respondent the agreed sum of €4,000.00 monthly. These payments were allegedly made in cash at the request of Mr. Linkov and were received by Ms. Kazantseva as well. These cash amounts were allegedly paid either by Mr. Pleshakov or by Ms. Olga Simonova ("Ms. Simonova), an employee of Mr. Pleshakov, on his instructions and were made over the period 2006 – 2013.

[7] Mr. Pleshakov alleged that in March 2006, Sky Stream acquired a 19.99% stake in Transaero. This, he said, was done as a result of negotiations conducted between himself and a group of Russian companies associated with a Mr. Boris Berezovsky (the "BB Group") and were so acquired for his sole use and benefit. Mr. Pleshakov posited that he initiated several transactions between Sky Stream and other parties between March 2006 and 2013; these transactions, he says, were undertaken unfailingly by the appellants on his instructions and were all concluded for his benefit and the benefit of his family members and other persons identified by him. As a result of these transactions, Sky Stream's shareholding in Transaero was reduced to 12.98%.

[8] Mr. Pleshakov claimed that due to a breakdown in trust between him and Mr. Linkov, he wished to bring the nominee agreement to an end and gave instructions for the appellants to transfer their entire shareholding in Sky Stream to him absolutely. They refused to do so and Mr. Pleshakov initiated legal action in the BVI, seeking an order that they be compelled to complete the transfer in accordance with the nominee agreement.

[9] The appellants denied Mr. Pleshakov's version of events. Mr. Linkov denied acting for Mr. Pleshakov in legal matters save for two previous occasions, both of which are irrelevant in these proceedings. Mr. Linkov claimed that while vacationing in the BVI, he received a telephone call from Mr. Pleshakov enquiring

whether he would be interested in obtaining a shareholding in Transaero at a substantial discount. He was not told the price of the shares or the number of shares but indicated that he was very much interested in the transaction.

[10] Mr. Linkov stated that as he and Ms. Kazantseva were already in the BVI, they incorporated Sky Stream at their own expense and had an equal number of shares issued to them. The appellants admitted to executing the Deed of Trust but aver that this was not done in an attempt to establish a trust over the Sky Stream shares in favour of Mr. Pleshakov but solely to allow Mr. Pleshakov to act on behalf of Sky Stream for a period of 5 years, if a previously granted Power of Attorney expired and was not renewed. This, they say, was necessary under Russian law.

[11] The appellants denied that there was ever any nominee agreement between them and Mr. Pleshakov and claimed that their refusal to transfer their total shareholding to him was in keeping with their rights as absolute shareholders of Sky Stream. They denied that Mr. Pleshakov was the beneficial owner of any shares in Sky Stream and urged the court to dismiss the claim.

[12] The learned judge found that the evidence led by the parties confirmed that the appellants acquired the Sky Stream shares as nominees for Mr. Pleshakov and that the attempts by the appellants to cast doubt on the existence of such an agreement had failed. The learned judge found that the parties' general course of conduct post-incorporation was consistent with this finding. At paragraph 53 of his judgment, the learned judge stated that Sky Stream was acquired for the purpose of taking a transfer, to be procured at some unknown time in the future by Mr. Pleshakov, of Transaero shares whose number was then unknown to the appellants and at a price and upon terms equally unknown to them. The judge reasoned that this made it improbable that the appellants procured the incorporation of Sky Stream for their own benefit. The judge found it unlikely that persons in the BVI for a cruising holiday would spend time and not an insignificant

amount of money on the incorporation of a company in order to be in a position to take a transfer of some shares at some indefinite time in the future once the terms of any offer that might be made had been considered and accepted. At paragraph 54, the judge stated that it was more likely that the incorporation of Sky Stream was done at the request of Mr. Pleshakov. The judge opined that the terms of Mr. Linkov's email of 20th December 2005 to Ms. Simonova chime very well with that. The judge reasoned that it is unlikely that if Mr. Linkov had simply procured a company in anticipation of holding some shares for himself, he would have written to Ms. Simonova from holiday in such terms, referring to 'our plan' and 'our new partner'.

The case on appeal

[13] The appellants filed a notice of appeal advancing several grounds of appeal which were impermissibly intermingled with arguments. The first ground of appeal concerns the finding by the learned judge that Sky Stream was incorporated at the request and on behalf of Mr. Pleshakov. The appellants describe that finding as perverse. The appellants argue that Mr. Pleshakov failed to establish that he had ever acquired a beneficial ownership in Transaero shares and therefore the learned judge ought not to have found that Sky Stream was part of a larger plan to conceal such ownership. It was further argued that having found that the Deed of Trust did not create a trust over the Sky Stream shares, it was not open to the learned judge to make findings concerning the use of BVI counsel vis-à-vis Russian counsel.

[14] The second ground of appeal alleges that the learned judge erred in finding that the parties entered into a nominee agreement. The appellants contend that there was no basis in fact or in law on which the alleged Nominee Agreement could be established. Further, the appellants argue that Mr. Pleshakov did not argue that Mr. Linkov was authorised to act and/or agree to any purported nominee agreement on behalf of Ms. Kazantseva and that any finding to that effect by the learned judge is incorrect.

[15] The third ground of appeal concerns the findings of the learned trial judge regarding the cash payments, which Mr. Pleshakov alleged were made to the appellants pursuant to the nominee agreement. Essentially, the appellants argue that the learned judge erred insofar as he did not find that the evidence of Mr. Pleshakov's PA, Ms. Simonova, about alleged cash payments to Mr. Linkov was not infected by the "concocted and absurd" evidence of Mr. Lityagin, Mr. Pleshakov's head of security about cash payments. This concoction, they say, was most likely done with the knowledge and connivance of Mr. Pleshakov. The appellants argue that, in the absence of corroborating records and given other fundamental omissions in the evidence of Ms. Simonova and Mr. Pleshakov, the learned judge ought not to have found that cash payments were made to the appellants as alleged. The appellants contend that the learned judge should have found that Pleshakov's case, that the appellants were paid by him to be his nominee, was without any evidential basis and accordingly, there was no such agreement. They also say that the learned judge further erred in finding that the payments to Ms. Kazantseva, in the form of directors' fees, amounted €620,000.00 rather than €284,000.00

[16] The fourth ground of appeal alleges that the learned judge erred in concluding that Mr. Pleshakov was the beneficial owner of Sky Stream, when considering the conduct of the parties, in relation to Sky Stream, subsequent to the alleged nominee agreement. On the evidence, it was not open to the judge to come to that conclusion.

[17] The final ground of appeal concerns a complaint that the learned judge made several comments during the closing speeches of counsel pointing out, in essence, the fundamental defects in Mr. Pleshakov's case, but unjustifiably resiled from those comments in his judgment.

Appellants' arguments - Oral Agreement – Five Points

[18] The appellants addressed the grounds of appeal relating to the oral agreement in the form of Five Points and submit that these points show that the learned judge was wrong in his conclusion. The appellants also contend that Mr. Pleshakov's submissions do not properly address their case.

[19] The appellants state that Mr. Pleshakov's case was set out in the Statement of Claim and his witness statements; and that the Order and Judgment of the learned judge rest entirely upon an oral agreement. The alleged agreement was only between Mr. Linkov and Mr. Pleshakov. Mr. Pleshakov had to establish an oral agreement with Mr. Linkov that Mr. Linkov would acquire Sky Stream on his behalf and he and Ms. Kazantseva would, through Sky Stream, hold shares in Transaero. It was never alleged that Ms. Kazantseva was a party to the alleged agreement, nor that she had ever authorised Mr. Linkov to make it on her behalf, or she ever ratified it. The appellants denied the oral agreement. The appellants incorporated Sky Stream on 14th December 2005, each acquiring 25,000 shares. They became the legal and beneficial owners of the shares in Sky Stream. They had travelled to the BVI at their own expense where they procured the incorporation of Sky Scream, also at their own expense.

[20] The appellants contend that in appearing to accept that there was an oral agreement, the judge drew inferences and or made evaluations from the evidence which were wrong; and or that the judge arrived at findings without any or any reasonable foundation. The appellants submit that the judge should have found that there was no agreement under which Mr. Pleshakov acquired the beneficial ownership of the shares in Sky Stream and or that Mr. Pleshakov failed to prove his case; that he had not even attempted to establish a case against Ms. Kazantseva, and the judge should have dismissed the claim in its entirety.

The Five Points raised by the appellants

[21] The first relates to the time and place of the oral agreement. In that regard, the appellants submit that there was utter confusion and contradictions in Mr. Pleshakov's changing case, from pleadings, to affidavits, to written statements and oral evidence, resulting in there being no reasonable basis on which the judge could found an oral or any agreement. The corollary was the judge's failure and inability to find how, when and where the alleged oral agreement was made. There was no agreement made between Mr. Pleshakov and Ms. Kazantseva on Mr. Pleshakov's express admission and Mr. Linkov had no authority to make an agreement on her behalf. Further, the attempt by Mr. Pleshakov to assert a case against Ms. Kazantseva based on partnership law is unsustainable as no such claim was pleaded.

[22] The Statement of Claim referred to the agreement being at meetings in Moscow between Mr. Pleshakov and Mr. Linkov in late 2005. However, none of the judge's findings supported this case. The appellants contend that *sub silentio*, this case has been rejected, in that the judge's reference to the telephone conversations when Mr. Linkov and Ms. Kazantseva were in the Caribbean on a planned pre-booked holiday, independent of Mr. Pleshakov, contradict the notion that the company was incorporated following and as a result of meetings prior to Mr. Linkov leaving Moscow. Ms. Kazantseva was not said to be and was not part of such telephone conversations.

[23] The judge did not accept Mr. Pleshakov's uncorroborated evidence about a meeting or a series of meetings with Mr. Linkov in Moscow, whether before or after the incorporation of Sky Scream. The appellants further argue that having rejected Pleshakov's ever changing case as to how, when and where the oral agreement was made, the judge should have rejected Mr. Pleshakov's claim and found that there was no oral agreement.

[24] The second element concerns the funding of the trip to the Caribbean: This was the link between the alleged agreement made in Moscow and the trip to the BVI.

In his written evidence, Mr. Pleshakov stated that he paid for the trip by Mr. Linkov and Ms. Kazantseva. The judge rejected that evidence, finding that the trip had been planned and pre-booked and the appellants were not sent there at the behest of Mr. Pleshakov. The appellants point out that this point is ignored in Mr. Pleshakov's skeleton argument, notwithstanding its obvious significance. The rejection of Mr. Pleshakov's case that he funded the trip, compounded the rejection of Mr. Pleshakov's evidence as regards the alleged meetings in Moscow, which provided further confirmation that there was no oral agreement.

[25] The third element relates to the incorporation costs of Sky Stream that were paid by the appellants and not by Mr. Pleshakov. The appellants argue that the finding that they bore the incorporation costs themselves is wholly at odds with Mr. Pleshakov's case that he was the beneficial owner of Sky Stream. The judge then referred to sums subsequently received from Sky Stream from April 2007 as covering Ms. Kazantseva's share of the incorporation expenditure. However, the appellants point out that there was no evidence of reimbursement. Payments drawn by Ms. Kazantseva, by way of directors fees of €4000.00 per month a long time later were on nobody's case, a reimbursement. The appellants contend that the judge's "thought" that the expenses must have been indemnified is no substitute for a finding on the evidence and in any event, there was no evidential basis for the thought. The appellants submit that it was perverse for the judge to find that it was more likely that Mr. Linkov and Mrs. Kazantseva, having incorporated Sky Stream at their own expense, while on holiday on their own expense, would have done so for someone else's benefit rather than their own.

[26] The fourth element concerns the ownership of the Transaero shares. The essence of Mr. Pleshakov's case was that he should have the beneficial ownership of Sky Stream because the company was formed for his own purpose, that is, to hold shares in Transaero, which he was acquiring from the BB Group. He criticised the appellants' case, saying that it made no sense for him to acquire shares in Transaero and then to transfer them to the appellants' company. The

appellants pointed out that the flaw in this case was that there was no evidence that Mr. Pleshakov was the owner of the Transaero shares.

[27] Mr. Pleshakov's case depended upon his proving his beneficial ownership of the Transaero shares, since that was the sole purpose on his case for the creation of Sky Stream and his becoming the beneficial owner of its shares. The appellants submit that since the judge did not accept Mr. Pleshakov's evidence as to the ownership of the Transaero shares, the judge should have found that his case as to the beneficial ownership of Sky Stream was fatally undermined.

[28] It was demonstrated that Mr. Pleshakov did not own the shares which were put into Sky Stream. In the course of his oral evidence, Mr. Pleshakov conceded that the reference in his written evidence to his having acquired the Transaero shares, meant nothing more than his having been the lead negotiator on behalf of Transaero Finance and not that he had personally acquired the shares for himself. It follows that the very reason for Mr. Pleshakov to have acquired the beneficial ownership of the shares in Sky Stream disappeared.

[29] The fifth element concerns the acquisition costs of the shares of $55,000.00. The judge found that the evidence shows that Ms. Kazantseva paid for the incorporation of Sky Stream and that Mr. Linkov appears to have provided the $55,000.00 that had to be paid for the Transaero shares. The appellants contend that the findings, that Mr. Linkov had borne these costs, are wholly at odds with Mr. Pleshakov's case that he was the beneficial owner of Sky Stream; so too is the fact that Ms. Kazantseva reimbursed Mr. Linkov for her half of this cost. The appellants submit that there would be no reason for bare trustees to bear such expenditure themselves, and the fact that they did, shows that they were beneficial as well as legal owners themselves.

[30] The appellants point out that the judge himself observed that in the ordinary way, the evidence of the payment of the acquisition costs would have gone a long way

to show that the company had been formed by the appellants, as beneficial owners, in order to hold shares beneficially owned by them. The judge however said "But this is not the ordinary way". The judge stated that:[1]

> "This is a case where there was clearly a financial relationship between Mr Linkov on the one hand and Mr. Pleshakov on the other. Ms Kazansteva appears to have been in receipt of something in the region of €620,000 of monthly payments from Sky Stream over the six year period between April 2007 and March 2013. On the footing that Sky Stream was beneficially owned by Mr Pleshakov, Ms Kazantseva and Mr Linkov were clearly entitled to be indemnified for each of these expenditures and I think it likely that one way or another they will have been."

[31] The appellants contend that the case is a peculiar one and is based largely on the judge's evaluation, as demonstrated by the way in which he has rejected large parts of Mr. Pleshakov's evidence relating to the alleged oral agreement, yet found an oral agreement without identifying how, where and when it was made. The appellants posit that the judge's evaluation was wrong and invites this court to re-evaluate the same material, being in as good a position as the trial judge was to carry out that evaluation, and review the decision below and come to a different conclusion.

Mr. Pleshakov's position

[32] Mr. Pleshakov's position is that the case turns on the oral evidence assessed in the light of contemporaneous documentary evidence; the judge had the advantage of hearing four and a half days of evidence, at the end of which he accepted the overwhelming majority of Pleshakov's evidence and his supporting witnesses and rejected the overwhelming majority of the appellants' evidence. Mr. Pleshakov argues that the implausibility of the appellants' case is manifest. Mr. Pleshakov contends that there were numerous features in the conduct of the Company's affairs and in the documentary evidence which were inconsistent with the appellants being the beneficial owners of the shares. Mr. Pleshakov submits that the evidence was manifestly in his favour and the judge's conclusion should not be disturbed. Mr. Pleshakov relies on cases which urge appellate caution in reviewing

[1] Para 60 of the judge's judgment.

judgments of the lower court, in relation to determination of facts. Mr. Pleshakov submits that the issue the judge had to decide was whether there was an oral agreement and the judge accepted that an agreement was made for the reasons given in paragraphs 53 and 54 of his judgment.

The Law: Findings of fact

[33] The arguments raised engage the legal principles governing appellate interference with factual findings of a judge. These principles are well-settled. An appellate court should not interfere with the factual findings of a trial judge unless compelled to do so. This applies to findings of primary fact, as well as to the evaluation of those facts and to the inferences to be drawn from them. There are limited circumstances warranting appellate interference with findings of fact of a trial judge. An appellate court should not interfere with the conclusion of the trial judge on primary facts unless the trial judge was plainly wrong. **In re B (A Child) (Care Proceedings: Threshold Criteria)**,[2] at paragraph 53, Lord Neuberger underscored the rare circumstances in which an appellate court would contemplate reversing a judge's findings of primary fact. He explained that circumstances meriting appellate interference with a judge's conclusion of primary facts include (i) where there was no evidence to support the conclusion; (ii) where the conclusion was based on a misunderstanding of the evidence; or (iii) the conclusion was one which no reasonable judge could have reached.

[34] As Clarke LJ observed In **Assicurazioni Generali SpA v Arab Insurance Group (BSC)**,[3] some conclusions of fact are not conclusions of primary fact; "they involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ".

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[2] [2013] 1 WLR 1911.

[3] [2003] 1 WLR 577 at para 15 and 16, cited with approval in Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23, at paragraph 46.

[35] The words of Lady Justice Arden in **Langsam v Beachcroft LLP**[4] at paragraph 72 are also instructive:

> "...where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach. In other cases, where the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court must in general make up its own mind as to the correctness of the judge's finding."

[36] "An appellate court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness."[5] Of course, the appellate court takes into account that the judge had the advantage of seeing the witnesses give their oral evidence; an advantage not available to it. It is noted that the value and importance of having seen and heard the witnesses will vary according to the class of case and, it may be, according to the individual case in question. In **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd**, [6]Lord Hodge said at paragraph 17:

> "Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole."

[37] The principles regarding appellate intervention do not mean that an appellate court is never justified, indeed required, to intervene. They assume that the judge has taken proper advantage of having seen and heard the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the

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[4] [2012] EWCA Civ 1230.
[5] Mutual Holdings (Bermuda) Ltd and others v Hendricks and others (2013) 83 WIR 66.
[6] [2014] UKPC 21.

issues against the background of the material available and the inherent probabilities.[7]

[38] In **Watt (Or Thomas) v Thomas**,[8] the well-known and oft quoted passage of Lord Thankerton sets out the law as follows:

> "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."

[39] In **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd**,[9] Lord Hodge, delivering the judgment of the Board had this to say:

> "It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'... This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts... Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence..."

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[7] Central Bank of Ecuador v Centicorp SA [2015] UKPC 11 at para. 8.
[8] [1947]1 All ER 582 at p. 587.
[9] [2014] UKPC 21 at para. 12.

Discussion

[40] A critical issue in the appeal is whether the judge was wrong in finding that the appellants acquired the Sky Stream shares as nominees for Mr. Pleshakov. This necessarily engages the law with respect to appellate interference with factual findings and the judge's evaluation of the evidence. The appellants sought to illustrate that the judge got the evaluative exercise wrong and his decision was perverse. The appellants rely heavily on the Five Points relating to the alleged oral agreement. The appellants rightly submit that the Five Points are matters which are fundamental to the decision process and the ability of Mr. Pleshakov to prove his case, especially, as regards the existence, time and place of the oral agreement and ownership of the Transaero shares, which Sky Stream was acquiring. The appellants posit that the learned judge has rejected very substantial and crucial parts of Mr. Pleshakov's evidence relating to the oral agreement. The judge came to his conclusion without any finding as to how, where and when the alleged agreement was made, and thereby, in effect, rejecting Mr. Pleshakov's case in that regard. There is much force in that submission.

[41] The appellants point out that nowhere in the judgment is there a finding of primary fact that there was an oral agreement. It was for Mr. Pleshakov to establish the existence of an oral agreement on the evidence and there was no sensible evidence for the court to make a finding of an oral agreement.

[42] The appellants contend that notwithstanding the judge's inability to identify how, where and when the oral agreement was made, and despite the fact that he rejected a large part of Mr. Pleshakov's evidence concerning the agreement, the judge has made an assessment as to whether there was an oral agreement in respect of the beneficial interest in Sky Stream, based on inferences drawn from primary facts or on the perception and evaluation of the facts. The appellants point out that the judge made an evaluation of the weight to be attached to the payments by Ms. Kazantseva of the incorporation fees and by Mr. Linkov of the

price of the Transaero shares. I recognise that weight is a matter to be evaluated by the trial judge who has heard and seen the witness give evidence and in the absence of being perverse; an appellate court would not interfere with that evaluation.

[43] The appellants submit, and I agree, that the appellate court is able to make this evaluation itself without being at a disadvantage by not seeing the witnesses. By way of example, the learned judge found (on Mr. Pleshakov's case) that there was an entitlement to indemnification. Although the learned judge thought that it was likely that indemnification would have occurred, there was, however, no evidence of reimbursement. If the acquisition of the Transaero shares was by Sky Stream in circumstances where Mr. Pleshakov, not the appellants, owned Sky Stream, then the purchase price would have been paid by Mr. Pleshakov. However, it was demonstrated that the appellants paid the money and there is no evidence to show that they were indemnified. On evaluating the matter, I conclude that the appellants' payments went a long way in demonstrating that the appellants were the beneficial and legal owners of the shares in Sky Stream.

[44] The appellants posit that the judge balanced the payments they made against fees received by Ms. Kazantseva, whereas in fact, on Mr. Pleshakov's case, the monthly fees needed to be paid as a reward for nominee services rendered. In any event the appellants' note that the judge's calculation of €620,000.00 seems to be awry as monthly payments of €4000.00 from April 2007 to March 2013 would amount to €284,000.00 only.

[45] The appellants point to another example of a fundamentally wrong evaluation; this related to the issue whether Mr. Pleshakov was the beneficial owner of the Transaero shares which were acquired by Sky Stream. The appellants posit that the judge's evaluation was self-contradictory. At one point, the judge regarded the issue of whether Mr. Pleshakov owned the Transaero shares as not the issue before the court. At other points of the judgment, the judge treated the issue of

Mr. Pleshakov's ownership of the Transaero shares sold to Sky Stream as very important indeed. In my judgment, the judge's evaluation was flawed because this ownership issue should have weighed so heavily as to disprove the alleged oral agreement, whether by itself or alongside other factors, such as payment of the incorporation fees and the acquisition costs. The appellate court is in as good a position as the judge to carry out the evaluation itself and come to an opposite conclusion to that of the judge.

[46] I agree with the appellants that on the judge's finding that Mr. Pleshakov had failed to establish that he had ever acquired a beneficial interest in any of the shares formally held by the BB Group, including the 19.99% of Transaero which was transferred to Sky Stream, on 31 March 2006, it was not open to him to find that Sky Stream had been incorporated as part of a plan to disguise such beneficial ownership. It was also inherently self-contradictory for the judge to reason that Mr. Pleshakov would not have parted with the Transaero shares when he had never owned them and they were never his to part with. The learned judge recognised how fundamental this point was in the course of the final oral submissions, and Mr. Pleshakov's case was shattered, not least in consequence of his not owning the shares in Transaero.

[47] As the appellants posit, in his written judgment, the learned judge sought to marginalise the issue of whether the Transaero shares were those of Mr. Pleshakov, saying that the only issue was whether the appellants acquired Sky Stream as nominees for Mr. Pleshakov (Mr. Pleshakov agreed with the judge's definition of the issue). The appellants submit, and I agree, that this was to ignore (1) the whole basis of Mr. Pleshakov's case that Sky Stream was acquired so as to hold his own Transaero shares, and he needed to be the beneficial owner of Sky Stream, and (2) the reasoning of the judge himself at paragraphs 12 and 55 of his judgment. For instance, at paragraph 12, the judge stated;

> "At trial Mr Pleshakov's case, boiled down to its essentials, was that the Transaero shares obtained by Sky Stream on 31 March 2006 belonged to him beneficially. He would never have agreed to give 20% of Transaero to

> the Defendants via Sky Stream because that would have destroyed his (Mr Pleshakov's) majority. That being so, it was only natural that Sky Stream should also belong to him; and the opposite of natural that the company holding the Transaero shares on his behalf should belong beneficially to third parties."

[48] I agree with the appellants' submission that the learned judge should have found that the whole basis of Mr. Pleshakov's case was destroyed by the fact that he did not own the Transaero shares in the first place, either directly, or through Housecroft Holding Limited.[10] I am of the view that the learned judge made various errors in his approach to Mr. Pleshakov's pleaded case and has gone wrong in his approach to, and his evaluation of, the evidence, sufficiently material enough so as to undermine his own conclusion, thus warranting appellate intervention. Mr. Pleshakov's inability to establish the oral agreement and the fundamental building block of the ownership of the Transaero shares meant that his case fell apart. Upon looking at the inherent probabilities of the case and the objective facts, in my view, the oral agreement has not been established and the judge was plainly wrong in his conclusion.

[49] In my judgment, there is much force in the appellants' submissions, that the judge's rejection of Mr. Pleshakov's pleaded case as regards the time, place and existence of the alleged oral agreement, the sending of the respondents at his expense to the BVI and the ownership of the shares in Transaero, showed that Mr. Pleshakov's evidence was so unsatisfactory and unreliable on these fundamental aspects, that his case, as regards the existence of the oral agreement, was bound to fail. These points, individually and or when coupled with the payments by the appellants of the sums for the incorporation of Sky Stream (in the course of a trip paid for and instigated by themselves) and for the acquisition by Sky Stream of the Transaero shares were completely at odds with Mr. Pleshakov's case and his ability to prove his case. The payments by the appellants for the incorporation of Sky Stream and the acquisition of the Transaero shares and or absence of ownership of the Transaero shares by Mr. Pleshakov,

[10] A company from which Sky Stream acquired a holding of 19.99% in Transearo.

supported the appellants' case that they were intended to be the beneficial owners of the shares in Sky Stream.

Subsequent conduct

[50] The judge stated:[11]

> "The sole question in this case is whether the Defendants acquired Sky Stream pursuant to an arrangement with Mr Pleshakov that they should do so as his nominees. While I accept that the whole of the parties' conduct in any given case may be capable of throwing light upon the arrangements under which property has been acquired,it will, in my judgment, be the circumstances surrounding its acquisition which will have the most bearing upon the resolution of that question."

The learned judge found that the evidence established that the appellants acquired the Sky Stream shares as nominees for Mr. Pleshakov and nothing that happened subsequent to that acquisition is inconsistent with that finding.

[51] The appellants point to the total inability of the respondent to prove the existence, time and place of the alleged agreement. The appellants submit that the judge was demonstrably wrong in his findings in respect of subsequent conduct and on the basis of the evidence, these matters too, provided further support for their case, and the false nature of Mr. Pleshakov's case and his inability to prove his case. The subsequent conduct here referred to is as follows: (1) the non-payment of monthly fees of €4,000.00 to Mr. Linkov and Ms. Kazantseva respectively; and or (2) the sales and purchases undertaken by Sky Stream, including especially a sale on 22nd February 2012 by Mr. Pleshakov to Sky Stream; and or (3) Mr. Pleshakov's lack of interest in the many millions of dollars received by Sky Stream over many years; and or (4) Mr. Pleshakov's failure to require the transfer to him of the Sky Stream shares prior to these proceedings and especially at the meeting in Munich; and or (5) the confirmation on the part of senior Transaero employees as to the non-affiliate status of Sky Stream, all showed that Mr. Pleshakov failed to prove his case.

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[11] Para 52 of the judge's judgment.

[52] The appellants referred to other conduct subsequent to the alleged nominee agreement, relied upon in the Notice of Appeal, to which the judge failed to give any or any sufficient weight. This included (1) failing to give any or any sufficient weight to his own finding that Mr. Pleshakov undertook not to enter into any further agreements for Sky Stream without the appellants' consent, (2) the evidence that Mr. Linkov suggested that Sky Stream dividends could be used to pay Mr. Pleshakov for the representative services that Mr. Pleshakov provided to Sky Stream in Russia and (3) the resolution that Mr. Linkov had sole executive power over Sky Stream from 12th December 2001, when Mr. Pleshakov and his daughter were also on the board of directors. The appellants submit that the effect of each and any of these points is that the judge had been wrong to find in favour of Mr. Pleshakov's case.

[53] Mr. Pleshakov referred to various points of subsequent conduct which he contends are consistent with his being the beneficial owner of Sky Stream and the appellants holding the shares as nominees. The appellants contend that much of these matters which Mr. Pleshakov now wishes to put before the appeal court were not analysed, considered or given weight to by the trial judge. The appellants submit, and I agree, that that does not suffice to prove a case where mere consistency of matters years after the acquisition of the shares, is far less telling than the Five Points, which are about the circumstances of, and relating to, the acquisition of the shares in Sky Stream. Further, the points made by Mr. Pleshakov relating to conduct years after the event, are far narrower and less telling than the points of the appellants.

[54] An example of one of the points referenced above is with respect to Sky Ocean.[12] Even if Sky Ocean were to have belonged to Mr. Pleshakov beneficially, such agreement does not prove the alleged agreement in respect of Sky Stream many years earlier, if it cannot be established otherwise. Sky Ocean was an example of co-operation between Mr. Pleshakov and Mr. Linkov, on whichever version is

[12] A wholly owned subsidiary of Sky Stream.

accepted. An important feature of the analysis is that whilst Mr. Pleshakov and his daughter became directors of Sky Stream, they did not participate as such, save to approve a resolution on 12th December 2011, permitting Mr. Linkov alone to form a quorum for the purpose of board business. This is inconsistent with the beneficial ownership of Mr. Pleshakov in Sky Stream. Similarly, the fact that Mr. Linkov voted alongside Mr. Pleshakov in respect of the Transaero shares is consistent with collaboration between two persons who, in any case, worked closely together. Whether or not it is consistent with Mr. Pleshakov's case about beneficial ownership is not, in any meaningful sense, probative of the existence of the alleged oral agreement. The appellants submit and I agree that the series of points made by Mr. Pleshakov in respect of emails in the bundles between the parties does not assist him, in that almost all of them did not form part of the judgment. At its highest, they are relied upon as points of consistency in respect of conduct years after the acquisition, which has very little probative value.

[55] The judge also considered that the original share certificates for Sky Stream were lodged with Mr. Pleshakov. Although the judge recognised that the share certificates were not the equivalent of the shares themselves, he reasoned that the fact that Mr. Pleshakov held them would have put very considerable obstacles in the appellants' way, had they attempted to transfer the Sky Stream shares to some third party. The judge rejected the appellants' evidence that Mr. Pleshakov was given the original certificates in case depository agents should demand to see them before opening an account. The judge noted that Mr. Pleshakov had now held the original share certificate for ten years and had the appellants believed that they were theirs, they would have demanded their return as soon as it had become clear that no depository was in the slightest way interested in viewing the original share certificates of Sky Stream. The judge concluded that the most natural explanation for the fact that the certificates were placed in Mr. Pleshakov's possession and left permanently in his custody, is that he is entitled beneficially to the shares which they represent.

[56] Mr. Pleshakov relies on the fact that within days of the formation of the Company, its most important documents – certificate of incorporation, memorandum and articles, a power of attorney dated 15th December 2005, the Company's seal and original share certificates – were delivered to him, as was the Trust Deed. The appellants did not seek the return of these documents. Mr. Pleshakov submits that the suggestion that any of these documents could have been created without prior discussion and agreement with Mr. Pleshakov is utterly implausible and that the agreement had to be made prior to or in December 2005. Mr. Pleshakov argues that the appellants were unable to offer any plausible explanation as to the purpose for their execution of the Trust Deed other than to reassure Mr. Pleshakov that ultimately he controlled the Company which in turn held the Transaero shares.

[57] The appellants submit and I agree, that insofar as the judge found, as a balancing factor in Mr. Pleshakov's favour, the fact that he had the original share certificates, the judge erred in that the shares were registered in the appellants' names and were not bearer shares, and that the possession of the share certificates gave no power or rights to the possessor.

Deed of Trust

[58] The learned judge's findings on the Deed of Trust and the circumstances surrounding its execution, constituted a central plank in his overall finding that the shares of Sky Stream were being held on trust by the appellants for Mr. Pleshakov's benefit. He found that "The Deed of Trust is compelling evidence that it was the intention of the Defendants that Sky Stream was to be and remain under the control of Mr. Pleshakov."[13] While noting that the document did not create any trust of the Sky Stream shares, the learned judge formed the view that the Deed of Trust might be of tremendous importance to Mr. Pleshakov, in the event that something untoward befell either or both of the appellants. He also considered the fact that if the appellants intended to own the Sky Stream shares in a personal capacity, the Trust Deed would have been unnecessary. To fortify this

[13] Para 56 of the judge's judgment.

view, the learned judge noted that it was consistent with Mr. Pleshakov's evidence that he was told by Mr. Linkov that the Deed of Trust was only to be used *in extremis*.[14] The judge reasoned that there would have been no need for such continuity, had the appellants themselves not been intended to hold their Sky Stream shares in a representative, rather than a personal capacity.

[59] The learned judge rejected the appellants' contention that the Deed of Trust and Mr. Pleshakov's continued possession of the original was a requirement under Russian law. In doing so, he noted that the Deed of Trust was governed by BVI law and had its execution been a requirement under Russian law, as suggested by the appellants, then it would have been obtained from a Russian attorney as opposed to a BVI lawyer.

[60] The appellants point out that when Mr. Pleshakov first brought proceedings in May 2013, it was to obtain a stop notice over their shares in Sky Stream. In his first affidavit in support of that application, Mr. Pleshakov based his case upon the Deed of Trust dated 28th December 2005, as creating a trust over Sky Stream in his favour. However, by the time of his subsequent affidavits and witness statements in support of his claim, Mr. Pleshakov had abandoned this trust case and relegated the Deed of Trust to alleged evidence of the agreement, rather than the basis of his beneficial ownership of the Sky Stream shares. The appellants contend that this *volte face* must have been caused by the fact that the Deed of Trust said the opposite of what was contended for, namely, that Mr. Pleshakov was the trustee and not the beneficiary, and did not identify the beneficiary at all. The Deed of Trust was not even signed by Mr. Pleshakov. In his oral evidence Mr. Pleshakov reverted to his previously abandoned Trust Deed case. In the course of his oral evidence, but not mentioned in any of his affidavits or witness statements, Mr. Pleshakov contended that Mr. Linkov had said to him that the Trust Deed would only be used in an extreme situation, if something had

[14] Para 56 of the judge's judgment.

happened to Mr. Linkov or Ms. Kazantseva. Mr. Pleshakov could not explain why this was only mentioned for the first time orally.

[61] The appellants submit that the judge having rightly found that the purported Deed of Trust did not create any trust of the Sky Stream shares, erred and misdirected himself when he went on to make findings, without any evidential basis, about the use of and instructions to a BVI lawyer and the relative probability of the use of a Russian lawyer in respect of the Trust Deed. The appellants submit and I agree, that the references to emails and the Trust Deed do not provide a basis for the claim because they do not make out an agreement. Mr. Pleshakov had, long ago, abandoned his case based on the Trust Deed (which he had relied upon in his application for a stop notice), and neither his claim nor his written evidence was based on the Trust Deed. As the appellants submit, this was not surprising since he never read the Trust Deed, at the time had not signed it and it did not even identify beneficiaries. In the circumstances, reference to the Trust Deed cannot hide Mr. Pleshakov's inability to identify the agreement on which his case was said to be based.

Judge's comments / approach

[62] The appellants' argue that the learned judge made certain comments during the course of the trial which suggested that Mr. Pleshakov's case was fundamentally defective because of, inter alia: (i) the absence of evidence that Mr. Pleshakov ever owned the Transaero Shares; (ii) the purchase of Transaero shares by Mr. Pleshakov from Sky Stream was inconsistent with Sky Stream shares being Mr. Pleshakov's at all times; (iii) the payment by Mr. Linkov and Ms. Kazantseva for the acquisition of Sky Stream and for the Transaero shares being inconsistent with their being trustees; and (iv) the concern of Mr. Pleshakov being limited to the remaining Transaero shares and not to the other assets of Sky Stream. If Mr. Pleshakov had owned Sky Stream, his concern would not have been so limited.

[63] The appellants' complain that after four days of the court making these points, the learned judge sent a draft judgment which represented a stark *volte face*. The appellants say that the judge's observations during closing speeches were so obviously right and his reasoning in the judgment handed down only four working days later so obviously wrong that the volte face was entirely unjustified.

[64] The appellants contend that the judgment has all the hallmarks of seeking to produce a result to satisfy the judge's concern in respect of the beneficial ownership of the Transaero shares. The appellants posit that this was a wholly unjustified result for the following reasons: (i) the result had consequences far beyond the Transaero shares, extending to all the other assets of Sky Stream; (ii) there was no case before the court about the ownership of the Transaero shares, and such a case would have been subject to different evidence, a different applicable law and a different jurisdiction; (ii) even if, which is denied, the beneficial ownership of the Transaero shares might have been with Mr. Pleshakov, it did not follow that the same applied to the beneficial ownership of the Sky Stream shares; and the judgment was entirely at odds with the well-reasoned points which the judge made during closing and to which there was no good answer.

[65] It has long been settled law that a judge is entitled to reverse his decision and has undoubted jurisdiction to change his mind and revisit his own decision at any time before his order is drawn up and perfected. His overriding objective must be to deal with the case justly. A relevant factor for consideration has been whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up.[15] In **Benjamin Exeter v Winston Gaymes et al**,[16] this Court noted that:

> "There may be nothing wrong in a judge giving some indication of his current thinking during the hearing of a matter. A judge may alert counsel

[15] Re L and B (children) (care proceedings: power to revise judgment) [2013] UKSC 8,per Lady Hale, at paras 16,19 and 27.
[16] SVGHCVAP2016/0021 consolidated with SVGHCVAP2016/0022 (delivered 13th June 2017, unreported) at para. 16.

> to the difficulties a litigant may face with respect to a matter or point in issue. The overarching principle is that a closed mind should not be shown. The law does not sanction anything which may prematurely indicate a closed mind."

That being the state of the law, it is axiomatic that a judge is free to resile from comments made during the hearing of a matter and also to change his mind before his order is drawn up and perfected. Because of the conclusion I have arrived at that the judge was wrong in his evaluation and conclusion, I do not think it is necessary to address this complaint further,

Order

[66] For the reasons discussed above, I would allow the appeal and set aside the orders made below. I would order that Mr. Linkov and Ms. Kazantseva be restored to the register as shareholders. I would also order that Mr. Pleshakov pay the costs of the appellants, both in this court and in the court below, such costs to be assessed by a judge if not agreed within twenty-one days.

[67] The delay in judgment is regretted.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Anthony Gonsalves, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar